INDEX

PLEADINGS, ETC.

TESTIMONY

EXHIBITS

I

Notice of Appeal

NEW JERSEY SUPREME COURT

National Surety Company, a corporation,
Plaintiff-Appellee,
vs.
The Board of Education of Clifton in the County of Passaic,
Defendant-Appellant.

NOTICE OF APPEAL

To: Frederick M. P. Pearse,
Attorney of Plaintiff-Appellee.

Take Notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

William B. Gourley,
Attorney of Defendant-Appellant.

Dated: May 2nd, 1933.

Service acknowledged May 4, 1933.
F. M. P. Pearse

II

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

National Surety Company, a corporation, Plaintiff-Appellee, vs. The Board of Education of Clifton in the County of Passaic, Defendant-Appellant.	On Appeal Action At Law

10

GROUNDS OF APPEAL

The appellant states the following grounds of appeal:

The Supreme Court found:

1. In favor of the plaintiff instead of the defendant.

20

2. That the arbitrators were not subject to the arbitration act.

3. That it was not necessary for the arbitrators to be sworn.

4. That it was not necessary for the arbitrators to give notice of the hearings to parties in interest.

5. That the Circuit Court properly directed a verdict against the defendant below upon two counts of the complaint for $7788. on the ground

30

that the pretended report of the arbitrators was conclusive.

6. That the Circuit Court properly refused to permit the defendant below to show the amount of earth and rock excavated on the ground that said pretended report of the arbitrators was conclusive on that question, whereas said findings are erroneous and not warranted in law.

William B. Gourley,
Attorney of Appellant.

III

Opinion of Supreme Court

(Filed March 29, 1933)

NEW JERSEY SUPREME COURT

No. 15 May Term 1930.

National Surety Company,
Respondent,
vs.
The Board of Education of Clifton, in the County of Passaic,
Appellant.

10

OPINION OF SUPREME COURT

Argued May 7, 1930. Decided March , 1933.
On appeal from Passaic Circuit Court.
For Appellant: Albert Comstock, William B. Gourley.
For Respondent: Frederick M. P. Pearse.
Before Gummere, C. J., and Justices Trenchard and Loyd.

20

Per Curiam:

The plaintiff below was the surety on a contract of Fallace Brothers for the erection of a school house in Clifton. Before the contract was completed the contractor became involved financially and failed. The surety, under and in accordance with its bond, took up the work and finished the job, also taking from the contractor an assignment of the contract. When completed there remained a small balance due under the contract and a dispute arose respecting a claim of the surety for excavating solid rock. Paragraph 12 of the contract provided that if solid rock should be encountered the same should be removed from the premises at unit prices for blasting to be

30

submitted in the estimate. The unit price for such blasting was specified in the estimate to be $4.00 per cubic yard in addition to the general contract price.

The parties were unable to agree and arbitrators were selected to determine whether certain excavation had been of the character specified in this paragraph. These arbitrators were selected in pursuance of provisions of the contract which directed that should any dispute arise respecting the true value of extra work or work omitted the same should be valued by two competent persons, one employed by the owner and the other by the contractor, and that these two should have the power to name an umpire, and that the decision should be binding upon all parties. The persons thus chosen selected an umpire. This umpire never acted but the persons mutually selected, coming to agreement, reported in favor of the plaintiff.

The award not being paid, suit was brought for the amount of the award together with the small balance still claimed to be due under the general contract. On the trial of the case the award was offered in evidence and on this phase of the case, a verdict directed for the plaintiff. From the judgment rendered the present appeal is taken.

Several grounds of appeal are presented in the record. Of these but two are argued in the appellant's brief, and in accordance with the established rule those not argued are deemed to have been abandoned.

The grounds argued are that the arbitrators were not sworn and that no notice was given of their meeting, and that in consequence the report was improperly received in evidence.

V

Opinion of Supreme Court

Reliance is placed by the appellant on the provisions of section 6 of the Arbitration Act, (I Compiled States, page 106) which provides that "in cases of arbitration, every arbitrator shall, before he proceeds to the business submitted to him, take oath or affirmation of the like nature with that hereinbefore prescribed to be taken by referees and to be administered in like manner."

Assuming, though not deciding, that if this were a statutory arbitration the arbitrators would be required to take the oath prescribed, and possibly also to give notice of hearings to the parties in interest, we think the present was not such an arbitration. It was the submission of the determination of a single fact to experts mutually chosen for the purpose. It was not the outgrowth of litigation, it was not made a rule of court to determine the issues between the parties, and was not for the determination generally of the issues between the parties. It was in our opinion such a reference as is illustrated in the cases of American Central Insurance Company vs. Landau, 62 Eq., 93; Stout vs. Phoenix Assurance Company, 65 Eq., 570.

Such being the case the persons selected were not required to be sworn or to accord formal hearings and the learned trial judge properly received the report of the arbitrators in evidence and gave it conclusive force in the trial of the cause.

The judgment is affirmed.

Judgment Record

IN THE PASSAIC COUNTY CIRCUIT COURT

National Surety Company,
vs.
The Board of Education of Clifton in the County of Passaic, impleaded as The Board of Education of the City of Clifton, a body corporate.

Judgment Record.

The Board of Education of Clifton in the County of Passaic, impleaded as The Board of Education of the City of Clifton, a body corporate, was summoned to answer unto National Surety Company, the Plaintiff therein, in an action at law upon the following complaint:

Plaintiff, National Surety Company, a Body Corporate, with its principal office in the State of New Jersey, at Newark, in the County of Essex, says that:

FIRST COUNT

1. On August 23, 1921, Antonio S. Faillace, Arthur E. Mullaney and Salvatore Faillace, co-partners, trading as Faillace Bros., entered into a contract in writing with The Board of Education of The City of Clifton, a corporation, a copy of which said contract is hereto annexed and made a part hereof.

2. In the aforesaid contract it was provided that Faillace Bros. should erect a building known as New School No. 15 on a plot known as the High-

land Ave. school site, Clifton, New Jersey, agreeably to and in accordance with the drawings and specifications made by one Henry Barrett Crosby, Architect, and that the defendant should pay them therefor, the sum of One Hundred and Thirty-One Thousand ($131,000) Dollars. It was also provided that said estimate should be increased or diminished accordingly as alterations, additions, deviations or omissions might be ordered by the owner during the progress of the work. Accompanying said contract and a part thereof, and annexed to said contract were certain drawings and specifications made by said Crosby.

3. It was provided in said specifications, as follows:

"Rock 12, Large Boulders shall be sunk below ground floor level in locations as directed by Architect, or shall be removed from off the premises. Should solid rock be encountered at level of bottom of walls, dress the rock to level surface and omit such parts of footings as directed. If solid rock is encountered, same shall be removed from the premises at unit prices for blasting to be submitted in estimate."

4. At the time Faillace Bros. submitted the estimate upon which said contract was made, they did, in accordance with said specifications submit as the price for removing solid rock the sum of Four ($4) Dollars per cubic yard in addition to and above the aforesaid contract price of One Hundred and Thirty-One Thousand ($131,000.) Dollars, and said estimate was accepted by said defendant at the time said contract was made and defendant agreed to pay said sum of Four ($4.) Dollars per cubic yard as aforesaid.

5. During the progress of said work solid rock was encountered and Faillace Bros. removed from the premises in accordance with said specifications, 1321 cubic yards of solid rock.

6. Said rock excavation was completed in the month of September, 1921. Upon its completion the said Architect Henry Barrett Crosby, filed his certificate with the Board of Education to the effect that Faillace Bros. had excavated within the meaning of said contract and said specifications 1321 cubic yards of rock, and were entitled to the payment of Five Thousand Two Hundred and Eighty-Four ($5,284.) Dollars. That no part of said sum has been paid to Faillace Bros. or plaintiff, although the plaintiff has frequently demanded same.

7. Before said school building was completed, as aforesaid, Faillace Bros. suffered financial difficulties and plaintiff was compelled to take over said contract, and complete the work. Plaintiff received from Faillace Bros. an agreement of subrogation and absolute assignment of all rights, title and interest Faillace Bros. had in said contract or in the moneys due or to grow due them thereunder, among which moneys was the said sum of Five Thousand Two Hundred and Eighty-Four ($5,284.) Dollars above mentioned.

8. Plaintiff has fully completed the work and has fully complied with each and every condition of said contract on the part of plaintiff or said Faillace Bros., to be done or performed, and more than thirty days have elapsed since said work was completed.

SECOND COUNT

1. Paragraphs Nos. 1 to 8 inclusive of the First Count are hereby repeated and made a part hereof.

2. That the aforesaid rock excavated and referred to in paragraph 5 of the First Count, consisted of brown stone and shale to the amount of 1321 cubic yards. That the defendant disputed the Architect's Certificate and claimed that the said brown stone and shale was not solid rock within the meaning of said contract, and that, as Faillace Bros. had not blasted to remove the said rock, they were not entitled to the additional payment of Four ($4.) Dollars per cubic yards. It was thereupon, at the request of the defendant, mutually agreed between Faillace Bros. and the defendant, the latter acting by a duly passed resolution on its part at a regular meeting held for that purpose, that the parties submit to arbitration the question of whether the work referred to, as aforesaid, in the Architect's Certificate, was within the meaning of the contract "solid rock", and whether Faillace Bros. were entitled to payment for such excavating even though they did no blasting: and it was thereupon further agreed that each of the parties to the said contract should appoint an arbitrator, and that said arbitrator should select an umpire, and that the decision of the board of arbitration so constituted should be final, and the parties agreed to abide by such award. The defendant named as arbitrator Russell L. Wise, and Faillace Bros. named Anton L. Pettersen, and said Wise and Pettersen selected as umpire Harold J. Harder.

3. That thereafter and on or about December 7, 1931, said board of arbitration consisting of said Wise and Pettersen and Harder, filed a written unanimous report with the Board of Education, the defendant in this action, reciting their examination of the questions and finding as follows:

"Although we have ascertained that no blasting was performed in connection with the grading of the school site, we consider it optional and entirely within the judgment and jurisdiction of the contractors to use such means, which in their opinion, would be most advantageous to remove from the premises any materials competent to be classified as solid rock under Section 12 Rock."

"Basing our judgment and decision upon our observations, it is our conclusion that hard rock, (brown stone boulders, and red shale rock) were encountered in connection with the excavation of the School site.

From the appearance of the excavated materials, judging from the formation of the present banks, it would indicate that the rock and shale formation were in layers and shelves intermingled with red sand and gravel, varying from 8 inches to 1½ feet in thickness.

We feel for that reason that the contractor is entitled to be paid for rock excavation.

Due to the unevenness of the rock strata we are unable to determine the quantity of materials excavated and percentage of rock encountered.

Respectfully yours,

(sig) Russell L. Wise, Eng'r, for Board of Education

(sig.) Anton L. Pettersen, Eng'r. for Contractors

(sig.) Harold J. Harder, Umpire."

4. That a quantity of brown stone boulders and red shale rock referred to in said arbitrators' report which was excavated by Faillace Bros. was 1321 cubic yards.

5. Disregarding said contract and said arbitration and said Architect's certificate, the defendant has refused to pay the plaintiff the sum of Five Thousand Two Hundred and Eighty-Four ($5,284.) Dollars, or any part thereof, although often requested so to do.

THIRD COUNT

1. On August 23, 1921, Antonio S. Faillace, Arthur E. Mullaney and Salvatore Faillace, copartners, trading as Faillace Bros., entered into a contract in writing with The Board of Education of the City of Clifton, a corporation, a copy of which said contract is hereto annexed and made a part hereof.

2. In the aforesaid contract it was provided that Faillace Bros. should erect a building known as New School No. 15 on a plot known as the Highland Avenue School site, Clifton, New Jersey, agreeably to and in accordance with the drawings and specifications made by one Henry Barrett Crosby, Architect, and that the defendant should pay them therefor, the sum of One Hundred and Thirty-One Thousand ($131,000.) Dollars.

3. Said contract also provided that the work was to be finished and testified by a writing or certificate under the hand of the Architect, Henry Barrett Crosby, allowing the Defendant to retain 15% of the contract price until thirty days after the completion of the building.

4. Before said school building was completed, as aforesaid, Faillace Bros. suffered financial dif-

ficulties and plaintiff was compelled to take over said contract, and complete the work. Plaintiff received from Faillace Bros. an agreement of subrogation and absolute assignment of all right, title and interest of Faillace Bros. in said contract or in the moneys due or to grow due thereunder.

5. Plaintiff having in all things performed the said contract according to its terms and the terms and specifications and plans, the said Architect Henry Barrett Crosby on or about March 25, 1924, issued a certificate in writing testifying to the completion of the said building and authorized the sum of $20,000., the balance due on said contract to be paid to Plaintiff.

6. On March 25, 1924, the Plaintiff was paid the sum of $18,000. by Defendant leaving a balance due on that date in the sum of $2000. which the defendant has refused, neglected and failed to pay, although Plaintiff has demanded the same of it.

PLAINTIFF'S DEMANDS

1. As damages, Five Thousand Two Hundred and Eighty-Four ($5,284.) Dollars on the first count, together with lawful interest.

2. As damages, Five Thousand Two Hundred and Eighty-Four ($5,284.) Dollars on the second count, together with lawful interest.

3. As damages, Two Thousand ($2000.) Dollars on the third count, together with lawful interest.

Frederic M. P. Pearse,
Attorney for Plaintiff.

THIS AGREEMENT, Made the 23rd day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-One,

BETWEEN THE BOARD OF EDUCATION of the City of Clifton in the County of Passaic and State of New Jersey, party of the first part; AND FAILLACE BROS. of the City of New York in the County of New York and State of New York, party of the Second Part:

Witnesseth, First, The said party of the Second Part do hereby for themselves, their heirs, executors, and administrators, covenant, promise and agree to and with the said party of the First Part, its heirs, executors, administrators or assigns, that they, the said party of the Second Part, their heirs, executors or administrators, shall and will for the consideration hereinafter mentioned, on or before the 28th day of February, 1922, well and sufficiently erect and finish the work called for under the accompanying specification of a school Building known as new school number fifteen, to be erected on a plot known as the Highland Ave. school site, Clifton, N. J., agreeably to the Drawings and Specifications made by Henry Barrett Crosby, Architect, First National Bank Building, Paterson, N. J., and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said Architect, to be testified by a writing, or certificate, under the hand of the said Architect as hereinafter mentioned, and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all the work called for un-

der the General Contract, including masonry, carpentry, steel and iron, sheet metal and painting works of the said Building mentioned in the accompanying Specification for the sum of One Hundred Thirty-One Thousand Dollars ($131,000.)

And the said party of the First Part does hereby, for itself, its heirs, executors and administrators, covenant, promise and agree, to and with the said party of the Second Part, its executors and administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the Second Part as specified, well and truly pay or cause to be paid unto the said party of the Second Part their executors, administrators or assigns the sum of One Hundred Thirty-One Thousand Dollars ($131,000.) lawful money of the United States of America, in manner following:

P.S. Eighty-five (85%) per cent of the conmonthly as the work proceeds; fifteen (15%) per cent of the contract price thirty days (30) after completion of the building.

P. S. (Eighty-five (85%) per cent of the contract price to mean eighty-five (85%) per cent of work done and material delivered.)

Provided, That in each of the said cases a certificate shall be produced, signed by the said Architect to the effect that the work is done in accordance with said Drawings and Specifications, said certificate however, in no way lessening the total and final responsibility of the Contractors; neither shall it exempt the Contractors from liability to replace work if it be afterwards discovered to have been done ill or not according to the Draw-

ings and Specifications, either in execution or materials.

And it is hereby further agreed by and between the said parties:

FIRST. The Architect shall furnish to the Contractors all drawings or explanations of drawings as may be necessary to illustrate the work to be done, and the Contractors shall conform to the same as part of this contract, so far as they may be consistent with the original Drawings and Specifications, and all plans must be furnished to the Contractor at the time of signing contract.

SECOND. The Contractors, at their own proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per Specifications herewith submitted.

THIRD. Should the Owner at any time during the progress of the said Building request any alterations, deviations, additions or omissions from the said contract, it shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

FOURTH. Should the Contractors, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

FIFTH. Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by the

Architect and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or any work omitted, the same shall be valued by two competent persons one employed by the Owner, and the other by the Contractors, and those two shall have power to name an umpire, whose decision shall be binding on all parties.

SIXTH. The Owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof respectively or for any of the materials or other things, used and employed in finishing and completing the same.

SEVENTH. No alterations or extra work shall be done without a written order from the Owner, approved by the Architect and an express agreement in writing as to the cost.

EIGHTH. The Owner will insure the building in the joint names and interest of and the Contractors against loss or damage by fire, in such sums as may from time to time be agreed upon with the Contractors to cover work and materials used in the building and around the premises, and the policies to be made payable to Owner and Contractors, as their interests may appear. The Contractors shall see to it that this insurance is satisfactorily effected.

NINTH. All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the Contractors until the same shall have been paid for, in accordance with the terms hereof; unless said Contractor shall, after receiving a payment thereon, have refused to

proceed with the work in accordance with the terms of this contract. And the Contractors shall have free access at all reasonable times to the said materials and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractors shall remove all surplus material after the completion of the work.

TENTH. Neither the Contractors nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

ELEVENTH. Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the Owner.

TWELFTH. In case this contract or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be not filed in the office of the Clerk of the County in which the above mentioned building situate before any work is done or materials furnished for said building, then and in that case the said Contractors shall produce and deliver to the Owner the release of all persons who may have furnished materials or done work on said building, who may have a lien on such building and the land whereon the same is erected, releasing their lien on said building and the land whereon the same—erected, with an affidavit by said Contractors thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or material furnished for the erection thereof ac-

cording to statute in such case made and provided.

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

Signed, Sealed and Delivered in the presence of

(Seal)

Attest: Geo. A. Smith, Secy.

Board of Education of City of Clifton
Geo. A. Easton, President.
Faillace Bros.,
By A. S. Faillace

Defendant, the Board of Education of Clifton, in the County of Passaic, a corporation of this State, impleaded as The Board of Education of the City of Clifton, says:

FIRST COUNT

1. It admits paragraph 1.
2. It admits paragraph 2.
3. It admits paragraph 3.
4. It admits paragraph 4 except it alleges that the price was $4.00 per cubic yard over earth for removing solid rock that required blasting.
5. It denies paragraph 5.
6. It admits that said sum of $5284., or any part thereof was not paid to Faillace Bros. or to plaintiff. Said alleged certificate of said architect embraced payment of $5284. for alleged excavation of solid rock at $4.00 per cubic yard which work had not been performed as said architect well knew.
7. It admits paragraph 7 except that it denies that said sum of $5284. or any part thereof was due to Faillace Bros. or the plaintiff.
8. It denies paragraph 8.

SECOND COUNT

1. The answers to paragraphs 1 to 8 inclusive of the First Count are hereby repeated and made part hereof.

2. It denies as alleged in paragraph 2 that brown stone and shale were excavated. It admits that it disputed the claim of Faillace Bros. that such work was done. Two arbitrators were appointed, who, together with an umpire, selected by them were to determine whether Faillace Bros. had excavated solid rock which required blasting to remove it; that said arbitrators were Russell L. Wise, and Anton L. Petersen, who selected as umpire, Harold J. Harder.

3. It admits paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5 except that it admits it has refused to pay the plaintiff $5284. or any part thereof. The alleged award of said arbitrators and umpire was void and of no effect and not binding upon this defendant, as they were not sworn faithfully and fairly to hear and examine the matter in question and to make a just and true report according to the best of their skill and understanding, nor was any notice given to defendant of any hearing nor were witnesses produced and sworn in said matter nor any hearing had thereon.

THIRD COUNT

1. It admits paragraph 1.

2. It admits paragraph 2.

3. It admits paragraph 3, but avers that said contract provided that said certificate issued by the architect should not in any way lessen the total and final responsibility of the contractors nor

exempt them from their liability to replace work if it be afterwards discovered to be done ill, and not according to the specifications in either the excavations or materials.

4. It admits paragraph 4.

5. It denies paragraph 5.

6. It admits paragraph 6 and avers that said sum of $2000. retained by defendant, was retained with the consent of the plaintiff, for the purpose of covering any expenditures which might be required to repair or replace the work in accordance with said agreement; that an expenditure of the value of $2000. was required to repair and replace said work.

SEPARATE DEFENSE TO FIRST COUNT

1. The certificate filed by the architect, Henry B. Crosby, with the Board of Education was accompanied by a letter from him stating that he had conferred with several engineers for the purpose of determining the validity of the claim made by Faillace Bros. and that he was enclosing copies of the opinions rendered by said engineers for the purpose of enabling the defendant to determine whether or not the claim was a valid one according to the provisions of the agreement between the defendant and Faillace Bros.; at no time did he certify that the claim was a valid one and should be paid by the defendant.

William B. Gourley,
Attorney of Defendant.

Plaintiff denies each and every allegation in the answer.

Frederic M. P. Pearse,
Attorney for Plaintiff.

This action was tried before Judge William B. Mackay, with a jury, in the presence of the Counsel of the respective parties, at the Passaic County Circuit Court, on September 26th, A. D. 1929.

The cause having been heard and submitted to the jury, they returned their verdict as follows: In favor of the Plaintiff on the second count of the complaint in the sum of Fifty-two Hundred and Eighty Dollars, ($5280.00), principal, and Twenty-five Hundred and Eight Dollars, ($2508.), interest, making a total on the second count of the complaint of Seventy-seven Hundred and Eighty-eight Dollars, ($7788.00.), and in favor of the Plaintiff on the third count of the complaint in the sum of One Thousand Dollars. ($1000.00), principal, and Three Hundred and Thirty-six Dollars and Sixty-seven Cents, ($336.67), interest, making a total on the third count of the complaint of Thirteen Hundred and Thirty-six Dollars and Sixty-seven Cents, ($1366.67).

Whereupon it is adjudged that the Plaintiff, National Surety Company, recover of the Defendant, The Board of Education of Clifton in the County of Passaic, impleaded as The Board of Education of the City of Clifton, a body corporate, the sum of Ninety-one Hundred and Twenty-four Dollars and Sixty-seven Cents, ($9124.67), and its costs, which are taxed at the sum of Eighty-nine Dollars and Seventy-four Cents, ($89.74), making in the whole the sum of Ninety-two Hundred and Fourteen Dollars and Forty-one Cents, ($9214.41).

Judgment Record

Judgment entered and signed October 18th, A. D. 1929, at 9.07 A. M. Action No. 11303, Docket K, page 217.

Lloyd B. Marsh,
Clerk.

State of New Jersey,
County of Passaic. } ss.

I, Lloyd B. Marsh, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: National Surety Company, Plaintiff, vs. The Board of Education of Clifton in the County of Passaic, impleaded as The Board of Education of the City of Clifton, a body corporate, Defendant, as the same is taken from and compared with the original entry thereof in Book "B-2" of Circuit Court Judgments, for said County and now remaining of record in my Office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County at Paterson, this Twenty-sixth day of October, A. D. Nineteen Hundred and Twenty-nine.

Lloyd B. Marsh,
Clerk,
By Floyd E. Jones,
Deputy Clerk.

(L. S.)

PASSAIC CIRCUIT COURT

National Surety Company,
Plaintiff,

vs.

The Board of Education of Clifton in the County of Passaic,
Defendant.

NOTICE OF APPEAL

To: Frederic M. P. Pearse,
Attorney of Plaintiff.

Take Notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this case.

William B. Gourley,
Attorney of Defendant.

Dated: October 5th, 1929.

Service of the within notice is hereby acknowledged this 6th day of October, 1929.

Frederick M. P. Pearse,
Attorney of Plaintiff.

Grounds of Appeal

(Filed November 21, 1929.)

