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## Amended Complaint.

(Filed August 24, 1914.)

The plaintiff, Gumaerd Lead & Zinc Company, a corporation existing under and by virtue of the laws of the State of New Jersey and having its principal office in the Township of Montague, County of Sussex in said State, says:

FIRST COUNT.

1. That defendant, the Erie Railroad Company, is a corporation existing under and by virtue of the laws of the State of New York and that defendant is authorized to carry on business in this State.

2. That on the twenty-fourth day of June, 1909, plaintiff and defendant executed a deed of bargain and sale by indenture bearing date on that day, a copy of which is hereto attached and made part hereof, wherein and whereby they respectively granted, conveyed and secured each to the other certain lands or interests or rights in lands situated in the Town of Mount Hope, County of Orange and State of New York.

3. That said deed contained certain covenants whereby the defendant covenanted and agreed as more particularly appears in paragraphs 4, 5, 6, 7, 8 and 9 of this complaint.

4. That defendant covenanted and agreed to furnish and install across and underneath its right of way, tracks and other railroad structures a connection pipe of the same kind and material and dimensions as the one and one-half (1½) inch water pipe which existed at the time of the execution of the deed referred to in paragraph 2 hereof,

connecting with the same at a suitable point on the east of said right of way and leading therefrom to a point of connection with the same pipe on the west of said right of way in such manner that the same volume of water might flow freely across said right of way through said connection pipe and into the old or pre-existing one and one-half (1½) inch pipe as formerly.

5. That defendant covenanted and agreed to furnish and install a pipe five (5) inches in diameter of the same kind and material as the pre-existing four (4) inch pipe which, prior to the execution of the deed referred to in paragraph 2, carried a portion of the waters of the stream that flows past Guymard Depot, which five (5) inch pipe should lead, from a point in said stream upon the plot marked "shaft and building plot" upon the annexed sketch of the said right of way and adjoining property, across and underneath said right of way and connect with the existing water power pipe on lands of plaintiff west of the Guymard Depot, in such a way that the same volume of water, from the said stream, might flow through said five (5) inch pipe into said power pipe freely and with the same head as theretofore.

6. That defendant covenanted and agreed to furnish and install a suitable conduit leading from the said stream, from a point upon said plot marked "shaft and building plot," across and underneath said right of way and the right of way of the Erie and New Jersey Railroad Company; said conduit to be such as to admit of the introduction and maintenance therein by plaintiff, its successors and assigns, of a sludge pipe to be of from nine to ten inches in diameter. Defendant further covenanted and agreed to excavate and make a suitable ditch across the lands of the plaintiff, from the westerly end of said conduit,

to a point in the existing stream above the forks thereof, at such point and at such grade and in such a way that the unpiped portion of said stream should flow through said conduit and ditch across said lands and into the old channel, freely, as theretofore. Defendant further covenanted that said conduit should be of such kind and character as to admit of the installation therein of electric light and power wires of the same kind, dimensions and character as those hereinafter mentioned in paragraph 7.

7. That defendant covenanted and agreed to furnish and install electric light and power wires of the same kind and dimensions as those that were in use on said premises prior to the execution of the deed referred to in paragraph 2 hereof to connect with the existing wires at a point on said "shaft and building plot" and leading therefrom to a point of connection with the same wires at a suitable point on the west of said right of way; that plaintiff has given all necessary consents for the construction and maintenance of said wires.

8. That defendant covenanted and agreed to maintain at all times subsequent to the execution of said deed, referred to in paragraph 2 hereof, all parts or portions of such pipes, wires and conduit as should be constructed upon the defendant's right of way.

9. That defendant covenanted and agreed that if it should make any excavations upon its land adjoining "shaft and building plot" which should interfere with the natural support of the surface of said plot, it would construct and maintain such retaining walls or other devices as might be necessary to prevent its slopes from encroaching on said plot to insure the preservation of the surface of said plot in its natural and normal condition.

10. That defendant has not performed its cove-

nant referred to in paragraph 4 hereof in that it has failed to duly and properly furnish, install and maintain, across and underneath its said right of way, the one and one-half (1½) inch pipe referred to in said paragraph.

11. That defendant has not performed its covenant referred to in paragraph 5 hereof in that it has failed to duly and properly furnish, install and maintain, under and across its said right of way, the five (5) inch water power pipe referred to in said paragraph, so that the water might flow through said pipe freely and with the same head as theretofore.

12. That defendant has not performed its covenant referred to in paragraph 6 hereof in that it has failed to furnish, install and maintain a suitable conduit in accordance with its covenant as alleged therein, and has wholly refused and neglected to comply with its said covenant more particularly set forth in said paragraph.

13. That plaintiff has furnished or offered to furnish the necessary consents for the performance of the covenants set out in paragraph 7 hereof but defendant has disregarded its covenant and agreement and has failed to furnish and install electric light and power wires of the same kind and dimensions as those that were in use upon said premises prior to the date hereinbefore first mentioned in accordance with said covenant.

14. That defendant has failed to perform its covenant referred to in paragraph 8 hereof.

15. That defendant has failed to perform its covenants referred to in paragraph 9 hereof in that it has not protected and preserved the natural support of the surface of the "shaft and building plot" and in disregard of its said covenant and agreement defendant actually removed or caused

to be removed a portion of the soil or sub-surface material to such an extent that the shaft and its accessories have sagged out of alignment and have become utterly useless as a means by which mineral ores and other substances can be brought to the surface and as a means of ingress and egress for miners to and from the mine below the surface of said premises, and that the underground ventillating system formerly in use in said mine has been rendered utterly useless.

16. That defendant had notice of the existence of the plaintiff's mine prior to and at the time of the execution of the deed hereinbefore first mentioned; that plaintiff by reason of defendant's failure to perform its said covenants has been unable to work its valuable mines below and underneath the premises conveyed by the deed hereinbefore mentioned; that said mines have lain idle and that plaintiff has lost enormous profits from said ores which plaintiff might and would have extracted from said premises but for the failure of defendant to perform its said covenants and agreements; that as a result of defendant's failure to perform its said covenants the said mines have become filled and flooded with water to such an extent that the work heretofore done by plaintiff in constructing shafts, drifts and other mine workings has been rendered valueless, which, prior to the date of the deed referred to in paragraph 2 hereof, were of great value.

17. That plaintiff by reason of defendant's failure to perform its said covenants, has suffered great damage to the extent that it will cost to put plaintiff's mine, shaft and their appurtenances in good working order.

18. That plaintiff by reason of defendant's fail-

ure to perform its said covenants, has suffered great damage to the extent that plaintiff's mine and its appurtenances have decreased in value between the time of the date of the deed mentioned in paragraph 2 hereof and the date of the commencement of this action.

Plaintiff demands the sum of $150,000 damages.

**Copy of Deed Referred to in Complaint.**

THIS INDENTURE, made the 24th day of June, in the year one thousand nine hundred and nine, between GUMAERD LEAD AND ZINC COMPANY, formerly named Bergenport Zinc Company, a corporation of the State of New Jersey duly authorized to do business within the State of New York, party of the first part, and ERIE RAILROAD COMPANY, a corporation of the State of New York, party of the second part:

WITNESSETH:

That the said party of the first part, in consideration of the sum of one dollar, lawful money of the United States, and other good and valuable considerations in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, does hereby grant, bargain, sell, remise, release and convey unto the said party of the second part, its successors and assigns forever.

ALL those certain lands and premises situate and being in the Town of Mount Hope, County of Orange and State of New York, bounded and described as follows:

BEGINNING at Station 71 + 33 on the center line of the Erie and Jersey Railroad; running thence north 54° 20′ west, fifty-one feet, more or less, to the westerly right of way line of the Erie Rail-

road; thence along said westerly right of way line, following the curve thereof to the right, seven hundred and fifty-seven feet, more or less, to a point, corner to the lands formerly of Laertes W. Gumaer and lands formerly of Cox, Dill and Watts, known as the "eighteen-acre hotel tract," and lands of the Erie Railroad; thence along said right of way line north 28° 26′ east ninety-seven feet; thence along said right of way line still north 28° 26′ east eleven hundred and eighty-one and nine-tenths feet to a point in the center of the public road at Guymard; thence along said right of way line still north 28° 26′ east one hundred and ninety-three and four-tenths feet to the division line between lands formerly of Sarah J. Gumaer and lands of the Gumaerd Lead and Zinc Company; thence along said right of way line still north 28° 26′ east one hundred and ninety-one and seven-tenths feet to the division line between lands of Gumaerd Lead and Zinc Company and lands formerly of Helene Plock; thence along said right of way line north 30° 46′ east six hundred and fifty-one and four-tenths feet to a point of curve; thence along said right of way line, following the curve thereof, five hundred feet to a point of tangent; thence along said right of way line north 25° 48′ east one thousand feet to a point of curve; thence along said right of way line and following the curve thereof two hundred feet to a point of tangent; thence along said right of way line north 27° 48′ east fifteen hundred and seventy feet to a point, corner of lands formerly of Helene Plock, lands formerly of Mary Hovencamp and lands of the Erie Railroad; thence south 53° 16′ east one hundred and three feet, more or less, crossing the Erie Railroad to the easterly right of way line thereof; thence along

said easterly right of way line of the Erie Railroad in a general direction somewhat west of south for a distance of 4,122 feet, more or less, to a point, corner to the lands of Andrew J. Gumaer, lands conveyed to Erie Railroad by Andrew J. Gumaer, and lands of the Erie Railroad; thence south 61° 34′ east one hundred and eighty feet; thence south 28° 26′ west twenty-two hundred and sixty-nine and five-tenths feet to a point, corner to the lands of Andrew J. Gumaer, lands of John Fitzgibbons and Mrs. Margaret Murphy and lands formerly of Andrew J. Gumaer; thence north 54° 20′ west one hundred and twenty-seven and one-tenth feet to the easterly right of way line of said Erie Railroad Company, thence north 54° 20′ west fifty-one feet, more or less, to the point of beginning.

The above described lands being shown within red outlines upon the map marked "Erie R. R., Erie & Jersey R. R. right of way map, Guymard, N. Y., Office of Chief Engineer, June 2, 1909," hereto annexed and made a part hereof.

Being a strip of land one hundred feet wide and about 6,350 feet long, occupied as right of way by said Erie Railroad and an adjoining parcel consisting of nine acres which was conveyed to said Erie Railroad Company by Andrew J. Gumaer by deed dated February 29, 1908, and recorded March 5, 1908, in Orange County Clerk's Office in Book 498, at page 155.

EXCEPTING THEREFROM AND RESERVING to the party of the first part, its successors, and assigns, all ores, minerals and fossil substances within the boundaries and below the surface of the above described premises, with the right by all proper and usual or appropriate subterranean methods to mine and remove the same. Provided, that no

tunnel, drift or other mine working underneath the railroad track or tracks shall be constructed, operated or maintained in such manner that such tunnel, drift or other mine working shall run longitudinally with such track or tracks; that no tunnel, drift or other mine working shall, except as hereinafter specifically set forth, be constructed or maintained so as to interfere with the exclusive use by the party of the second part of the surface of said premises or the proper support of said surface or of any structures or improvements that may now or hereafter be placed thereon; that no tunnel, drift or other mine working shall be constructed or maintained and no mining operations of any kind shall be carried on under any part of said premises so as to endanger or render unsafe any railroad structures or operations now or hereafter erected or maintained on said premises, or so as to interfere in any manner with the use of said premises for railroad purposes.

AND PROVIDED FURTHER that the plans of any and all tunnels, drifts and other mine workings underneath said premises shall be submitted from time to time to the chief engineer of the party of the second part, its successors or assigns, a reasonable time before the same are constructed, and such plans and said tunnels, drifts and other mine workings shall be subject at all times to the reasonable inspection and supervision and approval of the said chief engineer, so as to insure safety to the railroad of the party of the second part and avoid interference with its proper operation.

In case of any disagreement as to the application of the preceding section or any claim arising thereunder or any question as to the plans or methods employed or proposed to be employed by the party of the first part, its successors or as-

signs, in connection with its mining operations as hereinbefore provided for, which the parties fail to adjust between themselves, such matter or matters of disagreement shall be submitted for arbitration to a tribunal consisting of three competent, experienced and disinterested persons, one to be appointed by the party of the first part, its successors or assigns, one by the party of the second part, its successors or assigns, and the two thus chosen shall choose a third. The tribunal so constituted shall proceed without delay to determine the questions and matters submitted to them for arbitration and the decision and award of a majority of the arbitrators when made in writing and signed by them shall be final and binding upon the parties. The cost and expense of any such arbitration shall be borne and paid equally by the parties thereto.

The said party of the second part does, for itself, its successors and assigns, hereby covenant and agree with the party of the first part, its successors and assigns, to furnish and install across and underneath the right of way and the tracks and other railroad structures to be placed upon the railroad right of way included in the above described premises, a connection pipe of the same kind, material and dimensions as the existing one and one-half inch water pipe connecting with the same at a suitable point on the east of such tracks and structures and leading therefrom to a point of connection with the same pipe on the west of such tracks and structures in such a way that the same volume of water may flow freely across said right of way through the said connection pipe and into the existing one and one-half inch pipe as heretofore; also a pipe five inches in diameter, of the same kind and material as the existing four inch pipe which now carries

a portion of the waters of the stream that flows past the Guymard Depot, which five inch pipe shall lead from a point in said stream upon the plot marked "Shaft and Building Plot" upon the annexed map, across and underneath said right of way and shall connect with the existing water power pipe on the lands of the party of the first part, west of the Guymard Depot, in such a way that the same volume of water from the said stream may flow through said five inch pipe into said power pipe freely and with the same power as heretofore; also a suitable conduit leading from the said stream from a point upon said plot marked "Shaft and Building Plot" across said right of way and the right of way of the Erie and Jersey Railroad, with a suitable ditch across the lands of the party of the first part from the westerly end of said conduit to a point in the existing stream above the fork thereof at such point and grades and in such a way that the unpiped portion of said stream shall flow through said conduit and ditch across said lands and into the old channel freely as heretofore; said conduit to be such as to admit of the introduction and maintenance therein by said party of the first part, its successors and assigns, of a sludge pipe of nine to ten inches in diameter; also electric light and power wires of the same kind and dimensions as the existing wires, connecting with said existing wires at a point on said "Shaft and Building Plot" and leading therefrom to a point of connection with the same wires at a suitable point on the west of such right of way, tracks and structures. The party of the first part shall furnish all necessary consents for the construction of those portions of said pipes, conduits, wires and ditch as are to be located outside the lands of the Erie and Erie and Jersey Railroad Companies.

Such parts of said pipes, wires, conduit and ditch as shall be constructed upon the right of way of the said party of the second part, shall be maintained thereafter by the party of the second part, its successors and assigns.

TOGETHER with the appurtenances thereof, and all the estate, right, title, and interest of the party of the first part in and to said premises.

TO HAVE AND TO HOLD the above granted and described premises unto the said party of the second part its successors and assigns forever, subject, however, to the conditions, covenants and reservations herein contained.

And the said party of the first part does, for itself, its successors and assigns, hereby covenant with the said party of the second part, its successor and assigns, that it, the said party of the first part, has not done, suffered or caused to be done, any act, matter or thing whereby the said premises have been encumbered in any way whatever.

THIS INDENTURE FURTHER WITNESSETH, that the party of the second part, in consideration of one dollar paid by the party of the first part, the receipt whereof is hereby confessed and acknowledged, does hereby grant and release to the party of the first part, its successors and assigns forever.

(a) All the ores, minerals and fossil substances within the boundaries and below the surface of the above described premises, with the right by all proper and usual or appropriate subterranean methods to mine and remove the same, provided that no tunnel, drift or other mine working underneath the railroad track or tracks shall be constructed, operated or maintained in such manner that such tunnel, drift or other mine

working shall run longitudinally with such track or tracks; that no tunnel, drift or other mine working shall, except as hereinafter specifically set forth, be constructed or maintained so as to interfere with the exclusive use by the party of the second part of the surface of said premises or the proper support of said surface or of any structures or improvements that may now or hereafter be placed thereon; that no tunnel, drift or other mine working shall be constructed or maintained and no mining operations of any kind shall be carried on under any part of said premises so as to endanger or render unsafe any railroad structures or operations now or hereafter erected or maintained on said premises, or so as to interfere in any manner with the use of said premises for railroad purposes. And Provided Further, that the plans of any and all tunnels, drifts and other mine workings underneath said premises shall be submitted from time to time to the chief engineer of the party of the second part, its successors or assigns, a reasonable time before the same are constructed, and such plans and said tunnels, drifts and other mine workings shall be subject at all times to the reasonable inspection and supervision and approval of the said chief engineer, so as to insure safety to the railroad of the party of the second part and avoid interference with its proper operation.

In case of any disagreement as to the application of the preceding section or any claim arising thereunder or any question as to the plans or methods employed or proposed to be employed by the party of the first part, its successors or assigns, in connection with its mining operations as hereinbefore provided for, which the parties fail to adjust between themselves, such matter or matters of disagreement shall be submitted for arbi-

tration to a tribunal consisting of three competent, experienced and disinterested persons, one to be appointed by the party of the first part, its successors or assigns, one by the party of the second part, its successors or assigns, and the two thus chosen shall chose a third. The tribunal so constituted shall proceed without delay to determine the questions and matters submitted to them for arbitration and the decision and award of a majority of the arbitrators when made in writing and signed by them shall be final and binding upon the parties. The cost and expense of any such arbitration shall be borne and paid equally by the parties thereto.

(b) Also with respect to the parcel of land hereinafter described and referred to as the "Shaft and Building Plot," the following rights, to wit: The right by all proper and usual or appropriate subterranean methods to mine and remove all the ores, minerals and fossil substances within the boundaries and below the surface of said parcel; also the right to mine through, use, operate, extend and maintain the existing shaft, with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery, dumps, milling and other devices for treating ores and the products thereof as shall or may be proper or necessary for use in connection with the mining, removal or treating of ores and minerals obtained from said parcel and other lands in the vicinity of the hereinbefore described premises; also the right to construct and maintain on said "Shaft and Building Plot" one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, providing that said air or ventilating shaft

shall be located at least seventy-five feet easterly from the westerly side of said "Shaft and Building Plot," Provided, However, that the exercise of said rights with respect to said parcel by the party of the first part shall not interfere with, endanger or render unsafe any railroad structures or operations now or hereafter erected or maintained on the other portions of the herein described premises, and shall not interfere in any manner with the use of said other portions for railroad purposes, or with the proper support of the surface of said other portions or of any part thereof or of any structures or improvements that may now or hereafter be placed thereon, and Provided Further, that the plans of any and all tunnels, drifts and other mine workings underneath said parcel shall be submitted to the chief engineer of the party of the second part, its successors or assigns, a reasonable time before the same are from time to time constructed and such plans and said tunnels, drifts and other mine workings underneath such parcel shall be subject at all times to the reasonable inspection and supervision and approval of said chief engineer so as to insure safety to the railroad of the party of the second part, located upon said adjoining lands, and avoid interference with its proper operation. The party of the second part, its successors or assigns, shall have the right to use said "Shaft and Building Plot" at such times and to such extent as shall not interfere with the free and obstructed exercise of the rights herein granted, excepted or reserved to the party of the first part. The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such

retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel.

In case of any disagreement as to the application of this section or any claim arising thereunder or any question as to the plans or methods employed or proposed to be employed by the party of the first part, its successors or assigns, in connection with its mining operations as hereinbefore provided for, which the parties fail to adjust between themselves, such matter or matters of disagreement shall be submitted for arbitration to a tribunal consisting of three competent, experienced and disinterested persons, one to be appointed by the party of the first part, its successors or assigns, one by the party of the second part, its successors or assigns, and the two thus chosen shall choose a third. The tribunal so constituted shall proceed without delay to determine the questions and matters submitted to them for arbitration and the decision and award of a majority of the arbitrators when made in writing and signed by them shall be final and binding upon the parties. The cost and expense of any such arbitration shall be borne and paid equally by the parties thereto.

Said "Shaft and Building Plot" is more particularly described as follows, to wit:

ALL those certain lands and premises situate at Guymard, in the Town of Mount Hope, County of Orange and State of New York, bounded and described as follows:

BEGINNING at the northwest corner of a tract of nine acres, conveyed to the Erie Railroad Company by Andrew J. Gumaer by deed dated February 29, 1908, recorded March 5, 1908, in Book 498, page 156; thence (1) south 61° 34′ east one hundred

and eighty feet to the northeast corner of said nine-acre tract; thence (2) south 28° 26′ west one hundred and sixty-two feet, more or less, along the easterly side of said nine-acre tract to the northerly side of the present public road at Guymard; thence (3) along said northerly side of said public road north 61° 34′ west fifty feet; thence (4) south 28° 26′ west one hundred and sixty-five feet to a point distant one hundred and thirty feet south 61° 34′ east from a point ten feet southerly and three feet westerly from the sides of the existing shaft house of the party of the first part on said nine-acre tract; thence (5) north 61° 34′ west one hundred and thirty feet to said point ten feet southerly and three feet westerly from the sides of the said existing shaft building; thence (6) north 28° 26′ east three hundred and twenty-seven feet, more or less, to the point of beginning; said fifth and sixth courses being intended to run respectively ten feet and three feet from the southerly and westerly sides respectively of said shaft building, being the premises marked "Shaft and Building Plot" and included within green boundary lines on said map of June 2, 1909, hereinbefore referred to.

(c) Also the right to construct, maintain and operate, for use in connection with such mining operations, a private overhead crossing at the sole cost and expense of said party of the first part. Such crossing shall extend from a suitable point upon the lands hereinbefore referred to as the "Shaft and Building Plot" across the rights of way of the Erie and Erie and Jersey Railroads to a suitable point upon the lands of the party of the first part, which lie to the west of said Guymard Depot, the specific location of said overhead crossing to be subject to the approval of the chief engineer of said railroad companies,

their successors and assigns. *Provided,* however, that said overhead crossing shall be constructed and maintained and used with a clearance of not less than twenty-two feet above the top of the rails of the tracks of said railroads, at such height and in such manner as not to interfere with the use of the rights of way of said railroad companies for railroad purposes or so as to interfere with or endanger the running of trains thereon, and provided further, that said crossing shall be constructed in accordance with plans to be submitted to and approved by the chief engineers of said railroad companies and the party of the first part agrees to make such repairs to said crossing from time to time as said chief engineers shall reasonably deem necessary for the safety of traffic on said railroads and to remove the same when no longer necessary for use in connection with such mining operations.

The party of the first part hereby releases and discharges forever the party of the second part, its successors and assigns, from building, constructing and maintaining any private or farm crossings over or across the lands hereby conveyed or any private roads in connection therewith upon and adjoining lands owned by first party: It being the intention and purpose of first party to forever relinquish, surrender and release all right to have any private or farm crossings over or across the lands hereby conveyed or over or across any railroad constructed thereon in connection with any adjoining lands owned by the party of the first part, either by operation of law, contract or otherwise, except as hereinbefore specifically provided. All the covenants herein contained shall be construed by any court of law or equity as covenants running with the land and

shall bind the covenantors, their successors and assigns forever. Together with the appurtenances thereof and all the estate, right, title and interest of the party of the second part in and to the above granted and released rights and property.

To have and to hold the above granted rights and property unto the said party of the first part, its successors and assigns, for the uses and purposes and subject to the conditions and covenants as hereinbefore provided.

In witness whereof the said parties of the first and second parts have caused these presents to be duly executed, the day and year first above written.

Gumaerd Lead and Zinc Company,
By
President.

Attest:
Secretary.

Erie Railroad Company,
By. F. D. Underwood,
President.

Approved:
F. L. S. 6/23/09,
Chief Engineer.
Approved as to form:
G. F. B., 6/23 '09,
Vice-President and General Solicitor.
Attest:
David Bosman,
Secretary.

STATE OF NEW YORK, }
County of } ss.:

On this day of in the year one thousand nine hundred and nine, before me personally came to me known, who, being by me duly sworn, did depose and say that he resided in that he is the President of GUMAERD LEAD AND ZINC COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

On this 24th day of June in the year one thousand nine hundred and nine, before me personally came E. D. UNDERWOOD to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he is the President of ERIE RAILROAD COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

A. L. TRAVIS,
Notary Public, Kings County.
Certificate filed in New York County.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } SS.:

I, PETER J. DOOLING, Clerk of the County of New York, and also Clerk of the Supreme Court for the said county, the same being a court of record, DO HEREBY CERTIFY, that A. L. Travis has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the handwriting of such notary, and believe the signature to the said certificate of proof or acknowledgment to be genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county, the 24th day of June, 1909.

PET. J. DOOLING,
Clerk.

(Blue print attached.)

## Answer.

(Filed September 12, 1914.)

Defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in the State of New Jersey at the foot of Pavonia Avenue, Jersey City, says that:

FIRST DEFENSE.

1. It admits paragraphs one, two, three, four, five, six, seven and eight, except in so far as the same allege conclusions of law as to the construction and interpretation of said deed of June 24, 1909.

2. It denies paragraphs nine, ten eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen.

SECOND DEFENSE.

The damages, if any, sustained by the plaintiff, were due to its failure to exercise reasonable care to prevent or to decrease or to minimize the damages necessarily incident to the work of constructing and operating railroad tracks and the appurtenances thereof.

THIRD DEFENSE.

The damages, if any, sustained by the plaintiff by reason of the alleged breaches of covenants, were due solely to the operations of Erie & Jersey Railroad Company which were necessarily incident to the work of constructing and maintaining a railroad track of said Erie & Jersey Railroad Company and the appurtenances thereof.

FOURTH DEFENSE.

The damages, if any, sustained by the plaintiff by reason of the alleged breaches of covenants, were due solely to the operations of certain independent contractors, to wit, James A. Bennett and Robert Talbott, a co-partnership doing business under the name of Bennett & Talbott, pursuant to the provisions of a certain agreement dated August 10, 1905, as modified June 5, 1907, wherein and whereby the said James A. Bennett and Robert Talbot, a co-partnership, agreed to construct and complete all the work of excavating, grading, masonry, tunneling, drainage and construction of a standard double track roadbed from Howells, New York, to Guymard, New York.

*Answer.*

FIFTH DEFENSE.

The damages, if any, sustained by the plaintiff by reason of the alleged breaches of covenants, were due solely to the operations of this defendant and of Erie & Jersey Railroad Company as common carriers organized as railroad corporations under the laws of the State of New York; said damages were necessarily and unavoidably incident to the work of constructing, maintaining and operating railroad tracks and the appurtenances thereof.

SIXTH DEFENSE.

So far as relates to the allegations of paragraph fifteen of the complaint, this defendant did not disregard the said covenant and agreement, and did not actually remove or cause to be removed a portion of the soil or said surface material to such an extent that the shaft and its accessories have sagged out of alignment and have become utterly useless as a means by which mineral ores and other substances can be brought to the surface, and as a means of ingress and egress for miners to and from the mine below the surface of the said premises, and to such an extent that the underground ventilating system formerly in use in said mine has been rendered utterly useless.

SEVENTH DEFENSE.

So far as relates to the allegations of paragraph fifteen of complaint, it was agreed in one of the sections of said deed of June 24, 1909, that in case the defendant should make any excavations upon its adjoining lands which should interfere with the natural support of the surface of the said parcel described in said deed as "Shaft and Build-

ing Plot," it, the said defendant, would construct and maintain such retaining walls or other devices as might be necessary to prevent its slopes from encroaching on said parcel; and that in case of any disagreement as to the application of said section, or as to any claims arising thereunder which the parties to said deed should fail to adjust between themselves, such disagreements and claims should be submitted for arbitration to a tribunal of three competent, experienced and disinterested persons, one to be appointed by the plaintiff, one by the defendant, and the two thus chosen to choose a third; that the tribunal so constituted should proceed without delay to determine the questions and matters submitted to them for arbitration, and that the decision and award of a majority of the arbitrators when made in writing and signed by them should be final and binding upon the parties. Certain disagreements arose as to the application of said section of said deed of June 24, 1909, and as to certain claims arising thereunder, prior to the beginning of this suit; which said disagreements and claims are the matters referred to in paragraph fifteen of the complaint. Under said provisions of said deed the plaintiff was required as a condition precedent to the institution of this suit, so far as relates to the matters set forth in said paragraph fifteen, to arbitrate or offer to arbitrate said disagreements and claims; plaintiff did not, prior to the institution of this suit, arbitrate or offer to arbitrate said disagreements and claims. Defendant insists that the plaintiff's amended complaint so far as relates to the matters set forth in paragraph fifteen, is insufficient and defective in point of law because it fails to allege that the plaintiff arbitrated or offered to arbitrate pursuant to the said provisions of the said deed.

*Answer.*

EIGHTH DEFENSE.

So far as relates to the allegations of paragraph fifteen of the complaint, it was agreed in one of the sections of said deed of June 24, 1909, that in case the defendant should make any excavations upon its adjoining lands which should interfere with the natural support of the surface of the said parcel described in said deed as "Shaft and Building Plot," it, the said defendant, would construct and maintain such retaining walls or other devices as might be necessary to prevent its slopes from encroaching on said parcel; and that in case of any disagreement as to the application of said section, or as to any claims arising thereunder which the parties to said deed should fail to adjust between themselves, such disagreements and claims should be submitted for arbitration to a tribunal of three competent, experienced and disinterested persons, one to be appointed by the plaintiff, one by the defendant, and the two thus chosen to choose a third; that the tribunal so constituted should proceed without delay to determine the questions and matters submitted to them for arbitration, and that the decision and award of a majority of the arbitrators when made in writing and signed by them should be final and binding upon the parties. Certain disagreements arose as to the application of said section of said deed of June 24, 1909, and as to certain claims arising thereunder prior to the beginning of this suit. Pursuant to said provisions in said deed, the defendant, prior to the beginning of this suit, offered to arbitrate said disagreements and claims, and the plaintiff declined so to do.

## Reply.

(Filed October 3, 1914.)

Plaintiff replying to defendant's answer to plaintiff's amended complaint says:

1. That it denies all the allegations contained in the 2, 3, 4, 5 and 8 defenses of defendant's said answer.

2. That it denies that defendant did, in fact, offer to arbitrate in accordance with the allegations contained in the 7th defense in said answer and says that it was always ready and willing to arbitrate all matters in difference between it and defendant and did, in fact, offer so to do but that defendant did everything in its power to impede all arbitration negotiations and finally refused to accept plaintiff's offer to arbitrate.

The plaintiff will make the following objections to the 4th and 7th defenses respectively set out in said answer:

1. Plaintiff will object to the 4th defense on the ground that it is insufficient in law because acts of third parties do not relieve defendant from the burdens of its own covenant.

2. Plaintiff will object to the 7th defense on the ground that it is insufficient in law because an agreement to arbitrate will not oust this court of jurisdiction of the subject matter of this action.

## Rejoinder.

(Filed October 6, 1914.)

1. Defendant denies that the plaintiff was always or at any time ready and willing to arbitrate the matters in difference between it and the defendant in this action, and denies that the plaintiff did in fact order to arbitrate such matters, and denies that it did everything in its power to impede such arbitration and negotiations, and denies

that it refused to accept plaintiff's offer to arbitrate, and says that on the contrary the plaintiff at no time made any offer to arbitrate the matters in question in this action.

2. The defendant will object to the second reply to the defendant's answer to the plaintiff's amended complaint on the ground that the said reply is insufficient in point of law for the reason that said reply does not limit plaintiff's offer to arbitrate to the matters included in the agreement set forth in the amended complaint and upon which the plaintiff's alleged causes of action depend.

## Rule Amending Amended Complaint.

(Filed April 22, 1915.)

It appearing to the Court that the amended complaint filed in the above stated action should be amended, it is upon motion of Coult & Smith, attorneys for plaintiff, ordered that paragraph 16 of the amended complaint be, and the same is hereby amended as follows by inserting after the word "mentioned" in line 7 thereof, the following:

> "And also to enjoy the rights to mine, which said plaintiff had in certain tracts of land known as the Dill, Watts and Cox tracts, lying adjacent to said shaft and building plot on the west, and in a certain tract of land known as the A. J. Gumaer tract, adjoining said shaft and building plot on the easterly side thereof, which said rights to mine are more particularly described in a certain mining lease made by Ezekiel P. Gumaer, Jacob C. E. Gumaer, Peter L. Gumaer and Andrew J. Gumaer, to Stephen Hills, Jr., dated September 20th, 1862, and assigned to said plaintiff by C. I. Gumaer by deed of assignment dated May 1st, 1907."

**Postea.**

## NEW JERSEY SUPREME COURT.

SUSSEX COUNTY.

| | | |
|---|---|---|
| GUMAERD LEAD AND ZINC COMPANY, a corporation, *Plaintiff,* *vs.* ERIE RAILROAD COMPANY, a corporation, *Defendant.* | | Action at Law. |

This case was tried before Judge George S. Silzer with a jury at the Sussex Circuit on December 19, 1916.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Thirteen Thousand Six Hundred and 00/100 ($13,600.00) Dollars.

GEO. S. SILZER,
Circuit Court Judge.

## Testimony.

### NEW JERSEY SUPREME COURT.

SUSSEX COUNTY.

THE GUMAERD LEAD AND ZINC COMPANY,

*Plaintiff,*

*vs.*

THE ERIE RAILROAD COMPANY,

*Defendant.*

Before:

HON. GEORGE S. SILZER, J., and a jury.
Newton, N. J., December 19, 1916.

APPEARANCES:

MESSRS. COULT & SMITH (T. M. Woodruff, Esq., and Joseph Coult, Jr., Esq.), for the Plaintiff.

MESSRS. COLLINS & CORBIN (Hon. Gilbert Collins and G. S. Hobart, Esq.), for the Defendant.

A jury being empanelled and found satisfactory they were sworn.

The Court thereupon took a recess until one o'clock this day.

AFTER RECESS.

Mr. Coult opens for the plaintiff.

Mr. Collins opens for the defendant.

MR. COULT: I offer in evidence a deed made by the Gumaerd Lead & Zinc Company to the Erie Railroad Company, dated June twenty-fourth, 1909, approved on the same day.

Admitted and marked "Plaintiff's Exhibit P-1" of this date.

MR. COULT: There were certain interrogatories propounded at the last trial. Mr. Hobart and I read the answers to them. I will now read the following from those interrogatories:

FIRST INTERROGATORY: What estate did the defendant have in the lands described in the deed, a copy of which is annexed to the complaints filed in this action, which extends westerly from the westerly line of said shaft and building plot, as described in said deed for a distance of a hundred feet, more or less, at and subsequent to the date of the record of such deed?

ANSWER: The defendant has whatever estate is given to it as successor in interest to the New York and Erie Railroad Company, which latter company acquired certain rights in the premises in question by virtue of condemnation proceedings, also whatever estate is given to it by the deed dated June twenty-fourth, 1909, a copy of which has been offered and marked Exhibit P-1 of this date.

SECOND INTERROGATORY: What estate or rights, if any, were conveyed, granted or delegated in or the premises referred to in the first interrogatory, from the date of the record of said deed to the date of the commencement of this action, giving the names of the person or corporation to whom they were conveyed, delegated or granted, and if in writing, annex a copy or copies thereof, and, if recorded, the date and place of record?

ANSWER: No estates or rights were conveyed by the defendant.

*Introduction of Exhibits.*

THIRD INTERROGATORY: Did the Erie Railroad Company convey or grant any rights or right to the Erie & Jersey Railroad Company in and to the premises mentioned in the first interrogatory, and if so, what rights were conveyed or granted and how are they evidenced, and if in writing annex a copy or copies thereof, and a reference to where recorded?

ANSWER: This answer is limited to the period between the time referred to in the first interrogatory and the date of the commencement of the action, and with that understanding, the answer to that will be that the defendant did not convey or grant any right or rights to the Erie and Jersey Railroad Company.

MR. COULT: We also offer in evidence the map, to which I understand there is no objection.

MR. HOBART: No. There is no objection.

MR. COULT: It is a map entitled, a map of old and new water courses, pipe lines, property lines and ore veins of the Gumaerd Lead Company, dated October, 1914, L. H. Robinson, C. E.

Admitted and marked "Plaintiff's Exhibit P-2" of this date.

MR. COULT: We also offer in evidence a photograph entitled, "Gumaerd Lead & Zinc Company shaft house, taken March 11th, 1910.

Admitted and marked "Plaintiff's Exhibit P-3" of this date.

MR. COULT: We also offer in evidence photograph entitled Gumaerd Lead & Zine Company, shaft-house taken march fourth, 1910.

Admitted and marked "Plaintiff's Exhibit P-4" of this date.

MR. COULT: We also offer in evidence a photograph entitled Gumaerd Lead & Zinc Company, shaft-house and shaft exposed, taken March eleventh, 1910.

Admitted and marked "Plaintiff's Exhibit P-5" of this date.

MR. COULT: We also offer in evidence photograph, taken September sixth, 1914, showing shaft-house, crib work and retaining wall.

Admitted and marked "Plaintiff's Exhibit P-6" of this date.

MR. COULT: We also offer in evidence photograph showing the shaft-house and certain construction work of the railroad, bearing date March fourth, 1910.

Admitted and marked "Plaintiff's Exhibit P-7" of this date.

MR. COULT: We also offer in evidence a photograph entitled, "Showing wrecked shaft and subsidence without date."

Admitted and marked "Plaintiff's Exhibit P-8" of this date.

MR. COULT: We also offer in evidence photograph showing the interior of the shaft-house without date and without title.

Admitted and marked "Plaintiff's Exhibit P-9" of this date.

CHAUNCEY I. GUMAER, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Where do you live? A. At Guymard, Orange County, New York.

Q. How old are you? A. I am fifty-six years old.

Q. What is your business? A. I am a mining engineer.

Q. How long have you practiced that profession? A. For ten or fifteen years.

Q. What experience have you had as a mining engineer? A. Sinking shafts and general supervision of mining operations.

Q. Where have you worked? A. At Alma Colorado, and at Guymard, New York.

Q. Where were you born? A. I was born in the Town of Deer Park, about two miles from Guymard.

Q. When did you go West? A. When I was nineteen years old.

Q. What did you do out there? A. I mined, I was in the general mercantile business three years, I was County Commissioner, and two years Chairman of that Board.

Q. In what county? A. In Henry County.

Q. What state? A. Colorado.

Q. How many years did you put in there? A. Probably fifteen or sixteen out of the twenty-four that I was in Colorado.

Q. What mines did you work in out there? A. I had charge of the Champagne Mining Company, and Burkton Company's Mining operations, where we sunk ten shafts on one property.

Q. What kind of mines were those? A. Silver-lead mines.

Q. Did you have anything to do with sinking the shafts? A. I did. I was right there with the men and saw that the work was done properly, I also did the work.

Q. Under whose charge were they? A. Under my charge.

Q. Did you have any other experience with sinking shafts while you were in Colorado? A. We sunk very many shafts, probably forty or fifty.

Q. Can you name some others besides the one property that you have mentioned? A. Yes, I sunk a shaft up on the Alhambra, in that same district, and I sunk ten shafts on the Burton Company, I sunk two shafts for the Champagne Gold and Silver Mining Company, and a good many on individual leases that I had.

Q. Leases that you had yourself? A. Leases that I had secured, I was the lessee of the property, I had taken leases on other mines.

Q. Working under your own name? A. Working under my own name, yes, sir.

Q. When did you come East? A. I made a visit in 1902, and I came back here in 1904, and I was here those two times, in 1902 and 1904.

Q. You are connected with the Gumaerd Lead and Zinc Company, the plaintiff in this case? A. I am.

Q. And you were first connected with that company when? A. I think January twelfth, 1907.

Q. In what capacity? A. I had charge of the work that was going on there at Guymard and I was general manager, I was elected general manager in 1909, but I had charge of the work previour to that, between 1907 and 1909.

Q. Where is the mining property of the plaintiff company located at Guymard? A. It is located, well, right at Guymard.

Q. I mean, with reference to the Erie Railroad tracks, for instance? A. On the easterly side of the Erie Railroad tracks, that is where the work was—there were ores in other localities there, but that is where the main work was.

Q. On the twenty-fourth day of June, 1909, what work did the Gumaerd Lead & Zinc Company have near the tracks of the Erie Railroad Company at Guymard, Orange County, New York? A. We had a shaft down nearly ninety feet, from that shaft, at about sixty-five feet, there was a wing, a cross cut, what we call a cross cut, an opening, running from the shaft toward the Guymard vein. That afterward intersected that vein, running to the west about thirty-five feet, on the vein, running to the east, about seventy or seventy-five feet, something like that on the east, and after the cross cut had passed through the vein about forty-five or forty-eight feet, something like that. The mine was equipped with an engine, boiler for hoisting purposes, blacksmith shop, shaft-house, we had electric power plant, down below that furnish the electric lights for the mine. We had tracks laid in this mine opening, whereby we could run the material up to the shaft and raise it to the surface. The shaft consisted of what we call a two compartment shaft, one for the hoisting and one for the latters and air pipes. That opening was used by the miners going up and down to their work. That is the main equipment. We also had water pipes to furnish water to the boiler and furnish water for household purposes; we also had power pipes, four-inch power pipes, that brought the water down from the creek to the power house where we developed the electricity. Do you want me to confine it to just what the Gumaerd Lead and Zinc Company had on there?

Q. Well, you are familiar with the plot which is mentioned in the deed in evidence as the Shaft and Building Plot? A. I am.

Q. Were there any other structures on that Shaft and Building Plot besides those of the Gumaerd Lead and Zinc Company? A. There was.

Q. What? A. There was a dwelling house belonging to the Erie Railroad Company. There was what had been a creamery, bought for the contractors. Part of the Freight House of the Erie Railroad stood on the parcel. That is all.

Q. How long had the Gumaerd Lead and Zinc Company been engaged in constructing the equipment that you mention, there? A. From about some time the latter part of January, 1907, until 1909, about June twenty-fourth, I should say.

Q. On June twenty-fourth, 1909, did the company have any men working in the shaft? A. They did.

Q. How many? A. Five.

Q. Doing what? A. Sinking, we were sinking, the last work was done, we were sinking the shaft for deeper rock.

Q. How far was that from the company's shaft down to the cross cut that you mentioned? A. About sixty-five feet.

Q. How far had the shaft gone below the cross cut? A. I would say about eighteen or twenty feet.

Q. You are familiar with the locality about the mine, of course? A. I am.

Q. Turn to the map that hangs behind you, have you seen that before? A. I have, yes, sir.

Q. Have you ever had any experience in surveying? A. I have.

Q. What? A. Well, I have surveyed under-

ground workings, mining claims, on the surface, and some land claims, and checked up Mr. Wrighter on all of these lines, about three or four weeks after he surveyed this.

Q. You are familiar with the lines on that map? A. I am.

Q. And you have run them? A. I have.

Q. Is that map a correct representation of the locality about the mine? A. It is a correct representation.

Q. Will you briefly describe to the jury just what that map shows, so that they can understand the situation? A. The red line here that I am tracing represents what is known in the deed as the Shaft and Building Plot. On that plot, in this corner, the square marked "Shaft House," just east of which is the engine house, but all in connection. The shaft itself is in the westerly end of the shaft house. The head frame, sometimes mentioned as the gallows frame, with the sheave wheel, over which runs the cable from the engine, it runs up over that and goes down the shaft. That is the equipment. Now, in regard to the water pipe, here is a storage reservoir, this is conveyed through a pipe line from the springs and a small reservoir above. This is the main reservoir here, and this represents the pipe line running through here. Going to the house here. Here there is a short connection from the main lime, that runs into the boiler and feeds the boiler. The old line above the Erie construction followed the same course, here, the same course, here, the same course here, but at this point it passed directly across.

Q. So that the last line you have indicated represents the ancient course of the pipe, does it? A. From the point near the engine house, at the

intersection of the red and the black line, that is the starting point, on the side line above the railroad company.

Q. Have you pointed out the Erie Railroad tracks there yet? A. Not yet.

Q. Show them? A. Here they are. There is the main line of the Erie Railroad.

Q. That is, the four parallel lines on about the centre of the map running from right to left? A. Yes, sir.

Q. What is the red line that runs diagonally across from there, from the upper left hand corner down toward the right hand corner? A. This represents the old Gumaerd vein.

Q. You say that things are correctly represented on that map. How does that vein appear on the land? A. The vein crops above shaft number one, some several hundred feet up the mountain. It crops some couple hundred feet above shaft number one.

Q. What do you mean by cropping? A. It is where you can see the vein as it comes to the surface.

Q. How? What does it look like? A. Well, it is a fissure vein of ore, it shows there is ore there.

Q. We are not miners. How can you tell that is an ore vein when you say it crops? A. Because there had been ore mined all through here.

Q. But the cropping, what does it look like, describe it? A. Well, it is a vein that has two well defined walls, the mineral appearing in between.

Q. Can you see it when it comes out? A. You can, yes, sir.

Q. What else is there to indicate the presence of that vein along the wide line on that map,

along the red line there? A. I have stated of the outcroppings, the next that appears is in the cross cut run in from the shaft, where our company has intersected the vein at this point.

Q. Were there any old workings between those two points? A. Oh, yes, there are, it had been worked there to a depth of over three hundred feet.

Q. Have you ever seen it in there? A. I have.

Q. When? A. In 1876.

Q. Where did you see it? In what? A. In stopes, in the underground workings.

Q. Of what? A. Of the old lead mine.

Q. What old lead mine is there there? A. Well, the old Erie Lead Company.

Q. You are familiar with that. Just describe it to the jury. What is it? A. Well, there was one shaft put down, known as shaft number one; there was another shaft put down known as number two, and I have been through those levels, that is during the working, through 1875 and 1876, a great many times. I saw the ore being extracted, saw the ore raised from the shaft and saw the teams hail it and load it on the cars.

Q. Of the Erie Railroad? A. Of the Erie Railroad.

Q. Where were you living then? A. Our home at that time was just west of the Erie Railroad tracks, on the south side of the highway as it has been abandoned.

Q. What kind of ore was shipped from that old mine? A. Lead and zinc ore.

Q. What have you to say about the quantity of ore that you have seen shipped from that mine? A. Well, I have seen several mules with carts hauling the stuff there, I have seen as high as three carloads at a time leaving the siding, the siding was a switch.

Q. Where was the siding? A. Right in here.

Q. I think you said in your testimony that you found the vein again in the shaft that you sunk? A. That is in the cross cut, running from the shaft that we sunk.

Q. How did you know that the vein you struck in the cross cut that you ran from the shaft you sunk is the same vein as appears in the old workings? A. Because we have the outcroppings along here, and the vein as shown in the mine here, corresponds with the course as shown from the outcroppings on the surface.

Q. What does that indicate to you as a mining engineer? A. Well, it indicates to me that I have the same vein, and I have opened the ore in the vein.

Q. What kind of a vein is that? A. It is what we call a fissure vein.

Q. Where does it run, down toward the West? A. The only place that is open, exposed, this is all covered with gravel and wash, there is no exposure of the vein west from there about thirty-five feet from where we cut the vein, on the start, west from there, and there is thirty-five feet of that vein, showing that it is coming this way, but there is no opening to the west here on the vein. This is very deep wash here, owing to the rock and slope from thirty to thirty-five degrees, but when you get over that you get into a cut of rock. There was an ore shaft sunk down all through the wash here, showing that the wash is very deep.

Q. Where was that ore shaft sunk? You say "here," on which side of the Erie tracks? A. On the westerly side of the Erie tracks.

Q. How did that vein appear in the cross cut that you made from your shaft toward the north? A. The vein stood nearly perpendicular and was

four feet and four inches of ore and mineralized matter between the walls.

Q. What do you mean by mineralized matter? A. Well, you would not consider it shipping ore, the ore values are scattered through the ground in this particular mine, there is part of the ore that is a shippable ore, that is ready for shipment when you bring it up, from fifty to seventy per cent. Then we have through the vein a scattering material that is probably from seven to twenty per cent., where it is necessary for concentration.

Q. What is concentration? A. Concentration is taking the ore in its natural state and crushing and reducing it down and disposing of that part of the ore as mined and getting rid of the waste material, such as the quartzgang, or whatever it may be, leaving the concentrate practically free from quartz and making a marketable profit on it.

Q. Was there ore present in marketable quantities there, as indicated by what you saw in the cross cut? A. There was.

MR. COLLINS: I think that is not competent under the rule of the Supreme Court. We have had the general condition of the thing. I don't think we should go into this question. The only purpose of it under the decision is to show that there was something that the shaft might have been good for. He might have a right to say we ought to restore it, but we are getting too remote in this I think.

I object to it and move to strike it out.

Motion denied; defendant excepts.

Q. How deep was what you term the wash at the point where you sunk your shaft? A. Fifty-three feet at the easterly side of the shaft and fifty-seven and a half feet at the westerly side of the shaft.

Q. So, how far were you below the wash when you started your cross cut to the north? A. About twelve or fifteen feet.

Q. What was your purpose in doing that? A. It was to run to the vein.

Q. What for? A. To mine the ore.

Q. When did you strike the vein, can you recall? A. No, I cannot. I cannot. But it comes to me now—

Q. Can you tell us approximately about how long before this deed was made? A. Well, after striking the vein I passed on through that about forty-five feet, then I came back and ran easterly about seventy feet and westerly about thirty-five feet, and then I came back and started to sink another level, because the mine was so that to mine ore cheaply, to mine this ore cheaply I had to mine from a lower level, because the underhand stope in there was so that to mine out of the bottom you have got the water all the time to contend with, and the point was to cut the shaft down and run the levels along a hundred feet, and as the shaft got a hundred feet run down and tap in and run in on the vein and then run another hundred feet and tap in a hundred feet below.

Q. Can you give us approximately the length of time between the time that you struck the vein and the time when the work was discontinued in the mine? Was it a year? A. I did not quite get that.

Q. I say, can you give us approximately the time between the time when you cut the vein, when you found the vein and the time when work was discontinued in the mine? A. Well, it must have been about a year.

Q. You cannot fix the date accurately? A. No.

I cannot. I might if I had a little time with my time book. I think perhaps I could, but it would take some little time to look it up.

Q. Did you have charge of this work in the mine? A. I did.

Q. What was your idea in going out beyond the vein after you found it? A. To see if there was another vein.

Q. Did you find any? A. No. We went back again. Yes, we did.

Q. Where? A. Well, we cut one vein, but they were small, we did not consider that they were marketable, that is it was not in marketable quantities right in that point of the cross cut. We had one about four inches, another one about eight or nine inches, but I did not consider that, I just figured that it was probably a spur from the main vein.

Q. You said something about cutting parallel with the vein as I understood it, alongside of the vein in one direction for thirty-five feet and the other direction for about seventy feet, as I recall, what was that for? A. What was that?

Q. I say, what did you do that for? A. That opening?

Q. Yes. A. It was exposing the fissure vein east and west on the course of the vein.

Q. Did you want to see how far the vein extended east and west? A. Well, it was for that purpose, of course; we had to develop here, we had the ore, and, of course, we had to continue the development work right along.

Q. Did the vein run out in either direction? A. No, it did not. The vein continues right along in both openings.

Q. Can you tell whether it was as thick there as it was where you cut it? A. At the extreme

easterly part in the breast of my working, there is practically no ore, back about ten feet, where I show in the wall, I found the ore lies behind the wall instead of being out in the softer part of the vein, the ore made back in the hard quartz.

Q. Have you ever seen a vein like this before? A. Many.

Q. How many? A. Well, in the fifteen years in Colorado, examining veins for mining purposes and other things, I could not hardly tell, there would be so many. A dozen.

Q. It would be more than a dozen? A. I guess so, thirty or forty or fifty. I could not say.

Q. You have seen forty or fifty veins like this? A. Yes, sir; when I say like this, what I am talking about is fissure veins.

Q. How do the fissure veins which you have examined extend, directly down into the earth for any distance or not? A. Yes, true fissure veins are considered to run, well in indefinitely. You can base your calculation by the displacement of the rock surface that has caused that fissure vein. In this particular mine there is a faulting there whereby the movement of the earth has moved the rocks on one side out of alignment to the other side, and making a permanent fracture there, and to distinguish fissure vein from just mere fractures, one in the business recognizes the fissure vein from this one point, and that is this, that all true fissure veins carrying a hanging wall, with more or less tale gouge, some might only be pick material, hanging right on, sometimes a foot, often it will only carry an inch or two of the gouge, but where you have the walls smooth, cutting on acute planes that you go through or in granite, where there is no acute planes, when you have those smooth walls running along the vein,

that is why you know that you have got a true fissure vein.

Q. Was the vein you found in your cross cut a true fissure vein or not? A. It is.

Q. How deep does that vein extend in the old workings? A. Something over three hundred feet deep, and for a distance, oh, well, I have seen it myself for over six hundred feet in length in the old mine workings.

Q. And that is to the east? A. That is to the east of our workings.

Q. You spoke of the wash, what is that? A. That is sand and clay and gravel that overlies the bed rock. What is meant by bed rock is the solid formation under the gravel.

Q. At the surface of the land? A. At the surface of the land, yes, sir.

Q. Was the surface of the land level where your shaft house was? A. Nearly. There is a slight rise right at the shaft, back towards the east end, but not very much. After you got further back, then, of course, the mountain rises up more abrupt.

Q. There is a mountain back there? A. There is, yes, sir.

Q. Can you show where that grade begins, on this map back of you? A. Well, of course, as I say, back of the shaft, the slope is gradual, till it gets just east of the square on the map marked Barn, then from there it rises rather abruptly.

Q. How is the upper edge of this fissure vein in the mine with relation to the surface of the earth? A. It would be inclined, just at the same incline with the bedrock incline, the vein comes right up through.

Q. I am talking about the bed rock. How is the bed rock inclined? A. The bed rock inclines

thirty degrees in one corner of the shaft and thirty-five in the other corner of the shaft, north about four hundred feet, forty degrees.

Q. Can't you take that ruler and just demonstrate to the jury what you mean by that incline of the bed rock? A. The incline to the bed rock amounting to thirty degrees is about like that, and thirty five degrees about like this and forty degrees about like this and forty five degrees about like that. To the north it runs forty degrees, in the eastern part of the shaft it runs thirty-five degrees and at the southerly end of the shaft it runs thirty degrees.

Q. Then the farther you go to the west, the deeper the wash, is that right? A. The farther you go to the west the deeper the wash. It pitches right down here, it pitches right down, the slope of the ground west of the Erie railroad tracks, or, we might say, west from the shaft, is practically level, till just east of the line on the map marked as highway, and then the fall is a little more abrupt to the lake.

Q. Do you recall about when it was that you started to work digging the shaft? A. If I remember rightly it was the latter part of January, 1907.

Q. Just state to the jury your method in digging the shaft and working the interior? A. In sinking the shaft we dig out an opening large enough to admit of timbering around the outside, by which the ground is supported by the shaft timbers. In other words, as you dig down, you must support that hole and support it in such a way that it is absolutely safe for the men that you have got working in there. For instance, you judge by the condition of your ground how far that it is safe to go down, whether it is five or ten feet or fifteen feet at a time, before you must re-

timber up to the surface. Then from that point, in continuing down, if conditions are so you can run ten feet or fifteen feet, whatever it is, you go down that distance, remove all your material and start your lower set of timbers and run up and wedge up to the ones above.

Q. What do you mean by timbers? A. Timbers is the woodwork that supports the ground and keeps it from running in the shaft or crumbling away.

Q. What do they look like? A. Well, in our shaft there we took round timbers, cut them out of the timber, and faced one side, and then cut tennons on the ends and laid them up around the inside.

Q. Had you ever done that before? A. Many times.

Q. Where? A. In Colorado.

Q. What have you to say as to whether that is the usual way of constructing a shaft? A. That is the usual way. There is two methods of timbering. You can use crib timbering, or you can use timber shaped in a square set method, putting lagging in behind. But in ground that is bad, my experience had been that a solid crib shape, you cannot beat it. Of course, there is no support, only the support of the ground, that keeps it from going out, but, as you sink your shaft you fill in behind and the shaft has support all around on the outside. But if the support is moved from one side there is nothing to keep it from going over. It is just the same with square set method, you can take one of your square sets out and put your lagging in behind and if the support is taken away from one or two sides it is bound to go over, because that pressure from the other side would move it if it was concrete. It don't matter how you build it, it would

have to go. I selected that method knowing that it was bad ground. There was quicksand there, gravel and shale. Just as soon as that shale gets away it just flattens right out and I took that method because it makes a solid crib shaft.

Q. Was that shaft cribbed to way down to the bottom at the time you quit work at the mine? A. It was cribbed to bed rock. Beyond that point I expected to use the square set method, because it does not require the timber that it does in the crib method because where you have got, say, six inches wide all around your shaft that is one thing, but if you have got the square set method, you can put two inch planks behind and of course two inches of wood won't last as long as six inches.

Q. What kind of rock was this bedrock? A. It is bedrock, it was a sandstone.

Q. How did you get through that? A. Well, by drilling and blasting.

Q. So that you blasted your way down after you got out of the wash? A. After we struck bedrock certainly, everything was blasting ground, not only the shaft but the level work, all the work that was done down there is blasting ground. You have to drill and shoot it.

Q. You say you have electric lights in the mine? A. Yes, sir.

Q. Where? A. By the collar of the shaft. Down the shaft. At the landing, at the level landing and in through the mine from that point. Everywhere it was lit up so that we did not have to burn candles.

Q. How did your men go down the shaft and up again? A. Well, we tried to have them go down the ladder way but they have great ways of riding the bucket, what they call it, when they are tired, they don't like to make the climb.

Q. Where was your ladder way? A. The ladder way was at the south end of the shaft.

Q. Where was the bucket? A. The bucket way was in the northerly end of the shaft.

Q. What was the bucket used for? A. The bucket was used for hoisting rock or anything that was taken out. That is the one bucket. The valve bucket was used for raising water.

Q. Do you know whether any zinc was mined from the old mine? A. I do.

Q. Was there? A. There was.

Q. When? A. In 1865 or 1866, I was in the mine quite often with the man in charge Mr. Eudey.

Q. Where did that zinc come from? A. That zinc came from the lower workings, that is in there there is workings, below, what would be termed,—well, the lower workings, with the exception of one. They had started on the lower on the lower tunnel, just nicely got it started off the shaft, the ore shaft, where the men were mining, the ore was what we call in the underhand stope, below the level.

Q. Can you point out where that ore was upon this map? A. There is the shaft number two.

Q. With relation to shaft number two on that red line, where was that zinc taken out? A. It reached a distance of about a hundred feet to the nearest point to the shaft, the nearest point I should say was about, oh, possibly thirty or forty feet as near as I can remember and it reached a distance of about a hundred feet.

Q. Look at the scale on that map and locate that point if you can? A. They did not put the scale on his because this was an enlargement.

Q. By reference to other points that you know on that map can you point out about the point where this zinc was taken out, I mean where it

was mined, not where it was actually taken out of the ground? A. It was mined about this point here.

Q. You are indicating a point on the red line about two inches to the east of shaft number two? A. I should say between the square on the vein marked "stack" and the square on the vein which is not marked at all, but there is the shaft, and the vein is off that shaft, it was raised through this shaft, but taken from about half way between the opening of shaft number two and the square marked "stack" on the vein.

Q. Were the workings deep at that point or not? A. I would say probably two hundred and seventy five feet deep.

Q. Is it unusual or not in fissure veins or fissure veins containing lead ore to find zinc? A. It is very ordinary. You find the two metals in the same vein often, and the zinc near the surface and the lead coming in as you get depth.

Q. Did you find any evidence of zinc ore in the workings that made? A. I did.

Q. Where? A. I thought we had an underground map there among the papers.

Q. All right, go on and tell about it? A. About half way between the shaft and the crosscut.

Q. What were they? A. There was a vein crossing.

Q. What were the indications? A. There was zinc on the walls, the walls were about ten feet apart, there was not enough of it to pay. It would pay to develop, but there was only about two inches on one wall and about an inch on the other. I did not consider it a marketable quantity.

Q. Did the appearance of the zinc there have any significance to you as a mining engineer? A. Well, it would naturally lead us to believe that

the same condition would exist in our present work that existed in the old mine, that it was only a matter of getting depth there and we would get the zinc, as they did there, practically all the upper workings there we have lead, the upper part in lead and the lower part in zinc.

Q. There appear to be some pieces of ore on the table in front of you, do you recognize them? A. I do.

Q. Just tell us what they are and where they came from? A. This ore is what we call lead sulphide.

Q. Where did it come from? A. It came from the present workings of the Gumaerd Lead and Zinc Company. There is two grades of ore there. One is known as the shipping grade and the other is the milling grade. There is also two varieties of ore there, carbonate ore and the lead sulphide. That is what we call (indicating one piece) lead sulphide.

Q. You are indicating a piece of ore that you are handing to a juror? A. Yes, sir.

Q. Where did those come from, who got them? A. I got them.

Q. Where? In what part of the mine? A. In the vein that the crosscut from the shaft intersected.

Q. How do they happen to be here? A. I shipped them here.

Q. When? A. Just before the last trial.

Q. That was the other trial in this case? A. Yes, sir.

Q. That took place when? A. I think some time in April, 1915.

Q. Where did they come from just now? A. I just took them out of the box.

Q. What box? A. The box that they were shipped in.

Q. The box that they were shipped in when they came here in 1915? A. Yes, sir.

Q. Did you recognize the box? A. I did.

Q. And did you recognize those pieces of ore? A. I did.

Q. And are they the same pieces that were used at the last trial? A. They are.

Q. I notice there large pieces there, where did they come from? A. They came from the vein, about,—do you want the distance?

Q. Yes? A. Oh, if I had that other map I think it would show. (The other map is shown to the witness.)

MR. COULT: I offer in evidence this map of the underground workings made by Mr. Gumaerd and used at the last trial.

THE COURT: You need not prove it except by him.

Admitted and Marked "Plaintiff's Exhibit P-10" of this date.

Q. I am handing you here this map, have you seen that before? A. I have.

Q. Who made it? A. I did.

Q. From what? A. From a survey that I made.

MR. HOBART: There is only one point about that map. It has certain percentages indicated on it of various kinds of ore. I don't think that ought to be considered.

THE COURT: What is the purpose of this.

MR. COULT: We are not going into the question of profits at all, since the Supreme Court eliminated that we do not want to go into that, but we do not want the Railroad Company to claim that they are doing us a favor by preventing us from spending money uselessly in continuing the operations and we

are going to show that we have got a mine here anyway.

MR. HOBART: Haven't you already shown that?

MR. COULT: I suppose that is better.

MR. COLLINS: His characterization of the ore in certain places is not evidence.

MR. COULT: Of course that is irrelevant after the Supreme Court ruling, but I want the jury to get an idea generally of the situation there, and I am offering this only for that purpose. I am perfectly willing that the jury be instructed to disregard any of those markings.

THE COURT: Yes, the jury will disregard the markings on this map which deal with percentages. Otherwise the map will be admitted in evidence.

Q. You made this map and it is correct as to the underground workings at the crosscut? A. It is.

Q. Just describe that map briefly? A. This square in the right hand lower corner represents the shaft, along this opening toward the vein, a distance of ninety feet, the vein was cut here, across, and this work continued on here, and also run in here to this point, running westerly to this point here, that represents the underground workings, this dotted line here represents the vein, part of the vein. The gouge which is represented by the narrow part of the vein, this is ore that you see here, and these samples are taken at different points all along this vein, as exposed by the openings or level along the vein.

Q. Where did the big pieces of ore come from for instance? A. Along the easterly part of the exposed vein, at a cross and marked number eight.

Q. You took out all of this ore here, did you? A. Yes, sir.

Q. What did you do it with? A. I blasted it.

Q. Was anybody present when you did it? A. Yes, sir.

Q. Who? A. Mr. Belcher. Well, I say blasted it, this piece I took down with gads, we were afraid to shoot it, we had a piece already, about two hundred pounds, and we could not haul it and when it fell it crumbled, and this was the large piece and the main piece we took it out with gads.

Q. Was there more like that where you got this sample from? A. Lots of it.

Q. Did it show at that point where the crosscut intersected the vein? A. It shows at that point and all along.

Q. Where the crosscut goes through isn't that the point where you can determine the width of the vein? A. That is the point.

Q. Was the width indicated by material of this kind which you have in your hand? A. Not quite as good as this it was not as high a percentage, but it was a good marketable ore and ore that would have a good percentage of smelting ore and milling ore.

Q. How wide was it there? A. Four feet and four inches between the walls.

Q. When you took these samples here did you go around and pick out the best spots or did you just take them here and there as you would go along? A. I took them where they were the easiest to get out because the steel was rusty, and there was a reason, in fact our double handled hammers were down to the house when we took those samples and we just used what we call a moil and gads to take those samples out.

Q. Did you seek the best places? A. No, sir, there is fifteen or twenty places there that this ore was selected from.

Q. That was extending all along the line? A. Not all along, because here the vein comes to the wash. Running westerly from the cut, the loose galena ore, that is what we call the black ore here, was found, at number three. When you get east of number three and some little distance west of three you got into the carbonate ore, the carbonate of lead, which shows on these pieces there, they represent part of the ore, well, it is an ore, all ore, it is uniform of two varieties, the sulphide and the carbonate. It is nearly all carbonate ore from the mark along the vein marked three westerly, not galena ore this black ore, showing. But the ore is practically as good grade.

MR. COULT: I offer the pieces of ore in evidence. If Counsel don't object we can put them all in together.

MR. HOBART: All right, put them all in.

Admitted and Marked "Plaintiff's Exhibit P-11" of this date.

Q. Do you recall the date of the making of this deed which is the twenty-fourth day of June, 1909? A. Yes, sir.

Q. At that time was there any work being done by the railroad on its lands and the lines indicated on this map? A. There was not.

Q. Had any work been done then? A. No, sir, there was not.

Q. Was any done on the railroad subsequently? A. After this deed was given?

Q. Yes? A. Yes, sir.

Q. What kind of work? A. Grading, cutting. Here is the centre line of the Erie and Jersey, going right along on the line marked E. & J., the line marked down here, about two thousand feet from where it intersected the eastbound track

of the Erie Railroad. Then there was some construction up here, way up above and they would come on down here on the west side, and the tracks came together just on the west side of the Erie main line. That work was cutting, the cutting here opposite the shaft to the subgrade, forty feet. Then it decreased as it went up until it met the Erie at grade about two thousand feet below.

Q. After that work started did anything happen to your shaft? A. Yes, sir.

Q. What was it? When was it that you first noticed that anything was wrong with your shaft? A. When the back part of the head frame or the mudsill of the head frame showed that it was moving toward the railroad, I notice it.

Q. About when was that? A. In October.

Q. In the early or the late part of October? A. Well, I would say about the central part, about the middle of October.

Q. About the middle of October, 1909? A. Yes, sir.

Q. What is the head frame? A. The head frame? Some call it the gallus frame, that is the wood work over the shaft that supports the sheave wheel, that carries the cable from the engine overhead and down into the shaft; that is the purpose of it.

Q. Is any part of that apparatus shown in either of these photographs? A. You have got one shows the outside of the building, this one shows it.

Q. I show you Exhibit P-3, does the head frame appear on that photograph? A. It does. That is the upper part of the head frame.

Q. Just show where it is on that photograph? A. This is the shaft house, and the head frame with the sheave wheel is there, the sheave wheel, that carries the cable down, and the standards

and the uprights here, and then there is sills that carries the uprights and braces.

Q. Did you say something about the mudsills and the head frame? A. The mud sills, yes, sir.

Q. What are the mud sills of the head frame? A. The base, that rests on the ground.

Q. And it was in the mudsills of the head frame that you noticed first anything wrong with your shaft after this excavation? A. Yes, sir.

Q. How was that manifested in the mudsill? A. By a crack appearing behind the mudsill, showing that the mudsill was moving forward and it left an open crack behind the mud sill.

Q. Was there anything to account for that? A. Yes, sir.

Q. Was was it? A. It showed that the head frame was being pulled over toward the railroad track.

Q. Was there anything to account for its going over that way then? Did you see anything there? A. Well, it was the excavation on the outside.

Q. How deep was the excavation? A. At that time when it started they had excavated on the level with the Erie tracks up close with the shaft and moved the Erie tracks right up just as close to the engine house as they could get it.

Q. How near was that? A. About five feet.

Q. The Erie tracks were within five feet of the engine house? A. Yes, sir, they were moved just as far as they could get them that way. Of course, they had a purpose in doing that.

Q. I show you this photograph Exhibit P-7, March fourth, 1910, can you illustrate on that photograph what the situation was in 1909? A. I can.

Q. Just do so, will you please? Just show the jury how it was in 1909, October? A. The Erie main line was running right close on this grade

through here. They excavated just as close as they could along here. You will notice the excavation right close to the shaft, the main line tracks were moved over there, to admit of construction here. The ground was so bad there and was running what we call, running, bad, that the banks would not stand. They saw that they were going to lose their tracks, so they built a trestle here and shifted the tracks back from this point over to a temporary trestle until after the construction was completed. And, in making that excavation along the front of the shaft house, and taking the support therefrom, they let the settling take place and the pulling away take place at the same time. That, I said, showed on the back, it was noticeable at the back of the mudsill of the head frame.

Q. Did you do anything about that at that time? A. Did I what?

Q. Did you call anybody's attention to that at that time? A. No, not at that time.

Q. When did you first take up the matter of this excavation with the railroad? A. I think it was in December.

Q. Whom did you notify then? A. Mr. Harriman, I think the first letter I wrote to them. No, no, the first letter was to Mr. Norton, the resident engineer. The first trouble occurred there they were putting in what they call ground blast, and it was shaking up the shaft, so that I called Mr. Norton's attention to it, "Well" he says—

Q. Never mind that. You called his attention to it? A. Yes, sir.

Q. When was that? A. That was some time in October, as near as I can place it.

Q. Did this sinking of the mudsill interfere with the use of the shaft? A. Yes, it did.

Q. In what way? A. As it pulled over the

head frame tilted, and this tilting threw the cable so that the bucket was continually catching under the lower set of timbers at bed rock.

Q. Were you using the bucket at that time? A. The water bucket, yes, sir.

Q. What for? A. For keeping the mine dewatered, we did not want to let it flood. It is always injurious to mining operations to have your mine flood, especially the upper part that is in the wash. Of course, in the solid rock the flooding does not change the nature of the mine much. It may at times cause caving, but not so much as in the gravel material above the bed rock.

Q. What was the next thing that happened with regard to the shaft and the earth around it? A. That condition became worse and worse until in February, I think February twentieth, 1910, I called Mr. Connor's attention to it.

Q. Who is Mr. Connor? A. The assistant engineer.

Q. Where did you find him? A. I found him up there by the shaft and I called his attention to it and told him that they were weakening the banks so that we would have to cease hoisting water if it went over any more, because of the bucket catching there it was liable to strip the cogs in hoisting,—

Q. Was the surface of the ground around your shaft house disturbed at that time? A. It was.

Q. In what way? A. The excavation was being done on the westerly side of the shaft building is what did it.

Q. Take that plot marked, I suppose it is marked, how is it called, that plot, that lot, how is it called on that map, Shaft and Building Plot? A. Yes, Shaft and Building Plot.

Q. Take the lower line of that Shaft and Build-

ing Plot and tell us when it was that the surface was disturbed at the point along the lower red line? A. It was disturbed there in October.

Q. In what way? A. The excavation being made along there on the level with the old Erie tracks, and as I have already stated the track was being shifted over, just as close as they could get to the shaft house.

Q. That is your statement of the cause of it; how was it disturbed, in what way? Where did it go to? A. By the surface of this material being taken out there, and the caving in into the cut when the excavation was going on.

Q. How near did that get to the shaft house by the middle of October 1909? A. Well, it is within a few feet of the shaft house.

Q. Within a few feet of the shaft house in October? A. Yes, sir.

Q. By February 1910 where was it? A. Well, the main excavation here had reached a depth below the collar of the shaft, about forty feet.

