

# N. J. Court of Errors and Appeals.

LINO MARTINEZ,

Plaintiff in Error,  
(Plaintiff below.)

vs.

WILLIAM RUNKLE ET AL., ADMIN-  
ISTRATORS, &c.,

Defendants in Error.  
(Defendants below.)

On Error.

WILLIAM RUNKLE ET AL., ADMIN-  
ISTRATORS, &c.,

Plaintiffs in Error,  
vs.

LINO MARTINEZ,

Defendant in Error.

On Error.

## BRIEF FOR LINO MARTINEZ, THE PLAINTIFF BELOW.

This suit was commenced in July, 1890. The declaration alleges a contract made on November 2d, 1881, between Lino Martinez, the plaintiff, who was a Spaniard, then living in New York, but who had formerly lived and practiced

law at Havana, Cuba, and Daniel Runkle, a wealthy contractor, who resided at Asbury, Warren county, New Jersey, under the terms of which contract Martinez was to go to Havana, at his own expense, and there, as the representative of Runkle, use all lawful means and give such time and attention as might be necessary for the purpose of obtaining from the municipal authorities of Havana for Runkle, or for such parties as should be named by him and in his interest, a contract for the erection and construction of water works for the purpose of supplying the city of Havana with water.

The contract referred to in the declaration, which is *Exhibit P 1*, page 94a, recited that "it is supposed that said city will issue for that [the water works] and other purposes connected therewith its bonds to the amount and of the face value of about \$6,500,000," and that the sum of \$2,200,000 is to be paid by said city out of the sum realized by it from the sale of said bonds to the person or persons to whom the contract for the construction of the water works should be awarded. The contract between Martinez and Runkle then provided that if the contract for the water works should be awarded to Runkle, or to parties named by him, or in his interest, he would pay to Martinez the sum of \$175,000 in manner following: Out of the payments made to Runkle, or persons in his interest, by the city, for the erection of the water works, an amount in the same proportion to the amount as received by him as the whole amount of \$175,000 is to the sum of \$2,200,000. The declaration then alleges that Martinez carried out the agreements on his part, proceeded to Havana at his own expense, and there, as the representative of Runkle, gave his time and attention to the employment of all lawful means for obtaining, and did on March 28th, 1882, obtain for Runkle and three other persons named by him and in his interest, to wit, Edward C. Maddison, Walter H. Gilson and James H. Lyle, the contract for the construction of the water works for the sum of \$2,200,000. The declaration then avers that Runkle thereafter failed to carry out the contract for the water works, and did not undertake or begin their construc-

tion, but forfeited all rights under the contract with the city, and on August 4th, 1884, procured a cancellation of said contract, for the purpose and with the efficacy of exonerating himself from the losses and liabilities incurred to the city of Havana by his failure to carry out the contract. The declaration further charges that Runkle, by reason of his failure to perform, by his own act and omission, put it out of his power to receive the sum of \$2,200,000 agreed to be paid him, and out of which sum he had agreed to pay Martinez \$175,000, and that by said forfeiture Runkle committed a breach of his contract with Martinez as to the part wherein he agreed to pay the latter \$175,000 out of the payments to be made to him by the city for the construction of the water works. The amount of damages laid in the declaration is \$200,000, and the insistent on the part of the plaintiff is that the measure of damages is the amount of the plaintiff's loss, \$175,000 and interest.

The pleas are as follows :

1. *Non est factum.* 2. That Martinez did not carry out his agreements and did not procure for Runkle and his associates the contract for the water works. 3. That Runkle did not fail to carry out the contract with the city and did not request or procure a cancellation of the same. 4. That Runkle was ready to carry out the contract with the city, but that it was canceled by consent of all parties thereto or interested therein, including the plaintiff. 5. That Runkle did not, by failure, forfeiture or cancellation or by his own acts or omissions, put it out of his power to receive the \$2,200,000, or that out of that sum he had covenanted to pay to Martinez the amount alleged in the declaration. 6. That "the covenant or agreement in said declaration mentioned and each and every part thereof was rescinded, canceled and set aside by the mutual consent of the said plaintiff and this defendant." 7. That the contract for the construction of the water works was canceled at the instance and request and with the consent and by the procurement of the plaintiff.

After the pleas were filed Danied Runkle died, and the necessary proceedings were taken to have the suit proceed

against his sons, William Runkle and Henry G. Runkle, as administrators.

The replication takes issue on all the pleas, and on the issues so framed the cause was tried at the April Term, 1893, of the Warren Circuit, before Justice Abbett and a jury, and resulted in a verdict for the plaintiff for \$17,500, found under the charge of the Judge that under certain aspects of the case a verdict for the plaintiff might be rendered for a less sum than the amount claimed on his part as the measure of damages. Judgment on this verdict was entered June 6th, 1893. Page 15, line 11. From this judgment both parties have taken writs of error.

The evidence on the part of the plaintiff was altogether documentary with the exception of the examination of a witness as to the accuracy of the translations of the documents, nearly all of which are in the Spanish language. The following is a summary of the plaintiff's evidence:

The contract between Martinez and Runkle is *P 1*, and appears on page 94a.

*P 2*, page 94d, is a translation of the advertisement of the city of Havana for bids for the contract, published March 14th, 1882, in the "Havana Gazette." This advertisement shows the scheme under which the contract for the works was to be given. The bidding is for a loan to the city of \$5,600,000 (page 99), to pay (1) to the credit of the Spanish Bank \$3,272,982.85; (2) the cost of the water works, \$2,199,144, and (3) cost of taxes incurred by mortgage and issue of bonds and expenses connected therewith. This statement is contained in what is called "Fundamental provisions for the loan." Page 99. The amount was to be paid by the successful bidder in either of two ways, (1) by deposit in specie in the municipal treasury or to the order thereof in the hands of a responsible banker, or (2) by the lender himself undertaking to apply the same to the purposes set forth and to construct the works as contractor. Page 99, lines 22 to 30. The premium of the loan or rate of issue was to be eighty per cent. of the nominal capital, and upon that the bidding was to take place. Page 99, line 38. The advertisement also contains the two forms

of proposal to be used by bidders (pages 97, 98), one to take the loan at a certain rate and pay the cash, and the other to take the loan at a certain rate and apply the amount to the purposes declared in the first fundamental provision (*i. e.* payment to Spanish Bank), and in constructing the water works. The advertisement also contained the conditions of sale (page 95, line 23), which was to take place on March 28th, 1882. One of these conditions was that each proposal must be accompanied by proper document showing that a deposit had been made in the municipal treasury of three per cent. of the estimated amount of the works—that is to say, the sum of \$64,000. Page 95, line 34. The advertisement also contains (page 103) the bases for the execution of the works of storage and distribution of the water.

It must here be recalled that the contract between Runkle and Martinez recited that it was proposed to issue bonds by the city, and out of the proceeds to pay for the water works (*Exhibit P 1*, page 94a, line 21), and it appears by the next exhibit and others following, that it was concluded on behalf of Runkle and his associates to bid for the loan in the form of proposal No. 2, in the advertisement, which included the construction of the water works by the bidder.

The next exhibit is *P 5*, which is the translation of the award of contract for the loan and water works on March 28th, 1882. Page 107. This paper recites the proceedings at the sale, the handing in of two proposals, the opening of the same in accordance with the advertised conditions, and that the first one opened proved to be that of Don Emetrio Zorilla, who had deposited bonds to the amount of \$64,000, and who bid for the loan on his own account at the rate of eighty-one and one sixty-fourth per cent. in the form of proposal No. 2, including the construction of the water works, but imposing a condition that the management of the mortgaged property and revenues should be turned over to him. The second proposal was also in the form of proposal No. 2, and was from Don Lino Martinez on behalf of Messieurs Henry J. Overman, representing E. C. Maddison, of London, and Walter H. Gilson, in his own right and as

representing Messrs. Daniel Runkle and James H. Lyles, of New York (page 109, line 30), and it provided that they (the persons on whose behalf Martinez bid), jointly and severally agree to take said loan for their own account at the rate of eighty-one and one thirty-fifth per cent., they themselves applying that sum to the purposes set forth in the first condition, and constructing the works according to the estimates, &c. The proposal also contained a ratification of the same by the persons on whose behalf Martinez made the bid. Page 110, line 24. This document then recites that the bid of Martinez is more advantageous to the city, and that the bid of Zorilla contains a condition which cannot be acceded to, and that it is resolved by the committee to award the loan to the persons represented by Martinez, subject to the approval of the Council. That Martinez presented himself and accepted the award on behalf of the persons before mentioned. Page 111, line 2. It further recites that the proceedings of the committee as to the award were reported to the Municipal Council, and that the body made a decree in accordance. Pages 112, 113.

In connection with this award should be considered *Exhibit P 11*, which is the translation of a Spanish document called the deposit agreement. Page 128, line 30. This is executed between Martinez of the first part and Gilson for himself and as representing Runkle and Lyles of the second part, is dated March 27th, 1882, the day before the bidding, and provides that Martinez deposit \$64,000 as the guarantee required in the bidding for the loan on behalf of Gilson, Runkle, Lyles and Maddison & Company, and that Gilson, Runkle and Lyles undertake to deliver the above sum to Martinez whenever he may ask for it, if it should be demanded by the city in consequence of their not having carried out the contracts for the water works, or should be retained by the city for any cause. It also provides that Gilson, Runkle and Lyles as a remuneration, and for the payment of interest to Martinez for the said deposit, assign to him the amount of \$25,000 out of the amounts as they are paid for the works, and adds this is without prejudice to any other agreement between the parties.

Next in order of time is *Exhibit P 12* (page 130), called the agreement of severance. This agreement is executed between Maddison & Company, bankers of London, by Henry J. Overman, their attorney, of the first part, and Gilson of the second part, and Lyles of the third part, and Runkle of the fourth part, and bears date April 15th, 1882. This is signed by Runkle in person, and not by attorney. It recites that the parties have undertaken to procure the loan to the city of Havana of \$5,600,000, and to erect the water works, and that proposals to that end have been submitted by the parties to the municipal authorities and have been accepted by them, and that it has been agreed that said enterprise and award shall be severed as between the parties, so that Maddison & Company shall alone make or procure the loan of \$5,600,000, and Gilson, Lyles and Runkle shall alone undertake the erection of the water works. It then recites (page 131, line 16) that in pursuance of such arrangement Gilson, Lyles and Runkle have taken from the city a contract for the erection of the water works, and Maddison & Company have taken a contract for the procuring of the loan, but this recital was only a statement in advance of what the parties expected to do with the city—they never did sever so far as the city was concerned, and doubtless for the reason that the city authorities refused to permit it. The agreement formally provides for the severance as between themselves, Maddison & Company to undertake the loan, and Gilson, Lyles and Runkle to erect the water works. Pages 131-133.

Up to this point we have the documents evidencing the obtaining by Runkle and his associates, through Martinez acting in their behalf, of the contract for the loan and water works, and the division, as between themselves, of the two parts of the contract or award.

The lawful obtaining of this award was the performance by Martinez of his contract with Runkle. *Exhibit P 1*.

The next document in order of time is *Exhibit P 9* (page 118), which is the translation of four powers of attorney. Of these the first in date is that of March 6th, 1884, from Runkle and Lyles, individually, and as a member of Lyles

and Gilson to Martinez, and is No. 4 of *Exhibit P 9*, appearing on page 126, line 29. This recites that Runkle and Lyles, as contractors for the loan and water works, together with Gilson and Maddison & Company, give to Martnez power to do whatever may be required to withdraw, suspend and cancel the adjudication of said loan and incidents, and to withdraw, collect and receive the deposit of \$64,000 which was made with the city, that the grantors may be freed from said loan and its incidents and from all burden and responsibility in the matter. The next power of attorney is No. 3 of *Exhibit P 9* (page 123), and is dated June 26th, 1884, from Gilson to Dr. Jose Manuel Mestre, of Havana. It recites the award and the deposit of \$64,000, and that Maddison has transferred to Gilson all his interest under the award, and that it is agreeable to the interests of the contracting parties to rescind the contract and withdraw the deposit, and gives power to Mestre to execute all measures and proceedings that may become necessary to rescind or cancel the award for the loan and water works.

As will appear from the next exhibit to be considered, these powers were not regarded by the city authorities as sufficiently full, in that they did not contain a clause authorizing the attorneys to declare that both parties should be left free from all responsibility under the rescinded contract, and therefore two other powers were issued, one from Runkle and Lyles to Mestre and Martinez, dated July 24th, 1884, and the other from Gilson individually and as assignee of Maddison to Mestre and Martinez, dated July 25th, 1884. These are Nos. 1 and 2 of *Exhibit P 9*. Pages 118, 120. These powers ratify the former powers and provide for freeing all contracting parties from all liabilities upon the contract being rescinded.

Next in order is the document *Exhibit P 7* (page 114), which is the translation of what is called the rescission of the award and is dated August 4th, 1884. It should be noted that while this is called a rescission it is in fact nothing more nor less, so far as Runkle and his associates were concerned, than a release from liabilities already incurred by reason of non-performance of their contract. This

document recites a resolution of the Municipal Council made July 10th, 1884, providing for a rescission of the loan and water works contract and returning the amount deposited upon the contracting parties being mutually declared free of all responsibility under the contract as rescinded, and that Messrs. Martinez and Mestre had presented powers of attorney which, in the opinion of the Mayor, were insufficient in that they did not obtain a clause authorizing the attorneys to make the declaration as to both parties being left free of all responsibility under the rescinded contract, and that Martinez and Mestre had applied for new powers ratifying the former ones and providing for mutual releases, which new powers, under date of July 24th and 25th, were afterwards presented. It then recites that in view of the foregoing, the Mayor representing the municipality on the one part and Mestre and Martinez representing Runkle, Lyles and Gilson of the other part, rescind the contract for the loan, the \$64,000 deposited being returned and both parties being, as they now mutually declare one another to be, free of all responsibility on account of the contract so rescinded.

This completes the evidence on the part of the plaintiff, and these documents standing alone prove this state of facts: Martinez, as required by his contract with Runkle, went to Havana, and there, as his agent and legal representative, was awarded the contract for the construction of the water works, the loan for \$5,600,000 being also so awarded, and afterwards accepted, adopted and ratified by Runkle. It is contended by the defendant that this is not the contract he was to procure under his agreement with Runkle, because the award procured was for the making of the loan as well as the construction of the works; but, as before stated, the agreement with Runkle referred to the loan as being the source from which the money to build the works was to be procured, and it is clear from the documents, and particularly from the agreement of severance, signed by Runkle in person, that this award was accepted by him as a practical performance by Martinez of his agreement. From the powers of attorney to procure the release of all the parties

from liability for non-performance, and from the document showing the actual rescission, it abundantly appears that Runkle and his associates did not perform what was required by the contract with the city, did not construct the water works, and there is no dispute in the case that there was no attempt on the part of Runkle and his associates to construct the water works within the time required by the condition of their contract with the city, or at any time, and therefore by their neglect or inaction, which is to be deemed his, his liability to Martinez became fixed, because that neglect or failure made it impossible for the money to be received out of which the amount of \$175,000 was to be paid to Martinez by the terms of his contract with Runkle, *Exhibit P 1*. The evidence therefore shows performance by Martinez and conduct amounting to breach by Runkle, and unless there is something in the evidence produced on the part of the defendant which relieves Runkle either wholly or partially, he became liable in damages to the extent of Martinez' loss, to wit, \$175,000 and interest.

By the second request to charge the Justice was asked to instruct the jury that the measure of damages should be the amount agreed upon by *Exhibit P 1* as plaintiff's compensation. This was refused (page 67, line 7), and the refusal is the subject of the second assignment of error Page 75, line 11. The charge on this subject will be hereafter considered, but the point now urged is that unless the evidence shows something to relieve Runkle either wholly or partially, the measure of damages is the full amount of the plaintiff's loss—the amount that he would have received if Runkle had performed his contract.

The damages should be commensurate with the plaintiff's loss or injury.

2 Greenl. Evid. (Redf. Ed.), § 253.

Sedgwick Measure of Damages 27.

The measure of damages for the breach of a contract for services is the amount of compensation agreed upon.

5 Am. and Eng. Encyclopædia of Law 35.

Where an agent for an agreed commission found a purchaser for land at a stipulated price and the principal declined to sell, the measure of damages was held to be the whole commission.

*Prickett v. Badger*, 1 C. B. (N. S.) 296.

*Kock v. Emmerling*, 22 How. (U. S.) 69.

And see *Moses v. Bierling*, 31 N. Y. 462.

*Doty v. Miller*, 43 Barb. 529.

*Pearson v. Mason*, 120 Mass. 53.

We come now to the consideration of the question as to whether there is anything in the evidence produced on the part of the defendant which can relieve Runkle, in any degree, from this liability, and we will discuss the various documents produced by the defendant in connection with the charge of the Justice concerning them, and which is brought up by the eighth assignment of error.

The assignments of error on the part of the plaintiff are on page 75.

The first assignment is on account of the refusal of the Justice to charge the jury that the failure of Runkle to construct the water works could not deprive Martinez of his right to compensation for obtaining the contract. The second assignment is on the question of the measure of damages above discussed. The third assignment is, that he refused to charge that interest should be allowed from the time of Runkle's failure to construct the works. The fourth assignment is, that he refused to charge the jury that Martinez, by acting as attorney in fact for Runkle in the matter of the rescission two years, four months and six days after the award, in no way forfeited his rights under the contract of November 2d, 1881, for damages. The fifth assignment is, that he refused to charge the jury that the action of the plaintiff, as attorney in fact in the rescission, was not an assent to the failure of Runkle to perform the contract for the erection of the water works. The sixth assignment is, that he refused to charge the jury that the action of the plaintiff in reference to the rescission was the act of Runkle, and was not the individual act of Martinez.

The seventh assignment is, that he refused to charge that the purpose of the rescission was to save from the effects of the failure the deposit made with the city, and to exempt the contractor from any claims for damages by the city.

All these requests were either refused or were charged subject to the modifications appearing in the charge, and as that portion of the charge is the subject of our eighth assignment of error, it will be convenient to discuss all these matters under that assignment. The ninth, tenth, eleventh and twelfth assignments, appearing on page 78, are also connected with that part of the charge and bring up specific exceptions to the construction by the court of various documents introduced by the defendant.

The eighth assignment (page 75, line 38) is that the Justice erred in his charge relating to the rescission in leaving it for the jury to determine whether the rescission was the sole work of Runkle and his associates, or whether it was for the benefit also of the plaintiff, and charging them that if it was for the benefit also of the plaintiff, he could not recover the compensation named in the contract.

In this connection the Judge reviewed the exhibits of the defendant. He said (page 55, line 33): "Was this rescission the sole work of Mr. Runkle or his associates, or was it at the request and at the instance of and for the benefit of the plaintiff as well as for the benefit of the defendant and his associates? Upon this question I desire to call your attention to the exhibits with reference to the rescission of the contract." He then discusses the exhibits of the defendant, and, after considering them, charges the jury (see page 60, lines 3-17, and lines 31-40) that if, under all the testimony, they should find that the rescission was procured at the plaintiff's request, and for his advantage as well as for the defendant, then Runkle could not be charged with the \$175,000.

Before considering these exhibits it should first be remembered that it is not claimed by the plaintiff, and is not the fact, that the rescission had anything whatever to do with Runkle's failure to receive the amount out of which he agreed to pay Martinez \$175,000. His failure to receive

this was because he failed to carry out his contract with the city. The award was given March 28th, 1882. The work was to have been commenced within three months. No work was commenced. The rescission was August 4th, 1884, more than two years after Runkle's failure to even commence the performance of his contract with the city. The rescission had nothing whatever to do with his failure to perform, except to release Runkle from his liability to the city in consequence of such failure. This fact seems to have been entirely lost sight of by the Justice.

The first of the defendant's exhibits considered by the Justice in this connection is *Exhibit D 13*. Page 151. This is a letter from Martinez to Emmett R. Olcott, a New York lawyer. It is dated March 27th, 1884. In it he says he understands Olcott was concerned in drawing powers of attorney for the rescission of the contract, and urges the necessity of having the powers "in order to save the deposit of \$64,000 that I made to make the proposal to such loan, and that was guaranteed by contract March 27th, 1882." Thus he urges that Runkle send the powers of attorney so that the \$64,000 may be obtained from the city, as unless it should be so obtained Runkle would be liable to him for that amount under the contract of March 27th, 1882. *Exhibit P 10*, page 128. In this letter Martinez states that Mr. Mestre, who, it will be recalled, was the person to whom power of attorney to act in the rescission was given jointly with Martinez, and who was Olcott's partner, had asked him for a letter, declaring "that I do not propose to avail myself of the rescission of any right to my own advantage, and also that I release the contractors from all liability therein," and he adds, "I have not had any question in telling it to him, since I have not to their prejudice any plan, project or idea of other business negotiations."

He uses the expression, "I release the contractors from all liability." Can there be any mistake about the meaning of this? There was only one liability that the contractors had incurred to Martinez; that was under the contract of March 27th, 1882, to pay him \$25,000 as interest and for his expenses, &c., and also for the return of the \$64,000 in

case the city retained it. Mestre desired a statement in writing that he would release the contractors, and he, as he states, is entirely willing to do so. This expression of the letters cannot bear the construction attempted to be given to it by the defendant, that it was a release to Runkle from his liability on the contract sued on. The context shows that he is referring solely to the \$64,000, and the liability of the contractors who signed the agreement of March 27th, 1882.

He adds also in this letter, "I have not to their prejudice any plan, project or idea of other business negotiations." What this means is left somewhat to inference, but there is that in the case from which the inference can readily be drawn. It is suggested in the case in the cross-examination of Olcott at pages 43, 44 and 45, that there were other negotiations under consideration by some one. Olcott is asked (page 43, line 16) whether after the rescission the firm of Runkle, Smith & Company did not build the works. He is protected from answering by an objection. This objection, however (page 41, line 19), suggests what the fact was, that the works were afterwards built by the corporation, not firm, of which Runkle was a member, namely, Runkle, Smith & Company. However, at page 44, line 20, he says, "Mr. Gilson had intimated that Mr. Martinez had ideas of other negotiations for his own benefit exclusively." It is only a fair inference that Runkle had at this time in view the idea of under some other arrangement building the water works, and it having been believed that Martinez might have some idea of negotiations looking to the same end which would interfere, he makes this statement to set that matter at rest.

He also says in this letter, "If I do not have the powers I have asked for in time, that is, of all the contractors, I will find myself in the unfortunate but necessary position of enforcing my rights." That is to say, if the powers are not received so that the deposit can be obtained from the city, he will be compelled to enforce his rights under the agreement with the contractors of March 27th, 1882.

The letter to Mestre referred to is *Exhibit D 16* (page 154), and is of the same date as the letter to Olcott. This

letter contains expressions to the same effect as those in the letter to Olcott. The expression as to the release from liability, as it appears in this translation, is, "I release the contractors represented by you from all ulterior liability as to the *obligation* from the moment in which the contract for the loan being rescinded, the \$64,000 in gold of the deposit have been recovered by me." This translation is that made by the defendant's witness Olcott, and as appears from his cross-examination (at page 37, line 12) by Mr. Fuller, the Spanish word "*fianza*," which he translates "*obligation*," might be translated "*guarantee*." Page 37, line 35. And (on page 38, at line 25) he is asked, "Could a deposit of \$64,000, to secure the contract, be a *fianza*?" and he answers "Yes." This, Mr. Fuller suggests, is the proper translation. Olcott says he considers that "*obligation*" is its meaning here because it is a word "thrown in without any context." Page 38, line 1. Thus, according to his own idea, if the context would show that an undertaking might be referred to, this would be the proper translation. In this light there is no difficulty in ascertaining the true translation, as the context clearly shows that Martinez was referring to something connected with the deposit of the \$64,000, and it is perfectly clear that what he releases the contractors from is their liability under the deposit agreement; and he particularly refers to the deposit agreement, saying that if the powers are delayed the contractors will be liable for the damages that may result (that is, to the city if the rescission is not procured), "besides that stipulated in the contract of March 27th, 1882." But again, assuming "*obligation*" to be the proper translation of "*fianza*," Martinez says he releases the contractors (plural) from the obligation (singular). Therefore, it could not include any obligation of an individual contractor such as the agreement sued on, and the deposit agreement is the only obligation the contractors together incurred to him.

These two letters, with the others hereafter considered, are referred to in the charge as furnishing light to the jury on the question whether Martinez "wanted the rescission and urged it, and whether it was for his interest." What

do they show? A desire to have the \$64,000 which he had deposited with the city authorities returned, and that is the extent of it. As he states, unless it is returned by the city he will be compelled to hold Runkle and his associates for it under their contract of March 27th, 1882, and nothing is more natural than his desire, in their interest, that the \$64,000 which had become forfeited by the failure to erect the works should be returned and saved to his principal, Mr. Runkle. But how does this in any way affect the question of his recovery against Runkle under the contract, *Exhibit P 1*?

When Runkle failed to perform his contract with the city he became liable to Martinez for the \$175,000 named in his agreement with him. How can it be possible that the fact that Martinez afterward aided Runkle in becoming released from his liability to the city for his failure, can in any way affect Runkle's liability to Martinez under their agreement, fulfilled by him two years and six months before? Can it be that because he acted under the power, for Runkle, in obtaining his release from one liability to the city, that act relieved Runkle from another entirely distinct, anterior, fixed liability to Martinez himself? The Judge, in this same connection, next alludes to *Exhibit D 17* (page 155), which is a letter from Martinez to Runkle under date of April 19th, 1884. In this he alludes to the danger of delays in sending powers, "because if the municipality should change their minds the deposit would be in peril to be lost," and he adds that if the deposit is forfeited he would have to blame the postponers of the powers for the troubles and difficulties that may arise. This letter is precisely in the same line. He was giving the contractors clearly to understand that if, by their delay or inaction, the deposit should not be returned to him he would be compelled to hold them under the contract of March 27th, 1882.

The Judge then refers to *Exhibits D 19, D 20 and D 22* (pages 156, 157), which are telegrams from Martinez in reference to sending the additional powers of attorney suggested by the city authorities. He then takes up *Exhibit*

*D 11*, page 150. This is a letter from Martinez to Lyles, dated March 8th, 1884. From this letter it is apparent that there was some difficulty about the power of attorney from Gilson. This will be referred to hereafter, but in this letter Martinez says that he does not know whether Mr. Gilson sends the power or not, and he suggests that Mr. Runkle use his influence with Gilson to get the power of attorney. Prior to this time, and, indeed, shortly after the award was made, Gilson had become solely interested in the loan part of the award by transfer from Maddison. *Exhibit D 8*, page 141. In this letter Martinez suggests why it is that Gilson ought to have no reason for delaying the power. He says "he must know by this time that there is no hope to save the business," and says that if Gilson does not send the powers "it is because he feels pleasure in causing me prejudice as a reward for all my sacrifices." This, undoubtedly, refers to matters between Gilson and Martinez which had no connection in any way with the deposit. As Gilson had taken from Maddison all his interest in the loan which the agreement of severance had given him, it is doubtless the fact that upon taking upon himself that part of the contract he became, as between the contractors themselves, free from responsibility, as Maddison had been, for the water works part, and had therefore little or no interest in the return by the city of the \$64,000, which by the deposit agreement the contractors had undertaken to pay to Martinez in case it should be retained by the city "in consequence of their not having carried out the contracts for the water works." The \$64,000, it must be borne in mind, was connected with the water works; it was, as stated in the conditions (page 95, line 37), three per cent. of the estimated amount of the works. It is quite probable, therefore, that Gilson showed little interest in this matter. And besides, the fact appears that Runkle was financially responsible, and as to Gilson, the evidence indicates otherwise. But Martinez suggests in this letter to Lyles that Gilson ought to know there is no hope to save the business, and if he does not send the power, it is because he feels pleasure in causing him "prejudice," not loss.—Gilson knew Martinez was pro-

tected by the deposit agreement, but prejudice in reputation among the people of Havana.