NEW JERSEY SUPREME COURT

National Surety Company, a corporation, Plaintiff-Appellee, vs. The Board of Education of Clifton in the County of Passaic, Defendant-Appellant.	On Appeal.	10

GROUNDS OF APPEAL

The appellant states the following grounds of appeal:

1. The Court denied the defendant's motion for a non-suit as to the First Count of the Complaint.

2. The Court denied the defendant's motion for a non-suit as to the Second Count of the Complaint.

3. The Court denied the defendant's motion for a non-suit as to the Third Count of the Complaint.

4. The Court denied the defendant's motion for a non-suit as to all the counts of the Complaint.

5. The following question put to the witness, John A. Doolittle was overruled:

"Q. Can you tell us whether you found any rock or not?"

6. The Court admitted in evidence an instrument purporting to be the report of arbitrators which instrument, however, was not binding upon the defendant because the alleged arbitrators at-

(Marked Plaintiff's Exhibit P-1.)

tempted to perform their duties without having first been sworn and made said pretended report without having granted a hearing to this defendant.

7. The Court directed a verdict against the defendant upon two counts of the complaint for $7788. on the ground that the pretended report of the arbitrators was conclusive although the same was not made according to law, for the reasons aforesaid.

8. The Court refused to permit the defendant to show the amount of earth and rock excavated on the ground that said pretended report of the arbitrators was conclusive on that question, whereas said report of the arbitrators was not conclusive because not made according to law.

William B. Gourley,
Attorney of Appellant.

Service of the within Grounds of Appeal is hereby acknowledged this 19th day of November, 1929.

Frederick M. P. Pearse,
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT
Passaic County

National Surety Company, a body corporate, Plaintiff, vs. The Board of Education of the City of Clifton, a body corporate, Defendant.	Action at Law

Paterson, N. J., Sept. 26, 1929.

Tried before Hon. Wm. B. Mackay, Judge, and a Jury.

Appearances, Frederick M. P. Pearse, Esq., (Addison P. Rosenkrans, Esq., of Counsel), for the Plaintiff; Wm. B. Gourley, Esq., (by Albert Comstock, Esq.,) for Defendant.

A Jury was duly empaneled and sworn.

Counsel for the respective parties opened the case to the jury.

Mr. Pearse—Mr. Comstock, have you the contract?

Mr. Comstock—Yes, sir, I have.

Mr. Pearse—Your Honor please, I desire to offer in evidence contract dated the 23rd day of August, 1921, between the Borad of Education of Clifton and—

The Court—Let it be received and marked in evidence.

Mr. Pearse—Have you the specifications?

Mr. Comstock—Yes, sir. I haven't got the drawings.

Mr. Pearse—I do not know who has them.

Mr. Comstock—I do not, either.

Mr. Pearse—If your Honor please, I desire to offer in evidence the specifications which accompanied Exhibit P-1, which all seem to be contained within one folder.

Let them be marked as one exhibit P-2.

(Marked Plaintiff's Exhibit P-2.)

Mr. Pearse—If your Honor please, I desire to offer in evidence a copy of the bid of for doing this work, called for under the contract and specifications. Let it be marked P-3.

(Marked Plaintiff's Exhibit P-3.)

HENRY BARRETT CROSBY, sworn.

Direct Examination by Mr. Pearse:

Q. Mr. Crosby, you are an architect practicing your profession in the city of Paterson? A. I am.

Q. Were you an architect on the school job for the Borough of Clifton? A. Yes.

Q. Known as the Highland Avenue school, in the year 1921? A. Yes.

Q. I show you a paper, dated the 19th day of

October, 1921, and ask you whether or not that is your signature? A. That is.

Mr. Pearse—I offer that in evidence.

The Court—P-4.

(Marked Plaintiff's Exhibit P-4.)

Mr. Pearse—That is all, Mr. Crosby, for the present.

(No Cross Examination.)

Mr. Pearse—If your Honor please, I desire to offer in evidence, a portion of the minutes of the meeting of the Board of Education of Clifton, apparently held on the 15th day of November, 1921, as appears on pages 96 and 97 of the minute book, which is produced by the defendant; and as this is a public record, and I presume that counsel does not want it kicking around, perhaps I had better read these resolutions.

Mr. Comstock—If your Honor please, I object to the introduction of these resolutions at this time. They should show first that there was an arbitration, then they can show what led up to that arbitration; but we claim that there was no arbitration, therefore, there was no validity to their report. Have them show the arbitration first; then if there was an arbitration—

The Court—(After argument.) I think I will admit it.

Mr. Gourley—I ask an exception.

Mr. Pearse—May I read it, without having the book marked, since it is a public record, your Honor?

The Court—You may.

(Mr. Pearse thereupon reads resolution dated November 15th, 1921, to the jury.)

Mr. Pearse—I now offer in evidence, if your Honor please, an instrument signed by Russell S. Wise, Anton L. Petersen, H. J. Harder, which is produced by the defendant, on the demand by the plaintiff, as the report of the arbitrators appointed to decide these questions.

Mr. Comstock—If your Honor please, I object to the admission of this report, at this time. I think it should be shown—I know it must be shown—that the arbitrators acted under the statute, in accordance with the law, before they made their report. Cannot go around the corner and come together and make their report. The plaintiff has to show that the arbitrators acted according to law, within the law, and then made the report, because it should be shown by them now. As a matter of fact, they did not meet, as far as the record shows now, did not even meet, and therefore I object to the admission of it at this time. Of course the statute calls and the cases so hold that the arbitrators must be sworn, must hold their meetings and so forth.

The Court—I suppose that can be connected, can it?

Mr. Comstock—I object to the report, at this time, as a matter of fact, it was not done. As a matter of fact it was not done; I know it. And I move now that it is not properly proven for admission; therefore, I object to its admission in evidence.

Mr. Pearse—If Your Honor please, it is admitted in the answer that there was a report made by arbitrators, who were appointed,—on the second count.

The Court—It admits that two arbitrators were appointed, together with an umpire by them, to determine whether Faillace Brothers had excavated solid rock which required blasting to remove it, that the said arbitrators were—who selected—that part is admitted.

Mr. Comstock—Yes.

The Court—(After argument.) There is no admission that they made a report.

Mr. Pearse—No, but we have demanded that they produce the report that they did make, and they have produced it, Your Honor please, and I offer it in evidence.

Mr. Comstock—And I object to it on the grounds I have stated.

The Court—Can't you put one of the arbitrators on?

Mr. Pearse—Very easy, if that is necessary, but I do not think that is the point of the objection that the other side makes, as I understand Mr. Comstock. The point that he makes is that these particular arbitra-

tors were not sworn. That fact will be admitted on the record.

The Court—That they were not sworn?

Mr. Pearse—That they were not sworn. Our contention, however, on that point, is that under an arbitration of this kind, there is nothing in the law which requires that arbitrators, either acting at common law or under the terms of a contract, shall be sworn. That is a method which the parties themselves devise, in their own contract, for submitting any disputes to three or to two persons, one selected by each side, and the third selected by the two arbitrators.

The Court—In other words, it is not statutory.

Mr. Pearse—This is not a statutory arbitration, and I refer Your Honor particularly to the case in 73 law, Kaplan v. Niagara Falls Ins. Company, which is a Court of Errors and Appeals opinion, at Page 780. (Citing extensively from said case.)

Mr. Comstork—(After citing Sec. 6 of the act concerning arbitration.) We had no hearing at all. I suppose you will admit that, too, for the purpose of the record?

Mr. Pearse—If you say so.

Mr. Comstock—They were not sworn, and there was no hearing held.

Mr. Pearse—Well, I won't admit that there is anything about that, that required they be sworn and hearings held.

Mr. Comstock—Will you admit that there was no hearing?

Mr. Pearse—I will admit that there was no formal notice or formal hearings held, if counsel means, hearings where witnesses were examined.

Mr. Comstock—That is what I mean.

Mr. Pearse—No witnesses were examined. The arbitrators, who were experienced men, went to the premises themselves, and reported on what they found.

Mr. Comstock—Then, it is admitted in the record that the arbitrators were not sworn, that they held no formal hearing, of which notice was sent to either party, and no witnesses were sworn, or representatives before them in formally considering—

Mr. Pearse—I do not say that no one was represented before them; I do not go that far.

Mr. Comstock—You did—

Mr. Pearse—You said, "no witnesses or representatives were before them."

Mr. Comstock—There was no formal hearing of which notice was sent to either party.

Mr. Pearse—That is right, and no witnesses were called, sworn or examined.

Mr. Comstock—And the arbitrators themselves were not sworn.

Mr. Pearse—And the arbitrators themselves were not sworn.

The Court—(After further extended argument.) I think I will admit it; allow you an exception.

Mr. Comstock—Exception.

(Marked Plaintiff's Exhibit P-6.)

Mr. Pearse—With Mr. Comstock's permission, I will omit the preliminaries—I want to read the finding to the jury—if you prefer me to read it all, I will.

Mr. Comstock—No, if Your Honor please, I object to the reading from this pretended report of what they designate as the findings.

Mr. Pearse—The report is in evidence.

Mr. Comstock—In other words, every step leading to that, I want an exception—formally to make it.

Mr. Pearse—Oh, yes; certainly.

The Court—Yes; that is in evidence now.

Mr. Pearse—If you have any questions of law to raise, it has been raised, I assume, by the objection to the admission in evidence.

The Court—You objected to the admission of the report, as I understand it, first—

Mr. Comstock—Yes.

The Court —and you gave your reasons; then, Mr. Pearse argued what he thought the law to be, and then you argued what you thought the law to be; I admitted the report, and that puts it squarely on the record.

Mr. Comstock—I understand, it was admitted on the record that the arbitrators were not sworn and held no hearings.

Mr. Pearse—It is.

The Court—Yes, that is all in the record, that it is, with your reasons why you ob-

jected to the introduction of the evidence. Is that so?

Mr. Comstock—Yes.

(Mr. Pearse then read portions of Exhibit P-6 to the Jury.)

GEORGE H. NOBLE, sworn.

Direct examination by Mr. Pearse:

Q. Mr. Noble, where do you reside? A. 14 Barrington Avenue, Clifton.

Q. What is your profession? A. Civil engineer.

Q. What position did you occupy in the year 1921? A. Assistant City Engineer, to the City of Clifton.

Q. Were you familiar with the—or did you have anything to do with the work done in the building of a new school building on Highland Avenue, known as School No. 15, I think? A. I did.

Q. What was that? A. Well, I maintained a private business or a private office of my own, and the contractor engaged me to take cross sectioning of the property, that was to be graded for the erection of this school.

Q. Yes? A. And during the cross sectioning of it, we encountered some red shale rock.

Q. Did you measure all the red shale rock that was encountered in making the excavation? A. My assistant measured it, but I went out and looked at it, and decided that it was to be allowed as solid rock.

Q. Have you any original memoranda which you made at that time? A. Well, just the figures of the—there are the excavations, from the part I sectioned—that the ground the rock originated in.

Q. Was this made at the time? A. Yes, sir, it was.

Q. Looking at that for the purpose of refreshing your recollection, can you tell us how many cubic yards of red shale rock was excavated? A. There was 1,320, I believe—I have got that on another paper here—in this area, there was a total of 2,201 cubic yards of excavation; of that amount there was—

Q. We do not want any confusion about it; I just want the cubic yards of red shale rock? A. Cubic yards of what?

Q. Yes, sir. A. 1,321 cubic yards.

Q. Did you so report that to Mr. Crosby, the architect? A. I did.

Mr. Pearse—That is all, take the witness.

Cross-examination by Mr. Comstock:

Q. Mr. Noble, what is the size of that school plot? A. What is the size of what?

Q. The school plot. A. The school plot is approximately 230 by 350 feet.

Q. Where is it located? A. It is bounded by Gregory Avenue and Home Place; the school faces on Home Place.

Q. What is the size of the building? A. The size of the building is 73 feet by 105 feet.

Q. Is that the size of it? A. That was the size of the foundation.

Q. How deep are the foundations going down? A. Why, I don't know just how deep the foundation—(referring to paper)—I couldn't exactly say what the depth of the foundation is.

Q. Can you tell us the width of the foundation trench? A. Well, there was a trench for the footings outside, along the boundary line of the main foundation—

Q. Well. A. Those footings went down about—

Q. Do you know how deep they were? A. Well, I really cannot say; six years ago since I have seen the excavation, that is the excavated site.

Q. How deep was the cellar? A. Why, I think, if I can remember right, it is approximately about five or six feet below the graded surface.

Q. You are not sure about that? A. No, I cannot recall it just exactly.

Q. What was the size of the basement, the cellar? A. Well, I just gave you those figures; that was the total size of the excavated building.

Q. That is the size of the cellar, is it, or basement? A. I don't say—

Q. Do you know? A. Well, I do not know; I was not called at the time to see the foundation; all I was interested in was cross sectioning; I was not there during the construction of the building.

Q. You do not know the depth of the cellar or the basement, or the depth of the foundation trenches, or the width of them. How can you figure the cubic yards taken out? A. That is all here

Q. That is what I asked you to give us. A. The total cubic yards of the whole site?

Q. No, I did not ask you that. I asked you the depth of the cellar, the width, length and the depth; and the foundation trenches, their width. A. I am telling you, I cannot give you those figures exactly; have forgotten exactly what they were.

Q. Did you ever measure them? A. I did not myself, no.

Q. You, yourself, do not know how many cubic yards of excavation there was there, do you? A. Only from a checking over the figures at that time.

Q. Only from what somebody else told you? A. From what my assistant told me.

Mr. Comstock—I move that the testimony be stricken out, your Honor; he does not know, apparently, of his own personal knowledge, anything about it.

The Court—You do not know of your own personal knowledge?

The Witness—I do not know of my own personal knowledge; I did not make any measurements.

The Court—You just checked up?

The Witness—I just checked up.

The Court—It will have to be stricken out.

Redirect examination by Mr. Pearse:

Q. Who was your assistant? A. Edward B. Ulbert.

Q. Where is he? A. He is at—well, he has an office at Crooks and Main Avenue, in Paterson.

Q. Crooks and Main Avenue? A. Yes, sir.

Q. You say that he made those measurements? A. He made those measurements, yes.

Q. Not in your presence, or when you were around at all?

Mr. Comstock—He said, no.

The Witness—Some of them.

Mr. Pearse—I did not hear him say.

Mr. Comstock—He did.

The Witness—He did not make all of them in my presence, no.

Q. What was the basis from which you arrived at the determination that there was 1,321 cubic yards of red shale?

Mr. Comstock—I object to that.

The Witness—What he had measured out and brought me to look at, to see whether I had allowed for loose or solid rock.

The Court—In other words, what he told you?

The Witness—Well, he told me, that he encountered rock in that stretch, and he brought me out to pass—

The Court—I mean it is all based on what he told you.

Mr. Pearse—If your Honor please, I will withdraw the witness and pray the Court's indulgence, in an effort to get this other man, before the case is over. I perhaps

ought to apologize to Court and counsel, but I understood these were measurements made by Mr. Noble himself, and not from what somebody told him.

(Witness withdrawn.)

HENRY BARRETT CROSBY, Recalled.

Direct examination by Mr. Pearse:

Mr. Comstock—There is no dispute as to that, Mr. Pearse?

Mr. Pearse—If that is admitted, that will avoid the necessity of my asking Mr. Crosby questions.

Mr. Comstock—Yes, that is.

Q. I want to ask you this question: Can you tell us whether or not, you gave a final certificate on this job? A. I believe I did, yes.

Mr. Comstock—What was the answer?

Mr. Pearse—I believe I did; yes.

The Witness—My recollection is, that I did.

Mr. Comstock—I will ask counsel on the other side, if they have it.

Mr. Pearse—I never saw the final certificate; the final payment was twenty thousand, we paid eighteen and retained two.

Q. You recommended the final payment of $20,000, Mr. Crosby? A. I have forgotten whether we retained two thousand dollars out of that, or not.

Q. Well, it is admitted on both sides, that two thousand dollars was retained? A. Yes; two thousand, they had their final payments up to two; that is all.

Q. Will you tell us, whether or not there was a substantial compliance with the terms of the contract by the National Surety Company?

Mr. Comstock—I object to that, it is not material at all in this case.

Mr. Pearse—I want to show that the work was substantially done.

Mr. Comstock—Well, the facts are that you got eighteen thousand, we kept two, to make good the defects, you consentel that we should keep two, for that purpose.

Mr. Pearse—If your Honor please, I do not want to get into any controversy over this thing; I want it perfectly clear, that the contract was substantially performed, and that we are entitled to two thousand dollars more, which we have not been paid. I assume it is really a matter of defense, as to whether or not there were defects, which they were justified in spending any part of these two thousand dollars, or all of it.

The Court—Apparently there is no dispute as to the substantial performance, with the exception, however, that they did retain two thousand dollars, which I presume, as a defense, they are going to show how they used it.

Mr. Pearse—Very well. I want to have it perfectly clear on the record, however,

by the testimony of the architect, that there was a substantial compliance, and that there was a consent by the National Surety Company for the retention of two thousand dollars to make sure that the work was properly performed.

Mr. Gourley—That is the matter, whether those two thousand dollars were sufficient or not. How could there be a substantial compliance, if two thousand dollars were not enough?

Mr. Pearse—I do not say that.

The Court—I do not think the matter is disputed, so far as the performance of the contract is concerned, and he gave a final certificate, but the defendant retained two thousand dollars for certain purposes. It may be a substantial compliance when only two thousand dollars are retained out of $131,000.

Mr. Gourley—Of course, it costs us more than five thousand to make it good, as a matter of fact.

The Court—As I understand, it is a defense, that you used the two thousand dollars for defects of some kind or other.

Mr. Pearse—Very well, sir, if that is the understanding, I have no further questions.

Cross-examination by Mr. Comstock:

Q. Mr. Crosby, as to the two thousand dollars, which was retained, you gave no certificate for the payment of that, did you? A. I do not remember having done so.

Mr. Pearse—I offer in evidence, if your Honor please, a letter dated the 13th day

of February, 1924, signed by Mr. Crosby, and addressed to Mr. Comstock, in reference to the retention of—with reference to this work, and unless you object to it, I will—

Mr. Comstock—Put them all in.

Mr. Pearse—Yes, I am going to put all three of these in.

(Marked Plaintiff's Exhibit P-7.)

Mr. Pearse—I now offer in evidence, letter of the National Surety Company, dated the 21st day of February, 1924, and signed by an attorney of the National Surety Company, and also addressed to Mr. Comstock, whom I think, for the purposes of the record, it ought to appear, was occupying what position at that time?

Mr. Comstock—I was counsel for the Board of Education.

(Marked Plaintiff's Exhibit P-8.)

(Exhibit P-7 and P-8 read to the jury.)

Mr. Pearse—It is admitted, ladies and gentlemen, that we got the eighteen thousand. That is all. Now, do you want to ask Mr. Crosby any questions?

Mr. Gourley—No, no more than we have.

Mr. Comstock—I will ask one question.

Q. Mr. Crosby, do you know what those defects spoken of, were? A. I do not remember, I think there was some painting, odds and ends, to be done.

Q. Eh? A. Painting and odds and ends, some touching up to be done.

Q. You do not remember? A. I do not remember what they were, no.

Redirect examination by Mr. Pearse:

Q. Mr. Crosby, in order to furnish you with that information, which counsel desires, I call your attention to a paper and ask you whether or not that is a letter dated January 22nd, 1924, written by you to the National Surety Company; isn't it? A. Yes.

Q. For the purpose of informing them as to what those minor repairs were? A. Yes, sir; that was written from my office.

The Court—Did that list them?

Mr. Pearse—Yes, sir.

The Court—What exhibit is that?

Mr. Pearse—I haven't had it marked yet; I did not have the opportunity of getting it in, until counsel asked the question.

Mr. Comstock—I would like to ask a question.

Mr. Pearse—Do you want to cross-examine him on that?

Mr. Comstock—Yes.

Mr. Pearse—I will let you have it. Mark that for identification, please.

(Paper marked Plaintiff's Exhibit P-9, for identification.)

Recross examination by Mr. Comstock:

Q. Did you dictate this letter, Mr. Crosby? A. It is signed by my superintendent, Mr. Worall.

Q. And signed by him, you say? A. Dictated and signed by him, I think.

Q. Did you go down to the school to examine— A. Yes, I did, that—

Q. And picked out these defects? A. I think he and I went down together.

Q. But you went down yourself? A. Yes, sir.

Q. Now, do you know whether there are any more defects than these that you have pointed out, developed afterwards, do you know of that? A. Not that I know of, no.

Q. Did you go down to the school to examine afterwards? A. Yes, sir, I did.

Q. When? A. Well, I don't remember now, the date.

Q. Do you know whether or not the bonding company ever attempted to make good these? A. I think that was under the—no—my superintendent; I do not think I went down after that.

Q. You do not know whether the bonding company endeavored to make these good, or not? A. I understood they had.

Q. You understood they had, or did the Board of Education hire someone to do that? A. I do not know anything about that.

Q. And paid them out of the two thousand dollars? A. No, I do not know that.

Q. You have no estimate here of what those repairs would cost? A. No.

Q. You do not know? A. No.

Q. You do not know what they actually did cost? A. No.

Mr. Comstock—I object.

Mr. Pearse—I now offer the letter in evidence.

The Court—Let it be received.

(Marked Plaintiff's Exhibit P-9, and read to the jury.)

Mr. Pearse—That is all.

Mr. Pearse—If your Honor please, that is the plaintiff's case, with the exception of the witness that we would like to produce in reference to the cubic yardage of the point of what was classified as rock, encountered in the excavation. We have been surprised by the testimony of our witness, Mr. Noble, having been previously informed that it was his own measurements, and I am wondering if it could be possible for the defendant to go on with its case, and permit us to produce that testimony, if we can produce it at a later time;—I mean today;—I do not mean some other day; we have already sent for this witness.

The Court—When do you expect him?

Mr. Rosenkrans—We have no information as to that; Mr. Noble is out after him now.

The Court—Well, if he could be here by one o'clock, we could take a recess now.

Mr. Rosenkrans—Well, we will try to get him here.

The Court—Because I do not think Mr. Comstock wants to go on with his case.

Mr. Comstock—There are three counts, I think, four counts; I would like to make a motion for a non-suit as to some of them.

The Court—Three counts?

Mr. Pearse—There are three counts.

The Court—Aren't the first and second based on the same claim?

Mr. Pearse—Yes, sir.

Mr. Comstock—Some sum of money.

The Court—Just a matter of pleading, isn't it?

Mr. Pearse—One is what might be called, on account of the contract, and the other is the arbitration.

The Court—They really call for the same claim.

Mr. Comstock—The same amount of money.

The Court—Yes. The second count involves—

Mr. Pearse—The award.

The Court—The first and second counts are for the sum of five thousand odd dollars. And the third count—there are only three counts.

Mr. Comstock—As to the second count, I ask for a non-suit, on the ground that the count is based entirely upon an award of arbitrators, and it appears now that the arbitrators were not sworn according to the statute to perform their duties; they held no formal hearing at which we were invited to be present, and we had no opportunity to produce before the arbitrators any witnesses to show our side of the controversy and that therefore, the award is of no avail; and on that ground I ask for a non-suit.

The Court—Practically the same motion made on the offer to produce in evidence

the report; I will deny the motion, allow you an exception.

Mr. Comstock—Now as to the third count, I ask for a non-suit.

The Court—That is not pleaded yet.

Mr. Comstock—The third is.

The Court—Oh, yes. The third count asks for the return of the two thousand dollars. It appears, under the evidence, that they are not entitled to the return of two thousand dollars; it appears that they are entitled only to the return of what is left of the two thousand. What are you going to leave for the jury to say on their prima facie case that there is left?

The Court—Well, that is up to the jury.

