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Complaint.

Borough of Ridgefield, a copy of which is hereto annexed and made a part hereof, for the sum of \$10,300.00, which the said defendant agreed to pay to the plaintiff.

10 3. Plaintiff has in all things performed the said contract according to its terms and the terms of its specifications and plans therein referred to, except in the particulars hereinafter stated.

4. On May 16, 1917, while plaintiff was going about the completion of the said contract, the defendant decided not to complete the said work and prevented the plaintiff from completing the same and compelled him to stop work before the same was completed.

20 5. The fair value of the work, labor and materials, done and performed by the plaintiff under said contract up to said last mentioned date, was the sum of \$8900.00 and the amount of money paid by the defendant on account of said contract is the sum of \$5231.59, leaving a balance due thereon of the sum of \$3668.41.

6. On account of the defendant preventing plaintiff from completing the said contract plaintiff claims the sum of \$280.00 which is a fair profit on the completing of the said work.

Plaintiff claims as damages on the first count the sum of \$3948.41.

Second Count:

30 -1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.

2. The defendant during the progress of said work and by resolutions of the Mayor and Borough Council, with the approval of the Borough Engineer, the said defendant duly adopted on October 25, 1916 and February 14, 1917, directed the construction of certain changes and additional works in the said sewage disposal plant for which no unit price was provided in the said bid proposal or contract and the amount of which additional work and changes directed by said two resolutions was the sum of \$13,258.75.

40 3. At the time plaintiff stopped work under the order of the defendant, of May 15, 1917, the amount of work, labor and materials performed and furnished by him under said two resolutions was the sum of \$13,237.43.

4. The amount of payments made to plaintiff on account of labor and materials performed and furnished under said two resolutions was the sum of \$7851.78.

50 5. Plaintiff claims a balance due under this second count of \$5385.65.

*Complaint.**Third Count:*

1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.
2. On September 13, 1916, during the progress of said work, the said Borough Engineer ordered in writing the plaintiff to make certain changes on the sludge beds, forming a part of the said sewage disposal system, at a cost of \$1844.19. 10
3. The defendant paid plaintiff on account of said item the sum of \$1567.56.
4. Plaintiff claims a balance due under this third count of \$276.63.

Fourth Count:

1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.
2. At the time plaintiff claims work was stopped by the defendant, the defendant took possession of the said works and appropriated to its own use and for its own benefit, a large quantity of lumber, mason materials, equipment, and other goods and chattels of the plaintiff of the value of \$2020.37. 20
3. Plaintiff claims under this count the sum of \$2020.37.

Fifth Count:

1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.
2. After the plaintiff started work on the said contract, the defendant decided to make certain changes in the method of construction thereon and directed the plaintiff to discontinue work while plans and specifications were being prepared and the changes considered and decided upon. 30
3. Defendant promised to pay to the plaintiff any loss or damage due to the said shutting down of his work under the defendant's order but has not done so.
4. The amount of loss sustained by the plaintiff by reason of said discontinuance of his work as aforesaid, including moneys paid out and expended for wages and maintenance of his plant, and other matters, is the sum of \$1708.00. 40
5. Plaintiff demands as damages under this count the sum of \$1708.00.

Sixth Count:

1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.
2. After plaintiff was directed to discontinue work in March, 1917, he desired and attempted to remove his plant from the said work. 50

Complaint.

3. The defendant prevented the plaintiff from removing his said plant and it was forced to remain upon the site of the said work for a long period of time thereafter, to wit, from March 1917 to May 1917.

10 4. During said last mentioned period the plaintiff was forced by the said action of the defendant to lay out and expend large sums of money for wages of engineers, watchmen, laborers and others and for the rental and upkeep of the said plant to the extent of \$1240.26.

5. Plaintiff claims damages under this count of the sum of \$1240.26.

Seventh Count:

20 1. Plaintiff claims under all of the said counts the sum of \$25,000.00.

HOWE & DAVIS,
Attorneys for Plaintiff.

MONTHLY STATEMENT.

Office Phone 5062

Residence Phone 4332

Orange, N. J. March 27, 1917.

Borough of Ridgefield, New Jersey

30

To CHARLES IPPOLITO, Dr.

General Contractor

252 Main Street

1916

Nov.	1 Bill rendered as per itemized statement on file with the Borough of Ridgefield	264.89	
Nov.	1 Bill rendered as per itemized statement on file with the Borough of Ridgefield	1846.80	
		<hr/>	
		2111.69	
	Less credits	267.50	1844.19
		<hr/>	<hr/>

40

WORK DONE UNDER RESOLUTION OF OCT. 25, 1916.

Dec. 1 Bill rendered as per itemized statement on file with the Borough of Ridgefield

2455.24

50

Complaint.

Dec.	31	Bill rendered as per itemized statement on file with the Borough of Ridgefield	3317.04	
1917				
Jan.	31	Bill rendered as per itemized statement on file with the Borough of Ridgefield	3849.31	10
March	1	Bill rendered as per statement itemized on file with the Borough of Ridgefield	2477.95	
March	27	As per bill attached	1137.89	
			<hr/>	
			13237.43	13237.43
Total Contract price with the Borough of Ridgefield			10300.00	20
Less stone, cement, channel iron, labor required to finish contract			1400.00	
Amount due on contract			8900.00	8900.00
Plus 20% on unfinished work as above stated			280.00	280.00
1916				
Material delivered on work not yet used:				
Aug.	1	E. Kiernan Co., as per bill attached	250.55	
Sept.	1	E. Kiernan Co., as per bill attached	260.61	
1916				
Oct.	1	E. Kiernan Co., as per bill attached	464.72	30
Oct.	31	E. Kiernan Co., as per bill attached	213.90	
			<hr/>	
			1189.78	
Plus 15% profit			178.36	
			<hr/>	
			1368.24	
Less credits as per allowance made on estimates for month of Nov. 1916				
				40
5894 F. B. M. at \$27 Per M			\$159.13	
2000 " " " 2 x 6 T. G. At \$35			70.	
25 pieces 2 x 8 x 14 circular			15.68	
4 pieces 6 x 6 x 22			13.70	
20 " 2 x 6 x 16			11.20	
For Month of December				
850 F. B. M. at \$20 per M			17.00	
300 " " " 2 x 6 at \$20				50
Per M			9.00	

Complaint.

MONTH OF JANUARY

1528 F. B. M. At \$25 Per M	38.20	333.91	1034.33
		<hr/>	<hr/>
Total carried forwd.			25295.95
Amount Brought Forward			25295.95

10

1916 MATERIAL DELIVERED ON WORK NOT YET USED

Aug.	1	Carrugated Bar Co., as per bill attached	306.28	
Aug.	8	R. D. Wood Co., as per bill attached	68.61	
Aug.	15	R. D. Wood Co., as per bill attached	46.92	
Aug.	17	R. D. Wood Co., as per bill attached	139.62	
Oct.	14	R. D. Wood Co., as per bill attached	85.14	
Nov.	14	R. D. Wood Co., as per bill attached	52.89	

20 1917

March	1	Charles Ippolito, as per bill attached	158.40	
		Plus 15% profit	857.86	

Plus 15% profit	128.68	986.54
	<hr/>	<hr/>

1916

Nov.	1	As per bill rendered for accrued damage	1358.00	
30 Dec.	1	As per bill rendered for accrued damage	350.00	1708.00
		For extra charge in dismantling plant as ordered by the Borough	100.00	100.00

Grand Total due		<hr/>	28090.49
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RECEIVED BY CASH

1916			
40 Sept.	13	\$2550.00	
Oct.	13	1275.00	
Nov.	13	2974.15	
Dec.	11	2247.09	
1917			
Jan.	13	2335.12	
Feb.	10	3269.57	
		<hr/>	
		\$14650.93	14650.93
			13439.56

Balance due

50

Complaint.

1916	Material delivered on work ordered as extra work for January and February 1917, as per itemized bill on file with Borough of Ridgefield:		
	E. Kernan Co., for lumber	\$196.11	
	Nicholas Scioli, for stone	174.25	
	Carrugated Bar Co., for steel	170.58	10
		<hr/>	
		\$540.94	

This charge of \$540.94 is included in January and February 1917 itemized bill for extra work on file with the Borough of Ridgefield.

MONTHLY STATEMENT.

Office Phone 5062

Residence Phone 4332

Orange, N. J. April 30, 1917.

Borough of Ridgefield, New Jersey

To CHARLES IPPOLITO, Dr.

General Contractor

252 Main Street

EXTRA WORK—Jetting and Driving Piles—Foundation at Sewerage Plant.

LABOR				30
225 hrs. Foreman	at \$1.10	247.50		
30 days Watchman	“ 3.00	90		
		<hr/>		
		337.50		
(Subject to correction)	4.74%	15.99	353.49	
		<hr/>		

RENTAL

One Month Derrick,		250.		
“ “ Hoisting Engine,		125		40
“ “ Centrifugal Pump		125		
“ “ Pulsometer		75		
“ “ Concrete Mixer		100		
“ 24" gauge and cars		50	725.	
		<hr/>		
			1078.49	
Plus 15%			161.77	
			<hr/>	
			\$1240.26	50

Complaint—Proposal.

NOTICE TO BIDDERS

PROPOSALS FOR CONSTRUCTING SEWERAGE SYSTEM AND FOR CONSTRUCTING SEWERAGE DISPOSAL PLANT, in accordance with the specifications and under the terms of the contract as herein set forth, addressed to the Mayor and Council of the Borough of Ridgefield, Bergen County, New Jersey, enclosed in sealed envelopes, will be received at 9 o'clock P. M., on April 19th., 1916, at a meeting of said Mayor and Council to be held in the Borough Hall at Ridgefield, N. J.

Each bid must be delivered by the bidder in person or by his agent, and no bids will be received previous to the hour designated in this notice and no bids will be received thereafter. Bids will be opened immediately and the contents there will be publicly announced, and recorded upon the minutes.

Plans and specifications may be seen and blank forms of proposals obtained at the office of Borough Engineer, Broad and Columbia avenues, Morsemere, N. J. A charge of \$5.00 will be made for plans and specifications furnished to applicants therefor, this charge to be refunded upon the return in good condition, of the plans and specifications to the Borough Engineer.

Each proposal must be made on one of the forms herein and must be accompanied by a certified check payable to the order of the Borough of Ridgefield. The amounts of said certified checks shall be as follows: For the construction of the Sewerage System, \$2,500. For the construction of the Sewerage Disposal Plant, \$1,000.00.

The bidder whose proposal shall be accepted will be required within ten days after the date of notice of award if given to said bidder in person or by mail, to execute a contract in the form herein, and to furnish a bond in the form herein in an amount equal to the total contract price for the work as computed from the accepted bid signed by the contractor as principal and by a surety company acceptable to and approved by the Mayor and Council as surety. In case the bidder receiving the award should fail to execute the contract and file the bond as aforesaid, the certified check accompanying his proposal shall be deemed forfeited to the Borough of Ridgefield as liquidated damages.

The checks of unsuccessful bidders will be returned to them within three days after the award of the contract, or within two weeks after opening the proposals, if no award is made within that time.

The contractor will be required to commence work within two weeks after the execution of the contract and complete the work within time periods thereafter as follows: For constructing Sewerage System, Ten Months. For constructing Sewage Disposal Plant, Three Months.

The contractor will be paid, on or before the 10th. day of each month, 85 per cent. of the value of the work done in the preceding calendar

Complaint—Proposal.

month as estimated and certified to the Mayor and Council by the Engineer. Of the remaining 15 per cent. one-half will be paid three months and one-half six months after the date of the final approval of the completed work by the Mayor and Council.

The attached list of quantities will be used in comparing proposals, but bidders are hereby informed that these quantities, or any of them, may not be even approximately correct, and each bidder must judge for himself as to the quantities that will be required in the construction of the work, from his own examination of the plans and specifications and local conditions. 10

Unbalanced bids, showing disproportionate or irrelative unit prices, will be held to be evidence of bad faith on the part of the bidder, sufficient to warrant the rejection of such bids.

The Mayor and Council reserve the right to award a contract for the Sewerage System, or the Sewerage Disposal Plant, or both, to one bidder or to different bidders or to reject any or all bids. 20

It is to be understood that wherever the words, "Borough of Ridgefield" or "Mayor and Council" are used herein, they shall be held to mean Municipal Corporation of The Borough of Ridgefield, or its successor or successors.

CLARENCE D. INMAN,
FRANK D. ROYLANCE,
WALTER G. BROOKS,

Sewer Committee of Borough of Ridgefield, N. J.

30

LIST OF QUANTITIES

A list of items is stated in the original but omitted here, as it is not pertinent to the controversy.

Contingent Extras

Concrete for concrete sewers	
Flooring and foundation lumber	
20 cu. yds. concrete not shown on drawings	40
5000 b. ft. sheeting and shoring left in	
1 M. b. ft. forms for concrete	
300 cu. yds. earth excavation not included otherwise	
30 cu. yds. rock excavation not included otherwise	
6 in. tile underdrain in separate trench	
100 lin. ft. 6 in. tile underdrain 6 ft. deep or less	
50 lin. ft. tile underdrain 6 to 8 ft. inc. 8 ft.	
50 lin. ft. 6 in. tile underdrain 8 to 10 ft. inc. 10 ft.	
4 in. tile underdrain in separate trench	50

Complaint—Bid.

- 100 lin. ft. 4 in. tile underdrain 6 ft. deep or less
 50 lin. ft. 4 in. tile underdrain 6 to 8 ft. inc. 8 ft.
 50 lin. ft. 4 in. tile underdrain 8 to 10 ft. inc. 10 ft.
 3 in. tile underdrain in separate trench
 100 lin. ft. 3 in. tile underdrain 6 ft. deep or less
 50 lin. ft. 3 in. tile underdrain 6 to 8 ft. inc. 8 ft.
 50 lin. ft. 3 in. tile underdrain 8 to 10 ft. inc. 10 ft.

Sewer disposal plant, complete, including tank, sludge bed complete, pipe line from tank to sludge bed, sludge bed to affluent pipe, affluent pipe from tank to creek, all as per drawings and specifications, lump sum.

PROPOSAL

- 20 To the MAYOR AND COUNCIL,
 RIDGEFIELD, N. J.

The undersigned bidder hereby proposes to construct a sewerage system and a sewage disposal plant, or either, in the Borough of Ridgefield, N. J., in accordance with the drawings, specifications and form of contract herein.

- 30 The bidder has carefully examined the notice to bidders, drawings, specifications and form of contract and bond, visited the site of the proposed work, and observed and ascertained all conditions and limitations applying to said work or effecting cost of its performance by the bidder.

The bidder proposes to perform the work, including the furnishing of all materials, labor, tools, machinery, apparatus and equipment requisite to the full and proper completion of said work and of each of its items, at and for the prices below stated, all of which include excavation and backfilling:

(Note:—Bidders may bid on either the Sewerage System or Sewage Disposal Plant, or both.)

- 40 Sewerage System

List omitted as not relative to this controversy.

Contingent Extras

- | | |
|--|---------|
| Concrete for concrete sewers,
Per cubic yard—Nine dollars | \$ 9.00 |
| Flooring and foundation lumber,
Per thousand feet B. M.—Fifty dollars | \$50.00 |
| Concrete not shown on drawings, in place,
Per cub yard—Ten dollars | \$10.00 |

Complaint—Bid.

Sheeting and shoring, left in place, Per thousand feet, B. M.—Forty-five dollars	\$45.00	
Forms for concrete, left in place, Per thousand feet, B. M.—Sixty dollars	\$60.00	
Earth excavation, not included otherwise, Per cubic yard—One dollars and fifty cents	\$ 1.50	10
Rock excavation. Per cubic yard—Four dollars	\$ 4.00	
6 in. tile underdrain in separate trench 6 ft. deep or less Per lineal foot—Seventy cents	\$.70	
6 in. tile underdrain, 6 ft. to 8 ft. deep including 8 ft. Per lineal foot—Eighty-five cents	\$.85	
6 in. tile underdrains, 8 ft. to 10 ft. deep, including 10 ft. Per lineal foot—One dollar and twenty cents	\$ 1.20	
4 in. tile underdrain in separate trench 6 ft. deep or less Per lineal foot—Seventy cents	\$.70	20
4 in. tile underdrain, 6 ft. to 8 ft. deep including 8 ft. Per lineal foot—Eighty three cents	\$.83	
4 in. tile underdrains, 8 ft. to 10 ft. deep, including 10 ft. Per lineal foot—One dollar and fifteen cents	\$ 1.15	
3 in. tile underdrain in separate trench 6 ft. deep or less Per lineal foot—Sixty-five cents	\$.65	
3 in. tile underdrain, 6 ft. to 8 ft. deep, including 8 ft. Per lineal foot—Seventy-five cents	\$.75	
3 in. tile underdrain, 8 ft. to 10 ft. deep, including 10 ft. Per lineal foot—One dollar and ten cents	\$ 1.10	30
Sewage disposal plant, complete, including tank, sludge bed complete, pipe line from tank to sludge bed, sludge bed to affluent pipe, affluent pipe, from tank to creek, all as per drawings and specifications.		
Lump sum—Ten thousand three hundred dollars	\$10,300.00	

The bidder proposes and agrees to perform any or all work classified as Contingent Extras, and any or all work required in the construction of the sewerage system and sewage disposal plant for which unit prices are not provided herein, including the furnishing of the materials and labor therefor and as each or all of the items of said work, including Contingent Extras, will accept in full payment the actual cost to the bidder of the materials and labor used in its construction, plus fifteen per cent., (15%), the Borough of Ridgefield to have the option of paying for Contingent Extras, or any of them, at the unit price or prices bid, or at cost plus fifteen per cent., (15%), as occasion for said work is done, in such case.

The bidder agrees to furnish to the Mayor and Council of the Borough of Ridgefield, full itemized accounts and vouchers of the

Complaint—Bid.

cost of all materials and labor furnished as above on the basis of cost plus fifteen per cent., (15%); that the charged cost of materials shall be only the commercial value thereof at the site of the work; that the charged cost of labor shall be only the amount paid or payable to the workmen, foreman or superintendent at the site, for the
 10 time they are actually employed on the work for which charge is made; and that the percentage shall include the use, purchase price, rental and transportation of tools, plant, scaffolding and equipment, liability insurance, all charges for general supervision and administration, all charges for permit, faithful performance bond, interest on working capital and anticipated profits.

The bidder admits and agrees that the prices bid herein are based on the bidder's own conclusions as to the amounts and quantities of work to be performed, the character of the soil, and the nature and
 20 extent of the risks, involved.

The bidder will accept and award of either contract or both contracts on which prices are bid herein, and if awarded both contracts, will deduct from all units prices.....per cent. thereof.

The bidder agrees to execute a contract in accordance herewith and furnish the required bond within ten (10) days after the acceptance of this proposal, and that in default thereof the certified check accompanying this proposal shall be forfeited to the Borough of Ridgefield as liquidated damages and not as a penalty.

The bidder accepts and agrees to all the conditions and requirements set forth in the NOTICE TO BIDDERS, herein and expressly concedes and acknowledges the right of the Borough of Ridgefield to
 30 reject this proposal if the prices bid are unbalanced, disproportionate or irrelative, or if the Mayor and Council shall decide that the undersigned is not the lowest responsible bidder for said work, or shall decide to reject all bids.

References as to experience in the construction of sewerage are as follows:—(Give place, date, kind and cost of work).

1905—Orange, N. J. sewers	\$ 15,000
1905-06 West Orange “	\$140,000
40 1912 Newark N. J. “	\$ 60,000
1908 Auburn, N. Y. “	\$110,000
1909 Haverstraw, N. Y. “	\$ 95,000
1910-11 Madison, N. J. “	\$110,000
1912-13-14 Schenectady, N. Y. sewers	\$330,000
and many others.	

This proposal is made without collusion or fraud, without any connection with any other person or persons making a proposal for the same work, and the names of all persons interested in it as principals are as follows:
 50

Complaint—Specifications.

Name Charles Ippolito

Address 252 Main St., Orange, N. J.

Name.....

Address.....

Name.....

Address.....

10

Signature of Bidder Charles Ippolito

Address of Bidder 252 Main St., Orange, N. J.

Dated April 19th 1916.

SPECIFICATIONS

For

CONSTRUCTION OF A SEWERAGE SYSTEM AND
DISPOSAL PLANT

20

In the

Borough of Ridgfield, Bergen County, New Jersey
Scope of Contract

The Contractor shall furnish all materials, labor, tools, and equipment, necessary properly to prosecute and fully complete the work described in these specifications or shown on accompanying drawings, including everything necessarily involved, and which can reasonably be inferred, to make the work complete, and including everything herein mentioned to be furnished or performed in the prosecution of the work.

30

The drawings herein referred to are:

1. General Plan.
2. Profiles.
3. Detail Sheet.
4. Pumping Stations.

40

ENGINEER'S SUPERVISION

Whenever the word "Engineer" is used herein it is understood to refer to the Engineer or principal of the Engineers employed by and acting under the authority of The Sewer Committee of the Borough of Ridgfield, New Jersey.

The work shall be carried on under the supervision of the Engineer, or of his properly authorized assistants and inspectors.

All work done and materials furnished shall be subject to such inspection and tests as may be deemed necessary by the Engineer,

50

Complaint—Specifications.

and all work and materials which do not conform to the requirements of the specifications will be rejected. The Engineer shall have the right to mark rejected materials in such manner as will clearly show that they are not to be used in the work.

10 The Engineer shall have the right to inspect any materials which have passed a previous inspection, should the same, in his opinion, seem to have deteriorated in quality or become damaged, and to reject for causes hereinbefore stated.

All sewer pipe, iron pipe, castings and cement, shall be inspected by the Engineer before being hauled to the work. The Contractor shall afford the Engineer sufficient, safe and proper facilities for making inspection and tests, and allow him free access to all yards, ware-houses, factories, sheds or other places where materials to be used in the work are placed or labor in connection with the work is being done.

20 The pipe laying, tile laying, brick laying, concreting, cementing, bottoming, and the first two feet of backfilling, shall be under the special supervision of the Engineer, and whenever any work of this character is done without his supervision or that of one of his authorized representatives, or whenever any improper work is done, said Engineer shall have the right to cause it to be reconstructed, relaid, recemented, uncovered, and refilled, as the case may be, at the Contractor's expense.

Contractor's Supervision and Employees

30 The Contractor shall give frequent and adequate personal supervision to the work, at the site, and shall at all times be represented on the work by a competent superintendent, who shall be satisfactory to the Engineer.

Copies of approved plans and specifications shall be kept on the work at all times.

The Contractor shall employ competent and skilled foremen and experienced mechanics and laborers, and must promptly discharge any man or men who refuse or neglect to obey the orders of the
40 Engineer, or who are considered by him to be incompetent or disorderly.

Patents and Royalties

The Contractor shall pay all royalties and license fees, and save the Borough of Ridgefield harmless from loss on account of suits or claims of any kind for infringement or patents on materials, plant, equipment or processes used in the work or in its construction, or for the use therein of patented articles or processes.

Complaint—Specifications.

Order of Procedure

The Contractor shall begin and proceed with it only where directed and approved by the Engineer, who shall have the right to decide where and at what time each part of the work shall be undertaken and continued, provided he enables the Contractor to keep his working force fully employed.

10

Alignments, Grades, Etc.

All work must be constructed in conformity with lines and grades indicated by the stakes and grade bars to be set by the direction of the Engineer.

The Contractor shall furnish all stakes and grade bars required for lines and grades on construction work, and all assistance required in driving and setting them, without extra compensation; and in case the Contractor fails to preserve them, or if they are removed or disturbed the cost of resetting them shall be charged to said Contractor.

20

The sewers will be located on the centre line of the street, wherever practicable, but the Engineer shall have the right to locate them to one side or the other of the centre line, and to change their location whenever obstructions are met with, which in his opinion, make a change of line desirable.

The line of trenches shall be indicated by stakes set at one side of the trench. A width of at least two feet on the side of trench where the stakes are placed shall be kept free from obstruction, as the work progresses.

30

The Contractor shall preserve all street monuments or survey markers which may be encountered in the excavating done by him, and they must not be disturbed or removed until the Engineer has been notified and has properly located them.

All sewers must be laid in a straight line and on a straight grade between the changes of direction and grade established by the Engineer. All pipes shall be laid true to line by plumbing down from overhead to each pipe, or by establishing a true line near the bottom of the trench, or otherwise, as may be directed by the Engineer, and the acceptance of any sewer depends, among other things, on its true position as to line and grade.

40

The Engineer shall furnish lines and grades as promptly as possible, but the Contractor shall have no redress for delays unless he shall have given twenty-four hours notice in writing to the Engineer that such lines or grades will be needed.

Protection and Precautions.

All excavations, embankments, materials, rubbish, heaps and other obstacles and encumbrances incident to the work, must be strongly

50

Complaint—Specifications.

barricaded, and their presence clearly indicated by red lights kept burning between sunset and sunrise.

10 All official regulations and ordinances relating to such precautions and safe-guards, and for the protection of persons and property, must be faithfully complied with by the Contractor, who must assume all liability in consequence of their disregard or violation by himself or his employees or agents.

At street crossings, where ordered by the Engineer suitable bridges with guard rails, for the use, convenience and safety of the public, shall be constructed and maintained by the Contractor.

20 The Contractor shall conduct his work in such manner as will afford the greatest protection to persons and property. He shall shore up, keep in position, protect, repair, replace and make good, as may be necessary, all buildings, walls, fences, bridges, tracks, poles, wires, pipes, conduits or other property injured, or liable to be injured, during the progress of the work or in consequence of its construction, and shall replace and make good all paving, surfacing, highways, sidewalks, street crossings, ditches, private roads or other property disturbed or injured during the progress of or in consequence of the construction of the work.

The Contractor shall also be held responsible for all waste of water, gas or electricity by leakage from or breakage of pipes or wires caused by or due to his acts and omissions.

30 Watchmen shall be employed upon the work at night whenever, in the opinion of the Engineer, it shall be necessary for the protection of the public.

Only suitable and safe appliances and machinery may be used in the work herein specified, and any appliance or machine which the Engineer deems to be unsafe or unsuited for the work to be performed, shall, upon his order, be removed from the work.

40 No stationary boiler shall be used, by or on behalf of the Contractor or any sub-contractor, until, unless or except as such boiler, its parts and appliances shall be in conformity with any and every State, Departmental and Municipal rule, regulation and requirement if any, applicable thereto at the place of such use, and shall have been thus or otherwise proven to the satisfaction of the Engineer to be safe, suitable and proper for such use.

50 No larger quantity of explosives may be kept in the line of the work than will be actually required for the twenty-four (24) hours work next ensuing, and such supplies must be separated as much as possible and kept in a fireproof structure and under lock, the key of which shall be only in the hands of the foreman or other equally trustworthy person. The amount of explosives kept in any one place must not exceed the limit permitted by the ordinances of the Bor-

Complaint—Specifications.

ough. Caps and exploders must not be kept in the same place with dynamite, and other explosives. During freezing, weather, special precautions must be taken as to the care and manipulation of dynamite.

In blasting every possible precaution shall be taken by the Contractor to prevent accidents or injury to persons or property, and the material to be blasted shall be carefully and properly covered with timbers or ties chained together, or with a heavily weighted rope mattress, when the blast is ignited. 10

The Contractor shall be responsible for the whole work until completed and accepted, and shall be liable for all damages or injury to persons or property resulting from blasting operations, or from neglect in properly guarding trenches or encumbrances or from any other cause connected with the prosecution of the work.

If the Engineer deems the precautions taken by the Contractor to be inadequate he may order additional protections and should the Contractor or his men neglect to put up and maintain such suitable protection as is required by these specifications, the Engineer or the authorities of the Borough of Ridgefield may immediately, and without notice to the Contractor furnish materials and put up and maintain such protection as is deemed necessary, and the cost thereof shall be paid by the Contractor. 20

All expenses incurred for protective measures herein specified, and for repairs and replacements, shall be born by the Contractor. 30

PILING OF EARTH AND MATERIALS.

The Contractor must so conduct his operations that traffic may always be maintained on the streets and driveways and that public business may be carried on without interruption.

All materials delivered for the work shall be neatly piled, and the excavated material shall be placed so as to cause the least possible inconvenience to the owners of neighboring property and to the public. Fire hydrants must be kept clear and accessible. Driveways and streets crossings must not be obstructed, and the Contractor shall provide and maintain suitable bridges, guards-rails, barricades and signs, at his own expense, where and as directed by the Engineer. 40

Material shall not be distributed nor piled along the line of the work in excess of such quantities as are needed to avoid delaying the work in which they are to be used.

* * * *

Complaint—Specifications.

Construction in Excavation.

No water shall be allowed in or around the sewers or other work constructed until the cement in the joints, masonry or concrete is properly set; and no pipe, masonry or concrete shall be laid in water, nor joints made under water, except by and with written permission of the Engineer and under his direction.

Where required by the Engineer the Contractor shall excavate in advance of the completed sewer and lead the water into sumps by means of narrow channels at one side of the trench, these channels, and sumps to be refilled with sand or gravel as the sewer construction advances.

Where pumping is done from sumps in the bottom of the trench, the Contractor must use great care to avoid undermining or weakening the sewer or appurtenances.

In quicksand and other soft or shifting bottom, and in all trenches from the bottom of which water cannot be kept down, or when water enters or stands in the bellholes of sewers, such additional means for the proper performance of the work shall be used as may be required by the Engineer, and all these requirements shall be fulfilled by the Contractor without extra compensation.

The Contractor must take effective precautions to prevent sand, rubbish or other substances from entering the sewer or underdrains. He must keep the trenches clear of water at all times, and shall, at his own expense, provide and operate all pumping machinery and other appliances necessary for that purpose, and when a trench is left for the night, or work is stopped by storms, or on leaving the work for any reason, the ends of the sewers and underdrains must be closed with plugs properly caulked and cemented. When removing caps from branches to make connections, great care must be taken to prevent the entrance of earth, mortar, rubbish, etc., into the sewers or underdrains.

Where ordered by the Engineer the sewer or masonry shall be laid on and supported in concrete, or on a wooden flooring, in such manner and position as the Engineer shall specify. When so ordered said concrete or flooring will be paid for at the contract price established therefor. No payment will be made, as an extra, for forms used for concrete unless the Engineer orders said form left in place.

All pipes and tiles shall be graded by measurement with a rod from an overhead line set parallel to the grade of the sewer by the Engineer. The Contractor shall furnish measuring rods for this purpose. The bottom of each rod shall be fitted with an angle iron long enough to rest on the interior bottom of the pipe when the rod is held plumb. The Contractor shall also provide grade lines of fine strong material (braided fish-line) which must be kept at all times

Complaint—Specifications.

taut enough to prevent any sagging when stretched between the grade bars.

The settlement or injury of any sewer, underdrain or masonry, by reason of insufficient support, improper backfilling, settlement of backfilling, or from any other cause, must be rectified by the Contractor at his own expense.

10

Settling Tank.

The Contractor shall clear an area sixty feet (60) ft. in diameter on the site of the tank, removing all turf, peat, or other material down to the clean sand. The material excavated shall be so placed that it will be kept free from refuse of the trimmings of the site, so that it may be used for banking ground around the tank after its completion.

This having been done a double circle of piles of good, sound oak, spruce or other timber cut from live trees, free from all defects, shall be driven. The inner circle to support the lower walls of the tank; the outer circle to support the upper section of the tank as shown on the drawings. These piles shall not be less than seven inches (7 inches) at the small end and not less than ten inches (10 in.) at the butt and shall be driven with a hammer not less than two thousand pounds (2000 lbs.) in weight, the heads properly protected by rings to prevent splitting, and driven until the piles does not lower more than three inches (3 in.) under three (3) blows of the hammer falling ten (10 ft.). These piles having been driven the work of excavating shall be begun and when this has reached the proper depth, piles are to be sawed off at the proper elevation and upon them are to be built the forms for the concrete work. All forms are to be built in a substantial manner and of timber of such strength as to prevent any bulging after the placing of the concrete. They shall be set perfectly true to the lines and dimensions shown on the plans and all concrete so formed shall be smooth and uniform without any irregularities and conforming exactly with the shapes and dimensions on the plans.

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During the excavation the Contractor shall employ necessary pumps or other means for keeping the excavations free from water at all times where concrete work is being done and until it is thoroughly set.

40

The reinforcement shall be bars of mild, open hearth steel having a tensil strength of 52,000 to 60,000 pounds per sq. in. before deformation, with elastic limit of not less than half the ultimate strength and show an elongation of 25% in eight inches (8 in.). They shall be deformed, by twisting, corrugating or other means satisfactory to the Engineer, shall be uniform as to deformation from end to end and such deformed bars shall show an increase in elastic limit of at least

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Complaint—Specifications.

50 per cent. and in ultimate strength of 25 per cent. above the strength obtained prior to deformation.

10 The reinforcement shall be placed in the forms exactly as shown on the drawings and the Contractor shall employ suitable means to prevent any displacement of the reinforcement when the concrete is placed in the forms. When the forms are placed for the vertical wall for the upper section of the tank they shall rest upon the outer circle of piles which are to be cut off at the proper elevation. The concrete forming all parts of the tank shall be composed of one (1) part cement, two (2) parts clean sharp sand, four (4) parts broken stone, each particle to be of such size as will pass in any direction through a two inch (2 in.) ring and not less than one quarter inch (one-fourth) inch in any dimension. Concrete must be thoroughly mixed by not less than four (4) turnings and until thoroughly homogeneous, immediately put in place in layers of not over six (6) inches and immediately and thoroughly tamped until the water in it flushes to the surface. The concrete composing the upper vertical wall of the tank and forming the surrounding channel, the inlet channel and the circular distributing channel in the center of the tank shall be placed within forms of plain matched lumber.

20 The apron or comb separating the tanks, also the inner surface of the main wall of the upper portion of the tank shall be finished particularly smooth and uniform. The surface of the concrete composing the lower chamber, including the bottom of the tank and the under side of the apron to the top of same shall be painted or coated after the concrete has become sufficiently hard and dry as determined by the Engineer with three (3) coats of an approved bituminous coating equal to and similar to the American Asphalt Rubber Companies' Pioneer Mineral Rubber Coating for Concrete, each coat being allowed to set and harden before the next is applied. The Contractor shall furnish and set all cast iron pipes, i-beams, channels, platforms, baffles, scum boards and other appurtenances as shown on the drawings and to be included in his price for the work. He shall also provide and place a two inch (2) lead pipe around the inside of the tank in the lower chamber as shown on the drawings, the thickness of metal being not less than one-quarter inch (1-4) with holes one-eighth inch (1-8) in diameter, drilled in a horizontal diameter of the pipe toward the center of the tank and separated about eight inches (8 in.) apart. He shall also make the necessary water connections for the use of this pipe.

40 The sludge pipe from the tank to the sludge-drying bed shall be 8 in. cast iron pipe the same as specified under "IRON PIPE SEWERS."

Complaint—Specifications.

Sludge-Drying Beds.

The Contractor shall remove all grass and vegetation from the surface at the location of the bed. Upon the cleaned surface shall be spread clean steam boiler clinkers or cinders which shall be sprinkled with water and tamped and rammed thoroughly solid and firm and true to the lines and grades as shown and marked on the plans. The surrounding embankments shall be brought up in layers about nine (9 in.) inches in thickness each sprinkled and rammed.

10

Upon the Cinders prepared a clay bed shall be formed composed of four (4) parts selected approved clay to one (1) part fine, clean sharp sand. The clay and sand shall be tampered or worked and thoroughly mixed in a suitable box with the proper amount of water to the consistency of mortar, entirely free from lumps or any irregularities of material before placed on the cinder bed. When placed on the cinder bed the clay shall be tamped, puddled and screened to a solid compact mass and graded as shown. After the bed has dried out sufficiently the surface shall be sprinkled and rolled with a light roller until thoroughly compact and smooth and true in lines and grades.

20

Four inch (4 in.) vitrified tile pipe in two foot (2 ft.) lengths shall be laid on the clay bed as shown on the plans. Strips of cheese cloth or light muslin about six inches (6 in.) wide shall be placed around the joints and the upper ends of the lines be securely closed with cement mortar or other approved stopper.

The six inch (6 in.) drain pipe shall have the necessary number of T-branches to connect the four inch (4 in.) lateral lines. Upon the clay bed and tile shall be placed a six inch (6 in.) layer of broken stone ranging in size from one inch (1 in.) to two and one-half inches (2½ ins.). Upon this shall be placed a six inch (6 in.) layer of broken stone ranging in size from one-quarter inch (¼ in.) to one inch (1 in.); upon this shall be placed a one and one-half inch (1½ in.) layer of broken stone from one-sixteenth inch (1-16 in.) to one-quarter inch (¼ in.) in size, and upon this a finishing layer of mortar sand two inches (2 in.) thick. The latter shall be thoroughly screened and washed and only clean sound material, free from dust and dirt shall be used in forming the bed.

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The six inch (6 in.) outlet drain passing through the side or bank of the bed shall be hub and spigot vitrified pipe and joints made with cement mortar as specified for sewers as far as the outer edge of the bed, and from this point to its connection with the outfall sewer or effluent pipe leading to Overpeck Creek, it shall be cast iron same as specified under "IRON PIPE FOR SEWERS."

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Complaint—Contract.

Outlet Pipe From Settling Tank.

10 Furnish and lay the outlet pipe from the settling tank to the point of outlet shown on general plan, a total length of approximately 360 feet of 20 in. cast iron pipe to be in all respects as specified under "IRON PIPE SEWERS," pipe to have continuous fall to outlet and be supported by such piling and platform, masonry, concrete or other means as may be necessary to hold the entire line in a permanently unyielding and immovable position, said means of support to be such as will meet the requirements and approval of the Engineer. That part of the line across land unwatered at low tide shall be laid in a trench at least 2½ feet deep. That point of the line in Overpeck Creek to be placed so that the top of the pipe at all points is below the bed of the Creek.

20

Miscellaneous.

Although the Engineer may assent to special means for prosecuting the work in difficult cases, this shall not relieve the Contractor of responsibility as to the result.

30 In making the final estimate of work the horizontal length of the sewer shall be used, without regard to the grade on which it is laid, and no deduction will be made for space occupied by Y-branches, lamp-holes or manholes, and it is understood that the price bid for each of these items is a price over and above the price bid for straight sewer. At flush-tanks the sewer measurements will terminate at the center of the adjoining lamp-hole.

The Contractor must provide suitable conveniences for the use of the men employed on the work, and shall not allow the same to become nuisances.

CONTRACT

40 THIS AGREEMENT, between the BOROUGH OF RIDGEFIELD, Bergen County, New Jersey, a municipal corporation by the MAYOR AND COUNCIL thereof, hereinafter called the Borough, and Charles Ippolito, of Orange, New Jersey, hereinafter called the contractor.

WITNESSETH, that the contractor agrees:

50 1. To construct the sewage disposal plant in the Borough of Ridgefield, in strict compliance with the accompanying drawings and specifications, which together with the notice to bidders and the contractor's proposal, are to be construed as part of this contract. The drawings referred to are: Of the Sewerage System, General Plan, Profiles and Detail Sheet; of the Sewage Disposal Plant, Details of Settling Tank and Details of Sludge Drying Bed.

Complaint—Contract.

2. Not to sublet or assign this contract, nor any rights, claims nor payments thereunder, without the written consent of the Borough.

And the Borough agrees:

1. To pay to the Contractor in current funds, in the manner and at the times stated in the specifications and notice to bidders, the prices stated in the bid submitted by the contractor, provided however that should any portion of the work done under the contract require repairs prior to the expiration of three (3) months from the date of the final approval of the completed work, and the contractor fail, neglect or refuse to repair the same within ten (10) days after date of written notice from the Mayor and Council, the Mayor and Council may have work done and deduct the cost of same from the retained percentage and provided further that the making of any payment on account, shall not be deemed an acceptance of any part of the work.

It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the Engineer and is to be subject to the inspection at all times of the said Engineer and the Mayor and Council, and that as to the true construction and meaning of the plans, details and specifications, the decision of the Engineer when approved by the Mayor and Council shall be final, and also that any additional drawings and explanations necessary to detail and illustrate the work to be done, are to be furnished by the Engineer and that the Contractor does agree to conform to and abide by the same, so far as they are consistent with the purpose and intent of the original drawings and specifications.

Should the Contractor refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Borough shall be at liberty, after three days notice in writing to the Contractor, to provide any such labor and materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor.

This contract shall bind the contractor and the Borough, and their respective successors, heirs, executors, administrators, and assigns.

IN WITNESS WHEREOF, this agreement is executed this 16th day of May, 1916, by the BOROUGH OF RIDGEFIELD.

by CHARLES ENGLEHARDT

Mayor.

Attest:

CHAS. B. WILSON
Borough Clerk.

And by the contractor

CHAS. IPPOLITO

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Answer.

Answer.

Filed October 10, 191—

BERGEN COUNTY CIRCUIT COURT.

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CHARLES IPPOLITO,

Plaintiff,

vs.

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY, a municipal corporation,

Defendant.

Action at Law.

Answer.

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The defendant, Borough of Ridgefield, a municipal corporation situate in Bergen County, New Jersey, says—

ANSWER TO FIRST COUNT.

1. Defendant admits the first and second paragraphs.
2. Defendant denies the third and fourth paragraphs.
3. Defendant admits that it has paid plaintiff \$5231.59 on account of the original contract price as alleged in paragraph five, and denies the remaining allegations of said paragraph.
4. Defendant denies the sixth paragraph.

30

FIRST DEFENSE TO FIRST COUNT.

1. Defendant will object that under the facts alleged in the first count, plaintiff cannot recover the fair value of the work, labor and materials alleged to have been furnished by him, but that plaintiff's damages, if any, are limited to such a proportion of the entire price fixed by his contract with defendant, as the fair cost of the work done by plaintiff bears to the fair cost of the whole work, and in respect to the work not done, such profits as the plaintiff would have realized by doing it.

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SECOND DEFENSE TO FIRST COUNT.

1. Defendant will object that plaintiff cannot recover anything on the facts alleged in the first count, because compliance with the following condition of the contract is not alleged:

“The contractor will be paid, on or before the tenth day of each month, 85 per cent. of the value of work done in the preceding calendar month as estimated and certified to the Mayor and Council by the engineer. Of the remaining 15 per cent. one-half will be paid

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Answer.

three months and one-half six months, after the date of the final approval of the completed work by the Mayor and Council.”

ANSWER TO SECOND COUNT.

1. Defendant repeats its answer as above to paragraphs one, two, three and four of the first count, which paragraphs are repeated by plaintiff as paragraph one of the second count. 10

2. Defendant admits that on October 25th, 1916 and February 14th, 1917, defendant by resolution of its Mayor and Borough Council, with the approval of the Borough Engineer, directed the construction of certain work in the said sewage disposal plant for which no unit prices were provided in plaintiff's bid, proposal, or contract, as alleged in paragraph two, and denies the remaining allegations of said paragraph. 20

3. Defendant denies the third paragraph.

4. Defendant admits that it has paid plaintiff \$7851.78 on account of the increase of the original contract price by reason of the afore-said resolution, as alleged in paragraph four, and denies the remaining allegations of paragraph four.

ANSWER TO THIRD COUNT.

1. Defendant repeats its answer as above to paragraphs one, two, three and four of the first count, which paragraphs are repeated by plaintiff as paragraph one of the third count. 30

2. Defendant admits the second paragraph.

3. Defendant admits paragraph three.

ANSWER TO FOURTH COUNT.

1. Defendant repeats its answer as above to paragraphs one, two, three and four of the first count, which paragraphs are repeated by plaintiff as paragraph one of the fourth count.

2. Defendant denies that the value of the materials mentioned in paragraph two is \$2020.87 and admits the remaining allegations of said paragraph. 40

ANSWER TO FIFTH COUNT.

1. Defendant repeats its answer as above to paragraphs one, two, three and four of the first count, which paragraphs are repeated by plaintiff as paragraph one of the fifth count.

2. Defendant denies the second, third and fourth paragraphs. 50

Reply.

ANSWER TO SIXTH COUNT.

1. Defendant repeats its answer as above to paragraphs one, two, three and four of the first count, which paragraphs are repeated by plaintiff as paragraph one of the sixth count.

10 2. Defendant denies the second, third and fourth paragraphs.

As a first defense to the SECOND, THIRD, FOURTH, FIFTH and SIXTH counts, defendant will object that plaintiff cannot recover anything on the facts alleged in the second, third, fourth, fifth and sixth counts, because compliance with the following condition of the contract is not alleged:

20 "The contractor will be paid, on or before the tenth day of each month, 85 per cent. of the value of work done in the preceding calendar month as estimated and certified to the Mayor and Council by the engineer. Of the remaining 15 per cent., one-half will be paid three months and one-half six months after the date of the final approval of the completed work by the Mayor and Council."

WM. J. MORRISON, JR.,
Attorney for Defendant.

Reply.

Filed October 29, 1917.

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BERGEN COUNTY CIRCUIT COURT.

CHARLES IPPOLITO,

and

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY,

Plaintiff,

Defendant.

Action at Law.

Reply.

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The plaintiff replies to the answer of the defendant, as follows:

Under First Count:—

1. Plaintiff says that under the law the defendant has not correctly stated the rule for the measure of damages in its first defense to first count but that the true rule is as stated in the plaintiff's complaint.

50 2. Plaintiff says replying to defendant's second defense to first count (a) that the duty of presenting certificate to the Mayor and

Reply.

Council was on the defendant and not on the plaintiff; (b) that the estimate or certificate referred to had reference to payment to the contractor for the work proposed in accordance with the contract and had no reference to payment to the contractor for work done when he was prevented by the defendant from completing the work the contract called for in this case; (c) that if the work done was not estimated or certified to the Mayor and Council by the Engineer on or before the tenth day of the month or at any time before plaintiff began this suit, the failure to so estimate and certify was the fault of the defendant or its agents or servants and that the right of the plaintiff to recover was not affected in any way whatsoever by such failure; (d) the payments of 85% and 15% at the times referred to as quoted from the contract are not applicable to the plaintiff's demand herein and refer to monthly payments and final payments where the work progressed to completion but not where the plaintiff was prevented from doing the work as in this case; (e) if the defendant had in its possession at any time prior to the commencement of this suit an estimate or certificate of its engineer alleging the sum due to the plaintiff less than the plaintiff's demand, the plaintiff is not bound by such estimate or certificate; (f) the defendant dispensed with such estimate or certificate and made it impossible for either the plaintiff or defendant to secure the same by having no engineer to make such estimate or certificate and by failing to appoint any for that purpose; (g) if such certificate were necessary (which plaintiff denies) the defendant waived its right to same.

FURTHER REPLY.

In reply to the defendant's defense to the second, third, fourth, fifth and sixth counts of the plaintiff's complaint, plaintiff repeats his reply as above fully stated in his reply to second defense to first count, which reply is here repeated by plaintiff.

HOWE & DAVIS,
Attorneys for Plaintiff.

Amendment to Answer.

Amendment to Answer.

Filed March 10, 1919.

BERGEN COUNTY CIRCUIT COURT.

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CHARLES IPPOLITO,

vs.

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY,

Plaintiff,

Defendant.

Action at Law.

Amendment
to Answer.

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By leave of the Court the defendant amends its answer by adding thereto the following defenses:

DEFENSES TO THE FIRST AND SECOND COUNTS.

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Defendant will object that the contract mentioned in paragraph two of first count, a copy of which is annexed to and made a part of the complaint, and the resolutions mentioned in paragraph two of the second count are *ultra vires* the defendant, in that there was no common standard in said contract for the competitive bidding on the work, because said contract provided that any or all work required on the construction of the sewage disposal plant for which unit prices were not provided therein, should be done and paid for at actual cost of the materials and labor used in its construction plus fifteen per cent.

SECOND DEFENSE TO THE SECOND, THIRD, FOURTH, FIFTH AND
SIXTH COUNTS.

The defendant will object that the contracts, express or implied, on which these counts are based, are *ultra vires* the defendant because in violation of Chapter 342 of the Law of 1912, P. L. p. 593.

40

WM. J. MORRISON, JR.,
Attorney for Defendant.

Reply to Amendment to Answer.

Reply to Amendment to Answer.

Filed March 14, 1919.

BERGEN COUNTY CIRCUIT COURT.

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CHARLES IPPOLITO,

vs.

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY, *et al.*,

Plaintiff,

Defendants.

Action at Law.

*Reply to
Amendment
to Answer of
Defendant.*

Plaintiff replying to amendment to answer of defendant, says: 20

1. Plaintiff denies the defenses to first and second counts, as stated, in defendant's amendment to answer.

2. Plaintiff denies the second defenses to the second, third, fourth, fifth and sixth counts, as stated in defendants amendment to answer.

HOWE & DAVIS,
Attorneys for Plaintiff.

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Charles B. Wilson, direct.

BERGEN CIRCUIT COURT.

CHARLES IPPOLITO,

Plaintiff,

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against

BOROUGH OF RIDGEFIELD,

Defendant.

Before

HON. WILLARD W. CUTLER,
Judge, and a Jury.

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Hackensack, N. J., April 2nd, 1919, 10 A. M.

Appearances:

MESSRS. HOWE & DAVIS (by Mr. Davis), for the plaintiff.

WILLIAM J. MORRISON, JR., for the defendant.

A jury was duly empaneled and sworn.

Mr. Davis opened the case to the jury for the plaintiff.

Mr. Morrison opened the case to the jury for the defendant.

30 CHARLES B. WILSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Davis.

Q Mr. Wilson, do you hold any official position in the Borough of Ridgefield? A Yes, sir; the position of borough clerk.

Q And how long have you held that position? A Twenty-two years.

Q You were holding it in 1916? A I was.

40 Q And as the clerk, have you the possession of all the town's papers? A Yes, sir.

Q The minute books? A Yes, sir.

Q And the contracts? A Yes, sir.

Q Will you produce, Mr. Wilson, please, the minute books for 1916 and 1917? Do you produce them? A I do.

(Books produced.)

Q The 1916 book is designated in what way? A By number, I presume.

The Court. Number what?

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The Witness. Number seven, your Honor.

Charles B. Wilson, direct.

Q The 1916 book is designated in what manner, Mr. Wilson; what number is it?

Mr. Morrison. I think it runs in two books. There is 1916 in No. 7, and it would run into No. 8.

Q And the 1917 minute book, is that all in number eight? A 10
Yes, sir; that runs to December 26th, 1917. That would be all in there (indicating).

Mr. Davis. I offer in evidence, if your Honor please, minute books numbers 7 and 8 of the borough.

Mr. Morrison. Now, if the Court please, I suppose we do not want those books in this record, entire.

Mr. Davis. I offer them in evidence for the purpose of reading extracts from them. I offer in evidence those portions of the minute book that relate to this Ridgefield sewer matter. I think Mr. Morrison and I can agree on that. 20

The Court. Then suppose you do that. You offer such portions of them as you want. You offer the books as a whole, but you want to refer to such portions as are relevant.

Mr. Davis. I don't suppose there is any need of having them marked?

The Court. No, it is a public record.

Mr. Davis. Shall we designate Minute Book No. 7 as Exhibit P. 1? 30

(Minute Book No. 7 was received in evidence and considered marked P. 1.)

(Minute Book No. 8 was received in evidence and considered marked P. 2.)

Mr. Davis. I would like to get on the record, as it will save time—it is admitted by counsel—that the contract which I will now refer to for \$10,300, between the Borough of Ridgefield and Charles Ippolito, was awarded by the governing body after bids for the same were advertised for and proposals received by the council. 40

Mr. Morrison. Yes.

The Court. Admitted.

By Mr. Davis.

Q Mr. Wilson, have you with you a contract between Charles Ippolito and the Borough of Ridgefield? I show you a printed book. Is that the original contract? A Yes, sir.

Mr. Davis. I offer in evidence a document marked "Original contract, Borough of Ridgefield with Charles Ippolito, 50

Charles B. Wilson, direct.

Sewerage System"—well, the only part of that refers to our case is headed, "Disposal Plant, Notice to Bidders, Specifications, Contract and Bond."

10 *Mr. Morrison.* I object to the admission of this book in evidence, on the grounds stated in the amended answer which was admitted a few days ago, that this book is not binding, being a contract with the Mayor and Council did not have the power to make in the form in which they attempted to make it.

The Court. Well, wouldn't it be competent evidence—would it be the question of the effect of it?

Mr. Morrison. They cannot properly offer in evidence anything which isn't evidential.

The Court. Now, why isn't it proper?

20 *Mr. Morrison.* The reason it is not proper is the reason set forth in our answer, the first of the reasons which were put in, that the Mayor and Council attempted to make a contract which was beyond their powers, that this contract is not a valid contract.

The Court. Why do you say they didn't have the power?

30 *Mr. Morrison.* The reason I say that is that the contract contains a provision which destroys the competitive bidding feature to secure the lowest responsible bidder, which the statute requires. The contract provided for a competitive bidding on certain work, a sewage disposal plant, and contained another provision which destroyed the competitive feature, whereby they could go on and order, as they did go on and order, and Mr. Ippolito is now attempting to recover additional work at cost plus a certain percentage. Now, the feature of cost, plus a certain percentage, is not in compliance with our statute, which requires municipal contracts, in excess of \$500, to be let on competitive bids. There is no competition there, and a large part of the work which Mr. Ippolito has done is based on that non-competitive feature of the contract.

40 I call your Honor's attention to the case of *Browning versus the Freeholders of Bergen County*, where that situation arose, and where the Court of Errors and Appeals decided that the competitive feature was destroyed in that case, and the contract was a void one. Now, I contend that this contract is not binding on the borough as a municipality, and is therefore not evidential and should not be admitted.

The Court. Would it be binding so far as the work that they are authorized to have done?

50 *Mr. Morrison.* It seems to me, your Honor, it either stands or falls as a whole.

Charles B. Wilson, direct.

The Court. You had better get that case you spoke about.

Mr. Morrison. I will get all the cases, if your Honor will excuse me for a moment. This is the case of *Browning against* the Freeholders of Bergen County, 79 New Jersey Law, 494, the second paragraph of the syllabus is one which I think affects this situation.

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(Book handed Court.)

(Discussion.)

The Court. Now, Judge Davis, I will hear what you have to say.

Mr. Davis. If your Honor please, in this bridge case—

The Court. That is where reported?

Mr. Davis. It is 79 Law, 494. It seems to me that the bridge case is not in point at all. In that case the provisions were very similar, so far as the contract was concerned. The provisions of that contract were very similar to the provisions of this contract, and what they did there was to get lump sum bids, just as they did here, but in that case, after getting the lump sum bids, then the engineer—the county engineer took the bids, estimated what things were going to be done, and what were going to be left out, and what were going to be added, and then on the computation made by him in that way, before the contracts were awarded at all, a resolution was passed by the Board of Freeholders, awarding the contract to the person who was found to be the lowest, according to these computations made by the engineer. The Court held that the lowest bidder should have gotten the contract, and that the lowest bidder was the man who put in the lowest lump sum bid.

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(Discussion.)

The Court. I shall admit this evidence—this contract.

Mr. Morrison. Your Honor will allow me an exception?

The Court. Yes, take an exception. That will raise the question.

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Received in evidence and considered marked P. 3.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Have you, Mr. Wilson, the certificates of the engineer for payments made under this contract to Mr. Ippolito?

Mr. Morrison. I have them here.

(Papers produced.)

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Charles B. Wilson, direct.

Mr. Davis. They are not numbered.

Mr. Morrison. They are not numbered. They are lettered from A to L.

10 *Mr. Davis.* I offer in evidence engineer's estimate and certificate, dated September 1, 1916, addressed to the—may I read one into the record? I think they are in practically the same form.

The Court. I think it would be well to read one into the record.

20 *Mr. Davis.* (Reading.) "Engineer's Estimate and Certificate No.———, September 1, 1916. To the Mayor and Council of the Borough of Ridgefield. Gentlemen: Attached hereto is my estimate of the value of the work done prior to the 1st of September, 1916, by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield, for the construction of a sewage disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

"Total value of work to the 1st of September, 1916, \$3000.00, 85% thereof, \$2550.00; less payments heretofore made to contractor———. Amount for which payment should now be made, \$2550.00. Charles F. Blood, C. E., borough engineer in charge of work under aforesaid contract. Itemized estimate attached."

