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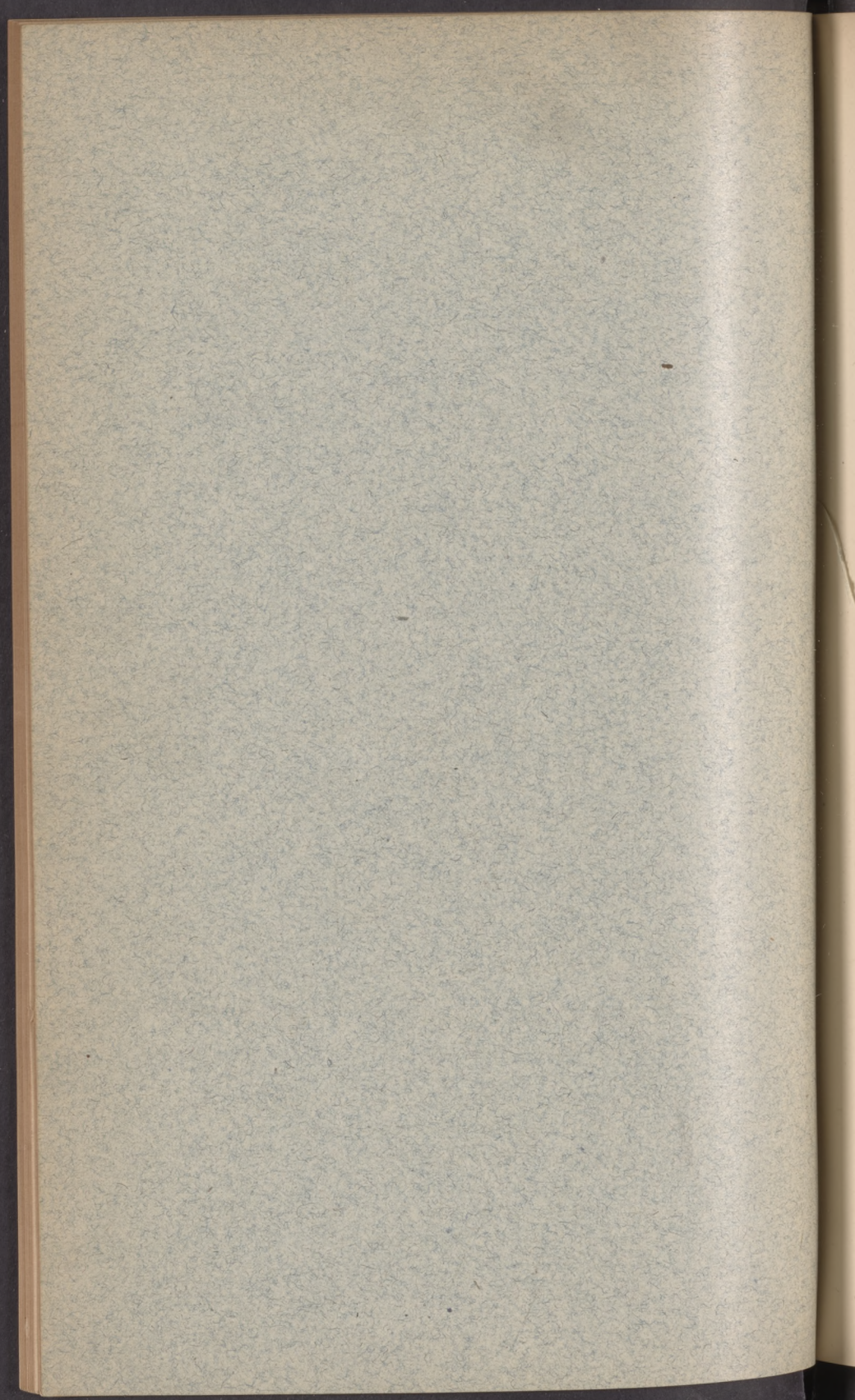
COURT OF ERRORS AND APPEALS.

THE INHABITANTS OF THE
TOWNSHIP OF NORTH
BERGEN, IN THE COUN-
TY OF HUDSON,

In Debt.

vs.

JOSEPH EAGER.



Court of Errors and Appeals.

THE INHABITANTS OF THE TOWNSHIP OF
NORTH BERGEN, IN THE COUNTY OF
HUDSON

vs.

JOSEPH EAGER.

*In Error to the
Supreme Court.*

JOHN C. BESSON,

Attorney for Plaintiffs in Error.

Points of the Plaintiffs in Error.

STATEMENT OF FACTS.

On the 21st day of September, A. D., 1872, Edgar B. Wakeman entered into a contract with the plaintiffs in error to regulate and grade Homestead place from the Northern Railroad to Grand avenue [see Case, page 22] according to specifications [see Case, page 19].

The work to be done consisted of several items: excavations, earth filling, rock excavations, retaining wall, culvert, and box drains or basins [see page 19 of Case].

By the contract he was to do the whole work at prices agreed upon for each item [see Case, page 24].

It was agreed that he should receive improvement certificates, as the work progressed, in sums of not less than \$1,000 for eighty-five per cent. of the work done.

If Wakeman abandoned the work or failed to complete it the town committee reserved the right to complete it, and Wakeman agreed that the expense of so doing should be deducted from what might be owing to him, and that if the expense of completing it exceeded what was due to him, he should pay the deficiency [see Case, page 23 line 22 to page 24 line 11.]

Wakeman made some excavations in the street for which the improvement certificates sued on were issued.

The plaintiffs in error claim that he then abandoned the work in an unfinished condition, so that they derived no benefit from what he had done [See testimony of Ryder, Bock and Braue, beginning on page 12 line 17 of the case].

There is no sufficient evidence in the cause to prove that the township ever passed an ordinance authorizing this work to be done.

POINTS OF THE PLAINTIFFS IN ERROR.

I.

The Justice before whom the cause was tried erred in refusing to non-suit the plaintiff when he rested his cause.

1. By the fourth section of an act entitled "A further supplement to an Act entitled 'An Act to divide the Township of North Bergen, in the County of Hudson, passed February 28th, 1861,'" approved March 18th, 1870, [P. L. 1870, p. 1312,] it is enacted that it shall be lawful for the Township Committee of said township, by ordinance, to provide for the laying out, opening, altering, widening, filling up, grading, &c., any one or more of the streets, roads and avenues, or part or parts thereof, within said township, &c.

There is no evidence in the cause to show that any ordinance had been passed authorizing the work to be done for which the certificates sued on were issued.

A municipal corporation is not liable for the unauthorized acts of its officers, although done under color of office.

Prather v. City of Lexington, 13 B. Mon., p. 559.

A municipal corporation must exercise its powers in strict conformity to the charter. Where it provides for doing a thing by ordinance, it can not be done otherwise.

The State v. The Mayor, etc., of Hoboken, 6 Vr., p. 205.

Kyle v. Malin, 8 Ind., p. 34.

Johnson v. Indianapolis, 16 Ind., p. 227.

2. The moneys sued for were not due, according to the terms of the alleged contract.

[Read stipulation on page 18 of the printed case, and schedule "A," page 33.]

The work contracted for was not completed, and no assessment had been nor could be made.

Indebitatus assumpsit will not lie on special contract, unless fully performed by plaintiff.

Powelton Coal Co. v. McShain, 75 Penn., p. 238.

3. The contractor, Wakeman, to whom the certificates were issued, abandoned the contract and left the work in an unfinished condition, so that the defendant never derived any benefit from it.

The burthen of proof is on the plaintiff to show that Wakeman performed the contract on his part.

2 Pars. on Cont's, p. 675, and cases cited.

The certificates of indebtedness sued on are not commercial paper in the sense that excludes inquiry into the legality of their issue, or precludes defenses thereto.

Knapp v. The Mayor, &c., of Hoboken, 10 Vr., 394.

4. The township had no power to bind itself to pay these obligations out of the general funds of the town.

The fifth section of the act above referred to, provides that the costs of the improvement shall be assessed on the property benefited.

There is no power given in the act to borrow money for this purpose, and there is no power given to raise the money by general taxation to pay for such improvements.

The contract to pay out of the general funds is void.

Swackhammer v. Hackettstown, 8 Vr., 191.

II.

1. The evidence shows that Wakeman entered into the contract with an intent to defraud.

See lines 14 to 20, p. 13.

2. There is evidence that the work done by Wakeman was an injury to the public, and that the public derived no benefit therefrom whatever.

See Brock's testimony, p. 12.

III.

His Honor, the Justice, erred in taking the case from the jury.

It should have been submitted to the jury to find whether Wakeman entered into the contract with intent to defraud.

Whether he had performed the contract on his part.

And whether the defendants below received any valuable consideration for the certificates of indebtedness sued on.