The one other matter referred by the Judge in his charge concerning the interest of Martinez in the rescission is the testimony of Olcott as to the payment made by Runkle to Gilson in order to get him to sign the powers of attorney. Olcott's story appears on pages 40, 41 and 42. The substance is this, that in order to induce Gilson to execute the powers of attorney Runkle was required by Gilson to pay him \$10,000, part of which sum, \$3,000, was paid in cash, and the balance was represented by promissory notes, which were afterwards paid, the notes reading, as appears by *Exhibit D 23* (page 157), that they were payable "four months after the surrender and payment to Lino Martinez of the deposit of \$64,000." Now what does this show? As suggested above, Gilson had no interest at this time in the return of the \$64,000; Runkle had—he was liable to Martinez for it if it was retained by the city. Runkle was so desirous of relieving himself of the possible necessity of paying the \$64,000, that he acceded to the terms imposed by Gilson and paid him, through Olcott, the \$10,000 required. But he was careful to provide as to the \$7,000 not paid in cash, that it should be payable only in the event that the \$64,000 should be returned by the city to Martinez.

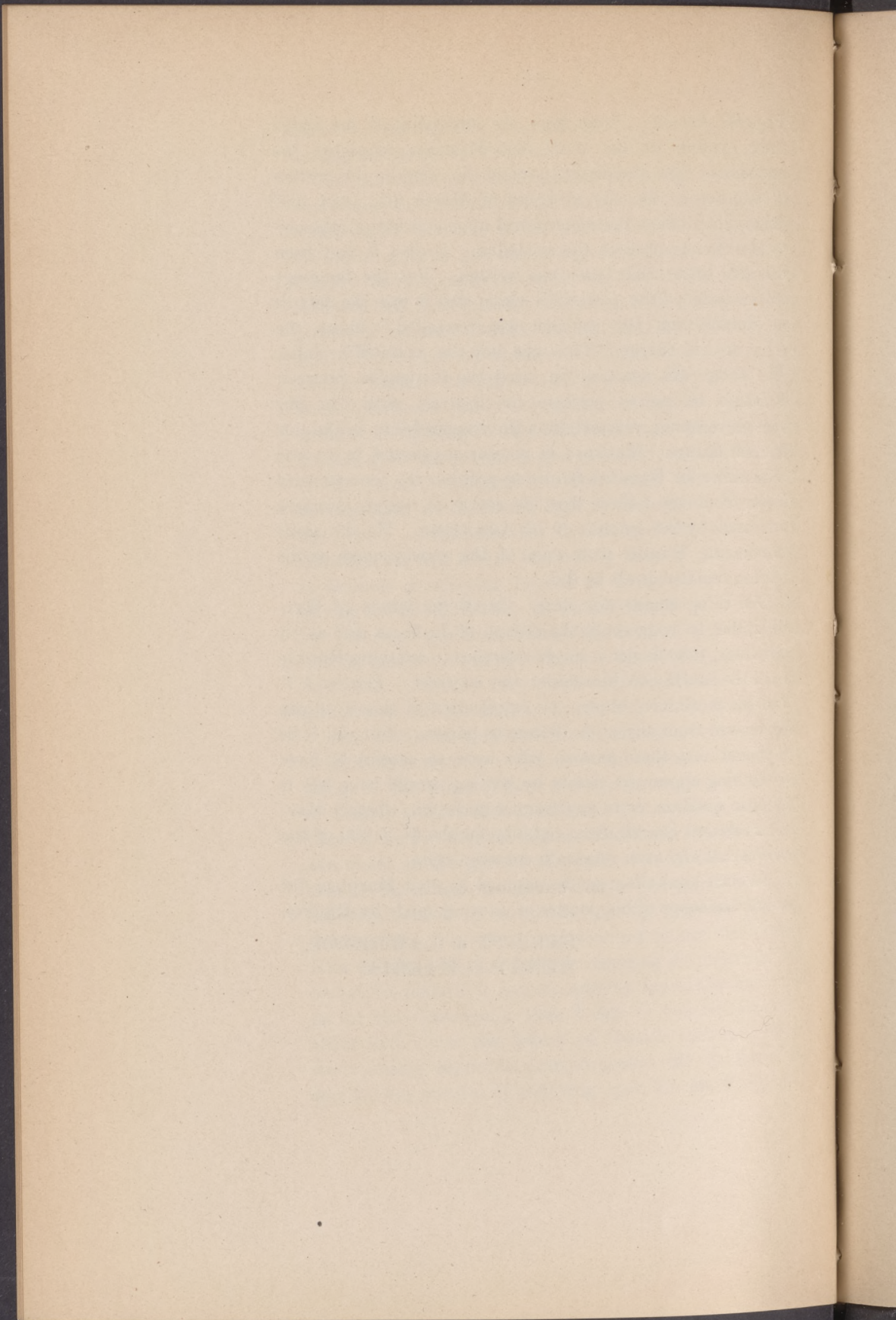
This is only in keeping with all the other evidence of the defendants heretofore referred to, and commented on by the Judge to the jury. There was a plain anxiety on the part of Runkle to have the rescission carried out, thus ending his liability for the \$64,000 and his liability to the city. There was desire on the part of Martinez to assist him in this, so that he might get the \$64,000 from the city directly, and not be compelled to require its loss by Runkle. The evidence goes to this extent, and does not go one step further. How does it justify the Judge in charging the jury that "if it was at the plaintiff's request, and for his advantage as well as for the defendant's, then I say to you the plaintiff's claim that it was the default of Runkle that the contract was rescinded cannot be charged against Mr. Runkle in the case for the purpose of inflicting upon him the \$175,000?"

Page 60, line 33. Even from the standpoint of the Judge these exhibits do not show that Martinez requested the rescission. The first letter in which he refers to the powers of attorney is the one to Lyles of March 8th, 1884, and Runkle had before that determined upon a power of attorney to Martinez to procure the rescission. In fact it had been executed before this letter was written. But the language of the Judge, "the plaintiff's claim that it was the default of Runkle that the contract was rescinded," shows the error of his charge. This was not the plaintiff's claim. The Judge did not keep in mind the distinction between Runkle's failure to perform his contract with the city and his becoming released from the responsibility to the city for that failure. Martinez in no way acquiesced in or was responsible for Runkle's failure to perform the contract, and it was from this failure that his action to recover damages measured by the amount of his loss arises. He did assist in relieving Runkle from some of the consequences of his failure, but that is all he did.

One thing stands out clear. In all the letters of Martinez, that in response to the request of Lyles as well as in all others, there is not a single reference to relieving Runkle from the liability to him under the contract. *Exhibit P 1*. Indeed, as we have shown, no implication of this kind can be derived from any of the letters or papers. Nor can it be supposed that these parties, who were so careful to have everything appear so clearly by writing, would have left it an open question, or in any manner uncertain, whether Martinez released Runkle from liability for the \$175,000, if the parties had any such release in contemplation.

No such legal effect can be imputed to what Martinez did within the scope of his powers of attorney made by Runkle.

BABBITT & LAWRENCE,  
HENRY S. HARRIS.



NEW JERSEY  
Court of Errors and Appeals.

LINO MARTINEZ, Plaintiff in Error,	}	On Cross.
v.		
WILLIAM RUNKLE ET AL., ADMINISTRATOR, &c., Defendants in Error.	}	Errors.

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Points of R. V. Lindabury for Estate of Daniel  
Runkle, deceased.

I.

There was a total failure to show performance of the contract sued on by the plaintiff, and the judge should have either granted a non-suit or directed a verdict for the defendant.

*a.* It did not appear that the plaintiff performed any of the covenants which by the contract he agreed to perform, and which are therein declared to be mutual. 10  
(See *Cont. par. 3, page 94, B.*)

In the award which was obtained the plaintiff seems to have had no part except merely to present the proposals.

The Spanish agreement of severance, made on the

same day as the award, recites that in obtaining the latter Runkle was represented by Mr. Gilson.

In none of the subsequent papers to which Runkle is a party is there a recognition of the plaintiff as a factor in obtaining the award.

b. The contract obtained was not of the kind contemplated by the November agreement.

By the November agreement Runkle was to have the sole benefit of the contract. By the award he was only 10 to have a third. (See *contract of severance, paragraph 4, page 133.*)

By the November agreement he was to have the city for his debtor. By the award he and his associates were compelled to negotiate a loan, not only to pay themselves, but to pay a large debt of the city besides. (*Pages 49, 109.*)

c. There is no evidence whatever to show that the November agreement was modified so as to cover such a contract.

20 If there was a modification or an agreement to accept a substituted performance it should have been both pleaded and proved.

Instead plaintiff pleaded performance of the original agreement not pretending to any other. (*See Dec. 18.*)

Upon the issue joined thereon plaintiff could not have proved a substitute agreement had he been able. He neither did so nor tried to do so.

## II.

· If the plaintiff did procure the contract and Runkle 30 did accept such procurement as a performance of the November agreement, still plaintiff was not entitled to recover, because he was only to be paid out of the moneys Runkle received under the contract, and Runkle never received any. (*See November Agreement, 94 B.*)

If Runkle had failed to receive these moneys through any default of his own he would be liable to plaintiff, but he is not liable for failure to receive them through the default of another.

By the contract as negotiated and finally expressed in agreement of severance, Runkle was not to furnish the loan, he was only to build the water works. (See *contracts of severance, pages 130 to 139.*)

If plaintiff negotiated the agreement of severance he is bound by its terms. If he did not his claim to have 10 performed the November agreement is preposterous.

By the agreement thus completed the loan was to be furnished in forty-five days. (*Page 101, par. 14.*) The work was to be begun in three months (*page 104*), and was to be paid for in monthly payments as it progressed. (*Page 105.*) The fund to pay for the work was to be put in bank so that payments could be made according to the contract. (*Page 100, par. 9.*)

Until this fund was created Runkle was not bound to perform the work. 20

Even if he had performed it the fund could not have been created out of which plaintiff was to be paid.

Plaintiff himself says that no one, not even the Spanish Bank could have created it. (*Letter on page 150.*)

The plaintiff undertook to effect the loan himself, and failed like Maddison and Gilson. (See *L. 8, L. 9 and L. 10, pages 141-147.*)

Under these circumstances his claim that he failed to receive his money through the default of Runkle, seems like insufferable impudence. 30

III.

The agreement to build water works was rescinded with the plaintiff's consent, and by such consent he waived all claim to the creation of the fund out of which he was to be paid. (See *L. 10, L. 11, L. 13, L. 16, L. 17, L. 18-22.*)

IV.

Plaintiff is estopped by his letters, L. 15 and L. 16, from maintaining this action.

10

V.

The court also erred in its charge as to the measure of damages.

(a) The claim as submitted was outside the issue.

(b) It was also impossible under the contract.

R. V. LINDABURY.

New Jersey Court of Errors and Appeals.

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LINO MARTINEZ,  
Plaintiff in Error  
(Plaintiff below),

vs.

WILLIAM RUNKLE ET AL., Adminis-  
trators, &c.,  
Defendants in Error  
(Defendants below).

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WILLIAM RUNKLE ET AL., Adminis-  
trators, &c.,  
Plaintiffs in Error,

vs.

‡LINO MARTINEZ,  
Defendant in Error.

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**Brief for Runkle et al., Administrators.**

The case comes up on writs of error issued at the suit of both the plaintiff and defendants in the Court below from a judgment of the Supreme Court entered upon the verdict of a jury at the Warren Circuit in favor of the plaintiff for the sum of \$17,500. The case is based solely upon a contract in writing made between

Daniel Runkle, the defendants, intestate and Lino Martinez, dated November 2d, 1891, marked "Plaintiff's Exhibit P 1," page 94a, &c. The declaration (pp. 6, &c.), declares solely upon this contract (see also Bill of Particulars, p. 158), and alleges that the plaintiff is entitled to recover the amount therein agreed to be paid.

The pleas filed by the defendants, intestate are in effect that the contract in question is not his contract; that the plaintiff failed to carry out his part of the agreement; that the defendant did not procure the cancellation of the contract; that the defendant was at all times ready and willing to carry out the contract until it was canceled by the consent of all parties thereto, including the plaintiff; that he did not receive the sum out of which the amount payable to the plaintiff was to be paid; that the original agreement with the plaintiff was canceled and rescinded by the mutual consent of both parties, and at the instance and request of the plaintiff.

The evidence given upon the trial was confined substantially to documentary proof, and disclosed the following state of facts.

In November, 1881, the City of Havana, Cuba, was desirous of constructing certain water-works in accordance with specifications which had been prepared by it for that purpose, for which the city was to pay the sum of \$2,200,000, to be realized from the sale of bonds, and thereupon it was agreed (p. 94A) between the parties to this action, that in case the contract "for the erection and construction of said water-works" should be awarded to Runkle "or to parties that may be named by him, or in his interest," that Runkle should pay to Martinez the sum of \$175,000, as follows: That out of payments made by the City of Havana under the contract for the construction and erection of water-works, Runkle would pay to Martinez an amount which should bear the same proportion to the amount received by him as the whole amount of \$175,000, bore to the sum of \$2,200,000, such payments to be made only out of the moneys received by Runkle

under this contract. In consideration of this arrangement Martinez was to proceed to Havana at his own expense, and as the representative of Runkle use all lawful means "and give such time and attention as may be necessary for the purpose of obtaining the contract aforesaid and in the manner aforesaid," and that he should personally be responsible for all commissions which he agreed to pay to any persons in the City of Havana up to the time such contract should be regularly executed and delivered to Runkle; that if the contract by the city should be awarded to Runkle at a less price than that fixed, there should be paid to Martinez in all events \$100,000, and that the compensation to him should be reduced ratably, such reduction to come out of the remaining \$75,000, and that all payments to Martinez were to be immediately upon the receipt by Runkle of payments from the city. This agreement was executed November 2d, 1881.

There is no evidence in the case that after this date Martinez did any act in relation to this contract. Although present at the trial he was not offered as a witness, and no evidence was adduced of any kind that Martinez went to Havana as required in the contract, or that he took any steps there on behalf of Runkle towards the procurement of a contract such as is described in this agreement.

The only thing he is shown to have done in the matter was to send a letter to the Mayor of the City of Havana, dated November 9, 1881 (D. 2, p. 135), wherein he states that he appears as the representative of the syndicate of foreign bankers for the purpose of making a loan to the city of £1,300,000. He does not in this letter state anywhere that he appears as a representative or otherwise for Runkle or for persons seeking a contract for the purpose of constructing water-works. The only reference in the letter contained referring to water-works is that the loan was to be used in part for that purpose.

Runkle was not a banker, but a contractor.

The sequence shows that Maddison & Co. were the bankers referred to.

The next proof is found in Plaintiff's Exhibit P 2, which was an advertisement published March 14th, 1882, in the "Havana Gazette," the official newspaper of that city, for a loan to the city of \$5,600,000, the bidders either to return the amount of the loan to the city, or themselves to apply it to the purposes specified in the advertisement, namely, to the payment of the debt to the Spanish Bank, the payment of erecting the water-works, and the costs and expenses of issuing the bonds, &c. This, as will be seen by an examination of the advertisement (pp. 94, &c.), was solely and exclusively an advertisement for proposals for a loan and not at all for proposals for the erection of water-works; the only reference to the last purpose being found in the ninth paragraph on page 100, where it is provided that, if the lender himself shall undertake the erection of storage and distribution works, so much of the loan as was intended for those purposes should remain on deposit in the Spanish Bank of Havana, or some other accredited establishment, abroad or at home. The advertisement plainly contemplated that the bidder might, if he so chose, undertake the construction of these works, or that he might contract with a third party for that purpose; in the first place depositing the funds and proceeds of the loan to cover such construction with some bank, and in the latter case himself assuming the payment for the construction as it progressed. Attached to this advertisement are specifications for the construction of the water-works.

There is no evidence in the case to show that this advertisement was made or issued in pursuance of the purposes specified in the contract of November previous, and nothing from which an inference of such connection can be legitimately drawn, except the fact that both arrangements contemplated, in some way, the erection of water-works.

But it will be observed that the contract of November, 1881, contemplated a direct agreement between

Runkle and the City of Havana solely for the construction of water works for a price not exceeding \$2,200,000, and that Runkle would have as his security for such contract the whole financial responsibility of the City of Havana; whereas, the advertisement which has been put in evidence was for proposals for a loan of a much greater amount, namely, \$5,600,000; not at all contemplated in the November contract, and that the water-works arrangement was incidental and subordinate to the loan.

The next instrument is the award made pursuant to the proposals received under this advertisement, and is Exhibit P 5, page 107.

It begins as follows:

"I, Don Augustin Maria Guaxardo Taxarda y Melo de Portugal, Chief the First Division of Loans, Civil Administration; Secretary of the Most Excellent Council of this Municipality,

"Do Certify, That in the papers of record in this office concerning the negotiation of a loan, there appears a document of the following tenor: "

and it thereby appears that pursuant to the advertisement and at the time and place therein stated two bids were received, one by Zorrilla, by which he agreed to take the loan of \$5,600,000 at the rate of eighty-one and one sixty-fourth per cent., and himself apply the sum thus raised to the purposes set forth in the condition of the loan, including the construction of the water-works. The other proposal was made as follows:

"Don Lino Martinez, a resident of Havana, on behalf of Messieurs Henry J. Overmann, representing Mr. E. C. Maddison, of London, and Walter H. Gilson in his own right and as representing Messrs. Daniel Runkle and James H. Lyles, of New York," who agreed to accept the loan at eighty-one and one thirty-fifth per cent., and to apply the proceeds to the purposes set forth in the advertisement, including the erection of water-works. This proposition was signed by Martinez, and at the foot is found the following:

“ We adopt and ratify the foregoing proposal made  
 “ on our behalf by Don Lino Martinez, date as above.  
 “ E. C. Maddison, p. p., H. J. Overmann, Walter H.  
 “ Gilson, Daniel Runkle, p. p., W. H. Gilson, James  
 “ H. Lyles, p. p., W. H. Gilson.”

and then appears the following :

“ The reading of said two proposals having been finished, the Committee resolved, subject to the approval  
 “ of the Most Excellent Council, *to award the loan to*  
 “ *the persons represented by Don Lino Martinez*”  
 whereupon it is further stated that Don Lino Martinez  
 “ took the oath required by law and accepted the  
 “ *award of the loan* on behalf of the aforementioned  
 “ E. C. Maddison, Walter H. Gilson, Daniel Runkle  
 “ and James H. Lyles, undertaking for his principals  
 “ well and faithfully to perform under the guaranty of  
 “ the deposit which he has made ”

and by the same certificate, on pages 111 and 112 appears the following resolution of the Municipal Council :

“ Report having been made to the Most Excellent  
 “ Municipal Council of the foregoing action *awarding*  
 “ *the loan of five million six hundred thousand dollars*  
 “ in specie, it was resolved, upon motion of Messieurs  
 “ Calderon and Bruzon. \* \* \* Second, to approve  
 “ *the award of the loan* made by the committee to the  
 “ individuals represented by Don Lino Martinez, to  
 “ wit, Mr. Henry J. Overmann, representing Mr. E. C.  
 “ Maddison of London, and Mr. Walter H. Gilson, in  
 “ his own right, and as representing Messieurs Daniel  
 “ Runkle and James H. Lyles of New York ; proof to  
 “ be duly made to the secretary of the authenticity of  
 “ the signatures appearing at the foot of the proposal  
 “ of Mr. Martinez and Messieurs Overmann and  
 “ Gilson, being to present their powers of attorney,  
 “ duly translated, for examination by the first Syndic  
 “ to whom the papers in the matter will be transmitted  
 “ within two days.”

then appears the report of the Syndic as follows :

“ The first Syndic says that, in pursuance of the

“ directions in the foregoing decree contained, he has  
 “ examined the power of attorney given by Messieurs  
 “ Daniel Runkle and James H. Lyles to Mr. Walter  
 “ H. Gilson, and presented by the latter, and also that  
 “ given by Mr. E. C. Maddison to Henry J. Over-  
 “ mann, and presented by said Overmann ; and finds  
 “ them sufficient for the purposes for which they were  
 “ executed.”

The situation then appears to be as follows : The City of Havana in March, 1882, had advertised for proposals for a loan of \$5,600,000, which loan was to be used for certain specified purposes, among others, for the erection of a water-works, which latter might be done either by the lender himself, or he might contract it out to others ; in either case, the water-works to be constructed according to specifications annexed to the proposals. This loan had been awarded to four gentlemen, Maddison, Runkle, Lyles and Gilson, and, thereupon it was for them to say whether they would construct the water-works themselves or would contract such construction out to other parties ; in their bid, they had elected the former course. That the loan was the fundamental element of the whole arrangement is shown conclusively by the fact that the proposals furnished by the two bidders were primarily for a loan ; that the report to the Municipal Council was confined to the *awarding of the loan*, and that the action of the Municipal Council thereon was confined to the approval of the *awarding of the loan*, and nothing is said in all these proceedings of the erection of a water-works. Moreover, the contract for rescission (P 7, p. 114), hereinafter spoken of, refers only to a *loan*.

There is no evidence in the case that this contract for a loan was accepted by Runkle as a fulfillment of the agreement of November, 1881, and nothing upon which such a conclusion could be based or supported, excepting the fact that the award was later in point of time. Very clearly the award thus made in no respect fulfills the provisions of the November agreement. It is not an agreement to construct water-works, but simply an

agreement under which water-works might be constructed, but not necessarily by the contracting parties.

Again: The contract of November is expressly confined in its operation to a contract for the construction of water-works to be awarded to Runkle, "or to parties that may be named by him or in his interest." The contract proved was awarded to four individuals, Maddison, Runkle, Lyles and Gilson, and there is no word of evidence in the case to show that either or any of these individuals had been nominated by Runkle or were acting in his interest. On the contrary, the evidence shows conclusively that each was acting for himself, and that each was to receive a full third of the profits (see Agreements of Severance, Ex. P 12, p. 130, &c., and D 7, p. 139).

Again, it appears that in the procuring of this contract Martinez represented Maddison (to some extent an adverse interest). Gilson represented himself, Runkle and Lyles; whereas the November arrangement with Martinez had reference only to a contract to be procured from the city for Runkle by Martinez. But this award is the only evidence in the case to show any compliance by Martinez with the terms of the November contract.

The next step in the story is found in Plaintiff's Exhibit 12, page 130—the agreement made April 15th, 1882, between Maddison & Co., of London, of the one part, Gilson and Lyles, of the United States, of the other two parts, and Runkle of the fourth part. This agreement put into more familiar form the arrangement which had been made between the parties in Havana two days after the award (See D 7, p. 139).

The English agreement recites that the parties had undertaken to procure this loan for the City of Havana, and to erect certain water-works; that their proposals had been accepted by the city; that in these proposals the parties of the third and fourth parts, Lyles and Runkle, had been represented by Gilson; that it had been agreed between them that the award should be severed so that Maddison & Co. should alone undertake

the raising of the loan, and Runkle, Lyles and Gilson should alone undertake the construction of the water-works. The party of the first part, Maddison, assuming the loan and indemnifying the others against any liability therefor, and Runkle, Lyles and Gilson assuming the construction of the water-works, and indemnifying Maddison from any liability therefor, except that Maddison undertook to pay, or caused to be paid, to Runkle, Lyles and Gilson, from time to time, *as and when required by said contract or undertaking and* as the construction of the water-works progressed, the full consideration of \$2,200,000 therefor, and Runkle, Lyles and Gilson undertook to construct the water-works and *divide equally between themselves* all the costs and expenses thereof, and *also to divide equally between themselves all the profits, gains or increase* that might arise therefrom; and it is finally agreed that this agreement shall inure to the benefit of and be binding upon the successors, heirs, executors, administrators or *assigns* of each and every of the parties thereto.

It also appears at page 128 (Exhibit P 11) that the deposit of \$64,000 required by the advertisement to be deposited by the city as a guaranty solely for the loan was procured by Martinez under an independent agreement and for a separate consideration therein expressed.

For some reason Maddison & Co. failed to take or obtain the loan, and prior to November, 1882, assigned his contract for the loan to Walter H. Gilson.

The next step in this history is furnished by Exhibit D 8, page 141, which is an agreement dated November 11th, 1882, between Gilson and Martinez, both then in London; it recites the agreement with the City of Havana, the severance of that contract, and the vesting of all interest in the loan in Maddison, the assignment of this interest by Maddison to Gilson, *who is thereby declared to be solely entitled to all the rights and interests of the contractors in the said loan*, that Martinez had acted as the agent of the contractors in Havana in connection with obtaining the said contract,

and it was intended that he should continue to act in the manner and upon the terms thereafter mentioned, agrees that *Martinez* shall be the *financial agent* of Gilson in Havana so far as relates to the *loan*, and shall draw bills of exchange on London for the payments thereunder upon which he was to receive a commission of one-half per cent. to be equally divided between *Martinez* and Gilson. This involved a profit to *Martinez* of \$28,000.

And on the same day another and further agreement was made between the same parties for a *division of the profits* arising from the procurement and issuance of the *loan*. This agreement is as follows :

That out of the first profits there should be paid through the said Lino *Martinez* to Emetrio Zorilla one hundred and five thousand dollars ; to Antonio Bermudez twenty thousand dollars ; twenty thousand for press expenses ; twenty thousand dollars to be divided between *Martinez* and Gilson, three-fifths to the former and two-fifths to the latter ; of the remaining profits to be divided between *Martinez* and Gilson, *Martinez* was to receive one-third and Gilson two-thirds.

The letter written by *Martinez* to Pamure Gordon, dated September 10th, 1883 (Exhibit D 10, p. 147), shows that *Martinez* & Gilson had been working in London for over a year with various bankers (among them J. L. Perry & Co., Morgan & Company, Morton, Rose & Co.) to place the loan, that they had endeavored to modify the conditions with the City of Havana and the Spanish Government, and that he (*Martinez*) despaired of success.

Finally, in March, 1884, *Martinez* seems to have abandoned the project, and to be intent only upon obtaining a release and securing the return of his deposit.

In furtherance of this idea he wrote to Lyles on March 8, 1884 (Ex. D 11, p. 150). This letter has an important bearing upon the questions involved in this case. As has already appeared by the agreements in evidence, the obtaining of the loan was a condition

precedent to the erection of the water-works, for all payments for the water-works were to be made out of the proceeds of the loan. This appears both by the original advertisement and award of the City of Havana and by the contract of severance already referred to. By the latter contract Maddison had assumed the burden of negotiating this loan, such assumption being not only for himself, but for his assigns who turned out to have been Gilson and Martinez, they assuming for themselves the procurement of the loan and dividing among themselves the profits to be obtained therefrom. So that in March, 1884, Martinez, the plaintiff, was one of the parties upon whose shoulders rested the burden of obtaining this loan, the necessary prerequisite to the construction of the water-works. Under these circumstances he writes as follows :

“ The impossibilities to do the business under the present circumstances are quite out of question, no one can do it at present, not even the Spanish Bank, but in case they should undertake it they will not need or have any of it. I am well aware of it for I have offered the business to them twice and they have refused it. \* \* \* He (Mr. Gilson) must know by this time that there is no hope to save the business and that it is of the greatest impossibility to do it even with the money on hand.”