Mr. Comstock—How can they find what these items cost? It is up to them to find what these goods cost and the defects, and the balance asked from us. Suppose I put in no defense at all to that? They are only entitled to wat is left after we make them. I think that is understood.

The Court—If there is no proof that it cost anything to make them, then they would get the two thousand dollars from the jury.

Mr. Comstock—But there is no evidence as to the cost.

The Court—They were only minor ones that is the evidence that the jury might draw from, that they were not worth considering. (After argument.) No, I think it is a jury question.

Mr. Comstock—I will ask an exception.

The Court—I will deny the motion. You may have your exception.

Mr. Comstock—I ask for a non-suit, as to the first count, on the ground that they have not produced the architect's certificate, alleged in the complaint; they have produced no architect's certificate showing what excavation was made. There is the certificate, if your Honor wishes to look at it, nothing about what excavation.

The Court—Five thousand, two hundred and eighty—

Mr. Comstock—What for?

The Court—Extra work.

Mr. Comstock—What is the extra work?

The Court—That was the excavation, I presume.

Mr. Comstock—I know you presume so, but that is not the proof.

The Court—I think there is sufficient evidence before me, on that score.

Mr. Comstock—I ask for an exception.

The Court—Besides the certificate, to warrant it being held by the jury.

Mr. Comstock—I ask for an exception.

The Court—You may have it.

Mr. Comstock—Now, on the further ground, it is, there may be some question, if your Honor says, and as Mr. Pearse says, it is a certificate for extra work, then they are not entitled to this extra work, because it was not agreed upon, in accordance with the requirements of Section Four of the contract.

The Court—I will deny the motion on that.

Mr. Comstock—Did your Honor read that section?

The Court—Yes.

Mr. Comstock—No extra work shall be done without complying with certain conditions of that section, requiring a written order, signed by the owner, and no such order has been produced.

The Court—I will deny the motion; allow you an exception.

Mr. Comstock—I will ask an exception.

The Court—Yes, you may have it noted.

Mr. Comstock—Now, if your Honor please, I ask for a non-suit as to all of the counts on this ground; that the school law, Section 129, as amended, in 1928, provided no contract for the erection of any public school building or any part thereof, shall be made until after the blueprints therefor have been submitted to and approved by the State Board of Education, a copy of the plans and specifications as provided shall be filed with the State Board of Education, and a copy of the contract for the erection of the whole or any part of the school building—shall be filed with the secretary of the State Board of Education and there is no proof that the contract was approved by the State Board in this case (Citing of Fletcher vs. Board of Education, 85 New Jersey Law, at page one).

The Court—I think I will deny the motion, and allow you an exception, Mr. Comstock. We will now take a recess until one-thirty.

(Noon Recess.)

September 26, 1929; 1:30 P. M.

EDWARD B. ULBERT, sworn.

Direct Examination by Mr. Pearse:

Q. Mr. Ulbert, what is your profession? A. Engineer and surveyor.

Q. With whom were you associated in the year 1921? A. In 1921, I was connected with Mr. Noble.

Q. Do you recall making some measurements at the Highland Avenue school in Clifton, in the latter part of that year? A. Why, I had made some measurements; I do not remember just what time.

Q. During that year, however, while the building was in the course of erection? A. In the course of erection; yes, sir.

Q. Will you tell us whether or not that is a plotting that you made at the time of the measurements, that you had taken in this vicinity? A. Those are my figures.

Q. Is this plotting too? A. Yes.

Q. In other words, it is all in your handwriting? A. Yes, sir.

Mr. Pearse—May I have that marked for identification?

(Marked Plaintiff's Exhibit P-10, for identification.)

Q. Did you make certain measurements there, at that time? A. I did.

Q. Will you tell us whether or not, that is the paper which records the measurements, in your own handwriting? A. That is my handwriting; yes, sir.

Q. Does that record the measurements taken by you at that time? A. It does.

Mr. Pearse—May I have that marked for identification?

(Marked Plaintiff's Exhibit P-11, for identification.)

Q. After you had made these measurements, with whom did you confer, or to whom did you submit those figures? A. Why, I submitted these figures to Mr. Noble.

Mr. Pearse—Take the witness.

Cross-examination by Mr. Comstock:

Q. Where is the school located? A. Why, on Gregory Avenue.

Q. What other street? A. Gregory Avenue near Highland Avenue.

Q. What street does it face on? A. Gregory Avenue.

Q. Is the lot, the same grade with Gregory Avenue? A. At the present time?

Q. At the present time. A. I haven't been over there in a good many years; I do not remember whether it is or not.

Q. Was it at the time you were there? A.

Why, I believe there was a bank there, of five or six feet.

Q. Terrace? A. Terrace; yes, sir.

Q. How large is the plot; what is the dimensions? A. That I do not remember.

Q. Got no memorandum of it? A. Nothing on it; no, sir.

Q. How deep were the trenches? A. I do not remember.

Q. Got no record of it? A. No, sir.

Q. How wide was it? A. I couldn't say.

Q. Got no memorandum of that? A. No, sir.

Q. How large was the cellar or basement? A. I do not remember.

Q. No record of it? A. No, sir.

Q. Do you know how deep the cellar was dug? A. I do not remember that.

Q. You don't remember much about it, do you? A. Why, it is about eight years ago, and I have no records on it, and I do not remember what was done.

Q. What are these records you just referred to? A. They are in my handwriting.

Q. Do you know what they are? A. They are a sketch of the area measured up at the time the work was done.

Q. Are of what? A. Of the measurement of the rock.

Q. Of the trenches? A. No, sir; no trenches shown here.

Q. Is the cellar shown? A. It shows the out line of the school, but does not show any part of the cellar.

Q. What part of the plot does it show? A. It shows the area of ground, which would be on the

righthand side of the school, showing the contour and cross sections taken at that time.

Q. How long is that side of the lot? A. 134.66 on one side, and fifty feet on an angle, and then the whole plot, about 234 feet long.

Q. Now, can you tell us how many cubic yards of excavation was made there? A. I couldn't tell you that, now.

Q. Your record there doesn't show that? A. There is one record here, shows that, yes.

Q. What does it show? A. It shows there measurements of 2,200 yards, which doesn't seem to be the final—it just says here, the area computed.

Q. The area is not computed? A. I say here it shows the area which was computed here.

Q. What was the area? A. The area is 19,812 square feet by an average of a three foot cut which makes 2,201 cubic yards.

Q. Where was that? Was that for the foundation, cellar, or basement? Where was that? Was that for the foundation, cellar, or basement? Where was it? A. Why, that shows it was just on the property to the south of the school; it doesn't include any trenches, as far as I can see here.

Q. Doesn't include any excavation then? A. Excavation of what? Trenches?

Q. Yes. A. It doesn't show any excavation or trenches.

Q. Or the cellar? A. No cellars.

Q. No basement? A. No basement.

Q. All it shows is the grade, I suppose? A. Yes, sir.

Q. Got nothing to show the trenches or the cellar? A. No, sir; not according to this sketch.

Mr. Comstock—That is all.

GEORGE H. NOBLE, recalled.

Direct Examination by Mr. Pearse:

Q. Mr. Noble, I call your attention to Exhibit P-10 and P-11 for identification, and ask you whether or not you have ever seen these before? A. I have.

Q. By whom were they given to you? A. Mr. Ulbert.

Q. Now, after these figures were compiled, will you tell us what you did with reference to ascertaining in the area which is described on these two exhibitis, the quantity of rock encountered?

Mr. Comstock—Now, I object to that, if the Court please, unless he confines it to the grading, which he says does not show either the excavation for the cellar or foundation.

The Court—Well, we had better find out; if he doesn't know anything about that—

Mr. Pearse—If your Honor please, I do not quite see counsel's point, because this was work which we are claiming compensation for, was part of the contract which we had to perform and this excavation was a part of the labor which we were called upon to do. I think it will be developed by this witness, that it is true that it was not in the foundation, that was not where it was encountered. I will let the witness describe first what area is comprised within this sketch.

Mr. Comstock—I object to that. The previous witness made this memorandum and he testified to what it was.

The Court—Well, he may be able to read them.

Mr. Pearse—Yes.

The Court—If he knows, if he can read them.

The Witness—Yes.

Mr. Pearse—May I ask another question?

Q. After these papers were handed to you, did you make a personal inspection of the ground with Mr. Ulbert? A. I did; I made it before they were handed to me, and after they were handed.

Q. Just tell us what is the location which is comprised within the area which you were speaking of? A. The entire area of the school building is 350 feet, on Home street, 246 feet on Gregory avenue, and it takes a jog on Home street for 100 feet, and then extends—I should say, I think easterly direction of fifty feet, and then goes over a distance of 134.66, which made the entire plot that was bought by the school—Board of Education for school purposes. On the right hand side of this plot, that is, I think, if I have got my bearings right, is the easterly side of the lot, it was terraced about 5 or 6 feet; on the Gregory ave. side of the lot it ran down quite a drop, from an elevation of 1.29 to an elevation of 1.10, which is about nineteen feet. What was excavated on the righthand side of the building, for instance, facing the school, was filled in on the lower part of the lot, on the Gregory avenue side, making the lot level. It was in stripping this terraced part on the righthand side of the lot, that the rock in question was encountered, and that is the only portion of the plot that the

rock was encountered on. There was no rock in the foundation of the school, or no rock in the footings or trenches. Mr. Ulbert, when he found the rock, there, he came in and told me about it, because—

Mr. Comstock—I object to what he told you.

The Court—Yes.

The Witness—(Continuing)—I said, he told me—

Mr. Comstock—Never mind.

Q. Did you see the rock there? A. Yes, sir; that is what I went out to see.

Q. You went out and you did see it? A. Yes, sir; and we went over the amount of the grading that was there, and we estimated what the quantities were.

Q. On that estimation, what percentage of it was rock? A. Well, we figured about 60 per cent.

Q. Sixty per cent of how many cubic yards? A. of 2,201 and three-tenths cubic yards, the total excavation in that area.

Q. Which as a matter of calculation is 1,321 cubic yards? A. 1,321 cubic yards.

Q. Will you tell us whether or not that was excavation which the contractor was called upon to do under the terms of his contract and the specifications?

Mr. Comstock—I object, to that, if the Court please; the specifications and the contract speak for themselves.

Mr. Pearse—But the specifications are in evidence.

Mr. Comstock—That is the point I raise.

Mr. Pearse—I will withdraw the question.

Q. That is within the area of where the school was? A. It was; yes, sir.

Mr. Pearse—I now offer these two papers in evidence.

The Court—Let them be received.

(Plaintiff's Exhibits P-10 and P-11, for identification, marked Plaintiff's Exhibits P-10 and P-11, in evidence.)

Cross-examination by Mr. Comstock:

Q. I understand that none of this rock was in the cellar or foundation A. No, not in the cellar or foundation.

Q. What street does the school face on? A. The school faces on Home Street, and one end of it is down toward Gregory Avenue. It sets back as far, almost, from Home Street, as it does from Gregory.

Q. It faces on Home Street? A. It faces on Home.

Q. Sure of that? A. Yes.

Q. How far does it front on Home Street? A. How far is it from Home Street?

Q. How far does it face on Home Street? A. Why, it is 162 feet, I think, is the over-all length of it.

Q. It is on a corner, isn't it? A. No, it is not.

Q. What do you say about Gregory Avenue? A. Well, it sets in from Gregory Avenue and it sets in from Home Street. It is about, I should say, probably if I can remember rightly, might be eighty feet in from Gregory Avenue and about a hundred feet in from Home Street.

Q. Don't it face on both streets? A. The end of it faces—

Q. I mean the building. A. Oh, the building is a corner building, yes.

Q. How many feet of it is on Gregory Avenue? A. Gregory Avenue? About 240 some odd feet.

Q. How many feet on Home Street? A. Three hundred feet to a jog, then goes a hundred feet, then a jog of fifty feet, and then it goes back, and meets this back line.

Q. I said, how many feet front on Home Street? A. The plot or the school?

Q. The plot. A. 350 feet.

Q. Have you read the specifications of this school? A. I have not, to my knowledge.

Q. What is the difference between grading and excavation?

Mr. Pearse—I object, not being material, as long as the contractor was called upon to do it.

Mr. Comstock—He has told us both things; I want to see what he classifies as the difference between the two.

Q. What is grade and what is excavation?

Mr. Pearse—I object, if your Honor please. I do not see how that enters in it.

The Court—Admitted.

Mr. Pearse—Your Honor will allow me an exception?

The Witness—Grading and excavation, both come under the same heading.

Q. I say, what is the difference between them? A. Excavation is removing the dirt; grading is bringing up to grade, bringing the low spots up to grade, with what you have excavated from the high spots.

Q. Excavation includes the cellar and trenches, doesn't it? A. Yes,—

Q. And the grade—

Mr. Pearse—Let the witness finish.

Mr. Comstock—He had; he said, yes.

Mr. Pearse—He had not finished.

Q. That grading includes the entire plot; is that right? A. Grading includes the entire plot.

Q. How much grading was necessary on this plot outside of the cellar and trenches? A. Why—

Mr. Pearse—I object, if your Honor please, unless it appears he is speaking of some area inside of the plot, included by the building itself.

Mr. Comstock—I am speaking about the entire plot.

The Court—Didn't your evidence go to excavation outside of the building itself?

Mr. Pearse—I think it does, yes; I will withdraw my objection.

Q. How much of it is included in grading outside of the cellar and trenches? A. Well, there is one paper there, I have got it on, if you will let me see it. Get that, it is the yellow paper there, I think; that is it. Mr. Pearse, that yellow paper over there.

Mr. Pearse—I beg pardon.

A. (Continuing) The total amount of excavation on the whole plot was 5,300.84 cubic yards.

Q. What does that include? A. That includes all excavation of that, which came out of the foundation and footing.

Q. From the cellar? A. Yes, sir.

Q. Now, there was no rock in the cellar foundation, was there? A. There was not.

Q. How much of this—how many cubic yards of grading was there outside of the cellar and the trenches? A. Well, I haven't got it separated that way; I have got it here, the total; in the area where the rock was there was a total of 2,201 and three-tenths cubic yards of excavation, that is, including rock and dirt; of that 60 per cent was hard rock.

Q. Were you there, when it was excavated? A. What is that?

Q. Were you there when they were excavating? A. At times, I visited the site, from time to time.

Q. Did they do any blasting? A. No.

Q. How did they get this rock out?

Mr. Pearse—I object, not being material, your Honor please; this witness is called for the purpose of testifying as to the number of cubic yards of rock which were encountered by the contractor. The arbitration committee to which the proposition was submitted specify what was and what was not rock, and is binding upon the parties, and therefore, any opinion by this witness as to what was or was not rock is not material, furthermore, it is not proper cross examination.

The Court—No, I do not think his opinion is evidential.

Mr. Comstock—I did not ask him for his opinion. He said, he was there, and measured this rock. Now, I want to test whether he was there or not; for instance, did he see them doing it; how did they do it; that is proper cross examination.

10 The Court—Testing his credibility?

Mr. Comstock—Yes.

The Court—I will permit it, for that purpose.

Q. How were they getting this, what you call rock, out? A. What is that?

The Court—How were they getting the rock out?

20 The Witness—Why, they took the rock out with a steam shovel. That is, they caught the piece of the steam shovel got it under it, and jerked it, broke it off in big layers, some of it came off half the size the contents of this desk.

Q. Was that what you call shale? A. No—

30 Mr. Pearse—I object to that question, if your Honor please, what they call it. Counsel is now asking for definitions and not confining himself to the credibility of the witness.

The Court—Well, he said rock and I suppose he can ask him what it was. What do you mean by rock?

Mr. Pearse—If your Honor please, I sub-

mit that that does not test his credibility. As to what was rock, has already been determined by the arbitrators and it is not for this witness to express an opinion in order to test his credibility.

The Court—He may say, whether or not he was actually there, if he actually saw it, whether he did see solid rock or shale or something, or what it was, that might test his credibility.

Mr. Pearse—The question was: what do they call shale.

The Court—No, what did you call shale.

Mr. Comstock—That is right.

Q. What do you call shale?

Mr. Pearse—My argument is that counsel is asking for definition of a certain thing from this witness, not testing his credibility.

Mr. Comstock—I will withdraw the question; frame it to suit your convenience.

Q. Do you know what shale is? A. I do.

Mr. Pearse—I—

Mr. Comstock—The objection is too late.

Mr. Pearse—I do not object to it; I had just said I—

Q. Do you know what rock is? A. I do.

Q. Do you know what solid rock is? A. I do.

Q. Now, you say you were there at the school site? How many times? A. Probably a dozen times in the course—

Q. You were there twelve times? A. Yes.

Q. In what year? A. 1921.

Q. Now, do you recall what month you went there first? A. Why, it was in the late summer —I do not know whether it was the latter part of August or the beginning of September; it was in the summer of that year.

Q. What were they doing at that time? A. Well, the first thing that was done—

Q. What were they doing the first time you went there? A. I went there before they arrived. If you want to know how, I will say the contractors or anyone else, interested in the job, I was there first with Mr. Ulbert and our field party.

Q. Why did you go there? A. Just to look over the site with them.

Q. What? A. To look over the site with them.

Q. For whom? A. If the job was given to my office to you.

Q. Who gave the job to you? A. The contractor.

Q. Felice Brothers? A. I guess it was Felice Brothers.

Q. You mean the contractors who were building the school? A. Why, yes, they had the entire contract.

Q. You say they hired you, your firm? A. Yes.

Q. What for? A. To cross section and give grade stakes for the excavator.

Q. Then you went there to do that? A. Yes.

Q. You did not see any rock then? A. Not when we laid out the ground, no.

Q. When was the first time you went there for the purpose of seeing the rock? A. Well, after the survey stakes were put in, that is what I mean,

the stakes that form the boundary of the plot, the dirt that was excavated, part of that was covered with a dense growth of underbrush, and after that was cleared off, why, there was an outcropping of rock that I noticed there, but I, at that time, did not know what the quantities of it were.

Q. You went afterwards to ascertain what the quantities were? A. When they were stripping it; yes, sir.

Q. Whom did you go for then? A. Mr. Ulbert came in for me and said, that there was rock out there and he would like for me to go out there to check how much of it would be allowed the contractor.

Q. There is no secret about whom you were employed by, is there? A. No, none at all.

Q. It was Faillace Brothers? A. It was Faillace Brothers; I imagine that is the contractor.

Q. They wanted you to go there to see the rock, didn't they? A. They did not ask me to go to see the rock at all; it was Mr. Ulbert.

Q. What did you go there for, just curiosity? A. No, Mr. Ulbert came and asked me to go out there, to ask how much of the excavation he would allow for rock and how much for ordinary excavation.

Q. And you looked it over? A. And I looked it over.

Q. What were they doing then, at that time? A. The shovel was working there at that time.

Q. Working where? A. They were working in this area that this excavation was coming out of.

Q. Was that the cellar? A. No, sir; it was to the right of the building.

Q. The trenches? A. No, sir.

Q. Wasn't the cellar and trenches the depressed excavation? A. It was included in the general excavation but not in the section I am speaking of now.

Q. I understood you to say the shovel was working at the depressed excavation? A. Apparently, just take that plot, I can follow you at the same time you are asking me questions. There is the whole building there.

Q. Just answer my question. A. Yes, sir.

Q. I just want to know where the steam shovel was when you got there? A. The steam shovel was working on this embankment, to the right of the school site.

Q. Was it in the trenches or the cellar? A. No, sir.

Q. They was doing the grading? A. It was the depressed part of the cut.

Q. You saw rock there? A. Yes, sir.

Q. What was the color of t? A. Red.

Q. Sand stone you mean? A. Well, red rock is a formation of sand stone; it is classified in the sand stone group.

Q. It wasn't sand stone, however? A. No.

Q. Was it shale? A. No.

Q. What is shale? A. Shale is limestone ledge rock but this was not limestone; it came in solid ledges.

Q. Was it blasted? A. No, it was in ledges or shales.

Q. Did the steam shovel pick it up? A. The steam shovel happened to get under it, because the way the grain of the rock was running, he was able to get in under it and jerk it off; then jerking his bucket of his shovel, he broke it off.

Q. Then they transferred it to trucks? A. To trucks and then right on down to the other end of the plot, and dumped it in where they were filling in there.

Q. Used it in the filling? A. Yes.

Q. That was all in the grading? A. That was all in the grading contract, as far as I know.

Mr. Comstock—That is all.

Mr. Pearse—Plaintiff rests.

(The Plaintiff Rests.)

Defendant's Motion for Non-suit continued.

Mr. Comstock—If your Honor please, I ask for a non-suit on the additional ground, as to the two thousand dollars, that there was no architect's certificate produced to show two thousand dollars owing the plaintiff.

The Court—I think that is the counter charge.

(Extended argument.)

The Court—I think there is sufficient evidence here to show that there was an architect's certificate issued, even if it has not been produced, apparently, has been lost. I think there is sufficient evidence to show it, and to show, perhaps what you might say was the waiver on the part of the Board of Education, even if there had been no certificate issued to the effect that they agreed that there was a $20,000 payment due to the Surety Company—that the Surety Company was entitled to that, and they just gave them $18,000, and retained $2,000. As

a matter of fact, they agreed to it by complying with the contents of that letter.

Mr. Comstock—And we gave them the eighteen thousand, you mean?

The Court—Yes.

Mr. Comstock—I will ask an exception, your Honor, please.

The Court—Yes, you may have it.

DEFENDANT'S CASE

Mr. Comstock—Now, I have here several witnesses for the purpose of showing that there was no rock, such as described in the specifications, encountered on this job. I think there are twelve witnesses, some of whom are engineers, some of whom are not; but in view of the ruling of your Honor, with respect to the arbitration, it is a question of what the issue is in respect to that, if this arbitration is conclusive, I cannot attack it, if you say it is conclusive; and, why, then I cannot put this testimony in.

The Court—(After argument) Well, probably not; the only issue is as to the third count in the complaint, on the two thousand dollar item.

Mr. Comstock—Yes, this is the way I look at it. I would like to produce one witness at least to make the formal offer of proving it.

The Court—Yes.

Mr. Comstock—Then you can overrule it, and I will take an exception.

JOHN A. DOOLITTLE, sworn:

Direct Examination by Mr. Comstock:

Q. Mr. Doolittle, what is your profession? A. Civil engineer.

Q. Where is your place of business? A. In Passaic.

Q. How long have you been a civil engineer?

A. I have been working at it about forty-five years.

Q. You were city engineer for Passaic, I believe, at one time? A. Yes.

Q. Did you have occasion to examine this lot where School 15, was erected in Clifton, which has been spoken of here? A. I did.

Q. Can you tell us whether you found any rock or not—

Mr. Pearse—I object, if your Honor please, on the ground it has already been found that the arbitration is binding upon the parties and cannot be contraverted by oral testimony.

Mr. Comstock—I offer the evidence to prove that there was not any such rock encountered on this excavation or in the grading as to be entitled to four dollars a cubic yard.

The Court—I will overrule the offer.

Mr. Comstock—I ask an exception.

The Court—I will allow you an exception.

Mr. Comstock—That is all.

JOHN H. ADAMSON, sworn.

Direct Examination by Mr. Comstock:

Q. In 1921, Colonel, were you a member of the Board of Education of Clifton? A. Yes, sir.

Q. Do you remember the erection of School No. 15? A. I do.

Q. Who were the contractors? A. No, not Delaney—it was an Italian name.

Q. De Cillis Brothers? A. De Cillis Brothers, that is it.

Q. Do you recall the time that the eighteen thousand dollar payment was made? A. Yes, I do.

Q. Why was two thousand dollars retained?

Mr. Pearse—I object.

The Witness—(Interrupting) For the reason.

Mr. Pearse—I object, if your Honor please.

The Witness—One moment.

Mr. Pearse—I object; there is written correspondence between the parties, why the two thousand dollars was retained.