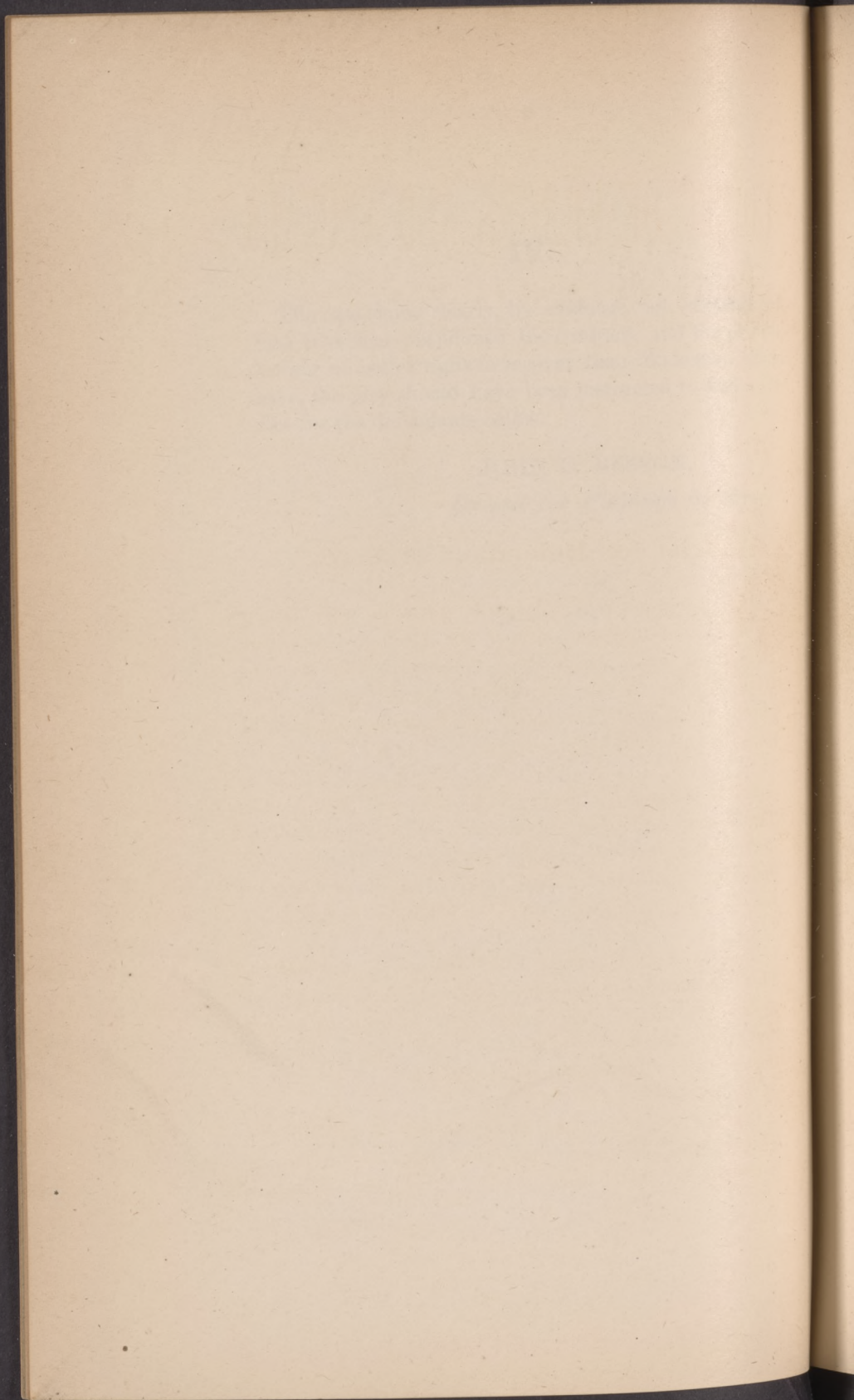
IV.

The case shows clearly, by evidence not contradicted, that Wakeman abandoned the contract, and the plaintiff having no better right to recover than Wakeman would have, the jury should have been instructed to find a verdict for the defendants below.

JOHN C. BESSON,

Counsel for Plaintiffs in Error.

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COURT OF ERRORS AND APPEALS.

THE INHABITANTS OF THE TOWNSHIP
OF NORTH BERGEN, IN THE COUNTY
OF HUDSON,

vs.

JOSEPH EAGER.

In Debt.

Brief for Defendant in Error.

The improvement certificates in question were issued for work done under a contract for the improvement of Homestead place, from the Paterson plank road to Grand avenue, in the township of North Bergen. The improvement was the laying out and opening of said street, between the points named.

Pamp. laws, 1870, page 1,314, section 4, provides:—
That it shall be lawful for the township committee, by ordinance, to provide for the laying out, opening, and grading of the streets, roads and avenues, or part or parts thereof, within the township of North Bergen.

Pamp. laws, 1870, page 1,315, section 4, provides:—
That the township committee *shall require the contractor to furnish a bond with ample freehold security for a due performance of the contract.* Whereupon the contractor shall at once begin the work, &c.

Pamp. laws, 1870, page 1,315, section 4, provides:—
That the* township committee may issue certificates of improvement under seal * * * which certificates

shall bear interest from the date of the completion of the work to the time of payment, at the rate of seven per centum per annum.

Pamp. laws, 1872, page 1,345, section 1:—Improvement certificate to bear interest “from the date of their issue.”

Page 29, line 10, printed book: Clerk directed to prepare an ordinance in conformity to the petition for said improvement, and advertise same pursuant to statute.

Page 13, line 34, printed book: Gerhaud Braue, a member of the township committee, testifies that “*that there was an ordinance passed, authorizing this work, but I don't know what became of it.*”

Page 30, line 1, printed book: Resolution awarding the contract for said improvement to E. D. B. Wakeman.

Page 22, line 14, printed book: Copy of contract with Wakeman.

As between the creditors in good faith and the corporation, the questions are—Whether the city agents, the Mayor and Common Council, had the general power of ordering the work done, and whether it had been done, and certificates issued for a just payment. If there be an ordinance directing the work to be done, and the contract made under it be executed, the workman and contractors need look no further.

Knapp *v.* Mayor, etc., of Hoboken, 9 Vroom,
371.

The improvement in question was not fully completed.

The improvement certificates contain a condition that the township committee *will use due diligence in making and collecting said assessments*; "and in case the said assessment is not collected to meet this certificate within one year from the date of the confirmation of the said assessment, that they will pay the same, etc., with interest" to the holder, upon thirty days' notice of default in the collection of the assessment.

The contract was awarded September 14th, 1872; no work has been done thereunder, or upon the street since the Spring of 1873. Page 13, line 12, printed book.

The improvement not having been completed, no assessment has or could be made, and because of this it is contended upon the part of the township that by the terms of the certificates the same are not due.

The demand and notice of default in the collection were unnecessary, but were made and given.

Page 18, line 22, printed book.

The summons was not issued till February 23d, 1876, the holder of the certificate having waited a reasonable time for the completion of the work, and confirmation of the assessment.

It was beyond the legal power of the township to complete the improvement, and make an assessment, as the township committee, by its resolution adopted June

13, 1874, rescinded and declared void the contract made with Wakeman.

Page 31, line 32, printed book.

Certificates of indebtedness must be paid out of the general fund if a proper assessment is not made within a reasonable time.

Knapp *v.* Mayor, &c., of Hoboken, 9 Vroom,
page 376.

An improvement certificate payable to the contractor, or holder, is assignable, subject to the equities between the original parties.

Knapp *v.* Mayor, &c., of Hoboken, 9 Vroom,
371.

As to the improvement certificates in question, there were no equities between the original parties that can affect this case.

The contractor agreed [page 24, line 12, printed book] to accept a specified sum for the different kinds of work to be performed by him, and payments were to be made by issuing and delivering to him improvement certificates in sums not less than one thousand dollars *for eighty-five per cent. of the value of the work done, as the work progressed*, and the remaining fifteen per cent. at the time of the confirmation of the assessment for said work.

See also, as regards payments, page 21, line 1, printed book, * * * *payments will be made only on the certificate of the surveyor in charge.*

Page 30, line 32, printed book : The surveyor's certificate, bearing date February 17th, 1873, certifying that the contractor is entitled to a certificate in the sum of one thousand dollars.

Page 30, line 36, printed book : Resolution directing the clerk to prepare the certificates in question.

Page 18, line 27, printed book : Admission that the contractor did the work certified by the engineer.

The total cost and expense of making said improvement was not known when the contract was awarded, neither could the same be ascertained till the whole work was completed. The total cost depended upon the number of cubic yards of earth to be excavated, etc., and was apportioned, or to be apportioned, among the different kinds and quantity of work making up the whole improvement, to be ascertained as the work progressed; and as the work progressed, the contractor was to be paid for so much work as he performed, less 15 per cent. (This latter amount being intended to indemnify the township against any loss for so much work as had been done, and for which an improvement certificate had been issued.)

As the engineer's certificate shows how much work had been performed, how much the contractor was entitled to, and the township committee (who are the trustees of the township) having determined in the body of such certificate that "this certificate entitles Edmund D. B. Wakeman, *or the holder*, to receive of the treasurer * * * on account of contract for improvement of Homestead place," &c. This closes all equities, as to so much as is represented by the certificates in question. If the work had not been done there would not have been any engineer's certificate, hence no improvement certificates.

The engineer, and township committee, as the agents of the township, have determined that sufficient work was done to entitle the contractor to the said certificates of indebtedness, and that the treasurer would pay the same.

For so much work as the engineer certified that Wakeman had done there was a benefit corresponding with the amount of the improvement certificate.

The improvement certificates were not a condition precedent to the performance of the work—but work was the condition precedent to the issuing of improvement certificates.

An improvement certificate, payable to the contractor or holder, is assignable, subject to the equities between the original parties, *as to the legality of its issue.*

If there were no equities at the time of the issue of the certificates, then the amount claimed by Eager under the certificates is recoverable, notwithstanding any irregularity in the performance of the contract after the issue, and certainly after they had passed to an innocent purchaser for full value. To hold otherwise would be productive of much mischief.