So that up to this date Martinez and Gilson had failed to negotiate the loan, and Martinez then and there gives up the effort.

It will be remembered, however, that Martinez had deposited as a guaranty with the City of Havana for the performance of this original contract, the sum of \$64,000, and now begins an effort on his part to recover back the amount of this deposit.

At this time Runkle was represented by a firm of lawyers in New York known as Olcott, Mestre & Gonzalez, of whom Mestre resided in Havana (p. 34 and 35). On March 27th, 1884, Martinez writes to two of the members of this firm, Olcott and Mestre, in regard to the rescission of the contract *for the loan* for which the

city required the signatures of all the contracting parties. These letters are Exhibits D 13 and D 16 (pp. 151, 154). In the one to Olcott he says :

“ I have not hesitated to apply to you to-day by  
 “ cable to ask you to inform those gentlemen (Runkle,  
 “ Lyles and Gilson) of the necessity *I am in* of having  
 “ those documents *in order to save the deposit of*  
 “ \$64,000 that I made *to make the proposals to such loan,*  
 “ and that was guaranteed by contract of March 27th,  
 “ 1882. Mr. Mestre, to whom the powers of attorney  
 “ of Mr. Runkle and Mr. Lyles have been forwarded,  
 “ has asked me for a letter declaring that I do not pro-  
 “ pose to avail myself of the rescission of *any right to*  
 “ my own advantage, and also that I *release the con-*  
 “ *tractors from all liability therein,* and I have not had  
 “ any question in telling it to him since I have not to  
 “ *their prejudice any plan, project or idea of other*  
 “ business negotiations. I send you herewith a copy  
 “ of that letter. I have done in this manner all that it  
 “ has been possible for me to avoid damages and  
 “ claims, but if I do not have the powers I have asked  
 “ for in time—that is, of all contractors—I will find  
 “ myself in the unfortunate but necessary position of  
 “ enforcing my rights.”

The enclosed letter to *Mestre*, Exhibit D 16, is as follows :

“ In accordance with your wishes in order to satisfy  
 “ the persons represented by you in the matter of the  
 “ Municipal loan of this City, I have the greatest  
 “ pleasure in addressing this to you, wherein I declare  
 “ that I have no purpose in concurring in representing  
 “ them in the rescission of the contract for the loan to  
 “ utilize any rights nor to obtain any advantages of this  
 “ rescission hereafter on account of any other negotia-  
 “ tions in view leading to such course, nor do I have  
 “ consequently any idea to carry out to the injury of  
 “ the present contractors, and no other desire moves  
 “ me than that of saving the deposit made by me and  
 “ guaranteed by them.”

“ I also certify by this letter that I release the con-

“ tractors represented by you from *all ulterior liability*  
 “ as to the obligation from the moment in which the  
 “ contract for the loan being rescinded the Sixty-four  
 “ thousand dollars in gold of the deposit have been re-  
 “ covered by me, for which purpose *all the contractors*  
 “ *should provide me in due course* with special Powers  
 “ of Attorney in that regard, and not doing so they  
 “ will be liable for the damages that may result by  
 “ reason of the delay besides that stipulated in the  
 “ contract of March 27th, 1882.”

Again, on April 19th, 1884, he writes to Runkle (Exhibit D 17, p. 155) :

“ The postponement and delays in sending the pow-  
 “ ers to Mr. Mestre have created new difficulties which  
 “ will surely cause great delays, and, more still, a dan-  
 “ ger, because, if the municipality should change their  
 “ mind, the deposit would be imperiled to be lost.  
 “ Had I received the powers in time, there would not  
 “ be such risk at present. Should the deposit be for-  
 “ feited, I would have to blame the postponers of the  
 “ powers for the troubles and difficulties that may  
 “ arise.”

In the letter of March 8th (D 11) he had written :

“ Up to the present time I know not whether Mr.  
 “ Gilson sends the power or not, and I beg you to do  
 “ your best and ask Mr. Runkle to use his influence  
 “ with Mr. Gilson so as to get this document from him.”

Urged by this letter of March 8th, Runkle negotiated with Gilson to obtain from him the powers required to release this deposit for which Runkle, Lyles and Gilson were liable, if it should not be paid by the City of Havana, and to cancel the contract for the loan. Finally, on June 25th, being impressed with the importance of this power, both to Martinez and himself, as a means of procuring their release from from all further responsibility under this contract, Runkle, in order to procure Gilson to execute the same, paid him the sum of \$10,000 (pp. 40 and 41).

Certain powers were sent ; proving insufficient, Mar-

tinez united with Mestre on July 18th, 1884, in a telegram to Olcott, Exhibit D22, page 157, as follows:

“ The powers received are insufficient. It is urgent  
 “ to send by to-morrow’s steamer new Spanish power  
 “ in Spanish for Runkle, Lyles and Gilson, Maddison  
 “ to Martinez-Mestre, confirming the power of March  
 “ 6th and June 26th, amplifying them specifically to  
 “ cancel the contract to loan, to accept return of de-  
 “ posit, giving Common Council liberty of action, and  
 “ to execute a general release, all well explained.”

Again, on July 22d, they cabled to Olcott:

“ Send anyhow first steamer power according tele-  
 “ gram eighteenth.”  
 and on the next day

“ Telegraph if power is coming to-morrow steamer.”

These powers appear to have been sent, and are found as Exhibits P 9 (pp. 118 to 122), one dated July 24th, made by Runkle and Lyles; one dated July 25th, made by Gilson; and on August 4th, 1884, pursuant to these powers of attorney, the contract was rescinded, all parties released and the deposit repaid (Exhibit P 7, p. 114).

It will be noticed that in each of these powers of attorney the only contract spoken of to be rescinded is a *contract* for a *loan*, and nowhere is any reference made to a contract for the construction of water-works.

In this latter instrument (P 7) appears the following, after reciting the action of the Council on the subject:

“ That, in view of the foregoing, the Mayor, repre-  
 “ senting the Municipality on the one part, and the said  
 “ Mestre and Martinez, representing Messieurs Daniel  
 “ Runkle, James H. Lyles and Walter H. Gilson, of the  
 “ other part, *rescind the said contract for a loan of five*  
 “ *million six hundred thousand dollars*; the sum of  
 “ sixty-four thousand dollars in gold deposited by Don  
 “ Lino Martinez Castellanos in the Municipal Treasury  
 “ on the twenty-eighth of March, eighteen hundred and  
 “ eighty-two to secure the execution of the contract  
 “ now rescinded, being returned; the Municipality  
 “ being to recover, as it does now recover, its freedom

“ of action in the premises, and both parties being to  
 “ be, as they now mutually declare one another to be,  
 “ free of all responsibility on account of the *contract*  
 “ so rescinded, and each of them accordingly obliging  
 “ itself to refrain from making any claim at any time  
 “ against the other.”

Upon these facts we ask the reversal of the judgment below for the following reasons :

### POINT ONE.

#### **No compliance was shown by the plaintiff below with the contract of November 2d, 1881.**

By that contract the defendant agreed to pay to the plaintiff the sum of \$175,000 in the manner therein provided, provided a contract for the erection and construction of water-works should be awarded to Runkle by the City of Havana, or to parties that might be named by him, or in his interest, and he should be duly paid for the same.

It will be noted that under this contract of November, 1881, Runkle was to obtain a contract in his own interest, directly with the City of Havana, for the sole purpose of constructing water-works, and that he was to have as his security the whole responsibility of the City of Havana.

No compliance is shown with this agreement. It does not appear that any contract between Runkle and the City of Havana, such as is described in the agreement of the 8th of November, 1881, was ever awarded or entered into.

It is important to remember that this contract of November contemplated only the award of a contract for the erection of water-works, and that it should be

awarded either to Runkle individually, or to parties that might be named by him, or that were in his interest.

No award has been shown by the City of Havana of a contract for the construction of water-works. An attempt has been made to show compliance with this contract by the introduction in evidence of the advertisement for proposals and the action of the City of Havana thereon (Exhibits P 2 and P 4, pp. 94 D and 107).

These were not awards of a contract for the construction of water-works.

In P 2 it appears that the resolution of the Havana Council was confined to a loan of \$5,600,000 and that was the sole object of the bidding. True it is therein stated that a certain proportion of the proceeds of this loan was applicable to the construction of water-works, but that was but an incident of the loan of precisely the same character as the payment of the loan to the Spanish Bank (p. 99).

The contract with Havana was for a loan. As incidental to that contract the parties to whom the loan was awarded were authorized either themselves to construct a water-works or to contract out the construction to other parties upon terms specifically provided for in the proposals. This was a wide departure from the terms of the November contract; by it Runkle assumes a responsibility largely in excess of that contemplated in the November agreement, he loses the responsibility of the city and accepts in the place of it the responsibility of a co-contractor.

While it is true that it was competent for Runkle to accept this modified arrangement—this contract for a loan with the erection of water-works as an incident in place of a contract for the erection of a water-works alone—still, whether he did so accept it or not was a question of fact, to be proved as any other fact in the case, and in the absence of proof upon that subject, with the plaintiff present in the courtroom and not sworn, the Court was not authorized to assume that

this contract was accepted as a substituted performance of the November agreement.

Smith vs. Brady, 17 N. Y., 173.  
 Satterlee vs. Jones, 3 Duer, 102.  
 Bond vs. Newark, 4 C. E. Gr., 376.  
 Glasius vs. Black, 50 N. Y., 148.  
 Wallis vs. Randall, 81 N. Y., 164.

The case of Satterlee vs. Jones, above cited, is very much in point. In that case plaintiff had agreed to render certain services to the defendant, to expedite the collection of, and to collect from the Government the amount alleged to have been collected for excessive duties. The plaintiff rendered all the services he had contracted for, but it did not result in a recovery, whereupon the defendant commenced his action against the Collector of the Port, based upon the information acquired by the plaintiff, and as the result of that action recovered from the Government the amount of his claim; whereupon the plaintiff commenced this action to recover from the defendant the amount payable to him under his original contract. Upon the trial the jury found for the plaintiff. On a motion for a new trial, the Court held that the plaintiff could recover the stipulated compensation of twenty per cent. only upon proof of a full performance of his contract; that whether the defendant had refused to permit the plaintiff to execute his contract, or whether the plaintiff had voluntarily abandoned the contract, or whether the contract had been rescinded by mutual consent; all of these questions were questions of fact to be proved in the action.

In reviewing this decision the Court, at General Term, held as follows: "The agreement, if valid when made, and when the services of the plaintiff were performed, ceased to exist when the application for a return of the duties illegally exacted was denied by the Secretary of the Treasury in October, 1844. The terms of the agreement contemplated a return of the duties as the result of an application to the Government, not of a hostile suit against the Collector, to

whom they had been paid. Hence, the denial of the application upon an objection which, so far as the parties then knew, could not be removed, was the natural termination of the agreement. The plaintiff's efforts had failed of success, *the condition upon which his right to a compensation depended had not been performed, and nothing further remained to be done.* It is true the parties might, had they pleased, have continued the agreement in force, *but positive evidence was necessary to show that such was their intention and understanding, and no such evidence had been given.* \* \* \* *From the time of the commencement of this suit until the satisfaction of the judgment that was obtained, there was no proof of any act, proceeding, effort or claim on the part of the plaintiff that could warrant the inference or suspicion that the original agreement between him and the defendant was regarded by him as still subsisting.* Under these circumstances it was not necessary or proper that the question whether the agreement had been abandoned or rescinded by the parties should have been submitted to the jury. The burden of proof was upon the plaintiff to show, that notwithstanding the failure of his application to the Government, the agreement under which it was made remained in force, and this necessary proof had not been given. Lastly, to entitle the plaintiff to recover at all, it was necessary to be proved, as his counsel had properly admitted, that the agreement had on his part been fully performed, and that the refunding of the duties illegally exacted was the consequence of his services and efforts."

Again the November agreement provided for a contract with Runkle personally, or with persons named by him or who were in his interest. The contract as awarded by the city was awarded to Maddison, Gilson, Lyles and Runkle, and that they were not parties in his interest is conclusively show by the agreement of severance, Exhibit 12, page 130, where it is distinctly agreed that all profit, gain or increase to arise from the construction of the water-works was equally divided

between Gilson, Lyles and Runkle. It certainly was contemplated by the November contract, whether the City of Havana contracted with Runkle himself or with some other person, that Runkle should receive the whole benefit of that contract.

There is nothing in proof to show that the parties who took the contract awarded by the City of Havana, were parties nominated by Runkle or in his interest; the evidence is to the contrary; but unless they were, the contract with the City of Havana of March, 1882, was not a performance of the November agreement. Whether they were or were not is certainly a question of fact to be proven in the case as any other fact would be, namely, by evidence, and the Court was not justified, in the absence of any evidence upon the question, in assuming or inferring that such facts existed, especially since it appeared by the plaintiff's own case that Runkle's associates in the contract that was made were not at all in his interest, but in their own.

Again, the contract provided for in the agreement of November, 1881, was one which was to be procured by Martinez as the representative of Runkle. The evidence shows that, in obtaining this contract which is now sought to be introduced as a performance of the November agreement, Martinez did not represent Runkle, but represented Maddison & Co. (an adverse interest), and Runkle was represented by Gilson.

The contract then that Runkle entered into with the City of Havana, although subsequent in date to the contract of November, was in no respect a performance of that contract, and in no respect corresponded to the contract which it was agreed in November should be obtained, and there is no evidence in the case that the contract, as finally obtained, was, or was intended to be, a substituted performance of the November agreement.

If I employ a man to buy me a house in New York at a certain fixed compensation, and he, months afterwards, buys a house for me in Brooklyn, renting for

one-third the amount, he cannot claim the latter to be a performance of his contract with me, and that he is therefore entitled to the compensation agreed to be paid for the purchase of the New York house until he has shown affirmatively that I accepted the Brooklyn house in lieu of the house which he had undertaken to procure for me. Whatever compensation he may be entitled to for his services in the matter he could not claim the compensation provided for in my agreement as such.

Not only does it nowhere appear that the contract taken by these parties was accepted as a performance of the November agreement, but in the contract of severance made between the parties themselves the November agreement is nowhere recited nor is it stated that this contract had been obtained by Martinez from Havana ; the absence of such recitals and of any provision for the payment of the great commission of \$175,000 to Martinez is significant, when we consider that in the contract as taken Runkle had only a third interest while in the contract for which the commission was to be paid he had the entire interest.

## POINT TWO.

**If the contract entered into with the city can be held to be a performance of the November contract between the parties thereto, Martinez has by his own acts barred himself from any recovery thereon.**

(1) It will be remembered that by the agreement of severance, so called, Maddison & Co. undertook the procurement of the loan ; Runkle and his associates undertook the execution of the contract for the building of water-works ; and it was there agreed that Maddison or his assigns would from time to time advance

the money from the proceeds of the loan, as the same was required for the completion of the water-works in accordance with the contract. This contract called for the deposit of the full amount in the Spanish Bank. So that the obtaining of the loan as between these parties was a condition precedent to the erection of the water-works.

Martinez and Gilson subsequently became the assignees of Maddison, assuming between themselves the obligation of raising the loan and dividing between themselves the profits to be thereby obtained. They, of course, assumed this obligation *cum onere*, and were bound to make the payments which Maddison had agreed to make for the construction of the water-works. Until, then, the loan had been obtained, Runkle was under no obligation to proceed with the erection of the water-works.

But the loan failed, and it failed through the default of Martinez and his colleague, Gilson; and, because of such failure, and solely because of such failure—for it is shown without contradiction that Runkle had ample means with which to construct these water-works (p. 43)—the water-works contract fell through; and now Martinez, in default in his share of the contract, seeks to charge Runkle with the consequences of a default on his share of the contract resulting directly from Martinez's failure to perform the obligations he had assumed.

(2) It has been shown in the case that at the filing of the bids Martinez deposited with the City of Havana the sum of \$64,000 under an agreement with Runkle, Lyles & Gilson which has been proven. When, as Martinez says in his letter, the performance of the contract had become impossible, he, for his own protection, and to recover back the amount of his deposit, became exceedingly anxious to bring about a rescission of the agreement with Havana. He was not only anxious but importunate, importuning Runkle by letter and by cable to forward the documents necessary to autho-

ize this rescission. Through his procurement, with his knowledge, and as the result of his efforts, that contract was rescinded, and the \$64,000 repaid. During all this time Martinez never intimated to Runkle that when the contract should be rescinded he proposed to hold him responsible for a default in its performance. On the contrary, he assured Runkle and his attorney that he had no such intention.

Thus, he seeks to charge Runkle for a default in the performance of the contract which he himself procured to be rescinded for his own protection. He seeks to charge Runkle for a fault to which he himself was a party, and to impose enormous liability upon a man in his own favor for doing a thing which he himself induced that man to do without an intimation that he should hold him responsible for such an act.

(3) Martinez is estopped. By his letters written in March (D11, D13 and D16), for the purpose of inducing the procurement of the necessary papers to effect the rescission of the contract with the city, he states as follows :

“ Mestres has asked me for a letter declaring that I do not propose to avail myself of the rescission of any right to my own advantage, and also that I release the contractors from all liability therein, and I have not had any question in telling it to him since I had not to their prejudice any plan, project or idea of other business negotiations.”

He also states, in the letter to Mestres enclosed in the above :

“ I also certify, by this letter, that I release the contractors represented by you from all ulterior liability as to the obligation from the moment in which the contract for the loan being rescinded of \$64,000 in gold of the deposit had been recovered by me.”

Acting upon this assurance of Martinez, and induced by his importunities, Runkle, for the sake of obtaining an authority from Gilson to rescind this power of

attorney, paid to Gilson the sum of \$10,000 (pp. 40 and 41).

Here would seem to be a perfect case of estoppel *en pais*. Martinez represented to Runkle that he, upon obtaining back his \$64,000, would release him from all obligation, and that he entertained no ulterior purposes as against him. On the faith of that assurance Runkle expended the \$10,000; and, unless Martinez is bound by this agreement, Runkle will be injured.

These are the elements of an estoppel *in pais*.

(4) The contract of November, certainly so far as Martinez was concerned, was one contrary to public policy and void.

Read his letter of February 16th, 1882, (Exhibit D 3, p. 136), written three months after the contract of November, 1881, in which he says:

“When I asked you in New York for \$100,000, for awards and presents C C without being obliged to render accounts of its investment, it was with the understanding that I would have no other duty but to be the mediator with those persons who only accepted a present in confidence and without which direction the affair would never have come to an end. I knew perfectly well that many of these accounts that I had to offer would have to be paid in signing the contract, and as by our covenant I shall not receive the amounts but during two years it must come out of my private money, otherwise nobody would have accepted to help us to collect their reward in two years.”

A letter of that character is capable of but a single construction. Martinez purposed to bribe certain of the municipal authorities in the City of Havana. If that was not the meaning of this letter, Martinez, who was present during the whole trial, could easily have explained it. His silence under such circumstances is a confession that no other explanation was possible.

Nor are we embarrassed upon this point by the verdict of the jury. True, they have found in favor of the plaintiff, but not on this contract. Under the contract of November the only possible recovery was the sum of \$175,000 with interest, and therefore the finding of a less sum, namely, \$17,500, the amount of the jury's verdict, is in its necessary effect a finding that the contract should not be carried out or enforced.

### POINT THREE.

#### **The verdict of the jury was unwarranted.**

The rule is thoroughly well settled that a party to an action must be confined in his recovery to the facts alleged and proved by him. He can neither recover upon a state of facts alleged and not proven, nor upon a state of facts proved but not alleged; and certainly he cannot recover upon a state of facts neither alleged nor proved, and not even suggested until the charge by the Court (see p. 66, fol. 10).

But this is what has been done in this case.

The learned trial Judge submitted to the jury the question of what the plaintiff was entitled to for his services in this matter without regard to the contract, and the award by the jury of a sum less than the amount of the contract shows conclusively that they adopted the submission of the Court and determined what the plaintiff's services were worth in procuring, not the contract contemplated by the agreement of November, 1881, but an entirely different contract.

But there is no allegation in the declaration which would support such a finding. It neither alleges the rendition of services, nor the value of them; and the foundation of his action, both in his declaration (p. 6) and in the bill of particulars (p. 158), was confined to

the right acquired by him under this contract. So that there is no allegation in the declaration which would support a finding or a judgment upon a *quantum meruit*.

In *Wright vs. Delafield*, 25 N. Y., 268, the Court said: "The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice."

See, also,

*Larrison vs. Polhemus*, 12 Stew., 306.

*Narr vs. Union & Essex Land Co.*, 7 Stew., 112.

*Rogers vs. Colt*, 1 Zab., 27.

*Day vs. New Lots*, 107 N. Y., 154.

*Romaine vs. Sickels*, 108 N. Y., 652.

*Clark vs. Post*, 113 N. Y., 17.

Again, there is no evidence in the case upon which such a finding could be predicated. There is no proof that the plaintiff went to Havana or did anything in relation to this contract with the city. There is no proof at all upon the subject; neither the plaintiff nor any other person was called as a witness upon this question, nor is there any proof that the plaintiff was at all instrumental in obtaining this award from the City of Havana. All that is shown is that the proposal for the contract was signed by him as the representative of Maddison & Co., and that he was present personally at the time that the award was made.

If it was competent for the Court to submit the question of *quantum meruit* to the jury, the defendants were entitled to introduce evidence upon that question. They can well claim to have been *surprised*, not by their opponents, but by the Court.

If the plaintiff had been permitted by amendment to introduce such a cause of action, it would have been a good reason for a postponement of the trial on motion of defendant. No amendment was asked for or granted; in fact, the plaintiff in his exceptions distinctly objects to this theory of his case (p. 78, Exception 13).

Again, the parties, by the November agreement, have

expressly stipulated against a *quantum meruit* (p. 94c, fol. 30):

“ If for any reason the contract hereinbefore referred to should not be given by the City of Habana to the party of the first part (Runkle), or any one in his interest, the party of the second part shall have no claim for services or disbursements against the party of the first part.”

It is difficult, therefore, to see upon what possible theory the Court was justified in submitting a question of *quantum meruit* to the jury, and upon what evidence the jury based its finding of the value of services the rendition of which had never been proved.

#### POINT FOUR.

**If anything should at any time become due to the plaintiff from the defendant, it was not due at the time of the commencement of this action.**

The money which plaintiff was to receive was to be paid out of a special fund, namely, out of the payment to be received by Runkle for the construction of the water-works, and it was to be paid only as and when these moneys were received by Runkle.

It appears affirmatively in the case that Runkle never received any of those moneys, and therefore, the subject of the action never became payable to the plaintiff.

This difficulty is sought to be overcome by the claim that Runkle is to be charged as though he had received the money, because his failure to receive it resulted from his own default.

But this claim is utterly without foundation, as has been already shown. Runkle was in default, not

through any inability or unwillingness on his part to perform the contract (p. 43), but solely because the plaintiff himself had failed in the performance of the condition precedent which he had undertaken, and had himself been a party to the destruction of the contract through which alone his compensation was to come.

Under the original agreement with the City of Havana the money required to build the water-works was to be deposited, out of the corpus of the loan, in the Spanish Bank or some satisfactory depository (p. 100). Until this was done under the contract with Havana Runkle was under no obligation to do anything. It was not at all contemplated that any one should build the water-works except out of this fund. As between the parties, Maddison & Co. were to raise the money for the loan and make the deposit, which duty was afterwards assumed by Gilson and Martinez. They failed to do so and the deposit was never made.

The only parties having the power to create the fund failed to do it; Runkle, therefore, never became obligated to build the water-works and could not be in default for not constructing them. Certainly one of the parties (Martinez), responsible as he was for the only default that took place, namely, the failure to raise the loan, cannot impute his own default to another and thus take advantage of his own wrong.

Suppose Runkle had been the owner of a ship which through Martinez's procurement he had chartered to a third party, and for which service he had agreed to pay Martinez from the proceeds of the charter party; and suppose that before the delivery of the ship to the charterer Martinez had scuttled and destroyed her and then had claimed from Runkle the payment of his compensation because forsooth he had made default in the delivery of the ship; would not such a claim be preposterous, absurd and not to be considered a moment?

But is that at all different from this situation? Assuming that Martinez had obtained this contract for Runkle; by his own default he had rendered it impossible of performance; by his own act he had

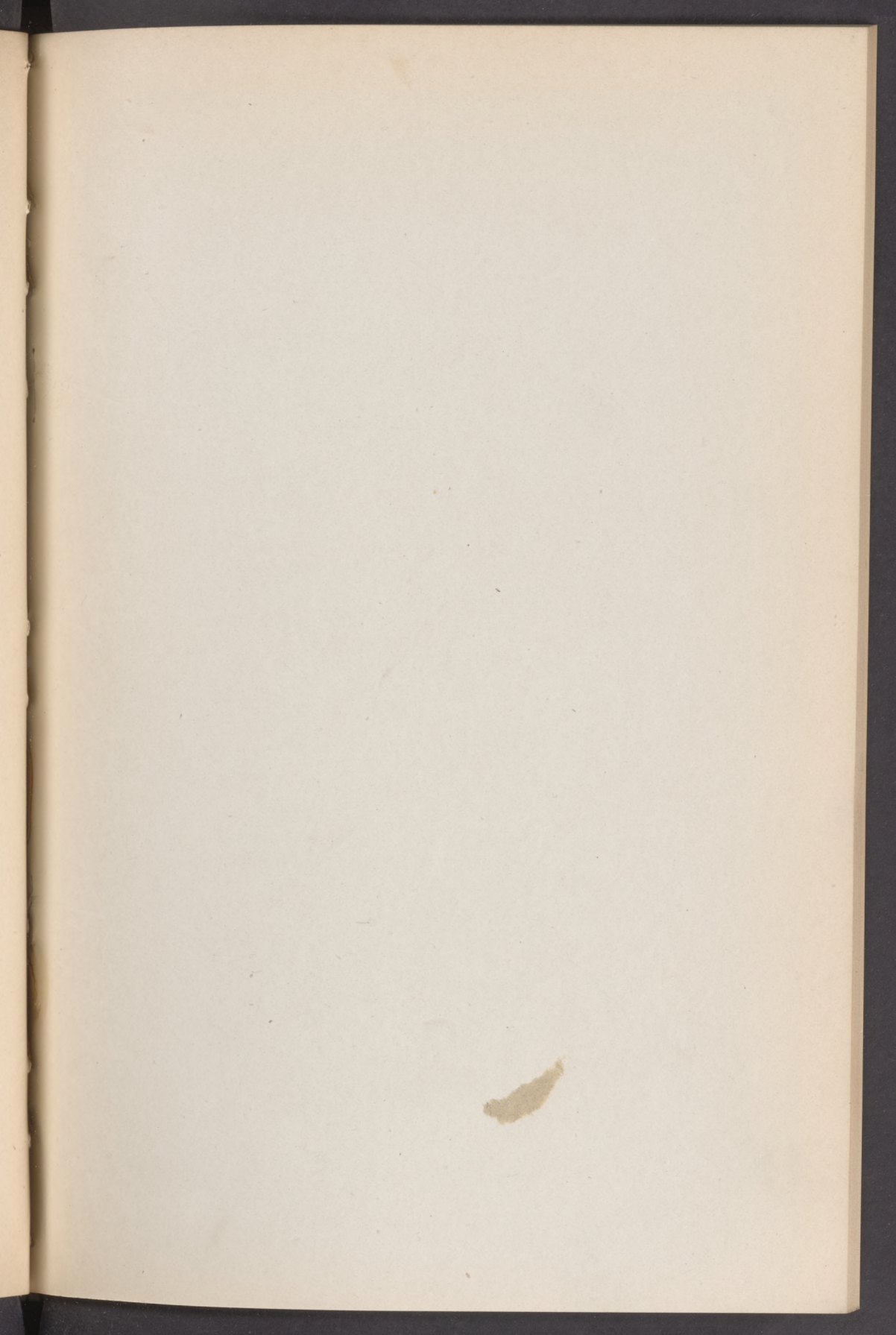
rescinded and destroyed it, and now seeks to hold Runkle for a failure to perform it.