Q. Two thousand dollars was retained, I understand, to make repairs; is that right?

Mr. Pearse—Just a moment, I object to counsel leading the witness. Just a moment, Colonel.

The Court—No; I think that is admitted, Mr. Pearse.

Mr. Pearse—Not to make repairs, no.

The Court—Well, for some purpose.

Mr. Pearse—But not to make repairs.

The Witness—To overhaul the rejected defective work that was done on the job.

Mr. Pearse—I ask that that be stricken out.

The Court—Yes, strike it out. Just wait until we get through discussing this question, Mr. Adamson. (After argument.) Well, the architect's letter is in evidence; I will allow the question. Repeat the question, Mr. Stenographer.

Q. (Repeated by stenographer.) Two thousand dollars was retained, I understand, to make repairs; is that right? A. Yes.

Q. Did you examine the building, Colonel? A. All of the time; when the building was in construction I was up there, every other day.

Q. By the way, what is your business? A. Building contractor, was; I am retired now, since 1925.

Q. Well, in 1921, you were a building contractor? A. Yes.

Q. Now, can you tell us from your observation of the building, what repairs were necessary, at that time?

Mr. Pearse—If your Honor please I object to the question on the ground that the architect who was in command of this job enlightened the contractor as what remained to be done.

The Court—But that does not—

The Witness—(Interrupting) There was a representative of the bonding company that agreed to that, to that two thousand dollars.

Mr. Pearse—Just a moment.

The Court—(After argument) I will permit it.

Mr. Pearse—Your Honor, allow me an exception?

The Court—Yes.

Q. Tell us, from your observation of the building, when the two thousand dollars was retained, what repairs were necessary? A. Why, things were so bad—

The Court—No.

The Witness (continuing)—in the concrete work—

The Court—No, strike that out; "things were so bad;" that doesn't mean anything. Just answer the question.

The Witness—The repaving of the playgrounds on the basement floor, it all came up; that was condemned by the State Board architect.

Mr. Pearse—I ask that that be stricken out, if your Honor please.

The Court—Strike it out. That is the first item, repaving of the playgrounds on the basement floor.

Q. What else, Colonel? A. The second very important item was that the stairs leading from the ground floor up to the upper floor had to be practically ripped down and standardized to the twelve by seven inch—twelve inch treads and seven inch risers.

Q. Anything else? A. That was the first item that was done. Since that time, why, the doors that were put on originally had to be taken off and new doors put on.

Mr. Pearse—I object, and ask that that be stricken out.

Mr. Comstock—Why?

Mr. Pearse—Because he said it was later.

The Court—When was this relative to the doors?

The Witness—Well, that was a couple of years later.

Mr. Pearse—A couple of years later?

The Witness—Yes.

The Court—I do not see how that is material or competent.

Mr. Comstock—Two years for a building of this kind, put up two years; I do not think that is too remote.

The Court—You cannot tell what the school children might have bettered in, in two years.

Q. Why was it necessary to change the doors? A. Well, because they were made of poor material. Q. What happened to them? A. Why, they shrunk.

Mr. Pearse—If your Honor please, I ask that that be stricken out, that they were made of poor materials; that is a conclusion of the witness.

The Court—Conclusion, yes.

Mr. Comstock—As a contractor, he knows material.

The Court—What do the specifications provide for those doors? Were they according to the specifications? I suppose that is what we want to find out.

Mr. Comstock—Well, the specifications are in evidence. Got them here?

Mr. Pearse—Sure.

Q. Now, aside from the doors, what else did you find that had to be repaired? A. Painting, the paint had to be all gone over.

Q. What was wrong with the painting? A. Well, it peeled off.

Q. Can you tell us who did the repainting? A. Well, I think that he has the bills.

Mr. Pearse—I submit that this evidence should not be produced until it is first shown when the repainting was done.

The Court—When was this done, the repainting?

The Witness—Oh, immediately after the work had been turned over to us to do, by the bonding company, allowing the $2,000.

Q. Who did that repainting? A. Well, I do not remember the name of the contractor; we had several contractors on the repairs; I cannot say that I remember the name of the contractor.

Q. Anything else that required repairs? A. Well, that was the sum total that we figured on, the two thousand dollars.

Q. Now, you say those repairs were actually made by you; is that right? A. Yes.

Q. Do you know what they cost? A. I should imagine that they may be about—

Mr. Pearse—I object.

The Witness—five thousand dollars.

Mr. Pearse—I object, to what this witness imagines as not evidential.

The Court—No.

Q. What did they cost? A. I do not know.

Mr. Pearse—I object; your Honor please, counsel has already asked the witness as to whether or not the work was done by the Board of Education, and I submit the best evidence as to what they cost, are the cancelled vouchers, or whatever records the Board of Education have as to the expenditures made for this particular purpose, and that the recollection of this witness is not evidential.

The Court—Well, not if he doesn't know, but oral evidence is admissible.

Mr. Pearse—It may be in the absence of a specific record.

The Witness—Well, I told you—

The Court—No, do you really know what the painting cost? If you actually know, of your own knowledge, do you actually know?

The Witness—No, I do not retain that in my memory; that was away back in 1921.

The Court—What else was there?

Mr. Pearse—He said that was all, if your Honor please.

The Court—Oh, all right.

Q. You said the Board of Education made the other repairs which were necessary; do you know who made them? A. I think that Mr. Ganly, who is here, would be able to answer that question more accurately than I can.

Q. You do not remember the contractor; is that it? A. No.

Q. Do you remember what they cost? A. No.

Q. You know the Board of Education paid the bills for them? A. I do.

Mr. Comstock—That is all.

Cross Examination by Mr. Pearse:

Q. What rise was called for in the stairs by the plans? A. I think it is seven and one-half inches.

Q. Have you the plans? A. I do not know that that is called for, but that is the usual twelve inch tread and a seven and a half inch riser.

Q. Then you do not know whether or not the plans called for the particular tread? A. You mean the plans or the specifications?

Q. Either or both, wherever it would appear. A. No, I do not remember that.

Q. Do I understand you to say, Colonel, that the whole building was repainted? A. Yes, all of the class rooms.

Q. How soon after you took possession of the building? A. Why, Mr. Ganley will answer that.

Q. No, I am asking you. A. Well, I cannot remember, I do not know.

Q. Haven't you any vouchers here to show when the painting was paid for? A. I think that Mr. Ganley has.

Mr. Pearse—Have you those vouchers, Mr. Comstock, showing when the painting was paid for?

Mr. Comstock—I have all of the vouchers.

Mr. Pearse—Will you let me see that one?

Mr. Comstock—Mr. Ganley will take the stand; the secretary of the Board will fix the date of those payments.

Mr. Pearse—I am asking you now; he said that there were vouchers; you say you have both vouchers; I am asking for the vouchers on these items.

Mr. Comstock—The secretary has charge of the vouchers.

Q. Then you do not know when it was paid for? A. I do not know when it was paid for.

Q. When it was paid for? A. I couldn't tell you when; I was interested in it, possibly, at that time, I signed the vouchers.

Q. Did all of the paint peel off in every room? A. Yes, and the hallways.

Q. And in the hallways? In the whole building? A. (No audible response.)

Q. So that it had to be entirely repainted, is that it? A. Yes.

Mr. Pearse—That is all, Colonel.

Mr. Comstock—That is all.

DAVID M. GANLY, sworn.

Direct Examination by Mr. Comstock:

Q. Mr. Ganly, you are secretary of the Clifton Board of Education? A. I am, sir.

Q. How long have you been secretary? A. Since February 1st, 1922.

Q. Do you remember the construction of School 15? A. Yes, sir.

Q. Now, after the payment of eighteen thousand dollars was made to the bonding company, I believe you retained two thousand dollars, for the purpose of making repairs and replacements? A. So I understood.

Q. Now, were such repairs made? A. There was some such repairs made, yes.

Q. I show you vouchers of the Board of Education for payments. Can you tell me which of these were for School 15, for repairs, after the eighteen thousand dollars was made to the bonding company? A. You should have more than these, Mr. Comstock. There was one bill paid to the Quality Brands Company for vitoplastic caulking and glazing compound, $45.00.

Mr. Pearse—I object; no evidence that was necessary to be done.

Mr. Comstock—That is one of the things mentioned by the architect.

Mr. Pearse—If your Honor please, I understand from Colonel Adamson, that there were three things that he testifies to, or four things, that he said were necessary to be done, and that was all.

Mr. Comstock—That is all that he said; you supplied the other things yourself.

The Court—That is so, so far as he was concerned; then there was the architect's items; which you have in evidence.

Mr. Pearse—Yes, that is true. If that is what this is, but that has not been identified as one of the architect's items. That is what confuses me.

The Court—That is what we want to know.

Mr. Comstock—I will connect it up.

Mr. Pearse—Let us connect that as we go along.

Mr. Comstock—You can tell from his letter there, whether it is one or not.

The Court—Let us make sure. Where is the letter?

Mr. Pearse—Here is the letter.

Q. What was that bill, $45, for? A. What was it for?

Q. Yes. A. For one keg Vito-Plastic caulking and glazing compound, $45.

Q. Do you know what it was used for? A. No, sir.

Q. Who was the contractor, who was he? A. The Quality Brands Company.

Mr. Pearse—Well, I ask that that be put aside, please.

Mr. Comstock—I will have to connect that latter.

Q. What other items have you, Mr. Ganly? A. Then I have one from Chris Bergsma, for labor and materials, $546.85.

Q. What was that for? A. Carpenter work.

Mr. Pearse—I object to that, until it is shown it was carpenter work.

Q. For what school? A. 15.

Mr. Pearse—I object to that going in until it is connected.

Mr. Comstock—I cannot put it in all at once.

Mr. Pearse—I am going to make my objection each time.

The Court—They are not offered yet.

Q. Any other vouchers? A. To James Wilson of Passaic for installing new dry well, at School 15, $811.00.

Q. Dry wells? A. Yes.

Q. What are they? A. Well, I had nothing to do with the construction; I can only give you my understanding of what the dry wells consisted, if you wish that.

The Court—How much?

The Witness—$811.00.

The Witness—Shall I say what I understood that to be?

Mr. Pearse—No, not unless you know.

The Court—Do you know?

The Witness—Not personally, no.

Q. Any other vouchers there, Mr. Ganly? A. I have a voucher here from the Clifton Sheet Metal Works for repairing doors in School No. 15, $37.74.

Q. What, repairing what? A. Dry wells.

Q. Any other vouchers there? A. John Mahoney Company for coating walls of School No. 15, as per contract, $100.

Mr. Pearse—Coating walls?

The Witness—Yes, sir.

Mr. Pearse—May I look at that?

The Witness—Yes, sir (handing paper to counsel).

Mr. Pearse—I will ask that that be put aside; that is 1926, two years after payment.

Q. Any further vouchers there, Mr. Ganly? A. I have another one here from Chris Bergsma, part of which is for repairs at School No. 15, that is $69.00.

Q. What was that for? A. It just says repairs at School No. 15, repairs as per bid of November 19th, 1924, for work in stock room, etc., repairing front door, etc., $69.00.

Q. Front door did you say? A. Yes.

The Court—Repairing front door?

The Witness—Yes, sir.

Q. Any other vouchers there? A. I have four vouchers here from Di Cillis Brothers, which is on a combined contract for work at thirteen and fifteen, and the payments were given on architect certificates. There is no way that I can personally segregate them from No. 15, only to tell you what the architect has estimated. I believe we have Mr. Di Cillis here to testify as to the amount of bills which went into No. 15.

Q. Who was the architect? A. I mean our present architect, Mr. Lee, who was the architect under this repair work.

Q. All right, do you know whether they were paid? A. They were paid, but it was a combined contract, that is the two schools were included in one contract. There is no way of determining from

the certificate itself how much was made for School 15 and how much for School 13, but the architect advised me as to what amount of that is chargeable to School No. 15, and he gave me the amount, but I understand that he has called Mr. Di Cillis of the Di Cillis Brothers here today, for the purpose of telling how much of it is actually chargeable on No. 15. Then there are three or four others, which were hardware, and I am not quite sure on those, whether those are part of the Di Cillis contract or not; but these are all for hardware which it was necessary to replace in School No. 15.

Q. How much are they? A. On School No. 15, the contract is $498.70.

Q. What was that for? A. Hardware.

Q. Any others there? A. No; that is all I have.

Mr. Comstock—That is all.

Mr. Pearse—No questions.

MICHAEL Di CILLIS, sworn.

Direct Examination by Mr. Comstock:

Q. What is your business? A. General contractor.

Q. Did you do any work for the Board of Education of the city of Clifton? A. I did.

Q. On School 15? A. Yes, sir.

Q. I show you voucher No. 2, for School No. 13 and 15; is that work that you did—I think that is right—on the two schools, 13 and 15? A. Yes.

Q. Can you tell us what part was for each

school? A. I can (referring to memorandum). On 15, there was five thousand.

Mr. Pearse—If your Honor please, I object to any testimony as to what it was, as it appears that the vouchers for which the attention of the contractor has been called are dated September 9th, 1926, two years after the school—two and one-half years—after the school was in the possession of the Board of Education.

Mr. Comstock—Well, possession with the right to retain two thousand dollars until these things were made good; that is all. They might have occurred within a year or within two years, on a building of that kind. Let us see what the nature of the work was, to tell whether or not it was within a reasonable time. The contract itself is a guarantee of the material and workmanship.

The Court—It may be for the jury to say, but I do not—

Mr. Comstock—There is no limit in the time about the time and material. It has to be done in a good and workmanlike manner with satisfactory materials.

Q. What was it for, Mr. Di Cillis? A. No. 15, there was $5,108.82.

Q. School 15; what was that for? A. Well, for—work—new roof on the dressing rooms, required plastering inside of the dressing rooms, took out all of the old plaster, put new plaster in.

Q. In the dressing rooms? A. In the dressing rooms.

Q. What was the matter with the old plaster? A. It was all swelled up, put new wire lath in, plaster cracked off; we took the old wire lath, put new ones in, in the place of that.

Q. Why did you have to put new ones in? A. Because the old ones were all rotten, cracked.

Q. Could you tell what caused it to do that, what caused them to do that, do you know? A. Well, I believe some kind of dampness inside of building.

Q. Dampness? A. On account of the roof.

Q. The roof leaked? A. The roof leaked, yes.

Q. That is what caused this work? A. The plaster to be wet.

Q. What else was it you did? A. Patched up all of the stones, of the joint of the stone bases all of the way around.

Q. On the outside of the building? A. On the outside of the building, yes; all the way around the building and the—in front of the wall.

Q. What did you do? A. Pointed up, we joined between one to another, with this elastic compound.

Q. Why was that necessary? A. Because all the joints was all open.

Q. What else did you do? A. Waterproofing one coat, waterproof on the main entrance stone doors, for the entrance door, was waterproofed with some kind of a liquid—waterproofed.

Q. Why was that necessary? A. Why was that necessary? That was caused by dampness outside on the stone.

Q. That was not caused by the leaking roof? A. No, that is outside. Repairing cesspool outside.

Q. What was wrong with the cesspool? A. There was some part of the brick work on the side, some kind of a hole; we closed it up.

Q. What do you mean by a hole in it? A. This is a hole over the cesspool outside and there was some kind of a hole inside, leaving it open, which was danger for the kids; we closed it up, fitted it up all the way around.

Q. You mean it was built wrong? A. I don't know if it was built wrong or left purposely, I do not know.

Q. It was not finished; is that what you mean? A. It was not finished.

Q. What else did you do? A. Carpenter work, restored all of the old plaster, took trimming out and replaced again.

Q. Took the what, out? A. Trim.

Q. Then you had to put it back again? A. Then we had to put it back again. We put all of the three entrance doors—three pairs of new doors outside.

Q. Outside doors? A. All three entrances.

Q. You had to put new ones? A. New doors.

Q. Why did you have to put new ones? A. Because the old ones was all split off; that is what the specification was called for, new ones, and we put new ones in.

Mr. Pearse—Your specifications?

The Witness—Architect specifications.

Mr. Pearse—Your specifications?

The Witness—I didn't make the specifications.

Mr. Comstock—No, I mean your specifications, under your contract?

The Witness—Under my contract; yes, sir; but the architect made them.

Q. Mr. Lee was the architect? A. Mr. Lee, was the architect, right. It was some other doors in the building to be retouched, some kind of a lacquer to close it up right and some kind of a door was laying on one side fixed it up; then we took all of the step moulding—what we call moulding is the outside frame—and put some kind of a copper flashing—fill it up with elastic compound, all of the windows outside.

Q. Why was that necessary? A. That was necessary on account of dampness, water, because you would get rain in, and opened in the building.

Q. Anything else now? A. Hardware; we had copper flashings in the windows, as I said before.

Q. Flashings on the windows, did you say? A. Yes.

Q. It leaked around the windows; is that the reason? A. Just on top of the windows.

Q. Why did you put flashing on top? A. I said before the water was going through, the angle iron penetrates in the wall in the building.

Q. All right. A. Painting—

Q. What did you paint? A. Painted all of the auditorium, there is a stage in there, entrance hall doors by second floor, all of the way, there was some plastering to be done in the class rooms and the paint was to retouch them.

Q. Why was it necessary to repaint this plaster? A. Because it was all cracked, some kind of swelling up, bent, cracked it off, painted it over again.

Q. Blisters? A. Blisters.

Q. Was that all? A. That is all.

Q. What was your charge for that work? A. $5,108.82.

Q. Is this one of your vouchers? A. Yes.

Q. You got paid this from the Board? A. Yes.

Mr. Comstock—I offer this in evidence.

Mr. Pearse—If your Honor please, I object on the ground that every single item which this witness has mentioned, with reference to the work which he did, more than two years ago, after the building was in the possession of the Board of Education, and there isn't yet anything to show that the work which was done by the plaintiff contractor in this case was not done in accordance with the specifications or that any guarantee was given as to the length of time that any of this work would last. Leaks in roofs may come from many causes, various kinds of weather will cause leaks.

The Court (After extended argument).—I do not think it is sufficiently connected to be warranted putting in evidence.

(Extended discussion.)

Mr. Pearse—In order to keep the record

straight, I move the testimony of this witness be stricken out, in the absence of any proof that the things which he testified he did, were things which the plaintiff in this case was called upon to do under the terms and condition of its contract, in accordance with the specifications therein.

The Court—Oh, I will let it stand.

Mr. Pearse—Your Honor will allow me an exception.

Q. Were there any other payments received by you on account of work done at School 15, any others besides this mentioned; you have mentioned them all? A. I have mentioned them all.

Q. I show you a warrant, 421, and ask you if you received that payment? A. Yes.

Q. How much is that? A. That is included in your original figures? A. Yes.

Q. Is this also included in that figure of five thousand and some dollars? A. Yes.

Q. I show you voucher or warrant No. 4154, and 4155; is that part of the payment of the five thousand dollars which you have testified about? A. (Witness indicates affirmatively.)

Mr. Pearse—Your Honor please, without interrupting counsel, I presume it might appear on the record that I object to this line of testimony?

The Court—Yes.

Mr. Pearse—All proof of payment to this contractor on the same grounds that I have already stated.

The Court—Yes.

Mr. Pearse—Your Honor allows me an exception?

The Court—Yes.

The Witness—This is all of the testimony.

Q. You have been paid all of the money? A. Yes.

Mr. Comstock—That is all.

Mr. Pearse—No questions.

ELLSWORTH M. LEE, sworn.

Direct Examination by Mr. Comstock:

Q. Mr. Lee, what is your profession—business? A. Architect and engineering.

Q. Did you give out a contract for any work on School 15, in Clifton? A. For repair work.

Q. What kind of repair work was it? A. Well, made different times.

Mr. Pearse—If your Honor please, I submit that if he prepared plans and specifications, they would be the best proof of this. He said what kind of repair work.

The Court—Well, we will find out as he goes along.

Q. What kind of repair work did you have done? A. Well, at different times, there has been different work done there, Mr. Comstock.

Q. Did you have any work done by L. R. Litz? A. Yes.

Q. What was that? A. That was repairing hardware.

Mr. Pearse—If your Honor please, I submit it is not proper to answer that question until it first appears, when the plans and specifications were prepared.

Mr. Comstock—I cannot ask him all at once.

Mr. Pearse—It may not be evidential.

The Court—If he can connect that up, I will allow it.

Q. Do you know when it was? A. As near as I can remember, that was in 1925 or 1926, I couldn't tell you unless I looked the records up.

Q. I show you a certificate; does that refresh your mind any about the date? A. Well, that would be, dated 1926.

Q. How much was that for? A. $498.70; that is the total amount of the contract.

Q. What was the contract for?

Mr. Pearse—I object if your Honor please; it seems to me that in order to have the testimony of this witness evidential it must be first shown that something was left undone under the specifications of the original contractor. Until that is shown, nothing that was subsequently done by the Board of Education can be binding on this plaintiff.

The Court—(After an extended argument.) Did you examine the specifications, Mr. Lee?

The Witness—For the building? No, I did not.

The Court—Never looked over them?

Tht Witness—No.

The Court—(After extended argument.) I will permit the question.

Mr. Pearse—Your Honor will allow me an exception.

Q. Why was it necessary to replace the hardware? A. Well, upon an examination of it, so far as we could see, there were defects in the hardware. Whether those defects were there, it is a problem, as to whether they were defects due to wear and tear within a limited time on the building. Some of the gone, some of the windows were leaning out, would not stay on the spindles; there were defects to the butts on the doors. It was necessary to go over the entire work and make general repairs to all of the hardware. The hardware was not all replaced. There was a great part of the hardware that was required to be taken off and refinished and put back up on the building.

Q. That was $498? A. $498.70.

Mr. Pearse—Your Honor please, I ask that this testimony be stricken out on the ground that the witness has not said that the defects, so far as he knew, occurred because of wear and tear and not because of any structural defect.

The Court—I will let it stand; allow you an exception.

Mr. Comstock—That is all.

Mr. Pearse—No questions.

Mr. Comstock—That is our case, your Honor.

(The Defendant Rests.)

Mr. Pearse—Now, if your Honor please, at this time, I desire to move for a direction of a verdict on the second count in the complaint, which is a count based on the arbitration. The award is before the Court, the quantity is before the Court and there is no denial or dispute thereof.

The Court—What is that amount?

Mr. Pearse—That amounts to $5,280, according to the architect's certificate and interest from October 19th, 1921, the date of the architect's certificate, which according to my calculation amount to $2,508.00.

The Court—How much?

Mr. Pearse—$2,508.00, which would make a total of $7,788.00. I also move for a direction of a verdict on the third count in the complaint. That item is the one which the defendant has withheld, $2,000, for retained money, for the purpose of doing certain things. There is no evidence before the Court, that any of these things were done, or that the Board of Directors was put to any expense in connection with those items. That being true, and there being a substantial performance with the terms of the contract, it seems to me that a verdict should be directed for that sum with interest from February 17th, 1921, which is a date when we consented to the

retention of the money.

The Court—There seems to be no defense to the second count, as claimed, according to the Court's rule.

Mr. Comstock—I couldn't interpose any, because of the Court's ruling.

The Court—So that I will direct a verdict on the second count of the complaint, $5,280.00, with interest from October, 1921, that is $2,508.00. Both sides can figure out the interest making the total $7,788.00, in favor of the plaintiff against the defendant. I will deny the motion on the third count and allow you an exception.

Mr. Comstock—I ask an exception on your direction.

The Court—Yes.

(Mr. Comstock summed the case to the jury on behalf of the defendant.)

(Mr. Pearse summed the case to the jury on behalf of the plaintiff.)