The township committee possessed the legal power to make the improvement, an ordinance was adopted, the work was performed as certified by the engineer in charge—no defect in the work—the certificates, properly signed, sealed and delivered—no fraud upon the part of any person—in fact there appears to be no irregularity of any character to the time Eager accepts the certificates. Eager took the certificates subject to all equities that ex-

isted at the time of the issue or to the time of his receiving them—to this time it was within the power of man to investigate—but that which happened subsequently thereto, and which could not be foreseen should not attach itself to either Eager or his certificates. The opinions in Knapp vs. Mayor, &c., of Hoboken, 9 Vroom, 371—the same in 10 Vroom, 397—may be construed to bear this theory.

The opposite view, if correct, would stop the acceptance of improvement certificates by contractors, as there would be no sale of them. The contractors depend upon the sale of certificates for funds to carry on the improvement.

The certificates are issued as a convenience to the municipality and not as a convenience to the contractor. The city expect that the improvement will be completed, the assessment confirmed, and money paid by the property holder in time to meet the payment of the certificates.



The contract for performing the work upon this improvement is not an entire contract.

An entire contract is one that cannot be apportioned.

A contract is said to be apportionable when the amount of consideration to be paid by the one party depends upon the extent of performance by the other. And the question of apportionment always addressess itself to a contract which has already been ascertained not to be single and entire.

This is not a contract to pay a sum in gross. By its terms the township apportion the payments, measure-

The assignee of any chose in action takes it subject to all equities and defenses existing between the original parties at the time of the assignment. No rights accruing after the assignment or defenses springing from defaults or even fraud of the assignor—committed subsequent to the assignment—and which had no existence and were simply possibilities at the time of the assignment can affect the assignee.

Bush & Howard vs Cushman 12 C. E. Green 131



Trimming vs Mayor of Hoboken

Ob. Decd June Term 1878

ments are required, accounts to be kept, an engineer's certificate to show the amount due, *from time to time*.

If there were originally equities the acts and doings of the township committee, as trustees of the township, have estopped them from setting up those equities.

The loss, if any, is the consequence of their own acts.

The innocent holder, for full value, had the legal right to rely upon the township to carry out the terms of its contract, to enforce its collateral security, or other indemnity, to protect itself and thus protect the innocent holder of its certificates of indebtedness.

Eager purchased the certificates, in good faith, in the months of *March* and *June, eighteen hundred and seventy-three* [page 12, line 3, printed book], before it is said that Wakeman abandoned the contract, which contract Eager had the right to believe would not be rescinded.

June 13th, 1874.—The township committee adopted a resolution *rescinding and declaring null and void the contract made with Wakeman*.

Page 31, line 33, book.

The contract [page 23, line 21, printed book] did not provide for such a course, or proceeding, in case the work was unnecessarily delayed or abandoned.

The notice sent to Wakeman [page 33, line 1, printed book] did not contemplate such a proceeding, but that, unless he proceeded with the work, *the township committee would cause said work to be done as mentioned in the contract*, but instead of pursuing the course stated

in the notice, and as required by the contract, the committee come to the conclusion that the improvement, "*if carried on according to proposed plan, would be of no benefit* to the property located in the vicinity of said improvement. [Page 32, line 6, printed book.]

The township was protected by the 15 per cent. retained by them (and which it still retains); the clause in the contract giving it the power to complete the contract, and the bond [page 25, line 20, printed book] for the faithful performance of the contract.

The township committee by its action abandoned the contract. Wakeman had the right to expect, upon his making or causing unnecessary delay, that the work would be carried on by the township.

The township committee abandoned the work on Homestead place *and resolved to repudiate their contract with Wakeman.* They thus made it impossible for him to fulfil his agreement. They also neglected to proceed with the work themselves as they might have done, under the contract [page 23, line 21, printed book], had they done so, Wakeman would have received the benefit if the work cost less than the price they agreed to pay him, and in case the work cost more, he, Wakeman, and his bondsmen would have been liable for the excess.

By revoking the contract the township committee voluntarily released Wakeman from any further liability upon his contract, *they voluntarily released the sureties for the faithful performance of the contract, they thus surrendered a security which Eager had a right to have enforced for his benefit.*

If the township had proceeded with the work and completed it and levied the assessment, the certificates would undoubtedly have been collectable. By their declining to do so they made it impossible to carry out the exact terms of the certificates.

By their own wrongful acts they seek to avoid their obligations, which were lawfully issued for a just and full consideration—they cannot now take advantage of their own wrong.

The township have by its own wrongful act released the bondsmen of Wakeman, and thereby surrendered a security in its hands which Eager might have had enforced for his benefit.

By surrendering their right they prejudice Eager. They are estopped from setting up the non-fulfillments of the contract as a defense to the certificates.

The holder of the certificates is entitled to all the benefit of Wakeman's sureties that the township had at the time of his taking the certificates.

The recitals in the certificates being the determination of the township committee, the burthen of proof is upon it to disprove any of the facts therein recited.

ms.
March Term, 1878.

WM. BRINKERHOFF,

Att'y for Defendant in Error.

COURT OF ERRORS AND APPEALS.

*THE INHABITANTS OF THE
TOWNSHIP OF NORTH
BERGEN, IN THE COUN-
TY OF HUDSON,* } *In Debt.*
vs.
JOSEPH EAGER.

Writ of Error.

[Filed October 2, 1877.]

New Jersey, *ss.*—The State of New Jersey to the Chief Justice and other Justices of our Supreme Court [L. s.] of Judicature, greeting:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between Joseph Eager, plaintiff, and The Inhabitants of the Township of North Bergen, in the County of Hudson, defendants, in a plea of 10 debt, manifest error hath intervened, to the great damage of the said The Inhabitants of the Township of North Bergen, in the County of Hudson, as is said; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this

behalf, do command you that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the first Tuesday of October next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law of the State of New
 10 Jersey ought to be done.

Witness Theodore Runyon, esquire, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the thirteenth day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

HENRY C. KELSEY, *Clerk.*

JOHN C. BESSON, *Attorney.*

The answer of the Justices of the Supreme Court of New Jersey, within named:—The record and proceedings whereof
 20 mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, *Chief Justice.*

Copy of Judgment.

As yet of the twenty-eighth day of March, A. D. eighteen hundred and seventy-six.

Witness—

MERCER BEASLEY, Esq., *C. J.*

BENJAMIN F. LEE, *Clerk.*

30 Hudson County, *ss.*—The Inhabitants of the Township of North Bergen, in the County of Hudson, the defendants in this suit, were summoned to answer unto Joseph Eager, the plaintiff therein, of a plea that they render to the said plaintiff two thousand dollars, which to him they owe, and from him

unjustly detain: and thereupon the said Joseph Eager, by William Brinkerhoff, his attorney, complains, for that whereas the defendants on the eighth day of February, eighteen hundred and seventy-three, at the township of North Bergen, to wit, at Jersey City, in the county of Hudson aforesaid, were indebted unto one Edmund D. B. Wakeman in the sum of one thousand dollars, for work and labor done, and for materials for the same before that time provided in and about the construction and improvement of a certain street in said township, known as Homestead Place, from the Paterson plank road to Grand avenue; and being so indebted, they, the said defendants, in consideration thereof, and being then and there a body corporate and politic, under and by virtue of the laws of the State of New Jersey, did, by virtue of the statutes in such case made and provided, legally make their certain writing obligatory, (a copy whereof is hereto annexed, marked Schedule A, to which reference is hereby made,) according to the form of the statute in such case made and provided, and now shown to the court here, the date whereof is a certain day and year therein written, to wit, the day and year last aforesaid, sealed with the corporate seal of said defendants, attested by their township clerk, and signed by the chairman of the township committee of the said defendants, wherein and whereby it was certified that the said Edmund D. B. Wakeman, or the holder of said writing obligatory, was entitled to receive of the treasurer of the said defendants five hundred dollars on account of contract for the improvement of Homestead Place, from the Paterson plank road to Grand avenue, with interest thereon from the date thereof, being the day and year last aforesaid, at seven per cent. per annum, in amounts not less than fifty dollars at any time, as the money on the assessment for the said improvement should come to the hands of said treasurer. And it was therein expressly set forth and stipulated, that said writing obligatory should be receivable by the township collector of the defendants in payment for the assessment for which it was drawn, and should be transferable by endorsement. And the said defendants therein and thereby, by their township committee, bound themselves and their successors to exercise due diligence in making and collecting the said assessment; and in case the

said assessment should not be collected to meet the said writing obligatory within one year from the date of the confirmation of the said assessment, that they, the said defendants, would pay the said sum of five hundred dollars, with interest as aforesaid to the holder thereof, upon thirty days' notice of default in the collection of said assessment. And the said defendants then and there delivered the said writing obligatory to the said Edmund D. B. Wakeman, and the said Wakeman then and there for good and valuable consideration, endorsed 10 and transferred the same to Patrick H. Tealing; and the said Patrick H. Tealing then and there, for good and valuable consideration, endorsed and transferred the same to the plaintiff, at Jersey City, the day and year last aforesaid.

