

# New Jersey Court of Errors and Appeals.

PATRICK A. HENNESSY,  
Plaintiff—Appellant,

vs.

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY  
OF BURLINGTON, STATE OF  
NEW JERSEY,

Defendant—Appellee.

Action at Law.

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## Brief for Appellant.

This appeal brings up a judgment entered against the plaintiff below by the direction of the court for \$5,611.14.

The case was tried at the Burlington County Circuit Court before Judge Carrow and a jury. The court directed a verdict for the defendant against the plaintiff on a counter-claim, which the court permitted the defendant to file after the case had been closed and the question as to a direction for a verdict had been argued by the counsel of the respective parties. The facts in the case are as follows: 10

On October 23d, 1912, Patrick A. Hennessy, the plaintiff, submitted his two bids to the Board of Freeholders of Burlington county.

(a) To furnish all material and labor necessary to design and construct a reinforced concrete arch bridge over Assis-cunk creek at Broad street, Burlington, in conformity with plans and specifications dated July 19th, 1912, for the sum of \$10,870, and to complete the contract in 120 weather working days from the signing of the contract (120).

(b) To furnish all material and labor necessary to design and construct a reinforced concrete arch bridge on Pearl street, Burlington, for \$14,840 and to complete the contract 10 in 100 weather working days (213). Ex. P 1.

Both proposals were accepted and contracts for the Pearl street, Ex. P 1 (2) and for Broad street, Ex. P 2 (3) were signed December 19th, 1912.

Pearl street bridge was to be built first, as the old bridge had fallen down, and Broad street was to wait until the Pearl street bridge was completed (122).

Excavation for the south abutment was started on the Pearl street bridge on February 21st, 1913. On March 19th, it was completed and inspected by the Board of Freeholders and Mr. Logan, the engineer (5). The foundation was 20 found to be soft (6) and a test piling was driven and inspected by the engineer. On April 3d, 1913 (201), a dispute arose between the engineer and the contractor, and on April 11th, 1913, the contractor addressed a letter, Ex. P 4 (202) to the engineer protesting against the engineer's interpretation of the contract; a like protest was made on April 19th, Ex. P 5 (203). The contractor again called upon the engineer for a reply to his letter and called attention to his monthly estimate. Then on May 9th, 1913, 30 the contractor wrote another letter to the engineer therein calling attention to the fact that the Pearl street bridge was being held up, due to the question of piling, and requesting the engineer to furnish him with complete instructions, specifications, and written order to do the work required, Ex. P 7 (204), Ex. P 15 (211).

The controversy as to who should drive the necessary piling continued between the contractor and the Board of

Freeholders, and on July 31st the contractor suggested that the matter be arbitrated, and in order to avoid a legal tangle "he offered to abide by a decision on these lines even to driving piling without compensation" (209-Ex. P 11).

After the driving of the test piling on April 5th, 1913, the contractor discontinued the construction. The freeholders awarded other contracts to other parties (135) without taking any other action to rescind or abrogate Hennessy's contract (134).

After the awarding of these contracts the contractor purchased the necessary iron, cement, lumber, &c., constructed a cofferdam around the location for the south abutment of the Pearl street bridge, erected machinery, &c., preparatory to constructing the work, not only on the Pearl street bridge but also on the Board street contract. 10

The contractor was fully prepared to perform his contract. The engineer of the Board of Freeholders failed on demand to give the contractor direction as to the manner of driving the piling for the foundation of the Pearl street bridge (Ex. P 7, page 204), and he never received any instruction from engineer, asked for in Ex. P 7 (12). 20

The plaintiff in his complaint set forth a breach of contract on the part of the defendant for failure to perform its part of the two contracts for building the Pearl street and Broad street concrete bridges and for his loss thus sustained as well as for work done under the Pearl street contract. (Complt. I to VII.)

The answer of the defendant was a denial of its liability (VIII and IX). This was the issue before the Circuit Court when the case was tried. 30

The plaintiff showed the making of the contract, its breach and his loss sustained. At the conclusion of the plaintiff's case the court denied the defendant's motion for nonsuit, stating that the motion might be renewed at the conclusion of the whole case (84).

The defense set up was an abandonment of the contract by the plaintiff for the construction of the Pearl street

bridge and that it was not completed within the time specified, namely, July 12th, 1913 (121).

As to the Broad street contract, the defense was that the defendant was not liable because the plaintiff was never notified by the engineer to proceed with the construction of this bridge (123).

On May 14th, 1914, the Board of Freeholders, without notice to the plaintiff, awarded a new contract for the construction of both bridges. The defendant admitted that they  
 10 had never abrogated the contracts with the plaintiff, but simply awarded new contracts (134). At the conclusion of the defendant's case, counsel moved for a direction in favor of the defendant (143). The court on page 143, line 15, said: "The question, as I view it, is whether there was an abandonment of that contract by the plaintiff. In other words, did the county have the right to regard the contract as abandoned by the plaintiff? Now you start with the concession that Hennessy was to put down a piling at his own cost and that he started and put in a cofferdam about or  
 20 prior to April 5th, 1913, and that thereafter he did nothing on the job; and the county awarded the contract anew in May, 1914. It seems to me as I ought to hear from the other side. Your motion is for a direction with reference to the Pearl street contract?"

Mr. Davis—"And also with regard to the other one also." The court said: "Well, we are only dealing with one at a time now."

After hearing the argument of the counsel the court, on page 162, referring to the Pearl street bridge, said: "The  
 30 result is that plaintiff cannot recover any damages on this contract for the Pearl street bridge. Nor do I think that he can recover upon a *quantum meruit*; for, besides the question of *bona fides* in respect to his failure to go on with the contract, there are no facts showing acceptance, either expressed or implied, upon the part of the county of such work as he did. The proof shows that all he did was to construct a cofferdam and do some excavating, all of which he sold to the new contractor. The county never had anything to do with it. There is no proof of acceptance."

And on page 163, the court in reply to a question by Mr. Davis, "With respect to the Pearl street bridge then your honor directs a verdict?" said, "Well, it is not like directing a verdict. I tell the jury they cannot find any damages for the plaintiff on the contract for the Pearl street bridge."

The court then directed Mr. Davis to argue a motion for a direction as to the Broad street bridge, and, on page 163, the court said: "The situation respecting the Broad street bridge is different. There it seems to the court, probably there is something for the jury to consider, and we will have 10 to hear argument."

After a further argument by Mr. Davis, wherein he urged that the plaintiff had abandoned his contract, the court said, on page 165: "Well, Mr. Davis, I think that might create a situation of fact for the jury. The court cannot say as a matter of law that that amounted to an abandonment. That may be a question for the jury." And again, on page 166, the court said: "I think that would create a situation for the jury, whether he abandoned the contract or not."

Then, on page 170, "I will tell you what is in the mind 20 of the court now as to this question, whether the court can reserve this question and take a special verdict from the jury upon the facts." On the same page, line 24, the court said: "That would be for the jury to say."

On page 174, the court said: "The motion for a direction at this time is denied. The court under the present arrangement as I understand it, is to reserve the question whether the plaintiff was required to go on with his contract of the Broad street bridge regardless of any notice from the county engineer." And further on, after more argument, the court 30 on page 175, said: "Then I understand counsel on both sides agree that the court may reserve the question of law which involves the interpretation of the contract upon the question of whether the plaintiff was required to go on with this contract regardless of notice or not?"

The question whether the contract made by Hennessy with the Board of Chosen Freeholders for the Pearl street bridge was abandoned or not, was a disputed question of fact and one which should have been submitted to the jury. The court could not determine from the facts proven in the 40

case that the contract had been abandoned by Mr. Hennesy. The question who was responsible for the delay in the performance of the contract was the disputed question of fact between the plaintiff and the defendant, which arose out of the interpretation of the terms of the contract, due to the fact that the contract failed to provide for the supplying of the piling in case the same should be found necessary for the foundation of the bridge.

- It was proven in the case that upon making this discovery
- 10 the attention of the county engineer was called to the omission. Before the work was undertaken the Board of Freeholders was changed from a large board to a small board, and for a time both boards claimed jurisdiction over the affairs of the county. The new board notified the contractor to appear before them, which he did. They endeavored to have him give up his contract, which he refused to do, and several times while the work was in progress, the new board called upon the contractor and with the engineer inspected the work.
- 20 When the work had progressed so far that it was found necessary to place piling for the foundation, the contractor insisted that pilings were not specified under the contract or shown on the plans or specifications, and after a long interval of correspondence between the engineer, the contractor and the Board of Freeholders, it was finally determined that the contractor should drive a test piling. This piling was driven under the direction of the engineer, and thereafter the engineer directed the contractor to drive piling. The contractor insisted that he should be supplied
- 30 with the necessary plans and details as to the manner in which the same should be placed and driven. These instructions were never furnished, and as a result the work lagged. The contractor under the circumstances was helpless in the premises. He could not, and did not, provide any piling or attempt to drive them because of the failure of the engineer to give him the necessary details for doing the work. He was never notified to proceed with the work, and the delay in doing the work was acquiesced in by both parties. When the old Board of Freeholders again came
- 40 into power they readvertised for the re-letting of the con-

tract, providing for the necessary piling. The dispute as to who was liable for the failure to drive the piling, whether it was the fault of the engineer, in failing to supply the details, or whether it was the fault of the contractor for not going on with the work, was clearly a question for the jury. It was not for the court to determine whether the contractor had defaulted on his contract.

After the trial of this cause on the issues stated in the pleadings, and after a direction for a verdict had been fully argued, then for the first time the attorney for the defendant moves to amend its answer by filing a counter-claim, which the court allowed over the plaintiff's objection. 10

The counter-claim which the court permitted defendant to file was as follows:

"Defendant claims by way of counter-claim against the plaintiff the sum of \$6,300, with interest thereon from the 12th day of July, 1913, to date, as liquidated damages under the contract providing for the construction of the Pearl street bridge referred to in the plaintiff's complaint." Said amendment was allowed by the court. 20

The court then permitted the defendant to set up an entirely different issue than that tried out by the parties in this cause. In fact, it allowed the defendant to set up a defense which had not been anticipated from the testimony that was presented, of which the plaintiff had no notice, and by which he was surprised.

The only issue on the record and the only issue tried before the court and jury was: Was there a breach of contract on the part of the defendant, and, if so, the amount of damages which the plaintiff sustained, or was there a breach of contract on the part of the plaintiff, and should he be estopped from recovering damages? In other words, who was to blame for not carrying out the contract to build these bridges? Was it the fault of the plaintiff or the defendant? The court assumed and we contend wrongfully, that it was the fault of the plaintiff for not performing the Pearl street contract. Clearly that question was for the jury. On the other contract for the Broad street bridge, the evidence showed that the contract was lawfully let but that the county engineer arbitrarily withheld the giving of a notice to pro- 40

ceed with the work. This was not disputed, nor was the amount of the loss sustained by the plaintiff on that contract disputed, and the court assumed in this instance that the plaintiff was entitled to recover the amount of his damages. After determining on the two issues involved, in the cause, the first suggestion comes from the defendant, on a motion for leave to amend, by filing the counter-claim for the amount of \$20 per day as liquidated damages, stipulated under the contract for the Pearl street bridge. No such

10 issue as is set forth in this counter-claim was presented to the court and jury, and the court in its direction to the jury took it for granted that the calculation by the defendant's counsel that the 120 working days within which the plaintiff should do the work expired on the 12th day of July, 1913, and further took it for granted that between the said 12th day of July, 1913, and the date when the county relet the contract on May 20th, 1914, the delay in reletting the contract was due to the act, neglect and default of the plaintiff.

20 By the action of the court the plaintiff was deprived of an opportunity of showing, first, that the time for fulfilling the contract did not expire as stated; and second, that the time which elapsed before the letting of a new contract was not due to the act, neglect or default of the contractor but was due to some other cause or due to the action of the defendant. In fact the issue which was presented by the counter-claim was not within the issue on the record as the same stood before this amendment to the pleading was made. It has been held in this state that the subject-matter of the

30 amendment must be within the issue on the record before such amendment was made.

Hoboken *v.* Gear, 3 Dutcher 265; Price *v.* N. J. R. Co., 2 Vr. 229; Joslin *v.* N. J. Car Spring Co., 7 Vr. 141.

While it must be admitted that under contracts such as these, the parties may stipulate as to the amount of liquidated damages for which they may be held liable in case of failure to carry out their contract, and that the sum stipulated in these contracts, namely, \$20 per day, is not dispro-

portionate to the presumable loss, and that such amount may be recovered as liquidated damages, yet when such a defense is to be made on a counter-claim, the defendant cannot wait until the cause is closed and then amend, because such an amendment is an entirely new and distinct issue between the parties, which was not tried or even contemplated under the pleadings and the testimony before the court.

When, as in this case the plaintiff alleges surprise, it was the duty of the court to have stayed the cause or to withdraw a juror and direct a new trial, and clearly the court 10 could not direct that the amendment should be made; second, that the liquidated damages should be calculated by the counsel for the defendant, and on this basis awarded a judgment against the plaintiff and in favor of the defendant.

Merely counting the number of days intervening between the time when plaintiff's working days expired and the day of reletting the contract will not fix plaintiff's liability for liquidated damages. This the court permitted in this case. This method excluded all explanation of the plaintiff for the elapsing of this time of inaction on the part of the defend- 20 ant. The delay may have been, and undoubtedly was, due wholly to the negligence or indifference of the freeholders, or to the fact that during the long winter months which intervened, work of the character provided for under the contract could not be performed, and for this reason the board concluded to delay the re-letting until the following spring.

The county relet the building of a new bridge on Pearl street under an entirely new contract; not under the plaintiff's contract to do the work left unfinished by the plaintiff. The new contract provided for a construction which differed 30 in many respects from the one let to the plaintiff, for instance, it provided for piling and for abutments of greater width.

The amendment by way of counter-claim, setting up a loss of \$20 per day for failure on plaintiff's part to complete his contract within the time specified, presents other questions and operated to institute a new suit.

Under section 126 of the Practice act (P. L. 1903, p. 572), which authorizes all amendments necessary for the purpose of determining in the existing action the real ques- 40

tion in controversy between the parties, no amendment will be permitted which will institute an entirely new and different cause.

*Dorain v. Thompson*, 79 L. 99.

The defendant's counter-claim is filed under the Practice act of 1912 (P. L., p. 377, sec. 12), which provides: "Subject to rules, the defendant may counter-claim or set off any cause of action. He may, and when required by the court shall, issue summons against any third party necessary to  
10 be brought in; but, in the discretion of the court, separate trials may be ordered, or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out."

Under rule 47 of the Practice act, the counter-claim is deemed to be a cross action and the rule respecting the form of pleading the complaint, apply to the counter-claim.

Our contention is that the counter-claim was not properly pleaded, that it raised an entirely new issue, and was in fact a new action.

20 That the issue raised by the counter-claim was not tried between the parties.

That no judgment could be directed against the plaintiff on the counter-claim.

That there was no testimony offered by the defendant to sustain its counter-claim.

30 That the calculation made by the engineer of the number of days intervening between his notification to the freeholders that the time had expired on the contract and the date of awarding a new contract to another bidder, was no evidence of delay on the part of the plaintiff in the fulfillment of his contract for which he could be charged with a penalty of \$20 per day as liquidated damages.

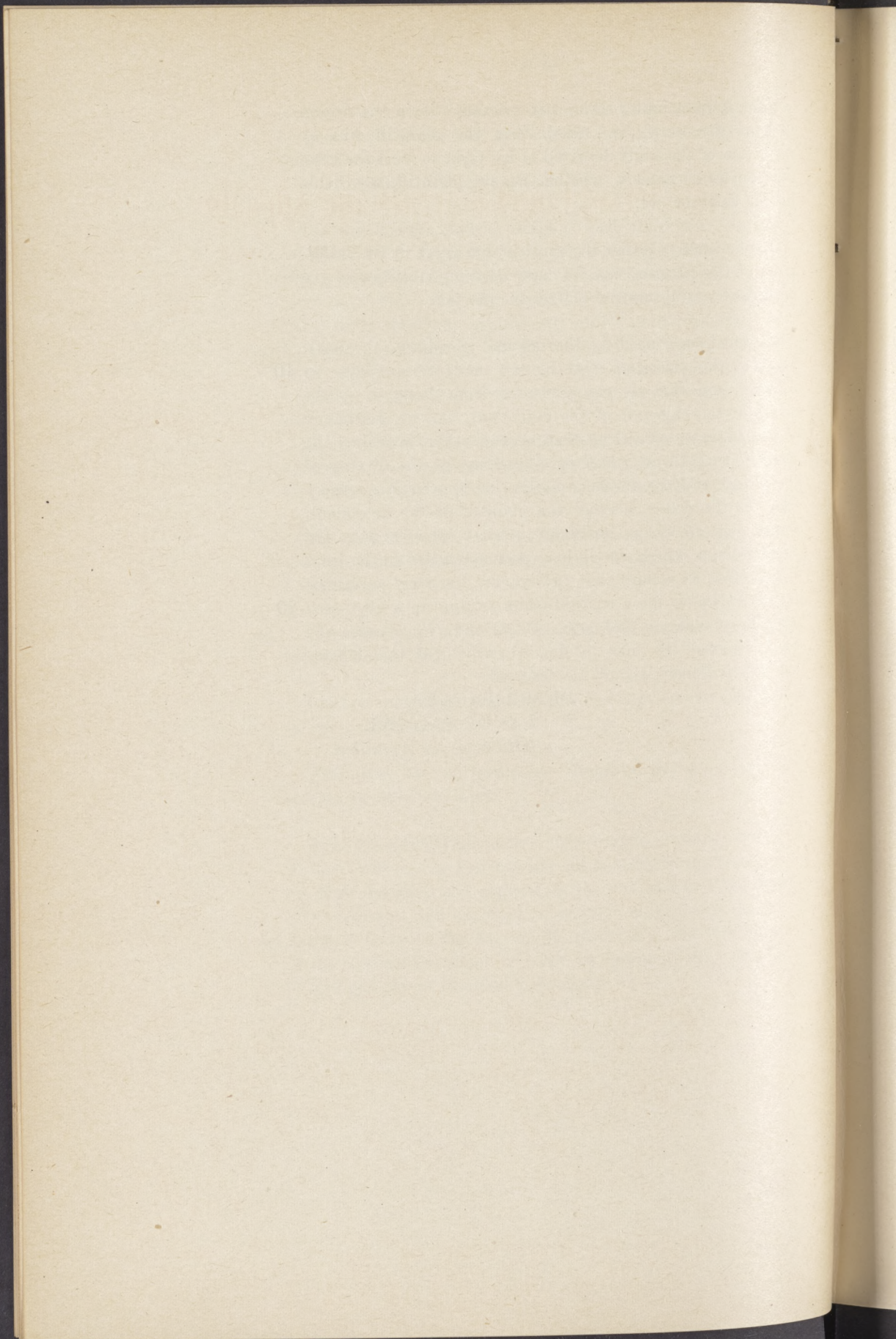
That if the counter-claim was allowed, within the discretion of the court, and filed, then the plaintiff was by the action of the court deprived of his right to meet the issue thus tendered, namely, whether he, the plaintiff, was liable for the delay or not.

The question whether the cause of the delay in the fulfillment of the contract was the fault of the plaintiff or of the defendant was a question of fact for the jury.

On the issue raised by the original pleadings, the testimony of the defendant that he was ready to complete his contract, and that he was prevented from doing so by the action of the engineer of the defendant, and the testimony of the engineer admitting that he had never furnished the plaintiff with the required specifications for the driving of the piling, and the further question as to who was responsible for the delay, whether the plaintiff or the defendant, was a question, if the testimony is to be considered on the counter-claim, which should have been submitted to the jury. 10

Therefore we submit that (a) because the court permitted the defendant to file a counter-claim setting up a new issue 20 after the testimony had been closed, and (b) because the court directed the jury to find a verdict for the defendant, the judgment should be reversed.

PETER BACKES,  
V. CLAUDE PALMER,  
*Attorneys for Appellant.*



# New Jersey Court of Errors and Appeals

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*Patrick A. Hennessy, Plaintiff,*  
*vs.*  
*The Board of Chosen Freeholders of the County of Burlington, State of New Jersey,*  
*Defendant.*

*Action at Law.*  
*Brief for Appellee.* 10

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The plaintiff in this case sued the defendant, the Board of Chosen Freeholders of the County of Burlington, on two contracts entered into between the parties for the construction of two bridges in the City and County of Burlington. One called the Broad Street Bridge, and the second, Pearl Street Bridge. 20

On the Broad Street Bridge, the learned trial Court below directed a verdict in favor of the plaintiff for all that he had claimed, therefore, we think that he has nothing to complain of and there is no necessity of arguing that matter further.

With respect to the Pearl Street Bridge, the situation is different. In that case plans and specifications were drawn up and advertisements for bids to construct the bridge in accordance with the plans and specifications were made and the plaintiff, on October 23, 1912, filed a 30 bid in accordance with the advertisement agreeing to build the bridge and furnish the materials therefor, for the sum of \$14,840, "said price to include everything," and further agreed to complete the contract in one hundred weather working days (Ex. B. for defendant, State

of the Case 212). The attention of the Court should be called to the fact that the plans and specifications are not printed among the exhibits, and Exhibit P-1, as printed, should be Exhibit P-2, and P-1, as marked by the stenographer and admitted in the Court below, was the contract, plans and specifications for the construction of the Pearl Street Bridge.

The complaint of the plaintiff alleges in paragraph 2 the agreement to make payments at the regular meetings 10 of the Board of Freeholders, and in paragraph 3 that the plans annexed to the said contract provided for the construction of the foundations for said bridge to a certain depth only, which depth was designated and shown on said plans. In paragraph 4 it is averred that in making the excavations it was discovered that the depth of the foundation as specified on the plans was insufficient and that no base for a foundation of said bridge could be found at the depth shown by said plans, and in paragraph 5, in claims that plaintiff's contract only requir- 20 ed him to construct the foundation for said bridge for the depth shown on said plans. In paragraph 6, the plaintiff claims that he demanded that the defendant cause sufficient foundations to be constructed in order that the plaintiff could erect thereon the bridge in accordance with the plans and specifications annexed to his said contract, or that the plaintiff should be permitted to do the required work and that the defendant pay the cost thereof, and in paragraph 7, the plaintiff claims that the contract between the parties failed to provide for the 30 doing of any extra or additional work, and in paragraph 8 "That the defendant absolutely refused to comply with the reasonable request of the plaintiff that it construct the necessary foundations or permit this plaintiff to do so, and that owing to such refusal of the said defendant to comply with the plaintiff's request, it became impossible

for him to perform said contract so made with the said defendant, and with which contract this plaintiff was at all times ready and willing to comply; that owing to said defendant's refusal this plaintiff was compelled to discontinue his said work on the construction of said bridge." Paragraph 9 alleges that the defendant, without notice to the plaintiff, readvertised and relet said contract and refused to permit the plaintiff to complete the bridge, and in paragraph 10 the plaintiff avers that he had "duly performed all the conditions and stipulations of his contract on his part agreed to be kept and performed and at all times has been ready and willing to comply with the terms of his said contract," and in paragraph 11, the plaintiff avers that by reason of the action of the defendant, the plaintiff had been prevented from performing his said contract; that he had sustained damages by reason of his loss of the profits in the doing of the said work under the contract, and further for the expenditure of large sums of money in and about procuring labor and materials in and about the preparation and construction of the said work and labor done and performed by him at the special instance and request of the defendant, and claimed, therefore, the sum of \$3,000. This is the complaint of the defendant in substance with respect to the Pearl Street Bridge, which, as the defendant views it, is the only matter in controversy in this case.

The Freeholders filed an answer denying the several paragraphs of the complaint seriatim. The plaintiff offered in evidence the contract for the Pearl Street Bridge, which was offered in evidence and marked Ex. P-1 (State of the Case 2, line 31). The testimony shows that on March 17, 1913, the County Engineer ordered the plaintiff to begin work on the said bridge and that it was to be completed within one hundred weather working days from Tuesday, March 17, 1913, (See Ex. E for defendant

—State of the Case, 214), and the plaintiff actually started work on February 21, 1913. Excavations were made by the plaintiff for a cofferdam on the South abutment of the bridge and on the nineteenth of March, 1913, (State of the Case, page 5, line 29 and following) the excavations had been completed and it was found that piling would be necessary to be put in (State of the Case page 6, line 8). A test pile was driven, the result of which showed that it was necessary to drive piling in order to  
10 provide for a foundation for the abutment and a dispute arose as to who should pay for the costs of the driving of the piling. On April 11, 1913, the plaintiff wrote the County Engineer a letter in which he stated that "I am unable to agree with your interpretation of my contract for the Pearl Street arched bridge insofar as you claim that the same provides that I must, without extra compensation, provide suitable foundations for this bridge, or in other words, such foundations as it now appears will  
20 have to be provided before the work may be properly done," and further says "In view of the foregoing, I am compelled to protest against doing any work of piling upon the grounds that the same is not provided nor called for by said contract, plans or specifications, but is absolutely extra work for which compensation must be made to me for the doing thereof." And on May 9, 1913, the plaintiff wrote to the Engineer that "the work on the Pearl Street Bridge is being held up through this question of piling, you are also aware that there are no plans or specifications covering piling." In the same letter he  
30 requests instructions with respect to the manner of the driving of the piling. In answer to the inquiry of May 9, 1913, the County Engineer (Ex. P-3—State of the Case 201) writes "You have my approval to drive 14-inch piles not less than 2 feet 6 inches or more than 3 feet center to center. Piles to be driven under my supervision."

The testimony also shows that during all the period of delay, Hennessy was giving as his reason for not proceeding with the construction of the bridge the fact that the County was required to build the foundation or pay Hennessy for doing the same, and on page 62, line 6, and following, he admits that he was demanding that he should be paid for the driving of the piling, and the plaintiff's entire contention in this case as set forth in his complaint, which remained unchanged throughout the entire controversy, is based on the theory that the defendant neglected to furnish a proper foundation for the abutments, but on page 83, the entire basis of the plaintiff's claim with respect to the Pearl Street Bridge is swept away by an admission of counsel. On page 83 (State of the Case) Mr. Backes replies, and in his reply he admitted that Hennessy was bound to furnish suitable foundation and that piling was the only suitable foundation under the circumstances, and the Court says, after Mr. Backes had made his statement, "I understand that counsel for the plaintiff concedes that by the terms of the contract, especially that portion of it, the plans and specifications, which says: 'They contemplate a complete structure and any error or omission in plans or specifications shall not release the contractor from building a structure complete,' counsel for the plaintiff concedes that the plaintiff was bound to build that bridge, even with piling if necessary, and that he stood ready to do so, and that the proof fails to show any abandonment or refusal on his part." We think this admission equivalent to an admission that the plaintiff had no cause of action under that part of the complaint arising from the contract for the construction of the Pearl Street Bridge.

ARGUMENT.  

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## THE COURT COMMITTED NO ERROR IN DIRECTING A VERDICT.

It should be remembered that at the close of the whole case no question of fact under the complaint remained in dispute; the whole thing was a conclusion of law from the proven and admitted facts.

10 With respect to the Broad Street Bridge the Court directed a verdict in favor of the plaintiff. The defendant is not complaining as to that, and, therefore, the plaintiff can find no error in the action of the Court in doing what the Court was requested to do by the plaintiff, so that I shall omit from the argument any discussion on the Broad Street Bridge.

I have set forth in the state of facts above what the plaintiff claimed under his complaint, namely, that he had  
20 been prevented from completing his contract, because the County wrongfully refused to provide suitable foundations for the abutment and refused to permit the plaintiff to construct them upon proper compensation. The plaintiff's case was presented on that theory, no other question was before the Court with respect to the Pearl Street contract, except that the County had not permitted the plaintiff to complete his contract, by reason of the failure to provide suitable foundations for the abutment. But that question had been solved by the admission of  
30 the plaintiff's counsel as appears from the Court's remarks on page 83, so that it, therefore, appeared that the learned trial Judge said, on page 163 (State of the Case, line 9) "Well, it is not like directing a verdict; I tell the jury they cannot find any damages for the plaintiff on the contract for the Pearl Street Bridge." And this, for the

simple reason that it appeared, and without contradiction, that the plaintiff had entered upon the construction of the bridge, that he had failed to complete it and that the failure to complete the bridge by reason of not driving the piles was a failure for which he, himself, alone was responsible. Certainly he couldn't claim damages for the non-performance of his contract when the non-performance was solely his own fault, and that appeared to be the fact by the admission of the plaintiff's counsel in open Court.

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There was no disputed question of fact with respect to the plaintiff's right to recover on Pearl Street Bridge. He had wholly failed to establish his right.

NOW, THE QUESTION REMAINS WHETHER OR NOT THE COURT COMMITTED ANY ERROR IN DIRECTING A VERDICT FOR THE PLAINTIFF ON THE LIQUIDATED DAMAGE CLAUSE SET UP IN THE CONTRACT.

This involves the right of the Court to amend the 20 pleadings. Section 23 of the Practice Act of 1912 provides "No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy by any procedure; but in such case, the Court shall, upon terms, order the writs, pleadings and other proceedings to be so amended, or new writs, pleadings or other proceedings to be respectively so issued, filed or taken, that the Court 30 may completely and finally hear and determine the whole matter in controversy between the parties and grant the proper remedy." And Section 27 of the Practice Act of 1912, "No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admis-

sion 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." Now, when the testimony was in and after the admission of plaintiff's counsel referred to above, it appeared that the plaintiff was without right in his claim. It resulted that the defendant was entitled to recover on the liquidated damage clause of the contract on which the plaintiff was suing and which had been offered in evidence by him. The  
10 testimony showed that the plaintiff had begun work on the contract on Feb. 21, 1913; that he had not completed the contract, although he had admitted that the failure was his own fault. The contract provided that the work should be completed within one hundred weather working days after notice to begin and that for every day of default beyond the one hundred weather working days the plaintiff should pay to the defendant the sum of \$20.00 as liquidated damages. The contract, the time of begin-  
20 ning the work, the notice to begin, the failure to complete the contract, the reasons for the failure and the length of time that had elapsed before the County took the matter out of the hands of the plaintiff had all been proven by the plaintiff's witnesses and in the plaintiff's case. The defendant, therefore, asked the Court for leave to file a counter claim, availing itself of its rights, as proven by the plaintiff, to wit, to recover on the provisions of the contract, as proven by the plaintiff.

The plaintiff had proven such a state of facts that by  
30 operation of law defendant became entitled to recover its liquidated damages.

Now, under such a state of facts, it would appear to be an abuse of judicial discretion to refuse to permit the County to recover what the plaintiff had proven the County was entitled to recover, and the learned trial

Judge, following the long-established practice of this State and the mandate of the Legislature above quoted, permitted the defendant to file a counter-claim. Page 178, line 7 (State of the Case), the Court said, "Well, I am inclined to allow it to be done, in order that the matter may be disposed of." On page 179 (State of the Case) the Court, addressing counsel for the plaintiff, says, "Now, I understand you answer and deny?" Mr. Backes: "We deny the right." The Court: "The plaintiff answering denies the defendant's counter-claim and says 10 that the defendant is not entitled to recover the liquidated damages therein claimed. Well, the Court has allowed you to file the counter-claim and it will be endorsed as such and you send it up with the papers to the clerk of the Court; and the plaintiff has answered on the record and the defendant will file a more formal answer with the clerk of the Supreme Court."

The plaintiff cannot claim any surprise, for in answer to their statement of surprise the defendant's counsel said: "In answer to that I am content to give them all of 20 the opportunity which your Honor will permit to offer any proof disputing the County's right to recover, or I am willing to allow your Honor, having heard the matter, to determine this without the aid of a jury." (State of the Case 178, line 27).

There was no request by the plaintiff for an opportunity to be heard or to offer any testimony or for any adjournment or for any other relief, but they sat in silence and permitted the matter to be disposed of by the Court.

The cases cited by the plaintiff in 2 Vroom and 730 Vroom were decided long before the passage of the Act of 1912, and, therefore, are no authority for this matter. But the case of *Joslin v. New Jersey Car Springs Company*, 36 N. J. Law 141, is an authority for this proposition, "Where an amendment is allowed by the Court at

the trial on motion to set aside the verdict, both surprise and substantial merits should be shown, and when justice has been done by a verdict, a new trial should not be granted." There is no claim in the present case for any merit, but only surprise, and unless they can show merit their claim in that particular should not prevail.

The case of *Doran v. Thomsen*, 79 N. J. Law 99, was also decided before the Practice Act of 1912, but the case cited by the defendant—*Hoboken v. Gear*, 27 Law 265—  
10 the Court said, "The power to amend pleadings, under the statute, extends to the introduction of matters which the parties hoped and intended to try in the cause, and is not limited to matters within the issue upon the records."

*Price v. Railroad Company*, 31 N. J. Law 229, the Court said, "The effect of the statutory provision authorizing amendments is, that every error in form, no matter how radical, can be corrected at any stage of the suit, in all civil causes, whenever such correction becomes necessary to enable the parties to try the matters which they  
20 contemplated to try, or to sustain the decision resulting from such trial."