Thereupon, the court charged the jury as follows:

Members of the Jury:

This is an action brought by the National Surety Company against the Board of Education of the City of Clifton, which was instituted on or about the 9th day of April, 1927, to recover, first and secondly, which in fact at the same, in what we call the first and second counts the sum of $5,280.00, with interest, with which you are not concerned now, except to render the verdict which I

have directed you to render, on the second count in the complaint of $7,788.00, which includes the interest.

The question for you to solve is the claim on the third count of the complaint. In that third count the plaintiff claims that on August 23, 1921, Felice Brothers entered into a contract with the defendant Board of Education, and that they did certain work under the contract, plans and specifications, and under the direction of an architect, and that later the contract was substantially performed, and that the architect set out certain repairs and replacements—I think that was the language that was used—that were necessary to be made.

Felice Brothers apparently went out of business or gave up the contract and it was taken over by the plaintiff in this case, the National Surety Company, who were on the bond and who were compelled to take it over and complete the work.

There is evidence to the effect that the architect set forth in a memorandum or letter just what had to be done before the final payment was made. That was not exactly a final payment. It was what counsel has called a reserve payment. After the work was completed and the money due under the contract there was a proviso that they should retain a percentage for thirty days for the purpose of taking care, perhaps, of any repairs or defects or whatever replacements might have been necessary to be done by the contractor, or the plaintiff in this case, under its contract.

Then there was a letter or correspondence of some kind between the plaintiff and the defendant, or between the parties to the contract and the architect. At any rate, there was correspondence to the effect that $18,000.00 of the $20,000.00 should

be paid over and $2,000.00 should be retained.

So the defendant comes in and answers and says, "Yes, we retained the $2,000.00, but it cost us more than $2,000.00 to do what was necessary to be done, and therefore you are not entitled to your $2,000.00." There is no counterclaim filed by the defendant in this case whereby the defendant asks for a judgment against the plaintiff for any moneys they may claim to have expended over and above this sum of $2,000.00, but the defendant does offer in evidence claims very much in excess of the $2,000.00 for repairs and replacements and other work which the defendant claims was necessary to be done because of the failure on the part of the contractor or the plaintiff to properly complete the work that they had agreed to complete in this case.

Now the defendant says that there was an item of $498.70 for hardware necessary for School No. 15; that in that hardware there were defects due to wear and tear and also defective; now, anything that was due to wear and tear you would not be able to consider, but you may consider what might have been defective. But you have to satisfy yourself, of course, that it was a part of the work that was necessary to be done by the contractor or the plaintiff bonding company which is taking the place of the contractor.

Now, the burden of proof is upon the plaintiff in this case to satisfy you by a fair preponderance of the testimony that the contract was substantially complied with, and that it is entitled to receive this sum of $2,000.00 and interest. There is an admission, however, presented on the part of the plaintiff, that there were some not serious matters

to be attended to,—some fourteen or sixteen items in number— do not remember the number—you can recall that when you have the paper before you— but there were those items, which were minor items, that had to be taken care of.

The burden of proving by the fair preponderance of the testimony means by the greater and weightier evidence. It means by the more convincing testimony. The plaintiff in order to succeed must have the more convincing testimony in this case in order to obtain a verdict at your hands for the sum of $2,000.00 and interest on this third count. As I have said, there is evidence showing that something had to be done.

The defendant produces evidence, showing two items, I think, $498.70 for hardware necessary, as I have before told you, and also for other work which was done, which was read off to you, amounting to $5,108.82, for plastering and many other things which you will probably recall better than I can, because I was not able to note them fast enough, as they were read off. In any event, any statement of fact that I might make as to the evidence, you have a right to entirely disregard, because you are the sole judges of all the facts in this case.

You are the sole judges of all the evidence and of the truth of the evidence and of the truthfulness of the witnesses. You have a right to believe or disbelieve the witnesses, as you see fit, either in whole or in part.

So you see the matter is very simple and very easy for you to determine. The burden is on the plaintiff, by the fair preponderance of the testimony. If the plaintiff has sustained that burden,

he would be entitled to the sum of $2,000.00 with interest, I think, from February 17, 1924. If, from the evidence you find there were any deductions to be allowed on that amount, either in part or entirely if you should find from all the evidence that is before you, that there should be some deductions made, then you say how much should be deducted from that sum of $2,000.00, giving the plaintiff a verdict for the difference on the third count against the defendant. If you should find that the cost of repairs and replacements was as much, or more than the $2,000.00, then you would give a verdict in favor of the defendant on the third count and against the plaintiff.

Your only verdict would then be the one that I have directed you to bring in, of $7,788.00. But in addition to that, you take under consideration this third count, which is entirely within your control, on the questions of fact and evidence that are before you. You must decide what that verdict shall be, whether it shall be for the plaintiff, for $2,000.00 against the defendant, or for a lesser sum, deducting what you think should have been the cost, under the evidence, to take care of these matters that I have mentioned, or whether it amounted to the $2,000.00 or more than $2,000.00, so that your verdict would be for the defendant and against the plaintiff.

This is a very simple matter for you to determine. I want you to give it your careful and thorough consideration and render a verdict on that count, the third count, that will do justice to the parties, that will square with the evidence that is before you. Take the case, consider it carefully, remembering that this is a consideration by you of

this third count, this claim of $2,000.00 I want to make it plain to you, so that you will understand what your duties are.

Your verdict, under the rules of law as I have given them to you, may be for the plaintiff for $2,000.00 and interest; it may be for a lesser sum for the plaintiff with interest; or, it may be for the defendant and against the plaintiff, in accordance with the charge that I have already given you. Take the case and deal with it properly.

(The Jury retired.)

(No exceptions to the charge taken on behalf of defendant.

After the jury retired, counsel for defendant offered in evidence exhibits overlooked during the trial and by consent, they were marked Defendant's Exhibits D-1, D-2, D-3, D-4, D-5, D-6, in evidence.

(End of the Case.)

EXHIBIT P-2

8. Excavation

Remove the top soil and loam to firm earth over the area of the entire building. Pile up good sodding in convenient places on premises. Excavate to depth shown for walls, footings, areas, rooms, etc. Excavate 12 in. outside of walls for boiler room, and coal vault and ash vault. For column and wall footings in firm earth, excavate to exact horizontal dimensions indicated on plan so as to avoid use of wood forms. All bearings must be on natural earth, except by special permission of the Architect. No footings shall be placed on refilled trench or other excavation. Where floors rest upon the ground, any loosely filled earth or debris which is not suitable, shall be removed and replaced with suitable material properly graded and made solid by wetting down, tamping, rolling or otherwise, same to be decided by Architect. Do excavating, filling and grading and provide solid bearing under all concrete floors where same are built directly on ground. Finished excavation for footings of walls, columns or other supports will be inspected by Architect before placing of the concrete on same. Contractor shall notify the Architect when suitable number of these excavations are ready for inspection, giving sufficient time for same.

All surplus rubbish shall be removed from off the premises. Earth, small boulders, etc., will be placed in front of lot in piles. Remove all debris from the building and from the premises during progress of the work, whether caused by mason or other contractor. No claim for extra work or materials made necessary by careless excavation will be allowed.

Exhibit P-3

12. Rock

Large boulders shall be sunk below ground floor level in locations as directed by Architect, or shall be removed from off the premises. Should solid rock be encountered at level of bottom of walls, dress the rock to level surface and omit such parts of footings as directed.

If solid rock is encountered, same shall be removed from the premises at unit prices for blasting to be submitted in estimate.

14. Rough Grading.

This contractor is to rough grade entire plot to elevations as noted on plot plan or as later directed by Architect. He shall remove all brush-wood, small trees, bushes, etc., on the entire plot. He shall lay out walks, roads, and paths as shown on plot plan and cement or finish same as hereinafter specified. All top grading to be of good top soil and evenly graded, ready for sodding or seeding.

Concrete Work

(Footings and walls below grade as noted and shown on plans.) All footings, walls, etc., to be of size as shown on plans and detail.

EXHIBIT P-3

Chas. Lieblich, Chairman Building Committee
Geo. A. Smith, Sec'y Board of Education,
Clifton, N. J.

Sealed bid with certified check to be delivered to High School Building, Clifton, N. J., on or before July 25th, 1921 at 8 P. M. Bids will be opened at the High School Bldg., Clifton, N. J., at 8 P. M., July 25th, 1921. (Daylight saving time.)

Gentlemen:

The undersigned hereby agrees to perform all labor and furnish all material for the entire com-

pletion of the General Contract which includes
General Conditions, Pages 1 to 11 (Both inclusive)
Masonry and Light Iron, Pages 1 to 30 " "
Re Concrete, Pages 1 to 5 " "
Structural Steel, Pages 1 to 3 " "
Carpentry, Pages 6 to 12 " "
Roofing and Sheet Metal, Pages 1 to 3 " "
Painting, Pages 1 to 7 " "

of new school No. 15 to be erected on the easterly side of Gregory Ave., between Highland Ave. and Home Place, Clifton, N. J., in accordance with the plans and specifications as prepared by Henry Barrett Crosby, Architect, First National Bank Building, Paterson, N. J., for the sum of $131,000.00, One Hundred Thirty--One Thousand Dollars. This contract hereby agrees to complete the work in this contract on or before May 1st, 1922 (This must be filled in).

In submitting this bid, the undersigned states that he has inspected the site, read the General Conditions preceding the specifications and includes in his estimate all labor and materials as called for under the various subdivisions and subheadings of the above branch or branches of work estimated upon.

The contractor shall submit with his bid a certificate from the Surety Company showing evidence that he can secure a bond for 100% of the contract price. Only a surety company bond certificate will be accepted.

Note. All provisions of the foregoing must be complied with or the bid will be rejected.

Enclosed please find certified check for two (2%)

per cent of the estimate made payable to the Board of Education of Clifton, N. J.

(Signed) Faillace Bros.,
7 East 42nd St., N. Y. C.
July 25, 1921.

Rock excavation that requires blasting
add $4.00 per cu. yd. over earth.
Addenda No. 1 add $200.00.
Addenda No. 2 add $72.00.

EXHIBIT P-4

Amount $5280.00. Certificate No. 2

October 19th, 1921

Owner, Board of Education; address, City of Clifton, N. J.

Faillace Bros. contractor for General Construct, having furnished labor and material on your school No. 15 located at Highland Ave., Clifton, under terms of contract dated Aug. 23, 1921 and amounting to $131,000, entitled to the extra payment of Four Thousand Two Hundred and Eighty Dollars.

This payment is not an acceptance of the work done until final payment is made and does not form any legal obligation on the part of the architect.

Summary

Amount of contract	$131,000.	
Extra work	5,280.	
		$136,280.
Previous payment	$ 8,500.	
Present payment	5,280.	
		$ 13,780.
		$122,500.

H. Barrett Crosby,
Architect.

EXHIBIT P-5

EXCERPT FROM THE MINUTES OF THE BOARD OF EDUCATION, Nov. 16, 1921

RESOLUTION

Clifton, N. J., Nov. 15, 1921

Mr. Chairman:

In view of the evidence adduced before this Investigating Committee tonight, I respectfully move that it is the finding of the Investigating Committee that the resolution adopted on November 2, 1921, at meeting of the Board of Education is unsustained in that the evidence is clear that the Architect did not certify unqualifiedly that the bill of Faillace Brothers was correct, and that the work has been furnished, in that there accompanied the said certificate letters from H. B. Crosby the Architect, and engineers, which letters contained opinions of experts to which the Architect called attention for the guidance of the Board in passing on the correctness of said bill of Faillace Brothers, one of which letters requested that action on payment of said Contractor's bill be held in abeyance pending further investigation, and further in view of the fact that said Architect's certificate was qualified by a letter of request from the Architect to take the matter under advisement before payment, and particularly in view of the fact that the aforesaid certificate is only for the information of the Board and not an absolute order to pay the Contractor, in the premises, and,

Further, that the portion of the aforesaid resolution of November 2nd is erroneous in stating that the Architect admitted that there was no rock ex-

cavation whatever made by the Contractors in view of the evidence and letters submitted by the Architect and others as to the percentage of rock contained in the excavation herein referred to, and I more further, that whereas there is a difference of opinion of experts as to whether there is any rock or not, or the percentage thereof, that it is the recommendation of this committee to the Board that the dispute between the contractors who did the excavation and this Honorable Board be submitted to arbitration in accordance with Section Five of the Contract which reads as follows:

"But should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons, one employed by the Owner, the other by the Contractor, and these two shall have power to name an umpire whose decision shall be binding on all parties"

And I further move that this entire recommendation and finding be submitted to the Board of Education at its next regular meeting as the report of the Investigating Committee.

(Signed) George A. Easton.

On motion by Com. Lieblich and seconded by Com. Harvey to adopt the resolution and discharge the Investigating Committee with thanks, for approval the following vote was taken:

No: Coms. Albrecht, Adamson. Yes: Coms. Lieblich, Harvey, Easton. Carried.

EXHIBIT P-6

Passaic, N. J., December 7, 1921.

To the Honorable, the Board of Education
Clifton, New Jersey.

Gentlemen:

We, the undersigned, Russell S. Wise and Anton L. Pettersen, Civil Engineers of Passaic, N. J., respectively selected by the Board of Education of the City of Clifton, and by Faillace Bros., Contractors, of the City of New York, to arbitrate in the dispute existing between the Board and the contractors above named, in reference to the performance of rock excavation on the site of School No. 15, situated on Gregory Avenue and Home Place in the City of Clifton, would respectfully report that we in conformity with Section 5 of the contract existing between your Board and Faillace Bros., have named Mr. Harold J. Harder, City Engineer of Paterson, as umpire. Section 5 reads as follows:

"But should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons, one employed by the owner, the other by the Contractor and these two shall have power to name an umpire, whose decision shall be binding on all parties."

The work imparted upon us to perform consists in, expressing our opinion and determining, "the question of 'Rock' on the Highland Avenue School site."

In the general specifications covering the entire work for School No. 15 we find under the heading of "Masonry", the following clause:

"Rock 12." Large Boulders shall be sunk below ground floor level in location as directed by Ar-

chitect or shall be removed from off the premises. Should solid rock be encountered at level of bottom of walls dress the rock to level surface and omit such parts of footings as directed.

"If solid rock is encountered, same shall be removed from the premises at unit prices for blasting to be submitted in estimate."

The price submitted to your Board by the contractors was a postscript on the proposal for the work on School No. 15, providing for rock excavation, a sum of four (4) dollars per cubic yard over earth.

Although we have ascertained that no blasting was performed in connection with the grading of the school site, we consider it optional and entirely within the judgment and jurisdiction of the contractors to use such means, which in their opinion, would be most advantageous to remove from the premises any materials competent to be classified as solid rock under Section 12 Rock.

For the purpose of determining the character of the materials encountered in connection with the grading of the school property, we made a careful and exhaustive examination not only of the excavated and filled in parts of the school site, but also of the surrounding vicinity. We caused testholes and excavations to be made at various places on the site and studied the nature of the soil encountered.

We attach hereto a plan showing the dimensions and location of the school site as well as the position of the new school building and the location of the testholes and excavations made under our direction.

Exhibit P-6

On the attached sketch "A" indicates the location of large sand stone boulders disclosed by the excavation. This is also shown as "A" upon the photograph herewith presented. At "C" and "D" the excavation disclosed the presence of red shale rock at the surface indicating that rock had been excavated down to this elevation. At "H" we found rock at about 8 inches below the present surface, which, however, appeared to be a filled in ground. At "B" we found the out-cropping of red shale ledge, also shown upon the photograph as "B". Excavations were also made at "E, F, G, J, K, L". At all these points the presence of red shale rock was discovered.

We also present a picture showing the formation along the Southeasterly property line, and a picture showing the filling along the Southeasterly side of Home Place. You will notice that on this last picture the presence of large sand stone boulders excavated from the Southeast section and deposited there by the contractor.

The entire filled in section reveals the presence of large boulders, red shale and red sand stone rock. We also made an examination of the adjoining properties, particularly Southeast of the school site, and found several points, where the out-cropping of boulders and red shale ledge appeared.

We also examined the excavation of the cellar on the Northwest side of Pleasant Place and found the presence of out-cropping shale along the Southeast side of the same.

Basing our judgment and decision upon our observations it is our conclusion that hard rock,

(brown stone boulders, and red shale rock), were encountered in connection with the excavation of the School site.

From the appearance of the excavated materials judging from the formation of the present banks, it would indicate that the rock and shale formation were in layers and shelves intermingled with red sand and gravel, varying from 8 inches to 1½ feet in thickness.

We feel for that reason that the contractor is entitled to be paid for rock excavation.

Due to the unevenness of the rock strata we are unable to determine the quantity of materials excavated and percentage of rock encountered.

Respectfully submitted,
Russell S. Wise,
Engineer for Board of Education.
Anton L. Pettersen,
Engineer for Contractors.
J. H. Harder,
Umpire.

Exhibit P-6

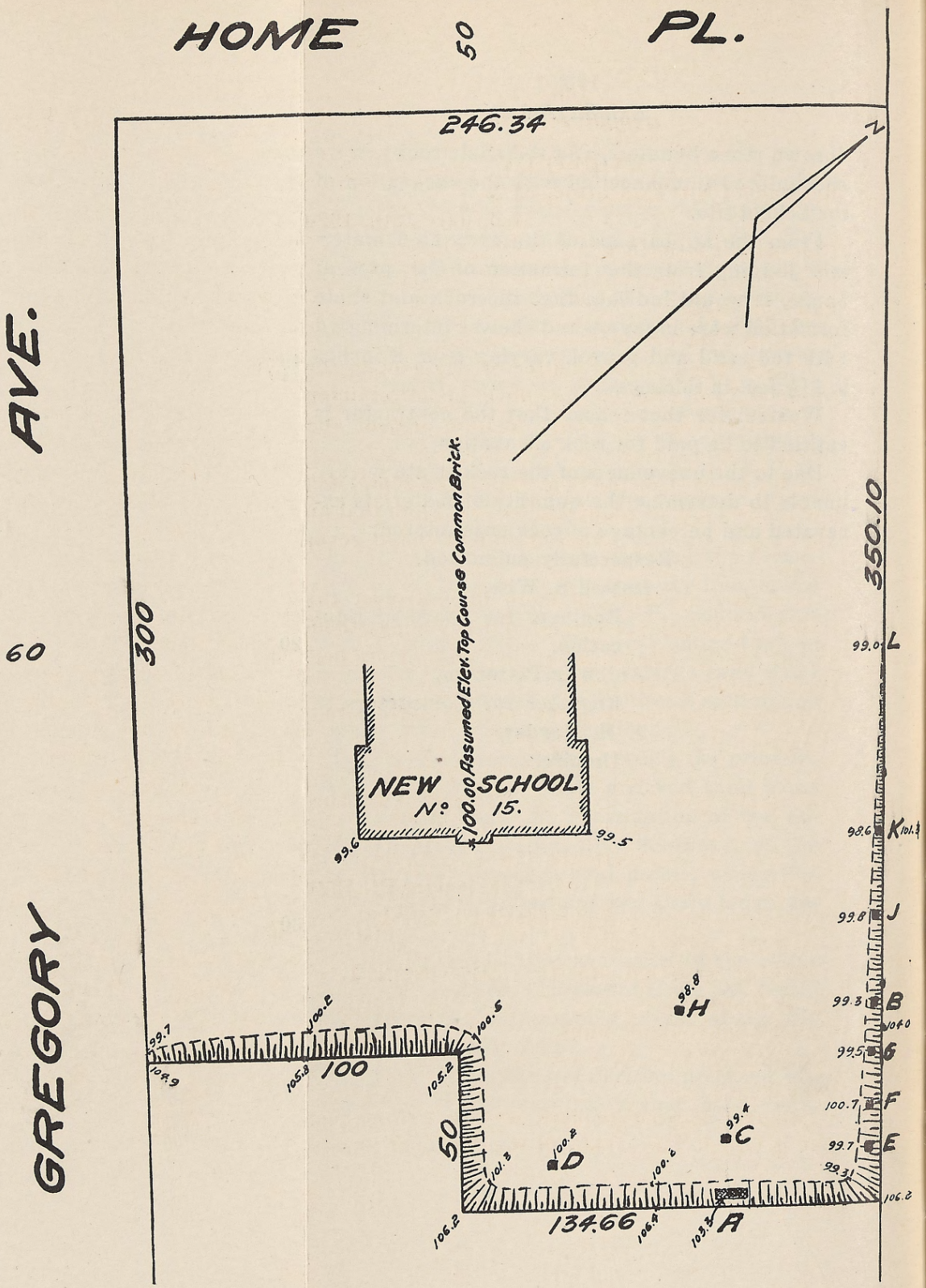
HOME
50
PL.
246.34
N
AVE.
60
300
GREGORY
350.10
99.0 L
98.6 K
99.8 J
99.3 B
99.5 G
100.7 F
99.7 E
99.3
106.2
Assumed Elev. Top Course Common Brick.
100.00
NEW SCHOOL
No 15.
99.6
99.5
99.7
100.2
100.5
104.9
105.8
100
105.2
50
101.3
100.8
D
H
98.8
C
99.4
100.6
106.2
134.66
106.4
103.4
A

EXHIBIT P-7

Re: School No. 15, Clifton, N. J.

February 13th, 1924

Hon. Albert Comstock,
First National Bank Bldg.,
Paterson, N. J.

My dear Commissioner:—

I have taken up the matter of payment to the National Surety Co. on the above school retaining a certain amount of money against present and future contingencies.

After going over the items still to be completed and made good, as requested by you, I find that an allowance of a few hundred dollars would cover same.

In order, however, to more than protect the Board of Education, I suggested that you pay them all but Two Thousand Dollars, which they are perfectly willing to accept.

Hoping this gives you the information desired, I remain

Very sincerely yours,

HBC:RTH H. Barrett Crosby.

EXHIBIT P-8

February 21, 1924

In re: Bond No. 3253748—Claim No. 21228,
FAILLACE BROS.
PUBLIC SCHOOL No. 15, CLIFTON, N. J.

Mr. A Comstock,
First National Bank Bldg.,
Paterson, N. J.

Dear Sir:

Pursuant to your request, we are writing you that it will be agreeable to the National Surety

Company, as surety for Faillace Bros., who constructed Public School No. 15 at Clifton, N. J., for the Board of Education of Clifton, N. J., to retain $2,000. from the fund which they are now holding; this $2,000. to constitute a guarantee to cover incidental expenses which may be necessary to repair or replace minor work which the School Board alleges remains to be done. The balance of this fund is to be turned over to the National Surety Company when this work has been completed. It is the understanding of the writer that the School Board will, therefore, release $18,000. promptly upon receipt of this letter.

Very truly yours,

B. H. Braluny,
Attorney.

EXHIBIT P-9

Re: School No. 15, Clifton, N. J.
SURETY CLAIM

January 22nd, 1924.

National Surety Co.,
115 Broadway,
New York City.

Gentlemen:

The following is a list of items that need your attention on above job.

1. Two door knobs at Boys' Entrance are off (janitor has knobs).

2. Piece of wood railing on Girls' stair loose.

3. Several handrail brackets on boiler room stair loosened up.

4. Wood handrail on top of small section of wrought iron railing in front entrance is loose (needs only one large screw).

5. A number of wood door stops came off and several others are loose (need only renailing).

6. Short piece of Auditorium picture mold fell off (needs renailing).

7. Practically all of the door checks need adjusting. This was never done (needs only adjustment of screw).

8. There is a small leak in rear roof over anteroom. Leakage shows in leader pipe in corner. (Probably due to flashing at this point.)

9. Small leak at boys' toilet vent at roof where vent pipe protrudes thru vent wall at roof. Leakage shows on vent pipe in toilet room.