And the said defendant, on the same day and year last aforesaid, at Jersey City aforesaid, being indebted so as aforesaid, and being then and there a body corporate and politic as aforesaid, did, by virtue of the statute in such case made and provided, legally make their certain other writing obligatory, (a copy whereof is hereto annexed, marked Schedule B, to which re- 20 ference is hereby made,) according to the form of the statute in such case made and provided, and now shown to the court here, the date whereof is a certain day and year therein written, to wit, the day and year last aforesaid, sealed with the corporate seal of said defendants, attested by their township clerk, and signed by the chairman of the township committee of said defendants, wherein and whereby it was certified that the said Edmund D. B. Wakeman, or the holder of said writing obligatory was entitled to receive of the treasurer of the said 30 defendants, five hundred dollars on account of contract for the improvement of Homestead Place, from the Paterson plank road to Grand avenue, with interest thereon from the date thereof, being the day and year last aforesaid, at seven per cent. per annum, in amounts not less than fifty dollars at any time, as the money on the assessment for the said improvement should come to the hands of said treasurer. And it was therein expressly set forth and stipulated that said writing obligatory should be receivable by the township collector of the defendants in payment for the assessment for which it was drawn, and should be transferable by endorsement. And the 40 said defendants therein and thereby by their township com-

mittee, bound themselves and their successors to exercise due diligence in making and collecting the said assessment, and in case the said assessment should not be collected to meet the said writing obligatory, within one year from the date of the confirmation of said assessment, that they, the said defendants would pay the said sum of five hundred dollars, with interest as aforesaid to the holder thereof, upon thirty days' notice of default in the collection of said assessment. And the said defendants then and there delivered the said writing obligatory to the said Edmund D. B. Wakeman, and the said 10 Wakeman then and there, for good and valuable consideration, endorsed the said writing obligatory, and transferred the same to Patrick H. Tealing; and the said Patrick H. Tealing then and there, for good and valuable consideration, endorsed and transferred the same to the plaintiff, at Jersey City, the day and year last aforesaid, of all which the defendants then and there had notice.

And the plaintiff in fact saith that at the time of the delivery to him of the said two writings obligatory as aforesaid, the defendants were engaged in work upon the said improvement of 20 Homestead Place, from the Paterson plank road to Grand avenue, and were prosecuting the work in pursuance of law, and pretended and represented to the plaintiff that the said improvement would be promptly pushed to completion, and an assessment duly made for the cost thereof, according to the tenor and effect of the said writings obligatory, and according to the duty of the defendants in that behalf.

Yet the defendants after the delivery to the plaintiff of the said two writings obligatory, wilfully disregarded their agreements therein contained, and their duties in that behalf, did not 30 continue work upon said improvement which they had theretofore in due form of law undertaken to make and complete, and did not push the same to completion, and did not use due diligence in making and collecting the assessment for said improvement, and did not make any assessment, but wholly neglected and refused so to do, and on or about the first day of April, eighteen hundred and seventy-three, abandoned the said improvement in an unfinished condition, and have never completed the same, or taken any steps to complete the same, or to make or collect an assessment therefor, notwithstanding 40

the plaintiff hath frequently requested them, the said defendants, to proceed with the said improvement, and to complete the same, and to make an assessment therefor, and to collect the same, and on or about the twentieth day of July, eighteen hundred and seventy-five, and more than thirty days before the commencement of this suit, the plaintiff gave thirty days' notice, in writing, of default in the collection of said assessment to the defendants, to wit, at Jersey City; yet the work upon the said improvement has never been re-commenced
10 since its abandonment as aforesaid, but still remains abandoned and incomplete, and no assessment has ever been made or collected therefor, by reason of which said premises the conditions of the said two writings obligatory have been broken and are become forfeited, and an action accrued to the plaintiff to demand and have of and from the defendants the said sums of money mentioned in the said two writings obligatory, which together amount to one thousand dollars, parcel of the said sum of two thousand dollars above demanded.

And whereas also, the said defendants afterwards, to wit,
20 on the eighth day of February, eighteen hundred and seventy-three, at the township of North Bergen, to wit, at Jersey City, in the county of Hudson aforesaid, being then and there a body corporate and politic under and by virtue of the laws of the State of New Jersey, were indebted to the said plaintiff in the sum of two thousand dollars lawful money of the United States, for so much money by the said plaintiff before that time lent and advanced to the said defendants at their special instance and request; and for so much money by the said plaintiff before that paid, laid out and expended to and for the
30 use of the said defendants, at their like special instance and request; and for so much money for money had and received by the said defendants from the plaintiff at the like special instance and request of said defendants; which said several last mentioned sums of money were to be paid by the defendants to the plaintiff when they, the said defendants, should be thereunto afterwards requested; whereby and by reason of the said several last mentioned sums of money being and remaining wholly unpaid, an action hath accrued to the plaintiff to demand and have the said sum of two thousand dollars above
40 demanded.

And whereas afterwards, to wit, on the said eighth day of February, eighteen hundred and seventy-three, at the township of North Bergen, to wit, at Jersey City, in the county of Hudson aforesaid, the said defendants accounted with the said plaintiff of and concerning divers other sums of money before that time and then due and owing, and in arrears and unpaid, from the said defendants to the plaintiff, and upon that accounting the said defendants were then and there found to be in arrear and indebted to the plaintiff in the further sum of two thousand dollars of like lawful money, to be paid by the said defendants, to the plaintiff, when they, the said defendants, should be thereunto afterwards requested; whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the plaintiff to have and demand of and from the said defendants the said last mentioned sum of two thousand dollars above demanded. 10

Yet the said defendants, although often requested so to do, have not as yet paid the said sum of two thousand dollars above demanded, or any part thereof, to the said plaintiff, but they to do this have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff two thousand dollars, and therefore he brings his suit, &c. 20

And the said defendants, by John C. Besson, their attorney, come and defend the wrong and injury, when, &c., and as to the first two counts of the said declaration, say that the said supposed writings obligatory therein mentioned, are not their deeds, nor is any or either of the same their deed. And of this they put themselves upon the country, &c.

And as to the said other counts of the said declaration, the said defendants say that the said defendants do not owe the said sums of money therein mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against said defendants. And of this the said defendants put themselves upon the country, &c. 30

And for a further plea in this behalf, as to the first two counts of the said declaration, the said defendants, by leave of the court here to them granted according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action against them, because they say that they, the said defendants, before and at 40

the time of making said several supposed writings obligatory in the said declaration mentioned, were, and still are a municipal corporation of the State of New Jersey, having no power or authority to them granted to make, construct or improve any street or streets, except the township committee of said township shall by ordinance provide for the making, construction or improvement of such street or streets. And the said defendants aver, and in fact say that no ordinance hath at any time heretofore been passed or adopted by the township committee of said township, to provide for the making, construction or improvement of said street in said township, known as Homestead Place, from the Paterson plank road to Grand avenue, or any part thereof.

And these defendants aver that there was and is no good or lawful consideration for said supposed writings obligatory, or improvement certificates in said declaration mentioned, and that the same are wholly void at law and in equity.

And this the said defendants are ready to verify, wherefore they pray judgment whether the said plaintiff ought to have
20 and maintain his action thereof against them.

And for a further plea in their behalf as to the first two counts of the said declaration, the said defendants, by leave of the court here to them granted according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action against them, because they say that said supposed writings obligatory were issued to said Edmund D. B. Wakeman on account of work pretended to have been done by said Edmund D. B. Wakeman, under a certain pretended contract in writing,
30 whereby said Edmund D. B. Wakeman did covenant, promise and agree to and with the Inhabitants of the Township of North Bergen, in the County of Hudson, to regulate and grade Homestead Place, from the bed of the Northern Railroad to the westerly line of Grand avenue, in said township of North Bergen, to the established grade, as shown on a certain grade map of said street, in said agreement referred to, which writing purported to be an entire contract for doing the whole of said work at certain prices therein stated.

And these defendants aver and in fact say that although
40 said Edmund D. B. Wakeman did some work under said pre-

tended contract or agreement, he, the said Edmund D. B. Wakeman, afterwards, to wit, on the first day of March, in the year eighteen hundred and seventy-three, did not complete and finish said work, but wholly abandoned the same in an unfinished state and condition, and from thence hitherto hath wholly neglected and refused to proceed with and finish said work according to said agreement, so that the same remains in an unfinished and useless condition, and the work done thereon is of no benefit, advantage or value to said defendants.

And the said defendants further say that they, the said defendants, have always since the making of the said supposed writings obligatory well and truly observed, performed and fulfilled and kept all and singular other the covenants, articles, clauses, conditions and agreements in said pretended agreement with said Edmund D. B. Wakeman comprised and mentioned, which on the part and behalf of said defendants were or ought to be observed, performed, fulfilled or kept, according to the true intent and meaning of the said agreement; and thereby the consideration for said supposed writings obligatory hath wholly failed, and said supposed writings obligatory are void and of none effect, and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And the said plaintiff as to the said several pleas of the said defendants have put themselves upon the country, doth the like.

And as to the third plea by the said defendants pleaded, the plaintiff saith that an ordinance was duly passed for the making, &c., of said street in said township, and that there was a good and lawful consideration for said writings obligatory. And this he prays may be inquired of by the country. And as to the fourth plea of the said defendants, the plaintiff saith that the defendants have not kept and performed all the covenants in said writings obligatory mentioned, which ought by them to have been kept, performed and fulfilled, and that the consideration for said writings obligatory hath not failed as above alleged in said plea. And this the plaintiff prays may be inquired of by the country.

And the defendants do the like.

Therefore let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the county of Hudson, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and seventy-seven, by whom, &c., and the same day is given to the parties aforesaid, there, &c.

And now at this day, to wit, the twenty-third day of June, A. D. eighteen hundred and seventy seven, before our said
10 Supreme Court at Trenton, comes the said plaintiff by his attorney aforesaid, and the justice before whom, &c., having sent hither his record had before him in these words, to wit :

Afterwards, that is to say, on the ninth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, at a Circuit Court holden at Jersey City, in and for the county of Hudson, before Manning M. Knapp, esquire, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within named Joseph Eager as the
20 within named The Inhabitants of the Township of North Bergen, of the County of Hudson, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say that the within mentioned writing obligatory is the deed of the said The Inhabitants of the Township of North Bergen, in the County of Hudson, as the said Joseph Eager hath within in that behalf alleged. And they find that
30 The Inhabitants of the Township of North Bergen, in the County of Hudson, the sum of one thousand dollars, and they assess the damages of the said Joseph Eager, on the occasion of the detaining the within debt, over and above his costs and charges by him about his suit in this behalf expended, at the sum of three hundred and three dollars and thirty-three cents, and for those costs and charges.