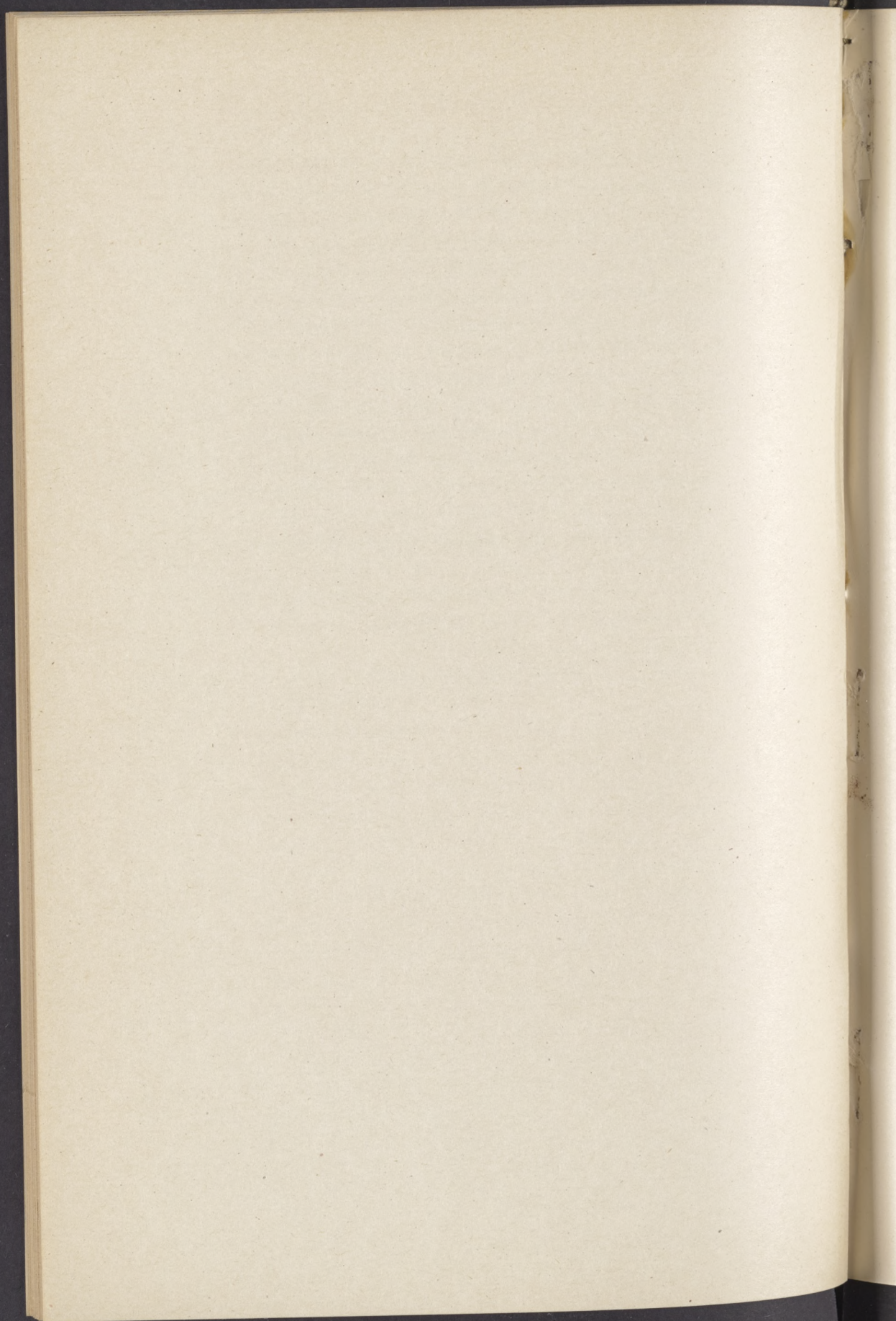
In answer, therefore, to the contentions of the plaintiff, to wit: "that the counter-claim was not properly admitted, that it raised an entirely new issue and was in effect a new action, the statutes and decisions above cited are a sufficient answer to their claim," that the issue raised by the counter-claim was not tried between the parties,"  
I reply that the defense to the plaintiff's counter-claim as well as the proof of the plaintiff's right had all been offer-  
30 ed in evidence and proved by the plaintiff himself, to wit, the plaintiff had proven the contract, the time of the beginning of its performance, the fact that it had not been performed within the time provided for by the contract and that the failure of its performance was the failure of the plaintiff; to their claim that no judgment

could be directed against the plaintiff on the counter-claim, the answer is that it is the law of this State that the issue shall be disposed of between the parties, that the statute permits the filing of counter-claim and that judgment shall follow the proof; and as to the contention of the plaintiff that there was no testimony offered by the defendant to sustain its counter-claim, the answer is that no proof was needed to be offered by the defendant to sustain its counter-claim inasmuch as the plaintiff had already proven the defendant's right to recover. 10

As to the amount claimed as liquidated damages, it should be remembered that there was no dispute. The number of days, the length of time, was testified to and not disputed. So that it remained an undisputed question of fact for the Court to deal with at the conclusion of the whole case.

It is, therefore, submitted that the learned trial Judge committed no error, and the appeal should be dismissed.

Respectfully submitted, 20  
JAMES MERCER DAVIS,  
Attorney of the Defendant.



NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

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PATRICK A. HENNESSY,

Plaintiff.

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
BURLINGTON, STATE OF  
NEW JERSEY,

Defendant.

COMPLAINT.

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BACKES & BACKES,

Attorneys for Plaintiff. 20

JAMES MERCER DAVIS,

Attorney for Defendant.

(Summons Issued October, 1915)

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The plaintiff, a resident of the Borough of Haddonfield, in the County of Camden, and State of New Jersey, says: 30

1. That on the 18th day of December 1912, the plaintiff made and entered into a contract in writing with the defendant, wherein the plaintiff agreed to construct for

the defendant a reinforced concrete arch bridge over Assiscunk Creek at Pearl Street, in the city of Burlington, Burlington County, New Jersey; and to furnish the materials and labor for the same, in accordance with certain plans and specifications annexed to and made part of said contract.

10 2. The said defendant agreed to pay to the said plaintiff for the doing of said work and the furnishing of said materials, the sum of \$14,840 at the rate of 80 per cent. as the work progresses, 20 per cent on the final acceptance and approval in writing of the Engineer and Board of Chosen Freeholders; payments to be made at the regular meeting of the Board of Chosen Freeholders of the County of Burlington.

20 3. That the plans annexed to the said contract provided for the construction of the foundations for said bridge to a certain depth only, which depth was designated and shown on said plans.

4. That in making the excavations necessary for said foundation, this plaintiff, and James Logan, the County Engineer of Burlington, under whose direction and supervision said contract was to be performed, found that said depth of foundation so specified on the said plans was insufficient and that no base for a foundation of said bridge could be found at the depth shown by said plans.

30 5. That plaintiff's contract only required him to construct the foundation for said bridge for the depth shown on said plans.

6. That plaintiff demanded of the defendant that it cause sufficient foundations to be constructed in order that this plaintiff could erect thereon the bridge so contracted for by him, in accordance with the plans and specifications annexed to his contract, or that the plaintiff should be permitted to do the required work, holding the defendant liable for the cost thereof.

7. That the contract between the parties failed to provide for the doing of any extra or additional work in 10 and about the construction of said bridge.

8. That the defendant absolutely refused to comply with the reasonable request of the plaintiff that it construct the necessary foundations or permit this plaintiff to do so, and that owing to such refusal of the said defendant to comply with the plaintiff's request, it became impossible for him to perform his said contract so made with the said defendant, and with which contract this plaintiff was at all times ready and willing to comply; 20 that owing to said defendant's refusal this plaintiff was compelled to discontinue his said work on the construction of said bridge.

9. That the said defendant without notice to this plaintiff readvertised and relet said contract for the construction of said bridge, and refused to permit this plaintiff to complete the said construction.

10. That the said plaintiff has in all things duly performed all the conditions and stipulations of his contract, 30 on his part agreed to be kept and performed and at all times has been ready and willing in all things to comply with the terms of his said contract.

11. That by reason of the action of the said defendant, this plaintiff was prevented from performing his said contract, and he has sustained damages by reason of the loss of his earnings and the profits in the doing of said work under said contract, and further for the expenditure of large sums of money in and about the furnishing and procuring of labor and material used in and about the preparation in and for the construction of said work, and for labor done and performed by him and his  
10 workmen in and about said work at the special instance and request of the said defendant, and thereby the plaintiff has sustained a pecuniary loss and damages.

Plaintiff claims damages in the sum of \$3000.00  
Count two:

1. That on the 18th day of December 1912, the plaintiff made and entered into an agreement in writing with the defendant, wherein the plaintiff agreed with the de-  
20 fendant to construct a reinforced concrete arch bridge over Assiscunk Creek at Broad Street in the city of Burlington, Burlington County, New Jersey; and to furnish materials and labor for the same in accordance with certain plans and specifications annexed to and made part of said contract; that said contract provided that the plaintiff complete the work specified within 120 weather-working days from and after being notified by the County Engineer of Burlington County to begin work.

30 2. The said defendant agreed to pay the said plaintiff for the doing of said work and the furnishing of said materials, the sum of \$10,870, at the rate of 80 per cent. as the work progressed, 20 per cent. on the final acceptance and approval in writing of the Engineer and Board of Chosen Freeholders; payments to be made at the regu-

lar meeting of the Board of Chosen Freeholders of the County of Burlington.

3. That at the time of the making of the aforesaid contract, James Logan was, and now is, the County Engineer of the County of Burlington; that ever since the date of said contract, the said County Engineer, without any justifiable cause, has absolutely refused to notify this plaintiff to begin the said work on the said contract, or to give him the notice required under the terms of the said contract; and that the said James Logan has publicly declared that he would never notify the said plaintiff to commence said work under said contract. That this plaintiff has repeatedly applied to the said James Logan and the Board of Chosen Freeholders of the County of Burlington for permission to commence the work under the aforesaid contract, and tendered himself ready and willing to preform the same. 10

That the said County Engineer and the said Board of Chosen Freeholders have, without justifiable cause, refused to permit this plaintiff to perform the work of constructing said bridge as provided for in the said contract, and that the said County Engineer and the said Board of Chosen Freeholders ever since making the said contract, although this plaintiff has repeatedly tendered himself ready and willing to perform the work, have refused to permit him to do so, and that the time for the completion of the work provided for by said contract has long since expired. 20

30

4. That this plaintiff has in all things performed the conditions and stipulations of his contract on his part agreed to be kept and performed, and at all times has been ready and willing in all things to comply with the terms of his said contract.

5. That by reason of the refusal of the said defendant to permit this plaintiff to perform the work under and by said contract, this plaintiff has sustained damages in the loss of the earnings and profits from the doing of said work under said contract; that this failure on the part of the defendant to perform its said contract so by it made with this plaintiff as aforesaid, has caused this plaintiff to sustain damages in the sum of \$2,000.00.

10 This plaintiff demands as damages the sum of \$2,000.

Count three:

1. That between the 18th day of December, 1912 and the first day of July 1913, the plaintiff furnished and supplied to the defendant, at its request, in and about the work of constructing the foundation for the abutments of the aforesaid Pearl Street bridge, certain labor, lumber, sand, gravel, reinforced steel and cement.

20 2. That for such labor and material so furnished by the said plaintiff, the said defendant undertook to pay to the plaintiff what the same was reasonably worth.

3. That same was reasonably worth \$1500.00, which said sum became due for the same on the day last aforementioned.

4. The defendant has not paid the same.

30 Plaintiff demands as damages \$1500.00 with interest from July 1, 1912.

10

This plaintiff demands as damages:

Under the aforesaid Count No. 1 . . . .	\$3,000
Under the aforesaid Count No. 2 . . . .	\$2,000
Under the aforesaid Count No. 3 . . . .	\$1,500
	<hr/>
	\$6,500

20

## ANSWER.

(Filed Nov. 17, 1915.)

The defendant, the Board of Chosen Freeholders of the County of Burlington, State of New Jersey, says that:—

Defense to first count:

- 10 1. As to the statements in the first paragraph, defendant does not admit, and leaves plaintiff to his proof.
2. As to the statements in the second paragraph, defendant does not admit and leaves plaintiff to his proof.
3. Defendant denies the third paragraph of his count.
4. Defendant denies the fourth paragraph of this  
20 count.
5. Defendant denies the fifth paragraph of this count.
6. Defendant denies the sixth paragraph of this count.
7. Defendant does not admit the seventh paragraph of this count and leaves plaintiff to his proof.
- 30 8. Defendant denies the eighth paragraph of this count.
9. Defendant denies the ninth paragraph of this count.

10. Defendant denies the tenth paragraph of this count.

11. Defendant denies the eleventh paragraph of this count.

Defense to second count.

1. Defendant does not admit the first paragraph of this count and leaves plaintiff to his proof. 10

2. Defendant does not admit the second paragraph of this count and leaves plaintiff to his proof.

3. Defendant denies the third paragraph of this count.

4. Defendant denies the fourth paragraph of this count.

5. Defendant denies the fifth paragraph of this count. 20

Defense to third count:

1. Defendant denies the first paragraph of this count.

2. Defendant denies the second paragraph of this count.

3. Defendant denies the third paragraph of this count and states that no such work was done. 30

JAMES MERCER DAVIS,  
Attorney for Defendant.

(Filed Nov. 29, 1915.)

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

10

PATRICK A. HENNESSY,  
Plaintiff.

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
BURLINGTON, STATE OF  
NEW JERSEY,  
Defendant.

ACTION AT LAW.  
ON POSTEA.

20

It is ordered that judgment be and hereby is entered  
in favor of defendant and against the plaintiff for the  
sum of five thousand six hundred and eleven dollars and  
fourteen cents besides costs to be taxed nisi.

Entered January 26, 1917. On order.

30

JAMES MERCER DAVIS,  
Attorney.

NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

PATRICK A. HENNESSY,

Plaintiff.

vs.

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
BURLINGTON, STATE OF  
NEW JERSEY,

Defendant.

ACTION AT LAW. 10

ON POSTEA.

JUDGMENT FOR  
DEFENDANT.

JAMES MERCER DAVIS,

Atty.

20

Judgment entered this twenty-sixth day of January,  
A. D. nineteen hundred and seventeen for the sum of five  
thousand six hundred and eleven dollars and fourteen  
cents damages.

WM. J. GUMMERE,

C. J.

30

Filed Aug. 14, 1917.

NEW JERSEY SUPREME COURT.

Appeal taken from the above stated Supreme Court of the State of New Jersey to the

10

COURT OF ERRORS AND APPEALS  
OF THE STATE OF NEW JERSEY

PATRICK A. HENNESSEY,  
Plaintiff-Appellant.  
*vs.*  
BOARD OF CHOSEN  
FREEHOLDERS OF  
20 BURLINGTON COUNTY,  
Defendant-Respondent.

ACTION AT LAW.

NOTICE AND GROUNDS  
OF APPEAL.

To James Mercer Davis, Esq.,  
Attorney of Defendant-Respondent.  
and  
Board of Chosen Freeholders  
of Burlington County.

30

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

(1) The Court over plaintiff's objections directed the jury to find out for the defendant on its counter-claim in the sum of \$5611.14.

(2) The Court over plaintiff's objections permitted defendant to mend its pleading by filing counter-claim after the case had been closed by both sides.

(3) Because the counter-claim set up by the defendant was not at issue, nor was such issue raised at the trial, until after the taking of testimony was closed, and the argument of counsel had been heard on the question of directing a verdict on the other issues raised by the pleadings. 10

(4) There was no testimony before the Court showing the time when plaintiff's contract would expire.

(5) That the default in the completion of the Pearl Street contract was due to the action of the defendant and its engineer who failed to furnish the plaintiff with the necessary detailed plans and specifications for the doing of the work under said contract. 20

(6) The question of plaintiff's default on his contract for the construction of the Pearl Street bridge was a disputed question of fact which the Court should have submitted to the jury.

(7) The Court committed error in directing the jury to find a verdict for the defendant. 30

(8) There was no evidence before the Court to warrant it in assuming the correctness of the amount claimed by defendants under its counter-claim, or the number of

days in default or that there was default by plaintiff on his contract, or that such default was due to the act or neglect of the plaintiff.

(9) Plaintiff's contract called for a completion within 120 weather-working days after plaintiff was notified to commence work. There was no evidence submitted showing (a) when the 120 days expired (b) that the delay in advertising and letting of a new contract was due  
10 to any act, neglect or default of the plaintiff.

(10) There was no proof submitted that the plaintiff's time to complete his contract expired July 12, 1913, nor that any delay between said July 12, 1913 and May 20, 1914 could be attributed to any act, neglect or default of plaintiff's.

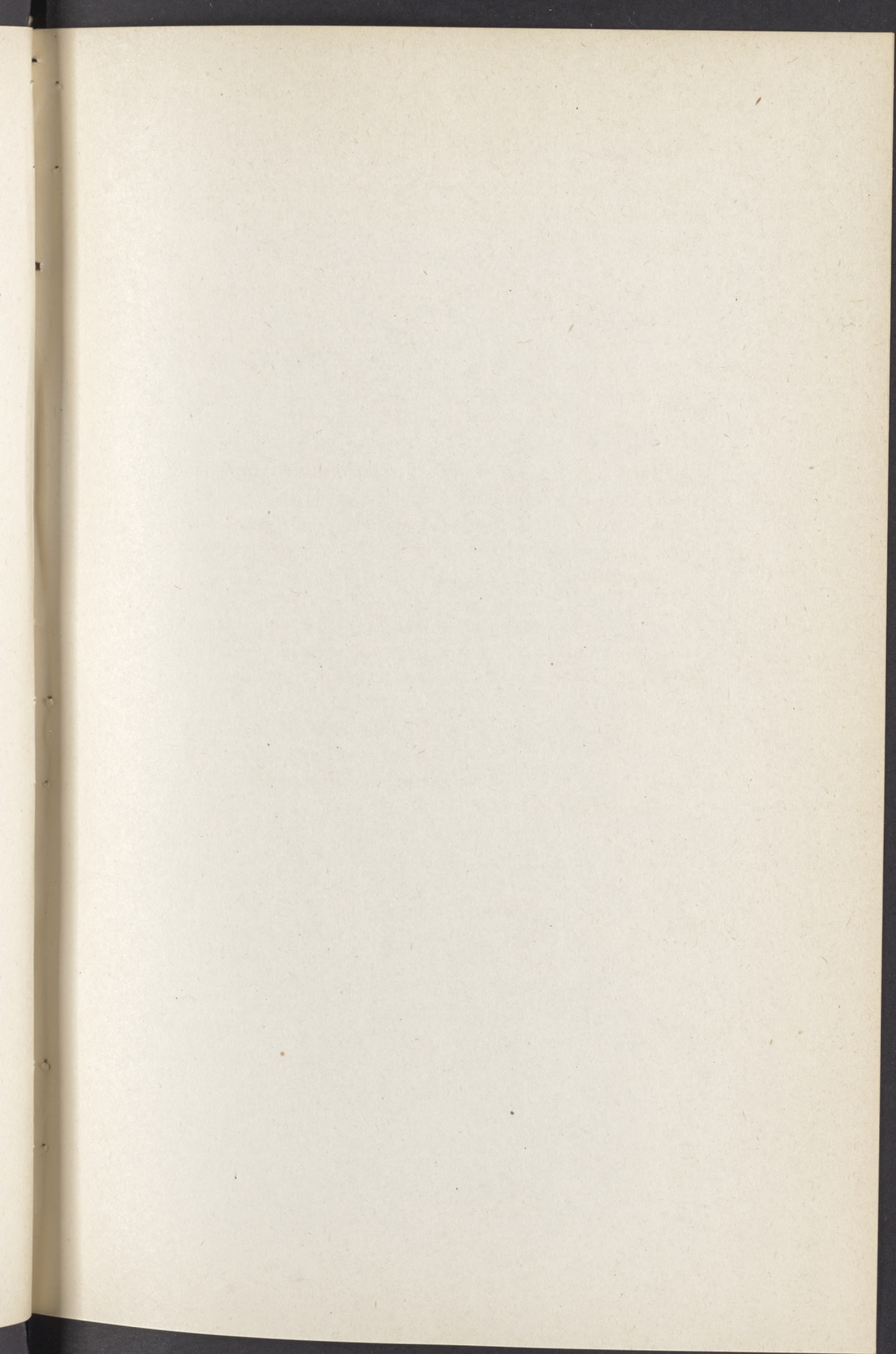
(11) That the delay (if any) in the completion of the work under said contract for the construction of the  
20 Pearl Street bridge was due the act, neglect or default of the plaintiff.

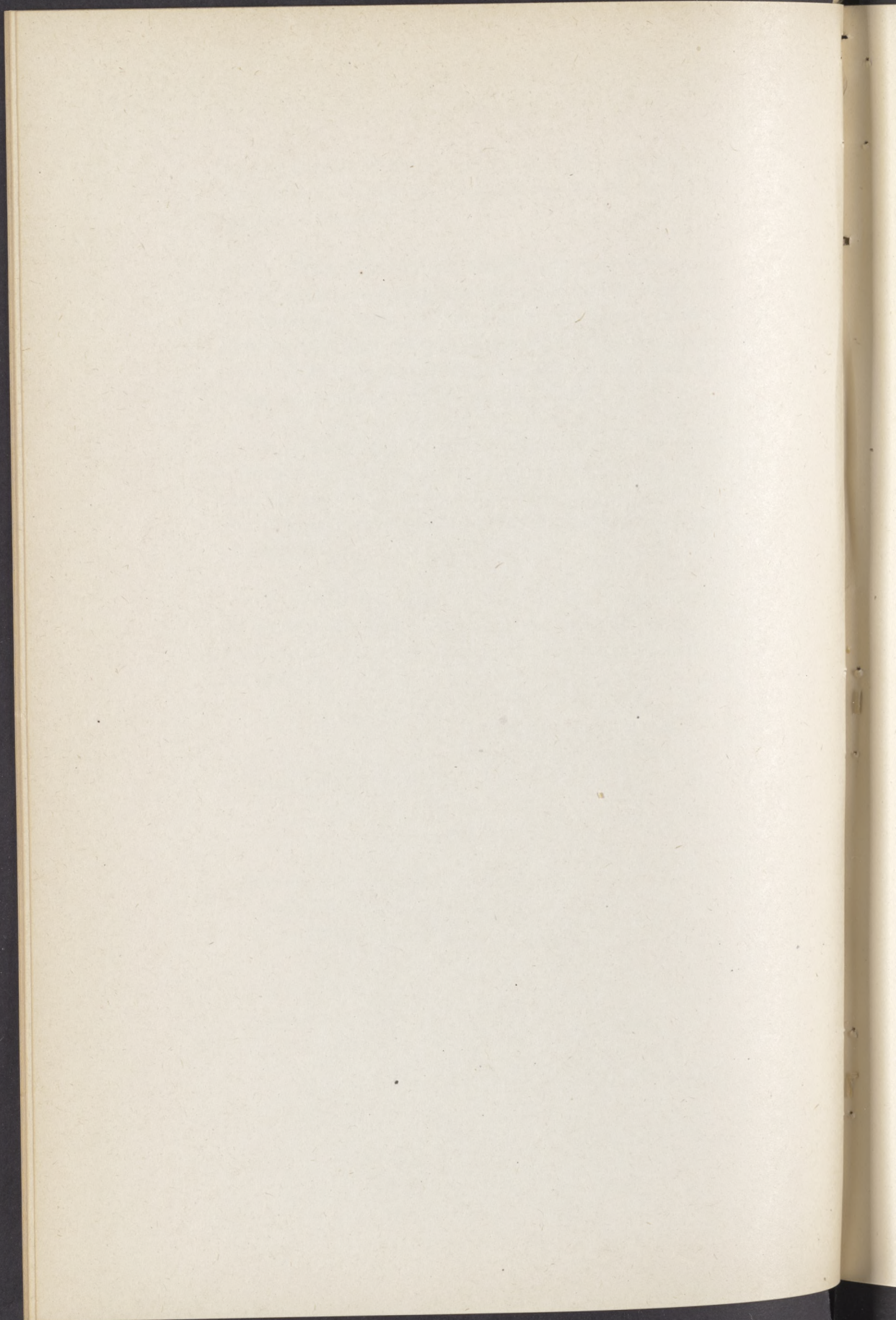
PETER BACKES,  
Att'y of and Counsel  
with Plaintiff-Appellant.

Dated June 15, 1917.

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30 Service acknowledged, June 20, 1917.  
JAMES MERCER DAVIS,  
County Solicitor.





NEW JERSEY SUPREME COURT,  
BURLINGTON COUNTY.

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PATRICK A. HENNESSY,  
Plaintiff, )  
vs. ) 10  
THE BOARD OF CHOSEN FREE- ) ACTION AT LAW.  
HOLDERS OF BURLINGTON )  
COUNTY, )  
Defendant. )

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Mount Holly, N. J., January 4, 1917.

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20

PATRICK A. HENNESSY, sworn for plaintiff.

Direct examination by Mr. Palmer:

- Q. Mr. Hennessy, where do you live?  
A. I live at Haddonfield.  
Q. New Jersey?  
A. New Jersey. 30  
Q. What is your business?  
A. Contractor.  
Q. How long have you been in that business?  
A. I have been contracting for myself about six or  
seven years, and about twenty years before that super-  
intendent for other firms.

Q. Did you in the fall of 1912 submit bids for the building of two bridges to the County of Burlington?

A. I did in October, I think.

Q. Were you awarded contracts for the building of those two bridges?

A. I was awarded the contract the following December.

10 Mr. Palmer: I call for the two contracts.

Mr. Davis: He has the contracts.

Mr. Palmer: If your Honor please, notice was served upon the defendant to produce the contract. I now call for them under that notice.

Mr. Davis: Well, I have the contract here, I think, at least a copy of it, and so does Mr. Hennessy have a copy of it.

20

(Produces contract.)

Q. I show you, Mr. Hennessy, what purports to be a contract dated December 18, 1912, between you and the Board of Chosen Freeholders of the County of Burlington and ask you if that is the contract you signed for the construction of the Pearl Street bridge in Burlington?

30 A. Yes.

(Contract offered in evidence and marked Exhibit P1.)

Q. Did you at the same time, Mr. Hennessy, also

sign a contract for the construction of the Broad Street bridge?

A. I did.

By the Court:

Q. The same date?

A. The same date.

Mr. Palmer: I ask for that contract.

10

(Contract produced by Mr. Davis.)

By Mr. Palmer:

Q. I show you, Mr. Hennessy, what purports to be a contract dated December 18, 1912, between you and the Board of Freeholders in the County of Burlington for the construction of a bridge at Broad Street in the city of Burlington and ask you if that is the contract 20 that you signed for the erection of that bridge?

A. Yes, that is my signature.

Q. That is the contract?

A. Yes.

(Contract offered in evidence and marked Exhibit P2.)

The Court: I suppose this contract ought to be read 30 -  
to the jury too, so they will know what it is about.

Mr. Palmer: I might do that with both of them.

The Court: Is there any difference in the two contracts, I mean the general provisions?

Mr. Palmer: No, they are generally the same, for the construction of concrete bridges.

The Court: I want to read it and I will read it aloud.  
(Reads contract.)

Q. Mr. Hennessy, after these two contracts were signed December, 1912, did you have any arrangement with Mr. Logan, the county engineer, as to which of those bridges was to be built first?

A. I had agreed with Mr. Logan to start the Pearl Street bridge first.

Q. What was the reason for that?

Mr. Davis: I object.

(Objection overruled.)

Mr. Davis: I cannot see that the engineer has any authority to state reasons.

Mr. Palmer: He is expressly made the controlling factor under the contract.

Mr. Davis: Yes, but his reasons are immaterial.

(Objection noted for defendant as ground of appeal.)

A. Pearl Street bridge had fallen down the year before, and there was no bridge there. That was the reason.

Q. Because Pearl Street bridge was down at that time?

A. Yes, had fallen down some time before.

Q. After the making of these contracts did you do

any work on the Pearl Street bridge?

A. I started work on February 21st.

By Mr. Davis:

Q. That is 1913?

A. I began actual work. I arranged my equipment in the meantime.

By Mr. Palmer:

10

Q. What work did you do?

A. I started excavation of a cofferdam on the south abutment of the Pearl Street bridge.

Q. And how much work did you do?

A. I did that excavation on that abutment.

By Mr. Davis:

Q. That is which abutment?

20

A. The south abutment I guess it would be called.

Q. That is the abutment nearer Burlington City?

A. Nearer Burlington City.

By Mr. Palmer:

Q. And what else?

A. On the 19th I had it completed and visited by the Board of Freeholders and Mr. Logan, the engineer. 30

By Mr. Davis:

Q. That is the 19th of what?

A. The 19th of March.

By the Court:

Q. The 19th of March?

A. The excavation for the south abutment was completed and visited by the Board of Freeholders and Mr. Logan, I think. I informed them that the abutment was completed, excavation for the abutment was completed. The foundations were soft. It was found that piling would be necessary to put in there and they were not  
10 shown on the plan or specified on the specification and there was some dispute over putting it in, but in the meantime I prepared to drive those pilings.

Mr. Davis: I move that be stricken out, "In the meantime I prepared to drive the pilings."

The Court: Upon what ground?

Mr. Davis: On the ground that it is a conclusion.  
20 He can tell us what he did.

Mr. Palmer: That is what he said he did.

Mr. Davis: He didn't say. He said, "I prepared to drive them." I want to know what he did.

A. I bought material and equipment and set it up and was ordered to drive a test pile by the engineer and did drive the pile.  
30

By Mr. Davis:

Q. A test pile?

A. A test pile.

Q. By Mr. Palmer:

Q. Did you send a record of that to the engineer?

(Objected to. Objection overruled. Objection noted for defendant as ground of appeal.)

A. The engineer came there and took the test himself, made a record, inspected the driving of pile on the day that it was driven. 10

By Mr. Palmer:

Q. Now after the test pile was driven what happened, Mr. Hennessy?

A. Shall I state the size of this piling?

Q. Speak a little louder.

A. After driving this piling I had measured it and driven it, it was 35 1/2 feet long and 4 feet in circumference at the butt and 21 1/2 inches at the top, and it was 20 found to be 13 feet longer than necessary after it was driven, projected beyond the water in the river at high tide.

Q. Now Mr. Hennessy, I show you a letter dated April 5, 1913 addressed to you at Burlington and signed by James Logan, and ask you if you received that letter from the county engineer?

A. I did.

(Mr. Palmer reads letter.)

30

(Letter offered in evidence and marked Exhibit P3.)

Mr. Palmer: I call upon the other side to produce a letter dated April 11, 1913, addressed to Mr. James

Logan, from Mr. Hennessy.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated April 11, 1913, addressed to Mr. James Logan, Mount Holly, N. J., and signed P. A. Hennessy, and ask you if you wrote and sent that letter to Mr. Logan?

A. I did.

10 Q. That is your signature attached thereto?

A. It is.

Mr. Palmer: I offer this letter.

Mr. Davis: If your Honor please, I wish to object to the offer of these detached letters unless the whole of the correspondence is offered.

The Court: I take it it is to be followed up, is it not?

20

Mr. Palmer: Yes. What Mr. Davis objects to is that something may be in here that serves his purpose and does not mine. That is up to him.

Mr. Davis: No, I object unless the whole correspondence is offered.

(Mr. Palmer reads letter.)

30 (Letter offered in evidence and marked Exhibit P4.)

Mr. Palmer: I call for a letter dated April 19, 1913, addressed to Mr. James Logan from Mr. Hennessy.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated April 19, 1913, addressed to Mr. James Logan, and ask if you wrote, signed and sent that letter?

A. I did.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 5.)

Mr. Davis. My objection to the offer of this letter<sup>10</sup> is that the replies are not being offered.

Mr. Palmer: There was none.

Mr. Davis: Oh, yes; there was a reply to that letter.

Mr. Palmer: Not the first one. There was to the last two, and I have the reply here.

Q. I show you a letter dated April 24, addressed to 20 P. A. Hennessy, signed by James Logan, and ask you if you received that letter?

A. I did.

Mr. Palmer: Do you admit the signature to this?

Mr. Davis: Oh, yes.

(Mr. Palmer reads letter.)

30

(Letter offered in evidence and marked Exhibit P 6.)

Q. Mr. Hennessy, you in these letters asked Mr. Logan to make some arrangement or agree with you as to unit prices for the work?

Mr. Davis: I object. The letters speak for themselves.

Mr. Palmer: I merely want to direct his attention to the matter I am going to ask him about, is all.

The Court: The letters say so.

Q. What did you do with reference to getting from  
10 Mr. Logan a unit price for the work that you had done?

Mr. Davis: I object to that as immaterial to the pleadings. It has nothing to do with the case.

(Objection overruled.)

Mr. Davis: Your Honor, he is not suing for the work which was done, he is suing for the profit.

20 Mr. Palmer: I think perhaps you will find it in the third count, Mr. Backes advises me refers to this.

Mr. Davis: Your opening only referred to the profit.

The Court: Well, I think it is proper.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

30

A. I asked him for them at one time and went to his office to ask about them.

Q. What did he say?

A. I had one made up according to my idea. We were to agree on the specifications, the contractor and

the engineer, and I got mine made out, what the unit prices should be, what I thought they should be, and I consulted with Mr. Logan and he changed them all. The excavation was to be \$4 a yard and he only allowed \$2. Anyway that is all I could get and I left his office and he promised to give me a certificate or get me the money or have the money for the work that I had done at that time.

Q. Did you ever get that certificate?

A. No, I never got that certificate.

Q. Did you ever get any money for the work that you had done? 10

A. I never got any money.

Mr. Palmer: I call for a letter dated May 9th, addressed to Mr. James Logan, Mount Holly, signed by P. A. Hennessy.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated May 9, 1913, signed by you, and ask if you sent that letter to Mr. James Logan? 20

A. I did.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 7.)

Q. Did you send that letter that I have just read you, marked P 7, to any one else except Mr. Logan? 30

A. I don't remember.

Q. Do you recall whether or not you sent a copy of that directly to the Board of Freeholders?

A. I think I sent them a copy.

Q. Did you as a result of that letter of May 9 ever

get any instruction for piling such as you asked for in that letter?

A. I never received any instructions excepting what is mentioned in that letter.

Q. How is that?

A. I received no instructions excepting what came in that letter that has been read before.

Q. That is the one that contains the record of the test pile?

10 A. Yes.

Q. That is the only one that you got any information from?

A. That one where it says giving liberty about driving piling two feet and a half?

Q. Yes, that is the one that contained the record of the test pile.

Mr. Palmer: I call for a letter dated May 31, 1913, addressed to the Honorable Board of Chosen Free-  
20 holders, Burlington County, New Jersey.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated May 31, 1913, addressed to the Board of Chosen Freeholders of Burlington County, and ask you if you sent that letter and if that is your signature thereto?

A. I did. That is my signature.

30 (Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 8.)

Q. Did you receive a reply to that last letter?

A. From the Board of Freeholders?

Q. Yes.

A. I don't remember it.

Q. I show you a letter dated June 3, 1913, addressed to you and signed Harry Hawkins, Jr., and ask you if that is an answer to your letter of the 31st of May?

A. That is an answer. I received that letter.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 9.) 10

Q. Did you attend the meeting of June 9th of the Board of Freeholders?

A. I attended a meeting about that time, I believe.

Mr. Palmer: Now I call for a letter dated June 9, 1913, addressed to the Board of Freeholders, signed by Mr. Hennessy.

(Letter produced by Mr. Davis.)

20

Q. I show you a letter dated June 9, 1913, addressed to the honorable members of the Board of Chosen Freeholders, and signed by you, and ask if that letter was presented by you to the Board at a meeting on June 9th?

A. I presented this letter.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P10.) 30

Mr. Palmer: I call for a letter dated July 31, 1913, addressed to the Board of Freeholders, signed by Mr. Hennessy.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated July 31, 1913, addressed to the Honorable Board of Chosen Freeholders and purporting to be signed by you, and ask if you sent that letter to them?

A. I sent this letter.

10 (Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P11.)

Q. Did you get any response from the Board of Freeholders to the letters I have just read of July 31, 1913?

A. I don't remember of getting any.

Q. Did you get any response at any time from them in answer to the proposition submitted by you in that letter?

20 A. No.

Q. Did you ever get any notice from the Board of Freeholders that your contract on the Pearl Street bridge was to be taken away from you?