Q. Here is a photograph of the shaft house taken on the eleventh day of March 1910, were you present when that was taken (referring to Exhibit P-5)? A. I was.

Q. Did you notice the exposure of the shaft as it appears in that photograph? A. I did.

Q. Did it ever get any worse than that? A. It did.

Q. When? A. The following two weeks, I think above two weeks.

Q. How much more of the shaft was exposed than appears in that picture? A. Well, it ran out to the back of the engine house, it took all the cribbing in front of the engine house, it showed the shaft cribbing exposed about, probably, not quite as much below the point as is exposed now, pretty well down to the bottom, because the wall just

beyond here was within a few feet, and of course they had to excavate or did excavate within a few feet of the shaft so that there was nothing to hold it there, and first going out of the ground and the ground running, it kept continually getting worse.

Q. I call your attention to the point where this excavation appears to run at the back part of the shaft house, by the side of the shaft house? A. Yes, sir.

Q. Did that excavation ever run farther back than that? A. Yes, sir.

Q. Suppose you take the map behind you and indicate on that map how far that excavation ran alongside of the shaft house? A. It runs to a line opposite the easterly part of the engine house.

Q. Suppose you make a little cross on the map with a pencil at that point? A. (The witness marks a double cross.)

Q. You say that that condition was the worst about two weeks after March eleventh, is that your recollection? A. Two weeks after, about March eleventh, yes, sir.

Q. That would bring it about March twenty-fifth? A. I could not say that because those slides are still going down every year. They put in some steam shovels there once or twice a year and take out ground that runs in the bottom of the cut, and that shows a bad condition of the ground.

Q. I mean with relation to the exposure of the shaft itself, conditions were the worst about the twenty-fifth day of March? A. Yes, sir.

Q. After that did the railroad do anything? A. They went on with their construction and they built a wall there.

Q. Such a wall as the one shown in the photograph Exhibit P-6? A. Yes, sir.

Q. And is that wall there now? A. That wall is there now.

Q. Has there been any other wall there between March twenty-fifth and the present? A. There has not.

Q. What is there that appears up above that wall? A. That is cribbing.

Q. When that wall was put in there and that cribbing built, what was the condition of your shaft? A. The condition of our shaft was, it was out of alignment, and it was not workable.

Q. How far was it out of alignment? A. About thirty feet from the collar of the shaft down.

Q. From the collar of the shaft down about thirty feet off? A. No, thirty feet of the distance from the collar of the shaft down.

Q. For thirty feet of the shaft it was out of plumb? A. Yes, out of plumb.

Q. How far was it out of plumb from top to bottom? Did you take any measurement to find out? A. Yes. If I remember right it was fifteen and three-quarter inches.

Q. Fifteen and three-quarter inches which way? A. Westerly.

Q. Toward the excavation? A. Towards the westerly excavation.

Q. It leaned westerly? A. Yes. You see the ground was taken from the sides so that it not only leaned westerly but it leaned southerly at the same time.

Q. How far did it lean southerly? A. Eight inches, I believe; about eight inches.

Q. How did you take those measurements? A. With a plumbline.

Q. When was that done, do you recall? A. Soon after the cribbing was put there.

Q. Who was present, anybody? A. Mr. Daly helped, the witness here.

Q. Mr. Daly from where? A. From Port Jervis.

Q. How did you take the measurement? A. With a plumbline in the top of the shaft.

Q. Just explain to the jury how you did it? A. Hanging a plumbline at the top of the shaft and took the distance that the plumbline was away from the side here and what the distance was as you could go down, as you went down. I only took the distance in two places. Mr. Daly took it right down through every six feet.

Q. And the distance that you have given is the distance that the shaft was out of alignment, and that was the distance between the extremes, I suppose? A. Yes, between the two extremes.

Q. Could your shaft be used when it was in that condition? A. It could not.

Q. Why not? A. Well, it was so far out of alignment with no support to the head frame and no support to the shaft building, that if you put a load on there you would have it all in the cut, that is all.

Q. There was nothing to hold onto on that side, there was nothing to hold it up over there? A. There was nothing to hold it up on that side, the support had all been taken from the two sides over here.

Q. Was it safe to put men into it to use it? A. It was not. Nor has it been since. It is getting worse all the time.

Q. Have you noticed any change in it recently? A. The concrete wall, I find on measurement, has increased its lean an inch since the measurement before the last trial. It is now three and a half inches, the concrete wall that they put in there is tipped three and a half inches.

MR. COLLINS: Which way?

New Jersey State Library

THE WITNESS: Westerly.

Q. Toward the cut? A. Toward the cut, yes, sir.

Q. Which concrete wall was that? A. That is right opposite the shaft.

THE COURT: That is what has been called the restraining wall?

THE WITNESS: Yes, that is the wall that is between their tracks and the shaft.

Q. And that is the wall which appears in the photograph Exhibit P-6 that I am showing to you is it not? A. Yes, sir.

Q. And the upper edge of that wall leans out three and a half inches now? A. Yes, sir.

Q. How did you find that out? A. The top of that wall is sixteen feet below the collar of the shaft.

Q. How did you find out that it leans three and a half inches? A. By a plumbline.

Q. When did you do that? A. The last measurement I took here about two weeks ago.

Q. When did you take the other measurement? A. Just before the last trial.

Q. When was that? A. That was some time, I think in April, about a year ago.

MR. COLLINS: You mean April 1915?

THE WITNESS: Yes, I think so.

Q. A year and a half ago? A. Yes. You might say the subsidence continues, the settling, but I am speaking about the lean. The subsidence continues right along and is marked by cracks appearing.

Q. That is on your shaft? A. Just behind the shaft, cracks in the ground.

Q. Cracks in the ground appear behind your shaft? A. Yes, sir.

Q. When you say behind the shaft? A. I mean on the easterly side.

Q. When did those cracks come there? A. Well, they are appearing all the time.

Q. Just point out on the map where that is? A. In the shaft house, east of the shaft, cracks appearing showing subsidence and moving forward at the same time.

Q. Here is a photograph, Exhibit P-8, does that show any cracks in the ground; or any evidence of subsidence there such as you mention? A. Yes, sir.

Q. What does that indicate? A. This photograph shows the inside of the shaft house on the easterly side of the shaft and shows subsidence of two feet or more.

Q. Show that to the jury? A. (Showing.) These cracks just here, that is one and here, and here is one of the braces and this is the mudsill of the gallus frame that carries the hoisting apparatus that at one time before the subsidence, before the construction in front of the shaft, that was up on a level about here, up with the upper timbers here. It is settled there and shows about two feet.

Q. Here is another photograph which has been marked Exhibit P-9, just show on that whether or not you can see there any of this evidence of subsidence? A. Yes, sir.

Q. Just show the jury. A. This shows the subsidence a little more plainly than the others, taken from the other view. The other was taken from this point northerly, this is taken westerly, looking at the house, and over at the shaft here, here are the two boards that protect the shaft when the ore is being hoisted, this back here shows it, and the subsidence you can see up here, and

this wall up here should be on a level with what we call the collar of the shaft. That shows a subsidence. Those cracks that you notice running right through here that shows the settlement. In fact there is several similar ones, but smaller, the way that is taken does not show them all, but that is the main crack.

Q. And I understand you to say that there are other cracks appearing even now? A. Yes, there are.

Q. Back of the shaft house? A. Yes, sir.

Q. I call your attention to a letter that I am handing you signed Erie Railroad Company by F. L. Stewart, Chief Engineer, dated February third, 1910, did you receive that in the mail? A. I did.

MR. COULT: I offer that letter in evidence.

Admitted and marked "Plaintiff's Exhibit P-12" of this date.

Q. That letter was received after you had taken up the matter of the subsidence of the shaft with Mr. Connors? A. Yes, sir.

Q. Could the injury to the shaft be repaired? A. It could—

MR. COLLINS: This gentleman has not been shown to be possessed of sufficient expertness to permit him to testify.

THE COURT: I understood him to say that he built about forty or more of these shafts.

Q. Have you had any experience in general construction work? A. I have.

Q. Such as the use of concrete etc.? A. I have.

Q. When and where? A. In Colorado, the three years when I was on the Board of County Commissioners there two years of which I was Chairman.

Q. What did you have to do with construction work there? A. The letting of contracts, the figuring of yardage, the excavation, the yardage of excavation, the figuring on the yardage of concrete work, also checking up the work and figuring the yardage to call for bids.

Q. On what? A. On concrete and excavation.

Q. Where, for what? A. Retaining walls, and bridge work.

Q. It was on roads, wasn't it? A. On highways, is was highways.

Q. You had the supervision of the highways? A. I had the supervision of the highways.

Q. How much highway? A. Over five hundred miles.

Q. It was a pretty large county wasn't it? A. It was.

Q. How big? A. Fifty miles across in one direction and about thirty miles in the other direction.

Q. And you had the supervision of the road and the construction of roads over that whole county, did you? A. I did.

Q. For how long? A. For three years.

Q. You say that repairs could be made to this shaft? A. I do.

Q. In what way? A. The shaft could be repaired by removing all the material above bedrock to the east and to the north, remove all of the material that is there, that is creating the trouble against the pressure of the shaft, remove that and place a retaining wall on the southerly side of the plot and another retaining wall on the westerly side of the plot and after the walls are in, and of course, in taking out the earth and sand and gravel and everything to bed rock, at the same time you will have to remove the shaft, that leaves a bed there for you to start your con-

struction work on both walls, and after those walls are up then there is no trouble to put your shaft in because the west wall crosses the end of the shaft and an opening can be left in the concrete work so that the shaft can be constructed, because the trouble of the whole business is removed, because all that weight of ground forty feet from the collar of the shaft down to the base of their retaining wall is all moving, that is moving, and if you take that out of there and put in your retaining wall and reconstruct the shaft you have got all the pressure off of there.

Q. How far will you have to run that retaining wall on the southerly side? A. On the southerly side fifty feet.

MR. COLLINS: Do you mean fifty feet deep or fifty feet long? What is fifty feet? Which way?

THE WITNESS: Fifty feet in length on the southerly side.

Q. How long on the westerly side? A. Fifty-five feet.

Q. How do you get those measurements? A. How do I get the measurements?

Q. How did you take them, yes? A. They were taken on the ground.

Q. On the southerly side what portion of the side of the lot did you include? Where the excavation was or more? A. I don't quite get that.

Q. Are you putting in your retaining wall on the southerly side where the excavation is or are you running it out beyond the excavation? A. I am running it back to where the slides has encroached on that line, the slides have encroached where I have marked the double cross there, those slides are under that point and that point is taken for the length of my southerly wall, because there

is no support in there until you get—or until after you get to where the two crosses are.

Q. When was that shaft and building plot set apart? A. It was set apart when this deed was signed, that was part of the agreement.

Q. That was set apart? A. That was set apart.

Q. And the shaft was there then? A. The shaft was there then, yes, sir.

Q. Right on that corner of the building plot where it is now? A. Yes, sir.

Q. That was not a separate tract of land before the deed was made? A. No, it was all in one.

Q. It was all a part of the whole tract? A. It was all a part of the whole.

THE COURT: Is there any part of this shaft that is in plumb? There are four sides to it?

THE WITNESS: Yes, sir.

THE COURT: Are two sides in plumb?

THE WITNESS: No, the whole thing has caved in.

THE COURT: Like a leaning tower?

THE WITNESS: Yes, sir.

MR. COLLINS: Down for thirty feet.

Q. And your opinion is if a load was put on there it would be more like the leaning tower still? A. Well, there would not be anything there to lean, it would be over entirely.

Q. It is, just, you might say, suspended now? A. Yes, and the only support, the wall that they put there, does not amount to anything, because it shows that is moving, that whole mass of ground behind is moving, because there is no foundation there.

THE COURT: Do I understand you to say that these two concrete walls which you suggest should be put there are on the side towards which the tower leans?

THE WITNESS: Well, the lean of the shaft is both west, it goes westerly, and southerly at the same time.

THE COURT: And you would put your walls on—

THE WITNESS: On both sides of the plot, to restore the plot.

THE COURT: That is you would put them on the south and on the west?

THE WITNESS: Yes, sir; and restore the plot, on the south and on the west I would put them.

Q. What is causing the shaft to lean over now? A. It is the pressure from behind with no support in the front.

Q. That pressure comes from the material that you have described as wash? A. It is the material above the bed rock described as wash.

Q. That I think you said consisted of sand, quicksand, shale? A. Yes, and shale, gravel.

THE COURT: Is there any way of restoring this shaft except the way that you have mentioned?

THE WITNESS: I don't know.

THE COURT: If you put a cribbing or whatever you call it back so that it would be in plumb?

THE WITNESS: Well, the pressure still exists there.

THE COURT: The pressure in the back would still push it out?

THE WITNESS: That would still push it out.

Q. Can you ever make it safe that way? A. No, I could not. I would not think of putting men down in the shaft to work there unless they were safe. I would not put men down where I would not go myself.

Q. Would you go down there yourself? A. No, I would not.

Q. What would be the dimensions of a concrete wall down to bedrock and extending up to the surface of the land as it was before this subsidence on the south wall? A. On the south wall, on the east end of the south wall it is about thirty feet to bed rock, making the calculation when I took the southerly end of the shaft the pitch I found was on a thirty degree pitch, following that pitch up at the end of fifty-five feet will be to bed rock thirty feet from the surface. As that wall is built westerly, of course it decreases in depth, it would be thirty feet down to bed rock here, and as your wall ran along here, the top being kept level, of course, that gains depth right along, of course, the depth to bedrock, and gives you a depth at the shaft and building plot on the west side of fifty-eight and a half feet.

Q. So that the wall would have to be how high? A. The wall would have to be thirty feet high here and fifty-eight and a half feet high here, and fifty feet in length.

Q. How thick? A. Three feet at the top and the average base would be eighteen feet.

Q. Would that withstand the pressure of the soil above? A. Oh, yes, that would make it as near as it could be made to restore it in as safe condition as it could be made artificially.

Q. What about the west wall? A. The west wall, that is fifty-five feet in length, and of course,

to go to bedrock is fifty-eight and a half feet on the front side of the wall and about fifty-five feet on the back side, because it comes up on a slope, the front wall, and the reason I have taken bedrock as the point of a good safe foundation is this; the present wall that the Erie has there, forty feet from the collar of the mining shaft, has no foundation. The water in the shaft rises, of course, to their subgrade before it finds its way out, the shaft is full of water up to that point. Of course, that makes the shale and sand and gravel at that point, it makes it in bad condition and that is without a proper foundation, so that that wall is surely and slowly going.

Q. Have you figured the cost of the excavation necessary to put in the retaining walls that you have described? A. I have.

Q. What do you make that cost? A. I have it figured out.

Q. When did you figure it out? A. Some few weeks ago.

MR. COLLINS: I submit that this witness has not shown any familiarity with the cost of that in this vicinity. He said he had done some mining work in Colorado and he dug this shaft. I don't think he has shown himself fitted to testify on this subject.

MR. COULT: I will qualify him.

Q. Have you done any excavating work in this vicinity? A. Yes. The foundation of the house.

Q. What house was that? A. That is the house that was moved from the Erie right of way.

Q. What have you to say about the cost of excavation there as compared with the excavation work that you did when you were supervisor of the County in Colorado? A. Why, the labor is

about twenty-five cents a day higher where I was in Colorado than it is here, and the cost of construction when you estimate that, when you take into consideration the cost of labor and all others, there is many elements, in the first place, you have got to consider the position, whether you are handy to your sand or crushed stone, whether you can get any crushed stone and the price of concrete.

MR. COLLINS: The witness has drifted off from the excavation into the concrete without giving us an opportunity to be heard. We are now confining ourselves to the excavation. If he undertakes to go into the concrete we want to be heard.

Q. What excavation work did you do here in the East?

MR. COLLINS: He said he dug the cellar of a house which was moved. I don't think that qualifies him to speak of the cost of digging a shaft.

THE WITNESS: I excavated for the house and excavated for the shaft.

THE COURT: It seems to me that a man who has dug a shaft and knows the character of the ground and is familiar with mining operations, ought to know how long it would take a certain number of men to make this excavation.

MR. COLLINS: I object to it on the ground that he has not shown any special knowledge on the subject.

THE COURT: Have you figured that in consideration of the wages paid for labor used in that kind of work here in the East?

THE WITNESS: I have.

Objection overruled. Defendant excepts.

Q. Right on that point, how many men did you employ for the company in excavating on that particular locality there?

MR. COLLINS: For the shaft?

MR. COULT: Yes, in this locality.

A. Four men, five men.

Q. You all did the same character of work, excavating and moving the house, didn't you? A. Yes, moving the house, it is shown here on the map, and there was a run of about four hundred feet and we moved it down something over four hundred feet, I believe, four hundred feet about down on the other side.

Q. Did you do any excavating there? A. Yes, I excavated for the cellars.

Q. How many men did you employ in that work? A. Five men.

Q. Did you oversee the work? A. Yes, sir, I did.

Q. Did you pay them for their labor? A. I did, yes, sir.

Q. You had not forgotten how to oversee labor from the time you had been in Colorado and the time you came home? A. Well, I hope not.

Q. Then how much do you figure the cost of excavating for the retaining walls that you have described here?

MR. COLLINS: Objected to on the same grounds.

Objection overruled. Defendant excepts.

A. In this particular piece of work where the excavation must be handled from a bank and shovelled into buckets and lifted to the surface

and moved out of the way, a dollar and a half a yard is what I consider to be fair. I don't think it could be done for less.

Q. How many yards did you figure would have to be taken out of there?

MR. COULT: If the Court please, I think this witness has made some memorandum of what the figures are and to save time, do you object to his using it?

MR. HOBART: If he worked it out himself, I don't suppose there is any objection.

Q. Have you got that memorandum here? A. Yes, sir.

Q. Where is it? A. It is among those papers and I guess I am the only one who can get it.

MR. COULT: Then I will ask that the examination of this witness be suspended until he can find the paper, for I know it will facilitate the matter very much.

THE COURT: He may be withdrawn.

MR. COLLINS: We have a witness whom we should like to have sworn for the defense, at this point, out of order, as he cannot be in attendance tomorrow.

THE COURT: He may be sworn now, if the other side does not object.

MR. COULT: We are willing.

JOSEPH A. VANMATER, sworn as a witness on behalf of the Defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You live in Plainfield and your profession or occupation is that of mining engineer? A. It is.

Q. What is your present position? A. I am managing the mines of the New Jersey Zinc Company.

Q. How long have you had that position? A. About nine years.

Q. Before that what was your work? A. I was manager for the Berth Mineral Company for five years, and previous to that manager for the Derby Lead Company in Missouri, and previous to that for about eighteen years manager of the mines at Franklyn Furnace.

Q. How many years' experience have you had as mining engineer? A. Thirty-two or thirty-three years.

Q. Does that include mining operations of various kinds in different states and different parts of the world? A. It does.

Q. Including Mexico and a great number of the states in this country? A. Yes, sir.

Q. How many mines are under your general charge as manager of the New Jersey Zinc Company? A. I think we are operating about twenty now.

Q. Have you had anything to do with the construction of shafts? A. Yes, a number of them.

Q. What kind of shafts? A. Both in solid rock and in soft ground.

Q. Have you designed them? A. I have.

Q. Have you had to do with the repairing of shafts from time to time? A. Yes, sir.

Q. Were you one of the men named by an order

of the Court in this case to inspect the mine and the shaft house of the Gumaerd Lead and Zinc Company? A. I was.

Q. Do you recall when it was you made that inspection? A. In January 1915. I think it was the ninth of January 1915.

Q. In the course of your inspection, did you examine the shaft? A. I did.

Q. What examination did you make of the shaft? A. As to the method of timbering and I noted that the upper part of the shaft was out of plumb, also I noted the crack in the ground. The cracking of the ground.

Q. How long did it take you to make your examination of the shaft? A. Why, I think I was in the shaft and under ground, possibly, an hour and a half, an hour to an hour and a half and about the same time above.

Q. You observed the shaft was out of plumb, I think you stated? A. Yes, however, I did not plumb it myself. I could see with the eye that it was out of plumb.

Q. About how much? A. I think the original figures were something like ten inches.

Q. For a distance of about thirty feet? A. Thirty feet in depth, the upper part.

Q. Can that shaft be repaired? A. It can.

Q. In what way? A. By replacing the timbering in the upper thirty feet. There are several ways of doing it. It could be done by cribbing or the timbers sawed and set, or there are more expensive ways of doing it.

Q. What is the present construction of the shaft? A. The present construction is cribbing.

Q. If this upper thirty feet were repaired in the same kind of construction as the present construction of the shaft you would do it then by cribbing would you not? A. Yes, I would do it by cribbing.

THE COURT: How would you take the pressure from the side of the shaft, is there any pressure?

THE WITNESS: That pressure occurred at the time the cut was put through, then there was a retaining wall placed at the westerly side of the shaft.

THE COURT: Was there any pressure there at the time you examined it?

THE WITNESS: There was no evidence of pressure and I cannot see any reason why there should be. The equilibrium was restored when the retaining wall was put up.

Q. Have you made an estimate of what it would cost to repair the shaft in the manner you have described? That is by the use of timber and cribbing? A. Do you mean by using new timber? Or, what it would cost to reset the timber at the time that the accident occurred?

Q. Have you made it both ways? A. Yes, I have made it both ways.

Q. Suppose you give it both ways? First by using the old timber that was in the shaft at the time it is said to have become out of alignment?

THE COURT: That is simply resetting them?

THE WITNESS: Resetting the timbers.

Q. Using the same timber? A. Yes. At that time that timber was probably good. It had not been in the shaft very long and was probably good. The cost of resetting that timber would have been less than a hundred dollars and straightening out the head frames and putting it in as good shape as it was originally, the same shape as it was originally.

Q. What would it have cost at that time to re-

store it including the straightening of the head frame, by the use of entirely new timbers in the place of the old timbers? A. Well, when I say that it would cost that I am estimating that at the time this accident occurred that labor conditions were about the same as they were in 1915. Now, I don't know whether labor was higher at that time or not, but the item was largely labor in repairing the shaft or restoring the conditions and using the same timber over again, but I figured on two dollars and a half a day as the day wage and on that basis it would cost less than a hundred dollars to replace that timber.

Q. That is, using the old timber? A. That is using the old timber. If you used new timber, and assuming that the timber would cost twenty-seven dollars a thousand laid down, and wages on the same basis, two dollars and a half a day, it would cost between three hundred and seventy-five and four hundred dollars.

Q. About how long would it take to do it? A. It could be done in about two weeks' time, possibly a little over. I think it could be done in two weeks.

Q. Will you describe the method that you would follow? A. It could be either started at the top and put in bearing sills, or mud sills from which the shaft timbers would be hung—

MR. COLLINS: Would project?

THE WITNESS: Would project. Over on the back. But the preferable way would be to begin at the bottom and start at the point where the deflection occurs, the angle between the deflection and the straight part of the shaft and put in a platform and take out the first set of timbers, and then drop the set above down and reset them. First having established your points on top and

below that your lines. In that way the timbers would each drop down in succession and the dirt fall in behind them.

MR. COLLINS: That is the resetting?

THE WITNESS: That is the resetting.

MR. COLLINS: How would it be with the new?

THE WITNESS: Putting in the new timber I would do it the same way, starting at the bottom and come up, and just carry the platform up with you. That is the way we usually do unless there is some very good reason for adopting the other method.

Q. Have you yourself repaired shafts in both of those methods? A. A number of times.

Q. Did you observe the condition of the ground when you were there in making your examination in January 1915? A. It seemed to be good firm gravel.

Q. Was there any reason so far as you could see from your examination why the shaft repaired in either of the ways that you have described would not stand up and stay in line after it was once repaired? A. No, sir.

Q. You have made your estimates based upon your examination made in 1915 for the labor and I assume the cost of lumber in 1910 was about the same as in 1915, and of labor also? A. Yes, sir.

Q. Would your estimate for that sort of work be increased if it was made at the present time? A. Yes, the price of lumber would be increased from three to five dollars a thousand. I don't know about the price of labor in that locality the price of lumber would be increased from three

to five dollars a thousand and the price of labor generally had advanced.

Q. To what extent? A. From twenty-five to fifty per cent., depending on the locality and the kind of labor.

Q. How much lumber do you figure that it would be necessary to use in making the repairs? A. About sixty-two hundred feet.

MR. COLLINS: That is if you take the new?

THE WITNESS: If we put in the new about sixty-two hundred feet.

MR. COLLINS: Board measure?

THE WITNESS: Yes; sixty-two hundred feet board measure.

Q. Your present estimate then would simply allow for the increased price of labor? A. From three to five dollars a thousand on lumber and probably twenty-five to fifty cents a day on labor, although it may not have changed that much in that locality.

Q. What sized timbers would you get for that purpose? A. If. you were to use new timber?

Q. Yes, if you were to put in new timber, what size timber would you get for that purpose? A. I would put in the same size they have now, six by eight.

Q. What length? A. Well, I have estimated that a fourteen foot stick would cut an end piece and two side pieces. I have a memorandum of the measurement of that shaft, I don't recollect the exact figures.

Q. You had those figures before you when you prepared this estimate? A. I had those figures before me, yes, sir.

Q. Is there any occasion, so far as your observation of that shaft goes, for building two con-

crete walls fifty feet and fifty-five feet long respectively and three feet wide at the top and eighteen feet wide at the bottom and thirty to fifty-eight feet deep one on the west and the one on the south side, is there any necessity for it whatever? A. I don't know that I entirely understand what the proposition was.

MR. COULT: I object.

MR. COLLINS: Didn't you hear Mr. Gumaer's testimony.

THE WITNESS: I heard his testimony, yes, but I did not see just where he proposed to build those walls. I can only answer that in a general way.

THE COURT: What counsel wants to know is, is there any necessity for any walls being built there at all in order to restore the shaft?

THE WITNESS: I do not consider it necessary to put in any cement work at all. I don't think you would improve or help the condition at all to put any retaining wall on the east.

Q. You would not put any retaining wall there at all, but what is there now, would you? A. No, the present wall will accomplish all that walls put on the other side of the shaft would accomplish.

Q. When you went down this mine in January 1915 did you find any ore there, or did you find ore in marketable quantities? A. I did not then see ore in marketable quantities, that is, in commercial quantities.

Q. Did you examine all of the workings that were in the mine, that were under ground? A. Yes, I went through all the workings.

Q. Did you look at the walls as you went through to see if there was any marketable

quantity of ore, or commercial quantity of ore there? A. I examined the walls with a small pick, the walls were covered with dirt and you could only examine them by picking off fresh places. I picked off a great many places along the walls and I found evidences of mineral.

Q. Was there any pocket of ore in sight? A. I found evidences of mineral at the crosscut.

Q. Was there sufficient to make it worth while to work the mine? A. Well, not exposed in the work that had been done.

Q. Did you see any quicksands or anything of that sort in any of the examinations you made? A. No, sir.

CROSS EXAMINATION BY MR. COULT:

Q. How long were you on the premises? A. I suppose about three hours altogether.

Q. What time did you get there? A. I don't remember. I went up on the morning train from New York.

Q. You went all the way from New York up to Guymard on the Erie? A. Yes, I went to Middletown and then changed and went up on the branch.

Q. You did not get there until the afternoon, did you? A. No, I think it was between eleven and twelve.

Q. Did you get up before daylight to take that train? A. I think we left New York about eight o'clock in the morning.

Q. What train did you go away on? A. I went away on the afternoon train leaving there possibly about three, I don't remember the exact time.

Q. So you were there from about twelve to three? A. About three hours, I should say, as near as I can recollect.

Q. Between trains? A. Between trains.

Q. And your three hours included going up to the mine, looking it over and going down the workings and taking samples, I suppose and coming out again? A. No, I don't think I took any samples.

Q. You did not take any samples did you? A. I did not find anything to sample.

Q. You see those pieces of ore down there in front of you there? A. Yes, sir.

Q. Did you see anything like that in there at all? A. No, sir.

Q. You did not look for it, did you? A. No, but that might easily have come from there, that looks to me like crevice mineral.

Q. You could not find any of that in there? A. No, because I suppose it had been taken out.

Q. You think that is all there was? A. That is all there was in that place, they undoubtedly took all there was in that place. Further excavation might have found some more, and undoubtedly it would have found some more mineral.

Q. You think that that was taken out of the mine before you went in there? A. I don't know. I presume it was. It probably was, yes, sir.

Q. And that that was all there was in there and you could not find any more? A. No, not that that was all in there, not that that was all there was in the property, but they had taken out all there was in the excavated portion and there was no mineral showing of any kind, I don't mean that, but I say in quantities, I found some mineral.

Q. How long did you go poking around down there? A. About an hour and a half.

Q. During that time you made a careful examination I suppose of the crosscut and of the drifts along the vein? A. Well, I did not make

a thorough examination, that was not the object of my visit.

Q. Why not? A. I went to inspect mainly the shaft and the outlet of the mine.

Q. Weren't you to go up there to find out whether there was really anything down that hole or not? A. No, sir.

Q. Was not that the main object of your visit? A. No. As I understood it, the object of my visit was to determine the injury to the shaft and how it could be repaired.

Q. That was the purpose of your visit? A. That was the main purpose of my visit.

MR. COLLINS: It was only incidentally that he went looking around.

Q. So that there was no reason in your going down in the workings at all, was there? A. Well, out of curiosity, I went down out of curiosity to see what there really was down there.

Q. And you found just what you expected didn't you? A. Well I was not very much disappointed, no.

Q. You expected to find nothing and you found nothing? A. I cannot say that I found nothing.

Q. Were you an hour and a half down there trying to gratify your curiosity about this place? A. Well, naturally, being in that line of work, when I am around a mine I will see what there is there. I had to go down to see what there was there, zinc and lead being in our line I am interested in it and of course, those are things that I am looking for.

Q. How did you happen to go there? A. I was directed to.

Q. By the Erie Railroad Company? A. By the counsel for the Erie Railroad Company.

Q. It was this counsel? A. Yes, either Judge Collins or Mr. Hobart, I have forgotten which.

Q. No examination was made of the value of this mine at all or of the ore in it? A. I did not think I was to examine the mine at all.

Q. You were present at the last trial here, weren't you? A. Yes, sir.

Q. Do you remember a lot of testimony being taken about the value of the ore? A. Yes, sir.

10 Q. You remember testifying on that don't you? A. I was asked practically the same questions that I have been asked this time.

Q. On that question? A. Yes, and I made practically the same replies.

Q. And it just happened so that you were able to qualify as a witness as to the value of mines, didn't it? A. I don't think I was asked as to the value of the mine.

Q. I mean as to whether there was ore in there,

20 is that so? A. I don't think that I understand.

Q. If it had not been for your desire to gratify your curiosity about finding out what there was in the mine you would not have been worth anything as a witness to the defendant on the last trial, would you? A. I think I would, at least, from my view of the case it was entirely a question of damage to the utility to the property and had nothing whatever to do with the value of the mine.

30 Q. Do you remember how much testimony was taken as to the value of the ore in the mine? A. I know, but that was not in accordance with my idea.

Q. You had the same idea the Supreme Court did then? A. I think I proposed that view to our counsel if I am not mistaken and was very strongly of the opinion that the value of the mine had nothing to do with the case as far as

40 I could understand it.

MR. HOBART: The Supreme Court approved of your views?

THE WITNESS: I feel flattered.

Q. But I say the testimony from you that was available at that time and that was given then was merely so because of the result of the chance that you went down there to gratify your curiosity? A. Having been down in regard to the shaft I was in a position to testify as to what I saw and also to express an opinion.

Q. You spent more time underground looking around than you did up on the shaft didn't you? A. Well, I don't know but what I did; it did not take very long to size up the shaft proposition.

Q. You saw at once it was out of alignment, didn't you? A. Yes, sir.

Q. And you saw it was in a dangerous condition, didn't you? A. Well, it was not in good condition when I saw it on account of the many timbers that seemed to be rotted away.

Q. Wasn't it in a dangerous condition? A. If the timbers had been sound, it was not.

MR. COLLINS: How is that?

THE WITNESS: If the timbers had been sound it was not in a dangerous condition.

MR. COLLINS: What is that? I did not get it.

THE WITNESS: It was not in a dangerous condition if the timbers had been sound, it was not in a dangerous condition.

Q. But it was then in a condition where you would not want to send miners down into it? A. Well, I went down myself.

Q. You would take chances yourself that you

would not take with the miners? A. Well, I don't think a man would take any chances in going down there. I don't think a man would be taking any very great chance in going down there.

Q. Do you recall at the last trial being asked whether you would send miners down when the shaft was in that condition? A. No, I don't recollect that.

Q. And you don't recollect that your answer to that question was, "Not without repair." Do you remember that? A. No, I do not recollect it, but I may have said it.

Q. But it is a fact, is it not? A. Yes; that referred to the condition of the timber.

Q. That referred to the condition of the mine? A. It had nothing to do with the mine.

Q. Referring to the condition of the shaft? A. The shaft at that time, at that particular time, was not in a good condition.

Q. It did not make any difference that it was so far out of plumb that you could see it without taking measurements, as to whether it was dangerous or not? A. No. The statement I meant to make is that the condition of the shaft was due to the condition of the timbers. Had the timbers been sound the shaft being out of plumb would not have necessarily interfered with its operation.

Q. It would not? A. No, sir.

Q. So, really, all that the mine needed was retimbering, wasn't it, of the shaft? All the shaft needed was retimbering? A. Yes.

Q. That was due to the fact that the timbers were getting old? A. Well, the timbers were out of plumb and they were probably rotten. Those I saw were rotten. It was lined inside with boards and I did not take any of the boards off to ex-

amine all the timbers. Of course, it is safe to assume that pretty many of them were rotten and I guess they were.

Q. The fact that the shaft was out of plumb was due to the pressure from the opposite side from that to which it leaned? A. Yes, sir.

Q. And it leaned to both the south and the west didn't it? A. Yes, it had gone diagonally.

Q. Didn't you swear in your direct testimony about the retaining wall the railroad put in there holding it up afterwards? A. I said that the retaining wall was placed, and when it was placed it restored the equilibrium.

Q. There was something the matter with the equilibrium before that was put in wasn't there? A. Sure.

Q. If that retaining wall had not been put in there, what would have happened to the shaft? A. The bank would probably have sluffed down until it had reached its angle of repose and then it would have stopped.

Q. Where do you suppose the angle of repose would have to be? A. Somewhere between an angle of one and a half to one. That is, a lean of one and a half feet with a rise of one foot.

Q. Here is the photograph Exhibit P-5. If that shaft had been left in that condition what would have happened to it? A. It would have probably settled over.

Q. Gone down into the cut wouldn't it? A. Towards this corner.

Q. Gone down into the cut wouldn't it? A. It might have and it might not.

Q. It would be a good deal more likely to do so than not to? A. Well, I have seen shafts exposed a good deal higher than that, and still stand up.

Q. With a pressure behind it such as is there?

A. I don't know what pressure there is there. That dirt looks as though it had been shoved away, that does not look like as though it came from the pressure from behind; it looks as though it had been washed away with water.

Q. You think also that that cut down there was made by the action of the water don't you? A. No, that has evidently been a railroad cut there.

Q. You really think there was a railroad down there at some time? A. Well, there is a railroad there now.

Q. There was evidence of a railroad track there at the time that photograph was taken? A. Apparently there were tracks there.

Q. That cut looks as though it was made by man, doesn't it? A. That is a steam shovel in there.

Q. See where the shaft house is, and the cut up there, do you think water did that? A. The appearance of the upper part of the bank—

Q. Where does the operation of the water leave off and the operation of man begin on that slide? A. The cut was first made with a shovel and then the water has probably washed the upper part back.

Q. Just show me on the photograph where the work of the steam shovel stopped and where the work of the water began on that slide? A. I don't think I could do that.

Q. Why not? Why can't you? A. Well, that would be a rather difficult thing to do. There is evidently no sharp line of demarkation where one began and the other ends. A fresh embankment will always wash with water. Much more that a solid embankment.

Q. Well, if that condition were allowed to remain as it is there, that shaft would probably

have gone into the cut? A. The cribbing would probably have gone over sooner or later.

Q. So, it was necessary, when that condition was there, to do something to hold up the shaft, wasn't it? A. Yes.

Q. And it was only a question of what was the right thing to do in order to make a proper job of it, wasn't it? A. Yes, sir.

Q. Here is the photograph Exhibit P-6, that shows the stone wall that was put up in that vicinity, doesn't it, as far as you know? A. So far as I know.

Q. And do you think that that wall restores the equilibrium of the shaft? A. I think so.

Q. What was to prevent it from going to the south? A. It had slid enough to the south to keep it from going that way, I should think.

Q. You mean, there was enough earth between the shaft and the excavation on the south to hold it from toppling in that direction? A. Up at this corner it had earth all the way out.

Q. Do you think that is so or not? A. I think there is earth enough there. Yes.

Q. The retaining wall did not help it on the south did it? A. Yes, because it would hold this bank from coming down this way.

Q. What bank? A. The railroad bank. From the earth bank back of the wall, the retaining wall, it kept that from going down into this direction onto the railroad track.

Q. When you made your investigation did you find an earth bank to the south of the snart house? A. There is a slope of dirt there.

Q. Is there earth back to the south of it? A. There is certainly earth there.

Q. Is there anything at all to save it, to restore the equilibrium? A. There is the dirt there, the dirt sloping from the top on the grade working down grade.

Q. The dirt slopes right up to the very edge of the shaft house, doesn't it? A. That does not interfere at all with its holding.

Q. How much earth do you say there is between the top of that slope and the shaft? A. I don't understand.

Q. Where the top of that slope comes up to the shaft house? A. From the top of the wall here, you mean?

Q. No, I mean from the back of the wall to the shaft? A. To the south?

Q. To the south? A. How much earth from the top of the bank to the shaft?

Q. Yes? A. I don't know; there may not be over two or three feet, three or four feet.

Q. You think that is enough to keep the equilibrium of that on the south? A. Ample.

Q. Then what was the use of the retaining wall on the west? A. Why, to hold the foot of that bank.

Q. There is no retaining wall to hold the foot of the south bank, is there? A. It is not necessary.

Q. Why is it necessary on the west and not on the south? There is more water running down there? A. On the west side you have a cut running the full length, on the south side you have the slope of the embankment. I can illustrate that better with this ruler.

Q. Suppose that was the bank, now, show us? A. Well, suppose that was the bank sloping there right up to the shaft; if you have a wall on this side, if this bank here is continuous, you don't need any walls on the other two sides, you have the earth there to hold it.

Q. Let me see if I get what you mean? You have two banks, say, for the purposes of the argument, say, for illustration, exactly alike, and

there is the shaft on the corner here? A. Yes, sir.

Q. And that shaft is tilting out in this direction and you put a retaining wall on one of those sides, you don't need to put one on the other at all, do you? A. If the bank extends along here, you don't need a retaining wall there, you don't need a retaining wall on the other side, if the earth don't shoot away, you can fill in that earth again if it happened to slide a little.

Q. What is to prevent the pressure on this side of the shaft from shoving it over that way? A. What is going to shove it over that way? You must have something to cause your pressure.

Q. The earth behind it wouldn't it? A. No, sir.

Q. Why not? A. Because, you have not the earth behind there to cause pressure.

Q. Suppose there are cuts on two sides of the shaft, would not the earth fall quickly away in each direction? A. If you had cuts on four sides of the shaft the dirt would fall away on four sides.

Q. If you had cuts on two sides, would it not fall away? If there was a cut on two sides of the shaft at right angles, would not the pressure be the same on each side? A. Downward.

Q. And there is no such thing, is there? A. No.

Q. Why not? A. Because the cut is only in front of the shaft.

Q. Did you find that the shaft did lean towards the south? A. Yes, sir.

Q. You said it did, didn't you? A. Yes, sir.

Q. What made it? A. I don't think the shaft was parallel, my recollection is the shaft was not parallel with the cut.

Q. Didn't you say a while ago that the shaft leaned towards the west and towards the south? A. I think the caving was in a southerly direction, a southwesterly direction.

Q. Didn't you say a little while ago that that shaft leaned towards the west and towards the south, both? A. Yes, sir.

Q. What do you suppose made it lean towards the south? A. Why, the dirt had probably caved away, not only from the front, but would go away from the sides at the same time.

Q. So that the reason you had a lean towards the west was entirely different matter from the lean towards the south wasn't it? It was the pressure in the back that made it lean towards the west, wasn't it? A. Yes, sir.

Q. It was not the pressure in the back that made it lean to the south at all, was it? A. Well, the dirt was probably caved away from both the west and the south sides and when it deflected it went in that direction.

MR. COLLINS: You said diagonally, I think didn't you?

THE WITNESS: Diagonally, yes.

THE COURT: What Judge Coult is trying to find out is, if you filled up on the south side, how could you take care of the pressure that is on the west?

THE WITNESS: Let in the dirt again.

THE COURT: Fill that in?

THE WITNESS: To fill it in with dirt.

Q. Was that included in your estimate of repairing this shaft? A. No. I don't think I made any allowance for the filling in of dirt.

Q. Why not? A. I only estimated on the retimbering, straightening up of the shaft and straightening up the head frame.

Q. What you did was to estimate the cost of retimbering this shaft, just exactly as you would

on any shaft where there had been no subsidence or cave in at all? A. Well, no.

Q. What was the difference between your estimate on this shaft and an estimate of retimbering an ordinary shaft? A. Well, I don't know that there is anything extraordinary about this.

Q. I asked you what was the difference between your estimate of repairing this shaft and in retimbering an ordinary shaft where there has been no subsidence or cave in? Was there any difference? A. The fact of there having been subsidence would not affect the cost of timbering.

Q. Was there any difference in the amount of your estimate? A. I estimated on that job.

Q. Would it have been any different if it were just an ordinary shaft that needed retimbering? A. It might have been, I cannot say.

Q. There was nothing unusual about this job, was there? A. There was nothing particularly unusual.

Q. You think that there would be no risk attending the work, in having anybody go down there and taking those timbers out and putting new ones in? A. Very slight. I consider it a very simple job.

Q. If I was asking you about the danger of putting people in there you don't think there would be any? A. Very slight.

Q. What would be the slight danger? A. I suppose there always is more or less danger.

Q. It would not be any different in this case than it would be just going down an ordinary shaft? A. No, sir.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. You spoke of these samples of ore that have been produced here as crevice mineral, what do you mean by crevice mineral? A. Crevice min-

eral, usually it is segregations of high grade mineral, in a crevice or fissure through the rock. Crevice mineral is different from the mineral that you find in the hard ground. It has probably been deposited there by water action.

THE COURT: It is called crevice mineral because it is found in a crevice?

THE WITNESS: Because it is found in a crevice. It is segregated in rich lumps, usually in soft material and where you find it it is very good indeed, and there may be nothing between that and the next lump.

THE COURT: That you find sometimes boulders like?

THE WITNESS: Sometimes like boulders, yes.

Q. Is there any difference between that kind of mineral and the mineral in veins? A. Yes, sir.

Q. What is the difference? A. Vein mineral occurs in the solid rock.

Q. And is the vein mineral practically continuous? A. Not necessarily.

Q. It is more nearly continuous than the crevice mineral? A. Yes, it is a different deposition entirely from crevice. The crevice mineral is supposed to be water deposition.

RE-CROSS EXAMINATION BY MR. COULT:

Q. There would not be any difference in the appearance of the mineral whether it came out of a vein or out of a crevice, would there? A. Usually, yes.

Q. What is that? A. The crevice mineral is usually in the form of boulders or nodules.

Q. If the samples exhibited here came out of a fissure vein it would be a pretty good vein wouldn't it? A. If it was all like that, yes.

Q. It would be very valuable, wouldn't it? A. Yes, if there was enough of it.

Q. Do you remember testifying at the last trial? Did you say something about the pressure on this side being enough to crush the timbers and the shaft. The pressure would probably be equalized on the other side of the shaft, but, of course, if the timbers rotted they would give way and the pressure would be on one side only, and it is to prevent that that you align it. Do you remember giving such testimony as that? A. To prevent the timbers giving away?

Q. Do you remember giving this testimony at the last trial:

"Q. The pressure in this particular case would be enough to cause the timbers to give way if they rotted? A. They would give way, yes, very easily, if they rotted.

"Q. Due to the pressure on the shaft? A. Sure.

"Q. If the pressure all came from the east toward the west none of it came from the north to the south? A. Not necessarily.

"Q. Isn't that your opinion in this case? A. No.

"Q. Then if there would be pressure from the north to the south ought there not to be something there to prevent it?

"Q. You want your timbers in sound condition, certainly. You need timbers in that are sound.

"MR. COULT: I ask that be stricken out as not being responsive?

"MR. COLLINS: I think it is responsive.

"Motion denied; Plaintiff excepts."

Q. Do you remember at the last trial that you stated that the pressure, if there were no retain-

ing wall, would be sufficient to throw out of alignment a concrete or steel shaft, do you remember that? A. Yes.

Q. You were speaking then of a pressure from the east toward the west, weren't you? A. Yes, sir.

Q. And you think that a pressure which would throw out of alignment a concrete or steel shaft would be obviated by the wall that holds the railroad bridge that is shown in the photograph that you have referred to? A. Yes, I think it would.

The Court thereupon Adjourned to to-morrow, Wednesday, December 20th, 1916 at 9:30 o'clock A. M.

Second Day.

Newton, N. J., December 20, 1916.

The trial was continued this day pursuant to adjournment.

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CHAUNCEY I. GUMAER, resumes the stand.

DIRECT EXAMINATION (Continued) BY MR. COULT:

Q. When your testimony was interrupted to take the testimony of Mr. Van Mater, do you recall that you were talking about an estimate which you had made in regard to the amount of excavation necessary in order to repair the damage on the plot of land? A. Yes, sir.

Q. Did you get your figures? A. I did.

Q. Have you them with you? A. I have.

Q. Produce them please? A. (The witness produces papers and books.)

Q. You made those calculations yourself? A. Yes, sir.

Q. They are in your handwriting? A. Yes, sir.

Q. When did you do it? A. About three weeks ago.

MR. COULT: Do you want to look at them?

MR. COLLINS: He is testifying from his memory and calculations he don't need to look at those. We don't want them.

Q. Using those figures which you produce, can you tell us the amount of excavation necessary to build the wall that you mentioned in your testimony?

MR. COLLINS: Objected to on the ground that from the very nature of the thing it cannot be possible that any such thing would be required or be relevant.

THE COURT: It is, according to his testimony.

MR. COLLINS: I think not, even according to his testimony. That is my point.

THE COURT: Why do you say that it would not be relevant?

MR. COLLINS: I do not understand that he would be entitled, by any possibility, for the purpose of the restoration of that shaft, under the circumstances, to build the walls of the character he states, even on his own testimony. Of course, in the case of this unbalanced pressure, I can understand that it might be necessary to have a wall at the place where the excavation has occurred in the cut. We have a wall there which we think is enough. He says it is not, he is afraid it won't stand. There may be some evidence for argument that we will have to have a wall behind the one we built, but another one on the south, there is nothing I can see in this case that requires it. There has been no cut on the south at all. There was earth there

and they have that. Mr. Van Mater testified that the earth had been put back. That is the reason he did not take into account any cost of filling from the south; but it has been filled in at the south, as the Court knows, at least it has not been shown that it has not been. That picture showing some of the crib work exposed at the southeast corner, does not show the condition of affairs now, and Mr. Gumaerd will not say that the filling on that south side has not been restored now. There being no permanent excavation and the earth being not disturbed by excavations along there, there cannot be any possible ground for doing anything there to restore the earth. How can it be necessary to build a wall there?

THE COURT: I do not think that has been developed.

Q. What is the condition now with relation to the south side of the building plot? A. There is no support to the south side.

MR. COLLINS: That does not answer the question.

Q. Just describe the condition on the south side? A. The condition on the south side is this; the natural slope, in digging their track, the natural slope had sluffed off there over three to one, for instance, every foot in perpendicular, the slope runs off three feet and it has already reached the extreme back end of the shaft building and part of the engine house, and there is no support on that side.

THE COURT: Does not this wall that has been erected there provide support for the shaft?

THE WITNESS: On the south side? Not a particle.

THE COURT: On the westerly side?

THE WITNESS: On the westerly side it would if it had been properly put in, but that wall is moving, it is tipping. Therefore, it is no better, as far as we are concerned for the support of the shaft, it might just as well not be put there at all, there is no permanence to that.

MR. COLLINS: He has not said it has not been filled in?

THE COURT: Was it filled in?

THE WITNESS: There has been no filling in on the south side, except in the cribbing up there, the cribbing that was put there, to make it look a little better they hauled from the old mining dump and covered up part of the building on the side there.

Q. I show you again the photograph Exhibit P-6 and ask you how that photograph compares with the present condition on the south side? A. That is the present condition as it exists on the south side, with the exception that this surface has gone back here, back to the engine house, the top of this wall has gone over three and a half inches.

MR. COLLINS: That is the west wall?

THE WITNESS: The west wall.

Q. Where did this loose earth that appears in that photograph come from, do you know? A. Yes.

Q. Where? A. It was taken from the old mining dump.

Q. By whom? A. By the railroad company.

Q. What are these timbers that appear above

it and also below it? A. It is the wooden construction there with piles through it, that has been shoved up here, and wood and timbers down here, with the base of the wall.

Q. Did those piles and that wood construction and that earth dumped against it afford any support for the south side of that plot? A. Not at all. It is all temporary—

MR. COLLINS: I object to that. The witness has not shown expertness to that extent. Apart from that it cannot be possible that it can be necessary to have a wall where there has been no excavation. If there has been a slide and there has been earth put in there restoring it to the condition it was before, how can it be possible?

THE COURT: The witness; says it was not done.

MR. COLLINS: Whether it was done or not and he does not deny it was not, it is out of the question to have a fifty-five foot wall going down to bedrock there, where we make a cut along the west side there ought to be a restraining wall, and we were bound to put one there and we have put one there.

THE COURT: He says that cut has its effect on the south side.

MR. COLLINS: It is impossible in the nature of things to be so.

THE COURT: On this motion I have got to take it as true, at least, as some evidence.

MR. COLLINS: I don't think the Court has to consider impossible testimony as true. I make my objection to it.

Objection overruled; Defendant excepts.

Q. Do those piles and that wood construction and that earth dumped up against it afford any

support for the south side of the building plot? A. Not at all. It is a temporary construction, and does not give us any permanent support. Had not the cut gone through there this ground would have been up nearly to the level of the sills where it was. It was the construction of this cut, and the gradual running in on the slope of that cut, and as soon as the cut was made it gradually increased and I have taken measurements to see in one year where the bank has been from its natural slope, and the ground has run in eight feet in one year.

THE COURT: On the south side?

THE WITNESS: On the south side and it shows the condition of the ground naturally.

Q. Sometime ago I asked you a question the significance of which seems to have been overlooked, that was, point out on this map, how far the slope ran back along the building lot, do you remember doing so? A. I do.

Q. Do it again. Point out the double cross? A. (Indicating) There is the double cross, the extreme end of the building there, that slope runs around in this shape. For instance, the track runs this way. In excavating that they were forty feet below the collar of that shaft, the subgrade of the railroad, and, of course, these slopes all ran in and the slope of it runs way around here, and in another year or two they will have to move the railroad if they don't put some kind of a wall there. They put steam shovels in there once or twice a year to take out the slide that is sluffing off, and if it was ordinary ground, it would stand. The degree of what we call rest, amounts to about one and a half to one in that kind of ground, and it has gone off nearly four to one.

THE COURT: Then you say with the condi-

tions you find there it is necessary to have a cement wall support both sides?

THE WITNESS: Absolutely.

Q. Coming back to the previous question, what amount of excavation will be necessary in order to put in such a retaining wall?

MR. COLLINS: Are you going to differentiate the walls, or put them all together?

MR. COULT: I am going to prove the cost of them.

MR. COLLINS: If they are both taken into consideration that would be an increased amount naturally. There cannot be, I should not suppose, any necessity, for anything more than filling of the right kind, filling such as he says, ordinarily good filling would hold it up. But that particular material there he says he thinks will sluff on the south side, he says. That is all that can be necessary, and the wall on the other side that is already provided for and we only have to keep our wall there. Now, if he is going to blend into one answer the excavation for both of those walls, that is unfair for us. They must be separated. Because the Court may instruct the jury that a wall may be necessary on the west and not on the south.

THE COURT: He may separate them.

Q. Have you made those calculations with regard to the walls separately? A. I have.

Q. What is the amount of excavation necessary for the south wall you contemplate?

MR. COLLINS: Objected to on the grounds already stated.

Objection overruled; Defendant excepts.

A. No. I find in my figures that the excava-

tion is made in entirety. But I have got the two separate walls separated in other respects, but this is all in an entirety for the simple reason that in the excavation of the one you partly excavate for the other. It would take nearly as much excavation for one as for both. But the concrete construction is separated.

THE COURT: Then just give us the joint cost of excavation?

MR. COLLINS: I object to that on the grounds stated.

Objection overruled. Defendant excepts.

THE WITNESS: Excavation of dirt 4680 cubic yards, the dirt refilling after the walls are up 2760 yards.

THE COURT: Is there any difference in the excavation and the filling of the two sides? Do they bear the proper proportion to the distance?

THE WITNESS: There would be very little difference, because one filling makes part of the filling of the other wall.

THE COURT: For instance, if it cost one hundred dollars for a hundred feet, would that run in the same ratio all the way around on both sides, or is the digging more difficult on one side than the other, or is it of the same character?

THE WITNESS: Well, on the south side the bed rock slopes and, of course, the concrete work runs up on the bedrock.

THE COURT: I am talking about the excavation?

THE WITNESS: The excavation is the same thing, but the bedrock slopes up to the east and

therefore does not require the excavation on the east side that it does on the west side.

THE COURT: What would be the proportion of increase of one over the other?

THE WITNESS: I think you could call it practically the same. Of course, the deeper the excavation is the more water to be handled and that makes a little expense.

THE COURT: They are practically the same?

THE WITNESS: They are practically the same, yes, sir.

THE COURT: Go right on with your figures then.

Q. Right here, I will ask you to look at the map annexed to the deed, Exhibit P-1, and I call your attention to the little diagram at the bottom of the map showing the shaft and some lines drawn about it, what does that indicate? A. It shows the position of the shaft. It shows the position of two concrete walls that the Engineers of the Erie Railroad Company agreed to put there to prevent this damage, and it shows—

MR. COLLINS: I object to that statement of what the agreement was. The document must state what the agreement was.

THE COURT: Yes; that may be stricken out.

Q. What does it show about the shaft?

MR. COLLINS: Objected to, the document shows for itself.

MR. COULT: All right. I will show it to the jury.

MR. COLLINS: The paper is in evidence?

MR. COULT: Yes.

MR. COLLINS: Don't explain anything, but just show it to them.

MR. COULT: (Showing to the Jury.) I am showing you, Gentlemen, the map annexed to the deed. That diagram shows a sketch showing dimensions, and showing rectangular lines, one marked fifty-five feet and the other marked ten feet. I want you to look at it.

Q. What is the length of the wall necessary on the west? A. Fifty-five feet.

MR. COLLINS: Your Honor will bear in mind that there is no count in this declaration for our failure to build any wall we agreed.

THE COURT: No. All he says is that one of the elements of damage is that the wall is necessary.

MR. COLLINS: That is what he is claiming now. But he wants to show by this map that there is something that we agreed to build and did not build. Now, we say whatever we agreed to build we did build and it is there.

THE COURT: I understand he is calling attention to a map which the defendant made and which he claims intimates the very thing that Mr. Gumaerd contends is necessary, and from that he will argue that they then thought it was necessary.

MR. COLLINS: That is the inference. It is not claimed that we did not do what we agreed to do. They want something more.

MR. COULT: It is on the further ground, your Honor, that the deed says that they will build restraining walls to prevent the slopes from encroaching on our land, and that is all.

It is not in a claim for those walls, but it is in explanation of what was intended.

MR. COLLINS: There is no proof they did not do it.

Q. Have you estimated the cost of excavating? A. I have.

Q. What does that amount to? A. The cost of excavating the dirt, 4680 yards, I estimated at a dollar and a half per cubic yard, and while that may seem high—

THE COURT: What is the amount?

THE WITNESS: $7,020, and 2760 yards of refilling at fifty cents a yard $1,380.

Q. Have you estimated the amount of concrete necessary for your retaining walls? A. I have.

Q. What is the amount of concrete necessary for each wall, have you got that? A. I have.

MR. COLLINS: I object on the ground that he has not shown expert capacity sufficient to permit him to answer.

Objection overruled. Defendant excepts.

A. 865 cubic yards of concrete for the south wall. The west wall 1055 cubic yards. Total 1920 cubic yards of concrete re-enforced, at $8.00 per yard.

Q. What does it amount to? A. $15,360.

Q. Making a total of what?

THE COURT: Does that cover all?

THE WITNESS: No, sir.

THE COURT: What else is there?

THE WITNESS: Stepping or potting the bed-rock to hold the concrete on a thirty degree angle, one hundred dollars estimated; three thousand

feet of shoring to protect the Erie wall, at $35 a thousand, $105.

THE COURT: Is that all the items?

THE WITNESS: Yes, sir.

THE COURT: What is the total?

THE WITNESS: The total is $23,965.

THE COURT: What is what you say would be the cost of restoring?

THE WITNESS: Restoring the plot. I have not come to the shaft yet.

THE COURT: Let us have that.

Q. Have you figured the cost of restoring the shaft? A. I have.

Q. What did it amount to? A. I will give you the details of it. I have them here:

| | |
|---|---|
| 10,862 feet of 6 x 8 timbers and partition at $35 a thousand ..... | $380.17 |
| 39 days Carpenter framing Timbers, at $4 per day ..... | 156.00 |
| Retimbering labor ..... | 225.00 |

Retimbering labor is this: One engine man, $4 per day; two top men, $5; three men in shaft, $7.50; one foreman, $5; fuel, $1.00, $22.50 per day for ten days, making $225 on retimbering labor.

THE COURT: Is there anything else?

THE WITNESS: Cost of removing building to make excavation and replacing, $200, making a total of $961.17 of reconstruction of the shaft after the pressure had been removed and the material excavated.

THE COURT: That is $24,926.17?

THE WITNESS: Yes, sir.

Q. Were you present when the concrete wall which supports the railroad bridge which appears in the photograph Exhibit P-6 was constructed? A. Part of the time. I was there when the foundation was placed opposite the shaft.

Q. Does that foundation go down to bedrock? A. It does not.

Q. How far down did it go? A. It goes two feet below the ties.

Q. The ties are on the surface? A. Yes, and the bedrock is some seventeen and a half feet below.

Q. How do you know that? A. During the construction of the shaft to bedrock, I found that the line of bedrock, the bedrock on the line of the shaft and the building plot is fifty-eight and a half feet, the bedrock on the line of the shaft is fifty-seven and a half feet, that is on the westerly side. That was all dug out and bedrock was struck at that point, on the eastern slope it was fifty-three feet to bedrock.

Q. So that the bedrock is, as I recall your testimony, some fifteen feet below the foundation of the concrete wall? A. Yes, sir.

Q. Did you take any measurements to determine whether or not that wall was plumb shortly after it was constructed? A. I did.

Q. When was that? A. About three weeks after the wall was put in, after the sticks was put in behind.

Q. What did you measure with? A. I measured with a plumb line.

Q. From where? A. From the top.

Q. What did you find? A. I found that the wall sloped toward the shaft one-half inch.

Q. Have you plumbed it again? A. I plumbed it two or three times since and found it moving toward the cut.

Q. How far has it moved up to the time you took the last measurement? A. It has moved since the first measurement four inches.

Q. Which way? A. Toward the tracks.

Q. How does it lean now? A. That same way. It is going over all the time.

Q. You say, that same way, toward the track? A. Toward the track, westerly.

MR. COLLINS: Toward the tracks or the shaft?

THE WITNESS: Toward the tracks.

MR. COULT: There has been some testimony here in regard to Mr. Van Mater's testimony which is properly rebuttal.

THE COURT: I think we had better take it all together.

MR. COLLINS: We don't object to having it done now to save time.

THE COURT: I think it will be more orderly to have it all together. There may be matters brought out so that it will not be necessary to introduce that testimony in rebuttal.

CROSS EXAMINATION BY MR. HOBART:

Q. At the time of the giving of this deed of June 24th, 1909, the one upon which your action is based, will you state what consideration passed to your company for that deed?

MR. COULT: Objected to as irrelevant.

MR. COLLINS: If the Court will notice the opinion of the Supreme Court, it will find that they regard it as relevant.

MR. COULT: They only say the proof was not objected to.

THE COURT: How do you think it is relevant? You are not attacking the consideration in any way?

MR. COLLINS: No, but as bearing upon this contract the price which the company paid is relevant to the issue.

THE COURT: Why?

MR. COLLINS: I think it is relevant to show the whole transaction. It would be one thing if he gave the defendant this land, but he did not, he sold it as a part of the transaction.

THE COURT: What difference does it make whether they paid a dollar or forty thousand dollars for it?

MR. COLLINS: It makes a very great difference when we come to consider how to construe this contract.

Objection sustained; defendant excepts.

Q. Was there any money consideration passed from the railroad company to your company for the execution of this agreement?

MR. COULT: Objected to.

Objection overruled. Plaintiff excepts.

Q. How much?

MR. COULT: Objected to as irrelevant.

Objection sustained. Defendant excepts.

Q. You referred in your examination yesterday to the old workings of this mine which are located a little to the east of the present shaft, I think, are they not, as shown on the map? A. Yes, sir.

Q. Do you know when the work in that mine ceased? A. I do.

Q. When was it? A. In the Winter of 1876 and 1877, that Winter. There was some work done, I think, in 1883 after that.

Q. But there has been nothing done since 1883? A. The only work I know of, the last work, was in the Winter of 1876-77.

Q. It was in connection with the work, the old work of 1876-77 and the years prior thereto, that these two old shafts were constructed, was it not? A. It was.

Q. These shafts which are known as shafts numbers one and two? A. Yes, sir.

Q. According to your map, shaft number one is located directly over the vein, that is correct, is it not? A. Shaft number one is directly over the vein.

Q. Shaft number two is located how near to the vein? A. Well, it is some feet to the north of the vein, I could not tell exactly.

Q. About fifteen or sixteen feet, is it not? A. I should judge somewheres about that.

Q. Certainly not more than twenty feet, is it? A. No, sir.

Q. It is correctly shown on the map which is according to scale, is it? A. It is correctly shown on the map.

Q. Is the map according to scale? A. Do you have reference to this map which we have been referring to?

Q. Yes? A. Yes, that shows the shaft which is right, I should say, probably fifteen or eighteen feet, not over twenty feet.

Q. How far from this vein, as continued towards the west, is the shaft that is now under consideration in this trial? A. I should say it was practically three hundred feet.

Q. From the vein? A. You said from the shaft.

Q. No. How far is the shaft from the vein? A. At the present work?

Q. Yes? A. The present shaft I think is ninety feet.

Q. Can you give us any reason why that shaft was sunk at a distance of ninety feet from the vein when the other shafts were directly over it, one directly over it and the other within fifteen or twenty feet of it? A. I can.

Q. Give us your reason? A. The old highway is traced complete by the dotted line crossing the tracks at right angles, that I am pointing out, goes through the shaft and building plot. If this opening had been put over the vein—I would like to have that stricken out. What I took for the old highway, seems to be a water course—

Q. I thought you were mistaken. Well, give us any other explanation that you have? A. The old highway ran southerly from this water course about sixty feet, which brought the highway running across the vein so that there was no room for waste and dumping material in sinking the shaft. I had to go far enough away to have a chance to support what material I took from the shaft. We contemplated going at least four hundred feet, because we had to have at least eighteen or twenty feet of elevation around here to hold the waste that was produced from the shaft. The highway passing right up from this point, this is the new highway, the old highway ran here before it was changed and crossed right there, through here. Now, to have brought that over the vein here there would be a shaft right in the highway. We had to go far enough so that we would have plenty of room for the dirt that was excavated from the shaft. The reason these old shafts were not operated, this number one shaft at the upper left hand corner of the map had caved in and was in bad shape; following the vein down to the old shaft, the old shaft was in a very dangerous condition, and everything in the old workings was full of water. I was unable to get a renewal of

the lease on the ground east of the shaft and building plot, but I could get a renewal of the lease of the ground covered by the shaft and building plot, running south for some two thousand feet, containing about nine acres, and I did. I had to have my machinery and permanent mine workings on something where I had a renewal. These old workings, the ore had been extracted and the mine was full of water. That is, it raised up to within about eighty feet of the collar of this shaft.

Q. Did that old highway to which you have referred on that map—is it indicated on that map? A. No, sir.

Q. Did it run right on top of the vein? A. It crosses over the vein, just about the place where the red line crosses the brown line.

Q. The brown line is marked "Ditch, New Course"? A. No, the brown line is marked "Vein."

Q. What is the other line marked, so that we may know to which line you refer? A. The other line?

Q. You spoke of two lines crossing each other, you have described one of them, what is the other one? A. I described the point where the highway crosses the vein, at a point where the red line of the shaft and building plot crosses the brown line marked "Vein"; the old highway ran through there. The dotted line marked "Old Water Course", going from a point where it leaves the ditch on the shaft and building plot, follows the north side of the old highway.

THE COURT: Do you want all of this?

MR. HOBART: I don't want to stop him. I don't want to interfere with his making as full an explanation as he can.

Q. Did this old highway run practically north and south? A. The old highway?

Q. The old highway to which you have referred? A. Why, certainly not.

Q. Which way did it run, according to the compass, which way did it run? A. It ran northwest and southeast.

Q. And it crossed the vein at one point? A. It crossed the vein at some point near the point that I have described.

Q. But only at one point? That is the only point where the highway crossed the vein, is it not? A. No, the highway crossed the vein up above here again.

Q. That is the second point? A. Yes, that is the second point.

Q. Are those the only two points? A. Those are the only two points.

Q. Will you tell us again, what on earth the position of that old highway had to do with the location of your shaft in the particular place where you did locate it? How could it prevent you, for instance, from putting your shaft right over any other part of the vein where the highway did not cross the vein? A. There was no good place that I could put that shaft and have a surplus there for my machinery and for my dumps unless I did come far enough away from the old highway so that the dumps would not interfere with that highway.

Q. You mean you did not want to put the dumps on the highway, was that your idea? A. Practically. You could not use the highway.

Q. Was that your purpose? Was that your thought behind it? A. The thought behind it was to have enough ground surrounding all of that shaft to contain or to hold the material that would be brought out of this shaft.

Q. So as not to put that on the highway, is that what you mean? A. That was the reason it was put at the point it has been put. One of the reasons. The next was that there was a siding or a switch some call it, a siding along here, which made it better in elevating your ore there to have your tracks run right out from the shaft, dump your ore into chutes and load it on the cars there without rehandling.

Q. Did you ever load any ore from that shaft onto cars? A. I did not have a chance.

Q. You never did, did you? A. No, I did not.

Q. It has never been done since the mine was first established, has it, on that siding? A. There has been hundreds of carloads, but not out of that shaft.

Q. Not on that siding? A. From that siding. All the ore from the old mine was shipped from that siding.

Q. Is it there now, the siding? A. The siding has been taken out.

Q. When was it taken out? A. In 1909.

Q. It was taken out before your shaft was put there, wasn't it? A. No, sir.

Q. How long after your shaft was put there was it taken out? A. I started the shaft, as I have already stated, in 1907.

Q. That is, the present shaft you started in 1907? A. Yes, in 1907.

Q. I understood you to say you started the present shaft in January, 1909?

MR. COULT: No, he said 1907.

A. If I said 1909, it was an error.

Q. How large is that shaft and building plot, just give us the dimensions roughly? Do you know? From your map? A. One hundred and eighty feet at this point, one hundred and thirty

feet at this point, and, if I remember, three hundred and twenty-six feet or three hundred and twenty-seven on the west end.

Q. You had the right to sink your shaft on any part of that building plot, did you not? A. The shaft was started before that plot was laid out at all.

Q. Did you have the right, or did you understand you had the right to sink a shaft on any part of what was afterwards fixed as the shaft and the building plot? A. Yes, sir.

Q. That was part of your lease, wasn't it? A. It was included in—

MR. COULT: I think Counsel should be more definite about this. You are not talking about his Railorad Company lease?

MR. HOBART: No, I mean his mining lease. You understood that, didn't you?

THE WITNESS: Yes.

MR. COULT: I don't think the Jury understood it.

Q. So, under your mining lease, you had the right to sink a shaft at any point within that three hundred feet in one direction and over a hundred and thirty feet in the other direction, is that right? A. That is right.

Q. But, as a matter of fact, the point which you selected for the sinking of this shaft was just as close as you could possibly get to the railroad tracks, wasn't it? A. Naturally, yes. I had a reason for that. If I had gone to a place on the opposite side of the track, the slope instead of fifty-three feet of wash to go through, I would probably have a hundred feet of wash to go through. I wanted to be on the easterly side of the Erie tracks so that the ore could be taken to the easterly.

Q. That is where the present shaft is built, is it not? A. It is.

Q. On the east side of the railroad track you had a space of over three hundred feet? A. I did.

Q. At any point of which you could have sunk a shaft under your mining lease? A. I did.

Q. Is it not the fact that the point you selected out of this three hundred and fifty feet was the point that was in fact nearest to the railroad tracks? A. No. Any point along here would have been just as near to the railroad tracks as this point was. Any shaft sunk along here would have been just as close as that, the farther you went this way the farther you got away from the vein, the creek waters here interfere, and the intention was to keep away from that creek.

Q. Suppose you went further to the east, that would bring you further away from the railroad track, wouldn't it? A. It would.

Q. You had a hundred feet leeway, didn't you? A. I had a hundred feet leeway there.

Q. As a matter of fact, how close is your shaft to the railroad right of way?

MR. COULT: Counsel is referring now to the railroad right of way as it is now or as it was when the shaft was built?

MR. HOBART: Say as it is now?

THE WITNESS: The Erie right of way as it is now?

Q. Yes? A. Well, I have to be enlightened on that. They bought nine acres from me and have constructed onto it. Now, do you mean the old Erie right of way, as it existed? Because the new property that they acquired and have constructed on—I don't know, your question is not definite.

Q. The right of way as shown on this map, how

close is that right of way to your shaft, or how close is your shaft construction to that right of way? A. Three feet.

Q. Within three feet of that line, is it not? A. Three feet of that line? No, not three feet. It is more than three feet. But in the deed, they got back, they are to keep back there, to leave room to put a wall there, leaving me three feet between the shaft and the line. I only have the right to build on the three feet on the westerly side. It is probably, I would say, eight feet, eight or nine feet, but I am limited to three feet in front of the shaft and ten feet to the side.

Q. This was not the only shaft that you built in connection with the proposed operation of these mines, was it? A. It was not.

Q. Where was the other shaft started? A. On the westerly side.

Q. How far away from the present shaft, about?

MR. COULT: I object. It can only be relevant on this witness' qualifications as a mining expert, but he had been permitted to testify.

Objection overruled; plaintiff excepts.

A. Well, I would have to give that to you approximately. I have nothing to tie to. There is nothing in evidence here, no map to go by.

THE COURT: Give it to us approximately.

THE WITNESS: Approximately three hundred feet, three hundred and fifty feet, somewheres along there.

Q. And that was on the west side of the tracks? A. That was on the west side of the tracks.

Q. When did you start that shaft? A. That shaft was started in December, November. That was a level start there, first. I will see if I can

tie it with that shaft. The shaft on the west side, the nearest to the vein, must have been started in the east side shaft, there was a level started in there in either November or December of 1906, and the shaft was not started till after the railroad broke that level down.