10. Lock at girls' entrance does not work.

11. Auditorium entrance doors bind (hinges should be set in further on jambs).

12. A number of windows do not lock (sash lock should be set lower).

13. Nearly all of the floor dry wells seem to be clogged up. (Drain cover should be removed and cleaned out below.)

14. There is leakage over window heads in a number of rooms notably south stair hall, one in kindergarten, principal's room, teachers' room, doctor's room and over one sash on two south end classrooms (this we believe is due to improper pointing of brickwork above thesewindows).

15. There should be an operating chain on kindergarten ceiling light.

16. Fireproof sliding doors on Moving Picture openings are loose (lag screw need tightening).

Items numbers 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 15—need attention of a good carpenter who under-

stands hardware. Items numbers 8, 9, 16 should be attended to by the Newark Cornice & Skylight Works, your subcontractors on sheet metal and roofing. Items numbers 13, 14, should be attended to by a mason.

These are all minor items and could be attended to by an efficient carpenter and mason in about two days or less. Janitor can show your men just where the items mentioned are located.

Enclosed find copy of resolution of Board of Education. Kindly see that above noted items are attended to within 10 days from date as per resolution.

Notify this office when items are finished so we can make inspection of same.

Very truly yours,
H. Barrett Crosby,
per Albert J. Wehrell

Copy sent to Board.

Exhibit P-10

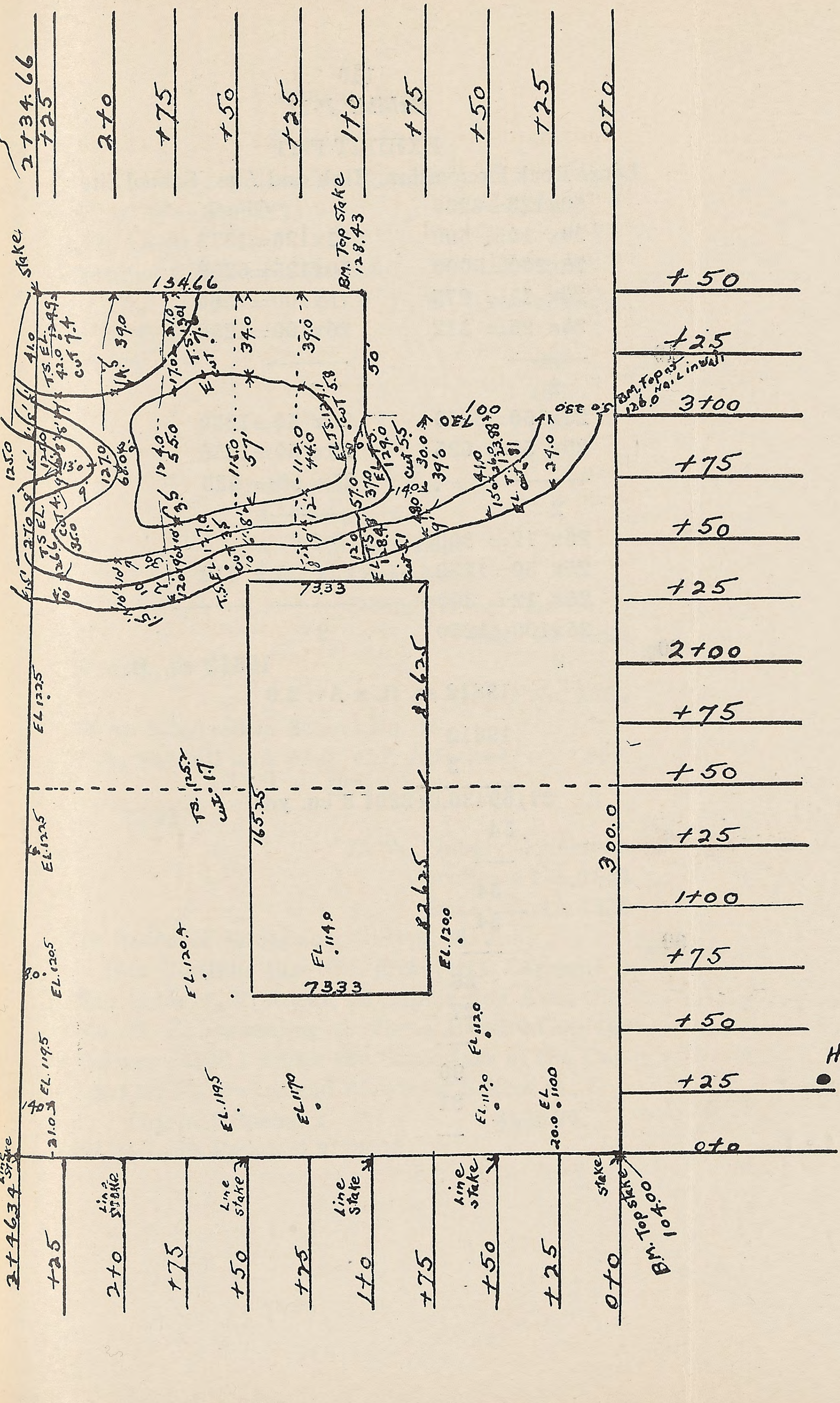
134.66
BM. Top stake 128.43
73.33
165.25
82.625
300.0
Hydrant EL. 109.27

Exhibit P-11

EXHIBIT P-11

Loose Rock Excavation, Highland Ave., School Site

50x125=6250
50x 10= 500
25x200=5000
25x 11= 275
25x 25= 312

2

25x150=3750
25x 50= 625

2

25x 12= 300
25x 50=1250
25x 12= 300
25x100=1250

2

Check

11x125=1375
50x125=6250
75x100=7500
25x100=1250

2

25x 50=1250
25x 50=1250
25x 50= 625

2

25x 25= 312

2

19812 sq. ft.

19812 sq. ft. x Av. 3.0

19812
3

27)59436.0(2201.3 cu. yds.
54

54
54

36
27

90
81

EXHIBIT D-1

Public School No. 15
No. of Warrant 4271
L. R. Leeds
Certified Correct for $300.00
D. W. Gangly, Sec'y.
O. W. 2225
L703 300.
400.
950.
1650.

Audited and Approved
A. Chambers
A. B. Macpherson
John H. Adamson
Committee on Finance.

Oct. 16, 1926

From L. R. Leeds

Order No. 2225

To be delivered to School No. 15
As per bill and Acct. Ctf. Attached 300.
4271
L703

D. W. Gangly, Principal.
Certificate No. 1543
Date Oct. 19, 1926

To Board of Education, Clifton, N. J.

This Certifies that the first (1st) Payment is Due to Mr. L. R. Reeds, 66 Luddington Ave., Clifton, N. J., amounting to Three Hundred 00/100 Dollars ($300.) under the Conditions of the Contract for Hardware and Repairs at School 15.

Original Contract $498.70
Am't of this Payment $300.00

Exhibit D-2

Entire Payments $300.00
Balance to Date $198.70

Lee & Hewitt
Oct. 20th, 1926

The Board of Education of Clifton
In the County of Passaic, N. J.
Return to D. W. Ganly, Secretary, Clifton, N. J.

To L. R. Leeds, Dr.

Oct. 26—As per Attached Certificate
No. 1543 300.00
P. S. No. 15

County of Passaic
State of New Jersey, ss.

L. R. Leeds, of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or person in connection with the same; that the same is correct and true, and the amount therein stated is justly due and owing, as set forth.

L. R. Leeds.

Sworn to and subscribed before me
this 23rd day of October, 1926,
R. L. Wattenor, D. C.
Notary Public of N. J.

EXHIBIT D-2
Public School No. 15
No. of Warrant 2745
Chris Bergsma $546.85
Audited and Approved
A. F. Ernst
E. H. Remig
John H. Adamson
Committee on Finance.

Exhibit D-2

Telephone Passaic 5712M

Clifton, N. J., June 1924

The Board of Education of the City of Clifton, N. J.

To Chr. Bergsma, Dr.

Carpenter and Builder

Real Estate

Materials and Labor used in repair work on School No. 15.

March	27	10 hours Carpenter Labor	
	28	10 hours Carpenter Labor	
	29	4 hours Carpenter Labor	
	31	11 hours Carpenter Labor	
April	1	14 hours Carpenter Labor	
	2	18 hours Carpenter Labor	
	3	8 hours Carpenter Labor	
	22	16 hours Carpenter Labor	
	23	16 hours Carpenter Labor	
	24	24 hours Carpenter Labor	
	25	32 hours Carpenter Labor	
May	2	8 hours Carpenter Labor	
	3	8 hours Carpenter Labor	
	5	16 hours Carpenter Labor	
	6	32 hours Carpenter Labor	
	7	32 hours Carpenter Labor	
	8	32 hours Carpenter Labor	
	19	6 hours Carpenter Labor	
	26	6 hours Carpenter Labor	
		303 hours Carpenter Labor at 1.50	454.50
May	6	Mason 8 hours, Laborer 8 hr. 1.50 — 1.00	
	7	Mason 4 hours, Laborer 8 hr.	30.00
May	6	Mechanic and Helper with Electric drill each 7 hours labor 1.50 — 1.00	17.50

Exhibit D-2

Materials used

15	lbs. nails	0.90
3	dozen screws	0.72
1	pane glass	1.50
24	extension bolts	1.20
7	solid brass door stops	6.95
4	large door stops with shield and hooks	16.92
16	lin. ft. brass chain	1.76
	Repairing of door check and locks at factory	12.50
	½ bag cement, ½ bag plaster	2.40
	Total	$546.85

June, 1924

The Board of Education
of the City of Clifton
Passaic County, N. J.
To Chr. Bergsma, Dr.

Materials and Labor used on No. 15 School
Order No. 566

Total amount as per attached bill $546.85

County of Passaic,
State of New Jersey, ss.

Chr. Bergsma, of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or persons in connection with the same; that the same is correct and true, and the amount therein stated is justly due and owing, as set forth.

Chr. Bergsma.

Sworn to and subscribed before me
this 10th day of June, 1924.

William A. Miller, D. C.
A Comm. of Deeds for New Jersey

Exhibit D-3

EXHIBIT D-3

Public School No. 13 & 15

No. of Warrant 4537

L. R. Leeds

Certified Correct for $84.40

D. W. Ganly, Sec'y.

O. W. 2576

L703

84.40
182.47

266.87

Audited and Approved
A. Chambers
John H. Adamson
W. J. Lentz
Committee on Finance.

The Board of Education of Clifton
in the County of Passaic

Feb. 11, 1927

To L. R. Leeds

Order No. 2576

Please deliver to School No. 13 & 15
As per bill and Acct. Ctf. Attached 84.40

4537

L703

D. W. Ganly, Secretary

Certificate No. 1595

Date Feb. 10th, 1927

To Board of Education, Clifton, N. J.

This Certifies that the Final Payment is Due to Mr. L. R. Leeds, 66 Luddington Ave., Clifton, N. J., amounting to Eighty-four and 40/100 Dollars ($84.40) under the Conditions of the Contract for Repairs to Hardware at Schools 13 and 15.

Exhibit D-4

Original Contract

School 13		$485.70
School 15		498.70
		$984.40
Am't of this Payment	$ 84.40	
Other Payments on Contract		
School 13	450.00	
School 15	450.00	
Entire Payments		$984.40

Lee & Hewitt.
Feb. 11th, 1927

The Board of Education of Clifton
in the County of Passaic, N. J.
To L. R. Leeds, Dr.

Feb. 27 As per attached Certificate $84.40
Final Payment on Repairs—P. S. 13 & 15

County of Passaic,
State of New Jersey, ss.

L. R. Leeds, of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or persons in connection with the same; that the same is correct and true, and the amount therein stated is justly due and owing as set forth.

L. R. Leeds.

Sworn to and subscribed before me this
15th day of Febr., 1927.
D. W. Ganly, D. C.

EXHIBIT D-4

No. of Warrant 2974
Jas Wilson $811.00
O. M. 289 D. W. Ganly
L703

Exhibit D-4

Audited and Approved
A. F. Ernst
E. H. Remig
John H. Adamson
Committee on Finance.
Oct. 16, 1924

From Jas. Wilson
Passaic, N. J.
Order No. 289
To be delivered to School No. 15
Repair dry well as per estimate submitted $811.00
L703
All complete except one well in the coal bin.
Chas. M. Sheehan, Principal
November 10th, 1924

The Board of Education
of the City of Clifton
Passaic County, N. J.
Order No. 289
To James Wilson, Dr.
Box 6, Delawanna, N. J.
For reinstating new dry wells at School
No. 15, Highland Ave. $811.00

State of New Jersey,
County of Passaic. ss.

James Wilson of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or persons in connection with the same; that the same is correct and true and the amount therein stated is justly due and owing, as set forth.

James Wilson.

Sworn to and subscribed before me
this 12th day of Nov. 1924.
D. W. Ganly, D. C.

Exhibit D-5

EXHIBIT D-5

Public School No. 13

No. of Warrant 4271

L. R. Leeds

Certified Correct for $400.00

D. W. Ganly, Sec'y.

O.N. 2224

Lo3

L-703

Audited and Approved
A. C. Chambers
A. B. Macpherson
John H. Adamson
Committee on Finance.
Oct. 16, 1926

From L. R. Leeds

Order No. 2224

To be delivered to School No. 13

As per bill and Acct. Ctf. Attached $400.00

4271

L703

D. W. Ganly, Principal.

Certificate No. 1544

Date Oct. 19, 1926

To Board of Education, Clifton, N. J.

This Certifies that the first (1st) Payment is Due to Mr. L. R. Leeds, 66 Luddington Ave., Clifton, N. J., amount to Four Hundred Dollars ($400.00) under the Conditions of the Contract for Hardware and Repairs School No. 13.

Original Contract	$485.70
Am't of this payment	400.00
Balance to date	$ 85.70

Lee & Hewitt.

Exhibit D-6

Oct. 20th, 1926

The Board of Education of Clifton
In the County of Passaic, N. J.
To L. R. Leeds, Dr.

Oct. 26 As per Attached Certificate
No. 1544 $400.00
P. S. No. 13

County of Passaic,
State of New Jersey, ss.

L. R. Leeds, of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or persons in connection with the same; that the same is correct and true, and the amount therein stated is justly due and owing, as set forth.

L. R. Leeds.

Sworn to and subscribed before me
this 23rd day of Oct., 1926.
R. L. Wattenor, D. C.
Notary Public of N. J.

EXHIBIT D-6

No. of Warrant 4476
L. R. Leeds
Certified Correct for $200.00.
D. W. Ganly, Sec'y.

O. W. 2494
L.703

Audited and Approved
A. Chambers
A. B. Macpherson
John H. Adamson
Committee on Finance.

Exhibit D-6

The Board of Education of Clifton
in the County of Passaic

Jan. 15, 1927

To L. R. Leeds

Order No. 2494

Please deliver to School No. 13 & 15
K500-6

D. W. Ganly, Secretary
Jan. 15, 1927

From L. R. Leeds

Order No. 2494

To be delivered to School No. 13 & 15
K500-6

D. W. Ganly, Principal
Certificate No. 1590
Date Jan. 31st, 1927

To Board of Education, Clifton, N. J.

This Certifies that the Second (2nd) Payment is Due to Mr. L. R. Leeds, 66 Luddington Ave., Clifton, N. J., amoundting to Two hundred Dollars ($200.00) under the Conditions of the Contract for Hardware Repairs at Schools 13 and 15, Clifton.

School 13	$485.70
School 15	498.70
	$984.40

Am't. of this Payment	$200.00	
School 13	400.00	
School 15	300.00	
Entire Payments		$900.00
Balance to Date		$ 84.40

Lee & Hewitt.

Exhibit D-6

Clifton, N. J., Jan. 31, 1927

The Board of Education of Clifton
in the County of Passaic, N. J.
To L. R. Leeds, Dr.

Jan. 27 To Payment on acct. of Contract
as per attached Certificate of
Lee & Hewitt $200.00

County of Passaic,
State of New Jersey, ss.

L. R. Leeds of full age, being duly sworn on his oath, saith that the goods or services itemized in the within bill have been delivered or rendered; that no bonus has been given or received by any person or persons in connection with the same; that the same is correct and true, and the amount therein stated is justly due and owing, as set forth.

L. R. Leeds.

Sworn and subscribed before me this 31st day of Jan., 1927.

D. W. Ganly, D. C.

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

New Jersey Court of Errors and Appeals

National Surety Company, a corporation, *Plaintiff-Appellee,* *vs.* The Board of Education of Clifton in the County of Passaic, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-APPELLEE.

The Pleadings.

The first count in the complaint sets up the making of a contract on August 23rd, 1921, between Faillace Brothers and the defendant, the Board of Education of Clifton, in the County of Passaic, for the erection of a school building for $131,000.00 and the provision for additional or extra compensation of $4.00 per cubic yard for excavation if rock is encountered; the encountering of rock to the extent 1,321 cubic yards; the financial failure of Faillace Brothers and the completion of the work by the plaintiff, the surety on the bond, and subrogation to the rights of Faillace Brothers and the refusal of the defendant to pay for the extra work amounting to $5,284.00 (R. 3), despite the certificate of the architect for the Board of Education that Faillace Brothers were entitled to extra payment of $5,280.00.

The second count (R. 4) is for the same claim and alleges that the defendant disputed the architect's certificate claiming that the brown stone and shale excavated were not solid rock

and that as a result of such dispute the question of the character of the material encountered and the further question as to whether or not Faillace Brothers were entitled to payment for excavating such rock, even though they did no blasting, were submitted to arbitrators, as provided in the contract, which provision is as follows (R. 10):

> "FIFTH: Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by the Architect and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or any work omitted, the same shall be valued by two competent persons, one employed by the Onwer, and the other by the Contractors, and those two shall have power to name an umpire, whose decision shall be binding on all parties."

The second count then sets up the award of the persons so appointed and their determination that solid rock was encountered within the meaning of the contract and specifications as defined in "Rock 12" of the specifications (R. 2) and that the contractor was entitled to be paid for rock excavation at the additional price of $4.00 per cubic yard as provided in the specifications (R. 5). There is the further allegation that 1,321 cubic yards of rock were excavated, hence the claim for the additional amount above the contract price of $5,284.00.

The third count is for $2,000.00, balance due on the contract price of $131,000.00.

As a verdict was rendered by the jury for $1,000.00 on the third count and as no issue was taken with the judgment rendered thereon, we are not concerned with the third count.

In answering paragraph 2 of the second count the defendant admits that "two arbitrators were appointed, who, together with an umpire, selected by them, were to determine whether Faillace Brothers had excavated solid rock which required blasting to remove; that said arbitrators were Russel L. Wise and Anton L. Pettersen, who selected as umpire, Harold J. Harder."

Its only denial to the allegations in paragraph 2 of the complaint is "that brown stone and shale were excavated," admitting further that it disputed the claim of Faillace Brothers that such work was done.

It admits the making and filing of the award, but attacks its validity on the ground that the arbitrators and umpire were not sworn, gave no notice of hearing and because no witnesses were produced before them.

The action was tried before Judge Mackay in the Passaic Circuit Court on September 26th, 1929.

The Judge directed a verdict on the second count for $5,280.00 and interest, which the jury returned. As hereinbefore stated, the jury found for the plaintiff on the third count for $1,000.00 and interest.

On appeal to the Supreme Court the judgment was affirmed.

Grounds of Appeal.

The grounds of appeal filed in the Supreme Court, except the third and fourth, all relate to the admission in evidence of, and the direction of a verdict upon, the award of the arbitrators and the refusal of the Court to permit the defendant

to offer proof to contradict the findings of the arbitrators (R. 19 and 20).

The third and fourth grounds of appeal relate to the third count and are not material here.

The first ground of appeal filed in this Court is that "The Supreme Court found: 1. In favor of the plaintiff instead of defendant" (R. II). The other grounds take issue with the findings of the Supreme Court.

Facts.

On August 23, 1921, Faillace Brothers entered into a contract with the Board of Education of Clifton, in the County of Passaic, for the erection of a new school building known as New School Number 15, on Highland avenue in Clifton, for $131,000.00, in accordance with the drawings and specifications made by Henry Barrett Crosby, an architect.

Before the building was completed Faillace Brothers suffered financial difficulties and the plaintiff-appellee, the National Surety Company, the surety on the bond of the contractor, was compelled to take over the work and to finish the job, all of which it did.

A dispute arose over the nature and quality of certain materials excavated which the contractors characterized as rock and for which additional compensation was claimed.

The specifications provided as follows (R. 2):

> "Rock 12. Large Boulders shall be sunk below ground floor level in locations as directed by Architect, or shall be removed from off the premises. Should solid rock be encountered at level of bottom of walls, dress the rock to level surface and omit such

> parts of footings as directed. If solid rock is encountered, same shall be removed from the premises at unit prices for blasting to be submitted in estimate."

It was agreed that the additional sum of $4.00 per cubic yard should be paid to the contractor for the removal of solid rock.

1,321 cubic yards of material, characterized by the contractors as solid rock under the terms of the contract for which they claimed compensation at the rate of $4.00 per cubic yard, were excavated and removed (R. pp. 45, 46, 50, 51).

The contract also provided that in the event of a dispute arising over extra work that each of the parties to the contract should appoint a competent person and that they should select an umpire, and their decision should be final, and the parties agreed to abide thereby (R. 10).

A question having arisen as to whether or not the rock encountered came within specification "Rock 12" and therefore compensable, and although the architect had given his certificate, the Board of Education, by resolution, named an engineer, Mr. Russel L. Wise and Fallace Brothers named another engineer, Mr. Anton L. Pettersen and the two arbitrators selected as the umpire, a third engineer, Mr. Harold J. Harder (R. 98).

On December 7th, 1929 (R. 100), the arbitrators filed a unanimous report with the Board of Education, in part as follows (R. 101, 103):

> "Although we have ascertained that no blasting was performed in connection with the grading of the school site, we consider it optional and entirely within the judgment and jurisdiction of the contractors to use such means, which in their opinion, would be most advantageous to remove from the

premises any materials competent to be classified as solid rock under 'Section 12 Rock.'

"Basing our judgment and decision upon our observations, it is our conclusion that hard rock, (brown stone boulders, and red shale rock) were encountered in connection with the excavation of the School site.

"From the appearance of the excavated materials, judging from the formation of the present banks, it would indicate that the rock and shale formation were in layers and shelves intermingled with red sand and gravel, varying from 8 inches to 1½ feet in thickness.

"We feel for that reason that the contractor is entitled to be paid for rock excavation.

"Due to the unevenness of the rock strata we are unable to determine the quantity of materials excavated and percentage of rock encountered."

The percentage of rock encountered had been ascertained by two other engineers prior to the submission, and the results are above set forth, viz.: 1,321 cubic yards (R. 45 etc.).

Plaintiff, the National Surety Company, was subrogated to all of the rights of the original contractor.

LAW.

I.

The appeal should be dismissed for failure to file proper grounds of appeal.

All the grounds of appeal (R. II) are based on the reasoning and holding of the Supreme Court, not one alleging that that tribunal erred in the judgment rendered.

This Court has repeatedly held (*Burhans, et al.* v. *City of Paterson*, 99 N. J. L. 490, 123 Atl. 883) that on an appeal from the Supreme Court sitting as a reviewing tribunal, the only proper ground of appeal is that the Court below erred in the judgment it gave.

In that case four grounds of appeal had been filed, all on the reasoning and holding of the Supreme Court, but not alleging that that tribunal erred in the judgment rendered. It was held that "because it is not alleged as ground of appeal that the Supreme Court erred in the judgment sought to be reviewed, the appellate jurisdiction of this Court is not invoked, and the appeal must therefore be dismissed."

Grounds 2, 3, 4, 5 and 6 are objectionable on the further ground that rulings of the Supreme Court, when sitting as an appellate tribunal are not assignable. *Kleinert* v. *Hutchinson, et al.*, (E. & A.) 98 N. J. L. 831, 121 Atl. 742.

II.

There was no error in admitting the award in evidence even though the arbitrators were not sworn, gave no notice of hearing and heard no witnesses.