30 Second page. "September 1, 1916. Money allowed Charles Ippolito on construction of sewage disposal plant, September 1st, \$3000.00; less 15%, \$450.00," carried out "\$2550.00. Charles F. Blood, engineer in charge."

40 Attached thereto resolution for said payment to Charles Ippolito: "Whereas, the value of the work done prior to the 1st of September, 1916, by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield, has been estimated at \$3000.00, and said estimate has been certified as correct by Charles F. Blood, borough engineer in charge of said work, and

"Whereas 85% thereof is \$2550.00, and no payment has heretofore been made on account thereof,

"Now therefore, be it resolved, that a warrant be drawn for \$2550.00 to the order of Charles Ippolito."

The Court. What is the date of that resolution?

Mr. Davis. There is no date. That was passed, according to Mr. Morrison's statement—

50 *Mr. Morrison.* September 6, 1916.

Charles B. Wilson, direct.

The Court. Is it admitted that was passed at that time?

Mr. Davis. I take it that is so.

Mr. Morrison. If the Court please, I object to the offer of all of these certificates. As to certificates A and B, there isn't any objection made other than the objection which your Honor has refused to sustain to the contract as a whole. Certificate C relates to the extra work on the order only by the borough engineer. We object to that as an attempt to put into evidence something which is immaterial because the Borough wasn't obligated by the engineer's orders, and as to certificates D, E and F, they are certificates relating to the work done under the cost plus basis, and we contend that those are immaterial because the Borough couldn't be obligated by work done in that way.

10

Mr. Davis. Well, I was putting them in one at a time.

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The Court. I will admit the one you have just offered. Exhibit P. 4.

Mr. Davis. The second estimate is marked "B," and this is the estimate of October 1st, 1916, showing total \$4500; 15% held back, \$675.00; that is \$3825.00; amount paid to date, \$2500.00, and amount due—I suppose that is the amount of this estimate—\$1275.00.

I offer that in evidence.

Exhibit P. 5.

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The Court. That would be October 4th?

Mr. Davis. That would be October 1st. I offer also in evidence the resolution passed October 4th, 1916, directing the payment of \$1275.00 on that estimate.

Exhibit P. 6.

Mr. Davis. The third estimate up to November 1st—I think there are some items here Mr. Morrison wants to object to. I will read it. "Estimate of work under original contract to November 1st, \$6154.81. Estimate of extra work on sludge bed, as per Order No. 1, \$1846.80, less refund as per Order No. 1, \$267.50." Carried out "\$1579.30. Extra work on Imhof tank as per Order No. 2, \$264.89. total———, less 15%, \$1199.85, amount paid to date \$3825.00; amount due \$2974.15." With resolution of November 3rd, 1916, ordering the third payment of \$2974.15.

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Mr. Morrison. Now, if the Court please, as to that certificate, the defendant objects in part. But \$1406.59 of that applies to the contract as originally let. As to that we simply

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Charles B. Wilson, direct.

10 renew the objection which your Honor has already ruled on. The balance of that \$1567.56 is for work which was done on order or orders given by the engineer, and we object. The borough as a municipality is not bound by an order given by the borough engineer without any formal action by the Mayor and Council, and that therefore that part of the certificate is immaterial in this case.

The Court. How would that be competent at the present time, Mr. Davis?

Mr. Davis. We expect of course to couple it up with the order of the engineer, and then the revocation of the order by the Council.

20 *The Court.* Well, is it proper to offer it now unless you do that? Mark it for identification.

Mr. Davis. May I submit to the Court that this, on the face of it, was ratified, no matter whether the Council had previously, by resolution, authorized the making of this change, or whether the engineer has made it.

The Court. You haven't even got the ratification in yet.

Mr. Davis. Yes, sir, I said the resolution ordered the payment of \$274.15, which included the extra work on the sludge bed, as per Order No. 1, was passed on the 3rd of November, 1916.

30 *The Court.* You offered that resolution?

Mr. Davis. Yes, sir.

The Court. I allowed it to come in subject to that extra work being shown, what it was, later on.

Mr. Davis. Yes, sir.

Juror No. 8. May I ask a question right here?

The Court. Yes.

40 *Juror No. 8.* I would like to know if we will be told what the total is,—the whole total when we are through?

Mr. Davis. The whole total claim is around \$13,000.00—nearer to \$13,500. I offer the estimate of extra work—the heading is, “Estimate of extra work completed, by Charles Ippolito, on foundation for Imhof tank, Borough of Ridgefield, November 1st to November 30th, 1916, a total of \$1953.99, plus 15%, \$293.10, making a total of \$2247.09,” and the resolution of December 5th, 1916, ordering the payment of that \$2247.09.

50 *Mr. Morrison.* If the Court please, the defendant objects to the admission of these papers marked D on the ground that

Charles B. Wilson, direct.

this work was done on the cost plus basis, and exceeds \$500 in value, and therefore these papers are immaterial.

The Court. I will admit them subject to your objection.

(P. 7.)

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Mr. Davis. I offer engineer's estimate and certificate marked No. 5, dated January 1st, total value of work to the 1st of January, 1917, \$13,389.84; 85% thereof, \$11,381.36; less payments heretofore made to contractor, \$9,046.24. Amount for which payment should now be made \$2335.12; with resolution of January 5th, ordering the payment of \$2335.12.

Mr. Morrison. I make the same objection to this offer. 20

The Court. Yes, your objection will be noted.

Mr. Morrison. Exception.

(P. 8.)

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Davis. Engineer's estimate and certificate dated February 1st, 1917, No. 6. Total value of work to the 1st of February, 1917, \$17,236.39. 85% thereof, \$13,650.93. Less payments heretofore made to contractor, \$11,381.36. Amount for which payment should not be made, \$3269.57; and also resolution of February 5th, 1917, ordering the payment of \$3269.57. 30

Mr. Morrison. The defendant makes the same objection.

The Court. Overruled.

Mr. Morrison. Exception.

(P. 9.)

Defendant's counsel prays an exception to this ruling of the Court. 40

Exception noted as ground of appeal.

Mr. Davis. Estimate of March 1st, 1917. Total value of work to the 1st of March, 1917, \$19,714.85. 85% thereof, \$16,757.62. Less payments heretofore made to contractor, \$14,659.93, and amounts for which payment should now be made \$2106.69, and the resolution of the 7th of March, 1917, laying on the table—passed by the Council, laying on the table this claim for February work.

The Court. What is the amount of that claim? 50

Charles B. Wilson, direct.

Mr. Davis. \$2106.69.

Mr. Morrison. The defendant makes the same objection.

10 *The Court.* Now, I think that ought to be marked for identification. I don't think that ought to be offered in evidence as it stands now, because it wasn't ratified by the Council. Objection sustained this time.

Mr. Davis. Then I ask it be marked for identification.

The Court. Yes, it may be marked for identification.

(Marked P. 10 for identification.)

20 *Mr. Davis.* Estimate of April 1st, 1917, total value of work to March 18th, 1917, \$20,849.83. 85% thereof, \$17,722.35; less payments heretofore made to contractor, \$16,757.62. Amount for which payment should now be made \$964.73. Signed by the engineer, with itemized statement attached, and there doesn't seem to be any action taken on it.

Mr. Morrison. The defendant makes the same objection to any offer.

The Court. Yes, objection sustained at this time.

Mr. Davis. I offer it for identification.

The Court. Yes.

(Marked P. 11 for identification.)

30 *Mr. Davis.* Now, I offer in evidence a bundle of vouchers, in number six, and numbered 2164, 2240, 2282, 2313, 2400 and 2424 of the Borough of Ridgefield to Charles Ippolito, all for account of improvements in pursuance of certain resolutions that are marked on the voucher. Had they better go in as a whole?

The Court. I think so.

(Six papers received in evidence and marked as one exhibit, P. 12.)

40 *Juror No. 6.* Do those vouchers represent receipts for those payments?

The Court. They are checks for those payments. They are hardly the receipts. They are the payments themselves. You may read one.

50 *Mr. Davis.* I will read one. I will take the first one, No. 2550, Borough of Ridgefield, N. J., September 8th, 1916. Commercial Trust Company of Jersey City, Green Street Branch. Pay to the order of Charles Ippolito—underneath it "When countersigned by the collector \$2550, for account improvements, voucher No. —, resolution 9/6/16. Attest, Charles B. Wilson, and endorsed Charles Ippolito.

Charles B. Wilson, direct.

Juror No. 6. Could I ask one more question?

The Court. Yes.

Juror No. 6. Do any of those represent any of these contested payments—that is, the cost plus payments?

Mr. Davis. Yes. Now, I think I had better read from the minute books the part that is pertinent at the present time. 10

The Court. Very well, read it.

Mr. Davis. I take it that it isn't necessary to read the portions relating to the awarding of the bids at all.

The Court. That is admitted.

Mr. Davis. Page 73, I am reading from Minute Book No. 8, page 73, beginning at the bottom of page 72, of Minute Book No. 8, and the minutes of the meeting of October 25th, 1917, of the Mayor and Council— 20

Mr. Morrison. 1916.

Mr. Davis. (Reading.) “Whereas, Charles F. Blood, borough engineer in charge of the construction of the sewage disposal plant, under contract heretofore made by and between the Borough of Ridgefield and Charles Ippolito, as reported to the Mayor and Council that certain work is required in the construction of said sewage disposal plant, for which work no unit prices were provided for in the bid or proposal made by said Charles Ippolito. 30

“Therefore be it resolved that the said Charles Ippolito be and hereby is authorized and required to perform the work shown and described in the drawings and specifications for the said work, to be prepared by the borough engineer, and to be approved by the Mayor, and that he be paid for said work in accordance with the provisions of his proposal, which said proposal was made a part of the said contract with the borough, provided, however, that no charge in excess of \$10,258.75 shall be made or incurred without first obtaining the approval of the Mayor and Council. 40

“Resolved that a copy of this resolution and of said drawings and specifications be delivered by the borough engineer to said Charles Ippolito.”

Mr. Morrison. If the Court please, the defendant objects to that being admitted in evidence in this case, because it is immaterial, the borough, as a municipality, not being bound by the action they pretended to take.

The Court. You may note your objection. I am going to admit that. 50

Charles B. Wilson, direct.

Mr. Morrison. May I have an exception running to that line of testimony so that it will not be necessary for me to object each time?

The Court. Yes, you may take a general exception to all this line of testimony.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Davis. Minute Book No. 8, page 77 of the minutes of November 3rd, 1916. "The borough engineer presented the following for endorsement by the Council and approval of the Mayor: To Charles Ippolito, contractor, 252 Main street, Orange, New Jersey. Dear Sir: In regard to my interpretation of paragraph 2, page 4, of the specifications for the construction of the sewage disposal plant, and in regard to which there seems to be some , is that you are to receive the actual cost of the following: Labor and materials required properly to execute the work * * *. In connection with this matter I will refer you to the first paragraph, page 55 of the specifications.

"Trusting this will clear up the matter, I am, yours very respectfully, Charles F. Blood, borough engineer."

And it was resolved that the foregoing communication receive the endorsement by the Council and the Mayor, authorized to approve the same.

Minute Book 8, page 122. This is a letter by Mr. Ippolito to the council.

"Orange, N. J., December 3rd, 1917. Gentlemen: In accordance with the terms of the resolution passed by the Mayor and Council on October 25th, 1916, covering expenditures of \$10,258.75, for work for which no unit prices were provided in the bid and contract, I wish to notify you that the expenditure under such resolution will reach the sum of \$10,258.75 within the next few days. The resolution of October 25th, 1916, requires me not to do any work contemplated in said resolution in excess of said sum, without first obtaining the approval of the Mayor and Council. If you desire me to proceed with the completion of the work contemplated by said resolution, will you please state the necessary and proper action which will enable me to continue?"

"On motion, the communication was referred to the sewer committee, and the following preamble and resolution adopted:

"Whereas, the value of the work done prior to the 1st day of February, 1917, by Charles Ippolito, contractor, under the

Charles B. Wilson, direct.

contract made by said contractor with the Borough of Ridgefield, for the construction of a sewage disposal plant in the Borough of Ridgefield, has been estimated at \$17,236.39, and said estimate has been certified as correct by Charles F. Blood, borough engineer in charge of said work, and,

“Whereas, 85 per cent. thereof is \$14,650.93, and payments amounting to \$11,381.36 having heretofore been made on account thereof,

10

“Now be it resolved that a warrant be drawn to the order of Charles Ippolito for the sum of \$3,269.57.”

Same minute book, page 132; minutes of the meeting of February 14th. It begins at the bottom of page 131.

Mr. Morrison. 131 is Ippolito's letter.

Mr. Davis. It begins on page 132. In reply to the communication—that is, the communication from Ippolito of February 3rd, 1917, the following preamble and resolution was adopted.

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“Whereas Charles Ippolito, by a letter dated February 3rd, 1917, has reported to the Mayor and Council that the cost of work now being done under resolution of October 25th, 1916, will reach the sum of \$10,258.75 within the next few days, and

“Whereas, the work shown in plans and specifications mentioned in said resolution is not yet fully completed, and

“Whereas it is estimated that the cost of completing the said work will not exceed the sum of \$3,000,

30

“Be it resolved that said Charles Ippolito be and is hereby authorized to proceed with said work and complete the same, provided that no charge in excess of said further sum of \$3,000 shall be made or incurred without first obtaining the consent of the Mayor and Council.

“And be it further resolved that a copy of this resolution be delivered to the engineer and said Charles Ippolito.”

The same minute book, on page 141, under date of February 28th. In response to the resolution adopted at the adjourned meeting of February 23rd, Mr. Alexander _____, sanitary sewer expert, made a preliminary report of present sewer situation and illustrated with maps how a sewerage system might be installed, which would be of great saving in operating costs to the borough, and at the conclusion of the report it was moved that the report be referred to the Council as a committee of the whole and that Mr. P.

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complete the work of formulating a system as outlined by him, and to present same to the Mayor and Coun-

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Charles B. Wilson, direct.

cil if possible at the regular meeting to be held March 14th, and it was resolved that Mr. P. be and hereby is consulting engineer at a sum not to exceed the sum of \$750, which amount is to be in addition to the amount awarded him at the adjourned meeting of February 23rd, 1917.

10 *Mr. Morrison.* If the Court please, I object to that as immaterial. Mr. P. 's connection with the borough seems to be as to sewer contract. This is as to the disposal plant, and I don't think it touches this matter in any way.

Mr. Davis. I think it will be shown to touch the whole situation, if the Court please.

The Court. I will allow it at this time and you may move to strike it out later if it is not connected.

20 *Mr. Davis.* Page 144 in the same minute book and from the same meeting, resolution as follows:

"Resolved that the committee on sewers be and hereby is authorized to order Charles Ippolito to suspend until the next regular meeting of the Council the work now being done under his contract with the borough, if and when in the opinion of Alexander P , consulting engineer, it shall be desirable so to do."

The Court. Now, when was that?

30 *Mr. Davis.* That is the meeting of February 28th, 1917. Page 150, minutes of March 9th. A letter from Mr. Ippolito, dated March 9th, 1917, to the Mayor and Borough Council of Ridgefield:

"This is to notify you that on March 8th, 1917, I received notice in writing from the chairman of the sewer committee, notifying me to stop all work at once. In pursuance of said order, I have stopped the work, and take this opportunity to notify you that I will not assume any obligation for any damage that may be sustained to the work already done.

40 "Respectfully yours, Charles Ippolito."

"On motion the communication was ordered filed."

Page 154 of the same minute book. Minutes of March 14th. Councilman Martling presented the following resolution:

"Resolved that the borough clerk be and hereby is instructed to notify Charles Ippolito to stop all work upon the disposal plant and to remove from the site of the work forthwith all of his plant and to render the borough a statement of the amount of materials he now has on hand."

50 Page 163 of the same minute book. Minutes of March 28th. A statement and letter was received from Charles Ippolito.

Charles B. Wilson, direct.

The statement showing all work done on disposal plant and all material furnished, and in his letter the attention of the Mayor and Council was called to the fact that rent for the land upon which the materials are stored had been paid by him up to April 1st, 1917, at the rate of \$5 per month. He also requests that the payment of work performed as per statement be promptly paid. On motion, the statement and letter was referred to the committee of the whole Council.

10

Have you got the statement, Mr. Morrison?

Mr. Morrison. I think I have, yes.

(Paper produced.)

Mr. Davis. I think at this point I will put the statement in.

Mr. Morrison. The pencil marks were put on when discussing the matter before the borough and are not part of this statement.

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The Court. The pencil memoranda on this statement were not part of the original statement as furnished.

Mr. Davis. I offer in evidence the statement.

Mr. Morrison. I object to the admission of this in evidence, on the ground that the borough cannot be obligated for the payment of money by the rendering of a statement.

The Court. No, but wouldn't it be competent to show what the man claimed at that time?

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Mr. Morrison. Then I renew the objection I made that his claim must first be rested on some obligation of the borough.

The Court. You may make your objection. I am going to allow it to go in evidence. I don't know what effect it may have. It may not have any.

(Received in evidence and marked P. 12.)

Defendant's counsel prays an exception to this ruling of the Court.

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Exception noted as ground of appeal.

Mr. Davis. Page 176 of the same minute book. Minutes of April 25th. Messrs. Howe & Davis requested that the claim of their client, Charles Ippolito, be paid without further delay, and after a recess had been taken and the question debated by a committee of the whole and Messrs. Howe and Davis, the clerk was instructed to notify Messrs. Howe and Davis that a formal answer would be given as soon as an audit of the account could be completed.

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Charles Frederick Blood, direct.

Q Have you, Mr. Wilson, the original plans that were filed with you, or were any plans filed with you?

Mr. Morrison. They are all in the custody of the borough engineer.

10 *Mr. Davis.* All right.

The Court. Counsel states that they are in the custody of the borough engineer.

Mr. Morrison. That is my impression.

CHARLES FREDERICK BLOOD, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Davis.

20 Q Mr. Blood, your profession is what? A Civil engineering.

Q And how long have you been a civil engineer? A Sixteen years.

Q You reside where? A Morsemere, New Jersey.

Q And how long have you lived in Morsemere? A About thirteen years.

Q Where have you been practicing your profession in the past sixteen years? A Well, in different cities here in this country and Porto Rico.

30 Q Did you hold any official position in the Borough of Ridgefield in the year 1916? A I was borough engineer.

Q How long had you been borough engineer in Ridgefield? A I was engineer for a little over four years.

Q And are you still engineer—borough engineer? A No.

Q When did you cease to be the borough engineer? A Why, in 1917—March.

Q Are you the engineer designated in the contract between the Borough of Ridgefield and Charles Ippolito, as the borough engineer? A I am.

40 Q Did you prepare the plans and specifications for the construction of this sewerage system? A I did.

Q What, in a general way, did the system consist of, Mr. Blood? A Why, it consisted of laterals in the different streets running into a trunk line which ran west on Edgewater, west of the westerly side of the borough, over Big Creek. From this sewage emptied into a tank, and from this tank flowed into the disposal tank, where it flowed from there into the sludge beds.

Q And from the sludge beds where? A The sludge was gathered in beds and the effluent flowed out into Big Creek.

Charles Frederick Blood, direct.

Q Now, in the letting of the contract for the construction of the sewers and this sewage disposal plant, was the contract let as a whole or separately? A Separately.

Q And the contract for the sewage disposal plant was the portion awarded to Charles Ippolito, was it? A Yes. 10

Q Where was it that that sewage disposal plant was to be erected? A Why, it was on an island on the south side of the Turnpike, probably about 350 feet Over Big Creek.

Q And was it entirely surrounded by the waters of Over Big Creek? A No, not entirely, but it was connected with the main line pipe.

The Court. Over artificial land?

The Witness. No, it was a little neck. It used to be an island, and then where the brook ran around one side, it had been filled in. 20

The Court. That was an artificial fill?

The Witness. Yes.

Q Did this island have any particular name, Mr. Blood, or did they call it just the island? A The island, is the only name I have heard.

Q These sewerage disposal works consisted of what? A Septic tank and sludge beds and outflow and the appurtenances that go with it.

Q And of what materials were they to be built, these various things? 30

Mr. Morrison. The contract and specifications speak for that.

Mr. Davis. I think it could be told in a very few words.

The Court. Any objection to it, Mr. Morrison?

Mr. Morrison. Not if we are permitted to amplify it.

The Court. It means a great deal of work for the jury to go over these and pick it out. It will simplify things and make it clearer. 40

Q Just describe in a general way, Mr. Blood, the sewage disposal plant and what it was to be composed of? A The first unit was the septic tank, which was a round tank, about thirty feet in diameter, made of reinforced concrete which was sunk into the ground about eighteen feet. The sewage poured into this and then flowed on to filter beds. These filter beds were made of concrete and filled with broken stone on the bottom, fine stone above that, and sand on the surface. Liquid air ran from the reinforced concrete 50

Charles Frederick Blood, direct.

tank, filtered down through this material in these beds, leaving the tank matter on the surface and the liquid running into drains at the bottom of the sludge beds and flowing off through a cast iron pipe into Over Big Creek.

10 Q Then the cast iron pipe and the sludge beds—was there more than one sludge bed? A The sludge beds were divided into two parts.

Q —and the tank composed the plant that Mr. Ippolito was to build? A Yes, those three units.

Q Do you recall or have you with you, Mr. Blood, the original plans and specifications for the doing of this work? A I have prints from them.

The Court. Where are the originals?

The Witness. I have the original tracings.

20 Q Will you produce them? A Yes. I haven't the tracings here. I brought the blue prints from the tracings.

Q Will you produce what you have? A The specifications are in this book.

Q Yes. I don't care for the specifications.

The Court. Now, do you object to the use of the blue prints instead of the original tracings?

Mr. Morrison. I didn't understand just where Mr. Blood said they were.

30 *The Witness.* I have them.

Mr. Morrison. If Blood will say they are prints from those, I will take his word for it.

The Witness. Yes.

Mr. Morrison. They cover all of the tracings, do they?

The Witness. Yes, all pertinent to the sludge beds. The tracings as to the sewer system—the regular sewer system, I haven't here.

40 *Mr. Morrison.* That wouldn't concern this case.

The Court. Then you may note the fact that the blue prints are used in place of the originals. These blue prints were made in the ordinary way?

The Witness. Yes, printed from the original tracings.

The Court. They are a true copy?

The Witness. Yes.

By Mr. Davis.

50 Q And how many sheets are these blue prints composed of, Mr. Blood? A Five.

Charles Frederick Blood, direct.

Q Five sheets? A Five sheets.

Q And does each sheet indicate what it purports to show? A It does.

Mr. Morrison. Do they all relate, Mr. Blood, to the original contract—to the contract as originally made? 10

The Witness. There is one here which does not.

Mr. Morrison. Suppose you take that out.

The Court. Now, the four that you have relate to the original contract?

The Witness. Relate to the original contract, yes.

Mr. Morrison. Do you know whether any show the change in the sludge bed?

The Witness. No.

Mr. Morrison. They show the sludge bed as originally designed? 20

The Witness. Yes.

Mr. Davis. I offer in evidence, if your Honor please, the four sheets.

Mr. Morrison. We continue our objection, as heretofore made, as to the form in which the contract was originally drawn.

The Court. Yes. I will admit them.

(Marked as one exhibit, P 13.) 30

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Were these the same plans that were approved by the Town Council,—the Borough Council? A They were, yes.

Q And are these the same plans that are referred to in the contract and specifications? A They are.

Q And do these plans now that you have presented with the contract and specifications that have been admitted in evidence, constitute the whole of the contract that Mr. Ippolito was to do for \$10,300? A They do. 40

Mr. Davis. I think it might be well to state for the purpose of getting it before the jury, that Ippolito's bid was \$10,300.

The Court. You have already offered the contract.

Q Now, Mr. Blood, when did the work start, if you recall, on this job? A I should think about June, 1916.

Q And what was the first work that was done? A The first work that was done was driving sheathing along the easterly side of 50

Charles Frederick Blood, direct.

the island to hold the tide back from the location where the tank was to be built.

Q And about how far from the water or the bank was the tank to be located? A Why, at about thirty-five to forty feet, I should say.

10 Q That would be in a northerly or westerly direction? A Westerly.

Q And on what side of the island? A On the southerly side.

(RECESS until 2 P. M.)

AFTER RECESS. 2 P. M.

20 CHARLES FREDERICK BLOOD, resumed the stand as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Davis.

Q And the first work that was done there, Mr. Blood, was it on the tank, the sludge beds, or the pipe? A The first work was the sheathing to the east side to keep the tide water out.

Q Yes, you told us that this morning, but aside from the sheathing and the protective work, what work was begun first? A The trimming for the sludge beds.

30 Q Now, one of the articles offered in evidence this morning, one of the exhibits was a matter of a change on the sludge bed, do you recall that? A Yes.

Q Under the original contract of what materials and how was the sludge bed to be built? A The sludge bed was to be built, first, but excavating to a fixed level given on the plan.

40 Q Louder, Mr. Blood. A By excavating, cleaning off the muck first, and excavating to a certain level over the area of the sludge bed. Then sealing that bed with clay, and the division between the two parts of the sludge bed was to be made by placing fill there, and the slopes of that fill to be covered with clay.

Q Now, how far had the contractor got with work on the sludge bed before any change in its construction was ordered? A Why, he had—the grass had been cut off, and there has been some trimming down.

Q Any of the excavation made? A Only one corner of it; some of the muck had been taken off.

Q To a depth of how big or how great was this excavation made? A About two feet in depth, I should say.

50 Q And was anything discovered then? A Well, that's when we found the running sand underneath the muck.

Charles Frederick Blood, direct.

Q Well, what did you find? A One part of the area covered by this sludge bed was running sand, quick sand, and that's when we found what the condition would be underneath this clay. We found that the pressure would be too great for that method of construction. The matter was taken up with the Mayor and Council, and we changed to concrete sludge beds, which is there now. 10

Q Now, who took the matter up with the Mayor and Council? A I did

Q And what did you do as the result of taking it up with the Mayor and Council? A Mr. Ippolito was asked to give a figure of what the change would cost.

Q Well, did he give a figure? A He gave a figure.

Q Have you got it with you? A Yes; it is in—

Q Where is it? A —that portfolio there in that file (indicating), right by my coat on the floor. 20

Q (Handing file to witness.)

Mr. Morrison. If the Court please, while Mr. Blood is looking for that, may I state that the defendant objects to this line of testimony, unless Judge Davis is able to do more than he pleads. He doesn't plead that the borough, by any valid action, ordered this change. He pleads that the engineer ordered the change, and if that is the purpose of the testimony about to be offered, it is immaterial, because the borough cannot be obligated by an engineer's order.

The Court. I will allow the evidence to come in. If it isn't connected showing the liability, of course, it won't affect the case. 30

Mr. Morrison. On what he pleads; this was ordered by the engineer, and not shown that the borough ordered it. I object now so that your Honor may see where the matter is going.

Q Well, maybe I can help you out, Mr. Blood. A I have seen that here somewhere.

Q It is around September, 1916. A Yes. It is a letter stating, or—of course, the contract price included cinders, cinder fill. Mr. Ippolito stated in this letter the allowance to be made for the— 40

Q Well, I will ask you this: As the result of your conference with the Mayor and Council, what changes did you determine upon, if any, to be made in the sludge bed? A I was authorized by the Mayor and the sewer committee to make these sludge beds of concrete.

Mr. Morrison. That is a conclusion for your Honor to pass upon, whether or not he was authorized. 50

Charles Frederick Blood, direct.

The Court. Well, what was done?

Q What changes did you determine upon, Mr.— A Placing a sludge bed on concrete piers, sinking concrete piers for the sludge bed to rest on; then the entire bed was made of concrete, re-enforced with steel.

10 Q Did you bring that before the Mayor and the Council? A Yes.

Q Do you know when? A Why, I would have to—it may be the date is given in the proceedings kept by the sewer committee; I couldn't say exactly the date.

Q Well, as a result of that, you say you got a communication from Mr. Ippolito? A Yes.

20 Q I show you a communication signed Charles F. Blood, C. E., engineer in charge, dated September 13, 1916, (handing paper to the witness); what is that? A (Referring.) This is the proposition, states the proposition which Mr. Ippolito made in regard to changing the sludge bed.

Q Well, that is your acceptance of it, isn't it? A Yes.

Mr. Davis. I offer in evidence—

The Court. Show it to the other side.

Mr. Morrison. We object to the offer on that ground that it is not binding upon the borough, and does not purport to be made by the Mayor and Council, or show any authority on its face for the engineer to make it.

30 *The Court.* You may offer it now, with the understanding that it is to be connected up.

Mr. Davis. I offer in evidence what is designated in pencil as order number one, September 13, 1916.

(Marked Exhibit P. 14.)

Mr. Davis. (Reading Exhibit P. 14 to the jury.)

Q Now, was the work of building the sludge bed proceeded then along the lines as changed? A Yes.

40 Q And I show you an estimate, or heading, order number one, change in sludge bed construction. Referring to your estimate of November first which is marked in pencil "C," I call your attention to estimate of extra work on sludge bed as per order number one, eighteen, forty-six, eighty; was that the estimate under the changes? A Yes.

Q I show you a bill of Charles Ippolito against the Borough of Ridgely, November first, 1916, for the amount of \$1,846.80. Does that represent the extra charge for the sludge bed? A (Referring.) Yes.

Charles Frederick Blood, direct.

Q As altered? A Yes.

Q Did you approve that bill as engineer? A Yes.

Mr. Morrison. I object to the question. Perhaps I am a little late, but is this evidence relevant?

The Court. Oh, yes; all this evidence. 10

Q Did you present that, or was it presented to the Mayor and Council? A Yes, it is in the monthly estimate.

Q And was it paid by them? A Yes.

Mr. Morrison. If the Court please, that is obviously untrue. It has been paid in part. The certificates are here. Part of it is still unpaid.

The Court. I suppose that shows the eighty-five per cent. has not been paid? 20

Q To what extent has it been paid, Mr. Blood? A Eighty-five per cent.; all of it.

Mr. Davis. Have you got the original of this, Mr.—

Mr. Morrison. I may have. I have got to hunt for it.

Mr. Davis. Well, may I offer this?

Mr. Morrison. Yes, except I object to all this line of testimony.

Mr. Davis. I offer in evidence this bill of November first, 1916, approved by Mr. Blood for \$1,846.80. 30

The Court. Yes, you may offer it.

(Marked Exhibit P. 15.)

Q Now, Mr. Blood, under the original plans and specifications, what sort of a foundation was going in on the tank, the Imhof tank?

A A double row of piles.

Q And what was to set on that double row of piles? A This concrete tank.

Q Was the tank to set on the ground, or below the ground level? A It is sunken into the ground about fifteen feet. 40

Q And how far below the surface of the ground, if at all, were these spiles to end? I mean the tops of them. A Where they were sawed off?

Q Yes. A Sawed off about four feet, I think.

Q Will you just state to the Court and jury the manner in which the spiles were, as originally planned, to support the tank. A That blueprint shows it.

Mr. Morrison. I think that I must object to the description of this. If Judge Davis wants to go into the matter 50

Charles Frederick Blood, direct.

in such detail, I suggest that he have the plans put upon the board and let the jury see them, and have the witness describe them from the plan.

The Court. Yes; I think that would be proper.

10 *Mr. Davis.* I thought to tell the story of the thing in a general way to the jury would be more enlightening than the other way.

Q Will you take out the proper plan and we will set it up, Mr. Blood? Now, what did you have in your mind, Mr. Blood? A A blueprint of the settling tank.

Q And what does it represent? A It represents the detailed construction of the settling tank.

Q Is it the detailed construction of the whole of the tank, or only a portion of it? A Well, the tank, without the foundation.

20 Q Now, the lower figure on this blueprint which is indicated as section AA, what does that represent? A That is a section taken on a line drawn through almost the exact center of the tank.

Q Well, does that represent the shape of the tank? A Yes.

Q And the upper part of this blueprint, circular form, what does that represent? A The plan.

Q The plan of what? A The tank, looking down on the top of the tank.

30 Q What is there on that plan that represents the spiles? A These drawings right here (indicating) show the spiles under the two lower corners, and under the two shoulders on either side.

Q Were there to be two rows of spiles, two circular rows? A Two circular rows.

Q And what was the smaller, or the inner circular row of spiles to support? A The bottom part of the tank.

Q And what was the outer row, or larger row of spiles to support? A That was to keep the tank in equilibrium, and also to take the weight of the trough which was around the outside of the tank.

40 Q Was there a sort of a flange on this tank on any part of it? A There was a trough ran around the outside.

Q Well, was there any sort of a flange that rested— A Upon the top of the piles?

Q The top of the piles? A That is this here (indicating).

Q That is about half-way up the tank? A Yes.

Q And how far above the surface of the ground on the island was the top of the tank? A About ten feet, I think.

The Court. How far?

The Witness. About ten feet.

Charles Frederick Blood, direct.

The Court. How far below under ground?

The Witness. About fifteen.

Q And the bottom of the tank, then, was about fifteen feet below the surface? A Yes, the total height was twenty-five feet.

Q And this outer row of piles upon which you say the flange of the tank rested; how far was that below the surface of the ground? 10

A That was just about level with the surface of the ground.

Q And what was there to be put up around the tank, if anything by way of support? A Well, the fill was to be placed around the outside, within the outer ring of piles.

Q That is an earth embankment? A Yes.

Q Now, this inner row of piles which you say was about fifteen feet below the surface of the ground; you say, there, the top of that was to be cut off? A Yes.

Q And cut off at what point? A Well, there was a fixed level given, of course, which was the distance down from the top of the tank those were to be cut off. 20

Q And it was on that inner row or circle of piles that the extreme bottom of this tank, you say, was to rest? A Not the extreme bottom.

Q Is that right? A Because the tank goes to a point—

Q Well, we will say the bottom— A Yes.

Q Now, how far had Mr. Ippolito progressed under his original contract with the construction of this tank? A Why, these two rows of piles had been practically all driven, and the work of excavating in the center to receive the point of the tank had been started, when we encountered the quicksand, which washed in so rapidly that it took the support away from these outer piles, and left them no bearing, and we had to sheath the hole, the quicksand bank, we couldn't excavate because the sand kept piling up here. 30

Q Now, at that time when you discovered the quicksand, had all of the spiles for the two circles been driven? A I wouldn't say all of them. I think they had, though, most of them, anyway.

Q And how much—had any of them been cut off? A Yes. 40

Q And how much of the excavation had been made? A I should think about six to eight feet had been excavated.

Q Had there been set any forms for the concrete work? A Yes.

Q And had there been any of the reenforced concrete work set?

A The steel was in place.

Q Was there any sheathing in place at that time? A Yes.

Q To what extent? A Well, half of it, I should say.

Q Now, when you discovered this quicksand, Mr. Blood, what was the character of the soil that you found it to be when you made 50

Charles Frederick Blood, direct.

that discovery? A Why, it is a very fine, powdery sand, which flowed in the—the water carried in from all directions.

Q How far below the surface of the ground was the excavation when you made this discovery? A That is about a foot of finished concrete.

10 Q Well, that would be about fourteen feet below? A I should say so.

Q The surface? A Yes.

Q And where was this water coming from? A From the bottom. The level was below tide water, so it was coming up from the ground.

20 Q What effect did it have, if any, upon the piles that were already in place. A Well, this—the water, of course, forced the sand in at the lowest point in the hole, and that made it all crumble in from all around the circle, and in flowing into the center, why, of course, it took all the material away, or considerable of the material, away from around the piles, which was the support of the piles.

Q Were any of the piles displaced? A They were not displaced. We didn't leave them that long, but there was only about an eight-foot penetration that the piles were in.

Q Now, do you know to what depth these piles had been driven under your original specifications? A About eight feet.

Q And then they were cut off? A Yes.

30 Q When you made this discovery about the quicksand there in the place of the foundation, what did you do? A Well, we stopped the work and took up the matter of the proper way of holding the banks to excavate.

Q Did you make any report to the Mayor and the Council? A Yes.

Q And what did you do with regard to strengthening the foundation, if anything? A Why, the only thing to do was to sheath around this—

The Court. No; what did you do?

40 *The Witness.* I did. That is what I did—to sheath around the outside of the hole to hold the sand back, and started driving piles over the entire area.

The Court. Then, as I understand it, you only put two circles around?

The Witness. Two circles.

The Court. Now, you have piled the whole area?

The Witness. Yes; three feet apart.

50 *The Court.* What was the size of these piles?

Charles Frederick Blood, direct.

The Witness. About ten inches at the top, the big end.

The Court. And how long?

The Witness. Well, they were thirty foot piles. They came to the ground as thirty foot.

The Court. All right. Did they strike solid bottom? 10

The Witness. Some of them did, and some of them did not.

Q Did you report that situation to the Mayor and Council? A I took them down there.

Q Now, I show you—

The Court. Now, let us find out: Did you tell them about the situation? You took them down there; if they were not experts, they would not know anything more about it than they did before. 20

The Witness. I explained the situation to them, and then they asked me to meet them on the ground.

Q Asked you what, Mr. Blood? A To meet them on the ground.

Q And did you meet them on the ground? A Yes.

Q Well, what was done there at that meeting? A I was instructed to figure up and find out what the cost of this extra work would be.

Q Well, first about the—the first thing that you did, as I understand it, was to put some—order some sheathing put in? A Yes. 30

Q I show you paper marked October 14, 1916, order number two, addressed to Mr. Charles Ippolito, and signed by you. Was that an order given by you with regard to the sheathing after you had made this discovery of the quicksand? (handing paper to the witness). A (Referring.) Yes.

Mr. Davis. I offer in evidence the Order Number Two of October 14, 1916. 40

Mr. Morrison. Defendant objects on the ground that it does not purport to be—there is no authority by the Mayor and Council of the borough.

The Court. I will allow it to be followed up; if it is not connected, I will strike it out.

Mr. Morrison. Your Honor will allow me an exception?

The Court. Yes.

(Marked Exhibit P. 16.) 50

Charles Frederick Blood, direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Juror. Your Honor, may I ask a question?

The Court. Yes.

10 *A Juror.* Was this gentleman in the employ of the borough, or the township, or whatever it is, at that time, and were they paying him for his services?

The Court. He asks whether you were in the employ of the borough at that time?

The Witness. I was.

Mr. Davis. (Reading Exhibit P. 16, Order Number Two dated October 14, 1916.)

20 Q Did you get a reply from Mr. Ippolito? A Yes.

Q Have you got it there?

The Court. Do you offer that letter in evidence?

Mr. Davis. It is marked already, your Honor, subject to Mr. Morrison's objection.

The Court. Yes. (To witness): Don't you find it?

The Witness. I think that is among the papers that I turned over to the borough; I haven't it.

Mr. Davis. Well, I will present it later, if your Honor please?

30 *The Court.* All right. Proceed.

Q Did you prepare any plan for the changed—for the strengthening of the foundation? A Yes.

Q Have you got it here? You present a fifth blueprint, do you?
A Yes.

Q What does that blueprint show?

Mr. Morrison. If the Court please, I object to his telling what it shows. I wish to object to its going in evidence.

40 *The Court.* Well,—

Mr. Davis. I withdraw that question.

Q Mr. Blood, did you present that to the Council and the Mayor?
A I did.

Q And did you get their approval of it? A I did.

Mr. Morrison. Objected to as calling for a conclusion.

Mr. Davis. Well, it will only mean referring to the minutes. I think it is already in.

Charles Frederick Blood, direct.

Mr. Morrison. No, it has never been proved.

The Court. Well, you may show it has been proved, of course. You may proceed and use it; then if you don't show it has been proved, it will be stricken out. You cannot put it all in at once.

10

Q What did you do with regard to bringing that to the attention of the Mayor and the Council? A They instructed me to make drawings and specifications for this change, and this was the result of that work.

Q Yes. And did you present that at a meeting? A I did.

Q And was or was it not approved at the meeting?

Mr. Morrison. Objected to.

Q What action was taken on it? What action was taken by the Mayor and Council when you presented it? 20

Mr. Morrison. Objected to. The minutes will show it.

The Court. Yes; the minutes will show it.

Mr. Davis. If your Honor please, if it is in the minutes, all well and good; but a lot of actions might not be in the minutes.

The Court. That is true. Let us find out first if it is in the minutes.

Mr. Davis. Mr. Morrison says there is nothing in the minutes, as I understand it. 30

The Court. You may show, then, what was done.

Q What was done by the Mayor and Council with regard to their approval or disapproval of that plan? A I went to work on this plan.

Q Well, did they approve it at this meeting? A Yes.

Q Did you present with it specifications? A Yes.

Q Have you got them with you? A No. The borough have them. 40

Mr. Davis. Have you got them, Mr. Morrison?

The Witness. I might possibly have a copy.

Mr. Morrison. I would like the privilege of questioning Mr. Blood as to the Mayor and Council approving this. That is a conclusion in his mind, especially that they were approved by the borough.

The Court. On cross examination you may go into that fully. 50

Charles Frederick Blood, direct.

Q Have you got the specifications there? A Here is a copy of the specifications.

Q Did you present the specifications to the Mayor and Council? A Yes.

10 Q And what did they do about them, as to whether they approved or disapproved them? A They told me to get figures on these plans and specifications.

Q Get figures from whom? A Contractors in that line of work; they didn't state who in particular.

Q And did you do that? A I did.

Q From how many contractors did you get figures? A Mr. Ippolito, Long-Broadhurst, and one other contracting firm; I don't remember the name.

20 Q And what did you do with those figures? A Put them before the Mayor and Council.

Q You recall the passage of the resolution of October 26th, I think it was? A 25th.

Q 25th, regarding the doing of this foundation work under the cost plus basis? A Yes.

Q Was it before or after the passage of that resolution that you submitted these various figures to the Mayor and Council? A I couldn't say whether it was just before, or after, without looking at the dates of the bids.

30 Q After the passage of the resolution by the Council ordering this work to proceed up to an expense of around ten thousand dollars, that according to the evidence was October 25th, 1916? A Yes.

Q What was done by the contractor? A I didn't get that question.

Mr. Davis. Will you read it, Mr. Stenographer?
(The question was read by the stenographer.)

40 A He went to work following out these plans.

Q Now, in the following out of those plans, will you just explain to the jury and the Court what the change was between those plans and the work as originally planned? A The way the work was done originally was that these two rings of piles were driven into the ground before any excavating was done; then the excavating was worked from the inside. The second time, on account of the running sand which we had encountered, we drove sheathing all around the outside of this hole to hold back the water from the sand, and then we excavated and drove piles three feet apart in
50 all directions over this area underneath the tank.

Charles Frederick Blood, direct.

Q With regard to the size of the piles that were driven under this second plan, how did they compare with the size of the first piles? A They were the same size.

Q And as to the depth, how did that compare, the depth driven, I mean? A Just the same. 10

Q And how many spiles were there driven originally? A I don't remember.

Q Well, was the number very much increased under the second plan, Mr.— A Yes.

Q The number of piles? A Yes; quite materially.

Q And were the second piles driven, Mr. Blood—what was the manner of driving them? A They were driven with a jet.

Q And that means what? A Forcing an opening in the material ahead of the pile with water, by force. 20

Q Do you know to about what depth they were driven? A Well, I should say they would average perhaps ten to twelve feet.

Q Below what? A Below the surface of the ground on the outside.

Q And with regard to the spiles that were driven directly under the bottom of the tank; how far below the surface were they driven? A Those were driven down as fast as we excavated; they probably had a penetration of about eight feet.

The Court. What do you mean, they were driven as they were excavated? 30

The Witness. We would drive the pile down until it was level with the dirt around it; then we would dig down and follow the pile down to that level.

The Court. Those piles were thirty feet long, you say?

The Witness. Thirty feet long.

The Court. And this excavation was only fifteen feet below ground?

The Witness. Yes. They trimmed off considerable, of course; they came to the ground thirty feet long. They weren't thirty feet long when they were raised to start driving. 40

The Court. Well, how long would they be when they were ready for driving?

The Witness. I should say about eighteen feet.

The Court. I see. Well, now, when you drove these, you drove those by the jet, was there any force used to drive them?

Charles Frederick Blood, direct.

The Witness. Yes, there was a hammer to drive them, but this jet was used at the bottom of the pile to force the sand apart.

The Court. What kind of a hammer?

10 *The Witness.* A steam hammer.

The Court. Proceed.

Q Were any difficulties encountered in driving the piles, Mr. Blood? A Yes.

Q Difficulties of what character? A Boulders, and a very small penetration to one blow of the hammer on account of the sand being so tight.

20 Q And did the contractor get to the point of driving all of the spiles that were to be driven under this last arrangement? A They were all driven.

Q And were any of them cut off? A I think they were all cut off.

Q How much of the excavation for the tank was made? A Practically all of it.

Q And was any of the concrete work laid? A No.

Q Any of the re-enforcement? A I think there was some re-enforcing, a small amount.

30 Q Any of the forms for concrete put in place? A Form for the mat, I believe, was partially in.

Q And was there any sheathing driven? A No, no sheathing driven.

Q Under this last arrangement, did it call for any sheathing at all? A That for the form of the tank was in the ground around the piles.

Q Well, I mean any sheathing, either outside of the circle of spiles or inside of the circle? A There was sheathing in the ground outside of the circle of the spiles.

40 Q Outside the circle. Now, when you got to that point where the spiles were all driven and cut off, were you or were you not ready then to begin the work of constructing the tank? A Yes, we were ready for the forms.

Q In the construction of the tank, what was it that was to be laid immediately over the lower tier or row of piles? A This concrete mat.

Q A concrete mat? A Yes.

Q And that was formed in what manner? A It was a flat slab of concrete, re-enforced with steel rods.

50 Q And the tank was to rise from that, was it? A Yes.

Charles Frederick Blood, direct.

Q Now, when you got ready for that work, or when the contractor was ready for that work, what, if anything, happened? A The work was stopped.

Q Who stopped it? A The Mayor and Council.

Q That was under the resolution of February 23rd, I believe— oh, February 28th; February 28th, 1917. Was there anything done by the contractor after that time? A No, I think not. 10

Q And what was the reason for the stopping of the work, if you know? A Why, a contemplated change in the sewer system, as far as I know.

Q Well, a change contemplated by whom? A The borough.

Q Up to that time was there any fault found with the work that Mr. Ippolito had done which resulted in the stopping of this work? A No.

Q Was the stopping of this work due to any fault on the part of the contractor, Mr. Ippolito? A It was not. 20

Q Did you order him to stop the work, or did the Council order it stopped? A His first order was from the chairman of the sewer committee.

Q And was there a second order? A Yes, sir.

Q And the second order was from whom? A I think the Mayor and Council.

Q After that second order—well, on the first order, did he stop, do you know? A I think he did.

Q And do you remember some time after the second order as to whether he did or did not remove his plant? A He went to work removing his plant. 30

Q Were there, at that time, any materials on the job? A Yes.

Q Do you remember what was done with regard to the materials? A Held by the borough.

Q What do you mean, held by the borough? A Well, they were taken over by the borough.

Q In what way? A Why, they took account of the material that was left, they piled the lumber there on the site, took the cement, the stone was there on the site. 40

Q What kind of material was it, Mr. Blood, was left on the job at the time the contractor stopped, and which was taken over by the borough; what was it? A Why, the forms for the tank and sheathing, and plank in the runways, cement, stone and some pipe.

Q That second resolution, according to the testimony, stopping the work, was the 14th of March, 1917. Now, with regard to that date, was it before or after that that you ceased to be the borough engineer? A It was after that. 50

Charles Frederick Blood, direct.

Q Do you remember when it was that you ceased to be borough engineer? A April, I think; the following April.

Q April, 1917? A I think so.

Q And did your term run out, or were you ousted, or what?

A I was ousted.

10 Q Mr. Blood, with regard to the monthly payments that were made to the contractor from the time he started work until he stopped, was it you that did the estimating and the making up of the estimates? A I made up the estimates from the reports that came in from the engineer under me on the job.

Q Who was there on the job all the time as representing the borough? A The engineer by the name, Ziegler.

Q Mr. Ziegler? A Yes.

Q And was he there in the pay of the borough? A Yes.

Q And in your absence, was he your representative? A Yes.

20 Q Was he there all the time? A Yes.

Q What was he there for, Mr. Blood? A To keep account of costs and to inspect the work that was done by Mr. Ippolito, to see that the specifications and plans were carried out.

Q Can't you speak a little louder? A He was there to see that the plans and specifications and contract was carried out by the contractor, Mr. Ippolito.

30 Q Did he have anything to do with the checking up of materials? A He checked on the extra work. He kept account of the materials and the time of the men working on the section of the work that was paid for on the percentage basis.

Q Now, what you have referred to as extra work, is that the work that was done after the passage of the resolutions, as we call them? A Well, I had in mind the change in the sludge beds.

Q Yes. A And the work necessitated by the change in the foundation to the tank.

40 Q In your monthly estimates under the original contract of \$10,300.00, you say that in that—that your estimate—attached hereto is my estimate of the value of work done and materials and so forth. Now, in making that estimate, did you estimate exactly or approximately?

Mr. Morrison. If the Court please, I object to this as an attempt to impeach his own testimony.

The Court. I will allow it.

Mr. Morrison. You will grant me an exception?

The Court. Take your exception.

Defendant's counsel prays an exception to this ruling of the Court.

50 Exception noted as ground of appeal.

Charles Frederick Blood, direct.

Mr. Davis. Will you read that question, Mr. Stenographer?
(The question was read by the stenographer.)

A Approximately.

Q And when you say approximately, Mr. Blood, was your estimate approximately more than the value of the work done or approximately less than the value of the work done? 10

Mr. Morrison. I object again, if the Court please, on the ground already stated, and on the further ground that the parties, the contractor and the borough, were bound by the certificates made by this engineer in this manner; they ought not now to be permitted to follow them. The contract provides that monthly payments should be made on estimates made by the engineer.

The Court. You may ask him the question, and take your exception. 20

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Why, I represented the borough, and I made an estimate I felt was safe for their side.

Q Now, will you just listen to the question, Mr. Blood, and answer it. I don't think your answer is responsive.

The Court. Yes; read it. 30

(The question was read by the stenographer.)

A Approximately less.

Q Now, when this work was stopped, Mr. Blood, and the contractor left the job, what was there still to be done by the contractor in order to have fully performed his contract? A Setting the forms for the tank and putting in the concrete.

Q That is the building of the tank? A Yes.

Q Have you, or did you at that time, make an estimate of how much it would cost to do that work of finishing the top from where the contractor left off? A I did. 40

Q Have you got that estimate there? A I have.

Q And will you just state what work would have had to be done by the contractor to fully complete his job from where he left off until the end of his contract; I don't mean the items; I mean what would he have to build? A He would have to build the wooden forms for the concrete, place the steel, put the concrete in the forms and do the wood-work in connection with the top of the tank platform and baffle boards.

Q Now, how much did you estimate it would cost to finish that job? 50

Charles Frederick Blood, direct.

Mr. Morrison. We object to that on the ground that it is immaterial, as not binding on the borough as to what the estimate might be by the borough's engineer as made at that time.

10 *The Court.* Well, wouldn't it be competent, even though it was made by the engineer? Isn't it a question of damages?

Mr. Morrison. I don't believe so.

The Court. How would you show damages if you didn't show it in that way? I think it is proper. Take your exception. It is a question for the jury.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 Q Do you remember the question, Mr. Blood? A The estimated cost of the work.

Q Yes, the estimated cost of completing the job? A \$1,692.13 was the amount of my estimate.

The Court. Sixteen what?

The Witness. \$1,692.13.

The Court. How did you estimate that?

30 *The Witness.* I estimated it by taking the prevailing prices for the various kinds of work at that time, and using the market prices of materials.

Q Did you make up a written estimate? A I have. It is right here.

Q Have you got all the items set out there as to how the \$1,692.13 is made up? A Yes.

Mr. Davis. I would be glad to offer it in evidence, if the Court please?

The Court. Show it to the other side.

Mr. Davis. Here is a copy.

40 *The Court.* You figured so much on the concrete and you figured on the material and labor?

The Witness. Yes, sir.

The Court. What was the regular price of concrete per cubic yard at that time?

The Witness. Well, in forms, of course, depending on the location where it was placed.

The Court. Well, I am speaking generally.

50 *The Witness.* I would say eight to nine dollars a yard.

Charles Frederick Blood, direct.

The Court. Would you consider three dollars a yard—

The Witness. Well, that would be in mass, but it would run more expensive in thin shapes like this, thin sections.

Mr. Morrison. There is no objection.

Mr. Davis. I offer in evidence the estimate made up by Mr. Blood showing \$1,692.13. 10

(Marked Exhibit P. 17.)

A Juror. If your Honor please, may I ask if that estimate includes the material already on hand and which was taken over by the borough?

The Witness. Yes.

A Juror. That is all included in the sixteen hundred?

The Witness. Yes.

Q Is all of the material that was taken over by the borough included in the sixteen hundred? A This sixteen hundred is what it would cost to buy the material and furnish the labor to complete the work. That sixteen hundred included some material to be bought. 20

A Juror. Yes, but it also included all the material that was on hand at the time?

The Witness. Yes, we allowed that.

Q In making up your estimate of \$1,692.13, did you take into consideration the fact that there was some material on hand, or did you make that up as if you had to go out and buy the material? A I made it up as though I had to go out and buy the material. 30

The Court. When was that made up?

The Witness. 1917. The date is on there.

Q I don't know whether there is a date on it or not; you can tell, (handing paper to the witness). A (Referring.) It was made up in March or April of 1917.

The Court. When did he stop the work on that plant? 40

The Witness. In March, 1917.

The Court. It was made up right after that time?

The Witness. Right after.

Q Mr. Blood, with regard to the keeping track of the time and materials that were used in the foundation change, will you just explain how that was done by the borough? A It was done on—kept on blank forms. For the—

Q Have you got the original of the blank forms that were handed in to the borough? A There is most of them (indicating), and I have some. 50

Charles Frederick Blood, direct.

Mr. Davis. The originals, have you got them, Mr. Morrison?

The Witness. I have some of them.

Q I show you three sheets dated October 12, 13 and 14, 1916,
10 and ask you what are those? A (Referring.) The extra work
report.

Q Of what? A Of the work that Mr. Ippolito was performing
on this disposal plant.

Q October 12th sheet represents what? A It represents so
much labor on this work, so many hours of carpenters and me-
chanics and fireman.

Q Any materials? A Not on that one.

Q Then October 12th represents the labor performed on the other
20 days, does it? A Yes.

Q Will you please look down at the bottom in the lefthand cor-
ner, and you will find, I think, the name of Ziegler there? A (Re-
ferring.) Yes.

Q Who was that? A He was the man who represented the
borough under me on that job.

Q And did he approve those sheets as correct? A He did.

Q How often were they handed in to you? A Every day.

Q And how often did you certify them to the Borough Council?
A Once a month.

30 Q Were each day's operations kept in this same manner? A On
the extra work.

Q On that extra work. That is the foundation work you are
talking of? A Yes.

Q Well, now, I show you here, Mr. Blood—will you please look
over the bundle of reports beginning November, running from No-
vember 30th back to November 9th (handing papers to witness) and
will you say what they are? A (Referring.) The cost accounts
on the foundation work for the tank.

40 Q For the month of what? A November.

Q And does that show materials used as well as labor? A It
does.

Q And is each one of these approved by the resident engineer?
A They are.

The Court. How did you get the price?

The Witness. The price? From the bills. The statements
issued by the people who supplied the materials.

The Court. The price doesn't appear on those statements?

The Witness. No.

Charles Frederick Blood, direct.

The Court. Then, in order to make your report, you got your prices from the—

The Witness. The supplies.

The Court. How did you get the prices of labor?

The Witness. By seeing that they were paid, and I knew 10
what they were paid, right there on the job.

The Court. I see. From your own personal knowledge?

The Witness. Yes, sir.

Q Now, with regard to the materials, Mr. Blood, what inspection, if any, did you make of the bills for materials supplied by the contractor before sending in your report? A The bills that the suppliers sent to the contractor were turned over to me before the first of each month.

Q Yes. A Or on the first of each month. 20

Q And then your estimate and report to the Borough Council was made up from what? A From the statements or the receipts of the suppliers of the material.

Q And those statements were made up by Mr. Ziegler, were they?
A And myself.

Q And yourself. Will you please look over all these, and see if they are of the same kind? A (Referring.) They are the same.

Q Do you know whether that is Ziegler's signature on all these bills? A I didn't see him write it all, but I am sure it was.