Q. That was in connection with the new railroad that was being constructed along that point, was it? A. It was not.

Q. Is it not a fact that there was a new railroad being built at that point? A. There was a railroad being built farther towards Otisville at that time.

Q. How far from the point where you started to construct the tunnel? A. Well, probably a mile, possibly a little less, possibly a little more.

Q. How far from the vein were you constructing then? A. That tunnel was not to develop this old vein. It was to develop a flat vein, a contact vein. This is a separate proposition entirely.

Q. Will you answer my question?

MR. COULT: We object to the question as entirely irrelevant.

Objection overruled; plaintiff excepts.

A. The question?

Q. How far from the vein that you have already referred to? A. Well, I should say that it was three hundred feet or more.

Q. At the time you started work on that tunnel there was a row of railroad stakes, or at least a row of stakes laid out very near to the point where you were doing your work, was there not?

MR. COULT: Objected to as irrelevant.

THE COURT: The plaintiff on his examination brought out the condition of this mine,

what it consisted of and that there was ore there and that there was some reason for putting the shaft there. And this certainly has a bearing on that.

MR. COULT: But, your Honor understands, that Counsel is now dealing with an entirely different locality.

THE COURT: It is part of the general mining plan.

MR. COULT: What has the construction of a proposed railroad line got to do with it?

MR. HOBART: It may have had a whole lot to do with it, and we think it did.

THE COURT: I think it is proper cross examination.

Objection overruled; plaintiff excepts.

A. Some little distance to the north of where the tunnel was started.

Q. How far? A. Oh, possibly a hundred or two hundred feet, may be more, may be less.

Q. Those stakes, if continued in the direction in which they were running, would pass right over the point where you were doing your work, wouldn't they, or, at least, very near to it? A. About twenty-seven feet above.

Q. That was in a perpendicular direction about twenty-seven feet above, but directly over where you were doing your prospecting work, wouldn't they? A. Yes, I think so.

Q. The fact is you were expecting the railroad to come along that very point, isn't that the fact about it. A. Well, there was a row of stakes there, but there had been several rows of stakes there, and there has been several surveys down that mountain, and none knew where that railroad was going.

Q. Those surveys were all railroad surveys,

weren't they? A. How can you tell a railroad survey from any other survey.

Q. Haven't you examined the maps on file? A. Later I did. When I was served with notice.

Q. Had you not already been served with a notice, had not your mother already been served with a notice?

MR. COULT: I object to this.

Objection overruled; plaintiff excepts.

A. In 1907 or 1906, when that was started?

Q. I am speaking about the time when you were doing your construction work on the west side, and you say this close, within a hundred feet or so of it? A. I do not recall that. She was served with a notice, but I do not recall that she was served with a notice until after that work was started. The notice would show for itself.

Q. At any rate you knew about the notice that was served? A. There was a notice served on her later, and there was a notice served on the mining company.

Q. Is it not the fact that you did not begin your work on that tunnel on the west side until after you noticed these stakes? A. I think there were stakes north of where that work is when that tunnel was started.

Q. Now, answer my question please; is it not the fact that you did not begin your work on that tunnel, on the west side until after you noticed those stakes?

MR. COULT: I submit the answer made is responsive.

THE COURT: Yes, I think it is responsive.

Q. Is it not the fact that as soon as you saw the stakes you began work on that tunnel? A. No, that is not true.

Q. That is not true? A. That is not true, no, sir.

Q. Didn't you testify at the other trial of this case, as follows: "Q. As soon as you saw those stakes you began work on your tunnel shaft, didn't you, isn't that right?" And did you answer, "Yes, that is right." A. I may have answered that.

Q. Was it correct at that time? A. Just give that question again.

Q. The question is whether you testified on the former trial in this case as follows: "Q. As soon as you saw the stakes you began work on your tunnel and shaft, didn't you, isn't that right? A. Yes, that is right." A. Well, I saw the stakes several weeks before that tunnel was started.

Q. Then I will put the question this way; you did not begin any work on this tunnel on the west side until after you had seen those stakes, isn't that right? A. Well, it was about that time. I cannot say whether it was just before or afterward, but it was just about that time, I think, when I started the tunnel. There was a row of stakes up back of the old tool house that was about two hundred feet to the north, in the neighborhood of two hundred feet to the north.

Q. The fact of the matter is that you had in mind to develop for your company, or at least, to prospect for your company, for the purpose of ascertaining whether there was any valuable mining rights at that point where the railroad was coming, isn't that the sum and substance of it? A. Yes. There was a contract vein pitching down there under the old line vein, and if there was another big vein coming in there I wanted to run down there and see if I could catch it.

Q. You wanted to find out about that before the railroad was actually constructed from that

point, isn't that the fact? A. I presume so.

Q. Have you any doubt about it? A. Not much.

Q. Not much doubt about it? A. No, not much doubt.

Q. Have you any doubt? A. No, I might say I have no doubt.

Q. How much room did you have to construct this tunnel? That is to say, you have already described it as being at a point about twenty-seven feet below where the stakes, if extended, would pass over it, was it necessary to construct your tunnel at that precise point? A. Twenty-seven feet below where the railroad would have passed over it?

Q. Why did you select that particular place for the construction of your tunnel, so as to come directly under, apparently under the railroad? A. At that point I had the solid bed rock at the surface, that was the reason. I had no wish to interfere at all. I started that right in the solid formation.

Q. And that was at the very point where these stakes, if continued, would pass over the tunnel? A. Yes, sir.

Q. And is it not the fact also that that is the identical spot where that railroad was afterwards constructed? A. It was.

Q. And was it not in the course of the construction of that railroad, or, at least, during the time of the construction work, that the tunnel that you have described caved in? A. It was not.

Q. Did not the railroad men do it? A. The railroad men did it, yes, but not the new construction work.

Q. They were getting ready for the new construction work, weren't they? A. Not at that point, no.

Q. They were then a very short distance out were they not? A. It was the gang worked on the main line of the Erie Railroad that caved that in.

Q. Did you, in connection with that tunnel, or as a part of your work in connection with it, dig a shaft? A. Yes, sir.

Q. Where was that? A. After they caved it in I moved a little to the north and started a shaft to reach the contact slope of the bed rock. I started a tunnel in here. When they broke that in I started to sink to catch the contact there, because it was a flat vein that showed in the workings on the east side of the track that I was after, and I could either reach that with a tunnel or a shaft and it was cheaper to run the tunnel the way I started first than it was to sink the shaft. After they caved that in then I started a shaft down there and went to work over on the outside for the old vein.

Q. How deep did that shaft go? A. I think I only got down, possibly twenty-one or twenty-two feet. I don't remember just how far.

Q. Was that shaft sunk at a point which would bring it directly in line with those stakes? A. No, sir.

Q. How far away from it? A. Probably six feet, five or six feet.

Q. Was that shaft also caved in? A. No, sir.

Q. What became of it? A. The railroad company bought it. In the settlement they bought all the improvements on the west side.

Q. Was that a part of this adjustment of June twenty-fourth, 1909, as shown in the deed? A. Yes, sir.

Q. So at the time of that adjustment you had not completed sinking that shaft on the west side, had you? A. Well, I was not working in it then.

Q. How much did that cost, that shaft twenty-one feet deep?

MR. COULT: Objected to as irrelevant. Objection withdrawn.

A. That was let by contract, somewhere between two hundred and two hundred and fifty dollars.

Q. The shaft that is now in question, the work of that was begun in January, 1907, that is correct, is it not? A. I think somewheres around January twenty-seventh or twenty-eighth.

Q. How long did it take to construct it, this present shaft? A. Well, the present shaft, with the levels, or just the shaft proper? Or all the underground workings?

Q. Just the shaft proper, not the underground workings? A. Well, I have nothing to tie to, to show when that shaft was completed.

THE COURT: You know approximately how long.

MR. COLLINS: You know the time from the beginning to the end of the work, but there may have been interruptions when you did not work.

THE COURT: How long did it take to do the work?

MR. COLLINS: How much time did it take to do the work, if you had done it continuously?

THE WITNESS: There was a delay in waiting for machinery. I don't know what that was.

MR. COLLINS: How many working days did it take to build that shaft and timber it?

THE WITNESS: Just the shaft work?

MR. COLLINS: Yes, just the shaft?

THE WITNESS: Possibly six or seven months, probably, possibly more, may be more, may be less, I have not anything to tie to.

Q. You mean steady working, or from the time you began? A. From the time we started. We were delayed waiting for machinery, the machinery came from Denver.

THE COURT: The question you are asked is how much time did it take, eliminating the delays in waiting for material and so on, simply the construction, how much time did it take?

MR. COLLINS: Suppose you began and went right ahead day after day, how many actual days did it take?

THE WITNESS: I should say somewheres about six months.

Q. How many men did you have at work on it?

THE COURT: You don't mean that, do you, because you just said that there was a delay waiting for machinery, and then that it took six months. You don't mean it took six months without counting the time that you were waiting for the machinery, but if you worked right at it from the start to completion?

THE WITNESS: I did not quite catch the question.

THE COURT: We want to know how long it took if there has been no delay, if you simply had gone at it and continued at it, how long would it take to complete that shaft?

THE WITNESS: I would say about sixty or seventy days.

Q. And that was working how many men, four or five? A. In the condition that exists there, yes.

Q. How many men? A. Part of the time we had—

THE COURT: In order to do it in sixty days, how many men would you have to put on the work?

THE WITNESS: About five men.

Q. What did you pay them? A. A dollar and seventy-five cents a day for the men that was working in the shaft and four dollars a day for the engineer, and the top men I think had the same, two dollars a day I think.

Q. Do you know what you paid for the lumber that you put in the shaft? A. The timbers were taken from the woods that were adjacent, trees.

Q. You cut them right in the neighborhood? A. They were cut about a mile away from the shaft and a carpenter faced those on one side and cut the tennons on them.

Q. How much did that cost you? A. I never kept any account of it.

Q. Didn't you pay anything for that? A. Did we pay anything?

Q. Yes.

MR. COLLINS: For the timber?

THE WITNESS: According to the lease we had a right to cut over the whole territory covered by the lease, seven hundred and fifty acres.

Q. Then the timber did not cost you anything, except as you paid for some royalty, whatever it was on the lease, isn't that right? A. No, it is not right.

Q. What is right then? A. We had a right to

cut this, but we had to pay the market price for it.

Q. Can you tell us how much you paid? A. I asked the proprietors—

THE COURT: How much did you pay?

THE WITNESS: We did not pay anything. I asked for a bill from the parties and they never presented the bill.

Q. How much had you agreed to pay, or how much did you expect to pay? I want to get at the cost of it if we can? A. I expected to pay nearly as much as sawed timbers would cost me for the simple reason that I would save the freight on them, and chestnut, of course, is supposed to be better—

THE COURT: The question is how much did you expect to pay?

THE WITNESS: Just put the question again?

MR. COLLINS: What is the market value?

THE COURT: You said you expected to pay as much as sawed timber and you have not told us yet how much?

THE WITNESS: I said not quite.

THE COURT: Well, how much?

MR. COLLINS: I don't think it is relevant to inquire what he expected to pay for it. What was it worth, is the inquiry.

THE COURT: He expected to pay a certain sum, because he had an agreement with the owner to pay the market price. Is that what you agreed on?

THE WITNESS: No, we had not agreed on the market price. I told him to present the bill.

THE COURT: You expected to pay something?

THE WITNESS: Certainly.

THE COURT: How much did you expect to pay?

THE WITNESS: Whatever the market price was.

THE COURT: What was the market price?

THE WITNESS: There was no market price there for rough timbers in the woods.

THE COURT: They must have been worth something in the market?

THE WITNESS: Of course, they were worth something.

Q. How were you going to find out how much to pay? A. Well, I would figure to pay at least in the neighborhood of two-thirds as much as sawed timber.

Q. How much was that? A. Well, probably twelve or fifteen dollars a thousand.

Q. That is board measure, I suppose? A. Board measure.

Q. How much, did you say, how much timber? A. About ten thousand feet.

Q. Do you remember the lengths? I think you have given the size, six by eight. What was the length of the timber, was it twelve, fourteen, sixteen, what? A. We figured to get those timbers sixteen feet long, which would cut and make one end and one side.

Q. Is that the way the timbers were in fact cut? A. That was the way.

Q. As I understand you, you cribbed the shaft, that is, put timber on the sides of the shaft down

as far as bed rock, not below bed rock? A. On the sides and the ends.

Q. So that below bed rock there is no timber at all? It is just the excavation in the rock itself, is it? A. There is timbers there, I put sills across, I was going to carry on a different system of timbering below bed rock.

Q. It is not cribbed? A. It is not cribbed below bed rock.

Q. And the depth of the cribbing was fifty-seven and a half feet, I think you said? A. If I remember right fifty-seven and a half feet.

Q. Where did you find your quick sand? Where was that? A. There was quick sand right on the bed rock, quick sand and boulders, we found boulders there after we had shot, that is the place where I was shooting, we had to blast, and there was quick sand, at two or three points down the shaft we ran across quick sand, where the gravel laid on the blue shale.

Q. The first that you noticed of anything wrong in your shaft was the month of October, the first you noticed of anything wrong in your shaft or shaft house, was in October, 1909, I believe you said, was it not? That was the time that you called attention to some crack in the mudsill? A. I think so. Some crack back of the mudsill, I said, on the east of the mudsill.

Q. A crack back of the mudsill? A. Yes, sir.

Q. In the earth itself? A. Yes. Well, the crack was caused by the mudsill moving forward, which made the crack.

Q. Which way did it move? A. Westerly.

Q. That would be towards the railroad cut? A. Yes, sir.

Q. Or at least where the cut was when it was afterwards constructed? A. Yes, sir.

Q. You did not call anybody's attention to that at that time, did you? That is, nobody connected with the railroad company? A. About that crack? No, I think not.

Q. Was not the railroad company engaged in construction work at that time? A. They were.

Q. Was not the engineer in charge there, Mr. Norton? A. Mr. Norton had charge of that work. I called his attention to the heavy shooting that was being done there and he rectified it.

Q. That was the blasting done by the railroad? A. The heavy dirt blasting that was being done just in front of the shaft.

Q. Do you know whether the blasting had anything to do with this crack behind the mudsill? A. It certainly was shaking up the whole shaft in good shape.

Q. That is probably what caused it, is it not? A. No, I don't think it was.

Q. You don't think it had anything to do with it? A. Well, it may have, I could not say.

Q. You would not be sure about that? A. No. The cracks were there, where the mudsill moved forward.

Q. But they kept getting worse and worse until finally you called another engineer's attention to it in February? A. On February second I called the Assistant Engineer Clarence K. Conner's attention to it.

Q. Was this getting worse all the time between October and February? A. It was.

Q. And during all of that interval, you did not say a word about it to anybody, is that right? A. I think that is right.

Q. When was it that you plumbed this shaft for the first time for the purpose of seeing to what extent it had become out of alignment? A.

Soon after the cribbing had been placed. No, the first time was when I took my measurements to get the distance that the cave-in had gone down from the bottom of the mudsills. I took the measurements from the outside and also took the measurements from the inside.

Q. Was the shaft out of plumb at that time? A. It was.

Q. To what extent? A. If I remember rightly, it was about, possibly, six or seven, possibly eight inches, to the west and six or seven to the south. It went both ways, that is as near as I can recall it.

Q. Can you tell us what time of the year that was? A. About the same time, that I made the outside measurements.

Q. About the same time that you noticed this crack behind the mudsill? A. Oh, it was after the crack, because the first alignment was after the loose slide there and that slide occurred, if I remember, March sixth, 1910, that is the main slide.

Q. Then it was after that slide that you first took those plumb measurements? A. They started the cribbing, around, I think, April twenty-third. April twenty-third, and they were a few days putting those piles down and filling in. It was after it was filled in.

Q. It was after the slide that you first noticed the shaft was out of plumb, isn't that right? A. Yes. No. Yes, that is as far as the shaft is concerned. The head frame was out of plumb, because the bucket was catching all the time under the timbers.

Q. That was moved over a little? That was because the shaft house settled over a little wasn't it? A. Yes, because the shaft house and the head frame.

*Chauncey I. Gumaer—Cross.*

Q. The head frame was fastened to the house, so when the house settled the head frame pulled over with it, is that right? A. The top of the head frame goes to the house, but it is not fixed to it, the boards did run up against it, so I suppose it did touch it, the boards on the roof ran up against it, and it was the subsidence of the shaft and the pulling forward that caused the catching of the bucket in under the lower set of timbers.

Q. You mean the subsidence of the shaft house, not of the shaft itself? You said the subsidence of the shaft? You mean the shaft house, don't you? A. I said, the subsidence of the shaft house and the head frame.

Q. You said the shaft, you mistook yourself? A. Yes, I mistook myself.

Q. Then, if I understand you aright, it was not until after the big slide in March, 1910, it was not until after that that you noticed the shaft itself was out of alignment? A. But you could see with your eye that it had gone over.

Q. To what extent? A. Well, at first I did not measure it, but I noticed the whole top over, you would see it for fifteen or twenty feet down.

Q. Can you tell us what extent? A. When the slide came it took all the material in front of that and it commenced to go over and go over and go over a little more, but it was the tilting of the head frame and the house that caused the centre of the shaft, well, that is supposed to pull the cable from the centre of the shaft. When this thing tilted forward it throwed the cable further to the west and caused it to catch in under, and when that occurred it shoved the corner from the back of this mudsill which was gradually letting loose.

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Q. That has to do with the shaft house, hasn't it? A. Yes, sir.

Q. What I am trying to ascertain is whether or not before the slide of March, 1910, did you notice that the shaft was out of alignment? A. No, I don't think it was.

Q. In other words, it was this slide of March, 1910, that pulled the shaft out of alignment? A. That pulled it out of alignment?

Q. Up to that time the shaft itself had been all right? A. I think so.

Q. Shortly after, or immediately after that cave-in of March, 1910, which we have been calling the big slide, the head frame was straightened up wasn't it, by some of the men working around there? A. After they put up this crib around the outside and filled in with loose material, they put jack screws in under there and raised, where the sills had gone down this way, they levelled that. It was pulled forward, but they levelled the sills up and jacked up the building. But it had been pulled forward and that what they did did not help the condition, because the frame had pulled forward and at the same time all of the dirt had settled around the shaft, around in the back of the shaft.

Q. Did it straighten up the head frame, didn't it? A. Well, it levelled up the sills and the head frame, but it did not put it back so, but what the bucket would catch if it had been operated.

Q. And that work by these men also included the straightening up of the shaft house, didn't it? Did they do anything with that? A. I think they jacked up the house, but, as a matter of fact I think they did that the same time. I think they jacked up the house the same time that they jacked up the mudsills and the head frame.

Q. Up to the time of this slide in March, 1910, what had you been using the shaft for? A. Previous to the slide?

Q. Yes? Previous to the slide. A. It could not be used previous to that time until you reached a point back to February.

Q. Of 1910? A. Of 1910.

Q. The shaft was finished sometime in the Fall or Summer of 1907, wasn't it? A. The shaft itself?

Q. Yes. A. Yes.

Q. What did you use the shaft for from the time it was finished to February, 1910? A. For bringing out the dirt from the levels from 1907 to 1909.

Q. Did you use it to bring up any ore? A. What we took out, yes?

Q. How much? A. It was not mined for ore.

Q. Answer my question. The question is perfectly simple.

THE COURT: How much? Is the question.

A. We took out 1,650 pounds of shipping ore, ore such as this, and nine tons of milling ore.

Q. What did you do with it? A. We put it on the surface.

Q. Did you sell it? A. We sold the shipping ore.

Q. What did you get for it? A. I think the shipping ore netted twenty-two or twenty-three dollars, somewheres along there.

Q. That is all that you sold from the time the shaft was first constructed? A. That was all that was sold.

Q. And all that you had taken out? A. This 1,650 pounds of shipping ore?

Q. Yes. A. No, we took out nine tons of milling ore that went down with the slide.

MR. COLLINS: The 1,650 pounds of shipping ore, that was all of that which you took out?

THE WITNESS: Yes, it was 1,650 pounds of shipping ore.

Q. Did you also use this shaft for the purpose of removing the water from the mine? A. We did.

Q. Were you using it for that purpose at the time the slide occurred in March, 1910? A. No, in 1910 I suspended. The ground was so dangerous that I stopped the work in February, 1910, the last date was February fourth, 1910.

Q. Up to that time had you used the shaft to take water out of the mine? A. Yes.

Q. What did you do with the water after you got it out? A. The water was raised in what we call a valve bucket, a hundred gallon valve bucket and when it reaches the surface the water chute that we had, that is already to come right down on the boards, after they are closed, and that bucket is laid back on the valve and that chute carries the water to a wooden tank and from there through pipes some hundred and odd feet away to the creek channel.

Q. When was it you ceased to pull water out of the mine you said in February, 1910, can you give us the date? Was it the fourth of February? A. February fourth.

Q. Was that the result of this letter of February third, 1910, which has already been read in evidence Exhibit P-12? A. That letter was the result of my telling him and telling him of the damage which was accruing.

MR. COLLINS: That is the letter from Mr.

Stuart in which he speaks about the water on the ground.

Q. This letter marked Exhibit P-12, dated February third, 1910, addressed to your company relative to throwing water on the ground, did you stop drawing water out of the mine as a result of the receipt of that letter? A. I did, partly.

Q. Is it the fact that some of the water that you had thrown out of the ground before you stopped on February fourth, 1910, flowed down over the embankment where the work was being done, where the cut was being constructed? A. At times there was some little dropped. I calked the water chute and kept the box, the tank calked, so that the water would get back down in the shaft and we used all ordinary care in drawing that water. There was some water that would drop and splash over.

Q. And run down this bank that they were cutting away with their work, isn't that the fact? A. Yes, and that bank was frozen—

Q. Referring now to this wall that was constructed that was known as the retaining wall or restraining wall—

THE COURT: I notice in Exhibit P-4 offered in evidence it says retaining wall, that is a paper that is now in evidence.

MR. HOBART: Yes, I noticed that.

Q. Referring now to this wall that was constructed and that is known as the retaining or restraining wall, I understood you to say that you measured that about two weeks ago? A. About two weeks ago, yes, sir.

Q. With a plumb line? A. Yes, sir.

Q. Did you have anybody to help you? A. Yes, sir.

Q. Who? A. My brother.

Q. Who held the line? A. I held one end and he held the other, or he held one end and I took the measurements and he also took the measurements.

Q. Where did you stand? On the top of the wall? A. Yes, sir.

Q. And the other at the foot of the wall? A. At the foot of the wall, yes, sir.

Q. And you dropped the plumbline? A. I dropped the plumbline.

Q. And then you estimated from that that the wall was three and a half inches out of plumb? A. It did not require any estimation, it was just measured from the line to the wall.

Q. Well, you measured? A. Yes, sir.

Q. By that you mean you measured at the foot of the plumbline, I suppose? A. At the foot of the plumbline, which was down as far as you could get in the ditch.

Q. Do you mean by that that the upper part of the wall had shifted to three and a half inches out, or had the entire wall pushed out to that extent? A. The upper part. There is a coping on the top, the line was held under that. There is a four inch protection out on top, but it was held right against the main wall. I don't mean that the bottom moved out. Is that what you are getting at?

Q. Yes, that is what I want to know, whether the bottom had moved? A. No, the top of the wall was moving over.

Q. Do you happen to know how wide the bottom of that wall is? Did you see it when it was being constructed? A. I saw it when it was being constructed.

Q. About how wide is it? A. About ten feet.

MR. COLLINS: It is a good deal more than that.

THE WITNESS: I could not say whether it was ten feet or eleven feet. But it was somewhere in that neighborhood. That is based on a figuring of forty-two or forty-two and a half per cent.

Q. Had you ever measured that wall before with a plumbline? A. Yes, sir.

Q. When? A. Some two or three weeks after its construction, after the filling in of the cinders.

Q. That was in the Summer of 1910? A. That was sometime in 1910, yes, sir.

Q. When you measured it shortly after its construction, how was it then? A. It showed a lean towards the shaft.

MR. COLLINS: Towards the shaft or towards the track?

THE WITNESS: Towards the shaft, of one half inch. That is I am giving you the extreme.

Q. Did you measure it again? A. I measured it several times.

Q. Didn't you measure it in April 1915? A. April 1915?

MR. COLLINS: At the time of the last trial?

THE WITNESS: I don't think it was in April. The first measurement was in March, I think I plumbed it up three or four different times, but I could not give you the dates.

Q. Did you measure it sometime shortly before the other trial in this case? A. Yes, sir.

Q. And what did you find it at that time? A. Two and a half, I think.

Q. Did you say anything about that at the other trial? A. Two and a half or three.

Q. Did you testify to that at the other trial?

A. Well, I think there was something in regard to that. I cannot say as to what I testified to. I don't remember.

Q. Is it not the fact that you did not say a word about it at the other trial? A. Well, it certainly was on my mind.

Q. Do you know whether you testified to it or not? A. No, sir.

Q. Haven't you read your testimony over in connection with the preparation for this trial? A. Not that part.

Q. Well, you have read your testimony haven't you? A. I have read part of it, but not all of it.

Q. In the part that you read, you did not find a word about any change in the retaining wall, did you? A. No, I think not.

Q. And is it not the fact that you did not say a word about it at the other trial, or don't you remember whether you did or not? A. I don't remember whether I did or not.

Q. At any rate, at the other trial you did not say a word about these new retaining walls that you now present to us, one fifty and the other fifty-five feet long, at a cost of twenty odd thousand dollars. You did not say anything about that, did you? A. No. I had the plans for those walls, but—

MR. COLLINS: Just answer the question.

Q. You did not say anything about that at all? A. No, sir.

Q. You did not suggest that to either your counsel or to your engineers or anybody else, did you? A. To my counsel I did, and I had a map prepared, but they said I would not be allowed to use the maps in evidence only of what was on the ground, and therfore the maps could not be used. This first map was drafted in after

the construction was made, and on the plan I made drafts and showed what should have been used there for the two retaining walls and drew the plans for just what they should be, and they told me that all that could not be used, that to get the map in evidence you had to have what was on the ground, you could not give your idea of the construction, you could not show that and therefore they were laid aside.

Q. And that is the only reason that you did not say a word about the necessity which you did not tell us, of these two walls, is it? A. Well, I gave it this way, I said, that the plot had no support, that there was nothing to support the mudsills and the house.

Q. Just answer the question—

MR. COULT: That is a responsive answer.

MR. HOBART: I submit it is not. I don't want a lecture on it, I just want a plain answer to a certain simple question.

MR. COULT: I don't see where that answer was not responsive.

Q. That is the only reason you did not say a word about the necessity which you now tell us for these two new walls which you now tell us about, is it? A. Yes, sir.

Q. Is it not also the fact that at the last trial you had in your retainer certain expert witnesses who testified as to the conditions at and around the shaft? A. Yes, sir.

Q. And, is it not the fact that none of those gentlemen said a word about those retaining walls which you now say are necessary? A. I don't think anything was said in regard to the retaining walls to preserve the plot. In fact, it was overlooked. The plot was overlooked, the attention was all centered on the shaft.

Q. That is a matter that you have thought of since the first trial, is that it? A. No, it is not. As I said, I had all these plans drawn then, two months.

Q. At any rate you overlooked it at the first trial? A. That was overlooked.

Q. A mere matter of twenty odd thousand dollars you overlooked? A. It was overlooked, the support of the plot, to make the plot safe.

Q. You limited your entire consideration of the matter to the reconstruction of the shaft isn't that right? A. The questions that were up were limited to just the reconstruction of the shaft.

MR. COULT: You mean on the last trial or this trial?

THE WITNESS: The last trial.

MR. HOBART: The last trial. I mean, of course, so far as refers to the shaft itself.

MR. COLLINS: I don't mean profits, of course, on the ore.

MR. COULT: There was something about that.

MR. HOBART: There was something about the mine and the ore in it, but I was not referring to that.

Q. You gave us your cost of excavation for these two retaining walls, that were overlooked at the first trial, at a dollar and a half a cubic yard? A. Yes, sir.

Q. Did that contemplate the use of a steam bucket or it is by hand excavation? A. That is hand excavation. We could not use a steam shovel in there.

Q. Why not? A. We have got no right to occupy any of the Erie's ground, and we could not put a steam shovel in there.

Q. You never asked permission for that did you? A. We could not use it from the plot.

Q. You never asked permission? A. No, we did not ask permission.

Q. About the restoration of the shaft, you have given us an estimate of what it would cost to restore the shaft and your figure was $961.17? A. Yes, sir.

Q. Which includes six by eight timbers? A. Yes, sir.

Q. Were you figuring on timbers sixteen foot long the same as in the original construction? A. Yes, sixteen foot long.

Q. And were you figuring on 10,862 feet? A. Yes, that included the partition.

Q. How far down were you going to rebuild or restore the shaft? A. Well, it is all restored, to bedrock.

Q. All the way down to bedrock? A. All the way to bedrock.

Q. How far is it out of alignment? A. Not over thirty feet, to the westerly; it is out of alignment near the bottom to the easterly, because by the leaning of the ground up from behind the timber and the pressure is a little on the opposite side there. I think it is about, well, not over an inch, which really does not mean much, it really does not amount to much. The main part of the shaft that is out of alignment is at the end of the thirty foot point, but below the thirty foot point the material had run out behind the timbers which necessitates a resetting. I don't say it will require new timber; but above the thirty feet it will require new timber, from the fact that the timbers are rotted. They have been in there practically ten years now and of course there is not much left of timber after it has been in ten years.

Q. They would rot just the same whether they were out of alignment or not wouldn't they? A. Certainly.

Q. The entire timber? A. My estimate is based on it all the way to bedrock.

Q. And you have included in this estimate which you want this Railroad Company to pay 10,862 feet of timber, which includes retimbering the entire shaft, with partitions, is that right? A. That is right.

Q. Have you made any estimate based upon the cost of retimbering down below where it is out of alignment? Just say from thirty feet down? A. No, I have not.

Q. Why not? A. It would be in the same proportion—

THE COURT: The question is why not?

THE WITNESS: Because it has got to be repaired from the bottom.

Q. Is that because the boards at the bottom have become rotten? A. No, sir.

Q. Are they rotten? A. No, sir.

Q. The boards at the top are rotten but those at the bottom are not?

MR. COLLINS: The timbers?

Q. The timbers at the top are rotten but those at the bottom are not? A. The timbers above the water line are in bad shape, they are rotten. Below the water line they are in—well, the decayed part probably on the timber is about an inch. But they have not got to be replaced. They have got to be reset, at least, if they were solid, because the cessation from the dewatering has taken the material out from behind there.

Q. The fact of the shaft being out of alignment down thirty feet from the top, has that anything

whatever to do with the condition of the timbers below that thirty foot point? A. No.

Q. Then, why do you expect this Railroad Company to furnish you new timber for the rest of the distance below the thirty feet? A. Well, they have kept us from working there at all—well, that is what I have included, if there is any difference it can be computed on the same basis.

Q. Well, why don't you do it? A. Because I consider it necessary to retimber the shaft to bedrock, all the way down.

Q. Assuming that it is not necessary, did you expect this railroad company to give you a new shaft all the way down? A. Well, they have kept me from work for five, or six or seven years. They ought to be willing to put the shaft back.

Q. That was your idea about it? A. That was my idea about it.

Q. Then the fact is, as I understand it, you have not made any estimate based upon the repair for the distance of thirty feet down? A. No, I have not.

Q. I believe you have already said you were general manager of this plaintiff corporation? A. Yes, sir.

Q. And you have been since it was first incorporated? A. No, not since it was first incorporated. I think in about June 1909; I supervised some of the work, but not as general manager.

Q. You have had charge of the company's operations haven't you? A. Yes, sir.

Q. You are the principal stockholder in the company? A. No; I am not.

Q. You are not? A. No, sir.

Q. How much stock do you have? A. How much stock do I own?

MR. COULT: I cannot see the relevancy of that. I object.

THE COURT: It goes to his interest.

A. I have two thousand shares out of ten thousand shares, about one-fifth of the ownership.

Q. Who is the president? A. A man by the name of Graham, F. E. Graham.

Q. Of Guymard? A. No, sir.

Q. Where does he live? A. He lives in Westtown, and Sniffen, secretary, he lived here in Brooklyn.

Q. You are now the active man in charge of the Company's affairs, are you not? A. I am the general manager of the Company.

RE-DIRECT EXAMINATION BY MR. COULT:

Q. You mentioned in your cross examination an old highway that was near the shaft and building plot, when was that closed? During the time of this railroad construction? A. During the time of the railroad construction, yes, sir; they took the highway that ran across here, they took it away down here northerly nearly a half mile and crossed over an overhead bridge and brought it back to this point here again.

Q. Between what two points did that highway run? Guymard to where? A. On the west side from Guymard to Cuddebachville, and on the east side from Guymard to Finchville.

Q. And Guymard is off the road now, is it not? A. Off the road or the railroad, or the highway?

Q. It is not on the changed route is it?

MR. COLLINS: The railroad?

Q. Of the highway? A. No, it is on the old highway.

Q. Is there any road running through there now above the building plot? A. No, that has been abandoned.

Q. You said something in your cross examination about a tunnel on the west side of the tracks, that tunnel you said was broken down? A. Yes, sir.

Q. Just describe to the jury how that was done? A. The gang of men working for the Erie Railroad Company cut the course of my tunnel and they went near the end and started to dig a hole, probably about ten or twelve feet under the surface, at that point in the solid rock and they started to sink down there to break it in and I had to stop the work there.

Q. What happened to the tunnel? A. It caved it in.

Q. For what distance? A. Well, at the end, it stopped the work at the end.

Q. How many men did they have working there breaking the tunnel in? A. Six or seven.

Q. For how long? A. Two or three days.

Q. What did you do about it? A. I sent a letter, I went to my attorney and he wrote a letter to the Company in regard to it.

Q. Something was said about stakes showing the proposed line of the railway on the west side of the track, was that the only line of stakes that was around there at that time? A. No; there was three lines of stakes.

Q. Where were they? A. I don't know, the one was down in the valley, one was down between the Navesink River and the Erie Railroad to the west and another one was right on the west side of the Erie.

Q. What was the purpose in putting in that tunnel on the west side of the track? A. The purpose of that was to locate a flat vein.

MR. COLLINS: I object to it, he cannot make a self serving declaration such as this.

Q. What purpose will the tunnel on the west side of the track serve? A. It will serve the purpose of opening a contact vein which is an entirely separate vein from the old Gumaerd vein.

Q. That tunnel was abandoned? A. That tunnel was abandoned, yes, sir.

Q. Why? A. Because they caved it in.

Q. Is there any tunnel of any kind in connection with your works now at all? A. No, sir.

Q. You said, on cross examination, on the last trial you mentioned nothing in your testimony about the concrete walls to hold the surface of this track, was anything asked you about that? A. No, there was not.

Q. Were you asked any questions about any method of restoring the surface of this track? A. No, it was all centered on the restoration of the shaft and I stated at the trial at that time that the trouble was that there was no foundation for the buildings or the head frame to do the hoisting.

Q. Was there anything said at that trial about the profits lost, the profits of the mine? A. There was.

Q. Did you testify in regard to that? A. I think so.

Q. And other witnesses produced by you? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. Referring to the stock of this company, is the par value a hundred dollars? A. The par value is a hundred dollars, yes, sir.

Q. And ten thousand shares? A. No; I did not say ten thousand shares.

Q. Not dollars, but ten thousand shares you said? A. I said thousand shares, a par value of a

hundred dollars a share, that is what I wanted to explain, that is what you wanted to know, what the capitalization was.

Q. It is a hundred thousand dollars? A. It is a hundred thousand dollars.

By Mr. Coult:

Q. How much of that stock is issued to you? A. Two thousand.

Q. Do you mean two thousand shares? A. No.

Q. That is what you said I thought on cross examination? A. No, it is two hundred shares.

Mr. Collins: Two hundred then it is not one-fifth of the whole?

The Witness: Yes, I said one-fifth.

Mr. Collins: That is twenty thousand dollars?

The Witness: Yes.

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Walter H. Tonking, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct Examination by Mr. Coult:

Q. Where do you live? A. At Dover, New Jersey.

Q. What is your business? A. Mining engineer.

Q. How long have you been engaged in that occupation? A. For thirty years.

Q. Where have you practiced it? A. Very largely in Morris County, some in New York, New York State.

Q. What had been your business connections in Morris County and in Sussex County? A. Operating iron mines in Morris County and quarries in Sussex.

Q. How long have you been connected with quarrying operations in Sussex County? A. Sixteen years.

Q. Where? A. At Franklin, New Jersey.

Q. You are connected with what company? A. B. Nicholl & Company.

Q. Do you know Mr. Gumaer? A. I do.

Q. How long have you known him? A. Two years.

Q. Do you recall a visit to the Gumaerd Lead and Zinc Company at Guymard, New York? A. I do.

Q. When was that? A. September ninth, 1914.

Q. At that time did you make an examination of the mine, shaft and shaft house? A. I did.

Q. And the locality surrounding them? A. I did.

Q. You are familiar with mining shafts generally? A. I am.

Q. And with the construction of them? A. Yes.

Q. Are you familiar with mining methods in this locality? A. I am.

Q. What was the condition of the shaft, the shaft house and the surrounding locality at the time you visited the mine, just tell the jury? A. The ground surrounding the shaft and the shaft house had slid from its original place, as it had it carried the shaft, the top part of the shaft, slightly out of alignment and undermined the timbers supporting the buildings.

Q. In what direction had that slide taken place? A. To the south and to the west.

Q. What was the condition of the land to the east of the shaft house? A. There was crevices running through it, it was broken.

Q. What did that indicate to you? A. It had

been disconnected from the main body and slid away from its original position.

Q. Was the main shaft in condition for mining operations at the time you saw it? A. No, sir.

Q. Why not? A. On account of its position and the condition of the timber.

Q. Was it in a safe condition? A. No, sir.

MR. COLLINS: By the condition of the timbers which you speak of, do you mean they were rotten?

THE WITNESS: Yes, sir.

Q. What was the character of the soil about the shaft did you notice? A. Well, it was gravelly, a gravelly shale, gravelly with shale.

Q. At the time you saw the shaft was it then in any danger of going further out of alignment or not? A. I should say yes.

Q. Have you yourself ever had charge of any mining operations? A. I have.

Q. In the condition that that shaft was then in would you have considered it safe to send men down it? A. No. Not to work.

Q. Did you notice the equipment of the shaft the buckets with which it was equipped? A. Not particularly.

Q. Did you notice the size of the shaft? A. Oh, yes; I should say it was about eight by five.

Q. Can you tell what sort of load would ordinarily be taken up out of the shaft in the operation of the mine? A. No, I could not tell you, I did not see the bucket.

Q. Do you know what sort of a bucket is ordinarily used in mining operations of that kind? A. I do, yes.

Q. What, in your opinion, would have been the result of placing upon the collar of that shaft a load such as would ordinarily be extracted from the mine in mining operations?

MR. COLLINS: Objected to. Because we have not got any criterion. Why don't you give a figure? You leave it all to guess what is ordinary.

MR. COULT: He said in such a shaft as this, the same sort of a shaft.

Q. Can you say on examining the shaft itself, what kind of a load would ordinarily be taken out of it if it were operated according to the ordinary manner of mining used here? A. Yes, sir.

Q. From that can you say what the effect would be of imposing such a load as that upon the shaft in the condition that you saw it?

MR. COLLINS: Objected to because he does not state what would be an ordinary load.

THE COURT: What would be an ordinary load?

THE WITNESS: A thousand pound bucket.

Q. What would be the effect of placing a load of a thousand pounds upon the collar of that shaft in the condition it was in when you saw it? A. Do you mean dropping that weight on, or laying it on gently or letting it down?

Q. In hoisting a load out of the shaft? A. In hoisting a load out of the shaft, the bucket drops and it would strike a blow very much harder than it is just gently rolled down, and in that striking of such a blow with a weight at the end of a thousand pounds, I say it would be a very dangerous thing to operate the mine or the shaft, it would tend to tilt the shaft over more than it was tilting at the time it was done.

Q. What, in your opinion, would be the result to the shaft of the continuous operation of the bucket in the manner that you have described? A. Well, it would be difficult to operate the bucket in the shaft on account of its running

over, its being out of alignment; in addition to that, this constant thumping and dropping of the bucket would tend to beat it further out of alignment.

Q. Is there any method of repairing that condition that you found there? A. Yes, sir.

Q. How could that be done? A. By removing the earth around the shaft down to the point where it deflects from the vertical.

Q. And then what? A. Rebuilding the shaft.

Q. To do that would the surface of the earth have to be restored about the shaft? A. Yes, sir.

Q. And, in order to restore the surface of the earth what would it be necessary to have done? A. In that case it would have to be retained in its position by more force than itself.

Q. In this case what would be necessary? A. A retaining wall.

Q. What kind of a retaining wall? A. Well, a concrete wall of sufficient size to resist the pressure of the loose earth.

Q. Where should such a wall as that be placed? A. Particularly on the south side of the property.

Q. Where else? A. Well, on the west and the south because the pitch or dip is in those directions.

Q. Did you notice any wall on the south side of the property at the time you were there? A. No, sir.

Q. Was there any wall on the west side? A. Not on the property. There was one on the railroad premises.

Q. Where was that wall located with reference to the shaft house? A. Well, directly in front of the shaft, I believe, to the west.

Q. What was the purpose of that wall? A. I presume to retain the material, the dirt, on the mining property.

Q. Did you notice whether there was any overhead railroad bridge at that point? A. Yes, sir, I did.

Q. Where did that extend from and to? A. At the lower end of the same wall.

Q. That started and was supported on this wall that you mentioned? A. Yes, sir.

Q. Was that wall such a wall as would adequately retain the surface of the land about the shaft house? A. If properly built and put in, yes.

Q. Was it so built and put in? A. I don't know.

Q. Did you notice how high that wall was? A. Yes, sir.

Q. Was it up on a level with the Gumaerd shaft? A. No, sir.

Q. How far was it below? A. Oh, I should say fifteen or sixteen feet.

Q. Was there any construction at or near this wall that you noticed? A. Yes, there was a large guard or log cribbing above the wall, between the wall and the shaft.

Q. Did that serve to relieve the pressure on the shaft from the east? A. No, sir.

Q. Why not? A. Because it was hardly able to stand its own weight.

Q. Did you notice anything on the south in the way of any structure to relieve the pressure from the north? A. Very little cribbing down near the bottom, as I recall now, a few ties.

Q. Was that such a construction such as would serve to withstand the pressure on the shaft from the north? A. No, absolutely not.

Q. Is there any way to repair the condition of the shaft except to restore the surface of the building plot? A. I think not.

Q. And is there any way of restoring the sur-

face of the building plot except by retaining walls? A. I think not.

Q. Have you had any experience in concrete work? A. I have.

Q. What? A. Oh, I have built foundations for retaining walls of all sorts and sizes, excepting the extremely large ones.

Q. Have you had any experience in excavating earth such as that which you noticed about this shaft? A. Yes, sir.

Q. What experience? A. Well, in operating and in opening up mining shafts, in stripping earth from the top of ledges, in digging cellars and construction of trenches for concrete work and all such things.

Q. Are you familiar with the cost of excavating such soil as you found about this shaft? A. In the usual way, yes, sir.

Q. Are you familiar with the cost of concrete retaining walls? A. Yes, sir.

Q. What sort of retaining walls would be necessary in order to support the surface of this parcel and to make the restoration of this shaft possible? A. It would be necessary to have a retaining wall to start from bedrock and to extend to a point beyond where the earth has been disturbed by this slide.

Q. Would a retaining wall not placed upon bedrock serve the purpose? A. No, sir.

Q. Why not? A. Because a vibration would be constantly going on in connection with the mining operation which would gradually sluff off the material. This material is resting upon a smooth bed of rock and that rock has a pitch of about thirty degrees and very little disturbance will cause it to slide and the only safe foundation is the rock.

Q. If a wall were built that was not on bed-

rock what effect would the sliding of the earth beneath the wall have upon the wall itself? A. It would carry it with it.

Q. Have you made any estimate of the amount of excavation necessary to construct a proper retaining wall to bed rock on both the south and west side of the shaft house? A. I have.

Q. What amount of excavation would be necessary for that? A. Five thousand cubic feet.

MR. COLLINS: May I ask if you have done that separately, south and west, or all together?

THE WITNESS: I did it all together, the excavation.

THE COURT: Would there be any difference in the character of it south and west?

THE WITNESS: No, it would be the same.

Q. How much is the estimate?

MR. COLLINS: Objected to on the ground that it is perfectly clear from the testimony in the case that there is no necessity for any wall on the south. There is one on the west. Of course, whether that is sufficient or not is a matter to be determined later, and, consequently, inasmuch as there must be in the very nature of things, and the condition of this contract, a difference between the south and the west sides, it is improper to give the excavation for all the sides together.

THE COURT: He says they are of the same character and cost the same amount.

MR. COLLINS: But the quantities are different.

THE COURT: If it is a matter of separation that can be estimated.

MR. COLLINS: I don't think it is possible in one case, because they have to go down

in one case forty-two feet. I think the slide down from that excavation right behind the retaining wall is that. That is one thing and the other side is not so much excavation.

THE COURT: What do you say about the retaining wall being necessary on the south and the west?

THE WITNESS: From the fact that the rock dips and the slide dips in the south and the west, from the shaft, the tilt of the shaft has been from both directions there, because of the pressure coming from behind to prevent it staying straight and driving it to the south and to the west.

THE COURT: Do you think a retaining wall is necessary on both sides, at both places?

THE WITNESS: Absolutely, yes, sir.

MR. COLLINS: The excavation must be different in quantity in both cases also.

Objection overruled. Defendant excepts.

Q. Have you estimated what the cost of excavation that would be necessary in order to construct retaining walls to the south and the west? A. I should say two dollars a cubic yard.

Q. How many cubic yards? A. About five thousand cubic yards.

Q. Have you estimated the cost of excavation? You say about two dollars? A. Two dollars a cubic yard.

Q. That would be ten thousand dollars? A. Yes, sir.

Q. How long should the retaining walls be on either side? A. About fifty feet, perhaps, on the west, a little longer, the ground seems to be disturbed to a distance of possibly sixty feet.

THE COURT: What effect has the retaining wall put there by the railroad?

THE WITNESS: It should prove effective if properly placed.

THE COURT: What is the trouble?

THE WITNESS: I don't know anything wrong. I have no knowledge. I have not given any testimony in reference to that wall. I don't know anything about the wall.

THE COURT: I understand you to say you saw the property?

THE WITNESS: I saw the property, and that wall is not on the mining property. I am testifying now for the protection of the property, the mining property itself independent of any other property. Now, the mining property has no wall to the west. There is a wall on the Erie property near that point.

THE COURT: If it is filled in between there won't that take care of the situation?

THE WITNESS: It should if the wall is properly built, yes.

THE COURT: Then would not that be cheaper than the doing of all this work that you are talking about?

THE WITNESS: Very much.

THE COURT: How much cheaper?

THE WITNESS: Two fifths less about.

MR. COLLINS: To fill in?

THE WITNESS: Yes, after the excavating and the concrete.

THE COURT: If you found that under the

agreement between the parties the restraining wall or retaining wall, is called for on the property of the railroad company, and such a wall is there, useful for your purpose, is there anything necessary except to fill in with the proper kind of earth between the wall and the shaft?

THE WITNESS: As far as the west was concerned, I should say not.

THE COURT: Now, then, what would it cost to do that filling behind the west wall?

THE WITNESS: Oh, that would be a comparatively small part. The west wall should be raised higher. That wall is not quite high enough. It is within sixteen feet of the level of the collar of the shaft. There is nothing to protect the shaft for that sixteen feet from the pressure behind it.

THE COURT: Then you mean that even if the present retaining wall was used it would not be a protection to the shaft if it was filled in?

THE WITNESS: Well, not unless it was raised higher, no sir.

THE COURT: Unless there was an addition made to the wall?

THE WITNESS: There would have to be an addition to it.

Q. Assuming that the retaining wall that you saw there is built on a foundation which extends only two feet beneath the surface of the ground and that it does not go down to bedrock, would you then say that that wall would serve any purpose after the ground was filled in and the pressure was resumed? A. No, sir.

Q. What would happen to it? A. It would tilt.

Q. Is there any pressure on that wall now? A. I should say yes.

Q. Is that pressure now as great as it would be if the surface was restored and the normal pressure of the earth placed behind it? A. No, sir.

Q. And, assuming that this wall was constructed at or about 1910 and that between that time and the present, with the conditions approximately the same during that time as they were when you examined the mine, that the top of that wall has tilted approximately three inches toward the railroad track, would that indicate anything to you as to whether or not it would serve any purpose in restraining the pressure on the east side of the track? A. It would indicate that if it was affected by the present load, it would be more affected by a greater load.

Q. And what would then happen to it? A. It would tilt more.

Q. What would be the cost of the construction of a proper concrete wall on the south side of the plot, can you tell us?

MR. COLLINS: Objected to on the ground that under the pleadings and contracts in this case that testimony is irrelevant what it would cost to build a concrete wall there, even assuming that the wall that has been built there does not conform to the contract. It does not follow that there has got to be another one built behind it to support this shaft.

THE COURT: Suppose you don't do it, haven't they got the right to do it and get paid for it?

MR. COLLINS: No, they have no right to build a concrete wall under this contract.

THE COURT: Suppose you do not do it, what is their remedy?

MR. COLLINS: Their remedy is to fill in behind the present contract wall.

THE COURT: They say that would be ineffective.

MR. COLLINS: To restore the shaft, which is only a matter of nine hundred dollars, and see. We cannot predicate this thing for all this expense upon the mere examination of Mr. Gumaer and his statement that the wall has gone over three inches, this retaining wall, that not only bounds this cut forty feet deep, but takes the main line of the Erie Railroad on a bridge over it, are we going to assume that it is going to tumble down? It might slide, or it might slip? According to Mr. Gumaerd, which I do not believe is adequate testimony on the subject but it does not follow that you have got to build a new wall behind it.

THE COURT: In the face of the testimony that we have here do you think that the parties are obliged to fill in, knowing as they claim they do, that this that would force the wall over. Do you feel that they are obliged to go through a useless performance?

MR. COLLINS: There has got to be something reasonable submitted to a court and jury as to the value.

THE COURT: Here are experts who claim that it is so.

MR. COLLINS: Based on Mr. Gumaer's dropping a plumb line down to see that the wall was plumb and then his statement that the wall had slid or tilted three inches. All based on that statement. I don't for a moment believe that the Court or the jury have considered that.

MR. COULT: I am confining this question solely to the south side.

MR. COLLINS: That was not your question.

MR. COULT: Yes, I put the question that way.

MR. COLLINS: Then I misunderstood it.

A. Fifteen thousand dollars.

Q. How did you figure that? A. I took about nine hundred cubic yards of mason work.

Q. What measurements did you use in making that estimate? A. Fifty feet long by sixty feet at the top by thirty feet on the top, I mean of the length, about three feet wide on the top and about forty per cent., batter.

Q. Have you estimated the cost of the construction of such a retaining wall as would be necessary on the west side of the tract?

MR. COLLINS: Objected to on the grounds stated in my objection to the question I misunderstood for this one.

Objection overruled. Defendant excepts.

A. I have not made an estimate independent of the south. I have made an estimate of the two walls, south and west wall and I have also of the south wall independent of the other.

Q. That would be merely a matter of subtraction then? A. Well, yes. And then some addition.

Q. What would be the cost of the two walls together, west and south?

MR. COLLINS: Objected to as incompetent and irrelevant; it is incompetent to state it without separation, and, furthermore, on the ground that there is nothing to predicate the necessity for a wall on the south side.

THE COURT: That last objection, of course, won't stand as to the other question.

MR. COLLINS: No, I did not make it, but that does not make it legal because I do not

object to it. I am merely dealing with the entire situation in this question.

THE COURT: The objection is addressed to the south as to the latter part?

MR. COLLINS: Yes.

MR. COULT: You object to the form of my question?

MR. COLLINS: No, I am objecting in this case to the fact that there is no separation. Because I shall contend, whatever may be testified with regard to the respective walls, they must be kept separate, and you are blending them, and he says that it is not a mere matter of deduction of the cost on the south side from the total cost, and, furthermore, on the ground, separately, that there is no adequate proof in this case to warrant taking any testimony as to the cost of the construction of a wall on the east side or one on the south side, particularly on the south side, because there is no promise to construct such a wall. This is not for negligence on the part of this company, this is a matter of the breach of this covenant.

THE COURT: Suppose there is an allegation that there is a breach of the covenant, then the plaintiff is entitled to damages that would flow from that breach. Now, he alleges that the damages are such as are incident to the restoration and making the shaft so that it is usable. He says in order to do that that he is obliged to put up a retaining wall, and you answer that by saying that there is one there already on the west side, to which they reply by saying that it so inefficiently constructed that it is not useful for any purpose. Now, you don't mean to contend that the plaintiff, before he can recover on this contract, if the engineers or

the experts are correct in their statement that this is useless, this wall, and that if it was filled in it would shift it, you don't mean to contend that the plaintiff had got to go through the useless proceeding of filling in behind the wall, which they contend is not safe for the purposes of the shaft, you do not mean to contend that they have got to do that filling in for the purpose of showing that it will not do the work, before they can recover for the present damage?

MR. COLLINS: No, that would be ridiculous, but I say the covenant is not performed by any such thing. We only have to put in a retaining wall so that the slopes shall not encroach on the land, and here is where we did it. On the west. And then as to the south, why it is not even pretended under this covenant that it is necessary to have a wall there. The natural fall of one and a half to one, whatever it is, the angle of repose suffices there.

THE COURT: Has not the Supreme Court settled that in this case?

MR. COLLINS: All the Supreme Court has said is that my argument that this must be a suit for negligence and therefore not within the covenants, an action of tort and not to be brought here, was correct, and all that had to be done under that covenant had relation to the permanent construction and not to the slide that occurred during the work. That they have decided against me. They have said that under this covenant if that new construction permitted the slide, they would be answerable for the damages, but that does not follow that there has got to be retaining walls constructed around this building.

THE COURT: That is only incidental to the question of damages.

MR. COLLINS: It may be, but I want to make the point that it is not permissible in this case to put in evidence as damages the constructing of a wall either on the west or on the south. They stand on different footings, as to the west and the south and I want to make the point.

THE COURT: I want to understand what your point is. As I understand it, it is that this retaining wall is not necessary because there is no encroachment?

MR. COLLINS: There is no encroachment on the west and on the south there is no encroachment. On the south during the progress of the work the building shifted and there was some displacement there, but that could be restored by filling. That did not go down to the cut.

THE COURT: That is where you differ, you say it can be restored and the other people say it cannot without building the wall.

MR. COLLINS: I do not understand they say that it cannot if there is the right kind of filling put in.

THE COURT: Could filling on the south side be restored if you put in the proper kind of filling, without a retaining wall there?

THE WITNESS: Only temporarily.

THE COURT: I will overrule the objection.

Objection overruled. Defendant excepts.

The Court then took a Recess until one o'clock this day.

AFTER RECESS.

WALTER H. TONKING, resumes the stand.

DIRECT EXAMINATION BY MR. COULT (Continued):

Q. With regard to the wall that was built by the railroad on the west side of the shaft and building plot, what have you to say as to the method of construction of that wall as to its continuity? A. I understand there are expansion joints throughout the length of the wall, so that the sections may be affected without affecting the whole.

Q. I show you the photograph which has been marked Exhibit P-6 and ask you whether by looking at that you see any evidences of the wall having been built in sections? A. Yes, there are indications of expansion joints.

Q. How many of them are there there? A. Well, there are three in sight that I can pick out on this.

Q. Three joints or number of sections of the wall? A. Three sections that I can see clearly outlined.

Q. What have you to say as to the ease or difficulty or the removal of any portion of that wall in sections? A. It could be removed without affecting the rest.

Q. What have you to say as to the effect upon each section if the pressure of the earth were to be the same as it had been before there was any cave in there? A. Well, it perhaps would not affect but one section.

Q. Might it affect two sections differently? A. Yes.

Q. What would be the result on the wall? A. Well, it would show the effect of the pressure where it was greatest, the greatest amount of pressure will be shown in that section directly in front of it.

Q. So that the movement of the sections of the wall downward might be different in different sections? A. Yes, sir.

CROSS EXAMINATION BY MR. HOBART:

Q. How many shafts have you constructed? A. A large number.

Q. Can you give us any more definite information than that? A. No, sir.

Q. Covering the period of thirty years, can you tell us any more definitely? A. No. Covering that period, it would be a very difficult matter for me to enumerate, and I have not given it a thought.

Q. Can you give us any idea at all about it? A. At least fifty.

Q. And, have they all been in Morris County? A. No, sir.

Q. Or, in various parts of the country? A. Yes, sir.

Q. And, state generally, what depth of shaft have you constructed? A. Large shallow shafts, not exceeding a hundred feet, in prospecting.

Q. And they have been shafts similar to this one, have they, perpendicular shafts? A. Yes, sir.

Q. Have you made any estimate of what it would cost to rebuild this shaft, the one that is in question in this case? A. From the foundation up, with everything clear, yes.

Q. You did not give us that on your direct examination? I think, did you? A. No.

Q. The restoration of the shaft? A. No, I was not asked.

Q. But you have made such an estimate? A. Yes, I have.

Q. Have you it before you now, or do you re-

member what it was? A. I guess I remember the figures. I have not got it before me.

Q. Suppose you give it to us now? A. I should say a thousand dollars, with the understanding that the materials all around have been removed, starting from the rock and going up.

Q. That contemplates an entirely new construction from a point beginning at bed rock about fifty-seven feet below the surface and with entirely new timbers? A. Yes, sir.

Q. What sized timbers would you use? A. Six by eight.

Q. By sixteen? A. By sixteen.

THE COURT: That includes the labor and the material?

THE WITNESS: My estimate of a thousand dollars, yes, sir.

Q. Can you, in connection with that, or as a part of such an estimate, tell us what it would cost to restore the present shaft, which would begin at a point thirty feet below the top, instead of reconstructing it all the way down to bed rock? A. Approximately a half.

Q. Approximately five hundred dollars? A. Five hundred dollars, under the same conditions.

Q. Would that include what has been called the head frame and other incidental parts of the shaft? A. Yes, sir.

Q. Including the material? A. Yes, sir.

Q. What is the material? A. Well, it is four timbers that are laid along the shaft, both lengthwise and sideways, in order to support the shaft independent of its own connection or its own—

Q. Are they laid right on the surface or on the level of the ground? A. On the level of the ground.

Q. Practically around the shaft proper? A. Yes, sir.

Q. So your estimate includes that item and all other items? A. Yes, sir.

Q. You visited these premises I think only on this one occasion? A. Only on one occasion.

Q. Did you make a careful observation of conditions generally? A. On the surface, yes.

Q. Was the location of the old vein pointed out to you? A. I saw the old workings, more out of curiosity than anything else. There was not much to see excepting the excavations.

Q. Did you go down into the shaft? A. No, I did not.

Q. You observed, did you not, that the present shaft was constructed some distance from the old vein? A. Yes, sir.

Q. About ninety feet, I think, it has been mentioned, is that what your observation shows? A. I really don't know. I did not charge my mind with it. I had no object in doing it.

Q. Well, it was some considerable distance? A. Yes, it was.

Q. Based upon the observations that you made, is there any reason why the new shaft should not be built in that shaft and building plot in the same general locality, say, within fifty feet of it to the north? A. Well, there were no surface objections.

Q. Having in mind that beginning at the corner of this shaft and building plot which would be approximately within two or three feet of the corner of the shaft house, you noticed the shaft house? A. Yes.

Q. Having in mind the fact that from that point running northerly the shaft and building plot extends for a distance of over three hundred

feet, is there anything, as far as you observed, which would prevent the construction of a new shaft at any other point within that distance? A. As far as the surface indications go, no, I know nothing about underground.

Q. As a matter of fact, if a new shaft should be built, say ninety feet north of the present shaft, it would bring it practically over the old vein? A. I don't know.

Q. Assuming that the present shaft is ninety feet distant of the old vein, you did not measure it? A. No, sir.

Q. That is, by going toward the north you find this old vein? A. Well, you say so. I have no testimony of that only from the fact that I made a casual observation.

Q. You observed it was north and south? A. I think so, yes.

Q. If you have not got it clearly in mind, perhaps where that would be? A. You are stating the fact to me and you want me to confirm your statement.

Q. I am asking you what you know about it? A. I don't know anything about it, so far as observations are concerned, absolutely nothing.

Q. At any rate you know this, that the old vein is north of the present shaft? A. No, I don't even know that.

Q. Didn't you observe that? A. No. I saw workings alongside of the hill there for quite a distance, and indications of old operations. I don't know what they were, of course.

Q. Did you go to any part of the underground workings at all? A. I did not.

Q. You did not go down the shaft at all? A. No, sir, I did not.

Q. The old workings that you saw, where were

they with reference to the present shaft, north or south? A. North of the shaft.

Q. Then, going to the north, in the direction of those old workings, if you please, from the present shaft, there was nothing, so far as the surface indications of the ground showed to prevent the sinking of an entirely new shaft at an entirely different place from the present one, was there? A. No.

Q. How much would it cost to sink an entirely new shaft of the same size and depth as the present shaft at any point that you observed, within that shaft and building plot?

MR. COULT: Objected to; in the first place, the indenture which is in evidence here, shows that the use of that land for mining purposes is restricted to one shaft, and, in the second place, that at the time of the breach of this covenant this shaft was being used, and the land therefore was being used for a certain specific purpose, there were underground workings.

THE COURT: Where is there a limitation to one shaft?

MR. COULT: While we find that, I will go on further. This piece of land was being used for a specific purpose, there was a shaft there, there were underground workings there and there had been fittings put in and it was in use.

THE COURT: Is not the plaintiff obliged to minimize the damages if possible?

MR. COULT: This is the point. That the breach is the disturbing of the surface of this plot which was being used for mining purposes. Now, we are not obliged to confine our

claim for damages to the repairment of a shaft of any kind that happens to be there or any other working. The point is this, that if the surface of our ground is interfered with we are entitled to the cost of restoration under those circumstances, because the land was in fact being used for mining purposes, and we are not obliged to go somewhere else and sink another shaft.

THE COURT: If it can be done. That is what counsel is asking. If it can be done you are obliged to minimize the damage, aren't you?

MR. COULT: Then what does your Honor say about the fact that the surface of our land has been interfered with?

THE COURT: That would only give you nominal damage.

MR. COULT: Not at all, because the land was being used for mining purposes. Here is the part to which I refer:

"(b) And also with respect to the parcel of land hereinafter described and referred to as the 'Shaft and Building Plot' the following rights, to wit: The right by all proper and usual or appropriate subterranean methods to mine and remove all ores, minerals and fossil substances within the boundaries and below the surface of said parcel; also the right to mine through, use, operate, extend and maintain the existing shaft, with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery, dumps, milling and other devices for treating ores and the products thereof as shall or may be proper or necessary for use in connection

with the mining, removal or treating of ores and minerals obtained from said parcel and other lands in the vicinity of the hereinbefore described premises; also the right to construct and maintain on said 'Shaft and Building Plot' one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, providing that said air or ventilating shaft shall be located at least seventy-five feet easterly from the westerly side of said 'Shaft and Building Plot.' "

THE COURT: That is another shaft.

MR. COLLINS: That has nothing to do with this shaft. That is something they never built. They had the right to use the existing shaft and there was no limit on that.

THE COURT: Is not that so, you might use the existing shaft and you might build an air shaft?

MR. COLLINS: That must be so.

MR. COULT: The title to this land is in the Erie Railroad. We did not get any further or greater rights than those which are given by this conveyance.

THE COURT: You are given the right to mine on that property and also given the right to use the existing shaft. It does not say the one exclusively.

MR. COLLINS: And they shall not be interfered with in that use by us.

THE COURT: As I understand the railroad admits at this time that under the agreement the plaintiff has the right to sink a shaft at another place and is not limited to the existing shaft, but may sink another shaft at this place?

MR. COLLINS: Yes, sir. Now, we cannot say that we are going to preserve this particular hole in the ground and keep it there with its rotten timbers by the expenditure of twenty thousand dollars for a retaining wall, when by going a few feet further, right on the vein itself and building a new one for a thousand dollars, the same purpose could be accomplished.

MR. COULT: What meaning is to be given to these words: "Also the right to mine through, use, operate, extend and maintain the existing shaft."

THE COURT: That means they can mine the mineral and also use the shaft that they have there now.

MR. COULT: That appears to be the limitation on the other shaft and any other shaft, for they give us the right to mine through the existing shaft. That appears a clear intention to limit us to the existing shaft.

THE COURT: I don't think it is. I don't think the purpose is to limit it to that. I will permit this inquiry.

Objection overruled; plaintiff excepts.

BY MR. HOBART:

Q. Now, will you answer that question; how much would it cost to sink an entirely new shaft of the same size and depth as the present shaft, at any point that you observed, within that Shaft and Building Plot?

MR. COULT: I also object to it on the ground that it is not matter of cross examination, but is a separate matter of defense.

MR. COLLINS: I submit they did not go into it, but we have a right to ask this witness

that they call here to testify that to keep this shaft we must have walls, we certainly have the right to ask him as an expert. Can't you build another one just north of it. That is legitimate cross examination.

MR. COULT: The direct examination was limited to the restoration of the surface by walls and the repair of the existing shaft.

THE COURT: He testified as to the character of the ground and all that. I will allow it. Of course, this is not the measure of damages; because there are other elements which come into consideration. But I will allow this question.

MR. HOBART: We do not concede that at present. We will proceed now, but we should like to bring that matter up for future consideration.

THE COURT: You may not concede that, but it is quite clear that the further you get away from the vein it certainly must cost something more than putting a shaft down.

MR. COLLINS: We are going to the vein. We are getting right onto the vein. This plaintiff built a shaft ninety feet from the vein and a tunnel to go to the vein. We propose now that he shall put one right on the vein. I submit that is plainly cross examination.

Objection overruled; plaintiff excepts.

A. Thirty-six hundred dollars.

Q. How do you estimate that? A. I take sixty dollars a foot for sixty feet or fifty-eight feet.

Q. That includes the timber and labor? A. That includes the timber and the labor.

Q. And, of course, the excavating? A. Yes, sir.

Q. And, of course, the difference between this proposed shaft and the restoration of the old shaft, according to your figures is twenty-six hundred dollars? A. Yes. That would be simply the excavating.

Q. Twenty-six hundred dollars is covered only by the excavating? A. Yes, sir.

Q. How much do you allow for the excavation? That is at what rate? A. Well, we have usually done work of that kind on a contract basis, so much a foot or yardage, so much a yard for the finished work, and that is where I got my figures. I have not done any particular thinking about it, because it is brand new to me, and I have used the figures we formerly had in other work for that sort of work.

Q. On a basis of so much per foot? A. So much per foot, yes, finished.

Q. And, according to those figures, the original construction of the present shaft must have cost about that same amount? A. Well, of course, the condition through which they passed. I am speaking now of normal conditions. If they had gone through quicksand or boulders, or any unusual conditions, the figures would be increased very materially.

Q. Would it affect your estimate of the cost of the construction of a new shaft, if you knew that the cost of the old shaft, when it was originally built in 1907, was under a thousand dollars, only a little over eight hundred dollars? A. Well, I really am not familiar with the construction of the old shaft, except with the timber, I know I saw the timber, what the condition was. What they went through in going down there I know nothing about. I am simply making an estimate taking the ordinary conditions we find, nothing unusual.

Q. Simply on the basis of so much per foot, without making any attempt to figure out how much for the labor and how much for the timber? A. No, I have not done that.

Q. Let us look at these new retaining walls for a moment, one on the south and the other on the west; the one on the west would be on the same side as the railroad tracks, wouldn't it? A. Yes.

Q. How deep a wall have you figured on for that construction? A. Sixty feet.

Q. Down to bed rock? A. Down to bed rock.

Q. You have estimated that bed rock is sixty feet deep? A. Yes, sir.

Q. You did not take any borings or anything of that kind to ascertain the fact? A. No, sir.

Q. How wide did you allow that wall to be at the bottom? A. Twenty-four feet.

Q. How close would that be to the present retaining wall? A. Well, I think it would be very close to it, I am not sure about the distance.

Q. It would run right into it, and would run half way through it, wouldn't it? A. No, hardly. No, it would not, no.

Q. Have you made any measurements to see? A. No. I have not.

Q. What I am trying to find out is how you are going to find room for a twenty-four foot wall between the present shaft and the present wall as it stands there to-day? A. Well, the lines, as I understand, run at angles, very near at right angles, that is, it is very much less than a right angle the nearer you get to the south end the narrower the line is, and I understand the shaft at one point is within ten feet of the line, at the upper end of the shaft, nine feet, and where you have got, more than ten feet there is no reason why, if the present timber work were taken out,

there is no reason why, if the retaining wall were put down there, you abandon the present timber work, it would be an easy matter to set over your timber a few feet over, the other way and still connect with the hole down through the rock.

Q. You mean the timber in the shaft? A. Yes.

Q. How far over would you have to set it? A. If it is ten feet there at one place it would have to go over fourteen feet I suppose.

Q. You mean build the new shaft fourteen feet away from the present shaft? A. No. I would bore a new hole down and connect with the present shaft, if necessary.

Q. You mean the shaft going down perpendicular in one direction and then have to drive a tunnel fourteen feet to get to the present shaft? A. No, I don't know how large the openings are. Usually the rock opening is very much larger than the timber.

Q. What I want to know is how you are going to put a twenty-four foot wall in a space where you have only ten feet? A. Crowd my shaft over.

Q. In other words, move your shaft? A. Yes, sir.

Q. Then, why not build a new shaft in the first place, ten feet away or fourteen feet away, or whatever it may be necessary, to make room for this retaining wall twenty-four feet wide? A. That would be the proper thing to do.

Q. In your opinion that would be the proper thing to do? A. Yes, sir.

Q. Then we would have an entirely new shaft? A. Yes, sir.

Q. And the new shaft, according to these figures would be about fourteen feet from the present shaft, is that right? A. Well, yes, something like that.

Q. The top of it would anyhow? A. That is,

if you moved over the present shaft, after building this angle, you could come within fourteen feet at one point, without permission from the adjoining property owners. I was given to understand that permission would be granted by the railroad to extend over there for the protection of that property. That is why I suggested the wall.

Q. You also suggested a wall—speaking of this same wall, on the west side, that you thought the present wall, if it were raised in height some short distance, might serve the purpose of retaining the present filling, assuming, of course, that the present wall was solid, or is not leaning over or is not likely to fall over. How much elevation would you have for that purpose? A. You would require sixteen feet.

Q. Sixteen feet more on the present wall? A. Yes, sir.

Q. And how wide? A. Well, it would be carried up fully the size, I should say, of the top of that wall, three feet on the top, it should be extended that is all.

Q. Three feet wide and sixteen feet high? A. Yes, sir.

Q. How long? A. I should think at least fifty feet.

Q. Have you figured what that would cost? A. No. I have not.

Q. You think that would stand all right, do you? A. If the foundation is very secure and the wall is properly erected for that purpose, yes.

Q. How long would it take you to figure out that for us, what that would cost?

THE COURT: Certainly, the plaintiff would not be bound by that, by what it would cost

to put up the wall on the defendant's property? He has no right to do that.

MR. COLLINS: This question assumes that the present wall is solid and proper in every way and has not shifted and has not moved, but only that it is not high enough. If that is so the plaintiff might very well claim that we should put it higher.

THE COURT: The question now is what it would cost. It does not make any difference what it would cost. If the defendant was obliged to do it it does not affect the matter what it would cost to put a wall on the defendant's property. But the plaintiff has no right to construct a wall on the defendant's property. Therefore, what has the cost to do with it? What it would cost to make that wall sufficiently high, what light does that throw on this case?