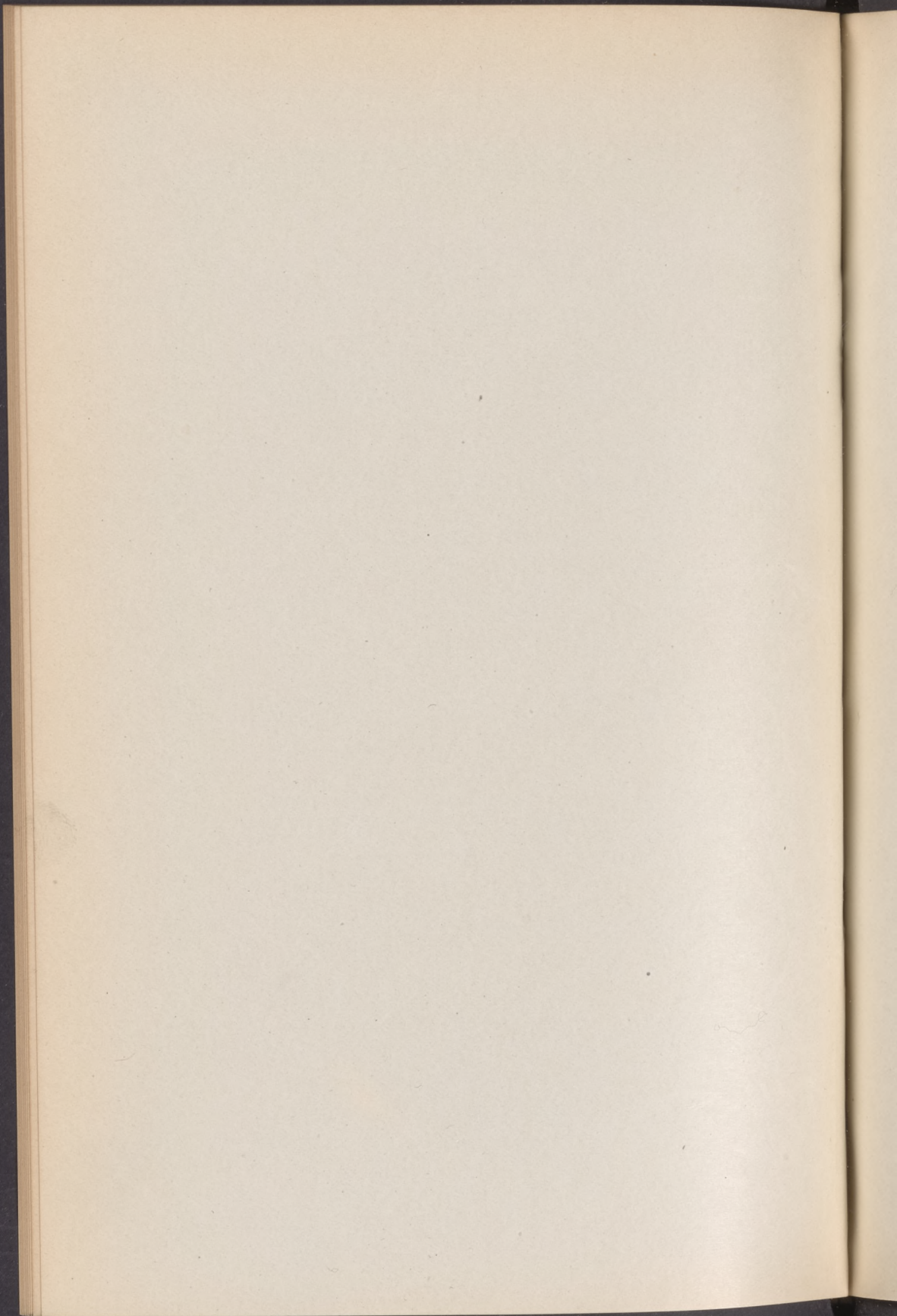
**POINT FIVE.**

**The judgment below should be reversed with costs.**

HAMILTON WALLIS,  
R. V. LINDABURY,  
WM. D. EDWARDS,  
Of Counsel.

WALLIS, EDWARDS & BUMSTED,  
Attorneys for Defendants Below.





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## NEW JERSEY COURT OF ERRORS AND APPEALS.

### CROSS-ERROR.

20

LINO MARTINEZ,  
Plaintiff in Error,  
(Plaintiff below),

vs.

WILLIAM RUNKLE and HARRY  
G. RUNKLE, Administrators  
of Daniel Runkle, deceased,  
Defendants in Error,  
(Defendants below.)

In Error to New  
Jersey Supreme  
Court.

Writ of Error,<sup>30</sup>  
returnable Au-  
gust 17, 1894.

BABBITT & LAWRENCE,

Attorneys.

40

WILLIAM RUNKLE and HARRY  
G. RUNKLE, Administrators of  
Daniel Runkle, deceased,  
Plaintiff in Error,  
(Defendant below),

10

vs.

LINO MARTINEZ,  
Defendant in Error,  
(Plaintiff below.)

In Error to New  
Jersey Supreme  
Court.

Writ of Error, re-  
turnable Octo-  
ber 23, 1894.

WALLIS, EDWARDS & BUMSTED,  
Attorneys.

NEW JERSEY, SS.

20

[SEAL.] The State of New Jersey to the Chief  
Justice and other Justices of our Su-  
preme Court of Judicature, GREETING:

Forasmuch as in the records and proceedings, and  
the giving of judgments in a certain plaint which  
was in our said Supreme Court of Judicature before  
you between Lino Martinez, plaintiff, and William  
Runkle and Harry G. Runkle, administrators of  
Daniel Runkle, deceased, defendants in an action upon  
30 contract; manifest error has intervened to the great  
damage of the said plaintiff as it is said; we being  
willing that the error, if any there be, should in due  
manner be corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you that if judgment be thereupon given and  
affirmed then you distinctly and openly send, under  
your seal the record and proceedings aforesaid, with  
all things touchings the same to our Judges of our  
40 Court of Errors and Appeals in the last resort in all

causes at Trenton, on the seventeenth day of August next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid the thirty-first day of July, eighteen hundred and ninety-three. 10

HENRY C. KELSEY,  
Clerk.

BABBITT & LAWRENCE,  
Attorneys.

ENDORSED.

"Returnable August 17, 1893."

"Filed August 17, 1893. Henry C. Kelsey, Clerk."

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

M. BEASLEY, C. J." [SEAL.]

NEW JERSEY, SS.

30

THE STATE OF NEW JERSEY to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING: [SEAL.]

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature, before you, between Lino Martinez, plaintiff, 40

and William Runkle and Harry G. Runkle, administrators of the goods and chattels which were of Daniel Runkle, deceased, in an action upon contract manifest error hath intervened to the great damage of the said defendants, as it is said, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and  
 10 affirmed then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-third day of October next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be  
 20 done.

WITNESS, Alexander T. McGill, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the fifth day of October, A. D. 1893.

HENRY C. KELSEY,  
 Clerk.

WALLIS, EDWARDS & BUMSTED,  
 Attorneys.

30

ENDORSED.

“Returnable Oct. 23, 1893.”

“Filed Oct. 28, 1893.”

HENRY C. KELSEY,  
 Clerk.”

A true copy.

40

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

LINO MARTINEZ, Plaintiff in Error, vs. WILLIAM RUNKLE, <i>et al.</i> , Ad- ministrators, etc., Defendants in Error	}	10
Stipulation.		
WILLIAM RUNKLE <i>et al.</i> , Administrators, etc., Plaintiffs in Error, vs. LINO MARTINEZ, Defendant in Error.	}	20

It is agreed between the attorneys of the respective parties that the return made by the Clerk of the New Jersey Supreme Court to the writ of error in the case first above cited by its title be used and taken as the return in the second case above cited; that said two cases on error be printed in one book at the joint expense of the parties and that said cases be argued and heard together at the coming No-  
vember Term of said Court or as soon thereafter as<sup>30</sup>  
they can be reached.

BABBITT & LAWRENCE,  
Attorneys of Lino Martinez.

WALLIS, EDWARDS & BUMSTED,  
Attorneys of Administrators of Daniel Runkle.

Dated, Oct. 21, 1893.

"Filed Oct. 28, 1893.

HENRY C. KELSEY,  
Clerk." 40

## NEW JERSEY SUPREME COURT.

LINO MARTINEZ,

vs.

WILLIAM RUNKLE and HENRY

10 G. RUNKLE, Administrators,  
etc., of Daniel Runkle, de-  
ceased.

On Contract.

On Postea.

BABBITT & LAWRENCE,  
Attorneys.

As yet of the twenty-first day }  
of July, A. D. eighteen hun- }  
20 dred and ninety.

Witness

BENJ. F. LEE,  
Clerk.

MERCER BEASLEY, Esquire,  
Chief Justice.

## DECLARATION.

WARREN COUNTY, ss:

Daniel Runkle, the defendant in this suit, was sum-  
30 moned to answer Lino Martinez, the plaintiff therein,  
in an action upon contract, and thereupon the  
plaintiff, by Babbitt & Lawrence, his attorneys,  
complains for that whereas heretofore to-wit, on the  
second day of November, eighteen hundred and  
eighty-one, at the City of New York, to-wit, at Bel-  
videre, in the County of Warren and State of New  
Jersey, by a certain indenture then and there made  
between the said defendant and the said plaintiff,  
40 said plaintiff now brings into Court, the date whereof

is the same day and year aforesaid it was witnessed that the plaintiff covenanted, promised and agreed with the defendant to proceed to Havana, in the Island of Cuba, without delay at his own expense, and there, as the representative of the defendant, use all lawful means and give such time and attention as might be necessary for the purpose of obtaining from the municipal authorities of the City of Havana for the said defendant or for such parties<sup>10</sup> as should be named by the said defendant and in his interest a contract for the erection and construction of water works for the purpose of supplying the inhabitants of the said City of Havana with water and further to pay and be responsible for all commissions to any persons in the City of Havana in and about the obtaining of said contract, and the defendant in and by said indenture did, for and in consideration of the premises and for the sum of one dollar in hand paid by the plaintiff and of other good and valuable considerations, covenant, promise and agree<sup>20</sup> with the said plaintiff that if the aforesaid contract for the erection and construction of said water works should be awarded to him by the authorities of the city of Havana, or to parties that may be named by him, or in his interest, he would pay to the plaintiff or to his executors, administrators or assigns, the sum of one hundred and seventy-five thousand dollars, lawful money of the United States, in the manner following: Out of the payments made to the defendant, or to the person or persons<sup>30</sup> named by him or in his interest, by the City of Havana for the construction and erection of the water works aforesaid, an amount in the same proportion to the amount as received by him as the whole amount of one hundred and seventy-five thousand dollars is to the sum of two million, two hundred thousand dollars, which was the sum to be received by the defendant from the City of Havana aforesaid, for the erection and construction of said<sup>40</sup>

works if said contract should be secured and carried out. And said plaintiff faithfully carried out each and every of the covenants, agreements and promises on his part made and in said indenture set forth, and in pursuance thereof, he, at his own expense, proceeded to the City of Havana and there, as the representative of the defendant, gave his time and attention to the employment of all lawful means for obtaining, in behalf of the parties named by the said  
 10 defendant, the contract for the erection of water works in the City of Havana, hereinbefore referred to, and as such representative on or about the twentieth day of March, 1882, did procure and obtain from the authorities of the City of Havana the contract for the construction of said water works for and on behalf of the defendant, Daniel Runkle, and of three other persons by him named and in his interest, to-wit, Edward C. Maddison, Walter H. Gilson and James H. Lyle, at and for the sum of two  
 20 million, two hundred thousand dollars.

And the plaintiff avers that the defendant thereafter failed and neglected to carry out the said contract as awarded to him, and to the other persons named by him and in his interest and failed to comply with the agreements of said contract, and did not undertake or begin the construction of said water works, and so disregarded his duty and obligations under said contract, that he forfeited all rights thereunder and on or about the fourth day of  
 30 August, eighteen hundred and eighty-four, requested and procured a cancellation thereof for the purpose and with the efficacy of exonerating himself from the losses and liabilities to the City of Havana incurred by his failure and neglect to carry out his agreements and obligations thereunder.

And the plaintiff says that by the failure and negligence of the defendant above set forth and by his forfeiture and cancellation of the contract for the  
 40 construction of the water works in the City of Ha-

vana, so as aforesaid, procured for him by the plaintiff, the defendant, by his own act and omission, put it out of his power to receive the sum of two million, two hundred thousand dollars, agreed to be paid to him under the said contract out of which sum he had covenanted and agreed to pay the plaintiff the sum of one hundred and seventy-five thousand dollars, as herein above set forth, and that by the said forfeiture and cancellation of the said contract <sup>10</sup> for the construction of said water works, the defendant committed a breach of the indenture above set forth, entered into and made by and between the defendant and the plaintiff as to that part thereof wherein he agreed as aforesaid to pay, to the plaintiff, his executors, administrators or assigns, the sum of one hundred and seventy-five thousand dollars as follows: Out of the payments made to the defendant, or to the person or persons named by him or in his interests by the City of Havana for the construction and erection of the water works aforesaid, an amount in same proportion to the amount so received by him as the whole amount of one hundred and seventy-five thousand dollars is to the sum of two million, two hundred thousand dollars. <sup>20</sup>

And so the plaintiff in fact says that the said defendant, although often requested so to do, has not kept the said covenants so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused and still doth neglect and <sup>30</sup> refuse to the damage of the said plaintiff of two hundred thousand dollars, and therefore he brings his suit, etc.

#### PLEAS.

And the said defendant, by Wallis, Edwards & Bumsted, his attorneys, comes and defends the wrong and injury when, etc., and says that the said indenture is not his deed. And of this said defendant puts himself upon the country, etc. <sup>40</sup>

And for a further plea in this behalf, the said defendant as to the first count of said declaration, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said plaintiff did not faithfully carry out each and every of the covenants, agreements, and promises or any  
 10 of them on his part made, and in said indenture set forth, and did not in pursuance thereof at his own expense or otherwise proceed to the City of Havana, and there as the representative of this defendant give his time or attention to the employment of all lawful means of obtaining in behalf of the parties named by this defendant the contract for the erection of water works in the City of Havana as therein referred to, and did not as such representative on  
 20 other time obtain from the City of Havana the contract for the construction of said water works for or on behalf of this defendant or of three other persons or any of them by him named, and in his interest, to wit: Edward C. Maddison, Walter H. Gilson and James H. Lyle, at and for the sum of two million two hundred thousand dollars, or any other sum, and of this he the said defendant puts himself upon the country.

And for a further plea in this behalf, the said defendant as to the second count or averment in said  
 30 declaration contained by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that this defendant did not fail or neglect to carry out the said contract as awarded to him, and to the other persons named by him, and in  
 40 his interest that he did not forfeit all right there-

under, that he did not on or about the fourth day of August, eighteen hundred and eighty-four, or at any other time request or procure a cancellation thereof for the purpose and with the effect of exonerating himself from losses and liabilities to the City of Havana, incurred by reason of his failure and neglect to carry out his agreements and obligations thereunder or for any other purpose whatever, and of this he puts himself upon the country. 10

And for a further plea in this behalf the said defendant as to the second count or averment in said declaration contained, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that he the said defendant was ready and willing at all times to fully carry out and perform his agreement with the said City of Havana for the construction of said water works, and tendered and offered himself ready and willing 20 to construct said water works, and was ready and willing to construct the same until the time when said contract was cancelled by consent of all parties thereto or interested therein, including said plaintiff. And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

And for a further plea in this behalf the said de-30 fendant as to the last count or averment in said declaration contained, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the city did not by failure and neglect or by forfeiture and cancellation of the contract for the construction of the water works in the City of Ha-40

vana or by his own act or omissions put it out of his power to receive the sum of two million two hundred thousand dollars agreed to be paid, or that out of said sum he had covenanted to pay the said plaintiff the moneys as in said count or averment of said declaration alleged or any other sum, and of this he puts himself upon the country, etc.

10 And for a further plea in this behalf the said defendant by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the covenant or agreement in said declaration mentioned, and each and every part thereof was rescinded, cancelled and set aside by the mutual consent of the said plaintiff and this defendant, and this he the said defendant is ready to verify, wherefore  
20 he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

And for a further plea in this behalf the said defendant by leave of the Court herefor this purpose first had and maintained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his  
30 aforesaid action thereof against him, because he saith that the said contract mentioned in said declaration for the construction of said water works in said City of Havana was cancelled and annulled at the instance and request and with the consent and by the procurement of the said plaintiff. And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

## REPLICATION.

And the said plaintiff prays a day to impart to the said pleas of Daniel Runkle, and then to reply to the same, and it is granted to him, etc., and thereupon a day is given to the parties aforesaid to come before the Court on the seventeenth day of February, 1891, that is to say for the said plaintiff to impart to the said pleas and then reply to the same, etc., at which day before the said Court comes the said plaintiff, by his attorneys aforesaid, and the defendant Daniel Runkle, cometh not, and thereupon the said plaintiff gives the Court here to understand and be informed, that after the last continuance of the pleas aforesaid, and before said day, the said Daniel Runkle died, and thereupon it was ordered by the Court that this action proceed at the suit of the plaintiff against William Runkle and Henry G. Runkle, administrators of Daniel Runkle, deceased.

And the said plaintiff as to the pleas of the said defendant Daniel Runkle, firstly, secondly, thirdly and fifthly above pleaded, and whereof he put himself upon the country, doth the like.

And the said plaintiff as to the said plea of the said defendant by him fourthly above pleaded, saith that the said plaintiff by reason of anything in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, William Runkle and Henry G. Runkle, administrators of Daniel Runkle, deceased, because he saith that the said defendant, Daniel Runkle, was not ready and willing at all times to fully carry out and perform his agreement with the said City of Havana for the construction of said water works and did not tender and offer himself ready and willing to construct said water works and was not willing and ready to construct the same until the cancellation of said contract and that the cancellation of said contract was not consented to by the

said plaintiff. And this he the said plaintiff prays may be inquired of by the country, etc.

And the said plaintiff as to the said plea of the said defendant, Daniel Runkle, by him sixthly above pleaded saith that the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, William Runkle and Henry G. Runkle, administrators of Daniel Runkle, deceased, because  
 10 he saith that the covenant or agreement in said declaration mentioned and each and every part thereof was not rescinded, cancelled and set aside, nor was any part thereof rescinded, cancelled and set aside by the mutual consent of the plaintiff and the defendant, Daniel Runkle. And this he, the said plaintiff, prays may be inquired by the country, etc.

And the said plaintiff as to the said plea of the said defendant, Daniel Runkle, by him seventhly  
 20 above pleaded saith that the said plaintiff by reason of anything in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, William Runkle and Henry G. Runkle, administrators of Daniel Runkle, deceased, because he saith that the said contract mentioned in said declaration for the construction of said water works in said City of Havana was not cancelled and annulled at the instance and request and with the consent and by the  
 30 procurement of the said plaintiff. And this the said plaintiff prays may be inquired of by the country, etc.

#### CONSENT ON FILE.

By consent this day filed it is ordered that the death of the delendant, Daniel Runkle, be suggested upon the record and that the above action proceed  
 40 at the suit of the above named plaintiff against Wil-

William Runkle and Henry G. Runkle, administrators  
of said Daniel Runkle, deceased.

Entered February 17, 1891.

On motion of

BABBITT & LAWRENCE,  
Attorneys.

JUDGMENT.

10

Therefore let a jury thereupon come before the  
Chief Justice or some other justice of the Supreme  
Court of the State of New Jersey at a Circuit Court  
holden at Belvidere, in and for the County of War-  
ren, on the first Tuesday of May, in the year of our  
Lord one thousand eight hundred and ninety-three,  
by whom, etc.

And now at this day, to wit, the sixth day of June,  
A. D. eighteen hundred and ninety-three, before our  
Supreme Court at Trenton comes the said plaintiff  
by his attorneys aforesaid and the justice before  
whom, etc., having sent hither his record had be-  
fore him in these words, to wit: 20

Afterwards, to wit at a Circuit Court holden at  
Belvidere in and for the County of Warren before  
His Honor Leon Abbett, one of the justices of the  
Supreme Court, on the second day of May, in the  
year of our Lord one thousand eight hundred and  
ninety-three, according to the form of the statute in  
such case made and provided, comes as well the  
said plaintiff as the said defendants by their respec-  
tive attorneys within mentioned and the jurors of the  
jury, between the parties aforesaid in the pleas  
aforesaid being summoned also come, who to speak  
the truth of the matters and things within con-  
tained being chosen tried and sworn say upon their  
oath that the within writing obligatory is the deed  
of the said Daniel Runkle as the said plaintiff hath  
within in that behalf alleged and they assess the  
damages of the said plaintiff by reason of the neglect 40

and refusal of the said Daniel Runkle to perform and keep the covenants of the said writing obligatory over and above his costs and charges by him about his suit in this behalf expended to seventeen thousand five hundred dollars, and for those costs and charges to six cents.

Therefore, it is considered that the said plaintiff do recover against the said defendants his said damages by the jurors in form aforesaid found to the  
 10 sum of seventeen thousand five hundred dollars and also fifty-nine dollars and twenty-two cents for his costs and charges aforesaid by the Court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to seventeen thousand five hundred and fifty-nine dollars and twenty-two cents.

Judgment signed this sixth day of June, A. D. eighteen hundred and ninety-three.

M. BEASLEY,

C. J.

20

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### BILLS OF EXCEPTIONS.

AS THE BILLS of exceptions signed for both sides contain the whole evidence, for convenience the two have been amalgamated; the exceptions taken by  
 30 each party being noted.

Belvidere, N. J., May 2nd, 1893.

Before His Honor, LEON ABBETT, one of the Jus-  
 40 tices of the Supreme Court, and a Jury.

For the plaintiff appeared HENRY S. HARRIS, ROBERT L. LAWRENCE and PAUL FULLER, of the firm of COUDERT BROS.

For the defendant appeared GILBERT COLLINS, WILLIAM D. EDWARDS, HAMILTON WALLIS and WILLIAM A. STRYKER.

MR. LAWRENCE on behalf of the plaintiff then opened the case to the Court and jury. 10

Mr. Lawrence then called upon counsel for the defendant to produce the agreement of severance, dated April 15, 1882, and the power of attorney of Runkle & Gilson dated January 5th, 1882.

The papers called for were produced by defendant's counsel.

Counsel for plaintiff also called for the power of attorney of Runkle to Gilson, which was likewise produced.

Mr. Lawrence on behalf of the plaintiff offered in evidence the contract sued on, dated November 2nd, 1881, and the same was marked Exhibit P 1 for the plaintiff. 20

ARTHUR PADRO, produced on the part of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION, by M. Lawrence.

Q. Where do you live?

A. New York.

Q. What is your nationality?

30

A. Spanish.

Q. How long have you lived in New York?

A. At different times about ten years altogether.

Q. Prior to that time where did you live?

A. In Cuba.

Q. What is your profession?

A. Lawyer, Spanish lawyer.

Q. Have you had experience in translating from the Spanish into the English?

40

A. I make that my business, I have been in the business for 3 or 4 years.

Q. You have translated or examined translations of certain documents in this case?

A. I have.

Q. I show the witness a newspaper, which contains the advertisement for bids for the erection of water works. Give the date and the name of that paper?

10 A. It is dated March 14, 1882, the is the name Gaceta De La Habana—the Havana Gazette, official paper of Havana.

Q. Have you examined the paper which I now show you?

A. Yes, sir, I see some notes in my own handwriting, some corrections I made myself.

Q. Is that a correct translation into English of the advertisement contained in this paper for bids for the contract for the erection of water works at Havana?

20 A. It is a literal translation.

Mr. Collins—I object to that part of the question in which he designates what the advertisement is and ask that it be stricken out.

The Court—That part comes out. This is a correct translation of the part of this newspaper which they will offer in evidence?

A. This is a literal translation of the second page, 30 third and fourth columns, and goes down almost the whole of the fifth column.

Mr. Lawrence, on behalf of the plaintiff, offered in evidence the translation of the portion of the newspaper offered, and the same was marked P 2 for the plaintiff.

Counsel also offered in evidence the newspaper and the same was marked P 3 for the 40 plaintiff.

Q. I show witness a paper in the Spanish language; it is the alleged award made by the city of Havana, dated March 28, 1882, and the translation. The award is in Spanish. Will you state whether the translation which I hand you, together with that award, is a true translation of it. You have examined it carefully?

A. Yes, sir.

Q. It is a correct translation? 10

A. Yes, sir; this is the same document.

The Spanish document was marked Exhibit P 4.

The translation was marked Exhibit P 5 for the plaintiff.

Q, I show the witness a Spanish document which purports to be a rescission of this contract, dated August 4, 1884, together with a paper, and ask the witness to state whether it is a proper translation or not? 20

A. I have examined this paper and it is a translation from this point here, this is the heading and title.

Q. What is the heading that you refer to?

A. It refers only to the name and the authority for for it.

The Court—You must have a translation of the whole document.

Mr. Lawrence—This translation I believe is satisfactory to the other side. 30

The Spanish document was marked Exhibit P 6 for plaintiff. The translation was marked P 7.

Q. I show the witness another Spanish document, which is a copy from the record of Havana of four powers of attorney, from Runkle to Gilson and Lyles to Martinez and Mestre. There are four powers.

The Court—Who is that paper from? 40

Q. State No. 1, the first power of attorney is from whom and to whom, and the date?

Mr. Fuller stated that No. 1, dated July 24, 1884, was from Runkle and Lyles to Mestre and Martinez.

No. 2, July 25, 1884, from Gilson individually, and and as assignee of Maddison, and as one of the partners of Lyles & Gilson to Mestre and Martinez.

No. 3, dated June 26, 1884, from the same parties  
10 to Mestre alone.

No. 4, dated March 6, 1884, from Runkle and Lyles, individually and as a member of the firm of Lyles & Gilson to Lino Martinez.

Q. Will you state whether the translations attached to that document in the Spanish language are correct translations of this power of attorney?

A. Yes, sir; and there are two, I think, repeated. Nos. 5 and 6 are repetitions of two and three. This original copy, one power is repeated a second time  
20 in the original.

The Court—The translations are correct translations of the original?

A. Yes, sir.

BY MR EDWARDS.

Q. And of what you purport to translate.

A. Yes, sir.

The Court—What is the purport of these?

30 Mr. Lawrence—To procure the rescission, and relieve the contractors from liability.

The Spanish documents were then marked Exhibit P 8.

The translations were marked Exhibit P 9.