Q Were they handed to you by Ziegler? A Yes. 30

Mr. Davis. I offer in evidence, if your Honor please, all of these, as follows: That is, the heading of them is extra work report. I offer first, the three sheets bound together, October 12th, 13th and 14th.

Mr. Morrison. If the Court please, the defendant objects to them in the absence of Mr. Ziegler, who, by Mr. Blood's explanation, and the face of the papers, was the man who kept them, and I think we have a right to cross examine him as to their accuracy. 40

The Court. Where is Mr. Ziegler?

Mr. Davis. Well, we can produce him, I presume, if it is necessary, but I submit, if your Honor please, that the proof is sufficient now, so far as these things are concerned. Mr. Ziegler was there to do this work, and he brought these reports to Mr. Blood and handed them in, and it was on these reports that the monthly estimate was made.

The Court. Well, on what theory do you consider them competent? 50

Charles Frederick Blood, direct.

Mr. Davis. Why, this work that is being done here is that part of the job which is done under the resolutions, namely, of cost plus 15 per cent.

The Court. Yes.

10 *Mr. Davis.* So that all of these show how the moneys paid to Mr. Ippolito under these two resolutions with the change in the foundation of the tank were made up.

The Court. Yes, that is proper. The question is now, how can you offer those unless you produce Mr. Ziegler who made them, or somebody who knows they are correct?

Mr. Davis. Well, I—

The Court. They are not self-serving documents, are they?

20 *Mr. Davis.* I think so, where they are absolutely approved by Mr. Ziegler, and handed by Mr. Ziegler to the engineer. The testimony is that Mr. Ziegler was there for that purpose, that he checked up the labor, and he checked up the material, and that he approved the daily report of materials and labor used, and he handed them to the engineer, and that from the daily reports, these approved by Mr. Ziegler, the engineer's report was made up, or, at least, the engineer's estimate at the end of the month.

The Court. By an employee of the defendant.

Mr. Davis. Of the town.

30 *The Court.* Why wouldn't that be competent as evidence against yourself?

Mr. Morrison. The distinction between an individual and a municipality comes in there. An individual is bound by those he holds out as his agents, but a municipality is not. We have a right to cross examine Mr. Ziegler, if he had been produced here, as a witness, as to the accuracy of what he did.

The Court. I think you may offer them for identification.

40 *Mr. Davis.* The first is the three sheets, October 12th, 13th and 14th.

The Court. Yes.

(Marked Exhibit P. 18 for identification.)

Mr. Davis. The next are the sheets from November 9th, 1916, to November 30th, 1916.

The Court. Yes.

(Marked Exhibit P. 19 for identification.)

Mr. Davis. Next is December 1, 1916, to December 31, 1916.

Charles Frederick Blood, direct.

The Court. Yes. P. 20 for identification.

(Marked Exhibit P. 20 for identification.)

Mr. Davis. Next is January 1, 1917—January 31, 1917.

(Marked Exhibit P. 21 for identification.)

Mr. Davis. Next is February 1st, 1917—February 28th, 10
1917.

The Court. Yes. P. 22 for identification.

(Marked Exhibit P. 22 for identification.)

Mr. Davis. Next is March 1st, 1917, to March 17, 1917.

The Court. P. 23 for identification.

(Marked Exhibit P. 23 for identification.)

Q Mr. Blood, in this last batch marked P. 23 for identification, I notice that the daily reports from March 9th to March 17th are signed Charles F. Blood? A Yes, sir. 20

Q Is that your handwriting? A (Referring.) It is.

Q You approved them personally, did you? A I did.

The Court. How did you get the data?

The Witness. By being on the job myself.

The Court. Yes.

Q Will you just look and see if all those sheets are signed by you? (Referring.)

Q They are? A They are. 30

Mr. Morrison. Those are what days?

Mr. Davis. 9th to the 17th, inclusive.

The Court. What became of Mr. Ziegler? Had he gone? Had he left the job?

The Witness. Yes.

Q When did Mr. Ziegler leave? A I think he left when that first order came out, about the 9th.

Q The 9th of March? A Yes.

Q Well, that was— A He left immediately as soon as the contractor stopped work. 40

Q The last one of these reports which bears the name of Mr. Ziegler appears to be March 8th, Mr. Blood. A That is the date he left then, because he signed them all when he was there.

Q And then, on March 9th, you began to sign? A Yes.

Q Then you think that March 8th was the last day that Mr. Ziegler was on the job? A Yes.

Q And did he cease his employment with the borough at that time? A He did. 50

Charles Frederick Blood, cross.

Q Have you got any of the bills for materials, Mr. Blood? A I think I have some.

Q Well, will you please produce them? A Those aren't all of them (handing papers to Mr. Davis).

10 Q Now, this bunch of bills for materials, from whom did you get them? A Mr. Ippolito.

Q And they represent materials that went into the job? A They do.

Mr. Davis. May I have them marked for identification?

The Court. Yes, you may mark them for identification. (Marked Exhibit P. 24 for identification in bulk.)

20 Q Did you have anything to do, Mr. Blood, with the putting of Mr. Ippolito off the job? A No, sir.

Q And it was not on your recommendation, was it? A No, sir.

Mr. Davis. Cross examine.

Mr. Morrison. If the Court please, may I reserve the right to move to strike out this testimony and still cross examine?

The Court. Yes, the Court will allow you to do that. You may reserve your right, protect your right, and proceed to cross examine.

Cross examination by Mr. Morrison.

30 Q Mr. Blood, I call your attention to the resolution of October 25th, 1916, which is on page 73 of Minute Book 8; that book is known as Exhibit P. 2; and reading from that resolution I find that it says: "Resolved, that the said Charles Ippolito be and hereby is authorized and required to perform the work shown and described in the drawings and specifications for said work to be prepared by the borough engineer and approved by the Mayor, and that he be paid—" and so forth. I call your attention particularly to the words "drawings and specifications to be prepared by the borough
40 engineer and approved by the Mayor," and ask whether at the time this resolution was passed you had then prepared the drawings? A Apparently not; I couldn't say whether it was just before or just after.

Q Now, isn't it a fact that you prepared the drawings and specifications for the work done under the first resolution after the resolution had been passed? A I think so, from that.

50 Q Isn't it a fact, then, that those drawings and specifications were approved by the Mayor, as stated in the specifications? A They are.

Charles Frederick Blood, cross.

Q And isn't it a fact, then, that those drawings and specifications were never submitted to the Mayor and Council as a corporate body and acted on by them? A No; not if I understand your question.

Q Will you tell me when the Mayor and Council by any corporate action approved the drawings and specifications— A Oh, no.

Q —made by this resolution? A No.

Q They never did? A No.

Q Referring to P. 17, which is your estimate for completing the work after the contractor had been stopped by the borough, you have stated that what remained to be done was the construction of the settling tank; was there not, in addition to that, work to be done from the affluent into the creek? A Not according to the original contract, no; he had done all that the original contract called for.

Q It had been carried to the point called for by the original contract? A Yes.

Q Was there not piping to be done between the Imhof tank and the sludge beds? A I think not.

Q Had that been put in? A I think it was. There might have been two or three lengths of pipe.

Q I see on your estimate two lengths of twenty-inch cast iron pipe; where was that to be used? A I think that particular length of pipe was between the end of the sludge bed and the affluent.

Q Then there was work to be done at that point? A Yes.

Q There is also fifty-two feet of ten-inch cast iron pipe; where was that to be used? A That is part of the tank; ten-inch pipe.

Q In the tank itself? A Yes.

Q Then, in addition to the construction of the re-enforced tank, there were certain pipes and fittings, either within or about that tank, to be constructed? A That is in my estimate.

Q Yes. And it is a fact that in addition to the construction of the concrete tank itself, there were pipes and fittings to be constructed and connected around it and in it? A Yes.

Q As I understand your testimony as to the presentation of the bills for materials purchased by Mr. Ippolito, you took as the cost of making your estimates, the prices which the various material men had billed to him? A Yes.

Q You didn't do anything further to estimate whether those prices were a fair cost for the work? A Well, I was doing other work all the while; I was familiar with the prices of material.

Q You took as the estimate of the cost of labor, the payroll rates which Mr. Ippolito was paying on that job? A I did.

Q And you took as to the number of hours' work, the quantities of materials, the sheets which were turned in to you by Mr. Ziegler?

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40

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Paul G. Koch, direct.

A Partly, and partly from my own figuring. I was there, also, a good deal.

Q Now, to what extent did your own figures enter into the calculation of this cost on which Mr. Ippolito's statements were based?

10 A Well, I always knew the number of men that were there. I knew, from talking to the men, what their rates of wages were.

Q And you took Mr. Ippolito's check for a report as to the number of hours that the particular men worked? A No, the representative of the borough, Mr. Ziegler, kept his own account.

Q Yes. And you based your figures on Mr. Ziegler's account? A Yes, to a certain extent, and what I got myself by being there, too.

Q Now, what I would like you to state, Mr. Blood, is what is it that you refer to in the words "what I got myself by being there?" What did you get? A Of course, I had a check on Mr. Ziegler's reports by going to the work back and forth myself. Mr. Ziegler made out the reports.

Q How closely did you check him? A Well, as to the number of men, and the material that arrived the different days.

Q Then you did not attempt to check him in every item of his report? A No.

Q Just a casual check as you happened to be there? A (Nodding head.) Yes.

Mr. Morrison. I think there is nothing further.

30 *Mr. Davis.* Nothing further for Mr. Blood.

(Witness excused.)

Mr. Davis. If your Honor please, I would like to read the—it comes in the order of sequence now—the deposition of Mr. Koch that was taken.

The Court. Mr. Who?

Mr. Davis. Mr. Koch. K-o-c-h. He is now in Germany in the army, and his testimony was taken here last June.

The Court. All right; you may read it.

40 *Mr. Davis.* (Reading):

"PAUL G. KOCH, called as a witness by plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Davis.

Q Mr. Koch, where do you live? A 442 Hancock street, Brooklyn.

Q And where are you located at the present time? A Camp Meade, Maryland.

Paul G. Koch, direct.

Q You are in the service of the United States? A Yes, sir.

Q Army or navy? A Army.

Q And so far as you know, you are about to leave the country? A Yes, sir.

Q Now, were you connected in any way with the work done by Charles Ippolito in the matter of the construction of the sewer disposal work in Ridgefield? A I was. 10

Q In what capacity? A Engineer and superintendent.

Q When did you go on the work—can you tell from any memorandum or book or anything? A Yes, sir.

Q What do you want to tell from? A Why, that book. (Indicating.) June 21 was the date.

Q 1916? A 1916, we started shipping machinery from Schenectady. 20

Q And when did you cease your connection with the Ridgefield job? A December 1st.

Q 1916? A 1916.

Q And during all of the time between June and December, how much of the time—how much of your time did you give to your duties on that job? A Absolutely all of it.

Q And just what were your duties on that job, what did you have to do? A Lining up the work, taking charge of the accounts, paying the local men, taking care of materials, and generally taking charge of things that an engineer would. 30

Q Did you keep the time book on that job of the time put in by the men? A Yes, sir, part of it.

Q I show you book entitled 'Weekly Time Book.' Is that the time book? (Handing book.) A Yes, sir."

Q Will you get that, please?

A Voice. Yes, sir. (Producing book.)

Mr. Davis. (Continuing reading:)

"Q Will you please look at that book and say if any part is in your handwriting, kept by you? A (After examining.) The weeks of July 13, July 20, July 27, August 3, August 10, August 17, August 24, and up to the week ending October 26th, all the intervening time. 40

Q And from the first to October 26th, is that entirely and exclusively in your handwriting? A Yes, sir.

Q And the entries, were they made from day to day? A Yes, sir.

Q And what does that time book show so far as your entries are concerned? A It shows the actual time put in by the various men employed on the work. 50

Paul G. Koch, direct.

Q Does it also show the number of men employed on the work from week to week? A Yes, sir.

Q Does it show the wages paid them? A Yes, sir.

10 Q And the entries made by you are embraced in what pages, from page what to page what? A The book isn't numbered.

Q It isn't numbered? A No, sir.

Q Then— A It is from where you have your finger in to the front of the book, from October—

Q Just show me, will you? A Starting right here, and ending here. (Indicating.)

Q They are embraced from the first page, entitled 'Week ending July 13, 1916'— A Yes, sir.

20 Q —to the page and including page entitled 'Week ending October 26, 1916'? A Yes, sir.

Q And the amount of money in the last column on each of those pages represents what, opposite each name? A Represents the amount of the payroll for that week for the men employed, outside of the overhead.

Q And the total at the foot of each page represents what in money? A Total cash paid, outlaid for the week.

Q For the week, of all the men? A Not including overhead.

30 Q Now, that payroll doesn't include what? A It doesn't include any of my time.

Q That is, your salary as engineer? A As engineer, and it doesn't include Mr. Olmstead's salary.

Q And what else doesn't it include? A It doesn't include any of the general overhead at all.

Q And by the general overhead you refer to what? A Wear and tear on machinery, repairs on machinery—that is, if any material was used.

40 Q It doesn't include any material, does it? A No, sir.

Q Of any kind? A Of any kind.

Q Then it includes simply labor, money paid to the men who worked on the job, exclusive of yourself and Mr. Olmstead, is that right? A Yes, sir.

Q Now, I show you another book, marked on the first fly-leaf, 'General Expense,' and ask you to look at it and say whether or not the entries in that book were all made by you. (Handing book.) What is that book? A General expense, and shows all the money outlaid, as cash outlay.

50 Q Was that book kept by you? A Yes, sir.

Paul G. Koch, direct.

Q Will you please look at the entries from the beginning down to the date of November 11, 1916, and say whether or not all the entries are in your handwriting? A (After examining.) Yes, sir.

Q From what other books or sources did you enter into that book, Mr. Koch? A I entered in this book from the small expense book that I carried— 10

Q And what else? A This is from part of the loose leaf book, and the check book, and checks, and from other bills that were paid directly from the Orange office.

Q That is, bills for material? A Yes, sir.

Q In what way did the bills you refer to for materials first come to your attention? A When the bills were received they were given to me for entry.

Q By whom? A Mr. Ippolito. 20

Q And the entries, so far as they relate to materials, in that book, are they from those bills? A Yes, sir.

Q Now, what other entries are in there; what do they represent? A They represent general expenses, petty cash—

Q Well, I don't mean under what head, but do they represent also labor? A Yes, sir.

Q Now, did you enter into that book all of the moneys paid under the payroll? A Under the payroll, yes, and any moneys—

Q I show you this small red book which you say is a memorandum book (handing book). A Yes, sir. 30

Q What did you keep in that book? A I kept notes, special notes about happenings on the job.

Q Well, with regard to the expenditure of money by you? A Actual cash outlay from day to day.

Q And did you transfer the cash items from the small red book into the general expense book? A Yes, sir.

Q I show you also this memoranda book, without a cover. what is that (handing)? A That is the same as this small book. 40

Q And did you transfer from that memorandum book also to the general expense book? A Yes, sir.

Q Now, does the book entitled 'General Expenses' show all of the moneys laid out by Mr. Ippolito for labor and materials on this original job from the time you came on the job down to November 11, 1916? A No, sir.

Q What is not included in it? A None of my salary and none of Mr. Olmstead's salary. 50

Paul G. Koch, direct.

Q Well, with the exception of your salary and Mr. Olmstead's salary, does it show all the money laid out during those periods? A No, sir.

10 Q Well, what else is excluded? A It wouldn't show the overhead, interest on money, and the wear and tear on machinery.

Q Well, with those exceptions; that is, the salary of yourself and Mr. Olmstead, and the overhead, and the wear and tear, does it show all the money laid out for labor and materials on that job? A Yes, sir.

Q Did you pay out any money on that job by your own check on account of Mr. Ippolito? A Yes, sir.

20 Q Will you please explain in what way that was done? A Mr. Ippolito from time to time gave me checks, and in order that I could get at the money as needed, put it in my personal account.

Q And then you did what? A I carried my check book with me, and as I needed a check for freight or general expenses, say, I would make it out right at the time of paying, and also draw the payroll each week.

Q In the book which is marked 'General Expenses,' did you enter also the checks that you drew on this account in the manner that you have just described? A Yes, sir.

30 Q I show you a bundle of checks; will you please look at them and see if those were checks drawn by you, paid by you, on account of this job (handing)? A Yes, sir.

Q All of them? A Yes, sir; they were either for actual work or for petty cash used in general expenses.

Mr. Davis. I ask that the books and documents I have referred to be marked for identification."

I don't know whether this is the proper place to offer them in evidence?

The Court. You had better finish reading your deposition.

Mr. Davis. (Continuing reading:)

40 "Q Mr. Koch, were you on the job at the time the change was made in the manner of construction of the tank foundation? A I was there when the change came up. The change came—may I ask the question was the change November 11?

Q That work was done after you left, wasn't it? A As I recall, it was started, I believe, around the 28th of November.

Q The 28th of what? A November.

Q And you left about the first? A I left the first of December. I haven't looked at any of my memorandum books.

50 Q The entries in those memorandum books under the various dates, were they made by you on the dates indicates? A Yes, sir.

Paul G. Koch, direct.

Q And made from time to time as the expenditures were made? A Yes, sir.

Q Now, do they relate to any job, so far as expenditures go, except the original job? A No, sir.

Q Now, I show you also a package of daily reports fastened together, the outside report being dated November 30. Will you please look through that bundle and see whether any of those reports are in your handwriting? A (After examining.) The report of November 30th. 10

Q Is that the only one? A Yes, sir.

Q And what does that report of November 30th represent? A It represents the cost of a watchman, night watchman.

Q Well, does it represent labor and materials used on the job on that day? A Yes, sir.

Q Who made out the report? A I did.

Q And how often was that kind of report made out? A Every day. 21

Q To what work did that refer, Mr. Koch? A To the extra work.

Q Well, what particular extra work on that part of the job?

A It was on the jutting of piles, and sawing off in connection with the foundation of the tank.

Q Under the changed plan or under the original plan? A Under the changed plan.

Q Now, I show you another bundle of daily reports—well, what did you do? A I made out the reports and submitted them to the resident engineer, Mr. Ziegler. 30

Q Who was Mr. Ziegler? A The borough's representative on the job.

Q And calling your attention in the lower left hand corner to the entry, 'Approved, A. Ziegler, Resident Engineer,' whose signature is that? A That is Mr. Ziegler's signature.

Q When were those entries made by you on that daily report? A They were always made the following morning or the following day.

Q That is, the morning following the day on which they bear date? A Yes, sir. 40

Q When is it that it was submitted to Mr. Ziegler for his approval? A At the same time, and if he wasn't there, as soon as he came.

Q Is the entire report with the exception of his signature in your handwriting? A Yes, sir.

Q Now, I show you a bundle of reports, the outside sheet being dated December 1, 1916. Will you please look through that bundle and say what of those reports are in your hand- 50

Paul G. Koch, cross.

writing (handing)? A Yes, sir. Two reports, the one dated December 1st and the other dated December 2nd.

Q And what does the report of December 1st represent? A Represents work on the tank foundation change.

10 Q Well, does it represent labor and materials used on the job on that day? A Yes, sir.

Q And can the same be said of the report of December 2nd? A The same; yes, sir.

Q Whose handwriting are they both in? A Both in my handwriting, with the exception there is a note on the December 2nd report in Mr. Olmstead's handwriting.

Q Are they both approved by Mr. Ziegler, the resident engineer? A Yes, sir.

20 Q On all these reports that you have referred to, so far as the sums of money in that last column are concerned, they represent what? A The actual money paid to the men, or—yes. Not the price being paid on material, that being shown by the bills.

Q And do those reports include the compensation of either yourself or Mr. Olmstead? A They include Mr. Olmstead, but don't include myself.

Q They don't include you? A No, sir.

Q What was Mr. Olmstead's position there while you were there? A Foreman in charge of the work.

30 Q Mr. Koch, in that book which is marked 'General Expense, does that include the moneys that were laid out for labor and material on the sludge beds? A Yes, sir.

Q And do you recall what, if any other extra than the change in the sludge beds there was from the beginning of the plant down to the time that the foundation construction was changed; do you recall any except the change in the sludge beds? A No, sir; I don't, sir."

Do you want to read the cross examination?

40 *Mr. Morrison.* You can read it, if you like.

Mr. Davis. (Continuing reading:)

"*Cross examination* by Mr. Morrison.

Q Mr. Koch, I heard your statement that in general the items shown on those books were charges for labor and materials on this job. I notice in glancing through the books many items of personal expenses, pullman tickets, meals, etc. You don't mean, do you, they are directly chargeable to the job? A Yes, sir.

50 Q As labor or material? A General expenses.

Paul G. Koch (recalled).

Q How was a pullman used on that job? A I had to go to Schenectady to ship machinery down from Schenectady in order to use the machinery on that job.

Q And Mr. Ippolito compensated you for that? A Yes, sir.

Q And for that reason you think that they are chargeable to that job? A Yes, sir. 10

Q And the other items of similar nature to the items mentioned are expenses incurred in the same way? A All items shown in this account are expenses incurred directly due to the job.

Q And all chargeable to Mr. Ippolito by you? A Yes, sir.

Mr. Davis. That is all, Mr. Koch, for the present."

Now, he was recalled (page 39).

(Reading:)

20

"PAUL G. KOCH, recalled, further testified as follows:

By Mr. Davis.

Q Mr. Koch, while you were on the job, and before Mr. Olmstead came, what did you do, if anything, with regard to checking up materials delivered on the job? A Checked all materials as received, against the bills.

Q Describe how you did it. A Well, if—the way it was done, if a load of stone was delivered, the driver would have a sheet with him showing three yards, or five yards, or whatever it was, and we would check up the wagon as close as we could do it, and when the slip is returned we get a receipt—we have a copy; for instance, a bill may come in in a month, say, showing so many loads received, so many yards, and we check the receipt we have against the bill, or if a load of cement was received, that would be received in the same way. 30

Q With regard to lumber, brick and things of that sort, how did you check up the bills with the amount received? A It was always checked; the driver always had a bill of the materials with him, and we checked off each bill as it came in, and counted the number of pieces, and measured the length of the pieces. 40

Q During what period did you do the checking up yourself personally? A On and off during the job, just according to who happened to be near the driver when he came in there.

Q When you didn't check off, who did, if you know? A Mr. Olmstead.

Q Did you find any discrepancies between the materials delivered and the bills? A No, sir. 50

Russell C. Olmstead, direct.

Q Then do you say that all of the materials called for in the bills, the various materials, that the amounts called for were delivered on the job? A Yes, sir."

I offer his deposition in evidence, if your Honor please.

10 *The Court.* You have read it. I suppose it goes in evidence, but not as an exhibit.

Mr. Davis. Now, if the Court please, I offer in evidence the time book that was referred to in Mr. Koch's deposition, beginning July 13th, and I think he ran down to December 1st, was it? I offer in evidence—well, I notice this time book is in two handwritings. I will reserve that until Mr. Olmstead comes.

I offer in evidence the petty cash book.

The Court. Kept by this man?

20 *Mr. Davis.* Kept by this man and referred to in his deposition, and it was marked at the time of the deposition P. 3.

The Court. It will now be marked according to our new numbers.

(Marked Exhibit P. 25.)

Mr. Davis. I offer in evidence the sheets that are bound together; it is designated a notebook without a cover, and in the deposition it is referred to as P. 4, all kept in his handwriting.

30 *The Court.* Yes.

(Marked Exhibit P. 26.)

Mr. Davis. I offer in evidence the bundle of checks referred to in his testimony and marked at the time of the deposition P. 5 for Identification.

The Court. P. 27.

(Marked Exhibit P. 27.)

Mr. Davis. Also the book marked "General Expenses," which, in Mr. Koch's deposition, was marked Exhibit P. 2, all in his handwriting.

40 *The Court.* P. 28.

(Marked Exhibit P. 28.)

RUSSELL C. OLMSTEAD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Davis.

Mr. Olmstead, where do you reside? A Hudson Heights, New Jersey.

50 Q And what is your occupation? A Contractor.

Russell C. Olmstead, direct.

Q How long have you been in that business? A Twelve years.

Q How many? A Twelve years.

Q And did you work for Mr. Ippolito on this Ridgefield job?

A I did.

Q Do you remember when you began to work there, Mr. Olmstead? A August 23, 1916. 10

Q And in what capacity did you go to work there? A Foreman.

Q Was Mr. Koch there, Paul Koch, at the time you went?

A Yes.

Q What capacity was he in? A He was acting as engineer and superintendent.

Q Now, you stayed there as foreman under his superintendency, then, did you, while he was there? A Yes, sir.

Q And when did he sever his connection and leave the job? A I think some time in December. 20

Q Of what year? A The same year.

Q 1916? A Yes.

Q And from December, 1916, onwards, what position did you then occupy on the job? A I had entire charge of the job.

Q You came there in August, you said? A Yes.

Q When you came there, Mr. Olmstead, to what extent had the job progressed? A The preliminary work had been done preparatory to driving the piles.

Q Well, had the sludge bed been completed? A No.

Q The preliminary work on what? A Just the actual work of getting the plant on the job ready to start the actual construction. 30

Q I see. And you say preliminary to driving the piles? A Yes.

Q What piles do you refer to? A Piles supporting the tank.

Q Well, after you came on the job in August, 1916, what was the first work undertaken? A Driving the piles under the tank.

Q And did that go along in connection with the sludge bed? A Yes, sir.

Q And was the out-fall pipe being laid at the same time, or later?

A It was laid after the piles had been driven in the tank, immediately after. 40

The Court. What do you mean by the out-fall pipe?

The Witness. That was a twenty-inch pipe running out into the river to carry the waste after it passed through the tank.

The Court. How did the stuff come into the tank?

The Witness. It was pumped in from the pumping station.

The Court. Through a pipe?

The Witness. Yes, sir. 50

Russell C. Olmstead, direct.

The Court. What do you call that pipe?

The Witness. I should call it a force pipe.

The Court. Did you put it in?

The Witness. No.

10 *The Court.* That was put in by another contractor?

The Witness. By another contractor.

Q You had nothing to do, did you, with the pumping station?
A No.

Q Or with any of the work of the sewerage system before the sewage got to the tank? A None.

Q This out-fall pipe ran from what to the river? A It ran from the tank to the river.

Q Was it connected up to the sludge beds? A Yes.

20 Q And you say it was twenty-inch iron pipe? A Yes.

Q How soon after you came on the job was work started on the sludge beds? A It was shortly after I came on the job. I should say about three weeks, we started to work on the sludge bed.

Q Did you have any charge of that work on the sludge bed?
A Yes.

Q Did you have charge of the men that were working on it?
A Yes.

Q And did you have anything to do with the keeping of the time of the men during the period that you were working on the job? A Yes.

30 Q When did you start keeping the time? A I don't know; it will show in the book, in my handwriting.

Q How many time books were there altogether, Mr. Olmstead?
A One.

Q Now, I show you a book marked "Weekly Time Book," which has been referred to in Mr. Koch's testimony, and is marked Exhibit P. 1 for identification. Will you please look at that and say what portion of it is in your handwriting, if any? A (Referring.) My handwriting starts the week of November 2nd.

40 Q 1916? A Yes, and the time for the week ending November 2nd, 1916.

Q And continues to what point? A Continues, with the exception of the days of December 7th—with the day of December 7th, until the end of the job.

Q And just give the date of the end of the job, as you call it, as shown by the time book? A May 28th, 1917.

50 Q Now, Mr. Olmstead, what does that time book show as kept by you? A That time book shows the hours of—that was worked by the men employed on that job per day, and the amount that they were paid, the rate they were paid per day or per week.

Russell C. Olmstead, direct.

Q And does it show any materials used on the job? A No.

Q Does it show any overhead expenses? A No.

Q Or interest? A No.

Q Wear and tear? A No.

Q Does it show your salary? A No.

Q Does it show Olmstead's? A No.

Q I beg your pardon; Koch's? A No.

Q It just shows all the men, exclusive of the superintendent and the foreman? A Yes.

Q How much were you being paid at that time? A \$250 a month.

Q Was that from the beginning? A Yes.

Q And did that continue all the way through? A Yes.

Q How much was Koch paid at the time? A I do not know.

Q Now, when he stopped keeping the time, either in November or December, he got off the job altogether, I understand? A Yes.

Q Koch. Referring to the item of December 7th, just look at that, will you please? You say that the entry for December 7th is not in your handwriting? A (Referring.) The entries for eight men are in the handwriting of Paul Koch, and three are in my handwriting.

Q Of that day? A Of that day only.

Q December 7th.

The Court. How did that happen?

The Witness. I do not know.

The Court. You do not recall now?

The Witness. I do not recall it now, exactly how it happened.

Q Now, when were the entries in that book made by you, Mr. Olmstead? A The entries every day was made at the closing of the work of the day, or in the morning of the day after.

Q And they were made by you personally? A Yes.

Q Now, the amounts that are stated in there, are they the true amounts that were paid by Mr. Ippolito for labor? A They are.

Mr. Davis. If your Honor please, I offer the payroll book, the time book, in evidence.

The Court. It may be marked.

(Marked P. 29.)

Q Mr. Olmstead, referring to the work of changing or strengthening the foundation of the tank, how was a record of the labor

Russell C. Olmstead, direct.

and materials used in that work kept? A They were kept on extra work sheets, a different form of stationery.

10 Q I show you a bundle of papers that have been referred to by Mr. Blood, running from P. 18 for identification down to P. 23 for identification. Will you please look at them and say what, if any of them, are in your handwriting? A (Referring.) The ones of October 12th to October 14th are.

Q Suppose you just designate them by—that is P. 18. That is all in your handwriting, is it? A (Referring.) All in my handwriting, all with the exception of this one dated November 30th are in my handwriting, that one (handing bundles of papers to Mr. Davis).

Q Now, just a moment. That refers to P. 19, does it? A Yes, sir. Is that the one?

20 Q And referring to the sheet of November 30th, P. 19, whose handwriting is that particular sheet in? A That is in the handwriting of Paul Koch.

Q Was that his last day on the job, Mr. Olmstead? A I don't believe so. I think he was there a day or so or a few days later. These are all in my handwriting for the month of December, with the exception of December first and second, which are in Mr. Koch's handwriting; that will be the last of his.

Q You refer to P. 20? A Yes. That is all in my handwriting.

Q Referring to P. 21? A P. 21; P. 22.

30 Q All in your handwriting? A Yes. P. 23 is all in my handwriting.

Q Now, will you just explain how those sheets were made up? Those daily sheets? A They were made up showing the actual hours that were worked by the laborers and mechanics on the extra work for that particular day, and it specifies what they were working on, what they were doing during that time.

Q Does it also show the actual money owing to the laborers? A Yes.

40 Q These men. Do these sheets also show the materials that were used? A It shows part of the material.

Q And how was the other part indicated or shown? A The other part was shown on the bills as they were received at the end of the month, or the statements from the material dealers.

Q How many of those time sheets were made out in a day? Was there just one original, or an original and duplicate? A An original and duplicate.

50 Q And what was done with each, the original and the duplicate? A The original was turned over to the inspector, Mr. Ziegler, and the duplicate was retained by Mr. Ippolito.

Russell C. Olmstead, direct.

Q Well, was not the original, or the paper that was signed by Mr. Ziegler, wasn't that kept by Mr. Ippolito? A Yes, the original was retained in our possession, Mr. Ippolito's possession, and the duplicate was given to the borough engineer through Mr. Ziegler.

Q Will you please—you probably have done it—if you haven't, will you please look at the name of Mr. Ziegler signed to all those sheets, and see whether or not that is his genuine handwriting? 10

A That is his signature.

Q And where was it signed, as a general thing, with regard to the work? A Do you mean the location of the signing?

Q Yes. A On the job.

Q Now, will you please state, Mr. Olmstead, what was done by you and by Mr. Ziegler in the way of making up these daily reports? A The time of the men was copied from the time book and made out on those reports.

Q Where was Mr. Ziegler stationed, as a general thing, during the day? A He was on the job all the time during the working hours. 20

Q And he was representing the town? A Yes.

Q And did he keep a record himself of the number of men that were employed there? A Yes. That is, he checked our time every day.

Q Each day? A Each day.

Q Did he do that before he signed his approval on the time sheets? A Yes, sir.

Q Now, I show you a bundle of time sheets or daily reports, as I call them, starting on March 18th, and running down to March 31st, 1917, which were marked—well, these were marked, if your Honor please—Mr. Olmstead was examined at the time of Mr. Koch, but I suppose it will confuse if I refer to them; they were marked at that time. I will just erase it. 30

The Court. I think so.

Q Will you please look at them and see in whose handwriting they are? A They are all in my handwriting.

Q And what do these daily reports from March 18th to March 31st show? A They show the amount of money paid to the watchman and, I believe, myself, on those sheets. 40

Q Was that during a period that you were carrying on work, or during a period that the work was stopped? A During the period the work was stopped.

Q Was this before or after you received the notice to stop the work, or get off the job? A It was after we had received the notice to stop the work.

Q After receiving the notice to stop the work, which was February 28th, 1917, did you stop work? A Yes. 50

Russell C. Olmstead, direct.

Q And then after getting the second notice, March 14th, 1917, from that time until the time that you got off the job, how many men did you keep working there? A We only had a watchman and myself, were the only men there.

Q Mr. Ziegler, was he there during that period? A No.

10 Q I noticed that none of these sheets from March 18th down to March 31st are approved by anybody, is that so? A (Referring.) That is so.

Q Those entries, Mr. Olmstead, on those sheets, were they made by you from day to day? A Yes.

Q And do they truly represent the outlay for labor? A Yes.

Q During those days? A Yes.

Mr. Davis. I would like to ask that this bundle, if your Honor please, be marked for identification?

20 *The Court.* You may so mark it.

(Marked in bulk Exhibit P. 30 for identification.)

Mr. Morrison. That is from the 18th to the 31st?

Mr. Davis. 18th to 31st, yes.

Q Until you got off the job, Mr. Olmstead, what plant did you have there? A Do you want the details of the plant?

30 Q Well, the names of the various parts of the plant? A We had a traveling derrick, hoisting engine, boiler, centrifugal pump, steam pump, a pulsometer, a single drum hoist, a concrete mixer, small tools such as small gasoline pump and picks and shovels and jacks, and all sorts of things that a general contractor would have on a job of that kind.

Q Did you have a hammer of any sort? A Steam hammer?

Q Yes. A Yes, a steam hammer.

Q And did you have any tracks or railroad apparatus? A We had a small industrial railway, with cars.

Q Running from where to where? A It ran from the mainland across the bridge onto the site of the tank and sludge beds.

40 Q Now, going back to the time that the sludge bed was begun, do you recall at that time the change in the sludge bed? A The plan, I believe, for the change in the sludge bed had been arrived at before I came on the job, but there had been a change.

Q Well, the sludge bed as constructed under you as foreman was constructed out of what materials? A Concrete.

Q Altogether? A Re-enforced concrete.

50 Q Now, with regard to the tank, before any change was made in the construction or strengthening of the foundation of the tank, how far had the work on the tank progressed? A All the piles had been driven, the excavation had been completed, and the tank was

Russell C. Olmstead, direct.

practically ready to place the concrete; the outside forms for the wall had been placed, and part of the re-enforcing steel for the walls had been in place.

Q Will you just describe the manner in which the piles were driven under the first driving? A The piles were driven with a traveling derrick with a fifty-five-pound steam hammer, and driven in a modern method to refusal. 10

Q Just what do you mean by driven to refusal? A Well, when they will go no further under the impulse of the hammer, with no appreciable penetration.

Q And what does that indicate in a case of that sort? A That indicates the pile has gone as far as it will go in that material without being ruptured.

Q The first driving of the piles, were they all driven, as you say, to refusal? A Yes. 20

Q Now, after they were driven, how deep down was the excavation made for the tank? A About fifteen feet from the ground level.

Q And then what was done with the spiles after the excavation was made? A They were cut off at the proper elevation.

Q And were they all cut off at a uniform elevation? A There were two rings; the inside ring was cut off lower than the outside ring, but each ring was cut off at the same elevation.

Q Now, this inside ring of spiles was cut off how far below the surface of the ground? A About eleven or twelve feet. 30

Q And the outside ring was cut off how far, if anything, below the surface of the ground? A They were about level with the ground level.

Q What was it, Mr. Olmstead, that the inside ring of spiles was to receive or act as a foundation for? A They were to carry the first section of the tank and support the outside walls of the tank.

Q Was that the section that went down deepest into the ground? A Yes.

Q What was it that the outside ring of spiles was to hold up? A They carried the tank farther up in its height and supported the outside walls there. 40

Q What was there, if anything, on the tank that was to rest on this outside circular ring of spiles? A There was a concrete bracket which rested directly on the spiles which, in turn, supported the tank.

Q Now, after you had gotten the spiles cut off to their proper level, had you gone ahead with any of the concrete or re-enforcing work under the original contract? A We had set the steel on the 50

Russell C. Olmstead, direct.

outside of the wall of this tank, and we hadn't done any concrete; we were ready to concrete the day that the work was stopped.

Q Did you have the forms, then, you say? A The outside forms for the first lift of concrete.

10 Q What were those forms for? A They were to form the concrete and support it while it was wet, being placed, until it was hardened.

Q I say, what were the forms for? A The outside of the tank.

The Court. Was the tank circular in shape?

The Witness. Yes, sir.

Q How much of the forms did you have set? A The first layer set; that is, they were about five feet high in a circle.

20 Q You hadn't yet begun to pour in concrete for the tank itself?
A No.

Q Had you started to pour any concrete for the mat over the bottom of the tank? A No.

Q At the time the work was stopped? A No.

The Court. Did you put the mat in after you put the side walls?

The Witness. No; put the mat in before; the side walls rested on the edge of the mat.

30 *The Court.* How could you put your form in then unless you had your mat?

The Witness. Well, the outside form went down to the bottom of the mat. The extent of the mat stopped on the outside of the wall.

40 Q Now, when you got to that point, Mr. Olmstead, where the excavation was made and your spiles cut off, and everything ready to go ahead with the tank itself, what was there, if anything, that happened? A We were completing the final excavation. There was a small amount of material remaining before we started depositing concrete, and when we pumped the tank out to do that work, the water and quicksand had been filling in on one side of the tank, that is, it displaced—it had misplaced several of the piles on the lower circle and loosened several on the outer circle, and the form was in a very precarious position as far as placing any concrete.

Q Well, did you proceed with the work, or did you stop? A We proceeded with the work of excavation and notified the engineer, and he stopped the work when he arrived on the scene.

50 Q How long, then, was the work stopped for, about? A About three or four weeks, I believe.

Russell C. Olmstead, direct.

Q Have you got any memorandum book in your possession, kept by you, that would show when the work was stopped and how long it was stopped? A Yes, there is a memorandum book there (indicating).

Q Will you please turn to it? A I believe it is there in that box (indicating). 10

Q Is this it? (Handing book to witness.) A That is it.

Q Well, can you tell without refreshing your memory at all by that book, or do you need to refer to the book to refresh your memory? A It was stopped on September 23rd, the first stop.

Q 1916? A 1916.

Q And how long did you remain inactive under that stoppage at that time? A Until October 12th, I believe.

The Court. We will take a recess at this place until tomorrow morning at 10:00 o'clock. 20

(Recess at 4:20 P. M.)

Thursday, April 3, 1919, 10:00 o'clock A. M.

TRIAL CONTINUED.

RUSSELL C. OLMSTEAD, resumed the stand, and testified as follows: 30

Direct examination by Mr. Davis.

Q You were referring yesterday, Mr. Olmstead, to the stoppage of work after the quicksand was discovered in the bottom of the foundation of the tank. Now, on October 12th, did you start up work again? A Yes, we started work on October 12th.

Q And you started work on what? A On the foundation for the tank.

The Court. On what?

The Witness. The foundation for the tank. 40

Q And what did that work consist of that you started on on October the 12th? A That was to re—to do more excavation in the tank proper and drive the sheathing further; that is, put new sheathing, heavier sheathing, drive it further around the sides and excavate and put in a concrete mat.

Q And did you continue on that work, then, without stop, until the following spring? A No, we continued with the work until the 14th, when we stopped. 50

Russell C. Olmstead, direct.

Q The 14th of what? A Of October.

Q And then you were stopped on the 14th of October? A Yes.

Q Now, on this first stoppage which you say occurred on what date? A October 12th?

10 Q No; that was when you started. When did you stop the first time on the order of the engineer? A September 23rd.

Q And how long—how many working days did you remain stopped at that time? A From the—that is, the number of working days between September 23rd and October 12th.

Q Well, have you got that in your book? A No. I have, with the exception of the number of Sundays that were in there. I haven't the Sundays dated in here.

Q Well, now, just state from your book how many working days you were stopped from September 26th to October 12th. A Sep-
20 tember 23rd.

Mr. Morrison. If the Court please, I wish to renew the objection of the defendant to this line of testimony. There is nothing to show—to lay a foundation for holding the borough liable for any delays. There is nothing to show that the borough was to respond to delays.

The Court. Well, I suppose they cannot put their case all in at once. They can put it in, and unless they show the borough was responsible, it makes no difference.

30 *Mr. Morrison.* May I have the permission to move to strike out the testimony—

The Court. Yes. It is one of these cases where you cannot take a witness off the stand and call another and put him back again.

Q Well, just state what days they were, Mr. Olmstead? A There were sixteen working days.

40 Q Sixteen days. And during that period that you were stopped work from the 26th to the 12th of October, what labor or what men did you have on the job, what charges have you got on the job? A We had all the men on the job.

The Court. What?

The Witness. We had all the men on the job.

The Court. And the charges that you were paying previous to that time?

50 Q Have you got a memorandum of that in your book? Just state what the charges were on this particular day? A I have a memorandum of the men on the job. The time book will show the names and the amount of money expended.

Russell C. Olmstead, direct.

Q (Handing book to the witness.) A (Referring.) There is an engineer, fireman, ten laborers, a night watchman and myself on the job at that time.

Q And they were there during all of that period? A They were there during all that period.

Q How much a week did the wages amount to? A Week ending September 28th, the wages for the laborers and engineers were \$260.89. 10

The Court. What date was that?

The Witness. That is for the week ending September 28th.

The Court. September 28th?

The Witness. Yes.

Q Well, but you stopped in the middle of that week, didn't you?

A We stopped in the middle of that week, yes. 20

Q Well, I want the days after you stopped? A I haven't that totalled up here.

Q Well, there were two or three days that week, weren't there?

A There were four days in that week.

Q Well, what were the wages for those four days? Were they two-thirds of the amount that you have named? A That would be two-thirds of that amount, approximately.

The Court. And what was the amount you named?

The Witness. \$260.89. 30

Q Then, that would be about \$173.00. And the next week were you stopped entirely all week? Was there any other charge in that week excepting the wages that you have spoken of?

Mr. Davis. Have you got that bill, Mr. Morrison?

Mr. Morrison. Which bill is that?

Mr. Davis. The bill rendered the borough?

Mr. Morrison. (Handing paper to Mr. Davis.)

Q Were there any other charges excepting the labor for those four days? A There might have been charges for material received. 40

Q Well, I mean on account of delay, charged up to delay? A There would be the loss of the plant which wasn't allowed to work on that section of the work.

Q Now, the next week, how much was paid for labor? A \$243.42 paid for labor the next week.

Q That was the week ending what? A October 5th.

Q And your next week was the week ending October 12th? A October 12th. 50

Russell C. Olmstead, direct.

Q How much was that? A \$337.58 was the—

Q And that included the wages of the superintendant, did it?
A No.

Q Did it include your wages? A No.

10 Q How much were your wages? Well, think you said you were getting \$250.00 a month? A \$250.00 a month. It is about \$9.90 a day.

Q And you don't know what Mr. Koch was getting? A No.

Q Now, on the 12th of October, you started then to do what work? A To start the work on the extra foundation of the tank.

Q Was that under what is called Order Number Two? A Yes.

20 Q And that contemplated doing what? A Driving heavier sheathing around the sides of the tank, and excavating the material to make the bottom of the tank level with the lowest point, and putting in a concrete mat.

Q That didn't contemplate the driving of these large number of extra piles? A No.

Q Then you worked on that—

The Court. Why did you have to have an order to put in that additional sheathing? Wasn't that up to you?

The Witness. No, sir; that was—

30 *The Court.* Why wasn't it? You had to put in that tank. Wasn't it your place to put it in according to the best way you could? Wasn't it your place to do that?

The Witness. Yes, it was our place to do that according to the plans and specifications.

The Court. They didn't show how your sheathing should be, did it?

The Witness. It showed how far we had to go with our sheathing, and the engineer ordered that we go farther.

The Court. Well, why?

The Witness. To put in a different type of bottom.

40 *The Court.* Well, but you hadn't been ordered to change your bottom then, had you?

The Witness. Yes, sir, we had a written order on number two to do that work.

The Court. All right; proceed.

Q Then that didn't contemplate the driving of this large number of piles that were finally driven, did it? A No.

Q Then you worked on that Order Number Two from October 12th till how many days? A October 14th.

50 Q And then the engineer ordered you to stop? A Yes.

Russell C. Olmstead, direct.

Q Now, from October the 14th, you were stopped, then, for how long? A Till the 9th of November.

Q How many working days? A Twenty-three.

Q That is from the 14th of October till what day in November? A Till the 9th of November.

Q And on what day in November, then, did you start under the—to strengthen the foundation by driving of these extra piles? 10

A On November 9th.

Q Then you continued that down to what period? A Until the work was stopped in the spring.

Mr. Davis. You have a bill, Mr. Morrison, I think, for the delay, I mean an itemized bill.

Mr. Morrison. In what form was it, Judge? I don't recall it. Was it in the form of a letter?

Mr. Davis. Yes; bill rendered for accrued damage, making a total of seventeen ninety. 20

Q Now, in the driving of your piles, Mr. Olmstead, were there any difficulties encountered? A Yes. That is, the piles driven the way they were, I had to be—you mean the new piles?

Q Yes. A Encountered difficulties in driving that made it very difficult to drive.

Q In all how many new piles were driven? A 104, I believe.

Q I think you testified yesterday as to the manner of driving them. Now, I show you the general expense book which is marked Exhibit P. 28. Have you gone over that? A Yes. 30

Q For the purpose of ascertaining what the job under the original contract cost? A Yes.

Q Now, I am directing your attention to everything that was done under the original contract, but having nothing to do with the change in the foundation, which was on a cost plus basis. Now, referring to the general expense book, state, if you can, what the entire money that was spent by Mr. Ippolito on this ten thousand three hundred dollar contract—that is, the original contract, and the change in the sludge bed, and everything exclusive of the work done on the cost plus basis, which was the strengthening of the foundation? 40

The Court. Was the sludge bed done under the same contract?

Mr. Davis. It was included in the contract, the sludge bed.

The Court. I know, but wasn't there a change made?

Mr. Davis. Yes, sir. I am going to ask him to state it both ways. I don't know just exactly which basis may be taken by your Honor. I think I had better have it stated both ways. 50

Russell C. Olmstead, direct.

The Court. Well, isn't that Rutherford *against* Kehoe the ruling case?

10 *Mr. Davis.* Well, the question is—as I understand it, the measure of damages—I think Mr. Morrison and I agree on this—is such proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work. That is Kehoe *against* Rutherford, and other cases.

20 Now, if it should be held that the entire price of the whole work would include the sludge bed as changed, and this little work that was done on Order Number Two, that would constitute one set of figures. If, on the other hand, we regard the sludge bed as what might be called an extra, and the work done under Order Number Two is what might be called an extra, then we would have to, as I understand there has been done—we would have to then confine ourselves to the original contract of \$10,300.00, and show all moneys that might be applied on that contract. So, I think we are prepared to show it both ways.

The Court. All right. I only call your attention to that Kehoe case.

Mr. Davis. Yes, sir; that is the measure laid down in the Kehoe case.

30 *The Court.* So far as the case has progressed, I should think that rule would apply to this case. There may be something before you get through that may change it, but it struck me so far that would be your rule.

Mr. Davis. That would be our rule?

The Court. Yes.

Mr. Davis. Yes, sir. That is what I think.

The Court. Proceed.

The Witness. You asked for the amount of money expended on the original contract?

40 Q First, we want the entire amount of money expended by Mr. Ippolito for labor and materials on everything, exclusive of the money spent, beginning with the change in the foundation, the strengthening of the foundation. Now, that would include, as I understand it, the original \$10,300.00 contract, the sludge beds, and the day or two work done under Order Number Two? A Well, from the analysis of these figures and the total amount that Mr. Ippolito spent until the work was stopped on November 11th, which included all of that work that you mention, the total amount—cost of the work, that is, the money actually spent by Mr. Ippolito, \$11,482.84.

Russell C. Olmstead, direct.

The Court. How much?

The Witness. \$11,482.84.

The Court. That included your salary and the salary of everybody?

The Witness. Yes, sir.

The Court. That is more than the original contract?

The Witness. Yes, sir.

10

Q Now, are there any items in that figure of \$11,482.84 that are not applicable to that—to those items that I spoke of? A Yes.

Q What are they? A The amount of money that was spent on the sludge beds, the extra work on the sludge beds, on extra Order Number Two.

Q No, Mr. Olmstead. I am asking you, the figure that you are giving us now includes all that? A Yes.

Q I will come to this other method later. Was there anything there, any items that should be deducted from the \$11,482 as not applicable to those items that I spoke of? For instance, did you buy any plant at all? A Yes.

20

Q Well, what did you buy? A We bought some cars and industrial track, a small plant, and pump and fittings.

Q And how much did that cost? A To the sum of about \$485.00.

The Court. How much?

The Witness. \$485.40.

Q Now, have you included also in that figure the labor payments during the periods of delay? A Yes.

30

Q And how much were they? A Amounting to \$777.30.

The Court. Seven—how much?

The Witness. \$777.30.

Q Now, those two items make up \$1,262.70, and deducting that \$1,262.70 from the \$11,482.84, would make, according to my figures, \$10,220.14; is that correct? A That is correct.

Q Now, you received on account of that—I don't think these are questioned—the payments, \$5,231.59?

40

Mr. Morrison. We admit that.

The Court. How much?

Mr. Davis. The payments received on account of those items are \$5,231.59 and \$1,567.56, making a total of \$6,799.15, altogether.

Q Now, what was the total price of the work, the \$10,300 contract, the sludge bed and the work done under Order Number Two?

50

Russell C. Olmstead, direct.

A The total contract price, of the work had been completed and paid for, would have been \$12,157.47.

The Court. How much?

The Witness. \$12,157.47.

10 Q Now, how was that arrived at? A The original total contract price was \$10,300. Now, when they changed the construction of the sludge beds from an earth construction to concrete, there was certain materials that were not used in that new construction, and there was a refund we made from the original contract price of \$267.50; that made the net original contract price \$10,032.50. Then we received extra on Order Number One, the change in the sludge beds, the sum of \$1,846.80, and on Order Number Two was \$278.17. That made the revised contract price for the original contract, and for two extra orders, \$12,157.47.

20 Q And have you made an estimate, Mr. Olmstead, as to how much it would have cost at that time to complete the tank from where you left off when stopped by order of the Borough Council, down to the time when the plant would have been entirely completed? A I did.

Q And how much would that estimate be—have been? A The total sum of \$1,541.24.

The Court. Won't you give me those again?

The Witness. \$1,541.24.

30 Q And that would include—would it include the fittings that Mr. Morrison spoke of yesterday? A You mean the fittings for the tank?

Q Yes. There were some little fittings there, I think. A Yes, it included all the fittings; but one item, I believe, of lead pipe, the sum of about \$36.00, that I haven't included in this estimate at all.

Q Now, if you include the \$36.00, what would your estimate be? A It would be \$1,577.24.

40 Q The price that you have stated there of the money spent by Mr. Ippolito, \$11,482.84, did that include all of the materials? A Yes.

Q And did it include all of the materials, not only those that had been used up to the time you stopped, but all the materials that were left on the job? A Yes.

Q Now, in the bill that was rendered to the town—in the bill that was rendered to the borough, and which, I think, has been marked, I do not see the—on the back of it, it is Ippolito's final settlement—

Russell C. Olmstead, direct.

Mr. Morrison. It is either P. 12 or P. 13, Judge.

Mr. Davis. All right. I do not see the mark.

Q Have you, in going over this, deducted any duplication of items, that is, is there anything charged here twice? (Handing paper to witness.) A The way this bill was made out, it was billed—that we had done the total amount of \$8,900.00 worth of work on the original contract, and then included that original contract that we billed on that basis, included all the materials that were bought pertaining to the original contract, and then there was billed here, certain bills for lumber and pipe, cement and steel, that are billed again, that shouldn't have been billed under that item of \$8,900.00. 10

Q Now, will you just pick out what they are, and what the amounts of them are? A There are four bills of the Kernan Lumber Company.

Q What lumber company? A E. Kernan Lumber Company. August 1st; September 1st; October 1st, and October 31st. 20

Q Amounting to how much? A Amounting to—that amount being deducted would include the profit that was figured on that, wouldn't it?

Q Yes. A Amounting to \$1,368.24.

Q Yes; and is there anything else? A The totals of the other bills amount to \$986.54.

Q Now, those two amount to \$2,354.78, and you think that they are charged on that bill twice? A It appears to me that way.

Q That is, in the item of \$8,900.00, and in the item of the materials left on the job; is that right? A I believe it is. 30

Q And then you think that the bill that was rendered to the town should be—have those items stricken off. Now, in the amount that you have testified that was spent for the materials, \$11,482.84, the materials and labor, that includes all of those items, does it? A It does.

Q And in that statement there is no duplication? A No.

Q Now, I show you bills—these are copies of what were rendered to the town. 40

Mr. Davis. You don't find the originals?

Mr. Morrison. No.

Q Referring to the matter of delay, \$350.30 for the one bill, and \$1,358.90. Will you please look over those items (handing papers to the witness) and say if they are correct? A They are correct as statements.

Q Well, what do you mean by that? A That is, in order to check them up exactly, why, we would have to have the—it says, the accrued damage, August to—September 23rd to October 31st. 50

Russell C. Olmstead, direct.

There was a period of two or three days in there that we worked on extra work in the tank, October 12th, 13th and 14th; whether that includes that time, or not—

Q Well, will you check them up, Mr. Olmstead, and we will recall you? A I can check them up on that.

10 Q All right. Now, I call your attention to the items on the bill rendered to the town on the second page of November 1st, as per bill rendered for accrued damage, \$1,358, and ask you if the second sheet that I have shown you itemizes that amount? A That is the amount.

Q I call your attention to the item of December 1st on the town's bill as per bill rendered for accrued damage, \$350.00; is that itemized on the first sheet? A Yes.

Q Is there a difference of cents there? A 35 cents.

20 Q. 35 cents? A Yes, sir.

Q Mr. Olmstead, in that lumber bill of Kernan, \$1,368.24, that you say you should deduct, is there not generally some salvage to the contractor? Should you deduct the whole bill? A No, there always is some salvage.

Q Well, what do you mean by salvage? A Well, that is the lumber that you could take away with you when you left the job. It would be your property.

Q Well, how much would that salvage amount to, as a usual thing?

30 *The Court.* Well, does it make any difference what is usual? Isn't the question what it is in this particular case?

Mr. Davis. Well, it would be very difficult to say in this particular case, if your Honor please, because it was all left there.

A In this particular case the amount that we estimated we could take away was between four and five hundred dollars worth, in round numbers.

40 Q Of the lumber? A Of the lumber.

Q Then, if you were going to have a salvage of four or five hundred dollars out of the lumber bill, should you have deducted from the town's bill the whole \$1368.00, or four or five hundred dollars less than that sum? A We should have charged them for that amount of lumber that they have—that was left there for the salvage, that is, we would be allowed that amount.

Q Then your deduction would be four or five hundred dollars less than \$2354.00 altogether? A Yes.

50 Q Eighteen or nineteen hundred and fifty dollars? A Yes.

Russell C. Olmstead, direct.

Q Now, I show you also a bill of damages amounting to \$1240.26, and also one for \$657.02, itemized. Will you kindly also check them up when you are checking the other two so that you may testify as to them? You better keep them altogether. (Handing papers to the witness.)

10

Now, Mr. Olmstead, referring to this P. 30 exhibit, which are the daily reports from March 18th to March 31st; they appear not to have been approved by Mr. Ziegler. What do the items on that bunch represent? A They represent the amount of money that was paid to myself and the watchman.