MR. COLLINS: We were bound to make a retaining wall of the character designated, and we have not done it because we have not got it high enough. Surely if that burden was on us to build a retaining wall and we have not got it high enough, it should be made to appear what the cost would be to make it high enough.

THE COURT: The plaintiff has no right to build a wall on the defendant's property, and if the defendant was bound to do it the defendant would have to do it no matter what it would cost.

MR. COLLINS: The Court at the last trial thought that it would be implied that for whatever was necessary to make this right they would have the right to go on our land. We find that in the record. There was a great deal of discussion about it.

THE COURT: I do not think the cost of this wall or the raising of it is at all material. We may proceed with the next question.

Q. Turning to that retaining wall on the south side, have you examined the land there to see whether there has been any sliding or slipping of the earth on the side there, on the south side? A. I have seen it, yes.

Q. Had it reached its, I think you call it, the angle of repose, when you were there before? In a normal condition such a thing does come about in due time. A. Yes, sir.

Q. That means that when the natural earth had reached such an angle it does not slip or slide any further, under ordinary conditions? A. Yes.

Q. So that, if, on the south side, the filled earth has reached the angle of repose, why should it be necessary to put a retaining wall there? A. It has not reached the angle of repose. The angle of repose would be about one and a half to one, and that is about four to one.

Q. Isn't there such a thing as putting in filling to affect this or to bring about this result? A. Yes, you might put filling in and get the thing all straightened up all right for one night and the next day it might be as bad as ever.

Q. Why? A. Because there is nothing to hold it in place. It is shoved down, it is not in the natural angle of repose.

Q. But as soon as it gets to the angle of repose that means that it stays there? A. This is not the natural angle of repose, this is not the natural condition now. It wants something to prevent it from slipping down from there, if it slides down to the natural angle of repose it is going to endanger that shaft, because you will remove the

little resistance there is in front of it and the pressure is still behind it.

Q. Why not put in some more filling then? A. You have got to put in something to hold that filling there.

Q. What is meant by the angle of repose? A. It is where the earth will lay naturally, that is where it will lay without further moving.

Q. When this earth reaches that position, why should it move any further? A. I don't say it would. I don't see why it should.

Q. But your view is, that in order to reach that angle of repose it is necessary to expose the shaft again, is that your theory? A. Yes. In order for that earth on the south side to reach the angle of repose it will run down away from the shaft and would leave that bare and exposed to the pressure behind it and would result, perhaps, in greater damage to the shaft.

Q. Why shouldn't we then put on some more filling until we got to a point where it would stop sliding? A. Perhaps you could, yes, if you put on the natural filling.

Q. Why couldn't you? Is there any reason why it should not be done? A. I don't know of any reason, no.

Q. How much would the filling cost?

MR. COULT: I object to this. This is all on the same line, as to what we had a right to do on their own land.

MR. HOBART: No, this is on your land.

MR. COULT: Then I think the witness ought to understand that.

THE COURT: Do you understand that?

THE WITNESS: No, I understand the material you are putting here must necessarily go over on

the adjoining property. You cannot produce the angle of repose on that end. You have only got about five feet over on one corner there, and you cannot do it without crowding your material over on the Erie Railroad. If you are allowed to do that there is no reason why it should not be done. But you will have to crowd it over the Erie Railroad to get the angle of repose there.

Q. And that would hold the shaft in place just as well as this seventy foot retaining wall, wouldn't it? A. No, sir.

Q. Why not? A. Because the retaining wall will overcome any vibration going on in the operation of that plant.

Q. Does not the angle of repose mean that it won't slide any more? Isn't that what you mean by it?

MR. COULT: Objected to.

Objection overruled; plaintiff excepts.

A. No, not necessarily, without any undue conditions. When any undue conditions affect it it will move. It may be apparently at the angle of repose and a very heavy rain might cause the dirt to slip on down, to cave away, as we say.

Q. Is it not the fact that all over this country there are thousands of railroad embankments built on the theory of the angle of repose? A. Yes.

Q. Without any retaining walls? A. On general principles, yes.

Q. And they don't slip or slide, do they, except under exceptional conditions? A. They are not all lying upon a smooth surface of rock with a pitch of thirty degrees, one part of which has been removed, the bond holding the earth on the north and on the east side of that shaft had been broken

which is very important. The material is not at repose. It is lying there, hanging in suspense and the slightest movement would start it. Now, it is lying in that condition to-day, or it is existing in that condition to-day, or rather when I was there. There is nothing to prevent its moving.

Q. Is it your understanding that the bedrock on the south of this shaft and shaft house, that that had been cut off or disturbed in any way by this excavation? A. No. The earth on the south side as well as on the west side. Your railroad track is swung on that south side.

Q. What is there now that is different to the south of this shaft house than what it was originally or by nature? A. Why, a large amount of earth has been taken out, the foot or the tie of the natural earth, the natural roll of that hill has been removed and there is nothing there to hold it up or to brace up the material above.

Q. The bedrock has not been touched? A. No, the bedrock you won't hurt that.

Q. Now, go back to this angle of repose for a moment; I want to find out, if I can, how much it would cost to put in natural fill there to bring about this condition of repose? Did you make an estimate of that at all? A. No, sir.

Q. Is it not possible to make that estimate? A. Yes, it can be made, but you will have to have the room to do it.

MR. COULT: I object to that on the same ground, because to put in the natural fill on the south side would be to restore the pressure so that it would be equalized on both sides of the shaft, and that is something that has got to be done by the railroad on the railroad land.

THE COURT: What I held last time was that the parties could go on the land of the railroad temporarily for the purpose of carrying out the agreement, but certainly the plaintiff could not put any permanent work on the railroad land. As I understand, this witness says you would have to put a part of this fill on the railroad land? Is that so?

THE WITNESS: Yes, sir.

MR. COLLINS: No. What I understand is, there is little space between the south line of the shaft and the south line of the track—

THE COURT: He says it will have to be a permanent condition. Is that what you mean?

THE WITNESS: I mean that you cannot reproduce the angle of repose on the south end without throwing the material on the Erie Railroad.

THE COURT: And it will have to remain there permanently?

THE WITNESS: Yes, in order to support this earth up there.

MR. COLLINS: Suppose it is made up to that angle, and it slides down; you put the filling on the little piece of the building plot and as you put it there it will slide along onto the lands to the south and if it is necessary in order to make it solid that it shall slide, that is implied in the nature of things.

THE COURT: Suppose it slides over so far that it slides over the railroad track?

MR. COLLINS: But it does not.

THE COURT: You are assuming one thing and the witness assumes another.

MR. HOBART: The railroad tracks are to the west, not to the south.

THE COURT: Suppose it does not go over on the railroad tracks, but that it goes over on land that the defendant is entitled to use for railroad purposes. I think any legitimate use which would be necessary in order to accomplish this purpose would be permissible, but certainly under this agreement the plaintiff would have no right to put a permanent construction on the defendant's property.

MR. COLLINS: I don't think they would be putting a permanent construction on if they simply let the material run over on it.

THE COURT: Suppose they let the material run over on the defendant's land, it was found necessary to do that to maintain the angle of repose, and then the defendant came along and desired to use that land and removed the material. Then you disturb the angle of repose and you are back where you start from, are you not?

MR. COLLINS: If we undertake to dig out the toe of this slope after the angle of repose is reached, we have got to keep the rest up, they could dump more in.

MR. COULT: Then we would bring an action, and they would say, "You keep on dumping more and more earth in."

THE COURT: The question was held in abeyance, and was for the purpose of showing the damages done could have been minimized by the erection of a wall by the plaintiff on the defendant's property. I will overrule the question.

Defendant excepts.

MR. COLLINS: Of course, we do not understand we are bound by the contention, we do not admit that any such thing is necessary.

We simply state that there is nothing needed to the south, as Mr. Van Mater testified, there is nothing needed to the south.

THE COURT: I understand that is your contention. Now you may proceed.

Q. In your estimate of the cost of excavation for the construction of these two retaining walls did you estimate the work would be done by hand? A. Yes, sir.

Q. Did you consider whether it could be done by the use of steam shovels? A. No. That would be absolutely impracticable to put a steam shovel in that place, that fifty-eight foot hole.

Q. So it could not be done? A. I say it would be impracticable.

Q. You mean it could not be done by a steam shovel? A. I mean I would not do it.

Q. It would be cheaper if done by a steam shovel, wouldn't it? A. No, not on your life.

Q. You think not? A. No, sir.

Q. Could it be done by the use of drag line scraper? A. Part of it, yes.

Q. Did you consider that? A. I thought of that, yes.

Q. That would be cheaper, wouldn't it, than by hand? A. Only a part of it. The cost of the installation of the plant as against the advantage over the old way, I should say not.

Q. What is a drag line scraper, what kind of a plant do you need for that? A. As I understand, it is a rope, scraper suspended upon a rope.

Q. It does not require an expensive apparatus and a big plant? A. No, not a big plant, but there is a lot of little details.

Q. It is a great deal cheaper than hand work, is it not? A. Where you can use it, yes.

Q. Is there any reason why you should not use it or why you could not use it here? A. For a short

distance, yes, but only for a very short distance.

Q. It would make the cost less? A. No. I think not, I think the installation of the plant would offset the gain.

Q. As I understand you, the method you have suggested to-day, by the use of retaining walls, the construction of the retaining walls on the south and on the west, is the only way by which this present shaft can be made workable, is that right? A. No. I did not say it is the only way. It would be my way. It is my opinion that it is the better way. It is not the only way.

Q. Have you changed your opinion since you testified in this very room some time ago on another trial of this case? A. No, sir.

Q. You have not? A. No, sir.

Q. Did you mention any such retaining wall when you testified before? A. No. From the fact that I was never asked.

Q. Were you asked on the other trial, as follows:

> "Q. Is there any possible way to take that same locality, the same location of shaft, and reproduce it there? A. Yes, sir.
>
> "Q. In some manner that would be workable? A. Oh, yes, yes, particularly from the west.
>
> "Q. What is the most practical way that that could be done? A. Why, I should excavate around the shaft, around the back and the two sides, down to a solid foundation, if I had to go all the way to bedrock. I would then erect a concrete retaining wall in order to protect the shaft from the ground on the back and on the sides, and straighten my shaft up as formerly."

That was your opinion then, wasn't it? A. Yes, sir.

Q. Is it your opinion now? A. No, sir.

Q. Then you have changed your opinion, haven't you? A. I formed my opinion from another angle, from another standpoint.

Q. Have you changed your opinion? A. In reference to the shaft?

Q. With reference to the way to make that shaft workable? A. As far as the shaft is concerned, no.

Q. So far as the way to make that shaft workable is concerned, so far as concerns the most practicable way to do it, have you changed your opinion? A. No, I have not.

Q. Do you say now, what you said before, that the most practicable way to do it was to erect a concrete retaining wall to protect the shaft in the back? A. In speaking particularly of the shaft alone, yes.

Q. Did you mention these two retaining walls on the south and on the west, did you mention or even suggest such a thing when you testified before? A. No, I did not.

Q. Why not? A. Because I had no thought in my mind to protect that plot of ground.

Q. You had no thought of it at that time? A. No, my attention was not called to it.

Q. Had you at that time examined the premises? A. Yes, I had.

Q. How long before? A. A few months before.

Q. Who suggested to you to make an estimate of the cost of the retaining walls instead of as you testified? A. No one. I did that myself.

Q. When? A. When I was going over this case, my attention was called to the fact that the damage was probably larger in the plot than it was in the shaft itself.

Q. Who called your attention to that? A. Mr. Gumaer.

Q. When? A. Perhaps four weeks ago.

Q. Then it was suggested by him? A. He called my attention to the fact that the plot must be protected. It was my idea of protecting it with the walls.

Q. Did he show you some plans? A. He did not.

Q. Did he suggest to you where the walls should be? How long they should be or how deep? A. We talked it over together afterwards.

Q. Did he suggest to you the having of two walls, each one about fifty feet long? Did you agree on the distance? A. Yes, we did.

Q. Who first mentioned fifty feet or fifty-five feet? A. I don't know. My idea was that the south wall should be somewhat longer than that because there was evidence of the breaking of the ground more than fifty feet.

Q. How did you and Mr. Gumaer come to agree practically on fifty feet for these two walls? A. From the fact that it would reach the point on the south and west of that property that was affected by that slide.

Q. Did Mr. Gumaer suggest to you that you should go down to bedrock with those walls? A. No, I had brains enough to know that myself.

Q. He did not suggest everything to you? A. No, I did think of some few things.

Q. Do you still think there ought to be a retaining wall back of the shaft and on the side, as you testified before? A. I think under the general plan that has been outlined, it will take care of the shaft and also the plot, it is the better plan to protect them both. If the shaft was considered alone I should go back to my original plan.

Q. By considering the shaft and the plot together you think it is not now necessary to have that concrete retaining wall in the back and on

the sides as you testified before, is that right? A. No, not now.

Q. Is it not the fact that when you gave your previous testimony and gave your opinion as to the most practical way of doing this work, that you then had before you, in your mind, when you gave your opinion, the examination that you had made just a few months before?

MR. COULT: Objected to. Counsel says, of doing this work, without referring to the restoration of the shaft alone or the method of restoring the sides of the plot and the consequent rebuilding of the shaft, which the witness has already testified about.

Objection overruled; plaintiff excepts.

A. Only as pertaining to the shaft.

Q. You gave us an estimate of the cost of the construction of a concrete wall on the south, and as I have it, your estimate was fifteen thousand dollars, is that right? A. Yes, sir.

Q. Would you mind telling us how you arrived at that? What are your items? A. I had nine thousand cubic yards of masonry at ten dollars. I had twenty-four hundred cubic yards of excavation at two dollars, and I had fifteen hundred yards of material returned to the excavation at fifty cents. And incidentals five hundred dollars.

Q. You have included in that fifteen thousand dollars then the cost of excavation then, as I understand? A. Yes, sir.

Q. In other words, you do not add to your fifteen thousand dollars your previous estimate of the cost of excavation at a cost of two dollars a yard? A. No, sir.

Q. That represents the total cost, including the concrete, the excavation and everything else? A. Yes, sir.

Q. How deep is that wall on the south side? A. Well, that would average about forty feet.

Q. In depth? A. About forty feet in depth.

Q. How wide would it be at the bottom? A. Twenty-four feet.

Q. How much on top? A. Three feet on the top.

Q. Do you know how much room there is on that side, on the south side, between the shaft line and the shaft lot? A. Well, no, I do not.

Q. Do you know it is only ten feet? A. I suppose it is more than ten feet, I don't know what it is.

Q. If it is only ten feet you would have trouble in cramming your twenty-four foot wall into that, wouldn't you? A. Yes, sir.

Q. You could not very well do it, could you? A. No.

Q. Did you consider that when you considered the question of making up these estimates? A. No. I understood there was room enough on that side for the wall.

Q. You did not make any measurements for the purpose of ascertaining that fact, did you? A. No. I did not.

RE-DIRECT EXAMINATION BY MR. COULT:

Q. What is the batter of a retaining wall? A. The batter is the angle of the face of the wall.

Q. Is there any difficulty in putting the batter on the plot in building those walls? A. No, sir.

Q. Is there any difficulty in running the shaft through the batter? A. No. No. It could be done without any great disadvantage.

Q. There would be no disadvantage to that? A. No, no great disadvantage.

Q. How could that be done? A. By making your form.

Q. Make a form of the shaft and run it right through, put the shaft through from the bottom up? A. Yes, sir.

Q. And that would do away with the necessity of putting the walls on the railroad land at all, wouldn't it? A. Yes, sir.

Q. Suppose that there is a slope of loose earth which is in a condition of repose at the angle at which earth naturally reposes, within what distance from the top of that slide would it be practicable and safe to construct a mine shaft? A. Well, I should say fifteen or twenty feet.

Q. Assuming that there is ten feet space between the shaft and the southerly line of the shaft and building plot, where would the top of a slope in repose have to start? A. I did not quite catch that question.

Q. Suppose there is ten feet between the southerly edge of the shaft and the southerly line of the tract, where would the top of such a slope have to start on the south side of this tract? A. I do not catch the question.

Q. Judge Collins in his examination made some reference to some method of protecting this shaft by filling on the south side by earth which in a normal state of repose would hold the top of the shaft, from further pressure from the other side, do you recall that? A. Yes.

Q. How far would the top of that slope have to be from the shaft in order to make it practical and safe construction? A. I should say at least ten feet.

Q. So that would be ten feet outside of the Gumaerd Company's lot, wouldn't it? A. Yes.

Q. Where would the foot of that slope be? A. That would be a great many feet up on the other land.

Q. Do you know the height of the excavation there? A. No, I do not.

Q. Assuming it was thirty-eight feet from there to the bottom of the cut, where would the outside edge of that slope be on the railroad property on the bottom? A. That is, the number of feet?

Q. Yes? A. Thirty-eight feet. That is variable. It would depend upon the angle of repose. I will have to calculate it a little bit. I should say sixty feet. There is a rule about that.

MR. COLLINS: One and a half to one, is it not?

Q. It amounts to fifty-seven feet? A. Yes, something about that.

Q. The foot of this slope would be about fifty-seven feet over on the railroad property? A. Yes, fifty-seven feet.

Q. In order to be effective it would have to be kept there, wouldn't it? A. Yes, absolutely.

Q. When you were on these premises on the occasion when you made this examination to which you have referred, did you take any particular observation of the retaining wall on the railroad property, the one that is now there? A. Yes, I examined it.

Q. Did you observe whether it was standing up straight or not? A. No, I did not. Well, apparently it was, yes.

Q. You did not plumb it? A. No, I did not.

Q. Why not? A. I had no occasion to. From all appearances it was all right.

Q. Was Mr. Gumaer with you then? A. Yes, sir.

Q. Did he suggest plumbing? A. No, sir.

Q. And it did not occur to you? A. No, sir.

Q. And nobody specially suggested that that wall was out of plumb, did they? A. No, sir.

Q. To all appearances it was all right? A. Yes, sir.

Q. There were not any cracks in it, were there? A. Not that I remember.

MR. COULT: I would like to put in some rebuttal of Mr. Van Mater's testimony by Mr. Tonking, and he says he wants to go away.

THE COURT: Is there any objection to that?

MR. COLLINS: Not a bit. We are willing to take it now and have it marked that it is rebuttal of Mr. Van Mater's testimony taken out of time.

BY MR. COULT:

Q. It has been testified to here that this shaft can be repaired by taking out the timbering now in it and by retimbering it from the bottom up; what have you to say about such a method of repair? A. It is absolutely impracticable and dangerous.

CROSS EXAMINATION BY MR. HOBART:

Q. You have never known of such a thing being done? A. No, never.

Q. You did not hear Mr. Van Mater testify about it the other day? A. Yes.

Q. Did you hear him testify that he had done that? A. Yes, sir.

Q. You think it is impossible? A. Practically, yes, practically impossible.

Q. Then you think that Mr. Van Mater did not do it as he said he did?

MR. COULT: Objected to.

Objection sustained; defendant excepts.

CHARLES E. DALY, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. WOODRUFF:

Q. Where do you reside? A. At Port Jervis.

Q. What is your occupation? A. Carpenter and builder.

Q. How long have you been engaged in that occupation? A. About twenty-seven years.

Q. In that vicinity? A. About seventeen or eighteen of it.

Q. You made an examination of the shaft and its surroundings on the shaft and building plot shown on the map directly behind you? A. Yes, sir; on the Gumaerd mining property, I did.

Q. When did you make your first examination? A. I think the latter week in November 1914.

Q. Did you make an examinaiton after that? A. Yes, sir.

Q. When did you make that? A. The first week in December of the same year, I think it was.

Q. Have you made any examination subsequent to the second one that you have mentioned? A. December tenth 1916.

Q. Will you describe to the Court and Jury, please the situation just as you found it at the time of your first examination? A. (The witness refers to a paper.)

MR. WOODRUFF: The witness seems to be referring to notes.

MR. HOBART: We have no objection if they are his notes.

Q. They are your notes? A. Yes, sir; they are notes I made for the suit before. You also have some notes I made on the tenth of this December for this case.

Q. Refreshing your recollection from those notes tell us the situation at the first examination? A. The first examination alone?

Q. Yes. A. The first examination, or the first two examinations included, they were only a week apart, I found that the shaft building had moved toward the track four inches; I found that the gallus frame had settled toward the track seven inches, I found that the gallus frame had lowered on the southwest corner twenty-three and a half inches, on the northwest corner, eighteen and a half inches. At that time I found that the shaft building leaned to the west fifteen and three-quarter inches, to the south six and three-quarter inches, that is the northwest corner of the building, the southwest corner of the building leaned eight and three-quarter and two inches respectively.

THE COURT: Was that all on the first examination?

THE WITNESS: Yes, sir. That is not all that was done at the first no.

THE COURT: Go right ahead.

THE WITNESS: I also had a line in the shaft, a line near the northwest corner of the shaft that showed a leaning of ten inches, it leaned at the northwest corner, it showed the shaft leaned west thirteen and three-quarter inches, that the shaft had spread five and three-quarter inches at the south end and three and three-quarter inches at the north end. I had a plumb line on the southeast corner of the shaft that extended from the top down sixty feet, I took the measurement every six feet starting from the top and working down.

Q. How far was the shaft out of plumb in depth? In other words, when did it start to go

out of plumb? A. At the top was the largest measurement, and the last measurement showing that it was out of plumb was twenty-four feet and it died out between twenty-four and thirty feet.

Q. At the time of your first examination did you put a plumbline on the retaining wall? A. The retaining wall of the railroad?

Q. Yes. A. I did.

Q. What did you find there? I show you the photograph Exhibit P-6. A. I found the wall leaned toward the track two and a half inches.

Q. That was your first examination; your second examination you say was in December of the same year, 1910, a week or so after that? A. The second examination, that was only a week after, I did not plumb the retaining wall each time.

Q. At the second examination what did you find with respect to the things that you have just testified about? A. That was the same as I testified, that was the two examinations together.

Q. What did you find as to those things in your recent examination this month, 1916? A. The examination I took the first time, I say, that wall leaned toward the track two and a half inches and the examination on the tenth of this month I found it leaned three and a half inches.

MR. COLLINS: That is the retaining wall?

THE WITNESS: Yes, sir; the one shown in Exhibit P-6.

Q. Did you make any measurement around the shaft or the shaft house at the last examination? A. At the shaft house I checked up all my measurements I had made in my former examination. I found the building leans west now twenty inches, that is, at the northwest corner, at the southwest

corner it leans nine and three-quarter inches. In the northwest corner it leaned twenty inches instead of fifteen and a quarter inches. The gallus frame, the settling there was twenty-three inches before, it is something more now but the markings are gone so I found it was hard to tell just how much it was. It was low on my first examination on the southwest corner twenty-three and a half inches, and on this examination twenty-six inches low, on the northwest corner before it was eighteen and a half inches, and now it is twenty-six inches low. That is it has gone toward the track.

Q. Considering your first examination in November 1914 and your recent examination, can you in each instance which you have just mentioned, tell us the difference, in other words, how much more the wall in one instance has sagged out of alignment, the shaft in another, and the sills etc.? In other words, I would like to have it before the jury as showing the difference.

THE COURT: He had given us the measurement on both occasions.

MR. WOODRUFF: It is very hard for the jury to remember it.

THE COURT: Well, he spoke about its being two and a quarter inches now and two inches before.

THE WITNESS: The retaining wall moved just one inch from the time I plumbed it before until this time.

Q. How much did the top move in a westerly direction? A. The shaft moved in a westerly direction, it is a variation from two to four inches.

Q. In a southerly direction? A. The variation is practically the same, from two to four inches, it seemed that it moved equally, but it moved in some places and some places not so much; at

this time some places did not show quite so much as it did before and in other places it showed more.

Q. How much is the southwest corner of the wall of the shaft house, how much has that sunk since your first examination? A. Four and a quarter inches.

CROSS EXAMINATION BY MR. COLLINS:

Q. How did you take your measurements, by a plumb and bob? A. Yes, sir.

Q. You are a carpenter, I understand? A. Yes, sir.

Q. And not an engineer or a surveyor? A. No, sir; I am not an engineer, no, sir.

Q. And say that the shaft itself sets more out of plumb when you examined it the early part of this month than it did in November 1914? A. Yes, sir.

Q. And you have given the difference? A. Yes, sir.

Q. Are you sure that you let your plumb bob down at the exact same point that you did before? A. No, I am not sure. I could not see where it would make any difference.

Q. I am only asking you the question, I am not arguing with you. A. I could not possibly put it the same place I did before—

Q. Just answer the question. And you think that the sills of the house are more out of place than they were then? A. Yes, sir.

Q. I don't care much about the house, but this shaft you are pretty sure it is more out of plumb? At the recent examination than it was in November 1914 when you examined it then? A. Yes, sir.

Q. And you ascertained it only by a plumb bob

and you are not sure that you used the same place for measuring both times? A. No, I am not sure I used the same place, but I am sure I have got the amount.

Q. Just answer the question. You testified before, I have your testimony before me, at page 208, and you gave the measurements at which you said the shaft and the shaft house and the sills were out of plumb, didn't you? A. Yes, sir.

Q. You did not say a word about the retaining wall, did you? A. I was not asked.

Q. Well, you did not, did you? A. No, I did not.

Q. Now, you come and say that at that time, November 1914, the retaining wall along the railroad cut on the west was out of plumb? A. Yes, sir.

Q. How much? A. Two and a half inches.

Q. And you never said a word about it? A. I was not asked.

Q. Just answer my question, I did not ask you to give the reason. You did not? A. I did not. no.

Q. You were not asked anything about it? A. No, sir.

Q. You told Mr. Gumaer about it, didn't you? A. Yes, sir.

Q. And yet, you were not asked about it? A. No, sir.

Q. You did that with a plumbline and bob, I take it? A. Yes, sir.

Q. At what point in the wall did you make that observation? A. At several points.

Q. At different points? A. Yes, sir.

Q. Can you specify where they were? A. I could show you if I was up there. I don't know as I can tell you exactly any other way.

Q. You cannot in any way describe it so that somebody else could test your work, can you? You cannot now in language describe where the points were? A. I cannot describe it clear enough for anyone to go and plumb in exactly the same spot I did.

Q. And you cannot tell whether your new observations were in exactly the same spot as the old ones? A. Yes, I can.

Q. Although you could not do it on the shaft you can do it on the wall? A. Certainly.

Q. How do you know that you laid your plumb-line down this last time were the identical places where you did that the first time? A. By marks on the wall.

Q. You made some marks, did you? A. I did not make marks, no, I identified marks that were there.

Q. Marks that were on the wall? A. Yes, sir.

Q. Do you remember how they came to be made? A. They were made when the wall was made there, during the construction of the wall.

Q. How many of them were there? A. A number of them.

Q. One on the south end and one on the north end and some in between? A. I did not plumb on the north end.

Q. You did not go way up to the north end? A. No, that is beyond the railroad bridge.

Q. How far did you go? A. I plumbed from where the railroad bridge crosses and joins on the retaining wall to the end of the wall.

Q. To the south end of the wall? A. Yes, sir.

Q. In how many places? A. In four places.

Q. What are those marks on the wall, what do they look like? A. They are small marks that show from the joints of the form work in building the concrete.

Q. Not marks made for any purpose but simply marks that naturally come in from construction, during the construction? A. They naturally come from the construction.

Q. How can you be altogether sure you got the same ones the second time? A. I am sure of it.

Q. You cannot tell how you were sure? A. I could tell by the marks.

Q. Won't a good many marks naturally come in the construction of such a wall? A. Naturally, yes, there would hardly be two of them exactly alike.

Q. And you remember all those months the looks of the ones you used on the first examination? A. Yes, sir.

Q. What did they look like, a crow's foot or what? A. No, the marks simply was where the ends of the boards was, near the joint, that is the place, the ends of the frames that are made up of boards to put the concrete in, there is joints in the concrete.

Q. The ends of the boards in the scaffold? A. No, in the form.

Q. In the false work? A. Yes, sir.

Q. You could tell where the end of the board came in the false work? A. Yes, sir.

Q. It showed a mark? A. Yes, sir.

Q. They were all alike were they? A. No, sir; they were not all alike.

Q. Every time there was the end of a board pressed into the concrete if it was soft it would make the same kind of a mark wouldn't it? A. Not exactly, no.

Q. They are similar? A. They are similar but not exactly alike.

Q. The shafthouse, mudsills was laid upon loose stones? A. Originally I believe, yes.

Q. No cement? A. I did not see any cement.

Q. On the wall was the variation that you spoke

of, two and a half inches on the wall out of plumb you spoke of, on the first examination? A. The first examination.

Q. Was it the same at each one of those places or did it vary? A. It varied.

Q. Then what have you given us, the average? A. No, sir, I am not giving the average, I am giving you the amount that it is out of plumb opposite the corner of the shed.

Q. Well, then, it is different at these other places? A. Yes, sir.

Q. What is it out of plumb at the other places? A. The first place I would say was one inch.

Q. Any other places? A. Various places and on up to three and a half inches.

Q. Give us all of it, give us each one of the places as you did them. Commence at the south and give us how much it is out of plumb in November 1914 and how much that point is now out of plumb, and then the next one and the whole four? A. The first measurement I took was the one the most off, that is right opposite the corner of the shaft. That is the one that is three and a half inches out.

Q. Three and a half inches out now? A. Yes, sir.

Q. I want you to give me both times? A. Two and a half inches in November 1914, and three and a half inches now.

Q. What is the next one, the next point going north, give the quantity out of plumb in November 1914 and the quantity out of plumb now? A. I did not take that in November 1914.

Q. You did not take but one in November 1914? A. That is all I took in November 1914.

Q. Then the four you took were only this last time? A. Taken in December here.

Q. I asked you how you could tell that you took the measurements in the same places the

second time that you took them at the first time and you said they were marked? A. Because I got that mark right there yet, where I took them the first time and where I took them the second time.

Q. There is only one place like that? A. There is only one place in 1914, and the same place in this year, that is all I said, only one place.

Q. Now, you only speak of one place you took both times? A. Only one place I took both times.

Q. And that is two and a half inches in November 1914 and three and a half inches now? A. Yes, sir.

Q. The next one you took a little while ago? A. In December 1910.

Q. What is that out of plumb now? A. Two and a half inches.

Q. What is the next one? A. One and a half inches.

Q. And what is the next one? A. One inch.

Q. There was no crack in the wall, was there? A. Sure there was cracks in the wall. There is joints in the wall, it was built in sections.

Q. I mean, from the settlement? A. Yes, one section is shifted beyond the other crack.

Q. Where? A. Where it is out of plumb the most.

Q. Do you mean to say that one section of that wall is not in alignment with the next section? A. I do.

Q. It does not come together? A. No, sir.

Q. That is not a crack? A. No, that is not a crack due from the pressure behind it.

Q. You simply say one section projects farther than the other? A. Simply because the joints have been pressed apart.

Q. The joints are not true on the front of the wall? A. No, they are not true; they are not now the way they were when they were built.

Q. But a crack, there is no such thing as that there that you can see? A. I did not notice any such cracks as that in size.

RE-DIRECT EXAMINATION BY MR. COULT:

Q. Can you separate one section of concrete wall from another without cracking off that section? A. Well, that depends.

Q. Are those sections loose? A. Those sections are loose. You might separate it by taking it endwise, but you could not separate it by taking it sideways without breaking something.

Q. What would you break? A. You would break the tongue part, that is in there, depending on how the joint is made.

Q. How are those joints? Loose? A. No, they are interwoven, so that they are run together.

Q. So that there was a crack at the joint? A. Yes, sir.

Q. You took the measurements twice you say? A. Yes, sir.

Q. The first time you took measurements at one place? A. Yes, sir.

Q. The second time you took how many? A. The first time I took one place.

Q. And the second time? A. The second time was December of this year, I took them at four places.

Q. Was there a third time you took measurements? A. This is the third time I took measurements of the retaining wall.

MR. COULT: I want to recall Mr. Gumaer. A juryman told me he was anxious to ask Mr. Gumaer a question and I spoke to the Court about it and was going to call him for that purpose and I want to recall him for another purpose.

THE COURT: You may do so.

CHAUNCEY I. GUMAER, recalled as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Is it possible on the building plot to construct another shaft such as the one that was injured which we are dealing with in this case? A. No. From the manner—

Q. I am asking you if it is a possible thing to do? A. It is possible—

Q. How much money did the Gumaerd Lead and Zinc Company expend in what it did underground up to the time of this cavein?

MR. COLLINS: Objected to as immaterial and irrelevant. Your Honor would not permit us to show what they paid and what money they expended.

MR. COULT: Counsel says we want to minimize our damages and we should put in another shaft like this, and this will tend to show what the work there really cost.

THE COURT: I think you have a right to show how extensively your work had been going on there in that shaft and below.

MR. COLLINS: It is not relevant to prove what it cost them for their work underground.

THE COURT: It shows at least to some extent whether they did any work there, whether the mine was one that was worth having a shaft down into.

Objection overruled. Defendant excepts.

A. The Gumaerd Lead and Zinc Company at this one point has expended between ten and eleven thousand dollars for actual development work. That does not count officers' salaries, books and upkeep of the company; actual cash ex-

penses in this operation here. The shaft with the levels and the apparatus in connection with it. Not the mining machinery either.

Q. What would it cost to sink another shaft on the same property at a point—

MR. COULT: Where do you want us to put it?

MR. COLLINS: What?

MR. COULT: The new shaft?

MR. HOBART: You have your choice.

Q. —the cheapest point between the present shaft and the east line of the property, on or near this vein, at a depth equal to the one that was there when this injury was occasioned and to construct such underground workings as was present in the mine that was in existence at the time of the injury?

MR. COLLINS: I object to the last part of the question.

THE COURT: Didn't he go into this thing yesterday? I understood him to say it would be impracticable to do it. That is to say, he mentioned reasons why the shaft could not be put in another place.

MR. COLLINS: No, he gave the reasons why the shaft was located where it is. First he said the road, and then he said the water course, and then afterwards he came back to the road again.

My objection to this question is he asks for the cost of the underground workings and they would not have anything to do with the value of this work. The underground workings were to reach the vein and if you put the shaft over the vein you don't need those underground workings. He is giving an ex-

cuse for not putting the shaft over the vein and they mostly had reference to the old public highway. He did not want to put his material that he took out on the old road. Now, counsel is asking what it cost to make those underground workings and I insist that is not proper.

(Question withdrawn.)

Q. I asked you as to the possibility, now I ask you, is it a practical matter to put another shaft on the present shaft and building plot? A. It is not.

Q. Why not.

THE COURT: Is that the question you answered yesterday when you told us why?

MR. COULT: He told us the reasons for choosing this point.

THE WITNESS: I told the reasons for choosing this point, but what I did not say was, that it shows that the course of the vein here from this shaft is this way and as this shaft continued right on down the cross cuts would be right at right angles, the vein would be east and west, so that we could handle the product from both the east and west on the upper level. There was the old Erie siding and the right of way and they loaded there, and this shaft was right below that, and this shaft is the nearest point to that. When you come out here, the old mine workings is practically back to the northerly point there some twenty-five or thirty feet from that point. All our workable part of the vein is west, with the exception of the shaft and the building plot, and then we would have on the other levels from the shaft the workings in east and west and for a hundred feet have levels and the plans of the company were to intersect the vein at right angles

so that you could turn either way and work it either way and extract the ore. From the fact that the principal part of our ores, the shoots in here, is tending with the slope of the rock and the slope of the rock is all coming to the west and our ore shoots off in this fashion, all trends that way, and of course, our main ore body is below here, and it is impracticable to put a shaft any other place. If you put a shaft over in another part of this mine, what are you going to do with the dump? It is just as necessary to have from eighteen to twenty-five feet above the collar of that shaft for our material that we extract, just as well as it is to have ore there, because when the material is raised from the shaft you have got to have some place to put that. That was the reason why I did that, why I reserved the right, and I was the one who suggested that it would be necessary to have between the shaft and the rest of the ground here, at least twenty to twenty-five feet, because we have to have dumps, we have to have chutes.

Q. Do you know how near the workings of the old mine are to the easterly line of the shaft and building plot? A. The easterly side of the shaft and building plot takes in some of the old workings.

Q. Some of the old workings are even under that plot? A. Yes, sir; they are.

Q. And would it be a good plan if you ran into that old mine? A. It would not. That is full of water. I would want to keep as far away from it as I could get.

Q. How near would you dare go to it as a practical proposition? A. Well, the added length of the level, the added level runs through there, that is a continuous level. There is a branch running to the west in that old property, just the

distance I don't know, but I would take good pains to keep far enough away from that that I did not tap those workings that are full of water.

CROSS EXAMINATION BY MR. HOBART:

Q. You say the Gumaerd Lead and Zinc Company has spent over ten thousand dollars on this shaft and underground workings? A. Yes, sir.

Q. When was it you built this shaft, January to July, 1907, wasn't it? A. It was from January twenty-eighth if I remember rightly, when the shaft was started, from that until, that is, 1907, to 1909.

Q. When was your company organized? A. The company was organized July twelfth, I think.

Q. What year? A. 1907.

Q. It was organized after most of the work had been done on the shaft wasn't it? A. No, the shaft, if I remember right, we were down let me see, I think we were down somewheres about twenty feet, we had quite a long delay in waiting for machinery to come and I cannot give you the dates, but we had quite a long delay.

Q. Have you got your certificate of incorporation or any other papers to give you the exact date of your incorporation?

THE COURT: Do you know the date?

MR. COULT: We can find it.

MR. HOBART: We can stipulate on the date whatever the fact is.

THE COURT: If it is necessary to find that date from the records, we can find it in the County Clerk's office.

Q. Would it cost you any more to put a shaft down in some other part of this Shaft and Building Plot than to put it down at any particular

spot that you have selected, say here? A. You could not use the underground workings in connection with a new shaft.

Q. Just answer the question—

THE COURT: Just to build the shaft?

THE WITNESS: I don't think it would make any difference whether the shaft was there or here, as far as the cost goes, because it is practically the same soil. In certain localities on that plot, as I have stated before, the bedrock runs up, with a slope, it follows the slope up.

Q. In other words any point in the Shaft and Building plot you could put a shaft? A. Yes, the shaft could be sunk anywheres in there.

Q. At about the same cost as the cost of this one, is that right? A. Approximately, I should judge, with the exception, I will modify that this way, whenever you sink a shaft on a vein you have to continually handle the water, you have continually got the water of that vein to handle during the sinking. A proper mining method would have you always to keep away from the vein to prevent that condition, the shaft is kept to one side where the rock is more firm and you get your shaft down and lead into your vein and carry your shaft down straight according to what dip the vein takes, and carry your shaft down straight and then drift to get at it over the level. Where if you start to follow down to the vein, the vein will pitch ten or fifteen degrees off of the perpendicular in one part and then you will strike it practically perpendicular, and I have known it to require that slope on the vein, so that as a matter of practical experience, we do not do it if we can help it, sink on the vein. We try not to do it.

Q. Your underground workings are there now,

aren't they just as they were before, only there is water in them? A. Yes, sir.

Q. Can you give us any reasonable reason why a new shaft should not be built right over the underground workings on that angle, if you like, where those workings run in the tunnel? A. The Company in their deed, when they had the deed drawn, we wanted the right to sink one or two more shafts and they refused it, they said, Here we will give you the right to use the present shaft and give you the right to sink another air shaft for the ingress and egress of the miners but that would be seventy-five feet away.

Q. Is that the only reason you can now suggest why another shaft should not be sunk so as to go over the underground workings? A. No. I say it is not practical and not according to the best methods of mining, and not according to the deed. When they allowed us to put down another shaft they limited it to an air shaft and I wanted that shaft so that it could be used as a hoisting shaft, but they limited it to an air shaft.

Q. In other words, you wanted to build another shaft in another place? A. The law requires two openings.

Q. Won't you please answer the question, you wanted to build another shaft at another place? A. I wanted to build two shafts.

Q. Two more shafts? A. No. One more shaft, making two openings.

Q. You mean a shaft by which air could be brought up or for ventilating purposes, a ventilating shaft only? A. I wanted another shaft that could be used for other purposes.

Q. Where did you want to build it? A. I wanted to build it within, somewhere. well, the distance, the law requires, I think the law re-

quirement is not closer than a hundred and fifty feet away.

Q. Of what? A. Of the operating shaft, to give the miners a chance to get out. It is a requirement of the law to do that.

Q. Is that the ventilating shaft that you are talking about now? A. I am talking about the ventilating shaft.

Q. I understood you to say a moment ago that you wanted to get the right from the company, and you thought you did not under this agreement, to construct another shaft, is that true or is it not? A. It was the ventilating shaft, to build it so that I could use it for an operating shaft in case I wanted to.

Q. You were allowed to build the ventilating shaft under this agreement, weren't you? A. I wanted it so built that I could raise ore out of it and they limited me to the ventilation.

Q. Where were you going to build it? A. I was going to build it, I think the law says a hundred and fifty feet, anyway it was the distance between that and the old shaft, here, somewheres, above here.

Q. On the vein? A. No, I would not sink it on the vein.

Q. How close to the vein? A. I would not start from the surface for that shaft. We had ore along here, what I wanted to do is to raise up and stop that ore out and make my shaft at the same time that the ore was being stopped out.

Q. Did you at that time have in mind the location where you wanted to build this other shaft? A. That is the shaft you are speaking about now.

Q. The one I am asking about now, yes? A. Yes.

Q. Tell us where it was? A. It was either a hundred and fifty or two hundred feet from this point of the old shaft.

Q. In which direction? A. Toward the old shaft. If the railroad had not been there I would put it here, or I could put it here if the road was not there.

Q. Your purpose was to build this other shaft a hundred and fifty or two hundred feet in an easterly direction towards the old workings? A. Yes, sir.

Q. Is there any reason why that should not be done now? A. Well, there can be a shaft sunk anywheres along there.

Q. It would not cost any more than the first one, would it? A. Well, there would be a little more slope to solid rock, the solid rock comes practically to the surface when you get up that way, it is thirty feet somewheres back of the engine house, and it would cost more money because you would have more rock there.

Q. You gave us the cost of the first one, as it figured up, between eight and nine hundred dollars, according to the data you gave us; this other one would not cost more than a thousand dollars would it? A. I don't remember it that way, that was the cost of retimbering, nine hundred dollars.

Q. I won't argue it with you, that is the purport of your testimony as I have it down here. At any rate, you say now, that this new shaft would cost a little more than the old shaft? A. Yes, sir.

Q. How much more? A. Five or ten per cent. more.

Q. How much per cent. more, can you give it roughly? A. I would probably have twenty five or thirty feet more rock to go through there.

Q. It would be approximately the same depth as the present shaft? A. I presume so, yes.

Q. So that the increased cost would be due to

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the fact that you had a little more rock, about twenty-five or thirty feet? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. COULT:

Q. How much would it cost to sink a shaft to bedrock at a point two hundred and fifty to one hundred and fifty feet to the east? A. How much would it cost to sink a shaft to bedrock?

Q. Yes. A. East of the present shaft?

Q. Yes. A. I think just practically the same as the other.

Q. How much did the other one cost?

MR. HOBART: He has already told us that.

MR. COULT: No, he has not.

MR. HOBART: I beg your pardon, he gave us all the data, so much for labor and so much for timber.

THE COURT: How much did it cost for the other one?

THE WITNESS: About four thousand dollars, sinking and timbering.

Q. The figure my friend seems to be referring to was the figure you gave for retimbering? A. The cost of retimbering had nothing to do with the sinking of the shaft in the first place at all; just let us have those retaining walls, and when it is made safe, so that you can go in and the restoration is safe and enduring, then the shaft can be retimbered, why, because the material has all been excavated, the quicksand and all the material has been taken away and the retaining walls placed and it is no great work to lay that right up.

Q. How much did it cost you to go through bedrock down to the depth equal to that in the mine at the time of the injury? A. Well, we usually figure—

THE COURT: How much did it cost?

Q. How much did it cost, can't you tell it quickly? A. The same depth as the other shaft?

Q. Yes. A. Figuring the bedrock at about ten to fifteen feet from the surface I would figure sixty dollars a foot for the sinking.

Q. What is the total? A. Fifty-one hundred dollars.

Q. How much would it cost to crosscut to the vein?

MR. COLLINS: That would depend upon where the shaft was.

Q. Assuming you put the shaft in a location similar to that of the original shaft with relation to the vein? A. About fifteen hundred dollars.

Q. How much would it cost you to light it?

MR. COLLINS: Objected to as irrelevant. He has got to light it anyway.

MR. COULT: If we have got to abandon this shaft we have got to abandon the lights through it also and that should be included in the estimate of the cost.

MR. COLLINS: You mean the electric lights?

Q. When I say light it, I mean putting in a system of lights similar to the one in the old shaft? A. That would only be a matter of twenty-five dollars, I should say.

Q. And, putting in the other equipment that was in the shaft and the crosscut at the time of the injury? A. Oh, I should say about a hundred and fifty dollars.

Q. So that your total cost of building a shaft similar to the one that existed at the time of the injury, at a different point, would be how much, the shaft and cross cut to the vein?

THE COURT: The total of the figures you gave us?

A. Yes, sir; $6775.

Q. And that would only take you to the vein?

A. That would only take me to the vein.

Q. That would not allow for any operations on the vein at all? A. Not at all.

MR. COLLINS: I don't wish to have any misunderstanding about this, and we will have to refer to the stenographer's notes if necessary, but he distinctly gave the items for the construction of that shaft. I remember he first testified it took six months, and then under questioning he said it took sixty days and five men worked on it, and the timber was so much, at the market value and the whole thing so much.

THE COURT: I think he was asked whether that included labor and material?

MR. COLLINS: Yes, that is my recollection, and we figured up what it came to. And now he says four thousand dollars.

(The testimony is read to the witness as it appears in this transcript at pages 158, 159, 160, 161.)

THE COURT: What do you say to that?

THE WITNESS: I was not sure as to the time.

THE COURT: You told Mr. Hobart at first that it took six months and then after consideration you finally brought it down to sixty days, and you said you had five men and you gave their wages, and then you stated the amount of timber, and adding all those figures together it apparently amounts to less than a thousand dollars. How do you explain that in comparison with the figures you have just given us now?

THE WITNESS: Well, it was not right.

*Chauncey I. Gumaer—Re-Direct.*

BY MR. COULT:

Q. You include your work through the bedrock? A. On the shaft, yes, I supposed it was to go the full length on the shaft. But I could not, nor I cannot now, I cannot tell how long I actually worked on that job for the simple reason that I sunk the shaft to the cross cut when I done work through the crosscut, then I came back to the shaft and I went back and sunk the shaft again, more, further down, it may be twenty feet deeper.

THE COURT: This figures out a thousand dollars. And you say the figures are much greater three times that, that is more than three thousand dollars. Can you explain that?

THE WITNESS: Well, the reason of it is I cannot place the date, the time of the construction work of that shaft.

THE COURT: It could not take the whole six months which you spoke of before, it could not take the whole six months when you were waiting for machinery and different things that took up the three thousand dollars?

THE WITNESS: All I can say is I was mistaken in the figure, because that would only figure up practically ten dollars a foot, and you cannot sink a shaft and handle your water for that, you have got to pull your water and it will cost from, well, we could not do it for anything like that, we never figure less than fifty dolars a foot, and, in some cases we make the figure as much as sixty or sixty-five dollars a foot, because, it is not only the excavation, but you have got to keep taking your water out all the time. There is that interruption and it takes much longer.

MR. COLLINS: It is only six months.

THE WITNESS: If I said positively six months I would have to take it back, because it could not be done.

MR. COULT: Have you got your time books here?

THE WITNESS: Yes, sir; my time-book is here.

MR. COULT: Can you produce them?

THE WITNESS: Yes, they are right in the grip.

(The further examination was thereupon suspended for the present.)

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DAVID R. HOSKING, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Where do you live? A. At Suffern, New York.

Q. What is your business? A. I am running a pumping station for the Erie Railroad.

Q. You are employed by the Erie Railroad Company? A. I am.

Q. Are you familiar with the location of the mine of the Gumaerd Lead and Zinc Company at Guymard? A. I am.

Q. Were you ever in the mine of the Gumaerd Lead and Zinc Company with Mr. Gumaer? A. In the works that he has now?

Q. Yes? A. Yes, sir.

Q. When was that? A. Two years ago once.

Q. Have you had any experience in mining? A. I served my time at it, thirty-five years.

Q. Where? A. In the Gumaerd Lead mines, Iron Mines, and in the West in gold and silver mines.

Q. How long did you work in the old Gumaerd mine? A. From 1861, I started to work on the surface of the Gumaerd mine, as a boy, dressing ore, about 1865, I was in the neighborhood of fifteen years old, when I went underground in the Gumaerd mine, and there I worked until 1874.

Q. What was being mined there? A. Lead and zinc, lead principally.

Q. Were there many men working with you? A. Yes, sir.

Q. How many men? A. In the neighborhood of about fifteen men, all told at that time.

Q. When were you in the new mine at Guymard? You were in there with Mr. Gumaer? When you were in there, did you see any ore? A. I did.

Q. Where was it? A. In the vein.

Q. Where was the vein? A. On the principal lode.

Q. Do you understand that map in the back of you? A. I can place it, yes, likely.

Q. Do you see where the shaft is? A. The shaft? The new shaft?

Q. Do you see where the shaft is placed on that map? Over here, in this corner—

MR. COLLINS: Suppose you let him find it.

Q. Running from that over is crosscut, do you understand that? A. That represents the shaft and this represents the crosscut.

Q. Going on through the crosscut what do you come to? A. It leads right on in until you strike the main vein, here is the main vein going this way.

Q. At the time you went through there was there any drift along the vein? A. Yes, a drift in here, right on up in there, and a contact in here, and one cross there, right across there, and one on the vein a little bit.

Q. How could you tell that was the vein there? A. By my experience.

Q. Did it look anything like the vein in the old mine? A. Just the same, yes, sir.

Q. Can you say whether or not it was the same vein? A. I am positive it is.

Q. How big is it, how thick is it where this cross cut goes through it in the new mine? A. The vein of ore there?

Q. Yes? A. The full width or the size of the vein matter?

Q. Well, take both the vein of ore and the width of the matter? A. Well, there was one showed about eighteen feet in length and averaged from ten to twelve inches of solid material, just as it lays there, and there was another showed about ten inches thickness and that ran about twenty feet in length, on the foot wall, and side, then on from the foot wall to the hanging wall in the cut, it runs about four to six feet wide all mixed up with ore in different places.

Q. How does that vein compare with the vein in the old workings in size? A. Not near as big.

Q. You have pointed to the samples of ore before you here, in evidence in this case? A. Yes, sir.

Q. Did you see any ore like that there? A. Yes, sir; that is the real kind of ore, the perfect genuine article.

Q. Did you see Mr. Gumaer on that day pick off any of those pieces of ore? A. No, sir.

Q. Did you take any? A. I took some, yes, sir; a few hand samples.

Q. What became of them? A. I had them down here the last Court.

Q. You brought them here at the last Court? A. Yes, sir.

Q. Can you pick them out of that collection

of samples? A. I can if they are there. No, I don't see the one I had.

Q. Did you put any mark on the samples you took out? A. I did. I put my name on it.

Q. Look down at the other samples over on the window sill, do you see it there? A. Here is one of them.

Q. Where did you get that sample from? A. I got that out of the lode in what they call the Chauncey Gumaer vein at present.

THE COURT: That is marked "L. H." on the side?

THE WITNESS: Yes, sir.

Q. Who put that mark on it? A. That is my name, that is my initials.

Q. There is another one there isn't there? A. Yes, sir.

Q. The same thing? A. There it is. That is the way the quartz is where the vein matter shows.

Q. Do you know what a fissure vein is? A. I do.

Q. Did you see anything that looks like a fissure vein in this mine? A. A real fissure vein, travels through there, the old vein, yes sir.

Q. How can you tell that is a fissure vein? A. By the course. A fissure vein always travels east and west.

Q. These samples you took, did they come out of that vein? A. Yes, sir.

CROSS EXAMINATION BY MR. COLLINS:

Q. Is that very valuable ore? A. Well, at the present time, the way the price of ore is now, it is quite valuable, yes.

Q. For what kind of material? A. For lead and zinc.

Q. Which is it, lead or zinc? A. That is lead.

Q. Are you a stockholder of this company? A. I am not.

BY THE FIFTH JUROR:

Q. What ore is this, what does that represent, (indicating a sample in evidence.)? A. That is steel lead ore.

Q. That is very heavy and different from the rest? A. Yes, sir. There is not any branch of the mining business but what I am a practical experienced man at it and I understand what I am talking about.

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CHAUNCEY I. GUMAER, recalled as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Have you your time book? A. Yes, sir.

Q. Can you turn to that book and show us how much you spent for labor on the shaft? A. I will try to.

Q. Can you do it? A. I think I can.

Q. Please do it just as quickly as you can.

THE COURT: Suppose he takes that book and finds the items and you can proceed with something else.

MR. COULT: I will call another witness.

(The examination of this witness was thereupon suspended for the time.)

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JAMES W. BELCHER, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Where do you live? A. In the Town of Greenville, New York.

Q. Do you know the mining property of the Gumaerd Lead and Zinc Company which lies at Guymard, New York? A. Yes, sir.

Q. Do you recall being in the workings of that mine with Mr. Gumaer? A. Yes, sir.

Q. When was that? A. Well, I have been in it several times with Mr. Gumaer. I worked there at one time.

Q. Do you recall being there at the time Mr. Gumaer took some samples out of the mine? A. Yes, sir.

Q. Do you remember when that was? A. As near as I can remember that was in December or January, 1914 or 1915, I cannot recall just which date it was.

Q. Where did Mr. Gumaer take the samples of ore from on that occasion? A. We took two, as near as I can remember now, right back at the corner where the cross cut is in the tunnel, then one on up above the cross cut, and we took one more, as near as I can remember where the body of lead ore appears or the biggest part of it, we did not try to get into this black lead ore, back in it like that, he took a sample right across the vein and said he did not want to get in that black lead so as to make an unfair sample of it, he wanted the sample just the way the vein ran, just as it was and him and I together got the samples out from there.

Q. Do you know what became of them? A. I put them in an ore bag, if I remember right and took them out, took them to the shaft, and I don't

know what became of them, Mr. Gumaer took them.

CROSS EXAMINATION BY MR. HOBART:

Q. You testified on the other trial, did you not? A. Yes, sir.

Q. And you spoke of these samples, you helped to take the samples I understand? A. Yes, sir.

Q. There was not any ore except around where the samples were taken, was there? A. Well, when you see all around—

THE COURT: Was there any ore, except at the places where you took the samples?

THE WITNESS: That is a question. You see at the point—

Q. Just answer the question? Is not the question plain? A. Not any particular, but this ore from where he took the samples, but it extended on.

Q. Didn't you testify on the other trial as follows: "Q. And there was not any ore at any point, except at those points where he took a sample, was there? A. No, sir, not to amount to anything." Is that right? A. That is right, but you understand from this—

Q. You have answered the question. You so testified and it was true, wasn't it? A. I did, yes. sir, but, of course—

MR. HOBART: Never mind.

BY MR. COULT:

Q. Just explain that to the jury please? A. You see, this ore, where this came from, is about twelve or fifteen inches wide, of all just such stuff as that, that is, the bright galena ore, as it has always been described to me, and this lies, I should judge eight or ten feet long. Well, now,

this would be on the west end and that ore is where the point is, as he stated we took samples, but you see from there further on eight or ten feet this ore runs right on, but between there and the other point there is smooth surface, just the same as a wall, and this tunnel has been driven as near as the man can come to it, and it has been driven since I worked there and, of course, if it was all taken out I could not say.

Q. You took this where it was exposed? A. Yes, sir.

By Mr. Hobart:

Q. How far did you go along the wall where the wall was smooth and showed no ore in sight before you came to the next place where you took a sample? A. I could not just tell you how far.

Q. You did not keep any record of that? A. No. But it was quite a few number of feet.

Q. Was it an interval, a considerable interval between each of these ore deposits? A. Well, there was the wall was just, practically smooth, the same as this, for a while. And this tunnel had been driven and I had not worked in the tunnel, of course.

The Court: Was there any considerable interval between the places where you found the ore?

The Witness: Well, yes.

Q. Give us some idea about the length of the interval, were they two feet, ten feet, a hundred feet or what? A. I don't know that I can give you an estimate of that distance, because it is a long time ago. Probably twenty-five or thirty, possibly a little more, and it may be not quite so much.

CLYDE B. MILLS, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Where do you live? A. In New York.

Q. What is your business? A. I am a chemist.

Q. How long have you practiced your profession? A. Nine or ten years.

Q. Do you remember going into a mine on the premises of the Gumaerd Lead and Zinc Company at Guymard, New York. A. Yes, sir.

Q. With whom did you go? A. With Mr. Gumaer.

Q. When was that? A. I think it was about 1908.

Q. What part of the year, do you remember? A. September, I think.

Q. Where were you working at that time? A. I was working with Dr. P. C. Macklin, in New York.

Q. What is his business? A. He is a chemist.

Q. At that time had you ever made any analyses of ores and minerals? A. Yes, sir.

Q. What experience have you had in examining and analyzing ores and minerals? A. Well, I had done considerable of it before that and I have been doing it since.

Q. You were in the mine with Mr. Gumaer? A. Yes, sir.

Q. Did you take any sample of ore? A. Yes, sir, I took four samples.

Q. Where did you get them from? A. I cannot recall the location in the mine, it is so long ago that I cannot remember.

Q. Did you make an analysis of the samples you took out of that mine? A. Yes, sir.

Q. What was the result of that analysis? A. Well, I have not my notes with me.

Q. Have you notes of it? A. Yes, I have, but they were left behind. This is a long time ago and I would have to refer to my notes.

Q. What is it you have there? A. These samples were sent to me—

Q. What are the papers you have got there? A. These are my reports.

Q. Were they made at the time? A. No, this covers a period, this covers the period of the year from March, 1914, to April 9, 1915.

THE COURT: Can you refresh your recollection from those?

THE WITNESS: The four taken in 1908—

Q. Have you any report of the four samples taken in 1908? A. Yes, the report filed.

Q. Look at that report and state what the result of the analysis was?

MR. COLLINS: Are those the samples he took? Are these the samples you took?

THE WITNESS: No, sir. The report is not here of the four samples I took.

Q. Have you anything there to show the result of the analysis of the samples you took? A. No, sir, not here.

Q. Can you recall what it was? A. I remember at the time the certificate was signed by Dr. Macklin and they were not admitted as evidence and they were got by Mr. Southard.

Q. You recall testifying here before, don't you? A. Yes. I did not testify to that work in 1908.

Q. What did you testify to? A. I testified to work I had done between March, 1914, and April, 1915.

Q. What was that on? A. That was samples sent to me by Mr. Gumaer and Mr. Hoskings and Mr. Weed.

Q. Did you make an analysis of those samples? A. Yes, sir.

Q. What did they show?

MR. COLLINS: We shall have to object to it as it is not identified.

THE COURT: I will assume they will connect it and show that these are the ones.

THE WITNESS: Do you want me to read off these results?

MR. COLLINS: Give me first the Hoskings and then Mr. Weed and so on.

Q. Can you identify the report of the samples that were sent to you by Mr. Gumaer? A. Yes, sir.

Q. With reference to those samples alone, what was your analysis?

MR. COLLINS: How can you do that?

THE WITNESS: I have my number on the different ones.

MR. COLLINS: You have your number on something that has been sent to you.

THE WITNESS: And I have recorded here the samples sent by Mr. Hoskings and by Mr. Weed.

THE COURT: This is to show they were sent by these people?

MR. COLLINS: I don't think that is sufficient.

Q. How were they sent to you? A. Mr. Gumaer sent his by mail, I believe; Mr. Weed's were delivered by messenger in New York.

Q. The ones came by mail were received by you in what way? A package? A. Yes. They were in ore sacks, wrapped together in a big paper box. I have forgotten just which way.

Q. Who did you receive them from? A. From Mr. Gumaer.

Q. I mean, directly, from the mail? Did you get them from the mail or how? A. I could not tell if it was mail or parcels post now.

Q. Parcels post is mail, is it not? A. Yes. Well, they either came by mail or by express.

Q. They came by mail? A. Yes, sir.

Q. Post prepaid? A. Yes, sir.

THE COURT: By mail to you? Or did somebody else give it to you?

THE WITNESS: They came direct to me, either by express or mail, I could not exactly tell which now.

Q. What was the result of the analysis of those samples?

MR. COLLINS: Objected to as not identified?

THE COURT: You are going to connect it.

MR. COULT: Mr. Gumaer testified that he mailed them to him and he will testify to it again.

Objection overruled; defendant excepts.

A. The sample received March, 1914, I found lead 64.53 per cent., and a trace of zinc. In the sample received April, 1914, he sent a sample for zinc alone, and on that I found 39.69 per cent. zinc. September eighth, 1914, I found lead 55.19, silver 2.62 ounces per pound. December twelfth, 1914, lead 4.45 per cent. Same date; lead 3.84 per cent.

Q. When you say lead 12.24, that means in a hundred pounds, or that there would be 12.24 pounds of lead in a hundred pounds of ore, doesn't it? A. Yes, sir.

Q. Is that all you had? A. No, sir, there is one the same date, lead 24.81 per cent., and there is one lead 12.24 per cent.

Q. What have you to say as to the quality of this ore? A. Well, those four were not specially good, but most of them were a very good grade of galena.

No Cross Examination.

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Chauncey I. Gumaer, recalled as a witness on behalf of the plaintiff, testifies as follows:

Direct Examination by Mr. Coult:

Q. Do you recall sending any samples of ore for analysis to Mr. Mills, the chemist? A. I do.

Q. How did you send them? A. I sent them by mail.

Q. When? A. Well, at different times, the principal samples I think were sent in December and January of 1915, I have my book here which gives the record of the whole business, the assay book there.

Q. Have you looked at your time book to see if you can give us the time and the amount of money the Gumaerd Lead and Zinc Company expended for labor in the main shaft? A. I have.

Q. Have you found out how much it was? A. I have.

Q. How much was it? A. $3,755.13.

Q. Besides labor, what was put in there? A. There was the timber.

Q. Did you spend any money for powder? A. Powder, of course.

Q. How much was that? A. Well, I cannot give you that now.

Q. About how much power was used in blasting out that shaft? A. Well, we usually use about six pounds to the foot and that would be about five hundred pounds.

Q. How much does that cost? A. Thirteen cents a pound.

Q. What other expenditures were there incurred in sinking that shaft, besides the matter of labor, timber and powder? A. Fuel.

Q. Anything else? A. Air pipe. Of course, electric lights, wires, railroad tracks on the bottom of the levels and so on.

Q. You testified that the Gumaerd Lead and Zinc Company spent something between eleven and twelve thousand dollars in that mine? A. Yes, sir.

Q. Can you itemize that expenditure exactly, now? A. Yes, sir.

Q. Suppose you do it? A. You will have to hand me the books.

Q. Can't you do it approximately without referring to the books?

MR. COLLINS: He cannot itemize them approximately.

Q. Can you not give it to us in general terms? A. I gave you the amount, ten to twelve thousand dollars. Do you mean to classify it?

Q. Yes. A. Do you want the shaft alone?

Q. Yes.

THE COURT: I suggest that to save time, that instead of doing this figuring on the

stand that the plaintiff rests subject to that.

MR. HOBART: We want to take a look at that time book.

MR. COULT: Yes, you will have ample opportunity to do that. You may look it all over. Plaintiff then rests subject to that reservation.

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PLAINTIFF RESTS.

MR. HOBART: The defendant moves for a non-suit, on the following grounds:

1. The proof fails to show any breach of covenant or any damage from the alleged breach, so far as relates to the agreement to restore certain pipes and wires.

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2. The proof fails to show any breach of covenant or any damage from the alleged breach with reference to paragraph nine of the agreement of June twenty-fourth, 1909.

3. There is no proof that the defendant did the acts of which the plaintiff complains.

4. There is no proof that the plaintiff offered arbitration, as required by the terms of the agreement.

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THE COURT: Mr. Hobart, do you think that the arbitration under this agreement is a condition precedent to bringing suit?

MR. HOBART: That is, to offer to arbitrate?

THE COURT: Yes.

MR. HOBART: That is what we argued before the Supreme Court. We do not care to waive it. The Court did not pass upon it.

THE COURT: Is it not required by the rule declared by the Court of Appeals that there

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must be something indicating that it is a

condition precedent or that it was necessary to be done before the suit was started, something to indicate that?

MR. HOBART: I don't think they said so in so many words, but there must be a condition precedent.

THE COURT: What is there here to indicate that it is a condition precedent?

MR. HOBART: We think there is an argument from the nature of the agreement, that it was within the contemplation of the parties that there should be arbitration. Of course, on this motion we are not dealing with that question. It may have to be dealt with at the close of the case, as to whether the defendant offered to arbitrate and the plaintiff failed to accept such offer. I think that will be the place to deal with it.

Motion denied; defendant excepts.

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ALBERT G. NORTON, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are a civil engineer by profession? A. I am.

Q. What is your age? A. I am fifty years old.

Q. I believe you live in Middletown, New York? A. Yes, sir.

Q. How long have you been practicing the profession of civil engineer? A. A little over about thirty years.

Q. Were you at one time employed by the Erie and Jersey Railroad Company? A. I was.

Q. Did you have charge of the construction work in the vicinity of the station at Guymard, New York, in 1909 and 1910? A. I did.

Q. Please state what your position with that company was at that time and what you had to do with this construction? A. I was known as resident engineer in charge of the construction.

Q. Did that construction include the retaining wall on the east side of the tracks? A. It did.

Q. Near this mining shaft that has been mentioned? A. Yes, sir.

Q. Do you remember when the construction of the retaining wall started? A. The foundations, the footing course was started in January, I believe, of 1909.

Q. Was it 1909 or 1910? A. January of 1910.

Q. Was there any preparatory work in the way of excavation before the wall itself was constructed? A. There was.

Q. And that preparatory work, of course, commenced a short time before the wall itself was started? A. Yes, sir, about in December, I think.

Q. Who were the contractors in charge of the construction of that wall? A. Bennett & Talbot.

Q. Were you employed by them or did you have any connection with them? A. No, sir.

Q. Were you there while the excavation was being made for the retaining wall, or while the wall itself was being built? A. I was.

Q. Did the wall go down to bed rock? A. It did.

THE COURT: By whom were you employed?

THE WITNESS: By the Erie and Jersey.

Q. What kind of rock was it? A. It was a red sandstone.

Q. Was there any quicksand there? A. No, sir.

Q. Do you know Mr. Gumaer who has testified in this case? A. I do.

Q. Was he present while some of this work, the excavation and construction was going on? A. I don't know as I ever noticed him around there when I was there, but I do not doubt, but what he was there at times.

Q. Did you see him or any of his men in their mine taking water out of the mine from time to time? A. Yes, sir.

Q. What did they do with the water? A. They dumped it just out of the shaft house and it took its own course away from there.

Q. Did any of it go anywhere near where the construction of the retaining wall was proceeding? A. Yes, sir.

Q. Where did it go with relation to that construction? A. It came down on our men who were down below the bank making the excavation.

Q. Did it interfere with the work at all? A. It did, decidedly.

Q. Did it do anything else besides get the men wet who were working there? Did it have any effect upon the soil? A. Yes, sir, it tended to soften the soil.

Q. To what extent was the work interfered with by this water? A. I think the men had to leave twice or three times their work on that account. They would not work there.

Q. Did you serve this communication that has already been offered in evidence as Exhibit P-12, dated February third, 1910, upon Mr. Gumaer and his company? A. I did.

Q. And, after that notice was served, did this practice of throwing water down the bank or allowing it to go down the bank, did that cease? A. Practically so, yes, sir.

Q. Were you present at this work on the occa-

sion of this slide that occurred in March, 1910? A. I was.

Q. Did you see the slide? A. I saw it after it had slid.

Q. Did you observe the effect, if it had any effect upon the shaft house or the head frame or the shaft? A. Yes, sir.

Q. What effect did it have, that you observed, first, upon the shaft house, next upon the head frame and next upon the shaft itself? A. It took the material away from the head house, therefore, the head house settled some on the southwest corner.

Q. About how much did the house settle? A. If I remember rightly it was about five to six inches.

Q. What effect did it have upon this head frame at the top of the shaft? A. It pulled the—well, it pulled that over with it, and it pulled the mudsills toward the track, about three inches, perhaps.

Q. Did you observe whether any repairs were made to the house or to the head frame after the slide? A. We had it jacked up and put in place again.

Q. Who did that? A. The contractors.

Q. Do you remember how long it took to do that? A. I do not.

Q. Was it a matter of a few days only? A. It was only a few days, a very few days.

Q. Was it done within a short time after the slide itself had occurred? A. Yes, sir.

Q. How soon after? A. I should say, within, oh, it was completed within ten or twelve days, I think, after the slide took place.

Q. At the time the slide took place was the retaining wall in process of construction? A. It was.

Q. And was it finished thereafter? A. Yes, sir.

Q. About how long after the slide? A. It might have been about six weeks after, perhaps that.

Q. Was it part of your work to supervise the construction? A. It was.

Q. After the retaining wall was finished was there any filler placed between the wall and the property of the Gumaerd Company, or the mining shaft? A. There was.

Q. What kind of filler? A. Well, to go into detail, the natural soil was to be put back, but the foreman mistook the order and put cinders in there. He had to take out all the cinders and put them where they belonged and put the natural soil behind the retaining wall.

Q. And you required him to remove those cinders did you? A. Yes, sir.

Q. Did you have anything to do with the putting in place of this crib work that is shown on the same photograph which I have shown you? A. Yes, sir.

Q. What did you have to do with that? A. To see that it was in place and to see that it was properly in place.

Q. That was done by the contractor? A. By the contractors, yes, sir.

Q. Do you remember when that work was done, that is, the work of putting the cribbing there? A. It was just after the slide, about March, I believe in March, March fifth, the slide was.

Q. When was the crib work finished? I suppose it took several days to do it? A. It took about twelve days to put in that crib work if I remember rightly.

Q. Then, if I understand you right, the fill that was placed between this wall and the shaft was the same material that was taken out, that is,

the natural dirt? A. Identically. It was the material taken out of there.

Q. Did you supervise this retaining wall as it was being constructed, to see whether it was properly constructed? A. I did.

Q. How wide was the wall at the bottom? A. If I remember rightly, it was about ten or twelve feet at the bottom.

Q. You saw it constructed? A. I did.

Q. Was it concrete, re-enforced concrete? A. It was concrete, plain concrete.

Q. With joints in it, what they call temperature joints? A. Temperature joints, yes, sir.

Q. Temperature joints between the different sections? A. Yes, sir, it was divided into sections, which made the temperature joints.

Q. This photograph shows the method of that work? A. Yes, sir.

Q. And is that the usual method employed for such work? A. Yes, sir, that is the usual method.

Q. Was the wall of the same width all the way up from the bottom to the top, or did it narrow towards the top? A. It narrowed towards the top.

Q. Do you remember what the width was at the top? A. It was about three feet.

Q. What was the heighth of it? A. About twenty-four feet.

Q. Do you remember the length of it? A. The length was something over a hundred feet I believe.

THE COURT: If that cement due to the heat or cold expands or contracts, the wall will crack unless you put those joints in there?

THE WITNESS: Yes, sir. And a very strange

thing, it will crack just about above the twenty foot mark.

MR. COLLINS: That is the reason they have temperature joints?

THE WITNESS: Yes, sir. A wall that has not got them will probably crack every twenty feet every time.

Q. Did you tell us at what intervals these joints were placed? A. They were placed, if I remember rightly, twenty feet.

Q. This wall, you say, goes down to bed rock, and then the railroad tracks run right along near the foot of it, do they not? A. They do, yes, sir.