At the outset we desire to call the Court's attention to arguments in appellant's brief on issues which were neither raised in the trial court nor in the Supreme Court.

As appears in the grounds of appeal filed in the Supreme Court (R. 19), the only complaints found with the rulings of the trial court were the denial of defendant's motion for a non-suit as to the second count; the admission in evidence of the award over the objection that the arbitrators had not been sworn and had not granted

a hearing to the defendant; the direction of a verdict over the objection that the arbitrators had not been sworn and had not granted the hearing; and the refusal of the Court to permit defendant to dispute the findings of the arbitrators. The 8th ground in the Supreme Court, as we will hereinafter show, is erroneous in stating that the Court refused to permit the defendant to show the *amount* of earth and rock excavated.

At the trial defendant moved for a non-suit as to the second count (R. 41) on the ground that the arbitrators were not sworn, and held no formal hearing at which defendant would have had an opportunity to produce witnesses.

The admission in evidence of the arbitrators' report was objected to on the same grounds (R. 24, 25).

It is well established that when a party excepts to the admission of testimony he is bound to state his objection specifically and on error he is confined to the objection so taken. (*The Columbia Delaware Bridge Company* v. *Geisse, et al.*, 38 N. J. L. 39 at 44, affirmed by this Court 38 N. J. L. 580.) See also *Shaw* v. *Bender*, 90 N. J. L. 147, 100 Atl. 196 (Case 2), where this Court said:

> "The trial court was not requested to grant a non-suit on that ground; hence the question is not before us for determination.
>
> "A question not presented and argued in the court below will be held to be waived and abandoned, and will not be considered in an appellate tribunal. State *v.* Heyer, 98 Atl. 413."

The only issues raised by the pleadings and by appellant in the trial court are the validity of the award made in this case in the absence of

an oath by the appraisers and notice of hearing, and the quantity of the rock excavated.

Appellant now argues for the first time that a submission of this kind was *ultra vires* and could have been *pleaded* by the Board of Education (Appellant's brief 14). It is sufficient to say that *ultra vires* was not pleaded. The argument meets the further objection that it was not raised below. This is also true with reference to the argument made on pages 15, 16 and 18 of appellant's brief.

The question to be determined by the experts appointed by the parties was not as stated in page 6 of appellant's brief, whether there was solid rock or not, but whether the rock excavated came within the classification of specifications number "Rock 12" (R. 2), for which extra compensation was to be made. On pages 7 and 8 of its brief, appellant further argues that the question submitted was "What was the total cubic yards of rock excavated?" The amount excavated was made known to the Board by the contractor through appellant's architect, who certified (R. 97) that the contractor was entitled to the extra payment of $5,280.00. The amount had been determined during the construction work (R. 45, 51). We reiterate that the single issue submitted to the experts was whether or not the contractor was entitled to payment at the rate of $4.00 per cubic yard for rock excavated, although such rock was removed without blasting.

As hereinbefore appears, the first count in the complaint is based upon the terms of the contract for the construction of a school building and particularly for extra compensation, as provided in the contract, for rock excavation. The

second count in the complaint is for the same item and is based upon the report and findings of the experts, who were appointed in accordance with the terms of the contract. The language of the provision for such appointment is repeated and is as follows (R. 100, l. 20): "But should any dispute arise respecting the true value of the extra work, or the work omitted, the same shall be valued by two competent persons, one employed by the owner, the other by the contractor and these two shall have power to name an umpire, whose decision shall be binding on all parties."

It will be observed from this language that these men so appointed, all of whom were engineers of experience, were not arbitrators in the usual legal definition or acceptance of that word. They were men appointed because of their expert knowledge, and had duties to perform similar to those of appraisers appointed under a standard fire insurance policy. As Vice-Chancellor Pitney said in *American Central Insurance Company* v *.Landau* (17 Dick. Ch. Rep., 73 at p. 93), "* * * the proceeding here is not an ordinary arbitration where the parties hear witnesses and appear by counsel and act upon sworn evidence only; but it is strictly an appraisal and ascertainment in a particular manner of the amount of the loss, made by two or three parties, as the case may be, in which they act upon their own judgment, with such information as they may obtain in an informal way * * *."

This definition is upheld by Vice-Chancellor Reed in *Stout* v. *Phoenix Assurance Co. of London* (20 Dick Ch. Rep. 566, at p. 570). The bill in that case was filed to set aside an appraisement made in a fire insurance case upon

several grounds. At page 570 of the reported case, the Vice-Chancellor says: "If the award made in this case is invalid, it must rest upon the failure of the appraisers to give notice to the insured or his agent of the time and place, when and where, the appraisement was to take place. If the provision for the ascertainment of the loss is to be regarded as an ordinary arbitration, of course the parties were entitled to notice. But, as already remarked, the proceedings is not a common-law arbitration."

The contention is made that under the statute relating to arbitration and references (Comp. Stat. Vol. 1, p. 106, sec. 6), the arbitrators must be sworn and if they were not sworn the award is void. This provision may or may not apply to so-called common-law arbitrations. The authorities on the subject where the question has arisen are not clear.

About the first case which arose under this statute is *Ford* v. *Potts* (1 Halst. p. 388). In that case suits had been begun by both parties and both suits were referred to arbitrators. Objection was made that the referees were not sworn as provided in the 6th section of the act. Chief Justice Kinsey says on page 394: "The legislature have not declared, that the omission to take the oath should invalidate the award, and we cannot suppose that this was their meaning. If such was their intention, it might easily have been expressed, but as it is omitted, we can only judge of their intentions by what they have done." This, however, is *obiter dicta,* as apparently the arbitrators had been appointed prior to the passage of the act.

Another early case is *Inslee* v. *Flagg* (26 N. J. L. 368). The opinion is by Chief Justice Green.

The suit was in assumpsit and the defendant pleaded an award. The plaintiff replied that the arbitrator had not been sworn and the Chief Justice holds that as the arbitration comes within the purview of the statute "the arbitrator cannot act—that, in fact, he is clothed with none of the powers of an arbitrator, and can make no award until he is sworn." It does not appear in the report of the case how the arbitrator was appointed. Mr. Justice Potts propounds the question in his concurring opinion (p. 373): "Does this section apply to all cases of arbitration, or only to such as are made a rule of court?" Apparently the award before the Court had not been made a rule of court.

We then reach the case of *Kaplan* v. *Niagara Fire Insurance Co.* (73 N. J. L. 780), an arbitration under a standard fire insurance policy. This case was tried at the Middlesex Circuit, Mr. Justice Fort sitting. There were eminent counsel both for the plaintiff and the defendant, and the trial justice in directing a verdict stated his reasons which are enumerated in the report of the case and are spoken of with approval in the opinion of the Court of Errors and Appeals. Mr. Justice Fort states (at p. 786): "A third suggestion was made by plaintiff's counsel, that the umpire chosen was not sworn, nor did he agree to accept. The appraisers agreed. His services were therefore not required. His failure to qualify, therefore, was quite immaterial (citing authorities)." "There is no requirement that the appraisers be sworn, and if they are not it will not invalidate the award. See opinion of Vice-Chancellor Reed in Stout *v.* Phoenix Assurance Co., 56 Atl. Rep. 691" (above cited).

In the opinion of the Court of Errors and Appeals (Judge Vredenburgh), the Court says: "The counsel of the plaintiff in error, having before them the light of the above-quoted opinion at the Circuit, fortified by its references to authority, urge in argument and in brief here two subjects deserving our consideration." But no reference is made to the consideration of the question of the swearing or non-swearing of the appraisers.

So far as this last proposition is concerned, in an arbitration similar to the one in the instant case, which, as we have already said, is not an arbitration such as is comprehended within the usual definition, the valuers were chosen by reason of their special knowledge respecting the matters in controversy. They were not called upon to give notice as of a formal hearing where testimony is to be taken or to hear proofs, and may be even justified in refusing to hear the evidence. (See *Stout* v. *Phoenix Assurance Co., supra*).

We find the following definition of a common law arbitration in *Corpus Juris* (5 *C. J.* p. 17, sec. 4):

> "Technically, to constitute a valid common-law award, it is necessary that there should be a submission, by the parties, of an existing matter of difference, for the purpose of concluding the parties as to the entire subject matter in issue between them, as distinguished from a submission for the ascertainment of a single fact, or the settlement of a particular question in the chain of evidence, constituting a mere appraisement, valuation, or reference not designed to terminate the whole controversy between the parties, which proceeding is said not to be an arbitration."

This, therefore, is our contention, that as the ascertainment of the fact with respect to rock excavation was the only function of the arbitrators or appraisers appointed in this case, the award made by them is not a common law award nor a statutory award. The provisions of the statute above referred to with respect to the swearing of the arbitrators do not apply.

It must be remembered that the provision for the appointment of experts is found in the contract between the parties, and they were selected because of that provision and not because a controversy had arisen and the parties had subsequently agreed to submit to arbitration.

As was said in *First Ecclesiastical Society* v. *Besse* (119 Atl. 903, at p. 905):

> "In many cases it appears that the agreements were designed to leave to the decision of persons to be selected questions of amount, quality, value, or price which might come up during or after the performance of the contract. Of these it has been said that a reference agreed on for such a purpose is not an arbitration in the accepted legal sense of the word, because an arbitration is a method adopted to settle already existing controversies, and reference of this kind is intended to affect only possible future controversies; and that the latter, accurately speaking, is an appraisement or estimate." (Citing authorities including *Stout* v. *Phoenix Assurance Co.*)

III.

A verdict was properly directed on the second count.

Point IV of appellant's brief is not properly before this Court as the objection made therein was not made in the trial court nor raised or argued in the Supreme Court (*Columbia Delaware Bridge Company* v. *Geisse, et al., supra; Shaw* v. *Bender, supra*).

At the trial appellant's counsel stated to the Court (R. 63) that he had several witnesses "for the purpose of showing that there was no rock, such as described in the specifications, encountered on this job. I think there are twelve witnesses, some of whom are engineers, some of whom are not; but in view of the ruling of your Honor, with respect to the arbitration, it is a question of what the issue is in respect to that, if this arbitration is conclusive, I cannot attack it, if you say it is conclusive; and, why, then I cannot put this testimony in." And upon objection to the question "Q Can you tell us whether you found any rock or not—," (number 5 of the grounds of appeal) appellant's attorney stated (R. 64), "Mr. Comstock—I offer the evidence to prove that there was not any such rock encountered on this excavation or in the grading as to be entitled to $4.00 a cubic yard."

In number 8 of the grounds of appeal, appellant states that the Court refused to permit it to show the *amount* of earth and rock excavated. As is shown by the above quotations the offer of proof was not to show the amount of rock but the character of the rock excavated.

The contention that the award must be certain and final upon all the matters submitted is not

properly before this Court, as it was not raised below. The cases cited in support thereof (Appellant's brief 26) are not in point.

The argument by appellant on pages 30 and 31 of its brief that the fifth paragraph of the contract does not support the arbitration was not raised in the Court below and on the contrary it was admitted by defendant in paragraph 2 of its answer to the second count that the question as to the meaning of "solid rock" and whether Faillace Brothers were entitled to payment for such excavating, was submitted to arbitrators. We quote (R. 14):

> "Two arbitrators were appointed, who, together with an umpire, selected by them were to determine whether Faillace Bros. had excavated solid rock which required blasting to remove it; * * *"

The appellant cannot therefore contend as it does on pages 29 and 31 that there was no proof of a submission or that a committee of the Board and not the Board itself, had referred the matter to experts for their determination. The Board of Education itself passed the resolution (R. pp. 98, 100). The issue at the trial raised by the pleadings and in the argument before the trial court was clear.

It is significant that nowhere in appellant's brief does it point out the page of the record wherein any of the matter contained in its brief, other than the swearing of and notice by the arbitrators, was raised in the trial court.

The Supreme Court therefore properly concluded that the only issue before it was whether the report was properly received in evidence over the objection that the arbitrators were not sworn and that no notice was given of a meeting.

IV.

In the absence of fraud or mistake the award was binding upon both parties.

Whether or not the material encountered by the contractor should be defined as solid rock was voluntarily submitted by the parties to the arbitrators. There was no doubt as to what they were called upon to decide. (See resolution of Board of Education agreeing to submission, R. p. 98.) The determination of the arbitrators in the absence of fraud, mistake or misconduct became binding upon the parties, in fact became a part of the contract itself.

The Courts are uniform in holding that such determinations are conclusive. *Inslee* v. *Flagg,* 26 N. J. L. 368 (above cited); *Richardson* v. *Lanning,* 26 N. J. L. 130.

V.

The defendant cannot attack the award at law, the proper remedy being in equity.

The determination of the arbitrators in the absence of fraud, mistake or misconduct being conclusive upon the parties in a court of law, the award cannot be attacked there but must be contested in equity (*Kaplan* v. *Niagara Fire Insurance Co.,* 73 N. J. L. 780 at p. 786).

It has always been held that in an action at law upon an award the defendant must resort to equity where he seeks avoidance of the award, courts of law having no authority to question its validity (*Cortlandt* v. *Underhill,* 2 Johns Ch. Rep. 366; *Sherron* v. *Wood,* 10 N. J. L. 7).

Conclusion.

We respectfully submit that the Supreme Court did not err in concluding that the submission to experts in this case of the single issue whether the material excavated by the contractor was rock under specifications No. "Rock 12," was not an arbitration under the arbitration statutes.

FREDERIC M. P. PEARSE,
Attorney for Plaintiff-Appellee.

On the Brief,
FREDERIC M. P. PEARSE,
MAX MEHLER.

New Jersey Court of Errors & Appeals

National Surety Company,
Plaintiff-Appellee,
vs.
The Board of Education of Clifton, in the County of Passaic,
Defendant-Appellant.

Brief for Defendant-Appellant

STATEMENT

This suit was instituted against The Board of Education of Clifton in the County of Passaic to recover moneys alleged to be due under a written contract between The Board and Faillace Bros., contractors, by the terms of which they were to erect a school building for the sum of $131,000. agreeably to and in accordance with the drawings and specifications made by the architect.

Faillace Bros. failed sometime after the excavation and the plaintiff which had become the surety on their bond completed the building. The chief difference between the original parties concerned the payment of $5284. for the alleged excavation of 1321 cubic yards of solid rock, which defendant was ready to prove had not been encountered.

Paragraph 12 of the specifications, p. 95, is as follows:

> "Large boulders shall be sunk below ground floor level in locations as directed by Architect, or shall be removed from off the premises. Should solid rock be encountered at level of bottom of walls, dress the rock to level surface and omit such parts of footings as directed.
>
> If solid rock is encountered, same shall be removed from the premises at unit prices for blasting to be submitted in estimate."

The proposal of the contractors as stated was $131,000. Then follows this language in their proposal.

> "Rock excavation that requires blasting add $4.00 per cubic yard over earth," p. 97.

This was submitted with the estimate and was part thereof. The proposal was on the printed form of the Board and this was the only unit price on the whole work.

It will be noted that no additional compensation was to be paid for "large boulders" or any kind of rock other than solid rock. No estimate was asked for large boulders. Only for the excavation of such solid rock that required blasting were the contractors to be paid. This it would seem is too plain for further discussion.

The rock in question in this case was removed by steam shovel, p. 56. It is quite clear therefore, that it could not have been of the massiveness indicated by the terms ***solid rock*** and further

qualified by the words "at unit prices for blasting."

There was no rock of any kind encountered in the foundation for the school, p. 55. The only rock claimed to have been encountered was in grading part of the premises.

The complaint contains three counts. The material allegations of each are as follows:

FIRST COUNT

That the contractors submitted a price of $4. per cubic yard for removing solid rock in addition to the contract price aforesaid of $131,000. which was accepted and which was performed and that the architect so certified.

SECOND COUNT

That the rock was of brownstone and shale; that the parties mutually agreed to submit to arbitration the question whether the brownstone and shale were solid rock and whether the contractors were entitled to payment, although they did no blasting; that arbitrators were appointed who selected an umpire who reported "that brownstone boulders and red shale rock were encountered" that "from the appearance of the excavated materials judging from the formation of the present banks it would indicate that the rock and shale formation were in layers and shelves intermingled with red sand and gravel varying from 8 inches to 1½ feet in thickness; that the arbitrators felt for that reason the contractor was en-

titled to be paid for rock excavation but that ***"we are unable to determine the quantity of materials excavated and percentage of rock encountered."***

Paragraph 4 of this count further alleged that the quantity of brownstone boulders and red shale rock referred to was 1321 cubic yards. (This calculation was completely outside the alleged award.)

THIRD COUNT

That a balance of $2000. was left with the Board which it refused to pay.

THE ANSWER OF DEFENDANT

The Board alleged in answer to the first count that the price was $4. per cubic yard over earth for removing solid rock that required blasting; that no such work was performed as the architect well knew.

The Board in answer to the second count denied that brownstone and shale were excavated; that the alleged award was void and of no effect as the arbitrators were not sworn nor was any notice given to defendant of any hearing nor were witnesses produced and sworn nor any hearing had thereon.

The Board answers the third count, that the balance of $2000. was retained with the consent of the plaintiff to replace work that might be required and that the expenditures exceeded said sum.

As a separate defense the Board declared that the architect did not certify that the claim for rock

was a valid one but on the contrary sent a letter to the Board that he had conferred with several engineers and enclosed copies of their opinions to enable the Board to determine whether the claim was a valid one according to the contract.

A verdict was directed for the plaintiff on the second count for $5280. principal and $2508. interest or a total of $7780. and on the third count a verdict was rendered for $1000. principal and $336.67 interest, or a total on the third count of $1336.67 or a total judgment of $9124.67. The plaintiff did not press the first count.

The Alleged Arbitration

There was no direct proof of any submission. What appears to have happened was that an investigating committee of the Board of Education had been appointed to consider the matter and that public meetings were held. The excerpt from the minutes of the Board of Education of November 16, 1921, p. 98, was offered by the plaintiff as Exhibit P-5.

The Board adopted the resolution of the investigating committee. It was resolved that the dispute as to ***whether there is any rock or not or the percentage thereof,*** p. 99, be submitted to arbitration according to Section 5 of the contract.

> "But should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons, one employed by the Owner and the other by the Contractor, and these two shall have power to

name an umpire whose decision shall be binding on all parties."

This section did not apply as will appear *infra.* The intention, however, clearly was that the question whether there was solid rock or not, and the percentage thereof should be submitted to arbitration. No formal submission so far as appears from the evidence was signed. Not a word was said about such a document. All we have to guide us is the resolution of the Investigating Committee and the report of the alleged arbitrators. We know from the contract between the parties embracing the agreement and specifications just what the contractors agreed to do. The Board of Education could not lawfully consent to an arbitration of a subject-matter so palpably at variance with its own contract. Why should the contractors be paid for alleged excavation of certain boulders and shale when they had agreed by their solemn contract that compensation for such work was included in their general contract and that by their own proposal over their own signatures they were only to be paid further compensation of $4. per cubic yard above the price of earth if they encountered solid rock that required blasting.

The only possible question that could exist was how much solid rock had been excavated. The price was fixed. The word "blasting" occurs in the specifications and in the proposal of the contractors.

This "rock excavation" of the proposal is of course the "solid rock" of the specifications. No further action of the Board is shown by the plaintiff. The next exhibit of the plaintiff was Exhibit

P-6, the alleged award, which is no award whatever. The arbitrators said that they attached a sketch to the report which is found on page 104; that the premises ***revealed the presence*** (bold ours) of large boulders, red shale and red sandstone rock and concluded that "hard rock (brownstone boulders, and red shale rock)"—the words in brackets theirs—"were encountered" and that it would indicate that the rock and shale formation were in layers and shelves intermingled with red sand and gravel, varying from 8 inches to 1½ feet in thickness, p. 101, 102 and 103. Manifestly rock 8 inches in thickness was not solid rock. This could readily be removed by a steam shovel and was so removed. A steam shovel could not remove solid rock without blasting the rock. It was ridiculous to think the Board would pay $4. a cubic yard above the price of earth for what could be removed with a steam shovel. The matter was treated by the arbitrators as if there had been no contract at all between the parties.

Both the resolution of the committee and the alleged award set out the clause of the contract about disputed value and yet the so-called award avoided it altogether.

Then they have this singular conclusion:

> "Due to the unevenness of the rock strata we are unable to determine the quantity of materials excavated and percentage of rock encountered." p. 103.

This conclusion makes the alleged award nugatory. It is not within the submission. What was committed to them was not whether they found a

piece of rock in this corner of the tract or the other corner, but what was the total cubic yards of solid rock excavated. The price had been fixed at $4. It was then a simple matter, if the number of yards of solid rock were known, to make the computation.

THIS JUDGMENT SHOULD BE REVERSED BECAUSE:

1. THE ARBITRATORS WERE NOT SWORN.

2. NO NOTICE WAS GIVEN TO THE DEFENDANT OF THE TIME AND PLACE OF MEETING.

3. NO HEARING WAS HELD.

4. THE ALLEGED AWARD WAS INCOMPLETE AND PLAINTIFF WAS OBLIGED TO CALL WITNESSES NOT ASSOCIATED WITH THE ARBITRATION IN AN ATTEMPT TO PROVE THE QUANTITY OF CUBIC YARDS OF ROCK ALLEGED TO HAVE BEEN EXVACATED WHICH WERE NOT STATED IN THE ALLEGED AWARD AND DEFENDANT WAS DENIED THE RIGHT TO PROVE THAT THE QUANTITIES OF ROCK WHICH THESE WITNESSES FOR THE PLAINTIFF TESTIFIED TO, DEHORS THE AWARD, WERE NOT EXCAVATED.

THE ARBITRATORS WERE NOT SWORN

This is admitted.

Section 6 of the arbitration act is as follows:

> "In cases of arbitration, every arbitrator shall, before he proceeds to the business submitted to him, take an oath or affirmation of the like nature with that hereinbefore prescribed to be taken by referees and to be administered in like manner."

In Inslee v. Flagg, 26 N. J. L., 368, Chief Justice Green said:

> "It is insisted that the sixth section of the act applies only to cases where the arbitration is to be made a rule of court. But certainly the act itself contains no such limitation. It comprehends every arbitrator and all cases of arbitration. Nor is there anything in the general structure and scope of the act, or in the reason of the thing, to narrow the natural import of the language of the sixth section. The two first sections of the act including the preamble are a substantial copy of Stat. 9 and 10 Will. III, ch. 15, and apply only to arbitrations where no cause is pending and where the submission is agreed to be made a rule of court. Lucas vs. Wilson, 2 Burr. 701.
>
> The third, fourth and fifth sections of the act regulate references where there is a cause pending in court. It might be inferred from what is reported to have been said by the Chief Justice (Kinsey) in Ford v. Potts, 1 Halst. 393, that the whole of the statute as found in Paterson, 141, is a

transcript of the English statute, and applies only to cases where no suit is depending. But the remark is applicable only to the two first sections of the statute. The residue of the act was drawn by Governor Paterson, and affords a more efficacious remedy upon reports of referees than existed at common law.

The sixth section prescribes an oath as the qualification of every arbitrator. No reason can be given why an arbitrator should be sworn when the arbitration is to be made a rule of court, and not sworn in all other cases. * * * It is further objected that if the arbitration is within the provision of the sixth section of the act, the failure of the arbitrator to be sworn is a mere irregularity and does not avoid the award.

This view was expressed in Ford v. Potts, 1 Halst. 393, but it was not necessary to the decision of that case and it is contrary to the uniform course of decisions in this court. It has been repeatedly held in this court that if it did not appear that the referee was sworn a judgment entered upon the report would be reversed." Quoting cases.