A. I never received notice.

Q. What was the first that you knew that it was to be? From what source did you get your information?

A. I never was informed at all it was to be taken away.

Q. Did you see any readvertisement of it?

30 A. I saw it readvertised.

Q. But nothing from the Board that your contract had been canceled?

A. Nothing from the Board, no notice.

Q. Did you ever have any hearing before the Board

where the question of cancellation of your contract was discussed?

A. I never did, never heard it discussed.

Q. Now Mr. Hennessy, under the contract for the Pearl Street bridge you were to prepare unit prices, were you not, for the use of the engineer?

Mr. Davis: I object. The contract will show.

Mr. Palmer: I merely want to call his attention to<sup>10</sup> what I am going to ask about is all.

The Court: The contract shows it.

(Objection noted for plaintiff as ground of appeal.)

(Question repeated.)

A. The specification states there what was to be done and I went according to them. I don't remember now. 20 I think I was to consult with the engineer.

Q. Did you prepare any unit prices for this Pearl Street bridge?

A. I did.

Q. Did you submit them to the engineer?

A. I called him on the telephone and took them to the office later on.

Q. I show you, Mr. Hennessy—the other side say they have no such copy.

A. Maybe I didn't leave it there. It came back with<sup>30</sup> me. He made a copy of his own.

Q. I show you, under date of April 25, 1913, a paper which purports to show unit prices on Pearl Street bridge contract, with payment for materials furnished as per

bill, and ask you if that is what you submitted to Mr. Logan?

A. These are not the ones I presented and not as I presented them.

Q. Have you any copy of the prices that you submitted to Mr. Logan?

A. There is a copy somewhere, I don't know.

Q. Did the engineer ever give you an estimate of the amount that was due you under the Pearl Street  
10 bridge contract for work that had been done?

A. He promised to make one out and send it to me at Burlington.

Q. Did you ever get it?

A. I never received it.

Q. And you never received any certificate for the work that you had done?

A. Never saw any certificate for the work that I had done.

Q. Or never received any money from the Board of  
20 Freeholders?

A. Never received any money.

Q. Now had you any agreement with Mr. Logan, the engineer, as to how much was due you for the work that was done based upon unit prices?

(Objected to. Objection overruled.)

Mr. Davis: Did your Honor overrule my objection?

30 The Court: You stated no grounds.

Mr. Davis: I thought they were so plain. The only way in which he could do it is by certificate.

The Court: Does the contract call for a certificate?

Mr. Davis: Yes. A mere oral agreement does not amount to anything. He must have a certificate of that work.

Mr. Palmer: If your Honor please, the calculation must be made under the contract between the contractor and the engineer. The engineer is then bound under the terms of the contract to give a certificate. Now if he withholds that certificate we are certainly not precluded from showing what that estimate was. 10

Mr. Davis: I cannot see that that can bind the county.

The Court: Probably not, but the mere fact, I am inclined to receive it, and see whether it has any legal significance.

A. I did agree with him —

The Court: Don't state the amount. 20

Q. What was that amount?

(Objected to.)

The Court: No, it is the certificate of the engineer that counts. The objection will have to prevail.

Mr. Palmer: Well, if your Honor please, if the engineer wrongfully withholds a certificate we certainly can show the amount of work we had done and what prices had been agreed upon. 30

The Court: You can show that by him?

Mr. Palmer: Yes.

The Court: You don't have to have what the engineer did regarding the matter.

Mr. Palmer: That is what I asked him, if they had reached an agreement, as there was a dispute —

10 The Court: I have allowed you to show that they reached an agreement. Now he can go on and show what the labor and stuff was worth.

Q. How many yards of excavation did you do upon this work?

A. About 150.

Q. And what was the price submitted by you?

(Objected to.)

20 Q. And what was the price that the engineer agreed should be—

Mr. Davis: Your Honor has an objection before you.

The Court: According to the contract the payments are to be made by the county on the certificate of the engineer. Now I think you are entitled to show by this witness that he had an agreement with the engineer, that far, without going into the contents of the agreement.  
30 I think he may show what the labor and material was worth without regard to any agreement of the engineer what it was worth.

Q. All right, Mr. Hennessy, putting it upon that basis, of what the labor and material was worth, how

much excavation do you say you did?

A. About 150 yards.

Q. And how much was that worth per cubic yard?

A. I placed it at \$4 myself.

Mr. Davis: I move to strike that out. He is telling what he based it on. That is not the basis nor the test.

Mr. Palmer. He is an engineer and contractor.

10

Mr. Davis: I don't care if he is. That does not exempt him from the law of evidence.

The Court: If he is entitled to recover he is entitled to recover upon the theory that the work and labor were reasonably worth a certain sum, and he can show that, what it was reasonably worth. I think that is upon a quantum meruit. I think that is the theory.

(Objection noted for defendant as ground of appeal.) 20

Q. What other work did you do other than the excavating?

A. I built a cofferdam around the abutment.

Q. How much was that worth?

A. That would include buying it.

Q. What it was worth as completed, for labor and materials?

A. Labor and material would cost about \$700, to buy it, about \$100 to put it in and about \$300 or \$400<sup>30</sup> to do the excavation, and \$200 or \$300 to set up the equipment.

Q. Any other items of work that you did up to that time?

A. That was done up to that time of the completion of the abutment, foundation.

Q. You never were paid for that work?

A. I never was paid for any of it.

Q. Mr. Hennessy, what was your estimated profit upon this job of building this Pearl Street bridge?

(Objected to.)

10 The Court: Well, is that a good word to use, estimated profit?

Mr. Palmer: Well, I will change it this way.

Q. What would profit have been on this job of building the Pearl Street bridge if you had been allowed to build it?

20 Mr. Davis: I object for the same reason. It has not been shown in this case that the County of Burlington did anything to prevent him from completing his contract. On the other hand we are urging him to do it.

The Court: Well, upon his theory of the case, that the county abrogated the contract without any justifiable cause, I think his measure of damages—

Mr. Davis: He has not said that.

30 The Court: Well, that is the theory of his case. You can't put it all in at once. I suppose that is the theory of your case, isn't it, without any justifiable cause?

Mr. Palmer: Yes.

The Court: And their contention is that they had justifiable cause for taking over and finishing the job. I think you are entitled to show that.

Q. Now will you answer the question, Mr. Hennessy?

(Question repeated.)

A. Twenty per cent. 10

By the Court:

Q. That is according to the plans and specifications?

A. According to the plans and specifications.

By Mr. Palmer:

Q. And twenty per cent. of the contract price, you mean?

20

Mr. Davis: I object. Let him tell what it means.

Q. Very well. You said twenty per cent. Twenty per cent. of what?

A. The contract.

Q. And how much would that have amounted to?

A. Well, twenty per cent. of the amount of the contract.

Q. You know the amount of the contract, don't you? 30

A. Yes, \$14,000.

Q. Now tell us what your profit would have been on that basis.

A. Twenty per cent. of \$14,780 or 840, whatever it was. I haven't the figures exactly.

Q. Well, do the figuring if necessary to produce the amount.

A. Well, I will have to see the contract, won't I?

Q. The contract was for \$14,840.

The Court: The jury can figure that.

Q. Now Mr. Hennessy, in reference to the Broad Street bridge, were you ever notified by the county  
10 engineer to begin work on that bridge?

A. I was.

Q. On Broad Street?

A. No, not Broad Street, no.

Q. I am leaving the Pearl Street and taking the Broad Street bridge now. Were you ever notified by the county engineer to begin that work?

A. I never was.

Q. Did you ever ask him for instructions as to when  
to begin?

20 A. I did.

Q. How often, more than once?

A. More than once.

Q. Did he ever give them to you?

A. I never received any instructions.

Q. What did he say?

A. Well, the first I asked him in the early part of the summer he didn't say anything, and the next time he said he wouldn't give it to me, at his office. And finally I went to his office again and then he said before wit-  
30 nesses that he would not give it to me. That is all I heard from him.

Q. Did you write Mr. Logan any letters with reference to the beginning of the work on the Broad Street bridge?

A. I wrote him something in reference to the Broad Street bridge; I don't remember what it was.

Mr. Palmer: I call for a letter dated August 31, 1914, addressed to Mr. Logan.

Mr. Davis: We don't have it.

Q. I show you a letter dated August 31, 1914, addressed to the Board of Chosen Freeholders, and ask you if you sent the original of that letter signed by you to the Board? 10

A. I did.

Mr. Palmer: Any objection to my using this?

Mr. Davis: No.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 12.) 20

Mr. Palmer: I call for a letter dated February 8, 1915, to Mr. Logan.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated February 8, 1915, addressed to Mr. James Logan, signed P. A. Hennessy, and ask if you sent that letter? 30

A. I sent this letter, a copy of this letter.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 13.)

Mr. Palmer: I call for a letter dated February 16, 1915.

(Letter produced by Mr. Davis.)

Q. I show you a letter dated February 16, 1915, addressed to James P. Logan, and ask if you sent that letter and if that is your signature?

10 A. I sent that letter.

(Mr. Palmer reads letter.)

(Letter offered in evidence and marked Exhibit P 14.)

Q. Did you get any replies to those letters?

A. I don't remember of any.

Q. Well, you would know whether you did or not, wouldn't you?

A. I would know, I would remember, I think.

20 Q. Did you ever get any?

A. No.

Q. Did you ever get any instructions to begin the work on the Broad Street bridge?

A. I never did.

Q. Did you go to Mr. Logan's office for the purpose of getting instructions with reference to the Broad Street bridge?

A. I went, yes, twice.

Q. And when?

30 A. I don't remember the date. I had notes made of them.

Q. What did Mr. Logan tell you?

A. The first time he didn't say anything, didn't give me any satisfaction. The next time he said he wouldn't notify me.

Mr. Davis: I object. The reason is Mr. Logan has under the contract certain definite duties, and that is to notify him. Now whatever his reasons may be for not notifying him are not material.

The Court: He is not asking for the reasons, he wants to know what Mr. Logan did with reference to his giving work or not.

Mr. Davis: He has asked for what he said and that<sup>10</sup> is what I am objecting to.

The Court: Well, I think I will allow it.

Mr. Davis: My reasons are that he is not qualified or not competent to bind the Board of Freeholders in any way by anything he does except by his written instructions pursuant to the contract.

The Court: I do not say that he is, but it is simply 20 one of the historical steps in the case.

(Objection noted for defendant as ground of appeal.)

Q. What did Mr. Logan say?

A. The first time he said that he would not notify me.

Q. What did he say the second time?

A. That is the third time. The second time he said he would not notify me. The third time I took a witness<sup>30</sup> and he said so again before the witness, and that is all.

Q. That he would not notify you?

A. That he would not ever notify me.

Q. Do you know what was done with reference to the Broad Street bridge by any other contractor?

A. During this argument over the Pearl Street bridge a new cover put on Broad Street, an entire cover was put on new, and steel beams and the flooring were made new and a shoring put up under the pilings to support it temporarily.

Q. That is, temporary repairs were made?

A. Yes.

Q. Now what was subsequently done with reference to building the new bridge?

10 A. It was advertised again and relet.

Q. Did you ever get any notice from the Board of Freeholders that your contract for Broad Street bridge had been canceled?

A. I never did.

Q. Were you ever asked to attend a meeting of the Board of Freeholders for the purpose of discussing the cancellation of your contract?

A. Never.

20 Q. What was the first when you knew that the Board of Freeholders had cancelled your contract?

A. I never knew it. I didn't know what they did.

Q. What was the first knowledge you had of any other work being done on the bridge?

A. I heard it was to be advertised again.

Q. Did you see the advertisements?

A. I did.

Q. Do you know whether or not it was built by some other contractor?

A. I know it was.

30 Q. Do you know when?

A. Last summer, I believe it was.

Q. Do you know how recently it has been finished?

A. I have a note of it. I think it was January 1st. I can't remember without taking my notes.

Q. Well, look at your notes and see.

The Court: Well, is there any question about the fact?

Mr. Palmer: I don't think so.

The Witness: A couple years later this was.

The Court: Is there any doubt that after the Board of Freeholders abrogated his contract they awarded the contract to somebody else? 10

Mr. Davis: None at all, sir.

Q. What would your profits have been upon the erection of this Broad Street bridge had you been allowed to complete it by the Board of Freeholders?

The Court: According to the plans and specifications?

Mr. Palmer: According to the plans and specifications? 20

A. If I refer to my book I can get it exactly.

Q. What would it have been on a percentage?

A. I am not sure but I think eighteen cents on the labor and twenty cents on material.

Q. Well, look at your book and give us the exact figures.

(Witness refers to book.)

30

A. The material was figured at eighteen per cent. and the labor at twenty per cent. profit.

Q. Now how much would that have amounted to, your profits?

A. The material was \$5,300, and 18 per cent, \$954. The labor is \$2,777, and twenty per cent. would be \$554.

Q. Then what would your total profit have been?

A. The total profit would be \$1,508.

The Court: Is there any question about the fact that the Board of Freeholders took the Pearl Street contract away from him and awarded it to somebody else?

10 Mr. Davis: None at all.

Cross Examination:

By Mr. Davis:

Q. Mr. Hennessy, you sent a written bid on these proposals, did you not, on these invitations, for the construction of these two bridges?

A. I presented one.

20 Q. This under date of Belvidere, New Jersey, October 23, 1912, is your bid for the Broad Street bridge, is it not?

A. It is.

(Paper marked Exhibit A for identification.)

Q. And this under date of Belvidere, New Jersey, October 23, 1912, is your bid for the Pearl Street bridge?

A. It is.

30

(Paper marked Exhibit B for identification.)

Q. On August 21, 1912, you signed this paper, did you not? You see your signature down there? You

recognize that, don't you? Is that your signature to that paper?

A. It is my signature.

Q. All right, if that is your signature. That is what we want to know?

Mr. Davis: I ask that this be marked.

(Paper marked Exhibit C for identification.)

10

Q. I show you what purports to be a letter addressed to James Logan, under date of May 16, 1913, signed P. A. Hennessy, and ask you if that is your signature?

A. Yes, that is my signature.

(Paper marked Exhibit D for identification.)

Mr. Davis: Do you have those letters under date of March 17th and March 20, 1913, addressed by Mr. Logan to you? I call for them. You said you had them. 20

(Letters produced by Mr. Palmer.)

Q. Now this letter under date of March 17, 1913, addressed to you, signed James Logan, was received by you?

A. Yes.

The Court: Mr. Davis, let me ask you a question. Is this correspondence merely confirmatory or accumulative<sup>30</sup> of what has already been in?

Mr. Davis: Oh, no.

The Court: How does it change it?

Mr. Davis: These letters that I am offering now, or rather, identifying, are the interpretation of Mr. Logan as to the foundations as provided for in the contract. You see the contract provides that if there is any interpretation to be made that the engineer does it. Now in regard to these foundations Mr. Logan made an interpretation of this contract and served it on Mr. Hennessy here, to the effect that he must put these pilings in at his own expense.

10

Mr. Palmer: If your Honor please, it is not a question of interpretation. The contract calls for matters of interpretation. Any question arising about the terms of the contract, the engineer's opinion probably would be controlling; but here is a matter that is neither mentioned in the contract, the plans or the specifications in any way shape or form, as to pilings.

The Court: Well, the court will ultimately have to pass upon that question. Well, it is perfectly obvious, from what has already appeared in the case, that there was a serious dispute between this contractor, and the county over the question of piling. The contractor discovered after he had made the excavation that the ground was too soft or doubtful to sustain the abutment without piling. The Board of Freeholders and the engineer said it was the business of the contractor to have known that in advance and made provision for it. That is the dispute, isn't it?

30

Mr. Davis: Yes, but there is a further question, and that is that this all goes back to the judgment of the engineer. If there is anything that is omitted the engineer nevertheless has authority to require it to be put in to form a completed whole.

Mr. Palmer: The question of something omitted from a part of the contract is a vitally different proposition, as a thing so essential as the question of this piling, that is not a question of omission.

The Court: Well, the court must finally say.

Mr. Davis: These letters are pertinent and offered on that ground.

10

The Court: I am not going to cut out anything.

Mr. Palmer: The only offer is that it was the engineer's interpretation of what that contract should be. We have no objection to your Honor's deciding the contract, but we object to the engineer's interpretation of it.

(Letter marked Exhibit E for identification.)

Q. I show you a letter under date of March 20th, 20 addressed to P. A. Hennessy, Esq., Burlington, New Jersey, and signed James Logan, county engineer, and ask you if you received that letter?

A. I received that letter.

(Letter marked Exhibit F for identification.)

Q. Now Mr. Hennessy, all you did do toward this bridge was the excavation for the foundations on the Burlington city side, was it not?

30

A. That and more.

Q. Now what else did you do?

A. Bought and set up equipment to do this work.

Q. I am not talking about the equipment, I am talk-

ing about as far as the construction of the bridge is concerned.

A. Built a cofferdam and made the excavation.

Q. Built a cofferdam where?

A. Under the south abutment, I believe it is.

Q. And you made an excavation for that south abutment, that is, the abutment on the side of the stream nearest to the city of Burlington?

A. Yes.

10 Q. Now what else did you do as far as actual construction is concerned?

A. Built forms for the concrete arch.

Q. Where were they ?

A. On the ground near the work.

Q. Never used?

A. I never used them.

Q. I am talking about what was done towards erecting the bridge.

A. Well, that was erecting, building the forms first.

20 Q. You never poured any cement in them?

A. No, sir.

Q. Never built any foundation?

A. No, sir.

Q. You never did a single thing as far as the constructive part, that is, the fabrication of the bridge?

A. No, built no part of the bridge.

Q. How many piles did you drive?

A. One test pile, I believe.

Q. Just one test pile?

30 A. One or two, I forget.

Q. When did you sell your material there to the succeeding contractor?

A. I sold it at different times. Some of it I never disposed of until a short time ago.

Q. What was the first thing you sold to him?

A. To the contractor?

Q. Yes.

Mr. Palmer: I object, because there has been no claim in our testimony—

Mr. Davis: Oh, yes; you claimed for material.

Mr. Palmer: In place.

10

Mr. Davis: Yes.

Mr. Palmer: All right. Go ahead.

A. I sold the cement all during that next summer in small lots.

Q. To the contractor?

A. No, I didn't sell any cement to the contractor.

Q. Who did you sell that to?

A. Why, just different people in Burlington and 20 Riverside.

Q. What was the first thing you sold to the contractor?

A. I sold the crushed stone on hand and sand on hand and some lumber.

Q. That was to the man who eventually built the bridge?

A. Yes, two years afterwards, two and a half. I don't remember the time.

Q. What was there there that you didn't sell? What was there there that was for the use of the bridge that you didn't sell? <sup>30</sup>

A. Labor and material there?

Q. Yes.

A. That was finally all disposed of.

Q. Sold it all?

A. Yes.

Q. Did you sell it all before you brought suit in this case?

A. Sold it any time I could.

Q. Answer the question. Did you sell it all before you brought suit in this case?

10 Mr. Palmer: I object. There has been no testimony on Mr. Hennessy's part or claim for the value of this material.

Mr. Davis: Yes, there is a claim here.

Mr. Palmer: No, there was no testimony on that point at all.

Mr. Davis: I am not saying your testimony but in your claim.

20 The Court: Do you abandon that part of the claim?

Mr. Palmer: Yes, as far as the claim for material on the Pearl Street bridge sold to somebody else, certainly. There has not been a bit of testimony on that. And in regard to abandonment, it is not competent cross examination, because he has not testified to it.

30 Mr. Davis: I propose to show, if your Honor please, that at the time he brought this suit he knew he was bringing a fake claim against the county, because at that time he had sold the very material which he was suing the county to recover for.

The Court: Well, now, I understand Mr. Palmer abandons that part of the complaint.

Mr. Davis: Nevertheless I have the right to cross-examine this man to show this jury that he is bringing a fake claim against the county and that he did not own it at the time he filed his complaint.

Mr. Palmer: Our claim is based on the testimony that we have offered.

The Court: No, the claim now is limited, as I understand it, to the item of profit he would have made if he had been allowed to finish the contract. Is that it? 10

Mr. Palmer: And the material actually used, the cofferdam and material used in the excavating on the Pearl Street bridge.

The Court: That is to say, the work and labor which actually was put into the job?

Mr. Palmer: Put into the bridge. 20

The Court: And the material?

Mr. Palmer: Yes.

The Court: But not the other?

Mr. Palmer: Not the other.

The Court: That is not a feature of your case? You abandon that? 30

Mr. Palmer: Yes.

Mr. Davis: That is the point I am going to try to

show, that every last thing, cofferdam and material, that went into this bridge had been sold to the contractor before he commenced this suit.

The Court: The court will permit you to show by cross-examination of this witness anything in reference to the material that went into this job or labor that went into the job but nothing in regard to the material that did not go into the job or labor that did not go into the job.

10

Mr. Davis: Well, but if your Honor please, he has testified that he was entitled to recover a certain per cent on the whole of the contract price. He has testified what that sum would amount to. Now he has already testified that apparently a part of this thing that he wanted to recover the profit on from the county of Burlington he in turn has sold to somebody else. Now isn't it pertinent to show that that has been reduced, that these goods for which he is now claiming profit he has already sold?

20

Mr. Palmer: No, because we had to buy them in the first instance.

Mr. Davis: Yes, but you have your profit in the sale.

Mr. Palmer: No, the profit does not figure on our buying and selling it.

The Court: Well, it is not a matter of any great moment one way or the other.

30

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RECESS TILL 1.30 P. M.

Trial of the cause resumed at 1.30 P. M.

PATRICK A. HENNESSY, resumed.

Cross-Examination, continued.

By Mr. Davis:

Q. Now you did nothing further toward completing this bridge, did you? 10

A. I didn't go forward?

Q. Yes.

A. I went as far as I could go.

Q. I say you did nothing further?

A. I made a form for the parts.

Q. Yes, you testified that, but I am talking about as far as the actual fabrication of the bridge is concerned, you did nothing further.

A. There was none of the bridge built.

Q. You didn't drive any other pile than this test pile? 20

A. No.

Q. You didn't excavate on the far side of the creek to see whether piles were necessary?

A. No.

Q. You didn't put down a foundation?

A. Put no foundation down.

Q. You did nothing whatsoever except what you have already testified to?

A. No.

Q. How long did you keep your stuff there? 30

A. At different times. I sold it when I got a chance.

Q. When did you sell the first material?

A. Well, I am not positive but I think the first I sold was to Mr. Smith.

Q. Mr. Smith was the subsequent contractor?

A. He bought some and hired some more.

Q. You have answered my question. Mr. Smith was a subsequent contractor, was he not?

A. Yes.

Q. What did you sell him?

A. I stated that once.

Q. State it again.

A. I sold the stone and sand and some lumber and rented the equipment, that would be the derrick and such  
10 things as those, that were required, and he used the cofferdam steel sheeting.

Q. You rented him the use of the cofferdam?

A. The steel sheeting. I don't know who used the cofferdam.

Q. The cofferdam was already in the water at the time?

A. Yes.

Q. You rented him the use of the cofferdam?

A. I rented him the use of the sheeting in the coffer-  
20 dam.

Q. In place?

A. In place, on one side.

Q. What was there on the premises that you did not sell to Mr. Smith?

A. Well, I didn't sell part of the lumber, and the cement, none of the cement.

Q. That was disposed of before or after Mr. Smith went there?

A. At times, whenever I could sell it.

30 Q. I am asking you was it before or after Mr. Smith went there?

A. I think it was mostly all disposed of before Mr. Smith went there. The cement was disposed of in the same summer of the contract anyway.

Q. Most everything in your opinion except what you

sold to Mr. Smith was disposed of before Mr. Smith went there to erect this bridge; that is a fact, isn't it?

A. No, I sold the reinforcing steel to Mr. Smith too.

Q. Well, I say the stuff you didn't sell to Mr. Smith was sold before Mr. Smith got there?

A. No.

Q. What was there that was not?

A. Some lumber.

Q. To whom did you sell that and when?

A. I can't remember the date.

10

Q. Before Smith went there or afterward?

A. Some before and some afterwards.

Q. Who did you sell that to that you sold afterwards?

A. Mr. W. C. Jones some.

Q. Now what time of the year was it that you sold the rest of your stuff.

A. This is in reference to Pearl Street, not including Broad Street?

Q. You didn't have anything on Broad Street, did you?

A. I did.

Q. What did you have there?

A. I had reinforcing steel and lumber bought for the two jobs together.

Q. I am speaking now about Pearl Street.

A. Pearl Street? What was that question?

Q. When was it that you sold the last stuff at the Pearl Street bridge?

A. I don't remember the date.

30

Q. Was it before you brought this suit?

A. I don't remember the date of the suit, exactly when it was brought.

Q. Well, this was brought in October, 1915. You had sold everything at that time, hadn't you?

A. No, not everything.

Q. Now what was there that was not sold?

A. That was before Smith came? I don't remember the date of it.

Q. This was in October, 1915. What was there at that time that you had not sold?

A. Was that before Smith came or after? I don't remember now the date. Before the other contractor went there or after?

10 Q. I can't tell you. I am trying to find out from you.

A. Well, it is in the record there exactly when it was.

Q. How much did you get for this stuff?

(Objected to.)

Mr. Davis: The purpose of offering this question is that he is claiming a profit of twenty per cent on the contract price of this stuff. Now he is trying to recover from the county this twenty per cent.

20

Mr. Palmer: The question of what he sold his material for, he had to buy it in the first place and put it there, and who he sold it to or what he did with it, or whether he burnt it up, does not change the proposition that he is entitled to his profit on his job, no matter what became of that, whether it was used there or what he did with it. There is no claim now for the material put in there except as he would be entitled to a profit upon the whole job. Now whether or not he had some stuff there that he  
30 afterwards sold cannot take the question of his profit one way or the other, because he had to buy it in the first instance.

Mr. Davis: No, but he is entitled to a profit on the work, if your Honor please, not only on the material but

on the work. He figured it twenty per cent on his entire work, the contract price. Now he abandons, as I understand, the material that was sold to the other party, and only that material which went into the bridge. Now how am I going to find out how much went into the bridge unless I can find out how much he sold?

The Court: I think upon that theory it may be answered.

10

A. I have a record of all the things I sold.

Q. All right. Now where is it?

A. Of the things I sold on both bridges.

Q. Well, you had never been told to go to work on the Broad Street bridge, had you?

A. No, but I had a contract and I assumed that I would build it and bought the material for it, bought the reinforcing steel.

Q. I understand, but you hadn't been told before.

A. No, I began to buy steel after the contract was 20 signed. I bought the steel sheeting which would be used for both bridges, also the reinforcing steel for both bridges, also the forms for both bridges.

Q. All right. Find that record now.

A. I have here a list of the sales and collections I made on those two bridges separately. I have a note down here and I also have them in this book, and I also have the vouchers for the material I bought.

Q. No, I ask you the same question and I want an answer to that one, Mr. Hennessy. How much money did 30 you get for the stuff that you sold?

A. I will tell you. On Pearl Street?

The Court: On Pearl Street.

A. \$1664.89.

Q. Now you sold to Mr. Smith—

A. I will give you that now. I have the record of it. 100 cubic yards of sand at 90 cents.

Q. No, the gross sum, the gross amount.

A. I will have to total it.

Q. Well, you got three checks from him, didn't you? You got a check of \$515.63, another check of \$416.63, another check for \$100?

10 A. That sounds like it. I can give you the total of it here.

Q. And that is the sum total of the money that he paid you, wasn't it?

A. Yes, I have the amount here.

The Court: How much does it amount to in a round sum?

Mr. Davis: \$1033.26.

20

Q. Now how much did you sell to other persons?

A. I sold lumber—I got returns, I collected from the indemnity company for liability insurance premium, \$58.

Q. That is the company that went into bankruptcy?

A. No, it didn't go into bankruptcy; the liability company.

Q. That is the one that went into bankruptcy?

A. No, I don't think it is.

Q. Don't you know?

30 A. I don't think it is. It is the liability company insuring labor.

Q. That is different?

A. That is different.

Q. Go ahead. How much was that amount?

A. And I sold Hennessy & Jones—that is myself and partner—on another contract—

Q. Sold to you and your partner?

A. Yes, on another contract, \$13.32. It gives the number of pieces of lumber and what size they were, if you want it. And I sold at an earlier date, from March 7th to April 23, 1914, I sold \$35.14 more to same contract, the same contractor.

Q. Sold it to yourself?

A. Sold it to the company, Hennessy & Jones. 10

Q. Of which you were a member?

A. Yes, and I sold to W. C. Jones alone 28,700 pounds of stone.

Q. How much money did you get?

A. \$1.25 a ton, \$17.93. And also sold at another date 4800 pounds of stone at \$1.20, \$2.48; four loads of sand, W. C. Jones, at 90 cents, \$3.60.

Q. Have you got dates on them?

A. Not all of them, no. Smith's are all dated.

Q. Just give us the sum total of the amount that you 20 sold there.

A. I gave you the sum total.

The Court: He said \$1664.89.

Q. Now what is the latest date that you have?

A. The latest date that I have laid down is the 24th of April.

Q. Of what year?

A. 1914. 30

Q. The 24th of April, 1914?

A. Yes.

Q. Now what did you sell after that date?

A. I haven't items here dated after that; I don't

know. Arthur Smith's would come about that time, I guess.

Q. No, Arthur Smith's come——

A. About that time.

Q. Arthur Smith's comes on the 30th of April, 1914.

A. That would be after that then. I guess the 24th is the last item I have dated.

Q. So that all of this stuff had been sold before you filed your claim against the county claiming compensation for those very things that you sold; is that correct?

A. I don't know the dates.

Q. You have got the dates there, haven't you? You told me that you could give them to me. The latest date that you have there is April 24th, what year?

A. 1914.

Q. What is the date of starting suit?

A. One moment. Is that right? The latest date I have here is April 24, 1914.

Q. Summons was issued in this case in October, 1915, so that all of the stuff was sold at that time, wasn't it?

A. I only ask in my case——

Q. No, won't you answer my question?

A. I believe mostly all was sold, yes.

Q. What was there that was not sold at that time?

A. There was a little lumber left there at that time?

Q. How much was it and who did you sell it to?

A. I believe that is the item of Jones.

Q. When was that sold?

A. I have no date on it.

Q. When was it sold?

A. Well, in the summer of 1914.

Q. Was sold in 1914? Well, then that was before October, 1915, wasn't it?

A. Yes.

Q. So that at the time this summons was served everything had been sold by you?

A. Mostly everything, yes.

Q. And yet you file a claim to recover from the county the price of materials which entered into this bridge which you brought there and which you had sold before you filed this claim?

A. I don't claim anything of the kind.

Q. You don't claim it?

10

A. No.

Q. Do you know what is in your complaint? Then do I understand that you make no claim against the county for the cofferdam?

A. I make claim against the county for my anticipated profits.

Q. I ask you do you make any claim——

Mr. Backes: He may be permitted to answer.

20

The Court: Yes, give him a chance to answer the question.

Mr. Davis: I ask him to answer my question, if your Honor please.

Q. Do you make any claim against the county for this cofferdam?

A. I answered what the claim is.

Q. Answer my question.

30

A. What I lost on the cofferdam?

Q. No, I am asking you for this cofferdam which you put in there, which you testified to on direct examination at Mr. Palmer's request, do you mean to say that you are claiming damages for that cofferdam from the county?

- A. The full amount of it?  
Q. Yes.  
A. No, sir; I deduct what Mr. Smith paid me and what I got in any other way.  
Q. How much was that cofferdam worth?  
A. I gave you the whole details.  
Q. Yes, I know you did.  
A. I can give it to you if you want to take it up, the cost of the building or the price of materials either one.  
10 Q. I am not proving your case.  
A. What do you want to know?  
Q. I am trying to find out if you are claiming from the county compensation for this material that you put in this cofferdam and for the material, sand, etc., that you had there that you testified to in direct examination for Mr. Palmer.  
A. I am claiming what I lost on that only.  
Q. You are claiming for that?  
A. I am claiming for that.  
20 Q. And that is the twenty per cent?  
A. I don't know. My books will show that.  
Q. All right, if you are satisfied I am.  
A. The books will show that, what I paid for them and what I lost on them.  
Q. You made visits up to Dr. Lejambre, did you not?  
A. Visits to Dr. Lejambre?  
Q. You heard my question, didn't you?  
A. Where at?  
Q. At his house in Bordentown.  
30 A. No, sir.  
Q. Didn't you ever go and see Dr. Lejambre? Do you know him?  
A. I know him, yes.  
Q. Did you go to see Dr. Lejambre about this bridge?

A. I never remember of it, being in Dr. Lejambre's house, never in my life.

Q. Did you meet Dr. Lejambre at the Bordentown House in the city of Bordentown and have a conversation with him with respect to this bridge?

A. I don't know. I don't remember it.

Q. Did you or did you not?

A. I don't remember of doing it.

Q. At that time didn't you have a conversation, or at Bordentown, when you met Dr. Lejambre, in the Bordentown House, didn't you have a conversation with him in respect to this bridge? 10

Mr. Palmer: I object, primarily because it is not cross-examination. It has no pertinency whatsoever.

The Court: I am inclined to think that is sound Mr. Davis.

Mr. Davis: If your Honor please, this is the plaintiff and he is trying to give the court and jury the impression that he has done everything and was always ready to go ahead with this bridge. 20

Mr. Palmer: It is for you to prove that he has not been, it is not for cross-examination.

Mr. Davis: Yes, I can. He is the plaintiff.

The Court: I think any cross-examination which is inconsistent with the present attitude is competent, Mr. Palmer. 30

Mr. Palmer: It is true so far as any matters have been developed. It is not shown who Dr. Lejambre is or

what his connection is with the situation or anything of the sort.

The Court: I assume that will all be brought out. I assume he is a member of the Board of Freeholders.

Mr. Davis: He was a member of the Board of Freeholders at that time, the small Board.

10 The Court: You see the plaintiff has the burden of proof. He must show either performance or that he was prevented from performing, and upon that theory any testimony which negatives either one of those propositions would be proper.

Mr. Palmer: But the question so far as appears at the present time does not bear upon either proposition that your Honor suggests.

20 The Court: I cannot tell until I hear it. It may not be strictly so, but I cannot say that any—he says he didn't see the man.

The Witness: I wasn't at his house.

Q. I didn't ask you that.

Mr. Palmer: Any conversation with Dr. Lejambre has no binding effect upon either of the parties.

30

The Court: No doubt. Anything that is said, unless it is consistent. For instance, this would be testimony and this would be proper cross-examination: suppose he went to our friend from Bordentown and said he didn't want the job anyhow and was going to throw it up, some-

thing to that effect. That would be proper cross-examination.

Mr. Palmer: That would not make any difference.

The Court: Let us hear it anyhow.