Q. That is, there is a railroad track in a sort of a cut and then another track which crosses on a bridge as shown in these photographs? A. Yes, sir.

Q. Can you state approximately when the final work was done on that retaining wall? A. I think that was done the latter part of April.

Q. Of 1910? A. Of 1910, yes, sir.

Q. And, when it was finished, did you examine it and inspect it to see whether it was properly completed or not? A. Yes, sir.

Q. Did it at that time have any bulge or any cracks or any inclination towards the railroad tracks or cut? A. No, sir.

THE COURT: Why is it they do not put in temperature joints in houses, for instance?

MR. COLLINS: You mean in concrete houses?

THE COURT: Yes?

THE WITNESS: They do if it is a plain cement house.

THE COURT: How do they do it and we do not see it outside?

THE WITNESS: You have noticed mostly stucco houses have you not?

THE COURT: Yes?

THE WITNESS: That is reenforced material.

THE COURT: That is not solid?

THE WITNESS: No, that is not solid. The steel keeps it from cracking. That is put on a steel lathe.

Q. There is no allowance for contraction and expansion? A. No, we do not allow for that in reenforced work.

Q. That is, you do not need those temperature joints in reenforced work? A. No, sir.

Q. Only in plain concrete? A. Yes, sir.

Q. What inspection of this wall did you make after it was finished? A. The ordinary inspection.

Q. Did you measure it, put a plumbline upon it? A. No, the ordinary inspection, seeing that it was all right in every way. We can very quickly tell if there is anything wrong when we see it going on and all finished.

Q. Have you ever seen that wall since? A. Yes, sir.

Q. When? A. Several times. The last time about six weeks ago.

Q. How did you happen to be up there at that time? A. I was doing some work at Guymard and I walked around past the wall. I was told that it was going out of line and in bad condition and I went up and looked at it and when they told me those things I wondered at it, and so I looked at it and examined it carefully from one end to the other.

Q. You were not in the employ of the Erie and Jersey then? You are not in the employ of the Erie and Jersey now, I believe? A. No, sir.

Q. Nor of the Erie Railroad Company? A. No, sir.

Q. Nor of any other railroad company? A. No, sir.

Q. You are doing independent work as an engineer and surveyor with an office at Middletown? A. Yes, sir, private work.

Q. And it was in connection with some of the work of that character around there that you happened to be at this place some weeks ago? A. Yes, sir.

Q. Do you remember who it was called your attention to that claim about this wall being in a bad condition? A. It was Mr. Gumaer.

Q. You saw him there, did you? A. Yes, sir.

Q. Was he with you when you looked at it? A. No, sir.

Q. You did not go there then in anticipation of this case? A. No, I did not know anything about the case until two weeks ago.

Q. You did not know the case was coming on at that time? A. I did not know anything about it at all.

Q. And the result of Mr. Gumaer calling your attention to what he said was something the matter with the wall, caused you to examine it? A. From an engineering standpoint, that is all.

Q. Did you find anything the matter with the wall? A. No, sir; I did not.

Q. Were there any cracks in it? A. There was not.

Q. Was there any change in its position relative to the cut or to the railroad tracks? A. No, sir.

Q. Was it bulging or in any way out of proper alignment? A. It was in perfect line and surface.

Q. Are you familiar with the construction of such walls? A. Yes, sir.

Q. And you are particularly familiar with the construction of this one, because, I suppose you saw it from the beginning? A. I saw it practically every day, yes, sir.

Q. Is there any reasonable likelihood of that wall going out or giving way or being pushed out in the future? A. Not in the least.

MR. COLLINS: Is it on a rock foundation?

THE WITNESS: Yes, sir.

Q. Do the trains go by it on the lower level track? A. Yes, sir.

Q. How far from the wall do they go? A. I think the clearance is eight or nine feet, perhaps, that is, to the centre of the track.

Q. And then, do trains also go by on this bridge which is rested entirely upon this very wall? A. Yes, sir.

Q. And, have they been doing that ever since the work on the wall was finished, for the past five or six years? A. They have, ever since the track was put on.

Q. Do you know whether that is the main line of the Erie and Jersey or the Erie Railroad at that point? A. It is.

Q. And there are numerous trains going over it? A. Continually, almost.

Q. And are they very heavy trains, that is, heavy freight trains? A. Decidedly heavy.

Q. Which way do the trains come that go on the lower level, do you remember? A. Those are heavy trains, they go east.

Q. The lower level track is the eastbound freight track is it not? A. Yes, sir.

Q. And those trains cause more or less jar in the surrounding land? A. They do.

Q. With those trains going back and forth constantly for the past five or six years, have you observed any change whatever in the position of that wall? A. None at all.

Q. Or any cracks or anything out of order with it? A. Nothing at all, no, sir.

CROSS EXAMINATION BY MR. COULT:

Q. You were in charge of the construction work at the point where the Erie Railroad passes the Gumaerd mine? A. I was.

Q. And you were in the employ of the Erie and Jersey Railway Company? A. Yes, sir.

Q. You were also in the employ of the Erie Railroad Company, weren't you? A. No, sir.

Q. Who was your superior? A. Mr. Connard, C. K. Connard.

Q. What about Mr. Stuart? A. He was the chief engineer.

Q. In charge of the work? A. He was directly over Mr. Connard.

Q. He had to do with the work, didn't he? A. Yes, sir.

Q. He was the chief engineer of the Erie Railroad wasn't he at that time? A. Yes, sir.

Q. And also of the Erie and Jersey Railroad? A. Yes, sir.

Q. At the point where the wall that you have mentioned in your testimony, was built, there was a cut made, how deep? A. I think that cut was about, depending on where you take it, of course.

Q. Opposite the shaft house? A. Well, it was about something like thirty to thirty-five feet there.

Q. Wasn't it more than that? A. I don't think so. I think it ran somewhere between thirty and thirty-five feet.

Q. Wasn't it nearer forty feet, right opposite the shaft house? A. No, I don't remember it as being forty feet.

Q. This wall that you mentioned in your testimony that extended up to the shaft house? A. It did.

Q. And that then goes beyond the shaft house does it? A. No, I hardly think that it did, I think it went just about to the shaft house, perhaps it went a little farther, perhaps a little farther than the end of the shaft house would be, but it practically stopped at the end of the shaft house.

Q. What was the total heighth of this wall from the foot of the foundation to the top? A. Taking in the footing course?

Q. Yes. A. I don't remember exactly, but it is something like twenty-eight feet, I believe, all together.

Q. And, how far was the foundation below the surface of the ground at the bottom of the cut? A. We excavated from the bottom of the cut anywhere from two to four feet, nothing under two feet.

Q. Nothing over four feet? A. No, I don't think there was any place over four feet.

Q. And you think your cut was about thirty-five feet from the natural surface of the soil? A. The original natural surface of the soil, yes, sir.

Q. So that by excavating from two to four feet below the cut, thirty-five feet deep, you got to bedrock did you? A. Yes, sir.

Q. You also testified in this case before, didn't you? A. Yes, sir.

Q. And do you recall that you were asked in reference to the point where this wall was

located: "Q. Do you know how far it is from there to bedrock? A. No, sir." Do you recall that? A. That depends on where you take the bedrock, we only went down, of course, we took off the shale or the loose material before the rock, above the red rock, the red sandstone, and that was, you might consider that that is bedrock, but farther down than that I don't know.

Q. Do you recall giving testimony as follows:

"Q. That is the truth, and the foundation of your retaining wall is about two feet? A. Yes, sir.

"Q. Do you mean to say that the foundation wall is on bedrock at that point? A. Yes, sir, I do—no, not bedrock, but red shale.

"Q. That is bed rock, is it not? A. No, sir, that is shale rock.

"Q. Shale rock? A. Yes, sir.

"Q. Do you know how far down it is from there to bedrock? A. No, sir.

"Q. You did not go down to bedrock at all there, did you? A. No, sir."

Do you recall that testimony? A. Yes, sir.

Q. Now, did you go down to bedrock or didn't you? A. I can say the same thing now. That depends. From the testimony here given you consider the red shale or the red sand stone, what I call the red shale, because it is broken up so, and we chipped off the loose part of that and when we got to the solid rock, where it is not cracked up at all. I don't know, nor no one else knows how far that is. What you would call bedrock is what has been called bedrock. We went to bedrock.

Q. You did not understand it that way at the last trial did you? A. I did not take it personally that way and I do not take it that way now.

Q. What kind of material was it you built this foundation on? A. It was a sandstone, that sand-

stone that is cracked in large chunks around there, just as you find it in the cuts to-day.

Q. Loose material? A. No, not loose material, it has been thrown up there and it is broken up more or less.

Q. That is pulverized, is it not? A. No, sir.

Q. What size pieces is it in? A. Some pieces are as large as that, (indicating the samples of ore in evidence). Some as large as those.

Q. Large boulders? A. Not so large as all that, but the average pieces of rocks.

Q. Are there any evidences of any such rock as that anywhere in the surface of the ground in your cut at that point? A. Yes, sir.

Q. So that at points in your cut you got down to just such rock as that in which this foundation was laid without going below the surface of the ground at the bottom of the cut, didn't you? A. Yes, sir.

Q. In other words, the cut itself struck such rock as you have described as bedrock? A. On the west side.

Q. At a point opposite the shaft house you say the total heighth of the wall was twenty-eight feet from the bottom of the foundation? A. It was something like that, I think.

Q. How far was the foundation below the surface of the ground in the cut at that point? A. As I said, the foundation was only just about two feet.

Q. Was it about two feet there? A. Yes, sir, I should say it was.

Q. So that that wall is twenty-six feet above the surface of the cut? A. Yes, sir.

Q. How far away is the top of that wall from the line of the Gumaerd Lead and Zinc Company's shaft and building plot? A. I don't remember what that distance is especially.

Q. You remember the railroad had a map here at the last trial don't you? A. No, I did not see that map.

Q. Haven't you any maps or blueprints of this retaining wall? A. I have not.

Q. Not a scrap of paper that shows where it is located with reference to the line of the Erie Railroad? A. Why, there may be some in my files. I don't know whether there is or not. I don't believe I have anything showing the shaft house whatever.

Q. Have you anything showing the property line? A. No, I don't think I have.

Q. Nor of the line of the right of way of the Erie Railroad at that point? A. No, sir; I think I have a plan of the wall itself, I don't know, I think so.

Q. How far is it, you say, from the nearest rail of the track in the cut to the retaining wall, eight feet? A. Not from the nearest rail. That would be about four feet, a little over perhaps.

Q. And that would be measuring the wall at its base? A. Well, probably it is a little more than that.

Q. That would be measuring the wall at its base? A. Yes, practically.

Q. How thick is the wall at its base? A. If I remember rightly, it would be about eleven feet, somewhere along there.

Q. How near was the outside edge of the wall to the Erie right of way? A. I don't remember that.

Q. You recall the cavein that exposed the shaft of the mine? A. Decidedly.

Q. Why so positive? A. Because I was right there and I saw it.

Q. Did it surprise you? A. No, sir; not at all.

Q. You were expecting it weren't you? A. Yes, sir.

Q. You knew that a cut such as you were making could not be put there through that ground without disturbing the surface of the land all the way along, didn't you? A. No, that was not the point at all. That was not the proposition that we were up against at that time.

Q. Could any sort of railroad construction have been put in there which would have prevented the disturbance of the surface of the soil near the shaft house by a giving away of the earth in the cut? A. You mean, prevented that?

Q. Yes? A. Yes, sir.

Q. What kind of a construction? A. Why, you could have gotten a plan to put in a wall there. We put in walls, you know, foundation walls etc., that we timbered around and build up the walls, and held the surface back in that way until we got the wall built.

Q. The cavein occurred before your wall was built didn't it? A. Before it was completed.

Q. Your wall was not built at the time to stop it caving in at that point was it? A. You did not ask me that. No, it did not stop the cavein, not at that point, no.

Q. What kind of a wall will stop it? A. Well, I have just told you, we could have done the same there that we did at the place above there when we held the surface back for this wall, put down piers and timber around them. Put in sets of timber.

Q. Why didn't you do it here? A. That would have been impracticable at that point.

Q. It would cost too much money wouldn't it? A. Yes, it would have cost considerable money.

Q. A good deal more than you spent in the way you did it? A. Yes, sir.

Q. But that would have been a very certain

way of saving the surface of the soil intact about the shaft wouldn't it? A. Yes, sir.

THE COURT: You showed some paper to the jury yesterday, Mr. Coult, indicating some notes which you claimed, as I understand, indicated cement walls. I wish to ask the jury about that.

Q. Did you have anything to do with the preparation of the map annexed to this deed Exhibit P-1? A. No, sir.

Q. Do you know who did? A. No, sir.

Q. Do you know who did that? A. No, I don't know anything about it.

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LOUIS H. ZOCH, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You live at Guymard, I believe, and you are a carpenter? A. Yes, sir.

Q. You know something about this mine that has been talked about in this case? A. Yes, sir.

Q. How long have you known it? A. I have known this one from the time they commenced sinking the shaft, I have known its owner.

Q. Did you used to work in the old mine? A. Yes, sir.

Q. How old were you when you worked there? A. Between twelve and thirteen years old when I started.

Q. How old are you now? A. About fifty-eight, pretty near.

Q. Do you remember the occasion when they stopped mining in the old mine? A. Yes, sir.

Q. Do you know whether, at the time they quit, they were getting any ore out of it? A. Very little.

Q. When was it when they stopped? A. No, I think it was—

Q. Was it sometime in the seventies? A. Yes, I think so.

Q. Did you have anything to do with the construction of this shaft that is in question in this case? A. The new shaft?

Q. Yes. A. I cut out timber for it and framed them.

Q. Where did you get the timber? A. Out of the woods.

Q. When you speak of "framing" them, what do you mean? Did you cut them on one side to get them together? A. Yes, sir; that is, hew them on one side and mortise them or tennon them.

Q. Were you foreman on the work? A. No, sir; I was not.

Q. Was there any foreman? A. No, sir.

Q. How many men worked there? A. Well, at times there worked, well, sometimes three or four.

Q. Did you work there steadily? A. No, sir.

Q. That is, from the time you began excavating, did you keep right on till the shaft was finished, or did you stop working? A. I did not work there steady, only at times.

Q. Was there any engineer in charge there? A. That is this new mine? Or the railroad, or what do you mean?

Q. I don't mean the railroad engineer, but was there any engineer in charge for Mr. Gumaer or for his company, in charge of the construction of the shaft? A. Yes, there was an engineer there, that is, to run the engine.

Q. That is a steam engine you mean? A. Yes, sir.

Q. Who supervised the construction, was it

Mr. Gumaer himself? A. Well, that is, in sinking the shaft he did.

Q. Was there any engineer, outside of the man running the steam engine, who had any supervision of the construction of that shaft? A. Not as I know of.

Q. And there was not any foreman either, outside of Mr. Gumaer himself? A. That is all.

Q. Do you know what is meant by the expression "top man"? A. What is that?

Q. In the construction of a mining shaft is there one of the men who is called a "top man"? A. Why, the man that worked on the top, on the top of the ground.

Q. Does he get more than the others? A. Not as I know of.

Q. Do you know what Mr. Gumaer meant by the expression "top man"? I want to know what that means whether he did other work from what the other men did or the same? A. I don't know. only that might be the man that works on the top of the ground.

Q. Do you know how long it took to build that shaft? A. No, sir, I do not.

Q. Was there a time while it was being built that you did not work, or did you work there all the time while it was being built, or only at intervals, did you work? A. I only worked at times, I did not work steady.

Q. Did you have anything to do with the construction of the shaft house? A. Yes, sir.

Q. How long did it take to build it? A. Well, about between three and four days I think.

Q. Did you help put up the head frame? A. Yes, sir.

Q. How long did it take to build that? A. Well, now, I could not say how long it did take.

Q. Can't you give us some idea, you are a carpenter aren't you? A. Probably two days.

Q. Was there any foundation under this house? A. No, sir.

Q. It rested directly on the ground, did it? A. Yes, sir.

Q. Were you working in the construction of this shaft at the time they got down to bedrock? A. No, sir.

Q. Did you get down in the shaft at any time? A. Not till after it was all done, that is the only time, about a year or two ago that I was down to the bottom.

Q. In the course of the construction of the shaft did you go down into it from time to time to do any construction work? A. No, sir.

Q. Just what was your work in connection with it? A. Only carpenter work.

MR. COLLINS: Not the timbering? You did not work on the timbering of the shaft?

THE WITNESS: On the timbering of the shaft? Inside in the shaft?

MR. COLLINS: Yes.

THE WITNESS: No, sir.

Q. Did you see the material that was brought up from the shaft as it proceeded, as the work proceeded? A. I did not take no notice of it.

Q. Did you see the kind of dirt that came up from the shaft as the work proceeded? A. Why, at times I saw the dirt taken out, but I never paid any particular attention to what kind of dirt it was.

Q. Do you remember whether or not it was hardpan? A. Sometimes it looked like hardpan.

Q. Was there anything that looked like quicksand? A. No, sir; I did not see any as I know of that looked like quicksand.

Q. You know it when you see it, do you? A. Well, I think so.

Q. At the time this shaft was being constructed did you observe that there was any construction work on the railroad line going on? A. Yes, sir.

Q. Where was that? A. Well, they were working about a mile or so from where the shaft is.

Q. Were there any stakes laid out to indicate where the line was to go? A. Yes, sir.

Q. Where were they? A. They were up near the shaft.

Q. On which side of the railroad tracks? A. On the east side.

Q. How close were they to where this shaft was being built? A. I could not say, I don't think I measured.

Q. Were they in sight of it? A. Oh, yes.

CROSS EXAMINATION BY MR. COULT:

Q. Do you remember when you started to work for the Gumaerd Lead and Zinc Company? A. I did not notice, I do not know.

Q. January, 1907, wasn't it? A. Well, I could not say, I have not got the dates.

Q. It might have been that, might it not? A. It might, yes, of course; I kept no dates of it at all.

Q. What kind of work were you doing when you began working for the company? A. I think it was carpenter work.

Q. Were you working underground at all? A. No, sir, I did not.

Q. Didn't you do anything but carpenter work for the Company while you worked for them? A. At times I helped to do some of the other things when I did not do carpenter work, some other little things around.

Q. What kind of little things? A. Well, help to wind up the stuff, that is, on the windlass.

Q. What kind of stuff did you wind up in the windlass? A. Well, it is dirt.

Q. Were they taking out dirt at the time you left the employ of the company? A. I think they were.

Q. Do you know how long you worked for the company? A. I do not.

Q. Was it a year and a half? A. I don't think so.

Q. It was over a year, wasn't it? A. I don't think so. I only worked there at times; I don't know.

Q. Is not your memory pretty good? A. Well, quite good.

Q. Would you say it is a fact that you did not get onto the monthly payroll every month from January, 1907, to June, 1908? A. I don't think so.

Q. You don't think so? A. No, sir.

Q. You cannot say positively that you did not, though, can you? A. No, I won't say so.

Q. And you think, whenever you left the employ of the company, they were still taking dirt out of the hole? A. Out of the hole, yes, sir.

Q. You had a little trouble with Mr. Gumaerd, didn't you? A. Why, yes, I had a little trouble.

Q. About some hay? A. Sure. That has not got anything to do with this, I don't think.

Q. You are just here to tell the truth and help do justice, aren't you? A. Yes, sir.

Q. When did you quit working in the old mine? A. Well, now, I could not tell you.

Q. The mine was running when you left, wasn't it? A. No, sir.

Q. Are you quite sure of that? A. I am quite sure.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Was your trouble about some hay? A. Why, my daughter-in-law, she had some hay up on some land up there and Mr. Gumaerd did not want me to take it out of there; he told me to stop taking the hay, so I went to Mr. Watts and Mr. Watts told me to go on and cut the hay, that he would stand to my back for everything.

Q. You took the hay, you cut it, did you? A. I certainly did.

Q. How long ago was that? A. Well, I think that was about three years ago, I won't say for certain.

Q. You have not any feelings against Mr. Gumaerd in the matter? A. No, sir, I have not any hard feelings against anyone.

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JOHN W. MCNABB, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You were in the employ of Bennett & Talbott as timekeeper? A. Yes, sir.

Q. I am not sure whether you are in their employ now or not? A. No, sir.

Q. But you were at the time this construction work was going on at Guymard? A. Yes, sir.

Q. You had charge of the time books? A. Yes sir.

Q. Do you remember the occasion of this slide in March, 1910? A. Yes, sir.

Q. As a result of that slide, did anything happen to the shaft house and the head frame? A. Yes, sir.

Q. Did you observe what happened? A. Well, I did not take any close observation, but I knew there was something done to it because our men repaired it and made out a bill for repairs.

Q. How long did it take your men to repair it? A. I think possibly it took three or four days.

Q. What was the cost, based upon your records and time slips? A. That repair work after the slide; this bill is headed Bracing Head House at the Gumaerd shaft $32.40.

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## No Cross Examination.

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CLAYTON E. LAW, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Were you also employed by Bennett & Talbot? A. Yes, sir, I was.

20 Q. What was your position in March, 1910, with reference to the construction work that was going on at Guymard? A. Working with the carpenters.

Q. Did you have anything to do with repairs to the head frame? A. Yes, sir, I helped them to straïghten it up there.

Q. What did you do in order to straighten it? A. We jacked it up, blocked it up, put in piles and posts to hold it up there.

30 Q. Was that in proper position when you finished your work? A. It was.

Q. How did you determine that? A. With a plumb bob and line.

Q. Did it measure up all right? A. It did.

Q. Did you observe anything about the shaft? A. I observed that the shaft was over a little toward the tracks.

Q. Was the shaft used after that? A. Yes, sir.

40 Q. For what purpase? A. There was water came out of there afterwards.

Q. How did the water get up or get to the surface? A. That I could not say, how it got to the surface; I was outside of the shanty.

Q. You saw water coming out of the shaft house? A. I saw water coming out of the shaft house, yes, sir.

Q. Did it come over the embankment where the work was going on? A. Yes, sir.

Q. Had you seen water coming over the bank before out of this house, before this slide took place there? A. Yes, sir, I had.

Q. Where did that water come from? A. It seemed to be coming from that shaft house then.

Q. Did that have any effect upon the bank, upon the dirt? A. No doubt it would.

Q. Did you have anything to do in the preparation of the forms for the concrete work? A. Yes, sir.

Q. For the retaining wall I refer to? A. Yes, sir.

Q. Did you observe whether the foundations of the retaining wall went down to bedrock? A. Well, yes, I believe it did go down to bedrock there. They generally made it go down to rock. They generally made them go down to where there was rock.

Q. Was there rock at this point where the foundation was in fact laid? A. Well, as near as I can remember, there was some too all along this foundation.

CROSS EXAMINATION BY MR. COULT:

Q. You remember when you went up there to repair the shaft house quite distinctly, don't you? A. Well, I remember repairing there, yes, sir.

Q. You remember there were some things you saw up there you have not told us about, don't you? A. I think I told you about all you asked me.

Q. Don't you remember those auger holes and the shavings down at the shaft house? A. Yes, sir, it looked just as though somebody had been tampering with the shaft house.

Q. Trying to make it look worse, is that so? A. It really did, to my judgment.

Q. You testified to that at the last trial? A. I certainly did.

Q. Counsel for the defendant asked you that? A. I don't know.

Q. Where were those auger holes and those shavings you then told about? A. Upon the ground.

Q. What were the auger holes in? A. In the dirt there, in the ground—the auger holes?

Q. Yes? A. In the wedges.

Q. There were wedges in there, were there, were there? A. Yes, there was wedges in there.

Q. Somebody had driven wedges back of the house? A. No, sir.

Q. Where were they? A. Under the mudsills, between the mudsill and the collar of the shaft.

Q. So as to tilt the shaft up and make it look worse than it was? A. No, I don't think it tilted the shaft any; what it was there I think was to hold the mudsill.

Q. But those wedges were driven on the high side, weren't they? So as to make the lower side lower and the higher side higher? A. I think probably those wedges were put in there to make it solid at the collar of the shaft, to make the head frame solid.

Q. Those were fresh auger holes and shavings that you saw there, weren't they? A. Yes, sir, they were.

ROBERT P. LAW, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. What was your occupation in March, 1910? A. I was superintendent.

Q. Superintendent of the mason work for Bennett & Talcott? A. Yes, sir.

Q. And in charge of the mason work at Guymard where this new construction was going on? A. Yes, sir.

Q. Were you working there at the time this slide occurred in March, 1910? A. I was.

Q. At the time of the slide was the retaining wall in the course of construction? A. It was north of the shaft for about fifty or sixty feet, as I remember it.

Q. Did you, as superintendent, have charge of the construction for Bennett & Talbot of that retaining wall? A. Yes, sir.

Q. Did you observe where the foundation of the wall was laid with reference to bedrock? A. I certainly did.

Q. Where was it laid? A. On bedrock, as near as I can tell now, it was from two and a half to three feet below the top. Below the neat work of the wall, there is a projection below the neat work that projects out about six inches.

Q. Did you excavate to that point? A. Yes, sir.

Q. Was the foundation wall laid upon the bedrock? A. It certainly was.

Q. All the way along? A. Yes, sir, there was varying depths of it, though; it ran from two to four feet.

Q. You mean the depth from the original surface? A. Some places the rock was changed, and

some places all the soft material was taken out till we got to good solid material for the foundation of the wall.

Q. You spoke about the depth being from two to four feet; you mean what? A. From the neat work of the wall, there is a foundation there and neat work.

Q. You were there when this slide occurred, I believe? A. Yes, sir.

Q. Did you see the repairs made to the shaft house and head frame after the slide? A. I was there when it was completed but I really did not have anything to do with it.

Q. That did not come under your direction directly? A. No, sir.

Q. You saw some of Mr. Bennett's men doing the work? A. Yes, sir.

Q. Did you see any water taken out of that mine before that slide occurred? A. I certainly did. I did not see directly it came out, but I saw it coming from there.

Q. You mean it came from the shaft house? A. Yes, it came from the shaft house, from in the shaft house.

Q. Where did it go to? A. What I call the tanks, it was a box built in there and it was filled up in a barrel and dumped in this box and they had a couple inch and a half pieces leading from that box down over the hill, and it was tilted in there and when it left the barrel the over supply over what would go in the box, would not go through the pipes, and that would in the emergency go over the box and come down the cut where our work was going on.

Q. Did that wash away the dirt where you were working? A. Yes, sir, it washed the dirt down into our foundation.

CROSS EXAMINATION BY MR. COULT:

Q. How deep was the cut at a point opposite the shaft house? A. That is, you mean from the top of the wall to the bottom of all the concrete work?

Q. I mean from the soil as it was before you began your cut to the bottom of your cut? A. Well, I believe about thirty-five or thirty-six feet. That is to the base of the cut proper, not counting our foundation work.

Q. You went two feet below that and struck bedrock? A. From two to four feet.

Q. So bedrock there was about thirty-eight or forty feet below the surface? A. I don't know exactly the distance, I am only giving it to you as near as I possibly can.

Q. About thirty-eight or forty feet below the surface of the cut? A. I don't think it was forty feet.

Q. How far was it? A. Some places, as I said, it ran from two to four feet below.

Q. At any point in that cut did you find bedrock further down than forty feet from the surface of the ground? A. Yes, there was places we found it less than that.

Q. I say, it never was more than that? A. No, I don't think it was over forty feet.

Q. Have you ever been down in the mine? A. No, sir.

Q. You have never been down in that shaft? A. No, sir.

Q. You don't know how far you would have to go down there to get to bedrock, do you? A. No, I do not.

FRANK J. CAVANAGH, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. I believe you are also associated with Bennett & Talbott, or at least you were at that time? A. Yes, sir.

Q. Did they have a contract for the construction of this concrete work, or did you have a contract from them for the construction of this concrete work? A. Yes, sir.

Q. I believe your contract was limited to the concrete work, was it not? A. Yes, sir.

Q. Did you build this retaining wall in question? A. Yes, sir.

Q. Were you there when the slide occurred in March of 1910? A. I was there shortly after it occurred.

MR. COLLINS: The same day?

THE WITNESS: The same day, yes, sir.

Q. You had been there right along in connection with your work, had you? A. Yes, sir, I never missed a day.

Q. Where was the foundation of that retaining wall built with reference to bedrock? A. It was built on bedrock.

Q. How far down did you have to excavate at the point where this wall was built in order to reach bedrock? A. About two feet.

Q. What kind of rock was it? A. A sort of a red sand stone.

Q. After the slide did you observe the condition of the head frame and the shaft house? A. My attention was called by the carpenter foreman to those auger holes in the wood at the top of the cribbing and under the stringers.

Q. Was the head frame on them out of line? A. Yes, sir.

Q. It was pulled over to some extent? A. It was pulled over some.

Q. Did you see it straightened up? A. They were straightening it up about that time.

Q. Do you know whether they got it straight or not? A. After they got it straight I had the carpenter plumb the building with a plumb bob and it was plumb then.

Q. Before this slide occurred, did you have any trouble with water coming down over the bank? A. Yes, sir.

Q. Where did the water come from? A. From the shaft house.

Q. To what extent did it come? A. Well, it came fast enough to stop us from work until we took care of it, by building troughs and pipes to pipe it over the place where we were working.

Q. Did it have any effect upon the soil or dirt of the embankment? A. Yes, sir.

Q. What effect did it have? A. It loosened it up more or less.

CROSS EXAMINATION BY MR. COULT:

Q. You saw the auger holes in the wedges that were under the sills of the shaft? A. Yes, sir.

Q. That were under the sills of the shaft house? A. Yes. I think they were under the head frame, the stringer.

Q. See if I have this straight. Under the head frame there were wedges on the side nearest to the track, is that right? A. Yes, sir.

Q. And somebody had taken an auger and put auger holes in those wedges? A. Yes, sir.

Q. And the effect of the removal of the wedges or their collapse would be the tilting of the head frame over towards the track? A. Yes, sir.

Q. And had those wedges been destroyed? A. Not all.

Q. But some of them had been— A. The thick end of them were bored off, or bored in.

Q. So that it would just tilt down and get out of plumb? A. Exactly.

Q. Did you notice whether the shaft was out of plumb? A. No, I did not. I did not go in the shaft at all. Mr. Bennett had charge of the fixing of the shaft. My attention was called to these borings and I went and looked at them.

Q. Who called your attention to them? A. Mr. Haugh, my carpenter foreman.

Q. Was Mr. Gumaer around there at that time? A. I did not notice him around there.

Q. Was anybody on the premises at all? A. Only the people working there.

Q. Did you go up there without any permission at all to do that work? A. Yes, the slide was away then. You mean up to the head house?

Q. Yes? A. The slide was away then. You could see right under it. You did not have to go in at all.

Q. Did you call anybody's attention to the fact that there were these auger holes in the wedges? A. Yes, sir.

Q. Anybody around the premises? A. There was nobody around to call the attention to except the workmen.

Q. You were at the work every day? A. Every day, yes, sir.

Q. You saw Mr. Gumaer there afterwards? A. I don't remember.

Q. You certainly saw him many times after that, didn't you, around the premises? A. I saw him around the house. I have not talked to Mr. Gumaer since we worked there.

Q. You talked to him while you worked there? A. No, sir.

Q. You saw him? A. I saw him.

Q. You knew who he was? A. I knew who he was.

Q. And you did not make any effort to inform him of these auger holes at all? A. It was not by business, that was nothing to me.

Q. What was your business up there? Your particular business up there that day was looking at those auger holes? A. My men were working replacing this shaft house or head house.

Q. Did you get any permission to do that? A. No, sir, I did not. I was not using my men. Mr. Bennett was using them. He had charge of replacing that. I was watching the wall.

Q. What for? What were you doing up there that day, what were you doing? A. I was called up by my carpenter foreman to look at those holes.

Q. So that all you went up there at all for was to look at the auger holes in the wedges? A. That is right.

Q. You had no other duty or purpose whatever? A. No, sir.

Q. And you never reported to anybody about it? A. Yes, sir, to Mr. Norton.

Q. You talked about the water going into the cut. I show you this photograph Exhibit P-7 and direct your attention to the stream of water at the top there. Is that the way the water from the mine went into the cut? A. No, sir.

Q. What water is that a photograph of, do you know? A. No. That is way beyond where we were working.

Q. Where does that water come from? A. There is water way down there, washes down from the hill.

Q. Did not the water from the mine go down that waterway? A. No, that was another waterway way below that.

Q. Point out on that photograph the point where the water from the mine went into the cut? A. Right along the shaft house there, it seeped all over us.

Q. It came out there, did it? A. It came out there and seeped all over there.

Q. That does not appear on the photograph, does it? A. No, it did not do it only when the water was taken out from the mine.

Q. That is a considerable stream down here, that did not make any difference to your work, did it? A. We took care of that.

Q. How did you take care of it? A. We took care of it over there till we got it piped up and then ran it around under the wall.

Q. And it was not with reference to that that you were testifying at all? A. No, sir.

Q. Did the water seep through, you say, through the top of the soil? A. Yes, sir.

Q. That is the water you are testifying about, the water seeping through? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Where were these augur holes we have been hearing about? A. In a wedge. A wedge that was put under the stringer of the shaft house and on top of the cribbing of the mine, the shaft.

Q. On which side? A. On the railroad side.

Q. So that if the wedges were taken out the shaft house would lean towards the railroad? A. It would lean towards the railroad.

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The Court then adjourned to to-morrow, Thursday, December 21st, 1916, at 9:30 o'clock A. M.

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THIRD DAY.

Newton, N. J., December 21st, 1916.

The trial was resumed this day pursuant to adjournment.

MR. HOBART: Mr. Gumaer had not finished his testimony as yet.

THE COURT: Yes, is he ready to proceed?

MR. COULT: Yes, we can put him on.

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CHAUNCEY I. GUMAER, recalled as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. COULT:

Q. Mr. Gumaer, you were asked to go through your books and compute the actual money that had been expended by the Gumaerd Lead and Zinc Company on the shaft and crosscut. Have you done that? A. I have.

Q. What is this book that I am now handing you? A. That is the timebook, the men's time, that worked on the property.

Q. Covering what period? A. Covering a period from the time of January twenty-eighth 1907 until June twenty-seventh or twenty-eighth, 1909.

Q. Who kept that book? A. I did.

Q. Is it in your handwriting? A. It is.

Q. Did you make the entries in there? A. Yes, sir.

Q. When did you make them? A. Every day. Every night, rather.

Q. By referring to that book can you tell when the shaft was started and when it was down to the cross cut? A. I can.

Q. Look at it and let us know? A. Down below the cross cut—

Q. When the shaft was down to the point where it was when the slide occurred? A. Yes, sir.

Q. Please do that? First, the time when you started the shaft, when the shaft was started to the time it was down to a point where you started work on the cross cut? A. The work was started January twenty-eighth 1907 and the crosscut was started March twenty-third 1908.

Q. How do you know by looking at that book when the crosscut was started? A. When the crosscut was started we put on a new shift, put on two more men.

Q. How many men were you working before you started the crosscut? A. Seven.

Q. And then there was nine when you worked in the crosscut? A. Yes, sir.

Q. When did you strike the vein? A. June eighth, 1908.

Q. How can you tell by looking at that book when you struck the vein? A. When we struck the vein I let a contract and work was done by contract to the east.

Q. What work was done by contract? A. The drift along the vein from the point, at the intersection of the vein and the crosscut along this vein here was let by contract. That gives me the date from the time we left the shaft until we reached that point.

MR. COULT: I offer the book in evidence, is there any objection?

MR. COLLINS: Of course, you cannot put the time book in evidence. It is not competent evidence. It may help him to testify, but the book is not evidence.

MR. COULT: Do you want to look at it?

MR. HOBART: We would like to look at it if you are not going to use it.

MR. COLLINS: We have no right to look at it except you offer it in evidence. We do

not call for it. We have no right to cross examine him on it, it is not in evidence.

Q. Do you know a gentlemen by the name of Zoch? A. I do.

Q. Did he work for you? A. He did.

Q. Does his name appear in this time book? A. It does.

Q. Can you tell by looking at that just how long he worked for? A. I can.

Q. When did he go on? A. He went on in January, 1907.

Q. When did he quit working?

MR. COLLINS: Finally, I suppose you mean? Because he says he went on at different times.

MR. COULT: We will see about that.

THE WITNESS: He worked right up to the time we laid the tracks, around June, June eighth, 1908, was the last day he worked.

Q. Was he off at any time between those two dates? A. He shows every month. His name appears every month.

Q. His name is on the monthly payroll every month? A. His name is on the monthly payroll every month, yes, sir.

Q. I show you another book which seems to be, —well, what is that book? A. This is a book of original entries, mine account.

Q. What is that book kept for? A. It is to keep track of the expenses of the mining company. Moneys expended and what for.

Q. Whose handwriting is that book in? A. It is in my handwriting.

Q. When did you make the entries with relation to the time when the items in it were transacted? A. Well, as they appear in the book, the dates are there before every item.

Q. Were the entries made at the time the transactions took place? A. They were, or when the bills were rendered, sometimes when bills were rendered it was after the transaction, sometimes bills were not rendered until the end of the month.

Q. And does that book show the moneys received or the moneys expended by the company? A. The moneys expended.

Q. By referring to that book can you tell what moneys were expended by the company at the mine for equipment and for labor on the shaft and the crosscut and the drift? A. I can.

Q. I show you another book marked Ledger, what is that? A. That is the summing up of the day book and shows all the accounts with the mining company.

Q. What is the book which you refer to, as the day book? A. The day book is the book of original entry.

Q. Is that the one I just handed to you a minute ago? A. Yes, sir.

Q. Who kept the ledger? A. I did.

Q. When did you put the entries in it? A. Well, sometimes I did not post right from the day book at the time, but every few days.

Q. Every few days from the day book? A. Yes, sir.

Q. Does the ledger show entries from time to time, from the time you started to sink your shaft till the time you struck the vein? A. It does.

Q. And from then on until when? A. Until the work ceased.

Q. Had you examined your books when you first testified in this case the day before yesterday? A. I had not.

Q. What was the first that you examined your

books since the starting of this trial with reference to learning with regard to the money expended on the mine? A. Last night.

Q. Have you, by refreshing your memory by your books that I have handed you, ascertained the amount expended for labor and materials in sinking the shaft? A. I have.

Q. What was the amount so expended? A. The expense of sinking the shaft was $4,699.03.

Q. Can you tell how that is made up? A. I can.

Q. Please do so? A. Labor on the shaft $4000.38. Cash paid out, $149.86.

Q. What was that for? A. February 10th, Cash paid Ben Hennion Blacksmith, five dollars, February 28th, cash paid freight one dollar.

Q. Well, the cash paid out is small items that appear in the book, is it? A. Yes, sir.

Q. What book are those in? A. Those are in the book of original entries, also in the ledger.

Q. What is your next item of expense on the shaft? A. Canales, $26.00; coal, $109.54; mining supplies such as drill steel, picks, shovels, powder, caps, fuse, $400.75; making a total of $4669.03.

Q. Now, take the tunnel leading from the shaft to the vein? A. The crosscut?

Q. The crosscut, have you figured the expense of that? A. I have.

Q. From the entries in your books? A. I have.

Q. What does that come to? A. $1483.54.

Q. Composed of what? A. Composed of March, April, May, June, labor $1087.76; Cash for freight $20.20, made up of three items; Mine supplies $375.58.

Q. Those were the same kind of supplies that you mentioned a minute ago? A. Yes, sir.

Q. What else? A. That is all.

Q. Making the total you just mentioned? A. Making the total of $1483.54, yes, sir.

Q. Have you calculated the money that was expended on the work in the interior of the mine after the vein was reached? A. I have.

Q. How much did that amount to? A. $3,420.51.

Q. What was the total amount expended in the underground workings? A. $9,764.71.

Q. You are not making any mistake about that total? A. No. It was over ten thousand dollars, but I deducted the lumber that was used on the surface.

Q. There is an item of lumber besides, is there? A. There is.

Q. Where was that lumber used? A. It was used in the buildings at the plant, the shaft house and the mansion house.

Q. How much was that? A. $502.84.

Q. That did not actually go down in the hole? A. The partition of the shaft was made from that lumber.

Q. What is the total including that lumber? A. $10,267.55.

Q. Is that the amount that you had in mind when you said approximately between ten and eleven thousand dollars had been expended? A. Yes, sir.

MR. COULT: We offer in evidence these books, the time book, the day book and the ledger.

MR. COLLINS: They are not admissible in evidence. We object to them.

Objection sustained. Plaintiff excepts.

CROSS EXAMINATION BY MR. HOBART:

Q. The first book to which you called attention was the time book? A. Yes, sir.

Q. You said last night, according to my figures, that the time book showed that the cost of the shaft was $3,755.00? A. The time book showed it.

Q. That is what you testified to? Is that right or isn't it? A. It is not right. Because I had not looked at the time book.

Q. You testified that after you had gone off the stand and spent a half an hour looking at the book and came back and gave us the figures, did you look over your time book before you gave that testimony? A. I would like to have my testimony read.

Q. Can't you answer my question whether you looked over your time book? A. I don't remember of computing any time here yesterday or any time before last night.

Q. When you went down from the stand for a half hour yesterday the question came up as to the cost of this shaft, did you look at your time book before you came back and gave your testimony? A. I don't remember whether I did or not.

Q. You know what the time book is? A. I do.

Q. You had it with you? A. Yes, sir.

Q. You went down from the stand for the purpose of looking at it, didn't you? A. (No answer.)

Q. My question, is, did you look at it yesterday afternoon, not last night, but yesterday afternoon? A. I don't remember.

Q. You don't remember whether you looked at it? A. Not quite. I went there to get the time book but I cannot remember.

MR. COLLINS: You sat at the table here a long time figuring.

MR. COULT: I think there was some reference to that, but my recollection don't tally with that. I don't think he went to the book, he started to go for a book, but I don't think he figured from the time book.

MR. COLLINS: He sat here at this table a long time figuring, I saw that.

THE COURT: If there is any doubt about the record let us have the record read if you want it and see just what he left the stand for.

(The testimony of the witness was then read as it appears at pages 335, 336 and 337 of this transcript.)

THE WITNESS: Those figures there the thirty-seven hundred dollars—

Q. Wait till I ask you a question. The question was whether when you gave your testimony as to the $3,755.13, for labor, that was not after you had just spend a half hour in looking over your time book for the purpose of getting those figures? A. I did.

Q. So that those figures were based upon your time book? A. They were based upon the time book in the short time that I had to figure it in.

Q. Now you say the cost of labor was $4000.38? A. Yes, sir.

Q. It has gone up over night then, according to that? A. Well, I have had a chance to figure it out in detail.

Q. Is this time book kept by you personally? A. It was.

MR. HOBART: I want to look at it for the purposes of cross examination. (Counsel takes the book.)

Q. You have an item in the first part of the

time book apparently in the year 1906? A. Yes, sir.

Q. Which is marked "Cribbing for Blacksmith shop and tunnel house." A. That was on the west side of the track.

Q. That had nothing to do with this construction that we are talking about now? A. No, sir.

Q. Then we come down to the date that you gave us of January twenty-eighth 1907, where is that place in the book, will you show me? A. (Showing.) It starts there, January twenty-eighth.

Q. You have got it marked, "Month of January, 1907. That is the way it appears in your time book, "Month of January, 1907," A. Yes, sir.

Q. Where were you doing any work at that time? Were you doing any at all? A. Yes, there was other work, but all this January work was done on the west side. The shaft was not started until the latter part of January, it starts in February first.

Q. After you started work on the present shaft on the twenty-eighth of January was there other work going on at the same time? A. Yes, sir.

Q. What other work besides the work on the shaft? A. There was a shaft being sunk on the west side there.

Q. In other words, the work on the shaft on the west side continued for a part of the time while the present shaft was going on, is that right? A. For about a month, yes.

Q. Where does that appear. The work on the west side? A. There near where the tunnel was caved in by the railroad.

Q. Yes, I know the place you mean on the ground, but where does it appear in the book? Where does that work appear? A. That work appears in January, (showing) January 1907.

Q. You are referring to the lower half of this page that you have shown me? A. I am referring to all the page.

Q. Does that page cover work on the shaft both on the east side and the west side? A. It does not. The work in the shaft was not started then.

Q. Perhaps you do not understand. I am asking you to point out in the book where you have a record of the work that was done on the west side? A. (Showing.) That is the work that was done on the west side, in January, December and January, the work previous to that was kept in another book, that was individual.

Q. Then the page you have shown me does include work done on the west side, does it? A. That is the month of January and the month of December, that was work done on the west side, that is not included in my estimate.

Q. Just confine yourself to the month of January. In the month of January what was done on the west side and on the east side, that is the latter part of that month? A. Only the twenty-eighth and the twenty-ninth. There was probably one day, one or two days in January. The first of January, of course, being a holiday we did not work, but my estimate commenced on the east side from the first of February.

Q. Where does that appear in the book? A. Here (showing.)

Q. On the next page? A. On the next page.

Q. On the same page, this work appears for what you were doing on the west side? A. There is nothing there in that time book on the page I have now shown you that shows anything being done on the west side, that is all on the easterly side the work was all on the present shaft.

Q. You have just told us that you continued

work on the west side for about a month after you started work on the east side, is that right or is it not? A. I did not say we continued a month after the start. If it appears that way it was not right.

Q. Do you want to refer to the record and have the minutes read again? A. The shaft on the east side was started on the twenty-eighth day of January.

Q. We know that, you have told us that several times? A. All the work before that time was on the west side. After I started the work on the other side the work on the west side did not go on and that is the only work in this book on the east side.

Q. Didn't you just tell us that the work on the west side continued for about a month after you had started work on the east side? A. If I did I did not mean it that way because it is not true.

Q. You were mistaken about that if you so stated? A. I was mistaken, yes, if I so stated.

Q. Was there any other work going on outside of the construction of the shaft on the east side after the twenty-eighth of January, such as work of preparing timbers, or cutting lumber and getting lumber ready? A. On the east side?

Q. Yes? A. Surely. That is all included in the labor. Mr. Zoch, the time book shows. He was the carpenter or the man who was framing the timber.

Q. So this includes the carpenter work as well as the excavation? A. Oh, yes.

MR. COLLINS: Was there any other work besides that?

Q. Was there any other work besides that that had any reference to the shaft? A. There was not.

Q. At these various places in the time book where you have indicated a cipher or zero, that meant that that particular man did not work on that day? A. Yes.

Q. And, I suppose, where the letter S, appears it means that it was Sunday? A. Sunday, yes, sir.

Q. And this gives the rate of pay of the men, does it? A. It does.

Q. Where is there anything in the time book which indicates that the work on the shaft was completed on the twenty-seventh of June, 1909? A. Just repeat that question.

Q. Where is there anything in the time book which indicates that the work on the shaft was completed on the twenty-seventh of June, 1909? A. On the shaft?

Q. Yes, on the shaft? A. I did not so state.

Q. Then you must have misunderstood the question again, or I must have misunderstood you again; when did you complete the work on the shaft? A. March twenty-second, 1908

Q. When did you begin work on your shaft house? A. There is nothing here to show.

Q. Is there anything in the other books, either in your day book or in your ledger? A. Well, it would be here in the time book if it was any place. There is nothing here to show, it is not separated.

Q. Can't you tell by referring to your day book or your ledger? A. I suppose it will give the date of the purchase of the lumber or other material for the shaft house and engine house.

Q. Can't you tell by reference to your books when you began the work on those buildings? A. I notice an item of lumber for $12.45, on May 31st, 1907, and another item of lumber on June 21st, 1907, $40.00; and June 24th, 1907, of lum-

ber, $34.40, and June 26th. I should say along there. There were the invoices for that lumber in there, I should say.

Q. Along in May and June, 1907 is when the work on the shaft house was started? A. It must have been from the purchase of the lumber.

Q. And the engine house, the engine house is a separate building, I believe, is it not? A. Well, it was all connected, it was fastened together, July eighth, the lumber bill of $18.20, must have been in there, along about June and July.

Q. Of 1907? A. Of 1907, yes, sir.

Q. Now, I want to find out, where you have got in your time book any distinction made between the labor upon your shaft house and engine house, any distinction between that labor and the labor on the shaft itself? A. No, there is none.

Q. Then you have included in your figure of four thousand dollars for the labor, the labor on the shaft house and on the engine house, haven't you? A. I have.

Q. Didn't you understand that you were asked to give a statement from your books of the cost of constructing that shaft, didn't you understand that? And, if you did, why did you include in the figure which you gave, the cost of the construction of the shaft house and the engine house? A. I did not include labor but I had no way of separating the time.

Q. Why didn't you tell us that before when you were asked to give us a statement of the cost of labor on the shaft? Didn't you understand that? A. Well, I should have understood it.

Q. But you did not, eh? A. It seems I did not.

Q. You wanted to have us believe that all this labor was for the cost of constructing the shaft, didn't you? A. No, sir; I did not give it with that intention.

Q. At any rate, that is what you testified to, isn't it? A. It was.

Q. Now, can you tell us, having had your attention directed to that, can you now tell us what was the cost of the construction of the shaft, take the labor cost first if you like? A. Well, I cannot say, there is no division line.

Q. You have no way of telling, have you? I thought not. That is all.

PLAINTIFF RESTS.

ROBERT HOPPEN, JR., sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are a civil engineer? A. Yes, sir.

Q. Employed by the defendant Company? A. By the Erie Railroad.

Q. How long have you been in that position? A. Since 1900.

Q. Since that time have you been actively engaged in making surveys and following out your datas in that connection? A. Yes, sir.

Q. Did you make a plan of the shaft and the shaft house in the so-called Shaft and Building Plot and the other general buildings in the general layout in connection with the shaft and property that is in question in this case? A. Yes, sir.

Q. Is this the plan which you made, which I now show you? A. Yes, sir; it was made under my direction. I did not make the tracing.

Q. You made the survey? A. Yes, sir.

Q. The plan is marked on the bottom, "Gumaerd Lead and Zinc Company vs. Erie Rail-

road, Graham, N. Y., December 16, 1916, office of Chief Engineer?" A. Yes, sir.

Q. The survey was made some time before that was it not? A. Yes, sir. It was made in June, 1914.

MR. HOBART: I offer the map in evidence.

Admitted and Marked "Defendant's Exhibit D-1" of this date.

Q. Is this plan on a scale? A. The scale is marked on it, yes sir.

Q. You have certain sections here indicated as Section A, B and C, also another known as Shaft Section. Will you describe those generally, where they were taken and what they show, as you go along, and as you explain those sections will you kindly point them out to the jury so that they will understand? A. Section A at the top of the map is referred to the key of the sections in the center of the map and is a section taken along the side of the shaft house and parallel to it down to the railroad track showing the surface of the ground at the shaft house, cribbing, top of wall and track.

A JUROR: Will you point to those, please?

THE WITNESS: (Indicating) There is the surface of the shaft house, the cribbing surface, between the cribbing and the top of the wall, and the surface there, and the wall and the track. The same is shown by aa and key to sections.

Section B is taken on the other side of the shaft house, nearest to Port Jervis, and shows practically the same thing, the surface of the ground at the shaft house, the cribbing, the surface of the ground between the cribbing and the wall, and the wall and the track.

Section C is taken from the key to Section CC,

taken on the other side of the shaft house nearest to the railroad and running parallel with the shaft house; that shows the cribbing, the surface of the ground at the shaft house and the cribbing on the other side, toward Port Jervis, the fill or ground between the bottom of the cribbing and the top of the wall, the wall and the track.

Section D is a section taken through DD on the key to sections, and shows the top of the bank, the slope of the bank and the railroad tracks.

And the other section, the Shaft Section HH, is a section taken from the shaft.

Q. Referring to the retaining wall, is the length of that indicated on the map in any way? A. By the solid red line, as retaining wall and bridge abutments.

MR. COLLINS: On the plan?

THE WITNESS: On the plan, yes, sir.

Q. How long is the wall? A. One hundred and twenty-five feet from the bridge to the end of the wall.

Q. Does that mean that the wall itself is a hundred and twenty-five feet long? A. Well, that is from the girder of the bridge to the end of the retaining wall.

Q. Just begin at the girder of the bridge and trace it out? A. Well, part of it is the abutment, you might call it, and the rest of it is wall, but it is all wall.

MR. COLLINS: That is the wall forms part of the abutment of the bridge?

THE WITNESS: The wall forms the abutment of the bridge, yes, sir.

Q. So the total length of the wall then is a hundred and twenty-five feet? A. Yes, sir.

Q. How does that retaining wall run with reference to the shaft that is located on the Shaft and Building Plot? Does it run parallel with it, parallel with the sides of the shaft or diagonal? A. It runs at an angle.

Q. As indicated on the map? A. As indicated on the map.

Q. Can you state what the angle was? A. No, sir.

Q. The map shows the angle? A. The map shows the angle. The shaft is marked "shaft." And the shaft house is there as well as on the road.

MR. COLLINS: Section B would show and the plan shows it?

THE WITNESS: The key to the sections shows it on a larger scale.

Q. The shaft house is located in a corner of the Shaft and Building Plot, is it not? A. Yes, sir.

Q. In what corner? A. In the southwest corner.

Q. How far to the south of that corner does this wall extend? That is, if you took a line from the corner of the shaft house to the wall. how far south will the wall extend from such a line? A. Forty feet from the Shaft and Building Plot to the corner of the wall.

Q. Is that wall straight or does it have any curves in? A. It is straight at this end.

Q. Have you observed the railroad tracks in that vicinity? How are they to the south of the wall? A. They curve to the right, or to the west.

Q. How far, if you remember, does the cut extend? A. Toward the south?

Q. Toward the south? A. It is quite some distance. I did not measure it.

Q. After the tracks have curved to the west or to the right as you express it, how long does that curve continue? Is it a gradual curve that leads finally to a straight line? A. Yes, sir.

Q. About where does the straight line begin, as compared with the shaft house? Is it indicated on the map? Does the map show it? A. The map does not go that far.

Q. It does not go quite that far? A. No, sir.

Q. Is it very much further than is indicated on that map, or just a short distance? A. Oh, it is several hundred feet.

Q. And the curve continues in the same direction to the west? A. Until it strikes that straight line.

Q. It is not a reverse curve, in other words, or anything like that at that point? A. No, sir.

Q. Referring particularly to this section known as HH which indicates the shaft house, will you please explain how a person looking at your map would look at the shaft itself? In other words, where was that section taken? Looking from what direction toward the shaft? A. Looking from the railroad track towards the shaft, the railroad tracks or lines which cross the grade abutments.

Q. Does that section show the entire depth of the shaft? A. It does.

Q. From the collar to the bottom? A. It does.

Q. I am not sure whether you have put the head frame indication on it, have you? A. I have not.

MR. COLLINS: I think he has the place where it is.

Q. Have you got the place where the head frame is? At any rate that is a part of the shaft? A. It is a part of the shaft.

MR. COLLINS: He has got the shack shown.

Q. Have you got the shack shown, or any corner of the shack? A. There is just an outline of the building there, yes, sir.

Q. The building known as the shaft house, is it not? A. Yes, sir.

Q. Will you please describe how you determined the exact dimensions of that shaft and the relative location of the various parts thereof, as you go down? How did you make the section, in other words? A. I located the centre of the shaft and then produced that centre so that it touched the collar, furthest away from the track, and suspended a plumb line at that point and took the measurements down along the plumb bob which are shown in Section HH.

Q. How did you make those measurements from the plumb line? Did you climb down the shaft? A. I went down in a boatswain chair, and measured the distance from the plumb line with a rule to the shaft.

Q. How far down did you go? A. I went down to the water which is in the bottom.

Q. Was the shaft dewatered at the time you went down? A. Yes, sir, all except a very small portion which is shown in the bottom, about three feet.

Q. Did you find the shaft out of plumb to some extent at this point of thirty feet from the top, that has already been mentioned? A. Yes, sir, and it is so indicated on the Section HH.

Q. To what extent was it out of plumb? A. Seven-tenths of a foot.

New Jersey State Library

Q. When did you make your measurements? A. December ninth, 1914.

Q. Was anybody with you when you made the measurements? A. Yes, sir.

Q. Who? A. L. F. Claren was the transitman and W. L. Blakeney was the rodman.

Q. There are two compartments in that shaft are there not? A. Yes, sir.

Q. Which one did you go down in? A. I went down the bucket way, and the measurements were taken in the bucket way.

Q. Was there any water pipe in there at the time? A. Yes, sir.

Q. Was that in the same compartment where you went down? A. Yes, sir.

Q. That was used for taking the water out of the mine for the purpose of allowing this examination I suppose? A. Yes, sir.

Q. It was a temporary arrangement in connection with this examination. was it not? A. Yes, sir.

Q. When you were lowered in this chair, where were the ropes fastened? A. They were fastened to the head frame with a block and fall.

Q. Where was this pipe line, this water pipe you say was there, how was that arranged? A. That sat on a collar and was suspended from the collar of the shaft.

Q. Was the pumping going on while you were there? A. Yes, sir.

Q. Did you measure the shaft itself, that is the horizontal measurement of it, show the width and length of it? A. Yes, sir.

Q. What are the measurements? A. Seven feet two by four feet seven.

MR. COLLINS: Was that in the clear or outside?

Q. Was that inside or outside? A. That is inside, and the bucket way was four feet seven by four feet and 62/100.

Q. Below the point that you have marked as thirty feet on that section of the shaft, was the shaft out of plumb? A. Well, the map indicates that there is a two-tenths difference between the two points. There is no difference further down to the bottom.

Q. In other words, the part of the shaft that is out of alignment is the thirty feet from the top, is that it? A. Yes, sir.

Q. At the time that you were there in December, 1914, making these measurements, did you at that time take any observations of this retaining wall, as to whether there was any cracks in it? A. I don't remember.

Q. You don't recall about that occasion? A. No, sir.

Q. Did you make another examination of this shaft recently? A. June twenty-first, 1916.

Q. When you made that examination did you observe anything about the retaining wall, as to whether there were cracks? A. I walked along the top of the wall and along the bottom, but I saw no cracks outside of the expansion joints that were there, that is all.

Q. The expansion joints are they the same things that some of the witnesses have called temperature joints? A. Yes, sir.

Q. Dividing the wall into sections? A. Yes, sir.

Q. That is always done in concrete work, is it not? A. Usually, yes, sir.

MR. COLLINS: When it is not re-enforced?

THE WITNESS: Yes, sir.

Q. You observed nothing except the expansion joints? A. That is all.

Q. Did you on this occasion, last July make any measurement of the shaft? A. Yes, sir.

Q. What did you do at this time, I mean, in the way of measuring the shaft? A. I established the same points, from the same points that I established in 1914 and found them to be in the same place then and from there I dropped a plumb line through the shaft opening and took measurements at the same places again as I did in 1914.

Q. Had the shaft moved any between those two dates? A. My notes do not show it so.

MR. COLLINS: And are your notes right?

THE WITNESS: Yes, sir.

Q. You made them at the time? A. I did.

Q. Will you tell us now how you arrived at your starting point for the dropping of the plumb line, you said you started it in the collar as you did before. How did you know, or how did you arrive at the same point where you had made the previous measurement in December, 1914? A. Well, in December, 1914, I set up the transit at a point on the south rail of the eastbound main track of the Erie Railroad—

MR. COLLINS: That is the overhead?

THE WITNESS: That is the overhead, which was a certain distance away from a certain station which we had established on this track.

Q. That was a surveyor's station? A. Yes, sir.

Q. Not a railroad station? A. Not a railroad station. A surveyor's station, and I turned that angle and measured the distance from the shaft house and then set the transit on this new point

that had been established near the shaft house, sighted on the station from which the transit had been removed on the tracks and turned another angle, located a point on the top of the collar of the shaft. From this same point I turned another angle and located another point on the collar of the shaft, and then I set the transit on one of those points on the collar and produced a line through the two points and turned an angle, putting those two points in line with the point which had been established outside of the shaft house. That same thing was done again, and it was relocated on July twenty-first, 1916.

Q. You took the same starting point? A. I took the same starting point.

Q. How did you determine that your starting point was in the same place as it was in 1914? A. By referring to my previous notes and relocating the station from certain fixed monuments, and establishing it again on the south rail of the eastbound main track and sighting along that straight line both before and behind me and finding it to be straight and then turning the same angles as I had done before.

Q. When you speak of turning the angles, do you mean by the use of your instrument? A. By the use of the transit, an instrument used to turn these angles, and to relocate these points and then following it down and finally found the point to be in the same place on the collar.

Q. And could you determine positively from such measurements whether or not the shaft was in the same place in July, 1916, as it was in 1914? A. My notes show it to be in the same place.

Q. Then from that starting point established on the collar, which was the same starting point

as you had in 1914, it was from that point, was it, that you dropped your plumb line? A. Yes, sir.

Q. And your measurements, after the plumb line was dropped, did they correspond or not to the measurements previously taken on the point as to whether the shaft had moved out of plumb any further than it was in the first examination? A. At the thirty foot point in July, 1916, I found ten inches, and I have that fact marked in the book that the shaft was off that much.

Q. That was in 1916? A. That was in 1916. And this measurement was taken to the crib work and not to the shafting, where it was taken before. That is ten inches. Now, the next measurement was taken, at thirty-eight feet instead of at forty as is shown on the Section HH, on account of the water.

Q. You could not get down to the exact forty feet depth? A. No, sir, because the water commenced about thirty-eight feet and I did not care to go down into the water.

Q. Referring to your measurement at thirty feet, can you state whether or not the side of the shaft was the same distance from your plumb line in 1916, when you made these measurements as it was in 1914? A. Well, I show ten inches here.

Q. Was it or not the same? A. Practically the same.

Q. Did you observe the position of the collar on these occasions when you made these measurements, the collar of the shaft?

THE COURT: You mean as to whether it was out of alignment or not?

Q. Whether it had moved any, or had it subsided any? A. Yes, sir.

Q. Was there any change in its elevation? A. No, sir.

CROSS EXAMINATION BY MR. COULT:

Q. You testified here at the last trial, didn't you? A. I did.

Q. You had a map here? A. I did.

Q. And it was something like the map you have produced this time, wasn't it? A. Well, it was not the same, it was just like it except that on this map there are no pipe lines shown.

Q. Was it made from the same survey? A. Yes, sir.

Q. So your only idea in having that new map was to eliminate the pipe lines? A. It was not my idea, it was the instructions that were given to me.

Q. Whose idea was it? A. I don't know, sir.

Q. Who did you get instructions from? A. From the chief engineer.

MR. COLLINS: In order to only have those items on that there is any controversy about.

MR. HOBART: The instructions of counsel, if you want to know.

MR. COLLINS: We did not want to confuse it with matters that were not going to be in the contest.

Q. Here is a curious looking thing on this map that I want to call your attention to, back of the shaft house? What does that indicate? A. That indicates a cut.

Q. Does it indicate a cut or a slide? A. It indicates a cut.

Q. Does it indicate a cut or a slide? A. That indicates a cut.

Q. Does it? A. Yes, sir.

Q. Was that on the other map? A. Yes, sir.

Q. Are you quite sure of that? A. Yes, sir.

Q. Did you put this depiction that you call a cut on this map from any measurements that you made on the ground? A. Yes, sir.

Q. There is a rather broken line around the lower edge of it as it is on the map, now does that indicate the upper edge of the cut or the lower? A. The top of the cut.

Q. And you have a scale on that map? A. Yes, sir, under the word plan.

Q. Scale one inch, scales ten feet? A. That is in the Section DD.

Q. In the plan section one inch equals fifty feet. A. Yes, sir, there is a scale marked underneath the word plan.

Q. What is the distance from the south side of the shaft to the north edge of this depiction that you have called a cut? A. Well, on a line with the shaft through that cribbing as shown in Section C.

Q. For what distance? A. Eight feet about.

Q. There is not eight feet of level ground, is there, between the shaft and the top of this cut? A. Well, there was at the time I was there.

Q. You were there twice, weren't you? A. Yes, sir.

Q. Was there eight feet of level ground the second time you were there? A. I won't say that, I did not measure it.

Q. Why not? A. Well, I did not resurvey the ground, I only resurveyed the shaft, the collar.

Q. Where is the map that you used at the last trial? A. Here in court.

MR. HOBART: Here you are if you want it.

MR. COLLINS: You are welcome to it.

MR. HOBART: You have a copy of it too.

Q. What is the scale of the plan of the shaft? A. One inch equals ten feet.

Q. And what is the scale of the plan of Section C, that is the same, is it not? A. Yes, sir.

Q. You made the plan of the shaft section from observations that you took inside the shaft itself? A. Yes, sir.

Q. Did you measure how far down the cribbing went? A. Yes, sir.

Q. You have got it indicated on your map, haven't you? A. Yes, sir, and I measured it.

Q. Where does the cribbing end below the surface? A. Below the collar you mean, is that right?

Q. I mean the surface of the ground? A. The ground in front of the shaft house or—

Q. Take the collar of the shaft? A. That is what I have indicated here.

MR. COLLINS: The top of the collar?

THE WITNESS: 57.5.

Q. That is fifty seven and a half feet, is it? A. Yes, sir.

Q. That is measured from the collar of the shaft to the lowest timber in the cribbing? A. Yes, sir.

Q. And the cribbing rests on rock at that point, doesn't it? A. Yes, sir.

Q. Take the Section C, on the map that is taken through the centre of the shaft, is it not? A. That is taken through the centre of the shaft? No, it is taken on the outside of the building, using the building to sight from.

Q. It indicates the building, doesn't it, the Section C? A. Yes, it is close to the shaft.

Q. And the upper line shows the figures 112.2 on the left hand side, and 112.6 on the right, where the shaft house is? A. Yes, sir.

Q. What does that mean? A. That is the elevation of the ground.

Q. Above what? A. Above the datum of 100, at the northeast corner of the south abutment of the bridge on which the Erie Railroad travels.

Q. And that is practically where the collar of the shaft is located, is it not? A. Yes, sir, approximately.

Q. Now, at the railroad track, in the extreme right of Section C are the figures 76.26, do you see those? A. Yes, sir.

Q. And that is the elevation of the railroad above the same point that you mentioned as your basis of calculation for the elevation of the shaft house? A. Yes, sir.

Q. Now, the difference between the 76.26 and the 112.6 will give you the depth of the cut from the point at the collar of the shaft to the bottom of the cut, won't it? A. Yes, sir.

Q. What is that? A. 36.34.

Q. So that the distance from the top of the shaft to bed rock, where it is in the shaft, is some twenty odd feet below the depth of the cut, is it not? A. I don't know where bed rock is.

Q. You said that you could tell the point where the cribbing ceased, couldn't you? A. I could. yes, sir.

Q. And that that rested on the rock, didn't you say that? A. I did.

Q. That point where the cribbing rests on the rock is some twenty feet below the bottom of the cut, is it not? A. Yes, sir.

Q. So that if the rock that the shaft rests on ran at a level beneath the surface of the soil it

would be how far, according to your calculation, below the level of the tracks? A. That is, from the level of the tracks to the end of the cribbing?

Q. Yes. A. 18.8 feet.

Q. And you don't know which way the bed rock slopes in that locality, do you? A. No, sir.

Q. Now, there is a line on your map which indicates the wall referred to as a retaining wall on the east side of the shaft house, isn't there, or on the west side of the shaft house? A. Yes, sir.

Q. Does that line indicate the top of the wall or the toe? A. It indicates the toe.

Q. On which side, toward the railroad or toward the shaft house? A. On the bottom it is that point nearest the railroad.

Q. That is where you have drawn your line to indicate the toe of the retaining wall, nearest to the railroad? A. The face, yes, sir.

Q. The face nearest the railroad? A. Yes, sir.

Q. And that wall is about eleven feet wide at the bottom? A. I could not tell you.

Q. You don't know? A. No, sir.

Q. You did not measure that retaining wall with any considerable accuracy, did you?

MR. COLLINS: He did not say he measured it at all.

A. I did not measure the width of the wall at all.

Q. Why didn't you put it on your map? A. Put what on? The wall?

Q. The retaining wall? A. I did put the retaining wall on the map.

Q. You did not measure it did you? A. Yes, sir, I measured the top of it.

Q. Why didn't you measure the bottom? A. Because I could not dig it out.

Q. Couldn't you tell the width of the retaining wall at the surface? A. Yes, sir.

Q. What is it? A. Three feet.

Q. That is at the top is it not? A. Yes, sir, that is at the top.

Q. Couldn't you measure the width of the retaining wall at the surface of the ground, at the cut, the surface of the cut, down where the tracks are? A. No, sir.

Q. Why not? A. Because it is filled in behind it.

Q. I show you a photograph, Exhibit P-6, that is what that wall looked like when you were there, is it not? A. No, sir.

Q. What is the difference? A. The difference is with the fill which is missing in this photograph, behind the end of the wall, the fill was there when I was there.

Q. That applies to the time when you took your first survey? A. Yes, sir.

Q. When was that? A. In 1914.

MR. COLLINS: In December?

THE WITNESS: In June.

Q. When you were there in June 1914 there was earth all over the end of this retaining wall, was there? A. All over the end of the retaining wall?

Q. Yes, where the width is apparent in the photograph? A. I don't remember.

Q. You don't know whether you could get the width of that retaining wall or not, do you? A. Well, you could at that point, yes, because there is not much to dig out to get it.

Q. There is nothing to dig out there at all according to that photograph? A. Not on that photograph, no.

Q. And the earth is not within say eight or ten feet from the end of the wall, is it? A. Not on that photograph.

Q. Don't you think that photograph is correct? A. It might have been at the time that was taken.

Q. Anyway you did not get the width of that retaining wall to put on your map did you? A. No, sir.

Q. That, of course was not your fault? A. No, sir, it was not.

Q. But the line you have there represents the face of the wall nearest to the railroad cut? A. Yes, sir.

Q. Is that face perpendicular? A. I did not plumb it.

Q. Why not? A. You don't go in to plumb a retaining wall when you make a survey.

Q. You plumbed the shaft didn't you? A. Yes, because we wanted to see whether the shaft was out of plumb.

Q. You did not want to see whether the retaining wall was out of plumb? Did you? A. I did not expect to find it out of plumb.

Q. You were here at the last trial weren't you? A. Yes, sir.

Q. And you heard something said then about the retaining wall being out of plumb didn't you? A. I don't know whether it was at the last trial or this one. I think I heard that yes. I had heard lots of things about it before that time.

Q. You did not care about that did you? It did not occur to you when you were there that you could just do the same thing on the retaining wall that you did on the shaft and find out whether the retaining wall was straight up and down, did it? A. No. Because I did not do it.

Q. You went there to see if that wall was all right didn't you? A. No, sir.

Q. Didn't you say you went there to examine it when you were there the second time? A. I looked at it because I walked along the top of it but with no idea of making any examination of it.

Q. You told your counsel just a minute ago that the retaining wall seemed to be in good condition didn't you? A. Because he asked me, yes.

Q. You were not there for the purpose of testifying whether it was in good condition or not, were you? A. No, sir.

Q. And you did not make any particular examination for the purpose of testifying to that at all, did you? A. No, sir.

Q. And, as a matter of fact you don't know, do you? A. I do know.

Q. You don't know whether it is plumb or not? A. No, sir.

Q. Would a railroad going upon that wall expect that it might be thrown out of plumb— A. (No answer.)

Q. That is not answered? A. I don't quite catch it. That is all. If you will make it a little plainer I will try to answer it for you.

Q. What is the distance from the top of the retaining wall to the nearest line of the shaft and building plot? A. At which point?

Q. At the point nearest the line?

MR. COLLINS: That is not parallel you know?

MR. COULT: I understand. Taken along the south line of the building plot. The south line of the building plot and the south line of the retaining wall where the two are nearest together?

MR. COLLINS: That is not the south line, it is the east line of the retaining wall, don't you mean?