The question was directly presented in Combs v. Little, 3 Green's Ch. R. 310. The answer in that case set up an award in favor of the defendant for a large amount, to be paid by the complainant. It admitted that the arbitrators were not sworn, but insisted that the award was not thereby ren-

dered void but that it was binding upon the parties in equity. But the Chancellor (Pennington) held that, as the arbitrators were not sworn, the whole proceeding was void.

The sound construction of the statute is, that the arbitrator cannot act—that, in fact, he is clothed with none of the powers of an arbitrator and can make no award until he is sworn.

"It is further insisted" the Chief Justice said, "that the necessity of the arbitrator being sworn may be waived; and if the party suffer the arbitrator to proceed without being sworn, it operates as a waiver. This doctrine has the sanction of judicial authority in a sister state, as well as the support of the ***obiter*** opinion of a learned judge of this court. Ford v. Potts, 1 Halst. 393; Browning v. Wheeler, 24 Wend. 258; Howard v. Sexton, 1 Denio. 4410; S. C. 4 Comstock, 157.

"These cases," he said, "proceed upon the ground that the oath of the arbitrator is not a pre-requisite to jurisdiction; that its omission is a mere irregularity which the party may waive, like any other irregularity by proceeding with the cause without objection. But this view of the statute is in direct conflict with the whole course of adjudication in this state. No judgment could ever have been reversed on the ground that the arbitrator was not sworn, if such omission was a mere irregularity and the party's proceeding before the arbitrator, a waiver of that irregularity. The

> construction is, in fact, a virtual repeal of the statute, which requires in express terms, that every arbitrator shall be sworn before he proceeds to act. This construction adopts the principle that he need not be sworn unless the party demands it."
>
> "Lastly," he said, "it is objected that the oath of the arbitrator being matter ***dehors*** the award, its omission cannot be pleaded in avoidance. It is undoubtedly true that a party cannot, in an action at law, plead or give in evidence, in avoidance of the award, collusion or misconduct, or mistake of the arbitrators, or other extrinsic matter, against which relief can be had only in equity. Sherron v. Wood, 5 Halst. 18. But the principle cannot extend to a matter which not merely impeaches the regularity but questions the very existence of the award."

Justice Potts also delivered an opinion in Inslee v. Flagg and after quoting the language of the sixth section of the act, he said:

> "In cases of arbitration." These words are broad enough to reach all arbitrators. No intention to limit their application is inferable from the language used. If such an intention had existed, it is reasonable to suppose it would have been expressed. The Legislature was aware that the proceeding by arbitration already existed at common law and would continue to exist, notwithstanding the statute and yet there is no ex-

ception of this class of arbitrators from the general directions given.

Justice Potts said in conclusion:

> "If arbitrators will not qualify themselves as the statute requires them to do for their duty, before they undertake to discharge it, the awards they make may be well enough, if the parties choose to submit to them, but they are not, in law, good awards and cannot be enforced."

Upon the trial counsel for the plaintiff rested the cause upon Kaplan v. Niagara Fire Insurance Co., 73 N.J.L. 780. The opinion of the Court of Errors in that case does not in any way aid the plaintiff. Indeed, it is otherwise for it was laid down "that if such vice or defect appears upon the face of the award or submission" it is a defense at law. Concerning the point whether the arbitrators should be sworn, for which it was cited, it furnishes no aid whatever for the plaintiff. Counsel read from the opinion of Judge Fort at the Middlesex Circuit which prefaces the opinion of the Court of Errors. The appraisers in that case were sworn. The umpire was not, nor did he agree to accept. The appraisers agreed. His services, as Judge Fort said, were not required, p. 786. The Court of Errors had not in consequence to pass upon the question.

Judge Fort said ***obiter*** in his opinion that there is no requirement that the appraisers be sworn and cited the single case of Stout v. Phoenix Assurance Co., 65 N. J. Eq. 566 as au-

thority. This was also an insurance case. Vice Chancellor Reed in that case quotes a single Missouri case as his authority. He pronounces these appraisals as ***sui generis.*** His language is

> "The clause provides for the ascertainment of the loss or damage in a manner which makes the proceedings ***sui generis.***"

These appraisal clauses are part of the standard form of fire insurance policies of the state. They are unique. Through our judicial opinions the representatives of the respective parties are commonly called appraisers and the method employed, appraisals or appraisements. They are treated as something different from an arbitration agreement in the usual meaning of that term. These clauses are part of the original contract. That is not so here as will appear ***infra.*** They are exclusively between private parties dealing with their own money and with no limitation upon their power to contract. In the case at bar the parties are dealing with public moneys and there is no agency of a public corporation clothed with authority to waive the important protection afforded by arbitrators that are sworn and an opportunity to be heard. They stand in different attitudes beore the court.

The Board of Education was dealing with public property. The law has thrown around these public bodies the shield of its protection. It allows them to plead ***ultra vires*** on questions not permissible to private corporations. Every creditor must present his claim against the corporation under oath. Every officer must subscribe

to an oath that he will execute his duties to the best of his ability. Statutes are passed to limit corporate expenditures. Public policy requires such strictness. Whatever view may be entertained about appraisals to estimate loss under a fire insurance policy between private parties growing out of their contract can have no reference to a public corporation. The Board intended to arbitrate but as will appear *infra* the clause of the contract that was supposed to cover the arbitration did not cover it at all. It has been held that a municipality has power to submit a controversy to arbitration. Paret v. Bayonne, 39 N. J. L., 559. There is no authority in a Board of Education to submit a dispute to arbitration unless it be under the protection of the arbitration act.

Whatever view may be taken about the power of a Board of Education in this respect it is clear that it can only be done when supported by every protection the law affords.

Section 73 of the School Law provides "such Board shall in and by its corporate name sue and be sued; and shall have power to submit to arbitration and determination any and all matters of dispute or controversy which have heretofore arisen, may now exist, or hereafter arise within the terms and provisions of the act entitled An act for regulating references, determining controversies by arbitration" (Rev. 1877, page 34 et seq. 1 Comp. Statutes of New Jersey, page 103, et. seq.)

Here the legislature has not left any doubt concerning the authority of the Board. Their power is limited to arbitration within the terms

and provisions of the arbitration act. The dispute concerning the quantity of rock is within the terms and provisions of this act. This is equivalent to saying that the Board must proceed according to the act. Independently of this statutory direction the same course would be required by public policy, for the protection of the public interest. It is alarming to think what will be the result if the present view prevails. It will be applauded by every municipal crook in the state. It will open the door to fraud and corruption. It will furnish profit to the malefactors and cause grave damage to the public interest. If arbitrators are not to be sworn nor to give a hearing to the witnesses for the municipality but can make a conclusive report without such procedure and make their award unassailable in court then the dice is loaded against the public.

The Per Curiam opinion has this language:

> "Assuming, though not deciding that if this were a statutory arbitration the arbitrators would be required to take the oath prescribed and possibly also to give notice of hearings to the parties in interest, we think the present was not such an arbitration. It was the submission of the determination of a single fact to experts mutually chosen for the purpose. It was not the outgrowth of litigation, it was not made a rule of court to determine the issues between the parties and was not for the determination generally of the issues

between the parties. It was in our opinion such a reference as is illustrated in the cases of American Central Insurance Co. v. Landau, 62 Eq. 93; Stout v. Phoenix Assurance Company, 65 Eq. 570.

Such being the case the persons selected were not required to be sworn or to accord formal hearings and the learned trial judge properly received the report of the arbitrators in evidence and gave it conclusive force in the trial of the cause."

With great respect these insurance appraisals are no precedents for the case at bar. It is an error to assert that before a municipality can avail itself of the advantages of the arbitration act it must have (1) a dispute for more than a single fact, or (2) be the outgrowth of litigation, or (3) be made a rule of court, (4) be for the determination generally of the issues between the parties.

Our whole arbitration law that has grown up in this state from December 1794 when Governor Paterson transcribed the two first sections from the English statute and drew the remainder of the act (Paterson 141) has made no such discrimination as this Per Curiam opinion engrafts upon our law for the first time.

Why is the arbitration of a single fact less important than the arbitration of several minor facts? Why is a single item, as here, involving the consideration of the claim that there were 1321 cubic yards of solid rock excavated at $4.00 per cubic yard making as alleged $5284.

of public moneys, (about five percent of the contract price of the entire school) less important than if there were many items in dispute of a less amount? Suppose the dispute related to $10,000.0 or $15,000 would the same rule prevail?

The school statute upon arbitration ***supra*** covers "all matters of dispute or controversy." There is no exception such as the Per Curiam opinion has made. This new view would make it difficult for counsel to advise the Board when it is possible to arbitrate within the act and when outside the act. The more one reflects upon the question the deeper becomes the conviction that no public body should be permitted to arbitrate outside the protecting safeguards of this act. The opinion of the witnesses for the Board of Education is that this rock question is a colossal fraud.

"It was not the outgrowth of litigation." Arbitrations are to prevent litigation. This dispute if not settled would undoubtedly have led to litigation. It did lead to it.

Nor is it necessary to be made a rule of court to determine the issues between the parties. We have the weighty authority of Chief Justice Green that "no reason can be given why an arbitrator should be sworn when the arbitration is to be made a rule of court and not sworn in all other cases."

> "The whole object of making it a rule of court is to enforce it by a more sum-

mary process than could otherwise be resorted to. The legislature doubtless designed to give to every party who submitted his controversy to arbitration the protection which the law affords to every party litigant, viz, the oath of the tribunal by which his rights are to be adjudicated."

Inslee v. Flagg, 26 N. J. L., 368, 370.

II.

NO NOTICE WAS GIVEN TO THE DEFENDANT OF THE TIME AND PLACE OF MEETING.

III.

NO HEARING WAS HELD.

Both these statements are admitted.

Counsel for the plaintiff also relied upon the opinion of Judge Fort in Kaplan v. Niagara Fire Insurance Co., supra, at the Monmouth Circuit in support of his statement that no notice of a hearing was necessary. Judge Fort made no such statement. In Stout v. Phoenix Assurance Co., supra, quoted by Judge Fort, Vice Chancellor Reed treats this question of notice fully. He has this language:

> "If the award made in this case is invalid, it must rest upon the failure of the appraisers to give notice to the insured or his agent of the time and place."

Vice Chancellor Reed quotes the following from Insurance Co. v. Payne, 57 Kan. 291:

> "An appraisement of existing property is usually made upon actual view, or with the aid of other evidence; and, in case of appraisers, entirely familiar with the property afterwards destroyed, they might make an intelligent estimate from their former knowledge, but this is not so as to appraisers who have never seen the property. In such cases the estimate must be as to property which was, but is not. And all knowledge of it must be derived from evidence of some sort, not necessarily on oath."

And again, in the same case he further said:

> "The appraisers had no knowledge of the age or condition of either (real estate or personal property). No effort was made to ascertain their original cost or to what extent the property had depreciated by time or use. In this situation, I think it was the duty of the appraisers or some one of them to inform the insured or his agent of the time and place when they would meet to make an appraisement and so afford them an opportunity to make, if he wished, any explanation or to point out sources of information that the appraisers might have the necessary knowledge to make a determination of the amount of the loss. For this failure to notify him or his agent, I think the award should be set aside."

This is a complete precedent for the case at bar.

We have quoted extensively from the opinion of Vice Chancellor Reed because it is given as authority for the statement of Judge Fort at the Middlesex Circuit, on which counsel sought to rest the case at bar. The principle in question is also observed at law. Where a suit at law is brought upon an award or on an arbitration bond the defendant is not required to resort to equity to set the award aside on the ground of want of notice but may plead the want of notice in defense to the action and that as a consequence neither he nor his witnesses had been heard.

Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

Maynard v. Frederick, 7 Cush. (Mass.) 247.

Peters v. Newkirk, 6 Cow. (N. Y.) 103.

In Thomas v. West Jersey Railroad Co., 24 N. J. Eq. 567, it was held that the presumption in favor of the validity of an award was destroyed by an admitted absence of notice.

Judge Dodd for the Court of Errors in this last case said that an opportunity to be heard was an essential preliminary to a valid award and that this doctrine is founded in natural justice and is not denied to be the law. p. 572.

It was pleaded in the present case that no notice was given and that the arbitrators were not sworn, p. 14.

There is, therefore, a very vital reason why notice should have been given in the present case. When the arbitrators saw the school grounds they had been graded. This condition is parallel to that before Vice Chancellor Reed. There was no direct evidence that any rock had been excavated. It is admitted no rock was found in the excavation of the school-building which was naturally of considerable depth; still the arbitrators took upon themselves, they report, to sink test holes and to examine the excavation of a cellar across the street! This was beyond any requirement of their duty. Yet still they could not determine quantities. It was the more imperative then that a hearing should have been held and witnesses heard who did know. Under such circumstances and dealing with a public corporation, they deprived the Board of Education of a fundamental right.

Exceptions were taken to the refusal of the various motions for a non-suit; to the refusal to admit testimony to be given on behalf of the Board of Education in relation to the question of rock, and to the direction of a verdict on the second count of the complaint based on the alleged award.

IV.

THE ALLEGED AWARD WAS INCOMPLETE AND PLAINTIFF WAS OBLIGED TO CALL WITNESSES NOT ASSOCIATED WITH THE ARBITRATION IN AN ATTEMPT TO PROVE THE QUANTITY OF CUBIC YARDS OF ROCK ALLEGED TO HAVE BEEN EXCAVATED WHICH WERE NOT STATED IN THE ALLEGED AWARD AND DEFENDANT WAS DENIED THE RIGHT TO PROVE THAT THE QUANTITIES OF ROCK WHICH THESE WITNESSES FOR THE PLAINTIFF TESTIFIED TO, DEHORS THE AWARD, WERE NOT EXCAVATED.

The Per Curiam opinion states:

> "Several grounds of appeal are presented in the record. Of these but two are argued in the appellant's brief and in accordance with the established rule those not argued are deemed to have been abandoned.
>
> The grounds argued are that the arbitrators were not sworn and that no notice was given of their meeting and that in consequence the report was improperly received in evidence."

With great respect this is an error. Among the grounds of appeal in the Supreme Court are paragraphs 5 and 8.

No. 5 of the grounds of appeal is as follows:

> The following question put to the witness John H. Doolittle was overruled:

"Q. Can you tell us whether you found any rock or not?"

No. 8 of the grounds of appeal is as follows:

The court refused to permit the defendant to show the amount of earth and rock excavated on the ground that said pretended report of the arbitrators was conclusive on that question, whereas said report of the arbitrators was not conclusive because not made according to law."

The following extract is from our brief in the Supreme Court:

Upon the trial this report was offered in evidence by the plaintiff. Ordinarily when an award is offered in evidence it is conclusive. Here, however the plaintiff called two employees of the contractor who testified to the number of yards of rock excavated which was the only matter in dispute. When the defendant offered on its part as a witness to testify about the quantity of rock the court ruled such testimony inadmissible on the ground that the award could not be contradicted. p. 64. It was admissible for the plaintiff but not for the defendant. Although twelve witnesses were in court to testify for the Board, p. 63.

Suppose 20 cubic yards were found by the arbitrators to have been excavated, could that justify proof of 1321 yards on the trial? As none was reported found, could that in any conceivable way justify proof of 1321

yards and if it did, by what rule could the defendant's witnesses be excluded?

The attention of the court was also called on page 23 of our brief to the fact that the trial court had directed a verdict for the defendant under the second count of the complaint which embraced the alleged award to which an exception was taken. There was therefore no abandonment whatever of this important point of the exclusion of the defendant's witnesses.

The defendant was deprived of the right to produce evidence as to the quantity of rock. p. 64. The so-called award did not fix the quantity of rock which was the only point in controversy; the price having been fixed by the contract. The court permitted the plaintiff to supplement the award by the arbitrators by presenting direct evidence concerning the quantity of rock and then when the defendant which had twelve witnesses in attendance for the purpose, ruled that the defendant was not permitted to contradict the testimony offered.

In other words, the existence of the alleged award was used to shut out the witnesses for the defendant while the plaintiff was allowed to present the very witnesses to substantiate its claim that it would have presented if there had been no award at all.

It is a mistake to consider this suit an action on the award. Counsel so stated and the Per Curiam opinion repeats the error that suit was brought on the award, p. IV. The greater part of the second count covered the award and then paragraph 4 was added as follows to complete this count.

> 4. "That a quantity of brown stone boulders and red shale rock referred to in said arbitrators' report which was excavated by Faillace Bros. was 1321 yards."

Thus the plaintiff alleged and later presented testimony of witnesses in the contractors' employ, p. 20, concerning the quantity of excavation which was not covered by the award at all. Large boulders are covered by the terms of the general contract. Par. 12 of the specifications, p. 95. It is well known that an award must be certain and final upon all the matters submitted. McKeen v. Oliphant, 18 N. J. L. 442; Hazen v. Addis, 14 N. J. L. 333; there must be a single and final determination, 5 C. J., p. 112, sec. 257; 50 N. J. Eq. 103. The award must be such a disposition of the matters submitted that nothing further remains to fix the rights and obligations of the parties, 5 C. J., Arbitration and Award, sec. 334. Alexander v. McNear, 28 Fed. R. 403.

It is clear that the action did not rest upon the award at all, and afforded no basis for the exclusion of defendant's witnesses.

The resolution of the Board was "whether there is any rock or not or the percentage thereof." The arbitrators in their award said

> "The entire filled in section ***reveals*** the presence of large boulders, red shale and red sand stone rock" (but large boulders were paid for under the general contract Par. 12 of Specifications, p. 95).

> "Due to the unevenness of the rock strata we are unable to determine the quantity of materials excavated and percentage of rock encountered."

Thus there was no finality about this award which was not an award at all.

Chief Justice Beasley in the Court of Errors and Appeals, in Ruckman v. Ranson, 35 B. J. L. (6 Vr..) 565, 570 said:

> "The general rule, on all sides admitted is that neither the fraud, misconduct nor mistake of the arbitrator can be set up at law in an action on the award or on the bond of submission unless such vice or defect appear upon the face of this award or submission."

This language was also quoted with approval in Kaplan v. Niagara Fire Insurance Company, 73 N. J. L., 780-788 in the Court of Errors and Appeals. To the same effect is Robertson v. Scottish Union & National Insurance Company, 68 Fed. 173-175.

Chief Justice Beasley in the Ruckman case has this language:

> "I think also it must be considered settled that the generality of this rule is subject to one exception which is that the award may be contradicted by parol in order to show that the arbitrators neglected or refused to take into consideration a matter submitted to them. This qualification of the gen-

> eral principle was declared to exist and was acted upon by the Supreme Court in Harker v. Hough, 2 Halst. 428."

In ***Harker*** v. ***Hough,*** a demurrer was filed to a plea alleging that the arbitrators had "refused to act upon a claim which was a matter in dispute between the parties" the court said:

> "On demurrer the fact must be presumed as pleaded and if so, there cannot remain a doubt that the award is a nullity."

The matter upon which the arbitrators had failed to act was one of several independent matters submitted to them for decision and upon which they refused to act at all. Judge Fort at the Middlesex Circuit as appears in Kaplan v. Niagara Fire Insurance Co., 73 N. J. L., 780-784 said the alleged failure was to take into account one item in the many items in the same manner submitted to the appraisers. In the present case the arbitrators did not act upon the matter submitted to them at all.

Chief Justice Marshall in ***Lyle et al.*** v. ***Rogers,*** 5 ***Wheat.*** 394-411 quoted 2 ***Saunders,*** 292, where it was admitted that so much of the award as directed payment to be made for task-work and day-work was void for uncertainty inasmuch as the arbitrator had not ascertained how much was to be paid on those accounts; but it was contended that the award was good for the residue inasmuch as enough remained to make it mutual. But the court said:

> "that if the clause of task-work and day-work be void as it is admitted to be, the whole award is void."

The Chief Justice added:

> "the application of this case to that under consideration is complete."

He had in this case previously declared:

> "That an award may be void in part and good for the residue will be readily admitted; but if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void."

The arbitrators in the case in hand reported that "brownstone boulders and red shale rock were encountered" "in layers and shelves varying from 8 inches to 1½ feet in thickness." This is not the solid rock that required blasting of the specifications. The still more important question as to the quantity was left completely untouched.

The plaintiff offered no evidence of a submission to arbitration, that is to say no formal proof of a written document signed by the parties. It left as we have stated the submission to be inferred from the minutes of a Committee and the report of the alleged arbitrators. It can be reasonably inferred just what was submitted as we have the specifications and the bill of the contractors claiming compensation for excavation which the Board refused to pay.

The Board of Education might lawfully arbitrate a dispute between a contractor and the corporation as to the quantity of rock excavated. It could not lawfully arbitrate whether the contractor was to be paid $4. a cubic yard for boulders and loose rock 8 inches in diameter when the contract between the parties expressly declared that that sum was to be paid for solid rock that required blasting, p. 97. The steam shovel under their plan would earn $300 per day. The word "blasting" is very expressive for it refers to rock of great solidity. Of course if such rock could be removed by any new method of excavation without blasting, if any existed, it would be perfectly proper for the contractor to adopt such method. None exists. It was for the slower and more costly method of blasting that the additional payment was to be made.

By this alleged award, the arbitrators changed the classification of the rock in complete repudiation of the contract, and failed to report on the number of yards excavated.

They made no report on the vital question submitted to them and as this defect appears on the face of their report, such a document is not a legal award.

It has been said ***supra*** that the clause of the contract which was thought to support this arbitration did not support it at all. The fifth paragraph is as follows:

> FIFTH: Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by the Architect and his decision shall be final and conclusive; but should

> any dispute arise respecting the true value of the extra work, or any work omitted, the same shall be valued by two competent persons, one employed by the Owner, and the other by the Contractors, and those two shall have power to name an umpire, whose decision shall be binding on all parties.

This relates to a dispute over the value of extra work or work omitted. The dispute in the case at bar has nothing whatever to do with extra work. The seventh paragraph of the contract, p. 11, provides that no extra work shall be done without a written order from the owner approved by the architect and an express agreement in writing as to the cost. Counsel upon the trial said "That is a method which the parties themselves devise, in their own contract for submitting any disputes to three or to two persons, one selected by each side and the third selected by the two arbitrators," p. 26. The investigating committee in their report to the Board fell into the same error, p. 99, and the arbitrators did likewise, p. 100. The Per Curiam opinion has this language:

> "These arbitrators were selected in pursuance of provisions of the contract which directed that should any dispute arise respecting the true value of extra work or work omitted the same should be valued by two competent persons, one employed by the owner and the other by the contractor and that these two should have the power to name an umpire and that the same should be binding upon all parties. The persons thus chosen

selected an umpire. This umpire never acted but the persons mutually selected, coming to agreement, reported in favor of the plaintiff."

With great respect this is wholly inaccurate. This is all the more remarkable because the opinion had previously stated that the contractors were to receive $4.00 per cubic yard for blasting the rock. The work was not extra. The total contract price was $131,000. The price for rock was $4.00 per cubic yard. All prices were fixed. The only thing unknown was how many cubic yards of rock would be found. This does not touch in the remotest degree "the true value of the extra work."

Such work required a written order from the Board approved by the architect and an express agreement in writing as to the cost. There is of course no reason for this excavation work being designated extra work. The arbitration was entered into by the Board under its general powers. Plaintiff cannot derive any support from the allegation that "these arbitrators were selected in pursuance of the provisions of the contract." No such provision exists.

In view of what has been said the trial judge erred in regarding the alleged award as conclusive admitting testimony for the plaintiff and excluding testimony for the defendant concerning the quantity of rock excavated, p. 64.

The plaintiff still can go to trial on the first count of the complaint when the whole matter can be laid before the jury.

This appeal was argued before the Supreme Court in May, 1930, and decided in March 1933. The Chief Justice died in the interim to the general sorrow of the state.

It is respectfully submitted that the judgment below should be reversed.

ALBERT COMSTOCK
WILLIAM B. GOURLEY
Of Counsel with Defendant-Appellant.