Q. Did you meet Dr. Lejambre at the Bordentown House in Bordentown?

A. I don't remember of it.

10

Q. Do you say you did or didn't?

A. I say I don't remember.

Q. Now didn't you meet him there and have a talk with him with respect to the piling to be used here and try to persuade him as one of the small Board of Freeholders to authorize the entering into a supplemental contract for the driving of those piles to hold the foundation?

(Objected to.)

20

A. I absolutely did not.

The Court: He has denied it.

A. I absolutely did not.

Q. Did you have any conversation with him in the Bordentown House with respect to this contract at all?

A. I don't remember speaking to him about it.

Q. Did you have any conversation with Dr. Lejam-  
bre anywhere else in respect—

30

A. Yes, I did.

Q. And where?

A. In Mount Holly, New Jersey.

Q. In the Board of Freeholders or in his private capacity?

A. In the Board of Freeholders. I met him one day at the station in Burlington too.

Q. Were you talking to him about this contract?

A. Just a simple remark. I made no request or no suggestions in any way.

Q. Didn't Dr. Lejambre at the Bordentown House in Bordentown, when you were talking to him about this  
10 contract, tell you to proceed with the contract, that the money was safe and that the county would pay you?

A. Never.

Q. Didn't Dr. Lejambre at the Bordentown House in Bordentown tell you——

A. I don't remember meeting him in Bordentown at all.

Q. Didn't he tell you at the Bordentown House in Bordentown that if you were not satisfied with your contract that the county would relieve you of your contract,  
20 open bids and allow you to bid again?

A. No, sir; not as I know of.

Q. Did he tell you that anywhere else?

A. Absolutely nothing, nowheres; never was spoken of by the Board of Freeholders.

Q. Did he tell you that anywhere else?

A. To give me a contract?

Q. Yes, if you were not satisfied with the contract that you give it up and bid a second time.

A. Yes, I have got a record of it. They said that  
30 here in Mount Holly.

Q. As a matter of fact this contract was readvertised afterwards?

A. Yes.

Q. And you came to Mount Holly at that time?

A. Yes.

Q. And offered a bid on that contract?

A. Yes.

Q. Have you that bid?

A. I never put that bid in.

Q. Did you not have a bid ready to offer?

A. At the time it was let?

Q. No, not at the time it was let, on the advertisement before it was let.

A. I had no bid under my own name. I helped a man prepare one, that is all. 10

Q. You appeared with the bid?

A. Not with my bid, no.

Q. I am not asking you about your bid.

A. Yes, I appeared with a man that had a bid.

Q. And a bid that you were interested in?

A. Only helping to figure it.

Q. You were interested in that bid?

A. No. Yes, I was interested in this man, in helping him make it out. My name was not connected with it at all. 20

Q. The bid that you offered was in the name of Jones, was it not?

A. Yes.

(Objected to.)

Q. He was your partner, was he not?

A. Not in this thing.

Q. I am not talking about this work, but your partner, the very man to whom you sold these goods that you mentioned a minute ago. 30

A. I had a—

Q. Answer my question.

(Question repeated.)

A. No partner on that bid.

Mr. Davis: I move the answer be stricken out.

Mr. Palmer: The witness has a right to answer that question.

Mr. Davis: You bet he has a right to answer it and I  
10 am going to insist on it.

A. The man that made that bid—

Mr. Davis: I move that the answer be stricken out.

The Court: The motion is denied. He is entitled to answer the question.

Mr. Davis: That is what I am asking. He is answering something else.

20 The Court: He is entitled to say that.

Q. I am now asking you if this man Jones, in whose name this contract was, and which contract was in your handwriting, where you had figured it up, wasn't he your partner?

(Objected to.)

A. In one particular case. We were organized to do  
30 one job and could do no more under our agreement.

Q. Was that the job of which you spoke, from which he bought your stuff at this place?

A. Yes, the same one.

Q. And the same goods that were on those premises and that entered into this contract were your goods that

you sold Jones which entered into this contract?

A. No, I didn't sell them to Jones, I sold them to Hennessy & Jones.

Q. But he was your partner?

A. On this specific job he was.

Q. On which specific job?

A. Building the floors and roofs of the Public Service building in Burlington power house.

Q. Were these the goods that you sold to him used in that contract? 10

A. Part of them.

Q. Used in this contract?

A. Used in this contract, sold to Hennessy & Jones.

Q. But I am trying to identify the party. He is the same man?

A. The same man.

Q. That bid on this contract?

A. It is the same man that bid on it.

Q. And you came to this town with the contract in your pocket which you had drawn estimates on? 20

A. I had helped him, not in my own name though.

Q. No, of course not. When was that?

A. I don't remember the date.

Q. Well, what year was it?

A. The records will show that.

Q. What year was it?

A. Well, it was before the Pearl Street bridge was let, a month or so.

Q. Before the Pearl Street bridge was let? 30

A. Yes.

Q. You mean the second time?

A. The second time. I think it was on the 3rd of March. It was a blizzard day and for that reason the bids were not open.

Q. Was this bid offered?

A. The Board didn't meet. There was a blizzard.

Q. I didn't ask you whether the Board met or not. I am asking you whether the bid was offered.

A. It was there but there was no one to offer it to.

Q. Mr. Logan's assistants were there, were they not?

The Court: What bid are you talking about now?

Mr. Davis: The bid after this bridge was advertised  
10 for the second time. After he had failed to carry out his contract it was readvertised and this man bid.

The Court: Was it the same contract?

Mr. Davis: The same bridge.

The Court: The same plans and specifications?

Mr. Davis: The same plans and specifications. It  
20 was the same bridge with some changes and modifications in it.

Q. What did you do with this bid?

Mr. Palmer: I object. There is no competency or relevancy whatsoever.

The Court: I think that is right.

30 Mr. Davis: Well, why doesn't it show that the man acquiesced the abandonment of this contract, when he prepares bids and brings them on a second time, when his contract is being abrogated. If that does not show acquiescence in the abrogation of the county I don't know what does.

Mr. Palmer: He had no notice of any abrogation whatsoever. It was not his bid at all.

Mr. Davis: He said he had a bid in his pocket.

The Witness: No, I didn't have it.

Q. Who did have it?

A. Mr. Jones.

Q. You were present and came over with him for that purpose?

A. Yes.

By the Court:

Q. You were trying to get the job for Jones?

A. Yes, I wanted to sell the stuff that I had on my contract. He agreed to take it at a certain price, the work I had already done and the equipment I had set up.

20

Mr. Palmer: It showed a knowledge of the readvertisement but it does not show any acquiescence or any abandonment on this man's part. That is as far as it does go.

The Court: Well, it may be a question of fact, you see, and it may be necessary to have all the facts and circumstances.

By Mr. Davis:

30

Q. You say at that time, at the time that this contract was being readvertised for, you were then desirous of selling your materials to Mr. Jones?

A. Desirous of selling it. I tried all the time to sell it.

Q. Won't you answer my question?

Mr. Palmer: He has a right to answer in his own way.

(Questioned repeated.)

10 Mr. Palmer: It is a perfectly legitimate and proper answer.

Q. You say you had been trying to sell it all the time?

A. Yes.

Q. How long had it been you were trying to sell your material?

By the Court:

20 Q. What the court wants to know and what the jury will want to know is whether when you knew that a new contract was to be awarded for this job you put in a bid for yourself.

A. No, I did not.

Q. You didn't put in a bid yourself?

A. No.

Q. Well, did you bid on the job in anybody else's name?

30 A. No. What he is coming at is that it was advertised one time before it was let and at this letting I had helped a man to figure the contract with the understanding that he was to take my stuff.

Q. You helped Mr. Jones, who was your partner?

A. Yes, at the time.

Q. And he was your partner at the time on some other job?

A. Yes, but it was specific. It was named in our agreement that it would be no other contract.

Q. And you helped him get up a bid on this job?

A. Yes, in his name.

Q. In his name?

A. Yes.

Q. And you wanted to turn over all of the stuff you had on this job to him? 10

A. Yes.

Q. To help you out?

A. To help me out, sell the stuff.

Q. Help you unload?

A. Unload.

By Mr. Davis:

Q. Now that was when?

A. Well, that is a matter of record, but it is March 20 3rd, the year that the bridge was built in. I am not sure now without looking at it. It is a matter of record there.

Q. Before that time you had applied yourself for the specifications for these new advertisements, hadn't you?

A. Yes.

Q. You had applied to Mr. Logan?

A. Yes, and got them.

Q. And got them from Mr. Logan?

A. Yes.

Q. And he wrote you letters asking you to return 30 them, did he not?

A. I don't know.

Q. Now look at this letter here.

A. I do think I have the specifications.

Q. I am asking you if at that time, on April 10, 1914,

you didn't receive a letter under that date from Mr. Logan asking you to return the specifications.

A. If I did I have it on file.

Q. Won't you look and see?

A. I had the specifications and returned them to Mr. Logan, and I think there was some dispute. I said I had left them at the office.

Q. Didn't you get a letter from him under date of April 6, 1914, asking you to return them?

10 A. I remember sometime getting a letter about the plans, yes.

Q. Now under date of March 5, 1914, didn't Mr. Logan write you a letter to this effect: "That owing to the severe weather conditions the Board has ordered re-advertising. Due notice of this will appear and a copy sent you?"

A. I never received any notice of that.

Q. You remember the day that you came over here with Mr. Jones with the bid in his pocket, it was a bad  
20 day and the weather was such that people were not here?

A. Yes.

Q. It was advertised, was it not?

A. Yes.

Q. Didn't you get notice of the fact that it was to be re-advertised?

A. No, I didn't get any notice that I remember of. I haven't any record.

Q. But before that time of the first day when the blizzard was on, you at that time had the specifications  
30 in your pocket?

A. Not at that time.

Q. Well, I mean before that time.

A. I had had them, yes.

Q. And you had at that time determined to sell all the stuff that you had on the ground?

A. Yes.

Q. Now when did you determine to do that?

A. That was in 1914.

Q. When did you determine to sell your stuff there?

A. As soon as I found that I couldn't get specifications for driving the piling.

Q. Now when was that?

A. Well, you will have to look the correspondence over between myself and Mr. Logan.

Q. I will let you determine when it was.

10

A. Well, I will see if I can find any correspondence with reference to the piling, which I never got any instructions to drive. Do you want me to go into all this?

Q. I just want you to answer the simple question I asked you, when did you determine that you were going to sell your stuff on this place?

A. After I had correspondence with Logan in this formal way. I had asked him for the plans and specifications—

Q. What date was it that you determined, as near as you can tell us, to dispose of the stuff that you had on the premises?

20

A. I began to think that we never would have any settlement in June.

Q. It was in June, 1913?

A. 1913, June or July, along there somewhere.

Q. And you were going to sell it to Mr. Jones because you thought it was best to abandon this contract, didn't you?

30

A. I didn't think about abandoning it at all, but I thought I never would receive specific orders for piling which I could go and buy and order piling on—

Q. But I am saying that you decided at that time that it was impossible to complete this contract, didn't you?

A. Impossible to complete it? No, absolutely no.

Q. I mean under the circumstances that existed.

A. Impossible to complete it? No. You could drive piling and complete it.

Q. Why didn't you do it?

A. I never got a diagram or specification. It wasn't in our original contract, wasn't in our specification.

By The Court:

10 Q. But the point is you were not willing to go on and complete the contract under the circumstances, were you, without a diagram of piling and without a new contract with reference to the piling?

A. Not necessarily a new contract.

Q. In other words, you wanted to be paid for the piling?

A. Yes, I wanted it but I didn't insist on it. I protested against driving them for nothing but I was always ready to drive them if I got the specification of what was  
20 required.

By Mr. Davis:

Q. In every one of these letters that you wrote then you insisted upon the payment——

A. I protested.

Q. One minute. Didn't you insist upon payment for these piling that were to be fixed?

30 Mr. Palmer: I object, because the letters speak for themselves and have been read to the jury.

The Court: I think it is proper cross-examination.

(Question repeated.)

A. I protested against driving for nothing.

By The Court :

Q. Then you refused to go on with your contract unless they agreed to pay you for your work ; isn't that a fact?

A. No, not at all.

By Mr. Davis :

10

Q. Why didn't you do it?

A. I couldn't drive the piling under the plans I had. I had to go and order the piling without knowing whether they were to be green or dry or crooked or straight.

Q. Didn't Mr. Logan tell you the size they must be driven?

A. Only the size, but not indicating the kind of timber or how straight it had to be or how small the top.

Q. In other words, you wanted Mr. Logan to go there and take charge of the business for you ; is that it? 20

A. No, I wanted him to give me my instructions according to the last page of the specifications, which he was bound to give me fully on any question that came up.

Q. In your letter of March 18th to Mr. Logan you say, "I beg to state with your approval that I am prepared to use any method which seems best for the construction of these foundations, and if it is found necessary to go beyond the bounds of the plans submitted I offer my services at a very reasonable cost. Now you were insisting that they should pay you for your services, were you not? 30

A. I didn't throw up the job for that.

Q. I understand, but you were insisting; you didn't throw up the job at all, did you?

A. No, I had different meetings with different Boards of Freeholders in the meantime, the evidence of which is not in yet—

Q. I am asking you this: at that time weren't you demanding compensation for putting in those pilings?

A. Yes, demanding it but not refusing to do it.

Q. You wanted to get paid for it?

10 A. Yes, but I was not demanding it.

By The Court:

Q. The job could not be done, the bridge could not be built, without piling?

A. No, could not be built without some foundation besides what was there.

Q. And piling?

A. Piling was the best.

20 Q. Why couldn't it be built without piling?

A. It was possible to build it, spread the abutments out or some other way, some other foundation.

Q. What was the matter?

A. It was soft, blue clay, not sufficient to hold the weight of the bridge.

Q. Was not sufficient to hold the weight of the bridge?

A. No.

Q. Sink down, would it?

30 A. Yes, that was my opinion, and also the opinion of the engineer.

Mr. Davis: I move that last part be stricken out.

Q. Well, is that the opinion he expressed to you?

A. Why yes, his opinion. He asked my opinion and I told him I thought piling to be driven would be the best way to build it. There were possible ways of doing it, otherways. Then I asked him for the clear specifications showing how long the pilings were and how far apart, how straight or how crooked, whether they were to be peeled, as usually given in specifications of piling so I could go ahead and order shipment of piling—not order shipment but have them dumped when they came there. 10

By Mr. Davis:

Q. This should have been completed without putting in piles?

A. It is possible. It wouldn't be advisable though.

Q. And this contract, together with the specifications, required you to put in a foundation, did it not?

A. Yes.

Q. What? 20

A. As I understood it, to put in a foundation according to the plans and specifications.

Q. Now it says, "Excavations. Foundations. Complete excavations for foundations shall be made by the contractor. The methods followed for obtaining the foundation shall rest generally with the contractor, subject to the approval of the engineer." You read that in your contract?

A. Yes. 30

Q. Now this should have been put down then by cement or by some other method than by piling?

A. It was possible to spread the abutment wide enough to get a surface with plank to put the foundation on.

Q. And the use of piling was just a preferable way of doing it?

A. Yes, very preferable.

Q. And if you had put in a cement foundation do you think then that you would be entitled to compensation?

A. It wouldn't be necessary to go below the foundation.

Q. Piling was cheaper than cement?

10 A. It was better anyway. We didn't know that and didn't mention any other way than piling.

By The Court:

Q. Did you both agree that piling was the best thing, or necessary for this job?

A. Yes, sir.

Redirect Examination,

20

By Mr. Palmer:

Q. I show you letter Exhibit P. 3, under date of April 13th, addressed to you and signed by Mr. Logan, that says: "You have my approval to drive 14 inch piles not less than 2 feet 6 inches nor more than 3 feet center to center, piles to be driven under my supervision." Did Mr. Logan ever give you any further or other instructions with reference to those piles?

30 A. He did not.

Q. And you wrote him about it?

A. I wrote several times and spoke to him and called him on the telephone.

Q. Now, Mr. Hennessy, with reference to the plans and specifications that you said that you helped Mr.

Jones prepare in response to the readvertisement of this bridge, were the plans and specifications upon which you figured at that time the same plans and specifications upon which you had figured for the contract given to you?

A. They were neither the same plans nor the specifications.

Q. Entirely different?

A. The bridge was similar, that is all you can say about it. The specifications were different altogether. The plans showed piling, showed you some of them were put in horizontally, sloping. 10

Q. And it was a bigger and larger bridge, was it not?

A. It was heavier and a little higher, and the structure itself was considerably longer, but the arch was no longer.

Q. I show you a letter of May 9, 1915, which was identified this morning, in which you ask for information as to piling. Did you ever get any response from that letter giving you any of the information asked for in it? 20

A. No, I never received any reply to that letter.

(Letter offered in evidence and marked Exhibit P 15.)

Q. Mr. Hennessy, you have given us figures of money that you received for stuff that you sold that you had on the ground for the bridges. What did that stuff cost you? 30

A. For the Pearl Street bridge?

Q. Yes. You said you sold stuff to the amount of \$1664.89.

A. On Pearl Street?

Q. Yes. Now what was the cost of that material?

A. The material I bought cost \$3240.13; that is, at Pearl Street.

Q. And except what was used of that on the bridge was sold by you and you received \$1664.89; that is correct, is it?

A. That is correct.

Q. Now then, with reference to the stuff that was at the Broad Street bridge, that was sold to Mr. Smith?

10 A. No, at the Pearl Street bridge sold to Mr. Smith.

Q. Well, that is included in that \$1664?

The Court: No, that hasn't anything to do with the Broad street.

Q. This is the Pearl Street I am speaking of.

The Court: Now tell us how much you paid for the stuff on the Broad Street job.

20

Mr. Davis: Your Honor, it seems to me it is immaterial in that respect, for the reason that he had no instructions to proceed with the work.

The Court: Probably that is so, but you want to get the figures.

Mr. Palmer: Yes, I am entitled to his figures.

30

The Court: If those figures on material don't figure of course they will go out. If they do we would like to have them in, that is all.

A. The material I bought on Broad Street and equipment, etc., \$1,745.91. That is what it cost me.

By The Court:

Q. That is what it cost you?

A. That is the material and everything, bonds.

Q. What did you sell it for? How much did you get for it?

A. What I sold of it, probably \$550.

Mr. Davis: It seems to me the cost of the bond ought to be stricken out. The county is not responsible for that. 10

Mr. Palmer: The cost of the bond?

Mr. Davis: Yes.

By Mr. Palmer: How much did the bond cost you?

The Court: Strike it out.

20

Mr. Palmer: We are trying to find out what it is.

The Witness: I will have to look for the bills, I guess. I have here the receipts of all bills that have been paid.

Q. Just give us the cost of the bond. They seem to think that is a bad proposition.

A. I have there the two together here, \$128.55 for the two bridges, and that would be in proportion to the cost of the two bridges. 30

Q. Well, that was for the two and that was for the bonds?

A. Yes, and then of course I got part back, \$58, I think it was.

Mr. Palmer: There was a matter I overlooked in direct examination, if I may have permission to interrogate the witness.

Q. Mr. Hennessy, do you recall in May, 1913, receiving a telephone message from Mr. Rigg, then solicitor of the Board, to come to his office for a meeting of the Board?

10 A. I had a couple messages from Mr. Rigg, I think one was from the small Board and one from the big Board.

Q. This was in May, 1913, when the small Board was in effect.

A. The dates I am not sure of. I received a telephone message from Mr. Rigg to come to his office to meet the old Board committee on bridges.

Q. Did you go?

A. I did go.

Q. Who was there?

20 A. The bridge committee was there of the old Board, the old bridge committee.

Q. And was Mr. Russ there?

A. Mr. Russ was there.

Q. Do you remember any conversation there with reference to the——

A. Yes, it was suggested——

(Objected to.)

30 Q. What was said there?

(Objected to.)

The Court: What was said by whom?

Mr. Palmer: The solicitor of the bridge committee.

The Court: About this job?

Mr. Palmer: This job, certainly.

The Court: What is the ground of the objection?

Mr. Davis: Why, certainly this is a corporation and they cannot do anything except by a corporate action. 10

The Court: True enough.

Mr. Palmer: What about Lejambre's conversation?

Mr. Davis: Well, that is an admission against interest.

The Court: True enough, it must act by resolution. 20

Mr. Palmer: Will your Honor rule on the question?

The Court: I do not think that any conduct that transpired is of any moment.

(Objection noted for plaintiff as ground of appeal.)

Mr. Palmer: Then I desire to move to strike out all the cross-examination of this witness dealing with conversations dealing with Mr. Lejambre, upon the same ground that your Honor has ruled against this question. 30

The Court: That testimony was not received on that ground; that testimony was received upon the theory that he made some statement to Dr. Lejambre incon-

sistent with his present attitude, but he said nothing; he said he never talked to Dr. Lejambre.

Q. What did you say that day at this meeting in Mr. Rigg's office?

Mr. Davis: I object to that too. He cannot make testimony for himself.

10 Mr. Palmer: Does your Honor overrule that question?

The Court: Well, if he cannot testify to what the committee said he cannot testify to what he said.

Mr. Palmer: May I have an exception?

The Court: You may ask him in a general way what happened at that meeting, without giving the details of  
20 the conversation.

Mr. Davis: It seems to me, if your Honor please, that that is incompetent too, unless it be shown that this committee had authority to transact the business and to do the things that they were there doing.

The Court: I think it is competent. I think he can say that he had an invitation to go to meet the bridge committee of the Board of Chosen Freeholders of this  
30 county at the office of the county solicitor and that he went there and they had a talk, a general talk, but you cannot give the details.

Mr. Davis: Let me make a further objection, if your Honor please, that there was no such Board at that time.

The Court: What is that?

Mr. Davis: As the large Board of Freeholders. Your Honor will perhaps not know unless I tell you that preceding that there had been an election in this county resulting in the election of a Small Board, and the Small Board was the Board that was then in authority. The large Board attempted to assert their right to a continued existence, and now this is the large Board which had been voted out and displaced by the Small Board that was there present. <sup>10</sup>

The Court: Which Board got in finally?

Mr. Davis: Well, they had another election and then it resulted in a large Board.

Mr. Palmer: But it was the result of having declared illegal the election which elected the Small Board. <sup>20</sup>

Mr. Davis: No, it was not, it was for want of proper organization.

By the Court:

Q. I understand you to say that you got an invitation to call at Mr. Rigg's office. He was the county solicitor?

A. At that time, yes.

Q. To meet with the bridge committee of the Board of Freeholders, as you then understood it was in existence. <sup>30</sup>

A. Yes.

Q. And you went there?

A. I went there.

Q. And you talked over your business with the committee?

A. Yes.

The Court: That is about as far as you can go.

By Mr. Palmer:

10 Q. What was said there with reference to paying for the piling to be driven under this bridge?

Mr. Davis: I object, for the reason as already stated to your Honor: in the first place that this committee was not a committee of authority, only a committee of citizens.

The Court: The committee could not bind the county you know, without authority, Mr. Palmer.

20 Mr. Palmer: The bridge committee had authority to do business on the bridge.

Mr. Davis: No, they have not.

Mr. Palmer: Does your Honor rule against that question?

30 The Court: You are trying to show now that this committee made some bargain with him with regard to the piling?

Mr. Palmer: No bargain was consummated but there was one talked over.

The Court: Well, I presume it can be assumed that he met the gentlemen and they talked over the business.

Mr. Palmer: They did. That is what I am trying to show, is what they talked over.

The Court: You can't show that they made any bargain with him contrary to his contract.

Mr. Palmer: Do you overrule the question?

10

The Court: Yes.

Mr. Palmer: May I have an exception?

The Court: Yes.

(Objection noted for plaintiff as ground of appeal.)

Q. At that time was it not suggested to you that the 20 Board of Freeholders pay half the cost of driving the piles and that you pay the other half?

Mr. Davis: I object to that for two reasons: in the first place it is leading and in the second place for the other reasons I have already mentioned.

(Objection sustained. Objection noted for plaintiff as ground of appeal.)

30

Re-cross Examination:

By Mr. Davis:

Q. How much did you say was the whole amount

of work and labor done by you was on those two bridges?

A. Work and labor? I have already given you for the work and labor, yes.

Q. Well, is that the \$4857.49?

A. I will give you the work and labor now.

Q. Now Mr. Hennessy, I just want the labor that is used in digging the excavation and putting in the cofferdam.

10 A. Not including the setting up of equipment?

Q. No, that is none of our business.

A. I have a total of everything and then—

Q. Is this the total of labor and material?

A. I gave in the other figures the total of labor and material and everything.

By Mr. Davis:

Q. That was the total?

20 A. The labor and everything.

Q. That was \$4857.49?

A. Yes. That includes everything, all labor and all material.

Q. Now when was the last labor and material put on these premises?

A. The last labor was put on the 8th day of June, I think it is. (Refers to book.) On the 10th of April 1913, was the last of the hired help.

Q. And the last material brought on the premises?

30 A. That is help, that is wages.

Q. Well, I am trying to find was there any material brought on the premises after that.

A. No, nothing to amount to anything, small items.

Q. Didn't you submit under date of May 6, 1914, a bill of damages accruing to you through the failure on

the part of the county to fulfill its obligations on the Pearl Street and Broad street contract let one year and a half ago?

A. That is the next year.

Q. I understand, but this is what you said. That is your letter?

A. That is my letter, yes.

Q. And that is the bill that was attached to it?

A. Yes, that was on it.

Q. That is right, is it?

10

A. Yes, I made that out.

Q. Now you set forth there that the total cost was \$6508.24, did you not?

A. Yes.

Q. And that the credit was \$2525.06; is that right?

A. Yes.

Q. Leaving a total loss of \$3983.18; that is right, is it not?

A. That was figured on a different basis.

Q. Is that right or not?

20

A. Yes, that is right; that is my figures.

Q. There was nothing done after this date and yet these figures are \$2000 away from the figures which you offer here now?

Mr. Palmer: No, they are not.

The Court: No, he says \$4857.49.

Mr. Davis: Yes, and these are \$6508.24.

30

Mr. Palmer: You are not taking the credit off there that he allowed.

Mr. Davis: But it is a thousand dollars out. It never figures the same way somehow.

The Witness: It wasn't put the same. It is figured two different ways.

Q. That is what I say. You never figure the same way two different times.

A. There was more material sold—

10 Q. That is what I say. It is always different.

(The letter last referred to by Mr. Davis was marked Exhibit F for identification.)

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PLAINTIFF RESTS

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MOTION FOR NONSUIT

Mr. Davis: I move for a nonsuit.

The Court: On what ground?

Mr. Davis: Upon the ground, your Honor, that they have not shown performance of their contract, neither have they shown any excuse for nonperformance. I  
30 want to call your Honor's attention to the fact—

The Court: I want to ask this gentleman a question before the plaintiff closes.

PATRICK A. HENNESSY, recalled.

By the Court:

Q. Were these two bridges over the same stream?

A. Yes, just one block apart.

Q. You couldn't tell whether piling would be necessary for the Broad Street bridge, could you, until you—

A. Wouldn't be positive, no. The only way I had of<sup>10</sup> knowing was that railroad bridge built within 100 feet of it, where I worked on Pearl Street, the Pennsylvania Railroad built a bridge and their abutment was in 100 or 75 feet of it. I saw what they had used for their foundation.

Q. What was that?

A. One abutment used piling and one no piling. The abutments were much similar and more loads.

Q. What did that indicate?

A. That would indicate there would be no piling. 20

Q. No piling on Broad Street?

A. Yes, sir; that would indicate there would be no piling for my structure.

By Mr. Backes:

Q. On both bridges?

A. The Broad Street job where the railroad bridge was constructed in the meantime.

30

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Mr. Davis: My reasons are that he has not shown that he has performed—in fact, it is admitted that he has not performed; and in the second place, that he has

failed to show any reason excusing the performance of it, or that the county of Burlington has in any wise made it impossible of performance.

Now there are just two or three things that it would seem to me are necessary to bear in mind. These specifications are made a part of the contract itself. The first paragraph in plaintiff's specifications says: "The work shall be constructed according to these plans and specifications, both of which shall be considered part of  
10 the contract. They contemplate a complete structure, and any error or omission in plans or specifications shall not release the contractor from building a structure complete." Now that it seems to me is as plain as the English language can make it that what he is bidding on is a completed structure. If the plans and specifications are deficient in any material, in any matter, they are not to alter or to abridge his obligation to erect a completed structure. It is a completed structure, not merely the construction according to the plans and specifications,  
20 but he must deliver to the county a completed structure.

Now on page 2, dealing with excavations and foundations, which is apparently the gist of this matter, it says: "Excavations and foundations. Complete excavations for foundations shall be made by the contractor. The methods followed for obtaining the foundation shall rest generally with the contractor, subject to the approval of the engineer." In other words, there lies upon him the duty of making a complete excavation for the foundation and to construct a foundation. The  
30 general outlines or methods to be followed by him in obtaining this foundation rests with the contractor, but subject to the approval of the engineer. So that there is clear, it seems to me, reading these two paragraphs together, the obligations to lay a foundation, the general methods of which rest with the contractor but subject

nevertheless to the approval of the engineer.

Now Mr. Hennessy has said that he could have laid a foundation there of cement, that it was not necessary, not absolutely necessary to have piling, though that was the better method. But he was bound to have a foundation. He could have had some other foundation than that of piling, but it was the choice, the preferable one. Now it is up to him to put a foundation there. If he wants to put a cement foundation all right, but apparently he wants to put a piling foundation, and he had Mr. Logan's express consent that he might put in a piling foundation, and Mr. Logan tells him the dimensions and sizes of the piling and what the test must be as to driving. 10

The Court: Well, he said that both sides agreed that piling was necessary.

Mr. Davis: Yes, and a foundation was necessary under this contract which he has signed and under those 20 specifications that he had to construct.

Now it seems to me to be perfectly clear from these two paragraphs of the contract that it is up to him to lay a foundation of approved type; the general method is with him but to be approved by the engineer.

The Court: What kind of a bridge was this, without going into all that detail?

Mr. Davis: It is a concrete arch bridge, your Honor, 30 spanning a small creek.

The Court: A heavy structure, wasn't it?

Mr. Davis: Yes.

Mr. Backes: Concrete construction with reinforced steel.

The Court: Well, it required a firm foundation.

Mr. Backes: Truly; it required to carry the travel over those two very important streets leading out of Burlington, and heavy trucks.

10 The Court: And trolley cars?

Mr. Backes: Yes, and trolley cars. The specifications require that the completed structure should carry a roller weighing at least ten tons.

The Court: Now Mr. Davis, let me take you away from the Pearl Street bridge to the Broad Street bridge just for the time being. We will go back to the Pearl Street bridge. What is the objection to the plaintiff's  
20 claim with respect to the Broad Street bridge?

Mr. Davis: It is testified by the plaintiff himself that it was agreed between him and Mr. Logan that he should construct the Pearl Street bridge first because that bridge had fallen in. The Broad Street bridge was still standing and being used, and before he would give him his orders to construct the Pearl Street the Broad Street bridge had fallen in—I mean he must build the Broad Street bridge in order to accommodate that  
30 traffic, so that both bridges should not be down at once. Mr. Logan tells me that I misstated the facts, your Honor, reversed the order of the bridges. The Pearl Street bridge was down; that had fallen in. Now the arrangement was between the engineer and Mr. Hennessy, testified to by Mr. Hennessy, that Mr. Logan and

he had agreed that the Pearl Street bridge should be first constructed before he should attempt to do anything to the Broad Street bridge. It is necessary, your Honor knows, to first remove the old bridge before you can attempt to construct a new one; and therefore they did not want to shut off all the travel from the city of Burlington and they required and agreed that first the Pearl Street bridge should be constructed and then the order given for the construction of the Broad Street bridge. 10

The Court: Now admitting that to be so, proceed. Let us see where it leads to.

Mr. Davis: Now in the first place, he never completed the Pearl Street bridge, therefore his contract so far as the giving of the order for the Broad Street bridge was contingent upon the Pearl Street bridge.

The Court: Does the contract say so? 20

Mr. Davis: No, the contract doesn't say so, but that was the agreement. The contract says he shall not begin to construct these bridges until he is given notice by the engineer to do so. Now they agreed between themselves that first they should construct the Pearl Street bridge and after that had been done Mr. Logan would give him instructions to proceed with the construction and erection of the Broad Street bridge. But right here, if your Honor please, just as soon as he had gone on there a little while and found out it was necessary to lay this piling, he has himself testified that he had begun to abandon the contracts of these bridges and sell the material. He admits he abandoned these contracts and did not propose to proceed with them. That is the whole situation. 30

What has this man ever done to the Pearl Street bridge? Doesn't his whole conduct evidence the idea clearly that he never intended to do anything to the Pearl Street bridge? He himself testified that it was impossible for him to do it, and that as early as June, 1913, these contracts having been signed——

The Court: Now didn't he say that he wrote several times?  
10

Mr. Davis: Yes, he said that he wrote several letters.

The Court: And he tried to get them to give an order?

Mr. Davis: Yes, he testified to that.

The Court: So that they could go on with the Broad  
20 Street job?

Mr. Davis: Yes, he testified to that; but at the same time he testified that in June, 1913, long before this negotiation had been entered, that he had made up his mind that it was impossible for him to proceed to the erection of those bridges and that he determined that it was necessary for him to abandon them. He had come over here with a contractor with a contract in his pocket bidding upon the construction of the same bridge that he  
30 insisted should go on, and he was at the same time selling and had sold the materials and was getting away with everything there and clearly evidencing the idea that he had abandoned the contract. It seems to me to be perfectly clear, and he himself testified that he had made up his mind he couldn't do it as early as June, 1913.

(Mr. Backes replies.)

The Court: I understand that counsel for the plaintiff concedes that by the terms of the contract, especially that portion of it, the plans and specifications, which says, "They contemplate a complete structure and any error or omission in plans or specifications shall not release the contractor from building a structure complete," counsel for the plaintiff concedes that the plaintiff was bound to build that bridge, even with piling if necessary, and that he stood ready to do so, and that the proof fails to show any abandonment or refusal on his part. Now, Mr. Davis, address your remarks to the single question in the case whether or not the facts as they now stand show an abandonment of the contract by the plaintiff or an unwillingness on his part to go on with his contract. 10

Mr. Davis: The only thing that Mr. Backes has alleged is the fact that Mr. Logan did not give him the plans for the driving of the piling. Now you can search the contract and specifications from beginning to end and you will find that there is not a single word in the specifications or contract which requires Mr. Logan to do it. With regard to the foundation it says "that the method generally shall rest with the contractor, subject to the supervision of the architect." 20

Now under date of April 5th, your Honor will remember that the testimony is that a test pile had been driven under the inspection of Mr. Logan. Now Mr. Logan is called upon to determine what size the foundation must be laid there and what should be its character. He writes to Mr. Hennessy: "Dear Sir: Record of test pile: weight of hammer 2175 lbs.; penetration, 18 feet; penetration under last twenty blows,  $\frac{1}{2}$  inch per blow; fall of hammer, 22 feet. You have my approval to drive 14 30

inch piles not less than 2 feet 6 inches or more than 3 feet center to center. Piles to be driven under my supervision."