Q And do they represent also the time put in by you and the watchman? A Yes.

Q During what period? A From March 31st until March 18th inclusive.

20

Q And what period did they cover with regard to whether the work was going on, or whether it was stopped? A The work was stopped.

Q Was that the final stopping? A Yes.

The Court. What was the date of that final stoppage?

The Witness, March 18th on this bill.

The Court. Didn't you make a statement yesterday that it was May 18th that the last work was done? Did you make a mistake when you said that?

30

The Witness. I don't think so.

The Court. You meant March 18th?

The Witness. I meant March 18th, if I made one that way. I cannot recall that I said May 18th.

Q Now, Mr. Olmstead, referring to the strengthening of the foundation by these additional piles; what change, if any, did that make in the work itself, if it had been completed? A It made no change in the original design of the tank proper.

Q The work, if it had gone to completion, would have done what with regard to the original contract? The original contract, what would you have furnished to the town? A We would have furnished everything under the original contract that we were supposed to.

40

Q Was there any change in the design of the tank? A None in the tank proper; there was in the tank foundation.

Q In the tank foundation. And the change then, in the foundation, was for what purpose? A For strengthening the foundation.

Mr. Davis. Cross-examine.

50

Russell C. Olmstead, cross.

Cross examination by Mr. Morrison.

Q Mr. Olmstead, referring to what Judge Davis calls the statement, I think it is Exhibit P. 12, have you that before you? Oh, no; here it is. Your attention has been called to the fact that the state-
10 ment P. 12, shows the cost of the work done on the original contract to be \$8900.00?

Mr. Davis. If you will permit me, Mr. Morrison, I think I promised the Court I would bring out the figures on both views. I overlooked—

The Court. You were going to do it.

Mr. Davis. Will you mind—

Mr. Morrison. Why certainly.

By Mr. Davis.

20 Q Mr. Olmstead, just lay that aside for the present, will you? Now, referring to the other view and set of figures and eliminating the sludge bed change and the work done under Order Number Two, can you say how much money was spent by Mr. Ippolito for labor and materials on the original contract of \$10,300.00 to get it up to where it was? A The amount expended on the original contract was \$7613.94.

The Court. Seven thousand—

The Witness. Six hundred thirteen, ninety-four.

30 Q And that eliminates the sludge bed change, and also eliminates the work done under Order Number Two? A Yes.

Q And your statement would be the same, I presume, that it would cost how much to finish, after that? A About fifteen hundred, or fifteen hundred and fifty.

Mr. Davis. Cross-examine.

By Mr. Morrison.

40 Q Mr. Olmstead, in the bill, P. 12, there is an item of \$8900.00 for the cost of the work done, as I understand it, under the contract as originally made. Were those figures prepared by you at the time that bill was rendered? A This bill was never prepared by me.

Q You hadn't anything to do with it? A No, sir, that is, with the exception of checking it up; that is—

Q Did you check it before it was rendered to the borough? A No.

Q Have you checked it before coming here today? A I haven't made any exact checking, but I have looked it over; but I haven't made any—

Russell C. Olmstead, cross.

Q And do you know by whom that bill was prepared? A I believe it was prepared by Mr. Ippolito.

Q Do you know what he used in arriving at that figure of \$8900.00, what factors or items he used? Are they in general the same items that you used in ascertaining the cost of the work done that you stated a few moments ago? A Yes, they were the total contract price for the borough of Ridgefield, \$10,300.00, minus an amount estimated to complete the work; that is, in this case, it was estimated it would be \$1400.00 to complete the work. 10

Q And you had estimated the cost to complete the work at \$1577.24? A Approximately that, yes.

Q What makes the difference between your estimate and Mr. Ippolito's? A Well, this is evidently his estimate to complete the work, \$1400.00

Q And that difference from yours is a considerable amount? A \$200.00 there. 20

Q Do you know what makes that difference? A No, I do not.

Q In making up your estimate of \$1577.24 for the completion of the work, have you your figures showing the details from which that is made up? A Yes, sir.

Q Will you please give those, or if it is in tabulated form—

Mr. Davis. Is it in tabulated form, Mr. Olmstead?

The Witness. Yes.

Mr. Davis. Well, suppose you take the sheet off and let Mr. Morrison have it. 30

(Handing paper to Mr. Morrison.)

Q Will you just read that estimate, Mr. Olmstead, please, so that the stenographer may take it? Your notes are a little rough; I am afraid I might not read them accurately. A The first item is the forms. The lumber was already on the job, and stored on the job to do that work. And the labor for placing the forms—it was estimated there was 3834 square feet of form surface to be placed, and at a figure of 4 cents per square foot for placing it, made an extended total of \$153.36. The concrete, the total yardage to be placed, was 154 cubic yards. The materials entering into that concrete approximated the value of about \$5.00. I believe the current price for stone was about \$2.00. Cement was \$1.80 a barrel gross, say \$1.40 net; that is without the bags; and the sand was \$2.00 a yard, but as there is a half a yard of sand used in a yard of concrete, it would make the value of \$1.00 for the amount of sand in the cubic yard. 40

Q What did you give for the figures of stone? A \$2.05 a cubic yard, and to place that concrete, mix it and place it, estimated at 50

Russell C. Olmstead, cross.

75 cents; that made a total price for the yard of concrete of, in the form, \$5.75; the extended total of 554 yards at \$5.75, made \$885.30.

The Court. Yes.

10 *The Witness.* There was 10,300 pounds of re-enforcing steel to be placed. That steel was bought and on the job waiting to be placed, and allowing $\frac{1}{4}$ cent a pound to place that, making the sum of \$25.50. There was 490 square feet of baffle board to be placed in the tank at the unit price of 12 cents a foot, total of \$58.80. There was 5500 pounds of structural steel to be placed in the tank, I-beams and anchor irons. That steel had not been bought, and the estimated price of that in place was 4 cents, making the extended total of \$220.00 for that item. There was about a thousand board feet of decking to be placed, two-inch plank on the top of the tank for a walk. That was at \$45.00 a thousand, one thousand. And to pipe the tank and place the pipes and accessories in the tank, 7,000 pounds of cast iron pipe, and placed there. That pipe was on the job and bought and paid for, so we didn't include the price of that in this estimate, and to place that we estimated a half a cent per pound, making \$35.00 to place that pipe. There had to be a water connection from the city water mains, we estimated that water connection at \$50.00. There was 250 cubic yards of earth, it was estimated, to back fill around this tank and protect it, that had to be filled around, at 40 cents a cubic yard; \$50.00 for that item. And I allowed \$100 to clean up and get off with the plant and machinery. Now, there was 65 barrels of cement on the job, and that cement has also been credited on this concrete material in the total yardage, so we deducted that. The total for that is \$158.40. That made the cost complete \$1541.24, plus that item of \$36.00 for lead pipe which I mentioned before.

20

30

The Court. Makes how much total?

40 *The Witness.* \$1500 and \$77, I believe, and 24 cents.

The Court. \$1577.24?

The Witness. Yes.

Q Do you say, Mr. Olmstead, that there was an item of cement which was to be credited because it was already on the job? A Yes.

Q Had you included the cost of that cement in your other calculation of the cost to Mr. Ippolito to the point of stoppage?

50 A You mean on this bill?

Russell C. Olmstead, cross.

Q No. You have given here this morning an estimate of the cost to Mr. Ippolito of the work which he had done under the contract and the sludge bed extras of \$11,482.84? A Yes.

Q Now, was that cement which was already on the job included in that \$11,000 figure? A Yes.

Q Were there not other materials which were also on the job included in that \$11,000 figure? A Yes. 10

Q Was there not an item of lumber? A Yes.

Q How large an item was that? A Several items of lumber here; the total, I believe, that we included, that was \$1,189.78 worth.

Q And where have you made any adjustment in your calculation of the cost of completion for those lumber items? A For the cost of completion?

Q Yes, you are making an estimate now of \$1,577.24 to complete? A Yes.

Q And you made an adjustment for the cement item. Have you made any similar adjustment for the lumber item? A No. 20

Q And why not? A Because on this item here of the lumber on the job, I have taken into account any lumber on the job, considering this all on the job and been paid for. In this estimate I am making here to complete, I am only trying to find out what it would have cost Mr. Ippolito to have completed that job if we had finished it.

Q Then you have included in your first figure of \$11,482.84, in addition to the cost of construction to the point of stoppage, certain material which was on the job and unused? A Yes, sir. 30

Q Lumber, cement and various other things, and the amount of that you have not specified in your testimony? A No, sir.

Q In making up the estimate of \$1,577.24 to complete, you have given Mr. Ippolito the advantage of those materials on hand? A Yes, sir.

Q And haven't made any adjustment except for this one item of cement? A That is all.

Q You have given the amount or the money value of the lumber; what proportion of that was set aside for use in the forms? A In forms? 40

Q Yes. A I couldn't say what proportion, but there were three thousand—there would have been about five thousand feet in the tank proper of sheathing and supporting lumber.

The Court. That remained?

The Witness. No, sir, it had been removed; that is, the forms for it would have had to be removed. Then there was a considerable portion of lumber there, of heavy timber used for cribbing.

Russell C. Olmstead, cross.

Q Didn't you make an estimate and testify to it earlier in your examination as to the cost of the forms? A Not as to the cost, no. I made an estimate here as to the lumber, that is, the labor, to erect the forms.

Q The labor to erect the forms? A Yes, sir.

10 Q Now, in connection with that labor, you have considered that the lumber already on the job was to be used? A Yes, sir.

Q Now, in making that calculation of the labor, can you not tell us, and will you not tell us, please, how much lumber would be utilized in applying that labor? A Well, the way this estimate is made now, on surface area, 3,174 square feet of surface to cover, there would have been 3,134 board feet of lumber used to cover that work. Then, to support that work there would have to be a certain number of 2 x 6's and 2 x 8's or 4 x 8's, whatever lumber
20 had been used, the general percentage is about, I have it three-quarters as much sheathing, so it would have been about five thousand feet of lumber used in that tank to do the work.

Q And what would the price of that lumber be? A The commercial price, I believe, was about \$28.00 for sheathing, and \$36.00 to \$40.00 for heavier sizes, 2 x 4, 2 x 6.

Q Didn't you mention as one of the prices for the lumber, \$40.00 a thousand? A This is an estimate for placing one thousand board feet in place, \$45.00. That included the price of the lumber and placing it.

30 Q Now, you have spoken about an industrial railway plant and certain tools for which you made a deduction of \$485.00. Was that \$485.00 the entire cost to Mr. Ippolito of those tools and railway? A No, sir.

Q What did it represent then? A It represented the amount less the depreciation for that job on those tools. That is, if we bought a tool for \$500.00 to use on that job, why, we wouldn't take it all off; we would allow something for the use of it on that job.

40 Q Yes. Now, what were the items that made up the \$485.00? Have you a tabulation of them? A No.

Q And from what source did you get those figures, \$485? A I took the figures from the materials and plant that was bought for that job.

Q And in what form or in what place did you find that record of materials and plant for the job? A I found them in this daily expense book or cash book.

Q And working from that, as I understand, you made a tabulation of the industrial railway and small tools, and so forth, but you haven't that with you now? A Yes, sir.

Russell C. Olmstead, cross.

Q I don't quite understand the answer; did you do it? A I did it, but I haven't that tabulation with me of four hundred and some odd dollars.

Q Can you, from the book which you have before you, or from a recollection of the process you have just described, tell us the principal items which go to make up this \$485.00? A I believe so. 10

Q Some of the larger items for instances—for illustration? A Here is an item of Flynn Company, 3000-pound pile hammer; that hammer was paid \$72.00 for. Now, these items that made up this sum was arrived at between Mr. Ippolito and myself more as a matter of judgment. There is no exact way to arrive at that definite cost. It is a matter of judgment, what it was going to come to. Now, I am not positive what we did on this pile hammer, but there was a certain percentage allowed for the use of that hammer, and then it was re-sold. 20

Q You speak of \$72.00? A That was one of the items that helped to make up that four hundred. 20

Q How long a period was the \$72.00 for, for the period of construction under the original contract for sludge beds? A Yes.

The Court. That wasn't the cost of the hammer?

The Witness. That was the cost of that particular hammer, the pile hammer.

The Court. The total cost of that hammer?

The Witness. It was a three thousand pile drop hammer. 30

Q Well, now, was there anything allowed for the driving of that hammer; when the job was completed, it was worth something then, wasn't it? A Yes, sir.

Q What allowance did you make for it then? A I don't know what allowance was made.

Q Do you know whether you made any? A Yes, there is always an allowance made for that material. I don't know personally whether there was an allowance made for that particular item or not.

Q Now, what other reasonably large item can you find there? Here are some items, Flynn Company; you spoke of the track? A Two one-yard dump cars at \$70.00; 360 lineal feet of track, \$144.75. That was another item that belonged to the sum that the drop hammer— 40

Q Now, those, as I understand it, were small cars and tracks? A Yes, sir.

Q You spoke of an industrial railway. When Mr. Ippolito took his apparatus away from Ridgefield, those were still usable, were they not? A Yes, sir. 50

Russell C. Olmstead, cross.

Q And how much of that original cost was charged up to this job by you? A I believe that we charged a percentage on that job, certain depreciation, a certain percentage of that for the depreciation on that particular job.

10 Q Do you recall what the percentage was that was charged to this job? A No, I don't recall the exact percentage.

Q Was that percentage which he used uniformly on all appliances, or did it differ for the hammer and the railway and for other things?

A It would not differ much on a hammer and a railway, but it might differ on another kind of a tool that would be liable to wear out quicker.

20 Q You remember, and have testified, Mr. Olmstead, to the conditions which developed when the attempt was made to build the sludge bed as originally designed, and when the attempt was made to build this tank as originally designed; I am referring to the quicksand, the running sand, as Mr. Blood called it? A Yes.

Q When the overlying material, the earth, had been stripped away for the sludge bed, was there any quicksand encountered in the side of the sludge bed? A In the sludge bed?

Q Yes. A I don't know whether you would call it quicksand there, because there was no water. It wasn't in a place where, if it was quicksand, it would run. There was no water to cause it to run. It was perfectly level ground above the tide level, except at high tide.

30 Q It was clear sand which would run if water ran through it? A Yes.

Q It would be quicksand if it were wet? A It could have been called quicksand if it had been wet in the place where it was hard to handle.

Q About how far below the original surface of the ground was that encountered? A You mean in the sludge beds or the tank?

Q In the sludge beds. A The sludge beds, I think about two or three feet below the surface of the ground that the sand was encountered.

40 Q And how far was that from the level of the water in the surrounding waterways? A At high tide the water flowed over the surface of that ground at the sludge beds.

Q And through this sand? A That is, the sand was below the grass and mud that was on the top.

Q Then at high tide this sand at the site of the sludge bed was wet? A Yes, sir.

50 Q Now, coming to the place where the tank was being built, you have described the quicksand in the bottom of the excavation for the tank. How far below the surface of the ground, the original

Russell C. Olmstead, cross.

surface of the ground, was that sand encountered? A About three feet.

Q And how far below or above the water level was that? A Well, the ground surface for the tank was considerably lower than the ground surface for the sludge beds it would have been submerged about three feet at high tide. 10

Q Before you did any excavation, the site of the tank was three feet below high tide? A Yes, sir.

Q And you have made an estimate of what it would have cost Mr. Ippolito to complete the work as specified and covered by the original contract? A Yes, sir.

Q Have you taken into consideration in making that estimate what he would have been obliged to do to construct the work as originally specified in the face of the difficulties that he met in the way of quicksand and water and so forth? A Yes, sir. 20

Q How much have you allowed for the completion of his original contract for handling the quicksand? A We have already spent that money, because we were ready to place that concrete at that point. We had spent all the extraordinary sums of money, At that time we were ready to go on and proceed with our work on a reasonable basis and a cheap basis, because we were going to be above the water.

Q Well, now I do not understand that you had spent any money which you have included in your estimate for completion? A No,

Q Well, then, what is the force of your last answer, that you had already spent the money which you would have been obliged to spend to retain the quicksand during the completion? A That we had already got to that point where we weren't worrying about the quicksand as contractors any more. 30

Q Perhaps I have not remembered your testimony as to conditions. As I remember, you testified that Mr. Ippolito and his force had driven down these two rings of piling? A Yes.

Q And were excavating preparatory to building the tank, and had some of the first parts of the forms set in the bottom of the tank, the first four or five feet, and when you had reached that point, the sand and soil commenced to run, some of the piles were displaced in the outer ring and in the inner ring, and all of them were weakened. A Not all of them were weakened, 40

Q Some of them were weakened? A Some of them were weakened.

Q Now, in that situation, if there had been no change made in the plan specified, Mr. Ippolito had been going on to finish as originally specified, he would have had to have done something to hold those piles in place and fight that quicksand while he put in the tank. 50

Russell C. Olmstead, cross.

Now, what have you put in your estimate for completion to cover that work?

10 *Mr. Davis.* If your Honor please, I object to that question because that is not the situation that developed. As I recall it, the contractors had to build, under the contract and specifications in the beginning, this double circle. Then the work was changed, and instead of the double circle, they put in a large number of piles. Now, I submit that the estimate that the witness has given was the estimate that it would—the cost of completing the work from where they left off.

The Court. It would appear that under this contract it was the plaintiff's business to put them in, and he took all the risks.

20 *Mr. Davis.* You mean to put in the quicksand?

The Court. Yes.

Mr. Davis. Well, it doesn't appear yet.

The Court. This is cross examination. I am going to allow it. It is a good deal like some of the testimony that you put in.

Mr. Davis. May I then take the same objection to that as taken by Mr. Morrison?

30 *The Court.* Yes. It may appear, but it doesn't have any relevancy to this case at all; but suppose it does appear that under the construction of that contract, he was to put in that plant, then I suppose the other side would contend that they had no right to make a special contract for work that was already covered. You may ask the question.

Mr. Davis. May my objection be noted?

The Court. Yes, and you may apply to strike it out later on if it appears that it isn't relevant.

Plaintiff's counsel prays an exception to the ruling of the Court.

40 Exception noted as ground of appeal.

Mr. Morrison. Will the stenographer please read the question?

(Question read by the stenographer.)

50 A Well, at the point when that work was stopped, as I said before, we were ready to place the concrete, with the exception when this sand came, in the morning we pumped that cofferdam out, and there was an amount of sand; it probably would have taken us two or three hours to clear the sand away that had run in during that time and stop that sand running and dig a hole and plug it with

Russell C. Olmstead, cross.

some hay or crushed stone or something to stop the flow of the sand and allow the water to run in. That would have given us time to have placed that concrete on top of that, and for that you could allow \$25 or \$30. He handled the situation in fairness the other way and wouldn't allow that amount, because we were doing those things every day at the start of excavation. When that concrete had been placed we would have been through with sand conditions entirely, because the bottom of the tank would have been sealed and the sides would have been protected by the sheathing and the sand and quicksand trouble would have been done away with.

10

Q You didn't proceed in that way? A No, sir.

Q You sent for the engineer and called his attention to what was happening. Why did you do that? A The inspection was on the job, Mr. Ziegler, and he recommended and insisted that the engineer be sent for, and that was done.

20

Q At his request? A Yes, sir.

Q You have spoken about the sheathing; the sheathing which is shown on the original plan, is there anything on the original plan to show the extent of the sheathing, or isn't it covered by the general specifications? Isn't it, "Sheath sufficiently to support the work"? A No sheathing shown on the plan at all. I believe it is covered by the specifications.

Q Now, in answer to his Honor's question while you were on the direct examination, I think I recall that you said the sheathing under the original plan was down to a certain depth, and under the changed plan you had charge of some of that additional sheathing. What did you mean by that? A I meant under the original plan it was reasonable for us to assume that we would only have to drive sheathing so far because the excavation would have been done; but under the new plan we had to excavate further; therefore, we had to put in more sheathing.

30

Q Then what you told his Honor was your own thought in the matter and not anything shown on the plans and specifications? A Not anything shown on the plans and specifications.

Q So we may have that clear, won't you please tell us how far, in your opinion, it was necessary to sheath under the original contract? A As far as we had sheathed, to the bottom of the outside ring of—on the inside ring of piles, to the bottom of concrete.

40

The Court. That is about fifteen feet?

The Witness. Between thirteen and fifteen feet.

Q Now, why was it necessary to do additional sheathing under the work as changed by the resolutions? A Well, the resolutions,

50

Russell C. Olmstead, cross.

under the resolutions, the work carried—the plans carried the work to a greater depth, and then the sheathing that was already in there had to be entirely removed at the—to do that new work. That is, when we changed those piles in here, misplaced all those materials in that way, the water coming up misplaced everything around there, loosened the ground around those piles.

10 Q Now, as I understand the way in which you engineers do this work, under the contract as originally made, you have to put down a circular sheathing to hold up the mud and dirt at the sides of the excavation so that you might work in the excavation? A Yes.

Q And if not necessarily circular, in some form to surround your work with the sheathing? A We had to protect our own work.

20 Q And that would have to go down far enough to permit you to work without having the material run in and cave in where you were working, and as you contractors were working there, it was part of your work, as originally specified was it not, to carry that sheathing to any depth it became necessary to accomplish your job? A Yes.

Q Nothing limited by the plans or specifications? A Nothing said about sheathing or depth or how far, or what was going to be done with it.

Q The sheathing as you did put it in, did fail to prevent the running of the sand, did it not? A Yes.

30 Q And what did you do then to correct that failure on your part to sheath sufficiently? A Well, I would hardly say it failed entirely to correct the running of the sand, because the running of the sand in the bottom of the tank was not entirely the fault of not being sheathed properly. The sand came up in the center of the tank as well as at the side—but that last question, please, will you repeat it?

Q You could have sheathed it sufficiently to have sustained the walls of the excavation, around the excavation, could you not? A Yes; it could have been done.

40 Q And that is exactly what you did after the change in the plan, was it not? A No, we hadn't reached that point; we had never reached the point of driving that sheathing down as far as it really had to go.

Q Well, to have gone on and actually set this tank under the plan as modified by the resolution, it would have been necessary to do that sheathing, would it not? A You mean under the plans and resolutions?

Q Yes. A Yes.

50 Q So that so far as the change made by the resolution went, there was no change in the necessary amount of sheathing? A Yes,

Russell C. Olmstead, cross.

as far as the resolutions made the work deeper, made it more hazardous, we had to put in a heavier type of sheathing, and it changed the type of our plans, our fill plans.

Q Now, do I understand the resolutions changed the depth in which the Imhof tank was to be set? A The depth of the foundation, yes. 10

Q But the tank itself, was it to be set in the same place? A Yes.

Q The foundation went farther down? A The main part of the foundation—that is, the lowest point, went a little farther down, but the sides of it went three or four feet farther down all the way around.

The Court. Was the form of the tank changed?

The Witness. No, not the form of the tank, but the tank originally had a cone-shaped bottom and it was flared on the outside, and when they changed the design, the bottom of the tank inside still remained cone-shaped, but the foundation would have been levelled off, brought where it would have been the bottom, but we flared it, brought it up level, made more excavation on the side. 20

The Court. Why was that done, do you know?

The Witness. You mean the work? 1

The Court. Yes; why was it made a different shape?

The Witness. That was the engineer's plan to do it that way. That was his idea and plan. We were only doing the work as directed by the engineer. 30

The Court. I understand. Did I understand you to say in answer to Judge Davis that the original cost of the contract would have been \$7,613.94 if done according to the—up to the time that you made the changes, under the original form of contract?

The Witness. Yes, on the—the net cost on the original contract—this is a digest of the figures that I took from a report made by the accountant who wrote the books up, that the net cost under the initial contract would have been \$7,613.94. 40

The Court. Now, did that include the material that you still had on the job, that would have been used to complete the contract? You see you gave us figures to complete the contract—

The Witness. Yes.

The Court. —of \$1,577.24. Now, this is seventy-six, thirteen— 50

Charles Ippolito, direct.

The Witness. Yes, I am quite positive that includes the cost of materials that were necessary to complete the job. They were on the job and paid for.

10 *The Court.* That would make your total cost of the job \$9,100 and some dollars. The difference between that and the contract price would have been the profit? Is that the way they figured it out?

The Witness. Yes, there are several ways to figure this thing; it gives you a different figure every time you come out, and one check the other within a few hundred dollars, and as you are working on estimating, and not on an actual cost basis to complete, there is no exact way to arrive at the dollars and cents to check each other.

20 *The Court.* When you are giving the cost the way you do, you are giving the actual cost not with any profit to the contractor?

The Witness. No.

The Court. Proceed.

Mr. Davis. That is all, Mr. Olmstead. Will you go to work, please, on that business?

The Witness. Yes.

Mr. Davis. Mr. Ippolito.

30 CHARLES IPPOLITO, the plaintiff, called as a witness in his own behalf, first having been duly sworn, testified as follows:

Direct examination by Mr. Davis.

Q Are you Charles Ippolito, the plaintiff in this case? A Yes, sir.

Q And you reside where? A Orange, New Jersey.

Q And that is your place of business, is it? A Yes, sir.

Q How long have you been in the contracting business? A About 16 years.

40 Q And during that period, what character of work have you performed? A General construction work.

Q Municipal? A Yes, sir.

Q You were the lowest bidder on this disposal system of Ridgefield, and got the job, did you? A Yes, sir.

Q And you started work when? A About July first, if I am not mistaken.

Q 1916? A 1916.

50 Q What plant did you bring on the job? A Well, we had derricks, pumps, picks and shovels, and small diaphragm pumps, all the tools that was required for the particular jobs.

Charles Ippolito, direct.

Q Now, what was the first change, Mr. Ippolito, that was made after you got started to work? A The sludge bed.

Q And what was done there? A It was changed from puddling the clay, puddling, to concrete.

Q What part of it was to be puddled under the original contract? A The outside walls of the sludge beds. 10

Q And when the ground was uncovered, what sort of soil disclosed itself? A Sand.

Q Were any tests made to ascertain anything? A We started the excavation.

Q Yes. What did the engineer do? A He saw that the—the engineer, when he saw the soil there, he thought it wasn't safe to build the sludge bed at that point, and he changed it around.

Q Well, did you change the location of the sludge bed at all? A Yes, sir, they did. 20

Q Where was the sludge bed to be built originally? A Well, I would call it farther east, that is, direct east from the island.

Q On the east part of the island? A Yes.

Q And how far had you gotten with your excavation when the determination came to change, to change the location? A Well, we had an area there of about twenty to thirty feet when the change was made.

Q And then you changed over how far away? A About 200 feet away from it.

Q Further west? A Further northwest. 30

Q And then what change was made so far as the building of the tank was concerned? I mean, the sludge beds? A It was changed, instead of having this clay puddling, why, they made it concrete, re-enforced concrete.

Q And then you built it according to that? A According to the direction of the engineer.

Q Now, with regard to the work on the tank itself, under your original contract, the testimony is that you were to drive a double circle of piles? A Yes, sir.

Q Cut them off, and so forth; you recall that? A Yes, sir; I do. 40

Q How far had you gotten with the work under the original contract before any change was made? A We were ready to concrete the foundation, the bottom of this tank.

Q Well, how far—what had you done? A As I recall the—we were supposed to start in concreting first thing in the morning, and as we started to pump the water out of the tank in itself, some quicksand began to run into it at the bottom, and the minute we discovered that, the inspector came along, and he saw the condi- 50

Charles Ippolito, direct.

tions there, and he ordered us not to go any farther until the engineer would come along and see the conditions of the bottom of that tank.

Q Well, now, did the engineer come then? A He came in about four or five hours.

10 Q What direction did he give you, if anything, as to the continuation of the work? A He simply told us to stop.

Q And did you stop? A I did.

Q How long did you remain stopped at that time? A I should judge a couple of days.

Q And then what did you do? A Why, it was suggested by the engineer it—it would be best to lay a concrete mat on the bottom of the tank.

Q Well, yes. What is that, a concrete mat? A It is—that is a flat piece of concrete with re-enforced steel.

20 Q Yes. And what else were you to do? A And to re-sheath the whole tank because it required deeper sheathing in order to put in that concrete mat.

Q Well, just describe what is this concrete mat you are talking about? A That is a concrete slab that is square, I should judge, about thirty-five feet square, and about a foot thick, with re-enforced concrete. It is to lay right at the bottom of the tank.

Q Over the spiles? A Over the spiles.

Q And then on top of that what was to go? A The original tank as it was designed.

30 Q Well, how long did you continue on that second direction of—or the first direction of Mr. Blood's? A Why, two or three days.

Q And what happened then? A Then Blood came over and he saw the condition—that is, he looked into the condition further, and he simply said to stop work, "because I don't want this tank to have the—to have the same results as the Fairview tank has had."

Q Did he say what that was? A He said that the bottom of that tank out there had fallen apart.

Q That is, the bottom of the Fairview tank? A The Fairview tank.

40 Q Was that an Imhof tank? A Yes, sir.

Q And then you say he ordered you to stop, and did you stop? A I did; yes, sir.

Q Well, what was done next with regard to any communication with the Mayor and the Council, so far as you were concerned? A We had several meetings at the Borough hall of Ridgefield.

Q With whom? A With the Mayor, Council and the city attorney, and the borough attorney, Mr. Morrison.

Q Mr. Morrison? A Yes, sir.

50 Q And Mr. Blood? A Mr. Blood.

Charles Ippolito, direct.

Q About how many meetings, conferences, did you have with the Mayor and the Council and the attorney and the engineer? A About half a dozen, I should judge.

Q Generally in the evening? A Generally in the evening; yes, sir.

Q And what were those conferences about? A As to the change of the plan. 10

Q So far as the foundation was concerned? A So far as the foundation was concerned; yes sir.

Q Now, Mr. Ippolito, will you just explain the conditions that were found down there in the bottom of this tank that brought about this matter of the strengthening of the foundation? A As we were ready to concrete and pump out all the water out of the tank, all of a sudden right at the bottom at the lowest point of the tank, of the excavated tank, force of water—that is what we call quicksand—started to bulge up, and which quicksand is running sand and water, and it wasn't safe to go ahead with any of that work. 20

Q To what extent did it affect the piles that you had already driven? A Well, some of them was displaced in a few places.

Q And at these conferences that you had with the municipal authorities, what was the subject of the discussion? A The subject of the discussion was as to how to build this tank, that foundation of the tank.

Q Well, was anything said to the Mayor and the governing body as to what the difficulties were that were encountered? A Yes, sir; we told them. 30

Q Well, what did Mr. Blood or yourself tell them? A Mr. Blood had a sketch there showing the—this concrete mat laying on a new set of piles, and we went into the details as to the cost of the work, and at several meetings I stated that the work would amount to about ten thousand dollars to adopt that there—as to Mr. Blood's plan.

Q Did Mr. Blood state to the Mayor and the governing body in your presence what should be done? A Yes, sir. 40

Q In order to strengthen this foundation? A He did.

Q What did he say? A He told them that it required a new set of piles, and to lay on top of that pile a concrete mat.

Q Did he say anything as to the size of the spiles, or how far they should be driven? A Yes, sir.

Q Or anything else of that sort? A Yes, sir.

Q Well, now, won't you tell everything he said, as far as you can recall it? A As far as I recall it, he told them the piles should be thirty feet long and a greater size than the previous piles, and be driven at a greater depth. 50

Charles Ippolito, direct.

Q Do you know how many he said there should be? A 104.

Q Do you remember whether he stated to the Mayor and the governing body whether or not he thought it would be safe or unsafe to proceed without strengthening the foundation? A He did.

10 Q What did he say? A He told them it was unsafe to go ahead with the original contract.

Q For what reason? A For the reason of the foundation.

Q Now, how soon after you stopped work were these conferences with the Mayor, the town attorney, the governing body, and the town engineer begun? A About three days after, the Mayor and chairman of the sewer committee, and if I am not mistaken, Mr. Morrison was there too, they came over and looked at the—right at the plant they were—and Mr. Blood.

20 Q Were you stopped at that time? A We were stopped previous to that, three days previous.

Q And when did you have your first meeting at the town hall, as you said a moment ago, with all of these town authorities on the subject of the change? A I don't remember the exact date, but I must say that there were about six days after the stoppage of the work.

Q Did you tell them at the time that you had been stopped by the engineer? A I did, sir; yes, sir.

30 Q And then you had a session with these authorities about how frequently from that time down to the time that you started up again? A Why, every week. Every two or three days we would have one.

Q Did the Mayor and the governing body ever come down to the job themselves to look at it? A They did; yes, sir.

Q I am referring now to the period after the work was stopped? A They did.

Q And were you there at the time? A At one occasion I was, yes, sir.

40 Q Do you remember whether the engineer was with them or not? A He was.

Q Now, you remember the resolution being passed, Mr. Ippolito, directing you to go on with the work; did you get from the engineer a plan at all, and specifications? A Yes, sir; I did.

Q Where is that plan? A It is right in that (indicating).

Q In here? A Yes, sir.

Q (Handing portfolio to the witness.) A This is the plan (indicating).

50 Q That plan was given to you by the engineer to work by, was it? A Yes, sir.

Charles Ippolito, direct.

Q I show you papers marked "specifications"; will you please look at them and say whether those are—where you got them from?

A (Referring.) I got these from Mr. Blood at the same time with the blueprints.

Q Those specifications, to what do they refer? A To the driving of the piles and the laying of that concrete mat on top of the piles. 10

Q As shown by that blueprint? A As shown by the blueprint, yes, sir.

Mr. Davis. I offer in evidence that blueprint and the specifications.

Mr. Morrison. The defendant objects to the offer on the ground that there has nothing been shown in the nature of a valid action by the borough, to make this arrangement obligatory on the borough. The resolution is apparently passed without any attempt to solicit competitive bids, and it refers to a plan and specification not then made, to be made later by the engineer and approved by the Mayor, a highly irregular proceeding. 20

The Court. I will allow it, subject to your objection.

Mr. Morrison. May I have an exception, please?

The Court. Yes.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

(Plan marked Exhibit P. 31.)

(Specification marked Exhibit P. 32.)

Q Now, from that time on, in strengthening the foundation, did you proceed according to that plan and specifications? A We did; yes, sir.

Q How many piles did you drive altogether under that plan? A 104.

Q And were they—how were they driven so far as the depth was concerned? Were they driven to refusal, or to a certain level? 40

A To a certain level.

Q And how were they driven? A With a jet. We had to use a jet in order to get to the level that was required by this plan.

Q And what sort of a hammer? A A steam hammer.

Q Did you encounter any difficulties in the driving of the piles? A They did. I wasn't there all the time during these pile—

Q Who had charge of that? A Mr. Olmstead.

Q And how often did you come on the job? A Every two or three days. 50

Charles Ippolito, direct.

Q Now, I show you a bill, March 27, 1917, and it is a bill to the Borough of Ridgefield from you, and it has attached to it also bills of material, and an itemized statement of material. Will you state what that is? A (Referring.) This is a bill for changing and driving pile foundation at sewerage plant.

10 Q And whose approval is attached to it, if anybody's? A Charles F. Blood.

Q What is the amount of it? A The total amount of it is \$1,134.98.

Q Now, that includes both labor and materials, does it? A Yes, sir.

Q And is that an itemized bill? A Yes, sir.

The Court. How much?

The Witness. \$1,134.98.

20 *The Court.* What is the date?

The Witness. The bill is under date March 27th.

Q 1917? A 1917.

Q Well, it is from what period to what period? A From March 1st to March 17th.

Q Was that paid by the town or not? A No, sir.

Mr. Davis. I would like to offer it in evidence.

30 *Mr. Morrison.* If the Court please, I hardly feel prepared to say that this should come in or to object to it until I know more about it. It is a bill, apparently, made up by Mr. Ippolito, or some of his office force, and I am not clear what it represents.

The Court. You may ask for further information as to that before you consent, or you may object to it.

Mr. Morrison. Perhaps the simplest way is to object to it at this time, as there is not sufficient foundation for offering this paper in evidence.

40 *The Court.* Yes, put it that way.

Mr. Davis. Well, I will ask what it is.

Q Mr. Ippolito, what does that represent? A This represents the extra work done as per resolution.

Q That is for the foundation? A For the foundation of the tank.

Q And it represents labor and material, does it? A Labor and material; yes, sir.

50 Q From what book was the labor taken? A From the time book.

Charles Ippolito, direct.

Q And that is the book that is already in evidence? A No, pardon me. From the time sheets as they were turned in to the engineer from day to day.

Q The time sheets? A The extra time sheets.

Q And the matter of material; are the material bills attached to the bill there? A Yes, sir. 10

Q And what material does that represent? A There is no material on this bill.

Q Oh, that is all labor, is it? A Except labor and plant.

Q And that bill amounts to how much? A To \$1,134.98.

Q That was the last bill you rendered, was it? A Yes, sir.

The Court. Let me see that, please.

The Witness. There is another bill here, Judge. You have got them both together (handing paper to Mr. Davis). If I am not mistaken about that bill, Mr. Morrison, I think that bill was passed by the Borough Council. 20

Mr. Morrison. If the Court please, I object to the witness making that statement unless—

The Court. Strike it out.

Q What was the first bill rendered? What was the month? Do you remember? Was it December? A December first.

Q All right. I show you a bill dated December first, 1916, from you to the Borough of Ridgefield, and the heading of it, extra work changing and driving piles. foundation; what does that represent (handing paper to witness)? A That represents labor, material and plant. 30

Q And it is approved by the engineer? A By the engineer; yes, sir.

Q And attached to it are the material bills? A Yes, sir.

Q And what is the amount of the bill? A The amount of the bill is \$2,247.09.

Q And does that include the 15 per cent.? A It does. 40

Q How much—were you paid anything on that bill by the borough? A 85 per cent. of it.

Q How much were you paid? A I couldn't give you that in figures, but just a deduction of—\$320.00 less than that, 15 per cent., about \$2,134.99; and there is also a deduction in this bill of \$175.00 that Mr. Blood deducted for salary that I paid to Koch, Paul Koch.

Q Yes. A He claimed that Mr. Koch at that time was a partner of mine, but he wasn't.

Q Well, what did he subsequently claim? A He wasn't. That \$175.00 ought to have been added to that. 50

Charles Ippolito, direct.

Mr. Davis. Have you got a letter of December 11th from Mr. Ippolito to the borough clerk?

Mr. Morrison. What is the purport of it?

Mr. Davis. In which he protests against the taking off of \$175.00.

10

Mr. Morrison. (Handing paper to Mr. Davis.)

Mr. Davis. Any objection to this being marked? I offer in evidence the bill of December first, 1916, with the attached materials.

Mr. Morrison. If the Court please, I think the objection is a running one and need not be made to each one. We wish to renew it if Judge Davis is going to put them all in.

Mr. Davis. Yes; I want to put them all in.

20

The Court. That is what date?

Mr. Davis. This is the bill of December first, 1916. The first bill on the changing and driving of these piles.

The Court. Weren't there any between that and March 17th?

Mr. Davis. Well, I unfortunately put that March 17th one in; that was the last bill, and I stuck it in first. I do not think I have had it marked yet; if your Honor please, I will put it in last where it belongs. This should be marked.

(Marked Exhibit P. 33.)

30

Q At the time you received the payment from the borough of \$2,347.09 on this bill of December first, 1916—I show you a letter from the borough clerk, Mr. Wilson, of December 9th, 1916. Did that accompany the check (handing paper to the witness)? A (Referring.) Yes, sir.

Q Did you reply to that letter? A I did.

Q I show you letter December 11th, 1916, addressed to Mr. Charles B. Wilson, borough clerk, is that your reply to Mr. Wilson's letter? A (Referring.) Yes, sir.

40

Mr. Davis. I desire to offer in evidence the letter that accompanied the check, and also Mr. Ippolito's reply.

The Court. P. 34 and P. 35.

(Marked Exhibits P. 34 and P. 35.)

Charles Ippolito, direct.

Mr. Davis. The letter of the clerk is:

“Ridgefield, N. J., Dec. 9, 1916.

Mr. Charles Ippolito,
252 Main Street, Orange, N. J.

Dear Sir: Enclosed please find check for \$2,247.09 in payment for extra work on sewage disposal plant from November 1st to November 30th, 1916, as certified by Mr. Blood. 10

Yours truly

CHARLES B. WILSON,
Borough Clerk.”

Mr. Ippolito's reply is:

“December 11th, 1916.

Mr. Charles B. Wilson, Borough Clerk,
Ridgefield, N. J.

20

Dear Sir: Your favor of the 9th instant is received with check for \$2,247.09 in the matter of sewage disposal plant. I wish to enter a protest against the deduction made in the bill as presented. I intend to furnish the borough with affidavits showing that I am entitled to the items which have been eliminated.

Yours very truly,

CHARLES IPPOLITO.”

Q Did you furnish the affidavits to the engineer? A I did, sir. 30

Q And the amount of that deduction, you say, was \$175? A On that particular month, \$175.

Q What was that deduction for, or why was it made? A Because we had—

Q You say it was on account of Mr. Koch? A On account of Mr. Koch. We had the Koch salary attached to the bill.

Q That was for superintendence, \$175? A Yes, sir.

Q And they took that out? A They took that out.

Q And you say it was a payment of your office for \$175 a month? A Yes, sir. 40

Q Now, I show you a bill of December 31, 1916, from you to the Borough of Ridgefield. What does that represent? A (Referring.) That represents extra work, changing and driving piles—foundation complete.

Q For what period? A From December 1st to December 31st, 1916.

Q So far as the labor is concerned, were those items secured from the daily time sheets? A Yes, sir. 50

Charles Ippolito, direct.

Q And so far as the materials are concerned, are they on there—

A Yes, sir.

Q Attached? A Yes, sir.

Q And so far as the other items are concerned, they are the derrick, hoisting plant, and so forth, they were the sums agreed upon, were they? A Yes, sir.

Q What is the amount of that bill, Mr. Ippolito? A The amount of the bill is \$5,234.00.

Q It has the approval of Mr. Blood, has it? A The amount of Mr. Blood's approval on that is \$3,143.75.

The Court. How much?

The Witness. \$3,143.75.

Q Where comes the difference? A He deducts the damage. I had rendered a bill for damages.

Q That was delay? A For delays.

Q I see. And he deducted that? A And he deducted that, and he also deducted the \$175.00 for Paul Koch, as superintendent.

Q What was the amount of the bill for labor and materials and plant as approved by him? A My bill is \$3,142.04, and in checking over there was a little mistake there of about a dollar, which made the amount approved by Mr. Blood \$3,143.75.

Q And you received 85 per cent. of it, did you? A 85 per cent. of that.

Q From the borough? A From the borough; yes, sir.

Mr. Davis. I offer in evidence the bill of December 31st with the attached material bills?

The Court. Yes, it may be marked; that will be P. 36.

(Marked Exhibit P. 36.)

Q Now, I show you a bill of January 31, 1917, from you to the borough. What does that represent? A Labor, material and plant for changing, driving piles on the new foundation.

Q For what period? A From January 1st to January 31st.

Q 1917? A 1917.

Q Is that approved by Mr. Blood, the engineer? A Yes, sir.

Q And is that bill, as to the various items, made up in the same way? A Yes, sir.

Q As the others? A Yes, sir.

Q And it has the materials, the material bills attached, has it? A Yes, sir.

Q Now, how much is that bill for, Mr. Ippolito? A The total bill is \$5,766.36.

Q And approved for what sum? A \$3,846.55.

Charles Ippolito, direct.

The Court. How much?

The Witness. \$3,846.55.

Q Any deduction made there? A Only the accrued damage that—the bill that I had rendered.

Q You put in your item for damage, how much? A \$1,917.05. 10

Q And they struck it out? A They struck it out.

Q And the bill is approved by Mr. Blood for what sum? A \$3,846.55.

Q And you received 85 per cent. of it from the borough, did you? A 85 per cent. from the borough.

Q Ordered paid by the Borough Council? A Yes, sir.

Mr. Davis. I offer in evidence the bill and attached bills of materials, January 31st. 20

The Court. P. 37.

(Marked Exhibit P. 37.)

Q I show you a bill of March 1st, 1917; what does that represent? A That represents plant, material, labor, for changing and driving piles, foundation at the sewerage plant.

The Court. For what date?

The Witness. From January 1 to—or from February 1st to March 1st.

Mr. Davis. Does your Honor wish to stop for a minute, Mr. Morrison has been called out of the room? 30

The Court. Yes.

Q And attached to that statement are the material bills? A Yes, sir.

Q And is that bill made up in the same manner as the others?

A Yes, sir.

Q For what amount was the bill rendered by you? A \$4,395.00.

Q And for what amount approved by Mr. Blood? A \$2,478.46.

Q What did he eliminate? A He eliminated the accrued damage bill that I rendered. 40

The Court. How much did he approve it for?

The Witness. \$2,478.46.

Q That was the third time he had put the damage claim off your bill, had he? A He did; yes, sir.

Q And you received 85 per cent. from the town, did you? A Yes, sir.

Q Did they order that bill paid? A Yes, sir. 50

Charles Ippolito, direct.

Mr. Davis. I offer in evidence the bill of March 1st, 1917.

The Court. It will be marked P. 38.

(Marked Exhibit P. 38.)

Q Mr. Morrison thinks you never got paid for this, Mr. Ippolito?

10 A That is right. I didn't get paid on that for February account.

Mr. Davis. Has your Honor that last bill I put in first?

The Court. (Handing paper.) That may be marked P. 39.

Mr. Davis. I offer the bill of March 27th, up to March 17th.

(Marked Exhibit P. 39.)

The Court. Approved for what sum?

Mr. Davis. Approved for \$1,134.98.

20 *The Court.* All right.

Mr. Davis. And there is a statement on this bill that above bill includes all work to March 18th, 1917.

Q Now, those bills, Mr. Ippolito, that we have referred to here, this last batch, do they represent all of the claims for labor and materials furnished and supplied by you in the strengthening of the foundation? A Yes, sir; except the damage.

Q Except the damage, and except the amount that was held back? A Yes, sir.

30 Q The 15 per cent.? A Yes, sir.

Q Now, I show you a bill of November 1st, 1916, that has been marked P. 14 for identification, and it is headed, Order Number Two, foundation of tank; what does that bill represent? A (Referring.) That represents labor, material and plant on the first stop we had there at the disposal plant for the foundation.

Q Well, that work was done under—

Mr. Davis. I think that Order Number Two is in, isn't it, Mr. Morrison?

40 *Mr. Morrison.* Or it is marked for identification.

Q Under what you call Order Number Two? A Order Number Two; yes, sir.

Q Yes, it is in; P. 16. I show you Order Number Two, marked Exhibit P. 16; is that the work that was done under that order until you were stopped? A (Referring.) Yes, sir.

Q And the amount of this bill is \$264.89 and approved by Mr. Blood? A Yes, sir.

50 Q Now, that represents what? A It represents work done on the disposal plant, the construction of the disposal plant.

Charles Ippolito, direct.

Q Labor and materials? A Labor and material and plant.

Q And that is made up in the same way as the other? A Yes, sir.

Mr. Davis. I offer in evidence that bill.

The Court. What is the date of it, please? 10

Mr. Davis. November first.

The Court. Yes. And the amount approved?

Mr. Davis. \$264.89. Now, that has been marked P. 14 for identification. I suppose the identification will simply be stricken out?

The Court. Yes.

(Marked Exhibit P. 14 in evidence.)

Q Was that bill paid, do you know, Mr. Ippolito? Was it included in one of your bills, do you know that? A Yes, sir; it was paid, less 85 per cent. 20

Q Less 85 per cent.? A Yes, sir.

The Court. Oh, you don't mean that.

The Witness. I mean less 15 per cent.; pardon me.

Q You got 85 per cent. of it. Now, the total amount of the work done and materials furnished by you in this strengthening of the foundations is figured up to be \$13,258.75; is that right? A Yes, sir. 30

Q Or no; I beg your pardon. \$237.43, and you have received on account of it \$7,851.78, and you claim a balance due under that part of the work of \$5,385.65? A I do; yes, sir.

Q That is correct? A Yes, sir.

Q Now, you went ahead under the changed foundation plans up to what point in the work before you stopped altogether? A You mean the last—the last time?

Q Yes. A Why, we were cutting off the piles. We had all the excavation done with the exception of cutting off the piles to the level of that mat, the concrete mat. 40

Q And about how far down had you got in the excavation below the surface of the ground? A I should judge about twelve feet.

Q The lower level of the piles, were they to be cut off at that level? A Yes, sir.

Q And were they cut off? A Most of them were.

Q Then, how many feet above that level were the other piles to be cut off? A About 3 or 4 feet. 50

Charles Ippolito, direct.

Q Was there a single row of piles that were 3 or 4 feet above the lower level, or was it a double row? A It was a double row. This last—a single row of piles.

Q How far had you gotten with the cutting off of the tops of those piles, down to the required level? A If I am not mistaken, I think they were all cut off.

Q Do you know if your forms were in place for the pouring of the concrete? A Where do you refer to now?

Q For the pouring of the concrete of the tank, this last time? A No, sir.

Q Then you had to set the forms, and you had to lay the mat, as you call it, over the lower part of the foundation, and what else had you to do before your job was finished? A We had to only finish up the tank and a few connections.

Q Now, that tank when finished, from that time on, was it the same tank as was called for originally in your original contract? A Yes, sir.

Q And from the beginning of the contract down to where it would have ended, what change, if any,—name all the changes that were made on that tank proposition; was there anything excepting the foundation? A The foundation was the only change that was made; the strengthening of the foundation.

Q Now, were you ever, before the work was begun or while it was in progress in this matter of strengthening the foundation, were you ever at a meeting of the Mayor and Council at which this plan, or the plan that was offered by Mr. Blood, was exhibited? A Only part of the rough sketch; that is all I saw there.

Q And that rough sketch showed what? A The number of piles that had to be driven, and this concrete mat.

Q And this drawing here (indicating), how did that correspond with the rough sketch? A Well, this was more elaborate than the other, of course.

Q How does it compare as to the amount of work that was to be done? A Not much.

Q What do you mean? A Only at that time, according to the sketch that Mr. Blood had, we had that thing figured out about ten thousand dollars—

Q Yes. A —and, of course, this new plan was simply—would add a few more thousand dollars to it.

The Court. Where was the difference?

Q Where was the difference? A Into the brackets that he had contemplated to put in; that is, this bracket here (indicating).

Q What brackets do you mean? A Those from the concrete mat up to the slope of this part of the tank.

Charles Ippolito, direct.

Q Well, just explain what they are? A Well, it simply means more concrete.

Q Those brackets were under what part of the tank? A Under the bottom of the tank, to support the bottom of the tank.

Q And were they a part of the foundation? A Yes, sir.

The Court. How could you put your tank in at all unless you had something there?

The Witness. Of course, you couldn't, Judge; but I am only referring to the sketch that I saw of Mr. Blood to this plan; that is the only change I seen.

Q And that was the only change between this plan and your sketch? A Yes, sir.

The Court. Was there any written estimate of the cost of this work?

The Witness. Roughly.

The Court. Was it written or verbal?

The Witness. Written.

Q Did you give to the authorities a written estimate of what this work was likely to cost? A We gave it to them. We had it in a sheet of paper, in pencil, showing about what it was going to cost.

Q And did you have that at a meeting, or more than one of the meetings? A Yes, sir; we did.

Q Who were present? A The Mayor, the councilmen, and the city attorney, Mr. Morrison.

Q And Mr. Blood? A And Mr. Blood.

Q You had that at the time the talks were going on? A Yes.

Q And how did the figures that were shown correspond with the figures that were embodied in the resolution passed by the Council? A Only about \$300.00 difference; about three or four hundred dollars, I should judge.

Q After the first of January, 1917, did you continue to do work on that job? A January?

Q Yes. A Yes, we did; after January, 1917.

Q And I think you wrote a letter, it has been read from the minutes, calling attention to the governing body of the fact that the amount of work that you had done was dangerously close to the amount that they had set as a maximum. Do you remember that letter? A I do.

Q Now, I show you what purports to be a certified copy of a resolution dated March 17th, 1917. Did you receive that from the borough? A Yes, sir.

Charles Ippolito, direct.

Q When did you get it, about? A About February the 18th.

Q And was that in response to the letter that you had communicated to them? A Yes, sir.

Q As to the progress of the work? A Yes, sir.

10 *Mr. Davis.* I am not sure whether that is in, or not, Mr. Morrison.

Mr. Morrison. I think you read that as part of P. 2.

Mr. Davis. Well, I think I ought to put this in as being received by Mr. Ippolito.

The Court. All right; put it in.

Mr. Davis. I offer in evidence this certified copy of resolution purporting to have been passed on February 14, 1917.

The Court. That will be P. 40.

20 (Marked Exhibit P. 40.)

Mr. Davis. (Reading.)

“This is to certify that at a regular meeting of the Mayor and Council held on Wednesday evening, February 14, 1917, the following preamble and resolution was adopted: Whereas, Charles Ippolito, by a letter dated February 3, 1917, has reported to the Mayor and Council that the cost of work now being done under resolution of October 25, 1916, will reach the sum of \$10,258.75 within the next few days; and, whereas the work shown on the plans and specifications mentioned in said resolution is not fully completed; and, whereas it is estimated that the cost of completing the said work will not exceed the sum of \$3,000.00;

30

Be it resolved that the said Charles Ippolito be, and hereby is, authorized to proceed with such work and to complete the same, provided that no charge in excess of said further sum of \$3,000.00 shall be made or incurred without first obtaining the consent of the Mayor and Council; and be it further resolved that a copy of this resolution be delivered to the engineer and the said Charles Ippolito. The borough seal and attest.

40

CHARLES B. WILSON,
Borough Clerk.”

Q Following that resolution of February 17th, did you then continue on the work until you were stopped? A Yes, sir.

Q Now, about January 1st, 1916—1917, was there any change in the administration in Ridgefield? A There was; yes, sir.

Q And who, after January first, was the chairman of the sewer committee? A Mr. Martling.

50

Charles Ippolito, direct.

Q And who, before January first, had been the chairman of the sewer committee? A I cannot quite remember his name.

Q Mr. Enman? A Mr. Enman.

Q And did the same gentleman continue to be Mayor? A Yes, sir.

Q In 1916 and in 1917? A Yes, sir. 10

Q And that was Mr. Charles Engelhardt? A Yes, sir.

Q Now, on March 3rd, 1917—well, I show you a letter of March 3rd, 1917. Did you receive that from the borough, or the chairman of the committee? A From the chairman of the committee, the sewer committee.

Q What is it that you have in your hand? A A letter.

Q From whom? A From Mr. Martling.

Q Chairman of the sewer committee? A Yes, sir.

Mr. Davis. I offer it in evidence. Mr. Morrison has no objection. 20

(Marked Exhibit P. 41.)

Mr. Davis. (Reading.)

“Ridgefield, N. J., March 3, 1917.

Mr. Charles Ippolito.

Dear Sir: Acting under the authority vested in me by the Borough Council, I hereby order you to proceed with the completion of that portion of the outlet sewer for the disposal plant yet remaining to be done. As you have exhausted the appropriation made for extras on the disposal plant, you will have to cease work on this until more money is appropriated or a change in the plan adopted. In the meantime you can greatly facilitate matters by getting promptly in touch with Alexander Potter, consulting engineer, 50 Church street, New York City, and give him a complete list of all materials you have on hand which might be utilized if the suggested modification of the disposal plant is carried out. 30

Yours very truly, 40

S. V. R. MARTLING,

Chairman of Sewer Committee.”

Q Now, did you reply to that letter of Mr. Martling's? A I did, sir; yes, sir.

Q I show you a carbon; is that a copy of your reply? A (Referring.) Yes, sir.

Mr. Davis. I offer it in evidence.

(Marked Exhibit P. 42.) 50

Charles Ippolito, direct.

Mr. Davis. (Reading Exhibit P. 42, letter of March 3, 1917, to the Mayor and Council of Ridgefield, N. J., and Mr. Martling, chairman of sewer committee, by Mr. Ippolito.)

10 Q I show you a carbon of a letter of March 5th addressed to S. V. R. Martling, Esq.; was that sent by you to Mr. Martling? I show you the original of it, Mr. Ippolito. Was that sent by you to Mr. Martling? A (Referring.) Yes, sir.

Q And is it in further answer to this letter of March 3rd? A I do not remember.

Q Well, what does it say in the first line? A That is, to the previous letter, yes, sir. "Answering further to your letter, March 31st."