Therefore it is considered that the said plaintiff do recover against the said defendants his said debt to one thousand dol
40 lars so as aforesaid found, and also three hundred and three dollars and thirty-three cents damages, which he has sustained

by the occasion of the detention of that debt, and also fifty-three dollars and ninety-seven cents for his costs and charges aforesaid by the court now here adjudged to him, and with his assent, which said debt, damages, costs and charges in the whole amount to one thousand three hundred and fifty-seven dollars and thirty cents.

Judgment signed this twenty-third day of June, A. D. eighteen hundred and seventy-seven.

M. BEASLEY, *C. J.*

I, Benjamin F. Lee, Clerk of the Supreme Court of the 10 State of New Jersey, do certify that the foregoing is a true copy of the judgment in the above stated cause, as the same remains of record in my office.

[L. s.] In testimony whereof I have hereunto set my hand and the seal of said court, at Trenton, this second day of October, A. D. eighteen hundred and seventy-seven.

BENJ. F. LEE,
Clerk.

Bill of Exceptions.

20

[Filed November 7, 1877.]

Be it remembered, that on the twenty-fifth day of May, in the year of our Lord, eighteen hundred and seventy-seven, at a Supreme Court Circuit holden at Jersey City, in and for the county of Hudson, before his Honor Manning M. Knapp, esquire, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, the issue joined in the above stated cause between the said parties (*pro ut* the pleadings) came on to be tried by a jury for that purpose duly empaneled, and whereupon the attorney of the said Joseph Eager, 30 the plaintiff, to maintain the said issue on his part, offered in evidence a written agreement, entered into between the attorneys of the respective parties, which is marked as an exhibit in the cause.

And called as a witness *Joseph Eager*, the plaintiff, who, being duly sworn, testified as follows :

I am the plaintiff in this cause ; I am the owner of these two certificates ; I purchased one of them March 5th, 1873, and the other June, 1873.

Whereupon the plaintiff rested his cause : which being done, the defendant, by its counsel, moved that the plaintiff be called, which motion, after argument, his honor, the said justice, denied ; to which ruling of the court the defendant
10 prayed a bill of exception, and the said justice sealed the exception accordingly.

M. M. KNAPP, [L. s.]
J. S. C.

The defendant, to maintain and prove the issue aforesaid, on its part, called *Anthony H. Ryder* as a witness, who, being duly sworn, testified as follows :

I was clerk of the township of North Bergen on April 1st, 1873 ; I believe I mailed a notice to Mr. Wakeman, as stated in the minutes ; at that time I was acting clerk ; at that time
20 my impression is I sent the notice by mail.

And, being cross-examined, testified as follows :

It is my impression that Mr. Wakeman appeared subsequently at a meeting of the township committee and acknowledged that he received the notice ; I would not be positive, however.

And the defendant also called as a witness *Louis Bock*, who, being duly sworn, testified as follows :

I know of the contract between Wakeman and the township, and know the work he was to do under it ; I live right
30 opposite the work ; it runs right along my property ; the work that was done by Wakeman was done for his own benefit and a damage to the township ; the first thing he did, he dug a hole and took sand out, and sold sand what had nothing to do with the contract ; then he began to work on the street ; then he began to blow rocks out, and filled partly that hole where he dug the sand out ; that was in the winter, from 1872

to 1873, when he blowed the rocks out; the rocks he piled up on an adjoining lot—a high pile; can be seen there yet; he was under the impression they would make pavement blocks, but they didn't do that, so he continued to work off and on through the winter of '72 and '73; so in the spring of '73 he started on that sand pit again, and sold a number of loads of sand out of it; finally he was stopped of that; the township committee stopped him; so he worked along partly through the summer; that is all he did; he left that hole undone where he took the sand out; the township committee 10 had to fill it up, and pay at least one hundred and fifty dollars for it; there has been nothing done on the street since; the street was passable before; it is not passable now.

I went to see him during the fall of 1873, at his residence on Monticello avenue, in South Bergen, and I asked him—“Ed, what's the reason you don't go on with the contract?” “Well,” he said, “you know we don't always take contracts to finish them—we take contracts to make money out of them, and if we can't make money out of it, we throw it up; so I hain't going to work no more on that job;” he told me that 2) in his own residence.

And *Gerhard Braue* was called as a witness, and, being duly sworn, testified as follows:

I was a member of the township committee at the time this contract was made with Wakeman; I continued in the board till May, 1873.

I know what was done by Wakeman under the contract; I saw the work done there; there was sand dug away, and there was rocks blown out; the street was left in an impassable condition by Wakeman. 30

He was ordered to go on and finish the work by the township committee; it is now impassable; there is a big hole where the rocks were taken out; the township committee filled up the hole where the sand was dug out; there was an ordinance passed authorizing this work, but I don't know what became of it.

And being cross-examined said witness testified as follows:

I don't know whether Wakeman received the notice I mentioned.

Q. Do you know of the truth or falsity of the certificate of the engineer in charge, wherein he certifies to the amount of work done by Mr. Wakeman?

• *A.* I believe what the engineer certified was correct.

Charles Pinnell was called as a witness, and being duly sworn, testified as follows:

I am a member of the township committee; I have been a
10 member since 1874.

I have on two occasions searched the records of the township for an ordinance authorizing this improvement, and there is nothing of the kind to be found, either printed or filed with our clerk; I searched expressly for this ordinance; went through all the books and was not able to find any.

And being cross-examined, said witness testified as follows: I was not a member of the board in 1872 and 1873; I was a member in 1871, and received the petition; my office ceased about April 22d or 24th, 1872; the petition was presented
20 when I was a member; the petition was advertised, and that is as far as it went while I was a member; I have never been clerk of the committee.

The parties rest.

The testimony in the cause having been concluded, and the parties having rested the cause, counsel for the defendant requested the court to direct the jury to find a verdict for the defendant, for the reasons following:

1. That there is no evidence that any ordinance was passed authorizing the work to be done for which the improvement
30 certificates sued on purport to have been issued.

2. There is no evidence that the contractor, to whom the said certificates were issued, completed said work according to contract.

3. There is no evidence to show that said certificates are due by the terms thereof.

4. That the contractor, Wakeman, to whom the certificates

were issued, abandoned the contract and left the work in an unfinished condition.

5. The defendant being a municipal corporation had no power to seal and issue the certificates sued on.

6. The defendant had no power to bind itself to pay said sums of money within one year from the date of the confirmation of the assessment for the improvement mentioned in said certificates.

7. The defendant has a right to rely on the same defence against the plain iff in this suit, as it could set up to an action 10 on the certificates by Wakeman, the contractor, to whom they were issued.

8. That the burthen of proof is on the plaintiff to show that Wakeman performed the contract on his part.

His honor, the said justice declined to direct the jury to find a verdict for the defendant as above requested, but directed the said jury to find a verdict for the plaintiff for the amount claimed.

Whereupon the counsel of the defendant, conceiving that by the law of the land the justice should have directed and 20 instructed the jury as above requested, and that he should not have directed and charged the jury as he did charge, that is to say, to find a verdict for the plaintiff, prayed that his honor the justice would set his hand and seal to this bill of exceptions to the opinion of said justice.

And it is sealed accordingly.

M. M. KNAPP, [L. S.]
J. S. C.

Assignment of Errors.

[Filed October 15, 1877.]

30

Afterwards, that is to say, on the second day of October, in the year of our Lord one thousand eight hundred and seventy seven, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, come the said The

Inhabitants of the Township of North Bergen, in the county of Hudson, by John C. Besson, their attorney, and say, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit: That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Joseph Eager to have his said action against the said The Inhabitants of the Township of North Bergen, in
10 the county of Hudson.

And there is also error in this, to wit: For that on the trial of the said cause, the plaintiff, having rested his cause, the defendants, by their counsel, moved that the plaintiff be called, which motion his honor, the justice before whom the said cause was tried, denied, whereas by the law of the land said motion should have been granted and said plaintiff should have been called. Therefore, in this there is manifest error.

And there is also error in this, to wit: That the counsel for the defendants below requested the said justice to charge
20 the said jury to find a verdict for the said defendants below, for the reasons stated in said bill of exceptions, and the said justice refused to so charge and direct the said jury. Therefore, in this there is manifest error.

And there is also error in this, to wit: For that the said justice charged and directed the said jury to find a verdict for the plaintiff for the amount claimed, and refused to give any further or other direction or charge to said jury. Therefore, in this there is manifest error.

There is also error in this, to wit: That by the record aforesaid it appears that judgment in the plea aforesaid was given
30 for the aforesaid Joseph Eager, against the said The Inhabitants of the Township of North Bergen, in the county of Hudson, when, by the law of the land, judgment in the said plea ought to have been given for The Inhabitants of the Township of North Bergen, in the county of Hudson, and against the said Joseph Eager. Therefore, in this there is manifest error.

Therefore the said The Inhabitants of the Township of North Bergen, in the county of Hudson, pray that the judgment aforesaid, by reason of the aforesaid errors and of other
40 errors appearing in the record and proceedings aforesaid, be

reversed, annulled and held for nothing, and that the said The Inhabitants of the Township of North Bergen, in the county of Hudson, may be restored to all things they have lost on occasion of the said judgment, and that the said Joseph Eager may rejoin to the said errors, &c.