Q. I show the witness another document in the Spanish language; this purports to be a copy of the agreement for the deposit of the \$64,000. I ask the witness whether the paper annexed to it is a proper  
40 translation; it is dated March 27, 1882?

A. Yes, sir; it is.

The Spanish document was marked Exhibit P 10.

The copies were marked Exhibit P 11.

The Court—You offer the originals with the right to substitute the translations?

Mr. Lawrence—Yes, sir.

10

CROSS-EXAMINATION, by Mr. Edwards.

Q: Did you make these translations yourself?

A. I have not.

RE-DIRECT.

Q. You have examined them all?

A. I have compared them three times.

Mr. Collins—I would suggest that Counsel offer by the numbers each of the documents in the order in which he thinks they are applicable to his case, and then take up each one separately.

The Court—Yes, now the question is as to their admissibility.

Mr. Lawrence—I offer in evidence the advertisement for bids; the paper itself has, under a stipulation which we have entered into been initiated by Mr. Edwards, so the objection don't go to that.

Mr. Wallis—We object to it as incompetent, so far as it appears on the face of it, without going into the body of the advertisement, stated to be contained in it. That is a mere newspaper article which is incompetent as evidence against anybody except the publisher of the article.

30

The Court—I understood the witness to state that this was the official newspaper of 40

Havana; in which these advertisements were published.

10 Mr. Wallis—The fact that the advertisement appears in the official newspaper of Havana is no evidence of the officialness of the advertisement itself. Anybody else can put in an advertisement. It is no evidence that it emanated with the City of Havana, or was published by its authority. Then there is a further objection to the contents of it, and that is that it is not an advertisement in relation to the matters covered by the contract between the plaintiff and defendants in evidence in this Court. It is entirely foreign to anything contained in the contract.

(Counsel then argued the objections.)

20 The Court—I shall admit this for the purpose of showing the facts and circumstances connected with the work of Mr. Martinez; as to its effect on this contract, the Court will deal with that specifically. It seems to me to be part of the history, and ought to be put in to intelligently determine the matter. I may afterwards rule that this advertisement is not part of the work of Mr. Martinez, and that Mr. Runkle never employed him to do it; that is another question, but I think it is competent to show the facts and circumstances, what he claimed compensation for.

30 Counsel for defendant prayed an exception which was allowed.

And said exception of the defendants' is signed and sealed accordingly.

LEON ABBETT, (SEAL.)  
J. S. C.

40 Counsel for plaintiff then read the advertisement.  
Mr. Lawrence—I now offer the award.

Mr. Wallis—We object to the award: there is nothing to connect defendants' intestate with this award.

There has been no bid shown

Mr. Lawrence—Everything is embodied in this paper that we call the award.

Mr. Collins—Then our objection is on the same ground as the objection to the advertisement. It is not within the scope of this contract. It is a different thing, and made to different people, the award is not made to the defendant intestate, nor does it appear that it was made to anybody to his interest, or named by him, but it is made to three different parties, and it is not a contract for the build-  
ings of the water works.

The Court—By itself it may not be sufficient, but as I understand the contract, the award must be to Daniel Runkle and to such other persons as may be named by him, or  
nominated in his interest. I suppose that they intend to follow it up. Standing by itself it does not amount to anything, but I suppose they intend to follow this up by some act of Daniel Runkle, which will show that he did accept this, as for instance, they might show that he entered into the rescission of it, which will show that he had something to do with it originally. I will have to admit it  
now.

Mr. Wallis—Our client is dead, and we have not been able to see him in relation to this case at all. It may be very true that Mr. Runkle did enter into a contract with the City of Havana, in conjunction with three other gentlemen for the obtaining of a loan for the erection of water works; that may be true. But our objection is that this contract is not

the contract contemplated by the agreement, which is the basis of this action. This is another contract, as to which no agreement has been shown between Mr. Runkle and the plaintiff. This is the point of our objection.

10 The Court—It is impossible for me to decide that question for the present; I shall admit it for the present, and if at the end of the case I am satisfied that Mr. Runkle had  
 nothing to do with this contract, and it is not  
 the contract mentioned in the agreement, I shall charge the jury that the plaintiff cannot  
 recover for any service, but in view of their  
 opening I suppose they will connect it.

Counsel for defendant prayed an exception.

And said exception of the defendant is signed and sealed accordingly.

LEON ABBETT, [SEAL.]  
 J. S. C.

20

Mr. Lawrence then read the paper.

30 Mr. Wallis—I would like to note another objection to this paper, and that is that it appears now that the paper has been read, that Mr. Martinez, the plaintiff, in procuring this contract, so far as Runkle was concerned, did not represent Runkle, but Mr. Martinez represented one Overman, as agent of Maddison and Gilson appears to have been the party  
 representing Runkle.

Mr. Lawrence—This paper says that Martinez represented all the parties.

Mr. Collins—We simply wish to have the other grounds stated.

40 The Court—If I understand the matter correctly there is no claim made by the plaintiff against the defendant for any service done by

him in reference to this present matter, this loan.

Mr. Lawrence—No, sir.

The Court—So that is only relevant as part of the history of the case. It may possibly show that it has something to do with the matter which finally resulted in his taking some action.

Mr. Fuller—There was a double award. 10

The Court—You had no power as far as it appears, to take such award and bind Mr. Runkle.

Mr. Fuller—No, sir, not yet.

Mr. Lawrence—I now offer the agreement of severance between Daniel Runkle and his associates, marked P 12, it is called the agreement of severance, and is dated April 15, 1882.

Mr. Wallis—We only object to that on one 20 ground, and that is that it has to do with a contract entirely foreign to the contract on which this action is brought.

The Court—I will have to look at it hereafter. It is admitted subject to future action, and an exception is allowed.

And said exception of the defendant is signed and sealed accordingly.

LEON ABBETT, [SEAL.] 30  
J. S. C.

The paper was then read.

Mr. Lawrence—I now offer the rescission dated August 4, 1884, and marked exhibit P 6 and P 7.

Mr. Wallis—I object to that paper, as it has no relation to anything included in the contract upon which the suit is based. 40

The Court—I will allow it at present as part of the history of the case.

Mr. Collins—We ask an exception.

The Court—It is impossible to understand this case until we get some things in it.

And said exception of the defendants is signed and sealed accordingly.

10

LEON ABBETT, [Seal.]  
J. S. C.

The paper was then read.

20

Mr. Wallis—There is another objection which I wish to take to that, and that is that thus far no authority appears in either Martinez or Mestre to represent Runkle in this matter, and that is a rescission of the contract for the loan, which had nothing to do with the original contract upon which this action is based.

The Court—Your difficulty is that in the agreement of severance, you state it was to build water works as well as to make a loan. There is a recital signed by you. Do you mean to say that you deny the fact which is recited over your signature?

30

Mr. Collins—It recites a contract, which contract they haven't proved; it does not say the contract they prove is recited.

The Court—The recital in that instrument is some proof of the fact that there was some contract?

40

Mr. Collins—Yes, but they haven't proved or offered any such proof, to wit, a contract by the City of Havana with Lyles, Gilson and

Runkle to build water works; they prove a contract with Maddison, Lyles, Runkle and Gilson to take the loan.

The Court—They prove your admission.

Mr. Collins—Not that that contract which they offer is the one that is recited, they do not connect it.

The Court—I do not mean to say that they proved that it is the same one, but they prove that it was a contract. 10

Mr. Wallis—There is not doubt about that, but my point is that that contract is not the contract referred to and upon which the action is brought.

The Court—So far as the agreement has been read, all that Mr. Martinez agreed to do was to get a contract from the City of Havana to build water works. 20

Mr. Wallis—For Mr. Runkle individually?

The Court—Or anybody he associated himself with.

Mr. Collins—In his interest?

The Court—That agreement of severance shows who were the parties that were in interest with him.

Mr. Collins—Not in his own interest; they were jointly liable. 30

Mr. Lawrence—Now, I will read the powers of attorney referred to in this paper which I have just read. There are four powers of attorney. Two are confirmatory, because the other two were objected to by the City of Havana

Counsel then read the papers. 40

The Court—I do not understand that there is anything in the language which authorized this person to whom the power of attorney is given to rescind the contract, if any existed, to build the water works.

10 Mr. Collins—It will not be pretended that there was any other contract ever made between Havana and anybody else, except this one. That is the only one; they do not claim anything else.

The Court—The trouble is the recital in your agreement of severance.

Mr. Collins—Either that recital refers to this, or it refers to something that did not exist.

20 The Court—I am speaking of this power of attorney; there is no other language except what you call my attention to bearing on the subject; it treats them together.

Mr. Collins—It treats the water works as an incident of the contract; it was undoubtedly.

The Court—One would not naturally call it an incident, but they might have made it so by practical construction.

30 Mr. Edwards—They had a right to bid, and they could pay their money in two ways either in cash and the balance in water works. The bid for the loan at 86, they pay part in money, the balance by building the water works.

The Court—Does the other side agree to that statement.

Mr. Fuller—I do, sir.

40 The Court—Then I understand it.

Mr. Lawrence—The next power of Attorney is dated June 26, 1884, Gilson, as assignee of Maddison, to Mestre.

Counsel read the paper.

The next is dated July 24, 1885.

Counsel read it.

The next is dated July 25, 1884.

10

Counsel read it.

Now I offer the agreement of deposit of the \$64,000 and read the translation.

Mr. Collins—We make the same objection that we have to the other documents; it relates to a different sort of a contract than the one sued on.

The Court—I admit it as a part of the history of the case at present.

20

Whereupon the counsel of the defendant prayed for an exception and said exception of the defendant is signed and sealed accordingly.

LEON ABBETT, [SEAL].

J. S. C.

Mr. Lawrence then read the paper.

The Court—Let me ask a question, this suit is not for that \$25,000 referred to; there is no claim in this suit for that.

Mr. Lawrence—No, sir; there is not.

It is admitted that the defendants are the administrators of Daniel Runkle, deceased, the original defendant.

40

## PLAINTIFF RESTS.

Mr. Collins, on behalf of the defendant, moved that the plaintiff be called, on the following grounds:—

1. That the contract obtained was not the contract referred to in Exhibit P 1.
- 10 2. That the plaintiff is estopped from asserting any right in this action by reason of the rescission which he procured to be made.

The Court refused the non-suit at the present time, and gave counsel for defendant an exception in order to allow the whole case to go in.

And said exception of the defendant is signed and sealed accordingly.

20

LEON ABBETT, [SEAL.]  
J. S. C.

Mr. Edwards, on the part of the defendant, then opened the case.

Mr. Edwards—We offer a communication signed by Lino Martinez to the Mayor of Havana, dated November 9, 1881.

(Counsel read it).

30

The original paper was marked D 1, May 2d, 1893.

The transaction was marked D 2.

Mr. Edwards—We have a letter of February 16, 1882, from Lino Martínez to Daniel Runkle. The signature of Martínez is admitted. The envelope is post marked Havana, February 16, 1882. Received in New York February 20, 1882.

40

(Counsel read it).

Marked Exhibit D 3. May 2d, 1883. The envelope was marked in the same way.

Also a letter dated May 11, 1882, from Martinez to Mestre, (letter read).

The original was marked Exhibit D 4, May 2d, 1883.

The translation D 5.

Also a small book, which is the advertisement in Spanish and English.

The Court—There is no proof that this book came with this letter.

It is agreed that this book is not to be considered part of the case, but that it is the Spanish and English of evidence already in the case.

Mr. Edwards—We have one of the tri partite agreement of severance executed in Havana a few days afterwards.

Mr. Lawrence—I did not intend to cover<sup>20</sup> by the initiating and admission to show that the translation is accurate.

The Court—I shall admit that paper under the stipulation you have entered into.

Mr. Harris Is it competent without the original?

The Court—Yes, under the stipulation. It is a translation of some paper in evidence in Spanish, executed in Cuba, and is offered in evidence under the stipulation. The translation of this paper should be the same as the paper already offered by the other side.<sup>30</sup>

Mr. Edwards—The paper they offered was an English paper. This is substantially the same severance. In other words, the minute they got this contract they went before a notary to sever in Spanish style. When they<sup>40</sup>

got to New York they draw one in English, and that is the one that has been offered.

This paper is offered in evidence and received only for the purpose of showing the date when this agreement was executed in Havana, and not for the purpose of showing any difference between the New York severance and the Spanish severance. Marked Exhibit D 7.

10

Mr. Edwards—I now offer in evidence an agreement entered into between Walter Holman Gilson and Lino Martinez, dated November 11, 1882, executed at London, relative to the agency for the Havana loan.

20

Mr. Harris—We object to that on the ground that it is not relevant, the defendant having shown that there was a severance of the loan and the water contract. This being an agreement between Martinez and Gilson, and having no connection with Runkle, the defendant.

Mr. Edwards—We offer it because we propose to follow it up by proof showing that at the time this contract was rescinded Martinez had an interest of his own in it.

30

The Court—It is received for that purpose, and an exception is allowed to the plaintiff and said exception is signed and sealed accordingly.

LEON ABBETT, [L. S.]  
J.

Mr. Edwards—The formal execution of this paper is admitted.

40

Mr. Lawrence—Yes.  
Market Exhibit D 8.

Mr. Edwards—The next is an agreement of that same date, entered into between the same parties, part of which I read before, but the whole of which I want to read now.

Mr. Harris—We make the same objection, that the contract of loan, and the water contract—that this agreement with Lino Martinez is irrelevant, because Runkle is not connected therewith. 10

Mr. Edwards—It is offered for the purpose of showing that at the time of the rescission Mr. Lino Martinez had an interest in the loan.

The Court—It is admitted for that purpose, and an exception is allowed, and said exception of the plaintiff is signed and sealed accordingly.

LEON ABBETT, (L. S.)

J.

20

Marked Exhibit D 9.

Mr. Edwards—I offer a copy of a letter, a letter press copy of Lino Martinez, with his signature—the bona fides of the letter is not in question—it is dated London, September 10, 1883, and addressed to Pen Muir Morgan, Esq., Holston Court, E. C., in re Havana Loan. I offer it for the purpose of showing as part of what Mr. Martinez was doing in Europe to float this loan. 30

Plaintiff's counsel objected to the offer as irrelevant.

The Court admitted the letter and granted an exception to the plaintiff. The same was marked D 10. And the said exception of the plaintiff is signed and sealed accordingly.

LEON ABBETT, (L. S.)

J.

40

Mr. Edwards—We next offer a letter dated Havana, March 8, 1884, from Lino Martinez to James H. Lyles, Esq., the letter begging Mr. Lyles to see that Gilson sent down the power of attorney.

Marked D 11.

Also a letter dated March 27th, 1884, written by Lino Martinez to Mr. Emmett R. Olcott, 35 Broadway, New York City.

10           Marked Exhibit D 12, the Spanish copy.

The English copy was marked Exhibit D 13.

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EMMETT R. OLCOTT, sworn for defendant.

DIRECT EXAMINATION, by Mr. Edwards.

20   Q. Where do you reside, and what is your occupation?

A. I reside in New York City and I am an attorney and counsellor at law.

Q. Do you follow any special branch of the law business?

A. Yes, my business is a specialty, dealing in matters in foreign countries.

Q. What was the style of your firm in 1884?

A. It was either Olcott & Mestre, or it was Olcott  
30 & Mestre & Gonzales; it was Olcott & Mestre for a short time, and then it was Olcott, Mestre & Gonzales.

Q. Who were the members?

A. Myself, Emmet R. Olcott, Joseph M. Mestre and Antonio Gonzales.

Q. Where was your office?

A. We had our principal office in the City of New York, but we had branch offices.

40   Q. Where?

A. In Havana.

Q. Who was in charge of your office in Havana?

A. Mr. Mestre was in charge of our business in the island of Cuba.

Q. Was he a Cuban lawyer?

A. He was a Cuban lawyer.

Q. In other countries do you have offices?

A. Yes, in Mexico and correspondents in other countries, where the Spanish and other foreign<sup>10</sup> languages are spoken.

Q. Did your firm at that time represent Daniel Runkle?

A. Yes, sir, from the inception of this matter.

Q. How were you in the habit of corresponding with the parties in Cuba; or how is Runkle, relative to his interest?

A. I think he did little or no writing himself, it was almost entirely done through myself or my office.

Q. Directed to whom?

A. To various parties there, Mr. Martinez, the<sup>20</sup> plaintiff in this case, and Mr. Mestre.

Q. Were you in the habit of receiving letters from Mr. Mestre in regard to this matter?

A. Yes, sir; I had some, and some from Mr. Martinez, the plaintiff.

Q. Do you remember when the rescission of the contract was first mooted in the month February or March, 1884?

A. I remember.

<sup>30</sup>

Q. I call your attention to the letter which has just been read D 12 and the translation, D 13; have you the paper or the copy of the letter which came with that letter?

A. Yes, the enclosure; the original letter, if I remember right is the one I hold in my left hand, and the enclosure is the one I hold in my right hand. (The witness produced a thin tissue paper copy of a letter in the Spanish language, made by letter press)<sup>40</sup>

the letter I have in my left hand is D 12, and the tissue paper is what came in it.

Q. Do you know the handwriting of Lino Martinez?

A. I do, I have seen him sign his name in my presence a number of times.

Q. I call your attention to the signature that is finely outlined there, Lino Martinez.

A. Yes, sir; that is Lino Martinez's signature to  
10 the best of my knowledge.

Mr. Edwards—We offer that paper in evidence as part of this communication of March 27, 1884.

Mr. Harris—We object to the letter; the original should be produced.

Mr. Edwards—You sent us the copy; that is what you sent us. That is the letter that was enclosed to us.

Mr. Harris—We have no further objection.  
20

Marked Exhibit D 14 for defendant.

Q. (Handing witness a paper). Is this a copy on thicker paper of this same document?

A. It is.

The copy in Spanish was then marked Exhibit D 15.

Counsel then offered in evidence the translation of that letter dated Havana, March 27, 1884, and the same was marked D 16.

30 A question then arose as to the correctness of the translation, and the witness and Mr. Fuller made a comparison of the letters.

The Court—What is the difference between your translations and Mr. Fuller's translation, it any?

A. We have compared the Spanish and we find that practically there is only one exception, the way Mr. Fuller has read it, is correct.

Q. What is the difference?

40 A. I claim that the Spanish word "fianza" means

obligations and the other side claim that it is a guarantee.

Mr. Edwards offered in evidence Mr. Olcott's translation and the same was marked Exhibit D 16.

Counsel for plaintiff claim that the word "fianza" should be translated into the word guarantee and not obligations. The witness testifies that it should be obligations.

10

CROSS-EXAMINATION, by Mr. Fuller.

Q. How would you translate the word "undertaking" into Spanish?

A. You mean a bond?

Q. Yes.

A. Fianza.

Q. What is the word in Spanish?

A. Fianza.

Q. What does fianza mean?

A. Fianza means a bond in Spanish; it is the equivalent in Spanish of various words used by us in English; in other words it might mean a bond, an undertaking, an obligation of any kind.

Q. It means something to cover another?

The Court—What do you mean by that?

Mr. Fuller—An obligation to cover the obligation of somebody else; an undertaking to answer for somebody else.

A. I think I have answered the question by giving you the equivalents of the word fianza. 30

Q. The words undertaking and guarantee both would be translated as fianza?

A. A guarantee?

Q. Yes.

A. A guarantee might by implication mean fianza?

BY THE COURT:

Q. What does it mean in that connection?

A. I take it it means obligation in this connection. 40

It was a word thrown in there without any context.  
 BY MR. EDWARDS.

Q. Is it a generic word?

A. Yes, sir; it has nothing in there to define what it is, and in translating I tried to find the nearest equivalent in English of the word in Spanish, and the word fianza covers whatever might be implied under the word obligations.

<sup>10</sup> BY THE COURT.

Q. Could it mean any of these other words which Mr. Fuller has mentioned?

A. Your Honor will bear in mind there is nothing in this with reference to it, and on that the translator has to stand or fall; it is simply the word fianza used there, and the best equivalent in English is the word obligations, because it might refer to a bond, it might refer to an undertaking that was given, it might refer to an obligation, as such, so there was  
<sup>20</sup> nothing to define it in the text itself of that particular clause.

FURTHER CROSS.

Q. But could a deposit of \$64,000 to secure the contract be a fianza?

A. Yes.

RE-DIRECT.

<sup>30</sup> Q. Did you call the attention of Mr. Runkle to these various letters?

A. I did; immediately upon receiving any letter from Mr. Martinez or Mestre I sent for Mr. Runkle and I either read them or handed them to him to read, such as were in English, or translated such as were in Spanish.

Mr. Edwards—I have a letter from Lino Martinez to Daniel Runkle, dated April 19,  
<sup>40</sup> 1884, in English.

The same was marked D 17.

Also offered in evidence the following telegram, from Martinez to Runkle and Lyles, care of Olcott, 35 Broadway, New York, partly in Spanish and partly in English, dated March 27, 1884, and marked D 18.

Q. Will you translate that telegram?

A. "I urge the forwarding of the powers of attorney pending; I protest against damages caused<sup>10</sup> by delay." That is a liberal translation.

Q. Signed how?

A. Martinez.

Q. What is the date of that?

A. March 27.

Q. Another of July 23d, 1884. Olcott, 35 Broadway, New York, from Mestre and Martinez as follows: "Telegraph if power is coming tomorrow's steamer."

Telegram referred to was marked Exhibit  
D 19. 20

Also telegram dated July 22d, 1884, to Olcott from Mestre and Martinez as follows: "Send anyhow first steamer power, according telegram 18th."

Marked Exhibit D 20.

Also a telegram of July 18, from Martinez and Mestre to Olcott, in Spanish, of which the following is a translation: "The powers received are insufficient. It is urgent to send by tomorrow steamer<sup>30</sup> new Spanish power in Spanish for Runkle, Lyles and Gilson, Maddison to Martinez, Mestre, confirming the power of March 6th and June 26th, amplifying them specifically to cancel the contract to loan; to accept return of deposit, giving Common Council liberty of action and to execute a general release, all well explained." Signed, "Mestre-Martinez."

The original telegram was marked Exhibit  
D 21; the copy D 22. 40

Q. What decision did Mr. Runkle reach relative to the obtaining of the power and release from Mr. Gilson?

A. The correspondence and cables show.

The Court—No matter; you can not tell what the correspondence shows?

Mr. Harris—The question is objected to; how can he speak of Mr. Runkle's decision?

10 The Court—He was the one who acted for him; he was his attorney.

Mr. Harris—He might state what was done, but he can't give his general conclusion.

Mr. Edwards—I want to show he negotiated, and finally a settlement was made.

15 A. Mr. Runkle requested me to obtain the papers from Mr. Gilson.

Mr. Harris—Objected to on the ground of hearsay.

20 The question is overruled in that form.

Q. What instructions did you receive from Mr. Runkle relative to obtaining the powers of attorney from Gilson; necessary to rescind the contract in Havana?

Same objection.

Question overruled.

30 Q. What did you do by direction of Mr. Runkle relative to obtaining the powers of attorney necessary to rescind the contract in Havana?

The Court—You mean the powers of attorney in this case.

Mr. Edwards—Yes, sir.

A. I saw Mr. Gilson and his attorney on various occasions, and finally—

40 Q. What is the name of his attorney?

A. Charles H. Winfield, and was told by them—  
Objected to.

The Court—No, tell the result.

A. And after various negotiations I paid \$3,000, I think it was \$3,000, in cash, and delivered the promissory notes to Mr. Runkle to make up the difference of \$10,000 over and above the amount that was paid in cash, and on payment of the amount<sup>10</sup> and the delivery of the promissory notes Mr. Gilson signed the paper that I presented to him to sign.

BY THE COURT.

Q. You mean the powers of attorney in this case?

A. Yes, sir.

FURTHER DIRECT.

Q. Who paid the \$10,000 for Mr. Runkle?

A. I did.

20

Mr. Harris—Is that relevant.

The Court—He simply says that he, as attorney of Mr. Runkle, by his directions, paid \$10,000 to get the very power of attorney which is in evidence in this case, that is the one from Gilson, and they propose to show, if they have not done so that it was absolutely necessary to get that in order to consummate this thing, and that it was at the re-<sup>30</sup>peated request of Martinez that it should be done. All of that bears upon the question of Martinez's knowledge and his action, on the question of the rescission of the contract.

Mr. Harris—It may be proper to show that Mr. Martinez was desirous of having the power of attorney, but I do not think the method is material.

40

The Court—I exclude the method, except that he paid a consideration for it. I will give counsel an exception.

Q. (Handing witness a paper) Is that one of the notes that was given?

A. It is.

Q. Were all these notes paid?

A. Yes, sir; they were.

Q. Through you?

10 A. Yes, sir.

Q. Were they all in the same form?

A. Yes sir; in the same form, tenor and text.

Note referred to was offered in evidence and marked Exhibit D 23.

Q. What has become of the others?

A. I don't know what became of them; I don't know that I have any left. They were returned to me as paid for.

20 Q. Do you know the endorsement of Walter H. Gilson?

A. Yes, sir; I do.

Q. Is that his handwriting?

A. Yes, sir; that is his signature.

BY THE COURT.

Q. Is there any other endorsement on it?

30 A. His wife's endorsement is also on it, he was very much incensed that I made it to his order, wanted it made to his wife; I told him I was not dealing with his wife.

Q. What was the state of his health?

A. He was ill unto death at the time, he was very near his end, I think he died within the year, but he was confined to his house.

Q. That is Runkle's signature to the note?

A. Yes, sir; I paid that myself.

40 Q. For him?

A. Yes, sir; with money supplied by Mr. Runkle.

Q. You were acquainted with Mr. Runkle's business affairs and situation in life.

A. I was.

Q. From your knowledge of his finances and affairs, from the second day of November, 1881, down to the first of December, 1884, was he abundantly able to perform this contract for the building of the water works in Havana so far as the building of the water works was concerned?

A. Amply so.

CROSS EXAMINATION, by Mr. Harris.

Q. He went on afterwards and did build them?

A. No, sir; I don't understand that he did.

Q. After the rescission of this contract didn't the firm of Runkle, Smith & Company build those works.

Objected to as irrelevant. it was not a firm, it was a corporation. 20

Counsel for plaintiff insisted that it was pertinent because it explained the letter concerning which there was so much difficulty in the translation.

The Court directed the counsel to examine with reference to the letter.

Q. You knew of future negotiations didn't you when you received your letter from Mr. Mestre, March 27, 1884? 30

A. I did not.

Q. Where is the letter that was sent to you, I think it is Exhibit D 13.

A. (Letter was handed to Counsel.)

Q. He says in this letter, wick is addressed to you: "My Dear Sir—Having been informed by the letters of Messrs. Runkle, Lyles and Gilson that you are the lawyer who took part in the drawing up of 40

the powers of attorney for the rescission of the contract for the municipal loan in this city, I have not hesitated to apply to you today by cable to ask you to inform those gentlemen of the necessity I am in of having these documents in order to save the deposit of \$64,000 gold that I made to make the proposals to such loan, and that was guaranteed by contract of March 27, 1882. Mr. Mestre, to whom the powers of attorney of Mr. Runkle and Mr. Lyles  
 10 have been forwarded, has asked me for a letter declaring that I do not propose to avail myself of the rescission of any right to my own advantage, and also that I release the contractors from all liability therein, and I have not had any question in telling it to him since I have not to their prejudice any plan, project or idea of other business (negotiations). I send you herewith a copy of that letter."

Did you know of the other negotiations referred to in this letter?