Q March 3rd? A Yes.

20 *Mr. Davis.* I offer in evidence the letter of March 5th.

Mr. Morrison. The same objection as before, and the further objection that this letter never came to the attention of the borough, and never shown to have been before the Mayor and Council as a corporate body. It is addressed to them.

Mr. Davis. Well, isn't that for him to show, if your Honor please? Mr. Martling's letter stated—it was written on March 3rd, whatever it was.

30 *The Court.* I think it is competent to go in, because, as it stands now, it appears that this gentleman represented himself as having authority and acting for the borough.

Mr. Morrison. If the Court please, there is the same difficulty, with a municipality you cannot presume the authority.

The Court. Well, do you show that he wasn't authorized?

Mr. Morrison. I think the rule is the other way with municipal bodies, and they cannot be bound unless they show that there was authority for their action; there is no assumption.

40 *The Court.* No, I understand that. You have, now, an order given to this gentleman to stop which you claim is your authority to have him stop, and it is given by a certain person who says he is acting for the borough. I think that is sufficient, under the circumstances, as it appears now. You may read it.

Mr. Davis. The March 5th letter is marked exhibit what? (March 5th letter marked Exhibit P. 43.)

Mr. Davis. (Reading).

Charles Ippolito, direct.

“Orange, N. J., March 5th, 1917.

S. V. R. Martling, Esq., Chairman of the Sewer Committee,
Ridgefield, N. J.

Dear Sir:

Answering further your letter of March 3rd, I think it will
be a great mistake to complete the outlet sewer from the dis-
posal plant at the present time. If this is done, the water
will back up into the plant at every high tide, and of course,
do a great deal of damage to the work already done. If the
Sewer Committee insists upon this being done, I will not be
held responsible for the damage that will ensue.

Yours very truly,

CHARLES IPPOLITO.”

We have here, if your Honor please—Mr. Morrison has
found the original letter of Charles Ippolito of March 3rd to
the Mayor and Council of Ridgefield; may that be marked p. 42
instead of the carbon?

The Court. Yes, mark that instead of the carbon.

(Marked Exhibit P. 42.)

Q Now, I show you a document of March 5th, 1917, purporting
to be a copy of a resolution. Did you receive that from the borough?

A (Referring.) Yes, sir.

Mr. Davis. I offer it in evidence.

The Court. P. 44.

(Marked Exhibit P. 43.)

Mr. Davis. (Reading.)

“Borough of Ridgefield, N. J., Ridgefield, N. J.,
March 5th, 1917.

This is to certify that at a regular meeting of the Mayor
and Council held on Wednesday evening, February 28, 1917,
it was resolved that the committee on sewers be, and is hereby,
authorized to order Charles Ippolito to suspend, until the
next regular meeting of the Council, the work now being done
under his contract with the Borough, if and when in the opin-
ion of Alexander Potter, Consulting Engineer, it shall be
desirable so to do.

Attest, Charles B. Wilson, Borough Clerk.”

Q After the receipt of that resolution, Mr. Ippolito, did you com-
municate with Mr. Martling, the chairman of the Sewer Committee?

A Yes, sir.

Charles Ippolito, direct.

Q I show you an undated letter addressed to Mr. Martling; is that the letter you sent in reply? A (Referring.) Yes, sir.

Q And about what time was it sent? A March the 7th.

Q I will take the copy and you can refer now to the original. And this letter was sent by you in answer to the resolution, was it?

10 A Yes, sir.

Mr. Davis. I offer the letter in evidence.

The Court. It will be marked.

(Marked Exhibit P. 45.)

Mr. Davis. (Reading.)

“Orange, N. J.”

Undated, but about March 7th, 1917.

“S. V. R. Martling, Esq., Chairman of Sewer Committee,
Ridgefield, N. J.

20

Dear Sir:

Regarding the resolution passed by the Borough Council on February 28th, 1917, authorizing the Sewer Committee to direct me to stop work upon the order of Mr. Alexander Potter, Consulting Engineer: I wish to notify you that I have received no notice in writing or otherwise from Mr. Potter to stop work. The resolution does not authorize any change in the plans of the work. I must therefore continue to follow out the old plans until council orders otherwise.

30

Yours very truly,

CHARLES IPPOLITO.”

Q I show you a letter of March 8th. Did you receive that from Mr. Martling, the chairman? A (Referring.) Yes, sir.

Mr. Davis. I offer the letter in evidence, if the Court please?

(Marked Exhibit P. 46.)

Mr. Davis. (Reading.)

40

“Borough of Ridgefield, N. J., Ridgefield, N. J.

March 8th, 1917.

Mr. Charles Ippolito, Contractor,
Dear Sir:

Acting under the authority vested in me by the Borough Council, and upon the recommendation of Mr. Alexander Potter, Consulting Engineer, 50 Church Street, New York City, I hereby order you to stop at once all work on disposal plant.

Yours very truly,

S. V. R. MARTLING,
Chairman, Sewer Committee.”

50

Charles Ippolito, direct.

Q Did you reply to that notice from Mr. Martling? A Yes, sir.

Q By a letter directed to whom? A To the Mayor and Borough Council of Ridgefield.

Q Is that a copy of the letter? A (Referring.) Yes, sir.

Mr. Davis. I offer in evidence letter of March 9th.

10

The Court. March what?

Mr. Davis. March 9th, 1917.

(Marked Exhibit P. 47.)

Mr. Davis. (Reading.)

“Orange, N. J., March 9th, 1917.

To the Mayor and Borough Council of Ridgefield:

This is to notify you that on March 8th, 1917, I received notice in writing from the Chairman of the Sewer Committee notifying me to stop all work at once. In pursuance of such order I have stopped work, but desire to take this opportunity to notify you that I will not assume any obligation for any damage that may be sustained to work already done.

20

Respectfully yours,

CHARLES IPPOLITO.”

Q Now, that was March 9th. I show you a communication of March 15th. Did you receive that from the Borough? A (Referring.) Yes, sir.

Mr. Davis. I offer it in evidence, if the Court please, March 15th.

30

The Court. P. 48.

(Marked Exhibit P. 48.)

Mr. Davis. (Reading.)

“Borough of Ridgefield, N. J., Ridgefield, N. J.,
March 15th, 1917.

Mr. Charles Ippolito, Main Street, Orange, N. J.

Dear Sir:

40

I am instructed by the mayor and council to direct you to stop all work upon the disposal plant, and to remove from the site of the work forthwith all your plant, and to render the Borough a statement of the amount of material you now have on hand.

Yours very truly,

CHARLES B. WILSON

Borough Clerk.”

The Borough seal attached.

50

Charles Ippolito, direct.

Q Did you reply to that letter? A Yes, sir.

Q I show you a letter of April 12th. Did you send that to the Mayor and the Council? A (Referring.) Yes, sir.

Mr. Davis. I offer it in evidence; April 12th.

10 (Marked Exhibit P. 49.)

Mr. Davis. (Reading.)

“Orange, N. J., April 12, 1917.

To the Mayor and Common Council, Borough of Ridgefield,
N. J.

Gentlemen:

I wish to notify you that pursuant to your order, I am about to dismantle my plant on the sewer disposal contract, and I expect to have my entire plant out of there within a few days. I beg to notify you also that there is on the premises material delivered to be used in the said construction work, and that I do not intend to assume any liability for the said material against loss or damage which may arise by the elements, weather, theft, or otherwise. Of course, you understand that I am not dismantling my plant of my own volition, but am doing so on your orders in writing, as I have been at all times, and I am still ready and willing, to carry out my contract.

20

Very truly yours,
CHARLES IPPOLITO.”

30

Q Did you later receive a communication from Mr. Martling? A Yes, sir.

Mr. Davis. I offer in evidence the letter of April 21st.

The Court. That will be P. 50.

(Marked Exhibit P. 50.)

Mr. Davis. (Reading.)

“Borough of Ridgefield, N. J., Ridgefield, N. J.,
April 21, 1917.

40

Mr. Charles Ippolito, General Contractor,
252 Main Street, Orange, N. J.

Dear Sir:

As stated to your foreman, Mr. Olmstead, I have received your bill and statement attached for work performed on the disposal plant at Ridgefield, N. J., but I fail to find an itemized list of the material on hand which was requested in the resolution passed March 14th. Kindly forward me an itemized list of the amount of material on hand, one chargeable to the

50

Charles Ippolito, direct.

extra account, and one chargeable to your original contract account. As soon as I receive same, I will call a meeting of the council and go over the matter and let you know promptly.

I am, sir,

Yours very truly,

S. V. R. MARTLING,
Chairman of the Sewer Committee."

10

Q Did you send the bills requested by Mr. Martling? A Yes, sir. I have sent that statement. That was the statement I sent.

Q That is the statement in the shape of a bill? A Yes, sir.

The Court. Is that the one that had been received prior to that last letter, or one after that?

The Witness. Prior to that letter.

20

The Court. Well, that letter says there wasn't any statement of the amount on hand.

The Witness. There is. The statement, the bills, I gave them an itemized account showing the copies of all the bills of material delivered on that particular job.

The Court. Mr. Davis, don't you think you better return to that and let him point out where that statement is?

Mr. Davis. That is what I am asking Mr. Morrison for now.

30

Q I show you Exhibit P. 12, which is the Ippolito final settlement, or statement at least; is that the bill that you referred to in your letter to Mr. Martling? A Yes, sir.

Q And does that bill cover items of material? A Yes, sir.

Q On what pages? A That is typewritten, That is a copy of the amount of the bills typewritten, and then a copy of all the material bills attached to it.

The Court. Which is the statement, now; of all the materials?

40

The Witness. This one here, Kernan's bills, and I have deducted from the Kernan bills amounts previously allowed by the borough, and also these here bills (indicating), of pipes, corrugated bars, and cement that was left on the job.

Q And at that time, Mr. Ippolito, who had the itemized bills for the materials referred to? A Mr. Koch.

Q And are there itemized bills attached to that claim? A Yes, sir.

50

Charles Ippolito, direct.

Q What had you done, so far as the engineer was concerned, with regard to furnishing him with itemized bills of all materials?

A I had sent him a copy of everything,

Q Of all itemized bills of materials? A Of all itemized bills; yes, sir.

10 Q And when would you send those copies to Mr. Blood? A Every month.

Q Were those sent before or after the monthly estimate was made up? A Before.

Q And were they used in the making up of the monthly estimate? A Yes, sir; I suppose they were.

Q And how was the bill for labor made up? A The labor bills were made out of the extra sheets, that is, the extra work, that is the heading of it.

20 Q How were the bills for labor and materials made up under the original contract before you came to the cost plus basis? A Why, they were kept by Mr. Koch.

Q He was the bookkeeper, was he? A Yes, sir:

Q Well, you mean what were kept by him? A The labor cost and the material.

Q Well, they were kept by him in your behalf? A Yes.

30 Q But how were the monthly estimates that you received from the engineer made up under the original contract before you came to the cost plus basis? A They were made on the actual amount of work done, less 15 per cent; whatever—

Q That is your estimate of it? A Approximately, yes.

Q Now, after you got the order finally to get off the job and move your plant, did you get off immediately or not? A I did not, sir; no.

Q Why not? A Under the orders, verbal orders of Mr. Blood.

40 Q To what effect? What did he tell you? A He told me that the borough—that he intended to go ahead with the work and finish it up. It was only a case that there was a little fight there in the Council at the present time, and he expected that the work would be resumed.

Q And you kept your plant there on that account? A I did, sir; yes, sir.

50 Q And you kept it there. This letter to—this letter of April 12, 1917, by you to Mr.—to the Mayor and Council, notifying them that you are about to dismantle your plant, how long did it take you to get the plant off the job after you started to dismantle? A Oh, it took me about a week or ten days, or more; I don't just remember the number of days.

Charles Ippolito, direct.

Q Do you remember whether you had started on April 12th to dismantle? A We had started some of it; yes.

Q And from that time on, you continued, did you? A Yes, sir.

Q Until you got it all dismantled? A Yes, sir.

Q Now, the materials that were left on the job, when you moved off the job, what, in a general way, did you leave there in pursuance of their direction? A We had a few meetings with Mr. Martling. He said that—he asked for a copy of all bills, those which I rendered to him. Then he promised to send someone on the job in order to check up the material that was left there, and I waited for him for two or three days. Finally, he sent out a man, I think it was the street commissioner of the borough. As the street commissioner came on the job, we went over and started to put up a few of the planks, and stuff that were left around the plant, and he simply gave up the job. He said, “This is not my job; it requires an engineer to go on and figure out every item to check up your account.”

Q Well, how far did the street commissioner get in checking up the stuff with you? A He only stayed there about half an hour. We hadn't moved more than three planks, when he give up the job.

Q Now, at that time, in a general way, what kind of materials were on the job? A Lumber.

Q What kind of lumber was it? A Sheathing and lumber for the form construction of the tank. The re-enforced steel and the fittings, the pipe fittings for the tank.

Q Any cement? A Cement, sand, bricks.

Q Any re-enforcing rods? A Yes, sir; there were.

Q Now, that was all material that you had bought and paid for, was it? A Yes, sir.

Q And it was proposed to be used in what manner? How did you propose to use it? A I proposed to finish up my contract.

Q And that you were ready and able to do, I presume? A Yes, sir.

Q Do you know what became of the stuff after you left it? A While we were moving our plant away, I heard that—

Q No, not what you heard. Did you have any talk with Mr. Martling? A I did; yes, sir.

Q Did he tell you anything that was done with any part of the stuff? A He sold the cement.

Q And was there anything else, to your knowledge, sold, or did he tell you anything else about selling any stuff? A No, sir, only I—after that, why, I didn't come around the job very much, so I don't know what they did with it.

Q You didn't take any of that stuff away with you then? A No, sir.

Charles Ippolito, direct.

Q Now, excepting what payments have been testified to here, have you received any other moneys from the borough, either on account of the original contract or an account of the work done on the foundations? A No, sir.

Q Or on account of the claim for delay? A No, sir.

10 Q Their delaying— A No, sir.

Q At the time when these delays happened, were you actually pushing the work ahead? A Yes, sir.

Q Did you have your force there ready to go on? A Yes, sir.

Q And did you have materials there at all times? A Yes, sir.

Q Prepared to go on? A Yes, sir.

The Court. Why did you do any work after you were notified to quit? I see your last work is about March 17th, and I see the notice to quit was March 8th.

20 *The Witness.* Why, we had to continue to finish some of the work that was under way there in order to protect what was done.

The Court. What did you do after you got your notice to quit?

The Witness. We began to store some of the material, that is, the cement and the bricks which were liable to be washed away from the river, and some of the cut-offs that we had, these piles were cut off and chopped up, and I think the borough, if I am not mistaken, they sold it, every bit of it.

30 *Mr. Davis.* Your Honor mentioned March 8th. Those are the two orders, one is March 8th and the other is the 15th (handing papers to the Court).

The Court. Yes, I see, that is the first one, March 8th.

Q Now, Mr. Ippolito, at the time you rendered the bill to the borough, did you make up an estimate of your own as to how much it would cost to complete the job? A Yes, sir; I approximately estimated.

40 Q And you estimated it approximately at what figure? A About \$1400.00.

Q And in rendering the bill, you took the \$10,300.00, the contract price? A Yes, sir; I did.

Q And deducted the \$1400.00 which it would cost to finish? A Yes, sir.

Q Now, have all the bills for the materials used on the job been handed in, or have you further bills for materials used on the job?

A They have all been handed in to the borough, I think.

Q Well, have we handed them all in here? A Yes.

Charles Ippolito, cross.

Q Including the material bills used on the original contract? A Yes, sir.

Q What profit did you estimate, Mr. Ippolito, for the work that was left undone? A 20 per cent.

Q And was that a profit that you were likely to make if you went ahead with the job? A Yes, sir. 10

Mr. Davis, Cross-examine.

Mr. Morrison. If the Court please, it is so near the hour for adjournment, may we defer the cross examination until after lunch?

The Court. Yes, you may do that.

(Recess at 12:53 P. M. until 2:00 o'clock P. M.)

20

AFTER RECESS. 2:00 O'CLOCK P. M.

CHARLES IPPOLITO, the plaintiff, resumed the stand for cross examination.

Cross examination by Mr. Morrison.

Q Mr. Ippolito, when you began your work on the foundation for the tank as it was originally designed under the first contract, you put in certain sheathing, did you not, around the excavation? A On the original contract? 30

Q Yes. A We had our form work, the forms.

Q Form for what? A For the concrete; ready for the concrete; that is all we had.

Q Didn't you put in sheathing around the place where you had excavated to set the tank? A No, sir.

Q You had no sheathing at all? A No, sir.

Q Then, what your witness, Mr. Olmstead, said this morning about sheathing, he was mistaken, was he? A I don't know as he made any mistake in that. I don't know what he said. I don't remember just what he said. 40

Q Well, now, did you put any boards around the hole or excavation where you were going to set this tank? A After we had our excavation down to a certain depth, that is, for the outside wall, where the slope begins, we had our form work set right up against the pile, at the outer ring of piles that held up the excavation that we were doing.

Q Now, what kind of boards were those? A Inch boards.

Q A grooved board? A Yes, sir.

Q And those were your forms for the cement? A Yes, sir. 50

Charles Ippolito, cross.

Q Then you were building, or trying to build this tank and foundation as originally specified without using any sheathing? A Well, the contract didn't call for any sheathing at all.

10 Q I am asking you what you did, not what the contract called for. A I anticipated to do it without any sheathing as cheaply as I could.

Q You knew the nature of the soil there; you had seen at that time the nature of the soil in which you were working? A Yes, sir.

Q And in order to do the work cheaply, you were attempting to work in quicksand— A Yes.

Q —without sheathing? A Well, as we got our first part of the excavation, we simply set our forms around the outer ring of the piles, and from that we simply back-filled whatever other material we took out from the bottom.

20 Q So that you were making the one inch tongue and groove boards which you refer to as your forms for cement, serve as sheathing to hold back this muck and quicksand? A Yes.

Q And isn't it a fact that the result of that was that those forms buckled and became misshapen? A No, sir.

Q Isn't it a fact that they didn't hold their true shape? A No, sir.

Q How far down into the ground did you carry these one-inch boards? A We carried them down to where the slope—at the beginning of that slope of the tank that went into this cone.

30 Q And what did you do to protect the slope or conical part of the excavation? A We simply sloped it down as we went along until we reached the bottom. That is where this quicksand began to come up, right at the point where the bank is.

Q You didn't attempt to put any sheathing in the conical part of the excavation? A Because it didn't call for it. I didn't think it was wise. I didn't need any sheathing at that point.

Q I am asking you what you did. A I didn't, or it didn't call for it. I simply say I didn't think it required any sheathing there.

Q In your opinion, it didn't require any? A No, sir.

40 Q And you didn't use any? A No, sir. Simply used this form work to protect the embankment that was around outside of the tank.

Q When the work was changed as to the nature of the foundation, then you did use sheathing, as I understood Mr. Olmstead? A Yes, we did.

Q He is right in that particular? A Yes, sir.

50 Q As I remember, he said he used more sheathing under the changed work than he did under the old work. What is your statement on that? A The reason we used more sheathing under the

Charles Ippolito, cross.

changed plan is that we had to go to a greater depth, and the tank had to be excavated square instead of round.

Q Is it to be inferred from your statement that a round excavation in soil of that sort will stand up without sheathing, and a square one will not? A Not at that depth; not as the plan was changed. Of course, you couldn't do it neither way unless you sheathed it. 10

Q You mean to say that it would have been impossible to construct either a round or a square excavation without sheathing? A Without sheathing, to the depth that the second plan required.

Q Now, what was the change in depth that the second plan required? A Required to go four or five feet deeper.

Q As I understand, the lowermost point of the tank proper was at the same level under the original and under the modified plan? A No, sir; it went deeper under the original, because we had to go two feet deeper than that. 20

Q You are sure it is two feet? A Yes, sir; I am quite sure.

Q Is that indicated on the drawing of the modified— A I think it does. I don't know whether the map calls for one foot, but we had to go two feet below that in order to—

Q Will you refresh your memory by referring to the drawing? A (Referring.) Well, this is what I mean; a foot and a half to two feet from this point. See? Up to this point (indicating). 30

Mr. Davis. Well, this point indicating what?

The Witness. Indicating the original drawing.

Q The apex of the inverted cone? A The apex of the inverted cone, and the original excavation was from this point down to here, and we didn't require any sheathing to go further down, only up to this point (indicating).

Mr. Morrison. This point, he indicates the junction of the base of the cone-shaped part with the base or head of the cylinder-shaped part of the tank. Is that a fair explanation? 40

Mr. Davis. Which would be a point in extension of the outside of the lower part of the tank.

The Witness. You see, our first—

Mr. Davis. Just a minute. Is that right?

The Witness. Our first excavation, that is, we started from this point (indicating); we came right straight down to this point (indicating), and when we reached this here point, we simply put our forms around; then we finished this other little excavation in order to reach to the bottom of 50

Charles Ippolito, cross.

the tank, and we took all this dirt and threw it around here in back of those forms which were there for the purpose—

The Court. Turn to the other diagram and show what you did.

10 *The Witness.* You mean on the original?

The Court. Yes, the original plan.

Mr. Morrison. I would like to put these up so the witness may indicate to the jury.

The Court. Yes.

The Witness. This is the original.

20 *The Court.* Now, suppose he puts up the original and let him explain to the jury. When you say "here" and "there," and refer to your map, the jury doesn't know anything about it, and if it ever goes up, the Court doesn't know anything about it.

Q Now, the drawing on your right, as you face the board, is your original plan, is it not, Mr. Ippolito? A On my left.

Q On the right is the original, and on the left is the modified one? A Yes.

Q On the left is the modified plan? A Yes, sir.

30 Q Now, using the pointer and pointing to the drawings, will you show how far you had carried down your boarding on the original plan? A We had—the first part of the excavation—the level of the ground somewhere around here. This is the level of the excavation; see? And we had to excavate it from that point down to here to the bottom of this (indicating). After we had all that excavation done under here, we set our form work, which—it was used for both, for to place the concrete and to hold back the earth excavation in the back of it. Then we went ahead and started to excavate here from this point down to here, from this point down to the bottom (indicating).

The Court. And how far would that be?

40 *The Witness.* About, I should judge, a couple of feet below the previous excavation below that point.

The Court. Yes.

50 *The Witness.* And as we reached this point here (indicating), this is where we encountered the quicksand. As soon as the quicksand was discovered, of course, then they gave us a revised plan which it required to dig the hole a good deal wider than the original design on account of the mat. In the original design all we had to do was to dig from that point to there, but here the mat was a good deal wider than

Charles Ippolito, cross.

the other, a couple of feet, and being that the mat is square, we would have to dig our hole in square form instead of round as we had originally started.

A Juror. What was your required depth on the original form?

The Witness. You mean the original?

A Juror. Yes.

The Witness. To here (indicating).

A Juror. How deep is that.

The Witness. About four or five feet from the level of the ground to the bottom there. Yes, this (indicating) is where the present elevation is.

Q Now, referring to the drawing on the left showing the work as modified by the resolutions, will you indicate the additional excavation which was required? A Well, the additional excavation was required in all this part here up to this point (indicating).

Q And referring to the drawing, about what is the vertical height of that additional excavation? A I should judge about three feet or more from this point down to here (indicating).

Q Then, as to that three foot depth, the original plan called for an excavation in the form of an inverted cone? A Yes, sir.

Q A cone with the point down? A Yes, sir.

Q And the new plan called for a square excavation in which to set this mat? A Yes.

Q And both excavations had a maximum depth of about three feet? A Yes, sir.

Q Now, in constructing, or attempting to construct the original plan, where were your boards set, giving it by referring to the drawing? A Up to this point (indicating).

Q Up from where? A From this elevation here, the present elevation, up to that point (indicating), about six feet, I should judge.

Q And is that six feet, and the other distance only three? A Well, the distance that I am referring to here is to the bottom of the tank, up to here, you see (indicating).

Q Yes. A Now, there is a difference there of about three or four feet.

Q Can you read that from the dimensions on the print? It doesn't seem to me that is possible. A From that point up to the top of that cone is about six feet. Now, taking that plan, up to this one (indicating), it would start from that point down to here; see?

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Charles Ippolito, cross.

Up from there (indicating). This is where would be the present elevation.

Q The original level of the ground would be about at the shoulder of the cylinder? A About here (indicating).

10 Q Yes; and on the other drawing of the work as originally planned, the— A About the shoulder.

Q About the same place? A The same place.

Q Now, in working out the modified plan, you carried your sheathing down how far? A We carried the sheathing down to the bottom of this concrete mat.

Q Why was that necessary? A It was necessary in order to hold—in order that—we had encountered on the previous contract that running sand, and we had to do some sheathing in order to hold that back.

20 Q Now, if while you were working under the original plan, you had driven down your boards as far as you did under the modified plan, would that not have held back the quicksand so that the modification would have been unnecessary? A If we hadn't encountered the quicksand, you mean?

Q No. A I didn't quite get that.

Mr. Morrison. Won't you read it, please?

(Question read by the stenographer.)

The Witness. No, sir.

30 Q And why not? A Why, as we did our excavation here at this point going down to that point there (indicating), we had no trouble in getting to it because we had already sunk a sump hole at this point which carried all the water that we encountered into the section, and from this point to here (indicating), we had a little trough which would have taken care of all the water that was in the bottom there.

40 Q Why did that little trough and sump hole fail to take care of it? A I don't know why it did fail; I don't know anything about that.

Q If you as a contractor had not built the plant as originally designed— A Yes, sir.

Q You could finish it? A Yes, sir; without any trouble.

50 Q And how would you have accomplished it had there been no change in the plan? A Well, all I have to do is to put in, as I said—I had the steam pump and everything set; all I would have to do is to keep on pumping, and then at the center of this point here (indicating), just sending a little—go down about six or seven inches deeper, in order to run that water into that sump hole which we

Charles Ippolito, cross.

had already dug, which we were using for the purpose of draining that tank there, and then pump until that concrete had set.

Q Now, Mr. Olmstead says that when you started to pump out this tank excavation preparatory to putting in the concrete, some of the piling commenced to change position; is that so? A Not as I recall it. 10

Q Were you there at the time? A Yes, sir; I was there.

Q Do you think Mr. Olmstead is mistaken? A I don't know if he is mistaken, but I was there the following day.

Q You weren't there at the time the pumping took place? A No, sir.

Q Now, if as Mr. Olmstead says, when the pumping was begun, the piling commenced to change position, what would be necessary to do to proceed with the work as originally planned? A Well, if it was necessary, perhaps we would have to brace up the piles that laid there and go ahead. 20

Q Would it not be necessary to sheath around the excavation? A No, sir.

Q You have spoken, Mr. Ippolito, of meeting the borough officials on several occasions and discussing the plan to change the foundation of this tank. Do you know whether there was ever any official action taken on that plan? A That I couldn't say.

Q You had delivered to you a copy of a resolution in reference to this change? A Yes, sir.

Q I call your attention to the fact that in that resolution it recites that the plan and specification is still to be prepared. Did you notice that when you received the resolution? A I did. 30

Q And how long after you received the resolution did you receive the plan and specification? A I received the plans and specifications almost the following day.

Q Do you know whether the plan and specification were ever the subject of any action by the Mayor and Council? A That I do not know.

Q I call your attention now to your testimony as to a change in the sludge beds. You have spoken of orders received from the engineer? A Yes, sir. 40

Q An Order Number One and an Order Number Two. Do you know whether there was ever any official action by the Mayor and Council in reference to Order Number One? A That I do not know.

Q Do you know whether there was ever any official action by the Mayor and Council as to Order Number Two? A I know this much: They paid the bill; that is all I know about it.

Q But outside of that was there any official action? A No, sir. 50

Charles Ippolito, re-direct.

Q And they didn't pay the bill in full? A They paid, less 15 per cent.

Q You are still suing for part of that bill? A According to contract, they hold back 15 per cent.

10 Q And you are still suing for that part of that bill? A I certainly do; yes, sir.

Q Now, as to the work which you did on the sludge bed for which you have presented a bill, did you submit competitive bids for that work? A On the sludge bed?

Q Yes. A No, sir.

Q As to the extra work you did on the foundation for the Imhof tank, did you submit a competitive bid? A We had quite a discussion over the price at the various meetings of the Borough Council. That is the only thing that was ever done.

20 Q Is it not a fact that there was no solicitation of bids by other contractors for that work? A If I am not mistaken, I think the Borough Council and the Mayor there ordered Mr. Blood to call in a few other contractors to bid on it.

Q Did you submit a bid in competition with other contractors for that work? A I simply gave them the price, what it would cost, and I told the Borough Council at that time that the only way I would proceed for that particular work was under extra proposition, that is, plus 15 per cent.

30 Q Then your proposition to do the extra foundation work was not a bid for the work to be done, but was a cost plus a profit basis? A Yes, sir.

Mr. Morrison. I think that is all.

Re-direct examination by Mr. Davis.

Q Mr. Ippolito, the Court called your attention to the two orders to quit, one of March 8th, I think, and one of April 21st—March 21st; do you recall the two notices? A Yes, sir; I do.

40 Q I don't remember the dates. What was the reason that you continued to work after the receipt of the first notice? A The reason were that the day previous of that notice, Mr. Martling, Mr. Tepper and Mr. Potter came on the job and they told me to—that if I would—to stop work, and I told them at that time that I didn't think I would consider that an official order unless I had it in black and white.

Q And when you got the second notice directing you to stop, by the Council, you stopped, did you? A The second notice that I got, yes, sir; I did.

50 Q That was the 15th? A Yes, sir.

Charles Ippolito, re-direct.

Q Now, referring to the plans here under the original contract and specification, were there anything in the way of piles to go under the extreme bottom of the tank? A No, sir.

Q And could you have gone ahead under the original contract, and by your pumping, as you say, of the water, could you have gone ahead and built your tank as originally intended under the original contract? A Yes, sir. 10

Q How much of the tank is above the ground? A Why, about nine or ten feet, I should judge.

Q Will you please indicate with the pointer the ground line, the surface line? A (Indicating.) This is the ground line, and this is the top of the tank.

Q The line marked "present surface of ground" is the surface of the ground there on the island? A Yes, sir.

Q And how much of the tank was to be below the surface of the ground? A From the surface of the ground to the lowest point of the tank, about seven or eight feet. 20

Q And the balance of it was to be above ground, was it? A Yes, sir.

Q And how were the sides under the original contract to be supported? A By piles.

Q Will you please show that? A Right here (indicating). We were supposed to build a bracket on the tank, and they were to be supported right on top of that. 30

Q Was to be supported by what you have designated as the outer circle of piles? A Yes.

Q And in addition to the outer circle of piles, what else was to support the tank above ground? A We were to fill it around with dirt.

Q Up to within how many feet of the top of the tank? A About four feet below the top of the tank up to this point (indicating).

Q Now then, the change—just take your place—calling your attention to the new plan on the left. A Yes, sir. 40

Q What are these uprights which are the extreme outside of the tank? A Well, this is almost to the extreme of the outside wall of the tank.

Q And what are those things underneath that? A This is concrete, and these are piles (indicating).

Q Is the corresponding one on this side also a pile? A Yes, sir.

Q Are those two part of a circle of piles going around the tank? A Yes, sir. 50

Charles Ippolito, re-direct.

Q And supporting it as before? A Yes, sir. This is the row of piles on the outside (indicating).

Q And the tank, after the foundation was strengthened, how much of it was to be below the surface of the ground? A You mean after all this was done?

10 Q Yes. How much of the original tank would then be below the surface of the ground? A Why, it would be similar to the original plan.

Q And about the same amount above? A About the same amount above; yes, sir.

The Court. You said it was 104 piles?

The Witness. Yes, sir.

The Court. Doesn't that call for 108 instead of 104?

20 *The Witness.* I think it took 104 all around; 108, I am not sure of that.

The Court. You said 104, and there seems to be eight square; that is sixty-four, and forty-four around the circle, that is 108.

The Witness. Well, you see, perhaps there is some of this here taken out on account of having this outer end of the piles approaching this point (indicating); one, two, three, four, done away with.

The Court. Took one out of each corner then?

30 *The Witness.* Yes, sir.

Q This change in the foundation, was that something that you had anything to do with at all, or did that entirely come from the town? A I had nothing to do with it at all.

The Court. Have you shown, Judge Davis, what the additional cost of the sludge bed was?

Mr. Davis. Yes, sir.

The Court. How much?

40 *Mr. Davis.* \$1,800 and some dollars; \$1,844.19, upon which \$1,567.56 was paid, leaving a balance of \$276.63.

The Court. That appears in the evidence?

Mr. Davis. Yes, sir. Have you got the sludge bed bill? That was one of the bills that was marked for identification.

Mr. Morrison. I left all the exhibits out this morning, Judge.

Mr. Davis. That is all, Mr. Ippolito.

Mr. Morrison. I would like to ask him another question or two that has developed.

50 *Mr. Davis.* All right.

Charles Ippolito, re-cross.

Re-cross examination by Mr. Morrison.

Q Mr. Ippolito, in preparing to do this work, did you have any knowledge of the cost to you of the sludge bed as originally designed? A I did, yes.

Q How much was that? A Why, I couldn't give it to you right offhand, but it was figured at the time that the change was made, that, if I am not mistaken, we allowed the borough over \$265.00 for the change. 10

Q And what was that allowance made for? A It was made for material and labor.

Q After taking out these items for this allowed \$267.50, what remained of the sludge bed as originally designed? A Nothing else.

Q Then this would represent the cost of the sludge bed as originally designed? A Of the—no, no, it would cost a good deal more. 20

Q And how much more? A That I couldn't say, because we had to—we had to excavate about four, I should judge, a couple of feet all around the sludge bed, which we did. On the changing of the plan we didn't charge anything for the excavation on the changing of the sludge bed, so that the only thing we deducted was the changing of the concrete to this clay puddling, which was to be surrounded to hold this—as it went into the sludge bed.

Q Then you didn't make any allowance to the borough for the labor that you would have expended in the construction of the sludge bed as originally designed? A No, sir. 30

Q Then your mental process on that was to balance one of those items against the other? A Yes, sir.

Q Can you say what the labor cost of constructing the sludge bed as originally designed would have been? A That I couldn't say offhand.

Q Can you approximately? A No, sir.

The Court. What did you do with that sludge bed, put in the cement? 40

The Witness. That called for a clay bottom.

The Court. Yes.

The Witness. Now, for instance, a layer of clay, instead of putting clay there, they substituted concrete.

The Court. How much concrete was there?

The Witness. Six inches concrete.

The Court. How about the walls? 50

Charles Ippolito, re-cross.

The Witness. The walls were supposed to be concrete. The original plan only called for this clay puddling just went about—

10 *The Court.* Have you any idea of the number of cubic feet of concrete you had to put in on the original—

The Witness. We had no concrete.

The Court. How much did you have to put in the other?

The Witness. I should think it was about 120 yards which we—we built that sludge bed under the unit prices.

The Court. I know you did. What did you charge a cubic yard for that?

The Witness. It was nine or ten dollars, if I am not mistaken.

20 *The Court.* Is that a fair price for cement work of that kind?

The Witness. It is. Sometimes it can be done less; other times it may cost a little bit more; it all depends on circumstances.

The Court. All right.

Q Mr. Ippolito, under the original design for this—how much excavation was to have been done? A The same amount of excavation under the new plan.

30 Q There was no change in the amount of excavation? A No, sir; as a matter of fact, we had to do quite a little less under the position in which the new sludge beds were set.

Q I don't think you had my point. What I mean is this: If you had built the sludge bed of puddle clay as originally designed—

A Yes.

Q —regardless of the design— A Yes.

Q —would you have had more or less excavation than you did as you had to build it of concrete? A Less.

Q How much less? A About 50 yards.

40 Q What would that be in dollars and cents? A I think the sludge beds were 30x20, twice that, by a half a foot, and that is a matter of multiplication, dividing up into cubic yards.

Q There were two areas, 30x20? A Yes, sir.

Q And you say there was a saving of six feet by the change? A Six inches.

Q You would save six inches by the change? A Yes, sir.

By Mr. Davis.

50 Q This price of concrete that you charged in the sludge bed, was that the price that you bid in your estimate? A Yes, sir.

Extracts from Minutes.

Q The borough already had your figure on that then in your original estimate? A Yes, sir.

Mr. Davis. That is all. May I have the minute book?

Mr. Morrison. I have omitted one question in relation to the excavation we have just been speaking of. 10

By Mr. Morrison.

Q How much did you excavate—you excavated the one, 30x20—two of them, and to what depth did you excavate? A About six to seven inches; something like that. It varies from nothing almost to a foot.

Q Due to the slope of the ground? A Yes.

Mr. Davis. That is all. If your Honor please, may I at this point—I think it is the proper place—before I call the few witnesses I have left, to read some extracts from the minutes? 20

The Court. You may proceed to read them now. You had better read them into the record so you won't have to bring those books back every time you want them.

Mr. Davis. This is towards the conclusion of the work. Minutes of February 23, 1917. An adjourned meeting of the Mayor and City Council held at 8:30 P. M. A report was presented by Councilman Martling, chairman of the sewer committee, in which he stated a canvass of the bids for the completion of the sewer had been made, and that if the two lowest bidders were reliable contractors, and if that were the only consideration, he would recommend the award of the work to the lowest bidder, and so forth. Now, that part has nothing, I think, to do with us. 30

Mr. Morrison. If the Court please, I think that refers to the sewers in the other part of the borough.

Mr. Davis. Well, there is a part down here. That is the introduction, and on the bottom of page 135: "In view of these things, I am of the opinion that before any action whatever is taken committing the borough to any further disbursement of money, that the plans under which we are proceeding be submitted to an expert sanitary engineer of national reputation to report upon the issue raised in this report, to suggest any revision in the plans that will substantially reduce either the first cost of construction, the operating expenses, or time when the entire plant can be put into operation. 40

(Signed) S. V. R. MARTLING.

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10 On motion the report was received and ordered filed, and it was resolved that the chairman of the sewer committee be, and is hereby, authorized to engage the services of Alexander Potter, consulting sanitary expert of 50 Church street, New York, to go over the plans prepared by Charles F. Blood of the sewerage system and sewage disposal plant for the Borough of Ridgefield, N. J., provided he will report by Wednesday, the 28th of February, upon any substantial changes or modifications that may be made in the plans of the sewerage system of Ridgefield, the cost of said report not to exceed the sum of \$500.00."

20 On page 138, the same minute book, Number 8: "Resolved that Charles F. Blood, C. E."—this is minutes of the same meeting, February 23rd—"be and hereby is authorized to deliver to the borough clerk on or before Monday, February 26th, at 8 p. m., all papers, records, inspectors' reports, time sheets, original plans and specifications, and all other records and data which he may have or which is in use appertaining to the construction of the sewer and disposal plant during his supervision of the same, up to and including this date, February 23, 1917; and it is further resolved that Charles F. Blood, C. E., be instructed to produce at the next meeting of the board all original maps, copies, or blueprints, file books and all data or other articles which are the property of the borough."

30 Meeting of February 28th, 1917. A regular meeting of the Mayor and Council, the following:

40 "In response to the resolution adopted at the adjourned meeting of February 23rd, Mr. Alexander Potter, sanitary sewer expert, made a preliminary report on the present sewer situation and illustrated with maps how a gravity sewerage system might be installed which would be a great saving in operating costs to the borough, and at the conclusion of the report, it was moved that the report be referred to the Council as a committee of the whole, and that Mr. Potter complete the work of formulating a gravity system as outlined by him, and to present same to the Mayor and Council at the regular meeting to be held March 14th. And it was resolved that Mr. Potter be and is hereby appointed consulting engineer at a salary not to exceed the sum of \$750.00, which amount is to be in addition to the amount awarded him at the adjourned meeting of February 23rd."

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On page 144 of the same minute book:

“Resolved that the committee on sewers be and hereby is authorized to order Charles Ippolito to suspend until the next regular meeting of the Council the work now being done under his contract with the borough, if and when, in the opinion of Alexander Potter, consulting engineer, it shall be desirable so to do.”

10

Minutes of March 14, 1917, page 152:

“Mr. Alexander Potter, sanitary engineer, reported in full on the advantages of a gravity sewerage system over the system now under construction, and on motion the report was received and referred to the sewer committee. The question of securing the services of one other expert in engineering and sewerage systems to confer with Mr. Potter and the borough engineer was debated, and the following preamble and resolution adopted: Whereas, the matter of sewer construction in the Borough of Ridgefield, Bergen County, New Jersey, has reached a point where it becomes a matter of selecting a system, and, whereas, two separate plans have been submitted by two engineers; and, whereas the taxpayers present desire disinterested”—would you call this uninterested or interested—uninterested—well, dis—or un—interested third party to confer with both for the purpose of reaching a decision, and, whereas it has been said that the Honorable William C. Ormond, president of the board of assessors, City of New York, may volunteer his services as such third party, be it resolved that this body request Mr. Ormond to be asked whether he would give us the benefit of his long experience in such matters, and that a copy of this resolution be sent to Mr. Ormond.

20

30

A report was presented by Messrs. Brooks, Watson and Inman, members of the sewer committee of 1916, objecting to the adoption of a gravity sewerage system, and on motion the report was received and referred to the sewer committee.”

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Page 154, of the same minutes:

“Resolved that the borough clerk be and hereby is instructed to notify Charles Ippolito to stop all work upon the disposal plant and to remove from the site of the work forthwith all of his plant, and to render the borough a statement of the amount of material he now has on hand.”

And on page 155, of the same minute book, the following resolution was presented by Councilman Martling:

“Resolved that the clerk be and he hereby is instructed to notify Mr. A. Ziegler that his services as inspector in the

50

Extracts from Minutes.

construction of the sewer system and the disposal plant are no longer required."

At this point, with regard to Mr. Ziegler, I subpoenaed a witness to account for his absence, and Mr. Morrison is willing to have it go on the record that Mr. Ziegler has moved to the South, as I understand it, and is out of the State, and cannot be subpoenaed.

The minutes of March 28, 1917, page 162, a regular meeting of the Mayor and Council:

"A report was presented by Mr. William C. Ormond, in which he recommended that the bid"—that has nothing to do with it. Will you strike that out, please? I think this is already in. I will withdraw 162; that apparently is already in.

Page 184, minutes of March 9th, at the bottom of page 183,—I beg your pardon—May 9th. This begins at the bottom of page 183:

"Whereas, the period of time for which Charles F. Blood was engaged pursuant to the resolution of July 14, 1915, expired on or about March 31st, 1917, be it resolved that the borough clerk be authorized and directed to notify Mr. Blood to comply forthwith with the terms of the resolution of February 23rd last calling upon him to deliver to the borough clerk all papers therein specified."

And on page 191, minutes of May 23rd, a letter from Howe & Davis, attorneys, relating to the claim of Charles Ippolito was, on motion, received and referred to the committee of the whole."

Mr. Morrison. If the Court please, as to these matters which are read, I wish to make an application, either now or when your Honor is ready to hear it, to exclude and strike out those which refer to the conferences of the Mayor and Council as to changes in the sewer system as immaterial. It appears there was considerable controversy as to what system of sewer they were to have. Mr. Ippolito's contract was to build a disposal plant.

The Court. What light does it throw on the subject, Judge Davis?

Mr. Davis. Why, I think the whole thing is pertinent to show the reason for discontinuing the work by Mr. Ippolito.

The Court. Well, does it make any difference at all why they did it?

Mr. Davis. Yes, sir; I think so. I think the reason for discontinuing is a part of the evidence, showing discontinu-

Extracts from Minutes.

ance. If they not only had a reason for doing it, but followed up that reason by the act of causing him to do it, after having debated the thing. The minutes show that they considered this matter, and that they were undecided as to what they would adopt under Mr. Potter, a gravity system, or whether they would go ahead under the old system that Mr. Blood had mapped out for them. Then those considerations were followed by their resolution putting him off the job and telling him to stop work. Then the further—is that the only part that you refer to?

10

The Court. Why are any of the resolutions of the Council passed after they had notified the plaintiff to cease work relevant in this case?

Mr. Davis. I think those resolutions that Mr. Morrison refers to were passed before they finally notified him.

20

The Court. But you read one in May.

Mr. Davis. The one in May referred to the fact that Mr. Blood's term had ended in March.

Mr. Morrison. We make no objection to that one; not to the last one in May, showing that Mr. Blood's term of office ended at that time.

The Court. Which ones do you particularly object to?

Mr. Morrison. Giving them by pages, 134 and 135, which was action submitting to an expert, the sewer system; page 138, a resolution that Mr. Blood deliver papers relating to the sewer to the borough clerk; page 141, to retain Mr. Potter at a fee of \$750.00; page 144—144 is already in; 152, Mr. Potter's report on the gravity system in contrast to a pumping system, which was Mr. Blood's.

30

The Court. I don't see that they have any bearing on the case at all. I will strike them out.

Mr. Davis. Will your Honor grant me an exception on the record?

The Court. Yes, certainly. You see in this case it is simply a question of whether or not this gentleman had a contract with this borough, and whether they had stopped him from doing anything. It is immaterial why.

40

Plaintiff's counsel prays an exception to the ruling of the Court.

Exception noted as ground of appeal.

Mr. Davis. I will have to recall Mr. Blood.

50

Charles Frederick Blood, direct.

CHARLES FREDERICK BLOOD, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Davis.

10 Q Mr. Blood, with regard to the matter of the sludge bed, what, if anything, did you do with regard to calling the attention of the Mayor and Council to the change in the sludge bed before it was made? A As soon as the top soil was trimmed off of the original location and we found the sand, why, I took the matter up with the sewer committee, and the chairman and one or two members went down to the site and looked at it with me, and asked me what my recommendations were. I told them, and they asked me to find out what the difference in cost would be. Then I took it up with Mr. Ippolito, and got from him what allowance he would make for the cinders, and so forth, and he wrote that in a letter which is among
20 the records.

Q Did you bring that to the attention of the Mayor and Council? A Right away, the same day.

Q And if I could find—we apparently have misplaced the order that was made on that, which had some notations of Mr. Blood on it. And when you brought it to their attention, was it at a meeting? A Well, I got the chairman of the sewer committee on the 'phone at his private residence first.

Q Who was that? A Mr. Inman.

30 Q Yes. A And then he called a meeting which was held within a few nights; I don't know whether it was that—

Q Where was it held? A (No response.)

Q Where was the meeting held? A I couldn't say whether it was in the Borough Hall, or in some private house or the sewer committee, as we met around at the different houses of the sewer committee very often.

Q What was done then with regard to having this matter of the sludge beds approved or disapproved?

40 *Mr. Morrison.* If the Court please, I object if the Judge's attempt is to show action of the Borough Council. The minutes speak as to that.

The Court. You may ask that question.

Mr. Morrison. Your Honor will allow me an exception?

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

50 *The Court.* I will allow this and see if you connect it up in any way.

Charles Frederick Blood, direct.

A I got the difference in cost from Mr. Ippolito to changing this to a concrete construction, and then put that, with a rough sketch as to what the future work was to be, and put that before the Mayor and Council for them to act on.

Q How soon after the meeting of the sewer committee did you put it before the Mayor and Council? A There was a special meeting for that, I should say within three or four days. 10

Q At that meeting what did they do with regard to authorizing you to go ahead or not? A They authorized me to write to Mr. Ippolito, a copy of which I gave you.

Q Authorizing the work to be done? A Yes, enumerating the allowances he was to make.

Q Now, with regard to the plan here of the change in the foundation; calling your attention to the resolution that was passed regarding the three thousand dollar appropriation, not exactly appropriation, but authorization to continue this work not to exceed the further sum of \$3,000.00, passed on February 14, 1917, Exhibit P. 40; the language is, that "Whereas, the work shown on the plans and specifications mentioned in said resolution"—that is the resolution of October 25th, 1916—"is not fully completed," then the resolution is that Ippolito is authorized to proceed with the work and no charge in excess of \$3,000.00 shall be incurred without the further consent of the Mayor. Now, calling your attention to the plans and specifications referred to in that resolution of February the 17th, what plans and specifications were referred to? A This revised plan on the left (indicating), and the specification which were— 20 30

Q This one here (indicating)? A Yes, and the specifications which go with it.

Q Had you at any time after completing that blueprint and the specifications, brought them before any meeting of the Mayor and Council? A The tracings from which this is a blueprint was put before the Mayor and Council before it went to the job at all, before there was any blueprint made.

Q That was the original from which this blueprint was made? A Yes. 40

Q And was it shown to all of them? A Yes, sir.

Q All that were present? A Yes.

Q Oh, Mr. Blood, regarding your striking off of Mr. Ippolito's estimate or bill of the wages of Paul Koch put in as superintendence: A letter has been produced in which you asked for some affidavit or other; was an affidavit furnished you to show that that was a proper charge? A Yes. Afterwards there was.

Q Well, I show you an affidavit of December 11th, 1916. Was that affidavit or a copy— A Yes. 50

Charles Frederick Blood, cross.

Q —furnished to you? A Yes.

Q And were you satisfied that a charge for superintendence was proper or improper? A I say after, I received those affidavits.

10 Q This plan of yours, both for the work that was to be done in the streets in laying the pipes, and the work that was to be done on the island at the sewage disposal plant, was that a gravity or a pump system? A This was a pumping system.

Q Was the change in the foundation by way of driving these additional piles, and so forth, necessitated in your opinion by anything that Ippolito had done or neglected to do under his contract and specifications in the progress of that work? A It was not. The trouble wasn't from the sides; it was from the bottom.

The Court. Could he have completed that contract?

20 *The Witness.* No; it wouldn't have stood.

The Court. It wouldn't have stood?

The Witness. No.

The Court. Could the work have been done, though?

The Witness. No, it couldn't after you got it stripped.

The Court. It couldn't have been done?

The Witness. No, it came up; it just poured up.

Cross examination by Mr. Morrison.

30 Q Mr. Blood, you have said in answer to one of the questions of Judge Davis that the system of pipes in the street in this disposal plant was a pumping system? A Yes.

Q Were any of the pumping stations included in Mr. Ippolito's contract? A No.

Q So he wasn't concerned at all with the pumping part of it? A No.

40 Q I call your attention to the resolution of November 3rd, 19— of October 25, 1916, in minute book 8, page 73, which is the first resolution for work in the modification of the tank foundation. In that resolution it refers to plans and specifications to be prepared by you and approved by the Mayor. Having that called to your attention, I ask you whether it was not the Mayor who approved those plans and not the Mayor and Council? A Why the matter stood like this: When I completed these drawings, I turned the tracings in to the—to a meeting; I don't know whether it was a regular or special, and explained in detail these tracings to the Mayor and Council, and then from that the blueprints were made
50 and we went to work.

Charles Engelhardt, direct.

Q Well, now, was the meeting at which you presented these tracings—and did you say you had the specifications with them? A The specifications with them, yes.

Q Was that meeting the one at which this resolution was passed, or an earlier or later meeting? A Well, I think it must have been later. I couldn't say exactly. 10

Q So that at the time the resolution was passed, you had not yet made your plan or had it approved? A Well, I had done this: I had made a pencil sketch, but I hadn't worked out any detail. I had shown in pencil on paper what this drawing would be, but not any dimensions or any working details for the contractor.

Q And that sketch was subject to certain suggestions and modifications brought out in discussion at the meeting which you were to incorporate in your finished drawing, was it not? A No, there was no modifications to it. The drawing was to be made as I pictured in my pencil sketch. 20

Q And that pencil sketch was not yet complete in what detail? A Well, as to the exact placing proposed of the steel, or exact thickness of the concrete, or lots of detailed dimensions that the contractor would need in setting forms.

Q Would it be a fair characterization to say that in a general way your sketch showed a suggestion or outline of what was to be done without showing the details? A Oh, yes. Because the details as shown on the tracing in the completed drawing would not have interested the Mayor and Council anyway. 30

Q And those were worked out after the passage of the resolution we have referred to? A The details were worked out.

Q And by whom were they approved? A It was approved in this way, as I just stated, by placing the tracings before the Mayor and Council and going over them with them and explaining them.

Q Now, when did you do that? A Well, I couldn't say on what date. I went right to work on these drawings, finished them right up, and immediately as soon as they were finished, they were submitted to this meeting.

Q Well, now, was that meeting held before or after Mr. Ippolito began to work on the modified plan? A It must have been after. 40

Mr. Morrison. Nothing further.

Mr. Davis. That is all, Mr. Blood. Mr. Engelhardt.

CHARLES ENGELHARDT, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct examination by Mr. Davis.

Q Mr. Engelhardt, do you hold any official position in Ridgefield? A Yes, I do. 50

Charles Engelhardt, direct.

Q What official position do you hold? A Mayor.

Q How long have you been the Mayor of the Borough of Ridgefield? A Since January the first, 1916.

10 Q And were you mayor when the sewer disposal plant contract was awarded to Mr. Ippolito? A Yes.

Q And you continued to be mayor down through that time until the work was stopped? A Yes.

Q And you are still mayor, are you? A Yes.

Q Do you recall, Mr. Engelhardt, the occasion when the matter of a change in the foundation of the tank was brought before the Mayor and Council by the city engineer? A I do; yes.

20 Q Do you recall one or more meetings at which conferences took place considering that matter by the Mayor, the Council, your own attorney, the borough engineer, Mr. Ippolito, and his attorney? A I don't recall but one meeting, and that was the regular meeting, when this matter came up before me, sir.

Q You do recall one meeting? A Yes.

Q When all those persons were present and the matter was considered? A Yes; it was a regular meeting.

Q And from whom did you, as the Mayor, take your advice on the necessity of this change? A From whom?

Q Yes. A Why, the recommendation came from the sewer committee, I think, and the engineer.

30 Q And the engineer? A Yes.

Q Mr. Blood was the borough engineer? A He was the borough engineer; yes, sir.

Q And it was he that made the recommendation for the change, wasn't it? A I don't recall, whether he was the one, or whether it was made by him and the sewer committee jointly. The circumstances I don't recall, but I know the recommendation was made.

Q Either by him alone or by him and the sewer committee jointly? A Yes, by him and the sewer committee.

40 Q And do you recall how long a period of time was taken by the Mayor and Council to consider that recommendation before the authority was given to go ahead? A Why, the resolution was passed that very night in October, I think it was the last part of October; I don't recall; the minutes will show.

Q Well, how long before the passage of the resolution had you been considering the matter? A It had been brought before me, as I mentioned before, only that night.

Q I see. A It was rather a surprise to me.

50 Q And you recall, whenever that was, the night the resolution was passed? A Yes.

Stephen V. R. Martling, direct.

Mr. Davis. That is all.

Mr. Morrison. No questions.

Mr. Davis. Mr. Martling.

STEPHEN V. R. MARTLING, called as a witness on behalf of the plaintiff, first being duly sworn, testified as follows: 10

Direct examination by Mr. Davis.

Q Mr. Martling, do you hold any official position in the Borough of Ridgefield? A I do.

Q What is that position? A Councilman.

Q And are you the chairman of the sewer committee? A Not at present.

Q Were you chairman of the sewer committee in the year 1917?

A I was not. 1916 or 1917? 20

Q 1917. A 1917; yes.

Q You became chairman of the sewer committee when? A January the first.

Q 1917? A 1917.

Q And then you continued to be chairman for how long? A Until December 31, 1918.

Q Do you recall selling some of the materials that were left on the job by Mr. Ippolito? A I do.

Q What materials did you sell? A Cement and wood.

Q Wood? A Cord wood.

Q Cord wood. Did you sell any of the re-enforcing bars? Weren't they also sold? A They were sold; yes. 30

Q Now, was there anything else sold? A Not to my recollection.

Q And the proceeds of those sales, where did they go? A They went to the collector, and credited to the sewer account.

Q That is, they went into the treasury of the borough, did they? A Yes.

Q After Mr. Ippolito got off the job, did you put any man in charge there of the place? A I think there was a watchman there for some little time. 40

Q Do you remember who it was? A I think it was Mr. Lambricks.

Q I didn't catch the name. A Lambricks. He might have been—he was there as watchman. Whether he was employed at that time by the borough, or whether he was employed by Ippolito, I am not positive.

Q And did you, after Mr. Ippolito got off the job, direct one of the city officials, I think it was the street commissioner, to take an account of the stuff? A I did. 50

Stephen V. R. Martling, direct.

Q Do you know if he took an account? A I do.

Q Well, did he, or didn't he? A He did.