JOHN C. BESSON,

Attorney for and of Counsel with Plaintiff in Error.

Joinder in Error.

[Filed November 13, 1877.]

And hereupon, afterwards, to wit, on the third Tuesday of 10 November, A. D. eighteen hundred and seventy-seven, &c., the said Joseph Eager, by William Brinkerhoff, his attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

WM. BRINKERHOFF,

20

Attorney for and of Counsel with Defendant in Error.

Exhibits.

It is agreed by the parties that the certified copy of the minutes of the township committee of said township, marked *Exhibit A*, may be read in evidence with the same effect as if the original documents were produced and proved; that the certificates marked *B* and *C* were issued pursuant to resolution as stated in said minutes, under date of February 17th, 1873; that James McFarlane was chairman of the township committee during the whole of the month of February, 1873, and that Edward D. Johnson was township clerk of said township during the same time, and that they each signed each of said certificates as such officers.

It is also admitted that the impression, purporting to be the seal of said defendants, is the seal of said defendants, without admitting that said seal was affixed to said certificates by legal authority; that said certificates were each endorsed by E. D. B. Wakeman to Patrick H. Tealing, and by said Tealing endorsed to the plaintiff.

The plaintiff demanded payment thirty days before commencement of suit, and gave notice of default in the collection of assessments.

It is admitted that the certificates sued on were issued for work done and materials furnished under the contract set forth in *Exhibit A*.

It is admitted that the work contracted for has not been and is not yet completed.

It is further admitted that said Wakeman did the work certified by Edward Kunberly, engineer, in his certificate dated February 7th, 1873.

The question as to whether there was any ordinance authorizing the improvement, as to whether Wakeman abandoned the contract, and as to whether the plaintiff is a *bona fide* holder for value, is left open, to be determined by proof.

Nothing has been paid on account of the certificates sued on May 14th, 1877.

WM. BRINKERHOFF,
Attorney for Defendant.

JOHN C. BESSON,
Attorney for Plaintiff.

EXHIBIT A.

Specifications for the improvement of Homestead Place, in the Township of North Bergen, in the County of Hudson, State of New Jersey. Said street shall be graded and regulated from the Northern Railroad to the westerly line of Grand avenue, embracing the following work and materials:

Estimate.

Earth excavations, about 12,000 cubic yards.	
Earth filling, about 2000 cubic yards.	
Rock excavations, about 6000 cubic yards.	10
Retaining wall, about 150 cubic yards.	
Culvert, about 85 lineal feet.	
Two basins or box drains, about 32 lineal feet.	

Specifications—Earth Excavation and Filling.

The street is to be brought to the established grade by excavating or filling in the same, the full width of the street, to rise from the curb on the sidewalks two inches in five feet, and the carriage to be excavated or filled to its proper crown, viz., the centre of the street to be six inches above the curbs. Filling to be made with good, clean earth, free from garbage 20 or other perishable matter. No stones to be used in filling of a larger size than would pass freely through a ring eight inches in diameter.

Rock Excavation.

When rock is excavated, in excavating, the same shall be removed to a depth of truly four inches below grade. All loose rock or boulders, that measure more than one-half a cubic yard or more, will be classed as rock excavation; all less than one-half cubic yard, will be classed as earth excavation. The contractor will assume all liabilities for damages 30 that may occur in blasting rock, and any damages thus occurring that shall not be settled for at the time the final estimate may be due, shall be deducted from any moneys due such contractor, to settle such damages.

Materials and Work to Comply with Specifications.

All the materials furnished, and all the work done, which, in the opinion of the township committee, or surveyor in charge of improvement, shall not be in accordance with this specification shall be immediately removed, and other materials furnished and work done that will be in accordance herewith. The work, under this specification, is to be prosecuted at and from as many different points in such part or parts of the street, on the line of the work, as the township committee may from time to time determine. Proper fences or guards are to be erected at night, whenever the safety of the public requires it, and a sufficient number of lights kept burning, on or near the work, from twilight in the evening until sunrise. In case there shall be, at the time stipulated for the commencement of the work, any rubbish or other encumbrance, such as trees, roots, &c., the same is to be removed at the expense of the contractor.

Work and Materials.

The above work to be done in a good and substantial and workmanlike manner; and the work and materials, at all times, to be subject to the direction of the township committee and surveyor in charge, whose certificate that the work has been faithfully done, according to contract, shall be obtained and filed in the office of the township clerk at the completion of the work; and if any material shall be brought upon the line of the improvement, or work done which may not be satisfactory, such materials and work to be done to the satisfaction of the township committee and surveyor. Profile, &c., to be seen at the office of the clerk of the township, of whom all further information can be obtained. All persons estimating will accompany the offer with the consent, in writing, of two responsible freeholders, to be approved of by the township committee, that they will become security in the sum of five thousand dollars for the faithful performance of the contract, if awarded to said contractor. No proposals will be received or considered unless accompanied by said consent.

Payments.

Payments will be made, in sums not less than one thousand dollars, in certificates bearing interest at the rate of seven per cent. per annum from the date of issue, and payable in one year from the date of confirmation of assessment for said improvement, as the work progresses, fifteen per centum being retained; and on completion of the contract, the balance remaining due will be paid in like manner. Payments will be made only on the certificates of the surveyor in charge.

Old Materials.

10

Old materials which it becomes necessary to remove shall be considered the property of the contractor. All loss or damages arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements on the line of the work, to be sustained by the contractor.

Retaining Wall Dry.

The retaining wall shall be laid dry, and built in the most thorough manner. Binders shall extend at least two-thirds 20 through the wall, and not more than two feet shall intervene between them in any direction. The wall shall have a thickness of five (5) feet at the bottom, and (2) feet at the top, with a batten of two (2) inches to the foot on the face.

Stone Culvert Foundation.

The bottom of the foundation shall be at least three (3) feet below the ground, unless rock is met with. In case the foundation is earth, the bottom shall be paved with sharp stones, set on edges, at least nine inches in depth, and shall extend under the entire foundation, the opening to be four (4) feet 30 high by three feet wide. The wall shall be three (3) feet thick, laid dry, and laid in the best manner. The crowning shall not be less than five inches in thickness, and six (6) feet in length.

Basins or Drains.

The basins or drains shall be made of the best yellow pine, extending from the curb line to the outside of the retaining wall, and they shall each be sixteen feet in length, by 16 × 12, and three inches in thickness.

Any proposals not made in strict compliance with the foregoing specifications and estimate, will be rejected as informal.

Proposals will not be received at any time later than stated in advertisement.

No subletting of any portion of the work, without the consent in writing of the township committee.

The township committee reserve the right to reject any or all proposals, if they deem it for the interest of the property holders so to do.

Agreements made this twenty-first day of September, A. D. one thousand eight hundred and seventy-two, between the inhabitants of North Bergen township, in the county of Hudson, in the State of New Jersey, party of the first part, and Edward D. B. Wakeman, of Jersey City, in Hudson county, State of New Jersey, party of the second part, witnesseth that the said party of the second part doth hereby covenant, promise and agree to and with the party of the first part, to regulate and grade Homestead Place, from the bed of the Northern railroad to the westerly line of Grand avenue, in the said township of North Bergen, to the established grade, as shown upon a certain grade map of said street, filed in the clerk's office of said township, in strict conformity to the specifications hereunto annexed, which specifications are hereby declared to be a part of this contract; and the said party of the second part doth further promise and agree, as aforesaid, to furnish all the work, labor and materials requisite and necessary to fully complete and finish all of said work, according to the requirements of said specifications, and that said work shall be done, and material therefor furnished, under the direction, and to the satisfaction of the township committee of said township, and the surveyor placed in charge thereof, and that all work which shall not be done in conformity to said specifications, and to the satisfaction of said

committee and surveyor, shall be taken up and removed, and replaced with good and sufficient work by the said party of the second part, without extra compensation.

And the said party of the second part doth further covenant and agree, as aforesaid, to commence said work as soon as directed by said committee, and also to finish and complete the same, in a good and workmanlike manner, on or before the first day of July next; and in case the same is not finished and completed, as aforesaid, within the time herein specified, to forfeit and pay to the said party of the first part, the sum 10 of five (5) dollars, for each and every day which shall elapse after the said time herein specified for completing the said work until the same is fully completed as aforesaid; and the said party of the second part doth promise and agree as aforesaid, that he will give his personal attention to the fulfillment of this contract, and shall not sublet the aforesaid work, but will keep the same under his control, and shall assign by power of attorney or otherwise, any of the moneys payable under this agreement, unless by and with the consent of the said township committee, to be signified by endorsement upon this 20 agreement.

And the said party of the second part doth further covenant, promise and agree, as aforesaid, that if the said work to be done under this agreement shall be abandoned, or if this contract shall be assigned otherwise than is herein specified, or if at any time the engineer appointed to have charge of the said work shall be of the opinion, and shall so certify in writing to said township committee that the said work, or any part thereof, is unnecessarily delayed, or that the said party of the second part is wilfully violating any of the conditions or cove- 30 nants of this contract, or executing said contract in bad faith, they shall have the power to notify the said party of the second part to discontinue all work, or any part thereof, under this contract; and thereupon the said party of the second part shall cease to continue said work, or such part thereof as the township committee may designate; and the said committee shall thereupon have power to complete the work, and provide all materials and labor necessary therefor, and charge the expense of the same to the said party of the second part, and the expense so charged will be deducted and paid by the party 40

of the first part, out of such moneys as may be either due or may at any time thereafter become due, to the said party of the second part, under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed by the said party of the second part, then the said party of the second part shall be entitled to receive the difference; and in case said sum shall exceed the last said sum, then the said party of the second part shall pay
10 the amount of such excess to the party of the first part, on notice from the said township committee of the excess so due.