20 A. I knew of no other negotiations. Mr. Gilson had intimated that Mr. Martinez had ideas of other negotiations, for his own benefit exclusively.

Q. Was that what he promised not to undertake?

Objected to.

The Court—That is a legal construction.

Q. Did you communicate this letter to Mr. Runkle.

A. The one you just read?

Q. Yes?

30 A. Certainly.

Q. Did you read the translation to him of this part of it, wherein he says, "If I do not have the powers I have asked for in time, that is, of all contractors, I will find myself in the unfortunate, but necessary position of enforcing my rights?"

A. I read him that letter in full.

Q. Did you discuss with him what Mr. Martinez's rights were that he threatened to enforce?

A. As I did not know Mr. Martinez had any rights  
 40 to enforce in connection with that letter, I don't

know that I discussed it extensively.

Q. You did not know what his rights were?

A. I did not know what Mr. Martinez was claiming.

Q. Did Mr. Runkle afterwards undertake to construct these water works, or of any of this business referred to in this letter?

Objected to as not cross-examination.

The Court—Do you mean individually? 10

Mr. Harris—In any way, either himself, or by persons whom he named as his associates.

The Court—Within what period do you intend to ask that?

Mr. Harris—Subsequent to the rescission.

The Court—How near?

Mr. Harris—At any time.

The Court—That certainly is not admissible.

Q. Did he within one year enter into any such contract?

The Court—That is with reference to himself, not what anybody else did? 20

A. I know nothing of Mr. Runkle's business in connection with Havana, after the closing of this business.

Q. You don't know whether he had any further interests in there or not?

A. I have answered the question.

Q. In whose handwriting is that note, the body of it?

A. The clerk, in my office, my engrosser. 30

Q. Was it signed in your office?

A. It was.

Q. Under whose direction did the clerk prepare that note?

A. Mine.

Q. Read that part of it that refers to the \$64,000

A. The whole refers to that.

Q. Read what part you think refers to it?

A. I think it all refers to it. 40

Q. It does, more or less, read the whole of it.

A. New York, June 28th, 1884. Four months after the surrender and payment to Lino Martinez, of the Island of Cuba, by the Honorable Common Council of the City of Havana, in said Island of Cuba, of a deposit of \$64,000 made through him, I promise to pay to the order of Walter H. Gilson, the sum of \$1,750, at the office of Olcott, Mestre & Gonzales, 35 Broadway. Daniel Runkle.

10 Q. Did you prepare that under Daniel Runkle's directions?

A. I had negotiated the settlement between Messrs. Gilson and Winfield, and this note was one of the amounts that were to be paid.

Q. From whom did you learn that the \$64,000 referred to in this paper had been deposited through Martinez?

A. I don't know; I can't recall who first told me that; prior to that date I had been in correspondence  
20 with Mr. Mestre, and I think I had seen Mr. Martinez himself, and Mr. Glison. I have seen Mr. Lyles and various other parties connected with this affair outside of Mr. Runkle.

Q. Did you prepare the powers of attorney of March 5th, 1884?

A. I think I took part in all the powers of attorney myself. I didn't write them out myself, but I think that I superintended the preparation by drafting the plan and scope of the powers of attorney.

30 Q. The first ones were executed by Gilson & Runkle.

A. I don't recall, the powers will speak for themselves.

Q. Well, Gilson, you are aware that he executed the one of March 6th, you prepared it?

A. The powers, as I told you, I think I was present at the execution of each of the papers.

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DEFENDANT'S REST.

## REST ALL.

Adjourned until May 3rd, 1893.

BELVIDERE, N. J., May 3, 1893. 10

## CHARGE TO THE JURY.

ABBETT, J.

Gentlemen of the Jury—This is a very important case by reason of the large interests involved in it, and by reason of the very interesting questions which have been submitted so ably and exhaustively by counsel on both sides. I think every question that could be raised in this case either on the one side or the other, has been submitted to the Court, and has been argued before you, and therefore when 20 I charge you with reference to the law in this case and give you my views, I think you will be possessed of every fact necessary to reach a fair and just conclusion between the parties.

The claim of the plaintiff is that on the 2nd of November, 1881, he made a contract with Daniel Runkle, now represented by his administrators in this suit, by which certain work was to be done by the plaintiff for the defendant, and upon the performance of that work he was to receive, according 30 to the terms of the contract, the sum of \$175,000 to be paid out of certain moneys which were to be the proceeds of a contract for building water works in the City of Havana.

The plaintiff alleges that he performed the services called for by that contract, and that therefore, he is entitled to receive the compensation provided for in that instrument. The defendant claims that he did not perform the services called for by that 40

instrument, and also that if he did, there were subsequent facts and circumstances and changes of relationship by reason of subsequent acts which relieved defendant from the claim under the contract. He claims also that even if not relieved, and the Court should so hold, or the jury should so find, under the instructions of the Court—even if not relieved from paying some damages, that defendant is not called upon to pay the \$175,000 as fixed damages named in that contract, but rather only called upon to pay what the plaintiff may prove in this case the damage was to him, without any reference to the sum named in the contract.

I think I have stated the claims of both parties, so that you will understand what is contended for on each side. It is not claimed in this case by either side that the fund out of which the \$175,000 was to be paid was ever created. It is admitted that there was no such fund in existence, but the plaintiff says that there is no reason why he should not recover, because he says it was not created by reason of the default of Runkle, who failed to perform his agreement with the City of Havana in reference to the loan and in reference to the building of water works.

Now, the first question the jury are to decide is whether or not the plaintiff did what the contract of November 2, 1881, called upon him to do. I will refer to the contract more specifically in a few minutes. If he did not do what he had agreed to do he is not entitled to recover anything whatever in this suit. He alleges performance, and that is one of the questions that the jury at the commencement must decide; as to whether or not he did perform that agreement on his part; whether he did what he contracted to do. If you find that the plaintiff did not do what he contracted to do, then, of course, he cannot recover anything in this suit, and your verdict would be for the defendant.

But in considering that question you will have to look at these features of the case. What the plaintiff obtained, if he obtained anything from the City of Havana, was a contract which involved two features; one was the procuring of a loan, or getting parties to procure a loan to the City of Havana for \$6,500,000. The other feature of the contract was the building of water works which should cost \$2,200,000, the payment for which was to be made<sup>10</sup> out of the proceeds of these bonds.

Now, the defendant contends that that was not what the contract of November 2nd, 1881, called for; that all the contract called for was the procuring of the contract for building water works in the City of Havana, and when the plaintiff obtained the contract which involved the necessity of getting a loan of \$6,500,000, that he coupled with the contract for the water works, a feature which he had no right under that agreement to put there, and I charge you as a matter of law, that the contract which the<sup>20</sup> plaintiff obtained from the City of Havana, could have been repudiated by Mr. Runkle, and that the coupling of the contract to build water works with getting this loan, would have justified Mr. Runkle in repudiating the action of the plaintiff, and that if he had so repudiated it, the plaintiff would have had no right to recover.

I further charge you that if the plaintiff obtained a contract to build water works for the City of Havana, coupled with this provision in reference to<sup>30</sup> obtaining this loan, and Runkle accepted that contract, and agreed to raise the loan to get the money, and that was coupled with it, and he accepted that as a performance by the plaintiff of his contract, I charge you that the fact that the building of the water works was coupled with this would not prevent him from treating the matter as an acceptance by Runkle of what the plaintiff had done in his behalf.

Upon this point the principal evidence as I recall it—it will of course be for you to consider the entire evidence in the case—but the principal evidence as I recall is this: It is proved in this case that in this Havana contract, whenever it was made, that the four parties who entered into or made that agreement, or who were concerned in it, executed a paper which is called the agreement of severance. That agreement of severance was executed, 10 one in Havana in March, and the other in the City of New York in April; one is in Spanish and one in English. You will recall the fact that four parties signed that agreement, and the recitals of that agreement, as to the taking by those parties of this Havana contract, and the division of the matter by which Maddison, the London Banker, or the representative of the London Banker, was to take upon his part all the duties with reference to raising the loan, and the other parties to it. Gilson, 20 Lyles and Runkle were to build the water works, and as between these four parties they were to divide it in that way. That instrument is important for you to consider as to whether or not it is not an admission, or proof before you of an acceptance by Runkle of this Havana contract, or bearing upon the question of acceptance on the part of Runkle of this contract. You will also recall the power of attorney which was executed for the rescission of the Havana contract. You will remember that among 30 these powers of attorney were two executed by Runkle, one on May 6th, 1884, and the other on July 24th, 1884, in which he gives power to Martinez and Mestre to take such proceedings and do such things as shall revoke this contract.

With these two items of evidence before you, and all the other evidence in this case, it will be for you to say whether or not Mr. Runkle did not accept what was done by Mr. Martinez. If you are satisfied 40 that he did anything (which the defendants

deny) you are to say whether or not it was not a practical performance by him of the contract, which was accepted by Runkle as such performance, if you find that it was a practical acceptance of it, and you are satisfied from the evidence in the case that Runkle accepted what Martinez did, if he did anything, as a performance of what was called for by this agreement of November 2nd, 1881, then you will go to another feature of the case. Of course, if you find that it was not, that ends the plaintiff's case. But if that was a practical performance and the evidence is all before you as to the recognition, or repudiation of it, and I fail to recall now any evidence whatever in the case, and counsel will correct me if I am mistaken, in which Mr. Runkle ever denied or raised the question that this was not a performance on the part of Martinez of what he agreed to undertake. Therefore, if the evidence be all on one side, and you find none on the other, it is for you to consider, taking all the testimony in the case, whether that was not a practical performance and an acceptance. If it was, then come the other questions in the case.

Now before we reach those, let me call your attention to just what this agreement of November 2nd, 1881, was. The recitals of that agreement are, that whereas the city of Havana desires to construct, or have constructed, certain water works in accordance with certain specifications, and that whereas it is supposed that the city will require the issue of \$5,500,000 of bonds for that and other purposes, and whereas the sum of \$2,200,000 is to be paid by the city out of the sum realized for the sale of the bonds to the person or persons to whom the contract for the construction of the water works is awarded—then a certain agreement is made based upon those facts. The party of the first part that is, Mr. Runkle, agrees that if the said contract for the erection and construction of said water works is

awarded to him by said city of Havana, or the parties that may be named by him, or in his interest, then the said party of the first part will pay to said party of the second part, or his executors, administrators or assigns, the sum of \$175,000. It is for you to say, gentlemen, whether or not Gilson, Lyle and Maddison, who were joined in the giving out of this Havana contract, were not there by the assent of Mr. Runkle. If they were there by his assent, 10 and he was acting then with them, I charge you that they were parties, lawfully there, and that so far as they were concerned, if you find that they were acting with him, and by his consent, that that would be a compliance with this agreement; although not only Mr. Runkle was one of the parties, but these other parties were joined with him. Upon the question whether they were joined with him, with his consent, this agreement of severance is evidence, and the recitals in it; the actions of Mr. Runkle are in 20 evidence, and the fact that they all joined in the rescission is in evidence, and on this question, and on all the case, it is for you to say whether it is not clear that these parties all acted with Mr. Runkle, with his consent, and that it was intended that they were the parties who were referred to in this agreement of November 2nd, as being the parties named by him. Whether that was not a compliance with the agreement so far as that is concerned.

30

Now, if that is so, and you so find from this evidence, then the plaintiff, if he procured this contract at all, which you are to find as one of the facts; that is, if he did the work, and on that you have the whole testimony in the case; his going to Havana; the correspondence in evidence and his actions as shown by the evidence and the different papers in the case. That he did some work under this agree- 40 ment, or attempted to do it, seems to be apparent

from the evidence, but I leave that for you to decide.

If it is so and these parties were lawfully joined with Mr. Runkle by his consent, then the plaintiff, if he obtained this contract in Havana, and it was accepted by Mr. Runkle, although embracing both these things, the loan and the water works, then the plaintiff procured the contract, which is called for in that instrument. If you find those other facts to be as I have stated, why then upon that you would have a right, and it would be your duty, to say that the plaintiff had performed his agreement of November 2nd, 1881; that he got that Havana contract.

But there is another feature of that agreement to which I call your especial attention, because it is very important in this case. This agreement does not stop with the words that Runkle is to pay the plaintiff \$175,000, but these words are added to that: "Pay \$175,000 in the manner and at the times following, that is to say, out of the payments made to the party of the first part by the City of Havana for the construction of the water works." It is not an agreement to pay \$175,000 absolutely, but to pay it out of a certain fund. This is very important in several aspects of this case, which will be referred to hereafter. Now, the plaintiff says that although it is true that there were no such funds created, out of which such payment could be made, and therefore Mr. Runkle never was in a position to pay the \$175,000 out of that fund, yet his failure to be in such condition arose from his own actions, and, therefore, that it does not lie in Mr. Runkle's mouth, or in the mouth of his legal representatives to say that he did not get it, because he could have gotten it if he had gone on and performed his contract with the City of Havana to raise the money and to build the water works. This is the contention of the plaintiff.

Now, gentlemen, I charge you that if you find these facts which I have stated, and reach the con-40

clusion that the plaintiff did perform services in the City of Havana, and did get such a contract as that instrument calls for, and Mr. Runkle accepted it as a performance of that agreement, that if this case had stopped in that position, that Mr. Runkle had failed to perform his agreement with the City of Havana to raise the money, and to build the water works—that if this case had stopped there, that the plaintiff would have been entitled to recover.

- 10 The difficulty in this case, however, is that it did not stop there. After the Havana contract was procured certain things transpired. There seems to have been a controversy prior to the execution of the Havana contract between Mr. Runkle and the plaintiff as to who should put up the guarantee fund of \$64,000. I think some of the instruments call it \$65,000 and others \$64,000. The plaintiff contended that he was not called upon to put it up, and Runkle seems to have contended that he was  
 20 not called upon to do it. There was finally an arrangement made by a paper which I haven't got, but which I know was in evidence of March 27, under which the money was to be paid by Martinez, or somebody that he procured to put it up, in which Runkle and the two other contractors for the water works, Lyle and Gilson, agreed that they would pay it back to him in certain contingencies. But Martinez put up the money and the city had it, and upon that money being put up, and this private  
 30 arrangement made between the parties, the contract was on the next day entered into between the City of Havana and these different parties.

Now, that was the condition at the time, but from that time, with this money up and with this contract signed and executed, up to May or June or July, 1884, nothing was done, for the reason, it seems to me, although it is not important, and I leave it to you as a question of fact, but for the reason, as coun-  
 40 sel seems to agree, that they could not sell their

bonds; they could not get a market for these \$6,500,000. Attempts were made to raise that money, but they failed. So that there being no fund by which the City of Havana could pay the contractors, and there being no fund by which the contractors could get payment for their work, there was no work done, so far as the water works were concerned, and the thing stood still.

In 1884 this condition of things became apparent<sup>10</sup> to all the parties, and for that, and for other reasons possibly, but for whatever reasons, that or any other, it reached a position in which somebody, as to whom it will be for you to say in a few moments, somebody wanted a rescission of the contract. Now, the contention on the part of plaintiff is that it was Runkle and his associates that wanted a rescission of the contract and nobody else. That they wanted to get rid of liability both to the City of Havana and on their agreement with the plaintiff to pay him back this \$64,000, if it was retained by the City of Havana. The defendants contend that not only did<sup>20</sup> Runkle and his associates want a rescission of the contract, but that Martinez, the plaintiff, wanted it, and that he wanted it for several reasons, one of which was to get back his \$64,000 which was lying there without any use, and which the City of Havana might forfeit, and leave him to a suit against Mr. Runkle and his associates to get it back.

Now, gentlemen, it is a question of fact which you are to decide in this case. If you fail to decide the<sup>30</sup> case of the main question that I have submitted, if you reach this branch of the case you are then to decide this question: Was this rescission the sole work of Mr. Runkle and his associates, or was it at the request, and at the instance of and for the benefit of the plaintiff, as well as for the benefit of the defendant and his associates. Upon this question I desire to call your attention to the exhibit with reference to the rescission of the contract. It seems to me<sup>40</sup>

that all the arrangement with regard to the rescission of the contract was made by Mr. Martinez, acting as attorney for Mr. Runkle, which action was afterwards ratified by the parties in interest. These instruments show, gentlemen, that whilst he was acting as attorney, all the terms of the rescission, and the effects and consequences of it were known to him at that time. The date of that instrument is August 4, 1884.

10 On the same point I call your attention to D 13. The question now is whether the plaintiff in this case wanted the rescission and urged it, and whether it was for his interests, or whether the rescission was solely for the interest of Runkle, and he only acted as Runkle's attorney, and in that capacity, and no other. D 13 is a letter from the plaintiff to Mr. Olcott, one of the attorneys of Mr. Runkle. It is dated March 27, 1884. I am speaking  
 20 now of the evidence bearing upon the question as to whether or not the plaintiff was acting for himself, and in his own interests as well as attorney. This letter says, among other things, "Mr. Mestre, to whom the powers of attorney of Mr. Runkle and Mr. Lyles have been forwarded, has asked me for a letter declaring that I do not propose to avail myself of the rescission, of any rights to my own advantage, and also that I release the contractors from all liability therein, and I have not had any question  
 30 in telling it to him, since I have not to their prejudice any plan, project or idea of other negotiations. I send you herewith a copy of that letter." There is also a copy of a telegram, "Urge forward pending powers. I protest damages delay. (Signed) Martinez.

Also D 16, a letter of the same date, from the plaintiff to Mestre, which says that "In accordance with your wishes, in order to satisfy the persons represented by you in the matter of the municipal  
 40 loan of this city, I have the greatest pleasure in ad-

dressing this to you, wherein I declare that I have no purpose in concurring in representing them in rescission of the contract for the loan, to utilize my rights, nor to obtain any advantages of this rescission hereafter, on account of any other negotiation in view, leading to such Court, nor do I have consequently any idea to carry out to the injury of the present contractors, and no other desire moves me than that of saving the deposit made by me and <sup>10</sup> guaranteed by them.

"I also certify by this letter that I release the contractors represented by you from all ulterior liability as to the obligation from the moment in which the contract for the loan being rescinded, the sixty-four thousand dollars in gold of the deposit have been recovered by me; for which purpose all the contractors should provide me in due course with special powers of attorney in that regard; and not doing so they will be liable for the damages that may result by reason of the delay, besides that <sup>20</sup> stipulated in the contract of March 27th, 1882."

Also D 17, which is a letter from Martinez to Runkle, dated Havana, April 19th, 1884:

"With none of your favors at hand since my letter to you jointly with Mr. Lyles, on the 23rd of February, I take this pleasure in order to inform you as to how matters stand at present.

"The postponement and delays in making the powers to Mestre have created new difficulties which will surely cause great delays, and more <sup>30</sup> still, a danger, because if the municipality should change their minds, the deposit would be in peril to be lost. Had I received the powers in time, there would not be such risk at present.

"Should the deposit be forfeited I would have to blame the postponers of the powers for the troubles and difficulties that may arise. (Signed) L. Martinez."

Also Exhibit D 19, which is a telegram from Mes. <sup>40</sup>

tre and Martinez to Olcott, the attorney of Runkle, dated July 22nd, 1884:

"Send anyhow, first steamer, power, according telegram 18th, Mestre-Martinez."

Also D 20, which is another telegram from Mestre and Martinez to Olcott, dated July 23rd, 1884.

"Telegram if power is coming to-morrow steamer."

Also D 22, which is a telegram from Mestre and  
10 Martinez to Olcott, the attorney of Runkle, dated July 18th, 1884, as follows:

"The powers received are insufficient. It is urgent to send by to-morrow's steamer new Spanish power in Spanish to Runkle, Lyles and Gilson. Maddison to Martinez, Mestre confirming the power of March 6th, and June 26th, amplifying them specifically to cancel the contract to loan, to accept return of deposit, giving Common Council liberty of action, and to execute a general release, all well explained."  
20

There is also a letter marked Exhibit D 11, from the plaintiff to Mr. Lyles, dated March 8th, 1884, which I will read:

"Your favor of the 1st inst. came duly to hand, in which you announce, by next mail, the remittance of the power to rescind the contract.

"You speak in that letter of a current report of my being in negotiations with the Spanish bank, and I must tell you in reply, that if it were possible for  
30 me to do such a thing, I would gladly offer you a share of the benefits; but unfortunately it is not so. The impossibilities to do the business under the present circumstances are quite out of the question. No one can do it at present, not even the Spanish Bank, but in case they should undertake it they will not need or have any of us. I am well aware of it, for I have offered the business to them twice, and they have refused it. What would I get by another  
40 trial? Another refusal only.

"Up to the present time I knew not whether Mr. Gilson sends the powers or not, and I beg of you to do your best and ask Mr. Runkle to use his influence with Mr. Gilson so as to get this document from him.

"He must know by this time that there is no hope to save the business, and that it is of the greatest impossibility to do it even with the money on hand.

"If, under these circumstance, he does not send me<sup>10</sup> the power, it is because he feels pleasure in causing me prejudice as a reward for all my sacrifices, and will prove to be a man who does not keep his word."

Now, you will also remember the further testimony bearing upon this question of fact, testified to by Mr. Olcott, and as shown in the notes of Mr. Runkle, which were afterwards paid. It is in evidence that after the receipt of this letter Mr. Runkle, through Mr. Olcott, (this letter is dated March 8th), on June 26th, got Gilson to execute a power of attorney. Up to that time Gilson had refused to execute a power of attorney, from the 8th of March up<sup>20</sup> to the 25th of June he refused, but on the subsequent day, June 26th, after the payment of \$3,000 in cash, and the giving of the three notes amounting to \$7,000 additional, he executed the power of attorney on June 26th, and on the subsequent day it was forwarded to Havana. Those two powers of attorney were afterwards found to be insufficient, and they were supplemented in July by powers of attorney for the same purpose, but in broader language. All<sup>30</sup> this testimony as to the request made by the plaintiff to Mr. Runkle, through his attorney, Mr. Olcott, to secure the execution of these powers of attorney, and the testimony of Mr. Olcott, that in order to produce them, Mr. Runkle was obliged to pay \$3,000 in cash, and give his notes that he would pay \$7,000 in addition, four months after Martinez had got back his \$64,000 from the city of Havana, bears upon the question whether or not this rescission was<sup>40</sup>

not at the request of and for the advantage of the plaintiff in this case, as well as for Mr. Runkle and his associates, and I charge you, gentlemen, that if you determine that it was for the advantage of the plaintiff and at his request, and that Mr. Runkle expended this amount of money in compliance with that request, that then you cannot charge against Mr. Runkle in this case, as a default on his part, the fact that the contract was rescinded. If you so find, 10 then the rescission would have been by Mr. Runkle and his associates, not only for his own benefit, but at the request of and for the benefit of the plaintiff in addition. And that being the case, it would not have been a default, which could be charged against Mr. Runkle, because it would be an action which he took at the request of and for the benefit of the plaintiff in this case as well as for himself.

Mr. Harris—The first power of attorney preceded these notes.

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The Court—The parties in Havana refused to rescind unless they had all the contracting parties sign the powers of attorney. They refused to act unless all the parties joined, and Mr. Martinez in the performance of his duty as attorney for these parties sent to procure the necessary powers, and get the necessary papers, but the one for Gilson was not obtained, and could not be obtained—(of course that is for you) without the expenditure of this money, 30 and whether it was for the advantage of the plaintiff as well as the defendant is for you to find. If you find under all the testimony of Mr. Olcott and the other evidence that it was at the plaintiff's request, and for his advantage, as well as for the defendant's, then I say to you the plaintiff's claim that it was the default of Runkle that the contract was rescinded cannot be charged against Mr. Runkle in this case for the purpose of inflicting upon him the 40 \$175,000. As to whether he is to pay anything what.

ever, that is an other question to which I will come later.

There is also a contention in this case under two letters which I have read, that the payment by Mr. Runkle of this \$3,000 in cash, the giving of these notes for \$7,000, at the request of Mr. Martinez was the payment of money by him and the giving of a consideration which released him absolutely from all liability under the contract; that a rescission was thereby effected, and that the parties cannot recover because Mr. Runkle expended \$3,000, and agreed to pay \$7,000 more on a certain contingency.<sup>10</sup>

I charge you that that will not destroy the plaintiff's case absolutely; I charge you that that only goes —(that is under the claim of the defendant that Mr. Martinez is to be charged with the rescission and held in default because of the breach of the contract) to the point of relieving Runkle from the payment of \$175,000 absolutely.

There is also in this question a claim on the part of the defendant that this contract was against public policy, and upon that point they refer to the terms of this contract, which provides, in the third clause thereof, the contract of November 2nd, 1881.

“That said party of the second part (that is the plaintiff in this case) in consideration of the mutual agreements hereinbefore contained, covenants, promises, and agrees to, and with the party of the first part, that he will proceed to Havana without delay, at his own expense, and there, as the representative of the said party of the first part (that is Runkle) use all lawful means and give such time and attention as may be necessary for obtaining the contract aforesaid, and in the manner aforesaid, and that he will pay and be responsible for *all commissions that he directly agrees to pay* to any person in the City of Havana, in and about the obtaining of the said contract, up to the time when the said contract<sup>40</sup>

is regularly executed and delivered to the party of the first part," that is, to Runkle.

In connection with that they also give in evidence a letter marked G 3, dated February 16, 1882, from Mr. Martinez to Daniel Runkle.

"Dear Sir—By some of your letters to Mr. Gilson I have had the opportunity to learn what you think in regards to the obligation I contracted with you, in reference to the \$100,000, object of our contract  
 10 celebrated in New York.

In order to have a better knowledge of this obligation I have thought it necessary to write you this, because by what I learn from you letters I infer that you suppose that I am compelled to do more than what in reality I am.

When I asked you in New York for \$100,000 for rewards, presents, etc., without being obliged to render account of its investment, it was the understanding that I would have no other duty, but to be  
 20 the mediator to these persons who only accept a present in confidence, and without which attraction the affair would have never come to an end.

I knew perfectly well that many of these amounts that I had to offer would have to be paid in signing the contract, and as by our covenant I shall not receive the amounts, but during two years, it must come out of my private money; otherwise, nobody would have accepted to help us to collect their re-  
 30 ward in three years.

Notwithstanding this difficulty, that for anyone else that had no funds at his disposal, would be of great importance, I have not said anything to you and am ready to avoid the difficulty.

I would have said nothing to you if I had not read in Mr. Gilson's letter that you believed that I am obliged to make the deposit of \$65,000 required and all what is necessary.

40 This, I would think it proper if I had received

the \$100,000, but as nothing has been given to me, I do not suppose this obligation concerns me.

Therefore, I wish you thoroughly to understand that I am not a man that fails his compromises, and that I am not obliged to deposit money for anybody.

However, all this; I am working in accordance with Mr. Gilson, so that at the necessary time the deposit may be ready, and I do not believe that for this new difficulty should be lost such a splendid<sup>10</sup> and well-worked affair that is near the end.

We have very short time to avoid difficulty, it has been approved by the principal officers and next week we must be ready to present it officially."