Q In addition to the material that you sold, or that the borough sold and the proceeds turned into the treasury, were there also materials remaining there after you completed your sales? A Oh, yes.

Q What did they consist of, Mr. Martling? A Rough lumber, frames for the concrete, re-enforcing steel, iron, cast-iron pipe, elbows, and some earthen pipe.

Q Any cracked stone? A And crushed stone; a little sand.

Q I beg your pardon? A A little sand.

Q And some sand. Do you recall whether there were some bricks there? A I don't recall bricks.

Q In the neighborhood of the sludge bed, did you find any bricks? A Yes, there was some over on the northwest corner of the sludge bed.

Mr. Davis. That is all, Mr. Martling.

The Court. What became of that stuff? That remained there?

The Witness. They were sold.

The Court. Any that remained there?

The Witness. I believe it is there at the present time, except for the stone which was taken by the borough and used on the roads.

The Court. Why did you sell part of it and not sell it all?

The Witness. The cement was sold because it was liable to deteriorate. The iron, the re-enforcing rods, were sold to the contractors building the school to facilitate their work; they couldn't get the iron.

The Court. Did you understand that the stuff there belonged to the borough?

The Witness. I understood it belonged to the borough.

The Court. All the stuff?

The Witness. Yes.

Q And was it under your directions that possession was taken of the stuff, or under the directions of the Council? A Under the direction of the Council, I believe.

Q And you reported the sales to the Council, did you? A Yes, authorization was granted by the Council.

Mr. Davis. That is all.

Mr. Morrison. No questions.

Mr. Davis. Mr. Olmstead.

Russell C. Olmstead, direct.

RUSSELL C. OLMSTEAD, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Davis.

Q Now, Mr. Olmstead, will you please give a statement of the amounts making up the first, second and third claims for delay, and how they were arrived at? Take the first one first. A The first claim, which runs from September 3rd, to October 31st, that claim was made up of rental for traveling derrick, \$274.90. Boiler and hoisting engine, \$82.50. Centrifugal pump, \$165.00. Pulsometer pump, \$115.50. Steam hammer, \$66.00. Concrete mixer, \$50.00, and overhead charges is \$605.00. The overhead charges in that instance included part of my time, some laborers, mechanics and engineers that we carried from day to day with the expectation of beginning the work from day to day, as we assumed we would be able to start.

The Court. What was the overhead charge altogether?

The Witness. \$605.00.

Q I show you now sheet of the November 1st bill, an itemized statement of the overhead charge of \$605.00. Can you state what it is? A The items making up that \$605.00 are my own time, Olmstead, 32 days, at \$9.90, \$316.80. Koch, the engineer, 32 days, at \$7.00, \$224.00 Bagley, steam engineer, 32 days, at \$5.00, \$160.00. Fireman Knapp and Malloy, 32 days at \$3.50, \$112.00. Night watchman, 38 days, at \$2.20, \$82.60. That was the total payroll at that time for these men that were engaged in this work, who were losing time and the money caused by the delay in the tank.

Q Now, what is the total of your first bill for delay ending October 31st? A \$1,358.90.

The Court. One thousand, three hundred and what?

The Witness. \$358.90.

Q Now, when was the second period? A Well, that is from the period September 31st to October 31st. Now, that runs until November 9th. There is this additional charge on that same bill from November 1st to November 9th of \$350.30.

Q And how was that made up? A That is made up of practically the same items.

Q Well, have you got them there? A Yes.

Q Will you just read them? A The pay of two engineers or firemen, four days at—this is made up for the pay of two—either two firemen or two timbermen; there were four days at \$2.50, \$14.00. Four laborers at \$3.00, \$12.00. Two night watchmen at \$2.20, \$4.40. That is, there is night watchman to the amount of \$4.40 charged against that time over nine days, and the laborers

Russell C. Olmstead, direct.

charged against that time was \$61.90, and my time was eight days at \$80.00. The plant charged—the rental of the plant was \$178.00, making a total, \$350.30.

Q Now, your third period runs from what date to what date?
A From March 17th to March 31st, 1917, inclusive.

10 Q And 31st inclusive? A Yes.

Q And what is the amount of that? A The total amount of that, plus the 15 per cent. profit, is \$657.02.

Q And how was that made up? A It is made up of 108 hours of foreman, that was my time, at \$1.10 an hour, \$118.80. Fourteen days watchman, \$3.00 a day, \$42.00. That was totalling \$160.80. The liability insurance was 4.74 per cent., making \$7.52, making a total of \$168.32. The rental of the plant and machinery was, fourteen days, derrick, \$10.00 a day, \$140.00. Fourteen days hoisting engine, \$5.00, \$70.00. Fourteen days centrifugal pump at \$5.00, \$70.00. Fourteen days pulsometer pump at \$3.00, \$32.00. Fourteen days concrete mixer at \$4.00 a day, \$56.00; and fourteen days 28-gauge track and cars, flat rate of \$25.00. That extended is \$403.00, making a total of those two items, \$571.32, plus 15 per cent., which is \$85.70, making a grand total of \$657.02.

Q Now, have you a bill carrying it down to the 10th or 12th of April? A This is the bill carrying it for the month of April.

Q Well, how far down? A To April 30th.

30 Q For the whole of April? A The whole month.

The Court. Why did you stop on the 30th of April? Why didn't you keep right on?

The Witness. Well,—

The Court. You were ordered to stop on the 8th of March. Now, why did you keep on after that?

Mr. Davis. Well, we understand that in our testimony that Mr. Blood told them there was a little squabble in the Council; it was going to blow over, and to stay where they were so as to go ahead with the job.

40 *The Court.* Do you think they did right to do that when they had received a copy of the resolution?

Mr. Davis. Well, he was our boss under the contract. We had to follow his instructions and it looked as if the squabble would blow over and they would go ahead.

The Court. All right. I cannot see, though, under any principle that you can recover for actual time that you were ordered off. You may recover for your profits, but how can you go on and show your loss when you are ordered off.

Russell C. Olmstead, cross.

Mr. Davis. Since Mr. Olmstead is here, I would like to get that in and argue it when the proper time comes.

The Court. I will allow you to put it in.

Q For the whole month of April, it is what? A \$1,240.26.

Q And up to the 12th it would be about two-fifths of that, would it? A It would be twelve-thirtieths, two-fifths, yes. 10

The Court. This is coming in subject to a motion to strike it out.

Mr. Davis. Yes, sir.

Q That two-fifths of the \$1,240.26 would be about \$480? A About that.

Q And how is that made up, how much a day for each affair? A The same rate on the machinery and the same rate for the hours of foreman. I was the only man there, with the exception of the watchman who was there nights. 20

Q And the only charge is for you and the watchman and the overhead, is it? A And the overhead.

Q If you take it for the whole month, it is \$1,240, and if you take it up to the 12th, the date of the letter of Mr. Ippolito to the Council, it is two-fifths of that? A Yes.

Mr. Davis. Cross examine.

Cross examination by Mr. Morrison. 30

Q Mr. Olmstead, you have stated regarding these calculations as to which you have just been examined, certain items of rentals; are we to understand that Mr. Ippolito actually hired those pieces of apparatus from some other person at those rentals? A No, these particular items are plant that belongs to Mr. Ippolito, which he is charging rental for.

Q And one of those was this industrial railway track and cars? A Yes.

Q As to which you testified earlier in the case that it had cost Mr. Ippolito certain sums? A Yes. 40

Q And the borough had been charged with those, less depreciation? A No, not the borough hasn't been charged with that.

Q Well, you had put into some of your bills which you had figured out, work which had been done, the cost of that industrial railway, and you said you had allowed some credit for it, less the depreciation, at the end of that calculation? A We had not charged the borough with that amount. We had charged ourselves with it in our bookkeeping for that amount. 50

Russell C. Olmstead, cross.

Q And based on that bookkeeping you made up certain cost sheets which you testified to, and which Judge Davis offered in evidence as to the cost of your construction, so far as you went?
A Yes.

10 Q And as to the estimated cost of completion, you mentioned in the earlier examination, a hammer which had been purchased for \$72.00; you now mention the rental of a hammer; is that the same hammer? A We had two hammers on the job. No, that hammer is a steam hammer. The other hammer, I believe, referred to a drop hammer.

Q Well, now, this one for which you are figuring in items of rental, this hammer, was it owned by Mr. Ippolito, this steam hammer? A No, it was not owned by Mr. Ippolito.

Q That was actually rented from somebody? A Yes.

20 Q Do you know the rental Mr. Ippolito paid for it? A No, I do not.

Q Then how did you ascertain the figure that you placed in your calculation? A This is Mr. Ippolito's figures that we made up jointly; that is, I would take Mr. Ippolito's word for what he was paying for the hammer.

Q You have an item for rental of a derrick? A Yes.

Q Was that actually rented, or did it belong to Mr. Ippolito?
A That belonged to Mr. Ippolito, I believe.

30 Q How did you ascertain the item of rental to be charged? A That is the item of rental, at \$10.00 a day, would be about what it would cost, the going rate of rental for a piece of plant that kind and size.

Q That was in your opinion? A In our opinion.

Q It was not an actual expenditure of Mr. Ippolito's? A No.

Q It didn't actually cost him \$10.00 a day to have that derrick there? A Well, he wasn't paying \$10.00 a day to anybody else.

Q He wasn't expending \$10.00 a day for that derrick? A No.

Q He had a derrick of his own which he had at some time bought and paid for and he was using it there? A Yes, sir.

40 Q Does that also apply to the hoisting engine? A Yes.

Q Did that belong to Mr. Ippolito? A Yes.

Q And the centrifugal pump? A Yes.

Q And the pulsometer pump? A Yes.

Q The concrete mixer? A Yes.

Q The track and cars you have spoken of as belonging to him?
A Yes.

Q The sheathing hammer? A Yes.

50 Q All of those things for which you have figured a rental, with the exception of that one steam hammer, all except the steam ham-

Russell C. Olmstead, cross.

mer belonged to Mr. Ippolito? A I will change that too; I think that particular steam hammer referred to a sheathing hammer. That belongs to Mr. Ippolito also.

Q So all these particular items for which you have figured a rental charge belonged to Mr. Ippolito? A Yes.

Q So as to none of those, he really had no expenditure at the time the job was going on; they belonged to him; he brought them there? A Yes.

Q And he made no disbursements on this job on account of those pieces of apparatus? A No.

Mr. Davis. That is all. If your Honor please, there were one or two exhibits that were marked only for identification.

The Court. Well, what are they?

Mr. Davis. Well, I think the only one that is left is that sludge bed. Now, the testimony—your Honor, I think, withheld the offering of that into evidence, and allowed it to be marked only for identification.

The Court. Yes.

Mr. Davis. Until the authority to make the change was connected up, and I now make the offer that it be admitted in evidence.

The Court. On what theory?

Mr. Davis. On the theory that the testimony of Mr. Blood was that before he did any changing on the sludge bed, he brought the matter of changes before not only the sewer committee, but the Mayor and Council and got their authority to do it, and then they went ahead and did it, and the work was done; and also upon the theory, or upon the evidence that the Council paid it and ratified it. Further, because on that particular thing, Mr. Morrison has admitted the whole business in his pleading. His answer admits the making of it, admits the amount paid, and admits the amount due on that particular item.

The Court. I will allow it to go in evidence.

Mr. Morrison. Your Honor will allow us an exception?

The Court. Take your exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Davis. Does your Honor recall any other exhibits for identification?

The Court. I think that is all.

Russell C. Olmstead, cross.

Mr. Davis. I think if there are any others marked for identification, I would like to offer them in evidence at this point, but I cannot recall any other.

I would like, at this point, if your Honor please, to ask for an amendment in the schedule to the first count, the amendment to read as follows, stating the claim to be, entire price of work under contract of \$10,300.00, and Orders Numbers One and Two, \$12,157.47; fair cost of work done, \$10,220.14; paid on account of above, \$6,799.15. The plaintiff claims such a proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, it being estimated it would cost from \$1500 to \$1700 to complete the work. Plaintiff claims profit of 20 per cent. of the work undone of from \$1500 to \$1700 dollars.

The Court. Well, what do you say?

Mr. Morrison. Well, if the Court please, it comes very late in the trial of the case, and I would like to have Judge Davis specify, at least, I think his amendment would not be proper and would be proper to be stricken out on our motion unless he specifies what he thinks his cost was in the work to be completed. As I heard him read this, he didn't state the cost of the work done.

The Court. Well, read it over again.

Mr. Davis. Entire price under contract of \$10,300, and Orders Numbers One and Two, \$12,157.47.

Mr. Morrison. That is the price?

Mr. Davis. That is the price.

The Court. That includes your original price and what?

Mr. Davis. The sludge bed and the little work that was done under the bottom of the tank; fair cost of work done, \$10,220.14; paid on account of above, \$6799.15. And then the allegation that it is estimated that it would cost \$1500 to \$1700 to complete the work, and claiming a profit on the—well, I will read it. The plaintiff claims such a proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, it being estimated that it would cost from \$1500 to \$1700 to complete the work, and the plaintiff claims also a profit of 20 per cent. on the value of the work undone of from \$1500 to \$1700 dollars.

Now, if your Honor please, I am practically adopting the very language of Mr. Morrison's answer, in which he took issue with my declaration as to what the measure of damages should be.

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Mr. Morrison. Judge Davis denied that pleading of ours.

The Court. Then you ought to be thankful that they have agreed with you.

Mr. Davis. Your Honor will recall, that on the motion which was made only about ten days ago by Mr. Morrison to amend his pleadings so far as the measure of damages were concerned, I stated I had accepted his view on the measure of damages, and this doesn't come as any surprise to him. 10

Mr. Morrison. We don't claim surprise in that sense, but the only surprise, in hearing it read once, I really do not know what it is, and I would like to have a few minutes to digest it. May I have until tomorrow morning to put in an answer to it? I don't know—

The Court. Oh, yes; you may put it in tomorrow morning. 20

Mr. Morrison. There will be a formal pleading to it.

The Court. It is perfectly safe to do that.

Mr. Davis. It is safe in this case because Mr. Morrison is adopting the rule that he admits in his answer.

The Court. That is a safe rule anyway. I do not see that there is any question about your rule of damages, it is so well settled and in line with that Rutherford *vs.* Kehoe case, down to the present time; there cannot be any dispute as to what the rule is. Anything further?

Mr. Davis. Only the motion to amend that schedule. 30

The Court. I will allow the schedule to be amended, and Mr. Morrison can have until tomorrow morning to put in such an answer as he desires.

Mr. Davis. Shall I hand this to the clerk?

The Court. You had better hand it to Mr. Morrison.

Mr. Davis. I am going to hand him a copy.

The Court. That may be filed.

Mr. Davis. We rest.

The Court. Now, Mr. Morrison, if you have some motion you want to make, I will hear you now. 40

Mr. Morrison. If your Honor please, our motion is to strike out a large part of the testimony and what would be, in effect, a motion for a non-suit. With your Honor's permission, I would like to take that up as to each count separately. I think I can make it clearer that way. There are six counts in the complaint. The first count is on the contract as originally made. The contention of the defendant as to that count and 50

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our present motion is to strike out the evidence which has been put in by the plaintiff in support of that count, because it is immaterial as offered to support a contract not made in the manner provided by statute so as to be obligatory on the borough.

10 Now, the reason that we contend that the contract itself is not obligatory on the borough is that the statute requires a municipality in contracting for work in excess of \$500.00, to do so by receiving competitive bids. That procedure was attempted in this case, and our contention is that it was not consummated. There was an advertisement and there were bids received, but there was no competition for this reason; that the contractor should bid against Mr. Ippolito, and Mr. Ippolito submitted figures for the sewage disposal plant as a whole, and that would have been a fair compliance with the statute; but that was modified by the further provision that those contractors could be permitted to do—and, in fact, Mr. Ippolito was permitted to do other work in excess of the original contract price on a non-competitive basis on a cost plus a percentage basis. The case, as I have already stated to your Honor, on which we rely is the case of Browning against the Freeholders of Bergen County. Your Honor has noted what was done there was to solicit bids for the building of that bridge across the river not far from the court house. That work was devided into two parts, the bridge proper as a whole, on which competitive bids were received, and then the structure across some of these clay pits. There was an alternative there of filling the clay pit or building a trestle. In that case, there was a competition on the unit price, each bidder bidding in his own unit price for the fill and the trestle. In that case the Court held that there was not a competitive bidder. Now, the present case is not even as strong a competition as that, because, while we had a competition in this sewer disposal plant as to the main structure, we had absolutely no competition, not within unit price, to be done on the cost plus basis.

The Court. In this case, wasn't it not only to do the work as called for, but you may do any other work that is called for during the continuance of your contract at cost plus 15 per cent.; the man makes his bid on that?

Mr. Morrison. A man who makes his bid makes his bid on it, but there is no competition.

The Court. Oh, yes, anybody who bids it in says, "I will do it for \$10,000; I will do it for that and take my chances;

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I will do it for \$11,000; I take my chances." They are bidding on the same thing.

Mr. Morrison. That is just the thing that the courts have attempted to protect the citizens of the boroughs represented by their governing bodies. This matter of taking chances, your Honor knows that the chances a bidder takes bears somewhat on his acquaintance with the engineer in charge of the work. The courts have said in this case that I cite, and other similar cases, that that is the very thing that the statute defining the public policy guards against, that they must all bid under fair competition for the same thing. 10

The Court. They are bidding for the same thing.

Mr. Morrison. No, they are not, because Mr. Ippolito, and nobody knew until he got on here, how much cost plus work he should do. 20

The Court. Well, are you going to have the borough saddled with the expense of stopping a contract in the middle?

Mr. Morrison. The borough had provided against that. The borough had provided in this case, at least, there was no provision that the borough should pay the expense.

The Court. Suppose you go on. No contractor would give you a fair bid if he had to be stopped in the middle of his contract and repeat on certain work.

Mr. Morrison. It isn't a question, if your Honor please, what the contractor would or would not do, but the question is what the statute permits a borough to do and obligate its citizens. 30

The Court. All right; proceed.

Mr. Morrison. So, as to the first count, that is the contract itself, our motion is to strike out the evidence on the ground that the contract is not a binding obligation of the borough.

The Court. I will decide that now. That I will refuse you. I think the contract is a binding contract. 40

Mr. Morrison. Your Honor will allow me an exception?

The Court. Yes; take your exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Morrison. Now, as to the second, which is the count under which they seek recovery for work done under the resolutions: We have the same situation there. Mr. Ippolito was able to do for the borough some \$10,000 and upwards of 50

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work without any advertisement or competition. He did it at cost plus. Now, if we can, for a moment, put the original contract out of our minds, and can see that the borough was about to build this extra foundation, and said to the contractor, "Here, we will pay you cost plus," it seems to me that the Court would not hesitate at all to say that that wasn't a compliance with the statute. What the borough should have done was to advertise for bids. If that had been a separate job from the other, there would be no question in your Honor's mind, but the question to be solved is whether an illegal provision of that sort can be carried through as part of that otherwise legal contract. And our contention is that if the contract itself, the original contract, if this contract was not within the power of the borough, it was not binding upon them. The testimony should be stricken out because that is not binding on the borough.

The Court. That is the second one?

Mr. Morrison. There has been some suggestion in Judge Davis's questions and testimony of his witnesses that there was a ratification of this work. As to that, I call your Honor's attention to the comparatively recent adjudication of the Court of Errors in a case in 90 New Jersey Law, *Eckert* against *West Orange*; that was the sewer or scavengers case. What the Court has decided in that case is this, as I read it: That no municipality can make a contract for over \$500.00 without advertising. They say that they cannot make an express contract or an implied contract. In another case in the Court of Chancery it was held that there was to be no equitable estoppel, which, in a sense, is the same as ratification. That is in 77 Equity, 467, *Hill Dredging Company* against *Ventnor City*. It is a chancery opinion by Vice-Chancellor Leaming, which seems never to have been modified.

The Court. What page is that?

Mr. Morrison. 90 New Jersey Law, page 545, *Eckert* against *West Orange*. That was a Court of Errors opinion. Now, what they said in the *Eckert* against *Orange* case was that the statute requiring an advertisement for contracts of \$500 and upwards, expressed a public policy; that the courts would not permit the evasion of that public policy by any device or happening; in other words, if the contract is one which should be let by advertising and they attempt to let it otherwise, that nothing will ratify it. So our contention on the second count is that there was no binding obligation

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on the borough, there being no advertising, and that there was no ratification. There could be no ratification, because, being originally void, it could not be ratified except by the receiving of bids and Mr. Ippolito perhaps being the lowest bid on that figure. That is the second count, and our motion there is to strike out the testimony, or, in effect, a non-suit as to the second count. 10

The third count is the part where they seek to recover for the extras on the sludge bed. The situation there is similar but not as strong as the second count. The changes on the sludge bed are shown by the testimony to have been made on an order given by the borough engineer; in fact, I think it is so pleaded. The Mayor and Council, so far as the minutes show and so far as any testimony here shows, never took any formal action on that at all. The amount specified is over \$500, \$800 and some odd dollars. There is no solicitation of bids; no attempt to advertise it, and so far as the minutes show, the Mayor and Council never knew or took action as to that item. The engineer has testified that he spoke to the chairman of the sewer committee, and that he thinks there was a meeting of the sewer committee at someone's private house, or some meeting at that time. I think that is about the strongest showing of municipal action that they have. 20

Mr. Davis. His last testimony was that he brought it before the attention of the Mayor and Council, and they authorized him to go ahead and do it; whether it was in the minutes or not, that he testified to in the last half hour. 30

The Court. Yes, it was testified to.

Mr. Morrison. Then we submit that a mere statement of the engineer that he did that controverted by the statements here in the minute books has no value, and should be stricken out as hearsay and as a conclusion of the engineer's, because it is not properly evidential. 40

The Court. You do not contend, do you, that a record of the municipal body cannot be shown to be correct?

Mr. Morrison. I do not contend that, but what I do contend is that the mere offhand statement and recollection of an engineer as to what happened in his time, lacking as this was of preciseness, is not sufficient to authenticate it.

The Court. Doesn't that present a jury question?

Mr. Morrison. Perhaps it does on that point.

The Court. I think it does. 50

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Mr. Morrison. But we still have no municipal action which validly obligated the borough on this sludge bed.

10 The fourth count is for material left on the job. Our contention as to that is that they are seeking to recover \$500 on a purely implied contract. There is no provision in the original contract that the borough should pay for material left on the job; they do not seem to treat it that way. Their testimony is that they made a bargain with the borough when they were through with it they would leave it there and the borough would send them a bill for it, and they did send them a bill for it. I walk into a cigar store and pick up a cigar; there is an implied contract that I will pay a price marked on the box. Now, the borough walked onto the job and picked up this material, and they plead an implied contract to pay them 20 \$500 for that material. Our contention is, under the Eckert case, that the borough cannot be held.

The Court. Yes.

Mr. Morrison. As to the 5th and 6th counts; the 5th being for delay while they were considering the modification of the foundation under the tank; and the 6th being for delay—or perhaps I had better take the 5th alone. There again we have an implied contract, because, in the contract itself—perhaps your Honor has not examined it in detail—there is no provision in the contract for payment for delays in their consideration of changes. I do not think there is anything in the contract. Presuming that is true, I am quite sure they are then resting upon an implied contract, and an implied contract, for \$1,700, which, under the Eckert case, the borough cannot be held for.

The Court. What about the 6th count?

30 *Mr. Morrison.* The 6th count we have the same objection to, and the additional objection that they have put into that charges and so mingled them that the borough cannot be expected to dissolve the confusion—charges for many days after the borough had told them to stop; they stayed on there; I don't know just how many days, and the items are so confused and so mingled that there is no testimony fit to go to the jury, fit to go to the jury on testimony which is admissible covering the charge for that time when they were entitled, if at all, to charge for delay. In other words, that they are not entitled to charge for it at all, and if they were, they have overcharged and mixed it so that we cannot separate it.

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The Court. Now, Mr. Davis, I will hear what you have to say on the last five counts.

Mr. Davis. Does your Honor wish argument on the sludge bed?

The Court. Yes, I would like to hear what you have to say. 10

Mr. Morrison. If the Court please, will there be anything more than this argument this evening? Some of my witnesses want to take an early train.

The Court. Have you got some witnesses that want to be sworn in the morning?

Mr. Morrison. I would like to carry them over until the morning. I might be able to swear some minor witnesses this evening, but the principal witnesses, it would be hard to finish with them. 20

The Court. All right. You may let your witnesses go until tomorrow morning.

Mr. Davis. Now, if the Court please, with regard to the work done under the resolutions and with regard to the sludge bed and with regard to the material left on the job, I think I might group the argument—one argument to meet those three.

The Court. All right.

Mr. Davis. Because I think it is all based on the \$500 matter. In this case, the testimony shows that the contract was regularly advertised for, and that it was let—it was let after competitive bidding. The contract advertised for contemplated an entire system of sewerage, consisting of street mains and a disposal tank—disposal system, and on the foot of page 13 of the contract, the language is, sewage disposal tank complete, including tank, sludge bed complete, pipe line from tank to sludge bed, sludge bed to affluent pipe from tank to creek, all as per specifications, lump sum \$10,300.00, and there is a provision some place here in the contract that the borough has the right to award the sewerage system to two contractors, viz., one for the sewerage disposal plant, and the other for the street mains, which they actually did, and after advertising and after competition, the contract was awarded to Charles Ippolito at the lump sum of \$10,300 for the sewage disposal plant. 40

Now, immediately following that provision in the contract regarding the lump sum, is a provision as to how the town is to pay for the work that is to be done. The bidder pro- 50

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poses and agrees to perform any or all work classified as contingent extras, that is, first, he is to do all the work proposed in the plans and specifications for the sewage disposal plant for the lump sum of \$10,300. Then he proposes to perform another kind of work which is classified as contingent extras, and those contingent extras are set out on page 12 and running onto page 13, and they give specified bids on specified things that may possibly occur in the progress of the work. For instance, one of the things that they bid on is concrete, \$9.00 a cubic yard, and then sheathing and shoring left in place, and things of that sort that may be more or less of an indefinite character with regard to quantity. And then the third class of work that this contract covers is, any or all work required in the construction of the sewerage plant and sewage disposal plant for which unit prices are not provided herein, including the furnishing of labor and materials specified, and as to each of the items, including the contingent extras, the contractor will accept in full payment the actual cost to the bidder of the materials and labor, plus 15 per cent. That was substantially the same sort of a call for bids that was used in the Bergen County case that Mr. Morrison has referred to. That is *Browning v. The Board of Chosen Freeholders* in 79 Law.

The Court. Yes.

Mr. Davis. And the Court held in that case—used this language: “The call for unit prices, on the other hand”—this is as compared to the way they juggled it in that case—“the call for unit prices, on the other hand,” was a protective measure in view of possible demands that might be made upon the successful bidder, when he should have become the contractor, by modifications in the details of the contract, presumably not yet determined upon by the board, and certainly not disclosed to the bidders or to all of them alike” And the Court there said that—I think I read it to your Honor the other day that, while there was no statutory authority for such a provision in the contract, calling for the statutory requirement for such a provision in the contract, calling for work of that sort to be done, that nevertheless it was a provision in the contract for the protection of the public, and it was there not to govern the dealings between all the bidders and the borough, but it was there to govern the relations that might exist between the successful bidder and the borough after the contract was awarded, viz., that in this case Mr. Ippolito gets the contract for \$10,300, and if, during

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the progress of the work, as will invariably happen, changes have to be made, either by way of deduction or addition in the doing of this particular work, that there was something in the contract that would govern the thing, and the Court, in that Browning case, said that was a measure which was protective of the public. Now, if the contention of Mr. Morrison is correct, viz., that in a situation of this sort, that with a contract of this sort advertised for, proposals received and award made to the lowest bidder, that if during the progress of the work an emergency arises whereby it is necessary for the governing body to deal with the situation, and in dealing with that situation to make a change in the contract that would call for the expenditure of \$500, his claim is that under no circumstances, since the decision in the Eckert case, has any municipal body the right, even with a provision of that sort in their contract, have they a right to deal with an emergency of that sort, have they a right to say an extra, where it exceeds \$500, without stopping the work where it is, without saying to the contractor, "You cannot go any further. We must advertise for this work," and proceed to give this job, even though it may be in the middle of the contract, to give the job to the lowest bidder? Of course it isn't necessary for me to go into the chaos that such a situation as that would result in, whether it be the construction of this sewer in this case, it would have resulted in all sorts of complications. I have got cases here that I will refer your Honor to shortly. Take the construction of a school house; they go down and dig the foundation, and they encounter some quicksand, and they find they have got to use some more concrete in the foundation to make a good job than otherwise they would have had to use if things went along smoothly. Now, if the strengthening of those foundations of that particular school house is going to involve an expenditure of over \$500, the contention of counsel is that, although it was provided in the contract, in case an emergency of that sort arose, they would be governed by certain rules and regulations, that nevertheless that provision is absolutely nugatory and that the governing body has got to stop right where they are, regardless of what the loss is, for the time necessarily involved in making plans and specifications, asking for bids, going over the proposals as they come in and then award the contract to the lowest bidder. Now, I say that would resolve itself practically into an absurdity. There never was, there probably never was a

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10 house built by a private owner where there wasn't some
change made in it, from the digging of the first shovelful of
earth until the house was decorated; as the situation went
along that it wasn't necessary to make some changes. I
don't believe there ever was a municipal contract of any sort
undertaken and carried to completion that there hasn't been
occasions arise where the governing bodies have had to
deal with problems that called for the exercise of some dis-
cretion. Now, according to the stand taken by counsel, that
discretion is absolutely taken away from them, no matter
what would be the situation that could possibly arise, that
your Honor or the jury or counsel could possibly imagine
could arise from the beginning of the job down to its com-
pletion; no matter how serious the situation might be, even
20 though this place might be carried away with quicksand, that
the hands of the governing body were tied, that by reason of
the decision in the Eckert case, they must stop regardless of
what the consequences are to their municipality, and they must
proceed in an orderly way and proceed as counsel would have
them do; advertise and get proposals and bids, and then
award the contract to the lowest bidder. Now, I say that
contention of counsel is not based either on decisions or on
statutes, and that under this very decision that counsel cites,
the Bergen County case, that there is authority, as in all con-
30 tracts, for the doing of extras. Now, the first question there
to be considered is whether a municipal body has the authority
to proceed in the progress of a piece of work and order
extras and pay for them. I call them extras. It might be
additional work or anything they might have seen fit; but,
for the sake of a better term, we will call them extras. Now,
the proposition that extra work may be ordered, if any
authority is needed for it, is recognized in this state in the
case of *State v. Jersey City*, 29 Law, 441, and in that case—

The Court. 441?

40 *Mr. Davis.* 441; 29 Law. I will give your Honor a copy
of this brief that I have prepared, if you wish it.

The Court. Yes.

Mr. Davis. And in that case the Court held this: "The
allowance to the contractors for extra work not included in
the contract and for the cost of material not provided for
in the contract, but deemed necessary for the security of the
work, was clearly within the discretionary powers of the
water commissioners, and in no way affects the validity of
50 the assessment."

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Now, strange to say, that is about the only discision that I can find in the State of New Jersey on the proposition as to whether or not the governing body has the authority to order extra work in the progress of a work of this sort, and the absence of any decisions on the question would seem to make it very clear that the decision in *State against Jersey City*, 29 Law, has not only stood for years and years, but also the question has never arisen. It has apparently been taken for granted that the governing bodies have the right in the progress of their work to use discretion. In other words, they have the right to use common sense.

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Now, in Dillon on Municipal Corporations, Sec. 813, the question there is pretty well covered:

“If a municipal corporation, by its own act, causes the work to be done by a contractor under a contract for an improvement to be more expensive than it otherwise would have been according to the terms of the original contract, or, if the municipality orders and directs the contractor to perform work or furnish material or labor which is not within the contemplation of the original contract, it is liable to him in the absence of stipulations to the contrary for the increased cost of or for the extra work.”

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Now, Dillon says there that they are liable unless there are stipulations to the contrary. Now, the provisions regarding extras in the present contract are contained on page 13, that I have referred to already. I have then summarized a list of cases from practically all over the country as to the authority to order extras and the right to demand compensation therefor. Inasmuch as I am to hand this to your Honor—

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The Court. You need not read it.

Mr. Davis. I won't attempt to go through that other than to say there are cases in New York and in Southwestern Reporter, and in the Northeastern Reporter, and out West, and in Pennsylvania, and in practically all the states. There is unquestioned authority by decisions, reported decisions, of the right of a municipal body to go on and order extras and pay for them.

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Now, here in the very situation that I think arises in this case; is most exhaustively set out in a case that I have here on my brief, and that I will hand to your Honor, in the case of *Alsmeier v. Adams*, 105 N. E., 1033, which is an Indiana case. It quotes exhaustively cases and authorities on just this sort of a situation. Now, there is only one part of it I need read,

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Motion to Strike Out Testimony.

because there are other questions involved in the case that I won't attempt to becloud the issue with here. This was a contract for a concrete sewer, and the opinion of the Court—it was to be in accordance with a monolithic process. Now, the Court says, on page 1039:

10 “It is argued, however, that the process adopted differs so materially from that specified that, conceding that in the course of the work, and after a substantial part of the sewer had been built, water difficulties were encountered of such a nature as to render it practically impossible to continue such process, the board was without power to authorize or to ratify such a change as was made here. It is argued that the board was without authority, under the circumstances presented, to do otherwise than to require the work to continue as specified, although it should be reasonably apparent that the resulting sewer would be worthless, or if the work should be discontinued as impossible of performance, to adopt new specifications, to re-advertise and to re-let the contract. If, under the force of overwhelming circumstances, the contractor should abandon the work when incomplete, the municipality would not be authorized to pay him for the work done or to require the property owners to do so, as the statute makes no provision for the acceptance of an incomplete improvement, or for payment *pro tanto*.” Citing a case in L. R. A.

20
30 “The argument carried out leads to the conclusion that, if any substantial part of such an improvement should prove to be impossible of performance by reason of unforeseen obstacles encountered in the progress of the work, the board would have no authority to arrange with the contractor for the completion of the contract by the use of some process other than that specified, even though the results from the substitution would be eminently satisfactory. Thus, applying the argument, should the water difficulties be such as to interfere with the construction of but one hundred feet or ten feet of the sewer by such monolithic process, the board would not be warranted in authorizing such hundred feet or ten feet to be built by some other process, just as good, but would be required to stop the work and adopt new specifications, etc., for such portion of the sewer. It cannot be said that the board has authority of a certain nature and scope when the affected part of the sewer is of a certain length and an absence of authority or authority of a different nature of scope when the affected part is of a different length. Hence, carrying the argument to its legitimate conclusion,

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Motion to Strike Out Testimony.

although the unforeseen difficulties should interfere with the specified construction of but a comparatively inconsiderable portion of the sewer, the board would be required to re-advertise, etc., rather than authorize the completion of the work by some other satisfactory process. The argument advanced does not appeal to us as sound. 10

It is evident that the property owners here were in need of a sanitary sewer and desired that it be constructed. In the new light as it then existed, a monolithic sewer commenced could not be completed. It is not an unreasonable presumption that, had the board been required to adopt new specifications, etc., for the completion of the work, a re-enforced concrete sewer would have been specified. On such presumption, assuming the work to have been properly and skilfully done, the people are getting, through the direct method of such a change, the same structure as would have been built through the roundabout method of re-letting, and, as we shall later determine, no one need be wronged. Our conclusion is not unsupported by authorities." 20

Now, there are a number of authorities here, and if your Honor is going to examine my brief at all on this subject, I have set out here extracts from this case in the Northeastern Reporter, which seems to be identically a case of our own sort; and I have also digested the cases that the Indiana court refers to, and they are all of that character, viz., that when the board undertakes a piece of work, that the law gives them a certain amount of discretion, and if certain situations arise that have to be dealt with in a common sense and businesslike sense, and that does not materially change the work at all and does not build something else that they didn't start out to build, that then it is entirely proper for them to deal with those emergencies, to settle them, and to go right on; and in this case I want to call your Honor's attention to this: that the result here would have been the same, whether one or the other plan was followed. What was set out to be done was to build a tank here, call it an Imhof tank, a sludge bed and an outfall pipe. Everything was done excepting the tank, and the only division that was made, so far as the tank was concerned, was to strengthen the foundation. Your Honor remembers that the contractor was going ahead and could have gone on and built that tank as it was originally intended to be built under the original plans and specifications. He testified how he could have pumped out the water and the quicksand and laid a concrete mat over the lower 30 40 50

Motion to Strike Out Testimony.

10 spiles that were driven there and built the tank up on that foundation, and he would have performed his contract fully, but it was the town, the Mayor and Council, and the borough engineer, apparently having in mind the collapse of a similar structure at Fairview, decided that such an affair should not happen in this work, and they thereupon determined that they would strengthen the foundation, and that is all that was done.

Now, I claim that I have authorities, if your Honor cares to have the Northeastern left with you, I will do that, and also a copy of my brief.

20 Now, on the question—I have not referred only to a part of the authorities that are in there, because of the length of time it will take. Now, as to the question of delay. There is a provision in this contract regarding delay. On page 19, at the head of the page, under the heading of the order of procedure. The contractor shall begin and proceed with it only where directed and approved by the engineer, who shall have the right to decide where and at what time each part of the work shall be undertaken and continued, providing he undertakes to keep his working force fully employed. And the engineer shall furnish lines and grades as promptly as possible, but the contractor shall have no redress for delays unless he shall have given 24 hours' notice in writing to the engineer for such lines or grades—that doesn't seem to cover—

30 *The Court.* That doesn't touch your contract.

Mr. Davis. No, sir. Now, this delay question has been dealt with in nearby states, although apparently not dealt with in the State of New Jersey.

I have here a little supplemental brief on the question of delays, and if your Honor is going to consider this at all over night, I will let you have it; otherwise, I will continue my argument in the morning.

40 *The Court.* You might hand it to me, and I will hear what you have to say in the morning.

Mr. Davis. Now, the other question that covered delay, the first count was out, that is, your Honor ruled against that, and my argument has gone under the head of resolutions and the sludge beds and the timber. In this case of the material, the minutes that we have produced here show that the taking of the stuff was authorized by the Council; they evidently had in mind using it for something else; they did use it for something else, and they have sold a part of it,

Motion to Strike Out Testimony.

and they have got the returns for that part. Of course, that isn't a contract, they haven't contracted—it is certainly an implied contract, if they come and take a thing, whether they take my land and build a building on it, or come in, take my horse and wagon or automobile, or building materials. I submit that their having taken it and having gotten the benefit of it and actually gotten the money for part of it, that we are entitled to compensation. 10

The Court. Before your client was notified not to take it away?

Mr. Davis. No, sir; he was not. He was notified to take his plant away, but the resolution required him specifically not to take the materials, but to leave the materials there. If there is any doubt on that, if your Honor please, I think Mr. Morrison will agree to that, that the resolution was to remove his plant, but to leave the materials there, and to send us a statement of them. If there is any question about that, the resolutions are here. 20

The Court. We will look at that in the morning.

Mr. Morrison. If the Court please, the judge is going to hand you a very voluminous brief, and I am wondering how I can answer that unless I have a copy.

Mr. Davis. Will you return my copy? I only have two copies of that. 30

Mr. Morrison. All right.

(RECESS at 4:20 P. M. until 10:00 o'clock tomorrow morning, April 4, 1919.)

Hackensack, N. J., April 4, 1919. 10:00 A. M.

TRIAL CONTINUED.

The Court. Have you anything further, Judge Davis? 40

Mr. Davis. No, sir.

Mr. Morrison. If the Court please, I had the pleasure of reading Judge Davis's brief, and it seems that the great attack that he makes in that brief is on the proposition that under a municipal contract, extra work or additional work may be ordered. We have no dispute of that. We are not contending that under a municipal contract let after competitive bidding, there may never be extra work ordered. Our contention is narrower than that. Our contention is 50

Motion to Strike Out Testimony.

10 that a municipality may make a contract by competitive bidding and may provide in that, if they do it in a way that the statute fixes for municipal action, proper enforceable municipal action, they may provide for extra work; but our contention is in this contract they did not do that, and the case that Judge Davis calls your Honor's attention to, which was first cited by us, the *Hackensack River Bridge case v. The Freeholders of Bergen*, in that, as Judge Davis says,—the Court may remember—that it was quite proper for the county in that case to provide for extra work and to take bids, competitive bids, your Honor will notice, on the unit basis, so that extra work could be done. Now, in this case that rule has not been followed. In this case the Borough of Ridgefield did not ask the bidders who were competing for this work to bid on unit prices for extra work; they didn't have any competitive scheme for extra work; the extra work was on a cost plus 15 per cent. basis.

20 *The Court.* Where in the contract do you find anything that compels this plaintiff to do any extra work at all? Isn't the contract absolutely devoid of anything?

30 *Mr. Morrison.* Well, now, if that is the case, your Honor, then we are driven back to a proposition that is even stronger in our favor, and that is this: If he does not rest on the contract, and cannot show somewhere in the contract a valid provision for the extra work, then he has done some ten thousand dollars worth of work for the Borough of Ridgefield without any contract, but under an implied contract, and under the West Orange scavengers case, there cannot be any contract of that kind for over \$500. Unless he can base his second count and his third count somewhere on the contract, our motion should, I submit, be granted without further argument.

40 *The Court.* I am going to grant your motion on those two counts.

Mr. Morrison. Now, as to the fourth count, the material left on the job: That is in the same situation, unless he finds something in the contract providing that material left on the job should be paid for at some stated rate. There again he relies on an implied contract, and the amount being over \$500, I think the motion should be granted.

The Court. I grant your motion so far as that is concerned, on the fourth count.

Motion to Strike Out Testimony.

Mr. Morrison. Now, in the 5th and 6th, I do not find any compensation for delay, in the pleading. There again is an implied contract, and we make the same motion as to that.

The Court. I grant you that. That leaves you the first count. Judge Davis, you may take exception to that. 10

Mr. Davis. Will your Honor grant me an exception to each and every one?

The Court. Yes, on each and every one.

Mr. Davis. On all those counts.

The Court. You better take them separately to each one, because the Court may say some of them are good and some of them are not.

Mr. Davis. Yes.

The Court. Now, that leaves you on the first count of your contract. 20

Mr. Morrison. As to that, your Honor has overruled our motion?

The Court. Yes. The party has made out a case to go to the jury under his first count of his complaint, that is on his contract.

Mr. Morrison. And as to that count, you have permitted the plaintiff to file an amended—

The Court. That only shows—

Mr. Morrison. And we were going this morning to answer it, and we follow your Honor's suggestion, and deny that. 30

Mr. Davis. May I get on the record an exception to your Honor's ruling striking out the evidence as to the—

The Court. I do not strike out. I grant a non-suit.

Mr. Davis. A non-suit as to the second count; also on the third count, the sludge beds?

The Court. Yes.

Mr. Davis. Does your Honor grant the motion as to the sludge beds? 40

The Court. Yes.

Mr. Davis. Exception to your Honor's ruling on the sludge beds, the second count. Also an exception to your Honor's ruling on the 4th, on the 6th, the 3rd count, the 4th count and the 5th count, and the 6th count?

The Court. Yes. I do not strike out your testimony. I grant a non-suit, so that you will have any benefit of any of the evidence that is in. 50

Motion to Strike Out Testimony.

Mr. Morrison. If the Court would grant me just a few moments with the Mayor and Council, perhaps we can shorten it even more.

The Court. Yes.

10

Plaintiff's counsel prays an exception to the ruling of the Court in granting the motion of non-suit as to the second count. Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the ruling of the Court in granting the motion of non-suit as to the third count. Exception noted as ground of appeal.

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Plaintiff's counsel prays an exception to the ruling of the court in granting the motion of non-suit as to the fourth count. Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to the ruling of the Court in granting the motion of non-suit as to the fifth count. Exception noted as ground of appeal.

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Plaintiff's counsel prays an exception to the ruling of the Court in granting the motion of non-suit as to the sixth count. Exception noted as ground of appeal.

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Exhibits.

EXHIBITS FOR PLAINTIFF.

- P. 1—Minute Books No. 7 of defendant.
- P. 2—Minute Books No. 8 of defendant.
(Extracts from which two books are found on pp .)
- P. 3—Contract between plaintiff and defendant found on pp. . 10
- P. 4—First Estimate of Engine, under first count; not material in this appeal.
- P. 5—Second Estimate of Engine under first count and second count, as follows:
- P. 6—Resolution of defendant on last estimate. See p. .
- P. 7—Engineer's certificate, Nov. 1, 1918, as follows:

EXHIBIT P. 8.

20

ENGINEER'S ESTIMATE AND CERTIFICATE

Ridgefield, N. J., Jan. 1st., 1917.

No. 5

To the Mayor and Council of the Borough of Ridgefield:

GENTLEMEN:—

Attached hereto is my estimate of the value of the work done prior to the first day of January, 1917 by Charles Ippolito, contractor, under the contract made by the said contractor with the Borough of Ridgefield for the construction of the sewage disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

30

Total value of work to the first day of January, 1917.....	\$13389.84
85% thereof	11381.36
Less payments heretofore made to Contractor.....	9046.24

Amount for which payment should now be made.....\$ 2335.12

CHAS. F. BLOOD

Borough Engineer in charge of work under aforesaid contract.

40

Exhibits.

EXHIBIT P. 9.

—COPY—

ENGINEER'S ESTIMATE AND CERTIFICATE

10

Ridgefield, N. J., Feb. 1st, 1917.

No. —

To the Mayor and Council of the Borough of Ridgefield:

GENTLEMEN:—

Attached hereto is my estimate of the value of work done prior to the first day of February, 1917 by Charles Ippolito, Contractor, under the contract made by said contractor with the Borough of Ridgefield, for the construction of the disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

20

Total value of work to the first day of February, 1917.....	\$17,236.39
85% thereof	14,650.93
Less payments heretofore made to contractor.....	11,381.36

Amount for which payment should now be made.....	3,269.57
--	----------

CHAS. F. BLOOD

Borough Engineer in charge of work under aforesaid contract.

30 Office Phone 5062

Residence Phone 4332

Monthly Statement

Orange, N. J., Mar. 1, 1917.

BOROUGH OF RIDGEFIELD, N. J.

To CHARLES IPPOLITO, Dr.

General Contractor

252 Main Street

EXTRA WORK—Jetting and Driving Piles—Foundation at Sewerage Plant.

40

LABOR

216 hrs. Foreman	at \$1.155/10	250
216 " Engineer	" .50	108
328 " Timberman	" .388/9	127 55
919 " Laborers	" .331/3	306 33
29 days Fireman	" 3.00	87
4 " Watchman	" 2.50	10

888 88

50 (Subject to correction) Insurance	at 4.74%	42 22	931 10
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Exhibits.

MATERIAL

J. I. Pickens	for Coal	177 85	
Edward Kernan Co.	“ Lumber	97 57	
Nicola Scioli	“ Stone	71 75	
G. F. Rovers	“ Miscellaneous	18 62	
H. J. McCoy	“ Cant Hooks	2 63	10
C. Ippolito	“ 20 gals. Oil at .40	12	
Brewster & Son	“ Nails	4 50	
Alfred Post	“ Water Rent	8	393 92
			<hr/>

RENTAL

One Month	Derrick	250	
“	“ Hoisting Engine	125	
“	“ Centrifugal Pump	125	
“	“ Pulsometer “	75	20
“	“ Concrete Mixer	100	
“	“ 24" gauge and cars	50	
Lines Flynn		32 72	
12 days in January	for use of Steam Hammer for Sheathing		
24 “ “	February for use of “ “ “		
—			
36 days at \$2.00		72	829 72
			2154 74 30
Plus 15%			323 21
			<hr/>
Balance due accrued damages			1917 05
			<hr/>
			\$4395 00

Exhibit P. 10—Engineer's certificate of March 1, 1917, as follows:

Exhibit P. 11—Engineer's certificate of April 1, 1917.

Exhibit P. 12—Bundle of bank checks of defendant showing payments to plaintiff as per form on p. . 40

Exhibit P. 13—Plans of work, hereto attached.

Exhibits.

EXHIBIT P. 14.

10 Chas. F. Blood, C. E.
 Assoc. M. Am. Soc. C. E.
 Civil and Construction Engineer
 56 West 45th Street
 New York

September 13th, 1916.

Mr. Chas. Ippolito, Gen. Contr.
 252 Main St.,
 Orange, N. J.

Dear Sir:—

20 In regard to your proposition for substituting concrete work in
 the sludge bed for the Disposal Plant of the Borough of Ridgefield,
 N. J. in place of cinders, puddled clay, and embankment, I under-
 stand the agreement to be as follows:

190 cu. yds. cinders @ \$.75 per cu. yd.	\$142.50
90 cu. yds. puddled clay @ \$.50 "	45.00
200 cu. yds. embankment @ \$.40 "	80.00
	<hr/>
Total	\$267.50

30 This amount to be deducted from the original contract of \$10,300.00
 and that you will put in all concrete at price bid under contingent
 extras for "Concrete not shown on drawings," forms left in place at
 price bid under contingent extras for "Forms for Concrete" and
 re-inforcing steel at five and one-half (5½) cents per pound. This
 arrangement is perfectly satisfactory with me and you may proceed
 with the work along these lines.

Yours truly,

CHAS. F. BLOOD C. E.
 Eng'r in charge

CFB—G

40

50

Exhibits.

EXHIBIT P. 15.

Telephone Conn.

Orange, N. J., November 1, 1916.

Borough of Ridgefield, New Jersey.

To CHARLES IPPOLITO, Dr.

General Contractor.

83 Cone Street.

10

ORDER No. 1. CHANGE IN SLUDGE BED CONSTRUCTION

124.5 Cu. yds. concrete @ \$10	\$1245.00	
4512 lbs. steel re-inforcement @ 5½c.	248.16	
5894 F. B. M. forms left in place @ \$60.00	353.64	\$1846.80

O. K.

C. F. BLOOD C. E.

Engineer in charge.

20

EXHIBIT P. 16.

Chas. F. Blood, C. E.

Assoc. M. Am. Soc. C. E.

Civil and Constructing Engineer

56 West 45th Street Morsemere

New York N. J.

30

ORDER No. 2.

October 14th, 1916.

Mr. Chas. Ippolito, General Contractor,
252 Main Street,
Orange, N. J.

Dear Sir:—

After having thoroughly gone over the matter of a proper foundation for the Imhoff Tank which you are constructing for the Borough of Ridgefield, I find it best to jet piles spaced three (3) feet centres in all directions over the entire area covered by the bottom of the tank, and to excavate to the depth required by the plans; upon these piles is to be placed a concrete mat and the tank built up from this. Also owing to the short distance penetrated by the outer ring of piles already driven, these also are to be jetted to a proper depth. This, of course, necessitates removing the form already built, as well as the steel which you had placed. The payment for this work I would like to be covered under three heads. You will kindly submit to me a price per foot for jetting the above mentioned piles, which

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Exhibits.

price will include the cost of all work in connection with same and a price for rebuilding the forms to the point you have already progressed. This to include the cost of all work in connection with removing present forms, the cost of all new material required, etc. The price per cu. yds. for concrete required and not shown on the plans of the tank, you have, of course, stated in your bid under 'Contingent Extras.' In other words, I wish the cost of all work not shown on the plans to be included under the above mentioned heads.

Although I am unable to determine the exact point at which the effluent pipe will terminate until I hear from the New Jersey State Board of Commerce and Navigation, it is certain we will need another carload of 20" cast iron pipe as required by the specifications for the effluent line and I hereby order you to obtain this amount.

Yours very truly,

CHAS. F. BLOOD C. E.,
Engineer in Charge.

CFB—G

Exhibit P. 17—Engineer's cost of estimate to finish original contract not relevant to any count except Count No. 1.

Exhibits P. 18, 19, 20, 21, 22, 23 are the daily records of labor and materials used on the work of change in foundation in tank, under second count of complaint. They run from Oct. 12, 1916, to March 17, 1917.

All are in the following form:

CHARLES IPPOLITO
for
EXTRA WORK REPORT

Order No. Work 191....
LABOR

No. Men	Class	Actual Hours	Hours Paid for	Rate	Amount	Remarks
Total cost labor \$.....						

40 MATERIAL

Kind	Quantity	Price	Amount	Remarks
Total cost material \$.....				

Total cost labor and material \$.....

Approved

Amount Due Contractor

Resident Engineer

Signed
CHARLES IPPOLITO
Per.....

Exhibits.

- Exhibit P. 24—Consists of all bills for materials used on the work.
 Exhibit P. 25—Supt. Koch's petty cash book, relates to first count.
 Exhibit P. 26—(Note book) relates to same.
 Exhibit P. 27—Bundle of checks, relates to same.
 Exhibit P. 28—General expense book, relates to same.
 Exhibit P. 29—Payroll book, relates to same and changes in contract. As to the latter, it is a duplicate, as to the labor of daily time sheets. 10
 Exhibit P. 30—Daily time sheets, showing loss because of stopping work, and relates to Count Sixth, as follows:

EXHIBIT P. 30.

CHARLES IPPOLITO BILLHEAD. 20

For accrued damages from March 17, 1917 to March 31, 1917, inclusive.

LABOR:

108 hours, foreman @ \$1.10 per hour	118 80	
14 days, day watchman @ \$3.00 per day	42 00	
	<hr/>	
	160 80	
Insurance @ 4.74%	7 52	168 32
	<hr/>	

30

RENTAL

14 days derrick @ \$10.00 per day	140 00	
14 days hoisting engine @ \$5.00 per day	70 00	
14 days centrifugal pump @ \$5.00 per day	70 00	
14 days pulsometer pump @ \$3.00 per day	42 00	
14 days concrete mixer @ \$4.00 per day	56 00	
14 days 24" guage and cars, flat rate	24 00	403 00
	<hr/>	

571 32

Plus 15%

85 70

85 70

40

\$ 657 02

50

Exhibits.

CHARLES IPPOLITO BILLHEAD.

Damages to April 17, 1917.

LABOR:

	225 hrs. Foreman	at \$1.10	247 50	
10	30 days Watchman	" 3.00	90	
			<hr/>	
	(Subject to correction) Insurance	" 4.74%	15 99	353 49
			<hr/>	

RENTAL

	One Month	Derrick,	250	
	" "	Hoisting Engine	125	
	" "	Centrifugal Pump,	125	
	" "	Pulsometer,	75	
20	" "	Concrete Mixer,	100	
	" "	24" gauge and cars	50	725
			<hr/>	
				1078 49
	Plus 15%			161 77
				<hr/>
				\$1240 26
				<hr/>

30 Exhibit P. 32—Plan of foundation of tank as changed under resolutions of Oct. 25, 1916, and February 14, 1917.

EXHIBIT P. 32.

SPECIFICATIONS

for the construction of

FOUNDATION WORK FOR IMHOF TANK

Borough of Ridgefield, Bergen County, N. J.

40 required in the construction of the Disposal Plant and authorized at a regular meeting of the Mayor and Council, held on Wednesday evening, Oct. 25th.

SCOPE OF CONTRACT

50 The Contractor shall furnish all materials, labor, tools and equipment, necessary properly to prosecute and fully complete the work described in these specifications, or shown on accompanying drawing, including everything necessarily involved, and which can reasonably be inferred, to make the work complete, and including everything herein mentioned to be furnished or performed in the prosecution of the work.

Exhibits.

ENGINEER'S SUPERVISION

Whenever the word "Engineer" is used herein it is understood to refer to the Engineer or principal of the Engineers employed by and acting under the authority of The Sewer Committee of the Borough of Ridgefield, N. J.

The work shall be carried on under the supervision of the Engineer, or of his properly authorized assistants and inspectors. 10

All work done and materials furnished shall be subject to such inspection and tests as may be deemed necessary by the Engineer, and all work and materials which do not conform to the requirements of the specifications will be rejected. The Engineer shall have the right to mark rejected materials in such manner as will clearly show that they are not to be used in the work.

The Engineer shall have the right to inspect any materials which have passed a previous inspection, should the same, in his opinion, seem to have deteriorated in quality or become damaged, and to reject for causes hereinbefore stated. 20

All piles, reinforcement, cement, sand, etc. shall be inspected by the Engineer before hauled to the work

All driving of piles, excavating, setting of forms, concreting, cementing, bottoming, and the first two feet of backfilling, shall be under the special supervision of the Engineer, and whenever any work of this character is done without his supervision or that of one of his authorized representatives, or whenever any improper work is done, said Engineer shall have the right to cause it to be reconstructed, redriven, recemented, or uncovered and refilled, as the case may be, at the Contractor's expense. 30

CONTRACTOR'S SUPERVISION AND EMPLOYEES.