Now what more plain and explicit could he ask for than that, when he had his permission to drive piles and to be driven according to this test pile and to be driven not less than 2 feet 6 inches centers, apart, nor more than 3 feet, and to drive them there? Now Mr. Backes has the temerity to say to your Honor that Mr. Hennessy  
10 was always ready and willing. Now is there a single bit of testimony in this case that ever another single pile was brought upon these premises to be driven? Now he says Mr. Logan was to blame for all of that. What was Mr. Logan to do? He was there to see that the piles were driven correctly. He could not be there until they were on the premises. And that is exactly what happened here. Hennessy had no more intention of completing this contract than of flying through the moon; and at this time he was selling everything he had, getting rid  
20 of it.

(Mr. Backes replies.)

The Court: Gentlemen, I am inclined to deny this motion at this time. The motion may be renewed at the conclusion of the whole case.

(Objection noted for defendant as ground of appeal.)

DEFENDANT'S TESTIMONY

ARTHUR E. SMITH, sworn for defendant.

Direct Examination by Mr. Davis:

Q. Mr. Smith, you are a general contractor?

A. I am.

Q. With your offices where?

A. Plainfield, New Jersey.

10

Q. You are a graduate of what institution of learning?

A. Rutgers College.

Q. As an engineer?

A. Yes.

Q. What year?

A. 1903.

Q. And you have followed that profession ever since?

A. Ever since.

20

Q. Have you in your business built reinforced concrete bridges?

A. I have.

Q. Did you obtain a contract from the county of Burlington to construct a bridge over the Assiscunk Creek at Burlington?

A. I did.

Q. And what was the contract price?

A. \$14444.

30

Mr. Palmer: I object unless it is proven that it is the same identical bridge.

Q. Is it substantially the same bridge as outlined in this plan here? (Plan shown witness.)

Mr. Palmer: It must be shown that this is the identical situation. This is a readvertisement, another contract, another bridge entirely.

The Court: Oh, I say it has got to be practically the same bridge.

A. Practically the same.

10 Q. Now what was the contract price of the construction of this bridge?

Mr. Palmer: I object, because the testimony has not disclosed that it is the same bridge.

Mr. Davis: He says practically the same bridge.

Mr. Palmer: That doesn't answer the proposition at all.

20 The Court: What is the significance of that testimony?

Mr. Davis: The significance is this: to show that all this twenty per cent profit that this gentleman was going to make is in his head.

The Court: Well, if it is practically the same let us see what the difference is. You will have the right under cross-examination to show the difference.

30

Mr. Palmer: But this witness cannot be permitted under any proposition to go on the stand and say that a thing is practically the same and then give the figures—

The Court: Show the kind of bridge that you built

with reference to the other bridge that Mr. Hennessy contracted to build, what difference if any there was.

Mr. Davis: He says it was substantially the same.

The Court: I know he says substantially the same.

Q. What difference was there, Mr. Smith?

A. The similarity is in the finished design. The span is the same, the rise is the same; the details were not <sup>10</sup> on the plan that you just submitted to me.

Q. Well, this was the plan that was submitted with the proposal.

Mr. Palmer: I object. This witness is not qualified to express an opinion as to that.

By the Court:

Q. Have you seen the plans and specifications of the 20 bridge that Mr. Hennessy contracted for?

A. The original plans?

Q. Yes.

A. I never saw them.

Q. Then how can you say that your bridge is practically the same?

A. He just submitted them to me.

Mr. Palmer: He just said that he had never seen the original plans and specifications, he had merely seen the <sup>30</sup> profile which is attached to the contract.

By Mr. Davis:

Q. Mr. Smith, does the plan that was submitted with

the proposal and constitute the plans, together with the specification of the bridge in question, is that substantially the same as the bridge that you contracted for or not?

(Plans show witness.)

Mr. Palmer: I object. All that is shown on that paper is a profile or picture.

10

The Court: The case cannot be finished today and I intend to adjourn in a few minutes and come back Monday.

Mr. Davis: I wanted Mr. Smith to be excused if he could, because he is from Plainfield and in business and it is at a great sacrifice that he is here.

The Court: I can't help that. I think that it is only fair to this jury that he should take the plans and specifications of Mr. Hennessy's contract and his own, so that he can intelligently point out if there is any material difference.

20

Mr. Davis: Let me state to your Honor a minute that the plan that Mr. Backes showed you here is a fabrication of Mr. Hennessy's. The Board of Freeholders has nothing to do with that. Here is the only plan that they submit. The detail of it is worked out by Mr. Hennessy and that is the thing Mr. Backes has been arguing with, that shows the depth of the foundation.

30

The Court: No, I think I understand the situation. Mr. Hennessy made a contract which refers to plans and specifications.

Mr. Davis: And these are the ones here.

The Court: This gentleman made a contract and evidently his contract refers to plans and specifications. Take the two and then let us know the difference there is in the job which you got and the job which Mr. Hennessy was to do. You understand what I am talking about?

Q. How long would it take you to do it? 10

A. It wouldn't take very long, a few minutes; if you had the other plans here I could point it out. I am very familiar with the other plans.

Q. Are you familiar with the plans of your bridge?

A. I am.

Q. Without reference to that before you? I mean could you compare them without having your plans before you?

A. Yes.

Q. Well, then look at that and state the difference. 20

A. This is just a general plan. There are no details on this plan.

Q. No, this is the plan that is offered. the same as it was offered here.

A. The general outline of this bridge is almost identical with the one that I built. The span of the bridge, that is, the clear span of the waterway opening, is exactly the same. The width of the bridge is the same, the rise of the arch is the same. There is no depth of foundation shown on this but there was on mine. The 30 plans I had were detail plans and showed piling under foundations.

By Mr. Palmer:

Q. May I ask where you got those detail plans?

A. I got them from the county engineer.

Mr. Palmer: Then I object to the witness testifying unless he used detail plans similar to the ones involved in Mr. Hennessy's contract.

By the Court:

10 Q. You had piling under your job?

A. Yes.

Q. How much more did that make the work cost, if you remember? Well, was the job practically the same excepting the piling?

A. Practically the same. There was one difference, that one abutment extended further back.

Q. Was it built of the same material?

A. Built of the same material.

Q. The same workmanship?

20 A. The same workmanship.

Q. The same size?

A. Exactly the same size.

Q. And what was the difference?

A. The difference was in the foundation.

Q. And how much was the cost of that?

A. I don't know what was contemplated in the original plans. I could tell you the approximate cost of the piling driven in place.

Q. All right. Do that.

30 A. About \$1800, \$2000.

By Mr. Davis:

Q. And the contract price of your structure was what?

Mr. Palmer: I object. Now this witness has testified and it is perfectly evident that for him to form a comparison of the two bridges he must have something more than a mere profile map; he must have, as any engineer would have to express an opinion from that situation, the detail plans in order to do that.

The Court: I will give him an opportunity. Be here Monday morning and in the meantime make an examination. 10

Mr. Backes: The detail plans from the county engineer's office, however, came to this man in this bundle that this man has here.

Mr. Davis: Oh, this was Hennessy's details, not the county engineer's.

The Court: You work it out your own way but do all you can. This jury is entitled to know from you, and 20 you appear to be an intelligent man, what difference there was between those two bridges in every respect.

---

DR. HUGH LEJAMBRE, sworn for defendant.

Direct Examination by Mr. Davis:

Q. Dr. Lejambre, you were a member of the small 30 Board of Freeholders?

A. Yes, sir.

Q. Do you know Patrick A. Hennessy?

A. Yes, sir.

Q. Were you a member of the small Board of Free-

holders at the time that the controversy between the Board of Freeholders and Mr. Hennessy took place with respect to the building of the Pearl Street bridge?

A. Yes, sir.

Q. How many times did you see Mr. Hennessy?

A. Well, I couldn't enumerate them. So many times I couldn't enumerate them.

Q. Will you begin at the first time, if you please, and go forward as well as you can?

10 A. Well, it was a great contention—the whole Board, as I understand——

(Objected to.)

The Court: Strike out the contention.

Q. Just tell about your conversation.

By The Court:

20

Q. Let me ask you a question: how many members are there in the new Board?

A. The small Board was five.

Q. Well, go ahead.

A. The whole thing came from this——

(Objected to.)

By Mr. Davis:

30

Q. No, I am asking you, Doctor, when was the first meeting?

A. The first meeting we had with Mr. Hennessy I notified the clerk—I was ringleader in this business——

(Objected to.)

Mr. Palmer: Now you have sense enough to know, Mr. Lejambre, that when an objection is made you should stop.

A. I beg your pardon.

Q. I am asking, Doctor, the first time that Mr. Hennesy came before you or you had a conversation with him was when, as near as you can tell? 10

A. The 2nd of January.

Q. 1913?

A. 1913.

Q. Now the Board met when?

A. The 2nd of January. When we had a conversation? You asked me for the conversation. We met him on the 8th of January by appointment.

By The Court:

20

Q. The whole Board?

A. Yes, sir.

By Mr. Davis:

Q. Where?

A. In the collector's office.

By The Court:

30

Q. And the collector's office, is that where the Board of Freeholders meet?

A. Yes.

Q. You mean the county collector's office at Mount Holly?

A. Right here, yes.

Q. Where the Board meets?

A. Yes.

By Mr. Davis:

Q. What conversation took place there between the Board and Mr. Hennessy with respect to this Pearl Street and Broad Street bridge, if anything?

10

Mr. Palmer: I object. The only competent testimony of what took place at that meeting is the minutes of that meeting.

The Court: I think you can show anything that Mr. Hennessy said to the Board.

Mr. Palmer: May I have an exception?

20 The Court: He is changing the form of the question. You may show anything that Mr. Hennessy said on that occasion to the Board. Of course when they act they act by resolution.

Mr. Davis: But I am speaking now, not to show any formal action taken by the Board but to show Hennessy's attitude with respect to the completion of this contract.

30 The Court: I say I am allowing you to show that.

Mr. Palmer: There is a further objection, that they were anyhow in a formal session of the Board of Freeholders, and the only competent testimony of what took place at that meeting is the minutes of that meeting, not

this man's recollection of something that happened four years ago.

(Objection overruled.)

(Objection noted for plaintiff as ground of appeal.)

The Court: You are allowed now to show what Mr. Hennessy said to you, to your Board, to the Board there on that January day. 10

A. That he wanted compensation for putting down extra piling.

Q. At the Pearl Street bridge?

A. At the Pearl Street bridge.

Q. What was said by any members of the Board with respect thereto if anything?

(Objected to.)

20

A. Can I have a right to say what I said?

The Court: No.

Mr. Davis: It seems to me, your Honor, I am entitled to the whole conversation.

The Court: No.

Q. Was there anything further that Mr. Hennessy said? 30

A. He wanted compensation for it.

Q. That was on the 8th of January?

A. Yes.

Mr. Palmer: I object to this testimony.

Q. Did you have any further conversation with him?

Mr. Palmer: For the same reasons given before.

The Witness: At what time?

10 Q. You have told me all that took place on the 8th  
of January, haven't you?

A. Yes.

Q. All that he said?

A. Yes. There was a great deal more he said, but  
Mr. Palmer objects to it on the condition that it was  
hearsay evidence. I said to Mr. Hennessy myself——

(Objected to.)

The Court: Strike that out.

20

Q. His Honor said that you can't say what you said  
to Hennessy.

A. That he would not do the job until he got paid  
for the extra—he would be at a loss by doing it.

Q. Did he say whether or not he would perform the  
contract?

(Objected to as leading.)

30 Q. What did he say if anything in respect to his will-  
ingness to perform this contract?

A. He never had any willingness to commence at all.

Mr. Palmer: I ask that that answer be stricken out.

The Court: That will be stricken out.

Q. What did Hennessy say with respect to it?

A. He said no, that he couldn't afford it.

By The Court:

Q. Couldn't afford what?

A. To put in the piling.

10

By Mr. Davis:

Q. Do you remember anything else that he said at that time there?

Mr. Palmer: May I have an exception to all of this conversation, without asking it specifically to each question?

The Court: Yes.

20

(Objection noted for plaintiff as ground of appeal.)

A. Not at that time but it was another meeting.

Q. Now when was that other meeting?

By The Court:

Q. Was that January, 1913?

A. Yes, January, 1913.

30

By Mr. Davis:

Q. Well, when was the next meeting?

A. I think in July. The minutes will show in July, June or July; June maybe. Maybe it was June.

Q. Was Mr. Hennessy before you?

A. Mr. Hennessy came before us and we told him to go on with the work.

Mr. Palmer: I move that that be stricken out.

The Court: Strike it out.

Q. Was the whole Board there?

10 A. Yes.

Q. Was there any action taken with respect to anything that was said to him?

A. Told him to go on with the work.

Mr. Palmer: I ask that that be stricken out.

By The Court:

Q. Is there a minute to that effect?

20 A. I didn't bring my minutes with me.

Q. You were not clerk of the Board, were you?

A. No, sir; Mr. Hawkins was, and I have the minutes because he gave us all a copy of the minutes of every meeting, but I didn't bring them this time.

Q. What did Mr. Hennessy say at that meeting if he said anything?

A. The same contentions he said at the January 8th meeting.

Q. What were they?

30 A. That he wanted extra compensation of \$1,800 for putting the piling down.

By Mr. Davis:

Q. What did he say with respect to doing the work

without compensation if anything?

A. Didn't say anything at all as to that. He said—  
oh, at the last meeting we had, then he was not sure—

By Mr. Palmer:

Q. When was this, Doctor?

A. June or July. We had another meeting prior to  
his time expiring, of the limit of the time, then we met  
him and he came up there and talked with me in Borden- 10  
town.

Q. Now you are mixing your conversation with him  
individually with this board meeting. Keep them separ-  
ate.

A. He was an individual then when he was at the  
board meeting, because he went around to all of us.

Q. Well, the board was there, wasn't it?

A. Yes, at that time, here at the Collector's office.

Q. Have you told what he said, whether he would go  
on with the job or not if he didn't get it? 20

A. No, he wouldn't go on with the job.

By Mr. Davis:

Q. Is that what he said?

A. Yes, he wouldn't go on with the job.

Q. Did you have a talk with him in Bordentown?

A. Yes, sir.

Q. And where was that, Doctor?

A. At the Bordentown House. I was going in an 30  
automobile and he was sitting at the curb. He was sit-  
ting on the horseblock on the curb there.

Q. At that time did you say to him that he should  
proceed with the work?

(Objected to.)

Mr. Davis: That is contradiction. Hennessy said there was no such thing said, and I laid the foundation.

Mr. Palmer: The testimony was incompetent originally. If it is incompetent originally any answer to it certainly is.

10 The Court: I think it is competent. He can say that as an individual, as a citizen.

Mr. Palmer: What, can they charge this plaintiff with a situation communicated to him as an individual?

The Court: Go ahead.

Q. What did he say to you?

20 Mr. Palmer: That is objected to as incompetent and immaterial to this issue from any standpoint.

The Court: Mr. Davis, how is it material what he said to the Doctor?

Mr. Davis: It affects his credibility. I laid the foundation for the impeachment and I am impeaching him.

30 Mr. Palmer: Then the only way to impeach this witness is to ask this witness the identical question that you asked Hennessy.

Mr. Davis: That is what I am doing.

The Court: Affecting his credibility upon a material matter?

Mr. Davis: Yes.

The Court: Proceed.

Q. Did you tell him at that time that if he could not perform the contract that he should throw it up and that the Board of Freeholders would readvertise? 10

A. Yes, sir.

(Objection overruled. Objection noted for plaintiff as ground of appeal.)

Q. Did you say to him at that time that if he could not carry out the contract that if he would throw it up the Board of Freeholders would readvertise and give him an opportunity to bid, or words in substance to that effect? 20

(Objected to. Objection overruled. Objection noted for plaintiff as ground of appeal.)

A. Yes, sir.

Q. What did he say to you in regard to that?

A. He didn't give me any answer at all.

The Court: Then he didn't deny it. It doesn't dispute what Mr. Hennessy said. 30

Mr. Davis: Yes, he says that he never said such a thing, that he didn't see Dr. Lejambre in Bordentown.

## Cross Examination.

By Mr. Palmer :

Q. Doctor, when was this meeting at Bordentown?

A. In June, the month of June. Well, there were several meetings in Bordentown. I tell you there were many of them——

Q. The talk that you had.

10 A. Well, every time it was the same talk. It was the same talk over and over. Every time he would come to meet us it was the same story.

Q. There were two meetings at Bordentown?

A. No, there were more than two meetings at Bordentown.

Q. There were two times that you had a talk with him?

A. No, three times.

Q. Where was it?

20 A. Generally right in front of the Bordentown House.

Q. And when were they?

A. They were May and June.

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(Adjourned till Monday, January 8, 1917, at 9 45  
A. M.)

Mt. Holly, N. J., January 8, 1917.

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(Trial of the cause resumed at 9.45 A. M.)

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JAMES LOGAN, Sworn for defendant.

10

Direct Examination by Mr. Davis:

Q. Mr. Logan, you are the County Engineer?

A. Yes, sir.

Q. And you were the County Engineer at the date of the signing of the contract between Patrick A. Hennessy and the Board of Freeholders for the construction of Broad Street and Pearl Street bridges in Burlington?

A. Yes, sir.

Q. You were also the engineer at the time the specifications were drawn up?

A. Yes, sir.

Q. They are your work, are they or are they not?

A. Yes, sir.

Q. I show you Exhibit P 2, which is the specifications and contract for the building of the Broad Street bridge, and I call your attention to the blueprint attached thereto, which purports to be the plan of Broad Street bridge, and ask you if this was also your work.

A. Yes, sir; it was.

30

Q. Was this blueprint the only blueprint prepared for the county by your office to use in this work in the construction of this bridge?

A. Yes.

Q. Now another plan has been referred to here and

produced by Mr. Backes. I think they call it a detail plan. Whose work was that?

A. That was submitted by Mr. Hennessy.

Q. Now the plan which you produce and which was attached to this blueprint, does it have anything showing the depth of the foundation to be built under this bridge?

A. No.

Q. Does it show the lack of a foundation or that a foundation is needed?

10 A. It does not indicate on the plan any depth for foundation.

Q. Now the detail plan that was gotten out by the contractor was gotten out pursuant to the plans and the specifications?

A. Yes.

Q. That is his work entirely?

A. Yes.

Q. And does the same thing that you have testified to with respect to the Broad Street bridge pertain also  
20 to the Pearl Street bridge?

A. Yes.

Q. The plaintiff in this case was notified to begin work on March 17, 1913?

A. I notified him by letter.

Q. Yes, that has been testified to, that the notice was given at that date.

The Court: He got it on March 18th.

30 Mr. Davis: He got it on March 18th. The letter - was dated March 17th.

The Court: Yes.

Q. Now at that time or at any time before had there

been any agreement as to the order of the building of those bridges?

A. Mr. Hennessy and I talked the matter over. Pearl Street bridge was to be built first because we had no bridge at Pearl Street.

Q. And the public in order to get into Burlington from the—I suppose you would call it the east; that is, crossing Assiscunk Creek—had to travel what roads and cross what bridges?

A. They had to travel the River Road crossing Pearl Street, the Bordentown-Burlington and the Columbus-Burlington Road crossing Broad Street, and the road leading from Jacksonville, which crosses Mitchell Avenue. <sup>10</sup>

Q. Now the road crossing from Jacksonville is much to the east, is it not, of the Broad Street bridge? Isn't that the direction?

A. It is upstream, yes.

Q. And is inconvenient for the travel of all the country to the east of Burlington. <sup>20</sup>

A. Yes, the River Road, it is very inconvenient from the River Road.

Q. Was or was not that the reason of the fixing of the order of the building of these bridges?

A. That was the reason, because we had no bridge at Pearl Street.

By The Court:

Q. Was that with reference to the bulk of the traffic, was that the principal bridge, the Pearl Street bridge? <sup>30</sup>

A. The travel from Florence and Roebling crossed that bridge.

By Mr. Davis:

Q. Crossed the Pearl Street bridge?

A. Crossed the Pearl Street bridge. The travel from Columbus would cross the Broad Street bridge.

Q. And Bordentown and all through that way, and Trenton, does it not?

A. Yes, would cross the Broad Street Bridge.

10 By The Court:

Q. Well, that is the bridge then for due north travel?

A. Yes, the two bridges would take the due north travel.

By Mr. Davis:

Q. Well, the road which connects with Broad Street bridge is the improved road, is it not?

20 A. Yes.

Q. That is a stone road?

A. It is a county road. It is a good improved road, leading into Columbus north.

Q. And it is the main artery along the river from Camden to Trenton and north?

A. Yes.

Q. Now the Pearl Street bridge at that time—I mean the road east of Pearl Street—is what his Honor calls due north, is unimproved, is it not?

30 A. Yes, unimproved township road.

Q. It is a township road but does connect or rather is used by the trolley lines of the Public Service Railway Company?

A. Yes, they parallel.

By The Court :

Q. The Pearl Street bridge was also used by the trolley?

A. Yes, sir.

By Mr. Davis :

Q. And what reason if any was there for your—I mean practical reason—refusing or neglecting to give to Mr. Hennessy the notice to begin the Broad Street bridge? <sup>10</sup>

A. We had not completed the Pearl Street bridge.

Q. And that was to await the completion of the Pearl Street bridge?

A. Yes.

Q. Now, Mr. Logan, did Mr. Hennessy express to you at all his willingness to construct the foundation for the Pearl Street bridge without compensation?

20

Mr. Palmer: I object. The question is not what he expressed but what he said.

Q. Well, when I say expressed I mean either by letter or by mouth.

Mr. Palmer: It must be what was said or written to him with reference to it.

The Court: No, Mr. Palmer, I think that is a proper question. Of course expressed is a very familiar term and it means did he ever say by writing or word; that is what it means, I suppose. <sup>30</sup>

Mr. Davis: That is what I intended it to mean, sir.

A. I gathered from all of Mr. Hennessy's—

The Court: No, no.

Q. No, what did he say to you? Did he ever express his willingness to build these foundations without compensation?

Mr. Palmer: I object for the reasons given before,  
10 that that question calls for a conclusion by this witness, gathered from conversation and correspondence that he is not permitted to give. He may give that correspondence or conversation; the conclusions are to be drawn by the court and jury.

Mr. Davis: I think your Honor has ruled on the question, have you not?

The Court: Well, I have ruled that you can show—  
20 I am assuming that you are using the word "express" in this sense: did Hennessy ever write or say anything to you showing a willingness on his part to go on with this job, put down the piling without any extra pay?

Mr. Davis: That is the question.

A. No.

Q. Did he give to you any reason for not proceeding with the building of the bridge and the driving of the  
30 piling?

Mr. Palmer: I object, first because the correspondence will disclose that situation; secondly, if it relates to conversations the time and place should be given.

Mr. Davis: I have not asked him to state what it was. I am asking if he did. It is preliminary.

The Court: He may say yes or no.

(Question repeated.)

A. Yes.

Q. And what was that reason?

10

Mr. Palmer: I object, until the time and place, if it was a conversation, are given, and if correspondence, the correspondence speaks for itself.

By The Court:

Q. Was it in writing or by word of mouth or both?

A. Both.

Q. Well, was the writing letters that have been introduced here in evidence?

20

A. Yes, they are the letters.

By Mr. Davis:

Q. Now the word of mouth, did he give you any reason by word of mouth why he could not proceed to construct it?

A. Yes.

Mr. Palmer: I object until the time and place are fixed. <sup>30</sup>

Q. Can you tell us when and where?

A. I can't give the date.

Q. Well, can you approximate it or give the circumstances under which it was spoken?

By The Court:

Q. Well, was it after these letters were written or before?

A. It was before and after.

10 By Mr. Davis:

Q. Do you remember where any one of them took place?

A. One conversation, more than one, took place at the site of the bridge, some in the County Collector's office, and some in this room and some in my office.

Q. Now you just go ahead in your own way and tell as near as you can of your knowledge what occurred and what was said by Mr. Hennessy.

20 A. He claimed that he should have extra compensation for driving the piles. I objected to that. I held that the specifications covered all foundation work. At one time he made up a bid for those extra piles. The conversations were all similar. He wanted extra pay for driving the piling.

By The Court:

30 Q. Was that sufficient to cover the entire situation with respect to the piling?

A. Yes.

By Mr. Davis:

Q. Mr. Logan, you were the Engineer of the Coun-

ty continuously from the date of the Hennessy contract to the present time?

A. Yes.

Q. The contract for the Broad Street bridge was afterwards awarded to the Averill-Mathis Company?

A. Yes, sir.

Q. I show you what purports to be an agreement or contract between the Averill-Mathis Company and the Chosen Freeholders of the County of Burlington and ask you if that is the contract for the building of that bridge? <sup>10</sup>

By The Court:

Q. What is the date of that contract?

A. The 4th day of April, 1916. That is the contract.

By Mr. Davis:

Q. Now between the date of the Hennessy contract and the date of the Averill-Mathis contract, April 4, 20 1916—

By the Court:

Q. What was the date of the first contract?

By Mr. Davis:

Q. What is the date of that Hennessy contract?

30

Mr. Palmer: December 18, 1912.

Q. Now my question is, between the date of the Hennessy contract and the Averill-Mathis contract for the construction of the Broad Street bridge was anything

done by the county towards letting the contract for the construction of that bridge or the interference with the Hennessy contract?

A. No.

By The Court:

Q. Now you mean to say that from December, 1912, until April, 1916, Hennessy had to perform his contract?

10 A. He still had the contract.

By Mr. Davis:

Q. Well, the county had done nothing to interfere with his construction of that bridge during that time? Had it or had it not?

A. The county had not advertised any plans or specifications for the job.

Q. And the bridge had remained the same with the  
20 exception of the county putting supports under it so as to support the travel, had it not?

A. Yes, the county put supports under each panel.

By The Court:

Q. When was that done?

A. That was done immediately following the letting of the contract to Mr. Hennessy.

30 By Mr. Davis:

Q. That was done for the purpose of making the travel safe over the bridge until it was reconstructed, was it not?

A. Yes, that was the idea.

By The Court:

Q. In other words, the old bridge which had been knocked into the stream——

Mr. Davis: No, this is the Broad Street.

The Court: What are you talking about, the Broad Street bridge?

10

Mr. Davis: Yes.

The Court: Oh, I thought we were dealing with the Pearl Street bridge.

Mr. Davis: No, I am talking now about the Broad Street bridge. This contract relates to the Broad Street bridge.

The Court: Let us finish one bridge at a time, gentleman, and we will keep these two things separately in our minds. The Pearl Street bridge has not been cleared up yet by any means. 20

Mr. Davis: What is there any doubt about in your Honor's mind?

The Court: It does not appear in the case when the new contract was let.

30

Mr. Davis: Oh, yes, that was testified to.

The Court: Well, the date does not appear.

Mr. Davis: I think it was testified to.

By Mr. Davis:

Q. Can you tell me the date of the letting of the contract for the Pearl Street bridge?

A. It was some time the early part of the year 1914. I can't give you the exact date.

The Court: Let's get everything in that you are going to put in with reference to the Pearl Street bridge  
10 and then we will deal with the other situation. The two cases are somewhat different.

Mr. Davis: Well, I didn't intend to ask this witness anything further in respect to the Pearl Street bridge.

The Court: Upon the question of abandonment and whether the county was justified in its position to award the contract anew for this Pearl Street job will depend upon facts. The circumstances must appear in the case,  
20 whether the public was being held up, and there were public necessity, etc. These are questions —

Mr. Davis: It already appears in the testimony of the plaintiff himself that after June he came to the conclusion it was impossible for him to construct this bridge, that he sold off all the material, removed his plant and disposed of the material which was in the bridge.

The Court: After June?  
30

Mr. Davis: Yes.

The Court: Of what year?

Mr. Davis: 1913 — a clear abandonment. The

plaintiff himself has proven the abandonment of that contract.

The Court: Well, let's have all the facts of the case.

By Mr. Davis:

Q. Now, Mr. Logan, over Pearl Street bridge after it collapsed, which was just before the letting of the Hennessy contract, what structure had there been put across the stream to accommodate the public? 10

A. A temporary pile trestle.

Q. Was it calculated to carry the heavy loads or sufficient to accommodate the travel?

A. The width of the bridge was just wide enough for a street car and it was not a very good proposition to accommodate the travel that was going over the bridge.

Q. Was it necessary to construct a larger and more substantial bridge, such as set forth in the plans and specifications for the Pearl Street bridge? 20

A. Yes.

Q. Can you tell us about what time Mr. Hennessy quit work on the Pearl Street bridge?

A. He did no construction work after the driving of the first pile.

Q. And the date of that test pile is set forth in Exhibit P 2, is it not?

A. P 3.

Q. Is that the date of the driving of the test pile?

A. The date of the driving of the test pile is a day or 30 so prior to that.

The Court: What is the date of that?

A. April 5, 1913.

Q. You say after that date he did nothing further?

A. No.

By the Court:

Q. Now before that he had done some excavating, had he not?

A. Yes.

10 Mr. Davis: He testified, which I think is a fact, that he had built a coffer-dam and had excavated around the western abutment, that is, the abutment on the Burlington City side of the stream.

The Court: He built a coffer-dam?

Mr. Davis: Yes. It was necessary for the excavation.

20 By the Court:

Q. Now you say he did nothing after April 5, 1913?

A. No. nothing.

Q. And when was the new contract awarded, do you remember?

A. Some time in the early part of 1914.

Q. What do you mean by sometime in the early part? Was it in January or February?

30 Mr. Davis: I will get the exact date after awhile.

The Court: Can't you agree, gentlemen, on the exact date?

Mr. Palmer: We don't know, therefore we can't agree.

Mr. Davis: I have it here in the contract. It is dated the 20th day of May, 1914.

The Court: The new contract is May 20, 1914?

Mr. Palmer: That is Pearl Street.

10

Mr. Davis: That is the Pearl Street bridge.

By the Court:

Q. Now, Mr. Logan, explain a cofferdam. That is, what do you mean by a cofferdam?

A. A cofferdam is constructed by driving sheet piling around an enclosure to exclude the water.

Q. Well, now, how long did that remain there?

A. That remained there until the contractor who 20 was finally awarded the job had completed his excavations and had deposited his concrete.

By Mr. Davis:

Q. And that was the cofferdam that Mr. Hennessy testified that he sold to Arthur Smith, was it not?

A. Yes, the same cofferdam.

Q. Arthur Smith was the subsequent contractor?

A. Yes.

30

The Court: Did Mr. Hennessy testify that he sold this cofferdam to the new contractor?

Mr. Palmer: No.

Mr. Davis: Oh, yes, he did under cross-examination.

Mr. Backes: He testified he sold it the next year.

Mr. Davis: Certainly.

The Court: To whom?

10 Mr. Backes: I don't know that he testified.

Mr. Davis: He testified to Arthur E. Smith, the subsequent contractor.

The Court: The point of the inquiry is whether the county got the benefit of this cofferdam or whether Mr. Hennessy sold it to some outside party.

20 Mr. Davis: He testified and I offered the checks here and questioned him with respect to the checks, that he sold this cofferdam and certain parts of the material to Mr. Smith, who afterwards secured the contract for it.

The Court: Is that so, Mr. Hennessy?

Mr. Hennessy: A year after the date, the next year.

The Court: You sold it to the new contractor, did you?

30 Mr. Hennessy: Yes, one year after.

The Court: You sold it to the new contractor?

Mr. Hennessy: I sold it to the new contractor. I think I testified to that before.

By Mr. Davis:

Q. Now my question is, Mr. Logan, when did the time expire for the completion of this Pearl Street bridge, do you recall?

The Court: One hundred working days it says.

Mr. Davis: One hundred and twenty working days was not for the Pearl Street bridge. That made it expire on the 12th of July, 1913. 10

Mr. Palmer: No, that doesn't follow. One hundred and twenty weather working days does not mean one hundred and twenty consecutive days.

Mr. Davis: Well, it may or may not mean that.

Mr. Palmer: Well, then, don't state it.

20

By the Court:

Q. What were the weather conditions?

A. I advised the board by letter when the time expired. I cannot recall just when it expired.

By Mr. Davis:

Q. Just take these letters. Is it in these?

A. If there are all exhibits it is not in these.

30

By the Court:

Q. Well, do you know when the time was up for this job to be finished?

A. I can't recall the date. It is in writing.

By Mr. Davis:

Q. Well, did it expire before the contract was let to Mr. Arthur E. Smith?

A. Yes.

Q. Or before the advertisements in the papers for invitations for bids?

10 A. Yes, sir.

The Court: Oh, well, he can get nearer the time than that, Mr. Davis. That testimony is of no value. One hundred and twenty working days from December, 1912.

Mr. Palmer: No, from the time he was noticed.

The Court: From the time he was noticed to go ahead?

20 Mr. Palmer: Yes, in March.

The Court: And he was noticed to go ahead on March 17th.

Mr. Davis: If the weather had been good, and the the fact is that all the parties construe the time as expiring on July 12, 1913.

30 Mr. Backes: Where does that appear?

Mr. Davis: It appears in the minutes.

Mr. Palmer: That doesn't bind us, what the Freeholders said in their minutes.

The Court: Well, this gentleman is a practical man and he ought to know. I assume that he is an intelligent man and knows his business. He ought to know when. He will not be pinned down to the precise day, but when that contract was up for that job to be done.

The Witness: It was sometime during the month of July.

By the Court: 10

Q. Of 1913?

A. Yes.

Mr. Davis: If your Honor please, the Clerk of the Freeholders has a letter from the Engineer reciting that the time was up, expired on July 12th. That letter is on file with the County Clerk and will doubtless be produced.

By Mr. Davis: 20

Q. Now after that time, that is, after July 12, 1913, up until May, 1914, did Hennessy do anything towards the construction of the Pearl Street bridge?

A. No.

Q. Do you know whether or not his equipment was removed or any part of it?

A. I couldn't say about that.

Mr. Davis: He testified about it anyhow. 30

By the Court:

Q. Was the public using this temporary structure in the meantime?

A. Yes.

By Mr. Davis:

Q. Now this temporary structure, Mr. Logan, was flush with the street, or had it been placed to the side, so as to permit the construction of the new bridge while using the temporary structure?

A. It had been placed upstream so that the new  
10 bridge could be constructed in its correct place.

Q. Well, did that necessitate what you might call a deviation from the line of travel ?

A. Yes.

By the Court:

Q. The public was inconvenienced then by the fact that this job was not completed; is that so?

A. That is correct; yes, sir.

20

By Mr. Davis:

Q. And what about the navigation of the stream?

A. No, I don't believe it did.

Q. Now this Broad Street bridge, was that structure that was across the stream at that point safe for travel after the letting of the contract to Hennessy and before the letting of the contract to the Averill-Mathis Company?