And the said party of the second part doth further promise, covenant and agree as aforesaid to take and receive, in full compensation for said work, the following prices, to wit:

For earth excavations, one cent per cubic yard, which price includes excavating the earth, where excavating is necessary, and removing the same.

For rock excavation, two dollars per cubic yard, which price includes excavating the rock, where excavating is necessary,
20 and removing the same.

For earth fillings, twenty cents per cubic yard, which price includes the furnishing of the requisite quantity of earth filling, bringing it upon the line of the street where required, regulating and grading the same.

For retaining wall, two dollars per cubic yard, which price includes furnishing materials for said wall, and finishing and completing same according to specifications hereunto annexed.

For culverts, twenty cents per lineal foot, which price includes furnishing materials for said culverts, and finishing and
30 completing same according to specifications hereunto annexed.

For the construction of two basins, fifty dollars, which price includes the furnishing of materials for same, and finishing and completing according to specifications hereunto annexed.

And the said party of the first part do covenant and promise and agree with said party of second part, to pay to him the prices above mentioned, for doing and completing the said work in the manner aforesaid, by issuing and delivering to him improvement certificates, in sums not less than one thousand dollars, for eighty-five per cent. of the value of the
40 work done, as the work progresses, and a certificate for the

remaining fifteen per cent. at the time of the confirmation of the assessment for the said work, which certificates shall bear interest at the rate of seven per cent. per annum, from date of issue thereof, and will be due and payable in one year from the date of the confirmation of said assessment for said improvement.

And be it further agreed that all covenants and agreements on the part of the said party of the second part, shall extend to and bind his heirs, executors and administrators.

In witness whereof the said Inhabitants of the Township of 10 North Bergen, in the County of Hudson, have caused this agreement to be signed by the chairman of said township committee, and their corporate seal to be hereunto affixed, attested by their town clerk, and the said party of the second part has hereunto set his hand and seal, the day and year first above written.

[Corporate seal N. B.]

JAMES McFARLANE,

Chairman Township Committee.

[L. S.]

E. D. B. WAKEMAN,

Party of the second part.

Attest: EDWARD D. JOHNSON, *Township Clerk.*

20

Know all men by these presents, That Edward D. B. Wakeman, Edgar B. Wakeman and Peter C. Westervelt, all of Jersey City, in the County of Hudson, N. J., are held and firmly bound unto the Inhabitants of North Bergen Township, in the County of Hudson, in the State of New Jersey, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said The Inhabitants of North Bergen Township, County of Hudson, State of New Jersey, their successors, for which payment well and truly to be made, we bind ourselves, and each of us, firmly by these 30 presents. Sealed with our seals, dated the twenty-first day of September, one thousand eight hundred and seventy-two. The condition of the above obligation is, that whereas the above bound Edward D. B. Wakeman, did, upon this twenty-first day of September, A. D. 1872, contract to and with the Inhabitants of North Bergen to grade and regulate Homestead Place, from the Northern Railroad to the westerly line of Grand avenue, according to specifications and contract

hereunto annexed, then this obligation to be void, otherwise to remain in full force and virtue.

EDWARD D. B. WAKEMAN, [L. S.]

EDGAR B. WAKEMAN, [L. S.]

PETER C. WESTERVELT. [L. S.]

Signed, sealed and delivered in the presence of

EDWARD D. JOHNSON,

Township Clerk.

Endorsed—

- 10 Dated September 21st, 1872.
 E. D. B. Wakeman,
 Edgar B. Wakeman,
 Peter C. Westervelt,
 To
 The Inhabitants of North Bergen.
 Bond, \$5000.

[Minute Book, marked 1871; pages 156–157. Minutes of February 20th, 1872.]

Petition.

- 20 To the Honorable, the Township Committee of North Bergen, in the County of Hudson, in the State of New Jersey:

We, the undersigned line owners, representing the larger extent of frontage along the proposed laying out and opening of Homestead Place, a proposed street in said Township of North Bergen, do hereby make application to your honorable body for the laying out and opening of said street so called, in the township of North Bergen, county and state aforesaid, beginning at a point at the commencement of a certain line of said proposed street, on the easterly line of Grand avenue,
 30 as laid down in a map entitled A map of Homestead, in the Township of North Bergen, County of Hudson, State of New Jersey, made by John Foguet, surveyor, and duly filed in the clerk's office of the County of Hudson, at a distance south-westerly of one hundred and forty-nine and ninety-eight hundredths ($149\frac{98}{100}$) feet, from the northwesterly line of said property so described and laid down upon said map of Homestead; thence running northwesterly in a line as the centre line of

said property, opening at right angles to easterly line of Grand avenue, to the bed of the Northern Railroad, be the distance what it may, said street to be laid out and opened eighty feet wide, or forty feet on each side of said centre line, according to the aforesaid map entitled A map of Homestead, in the Township of North Bergen, County of Hudson, a copy being hereunto, reference thereunto being had will fully appear, being the line marked in red ink "Homestead Place," "proposed street."

James K. Sellick, 200 feet.

10

Louis Bock, 80.75 feet.

James Gellies, 135 feet.

H. G. Norton, 842.94 feet.

Resolved, To accept the foregoing petition, provided the sum of fifty dollars be deposited with the treasurer, for the purpose of liquidating preliminary expenses.

Messrs. Louis Bock and James K. Sellick appeared and deposited the required sum with Charles Pinnell, Chairman.

Resolved, That the petition embodied in Section 7 of the minutes of this instant be advertised for two weeks, to date 20 from the 24th day of February, 1872, in the *Palisade News*, a weekly paper, published in the Township of West Hoboken, and edited by Alfred E. Gregory; and be it further resolved, that this board will convene upon Tuesday, the 12th day of March, 1872, to hear objections to said petition, if any there be presented in writing.

Resolved, That the clerk is hereby directed to prepare copies of said petition for advertising, and post the required number of notices of objections throughout the township, all according to the statutes made and provided February 23d, 30 1872.

Reading of the minutes of the 20th instant—

Resolved, That they be approved as read, with the exception of actions taken on the petition praying for the opening and laying out of "Homestead Place."

March 13th, 1872—

Resolved, That the petition for the laying out and grading of Homestead Place, be and is hereby accepted, with the amendment of "and grading," inserted in the sixteenth line; and be it further resolved, that the clerk is hereby directed 40

to have said petition, as amended, advertised in the *Palisade News*, a weekly paper, published in the Township of West Hoboken, and circulated in the Township of North Bergen, and post necessary notices, all pursuant to the statutes made and provided; and furthermore be it resolved, that this board will convene on Saturday, the 30th day of March, A. D. 1872, at three o'clock P. M., for the purpose of hearing objections to said improvement, if any there be presented in writing.

March 30th, 1872—

- 10 The clerk reported that no objections have been filed to the "Homestead Improvement," in his office.

April 27th, 1872. Page 211—

Be it resolved, That Mr. Kimberly be and is hereby appointed as surveyor upon the proposed "Homestead Place" improvement, and that he prepare a profile map of proposed grade, and present the same to this board, at his earliest convenience.

March 7th, 1872.

Be it resolved, That section 5, page 211, of this board, held upon April 27th, 1872, be and are hereby repealed.

- 20 Page 219—

Be it resolved, That John Camp, Esq., a resident of Jersey City, be and is hereby appointed the surveyor for the purpose of performing necessary engineering pertaining to the opening and grading of the "Homestead Place" improvement, and the clerk is hereby directed to notify said Camp of the foregoing fact, and furthermore request the presence of Mr. Camp for the purpose of making estimates of the costs of his duties.

May 11th, 1872—

- 30 *Resolved*, That section 5, page 219, of the minutes of this board, of the 7th instant, be and are hereby repealed.

Resolved, That E. Kimberly be and is hereby appointed the surveyor for the purpose of performing the engineering duties pertaining to the improvement of Homestead Place, and the clerk is hereby directed to notify the said E. Kimberly to appear before this board, and submit an estimate of his charges for the work to be performed by the said Kimberly upon said improvement, before qualifying for said duties.

May 18th, 1872.

- 40 The clerk reported having delivered to Mr. James K. Sellick a notice pursuant to section 4 of minutes of the 11th instant, to be forwarded to Mr. Kimberly.

July 6th, 1872—

Be it resolved, That the clerk is hereby directed to notify E. Kimberly, Esq., surveyor, to file a profile map of the grade of the Homestead Place improvement forthwith, or state objection.

July 13th, 1872—

Mr. E. Kimberly appeared according to notice, and made statement that he had endeavored to establish a grade for Homestead Place improvement, by consulting with the line owners, and had failed in accomplishing his purpose, and prayed for time to complete the map.

10

July 27th, 1872—

Resolved, That the map of Homestead Place improvement, as submitted by E. Kimberly, Esq., surveyor, be and is hereby accepted, and the clerk be and is hereby directed to prepare an ordinance in conformity to the petition for said improvement, and have same advertised pursuant to the statutes made and provided; and furthermore, that the clerk is directed to notify Mr. Kimberly to prepare the specifications for said improvement, in accordance with said map so filed.

August 25th, 1872—

20

Resolved, To adjourn to convene upon Saturday the 4th day of September, 1872, at 5 o'clock P. M., for the purpose of hearing proposals for the necessary work to be performed upon the Homestead Place improvement, and the clerk is hereby directed to advertise for said proposals in the *Hudson County Democrat*, *Jersey City Journal*, and *Palisade News*.