You will also remember the testimony in this case, that this contract was the contract which was to be given out on public bidding by the municipal authorities of the City of Havana, and that it was let at public bidding, and that there were two bidders and that it was finally awarded to Mr. Runkle and his associates, because their bid presented better terms than the other. You are to take this testi-<sup>20</sup>mony and all the testimony in the case and see whether or not you find from it that any portion of this money which was to be paid to the plaintiff by Mr. Runkle finally, was to be used for the purpose of paying public officials, or persons connected with the administrations of public affairs in the City of Havana, as presents or reward or gratuities, to influence them in their administration of public duty.<sup>30</sup>

I charge you as a matter of law that if it was the understanding and agreement, if you find from all the testimony in the case that any money was to be used for the purpose of affecting the action and the judgment of the public officials of Havana, that the contract is void and no amount can be recovered on it. But I charge you, gentlemen, that the plaintiff in this case had a right to use his own funds in anticipation of what he was to receive, to procure<sup>40</sup>

the influence of parties to assist him in doing the business for which he was engaged by Mr. Runkle, as long as it did not touch public officials or those who were connected with the giving out of that contract, or with the proceedings which led up to it. He had a right to deal with parties that were outside, and to use such proper and legitimate influence as was necessary in order to present the matter properly to the authorities. He had the right to do that, and if that is all the meaning of this that he was simply to use this to influence outside parties, and to do it in a legitimate manner and for lawful purposes, the contract would not be against public policy and that would be no ground of defence in this suit

Therefore, if you find that it was subject to the criticisms I have made, then there can be no recovery, no court of justice will give a man a dollar on any contract that is tainted with fraud or tainted with corruption of public officials, or by presents. It is not necessary to have a bribe, the giving of presents to affect their official conduct is just as reprehensible and would destroy the contract the same as a bribe. Whether or not this evidence is sufficient is for you to say, I have only this to say in addition, in considering that question, you ought naturally to give any man's conduct the benefit of every reasonable doubt. If it is not clear in your mind beyond all question of reasonable doubt that this was used illegitimately, then you should not find this contract void on that ground, because the law presumed that men are honest, and are doing that which is legitimate and right. The testimony must therefore be clear and strong enough to overcome that presumption before you will find that the man was dealing illegitimately in this matter.

Now after you have disposed of the case to that point, you may reach this condition of the case.

The question may then arise whether or not the plaintiff is entitled to recover anything by way of damages on his contract. If you should find against him as to the \$175,000 for the reasons, and upon the facts which I have presented to you and which you are to determine for yourself.

I charge you, gentlemen, that if you find, first, that the plaintiff in this case did obtain a contract from the City of Havana by his actions and by his work, in pursuance of his agreement under the contract of November 2nd, 1881, and if he did obtain it, it was satisfactory to the defendant, was accepted by him, if you reach that point, then, although it was rescinded afterwards, and the source from which the money was to come was rendered impossible by a rescission of the whole contract, so that the money could not come, yet, I charge you that if you find that that rescission was made by the joint action either of Mr. Runkle or his associates for themselves individually, or by their action together with that of the plaintiff, that then that rescission does not prevent the plaintiff from recovering for what he is fairly and honestly entitled to as compensation for what he had performed up to that time under the contract.

Now, understand, first you must find, if you reach that branch of the case, that he did the work, that he was the one that obtained the Havana contract; that the Havana contract was accepted by Mr. Runkle, that he acted under it and accepted it as performance of it; then that the rescission of the contract was made by Mr. Runkle, either of his own accord or in connection with the plaintiff—if you reach that point, I say that then it was done with their consent, then the plaintiff would be entitled to recover what he fairly ought to receive for his work under that contract up to that time.

Now the amount that he would receive, if you reach that branch of the case, is not the \$175,000.

The \$175,000 is no basis to act upon. You must eliminate that absolutely from your mind if you reach that point in the case. If you have reached the conclusion that a rescission was made with the consent and at the instance of and to help Mr. Martinez, the plaintiff, then the \$175,000 as a measure of damages, is eliminated from the case. You are not to consider it, but you are to consider what in justice and fairness he is entitled to under the proof  
 10 in the case. The proof that has been given on that branch of the case is very meagre. It is meagre because I suppose it was a view of the case that did not suggest itself to counsel. It has only developed in the mind of the Court during the trial of the case. But it is proved that the plaintiff went to Havana; it is proved that he was one of the firm of Martinez and Mestre, and was one of the firm which represented Mr. Runkle; it is proved that he was in contact with the authorities of the  
 20 city; that he appeared and acted as attorney, that he signed powers of attorney and did various other things, and he did it, if the other features of the case are found by you in plaintiff's favor, legitimately and lawfully, and that is for you to say. The question is what is that worth? There is sufficient evidence to consider it, and you have got to find what it is worth upon this feature of this case. There is no evidence of what he paid out as expenses in Havana, or, exactly, what is the proper  
 30 measure of damages for such a case as this, even if he could bring such evidence, but the work was done, and upon it you will have to say, upon the best light that the case gives you what it was worth—if you reach that branch of the case.

I am requested by the plaintiff to charge as follows:

First—That the failure of defendant to construct the works cannot deprive plaintiff of his right to  
 40 compensation for procuring the award. I charge

that subject to the modifications and statements in my charge.

Second--That the measure of damages is the amount agreed upon by Runkle as plaintiff's compensation for procuring the award.

I refuse to charge that, and refuse to charge thereon, except as stated in my charge to the jury.

Third. That interest should be allowed from the time of Runkle's failure to construct the works. <sup>10</sup>

I refuse to charge that, and refuse to charge thereon except as stated in my charge to the jury.

Fourth. That Martinez by acting as attorney in fact for Runkle in the matter of the rescission two years, four months and six days after the award in no way forfeited his rights under the contract of November 2nd, 1881, for damages.

I charge that subject to the modifications thereto in my charge to the jury.

Fifth. That the action of Martinez as attorney in fact in the rescission was not an assent to the failure of Runkle to perform the contract for the erection <sup>20</sup> of the water works.

I charge that subject to the modifications and statement in my charge to the jury.

Sixth. That the action of Martinez in reference to the rescission was the act of Runkle and not the individual act of Martinez.

I charge that action of Martinez, so far as he acted as attorney, was the act of Runkle, but I refuse to charge it so far as his individual acts were concerned, or were for his own individual benefit. <sup>30</sup>

Seventh. That the failure to construct the works antedated the rescission; the purpose of the rescission was to save from the effects of the failure to deposit, made with the city and to exempt the contractor from any claims for damages by the city.

I refuse to charge the second part of that request. I have charged the jury as to the purposes of the re- <sup>40</sup>

scission, that being a question for the jury to decide under the charge.

The requests submitted by the defendant are:

1. I am requested to direct a verdict for the defendants on one or all of the following grounds:

1. That there has been no proof that the plaintiff performed the contract, Exhibit P 1.

2. That there has been no proof that the plaintiff was the procuring cause of the contract which was  
10 awarded by the City of Havana to the persons named—Maddison, Lyles, Runkle and Gilson, and afterwards severed.

3. Upon the ground that the contract P 1 has been shown to have been against public policy, and therefore void.

4. On the ground that it appears that the procuring of the loan to the City of Havana was a prerequisite to the water works part of the contract, and the plaintiff having undertaken to procure that  
20 loan, and having failed, is barred from recovering.

5. Also, because the plaintiff is estopped from asserting any right in this action by reason of the rescission which he procured to be made.

6. Also, upon the ground stated in the motion to non-suit, which are; that the contract obtained was not the contract referred to in Exhibit P 1; and that the plaintiff is estopped from asserting any right in this action by reason of the rescission which he pro-  
30 cured to be made.

7. Also, because the defendant acted to his harm or prejudice upon the faith of the action of the conduct of the plaintiff, as shown by the evidence and other evidence offered.

I refuse so to direct the verdict.

2. I am requested to charge that if this contract is against public policy it is void, and there can be no recovery.

40 I so charge.

3. I am requested to charge that the measure of damages, if there was any right of recovery at all, is not fixed by the sum named in the contract, but that is for the jury to fix.

I refuse to charge that, except as I have charged it to the jury.

4. That the plaintiff has not shown that he had sustained any damages under the circumstances in this case as developed.

I refuse so to charge as a matter of law.

5. That the defendant intestate, Daniel Runkle, cannot be charged with the failure of Maddison and Company, or their assignee, Gilson, or Gilson and Martinez, to make the loan, which was a condition precedent to the building of the water works.

I refuse to charge with reference to that, other than I have charged the jury.

6. That if the defendant intestate acted to his prejudice upon the faith or by reason of the conduct of the plaintiff, and his agreement to release him from responsibility to him—if they find such an agreement or offer, whereby the defendant, intestate, paid the sum of \$10,000 or any sum to procure the power of attorney and release, which the plaintiff desired, then the plaintiff is estopped from asserting the present claim in this suit.

I refuse to charge with reference to that otherwise than I have charged.

7. If the plaintiff requested the defendants intestate to take part in the rescission of this contract, and failed to make known a purpose to assert a claim for compensation under Exhibit P 1, notwithstanding that rescission, that he is estopped by reason of his silence.

I refuse to charge that otherwise than I have charged the jury.

## THE JURY THEN RETIRED.

Mr. Harris—I except to the answers your Honor made to each request to charge on the part of the plaintiff, except where the Court has charged as requested, leaving the modifications to appear from the charge. And the plaintiff prayed that this, his bill of exception, be sealed, and it is sealed accordingly.

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LEON ABBETT, [L. S.]  
J.

Also to that part of the charge relating to the rescission wherein the Court stated it was a matter for the jury to determine whether this rescission was the sole work of Mr. Runkle and his associates, or whether it was for the benefit also of Mr. Martinez.

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The Court—You may take an exception to what I did say on that. And thereupon the plaintiff prays that his bill of exceptions be sealed, and it is sealed accordingly.

LEON ABBETT, [L. S.]  
J.

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Mr. Harris—Also to that part as to whether or not the plaintiff wanted the rescission and urged it; also in that connection as to the letter to Olcott of March 27, 1884; and also to the charge in the same connection concerning the Mestre letter, D 16; also the letter of Martinez to Runkle on April 19th, 1884, and Martinez to Lyles. And the plaintiff prays that his bill of exceptions be sealed, and it is sealed accordingly.

LEON ABBETT, [L. S.]  
J.

I also except to the charge as to the letter of Martinez to Runkle, with reference as to who was to

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make the deposit, and with reference to the \$100,000; also to that part of the charge wherein Your Honor stated that if the jury found that this rescission was for the benefit of both parties, that the plaintiff could not recover the \$175,000 or what the Court said on that subject; also, to the last part of your Honor's charge with reference to the quantum meruit. And thereupon the plaintiff prayed that his bill of exceptions be sealed, and it is sealed accordingly.

LEON ABBETT, [L. S.]

J.

Mr. Collins—I beg leave to except to the Court charging the first of the seven requests of the plaintiff, Justice Abbett. It was charged subject to the modifications and statements in my charge.

And thereupon the defendants pray that this, their bill of exceptions be sealed, and it is sealed accordingly.

LEON ABBETT, [Seal.]

J. S. C.

Also to the Court's refusal to direct a verdict as requested.

And thereupon the defendants pray that this, their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, [Seal.] 30

J. S. C.

And to the Court's refusal to charge the requests of the defendant which he did absolutely refuse. And thereupon the defendants pray that this, their bill of exceptions, be sealed, and it is sealed accordingly.

LEON ABBETT, [Seal.]

J. S. C.

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And to the modifications of those requests which the charges contain, where he did not absolutely refuse. And thereupon the defendants pray that this, their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, [Seal.]  
J. S. C.

And to the modifications of those requests which  
10 the charges contain, where he did not absolutely refuse.

And thereupon the defendants pray that this, their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, [SEAL.]  
J. S. C.

I also except to that part of the affirmative charge, which was where the Court charged the jury that if the plaintiff obtained the water works contract,  
20 coupled with the loan, and Runkle accepted that contract, and agreed to raise the money, the jury may treat that as an acceptance of performance by the plaintiff of the contract of November 2nd, 1881, if they found the other facts.

Justice Abbett This does not exactly state all I said, but as to what I did say I allow an exception.

And thereupon the defendants pray that this, their bill of exception, be sealed. and it is sealed accord-  
30 ingly.

LEON ABBETT, [SEAL.]  
J. S. C.

Also to the charge that the agreement of severance might be evidence of an acceptance by Runkle of the plaintiff's performance, taken in connection with the powers of attorney of 1884, and the other evidence in the case; that they might find from these  
40 facts a practical performance accepted by Runkle.

Justice Abbett—This does not state all the charge, but to what I did charge in reference thereto I allow an exception.

And thereupon the defendants pray that this, their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, (SEAL.)  
J. S. C.

Also to the Court's charge that it was for the Jury<sup>10</sup> to say whether or not Gilson and Lyles were not parties by assent of Runkle, and if so, that there would be compliance with the contract of November 2nd, 1881, and if that was so, they were within the provisions of that contract for parties to be named by him, and that the Jury, on the conditions named by the Judge, would be justified in finding that the plaintiff performed the contract of November 2nd, 1881, by procuring the contract with the City of Havana.

And thereupon the defendants pray that this, their<sup>20</sup> bill of exception, be sealed, and is sealed accordingly.

LEON ABBETT, [SEAL.]  
J. S. C.

Also to the charge to the Jury that if the Jury should reach the conclusion that the plaintiff performed services and procured such a contract as the agreement of November 2nd, 1881, called for, and Runkle accepted it, that if the case had stopped there the plaintiff would have been entitled to re-<sup>30</sup>cover.

Justice Abbett—This is not all or exactly what I did say, but to what I did say on this subject I allow an exception.

And thereupon the defendants pray that this, their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, [SEAL.]  
J. S. C.

And lastly to the Court permitting the Jury to find a verdict based upon what is in fact a quantum meruit, or outside of the contract.

Justice Abbett—This is not what I did say, but I allow an exception to what I did say.

And thereupon the defendants pray that this; their bill of exception, be sealed, and it is sealed accordingly.

LEON ABBETT, [SEAL.]  
J. S. C.

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### ASSIGNMENT OF ERRORS

BY PLAINTIFF BELOW.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

20

LINO MARTINEZ

VS.

WILLIAM RUNKLE AND HENRY

G. RUNKLE, Administrators

of Daniel Runkle, deceased.

} On Contract.

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### ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the seventeenth day of August, eighteen hundred and ninety-three, in the Court of Errors and Appeals in the last resort in all causes in New Jersey, comes the said Lino Martinez, by Babbitt & Lawrence, his attorneys, and says, that in the matters recited and con-

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tained in said bill of exceptions, and also in the giving of judgment there is manifest error in this, to wit:

1. At the trial of said cause at the Circuit, the Justice who tried the same refused to charge the Jury that the failure of the defendant's intestate to construct the water works cannot deprive the plaintiff of his right to compensation for procuring the award. 10

2. That said Justice refused to charge the Jury that the measure of damages is the amount agreed upon by Runkle as plaintiff's compensation for procuring the award.

3. That said Justice refused to charge the Jury that interest should be allowed from the time of Runkle's failure to construct the works.

4. That said Justice refused to charge the Jury that the plaintiff, by acting as attorney in fact for Runkle in the matter of the rescission two years four months and six days after the award, in no way forfeited his rights under the contract of November 2, 1881, for damages. 20

5. That said Justice refused to charge the Jury that the action of the plaintiff as attorney in fact in the rescission was not an assent to the failure of Runkle to perform the contract for the erection of the water works.

6. That said Justice refused to charge the Jury that the action of the plaintiff in reference to the rescission was the act of Runkle, and was not the individual act of the plaintiff. 30

7. That the said Justice refused to charge the Jury that the purpose of the rescission was to save from the effects of the failure the deposit made with the city, and to exempt the contractors from any claims for damages by the city.

8. That the said Justice erred in his charge to the Jury relating to the rescission in leaving it for the Jury to determine whether the rescission was the 40

sole work of Mr. Runkle and his associates, or whether it was for the benefit also of the plaintiff, and that, if it was for the benefit also of the plaintiff, he could not recover the compensation named in the contract. That on this point the Judge erroneously charged the Jury as follows: "Now, gentlemen, it is a question of fact which you are to decide in this case, if you fail to decide on the main question that I have submitted. It

10 you reach this branch of the case you are then to decide this question. Was this rescission the sole work of Mr. Runkle and his associates, or was it at the request and at the instance of and for the benefit of the plaintiff as well as for the benefit of the defendant and his associates. Upon this question I desire to call your attention to the exhibits with reference to the rescission of the contract. It seems to me that all the arrangement with regard to the rescission of the contract was made by Mr. Martinez, acting as attorney for Mr. Runkle, which action was

20 afterward ratified by the parties in interest. These instruments show, gentlemen, that whilst he was acting as attorney all the terms of the rescission and the effects and consequences of it were known to him at that time. The date of that instrument is August 4th, 1884. On the same point I call your attention to D 13. The question now is whether the plaintiff in this case wanted the rescission and urged it, and whether it was for his interest, or

30 whether the rescission was solely for the interest of Runkle, and he only acted as Runkle's attorney, and in that capacity, and no other. D 13 is a letter from the plaintiff to Mr. Olcott, one of the attorneys of Mr. Runkle. It is dated March 27th, 1884. I am speaking now of the evidence bearing upon the question as to whether or not the plaintiff was acting for himself and in his own interest, as well as attorney."

40 The Court then quotes from the letter D 13, and also

the letter D 16 from the plaintiff to Mestre, and also the letter D 17 from Martinez to Runkle, dated April 19, 1884, and also the letter D 11 from Martinez to Lyles, dated March 8th, 1884, and refers to the testimony of Mr. Olcott as to the notes given by Runkle, and to the giving of additional powers of attorney, and then continues "all this testimony as to the request made by the plaintiff to Mr. Runkle through his attorney, Mr. Olcott, to secure the execution of these powers of attorney, and the testimony of Mr. Olcott that in order to procure them Mr. Runkle was obliged to pay \$3,000 in cash and give his notes that he would pay \$7,000 in addition four months after Martinez had got back his \$64,000 from the City of Havana, bears upon the question whether or not this rescission was not at the request of and for the advantage of the plaintiff in this case as well as for Mr. Runkle and his associates, and I charge you, gentlemen, that if you determine that it was for the advantage of the plaintiff and at his request, and that Mr. Runkle expended this amount of money in compliance with that request, that then you cannot charge against Mr. Runkle in this case, as the default on his part, the fact that the contract was rescinded. If you so find then the rescission would have been by Mr. Runkle and his associates not only for his own benefit, but at the request of and for the benefit of the plaintiff in addition. That being the case it would not have been a default which could be charged against Mr. Runkle, because it would be an action which he took at the request of and for the benefit of the plaintiff in this case as well as for himself." \* \* \* "If you find under all the testimony of Mr. Olcott and the other evidence that it was at plaintiff's request and for his advantage as well as for the defendants', then I say to you, the plaintiff's claim that it was the default of Runkle that the contract was rescinded cannot be

charged against Mr. Runkle in this case for the purpose of inflicting upon him the \$175,000."

9. That the said Justice erred in charging the Jury that they could consider the letter of the plaintiff to Olcott Exhibit D 13 as evidence going to show that the rescission was at the request and for the benefit of the plaintiff and that if so the plaintiff could not recover the compensation stated in the contract.

10. That the said Justice erred in charging the Jury that they could consider the letter of the plaintiff to Mestre, Exhibit D 16, as evidence to the same effect.

11. That the said Justice erred in charging the Jury that they could consider the letter from the plaintiff to Runkle, Exhibit D 17, as evidence to the same effect.

12. That the said Justice erred in charging the Jury that they could consider the letter from the plaintiff to Lyles Exhibit D 11 as evidence to the same effect.

13. That the judgment in said cause is erroneous in that it was given for the sum of seventeen thousand five hundred dollars, whereas by law judgment should have been given for the plaintiff for the total amount named in the contract as compensation.

BABBIT & LAWRENCE,  
Attorneys of Plaintiff in Error.

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## ASSIGNMENTS OF ERROR

BY DEFENDANT BELOW.

Afterwards, that is to say, on the twenty-third day of October, in the year of our Lord, one thousand eight hundred and ninety-three, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, come the said William

Runkle and Harry G. Runkle, Administrators of Daniel Runkle, deceased, by Wallis, Edwards & Bumsted, their attorneys, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That the declaration aforesaid, and the matters therein contained, and not sufficient in law for the said Lino Martinez to have his said action against the said William Runkle and Harry G. Runkle, Administrators as aforesaid. <sup>10</sup>

2. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid admitted in evidence an advertisement for bids for the erection of water works in the City of Havana contained in the Gaceta De La Habana of March the fourteenth, eighteen hundred and eight-two (marked P 3 for plaintiff on the trial below.) <sup>20</sup>

3. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of said issue so joined between the parties aforesaid admitted in evidence an alleged award, in the Spanish language, together with a translation thereof into English, of a contract to place a loan purporting to have been made on the twenty-eighth day of March eighteen hundred and eighty-two, by the City of Havana, in the Island of Cuba, with Messrs. E. C. Maddison and others, (marked P 4 and P 5 for the plaintiff on the trial below.) <sup>50</sup>

4. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of said issue so joined between the parties aforesaid admitted in evidence an agreement of severance between Daniel Runkle, Walter H. Gil-<sup>40</sup>

son, James H. Lyles and E. C. Maddison & Company, dated April fifteenth, eighteen hundred and eighty-two, (marked P 12 for the plaintiff below)

5. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of said issue so joined between the parties aforesaid admitted in evidence a contract of rescission, in the Spanish language, together with a translation thereof into English, dated August  
 10 fourth, eighteen hundred and eighty-four, made by the City of Havana, to Daniel Runkle and others, (marked P 6 and P 7 for the plaintiff below.)

6. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid admitted in evidence, a copy of the contract for the deposit of sixty-four thousand  
 20 dollars, dated March twenty-seventh, eighteen hundred and eighty-two, made in the Spanish language, between Lino Martinez and Daniel Runkle, and the translation thereof into English, (marked P 10 and P 11 for the plaintiff below.)

7. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid refused when requested by the defendants below upon the close of the case of the  
 30 plaintiff below, to grant a judgment of non-suit in favor of the defendants below, said William Runkle and Harry G. Runkle, Administrators, as aforesaid and against said Lino Martinez.

8. There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to direct the Jury to find a  
 40 verdict for the defendants and against the plaintiff below.

9. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the Jury, subject to the modification and statements made by him, in accordance with the first request of the plaintiff, to wit: "That the failure of the defendant to construct the works cannot deprive plaintiff of his right to compensation for procuring the award." 10

10. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to charge the Jury that the plaintiff had not shown that he had sustained any damages under the circumstances in this case as developed.

11. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to charge the Jury 20 that the defendants intestate, Daniel Runkle, cannot be charged with the failure of Maddison & Company, or their assignee, Gilson or Gilson and Martinez to make the loan, which was a condition precedent to the building of the water works.

12. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to charge the Jury that 30 if the defendants' intestate acted to his prejudice upon the faith or by reason of the conduct of the plaintiff and his agreement to release him from responsibility to him, if they find such an agreement or offer, whereby the defendants' intestate paid the sum of \$10,000, or any sum, to procure the power of attorney and release, which the plaintiff desired, then the plaintiff is estopped from asserting the present claim in this suit. 40

13, There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to charge the Jury that if the plaintiff requested the defendants intestate to take part in the rescission of the contract and failed to make known a purpose to assert a claim for compensation under exhibit P, notwithstanding said rescission, that he is estopped by reason of his  
10 silence.

14 There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the Jury that if the plaintiff obtained the water works contract, coupled with the loan, and Runkle accepted that contract, and agreed to raise the money, the Jury may treat that as an acceptance of performance by the plaintiff of the contract of November 2nd, 1881, if they  
20 found the other facts; that on this point the said Justice erroneously charged the Jury as follows:

“Now, the first question the Jury are to decide is whether or not the plaintiff did what the contract of November 2nd, 1881, called upon him to do. I will refer to the contract more specifically in a few minutes. If he did not do what he had agreed to do he is not entitled to recover anything whatever in this suit. He alleges performance and that is one of the  
30 questions that the Jury at the commencement must decide; as to whether or not he did perform that agreement on his part. Whether he did what he contracted to do. If you find that the plaintiff did not do what he contracted to do, then of course he cannot recover anything in this suit and your verdict would be for the defendants.

“But in considering that question you will have to look at these features of the case. What the plaintiff obtained, if he obtained anything, from the City  
40 of Havana was a contract which involved two

features; one was the procuring of a loan, or getting parties to procure a loan, to the City of Havana for \$6,500,000. The other feature of the contract was the building of water works which should cost \$2,200,000, the payment for which was to be made out of the proceeds of these bonds.

"Now, the defendant contends that that was not what the contract of November 2nd, 1881, called for; that all the contract called for was the procuring of the contract for building the water works in the City of Havana, and when the plaintiff obtained the contract, which involved the necessity of getting a loan of \$6,500,000, that he coupled with the contract for the water works a feature which he had no right under that agreement to put there, and I charge you as a matter of law that the contract which the plaintiff obtained from the City of Havana could have been repudiated by Mr. Runkle, and that the coupling of the contract to build water works with getting this loan, would have justified Mr. Runkle in repudiating the action of the plaintiff, and that if he had so repudiated it, the plaintiff would have had no right to recover.

"I further charge you that if the plaintiff obtained a contract to build water works for the City of Havana, coupled with this provision in reference to obtaining this loan, and Runkle accepted that contract and agreed to raise the loan to get the money, and that was coupled with it, and he accepted that as a performance by the plaintiff of the contract, I charge you that the fact that the building of the water works was coupled with this would not prevent him from treating the matter as an acceptance by Runkle of what the plaintiff had done in his behalf.

"Upon this point the principal evidence as I recall it—it will of course be for you to consider the entire evidence in the case—but the principal evidence as I recall is this: It is proved in this case that 40

you are satisfied from the evidence in the case that Runkle accepted what Martinez did, if he did anything, as a performance of what was called for by this agreement of November 2nd, 1881, then you will go to another feature of the case. Of course, if you find that it was not, that ends the plaintiff's case. But if that was a practical performance and the evidence is all before you as to the recognition or repudiation of it, and I fail to recall now any  
 10 evidence whatever in the case, and counsel will correct me if I am mistaken, in which Mr. Runkle ever denied or raised the question that this was not a performnncce on the part of Martinez of what he agreed to undertake. Therefore, if the evidence be all on one side, and you find none on the other, it is for you to consider taking all the testimony in the case, whether that was not a practical performance and an acceptance. If it was, then comes the other question in the case.