MR. COULT: Yes, I mean the east line, at the southwest corner of the plot to the east line of the retaining wall?

THE WITNESS: It scales fifteen feet.

Q. What is the distance in the level between the top of the retaining wall and the level of the ground at the shaft house?

MR. COLLINS: I don't quite understand that.

THE WITNESS: The bottom of the heading to the collar of the shaft?

Q. From the top of the retaining wall to the level of the ground at the shaft house?

MR. COLLINS: Do you mean a diagonal line?

MR. COULT: It must be in elevation.

MR. COLLINS: You are asking for the difference in elevation between the top of the retaining wall and the collar of the shaft?

MR. COULT: Yes.

THE WITNESS: 15.1 feet, in Section B.

Q. If earth were placed between the shaft house and the retaining wall and allowed to fill in there until the earth came up all the way to the edge of the retaining wall and to come to rest there, what would be the heighth of the fill?

THE COURT: On the shaft side?

MR. COULT: On the line of the Gumaerd plot front.

THE WITNESS: That is the fifteen feet mark I just gave you.

Q. Yes. It would be just ten feet wouldn't it? A. Fifteen feet I think I said.

Q. I say, the height would be just ten feet would it not? A. Yes, sir.

Q. Just exactly ten feet wouldn't it? A. Yes, sir.

Q. So that that retaining wall is not high enough to hold up the surface of the Gumaera plot by ten feet, if earth is used to fill in there, is it? A. The retaining wall aint high enough by ten feet?

Q. Yes. To hold up the surface of the Gumaerd plot if earth is used for a filler? A. It is not high enough by ten feet?

Q. Yes.

THE COURT: That is, it would be up ten feet above the point that you have just indicated that the earth to be filled in would be.

THE WITNESS: No, sir; it would not be ten feet.

Q. How much would it be? A. It would be around five feet.

Q. It is five feet too low to support the surface of the earth if earth were filled in there, is it not? A. In regard to that corner of the building plot.

Q. Now, just take the other corner and tell us how much higher it would have to be there? A. The other corner of the building plot?

Q. Yes. A. The east corner?

Q. Yes. A. Well, there is no cut there.

Q. First you took the corner nearest the track? A. Yes. That one right there.

MR. COLLINS: That is the southwest corner.

Q. Going along parallel with the railroad track along there, take the corner in the other direction? A. That corner (indicating)?

Q. No, of the shaft house, opposite the shaft house? A. In Section A.?

Q. Yes, that is on Section A. I can put it this way. The difference would not be very great, would it? A. No, sir.

Q. Probably less than a foot? A. Probably, yes.

Q. Look at this photograph which has been marked Exhibit P-6 again and tell me what it is that you have represented on that map which appears in this photograph between the line of the shaft house and the top edge of what you call a cut to the south of the track? A. Cribbing. Is that what you mean?

Q. Yes, that is what I mean. It is cribbing is it not? A. Yes, the cribbing.

Q. Do you remember saying that it was level ground a little while ago? A. Do I remember saying what was level ground?

Q. That space between the top of what you call a cut and the shaft house? A. I do not quite catch that?

Q. That little space that you measured off there, I think you said a while ago that it was level ground? A. I said it was between the shaft house and the top of the crib, yes. Did you mean that? Yes, I did say that.

Q. Between the shaft house and the top of the cribbing? A. Yes, sir; I said that.

Q. Is there anything between the shaft house and the top of the cribbing at all? A. Anything between the shaft house and the top of the cribbing?

Q. Yes. A. Yes, sir; there dirt, material, stones and material filled in behind the cribbing.

Q. Filled in behind the cribbing? A. Certainly.

Q. How wide is it? A. I don't remember at all. It is scaled here.

Q. Can't you tell without referring to the map? A. Not in my mind, I don't remember.

Q. Does your map show where the cribbing is at all? A. Yes, sir.

Q. Point out the cribbing on the map? A. (The witness indicates.)

Q. Is that on the south side? I am talking about the south side.

MR. COLLINS: The cribbing he has been talking about is on the west.

THE WITNESS: Here is the cribbing on the south side, and the cribbing on the east side of the shaft.

Q. Does your map show any cribbing on the south side? A. Yes, sir.

Q. Is that what you have indicated between the top of that diagram on what you call the cut and the shaft house? A. That is the broken line, between, for instance, Section C., the broken line between the elevation 111.6 and 96.5, is cribbing.

Q. I will come around and show you just exactly what I mean. Right here there is a crater like looking thing do you see that? A. Yes, sir.

Q. And that is the place where the earth is removed is it not? A. That is a slope, yes.

Q. And you have got a little space in here between the shaft house and the top of that slope? A. Yes, sir.

Q. Now, I want to know what that represents on the map? Does that represent cribbing or loose earth or what? A. It represents land at this point, at the point for instance where the letter H. is, your shaft house, there is no cribbing there, the distance between the top and that brown line is dirt.

Q. Did you measure around that shaft house and between there and the top of the excavation? A. I took enough measurements to make that map.

Q. Have you got your field book here? A. Yes, sir.

Q. Get your field book and show me the measurement you took between that shaft house and that excavation, the top of that excavation. A. I won't say I took measurements between the top of the shaft house and the top of the excavation, I may have taken it from the survey line.

Q. Look at it. A. (The witness refers to his book.)

Q. You have been referring to your book for some time in order to find what I was asking for, do you think you can find it if you have a chance to go through your books at leisure? A. Yes, probably I could plot some of the work over again to reproduce it.

Q. What would you have to plot it over again for? A. Because the base lines are the main things in making a survey and the distances are taken from those base lines, and to get the distance between two points would take further calculation.

Q. Is it not quite possible to put in that curved line around there from your memory of that situation as it was when you located it? A. Not altogether. I have located some points on the sketch, but you don't take a distance every five feet.

Q. Have you located any points to give you the curve of that so-called cut here? If you had that maybe you would be able to find it in your field books, wouldn't you? A. I might find it in the cross sections and I might find it in the transit notes.

Q. You cannot find it, however, conveniently, can you? A. No, because this map is not drawn with a view to presenting all those figures.

Q. Will you please look through your notes and see if you can find anything that will help you

locate the top of that excavation, whatever it is, to the south of the building shack? A. At what point?

Q. At any point to show the distance between the shaft house and the top of that cut, will you do that? A. Yes.

MR. HOBART: On the south side do you mean?

MR. COULT: On the south side?

MR. COLLINS: He says cut.

Q. What is that to the south side, a cut or slope or cavein or what do you call it? A. Why, it is a cut.

Q. You located the position of the shaft house by surveys you say you had taken from a station on the track? A. Yes, sir.

Q. When you first went there? A. Yes, sir.

MR. COLLINS: The shaft he talked about, not the shaft house.

Q. Was it the shaft or the shaft house that you located? A. I located both.

Q. You could not see the shaft through the shaft house, could you? A. Of course not. I cannot see through a board.

Q. So that the point that you took on the building about the shaft was a point on the shaft house wasn't it as you approached it from the outside? A. I don't quite get that.

Q. Well, we will make it different afterwards; anyway, you started at a point on the railroad? A. Yes, sir.

Q. That was what station? A. 41. plus something. It was 86.4 feet from station 41.91.

Q. Can you point that out on the map? A. About in there (indicating). That is about three-

eighths of an inch toward the left on the map from where it is marked 41.90.

Q. And from that point you ran a course where first? A. West.

Q. How far, course and distance? A. I turned an angle of eighty-nine degrees and fourteen minutes and went 65.6 feet to a point which will bring you west of the main track and opposite the shaft house.

Q. Then what did you do? A. Then I set the transit at that point and sighted the distance to the point I had just left on the rail there to show that this other line was right, and then I turned an angle of fifty-six degrees and forty-six minutes.

Q. Never mind the courses and distances now; how many separate courses and distances did you run before you got to the shaft house? A. One more, and that would only be one, one and the course from that one brought me in to the shaft house.

Q. I mean, all together, how many separate course and distances did you take from your starting point until you located this point at the shaft house? A. Well, the end of the second line brought me into the shaft house, into the collar.

Q. What did you do that for? A. To locate the collar.

Q. What did you locate the collar for? A. To determine the point at which to drop the plumb line, and to locate it.

Q. What did you want to locate it for? A. Why, to put it on this map.

Q. How many other points did you locate from the starting point that you had taken in giving this location, many others? A. No others.

Q. You go from point to point don't you? You

locate one point from another? A. We locate one point and then make locations from that one and then go to another one and locate other points from that.

Q. You went through this same operation again at what time? A. July twenty-first, 1916.

Q. And running the same courses and distances there you again were brought to the collar and the shaft? A. Yes, sir.

Q. How did you know you came to the same point on the collar that you had before? A. Why, the distances proved that I came to the same point on the collar, that I had before, otherwise I would not have been on the collar, I would not have been on the same line that I was on before.

Q. You are working this out in inches, aren't you? A. Yes, sir.

Q. To show that the shaft could not have changed its position in between the time of the first and the time of the second survey? A. Yes, sir.

Q. Now, I am asking you, how do you know that you came to the same point on the collar the second time that you did the first?

MR. COLLINS: He took the same angles and the same distances and it had to be so, didn't it?

A. Because I got the same dimensions from those points as I did in the first one.

Q. What this amounts to is this, is it not, that in 1914, you took a survey, starting from a certain point and running certain courses and distances, and you found the collar and the shaft? A. Yes, sir.

Q. In 1916 you started at the same point and took the same courses and distances and came to the collar and the shaft again? A. Yes, sir.

Q. And that demonstrates to you that the posi-

tion of the shaft could not have changed at all between the first and the second survey, does it? A. It demonstrates to me that the shaft had not changed, or at least had not changed between the two dates at which I made those two separate surveys. It might have changed any other time, but it did not change on those two dates.

Q. Not at all? A. No, sir.

Q. It did not make any difference where on the shaft you came at the end? A. Yes, it did.

Q. How did you locate that point? A. I am telling, in the first survey I located certain points.

Q. Did you make a mark? A. Yes, sir; I made a mark.

Q. Did you find that the second time you went there? A. Yes, sir.

Q. What kind of a mark was it? A. A tack.

Q. A tack? A. Two tacks. Surveyor's tacks.

Q. The second time you came there you came exactly on those tacks? A. Yes, sir.

Q. That did not surprise you any? A. I don't know. It might have surprised me and might not have.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Did you measure from the tacks to the corners of the shaft the second time? A. Yes, sir.

Q. And were the measurements the same as they were before? A. Yes, sir.

Q. Did you use the same angles the second time as you did the first? A. Yes, sir.

Q. And did you use the same distances and the same sights and the same locations? A. Yes, sir.

Q. And you put the plumbline down the same place on the second occasion as you did the first time? A. Yes, sir.

Q. Is that the recognized scientific method of

determining whether you are coming out at the same point when you want to check up your surveys? A. I believe it is. I don't know how else you could do it.

Q. It is a way commonly adopted by civil engineers is it not? A. Yes, sir.

Q. And it always has been that way ever since geometry was started wasn't it? A. I believe so.

Q. Do you know of any other way by which it could have been done accurately? A. No. You would have to go through it in some way.

MR. HOBART: I will recall this witness later on that point that distance counsel wants him to find.

MR. COULT: Yes, provided he finds it.

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ALBERT G. ISAACS, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Where do you live? A. In Scranton, Pennsylvania.

Q. What is your occupation? A. Engineer and contractor.

Q. How long have you been in that line of business? A. Twenty years.

Q. Have you had to do with the construction of mining shafts? A. Yes, sir.

Q. To what extent? A. Oh, possibly a hundred different shafts.

Q. That has been your business, has it, constructing mining shafts? A. Yes, sir; specially.

Q. In Pennsylvania, and elsewhere? A. Yes, west New York State.

Q. Did you examine the mining shaft which is in question in this case? A. I did.

Q. When did you make your examination? A. I think it was July twenty-first 1916.

Q. Did you observe that the shaft was out of plumb for a distance such as has been mentioned here, about thirty feet? A. I checked it over.

Q. Did you find it was out of plumb for a distance? A. Yes, sir.

Q. Have you prepared an estimate of the cost of repairing that shaft? A. Yes. I did. Using the old timbers, do you mean?

Q. Have you prepared it using the old timbers and also using the new timbers? A. Yes, sir.

Q. Will you give it to us both ways then, if you please? A. I prepared an estimate of $721., by using the old timbers and putting the shaft back in its original condition.

Q. How much for the using of new timbers? A. One thousand dollars.

Q. That, of course, is over this distance of thirty feet which it is out of plumb? A. Yes, sir.

Q. In regard to the original construction of shafts of this shape, you have said you have constructed a great many shafts, is there any average or ordinary price based upon the depth of the shaft? A. Well, that depends, somewhat on the size of the shaft.

Q. The size of this shaft, seven feet two in one direction and four feet something in the other? A. Well, there is under those particular conditions in that we don't get those conditions very much around coal mines.

Q. What would be the average cost per foot, if that is the way of reckoning, for the original construction of such a shaft?

MR. COULT: The witness says he has not had any experience with similar ones under similar conditions to this shaft, to the conditions existing here.

THE COURT: I did not understand he went as far as that.

MR. HOBART: Would you like to cross examine him?

MR. COULT: Yes.

BY MR. COULT:

Q. Have you had any experience in sinking shafts? A. Yes, sir.

Q. In Pennsylvania? A. In Pennsylvania and New York State.

Q. In coal regions? A. Yes, sir.

Q. Did you ever work outside of coal mining property? A. Yes, sir.

Q. Are you familiar with the character of soil at Guymard? A. Well, I looked it over, yes, I looked it over carefully.

Q. You looked over the top of it did you? A. Yes, and I also went down the shaft.

Q. Going down the shaft you could not tell what was beneath the surface? Could you see? A. No, no. It was cribbed all the way down.

Q. You looked at the surface of the ground? A. Yes, sir.

Q. And you looked into the shaft? A. Yes, sir.

Q. That is lined with timber? A. Yes, sir.

Q. You went there for the purpose of examining the condition of the injury to the shaft didn't you? A. Yes, that is what I was there for.

Q. So you don't know what there is below the surface to contend with if you were actually to sink a shaft there, do you? A. Well, I know that the surface conditions run I believe practically the same till you strike the rock.

Q. You do? A. Yes, sir.

Q. The surface condition is very loose? A. Well, it is composed of gravel and clay.

Q. And you think the gravel and the clay ex-

tend all the way down to bed rock? A. Well, pretty much. I think it is pretty much the same material all the way down to bedrock.

Q. How do you know that? A. Well, the evidence, you could see on the sides where they made the cut.

Q. You could see that, could you, in the cut? A. It is of that nature.

Q. It is all sand and gravel down to bedrock? A. I would not say all sand, but generally sand and gravel, and clay.

Q. Down to the rock? A. Down to where the rock starts. It may not be exactly bedrock, it may be some loose rock on top of bedrock.

Q. You could tell where the rock started by going down the shaft couldn't you? A. I could not from my examination, because the shaft is filled with water partially.

Q. You could tell where the cribbing stopped couldn't you? A. No, the cribbing went on down below the water.

Q. Have you had any experience in sinking shafts in soil similar to this? A. Yes, sir.

Q. When you say that you are now referring to a loose soil, all sandy and gravelly down to bedrock?

MR. COLLINS: Clay he mentioned also.

THE WITNESS: Clay, gravel and sand.

Q. Down to bedrock? A. Yes, sir.

MR. COULT: Go ahead.

BY MR. HOBART:

Q. What is the average cost per foot of constructing a shaft of this size in such material? A. I should say twenty-five dollars a lineal foot would be a very liberal price for this shaft.

Q. Is that applicable to construction down to

bedrock? That is to say, does bedrock cost more the construction through bedrock? A. You mean, to go through the solid rock?

Q. Yes? A. Oh, yes, that would cost more money.

Q. So your estimate of twenty-five dollars per foot is limited to the soil down to the point where bedrock begins? A. Yes, sir.

Q. And, after you started to go through bedrock what would it amount to? A. Well, that would depend somewhat on the character of the rock.

Q. If it were red sandstone or sandstone below? A. That would run all the way from fifty dollars up to seventy-five dollars a yard.

MR. COLLINS: You mean for blasting?

THE WITNESS: Yes.

MR. COLLINS: To be added to the twenty-five dollars a yard or not?

THE WITNESS: How is that?

MR. COLLINS: You don't add that to the twenty-five dollars, do you?

THE WITNESS: Oh, no.

MR. COLLINS: How much would it be a foot with that additional feature?

A. I could not give you an estimate on the rock because I don't know the nature of this particular rock.

MR. COLLINS: I don't quite get it in my mind. It is not all timbered below when it goes through the rock?

THE WITNESS: Why, they sometimes timber it and sometimes they don't, as I understand it.

CROSS EXAMINATION BY MR. COULT:

Q. Suppose the bedrock is quartzite, how much would it cost per lineal foot to drive a shaft through it? A. I don't know that I can tell you that.

Q. Why not? A. Quartzite, we don't come in contact with that very much in the coal regions.

Q. Then you have not had much experience in sinking a shaft under the conditions that are present where the bedrock is quartzite, have you? A. Well, it is usually sandstone, we usually come in contact with sandstone.

Q. What kind of sandstone? A. Oh, it is the ordinary gray sandstone and red.

Q. Is that pretty easy to get out? A. Yes, it is generally very easy.

Q. How much would it cost to get that out per lineal foot for a shaft the size of the one at Guymard? A. I would have to figure on the yardage; we usually figure on how many yards there is in a lineal foot.

Q. Well, can't you do that? A. Sure.

Q. How much do you make it? A. From ten to twelve dollars a foot.

MR. HOBART: You mean from ten to twelve dollars a lineal foot?

THE WITNESS: Yes, a lineal foot.

Q. Do you mean that is cubic yards or cubic feet? Did you give us first per cubic yard or per cubic foot, the cost of cutting out the sandstone? A. I simply figured the cost of this approximately. You cannot figure it accurately, because you have got to take in so many conditions that you have got to get by observation. You cannot go and figure on the thing just offhand. You have got to go through and examine your proposition and make a detailed investigation of it.

Q. What figuring were you doing? A. I am figuring now the lineal foot depth.

Q. Through what? A. In rock.

Q. What were you figuring from, what was your basis? A. The size of the shaft, do you mean?

Q. You are figuring on cubic yards, aren't you? A. On lineal feet.

Q. You were reducing something to lineal feet, I don't know what it was? What was it? Cubic yards or cubic feet? A. I was taking the shaft and estimating the number of cubic yards and, of course—

Q. How much do you say it would cost a cubic yard? A. Well, I figured here approximately seven dollars.

Q. In every foot, every lineal foot, there is 2.4 cubic yards, aren't there? A. Not as I figure it, no.

Q. What did you figure? The outside measurements of that shaft are seven by nine, aren't they? A. No, sir.

Q. They are not? A. Not as I have it here.

Q. What do you have it? A. I took it five by eight.

Q. Well, if they were seven by nine then there would be sixty-three cubic feet to every lineal foot, wouldn't there? A. Yes, sir.

Q. And twenty-seven cubic feet to a cubic yard? A. Yes, sir.

Q. That would be 2.4 cubic yards for every lineal foot and at seven dollars that would be pretty nearly seventeen dollars a lineal foot, isn't that right?

MR. COLLINS: That is, if you take it seven by nine.

Q. Wouldn't it? A. Yes, sir, approximately.

Q. That is approximately the cost of cutting rock, is it not? A. That would be the cost of doing the job on that basis.

Q. Putting in the necessary timbering, too? A. No, that would not include any timbering.

Q. That would be extra, wouldn't it? A. Yes, sir.

Q. And all incidentals such as equipment, picks, shovels and powder? A. No, you would include your equipment in that.

Q. You do include the equipment? A. Yes, sir.

Q. Do you know what quartzite is? A. Why, I do to-day, yes, sir.

Q. Quartzite would be a good deal harder to take out than red sandstone, wouldn't it? A. Well, that depends.

Q. Depends on what? On whether it is quartzite or not? A. No, no. Sometimes the rock is of such a nature, so soft, that it costs more to take it out than when it is hard. For instance, on those tunnels in the Hudson River, I figured there the lineal feet, I have forgotten the exact size, whatever it was it come to pretty nearly four hundred lineal feet of that shaft and due to the nature of the rock it was very different.

Q. Sometimes it is very expensive, is it not, to take out rock? A. Sometimes. It depends on your rock and your conditions you have.

Q. And you have not any idea from what you saw of that mine of just what the conditions were below bedrock? A. Well, I know from that country, I sunk shafts in New York State.

Q. You don't even know what kind of rock it was? A. No, I did not examine it. I could not get down. I knew the general nature of it, though.

HARRY R. COMFORT, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are employed by the Railroad Company as master carpenter, I believe? A. Yes, sir.

Q. And you have been how long? A. About twelve years.

Q. How long have you been a carpenter? A. Well, I have worked at the work about twenty-six or twenty-seven years.

Q. Have you examined this shaft at Guymard? A. I have been in the shaft and done some shoring work there, but I took no measurements and made no particular examination of it no more than to make it safe for the men to go down there.

Q. You saw the size of it and the general construction of it? A. Yes, sir.

Q. Have you made an estimate of what it would cost to repair the shaft, assuming that it is out of plumb for a distance of thirty feet from the top, using new timber? A. I have.

Q. What, in your opinion, would it cost? A. Approximately $604.

Q. Is that your estimate of the cost as of the present time? A. Yes, sir.

Q. That is higher than it was some time ago? A. Yes, sir.

Q. Prices have gone up in the last few months? A. Prices of material and prices of labor have advanced.

Q. Have you observed the conditions in the cut in the vicinity of this shaft?

MR. COLLINS: The railroad cut you are talking about?

Q. I am speaking of the railroad cut, yes? A. Yes, sir.

Q. Have you observed particularly the conditions at the culvert about a hundred and fifty feet to the north of the shaft? A. Yes, sir.

Q. There is a culvert there at that point, is there not, right across the railroad? A. Yes, sir, a pipe culvert through the main line Erie tracks and under the Erie and Jersey line.

Q. What is the nature of that soil at that point? A. At the points where this culvert goes under the Erie and Jersey it is in rock.

Q. What kind of rock? A. Red sandstone.

Q. Is this red sandstone on the surface at that point or is it below the surface? A. Very near the surface.

Q. How near? A. Within two or three feet.

Q. Were you there when this culvert was being constructed? A. I was there at different times when it was being constructed.

Q. Did you observe the conditions of the soil and of the rock? A. Yes, sir.

Q. Were you present at this shaft in the month of December, 1914, at the time that it was being dewatered? A. Yes, sir.

Q. In order that some examination might be made of it? A. Yes, sir.

Q. Did you have anything to do with dewatering it? A. Yes, sir, I had charge of the water.

Q. How was it done, what apparatus did you use? A. Why, what is known as a deep well pump.

Q. Did you have a pipe put down the shaft? A. Yes, sir.

Q. How long was the pipe? A. Approximately eighty-two feet.

Q. What was the diameter of it? A. Eight inches.

Q. Was that fastened to the pump? A. Yes, sir.

Q. How did you run your pump? A. The pump was—what is the question?

THE COURT: How did you run the pump?

THE WITNESS: By steam.

Q. Was there a steam engine that you used with Mr. Gumaer's permission or did you have another steam engine? A. No, sir, we put in a pump for that purpose.

Q. How was that pipe kept in place? A. It was fastened or suspended from the bottom of the pump and the pump was resting on the timbers.

Q. What was the pump supported on? A. On the timbers.

Q. What timbers? A. Across the top of the shaft on the ground.

Q. Resting on the collar of the shaft? A. Partly on the collar of the shaft and on the ground, each side of the collar of the shaft.

Q. Do you know what the pipe weighed? A. The weight of the pipe was 2263 pounds.

Q. That pipe was left there for a few weeks, was it not? A. Yes, sir.

Q. And taken out in January, 1915? A. I believe some time in January it was taken out.

Q. What was the weight of the pump? A. About two thousand pounds or a little more.

THE COURT: All this weight was resting on the shaft?

THE WITNESS: On the collar of the shaft and on the ground right close to the collar of the shaft.

Q. Have you included in those weights the weight of the water in the pipe when the water was pumped up? A. No, sir, there is the additional weight of the water there approximately seventeen hundred pounds.

Q. What was the total weight that was supported on the collar of that shaft at the time of that operation? A. About six thousand pounds.

CROSS EXAMINATION BY MR. COULT:

Q. Don't you know that while that pump was there the collar of the shaft subsided very nearly four inches? A. Subsided?

Q. Yes? A. What do you mean by subsiding?

Q. When down on the side where the pump was? A. Some of the timber crushed out from under there and the collar of the shaft might have tipped.

Q. That is what you saw go down on that side, was it? A. Yes, sir.

Q. You recall that it went down? A. Yes, sir.

Q. You were a little worried about the condition of the collar? A. Well, I sure was. For a few minutes.

Q. You were afraid the whole thing was going down the cut, weren't you? A. No, I was not afraid of its going down the hole.

Q. Where did you think it was going? A. For the pipe went to the bottom.

Q. You figured the cost of putting in new timber in this shaft, didn't you? A. Yes, sir.

Q. That is, you just took the measurements of the old timber that was in there, and the cost of procuring such timber again and the expense of laying it in the shaft, that is all your figures are? A. That is practically all.

Q. Taking out the old timbers and putting in new timbers? A. Yes, sir.

Q. That was about how much? A. $604, approximately.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Did you have charge of taking this pipe out after you had finished pumping? A. I sent men there to remove the pipe. I was not there personally, but I had men remove the pipe.

Q. Do you know whether you had to use the head frame in order to pull the pipe out? A. They had to use the head frame to remove this pipe, yes.

Q. What was the weight upon the head frame at the time the pipe was removed? A. That would be approximately thirty-eight hundred to four thousand pounds.

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The Court then took a recess until One O'clock this day.

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AFTER RECESS.

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ROBERT HOPPEN, JR., recalled as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION:

THE COURT: Have you the information which Judge Coult asked for?

THE WITNESS: I have not exactly the information. I have the notes to which I alluded to, by which I located the bank as shown there but not in the relation that Mr. Coult wants them.

BY MR. COULT:

Q. What have you got there? A. I have the survey lines and at certain stations on that survey line I took measurements to the top of the bank.

Q. What are those stations? A. Station three, for instance, the top of the bank, the top of the bank to the road 40.8 feet, station 3 plus 61.5, the top of the bank to the road, 52 feet.

Q. Where was the edge of the shaft house from that point? A. That is what I say without elaborate calculations I cannot give you the distances that you ask for in the relations which you ask for.

Q. In other words, there is nothing that you have before the Court and there is nothing that you can show us that will show where the top of the bank is from the shaft house? A. No, not direct measurements.

Q. Did you make any more elaborate calculations when you made that map? A. I did not have to make calculations when I made the map. I just drew out the base lines and calculated from the base lines and the notes taken.

Q. There is nothing that you can give me out of your calculations to show the difference between the top of the bank and the shaft house? A. Not out of my survey, no, sir.

By Mr. Hobart:

Q. Is there anything else there from which you can get that information? A. By scaling.

Q. Give it to us by scaling? A. The map is properly plotted and we can show it just the same as a calculation.

Mr. Coult: The witness has done that already.

The Witness: This is from the shaft house to the top of the bank. At what point on the shaft house?

Q. Take the centre of the southerly side of the shaft house? A. That scales about fourteen feet.

Q. Now, take the centre of the southerly side of the shaft, from that point to the top of the fill, or the beginning point of the fill, the point where the fill and the cribbing join each other? A. About fourteen feet.

By Mr. Coult:

Q. In doing that you are simply telling us what the map shows, aren't you? A. Yes, sir.

Q. I could do that just as well as you could, if I understood the scale of the map and had a scale in my hand, couldn't I? A. I presume you could.

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Dr. John H. Banks, sworn as a witness on behalf of the defendant, testifies as follows:

Direct Examination by Mr. Collins:

Q. Where do you live? A. In New York City.

Q. What is your age? A. Fifty-six years.

Q. What is your profession? A. Mining engineer.

Q. How long have you followed that profession? A. For thirty-three years.

Q. How extensively? A. Continuously.

Q. Have you had a large experience? A. Yes, my entire practice has been in that direction and in metallurgical practice.

Q. Has a part of your profession been the valuing of mining properties? A. It has.

Q. Does that or not involve knowledge of geological strata? A. Yes, and the geological aspects have to be treated in connection with almost every valuation of mining property.

Q. Are you familiar with the vicinity of Guymard where this shaft that is being talked about in this case is situated? A. I am generally familiar with it.

Q. You have been present during all the trial? A. I have.

Q. Describe briefly the geological formation on that hillside and down into the valley where the cut is? A. The formation is a bedded formation consisting of alternating beds of strata of salicified shale and sandstones and limestones, so far as I have observed it.

Q. Are they upright or flat or tilted? A. They are inclined at an angle of about thirty degrees, tipping to the northwest.

Q. Are there portions where the upper areas are eroded, have been eroded by glacial action or by water? A. Yes, on the elevations, on the hillside, for example, and on the top of the hill some of the overlying strata that were formerly there have been eroded away, removed.

Q. As to what kind of stone? A. Well, the limestone, which is in evidence now to the west.

Q. To the west of this cut by the railroad? A On the west side of the depression or valley formerly extended over the formation now exposed on the hill, that has been removed and some intervening strata of sandstone and shale have also been removed on the higher ground.

Q. And does that sandstone remain in the lower level where the cut is? A. Well, I presume it must be there, yes.

Q. Did you go down the shaft of Mr. Gumaer's company? A. I did.

Q. And go through the underground workings? A. Yes, sir.

Q. And did you examine the character of the walls of rock down there? A. Yes, sir.

Q. What was it? A. I took some pieces of rock for examination and found that the rocky material associated with the ore in the vein, the so-called vein matter, is quartzitic rock, you might call it

quartzite, but some rock I examined was salicified shale.

Q. Is that what has been spoken of by witnesses for the plaintiff as bedrock in that shaft? A. Perhaps so. It happens to be the bedrock at the shaft. It happens to be the rocky material under the gravel.

Q. What they would call bedrock at the shaft after they got through the gravel is what you call— A. A salicified shale.

Q. That is the rock that has been spoken of as the bedrock of the shaft? A. Yes, sir, as bedrock at the shaft.

Q. Whereas down in the cut you might come to a rock before you would reach that point of bedrock? A. That would be whatever the intervening strata happened to be between the limestone which shows clearly at the surface to the west of the mine structure and the hill to the east. I presume it would be, I have seen at other points, sandstones, further to the north, and I presume some of the sandstones would be found in the intervening space between the limestone and the other.

Q. You have heard the witness Norton speak about red sandstone as the bedrock on which the retaining wall of the cut was put, you heard him tell that, did you? A. Yes, sir.

Q. And you heard Mr. Comfort this morning testify to seeing some of that sandstone in the culvert a hundred and fifty feet north of the shaft? A. Yes, sir.

Q. Would that be in accordance with your knowledge of the way the geological formations are to be found in that region? A. Yes, that condition would fit in very well with what I should expect.

Q. So that there might be a red sandstone

down in the cut where the wall is located and be none up on the hillside where the shaft is cut because of the erosion in the past ages? A. Yes, sir.

Q. Well, now, you were down in the shaft at the foot of the shaft and went through the crosscut and along the vein, and did you look over the ore? A. Yes, sir.

Q. Tell the Jury what you found? A. I found at the intersection of the crosscut and the drift which follows the line of the vein, I found at the angle formed by the continuation of the crosscut beyond the drift on the vein and the drift itself, an occurrence of galena. I also found more or less galena scattered along the length of the drift which follows the direction of the vein on either side of the crosscut.

Q. What is galena? A. Galena is the sulphide of lead.

Q. Proceed? Were the evidences that you found there of this ore continuous masses or scattered? A. So far as I could determine scattered, with the exception of what I would call a pocket at the intersection of the crosscut and the drift referred to, the balance seemed to be scattered in comparatively small particles or occurrences. I found no body of any magnitude.

Q. What do miners mean when they speak of a body of ore in sight? A. As used in the valuation of mines, ore in sight really means ore that can be measured, and it is understood to be ore accessible for examination on three sides.

Q. Did you find anything of that kind down there? A. Well, the character of the development work is not such as to open ore up in that way. You see, the present workings are all on one level and immediately under the overlying wash, so that you could not expose any quantity of ore

above those workings, and since no development has been done below those workings, of course, you have no data to figure on ore in sight.

Q. Was there anything to indicate to you that there was any body of ore down there? A. My impression was that the ore was of limited extent. The character of the workings, of course, are not such as to enable one to give an opinion of the value of the property, but if an engineer was called to pass on what he could see there, of course, he would have to pass unfavorably.

Q. Did you hear Mr. Van Mater testify? A. Yes, sir.

Q. Did you hear him speak of what he called crevice ore? A. Yes, sir.

Q. What do miners understand by that term? A. Well, crevice ore—I would say that a crevice as distinguished from what is usually referred to as a true fissure is perhaps expressible in this way; that the so-called true fissure is an extensive fracture across the rock formation, and usually it is accompanied by more or less movement which results in the polishing of the walls, known as slick insides, and the grinding away of some of the wall rock in the formation of what is called the gouge, while the so-called crevice is usually a fracture without movement and of a more limited extent and frequently enlarged by the passage of ground waters rather than by the movement of the two walls upon each other.

Q. What do you use in your prospecting? What did you use in your prospecting in this mine to see what ore you could find? A. A Small pick.

Q. You picked it at different places? A. Yes, sir.

Q. Did you find any deposit of a commercial value? A. Well, I found no deposit there of any commercial extent, it would not be possible to

pass on the commercial value upon what could be seen in the workings.

Q. When was it you went down the shaft? A. On December ninth, 1914.

Q. The water had been taken out in order to allow of your inspection? A. Yes, sir.

Q. And you were one of the commissioners appointed by the Court to go down? A. I believe so, yes, sir.

Q. You and Mr. Van Mater, did you go down together or separately? A. Separately.

Q. When you went down in there did you examine the mine shaft? A. Yes, sir.

Q. Was that one of the main purposes of the trip? A. Yes, I think it was. I understood, really, I was to examine the shaft and also examine the general character of the workings.

Q. Did you do so? A. I did.

Q. Did you notice whether or not that shaft was to some extent out of alignment? A. Yes, sir.

Q. About how much, apparently? A. I estimated it as something less than a foot, and the measurements that were taken by Mr. Hoppen and witnessed by my son on the day I was there I believe make the exact deflection eight and a half inches at the top.

Q. About how far was this deflection down, about how far down did this deflection exist? A. It died out before the bedrock was reached, and the actual measurements show that it practically died out thirty feet from the top, that the deflection was limited to the upper thirty feet.

Q. Were the timbers rotted, some of them? A. Some of them were beginning to rot.

Q. How did you go down? A. We went down the ladder way.

Q. Have you had experience in the construction and repair of mine shafts? A. Yes, sir.

Q. Mine shafts of this nature? A. Yes, sir. Made of crib work? You refer to this style of cribbing?

Q. Yes? A. Yes, I have had occasion to repair such shafts.

Q. Is it possible to repair the alignment of that shaft and the position of the head frame and the shaft house and to leave it in as good condition as it was before it got out of alignment, and leave it safe and workable? A. In my opinion it is.

Q. Have you made an estimate of the cost of doing that using new materials? A. Yes, sir.

Q. What is it? A. I have estimated that the upper thirty feet of the shaft could be brought back into alignment with a new crib work, of new timbers, for a cost of about six hundred dollars.

Q. Will that include the restoration of the head-frame? A. Yes, that would be approximately my figure for that.

THE COURT: You mean that would put it in as good condition as it was for all practical purposes?

THE WITNESS: Yes, I do.

Q. And that is based on the present prices? A. Yes, under present conditions.

Q. The present prices are higher, I take it, than they were in 1910? A. Yes, they are at least twenty-five per cent. higher than what they were.

Q. How would you go to work to do it as a practical matter? A. The simplest plan, in my opinion would be to begin at the point of deflection, thirty feet in depth—

THE COURT: And work up?

THE WITNESS: Yes, work up.

Q. With a platform? A. With a platform.

Q. Taking out the old timbers and putting in the new timbers? A. Yes, with a platform to stand on and to hold back all the earthy material that might tend to come down.

Q. Mr. Tonking had an idea that that would be dangerous or impracticable, he said that that would be impossible? A. I cannot see any ground for such a statement, because it is a simple matter to support the crib work I think; ordinarily it does not need any support beyond when it gets from the pressure of the surrounding material.

Q. You have actually done it in fact? You have had actual experience in it and have tried it out and know from actual experience? A. Yes, sir.

Q. And you have in fact repaired shafts that way? A. Oh, yes, that form of construction is very common in the southern states in their small prospecting shafts and it is a frequent thing to find some of those old shafts that have to be reconstructed, and that is a very common way of fixing them up.

Q. Can that be done also from the top if you want to? A. It can be done from the top, yes.

Q. Which is the preferable way? A. I should prefer to start from below.

Q. To get down at the bottom and work up? A. Yes, sir.

THE COURT: After you did that, is there sufficient support around the sides to maintain that in the condition you would have it in when you replaced it?

THE WITNESS: There is, when the shaft is completed?

THE COURT: Yes?

THE WITNESS: I consider it so under present conditions. The retaining wall, supplemented by the crib work reduce the top slope of the filling to less than the recognized safety slope, and with those retaining structures and the present slope of the surface I should consider the present filling as perfectly safe.

THE COURT: You would not need any cement walls in order to maintain it?

THE WITNESS: Oh, no, I do not consider them necessary at all.

BY MR. COLLINS:

Q. They are not necessary at all? A. No, sir.

Q. On the west there is a retaining wall, one hundred and twenty-five feet long and you have heard it described here, haven't you, along the cut? A. Yes, sir.

Q. And it is not parallel with the shaft but it deflects toward the east so that it is rather nearer the property when you get south than it is as you progress north? A. Yes, it strikes diagonally with respect to the direction of the shaft.

Q. Does that wall afford support not only to the west, but, to some extent, as it progresses toward the south, to the south of the shaft? A. My recollection is that the southern end of the wall actually extends to about the line of projection of the side of the shaft to the south. That is, I think it extends a trifle beyond—

Q. Yes, the map shows that— A. Yes, the maps show it.

Q. My question is, whether that in itself, that wall, is some protection from the south as well as the whole wall is from the west? A. Yes, it is.

Q. You say that that wall, that retaining wall, with the crib work that has been erected between

the top of the wall and the shaft, and the slope from the south together with this retaining wall are sufficient to give support to that shaft? A. I so consider it, yes.

Q. Of course, I take it, that there must be good filling used in behind the retaining wall? Had that been done, did you notice? A. My recollection is that it was quite completely filled in at the time I was there.

Q. So that the condition was not as shown on this photograph, was it at that time? A. I have not seen the photograph.

Q. I show you this photograph Exhibit P-6, had there been filling in down there after that photograph was taken, supposing it to show the correct representation when it was taken? A. Yes. There was no such amount of exposure of timbers and sides behind that wall as I recollect it.

Q. This cribbing, as I understand it, is on the west side of the shaft and on the south side? A. Yes, sir.

Q. That cribbing can be restored if it decays? A. Oh, yes.

Q. How long would the restoration take that you have in mind, if it were to go out now, if you were to go there now in the condition of things as you saw it in December, 1914, and proceed to restore that shaft to a workable condition, do whatever it is necessary to do to make it so, including your filling in, as might be needed, how long would it take you to do it? A. Why, I think, with everything on the ground to begin work it could be done within two weeks.

CROSS EXAMINATION BY MR. COULT:

Q. Your estimate was about six hundred dollars you say? A. Yes, sir.

MR. COLLINS: Did that include any filling

in, if any was needed, or only for the shaft work?

THE WITNESS: It included the restoration of the shaft proper. I did not include any filling, because I did not suppose that any material amount was necessary.

Q. You knew that no filling was necessary didn't you? It was not a case of supposition? A. I assumed that virtually none would be required.

Q. Why did you estimate that? A. That is my recollection of the condition when I was there.

Q. And your recollection of the condition when you were there is quite different from the condition which appears in this photograph Exhibit P-6? A. Yes, sir.

Q. And if the condition actually was the way this photograph shows it, then your conclusion as to the work necessary to be done on the shaft might be quite different, might it not? A. This would lead me to think that some of the surface back of the crib work was missing, that would have to be taken care of. It does not show it very clearly, but I should infer that to be the case from that photograph.

Q. And there is quite a considerable tilt to the roof of the shaft house too, isn't there? A. Yes, sir.

Q. It looks as though that structure was inclined quite considerable towards the railroad? A. Yes, it is inclined towards the railroad.

Q. And did your estimate of six hundred dollars include the cost of putting new timbers in the shaft? A. Yes, sir.

Q. Just as you would repair any other shaft? A. Well, of course, there are many ways of repairing. I estimated on placing the timbers as they stand on the shaft.

Q. I mean, the fact that this shaft is claimed to be out of alignment, or might be out of alignment so that it might be in a somewhat dangerous condition by reason of the falling away of the earth on one side don't make a penny's worth of difference in the amount of the estimate which you made for repairing the shaft, does it? A. Well, the present condition, or the condition in which, if I were to do the work, I would expect to find the shaft, is not dangerous to the restoration of the shaft. That is, it is not dangerous to those who perform the work of restoration.

Q. Instead of giving an answer you are giving me a reason for your answer. I ask you if it is not true that the fact that the support might be gone on one side of this shaft does not make any difference in the amount of your estimate of repair? In other words, the cost would be just the same as if the surface were all there and there were earth on every side? A. Well, as I say, as I recollect it, the earth was there.

Q. Then, in other words, your estimate of the cost is just the same as if you were to retimber this shaft, this particular shaft, just as though the surface of the soil was in its original condition before the slide? A. Yes, sir.

Q. So that your estimate is an estimate for retimbering? A. Yes, sir.

Q. And that retimbering is confined to thirty feet of the shaft, the upper part? A. Yes, sir; the upper thirty feet.

Q. That is a very simple matter, is it not? A. Quite so.

Q. Anybody who has had any practical experience in mining and the sum of six hundred dollars would not have had any trouble at all to make such repairs as you say were necessary? A. I think not.

Q. And you think that such work could have been done with safety and that the shaft would have been workable after such work were done in the condition that the surrounding soil was at the time you made your examination? A. Yes.

Q. You are familiar with the old workings at Guymard aren't you, generally? A. Well, I can hardly say that, I have merely a crude notion of what they are like, I have been over the surface.

Q. You know where the shafts are, number one and number two shafts? A. Yes, sir.

Q. And you know generally the history of that mine, don't you? A. Well, very crudely. Of course, I have heard considerable about it in its past history, but I don't know that I have ever read much of the operation.

Q. There is a vein in the workings that you examined at Guymard, the new workings, isn't there? A. A vein?

Q. Yes? A. I could not say that there was. There is a vein fracture there, but if you mean by a vein a continuous vein of ore I could not say that there is a mineralization there.

Q. The reason I ask it is in your direct testimony you mentioned the drift running along the vein? A. Along the direction of the vein, by the vein I spoke generally, meaning the vein in the rock. You can have a vein in a rock without having it filled with mineral.

Q. There is a vein in the rock, speaking generally? A. Yes, to be more proper, I should say, a fissure in the rock.

Q. Now, that fissure in the rock extends in the general direction of the number one and number two shafts doesn't it? A. Yes, sir.

Q. And, if ore was taken out of the number one and number two shafts in marketable quantities in years gone by, would not that indicate to you

that there had been a fissure vein in the old workings? A. Yes, I am prepared to believe that there was a fissure vein in the old workings.

Q. And do you think that this fissure that you found in the new workings is a continuation of the fissure vein that was in the old workings? A. Well, apparently so.

Q. This galena that you saw in the new workings, you noticed right at the point where the crosscut intersected the vein in the rock didn't you? A. Yes, sir.

Q. You say there was not any ore in sight because it was not exposed on three sides? A. Yes, sir.

Q. If the workings had been such that the ore that you saw in the crosscut had been exposed on three sides, then you would have an ore in sight, wouldn't you? A. Yes, a certain amount.

Q. And if you did, then you could have told us with some degree of certainty whether the ore was there in marketable quantities, couldn't you? A. Well, only so far as the developments made it possible.

Q. You said something about there being an ore pocket, that pocket was right in the vein in the rock wasn't it? A. Yes, it was in the fissure.

Q. And you could not tell from what you could see there whether that ore extended back through that fissure all the way to the old workings or not, could you? A. No, sir.

Q. And you could not tell whether or not it extended from that fissure on to the west all the way down to the lake could you? A.No, I could not tell beyond the faces of the workings.

Q. Then why did you call it a pocket? A. Because I saw no continuation of it in the western extension of the drift, that is, the extension west of the crosscut.

Q. You could not see it, could you? A. I could not see it.

Q. It was not exposed, was it? A. Well, the drift follows the fissure.

Q. But there was no other cut in the fissure except right where you saw this ore? A. No. But presumably, and so far as I could see the drift was intended to follow the fissure and to develop the contents of the fissure.

Q. And if that was just a mere pocket of ore at the point where this vein was intersected by the crosscut, it was just a chance that the crosscut happend to strike that particular pocket wasn't it? A. Yes, sir.

Q. There might not be another one within miles on either side? A. Well, that might be the case, to be sure, yes.

Q. But, you would not go so far as to say that is the probability, would you? A. No, I would not, under the circumstances.

Q. That working is very near the surface of the bedrock is it not? A. Immediately under it.

Q. And it is not the proper place to put a working for the development of a mine is it? A. No, it is not.

Q. It is more of a prospect? A. Solely a prospect.

Q. To find out whether there is ore or not? A. Presumably.

Q. And the proper way to get at that ore if there is any is to go on down and run out another crosscut and try to find the vein below? A. Yes, you must develop in depth to get into the ore supply.

Q. And you really would not have a fair chance to pass upon the value of a mine of that kind until a shaft had been sunk and another crosscut put in down below where you could find out

what you had, could you? A. No. I should want to see more of the formation at the cut in the present workings, either by such extension or by examination of the old workings.

Q. You did not examine the old workings? A. No.

Q. And, unfortunately, the extension had not got far enough for you to look at it down below— The new shaft was not continued below this cross-cut? A. A short distance, but in a different formation.

Q. So far as you know there might be a valuable deposit of lead ore in that fissure below, might there not? A. Well, of course, I am not in a position to express an opinion on that question.

Q. You are called by the defense? A. Not to value the mine.

Q. But you would not say it has not any value? A. No, I would not take that position under the circumstances.

Q. Did you find any lead carbonate? A. There are some occurrences of lead carbonate.

Q. What does that indicate? A. Oxidation of the sulphide.

Q. Did you find any cellulous lead, lead crystals? A. No, I did not notice any.

Q. You were formerly of the firm of Rickets & Banks? A. Yes, sir.

Q. Do you recall making an analysis of ore for Mr. Gumaerd in May, 1908? A. I only recall it through reference to it on the previous occasion here.

Q. I will show you what is called the certificate of analysis and ask if that came from your firm? A. Yes, sir.

Q. You are, of course, employed by the railroad in this case? A. I am.

Q. And you expect to be paid for your time here to-day? A. I hope so.

Q. And you were paid for your services at the last trial? A. I was.

Q. This analysis that was made by your firm, was made before you had any connection with the Erie Railroad in this case, wasn't it? A. Yes, sir. No. I beg your pardon, this certificate is dated May twenty-ninth, 1908, and as I recall it, my first connection with this case was in 1907.

Q. And that was with the Erie Railroad? A. Yes, sir.

Q. Do you know where the sample of ore that you analyzed came from? A. No, I had no idea as to where it came from.

Q. You just knew that you got a sample of lead ore from Mr. Gumaer? A. Yes, sir.

Q. And you analyzed it? A. Yes, and this is a statement of what was found.

Q. Looking at that statement and refreshing your memory from it, can you tell what the result of that—

MR. COLLINS: He has not said that personally he had anything to do with it?

Q. That is signed by your name? A. Yes, I signed that.

Q. Did you personally make the analysis? A. No, sir.

Q. Was it made under your supervision? A. It was made in our laboratory by our employes.

Q. I will ask you what was the result of the analysis?

MR. HOBART: Is that the one you had before?

MR. COULT: Yes.

MR. HOBART: There is no objection. Offer it in evidence if you like.

MR. COLLINS: Of course, the witness had

nothing to do with it, but he stands by his firm.

MR. COULT: This certificate reads Sample of ore from blank, marked sample number one, on the blank submitted for analysis, contains; Lead 73.85 per cent. Signed Ricketts and Banks.

Q. That means that ore of the quality of this sample would show seventy-three pounds of lead to every hundred pounds of ore? A. Yes, sir.

Q. That would be, of course, a very high grade of ore? A. Oh, yes, that is high grade.

Q. Did you see any such ore as that in the new workings in Guymard when you were down there? A. In a very limited quantity, occasionally a piece that would perhaps assay like that.

Q. Did you take any samples out? A. Only for inspection, not for assay.

Q. Did you take them out of the mine? A. Yes, sir.

Q. And did you take them away with you? A. Yes, sir.

Q. And you did not analyze them? A. No, sir.

Q. Why not? A. I took them more to study the character of the ore and the character of the vein; the assay under those circumstances would mean practically nothing, because while you might take out a piece that might be practically pure galena and give a theoretical assay of pure galena, the quantity requited would be so small that I did not consider it worth while to make any assays. I could judge by the appearance of the ore about what it would assay.

Q. Was the ore that you found in the new workings calciferous ore? A. Well, similar to calciferous ore, I don't know that I could call it calciferous ore.

RE-DIRECT EXAMINATION BY MR. COLLINS:

Q. Was there anything that you saw there that would warrant, in your judgment, the sinking of the shaft deeper and making a new cross cut down and construction of further workings? A. I think I would say that it justified some further investigation.

Q. Further exploration? A. Yes, sir.

Q. But you did not have any indication that would warrant you in saying that it would be so? A. No, there was nothing except the mining chance ahead.

Q. A fissure, as I understand it, or fracture is some place where the rock has been by some geological force disrupted, broken apart? A. Yes, sir.

Q. A crevice, I suppose, is a small one, and a fissure is a large one, and a fracture is the usual term for any fault in the rock? A. Yes, sir, the term fracture would apply to the crevice or the fissure.

Q. Take a fissure, which is the larger, a fissure commonly and naturally, in the course of ages, would be filled up with some kind of substance, I take it, it might be disintegrated rock or it might be dirt, or just vegetable matter or any kind of thing, might it not? A. Where a movement has occurred, generally the fissure is filled with the broken pieces of the wall rock and with a cementing material that has been deposited from the circulating waters. Sometimes that cementing material is one thing, sometimes another, sometimes, perhaps, carbonate of lime or silica or sometimes ore. It varies.

Q. It does not follow that because there is a fissure in the rock that the contents would be ore does it? A. No, that does not follow.

Q. And, if there was any ore in it, it might be in separated fragments and not in a continuous body? A. Well, as a rule the occurrence is irregular in the filling, if there is ore there the occurrence in the ore is more or less irregular and controlled to some extent by the particular circulation of the mineralizing solutions.

Q. It is a very different thing from a vein of ore in solid rock? A. Well, of course, a vein would be in solid rock. And this would be in solid rock too.

Q. I mean a vein of ore in the rock, not in a fissure in the rock, but formed by the forces of nature, a vein of ore with a wall on each side of it of rock, surrounding it?

THE COURT: Deposited there originally with rock?

A. I don't think—

Q. What is the difference between the ore in a fissure vein and the ore in a vein in the solid rock? A. Well, there is not any great difference, no, sir. It is generally a local question or an individual condition. It may be an opening between bedding planes, a bedded formation and fill, just as a fissure would be filled, it is simply a question of conditions at the particular vein as to whether the ore body would be there and as to what the ore body would be.

Q. All veins are not fissure veins are they? A. No, sir.

Q. Will you tell us the difference between a fissure vein and some other kind of a vein? A. Well, a fissure vein, as a rule is looked upon as being a fairly deep-seated vein formation. The extent of the vein usually depends upon the extent of the fracturing and the movement that has

taken place. The vein itself, that is, the ore occurrence in the fissure is wholly independent of the fissure or the forces which produce that fissure. The ore formation is governed more by whether the adjacent rocks which were leached and which furnished the mineralizing substances which later filled that fissure, whether those adjacent rocks were mineral bearing to an extent to make a workable ore body, and whether the circulation of the mineralizing waters was sufficient to produce that end.

Q. In other words, because there is a fissure in the rock it does not follow that there must be any ore in that? A. Oh, no, not at all. You may have a beautiful fissure, with all the characteristics of a fissure and absolutely no ore in it.

Q. Assuming that the shaft, out of alignment as it was, was permanent, got as far as it would go, and that it was that much out of align, and assuming that the timbers were sound, could that shaft in its deflected condition be used? A. Yes, it could be used. Some slight repairs would make it usable. So long as you can raise ore from it, so long as you can still have a free passage for whatever sized ore car or hoisting bucket you use.

Q. And that could be done in that shaft, even if it were out of plumb? A. Yes, that could have been done.

Q. Won't you explain to us—you are evidently a scientific man—about pressure, when and how there is any injury likely to come by pressure. Suppose a hole in the ground and pressure on every side, I take it that nothing can happen, it don't need any protection of any kind, but when is it that the pressure becomes dangerous? A. Well, the pressure becomes serious and perhaps

dangerous when the equilibrium is disturbed, when the pressure on one side of the object is materially greater than it is on the other side, then, of course, movement is apt to occur.

Q. Is that what comes when we speak of colloquially as unbalanced pressure? A. Unbalanced pressure, yes, sir.

Q. If the earth around an opening was in a state of equilibrium is there any danger from the pressure there? A. No, sir.

Q. Merely because the ground on one side was higher than the other, if the whole mass is in a state of equilibrium? A. There is no danger under those conditions.

Q. And, so far as you could observe, was the land around this shaft of the Gumaerd Company in a state of equilibrium produced by the retaining wall and the cribbing that had been built and the filling that had been done around it? A. It was evidently in a state of equilibrium or rest at the time I saw it.

RE-CROSS EXAMINATION BY MR. COULT:

Q. Speaking of equilibrium, you know that the mine was dewatered so that you could go down into it? A. Yes, sir.

Q. Do you remember the pump and the engine that was in use up near the mouth of the shaft at the time you were there? A. Yes, sir.

Q. Was there one there? A. Yes, there was a pump there.

Q. Suppose that you knew that within two months before you went down the shaft, that pumping engine was there hoisting water out of a pipe, and that the shaft, the collar of the shaft had suddenly subsided about four inches toward

the cut, would you say that it was then in a state of equilibrium?

THE COURT: When it was working?

A. That is, this subsidence occurred during the pumping operation?

Q. Yes. A. Of course, I would like to have some information on why the settling occurred. It might occur from various causes. For example, if the earth work beneath the support of the pump, was freshly put in, perhaps not properly packed, it might settle, or, if the timbers immediately beneath the pump were weak or rotten they might give way, and that could explain it.

Q. You saw that shaft in December, 1914? A. Yes, sir.

Q. Did you see any evidences that the timbers on the shaft immediately below the collar of the shaft on the side toward the railroad had been rotting or had been giving away? A. I don't think I examined the timbers to that extent at that point.

Q. That reminds me, you went there mainly to determine the value of the mine, didn't you? A. No. No. I went to examine the shaft and the character of the workings.

Q. You certainly looked at conditions at the time in the shaft then, didn't you? A. Yes, sir.

Q. Assuming that the shaft was as you saw it, and that while the pumping engine there was there and was working, within two months of the time that you saw it, the collar of the shaft itself had tilted toward the railroad and subsided four inches suddenly, would you say that then that shaft was in a state of proper equilibrium? A. That is, this happened two months prior to the time that I saw it?

Q. Yes. A. And, under those circumstances, would I be able to say that it was in a state of equilibrium when I did see it?

Q. No, at the time that happened? A. Oh, at the time it happened?

Q. Yes. A. Well, was that settlement due to any weight that had been placed on the top at the time.

Q. I am asking you that, it is to be assumed, of course, that it was on the side where the engine was and where the pipe went? A. And with the pipe that you have just referred to resting on the top?

Q. Resting partly on the top and partly on the land? A. Well, if the pump merely settled four inches, I don't see that that affects the situation at all, because it might have settled from so many causes.

Q. I said, if the collar of the shaft had subsided on the side nearest to the railroad, a distance of four inches, would you say then that the shaft was in a state of proper equilibrium? A. Well, if the collar merely settled due to the collapsing of the timbers under it, I would say that that was due more to the rotting of the timbers than anything else, because it is merely a crushing down of the timber lining. It might be entirely and absolutely independent of the surrounding conditions.

Q. If such a thing had happened and it were due to the collapsing of the timbers, you would have seen those collapsed timbers when you were there, if they had not been restored? A. Well, four inches would not be any marked change in the entire line of the shaft, unless one's attention is called to it especially, it could be easily overlooked.

Q. It is the sort of a thing you might easily overlook when you were especially examining the shaft to find defects in it? A. Well, you must remember, of course, that the shaft was lined with sheathing, plank and the crib work was not all visible, and the condition of the crib work behind the shaft could not be determined without taking the shafting down, or the planking down, taking the boards off.

Q. If cracks in the earth had appeared on the side of the shaft house opposite the railroad from time to time before you made your examination, and have appeared since that time, would that have any bearing in your mind as to whether or not the shaft was in a proper state of equilibrium when you looked at it? A. Well, it would depend upon what those cracks were due to. They might be due to a shrinking away of wet earthly material, as you often notice in fresh filling. If the earthwork about the shaft had been put in freshly, you would naturally expect some shrinkage, just as you do if you fill in around a tree which you plant.

Q. That would keep on cracking from time to time for years afterwards? A. I would not say that, years, it would finally become compacted and thoroughly settled.

Q. And such cracks might very easily be due to the shifting of the whole body of soil over towards the cut, might it not? A. Well, of course, a shifting such as you speak of would naturally produce something of that kind.

Q. It would produce cracks in the soil? A. I should expect so.

Q. And it would interfere with the equilibrium of the shaft, wouldn't it? A. It would be due to lack of equilibrium.

WILLIAM W. DRINKER, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. COLLINS:

Q. What is your profession? A. Civil engineer.

Q. How old are you? A. Forty-eight.

Q. In whose employ are you now? A. I am in the employ of the Erie Railroad Company.

Q. How long have you been in their employ? A. Since the Fall of 1901, fifteen years and a little over now.

Q. Did your duties extend to railroad construction and supervision of it as well as pure engineering? A. Yes, they have had particular relation to construction for several years past.

Q. And you are familiar with railroad construction and earthwork and engineering and surveys and cuts and everything generally that comes in in connection with railroad work? A. Yes, sir.

Q. Do you know that has been called here the Shaft and Building Plot of the Gumaerd Lead and Zinc Company and its surroundings? A. I have been in there several times.

Q. I show you the photograph, Plaintiff's Exhibit P-6, that is supposed to show the shaft house and the surroundings on the date it was taken, what is it? A. September sixth, 1914.

Q. That professes to show the shaft house and the surroundings at that time, does it show it as it is now? I mean especially with regard to the filling? A. It does not look as if the filling in the back of the south end of the abutment was in the same shape at the time this photograph was taken as it is now.

Q. Will you describe the surroundings of that shaft house now, or the last time you saw it? A. Well, that is a pretty big job.

Q. Give the whole description, the retaining wall, how that wall runs, the cribbing, and the two sides, and the filling that has been done, so that the jury can get in their mind a picture of how it looks now? A. I can describe it better from the map than I can from recollection.

Q. The map would not show the filling, would it? A. Well, in a general way, there is a cribbing on the southerly side of the shaft house, and a cribbing on the westerly side of the shaft house, and between the shaft house and that it has been filled in with material of different character.

Q. I did not hear that? A. Between the shaft house and the crib, earth and other things have been filled in, filling in to the top of the crib between the shaft house, that has been filled in to the top of the cribbing.

Q. On both cribs? A. Yes, sir, on both cribs.

Q. In front of the cribs? A. In front of the cribs. There is the necessary slope reaching down to the retaining wall that is to the west of the shaft.

Q. How about the south, the south cribbing, south of that? A. There has been a railroad cut made in there the slopes of which touch the bottom of the south cribbing.

Q. And this retaining wall that bounds the cut, the railroad cut on the east, runs diagonally, as the map shows and as the witnesses said, to the side of the shaft, doesn't it? A. Yes, sir.

Q. So that the southern end of this wall runs to some extent past the south slope of the Shaft Plot, doesn't it? A. As the map shows it. That is this Section CC that line extended, which is the westerly line of the shaft house, intersects this retaining wall at this distance and also as the map shows it, another line drawn parallel to

this line CC on the easterly side of the shaft property would if extended strike that retaining wall.

Q. In the condition of the premises, with the retaining wall where it is, in the length it is, and the crib work where that is, on two sides, and the filling in that has been done, is or is not the property surrounding that shaft in a state of equilibrium so that there is no danger from pressure? A. I consider the shaft and the immediate property surrounding it in a state of equilibrium.

Q. Is there any danger from pressure upon a hole dug down into the ground, if the ground is in a state of equilibrium? A. Well, the ground is held in a state of equilibrium against the side of that hole by the strength of whatever the hole is lined with. If the lining of the hole is sufficiently strong to stand and the pressure is equal on all sides of the hole, that is, everything is in a state of equilibrium.

Q. And, is that condition there in your judgment? A. The only thing in question would be the timbers of the shaft.

Q. They might be rotten? A. They might be rotten.

Q. If the shaft is retimbered and put in proper alignment, will it stay there? A. I believe it would.

Q. I suppose this crib work you speak of, that can be restored if it should decay? A. Yes, sir.

Q. Have you had any experience in shaft construction and repair? A. I have lined a couple of shafts.

Q. Have you examined this shaft? A. I examined it as far as it could be examined, covered with sheathing as it is.

Q. Suppose that the timbers are fitted for use,

could they be reset? A. Yes, they could be reset if they were fitted for use.

Q. And could the head frame be restored to its original position? A. Yes, sir.

Q. If the timbers are rotten so that they could not be used or it would be best to have new timbers, could they be taken out down to the proper depth and the shaft retimbered? A. If you do it correctly, yes, sir.

Q. How would you do it? A. One way to do it would be to be a set of ten by twelve timbers at the top, support them properly and drive, say, three inch lagging around the external perimeter of these ten by twelve timbers and have it tight at the direct angle formed by the ten by twelve timbers, excavating if necessary, as the lagging proceeded downward and taking out such old timbers always having this lagging to protect you from anything falling in. Then when you got down to say, the foot of the first ten by twelve timbers, put in another set of ten by twelve timbers, and then in between the outside section of, to your ten by twelve timbers and lagging that you have driven, start the other lagging and go down to the end of those timbers and repeat the operation until you had reached the bottom.

Q. That is perfectly practical, is it? A. I have done it several times, yes, sir.

Q. You have heard the other witnesses, professional men, say that you could do it from the bottom too? A. Yes, sir.

Q. That is so too, is it? A. I have never tried it from the bottom, but I can see no reason why it should not be done.

Q. Have you made an estimate of what it cost? I don't know whether you have it both ways, but what it would cost, one way to reset and line up

and the other way to retimber with new timber? A. I made no estimate of what it would cost to reset.

Q. How much would it cost to use entirely new timbers of the size that there is there now, straighten the shaft and restore it to usefulness in every way ? A. I made the estimate in 1915 of $475. If that were to be done to-day it would cost about thirty per cent. more. In the neighborhood of $616 or $618.

CROSS EXAMINATION BY MR. COULT:

Q. You are employed by the Erie Railroad Company? A. Yes, sir.

Q. In what capacity? A. Civil engineer.

Q. Do you remember when Dr. Banks went down that mine? A. Yes, I was with Dr. Banks, I went down with him.

Q. Do you remember that some work was done to the shaft before the doctor went down there? A. There was some shoring put in, yes, across.

Q. And the water was taken out? A. Yes, of course, the water was taken out.

Q. Why was the shoring put in? A. Why, because the master carpenter who made the examintion of those timbers seemed to think that those timbers might collapse in such a way as to hurt his men, I presume. I don't know what his reason was.

Q. Who were those men? A. Some of the men the master carpenter employed in the operation of the pumping.

Q. The master carpenter did the pumping? A. The master carpenter was in charge of the pumping, yes, sir.

THE COURT: The witness here, Mr. Comfort?

THE WITNESS: Yes, sir.

Q. Do you know how much that repair work cost? A. I never heard.

Q. Do you know how long the railroad was at it? A. Why, I have an idea that the pump was there about a month, but how long it took him to prepare for the pumping I don't recall. I did not keep track of it.

Q. How many men did the master carpenter have working on the job in the shaft before Dr. Banks went down there? A. I don't know.

Q. Four or five? A. I don't know.

Q. You don't know at all? A. No, sir.

Q. Were there any around there when you went down there? A. There was a man there that was very hard to find, when I wanted to get a shovel, that was supposed to be watching the pump.

Q. You have testified to a method of repair of this shaft, haven't you? A. Yes, sir.

Q. And that is just the same as the repair of all the other shafts which you have repaired, is it not? A. Practically, yes, sir.

Q. There is nothing about this shaft to make it any different from any other? A. I don't know that there is.

Q. All that you have to do is to repair it and it is all right? A. Just repair it.

Q. It is not an expensive job? A. It is not so very expensive a job, no.

Q. Anybody who has had some mining experience could do it? A. Well, anybody who has had mining exeprience could do it, yes.

THE COURT: Anybody who knows how to do it could do it?

THE WITNESS: Yes. A dozen different men might arrive at different costs in doing it.

Q. You do not hesitate to give an estimate of the cost at all, it has been done, although you have only done it twice before? A. I have done so much similar work in deep excavation that I think I am qualified even if I have not been in the line of shaft work.

Q. You remember that you had a conversation with Mr. Gumaer in September, 1913, at the shaft house or near the shaft house? A. Yes, I recall, I was with Mr. Gumaer near the entire afternoon.

Q. And didn't he ask you then whether there was any way that that damage could be repaired? A. I don't recall precisely what he asked at that conversation.

Q. You recall testifying at the last trial? A. Yes.

Q. And do you remember then that you were asked: "Q. Do you recall a conversation that you had with him in reference to what was the proper thing to do to repair that damage? A. I recall Mr. Gumaer asking me what the proper thing was to do." Do you remember that? A. Yes, I recollect that.

Q. Does that refresh your recollection of the fact? A. I cannot, of course, remember my precise words at the last trial, but I am willing to say what I said at the last trial.

Q. Do you remember that conversation being brought up, what could be done to affect a repair of the shaft? A. Yes, sir.

Q. Didn't you tell Mr. Gumaer then you did not know? A. I don't think I could have told him possibly, I did not know, because I did know.

Q. At the last trial didn't you testify that that was what you said? A. My recollection is I said I could not have said it.

Q. Do you remember being asked this question: "Q. The reason you did not tell Mr. Gumaer how to do this thing at the time you had the conversation with him was because you thought he knew better than you how to do it, is that right? A. Well, I guess I will try to give you a frank answer; I was instructed not to." Do you remember that? A. Yes, sir.

Q. Do you recollect your saying that you did not tell him the reason was you were instructed not to tell him? A. I did not tell him I had been instructed not to tell him, no.

Q. But that was the fact, wasn't it? A. Well, that was the fact, yes.

Q. You were told by Mr. Bacon, the railroad's attorney? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. COLLINS:

Q. You heard the testimony of Mr. Gumaer and and Mr. Tonking about their judgment that there ought to be retaining walls built, one on the west fifty-five feet long and twenty-four feet wide at the bottom, and another one along the south of the same dimensions, only fifty feet long. In your judgment is any such construction, or any walls at all where they say, necessary? A. I think the present retaining wall answers all the purposes, combined with the crib work which has been built on the west and the south.

Q. So then you do not think any such walls, or walls even smaller in that place are necessary? A. Here is a wall both to the west and the south of the shaft—

THE COURT: Do you think those walls are necessary the counsel asks?

THE WITNESS: No. I think they are not necessary.

Q. Now, what were you going to say? A. As there is already a wall which is built to the west and to the south of the shaft and which I have heard the witnesses testify is founded on solid rock.

Q. As an engineering man you have heard the testimony of Mr. Norton? A. Yes, sir.

Q. And of some other witnesses that this wall in the cut rested on red sandstone, wasn't that the testimony?

MR. COULT: I object.

MR. COLLINS: Do you object to my asking him what they said?

MR. COULT: I am objecting to your repeating the testimony of the other witnesses in the form of a question.

Q. You heard them state on what the wall did rest didn't you? A. Yes, sir.

Q. Assuming, as a railroad constructor and engineer, assuming that the wall does rest on stone of the character that they have described, is that a good foundation? A. Yes, a thoroughly good foundation.

Q. Eh? A. Yes, it is a good foundation.

Q. Have you known of walls being constructed on shale? A. I have built a great many walls on shale.

Q. And does that give a good foundation? A. Shale give a good foundation if the looser stuff on top is first removed.

RE-CROSS EXAMINATION BY MR. COULT:

Q. You think the situation as it is now affords a proper working condition for the mine, do you?

A. I think the property is in a state of equilibrium.

Q. Is there any foundation there for resting the collar of the shaft as the mine is worked? A. There would be a foundation if the shaft were repaired and the timbers were heavy enough.

Q. You say that this photograph does not represent the situation as it now is, the Exhibit P-6? A. I say I think it does not represent the situation as it now is. Photographs are very deceptive.

Q. Then there was other fill put in after this photograph was taken? A. I could not say as to that. That would be the inference that would be drawn.

Q. Don't you know your railroad put in more fill in there afterwards? A. I don't know.

Q. Don't you know when the last fill was put in? A. No, sir, I do not.

MR. HOBART: I now offer in evidence a series of photographs numbered 2287; 2288; 2289; 2290; 2291; 2292; 2293; being the same photographs which were used on the other trial, and I suggest that they be marked as one exhibit as they were on the previous occasion.

THE COURT: They were taken at what time?

MR. HOBART: The date appears on each one of them, the first one was April thirtieth 1910.

THE COURT: If they have got the dates on them that will answer.

Admitted and marked "Defendant's Exhibit D-2" of this date.

MR. HOBART: I now offer in evidence contract dated June fifth 1907 between James A. Bennett and Robert Talbott, partners, as

Bennett & Talbott, and the Erie and Jersey Railroad Company, and a supplementary contract attached thereto, and, by consent of counsel, instead of having the entire document, which is very voluminous, placed on the record, we stipulate as follows:

That the length of the railroad referred to in this contract was thirty miles; that the original contract was dated August tenth 1905 and that the supplementary contract was dated June fifth 1907, and that the work to be done thereunder was as follows: "To construct and complete all the work of excavating, grading, masonry, tunneling, drainage and construction of a standard double track road bed from Howells, New York to Guymard, New York."

Admitted and marked "Defendant's Exhibit D-3" of this date.

THE COURT: This was on the land of the Erie Railroad?

MR. HOBART: Yes.

MR. COLLINS: But on the line of the other railroad.

THE COURT: Is that the situation, the Erie Railroad gave them the right to build their line on its property?

MR. COLLINS: It must have been so, they did it. I know of no way in which it could be done otherwise. One railroad could not build its road on the land of another no doubt without they had very cordial relations but they are entirely distinct and separate companies.

THE COURT: If I let a man build his railroad on my property I must have some connection with it?

MR. COLLINS: Yes, but it does not follow that you would be answerable for what he did.

THE COURT: He might or he might not.

MR. COLLINS: It is a defense we have a right to prove, that it was the other company did it.

MR. HOBART: We also offer in evidence a voucher issued by the Erie and Jersey Railroad Company to the order of Bennett & Talbott, dated August thirty-first, 1910, for the sum of $41,082.68, with the various documents thereto attached, being the same papers that were offered on the other trial.