Sept. 14th, 1872—

Proceeded to open proposals for the improvement of Homestead Place, with the following result:

	Earth excavation, per cubic yd.	Earth filling, per cubic yd.	Rock excavation, per cubic yd.	Retaining Wall, per cubic yd.	Culvert, per lineal foot.	Two Basins, per lineal ft.	Two Basins.	TOTAL.
Wifin Paul.....	12,000	2,000	6,000	150	85	32		
Dennis Dowd.....	\$ 01	\$ 01	\$2 40	\$3 00	\$8 50	\$1 00		\$15,744 50
Albert B. Dod.....	20	10	1 75	2 70	3 00	1 00		13,792 00
Wm. Clarkson.....	25	02	2 25	4 00	3 00	25		17,403 00
E. D. B. Wakeman....	25	25	1 89	2 90	8 00	1 25		15,994 00
Peter Hansen.....	01	20	2 00	2 00	20		\$50	12,887 00
E. Greenleaf & E. Post.	38	02	2 16	2 70	6 80	1 50		18,591 00
	30	03	1 95	03	1 10	1 15		15,494 80

WHEREAS, the bid of Mr. E. D. B. Wakeman being the lowest offered,

Be it resolved, That the contract for the improvement of Homestead Place, from the Northern Railroad to the westerly line of Grand avenue, be and is hereby awarded to said E. D. B. Wakeman, Esq., and the clerk is hereby directed to prepare the necessary bonds and contract to be entered into by said Wakeman and the inhabitants of North Bergen.

Oct. 5th, 1872—

- 10 *Resolved,* That the Messrs. Edward B. Wakeman and Peter Westervelt, sureties submitted by Mr. Edward D. B. Wakeman, contractor for improvement of Homestead Place, be and are hereby accepted, and requested to sign the contract to and with said E. D. B. Wakeman for said improvement.

Dec. 2, 1872—

- 20 *Resolved,* That the action of Mr. James McFarlane, the chairman of this board, in notifying the contractor for the Homestead Place improvement to discontinue the removal of sand from beneath the line of said improvement, and to return a detailed statement of all sand heretofore removed, to this board, be and is hereby approved of, and the clerk is hereby directed to serve notice in writing upon Mr. E. D. B. Wakeman, contractor, to same effect.

Feb'y 8th, 1873—

Mr. Edward Kimberly certified that he is entitled to receive \$200 on account of services as surveyor for Homestead Place improvement.

- 30 *Resolved,* That the clerk is hereby directed to prepare a certificate in the sum of two hundred dollars, in favor of Edward Kimberly, surveyor for the improvement of Homestead Place, to be known as No. 21.

Mr. Edward Kimberly certified by date Feb'y 17th, 1873, that E. D. B. Wakeman, contractor for improvement of Homestead Place, is entitled to certificate in the sum of one thousand dollars.

Resolved, That the clerk is hereby directed to prepare two certificates, in the sum of five hundred dollars each, in favor of Edward D. B. Wakeman, for the improvement of Homestead Place.

- 40 April 1st, 1873—

The clerk reports to having notified Mr. E. D. B. Wakeman to prosecute the improvement of Homestead Place with more diligence, and make a true return of all sand taken from beneath the bed of the road, together with the price per load.

July 5th, 1873—

Communications received were deferred. Homestead Place improvement hearing on the same fixed for 12th inst.

July 19th, 1873—

Homestead Place contractor Wakeman, and civil engineer E. L. Kimberly were heard. 10

Minute book marked minutes 1874.

Feb'y 21st, 1874. Page 15—

Mr. Louis Bock came before the committee, and made complaint touching obstacles existing at Homestead Place, arising from the present unfinished situation of that work.

Committeeman Brane received the papers referring to Homestead improvement, and was empowered to consult counsel in that matter.

May 9th, 1874—

Motion made by A. W. Duryee, that all papers and documents relating to Homestead Place improvement be referred to township counsel for advice. 20

May 16th, 1874—

Charles Pinnell reports in the matter of Homestead Place improvement papers in hand of township counsel for advice.

June 13th, 1874—

Chairman Pinnell reports having received the written opinion of township counsel, in the matter of Homestead Place improvement.

Moved and seconded that the written opinion of counsellor Besson, in the matter of Homestead Place improvement, be filed. 30

Motion made by A. W. Duryee, and seconded, that whereas Edward D. B. Wakeman, the contractor for the improvement of Homestead Place, has refused and neglected to proceed with the work therein contracted for, but has abandoned the same; therefore,

Resolved, That the said contract between the inhabitants of the township of North Bergen, in the county of Hudson, and the said Edward D. B. Wakeman, bearing date the (21) 40

twenty-first day of September, A. D. 1872, for the improvement of Homestead Place, in said township, be and the same is hereby rescinded and declared null and void.

Carried.

June 20th, 1874—

To the Honorable Township Committee of North Bergen—
The committee appointed upon June 13th, 1874, report that they have examined the Homestead Place improvement, and, after a close observation of the work performed and the
10 locality, in the judgment of your committee, we think the said improvement, if carried on according to proposed plans, would be of no benefit to the property located in the vicinity of said improvement.

Signed,

CHAS. PINNELL,
G. BRAUE,
DANIEL PECK.

Report accepted.

June 27th, 1874—

Chairman Pinnell reports having notified township counsel
20 that the township committee fail to find any ordinance in the matter of Homestead Place improvement.

August 1st, 1874—

Resolved, That the chairman be and is hereby empowered to sell timber, taken from the Homestead Place improvement, and turn the proceeds over to the treasurer of this township.

September 26th, 1874—

Chairman reports having sold five logs of wood, lying on line of Homestead Place improvement, to Louis Bock, for \$2.50, and turned over the proceeds to the treasurer, and the
30 clerk is instructed to charge the same to current expenses.

This is to certify that I have searched the records now on file in the town clerk's office, in the township of North Bergen, in reference to the proceedings on Homestead Place improvement, and the within statement is a full and true copy, to the best of my knowledge and belief, of all the proceedings of the township committee, now on file in my said office.

[L. s.]

JOHN W. ACKERMAN,
Township Clerk, Township of North Bergen.

Dated North Bergen township, April 7th, A. D. 1877.

To Edward D. B. Wakeman—You are hereby notified that the prosecution of the work mentioned in a certain contract, made and entered into by and between you and the township committee of the township of North Bergen, in the county of Hudson, for the improvement of Homestead Place, in said township, is unnecessarily delayed by you, and said work wholly abandoned; and that, unless you proceed with said work, and complete the same without delay, the said township committee will cause said work to be done, as mentioned and provided in said contract.

10

Dated at the town hall, in North Bergen, this 19th day of March, A. D. 1874.

By order, &c.

A. H. RYDER,

Township Clerk ad interim.

SCHEDULE A.

Township of North Bergen, County of Hudson, N. J.

\$500.

Improvement Certificate.

No. 22.

This certificate entitles Edmund D. B. Wakeman, or the holder, to receive of the treasurer of the township of North Bergen, five hundred dollars, on account of contract for improvement of Homestead Place, from the Paterson plank road to Grand avenue, with the interest thereon, at the rate of seven per cent. per annum, from the date hereof, in amounts not less than fifty dollars, at any time, as the money on said assessment shall come to the hands of the township treasurer.

20

And this certificate shall be receivable by the township collector, in payment for the assessment for which it is drawn, and shall be transferable by endorsement.

And the township committee of the township of North Bergen are hereby bound, for themselves and their successors, that due diligence shall be used in making and collecting the said assessment, and in case the said assessment is not collected to meet this certificate within one year from the date of the confirmation of said assessment, that they will pay the said sum of five hundred dollars, with interest, as above stated,

30

to the holder, upon thirty days' notice of default in the collection of the assessment.

Witness the hand of the chairman of the township committee of North Bergen township, duly attested by
 [L. s.] the signature of the clerk of said township, this eighth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

JAMES McFARLANE,

Chairman of Township Committee.

10 Attest—

EDWARD W. JOHNSON,

Township Clerk.

Endorsed—

E. D. B. WAKEMAN,

PAT. H. TEALING.

SCHEDULE B.

Township of North Bergen, County of Hudson, N. J.

\$500.

Improvement Certificate.

No. 23.

20 This certificate entitles Edmund D. B. Wakeman, or the holder, to receive of the treasurer of the township of North Bergen, five hundred dollars, on account of contract for improvement of Homestead Place from the Paterson plank road to Grand avenue, with the interest thereon, at the rate of seven per cent. per annum, from the date hereof, in amounts not less than fifty dollars, at any time, as the money on said assessment shall come to the hands of the township treasurer.

And this certificate shall be receivable by the township collector, in payment for the assessments for which it is drawn, and shall be transferable by endorsement.

30 And the township committee of the township of North Bergen, are hereby bound, for themselves and their successors, that due diligence shall be used in making and collecting the said assessment, and in case the said assessment is not collected to meet this certificate, within one year from the date of the confirmation of said assessment, that they will pay the said sum of five hundred dollars, with interest, as above stated,

to the holder, upon thirty days' notice of default in the collection of the assessment.

Witness the hand of the chairman of the township committee of North Bergen township, duly attested by [L. s.] the signature of the clerk of said township, this eighth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

JAMES MCFARLANE,

Chairman of Township Committee.

Attest—

EDWARD D. JOHNSON,

10

Township Clerk.

Endorsed—

E. D. B. WAKEMAN,

PAT. H. TEALING.

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