30 A. No.

Q. Had you reported that fact to the freeholders?

A. Yes.

Q. In your opinion was it dangerous for travel?

A. Yes, it was.

Q. It had been allowed to remain there because of what fact?

The Court: Well, are you talking about the Broad Stret bridge?

Mr. Davis: The Broad Street bridge.

The Court: Well, how can that affect this plaintiff? Was he ever notified to go ahead and construct it? 10

Mr. Davis: If your Honor please, I propose to argue to your Honor and I think that I will convince your Honor of the fact, that there is no requirement of notification necessary to make the plaintiff proceed to the construction of the bridge. Your Honor will notice in these contracts, and as I interpret them I think it is correct—

The Court: Well, we haven't time to deal with that now. I simply asked the question, Mr. Davis. I will 20 deal with it when the time arrives. You may proceed and get this testimony in.

(Question repeated, "It had been allowed to remain there because of what fact?")

A. Awaiting a new bridge.

Cross-Examination.

30

By Mr. Palmer:

Q. Mr. Logan, with reference to the detail plans which you have testified that Mr. Hennessy prepared for the construction of the Pearl Street bridge, were they

submitted to you for your approval?

A. They were submitted with the contract.

Q. Submitted with the contract or with the bid?

A. With the bid.

Q. So that the Board of Freeholders when they came to the point of awarding this contract to Mr. Hennessy had before them detail plans showing the construction of this bridge as contemplated by him in the utmost detail, did they not?

10 A. I wouldn't say in the utmost detail.

Q. Well, they were in such shape that you as engineer could tell whether or not it was to be a proper construction of a bridge?

A. Excepting the foundation.

Q. Oh, yes, I do not mean to include anything that the plans did not show. The plans themselves showed how Mr. Hennessy contemplated constructing this bridge in such a way that you as an engineer could tell whether it was to be properly constructed; that is true, isn't it?

20 A. Excepting the foundation.

Q. Yes, except so far as it did not show any details for the foundation; that is true, isn't it? Now will you look at those papers that I have just placed in front of you, and I will ask you if those are the detail plans that were submitted by Mr. Hennessy in response to the advertisement of this bid.

A. These are the plans.

(Plans marked Exhibit P 16.)

30

Q. Now all the contractors who submitted bids for this Pearl Street bridge submitted them in the same way, that is, they sent with their bids detail plans, detail drawings, of the contemplated construction?

A. Yes.

Q. Now did those detail plans show the depth of the excavation contemplated?

Mr. Davis. One minute. Which one do you refer to.

Mr. Palmer: For this Pearl Street bridge.

Mr. Davis: Now which one do you refer to ?

Mr. Palmer: These detail plans. 10

Mr. Davis: These here?

Mr. Palmer: Yes.

The Witness: Yes, they show a depth.

The Court: What is the point you are driving at now?

Mr. Palmer: There was some testimony as to whether or not this letter of April 5th covered everything that was necessary in the way of specifications for the piling. 20

Q. Mr. Logan, I show you a letter dated May 9, 1913, marked Exhibit P 3, addressed to you and signed by Mr. Hennessy, and I ask you if you made any reply to that letter. 30

The Court: The simple question is whether you made a reply to that letter. Answer yes or no.

A. No.

Q. Mr. Logan, how far apart are these two bridges,

Pearl Street and Broad Street?

A. About half a mile.

Q. As far apart as that? Isn't it about two blocks two city blocks, in going out of Burlington by either Pearl or Broad?

A. It might be about two city blocks if the distance was measured normally with the blocks, but it is on a skew.

10 Q. What I am getting at is some information as to the inconvenience of people desiring to go out. If a person desired to go over the Pearl Street bridge he would have to travel down to the Broad Street bridge, cross that and then go back to the road that he desired to take to Florence or Roebling, would he not?

A. Yes.

Q. And that would necessitate a detour of not more than a mile, would it?

A. About a mile.

Q. Just about a mile?

20 A. Yes.

Q. Now do you recall when the Pearl Street bridge fell in?

A. It was before I was county engineer. I don't just remember.

Mr. Davis: The 23rd of December, same year. I don't know when it was.

30 Mr. Palmer: December preceding the contract then, I guess.

Q. Now after the bridge fell in in December, 1911, did the county build any temporary structure across the stream at that point?

A. The trolley company built a temporary structure.

Q. And that was used by the trolley company and by the public?

A. Yes.

Q. Do you know how soon after the falling in of the bridge that temporary structure was built?

A. I have no definite knowledge, not being connected with the county at that time.

Q. But it was not very long, was it?

A. Well, I have understood that they built it up immediately. 10

Q. So that so far as the inconvenience in using the Pearl Street bridge is concerned after it had fallen in and before the time of the awarding of this contract, there was no inconvenience of any importance, was there?

A. Why, the bridge itself was a matter of inconvenience, to use that.

Q. Yes, I know, but you could travel across it with any vehicle that you desired to go across?

A. Yes. 20

Q. Now that remained, that temporary structure remained there—

By the Court:

Q. Was it safe?

A. Yes, the trolley cars were crossing it.

By Mr. Palmer:

30

Q. And that temporary structure remained there during all the time until the Pearl Street bridge was really completed by the second contractor?

A. That is right.

Q. So that the public in going out of Burlington at

any time could have used and did use this temporary structure?

A. Yes.

Q. Now with reference to the Broad Street bridge was there ever a time when that was closed to the public prior to the rebuilding of it by the second contractor?

A. No.

Q. All that the county did upon your recommendation that the bridge was not safe was to post notices,  
10 was it not, that the people crossing should cross at their peril?

A. No, they placed supports under Broad Street.

Q. So as to make it so that the public could use it.

A. Yes.

Q. So that there was never any inconvenience to the public in the use of Broad Street bridge up to the time of the rebuilding by the second contractor?

A. No.

20

HOWARD RUSS, Sworn for defendant.

Direct examination by Mr. Davis:

Q. Mr. Russ, you were a member of the old Board of Freeholders before 1913?

A. Yes, sir.

Q. And during 1912?

30 A. Yes, sir.

Q. You were a member also of the small board during the year 1913?

A. Yes, I was.

Q. Do you know Patrick A. Hennessy?

A. Yes, sir.

Q. The new board organized on what day?

A. January 6th.

Q. 1913?

A. Yes, sir.

Q. Before that day had you had any conversation with Mr. Hennessy with reference to the Pearl Street Bridge?

A. I had.

Q. Can you give us the time when it was?

A. It was some time prior to January 6th. I couldn't 10  
tell you the exact date.

Q. How long before that?

A. Oh, a week or ten days.

Q. And do you remember where the conversation took place?

The Court: What year, January 6th what year?

Mr. Davis: 1913.

20

The Court: 1913?

Mr. Davis: Yes.

Q. Was it after the signing of his contract, do you know, or after the awarding of the contract to him?

A. After the awarding of the contract. I don't think the contract was signed until about December 30th.

Q. December 18th.

A. Was it signed then? 30

Q. Yes. Where was this conversation?

A. Well, it was down to my house, and we met in Burlington and we met around here in Mount Holly. I just don't recollect where the places were, couldn't tell.

Q. Did he say to you at any time anything with re-

spect to his duty in the construction of the piling foundations or a foundation for this bridge?

Mr. Palmer: I object. Conversations with this man can have no binding effect upon the plaintiff. If it is intended for the purpose of contradiction there was never any foundations laid for it.

10 Mr. Davis: An admission by him, your Honor, before he began work that he knew it was necessary to build a foundation for this bridge.

The Court: I will allow the question. I cannot see, in view of the case as it stands, the direct relevancy of that testimony. However, I will allow him to answer it. Please answer the question.

(Objection noted for plaintiff as ground of appeal.)

20 A. In discussing the necessity for the foundation Mr. Hennessy said there should be a foundation but that the plans did not call for it. I stated to him, "Why didn't you specify in your bid that if any piling were required it would be so much per pile?" "Well," he said, "I have been trying to get contracts with Burlington County different times and I never succeeded and I wanted to make it look as low as possible and I made no mention of it, and in taking it up with my associates they recommended that—not make any mention of the necessity or require-  
30 ment of piling."

Q. Did you have any conversation or did the small Board of Freeholders have any arrangement with Mr. Hennessy as to the order in which these bridges should be constructed?

Mr. Palmer: I object. If there was an arrangement by the board the minutes of the board would be the only competent evidence.

Mr. Davis: Mr. Hennessy himself testified to something of that sort.

The Court: Well, was there any formal action taken by the Board of Freeholders with regard to the time when the Pearl Street bridge should be begun, the construction, and when the Broad Street bridge should be begun construction? Not any mere talk. I am asking now whether the Board of Freeholders ever formally by resolution—

10

Mr. Davis: I don't claim there was any such thing, your Honor.

The Court: Well, then, what significance has it, Mr. Davis?

20

Q. Did Mr. Hennessy ever tell you—

The Court: Counsel for the plaintiff, Mr. Palmer, said in his opening of the case to the jury that for the convenience of the public an arrangement was made between Hennessy, the contractor, and Logan, the engineer, by which the Pearl Street bridge was to be constructed first. Isn't that so?

30

Mr. Palmer: That is correct.

The Court: That is a fact in the case, is it not?

Mr. Palmer: Yes.

Mr. Backes: He commenced first. Mr. Logan testified so this morning.

Mr. Hennessy: Only commenced, that is all, not finished.

The Court: You agreed that it was to be commenced, not finished?

10 Mr. Backes: Yes.

The Court: Well, in the absence of an express agreement between the parties I do not see that it would be of any significance. The parties must stand or fall by the particular bargain as they made it in black and white.

Mr. Davis: Well, the only reason that I offered it, your Honor, is for this reason: that Mr. Backes on the other side argued to your Honor that the excuse for not  
20 beginning the Broad Street bridge was that Mr. Logan had never notified him to begin.

The Court: He says so yet.

Mr. Davis: Now I am trying to show, your Honor, that the reason that Mr. Logan never notified him to begin was that it was Hennessy's own act and acquiescence that they should build the Pearl Street bridge before they attempted the Broad Street bridge.  
30

The Court: Well, he couldn't change his contract. One party to a contract cannot change it. That contract has got to be changed by both parties.

Mr. Davis: But he cannot take advantage of something that he acquiesced in.

The Court: Well, we will see about that when we come to it. That is another phase of the case.

By Mr. Davis:

Q. Mr. Russ, was Mr. Hennessy called before your board at any time with respect to these contracts? 10

A. Several times.

Q. While the board was in session?

A. Yes, sir.

Q. Was there at any time any request from the Board of Freeholders that he should proceed with the execution of his contract?

(Objected to.)

The Court: Was it in writing? 20

A. I don't recollect that. Mr. Hennessy appeared before the board of course. I am probably ahead of my question on this, but with the idea of getting started or making further progress.

Mr. Palmer: That is objected to. The point of my objection is that if it took place at a meeting of the board the minutes of the board will show the action of the board at that time, and that is the only competent testimony. 30

Mr. Davis: It does not show Hennessy's action, though.

The Court: This witness would be permitted to show any declarations made by the plaintiff to the members of the board individually or sitting as a body. Of course then when you begin to go further and show the action of a municipal body, that can only be done in one way, ordinarily, and that is by the minutes; because a municipal body acts by resolution. Proceed.

10 No Cross Examination.

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The Court: Mr. Davis, did the Board of Freeholders ever act on Hennessy's contract?

Mr. Davis: What do you mean by act?

The Court: By resolution, rescind the contract.

20 Mr. Davis: No, sir.

The Court: Abrogate the contract.

Mr. Davis: No, sir.

The Court: Have they any official action taken on it?

Mr. Davis: No, sir.

30 The Court: They simply awarded the contract anew?

Mr. Davis: That is right.

The Court: In other words, simply took the job out of his hands?

Mr. Davis: Yes, sir. I would not agree with that statement, your Honor. The fact is that they awarded the contract to other parties.

Mr. Backes: But they awarded an entirely different contract for an entirely different bridge on the Broad Street job, and entirely different construction.

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10

WILLIAM H. FORD, Sworn for defendant.

Direct examination by Mr. Davis:

Q. Mr. Ford, what is your profession?

A. Consulting engineer.

Q. You are a graduate of what institution?

A. Dartmouth College and the Thayer School of Engineering, which is a post-graduate course.

Q. Connected with Dartmouth College?

20

A. Yes, sir.

Q. What year did you graduate?

A. 1894 from the college and 1895 from the Thayer School.

Q. And you have followed your profession since graduation?

A. Ever since.

Q. Are you connected with any contracting concern?

A. I am not.

Q. You just do general consulting engineering<sup>30</sup> work?

A. Yes, sir.

Q. Are you familiar with the plans and specifications involved in these contracts?

A. I have looked them over very carefully, yes, sir.

Q. And they are called what in general? What is the nature of them?

A. Why, the plan put out by the county was simply a general plan calling for bids, with which were to be submitted plans in greater detail.

Q. Are they what you would call open specifications?

A. They are decidedly open specifications, in that they cover practically everything without a great deal of detail on the plans themselves.

10 Q. Now is it the business of a consulting engineer to interpret plans and specifications such as these?

A. Very frequently, yes.

Q. Is it the business of a consulting engineer, such as your profession is, to determine what is called for under the plans and specifications such as these?

A. It is.

Q. Now will you tell us—you have already said that you examined the plans and specifications involved in these two contracts—whether or not in your opinion the  
20 rules and practices of your profession require the contractor to furnish a completed structure including the foundation?

Mr. Palmer: I object. This witness is not in a position to interpret this contract. The contract is perfectly interpretable by itself. It is very plain in all its terms, the question of usage, professional or otherwise. We have admitted as far as this case is concerned that the  
30 Pearl Street bridge, whether complying with the plans and specifications, necessitated the building of piling. We admitted that.

The Court: I understand that, but we keep on going over the same thing. I know what Mr. Backes on his argument on the motion to nonsuit stated that the plaintiff

was required under his contract to put down this piling at his own expense.

Mr. Davis: I suppose everybody else knows it, your Honor. I do, certainly.

The Court: Well, why is it necessary to keep on offering to prove it all the time.

Mr. Davis: I am not trying to prove it all the time; 10  
I am trying to show, your Honor, the very clear distinction that Mr. Palmer and Mr. Backes make in this case, that these plans, which they themselves drew, do not show any foundation or the detail of the foundation, and therefore they were not obliged to do it.

The Court: Obligated to do what?

Mr. Davis: To prepare a detail plan for the foundation. 20

The Court: He says now, that is already on the record, that Hennessy was required to put down a foundation.

Mr. Davis: Perfectly true, but he is arguing at the same time that his detail plan don't show it.

The Court: What difference does it make? It makes none whatever. Everybody has agreed from the beginning to the end that Hennessy was obliged to put down piling for the foundation and he didn't do it. 30

Mr. Davis: I agreed with your Honor on that some time ago.

The Court: Proceed. Do you have any further questions?

Mr. Davis: Cross-examine.

Mr. Palmer: No questions.

Mr. Davis: That is all, with the exception of Mr. Smith, who comes from Plainfield, and he cannot get  
10 here. I think I can prove two or three things by the witnesses here.

The Court: Have you anything on the other hand, gentlemen.

Mr. Palmer: I do not think we have, as far as the case has gone. I do not know what Mr. Smith will testify to.

20 The Court: I will order the case opened if necessary.

Mr. Palmer: As presented we have no rebuttal.

The Court: Now, Mr. Davis, the case is closed with the exception of Mr. Smith?

Mr. Davis: I have not closed.

30 The Court: I thought you said you had.

Mr. Davis: No, I said I thought I could prove two or three other things by the witnesses that I had here.

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WILLIAM H. FORD, recalled for defendant.

Direct Examination by Mr. Davis:

Q. Mr. Ford, the contract price in this case of the Broad Street bridge was \$10,870. The estimated profits on that were, I think, eighteen and twenty per cent respectively on the labor and the materials. Will you tell his Honor and the jury what is the practice among engineers as to the estimation of their profits? 10

Mr. Palmer: I object. This man is not a contractor and he has not qualified as a contractor.

By the Court:

Q. Have you ever taken jobs?

A. I have, sir.

Q. Where?

A. Two bridges at Ocean City that I was interested in a couple of years ago. There have been a number in different parts of the country. That same year there were two in Maryland for the state. 20

Q. What year was that?

A. That was 1913, I believe, sir.

Q. The same year that these bridges were built?

A. The same year.

The Court: Well, I think he is competent. 30

Mr. Palmer: Well, if your Honor please, this witness is not qualified yet. He merely stated that he was interested in these contracts. He has not qualified himself to be in a position to express an opinion.

By the Court:

Q. Were you the contractor?

A. I was interested to the extent that I made up the estimates, that I put in the bids, that I carried through the work as engineer at that time, representing the general contractors and having entire charge of the work, both for the estimation on the jobs and putting them through.

10

The Court: I think he has the qualifications.

Mr. Palmer: If your Honor please, one further objection. He has stated his interests were that of an engineer, not of a contractor.

The Court: Yes, I understand.

The Witness: As an engineer representing the general contractors.

20

Mr. Palmer: That has nothing to do with the question of estimates as to profits, so he is not qualified to any knowledge of a situation of that kind which qualifies him to express an opinion.

The Court: I think this man is qualified to show if there is a general custom respecting the profits on jobs on this character. You may ask that question first.

30

Mr. Davis: What I was trying to show, if your Honor please, was not the amount of the profits but the way in which they were figured. You will find that question is exactly in line.

By the Court:

Q. Is there or is there not a general custom respecting the profits on jobs of this character? Is there or is there not a custom?

Mr. Palmer: That is objected to. It is not a question of custom, it is what this man figured himself on this contract. It cannot affect this situation.

10

The Court: Yes, I think there is something in that.

Mr. Davis: I am not asking him to figure on this contract. The way Hennessy figured it it would cost not only \$10,000 but in addition to that his twenty per cent profit.

The Court: No, that is not the way he figures it.

Mr. Backes: Oh, no.

20

Mr. Davis: I say it is. He is figuring twenty per cent profit on \$10,000. If he is figuring that it cost \$10,000 he is figuring on the cost and therefore it would cost not only the \$10,000 but it would cost the county twenty per cent above that.

The Court: You ask him the question, Mr. Davis. I suppose the correct rule is that a contractor on a job of this sort would be entitled to recover as damages for its breach the difference between what the job would cost him if he had been allowed to go on with it and what the defendant agreed to pay him. <sup>30</sup>

Mr. Davis: That is right.

Mr. Palmer: Now if your Honor please, it is just exactly that situation. Hennessy testified that he estimated the cost of his material and the cost of his labor and added to the labor eighteen per cent and to the material twenty per cent, and that is what the total would be that is submitted.

Mr. Davis: No, he didn't say that.

10 The Court: That is what I understood him.

Mr. Davis: He said he figured twenty per cent profit on the price.

The Court: No, you are mistaken about that. He divided up labor and material and said one was eighteen per cent, I think, on one, and some other per cent on another, and between the two he figures he would have had a profit, which is wholly from memory, of \$1,300 or  
20 \$1,400 on the price of the job. Am I right?

Mr. Backes: Yes.

Mr. Davis: All right. I will ask no questions.

---

Mr. Davis: I may state what I will prove by Mr. Smith, so that your Honor may have that on the motion in dealing with this motion. I propose to show by Mr.  
30 Smith——

The Court: Your motion now is for what, for a direction?

Mr. Davis: Yes.

The Court: In favor of the defendant?

Mr. Davis: In favor of the defendant.

The Court: And you are reserving your right to call Mr. Smith when he arrives?

Mr. Davis: Yes.

The Court: Well, you may do that and the court will <sup>10</sup> hear your motion now for a direction in order to save time. Now I will ask you to deal with the contracts separately, please, for the Pearl Street contract first. The question, as I view it, is whether there was an abandonment of that contract by the plaintiff. In other words, did the county have the right to regard the contract as abandoned by the plaintiff? Now you start with the concession that Hennessy was to put down a piling at his own cost and that he started and put in a cofferdam about or prior to April 5, 1913, and that thereafter he did no- <sup>20</sup> thing on the job; and the county awarded the contract anew in May, 1914. It seems to me I ought to hear from the other side. Your motion is for a direction with reference to the Pearl Street contract?

Mr. Davis: And also with regard to the other one also.

The Court: Well, we are only dealing with one at a time now. Mr. Backes, I will hear you. <sup>30</sup>

Mr. Backes: With reference to the Pearl Street contract, there was never any abandonment of the Pearl Street contract by Mr. Hennessy, nor was there ever any resolution or formal action by the Board of Freeholders

taking that contract from Mr. Hennessy. The last written evidence of anything that transpired between Hennessy the contractor and Logan the engineer and agent of the board was the request upon Hennessy's part to obtain from Mr. Logan a full and explicit direction as to the manner of driving piling. Now your Honor will recall that the test piling was driven under the direction of the engineer and on April 5th the engineer in a letter stated what that test pile showed, and he said simply this:

10 "April 5th. Record of the test pile: weight of hammer 2,175; penetration 18 feet; penetration on the last 20 blows,  $\frac{1}{2}$  inch per blow; fall of hammer 22 feet.

You have my approval to drive 14 inch pile not less than 2 feet 6 inches nor more than 3 feet center to center. Piles to be driven under my supervision."

Your Honor will recall, too, that where there was any question as to the details required the engineer was to give them. That was the provision of the contract.

Hennessy then, after he found that he could not per-  
20 suade either the engineer or the members of the Board of Freeholders to give him extra compensation for these piling, said to the engineer, "Under your direction I will drive that test;" and then he said further on May 9th, "I want you, Mr. Engineer, to give me a plan whereby I shall drive these piling and how they shall be driven. The letter I will read to your Honor. It is very explicit. "As you are aware, the work on Pearl Street bridge is being held up through this question of piling. You are also  
30 aware that there are no plans or specifications covering piling."

"Now this matter may be greatly simplified if you will kindly give me full instructions in writing as to the requirements. The size of piling at butt and at top, whether peeled or unpeeled, whether you want the piles all vertical or part inclined to take the horizontal thrust of the

arch. If you require any inclined, state how many and what inclination, the least penetration of last blow of hammer, with a diagram showing the spacing. In other words, I ask for complete instructions and specifications on piling accompanied by a written order to do the work required."

The Court: Does that mean any more than this: that following up what he had previously said in his letters about extra compensation and the order for this extra work, does that mean anything more than that Hennessy wanted an order for this extra work in order that he could get extra compensation? 10

Mr. Backes: The extra compensation, your Honor will recall, could under no possible circumstances have been given to Hennessy without a certificate and without the approval and award by the engineer.

The Court: Well, now July 31st he writes this letter you read from May 9th—on July 31st he says:

"To the Honorable Board of Chosen Freeholders,  
Burlington County, N. J.,

Gentleman:

I can assure you that I did not enter into my contract for the purpose of litigation but to build your bridges. If, therefore, the foregone explanations and requests do not meet with your favor I am willing to withdraw from the contracts, if you will assume control of the money expended for labor performed and materials furnished and incorporate a provision in the next bids and contract taking care of this labor and material, provided you will agree to readvertise the both bridges, adopting the plans I have submitted and assuming payment therefor under 30

terms satisfactory to the Concrete Steel Engineering Company. I shall thereby sacrifice all expenses due to erecting plant, loss of time and other miscellaneous charges. You will also further agree to give me an even chance with other bidders."

No, that is not the letter, that is where he refers to the matter of arbitration. Now with respect to that other letter, a letter in May. This is May 31st, under the same date. This is the letter that I wanted to call attention to.  
10 Listen to this, Mr. Palmer:

Burlington, N. J. May 31, 1913.

To the Honorable Board of Chosen Freeholders,  
Burlington County, N. J.

Gentlemen:—

I desire to call your attention to what appears to me as a somewhat arbitrary and unreasonable action of your Engineer, Mr. James Logan, respecting my contract for the Pearl Street arch bridge at Burlington, New Jersey.  
20 Briefly under said contract, plans and specifications nothing was stated about or provided for a pile foundation under the abutment for this bridge. Under these circumstances it seems to be somewhat unreasonable, considering that my contract requires only the furnishing of labor and materials in accordance with the said contract, plans and specifications, to now attempt to compel me to do the piling or any other work not contemplated and not called for in the said contract. If it now seems necessary  
30 to you to drive piling I ask that you give me a supplemental contract or agreement, specifying what additional work not contemplated in my contract is to be done and the compensation therefore, unless the county wishes to drive the piling itself, giving me a safe bottom on which to place the structure in accordance with my plans, specifications and contract. I am sorry to have to state to you

that unless such an agreement is made or the piling is driven by the county, I will be forced to refuse to continue the work."

Now that is the reason I asked you the question whether the letter which you read under the date of May 9th did not merely amount to this; that Hennessy, the plaintiff, wanted an agreement or order for this work, this piling work, which would be equivalent to a new agreement, by which he would be entitled to extra compensation. Take the two letters together and all the letters together: doesn't it amount to that? 10

Mr. Backes: I don't think that it imports that meaning. What it does import was this: Hennessy's endeavor throughout to obtain extra compensation for this extra work. Undoubtedly he endeavored to do that. But having learned that he could not obtain it he never abandoned that contract but went on with it, even in the face——

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The Court: I understand that. Now what did he do? You say he never intended to abandon his contract and he wanted to go on with it. Now what did he do to show that? You see it is not what he had in his mind, undisclosed to the defendant. The action of the defendant must either be condemned or justified by what Mr. Hennessy actually did and said, that is it. It is not what he secretly intended. You see what I mean?

Mr. Backes: Yes, I grant you your Honor's position. 30

The Court: Did he do anything which caused the county to believe that he deliberately abandoned his contract without justifiable cause?

Mr. Backes: Well, is there anything in any of the letters which has been offered here to disclose any intent on the part of Hennessy to abandon or to lead the Board of Freeholders to believe that he had abandoned that contract? Absolutely nothing.

The Court: I have been considering, your argument must necessarily be the same as you made the other day, because that is the only answer.

Mr. Backes: Truly that is the answer.

The Court: Therefore I have heard you. So I think unless you have something further to say—

Mr. Backes: Only this: that the evidence discloses, even after writing all these letters, Hennessy's equipment, his appliances, his machinery, was all on that job for a year. Hennessy's last work was done some time in June of 1913, and therefore the acts of Hennessy in permitting his machinery and stuff to remain there, ready to go on with that contract when he should be ordered to do it, and his asking in this letter of May 31st, all clearly shows an intent, and it must have necessarily led the engineer and the County Board of Freeholders to the only conclusion, namely, that Hennessy was ready to go on with that work.

Now why didn't the County Engineer or the Board of Freeholders, as they had a perfect right to do, say to Mr. Hennessy, "Proceed with that work within so many days or appear before this board and show cause why that contract should not be taken away from you?" Why didn't they do it? Mr. Logan said he never ordered any formal action taken in any way, shape or form. Logan says, "I never gave him any notice." What was the con-

tractor to do under these circumstances? He was here; he had done part of his work; he had been withheld payments that were due him. Clearly the engineer held his certificate back for the other payments that were due to him under that contract. He had not received a dollar from the county for any work that he had done there; and it is stated that there was ample work there. He had put his material down there and he had asked in one of the letters to the engineer, "Will you allow me for the material that I have on the ground or shall I only be allowed for the work that has been put in there?" The engineer promised to give him a payment. 10

The Court: You said that the burden of proof is upon plaintiff to show substantial performance of his contract. Do you say that he was prevented?

Mr. Backes: Yes.

The Court: Well, do you claim that he could recover upon a quantum meruit under any circumstances? He is suing on a contract, isn't he? 20

Mr. Backes: There is a quantum meruit clause in there too, under the breach, and I think under a recent ruling that we could recover for the work actually done and performed if we were prevented from doing it.

The Court: Well, you can do that only upon the theory that the county accepted it? 30

Mr. Backes: Yes, that they did accept it.

The Court: Did they?

Mr. Backes: Surely they did.

The Court: I thought he sold it to the new contractor.

Mr. Backes: But he couldn't sell that hole in the ground that the other man got the benefit of.

10 The Court: But it was the cofferdam that he sold to the new contractor?

Mr. Backes: The cofferdam was the boarding around it, but the hole in the ground that he made, the excavation, neither the county nor anybody else paid him for it.

The Court: Now I will hear you on the second question.

20 Mr. Davis: Now the second question is somewhat more involved than the first one. I want to take your Honor's time just for a moment to read to you the contract which is involved in the Broad Street bridge, just the part of it that is material.

"This Agreement, made this eighteenth day of December, one thousand nine hundred and twelve, between Patrick A. Hennessy, of Mount Vernon, Westchester County, New York, party of the first part, and Board of Chosen Freeholders of the County of Burlington and State of New Jersey, party of the second part.

30 Witnesseth, that the said party of the first part hereby covenants and agrees to and with the said party of the second part to construct a reinforced concrete arch bridge over Assiscunk Creek at Broad Street in the City of Burlington, Burlington County New Jersey; and to furnish materials and labor for the same in accordance

with the plans and specifications attached hereto and forming a part hereof.

The said party of the first part hereby agrees to complete the work specified herein within one hundred and twenty weather working days from and after being notified by the County Engineer of Burlington County to begin said work."

Now that is the only part I think that is material.

The Court: Well, is there any doubt in your mind<sup>10</sup> but what he was to begin the job when he was notified by the County Engineer?

Mr. Davis: Oh, yes, that is just the reason I have read this to your Honor. Let me fix this in your Honor's mind again. "The said party of the first part hereby agrees to complete the work specified herein within one hundred and twenty weather working days from and after being notified by the County Engineer of Burlington County to begin said work."

20

Now all that this involves, when read in connection with the plans and specifications which I want to call your Honor's attention to, all that that clause does is to fix a time for the completion of it. In other words, under the modern law time is not apparently of the essence of a contract unless it is so made by the contract. That is the equitable rule and it is adopted by most common law courts; and all that this does is to fix a time when it must be completed. It does not say when he shall begin. I think in the other case, of the Pearl Street bridge, he<sup>30</sup> testified that he began before the engineer gave him the notice to begin. The giving of the notice by the engineer merely fixes the time from which the running of the time shall be made. He could go ahead and complete his work

and the engineer never notify him and yet be entitled to his compensation from the county.

The Court: Well, now, but there are some other things you must take into consideration here.

Mr. Davis: I want to argue that one question first.

10 The Court: Well, let us move along. I will have to view this case in the light of all the facts. His interpretation of that contract and the interpretation put upon it by the county was that the work should be begun when the contractor was notified by the County Engineer, and that was purposely withheld, according to your contention. You see your contention is that he made such a failure of the first job that the county held off and awarded the contract for the Broad Street bridge to another contractor.

20 Mr. Davis: No, I don't claim that at all. I never claimed that, and your Honor ruled that the only way that the county would be bound would be by resolution, and therefore refused to allow me to put in the testimony of Mr. Russ and other witnesses that I had in that respect, because these parties had to stand or fall by the contract which they had made. I think that I will make my position clear to your Honor and I am going to take up the whole of these questions as I come to them. But  
30 what I want to say to your Honor is this; that this agreement here, or contract, is nothing more nor less, you might say, than a writing ratifying the conditions set forth in the specifications, in which it says here, "that the said party of the first part hereby agrees to complete the work specified herein within one hundred and twenty weather working days from and after being notified by

the County Engineer of Burlington County to begin work."

The Court: When was he to begin?

Mr. Davis: He could begin any time.

The Court: Well, can he begin now? Upon that theory couldn't he begin now?

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Mr. Davis: Not now, of course.

The Court: Why?

Mr. Davis: For the reason that he has abandoned it. That matter comes in there. But I am talking about this? He could any time he wanted to, regardless of the engineer; he had that contract regardless of the county. His rights were secured under this contract. He could have gone to work the next day without any sign 20 or word from the engineer; and that is exactly what he did do with respect to the Pearl Street bridge.

The Court: Well, Mr. Davis, do you think that where public work like a bridge over a navigable stream is to be erected by a contractor contracting with the public, that there should not be some time when that work is to be begun and notification of the beginning of the work given?

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Mr. Davis: Well, I don't think it is necessary to answer that question, if your Honor please, because your Honor has already ruled that the parties are bound by the contract which they entered into. Now whether it ought to be public policy—

The Court: Well, don't you think the contract must be judged in the light of all the circumstances?

Mr. Davis: I think it must be judged in the light of what it says, what is contained within its four corners. Now that is what I am trying to say to your Honor and what the courts have said with respect to contracts of that kind.

10 The Court: All right, I will be very glad to hear you. Have you any authorities supporting your case?

Mr. Davis: Yes.

The Court: Let's have them.

Mr. Davis: Let me proceed in my own way, if your Honor please. I think I can show your Honor my thought. I have worked somewhat on it. I can show  
20 your Honor my thought by proceeding in my own way better than by taking it any other way.

I want to say then that this contract or agreement is nothing more nor less than a formal ratification of the terms contained in the plans and specifications. Now what do the plans and specifications, which show all, require with regard to the question of beginning? There are just two of them. One of them is found on page 7.

30 "Completion. Each bidder shall specify in his bid a date before which he will complete the proposed work, and failure to do so will render his bid informal. In case of failure to complete the contract before the date named, the County of Burlington shall be entitled to liquidated damages in the sum of twenty dollars a day of delay in completion."

Now that only requires that the bids shall show the

time in which it shall be completed; and Hennessy admits in the case that it was not completed in accordance with the terms of the bid.

Now there is one other provision, and that is on the last page of the specifications at the top of the page.

“Should the contractor fail or neglect to do the work as specified, after the notice has been given him of such failure, the engineer reserves the right to take the work out of his hands, have it properly done and charge him with the cost thereof.” 10

Now they are the only two things that are in the specifications with regard to time and to the penalties involved for failure to complete according to the terms of the bid. The first is that the county has the right to liquidated damages. That is all that means. The second one is that not only does the county have the right to liquidated damages as contained in the first, but they have in addition to that this right: that if the contractor begins this work and fails to complete it within the time the engineer can notify him and say, “Mr. Contractor, 20 you have failed to complete this bridge within the time which you have specified. The county therefore notifies you that they are going to take it out of your hands.” That is one thing. In addition to that he has bound himself that the county can then proceed to do the work under the contract, have it charged to him and collect the price from him. Now that is the remedy which the county has. It is not a remedy provided for the contractor, it is not at all fixed for the contractor. Those two clauses are not put in there for his benefit; they are 30 put in there for the benefit of the county. They are the only parties that can take advantage of it. He cannot take advantage of it. No single one of them enures to the benefit of the contractor, but only for the benefit of the county. That is, that they reserve the right, if he be

gins his contract and does not fulfill it within the time he has agreed to do it, that they can take the contract back and substitute a new one for it and proceed under that contract and charge him on his bond and collect the cost of doing it from the contractor—two remedies.

The Court: Well, couldn't you do that without any contractual provision?