Admitted and marked "Defendant's Exhibit D-4" of this date.

MR. HOBART: We also offer in evidence certificate of incorporation of the Erie Railroad Company dated November thirteenth 1895.

Admitted and marked "Defendant's Exhibit D-5" of this date.

MR. HOBART: We also offer in evidence the certificate of the Erie and Jersey Railroad Company, with the certificate of the County Clerk.

Admitted and marked "Defendant's Exhibit D-6" of this date.

MR. HOBART: We also offer in evidence Certificate of Necessity, issued by the Board of Railroad Commissioners of the State of New York, being the document printed on page 658 of the record of the former trial.

Admitted and marked "Defendant's Exhibit D-7" of this date.

MR. HOBART: We also offer in evidence two letters, one dated December fourteenth,

1914, addressed to Mr. Gumaer, signed by Mr. Bacon, and the other dated February First, 1913, addressed to Mr. Gumaer, signed by Mr. Bacon.

Admitted and marked "Defendant's Exhibits D-8 and D-9" of this date.

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DEFENDANT RESTS.

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MR. COULT: The plaintiff offers in evidence ten letters, which I suppose can be offered as one exhibit.

THE COURT: They are the balance of the correspondence relating to arbitration?

MR. COULT: Yes, sir; as I understand it.

MR. HOBART: They were not offered before, but we have no objection to their being all put in evidence. We agreed in advance we would not object.

Admitted and marked "Plaintiff's Exhibit P-13" of this date.

MR. COULT: We offer in evidence the certificate of analysis by Ricketts & Banks which was used during the examination of Dr. Banks.

Admitted and marked "Plaintiff's Exhibit P-14 of this date.

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PLAINTIFF RESTS.

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REST ALL.

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MR. HOBART: The defendant moves for the direction of a verdict in favor of the defendant on all the grounds mentioned in the motion for a non-suit, and on the additional ground that it now appears that this work and injury if any was done by an independent contractor and not by this defendant.

Motion denied; Defendant excepts.

(Mr. Collins then sums up for the defendant.)

(Mr. Coult then sums up for the Plaintiff.)

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## Charge.

The Court then charged the Jury as follows:

THE COURT: Gentlemen of the Jury, in this case, the plaintiff sues to recover on an alleged breach of a covenant in a deed or contract existing between the parties. That covenant, which you have heard read to you, you will find in the exhibit which will be put before you, and it reads as follows:

> "The party of the second part"—that is, the Railroad Company—"covenants and agrees that, in case it shall make any excavation upon its adjoining lands which shall interfere with the natural support of the surface of said parcel it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching upon said parcel."

The plaintiff sues for damages, claiming that there was a violation of that covenant, that the defendant did not perform it, and that, as a result of such failure, it was damaged and it asks you to reimburse it.

*Charge.*

The only basis upon which a recovery can be had in this case, Gentlemen, is for a breach of this covenant, because, that is what the suit is brought for, nothing else; and the burden of satisfying you, by a fair preponderance of the evidence, not only that there was a breach of the covenant, but also as to the damages, is upon the plaintiff.

I am not going to discuss at length the facts in the case, because counsel have already dealt with them quite fully, and I shall just mention them briefly, reminding you that you are the judges of the facts, and if the Court does not state the facts accurately, you will recall what the true facts are.

The plaintiff contends that it had a shaft upon this property, adjoining the railroad property; that the shaft ran down to a mine, or a place that it was working, or prospecting for mining purposes. It also claims that that shaft was in working condition and operation for mining purposes. It also claims that the defendant excavated on the adjoining property, with the result that there was a cavein, or a slide of the earth, whereby the shaft, the head frame and the shaft house, were put out of plumb, with the further result that the shaft could not be used for the purposes for which it had been constructed and could not be used for the same purpose that it had been used for up to that time.

The plaintiff alleges further, that there was a retaining wall erected, but that the retaining wall did not prevent the slopes from encroaching on said parcel, and there is the further allegation that this retaining wall was not properly built so that it would give the protection called for by the agreement.

That is practically what the complaint alleges in this case.

The defendant, on the other hand, says that there was no violation of the covenant at all. That it lived up to the covenant in every way; that, if there was any damage done, it was of a minor character, that they sent their carpenters there, and at an expense of something like thirty-four dollars, the damage was repaired, the shaft was put in workable order again. The defendant also suggests that the slide was caused, at least, in part, by water which the plaintiff company permitted to go upon this land. The defendant also says that the wall which was erected there is sufficient for the purpose, and that, if the land is filled in it will securely support this shaft.

Another defense is that the work was not done by this defendant, but, by the Erie and Jersey Railroad, and that there was a clause for arbitration in the agreement, and that the defendant was willing to arbitrate but the plaintiff was not, and that no suit will lie until the plaintiff has tried to arbitrate.

Now, as to the question of arbitration; I charge you this, that the agreement itself which speaks of arbitration, as a matter of law, does not require the plaintiff to submit its dispute to arbitration before it can bring suit. In other words, the plaintiff had the right to bring suit without submitting the matter to arbitration at all. So that that would be no bar to the bringing of this action.

Now, with reference to the claim that the work was not done by the Erie Railroad Company, but was done by the Erie and Jersey Railroad, the law is this, that the defendant in this case is not liable for injuries which are caused by the acts

of other persons which were not authorized or which it had no reason to anticipate, and of which it had no knowledge. That is the general rule. But, in addition to that, Gentlemen, it is also the rule, and this is the law in the case which you will take from the Court, that, if the work was done by the Erie and Jersey Railroad Company, and if the Erie Railroad Company knowingly permitted and suffered the Erie and Jersey Railroad to come on that land to do the work which it had reasonable cause to believe might cause a breach of the covenant, and which work thereafter did cause a breach of the covenant, then the Erie Railroad is just as responsible as if it had done the work itself. You see, this was land that belonged to the Erie Railroad Company and it had made a covenant that it would do certain things, so that if thereafter it knowingly permitted somebody to come on that land and do as I suggested a moment ago, it would be as responsible as if it did it itself.

Now, this is not an action for negligence. There can be no recovery for damages resulting from negligence. If the plaintiff recovers at all it must do so on the breach of the covenant and nothing else. And the rule for damages on a breach of covenant, if you come to the question of damages, I will give to you.

When you retire to your Jury room, take up first the question, Was there a breach of the covenant? Did the defendant Railroad Company do as it agreed to do, or did it not? If it did do as it agreed to do, and there was no breach of the covenant, then it is not responsible. Because, it agreed in a certain paper, to do a certain thing and if it did that thing, it cannot be held responsible in damages.

Therefore, if you find that the defendant lived up to its covenant, then your verdict must be no cause of action.

If on the other hand, you find that it did not live up to what it agreed to do, but that there was a breach of the contract, then you come of course, to the next question. Was there damage? And, if so how much?

Now, the rule for damages in a case of this kind has generally been stated in this way:

> "Where the parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to said breach of contract should be such as may fairly and reasonably be considered, either arising naturally—that is to say according to the usual course of event—from such breach of contract itself; or, such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it."

Another way of stating it, as applied to this particular case is this:

> "Any recovery by the plaintiff for breach of the covenant, must be limited to the reasonable cost of restoration or repair of the plaintiff's shaft, head frame and shaft house; that is, the reasonable cost of putting them back in as good condition as they were before the excavation was begun upon the lands adjoining the property described in the said deed as the shaft and building plot."

In as good condition as they were before the excavation, that is, and,

> "Second; interest on such cost—that is the cost of restoring it to its former condition—from the date of the breach of said covenant in said deed, down to the date of the verdict."

That is the rule for damages.

Now, there is also another matter that comes in there, Gentlemen, and that is, that if a man who is a party to a contract is damaged, he cannot sit still, simply, and say, "Oh, well, this damage is so much, I am not going to do anything, the defendant is obliged to make it good anyway". But he is required to minimize the damage as much as he can, and this is the way our Courts have stated it:

> "Where a contractor fails to perform his contract, it is the duty of the other party to make reasonable exertions to curtail his loss. The law imposes upon a party subject to injury, an active duty to make reasonable exertions to render the injury as light as possible. The rule requires such exertions only as are reasonable."

So that it was the plaintiff's duty to minimize the damages.

Now, Gentlemen, on the question of damages. There have been a great many facts introduced in this case, and we have had many figures, and they have been very far apart.

Another fact that the plaintiff, as I understand, claims is, that, in order to restore the shaft to the condition that it was in before the injury; that is to say, to put it in the condition that it was in at that time so that he could use it as a shaft, for the transportation of his men and material up and down, the claim of the plaintiff is that in order to do that that it would be required to do a number of things, including the building of some cement walls, and the total expense of that would be over twenty-four thousand dollars. You have heard the testimony of the witnesses called by the plaintiff with respect to the cost of restoration.

The defendant, on the other hand, through a number of witnesses, testifies that no such amount is required at all. One witness this afternoon testifying that six hundred dollars, I think it was, would completely restore the shaft to the condition it was in before the injury, and to put it in just as practicable and usable a condition as it was before this occurred.

So you will see that the figures are a long way apart, and it is for you to determine what causes this wide difference of opinion between men who apparently are honest in their statements. It may be that those statements can be reconciled. It may be that one side or the other is not telling what is true, and that is the reason that we have in this country an institution consisting of twelve men who are impartial and disinterested, who will apply their good common sense to a situation of this kind in order that they may determine just where the truth is. So you will see that you have to take that testimony and determine what is the truth of the situation. On the one side they say that they have got to build cement walls and do a lot of other things; on the other side they say that that is not necessary at all. And you have got to determine the truth. It may be, as I have said, that there is some explanation of this wide divergence of opinion—and let me say in this very connection, that you must not be prejudiced on either side in this case, either for or against the plaintiff, because that happens to be a corporation, nor against the defendant because it happens to be a railroad company. That does not make any difference. They are both here as litigants, placing their claims before twelve honest men of this County, and both sides ask you to do justice between them; and I don't know of any more important duty that a man can perform than to sit in the jury box and

mete out justice between two people who cannot agree as to what justice is. Now, it is your function to do between these parties what is right, according to the evidence that has been introduced here.

So that you will determine, Gentlemen, if you come to the question of damages, what is the reasonable cost, as I have already stated to you, of restoration; what you feel is fair and honest, and then add interest as I have indicated.

So, take the case, Gentlemen, and determine, as you go to your room, first, was there a breach of the covenant? If there was not, then your verdict will be, no cause of action. If you find that there was a breach of the covenant, then determine what is the reasonable cost of restoration, under the rules that I have given you, and add to the sum which you so return, interest and return that total amount as the amount of your verdict. In that case, the form of your verdict would not be so many dollars and interest. You bring in the full amount of whatever you find the damages and interest would be. In other words, if you find for the defendant, then your verdict would be no cause of action. If you find for the plaintiff, you find for the plaintiff and assess the damages at so much money, in which sum you have already included the interest as you figure it yourselves.

I have, from the defendant, certain requests to charge, which I dispose as follows:

No. 1. I decline to charge.

No. 2. The only basis for recovery under the evidence is for breach of the covenant in the deed of June 24, 1909, reading as follows: "The party of the second part covenants and agrees that in case it shall make any excavations upon its ad-

joining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel."

I so charge you.

No. 3. I have already charged.

No. 4. In considering the reasonable cost of restoration or repair of the plaintiff's shaft, the Jury, so far as concerns the re-timbering thereof must be limited to that part of the shaft which is out of alignment.

I so charge you.

No. 5. I refuse to charge except as I have already charged.

No. 6. I have already charged and I refuse to charge any further.

No. 7. I decline to charge.

No. 8. I decline to charge.

No. 9. Under the evidence in this case the Jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the west of the plaintiff's shaft.

I charge you Gentlemen, that if you find that a wall on the west of the plaintiff's shaft was not necessary in order to restore the plaintiff's property to the same condition that it was in before the injury, then you are not to consider the cost of constructing a retaining wall as an element of damages. That, of course, is true, Gentlemen, and that is also true as to the wall on the south side. If either or both of those walls are not necessary in order to restore the property to its former condition, then, of course, you have no right to consider them in your calculations. It is only if they are necessary that you may include them in the calculations of the sum that is

to be awarded to the plaintiff if it recovers any damages.

So take the case, Gentlemen, and as I have indicated before, first determine whether there is a breach of the covenant. If there is not, then there is no cause of action. If there is, then there has to be assessed the amount that you find the damages were.

Are there any exceptions to be noted before the Jury retire?

MR. WOODRUFF: None for the plaintiff.

MR. HOBART: The defendant asks exceptions to the charge as follows:

First: To that part of the charge which stated that, as a matter of law, the agreement did not require the plaintiff to submit to arbitration.

Exception allowed.

Second: To that part of the charge which dealt with the relations between the defendant Company and the Erie and Jersey Railroad Company, to the effect that if the defendant knowingly permitted the Erie and Jersey to do the work that then the Erie would be just as responsible as if it did the work itself.

Exception allowed.

To that part of the charge which left it to the Jury to determine as a question of fact that there was or was not a breach of the covenant.

THE COURT: Your claim being that I should have charged the Jury that there was no breach?

MR. HOBART: Of this particular covenant, as otherwise expressed in our request Number one.

MR. COLLINS: Only putting it not on the affirmative?

Exception allowed.

MR. HOBART: The defendant also excepts to

that part of the charge where the Court, in dealing with the question of damages, after stating the claims of the respective parties, said that it was for the jury to determine what the damages were, thereby giving the jury permission to allow as an element of damages this cost for the retaining walls or one or both of them. That is to say, we maintain that the cost of neither retaining wall is a proper element to be considered as damage. That is the point of the exception.

Exception allowed.

THE COURT: Your Requests Numbers eight and nine or nine and ten, covered that point.

MR. HOBART: The defendant also asks an exception to that part of the charge wherein, referring or quoting the Requests Numbers nine and ten, the Court modified those two requests.

THE COURT: Leaving it to the jury instead of directing?

MR. HOBART: First, the Court left it to the Jury to consider either or both of these walls as possible elements of damage, and then stated that if they found the retaining wall was necessary of course it would be an element of damage; our idea being that it should not be left to the Jury whether either one or both was necessary.

Exception allowed.

MR. HOBART: The defendant also asks an exception to the refusal of the Court to charge request number one as requested, also to the refusal of the Court to charge request numbers five, six, seven, eight, and also to the modification which the Court inserted in requests numbers nine and ten and the refusal of the Court to charge them as requested.

Exception allowed.

(The Jury then retire.)

NEW JERSEY SUPREME COURT.

GUMAERD LEAD AND ZINC COMPANY,
*Plaintiff,*
*vs.*
ERIE RAILROAD COMPANY,
*Defendant.*

## Defendant's Requests to Charge.

1. There can be no recovery by the plaintiff for the breach of the covenant of the defendant in the deed of June 24, 1909, reading as follows:

> "The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slope from encroaching on said parcel."

If request No. 1 is declined then the following requests are submitted:

2. The only basis for recovery under the evidence is for breach of the covenant in the deed of June 24, 1909, reading as follows:

> "The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel."

3. Any recovery by the plaintiff for breach of said covenant must be limited to;

(a) The reasonable cost of restoration or repair of the plaintiff's shaft, head-frame and shaft-house that is, the reasonable cost of putting them back in as good condition as they were before the excavation was begun upon the lands adjoining the property described in said deed as the "Shaft and Building Plot."

(b) Interest on such cost from the date of the breach of the said covenant in said deed down to the date of the verdict.

4. In considering the reasonable cost of restoration or repair of the plaintiff's shaft the Jury, so far as concerns the re-timbering thereof, must be limited to that part of the shaft which is out of alignment.

5. There can be no recovery by the plaintiff for breach of said covenant of said deed by reason of any act or omission of the Erie and Jersey Railroad Company, or of any person or persons other than the defendant itself, even though such act or omission was with the assent of the defendant.

6. There can be no recovery in this action for breach of the said covenant of said deed if the Jury find that the damage to the plaintiff resulted from negligence.

7. If the Jury find that the plaintiff failed to comply with the provision as to arbitration respecting the claims arising under that part of the said deed of June 24, 1909 relating to the "Shaft and Building Plot" or the covenant with respect thereto, then the plaintiff cannot recover any damages for breach of the said covenant recited in request No. 2.

8. If the Jury find that the defendant complied with the provision as to arbitration respecting claims arising under that part of the said




Ex P5

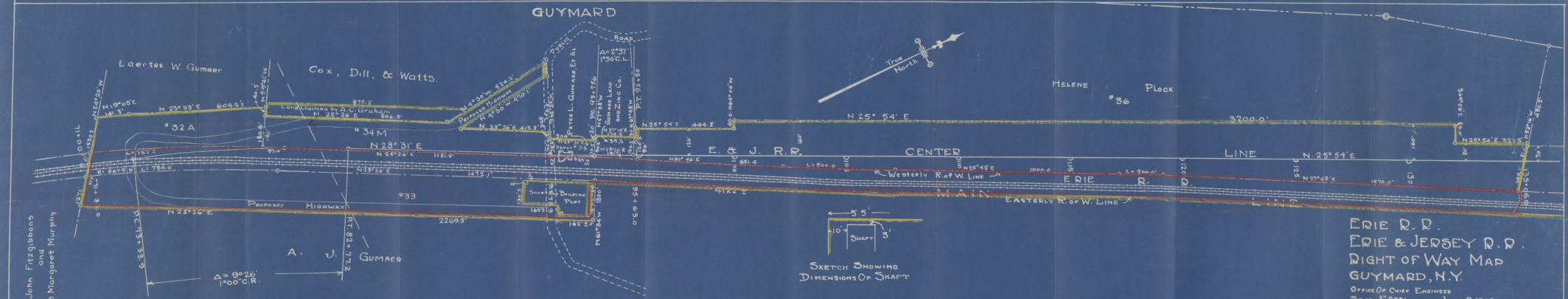



E. & J. R. R.
SUBWAY X'ING AT GUYMARD LANE
APR. 30. 1910.


Ex P-6
Taken Sept 6, 1914
Sept 6, 1914






GUYMARD
Laertes W. Gumaer
Cox, Dill, & Watts.
Land Claimed by A. C. Graham
Proposed Highway
Public Road
Peter L. Gumaer, Et Al
Gumaer Lead and Zinc Co.
True North
Helene Plock
#36
#32 A
#34 M
#33
N 28° 31' E
N 25° 54' E
3200.0'
E. & J. R.R. CENTER LINE
Westerly R. of W. Line
Easterly R. of W. Line
ERIE R. R. MAIN LINE
Proposed Highway
A. J. Gumaer
Δ = 9°26' 1°00' C.R.
Δ = 2°37' 1°30' C.L.
Shaft & Building Plot
Sketch Showing Dimensions Of Shaft
Shaft
John Fitzgibbons and Mrs Margaret Murphy
ERIE R. R.
ERIE & JERSEY R. R.
RIGHT OF WAY MAP
GUYMARD, N.Y.
Office Of Chief Engineer
Scale 1" = 200'
June 2, 1909.

Blue Print of Map
attached to (Deed) Ex P,

Vol 21

on back of Gunnard Lead + Zinc Co.

deed of June 24, 1909 relating to the "Shaft and Building Plot" or the covenant with respect thereto, then the plaintiff cannot recover for any breach of the said covenant recited in request No. 2.

9. Under the evidence in this case the Jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the west of the plaintiff's shaft.

10. Under the evidence in this case the Jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the south of the plaintiff's shaft.

COLLINS & COLLINS,
Attorneys of Defendant.

New Jersey State Library

## Exhibit P-1.

Agreement—Gumaerd Lead & Zinc Co. with Erie Railroad Company, dated June 24, 1909. This is the same agreement of which copy is attached to and forms part of the complaint. Copy of the blue print referred to in the complaint and agreement is submitted with printed book.

10

## Exhibit P-2.

Map entitled "Map of old and new water courses, pipe lines, property lines and ore vein, Guymard, New York, Oct. 1914, L. H. Robinson, C. E., Middletown."

(Blue print is submitted with printed book.)

## Exhibits P-3 to P-9.

20 Seven photographs entitled as follows:

3. "Gumaerd Lead & Zinc Co. shaft-house, taken March 11th, 1910."

4. "Gumaerd Lead & Zinc Company's shaft-house, taken March 4th, 1910."

5. "Gumaerd Lead & Zinc Co. shaft-house and shaft exposed, taken March 11th, 1910."

6. "Taken Sept. 6th, 1914, showing shaft-house, cribbing and retaining wall."

7. No title. Date on back "March 4th, 1910."

30 8. Showing wrecked shaft and subsidence—11/19/14.

9. No title—figures on face of photo 11/9/14 (showing interior of shaft-house).

40

## Exhibit P-10.

Map entitled "Gumaerd Lead & Zinc Co.'s Underground Workings."

(Blue print is submitted with printed book.)

## Exhibit P-11.

Several samples of ore.

## Exhibit P-12.

ERIE RAILROAD COMPANY

New York, Susquehanna & Western Railroad Co.
The New Jersey and New York Railroad Co.
Chicago and Erie Railroad Co.
Fulton Building, Hudson Terminal
One Block from Telephone 8480
Fulton St. Subway Station Cortlandt
Cortlandt St. "L" Stations
50 Church Street, Corner Fulton
New York

OFFICE OF THE CHIEF ENGINEER

February 3rd, 1910.

In your reply please refer to File Plat. No. 33.

Mr. C. I. Gumaer and
Gumaerd Lead & Zinc Co.,
Guymard, N. Y.

Dear Sirs:—

Referring to the provision in the Indenture of June 24th, 1909, whereby the Gumaerd Lead & Zinc Company conveyed certain lands at Guymard, N. Y., to the Erie Railroad Company and reserved certain mining rights and privileges, "provided however that the exercise of said rights with respect to said parcel by the party of the first part shall not interfere with, endanger or render unsafe any railroad structures or operations now or hereafter erected or maintained on other portions of the herein described premises,

*Exhibit P-12.*

and shall not interfere in any manner with the use of said other portions for railroad purposes or with the proper support of the surface of said other portions or of any part thereof for any structures or improvements that may now or hereafter be placed thereon."

Your attention is called to the fact that the water which is being thrown or allowed to overflow upon the surface of the ground upon the top of the bank adjoining the retaining wall that is being constructed along the side of the cut now being constructed through this property, is weakening the bank and endangering and rendering unsafe the structures and operations now being erected and carried on in the other portions of said premises, and interfering with the use of said premises for railroad purposes and the proper support of the surface—all in violation of the provisions of said deed.

Arrangement should be made either by means of larger drain pipes, or otherwise in connection with your pumping machinery, so as to prevent the discharge of this water upon the ground at the top of the bank, as a continuance of the present practice will result in damage for which we will hold you liable. The continuance of the discharge of this water as heretofore not only endangers our property and interferes with our operations, but also endangers your shaft.

Yours very truly,

ERIE RAILROAD COMPANY,

By (Signed) F. L. Stuart,

Chief Engineer.

## Exhibit P-13.

Ten letters offered as one exhibit (re arbitration). These letters are as follows:

Guymard, N. Y., May 2, 1910.

Francis Lee Stewart,
Chief Engineer Erie R. R. Co.
No. 50 Church St., New York City.

Dear Sir:—

Your attention is called to the conditions existing at the collar of our shaft at Guymard.

Owing to the ground falling away from two sides of the shaft over two months ago the shaft went out of line, this will necessitate retimbering for about 20 ft., this you should have attended to at once as well as placing the building and head frame plumb and level having been badly twisted out of shape.

The cribbing built under the supervision of Mr. Bennett is not high enough and is very unsatisfactory to our company for safety and durability.

Mr. Conrad gave me to understand at time of settlement that it would be a concrete wall.

We have suffered much already by this unnecessary delay, the mine being flooded and the shaft nearly full of water and we sincerely hope the delay will soon be to the end.

Sincerely yours,
GUMAERD LEAD & ZINC COMPANY,
By (Signed) C. I. GUMAER,
Gen. Mgr.

Guymard, N. Y., October 1, 1912.

Hon. Henry Bacon,
Goshen, N. Y.

Dear Mr. Bacon:

I write once more to ask the favor of a reply to my letter of August 31st, in rereading which I discover that by typographical error the word "diversity" was written where I intended to use the word "diversion" as the context shows.

*Exhibit P-13.*

However, this cannot account for delay, and I am fearing that you may be absent, or—which I sincerely trust is not the case—ill.

I am most anxious to bring this controversy to a close for my Company's damages are increasing from month to month.

If we are to arbitrate instead of going into Court we will have to get at it very soon.

Sincerely yours,

C. I. GUMAER.

Guymard, N. Y., November 12, 1912.

Hon. Henry Bacon,
Goshen, N. Y.

Dear Mr. Bacon:

I was disappointed in not hearing from you last week in answer to my letter of November 2d.

We are loosing precious time as this beautiful weather will not last much longer and as the Arbitrators will no doubt want to view the premises and take the testimony here you should keep your end up.

Very truly yours,

C. I. GUMAER.

Guymard, N. Y., Jan. 13, 1913.

Hon. Henry Bacon,
Goshen, N. Y.

Dear Mr. Bacon:

Your letter of 14th ult., was received and after some delays, from various causes one of which was the calling of a directors meeting. I am mailing you under separate cover agreement of submission in triplicate as you request.

I have added a few lines on the last page, to make more specific, which my company wants included and I see no good cause for objection on your part.

I have also put the name of our arbitrators in

*Exhibit P-13.*

the submission, our arbiter being Hon. Albert H. F. Seeger, of Newburg.

Hoping we will soon have this matter closed up, I am,

Sincerely yours,

C. I. GUMAER.

BACON AND RORTY
Attorneys and Counselors
Goshen, N. Y.

Henry Bacon Philip A. Rorty

February 25, 1913.

Mr. Chauncey I. Gumaer,
Guymard, N. Y.

Dear Sir:—

Your letter of the 22nd inst. has been received. You are quite right in saying that I have not found any fault with the text of your proposed addition to the arbitration agreement. I have not passed upon the question of the propriety of that amendment at all and I do not deem it necessary to do so until it is put in the proper form.

You do not appreciate the difficulties which your changes make. You and I struggled along for a long time and finally agreed upon the form of the agreement. That form you accepted and sent to me for submission, I accepted it and sent it to the Erie Railroad Company. It was presented to their general officers and accepted by them. You now insert another separate clause which you say yourself is an addition intended to cover something which you think has been omitted. If you insist upon the addition, I must insist that you put it in such place in the questions submitted as seems to you proper and send it to me. If I approve or disapprove of it I will advise you and if we agree upon it I will submit it to the officers of the Erie Railroad Company. If you intend to do this I trust you will make

*Exhibit P-13.*

sure this time that you and I agree upon the form and that you have everything in it that you want in it.

Trusting this will make plain my position about it, I am,

Very truly yours,

HENRY BACON.

H.

Guymard, N. Y., March 1, 1913.

Hon. Henry Bacon,
Goshen, N. Y.

Dear Mr. Bacon:

Yours of the 25th ult., replying to mine of 22nd ult., came duly to hand. Your whole letter seems to have been written under a total misapprehension of my purpose, and you are absolutely in error when you say that I "now insert another separate clause which you (I) yourself (myself) say is an addition intended to cover something which you (I) think has been omitted." I have never intended to make any such statement, and upon rereading my letters I wholly fail to find any expression therein capable of being so distorted as to imply such intent.

On the contrary I have clearly stated that what you originally characterized as an "addition" was not such in substance but merely involved a construction by the parties of the *scope* of the submission in respect of a point in regard to which the wording of the latter might be charged with ambiguity, the point being whether or not the arbitrators should be entrusted with power to estimate and determine what, if any, expense of restoration would be necessary because of any of the alleged acts, omissions or delays complained of. While my view is that the submission as finally submitted by you to your people covers

damages of the kind referred to, a careful re-reading of the same raised a doubt in my mind as to whether or not it might be argued on your side that such damages could not be taken into account for the reason that, notwithstanding the fact that the acts, omissions or delays *necessitating such expense* had *occurred prior to the submission* the damages occasioned thereby would not be actually *suffered* until such expense had been *actually paid* or *incurred.* What *you* call my "addition" is only intended as the parties' own construction of the submission upon this point, and what I have so strenuously endeavored in my last few letters to ascertain is whether or not you are satisfied to construe the submission so that without ambiguity it may either include or exclude consideration of such damages. I have most pointedly asked you to say either "yes" or "no" on this point, but as yet am without your reply.

I now repeat that I do not propose any new allegations of fact but am merely desirous to know whether or not the submission as submitted by you to your client is to carry authority on the part of the arbitrators to allow for any damages of the kind referred to in my so-called "addition".

If you do not care to assume the responsibility of deciding that such damages may be considered under the submission as it stood when you referred it to your client, I shall be quite content if you will take the negative position and say that they shall not. Obviously it would be to the advantage of my Company to exclude damages of the kind named so that by a subsequent proceeding it could recover fully for the real expense of restoration—which almost invariably exceeds estimates—but in formulating the submission I felt committed by our agreement that every pos-

sible element of damage from acts, omissions or delays prior to the submission should be included therein. I beg that you will answer my questions and state how you construe the proposed submission as it stood prior to my so-called "addition."

Sincerely yours,

C. I. GUMAER.

Guymard, N. Y., March 18th, 1913

HON. HENRY BACON,
Goshen, N. Y.

Dear Mr. Bacon:

Having received no reply from my letter of March 1, I am writing again asking you to kindly let me hear from you at your earliest opportunity and greatly oblige,

Sincerely yours,

C. I. GUMAER.

BACON AND RORTY,
Attorneys and Counselors,
Goshen, N. Y.

Henry Bacon, Philip A. Rorty.

March 21, 1913.

MR. CHAUNCEY I. GUMAER,
Guymard,
New York.

Dear Sir:

Your favors of the first and 19th insts. have been received. I have been confined to my house with an attack of grippe and am still not attending strictly to business.

I do not see that there is anything to be added to what I have already written to you. I will not construe this agreement. That is for the arbitrators to do and involves, first, the determination whether the particular thing you inserted into this agreement is within the agreement that was accepted by both of us, and second, whether any such

*Exhibit P-13.*

claim amounts to legal damage for which you are entitled to recover. I confess that I cannot see any reason for what you now are insisting upon except that you do not want to arbitrate at all. Every possible form of covenant which you claimed was broken you specified in the agreement and the alleged breach of it, and the arbitrators are asked to determine first, whether any such breach has occurred, and second, if so, whether any damages accrued to you by reason of such breach, and third, what the amount of them is. These are plain allegations, and while they are marred somewhat by needless repetition, I agreed to them.

I am prepared to stand by that agreement and by the clause which says the breaches so alleged constitute all the questions and controversies between the two companies. If you are not, I cannot help it.

Yours truly,

HENRY BACON.

Guymard, N. Y., March 29th, 1913.

HON. HENRY BACON,
Goshen, N. Y.

Dear Mr. Bacon:

Your favor of the 28th inst. reached me in due course and found me ill and abed—but not too feeble to be able and willing to construe my own agreement. I regret to learn that you also have been unwell and to see that, as you yourself say, you are still unable to attend "strictly to business." You state that you "will not construe this agreement", meaning the agreement that you have helped formulate, and which, therefore, for the purpose of this letter, must be taken as your own. You say: "that is for the arbitrators to do," which, stripped of the misleading verbiage and mistaken averments in which the assertion is found, means

*Exhibit P-13.*

that the leader of the Orange County Bar wishes to put off upon others the construction of an important legal document over the preparation of which he has labored for the last two or three years. For my part, my only desire being to avoid uncertainty I am proposing that you and I agree in advance upon the proper legal construction of our submission instead of leaving such construction to the arbitrators.

The suggestion that my attitude upon this point is explicable only upon the theory of subterfuge, under cover of which I wish to avoid arbitration is not just and I am confident that upon reflection you will regret having made it.

Your inability to determine whether or not the proposed submission as trimmed and accepted by yourself seems to more than justify my position, which merely is that you join with me in stating, within the submission itself, whether or not the intent of the latter instrument is to authorize the arbitrators to consider the question whether or not damages of the particular character referred to have been sustained. As I have repeatedly stated, I am willing that such damages shall either be passed upon in the proposed arbitration or left for future disposition, as you may prefer, but I must insist, and now more strenuously than ever, that we join in an agreed construction of the submission as partly formulated and as actually accepted by yourself. If you have not yet sufficiently recovered to enter upon such a task I shall be willing to wait your restoration to health, with all the patience that my high personal regard for yourself inspires.

Trusting that you may be able to respond speedily and in a spirit calculated to avoid legal fog, I am,

Sincerely yours,

C. I. GUMAER.

*Exhibit P-13.*

Guymard, N. Y., November 8th, 1913.

G. F. BROWNELL, Esq.,
Vice President and General Solicitor, Erie R. R. Co.,
50 Church St., New York City.

Dear Sir:

As long ago as March, 1910, on behalf of the Gumaerd Lead and Zinc Company, of which I am manager, I began an effort to obtain an arbitration of certain differences between the last named company and the Erie Railroad Company, which, under the agreement of June 24th, 1909, were subject to adjustment by that method. By July 9th of that year we had progressed so far that you then by letter of that date suggested that my company name an arbitrator and also prepare a specific statement of such of the claims of my company as were arbitrable under the agreement mentioned—the deed of June 24th, 1909. From that date—July 9th, 1910—I have been struggling with your legal representative in a seemingly hopeless attempt to formulate a statement of my company's claims that he will consent to have submitted to arbitration. I have claimed the right to word the charges or complaint so that my company's grievances shall be set forth as it understands and desires to have them understood, and at the same time I have always consented that in meeting the case in arbitration your company should have absolute freedom both as to the substance and the wording of any defense it may choose to interpose.

Under such conditions it would seem that it should not be difficult to effect a speedy submission of my company's complaints—yet after more than three years of constant effort to formulate a statement that your representative will allow to go to arbitration we seem to be as far apart as

*Exhibit P-13.*

ever. One of the points on which we could not agree—though I was willing to leave that point for future determination—was how to cover any water damages to the underground workings that could only be determined with absolute certainty after the mine should have been dewatered.

On this point I am willing either that such damages should be left for further consideration or that experts should be allowed to testify as to what such damages might reasonably be assumed to amount to.

Being unable to reach an agreement upon this point—your representative insisting that the arbitration should cover all damages of every kind up to the date of the award and yet refusing to allow experts to estimate such damages as could only be ascertained by dewatering the mine—I took up the question of dewatering. After nearly two months on this point, I find it apparently impossible to obtain any action on the part of your company that will enable dewatering to go forward. In his last communication your representative has virtually referred me directly to the company and I therefore now ask that you call for the correspondence and that *you take* this matter up without further delay.

If my company finds itself blocked on all sides in its efforts at friendly adjustment it will be forced to go into such federal or state court as will be most likely to afford the relief needed.

Kindly reply and say what your company may be willing to do.

Sincerely yours,

C. I. GUMAER.

## Exhibit P-14.

RICKETTS & BANKS,

Mining and Metallurgical Engineers and Chemists,
104 John Street.
Pierre deP. Ricketts, E. M., Ph. D.,
John H. Banks, E. M., Ph. D..

CERTIFICATE OF ANALYSIS.

No. 31136. New York, May 29, 1908.

Sample of Ore
From
Marked "Sample No. 1"
Weight
submitted for analysis contains
Lead.....73.85%

Yours respectfully,
(Signed) RICKETTS & BANKS. (Seal.)

To Mr. C. I. Gumaer.

## Exhibit D-1.

Map entitled "Gumaerd Lead & Zinc Co. vs. Erie Railroad Co., Graham, N. Y., December 16th, 1916, Office of Chief Engineer, N. Y."

Blue print submitted with record.

## Exhibit D-2.

Seven photographs all dated April 30, 1910, numbered and described as follows:

No.
2287 Shaft building at Guymard (South).
2288 Shaft building at Guymard (Northeast).
2289 Shaft building at Guymard—interior (West).
2290 Subway X'ing. at Guymard. Looking N.
2291 Subway X'ing. at Guymard. Looking S.
2292 Subway X'ing at Guymard. Looking S.
2293 General View S. from Guymard Station.

## Exhibit D-3.

Contract dated August 10, 1905, between James A. Bennett and Robert Talbott, partners as Bennett & Talbott, and Erie and Jersey Railroad Company, and supplemental contract attached thereto dated June 5, 1907.

(Not printed; stipulation made as to terms thereof; see p. .)

## Exhibit D-4.

Voucher issued by Erie & Jersey Railroad Company reading as follows:

ERIE & JERSEY RAILROAD CO.

Stamped Sep 15, 1910

New York, Aug. 31, 1910. No. 1018

PAY TO THE ORDER OF Bennett & Talbott, $41,-082.68 (Forty-one thousand, eighty-two & 68/100 Dollars) in full for Voucher 3 Jul 10

ERIE & JERSEY RAILROAD COMPANY.

B. A. Bigoney,
Treasurer.

Collect at
COMMERCIAL TRUST COMPANY
OF NEW JERSEY
Jersey City, N. J.
or, UNITED STATES MORTGAGE & TRUST Co., New York, N. Y.

ENDORSED.

Bennett & Talbott

(Stamp)
Pay GIRARD NAT'L BANK
Philadelphia, Pa or order
all prior endorsements guaranteed.
WESTMORELAND NAT'L BANK
Greensburg, Pa.
JOHN S. SELL, Cashier.

(stamp)
Rec'd Payment,
MAIL
Sep. 14, 1910
THE CHEMICAL NAT. BANK
N. Y.

(stamp)
PAID
Sep 14, 1910
United States Mortgage & Trust Company.

*Exhibit D-4.*

ERIE & JERSEY RAILROAD COMPANY
to Bennett & Talbott, Dr.
c/o F. L. Stuart. Greensburgh, Pa.

---

Estimate No. 57—& Final.

For Labor and material in connection with construction of Otisville Section of the Erie & Jersey R. R. during June 1910 41,082.68 10

(Stamp)
PAID
Treasury
Erie & Jersey R. R. Co
Sep 15, 1910
(stamp) Paid by draft No 1018

---

Approved for payment,
C. P. CRAWFORD,
Auditor. 20

RECEIVED Sept. 6th, 1910, of ERIE & JERSEY RAILROAD COMPANY forty-one thousand eighty-two dollars and sixty-eight cents ..... Dollars, in full of the above account
BENNETT & TALBOTT.

Attached is a paper entitled ERIE & JERSEY RAILROAD No. 57 Final estimate of work done on Otisville Residency during month of June, 1910 by Bennett & Talbott, Contractor. Then follows details showing character of work, quantity of same and charges therefor. 30

Attached is letter reading as follows:

ERIE RAILROAD COMPANY
New York, July 31, 1910.

Re. Estimate Erie & Jersey Railroad
Month of June, 1910.

MR. FRANCIS LEE STUART,
Chief Engineer.

Dear Sir:

I have the following explanation of extra bills to final estimate No. 57 for month of June, 1910 40

on the Otisville Section contract Erie & Jersey Railroad, in favor of Bennett & Talbott.

Filling outside of Cribbing at Gumaer's shaft, amount $285.19

On the west side of the shaft considerable material was placed to prevent any further trouble from sloughing of the bank around the shaft.

Repairing broken pipe on Gumaer's Power & Water line, amount $12.68

This line was broken by a tie dropped on the end of the culvert where it crosses the Erie & Jersey and according to the agreement it is maintained by the Company.

Yours truly,

C. K. CONRAD,
Assistant Engineer.

Then follows paper headed "Distribution Sheet" Bennett & Talbott, Contractors, month of June, 1910.

This gives details of various excavation work, concrete construction, construction of fence, grading, bridges, etc.

Then follows summary of final estimate No. 57 reading as follows:

ERIE AND JERSEY R. R.
to Bennett & Talbott
Greensburgh, Pa.

Memo 4022

c/o F. L. Stuart.

8-5-10

Estimate No. 57 and final, for labor performed and material furnished, month of June, 1910, in connection with the construction of the Otisville Section of the Erie & Jersey R. R. as per statement attached.

(stamp)

Checked against Contract No. 502.

Total amount of final estimate payment $562,212.25

*Exhibit D-4.*

| | | |
|---|---|---|
| Less previous payments | $499,439.92 | |
| Advance from 10% reservation, Est. No. 40 | 41,000.00 | |
| | | 540,439.92 |
| | | $ 21,772.33 |
| Extra bill, June, 1910, as per statement attached | | 1,310.35 |
| Extra bill settlement of claims as per statement attached | | 18,000.00 |
| | | $ 41,082.68 |

Supple: Agreement dated June 5th, 1907.

I certify that the above contract is correct, and the expenditure was duly authorized.

F. L. STUART,
Chief Engineer.

Approved H. V. GRAHAM,
Vice-President.

(Stamp.)
Erie Railroad Co. Received Aug. 30, A. M. office of Auditor of disbursements 1910

Endorsed.

ERIE and JERSEY R. R.

Audit Number 3
Registered in Month of Jul
1910 3-July

Amount $41,082.68
In favor of Bennett & Talbott.

| Chargeable to | | Total |
|---|---|---|
| Cost of Road: Grading | 26,589.35 | 25,872.12 |
| Crossings & Signs | | 215.10 |
| B T & C | | 502.13 |
| Ind & Co.'s (Bennett & Talbott) | | 14,493.33 |
| | | 41,082.68 |

Aug. 30, 1910

## Exhibit D-5.

Certificate of Incorporation of Erie Railroad Company, dated November 13, 1895, filed and recorded November 14, 1895.

## Exhibit D-6.

STATE OF NEW YORK,
County of New York. } ss.:

I, THOMAS L. HAMILTON, Clerk of the said County and Clerk of the Supreme Court of said State for said County. Do hereby Certify, That the Certificate of Incorporation of Erie and Jersey Railroad Company with acknowledgment thereto annexed, was filed and recorded in this office on the 5th day of June, 1905, 11 h. 54 M.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this 5th day of June, 1905.

THOS. L. HAMILTON,
Clerk

(Seal.)

Fee $1.26.

Remittances should be made by Draft, Check, Express or Postal Money Order payable to the order of "Secretary of State."

Albany, N. Y., June 5, 1905.

Erie & Jersey R. R. Co.

to The Secretary of State, Dr.

The fees of this office are fixed by Statute and Payable in advance. A Prompt Remittance Expected.

| | |
|---|---|
| Filing Certificate of Incorporation | $25.00 |
| Recording same..... | 1.65 |
| Certified copy..... | 2.65 |
| | $29.30 |

*Exhibit D-6.*

Received Payment Jun 5, 1905.
John F. O'Brien, Sec'y of State.
Per Adams.

Please return this Bill with Remittance.

DUPLICATE.

$300.00. Treasurer's Office—State of New York.
Albany, Jun 5 1905 190

RECEIVED from Erie & Jersey Railroad Company Three Hundred Dollars, in full of tax of one-twentieth of one per centum upon the Capital Stock of $600,000 of the above named Company for the privilege of organization pursuant to Chapter 908, Laws of 1896 as amended.

SILAS E. HEMMAN,
Second Deputy Comptroller.

R. G. MILKS,
Accountant and Transfer Officer.

CERTIFICATE OF INCORPORATION
OF
ERIE AND JERSEY RAILROAD COMPANY.

In conformity with the provisions of the Laws of the State of New York in such case made and provided, we the undersigned, all being persons of full age and citizens of the United States and a majority residents of the State of New York, desiring to become a corporation under and by virtue of the provisions of the railroad law for the purpose of building, maintaining and operating a railroad for use by way of extension or branch or cut-off of the railroad of the Erie Railroad Company now existing, and for shortening, straightening and improving the line or grade of a part of such railroad of the Erie Railroad Company.

DO HEREBY CERTIFY:

FIRST. The name of the corporation is
ERIE AND JERSEY RAILROAD COMPANY.

*Exhibit D-6.*

SECOND. The number of years it is to continue shall be nine hundred and ninety-nine (999) years.

THIRD. The kind of road to be built and operated is a railroad of standard gauge, for general traffic, to be operated by locomotive steam power or by electric or other mechanical power.

FOURTH. Such railroad is to be built, maintained and operated from a point in the center line of the railroad of Erie Railroad Company, at or near the Erie Railroad station at Highland Mills, in the town of Woodbury, Orange County, New York, to a point in the center line of the railroad of said Erie Railroad Company, at or near the Erie Railroad station at Guymard, in the town of Mount Hope, Orange County, New York. Its length will be about forty-two (42) miles.

FIFTH. The said railroad is to be located wholly within the County of Orange.

SIXTH. The amount of the capital stock shall be Six Hundred Thousand Dollars ($600,000).

SEVENTH. The number of shares into which the capital stock is to be divided shall be six thousand (6,000) shares of the par value of One Hundred Dollars ($100) each, all of which shall be common stock.

EIGHTH. The names and post office addresses of the directors of the corporation who shall manage its affairs for the first year are as follows, viz:

| Names. | Post-Office Addresses. |
|---|---|
| Frederick D. Underwood, | 303 West 72nd Street, New York City |
| George F. Brownell, | 312 West 89th Street, New York City |
| Francis L. Stetson, | 4 East 74th Street, New York City |
| Charles Steele, | 34 West 49th Street, New York City |
| M. P. Blauvelt, | 203 West 36th Street, New York City |
| D. W. Bigoney, | 86 West 36th Street, Bayonne, N. J. |
| C. S. Goldsborough, | Bogota, New Jersey |
| C. P. Crawford, | 110 West 104th Street, New York City |
| Herbert A. Taylor, | Upper Montclair, New Jersey |

No director need be a holder of the capital stock of the company.

*Exhibit D-6.*

NINTH. The place where its principal office is to be located is the City of New York, County and State of New York.

TENTH. The name and post-office address of each subscriber to this certificate, and the number of shares of stock he agrees to take in such corporation, are as follows:

| Name. | Post-Office Address. | Number of Shares Subscribed. |
|---|---|---|
| C. S. Goldsborough, | Bogota, N. J. | 470 |
| M. P. Blauvelt, | 203 W. 54th St., N. Y. City | 10 |
| D. W. Bigoney, | 86 W. 36th St., Bayonne, N. J. | 10 |
| C. P. Crawford, | 110 W. 104th St., N. Y. City | 10 |
| Harrison Williams, | 26 Cortlandt St., N. Y. City | 10 |
| F. B. Church, | 103 W. 91st St., N. Y. City | 5 |
| David Bosman, | 210 Orient Way, Rutherford, N. J. | 5 |
| Wm. C. Cannon, | 21 Cortlandt St., N. Y. City | 10 |
| H. M. Merrihew, | 104 W. 70th St., N. Y. City | 5 |
| Edward M. Hunt, | 113 Waverly Pl., N. Y. City | 5 |
| Geo. N. Orcutt, | Hornellsville, N. Y. | 10 |
| F. W. Millspaugh, | 144 W. 94th St., N. Y. City | 10 |
| W. E. Talcott, | Empire Hotel, N. Y. City | 10 |
| B. A. Van Tassell, Jr., | Mt. Vernon, N. Y. | 10 |
| W. B. Bancker, | 43 Convent Ave., N. Y. City | 10 |
| F. W. Spring, | 67 Seventh Ave., N. Y. City | 10 |

ELEVENTH. The corporation hereby organized may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations, from time to time, when and as determined by the Board of Directors.

IN WITNESS WHEREOF, we have executed and acknowledged this certificate in duplicate, and have subscribed our respective names hereto.

Dated the 3d day of June, 1905.

C. S. GOLDSBOROUGH
M. P. BLAUVELT
D. W. BIGONEY
C. P. CRAWFORD
HARRISON WILLIAMS
F. B. CHURCH
DAVID BOSMAN
WM. C. CANNON
H. M. MERRIHEW
EDWARD M. HUNT
GEO. N. ORCUTT
F. W. MILLSPAUGH
B. A. VAN TASSELL, JR.
W. B. BANCKER
F. W. SPRING
W. E. TALCOTT

*Exhibit D-6.*

STATE OF NEW YORK,
City and County of New York. } ss.:

On this 3d day of June, 1905, in the City of New York aforesaid, before me personally appeared C. S. Goldsborough, M. P. Blauvelt, D. W. Bigoney, C. P. Crawford, Harrison Williams, F. B. Church, David Bosman, Wm. C. Cannon, H. M. Merrihew, Edward M. Hunt, Geo. N. Orcutt, F. W. Millspaugh, B. A. Van Tassell, Jr., W. B. Bancker, F. W. Spring, W. E. Talcott, to me personally known, and known to me to be the same persons described in and who executed the foregoing certificate of incorporation of Erie and Jersey Railroad Company, and they and each of them did thereupon acknowledge to me that they severally and respectively executed the said certificate for the purposes therein described.

H. C. HOOKER,
Notary Public No. 215,
New York County. (Seal.)

STATE OF NEW YORK,
City and County of New York. } ss.:

M. P. BLAUVELT, D. W. BIGONEY and C. P. CRAWFORD, being duly sworn, each for himself, deposes and says, that he is a director named in the foregoing certificate of incorporation, that at least One Thousand Dollars ($1,000) of the capital stock for every mile of road proposed to be built has been subscribed there to and paid in good faith and in cash to the directors named in the certificate, and that it is intended in good faith to build, maintain and operate the road mentioned thereon.

*Exhibit D-6.*

Severally sworn to before me } me this 3d day of June, 1905 }

M. P. BLAUVELT,
D. W. BIGONEY,
C. P. CRAWFORD.

H. C. HOOKER,
Notary Public No. 215,
New York County. (Seal.)

STATE OF NEW YORK, } Office of the Secretary of State. } ss.:

I have compared the preceding with the original Certificate of Incorporation of Erie and Jersey Railroad Company, filed and recorded in this office on the 5th day of June, 1905, and do HEREBY CERTIFY the same to be correct transcript therefrom and the whole of said original.

WITNESS my hand and seal of office of the Secretary of State, at the City of Albany, this fifth day of June, One Thousand Nine Hundred and Five. (Seal.)

HOMER G. TENNANT,
Second Deputy Secretary of State.

## Exhibit D-7.

ERIE AND JERSEY RAILROAD COMPANY CERTIFICATE OF NECESSITY.

Before the Board of Railroad Commissioners of the State of New York.

June 28, 1905.

Present:

COM. GEO. W. DUNN,
" FRANK A. BAKER,
" JOSEPH M. DICKEY,
" GEO. W. ALDRIDGE.

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IN THE MATTER

*of*

The Application of ERIE AND JERSEY RAILROAD COMPANY for a certificate under Section 59 of the Railroad Law.

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ORDERED, that said application be, and the same is hereby granted, and the Board of Railroad Commissioners hereby certifies, under Section 59 of the Railroad Law, that the conditions of said section have been complied with by the applicant, Erie and Jersey Railroad Company, and that public convenience and a necessity require the construction of the railroad of the applicant, Erie and Jersey Railroad Company, as proposed in its articles of association.

BY THE BOARD,
E. C. McEntee,
Assistant Secretary.

**Exhibit D-8.**

BACON AND RORTY
Attorneys and Counsellors
Goshen, N. Y.

HENRY BACON PHILIP A. RORTY

December 14, 1912.

MR. CHAUNCEY I. GUMAER,
Guymard, New York.

Dear Sir:

I am in receipt of a letter this morning from the Erie Railroad Company accepting the form of arbitration agreement as last submitted by you. If you will kindly have the agreement prepared in triplicate so that each party can have one executed instrument and the arbitrators can have an original, and send the papers to me, I will have them executed on behalf of the Erie Railroad Company.

You have never told me who your arbitrator was. The arbitrator proposed by me on behalf of the Erie Railroad Company is the Hon. William McCauley of Haverstraw, New York, County Judge and Surrogate of Rockland County. You can put his name in the paper.

Very truly yours,

HENRY BACON.

## Exhibit D-9.

BACON AND RORTY
Attorneys and Counsellors
Goshen, N. Y.

HENRY BACON PHILIP A. RORTY

*Re Gumaerd Lead and Zinc Co. vs. Erie.*

February 1, 1913.

MR. C. I. GUMAER,
Guymard, N. Y.

Dear Sir:

Your favor of the 13th ult. with enclosures has come to my hand since my return from my trip to Panama. I return the agreements herewith. You and I agree to a form of submission. I sent that to the Erie Railroad Company and procured their authority to execute it in the form you and I agreed upon. You have now added something to it and I cannot accept it in its modified form. If you will put the agreement in the shape in which we agreed upon it and in which it has been submitted and agreed to by the Erie Railroad Company, I will have it executed.

Yours truly,

HENRY BACON.

K Enc.

## Rule to Show Cause.

### NEW JERSEY SUPREME COURT.

GUMAERD LEAD & ZINC COMPANY,
*Plaintiff,*

*vs.*

ERIE RAILROAD COMPANY,
*Defendant.*

On due application on behalf of the defendant, ORDERED that the plaintiff show cause before this Court at the next stated term thereof why the verdict rendered in its favor on the twenty-second day of December, 1916, should not be set aside and a new trial granted.

FURTHER ORDERED that the following points, and no other, be and the same are hereby expressly reserved, to wit, all objections and exceptions noted by the defendant to the rulings of the trial judge at the trial of the cause which raise the question as to whether the plaintiff's action is maintainable on the covenant set forth in the complaint reading as follows:

> "The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel;"

and whether there was evidence to go to the jury of a breach of said covenant.

GEO S. SILZER,
Circuit Judge.

Rule entered this 10th day of January, 1917, on motion of

COLLINS & CORBIN,
Attorneys of Defendant.

## Reasons.

(Filed, Jan. 24, 1917.)

The defendant writes down the following Reasons upon which it rests its motion for a new trial in the above entitled cause:

1. The trial judge admitted the following question addressed to the witness Chauncey I. Gumaer and refused to strike out the answer thereto:

"Was there ore present in marketable quantities there, as indicated by what you saw in the cross cut?"

2. The following questions were admitted:

To the witness Chauncey I Gumaer:

"Have you figured the cost of the excavation necessary to put in the retaining walls that you have described?

"What do you make that cost?

"When did you figure it out?

"What have you to say about the cost of excavation there (referring to a certain house) as compared with the excavation work that you did when you were supervisor of the county in Colorado?

"Have you figured that in consideration of the wages paid for labor used in that kind of work here in the East?

"Right on that point, how many men did you employ for the company in excavating on that particular locality there?

"You all did the same character of work, excavating and moving the house, didn't you?

"Did you do any excavating there?

"How many men did you employ in that work?

"Did you oversee the work?

"Did you pay them for their labor?

"You had not forgotten how to oversee labor from the time you had been in Colorado and the time you came home?

"Then how much do you figure the cost of excavating for the retaining walls that you have described here?

*Reasons.*

3. The following question was admitted:

To the witness Chauncey I. Gumaer:

"Using those figures which you produce, can you tell us the amount of excavation necessary to build the wall that you mentioned in your testimony?"

4. The following question was admitted:

To the witness Chauncey I. Gumaer:

"Did those piles and that wood construction and that earth dumped against it afford any support for the south side of that plot?"

5. The following questions were admitted:

To the witness Chauncey I. Gumaer:

"Coming back to the previous question, what amount of excavation will be necessary in order to put in such a retaining wall?

"What is the amount of excavation necessary for the south wall you contemplate?

"Then just give us the joint cost of excavation?"

6. The following question was admitted:

To the witness Chauncey I. Gumaer:

"What is the amount of concrete necessary for each wall, have you got that?"

7. The following questions were overruled:

To the witness Chauncey I. Gumaer:

"At the time of the giving of this deed of June 24, 1909, the one upon which your action is based, will you state what consideration passed to your Company for that deed?

"Was there any money consideration passed from the railroad company to your Company for the execution of this agreement?

"How much?"

8. The following questions were admitted:

To the witness Walter H. Tonking:

"Have you made any estimate of the amount of excavation necessary to construct

a proper retaining wall to bed rock on both the south and west side of the shaft-house?

"What amount of excavation would be necessary for that?"

"How much is the estimate?

"What do you say about the retaining wall being necessary on the south and the west?

"Do you think a retaining wall is necessary on both sides at both places?"

9. The following questions were admitted:

To the witness Walter H. Tonking:

"What would be the cost of the construction of a proper concrete wall on the south side of the plot, can you tell us?

"Have you estimated the cost of the construction of such a retaining wall as would be necessary on the west side of the tract?"

10. The following questions were admitted:

To the witness Walter H. Tonking:

"What would be the cost of the two walls together, west and south?

"Could filling on the south side be restored if you put in the proper kind of filling, without a retaining wall there?"

11. The following question was overruled:

To the witness Walter H. Tonking:

"How long would it take you tofigure out that for us, what that would cost" (referring to the raising of the height of the present retaining wall)?

12. The following questions were overruled:

To the witness Walter H. Tonking:

"Now go back to this angle of repose for a moment, I want to find out if I can how much it would cost to put in natural fill there, to bring about this condition of repose? Did you make an estimate of that at all?

"Is it not possible to make that estimate?"

*Reasons.*

13. The following question was overruled:
To the witness Walter H. Tonking:

"Then you think that Mr. Van Mater did not do it as he said he did?"

14. The following question was admitted:
To the witness Chauncey I. Gumaer:

"How much money did the Gumaerd Lead and Zinc Company expend in what it did underground up to the time of this cavein?"

15. The following question was admitted:
To the witness Clyde B. Mills:

"What was the result of the analysis of those samples?"

16. The trial judge refused to non-suit the plaintiff when thereunto moved, whereas a non-suit should have been granted for one or more of the following reasons:

"(1) The proof fails to show any breach of covenant or any damage from the alleged brief, so far as relates to the agreement to restore certain pipes and wires.

"(3) There is no proof that the defendant did the acts of which the plaintiff complains.

"(4) There is no proof that the plaintiff offered arbitration, as required by the terms of the agreement."

17. The trial judge refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted for one or more of the following reasons:

"(1) The proof fails to show any breach of covenant or any damege from the alleged breach, so far as relates to the agreement to restore certain pipes and wires.

"(3) There is no proof that the defendant did the acts of which the plaintiff complains.

"(4) There is no proof that the plaintiff offered arbitration, as required by the terms of the agreement.

"(5) The construction work and the injury, if any, were done by an independent contractor and not by this defendant."

18. The trial judge charged the jury:

"Another defense is that the work was not done by this defendant, but by the Erie and Jersey Railroad, and that there was a clause for arbitration in the agreement, and that the defendant was willing to arbitrate but the plaintiff was not, and that no suit will lie until the plaintiff has tried to arbitrate.

"Now, as to the question of arbitration; I charge you this, that the agreement itself which speaks of arbitration, as a matter of law, does not require the plaintiff to submit its dispute to arbitration before it can bring suit. In other words, the plaintiff had the right to bring suit without submitting the matter to arbitration at all. So that there would be no bar to the bringing of this action."

19. The trial judge charged the jury:

"Now, with reference to the claim that the work was not done by the Erie Railroad Company, but was done by the Erie and Jersey Railroad, the law is this, that the defendant in this case is not liable for injuries which are caused by the acts of other persons which were not authorized or which it had no reason to anticipate, and of which it had no knowledge. That is the general rule. But, in addition to that, gentlemen, it is also the rule, and this is the law in the case which you will take from the Court, that, if the work was done by the Erie and Jersey Railroad Company, and if the Erie Railroad Company knowingly permitted and suffered the Erie and Jersey Railroad Company to come on that land to do the work which it had reasonable cause to believe might cause a breach of the covenant, and which work thereafter did cause a breach of the covenant, then the Erie Railroad is just as responsible as if it had done the work

itself. You see, this was land that belonged to the Erie Railroad Company, and it had made a covenant that it would do certain things, so that if thereafter it knowingly permitted somebody to come on that land and do as I suggested a moment ago, it would be as responsible as if it did it itself."

20. The trial judge charged the jury:

"Now, gentlemen, on the question of damages. There have been a great many facts introduced in this case, and we have had many figures, and they have been very far apart.

"Another fact that the plaintiff, as I understand, claims is, that, in order to restore the shaft to the condition that it was in before the injury; that is to say, to put it in the condition that it was in at that time so that he could use it as a shaft, for the transportation of his men and material up and down; the claim of the plaintiff is that in order to do that that it would be required to do a number of things, including the building of some cement walls, and the total expense of that would be over twenty-four thousand dollars. You have heard the testimony of the witnesses called by the plaintiff with respect to the cost of restoration.

"The defendant, on the other hand, through a number of witnesses, testifies that no such amount is required at all. One witness this afternoon testifying that six hundred dollars, I think it was, would completely restore the shaft to the condition it was in before the injury, and to put it in just as practicable and usable a condition as it was before this occurred.

"So you will see that the figures are a long way apart, and it is for you to determine what causes this wide difference of opinion between men who apparently are honest in their statements. It may be that those statements can be reconciled. It may be that one side or the other is not telling what is true, and that is the reason that we have in this country an

institution consisting of twelve men who are impartial and disinterested, who will apply their good common sense to a situation of this kind, in order that they may determine just where the truth is. So you will see that you have to take that testimony and determine what is the truth of the situation. On the one side they say that they have got to build cement walls and do a lot of other things; on the other side they say that that is not necessary at all. And you have got to determine the truth. It may be, as I have said, that there is some explanation of this wide divergence of opinion—and let me say in this very connection, that you must not be prejudiced on either side in this case, either for or against the plaintiff, because that happens to be a corporation, nor against the defendant because it happens to be a railroad company. That does not make any difference. They are both here as litigants, placing their claims before twelve honest men of this County, and both sides ask you to do justice between them; and I don't know of any more important duty that a man can perform than to sit in the jury box and mete out justice between two people who cannot agree as to what justice is. Now, it is your function to do between these parties what is right, according to the evidence that has been introduced here.

"So that you will determine, gentlemen, if you come to the question of damages, what is the reasonable cost, as I have already stated to you, of restoration; what you feel is fair and honest, and then add interest as I have indicated.

* * * * * * *

"If you find that there was a breach of the covenant, then determine what is the reasonable cost of restoration, under the rules that I have given you, and add to the sum which you so return, interest, and return that total amount as to the amount of your verdict."

21. The trial judge charged the jury (with reference to defendant's Requests Nos. 9 and 10):

"No. 9. Under the evidence in this case the

jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the west of the plaintiff's shaft.

"I charge you, gentlemen, that if you find that a wall on the west of the plaintiff's shaft was not necessary in order to restore the plaintiff's property to the same condition that it was in before the injury, then you are not to consider the cost of constructing a retaining wall as an element of damages. That, of course, is true, gentlemen, and that is also true as to the wall on the south side. If either or both of those walls are not necessary in order to restore the property to its former condition, then, of course, you have no right to consider them in your calculations. It is only if they are necessary that you may include them in the calculations of the sum that is to be awarded to the plaintiff if it recovers any damages."

22. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"5. There can be no recovery by the plaintiff for breach of said covenant of said deed by reason of any act or omission of the Erie and Jersey Railroad Company, or of any person or persons other than the defendant itself, even though such act or omission was with the assent of the defendant."

23. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"6. There can be no recovery in this action for breach of the said covenant of said deed if the jury find that the damage to the plaintiff resulted from negligence."

24. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

*Reasons.*

"7. If the jury find that the plaintiff failed to comply with the provision as to arbitration respecting the claims arising under that part of the said deed of June 24, 1909, relating to the 'shaft and building plot' or the covenant with respect thereto, then the plaintiff cannot recover any damages for breach of the said covenant recited in Request No. 2."

25. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"8. If the jury find that the defendant complied with the provision as to arbitration respecting claims arising under that part of the said deed of June 24, 1909, relating to the 'shaft and building plot' or the covenant with respect thereto, then the plaintiff cannot recover for any breach of the said covenant recited in Request No. 2."

26. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"9. Under the evidence in this case the jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the west of the plaintiff's shaft."

27. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"10. Under the evidence in this case the jury are not warranted in considering as an element of damage the cost of the construction of a retaining wall to the south of the plaintiff's shaft."

28. The verdict was against the clear weight of the evidence.

29. The verdict was against the charge of the trial judge.

30. The verdict was excessive.

COLLINS & CORBIN,
Attorneys of Defendant.

## Opinion.

### (On Rule to show Cause—Second Trial.)

(Filed August 17, 1917.)

### NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1917.

GUMAERD LEAD AND ZINC CO.,
*Plaintiff,*
vs.
ERIE RAILROAD COMPANY,
*Defendant.*

On Rule to Show Cause.

Before Justices Swayze, Minturn and Kalisch.

For the Rule—Collins & Corbin.

Contra—Joseph Coult, Jr., and William A. Smith.

Per Curiam.

This case comes before this court for the second time after a second trial, on a rule to show cause why a new trial should not be granted to the defendant.

The case was tried before Judge Silzer, sitting with a jury, in the Sussex Circuit and a verdict was rendered in favor of the plaintiff and against the defendant for $13,600.00.

The plaintiff's action is founded on a breach of covenant contained in a deed, made by the Zinc Company of the first part and the Erie Railroad Company of the second part, on the 24th day of June, 1909, which covenant is as follows: "The party of the second part contracts and agrees that in case it shall make any excavation upon its ad-

joining lands which shall interfere with the natural support of the surface of the parcel it will construct and maintain such retaining walls or other devices as may be necessary, to prevent slopes from encroaching upon said parcel."

The rule to show cause allowed in this case expressly reserves all objections and exceptions noted by the defendant to the rulings of the trial judge at the trial of the cause which raise the question as to whether the plaintiff's action is maintainable on the covenant above set forth, and whether there was evidence to go to the jury of a breach of that covenant.

Counsel for the defendant, in their brief, make the further claim, that even if an action on the covenant is maintainable and even if there was evidence to go to the jury as to a breach thereof, nevertheless, the verdict is against the clear weight of the evidence, against the charge of the court, and the damages are excessive.

It has not been pointed out to us in what essential respect the proof in the present case differs from the proof adduced at the former trial concerning the legal questions attempted to be raised here and which were passed upon by this court upon the former rule to show cause and where this court held that an action on the covenant was maintainable and that upon a proper construction of the covenant there was evidence of a breach to go to the jury. Therefore, as a result of this ruling, and in view of the fact that there was testimony in the present case tending to establish a breach of the covenant, we must conclude that the motions for nonsuit and direction of a verdict for defendant were properly denied.

In relation to the contention of counsel for de-

fendant that the verdict is against the clear weight of the evidence and against the charge of the court, leaving out of consideration the question of excessive damages which is reserved for comment in its turn, we find to be without support.

The undisputed facts are that the plaintiff some time in June 1907 constructed and sunk a mining shaft on its land which adjoined the defendant's. On the 24th day of June 1909, two years later, the plaintiff made a deed to the defendant of the land described in the deed, reserving to itself the "Shaft and Building Plot", to mine and remove all the ores, minerals and fossil substances within the boundaries and below the surface of the parcel of land described in the deed, and the right of mine through, use, operate, extend and maintain the existing shaft (the shaft constructed by the plaintiff in 1907), with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery, dumps, milling and other devices for treating ores and the products thereof, etc; also the right to construct and maintain on said "Shaft and Building Plot" one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, provided the air or ventilating shaft was located at least seventy-five feet easterly from the westerly side of the "Shaft and Building Plot".

It was as to this plot that the defendant had covenanted and agreed with the plaintiff, its grantor, that in case the former made any excavations upon its adjoining lands which interfered with the natural support of the surface of the

parcel, it would construct and maintain retaining walls or other devices as would be necessary to prevent its slopes from encroaching on said parcel.

The defendant made excavations upon its adjoining lands which interfered with the natural support of the surface of the parcel of land, whereby and as a result there was a slope of earth, the mining shaft and its accessories were damaged, the shaft was put out of plumb and it and the mine became unworkable.

The evidence tends to establish that the slope was due to the failure of the defendant to construct and maintain retaining walls or other devices as were necessary to prevent slopes from encroaching upon plaintiff's parcel, as required of it by the covenant in the deed.

We think the evidence clearly supports the finding of the jury in that regard. The principal attack made by counsel for defendant is levelled against the size of the verdict. In support of the attack it is argued that the verdict was the result of misapprehension of the trial judge of the legal rule controlling the recovery of damages for the breach of the covenant in that (1), the trial judge allowed testimony to be given that ore was found in the mine and as to the nature of such ore, against the defendant's objection which was in substance that damages could not be allowed for possible delay in the realization of unmined ore. But even if such testimony was improperly admitted we are unable to perceive that any harm resulted therefrom to the defendant, because it appears that the trial judge excluded every other element of damage from consideration by the jury, when he in clear and explicit terms instructed the jury that if they approached the subject

of damages they were limited to consider only "the reasonable cost of restoration or repair of the plaintiff's shaft, head frame and shaft house; that is the reasonable cost of putting them back in as good condition as they were before the excavation was begun upon the lands adjoining the property described in said deed as the shaft and building plot."

"Second: interest on such cost—that is, the cost of restoring it to its former condition—from the date of the breach of said covenant in said deed, down to the date of the verdict."

And charging thus, the trial judge did so at the defendant's request.

2. It is next said that the trial judge misinterpreted the rule of damages recoverable under the evidence of this case, as above laid down when he instructed the jury further as follows: "Another fact that the plaintiff, as I understand claims, is, that, in order to restore the shaft to the condition that it was in before the injury; that is to say, to put it in the condition that it was in at that time so that he could use it as a shaft for the transportation of his men and material up and down, the claim of the plaintiff is that in order to do that that it would be required to do a number of things, including the building of some cement walls, and the total expense of that would be over twenty-four thousand dollars. You have heard the testimony of the witnesses called by the plaintiff with respect to the cost of restoration."

No good reason has been advanced by the defendant why the plaintiff was not entitled to have full restoration of the parcel of land with its mine shaft and accessories in order that the plaintiff

might have the undisturbed possession and enjoyment of them as contemplated by the parties when they entered into the covenants expressed in the deed.

On this branch of the case the substantial controversy between the litigants appears to be whether there exists a reasonable necessity to build retaining walls on the south and west side of the shaft in order to accomplish a full and permanent restoration.

The plaintiff's expert witnesses maintain that such reasonable necessity does exist. On the other hand, the defendant's expert witnesses deny that. This sharp conflict in the testimony was preeminently within the province of the jury to settle, and as they found for the plaintiff on this issue of fact and since there is testimony which reasonably supports that finding, it will not be interfered with.

It is further argued by counsel for defendant that the damages awarded are excessive in that they are far beyond what it would actually cost to retimber and relign the old shaft.

But there was evidence in the case on which the jury might have properly found and evidently did find that retimbering and realignment of the old shaft, on account of the nature of the soil, were impracticable, and that the construction of concrete walls was necessary to maintain the alignment of the shaft and the preservation of the surface of the plot in its natural condition.

In the view the jury took of the situation, we cannot say that, under the evidence, the award of damages is excessive.

For the defendant it is further insisted that the plaintiff did nothing to minimize its damages.

In support of this assertion it is pointed out that it was the legal duty of the plaintiff when it found that retimbering and realignment of the old shaft were impracticable, to have sunk a new shaft, for which there was ample space on the plot seventy-five feet distant from the old shaft, which would have cost less than building concrete retaining walls. It does not appear that the defendant made any attempt to establish this by proof. The burden was on it to have done so. Besides there is testimony in the case that the old mine shaft and accessories cost about ten thousand dollars. Furthermore, by the very terms of the deed between the parties, the plaintiff has no legal right to sink another shaft for mining purposes but is expressly limited to sinking a shaft for light and air and for ingress and egress of miners.

We have examined the other reasons assigned by the defendant for setting aside the verdict and find them to be without merit.

The rule to show cause will be discharged, with costs.

**Rule Discharging Rule to Show Cause.**

(Filed August 24, 1917.)