The Contractor shall give frequent and adequate personal supervision to the work, at the site, and shall at all times be represented on the work by a competent superintendent, who shall be satisfactory to the Engineer.

Copies of approved plans and specifications shall be kept on the work at all times.

The Contractor shall employ competent and skilled foremen and experienced mechanics and laborers, and must promptly discharge any man or men who refuse or neglect to obey the orders of the Engineer, or who are considered by him to be incompetent or disorderly. 40

PATENTS AND ROYALTIES.

The Contractor shall pay all royalties and license fees, and save the Borough of Ridgefield harmless from loss on account of suits or claims of any kind for infringement or patents on materials, plant, 50

Exhibits.

equipment or processes used in the work or in the construction, or for the use therein of patented articles or processes.

ORDER OF PROCEDURE

- 10 The Contractor shall begin and proceed with it only where directed and approved by the Engineer, who shall have the right to decide where and at what time each part of the work shall be undertaken and continued provided he enables the Contractor to keep his working force fully employed.

ALIGNMENTS AND GRADES, ETC.

All work must be constructed in conformity with lines and grades indicated by the stakes and grade bars to be set by the direction of the Engineer, and the acceptance of any work depends, among other things, on its true position as to line and grade.

- 20 The Contractor shall furnish all stakes and grade bars required for lines and grades on construction work, and all assistance required in driving and setting them, or if they are removed or disturbed the cost of re-setting them shall be charged to said Contractor.

The Engineer shall furnish lines and grades as promptly as possible, but the Contractor shall have no redress for delays unless he shall have given twenty-four hours notice in writing to the Engineer that such lines or grades will be needed.

PROTECTION AND PRECAUTIONS.

- 30 All official regulations and ordinances relating to such precautions and safeguards, for the protection of persons and property, must be faithfully complied with by the Contractor, who must assume all liability in consequence of their disregard or violation by himself or by his employees and agents.

Only suitable and safe appliances and machinery may be used in the work herein specified, and any appliance or machine which the Engineer deems to be unsafe or unsuited for the work to be performed, shall, upon his order, be removed from the work.

- 40 No stationary boiler shall be used, by or on behalf of the Contractor or any sub-contractor, until, unless or except as such boiler, its parts and appliances shall be in conformity with any and every State, Departmental and Municipal rule, regulation and requirement if any, applicable thereto at the place of such use, and shall have been thus or otherwise proven to the satisfaction of the Engineer to be safe, suitable and proper for such use.

The Contractor shall be responsible for the whole work until completed and accepted, and shall be liable for all damages or injury to persons or property resulting from neglect in properly guarding

Exhibits.

trenches or encumbrances or from any other cause connected with the prosecution of the work.

If the Engineer deems the precautions taken by the Contractor to be inadequate he may order additional protections and should the Contractor or his men neglect to put up and maintain such suitable protection as is required by these specifications, the Engineer or the authorities of the Borough of Ridgefield may immediately and without notice to the Contractor furnish materials and put up and maintain such protection as is deemed necessary and the cost thereof shall be paid by the Contractor.

10

TESTING OF WORK

The Contractor shall make such tests in connection with the work as the Engineer may require to satisfy himself as to the conditions and quality of the work done.

The settlement or injury of any pile, form, concrete, or other part of the work by reason of insufficient support, improper backfilling, settlement, or from any other cause, must be rectified by the Contractor at his own expense.

20

MATERIALS

All materials must be of the best quality. No "seconds" nor second-hand materials shall be used.

SAND

Sand used in making mortar and concrete shall be clean, coarse, and sharp free from loam, clay or earth.

30

CEMENT

All cement shall be Portland cement, capable of standing, without fracture, tensile strain of 400 pounds per square inch on standard shaped briquetts when mixed neat and allowed to stand twenty-four hours in air and six days under water.

All cement shall be of the best quality, fresh and finely ground.

No cement shall be hauled on the work until tested by the Engineer, and then only in such quantities as needed for immediate use.

It must be protected from the weather and kept dry, and in no case will it be allowed to be piled on the ground without suitable planking beneath. All cement injured by dampness or otherwise will be at the sole loss of the Contractor.

40

Cement will be judged by the Engineer not only by the tests but also by its behavior in the work.

MORTAR

All mortar for pipe joints, brick work concrete, or other purposes shall be made of Portland cement and clean, sharp sand. The proportions by measure to be as follows:—

50

Exhibits.

For plaster.....1 part cement to 2 parts sand.

For concrete.....1 part cement to 3 parts sand.

10 The cement and sand shall be thoroughly mixed dry, in a clean, tight mortar box, until the mass has become homogeneous and of uniform color, only enough being mixed at one time for immediate use. Water shall then be added slowly, the material at the same time being constantly turned and worked up until the proper consistency for use is obtained. It must then be used immediately, and all which has begun to set before use, and all not properly mixed, must be thrown away, at the Contractor's loss.

All vessels in which mortar may be mixed, carried or deposited, shall be kept thoroughly clean, and any admixture of dirt, rubbish or cement which has set or begun to set, will not be permitted. In no case shall mortar be mixed, wetted or deposited upon the ground.

20 No lime mortar shall be used on the work, nor any admixture of lime with cement mortar.

Whenever mortar or concrete might become frozen before setting their component materials shall be heated as directed by the Engineer, and the finished work effectively protected from frost until it has completely set.

CONCRETE

30 The concrete forming the work shall be composed of one (1) part cement, two (2) parts clean sharp sand, and four (4) parts broken stone, each particle to be of such size as will pass in any direction through a two (2) inch ring and not less than one quarter (one-fourth inch) in any direction. Concrete must be thoroughly mixed by not less than four (4) turnings and until thoroughly homogeneous, immediately put in place in layers of not over six (6) inches and immediately and thoroughly tamped until the water in it flushes to the surface.

40 When workmen quit work one day to take it up again the following day, or when the concreting is interrupted for a considerable time and is resumed, considerable care is necessary in order to secure a perfect bond or joint, the surface to be jointed should be thoroughly washed clean and grouted, or if ordered by the Engineer when concrete is laid in successive tiers and not by one continuous operation, joints may be moulded by placing pieces of timber so that they will form grooves in the surface of the concrete when the last layer is placed each day, then removing the wood the following day, and coating the joint with neat cement or very thin, rich mortar before placing the next layer of concrete.

The concrete must be mixed on a tight wooden flooring of ample size.

Exhibits.

After concrete has been deposited and tamped it must not be disturbed or walked upon until it has well set.

FORMS FOR CONCRETE

Proper and substantial wooden forms must be used in concrete construction, firmly set to permit thorough tamping of the concrete, without distortion, All forms must be of sufficient strength and stability to obtain the exact dimensions of the finished concrete as indicated on drawings, with all lines or surfaces of the finished work straight, plumb and true. 10

Where the soil is sufficiently firm so that the sides of the excavation will stand without bracing, the Contractor may execute to the exact lines of the outside of the concrete work, and dispense with outside forms. Where this cannot be done, or if there are inequalities in the faces of the excavation, outside forms must be used. 20

CONCRETING IN FREEZING WEATHER.

Every precaution must be taken for the protection against frost, no mixing and placing of concrete will be allowed in freezing weather except by direction of the Engineer.

METAL REINFORCEMENT.

The reinforcement shall be of mild bar, open hearth steel having a tensile strength of 52,000 to 60,000 pounds per sq. in. before deformation, with elastic limit of not less than half the ultimate strength and show an elongation of 25 per-cent in eight inches, they shall be deformed by a means satisfactory to the Engineer, and uniform as to deformity, the deformed bars shall show an increase in elastic limit of at least 50 per-cent and in ultimate strength of 25 per-cent above the strength obtained prior to deformation. 30

The reinforcement shall be placed in the forms exactly as shown on the drawings and the Contractor shall employ suitable means to prevent any displacement of the reinforcement when the concrete is placed in the forms.

The reinforcement shall be free from rust, scale or coating of any character which would tend to reduce or destroy the bond. 40

PILING

Piles shall be good, sound thrifty growth, oak, spruce or other timber closely trimmed not less than twelve, (12) inches in diameter at the cut off, or measured ten (10) feet from the butt, and six (6) inches at the top. Piling shall be jetted to within one foot of established elevations as shown on drawings and then driven to a firm bearing so that the penetration will not be more than three (3) inches under three (3) blows from a 2000 pound hammer, falling ten (10) feet, or to the satisfaction of the Engineer. 50

Exhibits.

Piles under the center of tank shall be driven three (3) foot centers consisting of 64 piles. The outside ring of piles, shall be driven on two foot centers consisting of forty-four (44) piles.

10

EXHIBIT P. 33.

Telephone Conn.

Orange, N. J., December 1 1916

Borough of Ridgefield, New Jersey

To CHARLES IPPOLITO, Dr.

General Contractor.

83 Cone Street.

20 Extra Work—Jetting and Driving piles—Foundation Complete

LABOR

162 hrs. Foreman	@ \$1.10	\$178 20	
153 hrs. Engineer	@ 0.50	76 50	
325 hrs. Timberman	@ 0.38 8/9	126 39	
327 hrs. Laborers	@ 0.33 1/3	109 00	
4 days watchman	@ 2.50	10 00	
22 nights watchman	@ 2.20	48 40	
		<hr/>	

30

Insurance 4.74% (Subject to correction)

548.49

26.00

\$574 49

MATERIAL

J. C. Pickens Coal		56.39	
Wm Lange Team Hire		10 50	
850 F. B. M. 1" x 8" @ 20.00		17 00	
300 F. B. M. 2" x 6" @ 30.00		9 00	
Stailey Lumber Co. 48 piles @ 8.50		408 00	
40 Brewster Co. Tar paper, lath & nails		12 01	512 90
		<hr/>	

RENTAL

1 month land from Post		\$ 5 00	
1 month derrick		250 00	
1 month Hoisting Engine		125 00	
1 month Centrifugal pump		125 00	
1 month Pulsometer		75 00	
Lines, Flynn Co.		207 60	787 60
		<hr/>	

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Exhibits.

EXHIBIT P. 36.

Telephone Conn.

Orange, N. J., December 31 1916.

10 Borough of Ridgefield, N. J.

To CHARLES IPPOLITO, Dr.
General Contractor.
83 Cone Street.

Extra Work—Jetting and Driving Piles—Foundation Complete

LABOR

	234 Hours	Foreman	at \$1.10	257 40	
	234	“	Engineer	at 0.50	117 00
	335	“	Timbermen	at 0.38-8/9	130 28
20	975.5	“	Laborers	at 0.33-1/3	325 17
	5 Days	Watchman	at 2.50	12 50	
	10 Nights	“	at 2.20	22 00	
	21	“	Fireman	at 3.00	63 00
				<hr/>	
				927 35	
	(subject to correction)	Insurance	at 4.74%	43 96	\$971 31

MATERIAL

	J. C. Pickens Coal			169 00	
30	Stailey Lumber Company	30 piles	at \$8.50	255 09	424 09

RENTAL

	One month derrick			250 00	
	One month hoisting engine			125 00	
	One month centrifugal pump			125 00	
				<hr/>	
	One month pulsometer			75 00	
	Two months concrete mixer			200 00	
	Lines Flynn Co (includes material)			561 90	1,336 90

40

Plus 15% \$2,732 21

409 83

Superintendence \$3,142 04

175 00

3,317 04

Exhibits.

Balance Due Accrued damages	1,917 05
Amount due	<u>\$5,234 09</u>
Amount O. K. by Chas. F. Blood C E.	\$3143.75

10

EXHIBIT P. 37.

MONTHLY STATEMENT

Office 'Phone 5062 Residence 'Phone 4332
Orange, N. J., Jan. 31, 1917

Borough of Ridgefield, N. J.

To CHARLES IPPOLITO, Dr.

General Contractor

252 Main Street

20

EXTRA WORK—Jetting and Driving Piles—Foundation at Sewerage Plant.

LABOR

243 hrs. Foreman	at \$1.10	267 30	
243 " Engineer	at .50	121 50	
447½ " Timberman	at .38 8/9	174 02	
1246 hrs. Laborers	" .33 1/3	415 33	
31 days Fireman	" 3.00	93	
4 " Watchman	" 2.50	10	30

1081 15(Subject to correction) Insurance at 4.74 51 25 1132 40

MATERIAL

H. J. McCoy	for Rope	11 61	
Union Iron Works	" Repair steel boom	89	
Wm. Lange	" Teaming	102 50	
Hackensack Water Co.		35	40
Stailey Lumber Co.	" 30 Piles	255	
Corrugated Bar Co.	" Steel	170 58	
Errie R. R. Co.	" Freight on above	10 55	
George F. Rover	" Miscellaneous	17 74	
Edward Kernan Co.	" Lumber	98 54	
Nicola Scioli	" Stone	102 50	
J. I. Pickens	" Coal	159 59	
1528 ft. B. M. Sheathing	at \$25.00	38 20	1090 81

50

Exhibits.

RENTAL				
	One Month	Derrick	250	
	" "	Hoisting Engine	125	
	" "	Centrifugal Pump	125	
	" "	Pulsometer "	75	
10	" "	Concrete Mixer	100	
	" "	24" gauge and cars	35	
	Lines	Flynn Co. includes material	414 02	1124 02
				<hr/>
				3347 23
		Plus 15%		502 08
				<hr/>
				3849 31
		Balance due accrued damages		1917 05
				<hr/>
20				\$5766 36
		Amount O. K. by Chas. F. Blood C. E.		
		\$3846.55		

EXHIBIT P. 39.

MONTHLY STATEMENT

Office 'Phone 5062

Residence 'Phone 4332

Orange, N. J., March 27, 1917.

up to March 17.

30 Borough of Ridgefield, New Jersey.

To CHARLES IPPOLITO, Dr.

General Contractor

252 Main Street

EXTRA WORK—Jetting and Driving Piles—Foundation at Sewerage Plant.

LABOR

40	135 hours foreman	@ \$1.10 per hour	148 50	
	135 hours, Engineer	@ .50 " "	67 50	
	89 hours, timber man	@ .38 8/9 "	34 61—38.11	
	400 hours, laborers	@ .33 1/3 "	133.33	135.33
	17 days, fireman	@ 3.00 per day	51 00	
	1 day, watchman	@ 2.50 per day	2 50	
			<hr/>	
			442 94	
	(Subject to correction) Insurance at 4.74%		21	458 17
			<hr/>	
50			463.94	

Exhibits.

RENTAL				
17 days, derrick	@	\$10.00 per day	170 00	
17 days, Hoisting engine	@	5.00 " "	85 00	
17 days, Centrifugal Pump	@	5.00 " "	85 00	
17 days, Pulsometer Pump,	@	3.00 " "	51 00	
17 days, Concrete Mixer	@	5.00 " "	68 00	10
17 days, 24 in. of gauge & cars			34 00	
6 days, Sheathing Hammer	@	2.00 " "	12 00	
2 months rent to Alfred Post	@	5.00 per month	10 00	
For Water rents to Alfred Post			8 00	
			523 00	
			1134 98	
			<hr/>	
			523 01	
			986 94	
Plus 15%			148 04	
			<hr/>	
			\$1134 98	20
			170 25	
			<hr/>	
			964 73	

O. K. CHAS. F. BLOOD
 Engineer in charge.
 \$1134.98

Above amount includes all work to March 18th 1917

C. F. B.

30

EXHIBIT P. 40.

BOROUGH OF RIDGEFIELD
NEW JERSEY

Ridgefield, N. J., February 17th. 1917

THIS TO CERTIFY. That at a regular meeting of the Mayor and Council held on Wednesday evening February 14th, 1917. the following preamble and resolution was adopted.

Whereas, Charles Appolito by a letter dated Feb. 3rd, 1917, has reported to the Mayor and Council that the cost of work now being done under resolution of October 25th, 1916. will reach the sum of \$10,258.75 with in the next few days, and.

Whereas, the work shown on the plans and specifications mentioned in said resolution is not fully completed, and.

Whereas, it is estimated that the cost of completing said work will not exceed the sum of \$3,000.00 be it:—

RESOLVED. That the said Charles Ippolito be and is hereby authorized to proceed with said work and to complete the same, provided, that

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Exhibits.

no charge in excess of said further sum of \$3,000.00 shall be made or incurred without first obtaining the consent of the Mayor and Council, and be it further:—

RESOLVED. That a copy of this resolution be delivered to the Engineer and said Charles Ippolito.

10

Attest.

(SEAL)

CHAS B WILSON
Borough Clerk.

EXHIBIT P. 41.

BOROUGH OF RIDGEFIELD
NEW JERSEY

20

Ridgefield, N. J., March 3, 1917

Mr. Chas. Ippolito,
Contractor.

Dear Sir:—

Acting under the authority vested in me by the Borough Council, I hereby order you to proceed with the completion of that portion of the outlet sewer from the disposal plant yet remaining to be done.

30

As you have exhausted the appropriation made for extras on the disposal, you will have to cease work on this until more money is appropriated or a change in plan adopted.

In the mean time, you can greatly facilitate matters by getting promptly in touch with Alexander Potter, Consulting Engineer, 50 Church Street, New York City and give him a complete list of all material you have on hand, which might be utilized if a suggested modification of the disposal plant is carried out.

Yours very truly,

S. V. R. MARTLING
Chairman, Sewer Committee.

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Exhibits.

EXHIBIT P. 42.

Res. Telephone 4332

Office Telephone 5062

CHARLES IPPOLITO
 General Contractor
 252 Main Street

10

Orange, N. J. March 3, 1917.

To the Mayor and Council of
 Ridgefield, New Jersey, and to
 S. V. R. Martling, Esq.,
 Chairman of Sewer Committee,

Gentlemen:

I received to-day order in writing to shut down the work on the sewer disposal plant at Ridgefield. I take it that the shutting down is for an indefinite period, and I wish to hereby enter a formal protest against shutting down the work, and against the action of both the Mayor and Council, as well as the Sewer Committee in directing that the work should be shut down.

20

On February 3, 1917 I communicated with the Mayor and Council and the Engineer in writing, regarding the progress of the work, and in pursuance of such communication, the Mayor and Council passed a resolution on February 17, 1917 directing me to proceed with the work and to complete the same. This resolution was passed after I had communicated in writing with the Borough Engineer, suggesting what in my opinion would be best and most economical for the Borough in the matter of the sewer disposal plant, and stating that the work could be continued with a very slight interruption by the construction of a shed over the work and heating the same, at a cost of about \$575; while the expense of shutting down the work would amount to about \$400. a week, which would include the over-head charges, plant, superintendent's wages, day and night watchmen; in addition to which, the working force would have to be disbanded and a new working force organized when the work would be resumed.

30

The difficulties surrounding the shutting down of the work at the present time after all arrangements have been made, and orders given so recently to proceed with it, and after I have made all arrangements to carry out the orders of the Borough Authorities, compel me to say that unless a distinct understanding is had, that I shall be fully paid for all losses which I *shal* sustain by the shutting down of the work, and shall not be held responsible in any way for inability to secure a proper working force on the resumption of operations, I would very much prefer that the Borough Authorities should pay me my bill up to the present time with a reasonable profit on the balance

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Exhibits.

of the work to be done, and release me and cause a severance of contractual relations.

I have done everything in my power since I have begun work on this disposal plant, to perform the work in a workman-like manner, and to conduct myself in a business-like manner in dealing with the Borough. I, therefore, wish to enter a protest against shutting down, which can mean nothing but loss to myself and expense to the Borough.

In my opinion the shutting down of the work at this time will cause a large part of it to be done over again if the Borough determines to carry out the present plan.

Respectfully yours,

CHAS IPPOLITO

20

EXHIBIT P. 43.

Res. Telephone 4332

Office Telephone 5062

CHARLES IPPOLITO
General Contractor
252 Main Street

Orange, N. J. March 5, 1917.

S. V. R. Marthling, Esq.,
Chairman of Sewer Committee,
Ridgefield, New Jersey.

Dear Sir:

Answering further your letter of March 3rd, I think it will be a great mistake to complete the outlet sewer from the Disposal Plant, at the present time. If this is done the water will back up into the plant, at every high tide, and of course, do a great deal of damage to the work already done.

If the sewer committee insists upon this being done, I will not be held responsible for the damage that will ensue.

Yours very truly,

CHAS IPPOLITO

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Exhibits.

EXHIBIT P. 44.

BOROUGH OF RIDGEFIELD
NEW JERSEY

Ridgefield, N. J., March 5th, 1917 10

THIS IS TO CERTIFY. That at a regular meeting of the Mayor and Council held on Wednesday evening February 28th, 1917. it was:—

RESOLVED. That the Committee on Sewers be and is hereby authorized to order Charles Ippolito to suspend, until the next regular meeting of the Council, the work now being done under his contract with the Borough, if and when, in the opinion of Alexander Potter Consulting Engineer it shall be desirable so to do.

Attest.

(SEAL)

CHAS B WILSON 20
Borough Clerk.

EXHIBIT P. 45.

Res. Telephone 4332

Office Telephone 5062

CHARLES IPPOLITO
General Contractor
252 Main Street

Orange, N. J. 30

S. V. R. Martling Esqr
Chairman of sewer committee
Ridgefield N J

Dear Sir:—

Regarding the resolution passed by the Borough *Concil* on Feb. 28th 1917 authorizing the sewer committee to direct me to stop work upon the order of Mr. Alex. Potter, Consulting Engineer

I wish to notify you that I have received no notice in writing or otherwise from Mr Potter to stop work. The resolution *dos* not authorize any change in the plants of the work. I must therefore continue to follow out the old plants ontill council orders otherwise 40

Yours very truly

CHAS IPPOLITO

Exhibits.

EXHIBIT P. 46.

BOROUGH OF RIDGEFIELD
NEW JERSEY

10

Ridgefield, N. J., March 8, 1917.

Mr. Chas. Ippolito,
Contractor.

Dear Sir:—

Acting under the authority vested in me by the Borough Council and upon the recommendation of Mr. Alexander Potter, Consulting Engineer, 50 Church Street, New York City, I hereby order you to stop at once all work on disposal plant.

Yours very truly,

20

S. V. R. MARTLING
Chairman, Sewer Committee.

Was handed to me by Mr Martling @ 10 A. M. Mar 8/17

With him was Chief of Police

There were present Ziglor & Olmsted

EXHIBIT P. 47.

Res. Telephone 4332

Office Telephone 5062

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CHARLES IPPOLITO
General Contractor
252 Main Street

Orange, N. J. March 9, 1917.

To the Mayor and Borough Council of Ridgefield:

This is to notify you that on March 8, 1917, I received notice in writing from the Chairman of the Sewer Committee notifying me to stop all work at once.

40

In pursuance of such order I have stopped work but desire to take this opportunity to notify you that I will not assume any obligation for any damage that may be sustained to work already done.

Respectfully yours,

Exhibits.

EXHIBIT P. 48.

BOROUGH OF RIDGEFIELD
NEW JERSEY

Ridgefield, N. J., March 15th, 1917 10

Mr, Charles Ippolito.
Main Street.
Orange. N. J.

Dear Sir:

I am instructed by the Mayor and Council to direct you to stop all work upon the disposal plant and to remove from the site of the work, forthwith, all of your plant and to render the borough a statement of the amount of material you now have on hand.

Very truly yours.

20

(SEAL)

CHAS B WILSON
Borough Clerk.

EXHIBIT P. 49.

Res. Telephone 4332

Office Telephone 5062

CHARLES IPPOLITO
General Contractor
252 Main Street

30

Orange, N. J. April 12, 1917.

To the Mayor and Common Council,
Borough of Ridgefield, New Jersey.

Gentlemen:

I beg to notify you, that pursuant to your order, I am about to dismantle my plant on the sewer disposal contract, and I expect to have my entire plant out of there within a few days.

I beg to notify you also, that there is on the premises, material delivered to be used in the said construction work, and that I do not intend to assume any liability over the said material against loss or damage which may arise by the elements of the weather, theft, or otherwise.

40

Of course, you understand that I am not dismantling my plant of my own volition but am doing so on your order to me in writing, as I have been at all times and I am still ready and willing to carry out my contract.

Very truly yours,

CHAS IPPOLITO

Copy to the Mayor & Mr Blood

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Exhibits.

EXHIBIT P. 50.

BOROUGH OF RIDGEFIELD
NEW JERSEY

Ridgefield, N. J., April 21, 1917.

10 Mr. Charles Ippolito,
General Contractor,
252 Main Street,
Orange, New Jersey.

Dear Sir:—

As stated to your foreman, Mr. Olmstead, I have received your bill and statement attached, for work performed on the disposal plant at Ridgefield, New Jersey, but I fail to find an itemized list of the material on hand, which was requested in resolution passed March 14th.

20 Kindly forward me an itemized list of the amount of material on hand, one chargeable to the extra account and one chargeable on your original contract account. As soon as I receive same, I will call a meeting of the Council and go over the matter and let you know promptly.

I am, sir,

Yours very truly,

S. V. R. MARTLING

Chairman of the Sewer Committee.

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Exhibits.

ENGINEER'S ESTIMATE AND CERTIFICATE

No.....

Ridgefield, N. J. Sept. 1st, 1916.

To the Mayor and Council of the Borough of Ridgefield:

GENTLEMEN:

10

Attached hereto is my estimate of the value of the work done prior to the first day of September, 1916 by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield for the construction of the sewage disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

Total value of work to the first day of September 1916.....\$3000.

85% thereof 2550.

Less payments heretofore made to contractor..... _____

20

Amount for which payment should now be made.....\$2550.

(Signed) Charles F. Blood, C. E.

Borough Engineer in Charge of work under aforesaid contract
Itemized estimate attached

ESTIMATE OF CHAS. IPPOLITO

Money allowed Chas. Ippolito on construction of sewage
disposal plant, Sept. 1st..... \$3000.00

Money allowed Chas. Ippolito on construction of Sewage
disposal plant, Oct. 1st..... 1500.00 30

Total \$4500.00

Less 15% 675.00

..... \$3825.00

Amount paid to date 2550.00

Amount due \$1275.00

Estimate of work completed by Chas. Ippolito on the sewage
disposal plant 40

Borough of Ridgefield, N. J. to Nov. 1st.

Estimate of work completed under original con-
tract to November first \$6154.81

Estimate of extra work on Sludge bed as per
order #1 \$1846.80

Less refund as per order #1 267.50

..... 1579.30 50

Exhibits.

	Extra work on Imhoff Tank, as per order #2	264.89
		<hr/>
	Less 15%	7999.00
		1199.85
		<hr/>
10	Amount paid to date	6799.15
		3825.00
		<hr/>
	Amount due	2974.15

Ridgefield, N. J. December 5th, 1916

Whereas, Charles F. Blood (Borough Engineer in charge of the work) having certified that the cost of the extra work completed by Charles Ippolito on the foundation for the "Imhoff Tank" from November 1st to November 30th, 1916 is (with the 15% commission added) the sum of \$2247.09 now therefore be it RESOLVED that a warrant be drawn to the order of Charles Ippolito for the sum of two thousand two hundred forty-seven and 09/100 dollars, and the amount charged to the Sewer Construction Account.

Approved December 8th, 1916

Attest

Mayor

Borough Clerk

30 ENGINEER'S ESTIMATE AND CERTIFICATE

Ridgefield, N. J. Jan. 1st, 1917

No. 5

To the Mayor and Council of the Borough of Ridgefield:

GENTLEMEN:

Attached hereto is my estimate of the value of the work done prior to the first day of January, 1917 by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield for the construction of the sewage disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

Total value of work to the first day of January, 1917	\$13389.84
85% thereof	11381.36
Less payments heretofore made to contractor	9046.24

Amount for which payment should now be made	<hr/> \$2335.12
---	-----------------

Chas. F. Blood, C. E.

Borough Engineer in Charge of work under aforesaid contract
Itemized estimate attached

Exhibits.

ENGINEER'S ESTIMATE AND CERTIFICATE

Ridgefield, N. J. Feb. 1st, 1917

No. 6

To the Mayor and Council of the Borough of Ridgefield

10

GENTLEMEN:

Attached hereto is my estimate of the value of the work done prior to the first day of February, 1917 by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield for the construction of the sewage disposal plant of the Borough of Ridgefield which estimate I hereby certify to the Mayor and Council as correct.

Total value of work to the first day of February 1917	\$17236.39	
85% thereof	14650.93	
Less payments heretofore made to contractor	11381.36	20
Amount for which payment should now be made	3269.57	

Chas. F. Blood, C. E.

Borough Engineer in Charge of work under aforesaid contract

ENGINEER'S ESTIMATE AND CERTIFICATE

Ridgefield, N. J. March 1st, 1917

No.—

To the Mayor and Council of the Borough of Ridgefield:

30

GENTLEMEN:

Attached hereto is my estimate of the value of work done prior to the first day of March, 1917 by Charles Ippolito, contractor, under the contract made by said Contractor with the Borough of Ridgefield, for the construction of the disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

Total value of work to the first day of March, 1917	\$19,714.85	
85% thereof	16,757.62	40
Less payments heretofore made to contractor	14,650.93	
Amount for which payment should be now made	\$2,106.69	

Chas. F. Blood, C. E.

Engineer in charge of work under aforesaid contract

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Exhibits.

ENGINEER'S ESTIMATE AND CERTIFICATE

No. 8

Ridgefield, N. J. April 1st, 1917

10 To the Mayor and Council of the Borough of Ridgefield:

GENTLEMEN:

Attached hereto is my estimate of the value of work done prior to the eighteenth day of March 1917 by Charles Ippolito, contractor, under the contract made by said contractor with the Borough of Ridgefield, for the construction of the disposal plant of the Borough of Ridgefield, which estimate I hereby certify to the Mayor and Council as correct.

	Total value of work to 18th day of March, 1917	\$20,849.83
20	85% thereof	17,722.35
	Less payments heretofore made to contractor	16,757.62

	Amount for which payment should now be made	\$ 964.73
	Itemized account attached herewith	

Chas. F. Blood, C. E.

Engineer in charge of work under aforesaid contract

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Copy of Circuit Court Minutes.

BERGEN CIRCUIT COURT.

Circuit Court Issue.

April 2, 1919

Before Hon. W. W. Cutler, Circuit Court Judge.

10

CHARLES IPPOLITO

vs.

BOROUGH OF RIDGEFIELD

Action at Law.

Jury

- 1 Harry M. Brinkerhoff
- 2 Harry V. Ackerman
- 3 Jacob Hagedorn
- 4 Elvin E. Scott
- 5 Arthur W. Pierce
- 6 Harry A. Snider

- 7 Edwin F. Clark
- 8 William L. Koch
- 9 Fredk. W. Van Duyn
- 10 William F. Padberg
- 11 Elmer Bohlen
- 12 Walter G. Broun

20

HOWE & DAVIS

Attys. for Plaintiff

Witness " "

- 1 Chas. B. Wilson
- 2 Chas. Frederic Blood

WILLIAM J. MORRISON, JR.

Atty. for Deft.

Deposition of one absent witness Paul Koch was read into the record by Counsel for Plaintiff

- 3 Russell C. Olmsted

30

Recess at 4.20 P. M. until 10 A. M. Apl. 3.

April 3, 1919. Trial resumed

- 4 Charles Ippolito
- Charles F. Blood recalled
- 5 Charles Inglehardt
- 6 Stephen V. R. Martling
- Chas. F. Blood recalled
- Russell C. Olmsted "

40

PLAINTIFF RESTS

Motion for Non Suit and to strike out Plaintiffs evidence on several counts. held by the Court till Apl. 4. 1919

Recess to Apl. 4. 1919

50

Copy of Circuit Court Minutes.

April 4, 1919. Court granted Non Suit on 2nd, 3rd, 4th, 5th & 6th counts.

Witness for Defendant

- 1 Alexander Potter
- 2 Alexander C. Martin

10

The evidence closed and the case summed up by respective attorneys and submitted upon charge of the Court. The jury retired to consider of their verdict having an officer sent to attend them. The jury came into Court and being called all appeared and rendered a verdict in favor of the Plaintiff and against the defendant and do assess the plaintiff's damages at the sum of Three thousand seven hundred and eighty one dollars and twenty four cents (\$3781.24) in the first count in complaint.

20 Verdict Apl. 4, 1919.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } ss.

30 I, George Van Buskirk, Clerk of the County of Bergen, and also Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing is a true copy of the trial slip as the same is entered in the Circuit Court Minutes of 1919 at page 155 &c. in my office at Hackensack.

(SEAL)

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Court at Hackensack aforesaid this Eleventh day of April A. D. 1918.

GEORGE VAN BUSKIRK,
Clerk.

By William S. Downs, Dy. C.

40

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Rule for Judgment.

BERGEN COUNTY CIRCUIT COURT.

CHARLES IPPOLITO,

Plaintiff,

vs.

BOROUGH OF RIDGEFIELD, Bergen County, New
Jersey,

Defendant.

Action at Law.

10

*Rule for
Judgment.*

This action was tried before Honorable Willard W. Cutler, Circuit Court Judge, with a Jury, at the Bergen County Circuit Court, on April 4th, 1919, the cause having been heard and submitted to the Jury. So far as the first count (the Court having previously ordered a non-suit as to the second, third, fourth, fifth and sixth counts) in the said complaint is concerned they returned their verdict as follows:

20

They found in favor of the plaintiff and against the defendant on the first count in the sum of Three thousand seven hundred and eighty-one dollars and twenty-four cents (\$3,781.24), whereupon it is ordered that the plaintiff have judgment final against the defendant for the sum of Three thousand seven hundred and eighty-one dollars and twenty-four cents (\$3,781.24) and his costs, which are taxed at the sum of Fifty six dollars and seventy nine cents (\$56.79) making in all the sum of Three thousand eight hundred and thirty eight dollars and three cents.

30

Rule entered April 11, 1919.

On Motion of

HOWE & DAVIS,
Ptff.'s Attys.

A true copy of rule of Judgment.

GEO. VAN BUSKIRK,

C.

40

Filed Apl. 11, 1919.

GEO. VAN BUSKIRK,

C.

50

IN SENATE
JANUARY 11, 1918

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1917

ALBANY: J.B. LIPPINCOTT COMPANY, PRINTERS
1918

The first of the reports of the Commission on the
Land Office, which was presented to the Senate
on May 1, 1917, was a report on the
land owned by the State of New York.
The report was prepared by the
Commissioners of the Land Office,
and was presented to the Senate
by the Honorable Governor Charles
Dwight Smith.

On Motion of
The report was read and approved.

Approved: JAMES C. HARRIS, Governor
JAMES C. HARRIS, Governor
JAMES C. HARRIS, Governor

Printed and bound by
J.B. LIPPINCOTT COMPANY, ALBANY, N. Y.

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BERGEN COUNTY CIRCUIT COURT

CHARLES IPPOLITO,

Plaintiff,

vs.

BOROUGH OF RIDGEFIELD, BER-
GEN COUNTY, NEW JERSEY,
Defendant.

*Action at Law.
Rule for
Non-Suit.*

This action came regularly on for trial on April 4th, 1919, and at the close of the plaintiff's case a motion for non-suit having been made by defendant's attorney and the Court having granted the said motion as to the 2nd, 3rd, 4th, 5th and 6th Counts of the complaint; whereupon it is adjudged that judgment of non-suit as to the 2nd, 3rd, 4th, 5th and 6th Counts of the plaintiff's complaint be and hereby is entered, and that the defendant recover of the plaintiff its costs.

Rule entered November 18th, 1919, as of April 4th, 1919. On motion of

WILLIAM J. MORRISON, JR.,

A true copy.

Defendant's Attorney.

GEO. VAN BUSKIRK,

Clerk.

BERGEN COUNTY CIRCUIT COURT

CHARLES IPPOLITO,

Plaintiff,

vs.

BOROUGH OF RIDGEFIELD, BER-
GEN COUNTY, NEW JERSEY,
Defendant.

*Action at Law.
Order.*

At the trial of the above action, on April 4th, 1919, a motion for non-suit having been made by defendant's attorney, and the Court having granted the same as to the 2nd, 3rd, 4th, 5th and 6th Counts of the complaint, but no rule of non-suit having been actually entered, it is on this November 17th, 1919, ordered that the defendant have leave to enter the rule for judgment of non-suit as to the said Counts *nunc pro tunc*, as of April 4th, 1919.

WILLARD W. CUTLER,

A true copy.

Circuit Court Judge.

GEO. VAN BUSKIRK,

Clerk.

*Both Attorney for plaintiff
and defendant consenting to the
entry of order nunc pro tunc.
Wm Morrison, Jr*

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS DEPARTMENT

PHYSICS DEPARTMENT

Notice of Appeal.

Notice of Appeal.

Filed.

BERGEN COUNTY CIRCUIT COURT.

CHARLES IPPOLITO,

Plaintiff,

vs.

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY,

Defendant.

Action at Law.

Notice of Appeal.

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To William J. Morrison, Esq., attorney for above-named defendant:

20

TAKE NOTICE that the above named plaintiff hereby appeals to the New Jersey Court of Errors and Appeals from the judgment or judgments entered in the Bergen County Circuit Court against the plaintiff on April 4th, 1919, as follows:

1. From the judgment of non-suit as to the second count of plaintiff's complaint.
2. From the judgment of non-suit as to the third count of plaintiff's complaint.
3. From the judgment of non-suit as to the fourth count of plaintiff's complaint.
4. From the judgment of non-suit as to the fifth count of plaintiff's complaint.
5. From the judgment of non-suit as to the sixth count of plaintiff's complaint.

30

April 9, 1919.

HOWE & DAVIS,
Attorneys for Plaintiff.

40

Service of a copy of the within is hereby acknowledged this 10th day of April, 1919.

W. J. MORRISON, JR.,
Attorney for Defendant.

50

Grounds of Appeal.

Grounds of Appeal.

Filed.

10

New Jersey Court of Errors and Appeals

CHARLES IPPOLITO,

Plaintiff-Appellant,

vs.

BOROUGH OF RIDGEFIELD, BERGEN COUNTY, NEW
JERSEY, a municipal corporation,

Defendant-Respondent.

Action at Law.

*Grounds of
Appeal.*

20

The appellant states the following grounds of appeal:

I.

Second Count of Complaint.

30

1. The Court granted the motion of defendant's attorney to non-suit the plaintiff as to this count.

2. The Court should have denied the said motion.

3. The Court ordered a judgment of non-suit to be entered on this count.

4. The Court should not have ordered a judgment of non-suit to be entered on this count.

5. The Court should have allowed the jury to consider the second count and the evidence relating thereto.

6. The Court should have permitted the evidence relating to said second count to go to the jury for their consideration and verdict.

40

7. There was evidence upon which the jury would be justified in bringing in a verdict for the plaintiff under said count.

II.

Third Count of Complaint.

1. The Court granted the motion of defendant's attorney to non-suit the plaintiff as to this count.

2. The Court should have denied the said motion.

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Grounds of Appeal.

3. The Court ordered a judgment of non-suit to be entered on this count.

4. The Court should not have ordered a judgment of non-suit to be entered on this count.

5. The Court should have allowed the jury to consider the third count and the evidence relating thereto. 10

6. The Court should have permitted the evidence relating to said third count to go to the jury for their consideration and verdict.

7. There was evidence upon which the jury would be justified in bringing in a verdict for the plaintiff under said count.

III.

Fourth Count of Complaint. 20

1. The Court granted the motion of defendant's attorney to non-suit the plaintiff as to this count.

2. The Court should have denied the said motion.

3. The Court ordered a judgment of non-suit to be entered on this count.

4. The Court should not have ordered a judgment of non-suit to be entered on this count. 30

5. The Court should have allowed the jury to consider the fourth count and the evidence relating thereto.

6. The Court should have permitted the evidence relating to the said fourth count to go to the jury for their consideration and verdict.

7. There was evidence upon which the jury would be justified in bringing in a verdict for the plaintiff under said count. 40

IV.

Fifth Count of Complaint.

1. The Court granted the motion of defendant's attorney to non-suit the plaintiff as to this count.

2. The Court should have denied the said motion.

3. The Court ordered a judgment of non-suit to be entered on this count. 50

Grounds of Appeal.

4. The Court should not have ordered a judgment of non-suit to be entered on this count.

5. The Court should have allowed the jury to consider the fifth count and the evidence relating thereto.

10 6. The Court should have permitted the evidence relating to the said fifth count to go to the jury for their consideration and verdict.

7. There was evidence upon which the jury would be justified in bringing in a verdict for the plaintiff under said count.

V.

Sixth Count of Complaint.

20 1. The Court granted the motion of defendant's attorney to non-suit the plaintiff as to this count.

2. The Court should have denied the said motion.

3. The Court ordered a judgment of non-suit to be entered on this count.

4. The Court should not have ordered a judgment of non-suit to be entered on this count.

30 5. The Court should have allowed the jury to consider the sixth count and the evidence relating thereto.

6. The Court should have permitted the evidence relating to the said sixth count to go to the jury for their consideration and verdict.

7. There was evidence upon which the jury would be justified in bringing in a verdict for the plaintiff under said count.

HOWE & DAVIS,
Attorneys for Plaintiff-Appellant.

40 Service of a copy of the within is hereby acknowledged this 24th day of April, 1919.

W. J. MORRISON, JR.,
Attorney for Defendant-Respondent.

N. J. Court of Errors and Appeals

CHARLES IPPOLITO,
Plaintiff-Appellant,

VS.

BOROUGH OF RIDGEFIELD,
Defendant-Appellee.

On Appeal.

10

BRIEF FOR PLAINTIFF-APPELLANT.

This appeal brings up the action of the Bergen County Circuit Court, in granting defendant's motion of non-suit on Counts 2, 3, 4, 5 and 6 of the plaintiff's complaint at the close of plaintiff's case. The case went to the jury only on the first count of the complaint, on which count the jury rendered a verdict for the plaintiff. *This appeal relates only to the Court's action in granting the motion of non-suit on the other counts.*

20

STATEMENT OF FACTS.

The plaintiff and defendant, on March 16, 1916, entered into a contract, after due advertisement for bids, whereby the plaintiff undertook to construct a sewage disposal plant on an island (case p. 45, lines 10-27), consisting of sludge bed, Imhoff tank, and pipe outfall into Overpeck Creek, a tributary of the Hackensack River, within the Borough of Ridgefield, in Bergen County. It is undisputed that the plaintiff's bid was the lowest of all the competitors. The price for the work shown on the plans and specified was a lump sum of \$10,300, the work to be done under the drawings and specifications prepared by

30

40

Charles F. Blood, Borough Engineer, and under his directions. The performance of the contract, by the plaintiff, was begun shortly after its date, March 16, 1916. The contract is set forth in Case pp. 8-23 inclusive.

10 This sewage disposal plant was part of an entire sewage system being constructed by the Borough. The remaining part consisting of the sewers laid in the streets went to another contractor and we are not concerned in this suit with that part of the system.

The contract (Case p. 11) provided for the construction of the original work as follows:

Sewage disposal plant, complete, including tank sludge bed complete, pipe line from tank to sludge bed, sludge bed to affluent pipe, affluent pipe, from tank to creek, all as per drawings and specifications.

Lump sum—Ten thousand three hundred dollars, \$10,300.00.

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Besides this there was also a provision (Case pp. 10-11) for what were called "Contingent Extras," such as concrete, sheeting, timber, under drains, and the like, and a price fixed by the competitors upon each item that might in the future, figure as a contingent extra, so far as the same could be then foreseen.

30 In addition to this (Case pp. 11-12) the parties proceeded, by their contract, to provide for any work that might arise in the progress of the construction, which might entail the employment of additional labor and materials, beyond what could be foreseen at the time the contract was entered into, and which were not covered by the plans and the specifications and the bids on "contingent extras." These provisions as set out in the contract, are as follows (Case p. 11):

40 "The bidder proposes and agrees to perform any or all work classified as Contingent Extras, and any

or all work required in the construction of the sewerage system and sewage disposal plant for which unit prices are not provided herein, including the furnishing of the materials and labor therefor and as to each or all of the items of said work, including Contingent Extras, will accept in full payment the actual cost to the bidder of the materials and labor used in its construction, plus fifteen per cent. (15%), the Borough of Ridgefield to have the option of paying for Contingent Extras, or any of them at the unit price or prices bid, or at cost plus fifteen per cent. (15%), as occasion for said work is done, in such case. 10

“The bidder agrees to furnish to the Mayor and Council of the Borough of Ridgefield, full itemized accounts and vouchers of the cost of all materials and labor furnished as above on the basis of cost plus fifteen per cent. (15%); that the charged cost of materials shall be only the commercial value thereof at the site of the work; that the charged cost of labor shall be only the amount paid or payable to the workmen, foreman or superintendent at the site, for the time they are actually employed on the work for which charge is made; and that the percentage shall include the use, purchase price, rental and transportation of tools, plant, scaffolding and equipment, liability insurance, all charges for general supervision and administration, all charges for permit, faithful performance bond, interest on working capital and anticipated profits.” 20 30

AS TO COUNT NO. 2.

In the course of the work an emergency arose, which the Engineer and Borough thought would jeopardize the stability of the Imhoff tank (which was the principal feature of the disposal plant) unless the foundation was strengthened. The contractor was in the midst of the work; the foundation that had been called for originally, and practically completed, 40

was decided by the Borough to be unsafe to bear the burden proposed to be placed upon it (Case p. 158 line 19 &c.). An Imhoff tank, similarly constructed had collapsed in one of the neighboring towns, the town of Fairview. (Case p. 114 line 36). Therefore, while the bottom was exposed and the character of the soil made evident, the Engineer and the Borough decided that the emergency must be dealt with at once, and the foundation, built in accordance with the plans and specifications, must be taken out
 10 and a stronger foundation of piles driven in its place.

The Borough authorities thereupon took formal action and passed, on October 25, 1916 (Case p. 39), the following resolution:

“Whereas, Charles F. Blood, borough engineer in charge of the construction of the sewage disposal plant, under contract heretofore made by and between the Borough of Ridgefield and Charles Ippolito, has reported to the Mayor and Council that certain work is required in the construction of said sewage disposal plant, for which work no unit prices were provided for in the bid or proposal made by said Charles Ippolito.
 20

“Therefore be it resolved that the said Charles Ippolito be and hereby is authorized and required to perform the work shown and described in the drawings and specifications for the said work, to be prepared by the borough engineer, and to be approved by the Mayor, and that he be paid for said work in accordance with the provisions of his proposal, which said proposal was made a part of the said contract with the borough, provided, however,
 30 that no charge in excess of \$10,258.75 shall be made or incurred without first obtaining the approval of the Mayor and Council.

“Resolved that a copy of this resolution and of said drawings and specifications be delivered by the borough engineer to said Charles Ippolito.”

And on February 3, 1917, passed the following resolution:

40 “Whereas Charles Ippolito, by a letter dated February 3rd, 1917, has reported to the Mayor and

Council that the cost of work now being done under resolution of October 25th, 1916, will reach the sum of \$10,258.75 within the next few days, and

"Whereas, the work shown in plans and specifications mentioned in said resolution is not yet fully completed, and

"Whereas it is estimated that the cost of completing the said work will not exceed the sum of \$3,000.

"Be it resolved that said Charles Ippolito be and is hereby authorized to proceed with said work and complete the same, provided that no charge in excess of said further sum of \$3,000 shall be made or incurred without first obtaining the consent of the Mayor and Council.

10

"And be it further resolved that a copy of this resolution be delivered to the engineer and said Charles Ippolito."

After all the work called for by the foregoing resolutions was practically completed, the Borough became doubtful as to whether they wanted to complete the Imhoff System (Case p. 129 lines 20-40), and at that very critical point they called in an additional engineer —one Alexander Potter— and while he was investigating the subject of finishing up along the old lines, or building a gravity system, the Borough, of its own motion, stopped all work and subsequently ordered the contractor off the job (Case pp. 129 to 133).

20

By the original plans and specifications the Imhoff tank was to rest on an outer and inner circle of piles, the outer circle to support the flange of the tank, and the inner circle to support the bottom of the tank (Case p. 53).

30

In the strengthening of the foundation, the piles that had been driven under the original plan had to be taken out, and larger and stronger piles to a much greater number, were driven over the entire foundation area, spaced three feet apart (Case p. 200, l. 1 &c).

The last piles, 104 in number, were required to be sunk with a steam hammer, and steam jet, to a certain level (Case p. 117, l. 40 &c), while the first piles

40

were driven only with the steam hammer to refusal (Case p. 19, l. 20-30).

Regarding the emergency which arose requiring that the foundation should be strengthened in order to insure the stability of the Imhoff tank, the testimony shows that when the bottom was reached the character of the soil was found to be such, by reason of quicksand and water, that it was deemed by the Engineer and the Borough authorities unsafe to proceed unless stronger under-support was provided.

10 There was nothing to prevent the contractor from finishing the job under the original plans and specifications (Case p. 147, l. 7-10). But the Engineer and the Borough determined that it was to the interest of the Borough that a stronger foundation of piles should be made to support the Imhoff tank.

The nature of the emergency and the fact that the decision of the Borough authorities to require the additional work to be done was dictated by sound judgment, are shown by the following testimony.

20

Borough Engineer Charles F. Blood (Case p. 53, l. 28, &c.) :

Q Now, how far had Mr. Ippolito progressed under his original contract with the construction of this tank? A Why, these two rows of piles had been practically all driven, and the work of excavating in the center to receive the point of the tank had been started, when we encountered the quicksand, which

30 washed in so rapidly that it took the support away from these outer piles, and left them no bearing, and we had to sheath the hole, the quicksand bank, we couldn't excavate because the sand kept piling up here.

Q Now, at that time when you discovered the quicksand, had all of the spiles for the two circles been driven? A I wouldn't say all of them. I think they had, though, most of them, anyway.

Q And how much—had any of them been cut off?

40 A Yes.

Q And how much of the excavation had been made? A I should think about six to eight feet had been excavated.

Q Had there been set any forms for the concrete work? A Yes.

Q And had there been any of the reenforced concrete work set? A The steel was in place.

Q Was there any sheathing in place at that time? A Yes.

Q To what extent? A Well, half of it, I should say. 10

Page 54:

Q Now, when you discovered this quicksand, Mr. Blood, what was the character of the soil that you found it to be when you made that discovery? A Why, it is a very fine, powdery sand, which flowed in the—the water carried in from all directions.

Q How far below the surface of the ground was the excavation when you made this discovery? A That is about a foot of finished concrete. 20

Q Well, that would be about fourteen feet below? A I should say so.

Q The surface? A Yes.

Q And where was this water coming from? A From the bottom. The level was below tide water, so it was coming up from the ground.

Q What effect did it have, if any, upon the piles that were already in place. A Well, this—the water, of course, forced the sand in at the lowest point in the hole, and that made it all crumble in from all around the circle, and in flowing into the center, why, of course, it took all the material away, or considerable of the material, away from around the piles, which was the support of the piles. 30

And at p. 55:

Q Did you report that situation to the Mayor and Council? A I took them down there. 40

Q Now, I show you—

The Court. Now, let us find out: Did you tell them about the situation? You took them down there; if they were not experts, they would not know anything more about it than they did before.

The Witness. I explained the situation to them, and then they asked me to meet them on the ground.

10

Q Asked you what, Mr. Blood? A To meet them on the ground.

Q And did you meet them on the ground? A Yes.

Q Well, what was done there at that meeting? A I was instructed to figure up and find out what the cost of this extra work would be.

Q Well, first about the—the first thing that you did, as I understand it, was to put some—order some sheathing put in? A Yes.

20

Q I show you paper marked October 14, 1916, order number two, addressed to Mr. Charles Ippolito, and signed by you. Was that an order given by you with regard to the sheathing after you had made this discovery of the quicksand? (handing paper to the witness). A (Referring.) Yes.

30

Mr. Davis. I offer in evidence the Order Number Two of October 14, 1916.

Mr. Morrison. Defendant objects on the ground that it does not purport to be—there is no authority by the Mayor and Council of the borough.

The Court. I will allow it to be followed up; if it is not connected, I will strike it out.

Mr. Morrison. Your Honor will allow me an exception?

The Court. Yes.

40

(Marked Exhibit P. 16.)

The Borough Council then ordered the engineer to make plans and specifications of the changes proposed to meet the emergency, which he did and presented them to the Mayor and Council at a meeting, and which they approved. (Case p. 57 and 58).

Charles Ippolito, the contractor, described the emergency, as follows:

(Case p. 113, l. 45 &c., and pp. 114 and 115).

Q How far had you gotten with the work under the original contract before any change was made? 10

A We were ready to concrete the foundation, the bottom of this tank.

Q Well, how far—what had you done? A As I recall the—we were supposed to start in concreting first thing in the morning, and as we started to pump the water out of the tank in itself, some quicksand began to run into it at the bottom, and the minute we discovered that, the inspector came along, and he saw the conditions there, and he ordered us not to go any farther until the engineer would come along and see the conditions of the bottom of that tank. 20

Q Well, now, did the engineer come then? A He came in about four or five hours.

Q What direction did he give you, if anything, as to the continuation of the work? A He simply told us to stop.

Q And did you stop? A I did.

Q How long did you remain stopped at that time?

A I should judge a couple of days. 30

Q And then what did you do? A Why, it was suggested by the engineer it—it would be best to lay a concrete mat on the bottom of the tank.

Q Well, yes. What is that, a concrete mat? A It is—that is a flat piece of concrete with re-enforced steel.

Q Yes. And what else were you to do? A And to re-sheath the whole tank because it required deeper sheathing in order to put in that concrete mat.

Q Well, just describe what is this concrete mat 40

you are talking about? A That is a concrete slab that is square, I should judge, about thirty-five feet square, and about a foot thick, with re-enforced concrete. It is to lay right at the bottom of the tank.

Q Over the spiles? A Over the spiles.

Q And then on top of that what was to go? A The original tank as it was designed.

Q Well, how long did you continue on that second direction of—or the first direction of Mr. Blood's?

A Why, two or three days.

10 Q And what happened then? A Then Blood came over and he saw the condition—that is, he looked into the condition further, and he simply said to stop work, "because I don't want this tank to have the—to have the same results as the Fairview tank has had."

Q Did he say what that was? A He said that the bottom of that tank out there had fallen apart.

Q That is, the bottom of the Fairview tank? A
20 The Fairview tank.

Q Was that an Imhoff tank? A Yes, sir.

Q About how many meetings, conferences, did you have with the Mayor and the Council and the attorney and the engineer? A About half a dozen, I should judge.

Q Generally in the evening? A Generally in the evening; yes, sir.

Q And what were those conferences about? A As to the change of the plan.

30 Q So far as the foundation was concerned? A So far as the foundation was concerned; yes, sir.

Q Now, Mr. Ippolito, will you just explain the conditions that were found down there in the bottom of this tank that brought about this matter of the strengthening of the foundation? A As we were ready to concrete and pump out all the water out of the tank, all of a sudden right at the bottom of the lowest point of the tank, of the excavated tank, force of water—that is what we call quicksand—started to
40 bulge up, and which quicksand is running sand and

water, and it wasn't safe to go ahead with any of that work.

Q To what extent did it affect the piles you had already driven? A Well, some of them was displaced in a few places.

Q And at these conferences that you had with the municipal authorities, what was the subject of the discussion? A The subject of the discussion was as to how to build this tank, that foundation of the tank.

Q Well, was anything said to the Mayor and the governing body as to what the difficulties were that were encountered? A Yes, sir; we told them. 10

Q Well, what did Mr. Blood or yourself tell them? A Mr. Blood had a sketch there showing the—this concrete mat laying on a new set of piles, and we went into the details as to the cost of the work, and at several meetings I stated that the work would amount to about ten thousand dollars to adopt that there—as to Mr. Blood's plan.

Q Did Mr. Blood state to the Mayor and the governing body in your presence what should be done? A Yes, sir. 20

Q In order to strengthen this foundation? A He did.

Q What did he say? A He told them that it required a new set of piles, and to lay on top of that pile a concrete mat.

Q Did he say anything as to the size of the spiles, or how far they should be driven? A Yes, sir.

Q Or anything else of that sort? A Yes, sir. 30

Q Well, now, won't you tell everything he said, as far as you can recall it? A As far as I recall it, he told them the piles should be thirty feet long and a greater size than the previous piles, and be driven at a greater depth.