10 Mr. Davis: Couldn't you do what?

The Court: If you have a contract with a contractor and he falls down on his contract, leaves the job unfinished, wouldn't you have a common law right to take over the unfinished portion of the contract and do the work and charge him with the excess?

Mr. Davis: I have some doubts about it.

20 The Court: That is the law.

Mr. Davis: I have some doubts about that. It is always provided in modern contracts that that can be done. But I think his remedy, in all the cases I can find where a man has contracted to do a certain thing within a certain time, that his failure to do it in strict compliance with the terms of his agreement renders him unable to collect anything from the party that contracts with him. In other words, he loses all of his rights under that contract, and the cases so hold. (Cites authorities.)

30 The only exception to it is the equitable doctrine, where the court comes in and determines whether or not the parties have suffered any damages. That is the only exception to the cases.

Here is what I am trying to say to your Honor: whether or not he has a common law right to do it is material, and that has not arisen in this case. Here is a contract. Now what has he done? Now I claim that he could have at any time he wanted to availed himself of the right to go ahead and build that Broad Street bridge and charge the county for it, and they would have been obliged to pay it.

The Court: Do you think that is so, considering the fact that it is an undisputed fact in the case that the County Engineer and the plaintiff mutually agreed to the postponing of the beginning of the contract on the Broad Street bridge? <sup>10</sup>

Mr. Davis: I will let your Honor answer that question. You said awhile ago that the only way the parties could be bound was by their contract and it was by their contract that they were to be decided. Now the County Engineer has no authority to bind the county except as provided in this agreement here, no more than that. <sup>20</sup>

The Court: I think that is so. I think you are right about that.

Mr. Davis: Here is what could have happened: Hennessy could have said to them "I am going to do a certain thing in the Pearl Street contract. You can sue me for its breach, but I am going on with the Broad Street contract, because they are separate and independent," and the county would have been obliged to comply with the terms of that Broad Street contract. He could have said to the engineer or he could have said to the county in the most solemn way, "I refuse to do a single thing under the Pearl Street contract, but I am going to pro- <sup>30</sup>

ceed under the Broad Street contract;" and what answer could the county have had to that? And they have said, "The engineer will not give me a notice to begin work." There is not a thing in this contract that says that the validity of the contract is to be dependent upon the engineer given him notice to begin. There is not a single thing in this contract which says that he shall not begin until the engineer gives him notice, not a single word. He had a right to begin the very next day.

10 Now these parties may have interpreted it, the engineer may have interpreted it, but the Board of Freeholders, which was the contracting party, never interpreted it in any other way. The only thing they have ever done is to put their hand and seal upon this contract here.

Now the nearest case I have to this point is a case cited by Chief Justice Robertson, a Kentucky case, and this is in chancery, but which is far more liberal than the common law is. (Cites authorities.)

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The Court: I have concluded to deal with the Pearl Street contract first and get that out of the way and then I will hear further argument on the Broad Street situation.

With respect to the Pearl Street bridge plaintiff has the burden of showing either a substantial performance of his contract or that he was prevented from performing by defendant without legal justification. It has been conceded in open court by the learned counsel for  
30 the plaintiff that plaintiff was required under his contract to put down the piling at his own expense. The pleadings and proof, however, present a different situation. The complaint, beginning at paragraph 4, is as follows:

"That in making the excavations necessary for said

foundation this plaintiff and James Logan, the County Engineer of Burlington, under whose direction and supervision said contract was to be performed, found that said depth of foundation so specified on the said plans was insufficient and that no base for the foundation of said bridge could be found at the depth shown by said plans.

“That plaintiff’s contract only required him to construct the foundations for said bridge for the depth shown on said plans. 10

“That plaintiff demanded of defendant that it cause sufficient foundations to be constructed in order that the plaintiff could erect thereon the bridge so contracted for by him in accordance with the plans and specifications annexed to his contract, or that the plaintiff should be permitted to do the required work, holding the defendant liable for the cost thereof.

“That the contract between the parties fails to provide for the doing of any extra or additional work in and about the construction of said bridge. 20

“That the defendant absolutely refused to comply with the reasonable request of the plaintiff that it construct the necessary foundation or permit this plaintiff to do so, and that owing to such refusal of the said defendant to comply with the plaintiff’s request, it became impossible for him to perform his contract so made with the said defendant, and with which contract this plaintiff was at all times ready and willing to comply; that owing to said defendant’s refusal this plaintiff was compelled to discontinue his work on the construction of said bridge.” 30

Moreover plaintiff’s letters are capable of no other interpretation than that plaintiff either had abandoned or would abandon his contract unless the defendant came forward and agreed to pay him extra for the piling. I am sure all of plaintiff’s letters bear that out. I shall not

attempt to read all of said letters, but there are two letters which may be especially noticed; one is under date of April 11th to the County Engineer:

“Mr. James Logan,  
Mount Holly, N. J.

Dear Sir:

I am in receipt of your communication dated March 20th, 1913, and in reply would state that I am unable to agree with your interpretation of my contract for the  
10 Pearl Street arch bridge, in so far as you claim that the same provides that I must, without extra compensation, provide suitable foundations for this bridge, or, in other words, such foundations as it now appears will have to be provided before the work may be properly done.

“You will note that under the terms of said contract I am only to furnish materials and labor for the same in accordance with the plans and specifications attached thereto; further upon the said plans certain lines are provided as to the depth of the excavation for the founda-  
20 tion of the abutment, and that the work as provided also in the bid is to be done in strict conformity with the said plans and specifications, but neither in said contract or specifications nor upon the plan which forms a part thereof, is any provision made for piling beneath said abutments, nor is any designation for such character of work exhibited upon said plans.

“In view of the foregoing, I am compelled to protest against doing any work of piling upon the ground that the same is not provided nor called for by said contract,  
30 plans or specification, but is absolutely extra work for which compensation must be made to me for the doing thereof.

“As this matter is extremely important I would respectfully ask that you proceed towards the adjustment thereof at your earliest possible convenience, so that the

work provided by the contract may be carried forward to completion within the time limited therefor."

I have already read the letter of plaintiff under date of May 13, 1913.

Now plaintiff contends, even in the face of the complaint and his letters, that he at no time abandoned his contract; that upon the contrary, he was anxious and willing to perform it, even to the extent of putting down the piling at his own expense, but that he was prevented from carrying out his desire by certain unjustifiable conduct on the part of the defendant. He contends that Logan refused to furnish adequate instructions or details for the piling and that that caused the whole trouble. In other words, plaintiff in effect say that when he fell into the unforeseen situation regarding the character of the soil which made it necessary to have piling to support the bridge, he knew that he was obliged under his contract to put down the piling without extra compensation, and that he actually intended to do it, and that what he did contrariwise was only an effort to get extra money from the county which he was not entitled to receive and which the county could not lawfully allow him. 10 20

I do not see how plaintiff's contention can prevail. It is not what the undisclosed intention was, it is what he said and did which caused the defendant to act in the premises. They are the essential factors from which the court must decide this motion.

As I have remarked, plaintiff said he would not go on with the job unless his terms were acceded to by the defendant. All of his letters when read and considered together show that, and I fail to discover anything in the case even tending to show that the plaintiff ever receded from that position. And then I think plaintiff is concluded by his own complaint from raising this question. 30

We therefore have these undisputed facts; that plain-

tiff was to put down the piling under his contract at his own expense and that he did not do it; that he demanded extra pay for the piling, which he was not entitled to receive and which the county could not lawfully allow him; that the work on the bridge was unduly delayed, to the inconvenience of the public, so that great public necessity demanded prompt and efficient action on the part of the defendant.

We are now down to the crux of the case. Was defendant, in the light of the undisputed facts, legally justified in regarding the contract abandoned by the plaintiff? I think it was. Besides, there is proof in the case tending to show a course of conduct on the part of the plaintiff amounting to an acquiescence in the position of the defendant respecting the abrogation of the old contract and the awarding of the new. But I do not deem it necessary to pass upon that question. The question of acquiescence is therefore not decided. It is sufficient for the court to say that it is not willing to hold that a contractor can haul off and hold up the public on a contract for public work, as plaintiff did here, and then be allowed to recover on his contract upon the theory that he was prevented from performing it by the defendant. He is estopped by his conduct from asserting any such claim. The result is that plaintiff cannot recover any damages on this contract for the Pearl Street bridge. Nor do I think that he can recover upon a quantum meruit; for besides the question of bona fides in respect to his failure to go on with the contract, there are no facts showing acceptance, either expressed or implied, upon the part of the county of such work as he did. The proof shows that all he did was to construct a cofferdam and do some excavating, all of which he sold to the new contractor. The county never had anything to do with it. There is no proof of acceptance.

The situation respecting the Broad Street bridge is different. There it seems to the court probably there is something for the jury to consider, and we will have to hear argument.

Mr. Davis: With respect to the Pearl Street bridge then your Honor directs a verdict?

The Court: Well, it is not like directing a verdict. I tell the jury they cannot find any damages for the plaintiff on the contract for the Pearl Street bridge. <sup>10</sup>

Mr. Davis: So I shall proceed with regard to the Broad Street bridge?

The Court: Yes.

Mr. Palmer: May I have an exception?

The Court: Counsel for the plaintiff excepts to the ruling of the court with respect to plaintiff's claim for damages growing out of the contract for the Pearl Street bridge. It is allowed. <sup>20</sup>

Mr. Davis: Now, your Honor, with respect to the Broad Street bridge I don't know that I need say very much more except to say to your Honor that there is not a single word in this contract nor in the specification fixing the time when Hennessy should begin to work. <sup>30</sup>

The Court: I have got that point. Now proceed to the next question.

Mr. Davis: Now if that be true then the case that I cited to your Honor, Wall vs. Simpson, which is found

in 22 American Decisions, page 72, says that "The words 'On or before a certain day' inserted in an agreement to perform an act, give the promissor the right to perform the act at any time before the day; and performance or tender before the day confers upon him all the rights he would have acquired by performance or tender on that day."

Well, now, that bears upon this question: while this contract says that he shall complete the work within one  
10 hundred and twenty working days after having been notified, that is, that the time begins to run against him and he will only have one hundred and twenty days after he has been notified. As a matter of fact he can begin any time and he can finish sooner than the one hundred and twenty days, or one hundred days, the time provided here.

The Court: Well, you made that point before.

Mr. Davis: Therefore, if that be true, then this ques-  
20 tion about the failure of Mr. Logan to notify him to begin to work upon that day amounts to nothing, because he could have gone ahead without a notice, and he could have performed, and when he had performed the county would have been obliged to pay, irrespective of whether he did anything on the Pearl Street bridge or not. And as I have already, in answer to your Honor's query, said that the fact that Mr. Logan suggested that he would give him the notice on the Pearl Street bridge first, and  
30 that he complete that before he give him the notice on the Broad Street bridge, does not bind the county at all. They are limited as to what they have signed their names to in this contract.

Now if that be true—and it seems to me to be sound—what is there to show in this connection, that what took place with respect to the Pearl Street bridge in the way

of abandonment did not also apply to the Broad Street bridge? Now you have heard the testimony of the plaintiff himself that as early as June, 1913, he concluded that he could not build these bridges. That was the time that he had written these letters, a short time after he had written these letters, he concluded that it was impossible for him to perform these contracts. And what did he do?

The Court: When did he say that?

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Mr. Davis: He testified on the stand. Hennessy testified to it on cross-examination. If your Honor has any doubt about it I will ask the stenographer to turn back to it, because there is no doubt that that is what he testified to. Now what did he do in carrying out that intention or that idea of his? He said that he began to sell the material to the people who were around in the neighborhood. He sold some of it to his partner in another transaction, by the name of Jones, he sold some of it to different people, other persons; and here is a memorandum that he made in which he has sold some of the stuff, and he testified that before the letting of the contract on the 20th of May 1914, to Arthur E. Smith, for the Pearl Street bridge, he had sold everything that was the on the ground except that which he sold to Smith. Now that applies to the Broad Street contract, because he testified that he had bought material, he had ordered the steel, he had ordered the cement——

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The Court: Well, Mr. Davis, I think that might create a situation of fact for the jury. The court cannot say as a matter of law that that amounted to an abandonment. That may be a question for the jury.

Mr. Davis: The court has laid down the law that where the facts are undisputed—and this is his testimony; it is nobody else's but Hennessy's—the court has said that where the proper view is that what is a reasonable time within which a contract must be performed is a matter of law for the court, when it depends upon the construction of a contract in writing or upon undisputed extrinsic facts. Now these are facts which he testified to.

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The Court: I think that would create a situation for the jury, whether he abandoned the contract or not. Of course where facts are capable of only one interpretation then it is for the court to act and not the jury, because the function of the jury is to decide facts which are disputed, or facts which reasonable and fair minded men might disagree about.

Mr. Davis: Well, now, it seems to me, if your Honor please, that all of the testimony in this case—and it does not merely seem to me, it is the fact—that all of the testimony in this case as to everything he did and everything that the county did shows that he never intended to carry out this contract in June, 1913. That is, he says that in June, 1913, he had concluded that it was impossible for him to execute these contracts; that pursuant to that he sold all the material that was on hand and that he moved the stuff away and has never done another thing from that time on down to the present towards the construction of this bridge.

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Now if he did not abandon the contract, if your Honor thinks that is a question for the jury, then this question of law which I have stated, which is properly stated under the question of what is a reasonable time for its completion, is a question of law for the court and not a ques-

tion of facts for the jury, where the questions are undisputed; and they are undisputed in this respect, because they are the testimony of Hennessy himself.

Now starting with the proposition that he had the right to begin work when he got ready, and he had the right to finish this work in less than one hundred and twenty days if he wanted to, he had the right to start out and complete it and demand payment from the county; because he had their contract under seal; that they would pay him when he was done, and they had his contract that he would complete it within the time of one hundred and twenty days after they had notified him to begin work; and if they didn't notify him, then of course the common law comes in that he should do it within a reasonable time. He was not notified to begin the work, and therefore the one hundred and twenty days does not apply, but it is a question of law for the court in this case to say, did he do anything within a reasonable time, and can he now come in and say —

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The Court: I will save you perhaps a little time and effort. Of course if your contention respecting the interpretation of that contract is sound there can be no doubt but what the contractor was in default, because he could not hold the county up two years on the job, that is perfectly obvious.

Mr. Davis: Well, he held the county up five years.

Mr. Backes: Oh, no, he didn't, four years.

30

Mr. Davis: His contract was let in 1912, and the contract to—

The Court: That is very evident. If your interpre-

tation of that contract is sound the contractor was obviously in default. The court would say that.

Mr. Davis: I suppose that if my interpretation of this contract is not sound then it becomes incumbent upon somebody to say to your Honor that that is not correct; for the reason that there is no language, there is not a word in this contract that I have been dealing with of the time of completion or beginning of the contract that I  
10 have not read to your Honor. And I say there is not a single word about him telling him when he shall begin his work.

Now when a contract is entered into it means that it shall be performed within a reasonable time, unless a definite time is fixed for its performance. Now what is fixed in this contract for its performance? Only one thing, and that is this, and which varies the common law: he shall complete it within one hundred and twenty days after having been notified to do it. But does that  
20 prevent him from beginning before that time? Couldn't he have begun? To go back to my argument again, couldn't he have said, "Insofar as the Pearl Street bridge is concerned I will have nothing to do with it. You can take your remedy under the law. You can sue or do what you please with respect to the Pearl Street bridge. I will do nothing about it. But I stand upon my rights with the Broad Street bridge and I am going ahead and perform this contract unless you stop me, and I am going to collect my money from the county." And what  
30 answer would the county have had? They would have had no answer except to pay the contract price under this Broad Street contract. But he didn't do that. Instead of doing that he sells all of his stuff, he sells all of his material, he moves away. And I want to say to your Honor that the acquiescence in the cancellation of the

Pearl Street contract seems to bear very heavily upon the abandonment of the Broad Street contract. He does not do a single thing. He does not remove a single bit and does not attempt to dismantle the old bridge; not one single thing did he ever do to the Broad Street bridge to entitle him to compensation of the slightest bit.

If I am not right there I would like to be shown where there is a single word in this contract or in the specification which gives him the right to say that, "I will not begin work until I am notified; but I have no right to begin work, that it is not my duty to do it." 10

The Court: I will hear counsel on the other side.

Mr. Backes: I think the only answer to my friend on the other side is, suppose that this man had gone on without a notice from the engineer; it would have been for the county to say, "You never got notice from the engineer and we won't pay you for it." That would have been the position before contractor would have found himself in there 20

But let us see what this contract provides, "The said party of the first part hereby agrees to complete the work specified herein within one hundred and twenty weather working days from and after being notified by the county engineer of Burlington County."

The Court: Notified to do what?

Mr. Backes: To complete this work. 30

The Court: No, what is the county engineer to do, to notify him to begin work?

Mr. Backes: "After being notified by the County

Engineer of Burlington County to begin said work."

Now can the County Engineer lawfully withhold that notification and then can the Board of Freeholders go and make an entirely different contract without making this man whole for his loss? I say they cannot. I say they must stand by that contract, and that is the contract that we want to stand on: namely, that this contractor never refused, never abandoned that work?

10 The Court: I will tell you what is in the mind of the court now as to this question, whether the court can reserve this question and take a special verdict from the jury upon the facts.

Mr. Davis: Your Honor has a right to take a special verdict under the 1912 Act and you have a right to propound interrogatories.

Mr. Backes: It is a disputed fact here.

20 Mr. Palmer: This is a disputed fact proposition, the question of abandonment.

The Court: That would be for the jury to say.

Mr. Palmer: Your Honor has a right to ask for a special verdict on the proposition, but in doing that aren't you forgetting that it is just exactly whether they find one way or the other on this disputed fact, and won't that  
30 be conclusive?

The Court: No, they may find that the contract was abandoned or was not abandoned.

Mr. Palmer: Yes, that is what I say; they find one way or the other upon that.

The Court: They may find that the plaintiff was damaged or was not.

Mr. Palmer: Yes, but it must be predicated upon the abandonment or nonabandonment of the contract.

The Court: Certainly; the jury would not have any-<sup>10</sup> thing to do with interpreting the contract. But do you gentlemen agree that under the present Practice Act this specific question of fact may be propounded to the jury and the court may pass upon the question of law?

Mr. Davis: I think there is no question about it in the 1912 Act. I have never seen it invoked but I have often wondered why it was not done.

Mr. Backes: I don't think it can be done. 20

(Mr. Davis reads Section 19 of the Act of 1912.)

The Court: It can be obviated easily enough, to allow the court to find upon the question of law involved, the interpretation of the contract, upon the question of whether Mr. Hennessy was entitled to notice on the engineer to begin the work, and the jury may pass upon the two question or other questions of fact and return a special verdict. 30

Mr. Davis: Here is the section, Section 74 on page 398. (Reads.)

The Court: Well, gentlemen, what have you to say about it?

Mr. Palmer: Whatever course your Honor thinks ought to be taken, we have no objection to it.

Mr. Davis: It seems to me there is no disputed question of fact here. All the facts have been testified to by the plaintiff that I have argued.

10

Mr. Backes: The question of whether this notice was withheld?

The Court: That is not a disputed question. It is admitted it was withheld.

Mr. Palmer: The whole proposition turns right upon that point.

20 The Court: That is a question of law. It is conceded in the case that Mr. Hennessy frequently requested to be notified by the engineer to go on with the Broad Street job, and that notice was withheld; that the engineer told him that he would never notify him to begin. That is in the case. It is the question of law—that is wholly a court question, of course—whether under the contract he should have gone on with the job without notice.

30 Mr. Davis: That is absolute. That is my point. That is the question of law.

The Court: Now gentlemen, let us see if we cannot agree on issues of fact. The jury hasn't anything to do with that question, the question of law. Do you contend that it is for the jury and not for the court to say wheth-

er the plaintiff ever abandoned his contract for the Broad Street bridge? Is that a jury question?

Mr. Palmer: Unquestionably, disputed testimony.

The Court: That is a jury question?

Mr. Palmer: Yes. I can conceive of cases where that court question would not be a jury question, but in this case it is unquestionably. 10

The Court: Of course the question of abandonment settles the question of the breach, and that is a jury question.

Mr. Palmer: Yes.

Mr. Davis: I do not concede that.

The Court: Then the jury would pass upon the question of damages. 20

Mr. Palmer: Yes.

The Court: It is for the jury to say whether any substantial damages—of course if the jury finds there is a breach the plaintiff is entitled to nominal damages unless he shows substantial damages, and whether he showed substantial damages or not is a question of the amount. 30

Mr. Palmer: Yes.

Mr. Davis: But I contend, your Honor, that there is no disputed fact.

The Court: I understand what you contend, and I am going to deny your motion. Mr. Davis, for the direction of a verdict in favor of the defendant. Respecting that portion of the plaintiff's claim which relates to the Broad Street bridge the motion is denied.

(Objection noted for defendant as ground of appeal.)

10 The Court: The motion for a direction at this time is denied. The court under the present arrangement, as I understand it, is to reserve the question whether the plaintiff was required to go on with his contract of the Broad Street bridge regardless of any notice from the County Engineer.

Mr. Davis: I do not see how your Honor can do that.

The Court: Why?

20

Mr. Davis: That is the very basis of my motion.

The Court: No, you say in your motion that even if the interpretation which the plaintiff contends for with respect to the contract about notice is sound, that there are undisputed facts from which an abandonment should be legitimately inferred.

30 Mr. Davis: Yes, and I claim also——

The Court: Well, isn't it as broad as it is long, if the court reserves the legal question and disposes of it by consent of counsel after examination?

Mr. Davis: This is a Supreme Court issue.

The Court: Well, I thought you said according to the Practice Act that could be done.

Mr. Davis: I say what the statute says here, that your Honor can ask the jury and enter judgment according to that, according to the answers they give you as to questions of fact.

The Court: Cannot the court reserve a question of law? 10

Mr. Davis: I don't know, your Honor. I have read your Honor just exactly what the statute said.

The Court: Well, can't the question be obviated by having counsel agree that the court reserve the question of law and let the jury decide the questions of fact?

Mr. Davis: Yes, if counsel agrees, no doubt.

20

Mr. Palmer: We will agree.

The Court: Then I understand counsel on both sides agree that the court may reserve the question of law which involves the interpretation of the contract upon the question of whether the plaintiff was required to go on with this contract regardless of notice or not?

Mr. Davis: I am satisfied. I move to amend the defendant's answer by setting up a counterclaim against the plaintiff for liquidated damages under the contract for the Broad Street and Pearl Street bridges. 30

Mr. Palmer: I object to that as coming too late in the case.

The Court: I think it is too late now, Mr. Davis. That would involve putting the case over——

Mr. Davis: I propose to offer no testimony, to go on with the testimony that is already offered.

Mr. Backes: Well, even so then we are surprised by any defense of that kind, as we made no preparations to meet it.

10

The Court: Oh, well, that would only apply to the Pearl Street bridge. I can't see that it has any significance in the Broad Street bridge.

Mr. Davis: Well, it is not as to the Broad Street but it is as to the Pearl Street. Your Honor will understand that these answers were drawn before I was in the case, and this is the county and public that is interested.

20 Mr. Backes: If your Honor please, my friend Davis suggested that the time the case went over before that he would have some amendments to make to his answer, but he has never made a whimper until just this moment.

Mr. Davis: I would have the right, it seems to me, to set it up in mitigation of damages.

The Court: You mean the liquidated damages, the number of days you were held up?

30

Mr. Davis: Yes. It is provided here what liquidated damages shall be for failure to complete the contract.

The Court: I don't know how I can deny this motion very well under the circumstances.

Mr. Palmer: If your Honor please, you can deny it upon the proposition that it comes at a time in the case when it should not have come. If the suggestion had been made when the case was opened, when we started trial, it would have been perfectly proper for your Honor to permit it; but now it has reached a point where it is ready to close and go to the jury, and now a suggestion is made and we are not prepared to meet it and didn't know it was coming at all. It certainly is not a fair proposition.

Mr. Davis: Well, the plaintiff has shifted his ground since he got in court.

10

The Court: Well, now, the court has passed upon the Pearl Street contract. Now let me see. Well, I will consider that and deal with it when we return from the noon recess.

Mr. Davis: I will offer no further testimony. Mr. Smith's testimony related only to the Pearl Street bridge, it did not relate to the other bridge at all. Your Honor's action with regard to the Pearl Street bridge relieves us of the necessity of putting Mr. Smith on.

20

The Court: Your motion now is to put in a counter-claim against the plaintiff—

Mr. Backes: For the twenty dollars that they had provided for as liquidated damages under the contract. I assume that is it.

30

The Court: That is right. You see now that here the plaintiff is trying to recover damages on this Broad Street bridge, for the breach of that contract. Now you

in that case file a counterclaim saying, "Well, if he is entitled to any damages then the jury should also consider our damages."

Mr. Davis: Yes, that is the point.

The Court: Well, I am inclined to allow it to be done, in order that the matter may be disposed of.

10 Mr. Palmer: May I have an exception to your Honor's permitting this?

The Court: No, that is a matter of discretion.

Mr. Palmer: I am taking an exception as to whether your Honor properly exercised your discretion in admitting it at this stage of the case.

The Court: Well, I will permit it.

20 Mr. Davis: Then I will prepare it during the recess.

Mr. Palmer: May I state my ground for objection to your Honor's permitting this? It is that it comes at a stage in the case when we are without opportunity to prepare to answer it.

Mr. Davis: In answer to that I am content to give them all the opportunity that your Honor will permit to  
30 offer any proof disputing the county's right to recover, or I am willing to allow your Honor, having heard the matter to determine this without the aid of a jury.

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RECESS TILL 1.15 P. M.

(Trial of the cause resumed at 1.15 P. M.)

The Court: Your motion was to file a counterclaim.

Mr. Davis: Yes, your Honor. It is ready. I am just making a correction. I suppose it is all right now?

The Court: Read your counterclaim.

Mr. Davis: "Defendant claims by way of set-off and counterclaim——" 10

The Court: Not set-off. They are two different remedies.

Mr. Davis: I will strike out "set-off". "Defendant claims by way of counterclaim against the plaintiff the sum of \$6300, with interest thereon from the 12th day of July, 1913, to date, as liquidated damages under the contract providing for the construction of the Pearl 20 Street bridge referred to in the plaintiff's complaint."

I claim we are entitled to liquidated damages from the time given for its completion until the contract was let to other parties. I think now—I didn't at the time I drew this—that it dates from the date of the letting of the second contract. That would be May 20, 1914.

The Court: Now I understand you answer and deny? 30

Mr. Backes: We deny the right.

The Court: The plaintiff answering denies the defendant's counterclaim and says that the defendant is not entitled to recover the liquidated damages therein

claimed. Well, the court has allowed you to file the counterclaim and it will be endorsed as such and you send it up with the papers to the clerk of the court; and the plaintiff has answered on the record and the defendant will file a more formal answer with the clerk of the Supreme Court.

Now the question which the court must pass upon is whether in the presence of your counterclaim and the denial that you are entitled to any liquidated damages  
10 under it, you are as a matter of law; because there are no disputed questions of fact, whether you are as a matter of law entitled to liquidated damages. I will hear you.

Mr. Davis: There are no disputed questions of fact, as your Honor has said, and your Honor has ruled—

The Court: That the contract was abandoned by the plaintiff.

20 Mr. Davis: That the contract was abandoned by the parties—

The Court: By the plaintiff.

Mr. Davis: By the plaintiff, and it is in testimony that he began this contract—rather, notice to begin was signed on the 17th of March, 1913, and on the 18th of March, 1917, he acknowledged the receipt of the notice to begin work. It is in testimony and undisputed that  
30 the time for the completion of his contract under the contract expired on the 12th day of July, 1913. The contract for the Pearl Street bridge provides on page 7: "Completion. Each bidder shall specify in his bid a date before which he will complete the proposed work and failure to do so will render his bid informal. In case of

failure to complete the contract before the date named, the County of Burlington shall be entitled to liquidated damages in the sum of \$20 per day of delay in completion." That is undisputed. It is undisputed that the contract expired—that is, the date of the completion—on the 12th day of July, 1913, and that the contract was not relet by the County of Burlington for the construction of this bridge—

The Court: When was his time to be up? 10

Mr. Davis: On the 12th day of July, 1913.

The Court: Did he say so?

Mr. Davis: Yes, Mr. Logan testified so and it is undisputed.

Mr. Palmer: He said July.

20

Mr. Davis: No, he said the 12th day of July.

Mr. Palmer: He didn't say anything of the kind.

Mr. Davis: Well, if there is any dispute about it I will put him on the stand.

The Court: No, he did say on the 12th of July the time was up.

30

Mr. Palmer: He said in July.

The Court: Well, that is near enough.

Mr. Davis: I say it is in testimony that the time for

the completion of the contract was the 12th of July, 1913, and that the contract for the letting of the work to other parties was signed by the County of Burlington, in the subsequent contract, on the 20th of May, 1914. Now with the ruling of the court that the plaintiff in this case abandoned his contract it seems to me to be clearly undisputed under the contract that the County of Burlington is entitled to a verdict—

- 10 The Court: Read that over again, that part of the contract providing for the penalty.

(Mr. Davis reads section on "Completion.")

The Court: What date named?

Mr. Davis: That is the date named in the bid.

The Court: Does that show? What was his bid?

- 20 Mr. Davis: Yes, the bid is attached here somewhere. It was offered in evidence. It is 120 days on this contract.

Mr. Palmer: The bid has no effect after the contract has been signed.

The Court: What does the bid say here?

- 30 Mr. Davis: The bid says he will complete it in 120 weather working days. The contract also provides for that.

The Court: What does it say about the \$20 a day?

(Mr. Davis reads.)

The Court: Is it agreed that that is the bid, to agree to complete the job in 120 working days?

Mr. Palmer: It makes no difference what the bid said; the contract is the only thing that is effective.

The Court: You then agree that the time specified in the contract, 120 days after notice, governs the situation, do you? 10

Mr. Palmer: Yes, that is what the contract said.

Mr. Backes: The contract reads: "The said party of the first part hereby agrees to complete the work specified herein in 120 working days from and after being notified by the County Engineer." I suppose that is what he refers to.

The Court: But the stipulation regarding the liquidated damages refers to the period of time which he specifies to do the work in his bid, doesn't it? 20

Mr. Davis: There is the form of it. The other is identical with it.

Mr. Backes: No bid has been submitted here in evidence.

30

Mr. Davis: Yes, it is here in evidence.

The Court: Get the actual bid and I will allow you to put it in. Well, to save time, gentlemen, is there any doubt about the fact that in his bid Mr. Hennessy pro-

poses to do the work within 120 days after he was notified by the county engineer to begin?

Mr. Backes: That is the letter of his contract.

The Court: And is that what he said in his bid?

Mr. Backes: I don't know.

10 Mr. Davis: Yes, that is what he said.

The Court: Is that so? (To Mr. Hennessy.)

Mr. Hennessy: Yes.

The Court: Mr. Hennessy says that that is the bid, he agreed to do the work within 120 weather working days from the time he was notified by the engineer to begin. Now you claim as a matter of law that the  
20 parties had a right to enter into such an agreement for liquidated damages?

Mr. Davis: Yes.

The Court: \$20 a day?

Mr. Davis: That is what they have set forth. Now I figure the days at 312 days from the 12th of July, 1913.

30 The Court: It is proved in the case that it was July 12th?

Mr. Davis: Yes.

The Court: The other side deny it.

Mr. Davis: Let him stand up now.

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J. P. LOGAN, recalled for defendant.

Direct Examination by Mr. Davis:

Q. What date in July do you say? 10

A. I wrote a letter to the Board of Freeholders that says July 12th.

By Mr. Palmer:

Q. That is not what you said in your testimony this morning, is it?

A. I can't recall.

By the Court: 20

Q. When was this job to be done?

A. In 120 weather working days from the time he began.

Q. When was that 120 weather working days up?

A. July 12th.

By Mr. Davis:

Q. 1913? 30

A. 1913.

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The Court: Gentlemen, it seems to me there is very little for this jury to do. Is that a law question or a

court question, whether the penalty shall be—

Mr. Davis: It is a law question when there is no dispute about it.

The Court: What is the amount of your claim for damages growing out of the breach?

10 Mr. Palmer: \$2703.91.

The Court: Of the Broad Street bridge?

Mr. Palmer: Yes.

Mr. Davis: How do you figure that out?

Mr. Palmer: That is the loss of profit on the contract and loss on the materials.

20 Mr. Davis: You can't get both of them.

The Court: No, your measure of damages is the difference between what the job would have cost the contractor if he had performed it according to the plans and specifications and what the defendant agreed to pay him; in other words, his profits.

Mr. Palmer: \$1508.

30 The Court: Now what is the situation? What is there for the jury to do?

Mr. Davis: I think that the only thing for the jury to do is to render a verdict for the amount of my claim, and that is my motion.

The Court: Well, this appears to resolve itself into a legal case. What are your figures?

Mr. Davis: \$6240. I hadn't figured the interest.

The Court: Well, isn't the claim large enough without interest?

Mr. Davis: I guess so. I will waive the interest.

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### CHARGE OF THE COURT

Carrow, J.:—Gentlemen of the jury: in December, 1912, the plaintiff, a civil engineer and contractor, made a contract in writing with the Board of Chosen Freeholders of this county involving the construction of a concrete bridge in the city of Burlington, known as the Broad Street bridge. Under the terms of the contract the plaintiff was to begin work when notified by the county engineer, and he was required to complete the job within one hundred and twenty working days after receiving notice from the engineer to begin. He never received notice from the county engineer to begin, although he requested and demanded such notice. He was never allowed to go on with his contract. The Board of Freeholders, without any legal justification, broke the contract and awarded the contract to a new contractor. That being so, the plaintiff is entitled to recover damages growing out of the breach of that contract. There is no disputed question of fact regarding his damages. The measure of damages is the difference between what the completed job would have cost him if he had been allowed to go on and perform the contract

30

according to the plans and specifications, and what the defendant agreed to pay him. In other words, he was entitled to the profit which he says he would have made if he had been allowed to begin and complete his contract, as he was entitled to do according to the terms thereof. And he says his profits would have been \$1508; and his damages would be \$1508 under the rule for the measurement of damages which the court has stated. Therefore, as the case now stands, the plaintiff  
10 is entitled to the \$1508 with interest. If there was nothing else in the case than what I have stated you would be required to return a verdict for the plaintiff for the amount of his claim.

But the defendant has put in a counterclaim for damages, for liquidated damages growing out of the breach, not of the contract for the Broad Street bridge, because I have already told you plaintiff did not break that contract, the defendant broke it without any legal justification; but the damages claimed in the counter-  
20 claim are what are known in the law as liquidated damages, and they grow out of a breach of one of the conditions of the contract for Pearl Street bridge. The amount of damages which the defendant is entitled to recover upon the counterclaim is \$20 a day from July 12th until May 20th. Counsel has figured it at \$6240. You may figure it over again to see whether the figures are right. I have not made the calculation myself; it is not my duty to do it.