A rule to show cause why the verdict in the above entitled action should not be set aside having been heretofore allowed, and a hearing on said rule duly coming on for argument at the February Term, 1917, of this Court, and after hearing Collins & Corbin, attorneys for the defendant, for the rule, and Coult & Smith, attorneys for the plaintiff, contra, and this Court having duly considered the same.

It is Ordered that the rule to show cause here-

tofore allowed in the above entitled case why the verdict in favor of the plaintiff and against the defendant should not be set aside and a new trial granted, be and the same is hereby discharged with costs in favor of the plaintiff.

Rule actually entered August 24, 1917.
On motion of
Coult & Smith, Attorneys of Plaintiff.

10

## Rule for Judgment.

(Filed August 24, 1917.)

The rule to show cause heretofore entered in this cause having been discharged by the Court,

It is Ordered that judgment final be and hereby is entered in favor of plaintiff and against the defendant for the sum of thirteen thousand six hundred dollars besides costs to be taxed.

20 Entered August 24, 1917,
as of January 4, 1917,
On motion of
Coult & Smith, Attys.

## Judgment.

(Filed August 24, 1917.)

Subsequently to the rendition of said verdict a rule to show cause why the verdict should not be
30 set aside and a new trial granted was allowed to said defendant, which said rule was argued at the February Term, 1917 of this Court, and an opinion was filed at the June Term 1917, discharging said rule to show cause and upholding said verdict.

Whereupon it is adjudged that the plaintiff, Gumaerd Lead & Zinc Company recover of the defendant, Erie Railroad Company, the sum of

40

| | |
|---|---|
| Damages | $13,600.00 |
| Costs | 82.86 |
| | $13,682.86 |
| Costs on R. to S. C. | 51.00 |
| | $13,733.86 |

thirteen thousand six hundred dollars and its costs, which are taxed at the sum one hundred and thirty-three dollars and eighty-six cents, making in the whole the sum of thirteen thousand seven hundred and thirty three dollars and eighty six cents.

Judgment entered August 24, 1917, as of January 4, 1917.

WM. S. GUMMERE, C. J.

## Order Staying Execution.

It appearing that a petition for reargument of defendant's rule to show cause, dated December 22, 1916, has been filed and upon due notice to the attorneys of the plaintiff of the application for this order, it is on this 13th day of September, 1917, on motion of Edward A. Markley, of counsel with the defendant ORDERED that execution and all proceedings by the plaintiff be stayed till the further order of this Court.

By the Court,
FRANCIS J. SWAYZE,
J. S. C.

## Opinion

### (On Petition for Reargument.)

(Filed December 22, 1917.)

The present application is for a reargument of a rule to show cause, heretofore argued and decided by this Court in an opinion denying a new trial and discharging the rule. Upon the argument of the rule elaborate briefs were submitted by counsel of the respective parties dealing with all the controverted questions presented at the trial of the case excepting the questions specially reserved in the rule. Among the basic questions discussed at the trial and dealt with by the trial court in its charge and presented to us for review in the briefs was the question of damages and the trial court's charge in that connection. To the discussion of this important question the first six points in the defendant's brief were directed, and over seventy-five pages of printed brief are devoted to its elaboration. The first twenty-one pages of the brief contain a general statement and discussion of the case and the questions to be presented upon the argument of the rule. The remaining portion of the brief, of about seventeen pages, was devoted to the other contested questions in the case.

The general right to maintain the action was asserted in the prior opinion of this court, filed March 6, 1916, upon a rule to show cause granted upon the first trial. It is urged at this time as a basis for a reargument of the second rule to show cause that this court probably misapprehended the scope of the argument contained in the brief, because of the fact that a greater portion of it was

directed to the discussion of the question of damages for construction than was directed to the discussion of the law of the case as laid down by the trial court, and which, as is contended, was misunderstood or ignored by the jury in reaching their verdict. This latter element of the case was presented in the first point of the brief filed, which contained a liberal excerpt from the charge of the trial court upon the subject sufficient to enable us to grasp at the very outset of the argument the point now pressed upon us as a basis for a reargument.

It must suffice to say upon this application that there is nothing now urged in the petition for reargument, either upon the question of excessive damages, or upon the adoption of an erroneous rule of damages by the court or in its statement of the general abstract rule of damages, or in its elaboration of the rule by practically applying it to the facts of the case, or in the admission or rejection of testimony bearing upon the issues involved, which this court in determining the questions presented in the briefs has overlooked; or upon which it has failed to bestow that consideration which, in its judgment, the importance of those questions deserves, and which the elaborate and painstaking briefs of counsel entitled them to receive.

The result is that we are constrained to deny the present application.

## Rule Dismissing Petition for Reargument of Rule to Show Cause.

(Filed December 27, 1917.)

This matter being opened to the court by Coult & Smith, attorneys for and of counsel with the above named plaintiff, and it appearing to the court that the defendant by petition dated September 4, 1917, and filed in this court respectfully requested the court to grant a reargument of its rule to show cause mentioned in its said petition; and it further appearing to the court that at the time of the filing the said petition the court directed, by order dated September 13, 1917, that execution on all proceedings by the plaintiff should be stayed until the further order of the court; and the court having duly considered the said petition and having come to the conclusion that the relief prayed for in said petition should be denied and that the stay of execution directed by said order of September 13, 1917, should be dissolved;

IT IS therefore ORDERED that defendant's petition dated September 4, 1917, and filed in the above action be and the same is hereby dismissed with costs.

And it is further ORDERED that the stay of execution and all proceedings by the plaintiff directed by the order of September 13, 1917, be and the same is hereby dissolved.

Dated, Dec. 27, 1917.

Entered on motion of

Coult & Smith, Attorneys for Plaintiff.

Let the foregoing rule be entered in the minutes.

By the Court,

F. J. SWAYZE, J.

## Notice, and Grounds, of Appeal.

(Filed January 12, 1918.)

To COULT & SMITH, Esqs.,
Attorneys of Plaintiff.

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

1. The trial judge refused to nonsuit the plaintiff when thereunto moved, whereas a nonsuit should have been granted for the following reason:

> "(2.) The proof fails to show any breach of covenant or any damage from the alleged breach with reference to paragraph nine of the agreement of June twenty-fourth, 1909."

2. The trial judge refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted for the following reason:

> "(2.) The proof fails to show any breach of covenant or any damage from the alleged breach with reference to paragraph nine of the agreement of June twenty-fourth, 1909."

3. The trial judge charged the jury:

> "Gentlemen of the jury, in this case the plaintiff sues to recover on an alleged breach of a covenant in a deed or contract existing between the parties. That covenant, which you have heard read to you, you will find in the exhibit which will be put before you, and it reads as follows:
>
> "'The party of the second part'—that is, the Railroad Company—'covenants and agrees that, in case it shall make any excavation

upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching upon said parcel.'

"The plaintiff sues for damages, claiming that there was a violation of that covenant, that the defendant did not perform it, and that, as a result, of such failure, it was damaged, and it asks you to reimburse it.

"The only basis upon which a recovery can be had in this case, gentlemen, is for a breach of this covenant, because, that is what the suit is brought for, nothing else; and the burden of satisfying you, by a fair preponderance of the evidence, not only that there was a breach of the covenant, but also as to the damages, is upon the plaintiff.

"I am not going to discuss at length the facts in the case, because counsel have already dealt with them quite fully, and I shall just mention them briefly, reminding you that you are the judges of the facts, and if the Court does not state the facts accurately, you will recall what the true facts are.

"The plaintiff contends that it had a shaft upon this property, adjoining the railroad property; that the shaft ran down to a mine, or a place that it was working, or prospecting for mining purposes. It also claims that that shaft was in working condition and operation for mining purposes. Also claims that the defendant excavated on the adjoining property, with the result that there was a cave-in, or a slide of the earth, whereby the shaft, the head frame and the shaft house, were put out of plumb, with the further result that the shaft could not be used for the purposes for which it had been constructed and could not be used for the same purposes that it had been used for up to that time.

"The plaintiff alleges further, that there was a retaining wall erected, but that the re-

taining wall did not prevent the slopes from encroaching on said parcel, and, there is the further allegation that this retaining wall was not properly built so that it would give the protection called for by the agreement.

"That is practically what the complaint alleges in this case.

"The defendant, on the other hand, says that there was no violation of the covenant at all. That it lived up to the covenant in every way; that, if there was any damage done, it was of a minor character, that they sent their carpenters there, and, at an expense of something like thirty-four dollars, the damage was repaired, the shaft was put in workable order again. The defendant also suggests that the slide was caused, at least in part, by water which the plaintiff company permitted to go upon this land. The defendant also says that the wall which was erected there is sufficient for the purpose and that, if the land is filled in, it will securely support this shaft."

4. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"1. There can be no recovery by the plaintiff for the breach of the covenant of the defendant in the deed of June 24, 1909, reading as follows:

"'The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slope from encroaching on said parcel.'"

COLLINS & CORBIN,
Attorneys of Appellant.

Dated, January 11, 1918.

# New Jersey Court of Errors and Appeals.

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| GUMAERD LEAD & ZINC COMPANY,<br>*Plaintiff-Respondent,*<br>*vs.*<br>ERIE RAILROAD COMPANY,<br>*Defendant-Appellant.* | On Appeal from Supreme Court. |

## *BRIEF IN FAVOR OF ERIE RAILROAD COMPANY, DEFENDANT-APPELLANT.*

### I.

### Statement of the Case.

The appeal in this case was taken to review a judgment of the Supreme Court entered upon a verdict obtained by the plaintiff at the Sussex Circuit for the sum of $13,600 in an action brought to recover damages for the alleged breach of certain covenants expressed in an indenture between the parties dated June 24, 1909. A copy thereof is annexed to the complaint (Case, pp. 6-21). It will facilitate a consideration of the points to be argued in this brief if we first summarize the pleadings.

It was alleged in the complaint that the defendant had violated certain of the covenants set forth in the said indenture, respecting water pipes, conduits and electric wires; and further that

the defendant had broken another covenant, relating to the construction and maintenance of retaining walls, in that it had not preserved the natural support of the surface of certain lands of the plaintiff described in the indenture as "shaft and building plot", by reason whereof a mining shaft of the plaintiff (located on said plot) was forced out of alignment, and thereby the said shaft became "utterly useless" as a means for bringing mineral ores to the surface, and as a result thereof the plaintiff was unable to work its "valuable mines" and lost "enormous profits" (pp. 1-6).

At the trial which resulted in the verdict now under review the plaintiff abandoned its claims relative to water pipes, conduits and electric wires, and limited its proof to the alleged breach of covenant relating to the natural support of the said "shaft and building plot".

The situation with reference to this plot may be understood by reference to the map attached to the indenture of June 24, 1909, copies of which have been furnished with the printed book for the use of the court. By that document the plaintiff conveyed to the defendant certain lands described therein in detail and shown within red outlines upon said map (p. 8, l. 20), excepting therefrom and reserving to the plaintiff "all ores, minerals and fossil substances within the boundaries and below the surface of the above described premises, with the right by all proper and usual or appropriate subterranean methods to mine and remove the same" (p. 8, ll. 32-40).

By the same deed the defendant granted to the plaintiff all the ores, minerals and fossil substances, etc. (p. 12, l. 32).

The parcel of land referred to in the deed as "shaft and building plot" was particularly described therein (p. 16, l. 35, to p. 17, l. 25), and is

indicated on said map by green boundary lines. There was a further provision with respect to said parcel, reading as follows:

> "Also with respect to the parcel of land hereinafter described and referred to as the 'Shaft and Building Plot', the following rights, to wit: The right by all proper and usual or appropriate subterranean methods to mine and remove all the ores, minerals and fossil substances within the boundaries and below the surface of said parcel; also the right to mine through, use, operate, extend and maintain the existing shaft, with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery, dumps, milling and other devices for treating ores and the products thereof as shall or may be proper or necessary for use in connection with the mining, removal or treating of ores and minerals obtained from said parcel and other lands in the vicinity of the hereinbefore described premises; also the right to construct and maintain on said 'Shaft and Building Plot' one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, providing that said air or ventilating shaft shall be located at least seventy-five feet easterly from the westerly side of said 'Shaft and Building Plot'" (p. 14, l. 15, to p. 15, l. 3).

Then follow provisos that the exercise of these rights by the plaintiff shall not endanger the railroad structures and that the plans for tunnels and mine workings shall be submitted to the chief engineer of the railroad, etc.

Then follows the clause containing the covenant upon which the plaintiff's present claim is based (p. 15, l. 35, to p. 16, l. 3).

Then follows provision for arbitration in case of dispute, etc. (p. 16, ll. 3-30).

The complaint alleges as follows:

(a) Defendant agreed to furnish across and underneath its right of way and tracks a connection pipe, of the same kind as the one and one-half inch water pipe in existence at the time of the execution of the deed, and connection with the same at a suitable point on the east of the right of way and leading therefrom to a point of connection of the same pipe on the west of the right of way in such manner that the same volume of water might flow freely across the right of way through said pipe and into the old pipe as formerly (par. 4 of Complaint).

The breach charged was that the defendant failed to duly and properly furnish, install and maintain across and underneath the said right of way the said one and one-half inch pipe (par. 10).

(b) Defendant agreed to furnish and install a five-inch pipe of the same kind and material as the pre-existing four-inch-pipe, the said five-inch pipe to lead from a certain point in a stream flowing past Guymard Depot, across and underneath the right of way, and to connect with the existing water power pipe on the lands of the plaintiff, west of the depot, in such a way that the same volume of water from said stream might flow through said five-inch pipe into said power pipe freely and with the same head as theretofore (par. 5).

The breach charged was that the defendant failed to duly and properly furnish, install and maintain under and across said right of way, the said five-inch water pipe so that the water might flow freely, and with the same head as theretofore (par. 11).

(c) Defendant agreed to furnish and install a suitable conduit leading from a certain stream between certain points described in the complaint across and underneath its right of way, and the right of way of Erie and Jersey Railroad Company; said conduit to be such as to admit of the

introduction and maintenance therein by the plaintiff of a sludge pipe nine to ten inches in diameter; defendant further agreed to excavate and make a suitable ditch across the lands of the plaintiff between certain named points, so that the unpiped portion of the stream should flow freely through said conduit and ditch across said lands, and into the old channel, as theretofore; defendant further agreed that the conduit should be such as to admit of the installation therein of certain electric light and power wires (par. 6).

The breach charged was that the defendant failed to furnish, install and maintain a suitable conduit in accordance with said covenants, and neglected to comply with its "said covenants" set forth in paragraph 6 (par. 12).

(d) Defendant agreed to furnish and install electric light and power wires of the same kind and dimensions as those in use on said premises prior to the execution of said deed (par. 7).

The breach charged was that the defendant had failed to furnish and install said electric light and power wires (par. 13).

It was further alleged that the defendant agreed to maintain all parts of such pipes, wires and conduits as should be constructed upon its right of way (par. 8).

The breach charged was that the defendant had failed to perform its said covenant (par. 14).

(e) Defendant agreed that if it should make any excavations upon its land adjoining "shaft and building plot", which should interfere with the natural support of the surface of said plot, it would construct and maintain such retaining walls or other devices as might be necessary to prevent its slopes from encroaching on said plot *to insure the preservation of the surface of said plot in its natural and normal condition* (par. 9).

The breach charged was as follows:

> "(15) That defendant has failed to perform its covenants referred to in paragraph 9 hereof in that it had not protected and preserved the natural support of the surface of the 'shaft and building plot' and in disregard of its said covenant and agreement defendant actually removed or caused to be removed a portion of the soil or sub-surface material to such an extent that the shaft and its accessories have sagged out of alignment and have become utterly useless as a means by which mineral ores or other substances can be brought to the surface and as a means of ingress and egress for miners to and from the mine below the surface of said premises and that the underground ventilating system formerly in use in said mine has been rendered utterly useless" (p. 4, l. 35, to p. 5, l. 10).

This allegation is based upon a covenant which reads as follows:

> "The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel" (p. 15, l. 35, to p. 16, l. 3).

It will be observed that the allegation in paragraph 9 of the complaint which purports to state the covenants in question adds to the language as used in the deed, the words "to insure the preservation", etc.—as above italicized.

After reciting the foregoing as covenants, and alleging the foregoing as breaches thereof, the complaint then charged as follows:

> "16. That the defendant had notice of the existence of the plaintiff's mine prior to and at the time of the execution of the deed hereinbefore first mentioned; that the plaintiff by

reason of defendant's failure to perform its said covenants has ben unable to work its valuable mines below and underneath the premises conveyed by the deed hereinbefore mentioned; that said mines have lain idle and that plaintiff has lost enormous profits from said ores, which plaintiff might and would have extracted from said premises but for the failure of defendant to perform its said covenants and agreements; that as a result of said defendant's failure to perform its said covenants the said mines have become filled and flooded with water to such an extent that the work heretofore done by plaintiff in constructing shafts, drifts and other mine workings has been rendered valueless, which, prior to the date of the deed referred to in paragraph 2 hereof, were of great value.

"17. That plaintiff by reason of defendant's failure to perform its said covenants, has suffered great damage to the extent that it will cost to put plaintiff's mine, shaft and their appurtenances in good working order.

"18. That plaintiff by reason of defendant's failure to perform its said covenants, has suffered great damage to the extent that plaintiff's mine and its appurtenances have decreased in value between the time of the date of the deed mentioned in paragraph 2 hereof and the date of the commencement of this action" (pp. 5, 6).

Damages were demanded in the sum of one hundred and fifty thousand dollars ($150,000).

For a first defense, defendant admitted certain of the allegations in the complaint, but denied all of the allegations thereof with respect to the alleged breaches of covenant on its part, and with respect to the damages alleged to have been sustained by the plaintiff by reason thereof (p. 21, l. 35, to p. 22, l. 3).

For a second defense, the defendant alleges that the damages, if any, were due to the failure of the plaintiff to exercise reasonable care to prevent or to decrease or to minimize the damages neces-

sarily incident to the work of constructing and operating railroad tracks and the appurtenances thereof (p. 22, l. 10).

Plaintiff in its reply denied this part of the answer (p. 26, l. 5).

For a third defense, the defendant said that the damages, if any, were due solely to the operations of Erie and Jersey Railroad Company (p. 22, l. 20). This was denied by the plaintiff (p. 26, l. 5).

For a fourth defense, the defendant said that the damages, if any, were due solely to the operation of certain independent contractors, to wit, Bennett and Talbott, pursuant to a certain agreement dated August 10, 1905, and modified June 5, 1907 (p. 22, ll. 25-40).

This was denied by the plaintiff (p. 26, l. 5).

For a fifth defense, defendant said that the damages, if any, were due solely to the operations of the defendant, and of Erie and Jersey Railroad Company, as common carriers organized as railroad corporations, under the laws of the State of New York; that said damages were necessarily incident to the work of constructing, maintaining and operating railroad tracks and the appurtenances thereof (p. 23, l. 10).

This was denied by the plaintiff (p. 26, l. 5).

For a sixth defense, so far as relates to the allegations in paragraph fifteen of the complaint, the defendant said it did not disregard its covenant, and did not remove or cause to be removed a portion of the soil or surface material to such an extent that the plaintiff's shaft and accessories sagged out of alignment and became useless, etc. (p. 23, ll. 20-30).

For a seventh defense, so far as relates to the allegations of said paragraph fifteen, the defendant set up the arbitration agreement contained in said deed of June 24, 1909; that certain disagreements

arose between the parties prior to the beginning of the suit and that these are the matters referred to in said paragraph; that the plaintiff did not, as a condition precedent to the institution of the suit, arbitrate, or offer to arbitrate, the said disagreements, and for this reason, the complaint was insufficient and defective in point of law (pp. 23, 24).

For an eighth defense, so far as relates to the allegations of said paragraph fifteen, the defendant again set up the conditions for arbitration in said deed of June 24, 1909, and then alleged that certain disagreements arose between the parties, and that the defendant prior to the beginning of the suit offered to arbitrate the same, and the plaintiff declined to do so (p. 25).

To the defense of failure to arbitrate the plaintiff filed a reply that it denied that the defendant offered to arbitrate and said that it, the plaintiff, was always ready and willing to arbitrate, and did, in fact, offer so to do, but that defendant did everything in its power to impede the negotiations and finally refused to accept plaintiff's offer to arbitrate.

To this reply, the defendant filed a rejoinder denying that the plaintiff was always or at any time ready and willing to arbitrate and denied that the plaintiff did, in fact, offer to arbitrate; and denied that it, the defendant, did everything in its power to impede the arbitration and denied that it refused plaintiff's offer to arbitrate and said that, on the contrary, the plaintiff had at no time made any offer to arbitrate the matters in question in this action.

The plaintiff in its reply further stated that it would object to the fourth defense (that of independent contractor) on the ground that the acts of third parties did not relieve the defendant from the burdens of its own covenant; also that it would

object to the seventh defense on the ground that an agreement to arbitrate would not oust the court of jurisdiction.

The defendant in its rejoinder stated that it would object to the Reply (*re* arbitration) on the ground that it did not limit plaintiff's offer to arbitrate to the matter included in the agreement set forth in the complaint (pp. 26, 27).

At the trial various maps and photographs were offered, as follows:

Exhibit P-1 is the deed of June 24, 1909, upon which the action is based. Attached to this agreement is a blueprint on which is indicated by red lines the boundaries of the property conveyed by the deed and by green lines the property of the parcel described in the case as "shaft and building plot".

Exhibit P-2 is a large map entitled "Map of old and new water courses, pipe lines, property lines and ore vein, Guymard, New York, October 9, 1914, L. H. Robinson, C. E., Middletown".

Exhibits P-3 to P-9 are photographs showing the retaining wall, shaft house and the interior thereof. Several of these photos also show what is described by the witnesses as the "head-frame" —which projects above the top of the shaft house.

Exhibit P-10 is a map entitled "Gumaerd Lead and Zinc Co.'s underground workings". This was prepared by Mr. Gumaer and purports to show a tunnel or drift leading from the shaft in question to the alleged vein of ore and thence along the vein in an easterly and westerly direction. On this is indicated by arrows the locations in the vein where it is said certain samples of ore were taken.

Exhibit D-1 is map entitled "Gumaerd Lead & Zinc Co. v. Erie Railroad Co., Graham, N. Y., December 16th, 1916. Office Assistant Engineer, New York". This shows in detail the main line tracks of the defendant; also of the Erie & Jersey

R. R. It further shows the low level eastbound track of the latter company, the retaining wall, the shaft and building plot, the shaft house and shaft. On the side of the map is a profile showing the respective elevations; also a section of the shaft. Copies of these maps and photos have been furnished with the printed State of Case.

Exhibit D-2 is a series of seven photographs showing the shaft house with the headframe projecting above, the retaining wall, crib work, the low level track, interior of the shaft house, etc., as indicated on the photos.

At the time of the execution and delivery of the deed of June 24, 1909, a railroad company, known as Erie & Jersey Railroad Company (an entirely separate and distinct corporation from the defendant), wes engaged in constructing a double track railroad line for a distance of about 42 miles from a point known as Highland Mills to a point at or near the station of the defendant known as Guymard (see Exhibit D-6, pp. 396-401). The construction work was done by a partnership known as Bennett & Talbott under contract with said Erie & Jersey Railroad Company (p. 361, ll. 1-20).

For a short distance the centre line of the Erie & Jersey Railroad was located on the property of the defendant. On the map attached to the deed this is indicated as "Erie & Jersey R. R. Centre Line".

Prior to the starting of the construction work of the Erie & Jersey Railroad, one Chauncey I. Gumaer (the organizer and general manager of the plaintiff), begun to sink a mining shaft on the *easterly* side of the defendant's tracks. Many years before this time two other mining shafts had been constructed and had been used for the removal of ore. One of these old shafts was directly over the vein and the other within about fifteen or sixteen feet of the vein. But the *new*

shaft which Mr. Gumaer started to sink was located at a point *ninety* feet from the vein. The edge of this new shaft was within about three feet of the defendant's right of way, although under its mining lease the plaintiff had the right to construct this shaft at any point within the parcel described as "shaft and building plot"—which measured about three hundred and fifty feet in the direction parallel to the right of way and about one hundred and thirty feet easterly from the right of way and at right angles thereto (pp. 118-120). Not only was the new shaft built as close as possible to the right of way, but it was located in the precise corner (i. e., southwest) of the shaft and building plot which would bring it as near as possible to the place where the Erie & Jersey Railroad, through its contractors, made an excavation to a depth of about thirty feet for the purpose of constructing a "low level" eastbound track for that company—this track passing underneath the existing main line tracks of the defendant.

Mr. Gumaerd was asked to explain why he selected this particular part of the plot. At first he thought the choice was governed in some way by the location of an old highway (p. 114). This explanation was very lame, as this highway ran directly across the vein, touching it at two points only (p. 116, ll. 10-20), and could not possibly affect the location of the shaft. Finally Mr. Gumaer said that he wanted to have enough ground surrounding the shaft to hold the material that would be brought out of it. It is obvious that this explanation does not explain why he located this new shaft in the particular corner of the plot, which was as near as he could get to the railroad right of way, when he had over three hundred feet in one direction and over one hundred feet in another, where he could have located the shaft with much better advantage, and have plenty of room for the material brought up through the shaft.

His further explanation was that there was a siding which he thought would facilitate loading of the ore onto cars without rehandling. But even this does not explain why it was necessary to place the new shaft so close to the right of way. It is obvious that by a short extension of the ore chutes, the ore (if any was ever brought out of the mine) could be loaded just as efficiently if the shaft were located further from the right of way.

The real explanation of the construction of the new shaft so close to the point where the Erie & Jersey Raidroad Co. excavated for the cut where the low level eastbound track was built is indicated elsewhere in the testimony of Mr. Gumaer. It appears that shortly prior to the excavation near the shaft in question the Erie & New Jersey R. R. Co., through its contractors, was constructing a railroad track on the *west* side of the defendant's tracks. Mr. Gumaer observed the railroad under construction at a point near Otisville. While this construction work was proceeding Mr. Gumaer started a tunnel—which was also on the *west* side of the main line tracks of the defendant. When he began the construction of this tunnel the railroad work was distant about a mile more or less, and a row of surveyors' stakes had been laid out within one hundred or two hundred feet from the point where this tunnel was started. These stakes, if continued, would pass directly above the tunnel that Mr. Gumaer was then constructing, at an elevation of about twenty-seven feet (p. 122, ll. 20-30). After considerable fencing and dodging, Mr. Gumaer finally admitted that he began work on this tunnel "just about" the time he saw these stakes. At a previous trial he had testified that he had begun work on this tunnel as soon as he saw the stakes and when his attention was called to this former testimony he admitted that it was correct (p. 124, ll. 1-30).

After some more fencing he finally admitted that he had "no doubt" that he had started to construct this tunnel for the purpose of ascertaining whether there were any valuable mineral rights at the point where the railroad apparently was coming (p. 124, l. 30, to p. 125, l. 10). For the purpose of discovering these "valuable" rights he started his tunnel at the very point where the stakes if continued would pass over it and where in fact the railroad was afterwards constructed (p. 125, ll. 20-30).

He said that "railroad men" caved in this tunnel, and he then moved a little to the north and started a shaft. He sank this a distance of about twenty-one or twenty-two feet at a point which would bring it within five or six feet of the line of stakes. This shaft was bought by the railroad company in the settlement that resulted in the making of the indenture of June 24, 1909, upon which the present action is based.

This testimony shows that Mr. Gumaer invariably selected a location for his tunnels or shafts at points where the new railroad was to be constructed, or at least where he thought it was to be constructed. In sinking his last shaft (the one in question in this case) he came within three feet of the right of way and within about nine feet of the point where the excavation was in fact made—notwithstanding he had ample room to sink the shaft at points where it could not possibly be affected by the construction work of the new railroad.

The position of the low level eastbound track of the Erie & Jersey R. R. with reference to the main line tracks of the Erie R. R. and with reference to the plaintiff's shaft and shaft house may be understood by examination of plaintiff's photographs Exhibit 4, entitled "Looking North before Slide," dated March 4, 1910, and Exhibit 6, enti-

tled "Looking Northeast showing Shaft, House, Crib and Retaining Wall," dated Sept. 6, 1914. The latter exhibit shows the eastbound track of the Erie & Jersey passing under the Erie main line tracks.

The retaining wall went down to bedrock and was of very heavy concrete construction, being ten or twelve feet wide at the bottom and tapering to about three feet at the top. It was about twenty-four feet high and over one hundred feet long (p. 242). It served the double purpose of supporting a bridge on which the main line tracks of the defendant were carried and of protecting the low level eastbound track (as shown in Exhibit P-6) by bracing or holding back the dirt and fill around the plaintiff's shaft and shaft house.

While the excavation was being made for this retaining wall a slide or cave-in, on the side adjoining plaintiff's property, occurred in March, 1910, whereby it was claimed that the shaft house was caused to settle a few inches at the corner nearest the construction work and the shaft itself was exposed for a few feet—as indicated in the plaintiff's Exhibit 5, marked "Looking East—exposed Shaft after Slide—March 11, 1910"—thereby also causing the shaft itself, as plaintiff claimed, to become a few inches out of plumb and rendering it unworkable.

After the slide the contractors of the Erie & Jersey Railroad proceeded with the construction of the retaining wall and filled in behind it and then placed cribbing above the top of the wall as a further support to the plaintiff's shaft and shaft house, completing the work on or about April 30, 1910. The location of the cribbing may be understood by examination of plaintiff's Exhibit 6 and defendant's photograph dated April 30, 1910, part of Exhibit D-2.

The plaintiff claimed that because of the condi-

tion in which the shaft was left as the result of these operations it was not able to use it for the purpose of mining the ore which it claimed existed in the mine to which the shaft gave access, and further claimed that the defendant was responsible for the alleged damage resulting therefrom, on the theory that there had been a breach of the defendant's covenant in said deed of June 24, 1909, whereby the defendant agreed that in case it made excavations which should interfere with the natural support of the surface of the shaft and building plot, it would construct and maintain retaining walls or other devices to prevent its slopes from encroaching on said parcel.

If there had been any *negligence* in the excavation or construction work the plaintiff would have an action for trespass, but such an action would have to be brought in Orange County, New York, where the land was located. *Hill v. Nelson,* 70 N. J. L., 376; *Doherty v. Catskill Cement Co.,* 72 N. J. L., 315; *Karr v. New York Jewell Filtration Co.,* 78 N. J. L., 198.

If there was any damage to the plaintiff's property, and if it was caused in the manner claimed by the plaintiff, the plaintiff's right to an action for *negligence* is clear. But for reasons best known to Mr. Gumaer, the plaintiff, by virtue of the fact of its being a New Jersey corporation, brought this action as for an alleged breach of said covenant—which, of course, it had the right to do, as such an action is transitory. *Clement v. Stanger,* 75 N. J. L., 287.

The case has been twice tried. At the first trial verdict was found in favor of the plaintiff for the sum of $13,000. On rule to show cause this court (the Chief Justice, and Justices Swayze and Bergen sitting), under date of March 6, 1916, filed an opinion reading as follows:

"PER CURIAM:

"We think an action on the covenant is maintainable, and that upon a proper construction of the covenant there was evidence of a breach to go to the jury. But there are three errors which make a new trial necessary.

"1. The plaintiff was allowed to recover damages for the inability to work a mine. To prove its title to the mine a lease to Stephen Hills, Jr., of September 20, 1862, was offered in evidence, and assignments thereof as follows:

"Osgood to Bergenport Zinc Co., October 22, 1881;

"Bergenport Zinc Co. to Chauncey I. Gumaer, October 19, 1906;

"Chauncey I. Gumaer to the plaintiff, May 1, 1907.

"There was no assignment from Hills to Osgood. Obviously in the absence of such an assignment no right to the leasehold was shown in the plaintiff.

"2. If this difficulty were out of the way, the rule must still be made absolute, because of error in the rule of damages adopted by the court. The jury were allowed to award interest on the profits, if any, which the plaintiff might have made from ores that might have been mined, to be computed from the time the profits might have been made.

"Strictly speaking, we think the word 'profits' is not accurate. The value of the ores over and above the cost of recovering them is not profits but rather the value of the ore in situ. That, however, is not important, since the rule laid down by the judge did not allow a recovery except for the interest on that value during the time the plaintiff was prevented from working the mine. No doubt in a proper case, a mine owner whose working is temporarily stopped, might recover the damages due to the delay. He cannot, however, recover for fanciful or speculative or imaginary damages. They are too remote. That, we

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think, is the present case. No ore was taken from the mine from 1883 to 1909, and only 1650 pounds in all have been taken since 1883; even this small quantity seems to have been taken rather as a sample and to show that there was ore in the mine, than in the way of commercial working. If it resulted in any profit whatever, the profit was not large enough to lead to further operations. The facts of the case lead us to believe that such mining operations as went on were not in good faith for the working of the mine, but were rather meant for the working of the railroad company. Chauncey G. Gumaer, the organizer and manager of the plaintiff company, had some experience as a civil and mining engineer. In 1907 he saw stakes along the railroad, evidently indicating a proposed change of line or new line, and notices were served on him later on his mother preparatory to condemnation. He proceeded to work, by starting a tunnel and later a new shaft. He says his idea was that he had valuable mining rights, and a valuable vein which he was trying to locate before it was condemned, to prove its value. Instead of using the old shafts which were immediately over the veins, he started the tunnel and the new shaft some distance away. This matter was settled by a deed given to the Railroad Company in 1909 and the payment by the Railroad Company of $18,000. The deed reserved the minerals and contained the covenant on which this suit is brought. The mine was worked only for four days by a few men who took out 1650 pounds of ore in the same month in which the deed was made. There seems to have been no working of the mine afterwards, although eight months passed before its operation was interfered with by a slide of earth which is relied on to show a breach of defendant's covenant. It is difficult to see how damage could result from delay in working a mine that had been idle eight months and had been worked only four days in a small way for seventeen years. We think under the circumstances that damages cannot be allowed for possible delay in the realization of the value of the unmined ore.

"3. Evidence of experts as to the quality of the ore was allowed which was based upon sample taken from the mine. It was conceded that these samples were taken irregularly and not in the recognized way of taking samples for the purpose of ascertaining the value of a vein or ore. Such evidence should not have been permitted.

"The rule is made absolute."

At the second trial plaintiff abandoned any claims based upon alleged breaches of the covenants in said deed of June 24, 1909, relative to water pipes, conduits and electric light wires, as set forth in paragraphs 4, 5, 6, 7 and 8 of the complaint (subheads (a), (b), (c) and (d) supra); and confined its proof to an alleged breach of the covenant set forth in paragraph 9 of the complaint, reading as follows:

"The party of the second part covenants and agrees that in case it shall make any excavation upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel" (p. 3, ll. 30-40).

At this trial the plaintiff also abandoned its claim for "enormous profits" which it might and would have extracted from the mine but for the failure of the defendant to perform its covenants.

In lieu of this claim for profits the plaintiff came into court with an entirely new theory of the measure of damages and presented the extraordinary claim that under the above quoted covenant the defendant was under obligation to construct two concrete retaining walls; one fifty feet long on the south, and the other fifty-five feet long on the west of the present mining shaft, both of them extending to bedrock, with a depth varying from thirty to fifty-eight feet and a base of

eighteen feet, at a cost of about $24,000 (pp. 71 and 109).

The jury believed this extraordinary theory in part and brought in a general verdict for $13,600.

After this verdict the trial judge allowed a rule to show cause in the following terms:

> "On due application on behalf of the defendant, ORDERED that the plaintiff show cause before this Court at the next stated term thereof why the verdict rendered in its favor on the twenty-second day of December, 1916, should not be set aside and a new trial granted.
>
> "FURTHER ORDERED that the following points, and no other, be and the same are hereby expressly reserved. to wit, all objections and exceptions noted by the defendant to the rulings of the trial judge at the trial of the cause which raise the question as to whether the plaintiff's action is maintainable on the covenant set forth in the complaint reading as follows:
>
> > "'The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel';
>
> and whether there was evidence to go to the jury of a breach of said covenant."

It will be observed that the Supreme Court in its opinion setting aside the first verdict said:

> "We think an action on the covenant is maintainable and that upon a proper construction of the covenant there was evidence of a breach to go to the jury."

At the first trial the principal question involved were whether an action on this covenant could be maintained; and if so, whether the

plaintiff could include in its damages a claim for alleged loss of profits in the mining of the ore.

The rule to show cause granted after the second verdict was discharged by the Supreme Court (see page 421). Thereafter the defendant filed a petition for reargument of the rule—execution being stayed in the meantime (p. 423). This petition was denied (p. 426); thereupon final judgment was entered in favor of the plaintiff (p. 422) and it is from this judgment that the present appeal has been taken. The only questions involved in the appeal are the points reserved in the rule to show cause above quoted.

## 2.

## Specification of Grounds of Appeal.

1. The trial judge refused to nonsuit the plaintiff when thereunto moved, whereas a nonsuit should have been granted for the following reason:

> "(2) The proof fails to show any breach of covenant or any damage from the alleged breach with reference to paragraph nine of the agreement of June twenty-fourth, 1909."

2. The trial judge refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted for the following reason:

> "(2) The proof fails to show any breach of covenant or any damage from the alleged breach with reference to paragraph nine of the agreement of June twenty-fourth, 1909."

3. The trial judge charged the jury:

> "Gentlemen of the Jury, in this case, the Plaintiff sues to recover on an alleged breach of a covenant in a deed or contract existing between the parties. That covenant, which you have heard read to you, you will find in the exhibit which will be put before you, and it reads as follows:

"'The party of the second part'—that is, the Railroad Company—'covenants and agrees that, in case it shall make any excavation upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching upon said parcel.'

"The plaintiff sues for damages, claiming that there was a violation of that covenant, that the defendant did not perform it, and that, as a result of such failure, it was damaged and it asks you to reimburse it.

"The only basis upon which a recovery can be had in this case, Gentlemen, is for a breach of this covenant, because, that is what the suit is brought for, nothing else; and the burden of satisfying you, by a fair preponderance of the evidence, not only that there was a breach of the covenant, but also as to the damages, is upon the plaintiff:

"I am not going to discuss at length the facts in the case, because counsel have already dealt with them quite fully, and I shall just mention them briefly, reminding you that you are the judges of the facts, and if the Court does not state the facts accurately, you will recall what the true facts are.

"The plaintiff contends that it had a shaft upon this property, adjoining the railroad property; that the shaft ran down to a mine, or a place that it was working, or prospecting for mining purposes. It also claims that that shaft was in working condition and operation for mining purposes. It also claims that the defendant excavated on the adjoining property, with the result that there was a cavein, or a slide of the earth, whereby the shaft, the head frame and the shaft house, were put out of plumb, with the further result that the shaft could not be used for the purposes for which it had been constructed and could not be used for the same purposes that it had been used for up to that time.

"The plaintiff alleges further, that there was a retaining wall erected, but that the retaining wall did not prevent the slopes from encroaching on said parcel, and, there is the further allegation that this retaining wall was not properly built so that it would give the protection called for by the agreement.

"That is practically what the complaint alleges in this case.

"The defendant, on the other hand, says that there was no violation of the covenant at all. That it lived up to the covenant in every way; that, if there was any damage done, it was of a minor character, that they sent their carpenters there, and at an expense of something like thirty-four dollars, the damage was repaired, the shaft was put in workable order again. The defendant also suggests that the slide was caused, at least, in part, by water which the plaintiff company permitted to go upon this land. The defendant also says that the wall which was erected there is sufficient for the purpose, and that, if the land is filled in it will securely support this shaft."

4. The trial judge refused to charge the jury as follows when thereunto duly requested by the defendant:

"1. There can be no recovery by the plaintiff for the breach of the covenant of the defendant in the deed of June 24, 1909, reading as follows:

"'The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel'" (p. 427 et seq.).

NOTE: Paragraph 9 "of the agreement of June twenty-fourth, 1909" referred to in grounds 1 and

2 obviously refers to paragraph 9 of the *complaint* instead of the agreement, although by a coincidence the covenant in question happens also to be a part of paragraph 9 of said agreement (See page 15, l. 35, to p. 16, l. 3). This apparent error is, however, of no importance in the consideration of the argument in this brief, for the reason that the same points that are involved in the motion to nonsuit and to direct a verdict (grounds 1 and 2 p. 427) are also involved in the exceptions to the charge of the Trial Judge and in the refusal to charge the defendant's first request (See grounds 3 and 4, pp. 427-8).

## 3.

## BRIEF OF THE ARGUMENT.

**The proof failed to show any breach of the covenant in the deed of June 24, 1909, reading as follows:**

> **"The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slope from encroaching on said parcel."**

At the second trial the plaintiff puts its entire case upon an alleged breach of the above quoted covenant. This was the covenant referred to by the Supreme Court in its opinion setting aside the first verdict. We submit that under this covenant as properly construed there was no evidence to go to the jury of a breach thereof. According to the construction put by the plaintiff upon said covenant the obligation rested upon the defendant to "insure" the preservation of the surface of said plot in its natural and normal con-

dition; it was alleged that by reason of the defendant's failure so to do the plaintiff's shaft sagged out of alignment and became useless as a means for bringing mineral ores to the surface and as a means of ingress and egress for miners to and from the plaintiff's alleged mine. It was in support of this allegation that evidence was admitted showing the cost of replacing or rebuilding the said shaft. The defendant claims that the construction thus asserted is erroneous; and that on a proper construction of said covenant there was no evidence to show that it did not comply with the terms thereof.

The difference between the claims of plaintiff and of the defendant in this respect may be illustrated by parallel columns in the first of which is quoted the covenant and in the second of which is quoted the construction of the covenant as claimed by the plaintiff:

| **Covenant in Deed.** | **Claim of Plaintiff.** |
|---|---|
| The party of the second part covenants and agrees that in case it shall make any excavation upon its adjoining lands which shall interfere with the natural support of the surface of said parcel it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel. | Defendant agreed that if it should make any excavations upon its lands adjoining "shaft and building plot" which should interfere with the natural support of the surface of said plot, it would construct and maintain such retaining walls or other devices as might be necessary to prevent its slopes from encroaching on said plot *to insure the preservation of the surface of said plot in its natural and normal condition.* |

Defendant requested the Trial Judge to charge that there would be no recovery by the plaintiff for breach of this covenant (Request No.1, p. 375). This was declined (p. 371, l. 34). In lieu thereof, the Trial Judge left it to the jury to determine

whether there was a breach of said covenant, saying:

"Gentlemen of the Jury: In this case, the plaintiff sues to recover on an alleged breach of a covenant in a deed or contract existing between the parties. That covenant, which you have heard read to you, you will find in the exhibit which will be put before you, and it reads as follows:

" 'The party of the second part'—that is, the Railroad Company—'covenants and agrees that, in case it shall make any excavation upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching upon said parcel'.

"The plaintiff sues for damages, claiming that there was a violation of that covenant, that the defendant did not perform it, and that, as a result of such failure, it was damaged and it asks you to reimburse it.

"The only basis upon which a recovery can be had in this case, Gentlemen, is for a breach of this covenant, because, that is what the suit is brought for, nothing else; and the burden of satisfying you, by a fair preponderance of the evidence, not only that there was a breach of the covenant, but also as to the damages, is upon the plaintiff.

"I am not going to discuss at length the facts in the case, because counsel have already dealt with them quite fully, and I shall just mention them briefly, reminding you that you are the judges of the facts, and if the Court does not state the facts accurately, you will recall what the true facts are.

"The plaintiff contends that it had a shaft upon this property, adjoining the railroad property: that the shaft ran down to a mine, or a place that it was working, or prospecting for mining purposes. It also claims that that shaft was in working condition and operation for mining purposes. It also claims that the defendant excavated on the adjoining property,

with the result that there was a cave-in, or a slide of the earth, whereby the shaft, the head frame and the shaft house, were put out of plumb, with the further result that the shaft could not be used for the purposes for which it had been constructed and could not be used for the same purposes that it had been used for up to that time.

"The plaintiff alleges further, that there was a retaining wall erected, but that the retaining wall did not prevent the slopes from encroaching on said parcel, and, there is the further allegation that this retaining wall was not properly built so that it would give the protection called for by the agreement.

"That is practically what the complaint alleges in this case.

"The defendant, on the other hand, says that there was no violation of the covenant at all. That it lived up to the covenant in every way; that, if there was any damage done, it was of a minor character, that they sent their carpenters there, and at an expense of something like thirty-four dollars, the damage was repaired, the shaft was put in workable order again. The defendant also suggests that the slide was caused, at least, in part, by water which the plaintiff company permitted to go upon this land. The defendant also says that the wall which was erected there is sufficient for the purpose, and that, if the land is filled in it will securely support this shaft" (p. 364-366).

The defendant claims that the action of the Trial Judge in refusing to charge its request and in charging as he did was error, and that it was also error to refuse to nonsuit or to direct a verdict for defendant.

We submit that this covenant is nothing more or less than an undertaking on the part of the defendant to construct and maintain walls or other devices to prevent the *slopes* from *encroaching* on the shaft and building plot, *after* the construction work has been finished; in other words, the slopes

and the encroachments on said parcel have reference to the *permanent* condition of the land. If, during the course of the construction, the defendant did the work in a negligent manner or if it failed to do whatever legal duty might be imposed upon it with reference to the support of the adjoining land as the excavation proceeded, the plaintiff might have an action based upon negligence or trespass, but that would be entirely different from an action like the present—which is based solely upon the terms of the covenant. There is nothing in the covenant which requires the defendant to "insure" the preservation of the surface of the plot in its natural condition while the excavation was proceeding. The words used in the covenant indicate that both parties contemplated that in the course of the construction work of the railroad it would be necessary for certain excavation to be made; and that, if made, it *might* interfere with the natural support of plaintiff's land. If it did so interfere then the undertaking on the part of the defendant was to prevent its *slopes* from encroaching on the plaintiff's land. That is exactly what was done: a concrete wall eleven feet in width at the bottom and gradually narrowing toward the top was constructed, and thereby defendant's slopes were prevented from encroaching on plaintiff's land.

The parties must be presumed to have made this covenant with reference to the existing rules of law as to lateral support of adjoining land in case of excavation. It is well settled that land in its *natural condition* is entitled to lateral support from the adjoining land; and if the removal of that support causes injury to the land the adjoining owner is responsible for the depreciation in the value. thereof. But, if an injury results to a building or other structure on the land, the owner of the adjacent land is not responsible—unless the re-

moval of lateral support is done in a negligent manner. *McGuire v. Grant,* 25 N. J. L. 356; *Church of Holy Communion v. Paterson, etc., R. R. Co.,* 63, N. J. L. 470; *Pullan v. Stallman,* 70 N. J. L. 10.

It is equally well settled that if the negligence which causes the injury to the building or structure on the land is that of an independent contractor the latter alone is responsible. *McGuire v. Grant, supra; Cuff v. Newark & New York R. R.,* 35 N. J. L. 1.

The parties are presumed to have had the law in contemplation when they made the covenant in question in this case, 9 Cyc. 582; *Boston Ice Co. v. Boston & M. R. R.,* 86 Atl. 356. There is nothing in the terms thereof to indicate that it was the intention of the parties to change whatever right the plaintiff might have to recover for any injuries it might sustain either to its land, by reason of failure to provide lateral support, or to its structures, by reason of negligence on the part of anyone in the process of removing the soil of the adjoining land; neither is there anything in the covenant to suggest that the defendant, *if* it did the work of excavation, was to be relieved from whatever liability it might be under to respond in damages if lateral support was not provided, or if the plaintiff's structures were injured by negligence in doing the work; neither is there anything to suggest that it was the intention of the parties by this covenant to change the general rule of law that the independent contractor alone (in the event that work should be done by such contractor) should be responsible for damage to structures if such damage resulted from negligence. Whatever rights and liabilities the parties may have under these principles are not changed in any way by this covenant.

It would be superogatory on the part of the defendant to make a *covenant* to "insure the preservation of the surface of said plot in its natural and normal condition." It was bound to do that in any event in case it made excavations upon the adjoining lands—although it was not bound to insure that the *structures* on the plaintiff's land should not be injured. The measure of its duty in that respect was to exercise reasonable care to prevent damage to such structures or—if the work was done by an independent contractor—to use reasonable care to secure a competent contractor.

If the covenant be construed as claimed by the plaintiff it amounts to nothing more or less than an undertaking on the part of the defendant that it would do what the law already required it to do, namely, to provide lateral support for the plaintiff's *land*. The covenant must be construed in such a way as to carry out the presumed intention of the parties. It cannot be presumed that they intended by this covenant to recite nothing more than the rights and duties which by law already existed.

On the other hand, the construction for which the ~~plaintiff~~ defendant contends is reasonable and is in accord with the intention and contemplation of the parties. At the time the deed was executed both parties knew that railroad tracks were to be constructed near the plaintiff's property; they also knew that the plaintiff had constructed the shaft and shaft house in a corner of the "building plot" which was very close to the location where it would be necessary to excavate in order to construct the tracks. Both parties must be presumed to have been familiar with the law of gravitation, by virtue of which if lateral support of land is removed the adjoining land would probably tumble down.

They must also be presumed to have known that

if an excavation be made it is necessary to have *slopes* on either side in order to keep the excavation from filling—unless the sides of the excavation are protected by walls or other devices. If a retaining wall, such as was actually built in this case, had not been constructed, it is certain that the defendant could not have prevented the slope on the side of the excavation towards the plaintiff's property from encroaching on the parcel described as the "shaft and building plot."

The covenant in question was made in the light of these facts and of this knowledge of natural and written law; hence, the agreement on the part of the defendant to construct and maintain such retaining walls or other devices as might be necessary to prevent the slopes "from encroaching on said parcel."

It is not pretended that the wall constructed by the contractors of Erie & Jersey Railroad does not serve the purpose of preventing the slopes from encroaching on the plaintiff's land; on the contrary, the evidence is very clear that the wall is effective for that purpose.

If the defendant's construction of the covenant is correct it is obvious that there has been no breach thereof. If the plaintiff has suffered damage to its land by reason of the work of constructing the railroad near its shaft and building plot then it may have an action for failure to receive lateral support. But the plaintiff makes no claim for damage to the land as distinguished from the structures; and if there has in fact been any damage to the latter then the plaintiff's right to recover therefor, of course, depends upon whether or not the individuals or companies by whom the work was done were negligent. If there was no negligence, then the injury to the structure is *damnum absque injuria.*

The construction of the covenant was a question of law for the trial judge: *Smith & Wallace Co. v. Lunger,* 64 N. J. L., 539; *Gruber Engineering Co. v. Waldron,* 71 N. J. L., 597; it was therefore error to leave it to the jury to determine whether the covenant was violated. The trial judge, in accordance with defendant's request No. 1 (p. 375) should have charged as a matter of law that there could be no recovery by the plaintiff for any breach of the covenant in question.

It was therefore error to leave it to the jury to determine whether the covenant was violated.

**The judgment should be reversed and a judgment directed in favor of the defendant. The case is one for an affirmative judgment and not for an award of *venire de novo.***

COLLINS & CORBIN,
Attorneys of Appellant.

GILBERT COLLINS,
GEO. S. HOBART,
Of Counsel.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| GUMAERD LEAD AND ZINC COMPANY, *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, *Defendant-Appellant.* | *On Appeal from Supreme Court.* |

## Brief for Plaintiff-Respondent.

### I.

### Statement of the Case.

This action was brought by the Gumaerd Lead and Zinc Company, a New Jersey corporation having its principal office in the County of Sussex in the State of New Jersey, against Erie Railroad Company, a New York corporation, to recover damages for injuries done to the property of the plaintiff by reason of the breach or breaches of defendant's covenants contained in a deed dated June 24, 1909, to which plaintiff and defendant were parties.

Plaintiff's claim was based on the breach of the principal covenant, wherein defendant covenanted that, if it should make any excavation upon its adjoining lands which should interfere with the natural support of the surface of a certain parcel of land known as the "Shaft and Building Plot," in which plaintiff had certain rights granted by said deed, it would construct and maintain such retaining walls or other devices as should be necessary to prevent the slopes of its excavations from encroaching on said parcel, the purpose evi-

dently being to protect the rights which it itself had granted to the plaintiff in the parcel in question.

The deed in question contained two granting clauses. The first, by plaintiff to defendant, includes the entire property contained within the red lines on the map attached to the deed of June 24, 1909, a blue print of which is attached to this brief. Out of this grant is reserved the minerals beneath the entire tract providing the mining of them does not interfere with the use of the surface by the defendant for railroad purposes. The second, by defendant to plaintiff, is divided into two sections, "A" and "B." "A" is just a repetition of the reservations contained in the first grant. "B" grants the rights which are the basis of this action and contains the covenant for the alleged breach of which this action was brought.

Section "B" of the second grant is as follows:

> "Also with respect to the parcel of land hereinafter described and referred to as the 'Shaft and Building Plot,' the following rights, to wit: The right by all proper and usual or appropriate subterranean methods to mine and remove all the ores, minerals and fossil substances within the boundaries and below the surface of said parcel; also the right to mine through, use, operate, extend and maintain, the existing shaft, with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery, dumps, milling and other devices, for treating ores and the products thereof as shall or may be proper or necessary for use in connection with the mining, removal or

treating of ores and minerals obtained from said parcel and other lands in the vicinity of the hereinbefore described premises; also the right to construct and maintain on said 'Shaft and Building Plot' one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, providing that said air or ventilating shaft shall be located at least seventy-five feet easterly from the westerly side of said 'Shaft and Building Plot,' provided, however, that the exercise of said rights with respect to said parcel by the party of the first part shall not interfere with, endanger or render unsafe any railroad structures or operations now or hereafter erected or maintained on the other portions of the herein described premises, and shall not interfere in any manner with the use of said other portions for railroad purposes, or with the proper support of the surface of said other portions or of any part thereof or of any structures or improvements that may now or hereafter be placed thereon, and provided, further, that the plans of any and all tunnels, drifts and other mine workings underneath said parcel shall be submitted to the chief engineer of the party of the second part, its successors or assigns, a reasonable time before the same are from time to time constructed and such plans and said tunnels, drifts and other mine workings underneath such parcel shall be subject at all times to the reasonable inspection and supervision and approval of said chief engineer so as to insure safety to the railroad of the party of the second part,

located upon said adjoining lands, and avoid interference with its proper operation. The party of the second part, its successors or assigns, shall have the right to use said 'Shaft and Building Plot' at such times and to such extent as shall not interfere with the free and unobstructed exercise of the rights herein granted, excepted or reserved to the party of the first part. *The party of the second part covenants and agrees that in case it shall make any excavations upon its adjoining lands which shall interfere with the natural support of the surface of said parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel.*

"In case of any disagreement as to the application of this section or any claim arising thereunder or any question as to the plans or methods employed or proposed to be employed by the party of the first part, its successors or assigns, in connection with its mining operations as hereinbefore provided for, which the parties fail to adjust between themselves, such matter or matters of disagreement shall be submitted for arbitration to a tribunal consisting of three competent, experienced and disinterested persons, one to be appointed by the party of the first part, its successors or assigns, one by the party of the second part, its successors or assigns, and the two thus chosen shall choose a third. The tribunal so constituted shall proceed without delay to determine the questions and matters submitted to them for arbitration and the decision and award of a majority of the ar-

bitrators when made in writing and signed by them shall be final and binding upon the parties. The cost and expense of any such arbitration shall be borne and paid equally by the parties thereto." (P. 14, l. 17.)

To understand the meaning of the covenants a thorough inspection of the lay of the land as described in said deed is necessary. This is facilitated by the map attached to the deed of June 24, 1909, Ex. P. 1, Case, pp. 6 to 19. (See also blue print of map attached to said deed attached to this brief.)

*Two years before this deed was given, or in June, 1907,* the plaintiff had completed a mining shaft on its property, located about nine feet easterly from the easterly right of way line of the main line of the Erie Railroad. This point was also some fifty feet easterly from the easterly rail of the eastbound track of said railroad. Shortly after the completion of the shaft, condemnation proceedings were started by the Erie Railroad in New York State to condemn the property around and tapped by it. The proceedings were compromised and their settlement is evidenced by the deed in question (Ex. P. 1, Case, pp. 6 to 19). By this deed the land included within the red lines shown on the map attached thereto was granted to the defendant. (See blue print attached to this brief.) It in return for and in consideration of the grant to it, granted certain rights, described and limited in detail, to the plaintiff. That which was granted in return to the plaintiff consisted of certain rights on and underneath the surface of that parcel and enclosed within the green lines, and known as the "Shaft and Building Plot."

The surface of the "Shaft and Building Plot" and the collar of plaintiff's shaft (which was flush with that surface) were some fifteen feet above the main line Erie track extending in a northeasterly and southwesterly direction some fifty feet westerly from the westerly line of said "Shaft and Building Plot."

The main line of the Erie ran along a hillside, which extended easterly from the tracks at an angle of thirty degrees to the summit of the hill and descended westerly below the tracks, at a similar angle, three hundred feet to a lake. About fifty feet westerly of and parallel to the main line Erie tracks, and about twenty-five feet below in elevation, ran the main line tracks of the Erie and Jersey Railroad Company (Ex. P. 6; see reduction of this photo attached to this brief).

For the purpose of connecting the eastbound track of the Erie Railroad with the Erie and Jersey Railroad, the former purchased from the plaintiff the land, described on the aforesaid map, which extended southerly from the southerly side of the "Shaft and Building Plot" and easterly from the main line of the Erie. The connecting line was to run from the grade of the Erie main line, at a point some two thousand feet southwesterly from the "Shaft and Building Plot," on land belonging to the Erie and along its main line tracks, to a point beside the "Shaft and Building Plot," thence beneath the Erie tracks in the cut, to and connecting with the Erie and Jersey Railroad located as aforesaid.

The proposed connecting line was to run, by the shaft some thirty feet below the collar thereof, and between it and the main line tracks of the Erie, to a point northeast of the shaft

where it ran beneath the main line Erie tracks, and connected with the main line tracks of the Erie and Jersey Railroad, which paralleled the Erie on the west, and further down the hillside.

The deed, as before stated, was dated June 24, 1909, and soon thereafter the work of excavating near the "Shaft and Building Plot" began. This work progressed up to March 5, 1910, without any apparent effect upon the "Shaft and Building Plot." On that day a slide occurred baring the shaft some fifteen feet down from the collar. (See Ex. P. 5, a photo, a reduction of which is attached to this brief). The southerly line of the "Shaft and Building Plot" paralleled the shaft house ten feet distant from the southerly side of the shaft. The westerly line of the "Shaft and Building Plot" paralleled the westerly side of the shaft three feet distant therefrom. (See sketch on blue print attached hereto entitled "Sketch showing dimensions of shaft.")

## II.

## Argument.

WHAT IS ACTUALLY BEFORE THIS COURT "ON THIS APPEAL?"

This case has been tried twice. It has been before the Supreme Court three times. There was first a rule to show cause why a new trial should not be granted, which was made absolute. After the second trial, another rule was granted which the Supreme Court dismissed. An application was made to the Supreme Court for re-argument and the petition was dismissed.

This case now comes to this court on exceptions reserved to the defendant in the second rule to show cause. This rule appears on page

405 of the printed case. The exceptions reserved are not set out in it specifically. The trial judge allowed a reservation of "all objections and exceptions to his rulings at the trial of the cause, which raise the question as to whether the plaintiff's action is maintainable on the covenant set forth in the complaint, etc., * * * and whether there was evidence to go to the jury of a breach of said covenant.

It will be noted that the exceptions reserved are limited to the *rulings* of the judge. No exception taken to the judge's charge was allowed to be reserved.

The grounds of appeal before this court are four in number. The first is based upon the refusal to non-suit. The second is based upon the refusal to direct a verdict. The third is based upon errors in a portion of the judge's charge, which comprises almost two pages of the printed case (p. 428). The fourth is based upon a refusal to charge in terms amounting to a direction of a verdict in favor of the defendant.

We submit that the third ground of appeal (that is to say, error in that portion of the judge's charge quoted on page 428) cannot be considered here for the following reasons:

FIRST—Because no exception to the judge's charge was reserved in the rule.

SECOND—Because there was no specific exception taken to the terms in which the court submitted the question of the breach of the covenant to the jury. The only exception which could possibly relate to that portion of the charge appears on p. 373, l. 30 of the printed case as follows:

"To that part of the charge which left it to the jury to determine as a question

of fact that there was or was not a breach of the covenant.

"*The Court.* Your claim being that I should have charged the jury that there was no breach?

"*Mr. Hobart.* Of this particular covenant as otherwise expressed in our request No. 1.

"*Mr. Collins.* Only putting it not on the affirmative?

"Exception allowed."

This exception amounts to nothing more than a reiteration of the claim contained in defendant's request to charge No. 1, which is the basis of the fourth ground of appeal.

Counsel, however, undertakes to argue certain errors in the quotation from the charge referred to, beginning at the bottom of page 25 of the defendant's brief, where the defendant says:

"Defendant requested the trial judge to charge that there would be no recovery by the plaintiff for breach of this covenant (Request No. 1, p. 375). This was declined (p. 731, l. 34). In lieu thereof the trial judge left it to the jury to determine whether there was a breach of said covenant, saying,"

and there follows the same quotation from the charge in the third ground of appeal.

This is ingenious but improper, since the only questions, reserved to this court by the terms of the rule to show cause, and by the exceptions taken at the trial, are the same questions raised upon the motion to non-suit and the motion to direct, viz: that the proof fails to show any breach of the covenant or any damage from

the alleged breach, with reference to the matters contained in paragraph 9 of the plaintiff's complaint.

This is the view taken by the Supreme Court when, passing upon the second rule to show cause, it says, concerning the exceptions reserved (Case, p. 416, l. 32):

> "Therefore, as the result of this ruling and in view of the fact that there was testimony in the present case tending to establish a breach of the covenant, we must conclude that the *motions for non-suit and direction of a verdict for the defendant were properly denied.*"

The italics are ours.

After reserving the consideration of the legality of the court's ruling upon these two motions (based upon identical grounds), the Supreme Court proceeded to dispose of every other reason for a new trial alleged by the defendant, which were twenty-eight in number and which appear on page 406 of the printed case.

To recapitulate the points which we make on this branch of our argument:

The first, second and fourth grounds of appeal relate only to the causes mentioned in the motions for non-suit and direction, as the Supreme Court rightly conceived that they did. If there be any error in that portion of the court's charge quoted in the third ground of appeal, it cannot be inquired into here.

(1) Because no exceptions to the charge were reserved in the rule to show cause, the reservations in the rule being distinctly confined to the *rulings* of the court.

(2) There is no proper exception which would have directed the trial court's attention to any error in that portion of the

charge, since the only exception which could be applicable to this portion of the charge was expressly limited by counsel to the same grounds urged in the defendant's first request to charge, which are in turn identical with the grounds urged on the non-suit motion and the motion for the direction of a verdict for the defendant.

This is the same exception which is referred to and quoted above.

For these reasons we therefore submit that this court has before it only the single question: Does the proof fail to show any breach of the covenant, or any damage from the alleged breach, with reference to the matters contained in paragraph 9 of the plaintiff's complaint?

## DEFENDANT'S STATEMENT OF THE CASE.

The first twenty pages of the defendant's brief are devoted to matters which comprise what the defendant has called a statement of the case.

The first eleven pages relate to an analysis of the pleadings and a discussion of a number of issues which were abandoned by the plaintiff at the trial. The remaining nine pages are made up almost wholly of a collection of unpleasant things that the defendant has already said about Mr. Chauncey I. Gumaer at the two trials before the jury and in three briefs before the Supreme Court. All of these matters are quite aside from the issues in this case and have been passed upon and determined by the jury and by the Supreme Court. It may be that, by the exercise on our part of as much diligence as seems to have been expended by

the defendant, we might be able to set out matters derogatory to the conduct of the defendant in this case, which would be quite as significant as any of the matters contained in this prefatory argument, but we would prefer to rely upon the issue actually before the court and not waste energy in unnecessary recrimination.

WAS THERE EVIDENCE OF A BREACH OF COVENANT?

The defendant's argument on the propriety of allowing this case to go to the jury is founded on the premise that the trial judge did not properly construe the covenant in question (not when he construed the covenant in his charge, for that question is not before this court), but when he denied the motion for non-suit, the motion for the direction of a verdict, and the request to charge that there was no evidence to support the breach.

The reason for this claim advanced by the defendant is, that the covenant must have applied only to the duty of the defendant company to prevent its slopes from encroaching on the plaintiff's land, *after* the excavation had been completed. The plaintiff's contention was that the covenant was a clear undertaking on the part of the defendant to prevent the slopes of its cut from encroaching upon the plaintiff's land at any time, and to do this by means of retaining walls and other devices so that it should not interfere with the natural support of the surface of the parcel in question. If the latter construction is to prevail, there is no question about the breach. The evidence of the breach of the covenant under this latter construction was fully argued before the Su-

preme Court on the rule to show cause and disposed of in the following language:

"The undisputed facts are that the plaintiff some time in June, 1907, constructed and sunk a mining shaft on its land, which adjoined the defendant's. On the 24th day of June, 1909, two years later, the plaintiff made a deed to the defendant of the land described in the deed, reserving to itself the 'Shaft and Building Plot,' to mine and remove all the ores, minerals and fossil substances within the boundaries and below the surface of the parcel of land described in the deed, and the right to mine through, use, operate, extend and maintain the existing shaft (the shaft constructed by the plaintiff in 1907) with the right to erect, operate and maintain upon said parcel such workings, buildings, plant, water controlling devices, machinery dumps, milling and other devices for treating ores and the products thereof, etc.; also the right to construct and maintain on said 'Shaft and Building Plot' one air or ventilating shaft, of such size as to be used as a means of ingress and egress by the miners working in said mine, for use in connection with such mining operations, provided the air or ventilating shaft was located at least seventy-five feet easterly from the westerly side of the 'Shaft and Building Plot.'

"It was as to this plot that the defendant had covenanted and agreed with the plaintiff, its grantor, that in case the former made any excavations upon its adjoining lands which interfered with the natural support of the surface of the parcel it would construct and maintain retaining walls or other devices as would be necessary to pre-

vent its slopes from encroaching on said parcel.

"The defendant made excavations upon its adjoining lands which interfered with the natural support of the surface of the parcel of land, whereby and as a result there was a slope of earth, the mining shaft and its accessories were damaged, the shaft was put out of plumb and it and the mine became unworkable.

"The evidence tends to establish that the slope was due to the failure of the defendant to construct and maintain retaining walls or other devices as were necessary to prevent the slopes from encroaching upon the plaintiff's parcel, as required of it by the covenant in the deed.

"We think the evidence clearly supports the finding of the jury in that regard."

In fact, a glance at the photograph Ex. P. 5 (a reduction of which is attached to this brief) is sufficient to convince any one that the excavations had interfered with the natural support of the surface of the parcel, and that no one had made the slightest attempt to construct retaining walls or any other devices such as might be necessary to prevent the slopes of the excavation from encroaching upon the plaintiff's parcel.

The defendant claims, however, that it was not responsible for the condition which resulted from the slide of earth which is depicted in this photograph. The argument is that that slide might have been the result of negligence of the persons in charge of the excavation, for which an action would lie against them and that the defendant's only duty was to put in a retaining wall or other proper device, after

the excavation was completed, which would prevent the slopes of the excavation from encroaching on the parcel. While we believe that the proof in this case and the manner of its submission to the jury render a discussion of this claim purely academic, nevertheless, we have this to say:

The deed discloses the intention of the railroad company to make an excavation in very close proximity to the plaintiff's mining shaft. It contains many covenants and conditions for the protection of the plaintiff's mining rights and for the preservation of the use of this particular shaft. It limits the plaintiff to the use of that single shaft for mining purposes. Is it at all strange that the plaintiff should require from the Erie Railroad Company a covenant to protect it in case *anyone* working on the Erie's land should negligently interfere with the surface of the building plot and so cause damage to the mining shaft?

The defendant's brief states:

> "It would be superogatory on the part of the defendant to make a covenant to insure the preservation of the surface of such plot in its natural and normal condition. It was bound to do that in any event in case it made excavations upon the adjoining lands —although it was not bound to insure that the structures on the plaintiff's land would not be injured." (Brief, p. 30, ll. 1 to 10.)
>
> "If the covenant be construed as claimed by the plaintiff, it amounts to nothing, more or less, than an undertaking on the part of the defendant that it would do what the law already required it to do, namely, to provide lateral support for the plaintiff's land."

Had there been no covenant in this deed, the Erie Railroad Company would very promptly have told the plaintiff that its remedy, so far as injury to its mining shaft was concerned, was against Bennett & Talbot, the contractors, in an action for negligence, and it may be that after trial and judgment plaintiff would discover that the firm of Bennett & Talbot was judgment proof. Is there, therefore, anything startling in the proposition that before executing a deed to the railroad the plaintiff company should desire to have the Erie Railroad, over its own signature, undertake that it, the Erie Railroad, would be responsible for any encroachment by its slopes upon the plaintiff's parcel? For the very purpose and intent of the covenant was to hold the Erie Railroad for any injury caused by the encroachment by its slopes and to provide that the Erie Railroad (and not any other person who happened to be working on contract, nor any other railroad) should itself construct proper retaining walls or other devices to prevent the anticipated injury.

The defendant says that its duty commenced when the cut was complete, and that then it should construct and maintain such retaining walls or other devices as might be necessary to prevent the slopes from encroaching on the said parcel. If there was a breach of that duty, plaintiff would be entitled to a recovery. This suit was brought in March, 1914, more than four years after the completion of the railroad cut. The photograph Ex. P. 6, taken on the 6th day of September, 1914, shows the condition of the shaft house and the "Shaft and Building Plot" at about the time that the suit was brought.

On page 31, l. 18 of the defendant's brief, the following statement is made:

> "It is not pretended that the wall constructed by the contractors of the Erie and Jersey Railroad does not serve the purpose of preventing the slopes from encroaching on the plaintiff's land; on the contrary, the evidence is very clear that the wall is effective for that purpose."

Unless this is a correct statement, the defendant's case falls on its own theory; for if there was evidence that the wall was not sufficient to prevent its slopes from encroaching on the parcel, then, of course, there was a breach of the defendant's covenant on the defendant's own theory of construction.

The photograph, Ex. P. 6, would be alone enough evidence to send that issue to the jury. The railroad's slopes on the west side extend to a point midway in the length of the shaft house, and on the south side almost to the shaft house itself. It will be noted that the shaft house is tilted over on to the temporary cribbing that was placed there and is apparently nearly falling into the cut. There was much evidence in the case to show that the retaining wall and cribbing were not sufficient for the purpose for which it was claimed by the defendant to have been intended, and that the plaintiff's mining shaft had become more out of alignment since that wall and cribbing had been put in, and that the retaining wall itself, because it was not built to bed-rock, was gradually tilting, on account of the pressure of the earth, in the direction of the railroad cut. The amount of damage was based upon what it would cost to construct a proper retaining wall to prevent the slopes of the railroad from encroaching upon

the parcel, and there was evidence that, on account of the pressure of the land from the east and north, it would be impossible to hold up those slopes unless such retaining walls were sunk to bed-rock, and that the cost of so doing would be upwards of $24,000.

An examination of the charge will show that the court submitted to the jury this very question as to the sufficiency of the retaining wall as a means of preventing the slopes from encroaching on the parcel, *Charge to the Jury,* p. 365, l. 34, where the Court says:

> "The plaintiff alleges further that there was a retaining wall erected, but that the retaining wall did not prevent the slopes from encroaching on said parcel, and there is the further allegation that this retaining wall was not properly built so that it would give the protection called for by the agreement."

We therefore submit,

First: That the breach of the covenant occurred when the first slide took place;

Second: That if not, and the defendant's claim that the Railroad Company's duty, to protect the plaintiff's parcel as provided for in the covenant, did not begin until after the natural support of the surface had been interfered with, then there still remained a jury question as to whether or not the retaining wall and cribbing, erected by the defendant, was a proper compliance with its duty.

Respectfully submitted,

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