Q Do you know how many he said there should be? A 104.

Q Do you remember whether he stated to the Mayor and the governing body whether or not he 40

thought it would be safe or unsafe to proceed without strengthening the foundation? A He did.

Q What did he say? A He told them it was unsafe to go ahead with the original contract.

Q For what reason? A For the reason of the foundation.

Q Now, how soon after you stopped work were these conferences with the Mayor, the town attorney, the governing body and the town engineer begun?

10 A About three days after, the Mayor and chairman of the sewer committee, and if I am not mistaken, Mr. Morrison was there, too, they came over and looked at the—right at the plant they were—and Mr. Blood.

Q Were you stopped at that time? A We were stopped previous to that, three days previous.

Q And when did you have your first meeting at the town hall, as you said a moment ago, with all of these town authorities on the subject of the change?

20 A I don't remember the exact date, but I must say that there were about six days after the stoppage of the work.

Q Did you tell them at the time that you had been stopped by the engineer? A I did, sir; yes, sir.

Q And then you had a session with these authorities about how frequently from that time down to the time that you started up again? A Why, every week. Every two or three days we would have
30 one.

Q Did the Mayor and the governing body ever come down to the job themselves to look at it?

A They did; yes, sir.

Q I am referring now to the period after the work was stopped? A They did.

Q And were you there at the time? A At one occasion I was, yes, sir.

Q Do you remember whether the engineer was with them or not? A He was.

40 Q Now, you remember the resolution being

passed, Mr. Ippolito, directing you to go on with the work; did you get from the engineer a plan at all, and specifications? A Yes, sir; I did.

Q Where is that plan? A It is right in that (indicating).

Q In here? A Yes, sir.

Q (Handing portfolio to the witness.) A This is the plan (indicating).

Q That plan was given to you by the engineer to work by, was it? A Yes, sir.

10

Superintendent Russell C. Olmstead testified as to the emergency as follows:

(Case p. 88, l. 34 &c.).

Q Now, when you got to that point, Mr. Olmstead, where the excavation was made and your spiles cut off, and everything ready to go ahead with the tank itself, what was there, if anything, that happened? A We were completing the final excavation. There was a small amount of material remaining before we started depositing concrete, and when we pumped the tank out to do that work, the water and quicksand had been filling in on one side of the tank, that is, it displaced—it had misplaced several of the piles on the lower circle and loosened several on the outer circle, and the form was in a very precarious position as far as placing any concrete.

20

Q Well, did you proceed with the work, or did you stop? A We proceeded with the work of excavation and notified the engineer, and he stopped the work when he arrived on the scene.

30

Q How long, then, was the work stopped for, about? A About three or four weeks, I believe.

All parties concerned were in agreement that the work called for by the above resolutions and the plans and specifications made by the engineer pursuant thereto, was not called for by the original plans and specifications, but was additional work provided for in the original contract on the "cost plus" basis."

40

The contractor was paid by the Borough on account of the additional work called for by the above two resolutions. It is sufficient to say that the contractor has been paid more than half of the work done under the above resolutions, by resolutions of the Borough Council upon certificates of the Borough Engineer (Case pp. 39-42).

For the balance due for the work done under these resolutions the plaintiff seeks to recover the sum of \$5,385.65 in Count No. 2 of the complaint.

10

AS TO COUNT NO. 3.

In the early course of the work, while the contractor was proceeding to build the sludge bed in accordance with the plans and specifications, the Engineer and Borough authorities determined to change the location of the sludge bed to another part of the site and construct the same with concrete sides instead of clay (Case p. 157). Thereupon at a meeting of the Mayor and Council, they directed the engineer in charge, Mr. Blood, to write to the plaintiff a letter (Case p. 157) on September 13, 1916, (Exhibit p 14 page 190, in language following: Known in the case as Order No. 1, C. p. 50, l. 33) :

20

Chas. F. Blood, C. E.
 Assoc. M. Am. Soc. C. E.
 Civil and Construction Engineer
 56 West 45th Street
 New York.

30

September 13th, 1916.

Mr. Chas. Ippolito, Gen. Contr.
 252 Main St.
 Orange, N. J.
 Dear Sir:—

40

In regard to your proposition for substituting concrete work in the sludge bed for the disposal Plant of the Borough of Ridgefield, N. J., in place of cinders, puddled clay, and embankment, I understand the agreement to be as follows:

190 cu. yds. cinders @ \$.75 per cu. yd.	\$142.50
90 cu. yds. puddled clay @ \$.50 "	45.00
200 cu. yds. embankment @ \$.40 "	80.00
	<hr/>
Total	\$267.50

This amount to be deducted from the original contract of \$10,300.00 and that you will put in all concrete at price bid under contingent extras for "Concrete not shown on drawings," forms left in place at price bid under contingent extras for "Forms for Concrete" and re-inforcing steel at five and one-half (5½) cents per pound. This arrangement is perfectly satisfactory with me and you may proceed with the work along these lines. 10

Yours truly,
CHAS. F. BLOOD C. E.
Eng'r in charge

Later, on November 1, 1916, the Engineer, Mr. Blood, approved the bill of Ippolito for the changes in the sludge bed for \$1846.86 (Exhibit P-15, Case p. 191). Of this amount eighty-five per cent. has been paid. 20

The provision of the contract as to the payment of the withheld 15 per cent. is found Case p. 9, l. 25 seq. one-half to be paid in three months and one-half six months after the date of the final approval of the completed work by the Mayor and Council. The Engineer approved the entire bill. as above, on Nov. 1, 1916. On March 15, 1917, the Borough ordered the plaintiff off the work and put an end to his contract because of uncertainty as to whether a gravity system was to be substituted for the Imhoff system Case p. 138 ll 18 seq. 31 seq. The present action was begun September 17, 1917. C. p. 1—test of summons. 30

As above stated, the Borough, by resolution, directed the Engineer to write the letter of Sept. 13, 1916, which made a deduction of \$267.50 from the original 40

contract price and provided that the additional work shall be paid for "at price bid under contingent extras." (C. p. 190, l. 30). The giving of this order of Sept. 13, 1916, is admitted by the defendant's pleading, as also the payment by the Borough of \$1,567.56, paid on account of the additional work called for by the contract so made with the plaintiff.

Paragraphs 2 and 3 of the Third Count C. p. 3, l. 2 are as follows:

10 2. On September 13, 1916, during the progress of said work, the said Borough Engineer ordered in writing the plaintiff to make certain changes on the sludge beds, forming a part of the said sewage disposal system, at a cost of \$1844.19.

3. The defendant paid plaintiff on account of said item the sum of \$1567.56.

At Case p. 25 the defendant answers the above as follows:

2. Defendant admits the second paragraph.

20 3. Defendant admits paragraph three.

The claim under Count No. 3 is for the difference between the agreed price for the additional work done on the sludge bed, \$1844.19, less the admitted payments on account, \$1567.56, to wit \$276.63.

AS TO COUNT NO. 4.

30 This Count raises a different question than that raised by Counts 2 and 3 or by Counts 5 and 6. It is a claim for the value of material belonging to the plaintiff, not incorporated in the work or included in estimate rendered by the plaintiff and not included in either the first count, or the second or third counts, and the answer of the defendant admits the appropriation and simply denies the value (Case p. 25) "2. Defendant denies that the value of the materials mentioned in paragraph two is \$2020.87 and admits the remaining allegations of said paragraph."

40 When the Borough authorities became uncertain as to whether they wanted to complete the Imhoff

system or build a gravity system, notwithstanding there was no complaint whatever that the work that the plaintiff had done was not done in an entirely satisfactory manner, he was ordered on March 15, 1917, off the job (Case pp. 129-133—see below) and was ordered to give a list of all materials he had on hand (Case p. 133) “which might be utilized if the suggested modification of the disposal plant is carried out” (Case p. 129, l. 38-40). The plaintiff furnished such a list (Case p. 135, l. 15). The value of this material is given at the bottom of p. 98 of the Case. 10

After having taken possession of all of this material left on the job, the Borough sold some and turned the proceeds into the Borough treasury (Case p. 162).

It is to be remembered that the stopping of the work was not due to any fault on the part of the contractor, but solely because the Borough contemplated a change in the sewer system. This appears clearly by the testimony of the Borough Engineer, Charles F. Blood, who had charge of the work (Case p. 61, l. 12-30), and the following correspondence Case pp. 206-211: (*Italics ours.*) 20

EXHIBIT P. 41.

BOROUGH OF RIDGEFIELD
NEW JERSEY

Ridgefield, N. J., March 3, 1917 30

Mr. Chas. Ippolito,
Contractor.

Dear Sir:—

Acting under the authority vested in me by the Borough Council, I hereby order you to proceed with the completion of that portion of the outlet sewer from the disposal plant yet remaining to be done.

As you have exhausted the appropriation made for extras on the disposal, you will have to cease work 40

on this until more money is appropriated *or a change in plan adopted.*

In the mean time, you can greatly facilitate matters by getting promptly in touch with Alexander Potter, Consulting Engineer, 50 Church Street, New York City, and give him a complete list of all material you have on hand, which might be utilized *if a suggested modification of the disposal plant is carried out.*

Yours very truly,

10

S. V. R. MARTLING,
Chairman, Sewer Committee.

EXHIBIT P. 42.

Res. Telephone 4332

Office Telephone 5062

CHARLES IPPOLITO

General Contractor

252 Main Street

20

Orange, N. J., March 3, 1917.

To the Mayor and Council of
Ridgefield, New Jersey, and to
S. V. R. Martling, Esq.,
Chairman of Sewer Committee,

Gentlemen:

I received to-day order in writing to shut down the work on the sewer disposal plant at Ridgefield. I take it that the shutting down is for an indefinite period, and I wish to hereby enter a formal protest against shutting down the work, and against the action of both the Mayor and Council, as well as the Sewer Committee in directing that the work should be shut down.

30

On February 3, 1917, I communicated with the Mayor and Council and the Engineer in writing, regarding the progress of the work, and in pursuance of such communication, the Mayor and Council passed a resolution on February 17, 1917, directing me to proceed with the work and to complete the

40

same. This resolution was passed after I had communicated in writing with the Borough Engineer, suggesting what in my opinion would be best and most economical for the Borough in the matter of the sewer disposal plant, and stating that the work could be continued with a very slight interruption by the construction of a shed over the work and heating the same, at a cost of about \$575; while the expense of shutting down the work would amount to about \$400 a week, which would include the overhead charges, plant, superintendent's wages, day and night watchmen; in addition to which, the working force would have to be disbanded and a new working force organized when the work would be resumed. 10

The difficulties surrounding the shutting down of the work at the present time after all arrangements have been made, and orders given so recently to proceed with it, and after I have made all arrangements to carry out the orders of the Borough Authorities, compel me to say that unless a distinct understanding is had, that I shall be fully paid for all losses which I *shall* sustain by the shutting down of the work, and shall not be held responsible in any way for inability to secure a proper working force on the resumption of operations, I would very much prefer that the Borough Authorities should pay me my bill up to the present time with a reasonable profit on the balance of the work to be done, and release me and cause a severance of contractual relations. 20 30

I have done everything in my power since I have begun work on this disposal plant, to perform the work in a workman-like manner, and to conduct myself in a business-like manner in dealing with the Borough. I, therefore, wish to enter a protest against shutting down, which can mean nothing but loss to myself and expense to the Borough.

In my opinion the shutting down of the work at this time will cause a large part of it to be done over 40

again if the Borough determines to carry out the present plan.

Respectfully yours,
CHAS. IPPOLITO

EXHIBIT P. 43.

Res. Telephone 4332 Office Telephone 5062

CHARLES IPPOLITO

General Contractor

252 Main Street

Orange, N. J., March 5, 1917.

10 S. V. R. Martling, Esq.,
Chairman of Sewer Committee,
Ridgefield, New Jersey.

Dear Sir:

Answering further your letter of March 3rd, I think it will be a great mistake to complete the outlet sewer from the Disposal Plant, at the present time. If this is done the water will back up into the plant, at every high tide, and of course, do a great deal of damage to the work already done.

20 If the sewer committee insists upon this being done, I will not be held responsible for the damage that will ensue.

Yours very truly,
CHAS. IPPOLITO

EXHIBIT P. 46.

BOROUGH OF RIDGEFIELD

NEW JERSEY

Ridgefield, N. J., March 8, 1917.

30 Mr. Chas. Ippolito,
Contractor.

Dear Sir:—

Acting under the authority vested in me by Borough Council and upon the recommendation of Mr. Alexander Potter, Consulting Engineer, 50 Church Street, New York City, I hereby order you to stop at once all work on disposal plant.

Yours very truly,
S. V. R. MARTLING

40

Chairman, Sewer Committee.

Was handed to me by Mr. Martling @ 10 A. M.
Mar 8/17

With him was Chief of Police
There were present Ziglor & Olmsted

EXHIBIT P. 47.

Res. Telephone 4332 Office Telephone 5062

CHARLES IPPOLITO

General Contractor

252 Main Street

Orange, N. J. March 9, 1917. 10

To the Mayor and Borough Council of Ridgefield:

This is to notify you that on March 8, 1917, I received notice in writing from the Chairman of the Sewer Committee notifying me to stop all work at once.

In pursuance of such order I have stopped work but desire to take this opportunity to notify you that I will not assume any obligation for any damage that may be sustained to work already done.

Respectfully yours, 20

EXHIBIT P. 44.

BOROUGH OF RIDGEFIELD

NEW JERSEY

Ridgefield, N. J., March 5th, 1917

THIS IS TO CERTIFY. That at a regular meeting of the Mayor and Council held on Wednesday evening, February 28th, 1917. it was:—

RESOLVED. That the Committee on Sewers be and is hereby authorized to order Charles Ippolito to suspend, until the next regular meeting of the Council, the work now being done under his contract with the Borough, if and when, in the opinion of Alexander Potter Consulting Engineer it shall be desirable so to do. 30

Attest.

(SEAL)

CHAS B WILSON

Borough Clerk. 40

EXHIBIT P. 45.

Res. Telephone 4332 Office Telephone 5062

CHARLES IPPOLITO

General Contractor

252 Main Street

Orange, N. J.

S. V. R. Martling Esq.

Chairman of sewer committee

Ridgefield N J

10

Dear Sir:—

Regarding the resolution passed by the Borough Council on Feb. 28th 1917 authorizing the sewer committee to direct me to stop work upon the order of Mr. Alex. Potter, Consulting Engineer

I wish to notify you that I have received no notice in writing or otherwise from Mr Potter to stop work. The resolution does not authorize any change in the plants of the work. I must therefore continue to follow out the old plans until council orders otherwise

20

Yours very truly

CHAS IPPOLITO

EXHIBIT P. 48.

BOROUGH OF RIDGEFIELD

NEW JERSEY

Ridgefield, N. J., March 15th, 1917

Mr, Charles Ippolito.

30

Main Street.

Orange. N. J.

Dear Sir:

I am instructed by the Mayor and Council to direct you to stop all work upon the disposal plant and to remove from the site of the work, forthwith, all of your plant and to render the borough a statement of the amount of material you now have on hand.

Very truly yours.

(SEAL)

40

CHAS B WILSON

Borough Clerk.

EXHIBIT P. 49.

Res. Telephone 4332 Office Telephone 5062

CHARLES IPPOLITO

General Contractor

252 Main Street

Orange, N. J. April 12, 1917.

To the Mayor and Common Council,
Borough of Ridgefield, New Jersey.

Gentlemen:

10

I beg to notify you, that pursuant to your order, I am about to dismantle my plant on the sewer disposal contract, and I expect to have my entire plant out of there within a few days.

I beg to notify you also, that there is on the premises, material delivered to be used in the said construction work, and that I do not intend to assume any liability over the said material against loss or damage which may arise by the elements of the weather, theft, or otherwise.

20

Of course, you understand that I am not dismantling my plant of my own volition but am doing so on your order to me in writing, as I have been at all times and I am still ready and willing to carry out my contract.

Very truly yours,

CHAS IPPOLITO

Copy to the Mayor & Mr Blood

AS TO COUNT NO. 5.

30

This Count and Count No. 6 relate to a totally different matter than Counts 2, 3 and 4. The claim made thereunder is for damages to the contractor for delays by acts of the Borough. The contract (Case p. 15) provides as follows: "Order of Procedure" "The Contractor shall begin and proceed with it only where directed and approved by the Engineer, who shall have the right to decide where and at what time each part of the work shall be undertaken and

40

continued, provided he enables the Contractor to keep his working force fully employed."

The Engineer ordered the Contractor to stop work on the foundation of the tank on September 23, 1916, (Case p. 89 l. 16). That stoppage continued until October 12, 1916 (Case pp. 89 & 90). This was while the Engineer and the Borough were considering what they would do in relation to the pile foundation. They began work again under what is known as Order Number Two (Case p. 92 l. 16 seq.). On
10 October 14, 1916, the Engineer again stopped them until the 9th of November (Case p. 93) when they again began the work under the specifications furnished by the Engineer in pursuance to the resolution of October 25, 1916, of the Borough Council.

During these stoppages, the first of 16 days and the second of 23 days, the Contractor was compelled to keep and did keep his force and plant at the job but unable to work (Case p. 91). The expense as
20 shown by the figures in the testimony of Olmstead (Case pp. 163-164) amounted to \$1709.20 (See also Case pp. 90-93).

AS TO COUNT NO. 6

On March 8, 1917 (Case p. 210, Ex. P. 46, quoted above) a notice was served upon the contractor to stop the work at once, which he did, and on March
30 15th, a week later, he was ordered to take his plant off the job (Case p. 211, Ex. P. 48). During the week from March 8th to March 15th the plaintiff's plant was idle and in the bill covering the period from March 1st to March 18th (Ex. P. 39, Case p. 204-205) are included the expenses incurred in maintaining his force and his plant during that week.

The contractor was about to remove his plant pursuant to the notice of March 15, 1917 (Ex. p. 48, Case p. 211) when the Engineer, Blood, who had
40 charge of the work under the contract and specifica-

tions directed him not to do so and stated that the work would shortly proceed.

Mr. Ippolito's testimony on this point (Case p. 136 l. 35, etc.) is as follows:

Q Now, after you got the order finally to get off the job and move your plant, did you get off immediately or not? A I did not, sir; no.

Q Why not? A Under the orders, verbal orders of Mr. Blood.

10

Q To what effect? What did he tell you? A He told me that the borough—that he intended to go ahead with the work and finish it up. It was only a case that there was a little fight there in the Council at the present time, and he expected that the work would be resumed.

Q. And you kept your plant there on that account? A. I did, sir; yes, sir.

20

Thereupon plaintiff maintained his plant on the work until he became satisfied that the Borough did not intend to go on with the work and then he removed it between April 17th and April 30th, and then for the cost of maintaining the plant on the ground up to April 17th, 1917, he rendered two bills, one from March 17th to March 31st amounting to \$657.02 (Ex. P. 30, Case p. 193), and another bill bringing the account down to April 17, 1917, of \$1240.26 (Ex. P. 31, Case p. 194).

30

As already stated, the testimony under the first count was permitted to go to the jury and a verdict was rendered the plaintiff which covered only the work done under the original plans and specifications. None of the evidence to sustain the remaining counts went to the jury.

A motion was made on the close of the plaintiff's case to strike out the testimony (Case p. 169 l. 40 & pp. seq.) and at p. 185 l. 48 the Court converted that motion into a non-suit and granted a non-suit

40

on all counts except the first count, which sought to recover for work done on the original plans and specifications.

LAW.

The point in the present case is the propriety, under the testimony in the plaintiff's case set forth in the record and referred to and epitomized above, of the granting of the motion for non-suit on all the
 10 counts in the complaint excepting the first count.

The motion was to strike out the plaintiff's testimony. This the Circuit Court passed upon as a motion to non-suit (Case p. 185 l. 48).

It is not disputed that the plaintiff's bid was the lowest bid under the notice to bidders, proposal and specifications, all constituting part of the contract, and all prepared by the Borough (Case pp. 8 to 23). But it is claimed that the provision for payment on
 20 the basis of cost plus 15%, as to work not covered by the original plans and specifications and by the "contingent extras" (See Case p. 170-120 seq.) made the bidding non-competitive and the entire contract void.

This contention was based upon the three cases referred to in the argument on the motion (Case pp. 169-185).

Browning vs. Freeholders of Bergen County,
 79 N. J. L. 494;

30 Hill Dredging Company vs. Ventnor City,
 77 N. J. E. 467;

Eckert vs. Town of West Orange, 90 N. J. L. 545.

It was claimed that, under these cases, no recovery could be had on any part of the contract. The Court without giving its reasons, permitted the first Count to go to the jury and non-suited as to the rest, evidently holding that under the law, the lump bid was competitive and the contract to that extent valid,
 40 under P. L. 1912, p. 543, which requires competitive

bidding and the letting of the contract to the lowest bidder.

The cases referred to, and other cases in this State do not warrant the action taken. *Hill Dredging vs. Ventnor City*, relates solely to the power of a municipality to grant the privilege to lay pipe in or upon a public street.

Browning vs. Freeholders of Bergen, instead of being an authority in favor of the defendant is an authority in favor of the plaintiff. This Court there held that by virtue of the manipulations of the bids by the engineer, the bid instead of being awarded to the lowest bidder was in fact awarded to the highest bidder. It further held that the competitive feature of the proposal was the bidding invited *for the entire work as specified*, and that where there was such competition on the entire work as specified, it was entirely proper to call for unit prices as to unforeseen work, as a protective measure for the benefit of the contracting municipality. The language of the Court at page 497, is as follows:

“While there is nothing in the statute that expressly authorizes a call for these unit prices, the demand for them, as a protective measure, to the public in the event of modification of the work to be done by the contractor, is entirely unobjectionable. Clearly this was the only purpose for such a demand as expressed in the present proposal. The competitive feature of the proposal was the bids (called in the proposal “lump sum” bids) which each bidder was required to make for the completion of the entire work according to the plans and specifications exhibited to all alike; the call for unit prices, on the other hand, was a protective measure in view of possible demands that might be made upon the successful bidder when he should have become the contractor, for modifications, in the details of the contract, presumably not yet determined upon by the board

and certainly not disclosed to the bidders, or to all of them alike."

Eckert vs. West Orange, 90 N. J. L. 545, declared invalid a contract to collect and dispose of ashes and garbage, requiring the expenditure of over \$500 because there had been no advertisements for bids whatever.

10 Under the Browning case, the contract in the present case is valid because it was let to the lowest bidder for the work called for by the plans and specifications. The provision as to "Contingent Extras" calling for bids of specified quantities, were competitive under all the decided cases. The insertion in the "Proposal" of the provision that where the work was not included under the plans and specifications, nor under the "Contingent Extras," it should be paid for at cost plus 15%, was entirely a proper protective
20 measure to insert in the "Proposal" for the protection of the municipality. These terms are all embodied in the uniform "Proposal" prepared by the Borough and submitted to the bidders. Under the Browning case, therefore, the granting of the motion to non-suit on the Second and Third Counts was erroneous.

The leading cases in New Jersey bearing on this subject in addition to those above referred to, are the following:

30 Case v. Trenton, 76 N. J. L., 696;
Hornung v. West New York, 82 N. J. L., 266;
Mackinnon v. Newark, 100 Atl. Rep., 694.

The latest case we have found in this State is Thompson v. East Orange, Sup. Ct. Opinion filed February 19, 1919, and at this time pending in this Court. In that case the contract did not embody the provision contained in the contract in this case.

40 In Case vs. Trenton, supra, this Court held that the statutory provision, such as is involved here, required that all the bidders should be put upon the

same footing. That was clearly the situation in the present case, where the "proposal" was the same for all the bidders.

In *Hornung vs. West New York*, supra, the bidding was held not competitive because of the varying time of completion and the provision for an allowance based on such varying time.

In *Mackinnon vs. Newark*, supra, the contract was vitiated because different specifications were given to the different bidders.

As already said the cases above cited are barren of even a suggestion that a "Proposal" such as is involved in the present case made the bidding non-competitive. 10

Judged by the standard of good sense it would be an astonishing thing if a municipality is prevented from protecting itself by providing in its contract that, if there arose a necessity for work, additional to that specified and necessary for the accomplishment of the purpose of the improvement, that as to such unforeseen work it shall pay for it on the cost-plus basis. 20

The contract under consideration only protected the municipality as to such unforeseen contingencies. After providing for a lump sum bid for the work called for by the plans and specifications and for "Contingent Extras," it further protected itself by providing that as to the "Contingent Extras" that it might have the option to pay for them either at the unit bid for "Contingent Extras" or at cost plus 15%, whichever was the most advantageous to the Borough, and that any further unforeseen work should be paid for at cost plus 15%. 30

It would be an astonishing state of law if, after securing the competitive bidding on the work shown by the plans and specifications, and competitive bidding on "Contingent Extras" a municipal contract was void because a clause was inserted in the "Proposal," submitted to all the bidders, which thus wisely limited the cost of any further unforeseen 40

work necessary to complete the improvement designed, to cost plus 15%. Our own decisions held no such doctrine, but on the contrary, in the Browning case this Court declared that such a feature was not only unobjectionable but was proper as protective of the municipality.

Our examination of authorities elsewhere has not revealed a case in which such a contract has been declared void, but we have found cases in which such a contract has been valid.

10 In *Clark vs. City of Pittsburg*, the Supreme Court of Pennsylvania, 66 Atl. Rep, at page 154 said:

20 "A contract of a city of the second class for the construction of a reservoir, providing that the contractor shall do such extra work as the director of public works shall require, and shall be paid a reasonable cost, plus 10% for profits, and the use of tools, etc., was not in violation of Act May 23, 1874 (P. L. 230) and Act March 7, 1901 (P. L. 20), requiring contracts of cities to be awarded to the lowest responsible bidder."

At page 155 the Court said:

30 "This provision, limiting the compensation to be paid for extra work, was known to all bidders, from the lowest responsible one to the highest, and was, of course, taken into consideration by them in submitting their proposals; and it contravenes neither the letter nor the spirit of the act of 1874 or 1901. The contract itself was awarded to the lowest responsible bidder, and having been for the construction of a reservoir more than likely to require, from time to time, necessary extra work not definitely provided for in the contract, because not to be foreseen when it was executed, it would have been improvident on the part of the city not to have inserted the provision limiting the amount to be paid to the contractor for the same. By fixing the limitation on the amount to be paid for extra work that might be required, the city did about all it could have done to protect itself from imposition by the contractor in doing such work. It announced to the bidders, 40 through its advertisement, what would be the defin-

ite basis of compensation for the same, and in bidding on the general work they knew exactly what profit there would be in the incidents to it, designated as extra work. If the city should not be permitted to insert in a contract for municipal improvements a provision for the payment for extra work becoming necessary as the general work progresses, but must always award the same to the lowest responsible bidder, after advertisement for proposals, there would be inevitable delay in the completion of the work called for in the contract with no certainty of any saving to the city, but with likelihood of greater cost than if the extra work were done under a provision similar to the one in this contract; and, if each item of extra work should be awarded to a separate bidder, the confusion to follow in the general work may be well imagined, even if the imagination of the distinguished counsel for appellee is stretched in likening it in his brief to 'the confusion of tongues that occurred in the construction of the Tower of Babel.'

10

In *Allen vs. Rogers*, 20 Mo. Appl. Rep. 294, a bidding was upheld and a contract based thereon, under a statute like ours, where a "proposal" was that the competitors "might be required to do such extra work in connection with his contract as the street commissioner might specially direct and if it should be of a kind for which no price was stated in the contract the price should be fixed by the commissioner." It was argued that no bidder could know with a certainty, under such a proposal, the amount and quantity of extra work he might be required to do, or the price at which he might be required to do it and that a proposal of such an indefinite nature must necessarily have the effect of stifling competition and preventing persons from bidding who were not in the confidence of the officials having control of the work.

20

30

The Court upheld the contract and said:

"The fact that such a clause is in the contract and thus made a part of the proposal, would not probably have the effect of deterring bidders and preventing competition."

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In *Harrison v. City of Tampa*, 247 Fed. p. 569, it was held that:

10 “Where the original contract for the construction of a sewer, which was valid, authorized modifications, and they were made pursuant to that clause, failure of the municipality to advertise the modifications did not render the contract as modified, invalid, and hence a plea in an action on the contract, as modified, setting up that the modifications were invalid because made without advertisement, is defective and subject to demurrer.”

20 There are a number of cases laying down the broader doctrine that under a contract making no provisions for the ascertainment of the cost of additional work where in the progress of the improvement the necessity of additional work, not covered by the plans and specifications, appears, it is not necessary to advertise for competitive bids under a statute such as we have in this state. The cases which we shall refer to point out the consequences that would happen if the law required such bidding and an independent contractor was thrust into the middle of the construction to do the additional work, under a bid lower than the original contractor, and they point out the embarrassment that would arise and the impossibility of carrying out municipal contracts on such a construction of the statute, and hold that such additional work is not within the statute.

30 In *Alsmeier v. Adams*, 105 N. E. 1033, the Court said:

40 “The argument carried out leads to the conclusion that, if any substantial part of such an improvement should prove to be impossible of performance by reason of unforeseen obstacles encountered in the progress of the work, the board would have no authority to arrange with the contractor for the completion of the contract by the use of some process other than that specified, even though the results from the substitution would be eminently satisfactory. Thus, applying the argument, should the water difficulties be such as to interfere with the construc-

tion of but 100 feet or 10 feet of the sewer by such monolithic process, the board would not be warranted in authorizing such 100 feet or 10 feet to be built by some other process, just as good, but would be required to stop the work and adopt new specifications, etc., for such portion of the sewer. It cannot be said that the board has authority of a certain nature and scope when the affected part of the sewer is of a certain length and an absence of authority or authority of a different nature or scope when the affected part is of a different length. Hence, carrying the argument to its legitimate conclusion, although the unforeseen difficulties should interfere with the specified construction of but a comparatively inconsiderable portion of the sewer, the board would be required to re-advertise, etc., rather than authorize the completion of the work by some other satisfactory process. The argument advanced does not appeal to us as sound." 10

Smith v. Sanitary District of Chicago, 108 Ill. App. 69. In the course of the work to be done under the contract there considered, it became necessary to do additional work in the form of building embankments. Speaking of this point the Court said: 20

"The amount involved in a change or extra work does not determine whether the work comes under the inhibition of the sanitary district act, as is illustrated in this very case—a proposed change from dry rubble wall to a cement wall. The construction of these embankments was treated by the parties as extra work which became necessary and for which the parties had a right to stipulate under the reserved power in the original contract. 30

"The parties to this contract were confronted with this situation: The necessity of the embankments over sections 14 and 15 was not anticipated, but later become apparent. * * * It was found that this necessary work could be completed over section 14 without cost to the District, by adding but sixteen cents per yard for the material necessary to extend the embankment over section 15. Under the powers reserved in the contract and owing to the nature of the work, it is our opinion that it may properly be classed under the head of necessary and extra work, for the doing of which ample power was reserved in 40

the contract, and was incident to the very character of the undertaking. We are, therefore, of the opinion that the evidence bearing upon the issues in the case involving the embankments should have been submitted to the jury."

In *City of Chicago v. McKechney*, 91 Ill. App. 458, the Court said:

10 "A change of direction in the tunnel and a change in depth might not under ordinary conditions make a material change in the cost of the work. It was because the formation of the underlying strata proved to be such that, as there is evidence tending to show, a new material not considered by either party when the bids were made and the contract awarded, was unexpectedly encountered. This was more expensive material in which to construct the tunnel. The alterations which brought the tunnel into this material did therefore increase the expense, but this did not annul the original agreement and it became the duty of the commissioner to 'determine the value of the work so added.'

20 "To have re-advertised and let a new contract, the work having been partly finished, new conditions arising for which the contractors were not responsible, would have been impracticable. It would have involved a practical abandonment of the contract, exposed the city to payment of damages, created confusion, litigation and delay. The emergency which had arisen was incidental to the prosecution of the work. * * * The arrangement was not a new contract for new work within the meaning of the statute to cost more than \$500. It was an agreement to pay a certain extra sum per cubic yard for excavation and extra masonry so long as the tunnel should continue in that particular material, which was apparently uncertain."

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In *Meyers v. Wood*, 173, Mo. App. 564, 158 S. W. 909, a public improvement contract provided that the sewer contemplated should be built along the center of Main Street. While the work was in progress, the contractor encountered extensive deposits of limestone and high pressure water and gas mains. For the work to proceed further along such a street

40 would have necessitated blasting to such an extent

as to be very expensive, and there would have been danger of bursting said water and gas mains, for the consequent damage to which the contractor would have been required to pay. In consideration of the situation, the City Council authorized the contractor to detour the sewer around through an alley, a distance of 1100 feet. In a direct proceeding, brought by the property owners to cancel the tax bill issued on account of said improvement, arguments were advanced in support of the proceeding, substantially the same as here, to the effect that the acceptance of the sewer was void, because the City Council exceeding its power in authorizing the change in route; that there should have been a new ordinance, a re-advertisement, and a reletting; that, had it been known that the sewer was to be built through the alley than along the street, perhaps there would have been other bidders, etc., and that as a consequence the property owners were deprived of the benefit of competitive bidding, etc. In sustaining the action of the City Council the Court said:—

“These contentions all raise but one question, and that is concerning the power of the city and its officials in making the change to the alley instead of requiring the contract to be carried out and the sewer built along Main Street.

* * * * *

“Certain latitude in judgment must in all public improvement be left to the officials, who are intrusted with the power of seeing that it is done. There is no reason to allow them a discretion or the exercise of their judgment, where the thing which they change was and could be definitely known at the time of the letting of the contract. There is a reason, as before stated, why they should be allowed to exercise their judgment when they are dealing with a subject which necessarily develops unknown conditions and predicaments as the work progresses.

* * * * *

“To our minds such change was merely a variation of the plans as originally made, which variation was made to overcome the difficulties found to

exist on Main Street, and such an exercise of judgment would not for one moment be questioned, were it made between private persons. The sewer as constructed served every purpose and use intended under the ordinance and contract as originally made. * * * After all, it must be borne in mind that contractors and city authorities are only human; and they should be held to no higher duty in the use of good sense or good judgment than the ordinary run of men. The opinions holding that strict compliance with the law is necessary in order to bind the taxpayer on a special tax bill, as we read them, mean a substantial, sensible, business-like, compliance—a practical rather than a theoretical compliance—and courts should view these relations as practical men rather than as theorists.”

In Board of Comm. v. Gibson, 63 N. E. 982, at 985, the Court said:

“Appellant contends that its demurrer to each paragraph of the complaint should have been sustained for the reason that, as it must have been known that the proposed work would cost to exceed \$500, the board should have caused plans and specifications thereof to be prepared, and given notice of its purpose to let a contract for such construction, in accordance with the statute then in force. Sections 4243, 4244, Rev. St. 1881. This is practically an effort to set up the defense of ultra vires to a contract that has been fully executed by the opposite party. Such a claim, when, *ex aequo et bono*, the corporation ought to pay, is odious. The statute referred to was intended as a safeguard of the public interest, and we are disposed to enforce it according to its spirit. We do not think, however, that it was intended to apply to a case like this, where a sudden and unforeseen emergency confronts a board of commissioners after it has regularly let a contract for a public building, and where it is to be desired to avoid delay, and not to put a new contractor on the work, but to have the work continued by the general contractor for the construction of the building. In such a case, where it can be said that the new work is but an incident of a work before regularly contracted for, and where it does not appear that the act of the parties was a mere effort to evade the statute, we do not think that the statute is applicable.”

In a situation, such as existed in the present case, when there arose the emergency, shown by the above State of Facts, good sense justified the application of the provision inserted in the "Proposal" protecting the Borough by fixing the price of the additional work at cost plus 15%.

In all the cases where there was a provision in the contract *fixing the price* for unforeseen additional work to be done under a contract, courts have uniformly held the contract not void because non-competitive.

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The cases last above referred to hold that even where there is *no provision in the contract* fixing the price of such additional work, nevertheless in an emergency, such as existed in the present case, the statute does not apply and a contract may be made with the original contractor to do the additional work to meet the emergency, without advertising for bids.

The law is settled that even an *original* contract is not within the statute and advertisement for competitive bids is not necessary to the making of a contract by the Municipality where the work is called for by an emergency.

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Dillon on Municipal Corporations, 5th Ed. Sec. 802, at page 1200, discussing this subject, says:

"Emergency has been recognized as a ground for the exception. The nature of an emergency which will justify the making of a contract without advertisement and competitive bidding is illustrated by the necessity of preventing a city from being left in darkness through failure to light its streets, etc.

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* * * But every supposed emergency will not be considered as furnishing an excuse for failing to comply with the terms of the statute. If it is possible for the Municipal authorities to meet the emergency and protect the city interests whilst still observing the forms prescribed by law, then the provisions of the statute must be complied with. The correct rule is that the Municipal authorities have power to meet any emergency which may exist without complying with charter provisions requiring advertisement, but they must satisfy themselves and be able to satisfy

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the courts that the emergency is such as to prevent them from complying with these provisions."

The cases last above referred to, which point out the impracticability, when in the midst of the performance of a contract of injecting a new contractor under a competitive bidding for the additional work called for to meet the emergency, have done no more than to apply to such a situation the doctrine already established in regard to making an *original* contract
10 without regard to the statute where an emergency exists.

It has been stated again and again that the purpose of the statute is to secure for the Municipality its improvements at the lowest possible cost and to prevent dealings, after a contract is made, between contractors and officials, by which the city may be mulcted.

The statute under settled rules would always be considered in the light of evils to be remedied there-
20 by. In the present case the "Proposal" and contract provided a fixed price for every possible contingency that might arise in the completion of the Disposal Plant.

The contract cannot be assailed as exposing the Municipality to any of the evils sought to be overcome by the statute.

The additional work done, for which recovery is sought on the Second Count and Third Count, was
30 ordered on the recommendation of the Engineer by formal resolutions of the Borough. The Borough fully recognized the emergency that had arisen and provided for it in accordance with the provisions of the "Proposal" common to all the bidders.

Under the authorities in this State; under the doctrine of the cases cited, holding distinctly that such a provision as is here attacked, does not prevent competitive bidding; under the citations above as to the consequences of denying the Municipality the
40 right to agree with the contractor to do the addi-

tional work required to meet an emergency, it seems to us that the non-suit ordered on the Second and Third Counts, for the additional work ordered by the Municipality and done by the contractor, was erroneous.

Under the doctrine on which these non-suits were rested, it would be practically impossible for a Municipality to meet an emergency unprovided for by plans and specifications of a contract. The Municipality would have to stop the work, call for bids, which under our statute P. L. 1912, p. 593, requires two weeks' advertisement, and then have another contractor, who was the successful bidder, injected into the middle of the work, subject itself to the original contractor for the delay, and when the intervening contractor had finished his work, have the original contractor go on and complete it. Such a result seems to be a complete argument *ab inconvenienti*.

The testimony in the case makes it evident, that but for the ruling on the question of law there was evidence for the plaintiff that would take the case to the jury.

As to the non-suit on Counts No. 4, No. 5 and No. 6, the Trial Court gave no reasons for granting the non-suit as to these Counts. We do not see, even if it could have been correctly held that the contract as to the additional work on which Counts 2 and 3, discussed above, were based, was void because there were no competitive bids as to such additional work, how that could affect the claim of the plaintiff, if established by facts, for his materials appropriated by the Municipality without payment therefor; or how it could have affected any claim he established for damages occasioned by delay caused by the Municipality; or his claim for damages arising by interference, on the part of the Municipality, with the removal of his plant from the job.

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As to Count No. 4, the evidence cited above, shows that certain property, lumber, cracked stone, etc., owned by the contractor, not included in any claim under the contract, or for the additional work on his part, was appropriated by the Municipality, and a part of it sold and the money turned into the Borough Treasury, and another portion, consisting of stone, used by the Borough in the repair of its streets and the balance still held by the Borough as its property. On this Count and on the evidence produced on behalf of the plaintiff, which would have carried the case to a jury, the Court ordered a non-suit. A case presenting much the same situation is *City of Elgin vs. Joslyn*, 26 N. E. 1090, last clause of opinion on page 1092. There, "when the plaintiff quit the work begun by him, he left in the hands of the City certain material, tools and machinery. The materials were used and the tools and machinery were destroyed by the City in the completion of the work." The Court sustained judgment for the plaintiff. Under the facts proven in the case and cited above under the heading "Facts," the judgment of non-suit on this Count was erroneous.

As to Count No. 5, we do not see how any legal invalidity of the contract, if such exists, as to the additional work, could affect the liability of the Borough for delay it caused the contractor in the performance of the work called for by the plans and specifications bid upon. The express provisions of the contract (Case 15, l. 8) are that the Engineer would have the right to decide where and at what time each part of the work was to be undertaken and continued, provided "*he enables the contractor to keep his working force fully employed.*" The evidence shows that the delay of a month or more was occasioned by the action of the Engineer and Borough, cited in the "Facts" above, and shows the cost to the contractor of this delay.

The law seems to be settled that for such delay the City is liable—

“The City is liable in damages to a contractor for preventing him from completing an improvement or for losses caused to him by its fault or neglect and in case the contractor is delayed by the default of the City he may abandon the work or claim damages caused by the City’s fault.”

28 Cyc. 1058.

This seems to state the settled law. Where a Municipality by its action causes the work to be done by the contractor to be more expensive than it would be, as called for by the terms of his contract, it is liable for the additional expense. 10

Sheehan vs. Pittsburgh, 62 Atl. Rep. 642;
 Mayor & Council of Baltimore vs. Clark, 97
 Atl. Rep. 911;
 Marshall vs. City of San Antonio, Texas, 63
 S. W. 138;
 Messenger vs. Buffalo, 21 N. Y. 196; 20
 Holland vs. Mayor &c. 130 N. Y. 631; 20 N.
 E. 856.

Under the cases and evidence, this Count should have gone to the jury and the non-suit is erroneous.

As to Count No. 6, we do not see how any legal invalidity of the contract, if such exists, as to the additional work could affect the liability of the Borough for damages resulting from retaining the plaintiff’s plant upon the work, and keeping it idle. 30
 It was thus idle from March 18 to March 31 or later, and the damages to the plaintiff were shown by the evidence. The plant was retained there after the notice from Borough Clerk (Case p. 211-Ex. P. 18) by virtue of the order of Mr. Blood, Engineer in charge, quoted in the above “Statement of Facts.” Under the specifications, the Engineer had the power to give orders to the contractor as to what part of the work should be undertaken and continued, and where it 40

should be undertaken and continued (Case p. 15, l. 10). Pursuant to the direction of Engineer Blood, who acted under the direction or the authority given him in the contract, the contractor kept his plant idle, and on the work, with damage resulting to him as above set forth.

Under the authorities quoted above in the discussion as to Count No. 5 the evidence on this Count should have gone to the jury and non-suit was therefore erroneous.

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We respectfully submit that the record shows that there was evidence that should have gone to the jury on each of the Counts, and that the judgment of non-suit on each of these Counts should be reversed.

HOWE & DAVIS,

Attorneys of Plaintiff.

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EDWARD M. COLIE,

of Counsel.

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N. J. Court of Errors and Appeals

CHARLES IPPOLITO,
Plaintiff-Appellant,

VS.

BOROUGH OF RIDGEFIELD,
Defendant-Respondent.

On Appeal.

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REPLY TO RESPONDENT'S BRIEF.

Respondent's brief makes the following admissions:—

1. That the appellant was the lowest bidder for the work called for by the "Proposal, (Brief p. 8, l. 30) where it is stated, referring to the lump bid, "which was the lowest competitive bid."

2. That the unit price bid for "Contingent Extras" was a competitive bid, (Brief p. 6, l. 2-10), which is undoubtedly settled law. 20

3. That the respondent broke the contract and stopped the work (Brief p. 2, l. 5 and p. 18, l. 33), where it is stated that the contract was "broken by respondent."

4. That the plaintiff's contract required appellant to build the sewage plant complete "in accordance with the original plans and specifications" (Brief p. 3, l. 25 and 26).

The Respondent's Brief ignores:— 30

1. The law established in the cases cited in the principal brief of appellant, holding that where additional work is required by reason of unforeseen emergency arising in the progress of the work, the contract need not be interrupted and competitive bids procured for such additional work required to meet the emergency.

2. The doctrine laid down in *Clark v. Pittsburg*, (appellant's Brief p. 30), where it was held that a 40

contract providing that the contractor shall do such extra work as shall be required, and shall be paid for the same, the reasonable cost plus 10%, is not in violation of a statute requiring contracts to be awarded to the lowest responsible bidder.

3. The doctrine laid down in *Smith v. Sanitary District of Chicago*, (Appellant's Brief p. 33, l. 23, seq.), where it is held that "the *amount* involved in a change or extra work does not determine whether the work comes under the inhibition of the law."

10 4. The doctrine laid down in *Browning v. Freeholders*, (Appellant's Brief p. 27), that the competitive feature is the bid on the entire work; and that it is entirely proper for a municipality to protect itself by calling for unit prices without specific quantities, which is in all respects akin to cost plus 15%.

20 5. The doctrine laid down in *Clark v. Pittsburg*, (Appellant's Brief p. 30), that where you have a "cost plus" clause in a contract, for the protection of a municipality, it does not make the bidding non-competitive, because, as stated in that case, "This provision, limiting the compensation to be paid for extra work, was known to all bidders, from the lowest responsible one to the highest, and was, of course, taken into consideration by them in submitting their proposals; and it contravenes neither the letter nor the spirit of the act, etc."

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COUNTS 2 AND 3.

The respondent's brief, as does the entire record, shows conclusively that the Borough of Ridgefield encountered in the building of this disposal works, an actual emergency calling for immediate action to prevent a catastrophe to the Imhoff tank like that which befell the Imhoff tank at Fairview. There is no suggestion in the Brief or in the Case, but
40 that the action of all the parties was in perfect good

faith, in the effort to meet the impending emergency.

It must be remembered that the only change made, so far as the Imhoff tank was concerned, was to strengthen the foundation to make certain that it would support the tank as originally designed. The large cost was occasioned by the point in the work at which the emergency appeared. Had it appeared before the original foundation was completed, it would have been a simple matter, but appearing as it did, after the original foundation was practically completed, it required the entire removal of the work already done, and the building of the strengthened foundation, consisting of 104 piles, larger and stronger than the first piles, and driven by jetting as well as by using a steam hammer.

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A like situation would be this: If a public building, such as a city hall or court house, in course of construction under contract awarded to the lowest bidder, were designed with a roof to carry a dome, and when the roof was completed, it was discovered it was not strong enough to carry the dome, and the first roof had to be taken down and a more substantial one erected, it is readily seen that the cost of the building would be largely increased. Could it, in such case, be contended that the contract for taking down the first roof and putting up the new roof would have to be let by competitive bidding, and the original contractor be compelled to stop his work and hold his working force until a new contractor had taken down the old roof and put up the new, and then erect the dome on the new and stronger roof?

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Under the Freeholders act, there is a like provision in relation to competitive bidding. If a barge should run into a drawbridge, and so injure it as to stop all traffic over the bridge and on the river, through the draw, could it be contended that the Freeholders must advertise for bids for the specified

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period and let the contract for repairs to the lowest bidder?

If a contractor laying a pavement in a public street, as the lowest competitive bidder, encountered the emergency of a bursting water main,—through no fault of his,—could it be contended that the municipality would have to hold up the work and the repair of the damage until it advertised for and secured bids, if the cost exceeded \$500?

10 Such is not the law. The statute does not apply in such a case.

Appellant's Brief, p. 37, citing Dillon, states that "emergency has been recognized as a ground for the exception" for the making of an *original* municipal contract without advertising and competitive bidding.

Respondent's Brief, p. 11, quotes from Eckert v. West Orange, as applicable to the present case. We have pointed out in our Principal Brief, that the
20 Eckert case has no relation to this case.

There is no danger of the doctrine contended for by the appellant, opening the door to evasion or nullification of the statute relating to competitive bidding, for wherever there does not appear an actual emergency the doctrine contended for does not apply. The doctrine is illustrated by the cases cited in our Principal Brief. Here, in setting up this defence, the municipality is acting in bad faith, having recognized the existence of the emergency, passed the
30 resolutions directing the work to be done, permitted the contractor to spend his money, it now sets up the statute, and ignores the emergency theretofore recognized by its resolutions.

On p. 12 of Respondent's Brief, the case of Gillen v. Spring Lake is referred to. It has no bearing upon any phase of the question now before this Court, but construed a statute relating to the adoption by the voters of a sewerage system.

40 On p. 11, l. 4 of Respondent's Brief, it is said "they (the Borough) abandoned the original plan." This

is repeated p. 13, l. 24. The Borough did not, in fact, do any such thing. They merely took out the old foundation and put in a new one for the purpose of carrying out the original plan of building an Imhoff tank.

In relation to Count 3, the Respondent's Brief states, p. 12, seq., as follows:—

“This count is for labor and materials furnished in constructing the sludge beds of reinforced concrete instead of cinders sealed with clay; the change having been ordered by respondent's Engineer after the contract was made, involving an expenditure of \$1,885.17.

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“The order (P14) makes reference to appellant's unit price bid under contingent extras for concrete and for timber for forms, and fixes a price for reinforcing steel without reference to the bid in any way whatever, obviously because there was no price for steel fixed by appellant's bid. These prices for concrete and timber do not support this count because they were prices bid for contingent extras on the work as originally planned and bid upon, and not for concrete and forms for an entirely different kind of structure.”

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This relates to the sludge bed, and the change there also was occasioned by an undisputed emergency. There was no change in the size or shape of the sludge bed, but in the materials of which it was composed. Such emergencies were provided for by the bids for given quantities of “Contingent Extras,” and the contract by that provision, as well as the provision in relation to work other than “Contingent Extras,” to be paid for at cost plus 15%, obligated the contractor to do such additional work for the compensation provided in the contract wherever an emergency required such work in order to complete the Imhoff disposal works. The price for re-inforced steel was fixed by the contract at cost plus 15%. But on pp. 13 and 14 Respondent's Brief speculates as to what it was “conceivable,” that contractors might have done if they had been able to foresee these

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emergencies. Such speculations cannot be indulged in under well settled rules.

The foregoing disposes of that portion of Respondent's Brief which discusses Counts 2 and 3.

COUNT 4.

Respondent's Brief, on p. 15, discusses Count 4 of the complaint. The discussion there would lead to the conclusion that there was a jury question. It is argued that this claim was included in Count 1. It could not have been, because it is made the subject of a separate count,—Count 4,—the subject matter of which was materials which would have been left over after the completion of the job, to the point where the contract was broken and the work stopped by the action of the Borough, without any fault of the contractor. It was "salvage" (Case p. 98) and when appropriated by the Borough, as it unquestionably was, its value could be recovered upon a *quantum meruit*, under well settled principles.

COUNT 5

Respondent's Brief p. 15, discusses Count 5. Of course it is well settled as shown in our Principal Brief p. 40 seq., that the contractor can recover for delays occasioned by municipal action and without fault on his part.

Respondent's Brief (p. 17, l. 10) carries the doctrine contended for by the Respondent to its legitimate conclusion and says that the plaintiff cannot recover under this count for delay, because "no price for wages of employees and rental of apparatus by reason of delays, is fixed by the competitive bids."

"To hold respondent liable on this count would be to admit its power to pay for furnishing such materials, supplies and labor without fixing a price by competition as required by the statute. This would permit a municipal board so inclined to evade the legislative mandate by increasing the price fixed by competition by the device of delaying the work from

time to time and paying either the reasonable value or a price fixed by agreement without competition."

The above appears to bring the argument pretty close to *reductio ad absurdam*.

COUNT 6.

Respondent's Brief pp. 17 and 18, discusses Count 6. It is in error as to dates. On March 3 (not 31) the appellant was instructed to stop work on the foundation of the tank and proceed with the outfall from the tank to the river. He did not decline to go on with the outfall, but suggested the inadvisability of it. He was ordered, on March 8, to stop all work, and on March 15 to remove his plant from the job. The correspondence and notices are set out in full on p. 17 seq. of appellant's Principal Brief and Case p. 206-211. 10

He was entitled to recover for the delay. We have argued in our Principal Brief (pp. 41 and 42) that he was required to follow the orders of the Borough Engineer. 20

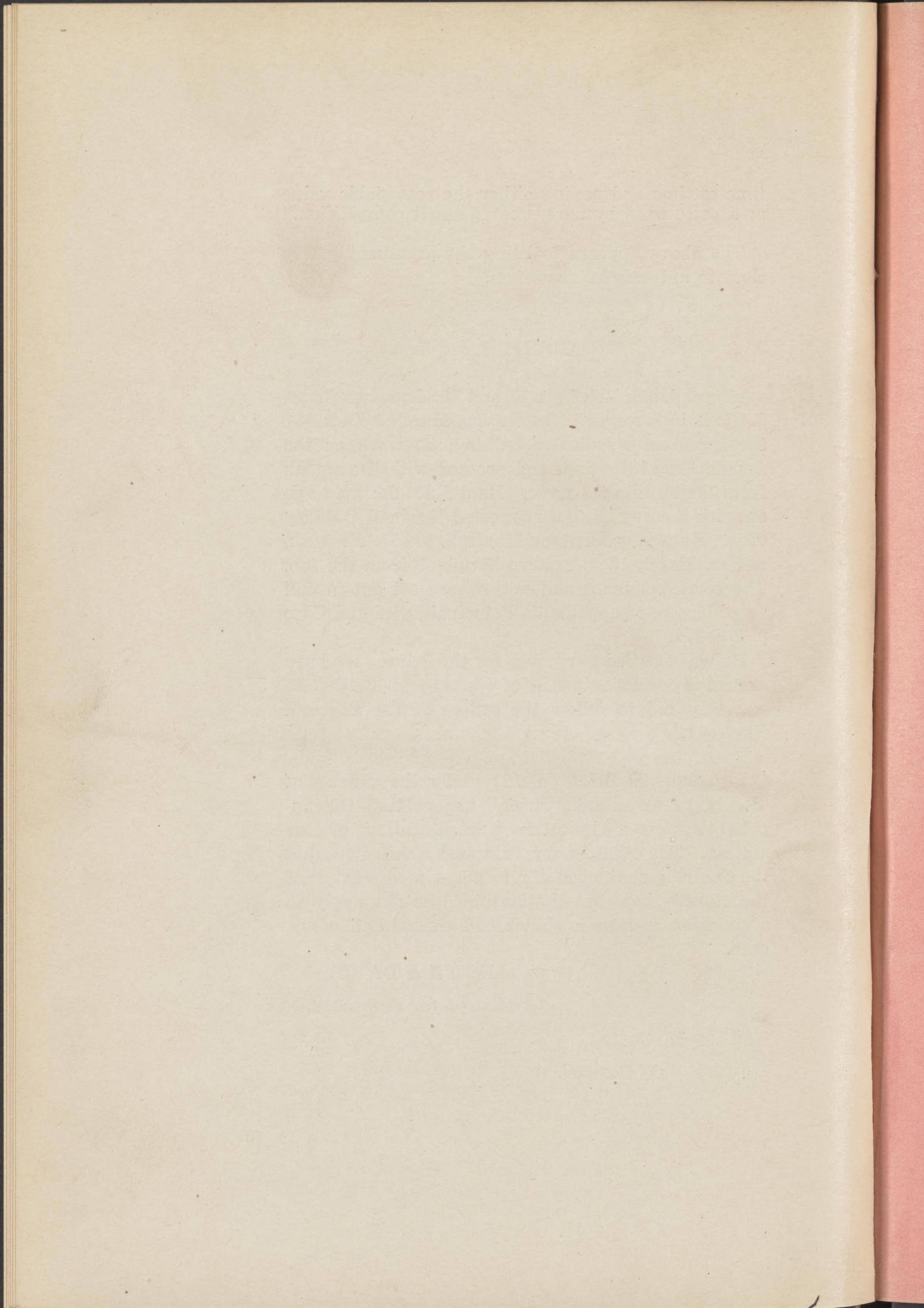
Respondent's Brief (p. 19) under the caption of "Reply to Appellant's Brief," argues that the appellant's view amounts to a modification of the statute. The cases in our Principal Brief show that the doctrine contended for is not a modification of the statute, but that the statute does not apply to a situation such as is shown to have existed in this case. 30

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