Now in view of what I said you will allow the plain-  
30 tiff \$1508 with interest. That ought to be figured up. You allow the defendant \$6240. And in arriving at your verdict you will have to take off the \$6240 plaintiff's claim of \$1508. That all ought to be figured out in dollars and cents.

Mr. Davis: We have it here. It leaves a balance due the county of \$5611.14.

The Court: Have you allowed interest on the plaintiff's?

Mr. Davis: Well, we deducted \$1508 from the amount of the counterclaim and allowed interest on the balance, which would equalize itself. That is what Mr. Logan has figured out here. 10

The Court: Well, that is the amount the jury will return a verdict for?

Mr. Davis: Yes. You see the amount would be \$4660 and interest on the \$4660 from May 20th.

The Court: Have you figured it?

Mr. Palmer: No figures. 20

The Court: How much is it?

Mr. Davis: \$5611.14.

The Court: You will return a verdict, gentlemen of the jury, for the defendant upon the counterclaim of \$5611.14.

30

Mr. Palmer: We pray an exception to the direction of a verdict.

(Objection noted for plaintiff as ground of appeal.)

Mr. Davis: We pray an exception to that part of the charge which in substance was to the effect that the defendant had broken the contract without justification and was therefore entitled to damages for its breach.

(Objection noted for defendant as ground of appeal.)

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- 10 (The letters heretofore offered for identification on the part of the defendant were ordered by the court to be marked as exhibits on the part of the defendant.)

(Letters previously marked Exhibit A, B, C, D, E and F for identification were marked Exhibits D1, D2, D3, D4, D5 and D6.)

EXHIBIT P. 1.

THIS AGREEMENT made this eighteenth day of December, one thousand nine hundred and twelve BETWEEN PATRICK A, HENNESSY, of Mount Vernon, Westchester County, New York, party of the first part, and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON of the State of New Jersey, party of the second part:

WITNESSETH that the said party of the first part hereby covenants and agrees to and with the said party of the second part to construct a reinforced concrete arch bridge over Assiscunk creek at Broad Street in the City of Burlington, Burlington County, New Jersey, and to furnish materials and labor for the same in accordance with the plans and specifications attached hereto, and forming a part hereof. 10

The said party of the first part hereby agrees to complete the work specified herein within one hundred and twenty weather working days from and after being notified by the County Engineer of Burlington County to begin said work. 20

In consideration of the foregoing the party of the second part hereby agrees to pay to the party of the first part ten thousand eight hundred and seventy dollars; in the manner specified in the specifications hereto attached and made a part hereof.

The said party of the second part hereby agrees to provide all necessary stakes and lines for the location of the new work immediately upon notification of the beginning of the work or to inspect it or cause it to be inspected, upon written notice of its completion. 30

And for the performance of each and every article of this agreement, the said parties hereby bind themselves

and heirs, executors, administrators and successors respectively.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused this agreement to be signed by its Director and its corporate seal hereto attached and attested by its Clerk, the day and year first above written.

10 Signed, sealed and delivered  
in the presence of  
BUDD M. RIGG.

PATRICK A. HENNESSY (SEAL)  
BOARD OF CHOSEN FREEHOLDERS  
OF THE COUNTY OF BURLINGTON.

HARRY E. DUBELL,

(SEAL)

Director.

HARRY HAWKINS, JR.,

Clerk.

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SPECIFICATIONS  
FOR

REINFORCED CONCRETE ARCH BRIDGE, ASS-  
ISCUNK BRIDGE, BURLINGTON, BURLINGTON  
COUNTY, NEW JERSEY.

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30 Plans and Specifications. The work shall be construct-  
ed according to these plans and specifications, both of  
which shall be considered part of the contract.

They contemplate a complete structure and any error  
or omission in plans or specifications, shall not release,  
the Contractor from building a complete structure com-  
plete.

Loading. The dead load to be considered as consisting of all earth filling above the arch, estimated as weighing 125 pounds per cubic foot and the concrete of the arch and spandrel walls estimated as weighing 140 pounds per cubic foot. The live load is to be considered as consisting of 100 pounds per square foot of floor system, and a 20 ton truck on any part of the roadway.

Old Structure. The Contractor shall remove any portions of the present abutments or walls to provide a satisfactory site for a new structure and have free use of any of the material from the old bridge that may be suitable in the erection of the new structure. 10

Lines and Stakes. Before commencing excavations, it will be the duty of the Contractor to notify the Engineer, who will give him center lines and stakes. The new structure shall be constructed true to the lines shown upon the plans, and as such staked out by the Engineer.

Guards. The Contractor shall, as provided by law, place proper guards at the site of the new bridge; at night he shall place proper and sufficient lamps for the prevention of accidents. 20

He is expected to take all proper precautions to prevent accidents or damage of any kind, and hence, is the sole person responsible in case such should occur, and shall be held liable therefor.

He expressly binds himself to save harmless the County of Burlington from all suits or actions of every description brought against the County of Burlington, for or on account of any injuries received by any party from the acts of the Contractor, or his servants, or in consequence of negligence, or improper materials used in construction. 30

Foreman and Workman. The Contractor shall, at all times, have a competent foreman on the work, or some authorized agent upon whom notice may be served, and

orders issued for the conduct of the work. He shall employ only competent workmen. He will be required to discharge any employee who, in the opinion of the Engineer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damage against the County of Burlington, or any of its officers or agents.

Excavations and Foundations. Complete excavations for foundations shall be made by the Contractor. The  
10 methods followed for obtaining the foundations shall rest generally with the Contractor, subject to the approval of the Engineer.

Flood-Proof Paving. If shown on the drawing, it shall be placed six inches below the bed of the stream at the abutments, following in a true curve to six inches below bed of stream in the centre. If rock or hard pan foundation occur in such form that they may be made to perform the functions of the flood-proofing pavement, the pavement and ties may be omitted by the Contractor,  
20 providing the surface of such footings of rock or hard pan be inclined or stepped up to form a skew-back.

Centers. The Contractor shall provide the centering for the support of the arch of sufficient strength to hold the concrete until firmly set. Uprights must be so solidly founded that they will not give or settle during the construction of the work.

Forms. All forms coming in contact with the exposed surfaces shall be sound, straight planking, smoothly  
30 planed, accurately matched, so that the surface of the concrete will not show any impressions whatever, on the joints, and shall be made non-absorbent by saturation with water. Soap or parafine may be used to prevent adherence of the concrete to the forms. They must be sufficiently braced and wired to prevent bulging. After

concreting the spandrels, the coping forms must always be realigned, before concreting the coping.

Corners. All corners of abutments, arch rings, spandrels, copings and railings shall be rounded by moulding or trowel, so that no sharp edges appear in the exposed places to be broken.

Reinforcement. Reinforcement shall be of open hearth medium steel, of round or any well known type of deformed bars. They shall be free from paint, oil or scales before embedding in the concrete, and shall be embedded to a depth of at least one inch. The size and spacing of rods shall be clearly shown on working plans to be submitted, by Contractor, which plans will become a part of the contract. 10

Any form of patent or other method of placing may be used, but it shall be designed of sufficient number and size to carry the loadings as set forth in these specifications.

Concrete. The concrete shall be composed of true Portland cement, clean, sharp sand and broken stone. 20

Cement. The cement shall be of good quality of Portland cement and shall have met the requirements of the Standard Specifications for cement as adopted by the American Society for Testing Materials.

The Contractor shall provide a store house at the site of the work for the proper storing and protection of the cement.

Where possible, it shall be delivered in time to have a sample taken and the usual one and seven days' test made. Any cement which may become damaged in transit or by improper care in storing, will be rejected by the Engineer or his authorized inspector, and the Contractor must promptly remove such rejected cement from the work. 30

Stone. Stone shall be tough, clean and hard, and shall not be larger in dimension than  $1\frac{1}{2}$  inches for all foun-

dations and abutments up to springing lines, nor larger than  $\frac{3}{4}$  inch above springing line.

Sand. Sand shall be good, sharp, clean, coarse and free from dust, loam, ashes, clay, coal, perishable matter or improper substance. Clean crusher screenings may be substituted for one half the volume of sand required in the mixture.

10 Inspection. All materials shall be subjected to inspection and approval according to these plans and specifications, and the Engineer shall control as to interpretation.

Mixing. Mixing of concrete in a thorough manner is the first requirement for securing good concrete. It shall be hand or machine mixed, of not more than one cubic yard in each batch. If hand mixed, the sand and cement shall be mixed to an even color dry, then the stone shall be added and the whole aggregate cut and turned three times, adding while turning sufficient water to make the mass wet.

20 Stone Concrete. Concrete for all foundations up to springing line of arches shall be composed of one part of cement, three parts of sand, six parts of stone, not larger than will pass through a  $1\frac{1}{2}$  inch ring. All concrete above springing line of arches shall be composed of one part of cement, two parts of sand and four parts of stone, not larger than will pass through a  $\frac{3}{4}$  inch ring. All quantities are to be measured accurately by volume loose.

30 Placing. Divisions of arch rings are to be made parallel with arch span, so that the arch shall consist of solid monolithic rings. Divisions of the girders or beams, shall be made transversely at the middle of the girder. Divisions of the spandrel may be made above the springings only. The end of the arch ring must be concreted monolithically with the spandrel with no joint between.

In continuous spandrels, expansion joints must be provided over springings.

Spading. All concrete facing on walls shall be thoroughly spaded while placing the concrete so that no honey-combing will appear on the work.

Expansion Joints. Expansion joints will be placed in the structure wherever shown upon the plans and shall be carried up through the parapet walls. A beveled vertical timber to form a groove shall be attached to the bulk head and before the adjoining section is constructed, the bulk head and vertical timber shall be removed, against which surface and groove there shall be placed one layer of hydrex felt, asbestos cloth or heavy paper extending uniformly to within one-half inch of the face of the finished surface. After removing the forms, the joint shall be neatly finished on the surface with a trowel. 10

Striking Centers. The Contractor shall strike centers at such time as he may determine, and at his own risk, but not later than sixty days after the completion of the spandrels. 20

Finishing. The face forms of spandrels must be removed as soon as possible after concrete has taken its initial set, and all the pointing done while the concrete is green. The walls will then be washed with a thin mixture of one part cement and two parts of sand until the holes are thoroughly close. This wash will be allowed to set over night and the next day the walls must be gone over with a smoothing stone and clean water until uneven parts and form marks are removed. The wall must then be washed with clear water and brushed to remove the film of surface cement. 30

Drains. All surface exposed to the elements shall be so designed as to drain water to outlets.

Railings. Monolithic railings, if shown, shall be erected after striking centers on spans.

Side-Walks and Paving. Six foot walls with curb and eighteen inch gutter on each side of bridge, as shown on general plan.

Walks to have a twelve inch porous foundation, five inch base, base to have one inch wearing surface. Base to be composed of one part of Portland Cement, two parts of sand and five parts of  $\frac{3}{4}$  inch stone.

Slope to be the same as the paving.

- 10 Paving shall consist of eight inches of water bound macadam, which shall be constructed according to the Standard Specifications of the Office of Public Roads, State of New Jersey, which includes rolling with a Ten (10) Ton Steam Macadam roller.

Earth Filling. Earth filling will be made by the Contractor and must be figured in the bid as part of the structure complete.

- 20 The space between the spandrel walls shall be filled with suitable material and be thoroughly compacted by ramming, saturating with water or with proper effective means, and finished over the arch to proper grade of approaches. Filling with frozen material, will not be permitted. It is important that the filling be placed with care, gradually and uniformly, from both sides of crown of arch, so that no eccentric application of load will result.

Name Plate. A suitable unobtrusive tablet, satisfactory to the Engineer, shall be prepared for the Bridge by the Contractor and placed where directed by the Engineer.

- 30 Final Clearing. After the completion of the work, the Contractor shall remove all rubbish and obstructions he has placed in the stream to the full width of the waterway of the arch, replace all fences and put property used, in as good condition as before the work started.

Completion. Each bidder shall specify in his bid a

date before which he will complete the proposed work and failure to do so will render his bid informal. In case of failure to complete the contract before the date named, the County of Burlington shall be entitled to liquidated damages in the sum of Twenty Dollars per day of delay in completion.

Engineer. Whenever the word "Engineer" occurs in these specifications, it is intended to mean the County Engineer of Burlington County, New Jersey.

Suits and Claims. The Contractor will be required to give security in form to be approved by the County Solicitor to protect the County of Burlington, or its representatives from all actions brought against them, on account of any patents which may be used in the work, or implied in the plans or specifications. 10

Certified Check. Bids shall be accompanied by a certified check in a sum equal to ten per cent. of the total amount of the bid, payable to the order of H. E. Dubell, Director, to insure execution of the contract. This check will be returned to him immediately upon rejection of his bid or upon his entering into written contract and the filing of his bond in approved amount, with approved securities for the faithful performance of his contract. 20

Instruction to Bidder. The bidder shall furnish complete detail drawings without extra cost, said drawings may be of any patent or other method of reinforcement, and must show all sizes and spacing of reinforcing material, together with the thickness of the arch ring at crown and of abutments and piers of foundations line, all figured with and governed by the loadings as set forth by these specifications and must conform to all other measurements and requirements as set forth on plan. 30

Responsibility for Accuracy. The approval of the Engineer shall in no way relieve the Contractor from responsibility for the accurate and complete execution of

the work, and for the correctness of all detail drawings. The drawings and specifications are intended to include whatever is necessary to render the work complete, and any necessary details that may have been omitted shall be executed by the Contractor without extra cost to the County.

10 Bids. Bids will be received under these specifications as follows: For furnishing all material and labor necessary to design and construct a reinforced concrete arch bridge, over Assiscunk Creek, at Broad Street, Burlington, Burlington County, New Jersey, in strict conformity with plans and specifications, the sum of said price to include everything.

20 Bond. The Contractor must inspect the site of the bridge together with plans and specifications and by submitting a bid, he shall signify his approval of them. If awarded the contract, he shall furnish a bond to be approved by Budd M. Rigg, Solicitor of the Board of Chosen Freeholders of the County of Burlington, in an amount equal to the Contract, for the faithful performance of the work, which bond will remain in force and effect, and be held as a guarantee that the work so erected will remain safe and sound from defects of design, workmanship or material for one year from date of contract. Should the Contractor fail or neglect to do the work as specified, after the notice has been given him of such failure, the Engineer reserves the right to take the work out of his hands, have it properly done and charge him with the cost thereof.

30 The Contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given, should such error or omission be discovered.

Payments. Payments to be made on certificates of the Engineer, Eighty per cent. (80%) as the work pro-

gresses. Twenty per cent. (20%) on final acceptance and approval in writing of the Engineer and Board of Chosen Freeholders, payments to be made at the regular meeting of the Board of Chosen Freeholders, County of Burlington.

The Board of Chosen Freeholders reserves the right to reject any or all bids.

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*EXHIBIT P. 3.*

Mr. P. A. Hennessy,  
Burlington, N. J.

Dear Sir:—

Record of test pile,

Weight of hammer, 2175 lbs.

Penetration, 18 feet.

Penetration under last 20 blows,  $\frac{1}{2}$  inch per blow.

Fall of hammer, 22 feet.

20

You have my approval to drive 14 inch piles not less than 2 feet 6 inches or more than 3 feet center to center. Piles to be driven under my supervision.

Yours truly,

James Logan.

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*EXHIBIT P. 4.*

30

April 11th, 1913.

Mr. James Logan,  
Mount Holly, New Jersey.

Dear Sir:

I am in receipt of your communication dated March

20th, 1913, and in reply would state that I am unable to agree with your interpretation of my contract for the Pearl Street Arch Bridge, in so far as you claim that the same provides that I must, without extra compensation, provide suitable foundations for this bridge, or, in other words, such foundations as it now appears will have to be provided before the work may be properly done.

10 You will note that under the terms of said contract I am only to furnish materials and labor for the same in accordance with the plans and specifications attached thereto; further upon the said plans certain lines are provided as to the depth of the excavation for the foundation of the abutments, and that the work as provided also in the bid, is to be done in strict conformity with the said plans and specifications, but neither in said contract or specifications nor upon the plan, which forms a part thereof, is any provision made for piling beneath said abutments, nor is any designation for such character of work exhibited upon said plans.

20 In view of the foregoing, I am compelled to protest against doing any work of piling upon the grounds that the same is not provided nor called for by said contract, plans or specifications, but is absolutely extra work for which compensation must be made to me for the doing thereof.

30 As this matter is extremely important I would respectfully ask that you proceed toward the adjustment thereof at your earliest possible convenience, so that the work provided by the contract may be carried forward to completion within the time limited therefor.

Awaiting your early reply, I am,

Very respectfully yours,

P. A. Hennessy

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*EXHIBIT P. 5*

Burlington, New Jersey.

April 19th, 1913.

Mr. James Logan,

County Engineer, Mount Holly, New Jersey.

Dear Sir:

On April 11th, I wrote you a letter in reference to supplemental work in connection with the Pearl Street bridge contract. But up to this time I have had no reply. Kindly give this matter your attention as soon as convenient. 10

Pursuant to the contract and our conversation I wish to call your attention to my monthly estimate.

As you are aware the excavation for the small abutment has been completed for sometime.

Do you allow for material on the site, and do you wish my co-operation in making out the list for unit prices?

Hoping for an early reply, I am,

Your very respectfully 20  
P. A. Hennessy.

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*EXHIBIT P. 6*

April 24, 1913.

P. A. Hennessy, Esq.,

Burlington, N. J.

Dear Sir:—

30

The reply to your letters of the 11th and 19th inst. can be found in my letters to you dated March 17th and 20th.

At your convenience please confer with me relative

to a unit price for the excavation you have made. Kindly to this before May the first.

Your truly,  
James Logan.

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*EXHIBIT P. 7.*

10

Burlington, New Jersey.

May 9th, 1913.

Dear Sir,

As you are aware the work on Pearl Street bridge is being held up through this question of piling, you are also aware that there are no plans or specifications covering piling.

Now this matter may be greatly simplified if you will kindly give me full instructions in writing as to the requirements:—the size of piling at butt and at top, whether peeled or unpeeled, whether you want the piles all vertical or part inclined to take the horizontal thrust of the arch, if you require any inclined, state how many and what inclination, the least penetration of last blow of hammer, with a diagram showing the spacing.

In other words, I ask for complete instructions and specifications on piling accompanied by a written order to do the work required.

Very respectfully,

P. A. Hennessy,

Contractor.

30

*EXHIBIT P. 8.*

Burlington, New Jersey.

May 31st, 1913.

To the Honorable Board of  
Chosen Freeholders,  
Burlington County, N. J.

Gentlemen:

I desire to call your attention to what appears to me as  
a somewhat arbitrary and unreasonable action of your  
engineer, Mr. James Logan respecting my contract for  
the Pearl Street arch bridge at Burlington, New Jersey. 10

Briefly under said contract plans and specifications no-  
thing was stated about or provided for a pile foundation  
under the abutments of this bridge. Under these cir-  
cumstances it seems to be somewhat unreasonable con-  
sidering that my contract requires only the furnishing of  
labor and materials in accordance with the said contract  
plans and specifications, to now attempt to compel me to  
do the piling or any other work not contemplated and not 20  
called for in the said contract. If it now seems neces-  
sary to you to drive piling, I ask that you give me a sup-  
plemental contract or agreement, specifying what ad-  
ditional work not contemplated in my contract, is to be  
done and the compensation therefor, unless the County  
wishes to drive the piling itself, giving me a safe bottom  
upon which to place the structure in accordance with my  
plans, specifications and contract. I am sorry to have to  
state to you that unless such an agreement is made or the 30  
piling is driven by the County, I will be forced to refuse  
to continue the work.

When entering the contract I was financially prepared  
to carry on the work under the terms mentioned therein  
but not withstanding that I have written to the engineer,  
requesting an estimate for work done or certificate en-

titling me to payment for work done. I have not received same to date.

The entire excavation for one abutment has been completed since March; the entire reinforcing steel has been delivered at the bridge site as also two hundred barrels of cement, one hundred cubic yards of sand, and considerable crushed stone for the concrete, upon all of which I have been entitled under the contract to a payment of 80 per cent. long since due.

10 I am enclosing herewith copies of all communications, between the Engineer and myself, respecting this work.

If you desire any further information regarding these matters, before giving me relief I would be glad to have my Engineers and New York Counsel meet you in conference in the expectation of bringing these matters to a speedy adjustment and in anticipation I have arranged with my Engineers and Counsel to meet you on Saturday next the 7th, inst, and hope this date may be convenient to you.

20 I would, however, thank you to take this matter up for immediate attention so that no further injustice be done me or greater financial lost is occasioned on this work.

Respectfully submitted

P. A. Hennessy.

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*EXHIBIT P. 9.*

30

Mount Holly, N. J., June 3, 1913.

Mr. P. A. Hennessy,  
Burlington, N. J.

Dear Sir:

Your letter of 31st ult. was read at a meeting of the Board of Chosen Freeholders to-day, and I was instruct-

ed to advise you that the Board would meet and you and your engineer and attorneys at the Court House, Mount Holly, N. J., on Monday, June 9th at 2 o'clock in the afternoon. Kindly advise me at once if this date will be agreeable to you, as I must notify the members of same.

Yours very truly,  
Harry Hawkins, Jr.,  
Clerk.

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10

Burlington, N. J.  
June 5, 1913.

Mr. Harry Hawkins, Jr.,  
Dear Sir:—

In reply to your letter of 3rd inst., I regret to state that I am unable to have my engineers and attorney on Monday, June 9. I very much desire this meeting.

Do I understand correctly that Dr. LeJambre's resolution was intended to have me appear before the Board next Monday at 2 o'clock and show cause why this contract is not being completed in a satisfactory manner. 20

Your Respectfully,  
P. A. Hennessy.

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*EXHIBIT P. 10.*

Burlington, N. J.  
June 9th, 1913.

30

Honorable Members of the Board of  
Chosen Freeholders;  
Sirs:—

Under the previous Board of Freeholders, I have gone to considerable expense, in time, and in money, getting plans prepared for these bridges.

All this I assure you, gentlemen, I have done in good faith.

Now, these plans were in possession of this Board for many days before they called upon me to have the contracts executed.

Inasmuch as they had ample time to see that piling was not shown on my plans, or mentioned in my bid, or in the specifications, does it not seem a trifle unfair to ask me to do this work without extra compensation.

10 Gentlemen, I ask you to give this due consideration and decide, justly, between myself and the County of Burlington.

Yours very truly,  
P. A. Hennessy.

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*EXHIBIT P. II.*

Burlington, New Jersey,  
July 31st, 1913.

20 To the Honorable Board of  
Chosen Freeholders,  
Burlington County, N. J.

Gentlemen:

I can assure you that I did not enter into my contract for the purpose of litigation, but to build your bridges.

If, therefore, the foregone explanations and requests do not meet with your favor, I am willing to withdraw from the contracts, if you will assume control of the money expended for labor performed, and materials furnished, and incorporate a provision in the next bids and contracts, taking care of this labor and material. provided you will agree to re-advertise the both bridges, adopting the plans I have submitted and assuming payment therefore under terms satisfactory to the Concrete-Steel

30

Engineering Company. I shall thereby sacrifice all expenses due to collecting plant, loss of time, and other miscellaneous overhead charges. You will also further agree to give me an even chance with other bidders.

Now gentlemen, if this form of compromise does not seem to do justice to your county, I respectfully suggest the undoubtedly fair and modern means of arbitration of the specifications. Your honorable body, or your engineer selecting one competent engineer and myself selecting one, these two to select a third man, all to be non-residents of the State. In order to avoid a legal tangle, I shall abide by a decision on these lines, even to driving the piling without compensation. 10

Hoping this will meet with your approval and that the Pearl Street bridge will yet be finished this season, I remain

Very truly yours,  
P. A. Hennessy.

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*EXHIBIT P. 12.*

August 31, 1914.

To the Honorable Board  
of Chosen Freeholders,  
Burlington, N. J.

Gentlemen:

In the matter of my Broad Str. Bridge contract, I desire to do this work the present season while my plant is on hand. 30

Trusting that you will advise me after your next meeting I remain

Yours truly,  
P. A. Hennessy.

*EXHIBIT P. 13.*

Burlington, N. J., Feb. 9, 1915.

Mr. James Logan,  
County Engineer,  
Mt. Holly, N. J.

Dear Sir:—

10 Notwithstanding the fact that you told me in your office last Oct. you would never notify me to begin work on the Broad St. contract I take this opportunity to show that I am still willing to proceed with this work, and suggest that I start at once to set up equipment and remove the old structure.

Kindly advise if this meets with your approval or otherwise what your intentions may be in regard to this contract which was signed Dec. 18th, 1912.

I am remaining in Burlington with my equipment in anticipation of carrying out this contract.

Yours very truly,

20

P. A. Hennessy.

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*EXHIBIT P. 14.*

Burlington, N. J., Feb. 16, 1915.

Mr. James Logan,  
Mt. Holly, N. J.

Dear Sir:—

30 On the 8 instant I wrote you in reference to the Broad st. contract.

To this date I have had no reply.

I am anxious to know decidedly if you will not notify me to start this contract and what your reasons are for not allowing me to proceed with this work at once.

I believe it was the intention of the agreement to have

the contract completed during the spring and summer of 1913.

Trusting soon to hear from you on this matter, I remain,

Yours very truly,  
P. A. Hennessy.

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*EXHIBIT P. 15.*

10

Burlington, N. J.,  
May 9th, 1913.

Mr. James Logan,  
County Engineer,  
Mount Holly, N. J.

Dear Sir:—

As you are aware the work on Pearl street bridge is being held up through this question of piling, you are also aware that there are no plans or specifications covering the piling. 20

Now this matter may be greatly simplified if you will kindly give me full instructions in writing as to the requirements:—the size of piling at butt and at top, whether peeled or unpeeled, whether you want the piles all vertical or part inclined to take the horizontal thrust of the arch, if you require any inclined, state how many and what inclination, the least penetration of last blow of hammer. with a diagram showing the spacing. 30

In order words, I ask for complete instructions and specifications on piling accompanied by a written order to do the work required.

Very respectfully,  
P. A. Hennessy,  
Contractor.

*EXHIBIT A for Defendant.*

Belvidere, N. J., Oct., 23rd, 1912.

To the Board of Chosen Freeholders,

Burlington County, N. J.

Gentlemen:—

I hereby agree to furnish all material and labor necessary to design and construct a reinforced concrete arch  
 10 bridge over Assiscunk Creek at Broad Street, Burlington, Burlington County, New Jersey, in strict conformity with the specifications and plans dated July 19th, 1912, for the lump sum of Ten Thousand Eight Hundred and Seventy Dollars, (\$10,870), said price to include everything.

I further agree to complete the contract in One Hundred and Twenty (120) weather working days from the signing of the contract.

Respectfully submitted,

P. A. Hennessy.

20

*EXHIBIT B. for Defendant.*

Belvidere, N. J., Oct. 23rd, 1912.

To the Board of Chosen Freeholders,

Burlington County, N. J.

Gentlemen:—

I hereby agree to furnish all material and labor necessary to design and construct a reinforced concrete arch  
 30 bridge over Assiscunk Creek at Pearl Street, Burlington, Burlington County, New Jersey, in strict conformity with the specifications and plans dated May 23rd, 1912, for the lump sum of Fourteen Thousand Eight Hundred and Forty Dollars, (\$14,840), said price to include everything.

I further agree to complete the contract in One Hundred (100) weather working days from the signing of the contract.

Respectfully submitted,  
P. A. Hennessy.

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*EXHIBIT C. for Defendant.*

10

The undersigned agrees hereby to furnish all material and labor necessary to design and construct a reinforced concrete arch bridge over Assiscunk Creek at Broad St., Burlington, N. J., in strict compliance with the plans herewith submitted and with the enclosed specifications for the sum of Ten Thousand Nine Hundred and Fifty Dollars (\$10,950); said price to include everything and further agrees that if in the abutments it is found to be unnecessary to go as deep as shown on plan by reason of rock or other firm material, to deduct Seven Dollars 20 (\$7.00) per cubic yard for concrete left out for this reason.

And further agrees that he is awarded the contract for both bridges to deduct two per cent. (2 per cent.) of the total bids on both bridges and further agrees to complete this bridge in one hundred weather working days from signing of contract.

P. A. Hennessy,  
Belvidere, N. J.

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*EXHIBIT D. for Defendant.*

Burlington, N. J.,  
May 16th, 1913.

Mr. James Logan,  
County Engineer,  
Mount Holly, N. J.

Dear Sir:—

Please find enclosed a copy of a letter written you on  
10 May 9th, 1913.

If you know anything about my estimate kindly  
advise.

Your very truly,  
P. A. Hennessy.

*EXHIBIT E. for Defendant.*

20

March 17, 1913.

P. A. Hennessy, Esq.,  
Burlington, N. J.

Dear Sir:—

You are hereby directed to commence work on the  
Pearl Street Arch Bridge, Burlington, N. J., same to be  
completed within, One Hundred weather, working days  
from Tuesday, March 18th, 1913.

Please acknowledge receipt.

30

Your truly,  
James Logan,  
County Engineer.

EXHIBIT F. for Defendant.

March 29, 1913.

P. A. Hennessy, Esq.,  
Burlington, N. J.

Dear Sir:—

Your letter of the 18th inst. has been received.

You call my attention to the fact that you are “pre-  
pared to use any method which seems best,” and you  
offer your services, “at a very reasonable cost.” I would  
call your attention to my letter of the 17th inst. which  
states that “the contractor must provide, at his expense  
and without extra compensation suitable foundations for  
this bridge,” and I also call your attention to a clause in  
the specifications under heading “BID”, which I quote  
below. 10

“BID.” “Bids will be received under these specifica-  
tions as follows:

For furnishing all material and labor necessary to de-  
sign and construct a reinforced concrete arch bridge over 20  
Assiscunk Creek, at Pearl Street, Burlington, N. J., Bur-  
lington County, in strict conformity with plans and speci-  
fications, for the sum of ..... said price to include  
everything.

I can see no reason for any allowance for your ser-  
vices.

When I visited the work on the 17th inst. you said that  
there was no doubt that piling must be placed under the  
abutments. You have my approval to place piling for 30  
the foundations, same to be driven under inspection.  
Spacing and length of piling to be determined by driving  
a test pile.

Please acknowledge receipt of my letter of the 17th.,  
ordering you to commence work.

Your truly,

James Logan,  
County Engineer.

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*EXHIBIT G. for Defendant.*

10

May 6, 1914.

To the Honorable Board of  
Chosen Freeholders of Burlington  
County, N. J.

Gentlemen:—

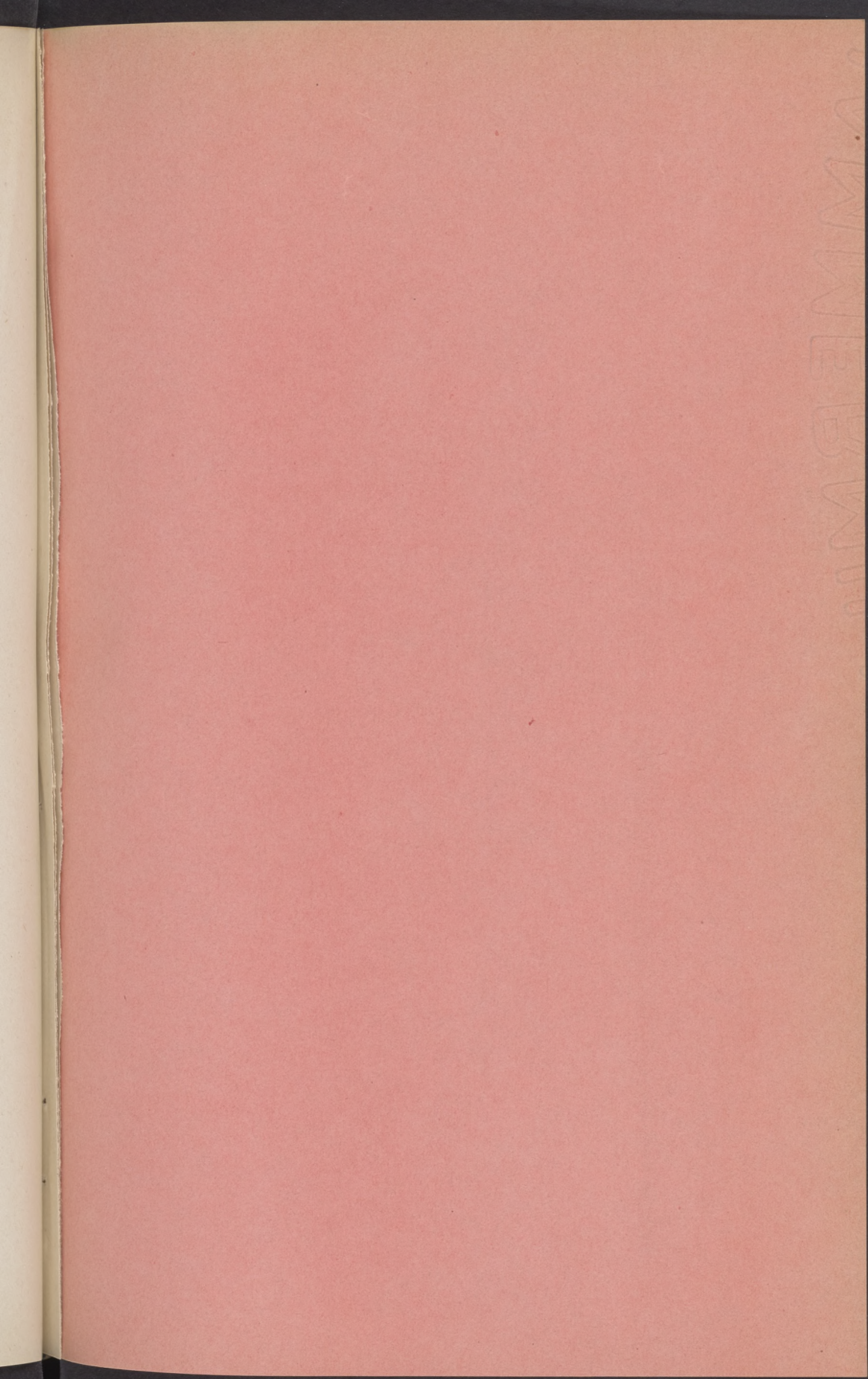
I herewith enclose bills of damage accruing through  
failure on the part of the county to fulfill its obligations  
on the Pearl St. and Broad St. contracts, let me one year  
and a half ago.

20 Trusting this matter will receive your attention that  
I may not be forced to appeal to the courts for justice.

Your very truly,

P. A. Hennessy.

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MEMORANDUM