20 "Now before we reach these, let me call your attention to just what this agreement of November 2nd, 1881, was; the recitals of that agreement are: That whereas the City of Havana desires to construct or have constructed certain water works in accordance with certain specifications, and that whereas it is supposed that the City will require the issue of \$6,500,000 of bonds for that and other purposes, and whereas the sum of \$2,200,000 is to be paid by the City out of the sum realized for the sale  
 30 of the bonds to the person or persons to whom the contract for the construction of the water works is awarded,—then a certain agreement is made based upon these facts. The party of the first part, that is Mr. Runkle, agrees that if the said contract for the erection and construction of said water works is awarded to him by the said City of Havana, or the parties that may be named by him, or in his interest, then said party of the first part will pay to said  
 40 party of the second part, or his executors, adminis-

in this Havana contract, whenever it was made that the four parties who entered into or made that agreement, or who were concerned in it, executed a paper which is called the agreement of severance. That agreement of severance was executed, one in Havana in March and one in the City of New York in April; one is in Spanish and one in English. You will recall the fact that four parties signed that agreement and the recitals of that agreement as to the taking<sup>10</sup> by those parties of this Havana contract; and the division of the matter by which Maddison, the London banker, or the representative of the London banker, was to take upon his part all the duties with reference to raising the loan, and the other parties to it, Gilson, Lyles and Runkle, were to build the water works, and as between these four parties they were to divide it in that way. That instrument is important for you to consider as to whether or not it is an admission, or proof before you of acceptance by Runkle of this Havana contract, or bearing upon the question of acceptance on<sup>20</sup> the part of Runkle of this contract. You will also recall the power of attorney which was executed for the rescission of the Havana contract. You will remember that among these powers of attorneys were two executed by Runkle, one on May 6th, 1884, and the other on July 24th, 1884, in which he gives the power to Martinez and Mestre to take such proceedings and do such things as shall revoke this contract.<sup>30</sup>

“With these two items of evidence before you, and all the other evidence in the case, it will be for you to say whether or not Mr. Runkle did not accept what was done by Mr. Martinez. If you are satisfied that he did anything (which the defendants deny), you are to say whether or not it was not a practical performance by him of the contract, which was accepted by Runkle as such performance. If you find that it was a practical acceptance of it, and<sup>40</sup>

trators or assigns, the sum of \$175,000. It is for you to say, gentlemen, whether or not Gilson, Lyles and Maddison, who were joined in the giving out of this Havana contract, were not there by the assent of Mr. Runkle. If they were there by his assent, and he was acting then with them, I charge you that they were parties, lawfully there, and so far as they were concerned, if you find that they were acting with him, and by his consent, that that would be a  
 10 compliance with this agreement; although not only Mr. Runkle was one of the parties, but these other parties were joined with him. Upon the question whether they were joined with him, with his consent, this agreement of severance is evidence, and the recitals in it; the actions of Mr. Runkle are in evidence, and the fact that they all joined in the rescission is in evidence, and on this question, and on all the case, it is for you to say whether it is not clear that these parties all acted with  
 20 Mr. Runkle, and with his consent and that it was intended that they were the parties who were referred to in this agreement of November 2nd, as being the parties named by him. Whether that was not a compliance with the agreement so far as that is concerned.

“Now, if that is so, and you so find from this evidence, then the plaintiff, if he procured this contract at all, which you are to find as one of the facts, that is, if he did the work, and on that you  
 30 have the whole testimony in the case; his going to Havana, the correspondence in evidence and his actions as shown by the evidence and the different papers in the case. That he did some work under this agreement; or attempted to do it, seems to be apparent from the evidence, but I leave that for you to decide.

“If that is so, and these parties were lawfully joined with Mr. Runkle, by his consent, then the  
 40 plaintiff, if he obtained this contract in Havana, and

it was accepted by Mr. Runkle, although embracing both these things, the loan and the water works, then the plaintiff procured the contract which is called for in that instrument. If you find these other facts to be as I have stated, why then upon that you would have a right, and it would be your duty, to say that the plaintiff had performed his agreement of November 2nd, 1881; that he got that Havana contract. 10

15. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury that the agreement of severance might be evidence of an acceptance by Daniel Runkle of the plaintiff's performance, taken in connection with the powers of attorney of 1884, and the other evidence in the case, and that the Jury might find from these facts a practical performance accepted by Runkle; that on this point the said Justice erroneously charged the 20  
Jury as follows:

"It is proved in this case that in this Havana contract, whenever it was made, that the four parties who entered into or made that agreement, or who were concerned in it, executed a paper which is called the agreement of severance. That agreement of severance was executed, one in Havana in March and the other in the City of New York in April; one is in Spanish and one in English. You will recall the fact that four parties signed that agreement 30  
and the recitals of the agreement, as to the taking by these parties of this Havana contract, and the division of the matter by which Maddison, the London banker, or the representative of the London banker, was to take upon his part all the duties with reference to raising the loan, and the other parties to it, Gilson, Lyles and Runkle, were to build the water works, and as between these four parties they were to divide it in that way. That instrument is 40

important for you to consider as to whether or not it is not an admission or proof before you of acceptance by Runkle of this Havana contract, or bearing upon the question of acceptance on the part of Runkle on this contract. You will also recall the power of attorney which was executed for the rescission of the Havana contract. You will remember that among these powers of attorney were two executed by Runkle, one on May 6th, 1884, and the other on July 24th, 1884, in which he gives power to Martinez and Mestre to take such proceedings and do such things as shall revoke this contract.

“With these two items of evidence before you, and all the other evidence in the case, it will be for you to say whether or not Mr. Runkle did not accept what was done by Mr. Martinez. If you are satisfied that he did anything (which the defendants deny) you are to say whether or not it was not a practical performance by him of the contract, which was accepted by Runkle as such performance. If you find that it was a practical acceptance of it, and you are satisfied from the evidence in the case that Runkle accepted what Martinez did, if he did anything, as a performance of what was called for by this agreement of November 2nd, 1881, then you will go into another feature of the case.

\* \* \* \* \*

“Upon the question whether they were joined with him, with his consent, this agreement of severance is evidence, and the recitals in it; the actions of Mr. Runkle are in evidence, and the fact that they all joined in the rescission is in evidence, and on this question, and on all the case, it is for you to say whether it is not clear that these parties all acted with Mr. Runkle, with his consent, and that it was intended that they were the parties who were referred to in this agreement of November 2nd, as being the parties named by him. Whether that was

not a compliance with the agreement so far as that is concerned."

There is also error in this, to wit, for that the said Justice, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties, aforesaid, charged the Jury that it was for the Jury to say whether or not Gilson and Lyles were not parties by assent of Runkle, and if so, that there would be compliance with the contract of <sup>10</sup> November 2nd, 1881, and if that was so, they were within the provisions of that contract for parties to be named by him, and that the Jury on the conditions named by the Judge would be justified in finding that the plaintiff performed the contract of November 2d, 1881, by procuring the contract with the City of Havana; that on this point the said Justice erroneously charged the jury as follows:

"Now before we reach those, let me call your attention to just what this agreement of November 2nd, 1881, was. The recitals of that agreement are, <sup>20</sup> that whereas the City of Havana desires to construct or have constructed certain water works in accordance with certain specifications, and that whereas it is supposed that the City will require the issue of \$6,500,000 of bonds for that and other purposes, and whereas the sum of \$2,200,000 is to be paid by the City out of the sum realized for the sale of the bonds to the person or persons to whom the contract for the construction of the water works is awarded,— then a certain agreement is made based upon those <sup>30</sup> facts. The party of the first part, that is Mr. Runkle, agrees that if the said contract for the erection and construction of said water works is awarded to him by said City of Havana, or the parties that may be named by him, or in his interest, then said party of the first part will pay the said party of the second part, or his executors, administrators or assigns, the sum of \$175,000. It is for you to say, gentlemen, whether or not Gilson, Lyles and Mad-<sup>40</sup>

dison, who were joined in the giving-out of this Havana contract, were not there by the assent of Mr. Runkle. If they were there by his assent, and he was acting then with them, I charge you that they were parties, lawfully there, and that so far as they were concerned, if you find that they were acting with him, and by his consent, that that would be a compliance with this agreement; although not only Mr. Runkle was one of the parties, but these  
 10 other parties were joined with him. Upon the question whether they were joined with him, with his consent, this agreement of severance is evidence, and the recitals in it; the actions of Mr. Runkle are in evidence, and the fact that they all joined in the rescission is in evidence, and on this question, and on all the case, it is for you to say whether it is not clear that these parties all acted with Mr. Runkle, with his consent, and that it was intended that they were the parties who were referred to in this agree-  
 20 ment of November 2nd, as being the parties named by him. Whether that was not a compliance with the agreement so far as that is concerned.

“Now, if that is so, and you so find from this evidence then the plaintiff, if he procured this contract at all, which you are to find as one of the facts; that is, if he did the work, and on that you have the whole testimony in the case; his going to Havana; the correspondence in evidence and his actions as shown by the evidence and the different papers in  
 30 the case. That he did some work under this agreement, or attempted to do it, seems to be apparent from the evidence, but I leave that for you to decide.

“If that is so, and these parties were lawfully joined with Mr. Runkle by his consent, then the plaintiff, if he obtained this contract in Havana, and it was accepted by Mr. Runkle, although embracing both these things, the loan and the water works,  
 40 then the plaintiff procured the contract which is

called for in that instrument. If you find those other facts to be as I have stated, why then upon that you would have a right, and it would be your duty, to say that the plaintiff had performed his agreement of November 2nd, 1881, that he got that Havana contract."

There is also error, in this, to wit, for that the said Justice, before whom, etc., at and upon the afore-<sup>10</sup> said trial of the said issue so joined between the parties aforesaid, charged the Jury that if the Jury should reach the conclusion that the plaintiff performed services and procured such a contract as the agreement of November 2nd, 1881, called for and Runkle accepted it, and that if the case had stopped there the plaintiff would have been entitled to recover; that on this point the said Justice erroneously charged the Jury as follows:

"But there is another feature of that agreement to which I call your special attention, because it is very important in this case. This agreement does<sup>20</sup> not stop with the words that Runkle is to pay the plaintiff \$175,000. But these words are added to that: 'Pay \$175,000 in the manner and at the times following, that is to say 'out of the payments made to the party of the first part by the City of Havana for the construction of the water works.' It is not an agreement to pay \$175,000 absolutely, but to pay it out of a certain fund. That is very important in several aspects of this case, which will be referred<sup>30</sup> to hereafter. Now the plaintiff says that although it is true that there were no such funds created, out of which such a payment could be made, and therefore Mr. Runkle never was in a position to pay the \$175,000 out of that fund, yet his failure to be in such condition arose from his own actions, and therefore, that it does not lie in Mr. Runkle's mouth, or in the mouth of his legal representatives to say that he did not get it, because he could have gotten it if he had,<sup>40</sup>

gone on and performed his contract with the City of Havana, to raise the money, and to build the water works. This is the contention of the plaintiff.

“Now, gentlemen, I charge you that if you find these facts which I have stated, and reach the conclusion that the plaintiff did perform services in the City of Havana and did get such a contract as that instrument calls for, and Mr. Runkle accepted it as a performance of that agreement, that if this case had stopped in that position, that Mr. Runkle had failed to perform his agreement with the City of Havana to raise the money, and to build the water works—that if this case had stopped there, that the plaintiff would have been entitled to recover.”

18. There is also error in this, to wit, for that the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, permitted and charged the Jury to find a verdict based upon what is in fact a quantum meruit, or outside of the contract: that on this point the said Justice erroneously charged the Jury as follows:

“Now, after you have disposed of the case to that point you may reach this condition of the case. The question may then arise whether or not the plaintiff is entitled to recover anything by way of damages on his contract. If you should find against him as to the \$175,000 for the reasons and upon the facts which I have presented to you, and which you are to determine for yourself.

“I charge you, gentlemen, that if you find first that the plaintiff in this case did obtain a contract from the City of Havana by his actions and by his work in pursuance of his agreement under the contract of November 2nd, 1881, and if he did obtain it, it was satisfactory to the defendant, was accepted by him; if you reach that point, then, although it was rescinded afterwards and the source from which the money was to come was rendered impossible by

a rescission of the whole contract, so that the money could not come; yet, I charge you that if you find that that rescission was made by the joint action, either of Mr. Runkle or his associates for themselves individually, or by their action together with that of the plaintiff, that then that rescission does not prevent the plaintiff from recovering for what he is fairly and honestly entitled to as compensation for what he had performed up to that time under <sup>10</sup> the contract.

"Now, understand, first you must find, if you reach that branch of the case, that he did the work, that he was the one that obtained the Havana contract, that the Havana contract was accepted by Mr. Runkle, that he acted under it and accepted it as performance of it, then, that the rescission of the contract was made by Mr. Runkle either of his own accord, or in connection with the plaintiff—if you reach that point—I say that then it was done with their consent, then the plaintiff would be entitled to recover what he fairly ought to receive for his work <sup>20</sup> under that contract up to that time.

"Now, the amount that he would receive, if you reach that branch of the case, is not the \$175,000. The \$175,000 is no basis to act upon. You must eliminate that absolutely from your mind if you reach that point in the case. If you have reached the conclusion that a rescission was made with the consent and at the instance of and held Mr. Martinez, the plaintiff, then the \$175,000, as a measure of dam- <sup>30</sup> ages is eliminated from the case. You are not to consider it, but you are to consider what, in justice and fairness he is entitled to under the proof in the case. The proof that has been given on that branch of the case is very meagre. It is meagre because, I suppose, it was a view of the case that did not suggest itself to counsel. It has only developed in the mind of the Court during the trial of the case. But it is proved that the plaintiff went to Havana, it is <sup>40</sup>

proved that he was one of the firm of Martínez and Mestre, and was one of the firm which represented Mr. Runkle; it is proved that he was in contact with the authorities of the city; that he appeared and acted as attorney, that he signed powers of attorney and did various other things, and he did, if the other features of the case are found by you in plaintiff's favor, legitimately and lawfully, and that  
 10 is for you to say. The question is what is that worth? There is sufficient evidence to consider it, and you have got to find what it is worth upon this feature of this case. There is no evidence of what he paid out as expenses in Havana, or exactly what is the proper measure of damages for such a case as this, even if he could bring such evidence but the work was done, and upon it you will have to say, upon the best light that the case gives you what it was worth—if you reach that branch of the case."

There is also error in this, to-wit: that by the  
 20 record aforesaid, it appears that the judgment in form aforesaid was given for the said Lino Martínez against the said William Runkle and Harry G. Runkle, administrators aforesaid, whereas by the law of the land it ought to have been given for the said William Runkle and Harry G. Runkle, administrators as aforesaid, against the said Lino Martínez.

WALLIS, EDWARDS & BUMSTED,  
 Attorneys of Plaintiff in error, William  
 30 Runkle et als, administrators, etc.

## PLAINTIFF'S EXHIBITS.

### P 1.

ORIGINAL CONTRACT OF NOVEMBER 2  
1881, BETWEEN DANIEL RUNKLE AND  
LINO MARTINEZ.

ARTICLES OF AGREEMENT made this second day 10  
of November, in the year 1881, by and between  
Daniel Runkle, of Asbury, County of Warren, State  
of New Jersey, party of the first part and Lino  
Martinez, of the City of Havana, Island of Cuba,  
party of the second part, witnesseth:

THAT WHEREAS, The City of Havana in the  
Island of Cuba is desirous of constructing or having  
constructed certain water works in accordance with  
certain specifications prepared by it for the purpose  
of supplying the inhabitants of said city with water,  
and

WHEREAS, It is supposed that said city will issue 20  
for that and other purposes connected therewith its  
bonds to the amount and of the face value of about  
six millions five hundred thousand dollars, and

WHEREAS, The sum of two million two hundred  
thousand dollars in the lawful money of the United  
States is to be paid by said city out of the sum  
realized by it from the sale of said bonds to the per-  
son or persons to whom the contract for the con-  
struction of said water works may be awarded. 30

NOW THEREFORE, the party of the first part for  
and in consideration of the premises and of the sum  
of one dollar to him in hand paid by the party of  
the second part at or before the ensealing and de-  
livery of these presents, the receipt whereof is here-  
by acknowledged, and of other good and valuable  
consideration, does hereby covenant, promise and  
agree to and with the party of the second part. 40

First. That if the said contract for the erection and construction of said water works is awarded to him by said City of Havana, or to parties that may be named by him or in his interest, then said party of the first part will pay to said party of the second part or to his executors, administrators or assigns the sum of one hundred and seventy-five thousand dollars, lawful money of the United States in the manner and at the times following, that is to say:

10 Out of the payments made to the party of the first part or to the person or persons named by him or in his interest, by the said City of Havana, for the construction and erection of said water works, the party of the first part will forthwith pay to said party of the second part out of said sum an amount, which shall be in the same proportion to the amount so received by him as the whole amount, one hundred and seventy-five thousand dollars so as aforesaid, to be paid by him to the party of the second part, is to the whole amount of two million, two

20 hundred thousand dollars so as aforesaid to be received by him from said City of Havana, for the construction and erection of said works.

Second. Said party of the first part further covenants, promises and agrees to and with the party of the second part that if any work is done by said party of the first part or by parties that may be named by him or in his interest, in or about the construction or erection of said works, not mentioned in the specifications of said works as they

30 have been submitted by the said City of Havana, then the party of the first part will pay to said party of the second part one eighth of the net profits arising from the performance of said extra work.

Third. The said party of the second part in consideration of the mutual covenants hereinbefore contained, hereby covenants, promises and agrees to

40 and with the party of the first part that he will pre-

ceed to Havana without delay, at his own expense, and there as the representative of the said party of the first part use all lawful means, and give such time and attention as may be necessary for the purpose of obtaining the contract aforesaid, and in the manner aforesaid, and that he will pay and be responsible for all commissions that he directly agrees to pay to any persons in the said city of Havana, in and about the obtaining of said contract, up to the 10 time that the said contract is regularly executed and delivered to the party of the first part or to the persons he may name or who may be in his interest.

Fourth. It is further covenanted, promised and agreed between the parties hereto that in case the contract for the water works should be awarded to the said party of the first part or to his representatives at a price less than two million two hundred thousand dollars then the commissions to be paid to the party of the second part shall be reduced as follows: There shall be allowed and paid to him the sum of one hundred thousand dollars, and from 20 the remaining seventy-five thousand dollars there shall be deducted such a proportionate sum as the amount of the contract price shall bear to the said two million two hundred thousand dollars.

It is understood and agreed between the parties hereto that the prompt payment of all commissions is guaranteed by the party of the first part and all such payments shall be made immediately upon the payment being made to the contractor or his repre- 30 sentatives and such commissions will be paid either in Havana or in the City of New York at the option of the party of the second part, and also that if, for any reason, the contract hereinbefore referred to should not be given by the City of Havana to the party of the first part or anyone in his interest, the party of the second part shall have no claim for services or disbursements against the party of the first part.

Fifth. It is further covenanted and agreed that the covenants, promises and agreements herein contained shall enure to the benefit of and be binding upon the executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.

10 Sealed and delivered } L. MARTINEZ, (L. S.)

in presence of } DAN'L RUNKLE, (L. S.)

The word October on 2nd line of 1st page erased and word November inserted before execution.

EMMET R. OLCOTT.

State of New York, }  
City and County of New York. }

On the second day of November, eighteen hundred and eighty-one, before me personally appeared Daniel Runkle and Lino Martinez, known to me  
20 and to me known to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereto set my hand and official seal at the City of New York the day and year first above written.

ANTONIO C. GONZALEZ,

30 [L. S.] Notary Public, N. Y. Co.

**P 2**

TRANSLATION OF ADVERTISEMENT FOR  
BIDS, PUBLISHED MARCH 14, 1892, IN  
THE HAVANA GAZETTE.

OFFICE OF THE MUNICIPAL COUNCIL OF HAVANA.

In virtue of the resolution passed by the Most  
40 Excellent Municipal Council in session of the 10th

instant, after due authorization by the General Government the 28th current, at twelve noon in the Council Hall was appointed to adjudge in public sale, subject to the conditions and with reference to the fundamental provisions hereinafter published, a loan of five million six hundred thousand dollars cash, for the purpose set forth in the first of said provisions, it being understood that the official instrument referring thereto and the schedules of general and special conditions and the other documents relating to the construction of the works for storage and distribution of water will be found on exhibition in the office of the Secretary of the Most Excellent Municipal Council from eleven to five P. M., where persons applying for the purpose of examining them will receive such information and data as they think proper to request, both as to those works and as to the other objects of the loan.

Havana, 14th March, 1882.

The President of the Municipal Council,  
PEDRO BALBOA. 20

#### CONDITIONS OF SALE.

1st. The sale will be made in the Town Hall before the proper committee, His Excellency the President of the Municipal Council presiding, on the 28th current at twelve noon.

2nd. Proposals will be presented to the president of the committee in sealed envelopes, in conformity with the contents of the fundamental provisions hereinafter quoted and according to the annexed form, and will be received from twelve to one of the day mentioned. 30

3rd. Every paper, whatever the proposal that it may contain, must be accompanied by the proper document which will prove the deposit in the Municipal Treasury of three per cent. of the estimated amount of the works—that is to say the sum of sixty-four thousand dollars metallic currency, or in 40

bonds of the Most Excellent Municipal Council as provisional guarantee to answer for the result of the sale.

4th. In the day, hour and place appointed, the committee having met, the proceedings of sale will be commenced, upon the declaration of the president to this effect, and the notice of the sale to the present provisions and conditions being read.  
 10 The parties interested will deliver to him the papers containing the proposals, which will be received only during the first hour, upon the lapse of which the president will give notice that in case they should think it advisable the bidders may ask such explanations as they desire. The doubts that might occur having been cleared up by the president, the inventory, drawing, and numbering of the proposals presented, no new interruption, nor even the withdrawal of any proposal being permitted.

5th. The drawing will be made by putting into a  
 20 box as many slips of paper numbered relatively as there have been proposals delivered and in another said proposals. The secretary of the committee will draw out a proposals and one of the bidders a slip of paper, the number of the latter being written on the outside of the former. The secretary will thereafter draw another proposal and another bidder another slip of paper, the number of which will be stamped on the outside of it and so on.

3) 6th. They will thereupon proceed to open the proposals presented in the order resulting from the drawing, and to read their contents aloud, at once throwing out all that are not in exact conformity with the fundamental provisions prescribed, and also those which are not accompanied by the proper guarantee.

7th. The reading being finished it will be declared  
 40 in the proceedings which is the most favorable proposal, but the respective receipts will not be re-

turned to the authors of the others until this has received the approval of the Most Excellent Municipal Council. If there should be several equal proposals a new verbal bidding will be opened among the authors of the same during fifteen minutes, and if the result should show equally between several preference will be given to the proposal the number in order of which is less than that of the other equal proposals, the proper declaration being made. 10

8th. The sale shall not be considered as finally adjudged until the result of the same having been reported to the Most Excellent Municipal Council the latter shall have resolved as it shall think advisable with reference to the decision of its substitute committee.

9th. Any difficulty that may occur in the adjudication as to the meaning or application of these conditions or of the fundamental provisions which follow shall be decided in the proceedings by the President, reserving to the Most Excellent Municipal Council 20 to examine and decide on any protest which the bidder considering himself prejudiced may make on the ground of his decision.

Habana, 11th March, 1882.

The President of the Municipal Council,  
PEDRO BALBOA.

#### FORM OF PROPOSAL No. 1.

Mr. \_\_\_\_\_, residing at \_\_\_\_\_, being in- 30  
formed of the notice published in the Gazette of Havana and in the official bulletin of the Province by the Most Excellent Municipal Council, dated \_\_\_\_\_, of the bases, conditions and requisites demanded for the adjudication in public sale of a loan of five million six hundred thousand dollars cash, intended for the purpose, or purposes, to which the first fundamental provision in those published is limited, he binds himself to take on his account said 40

loan at the rate of \_\_\_\_\_ (here the rate per cent. in one sum in words) and to cash it in (it shall be declared whether this is done in the Municipal Treasury or in some other place, in the latter case, stating the point where the sum has to be deposited).  
Date and signature.

Note.—The envelope of the proposal shall have this inscription: "Proposal for adjudication of the loan of \$5,600,000, which the Most Excellent the  
10 Municipal Council is selling at auction."

#### FORM OF PROPOSAL No. 2.

Mr. \_\_\_\_\_, residing in \_\_\_\_\_, being informed of the notice published in the Gazette of Havana and official bulletin of the Province by the Most Excellent Municipal Council, dated \_\_\_\_\_,  
20 of the bases, conditions and requisites demanded for the adjudication in public sale of the loan of five millions six hundred thousand dollars intended for the purposes to which the first fundamental provision in those published is limited, and also of the schedules of special and general conditions, of measurement of prices, and the estimates and plans relating to the works of storage and distribution of water in this city, which are on exhibition in the office of the Secretary of the Most Excellent Municipal Council; and finally of all the obligations and  
30 rights set forth in the documents which are to govern the contract; binds himself to take on his account said loan at the rate of (here the rate per cent. in one sum in words) himself, applying that amount to the purposes declared in the first fundamental provision and in constructing the works for the total amount of the estimate, with reference to the schedules of special and general conditions, al-  
40 ready mentioned as a whole.

FUNDAMENTAL PROVISIONS FOR THE  
LOAN.

1st. The loan is intended to pay:

1. The credit of the Spanish Bank of Havana and interest calculated for two quarters, - - - - -	\$3,272,982 35	
2. The estimated cost of the works of storage and distribution of water and that of the additional works relating to the latter and approved as extraordinary, - - -	2,199,144 00	10
3. Cost of the taxes incurred by the constitution of the mortgage, of issuing the bonds and unforeseen and eventual expenses of legalizations, drawings, etc., - - - -	137,873 15	
- That is a total of - - - - -	\$5,600,000 00	

Second. The Municipal Council shall receive 20 said sum in cash in either of the following manners:

1. Either in the Municipal Treasury in specie or by deposit to the order thereof in some place at home or abroad in the hands of a banker of property and responsibility.
2. Or by the lender himself undertaking to apply the same to the purposes set forth and to construct the works as contractor.
3. In case proposals should be presented in these 30 two different forms the first will be preferred to the second.
4. The interest on the loan will be at 6 per cent. per annum to be paid quarterly on the nominal capital represented by the titles that may be issued
5. The premium of the loan or rate of issue will be 80 per cent. of the nominal capital and upon that only shall the bidding take place. 40

6. The cancellation shall be made by half-yearly installments in thirty-three years, with ten *voix* as far as regards cancellation by a fixed and invariable amount for capital and interest, merely the interest due according to Statement No. 7 being payable in said ten half-yearly periods, the Municipal Council having the right to destine a certain amount to that purpose in due time.

7. In either case the loan shall be issued in two parts, one immediately of \$5,688,035, and the other, or \$1,331,965, one year after the first for the remainder, so that on this second part no interest shall be paid during the first year.

8. For the nominal amount of the loan bonds shall be issued, the form and subdivision of which shall be determined in agreement with the lender, which bonds shall immediately be delivered to the latter if he shall produce the total amount of the sum, deducting those pertaining to the second issue, or they shall be deposited in that place abroad or at home from which the proposals may have come, and where the amount is offered in the hands of a banker of property and responsibility, named by both parties, to be delivered by him immediately on the sum being placed to the order of the Most Excellent Municipal Council, those pertaining to the second issue being reserved until the date shall arrive, and under the condition that the lenders shall furnish guarantees that at the date before determined they shall make good this offer.

9. In case it be the lender himself who undertakes the execution of the works of storage and distribution, the part of the loan intended for these shall all remain on deposit either in the Spanish Bank of this city, if the production be made here, or in some other accredited establishment abroad or at home if the operation shall be effected outside the Island, or with the banker named by both

parties for that purpose, so that the payments for the works may continue to be made in the form stipulated in the schedule of conditions for the execution thereof, by drafts against the same, or in such form as may be agreed, but always on the understanding that on one half of the amount of the work no interest shall be paid in the first year.

10. The cancellation shall be effected by semi-<sup>10</sup> annual drawing by lot which will take place, either in this city, in case the operation should be carried through here before the president and proper committee, a notary public certifying to the result, or before the Banker of the Municipal Council if it should have been carried into effect abroad or some place in the Nation, a notary who shall certify to the act being likewise present.

11. In case the loan should be made in pounds sterling or in francs, the rate of exchange for presentation of proposals is now fixed at \$5.12 1-2 cts.,<sup>20</sup> for the pound sterling or the equivalent thereof in francs, pesetas or other money that may be proposed.

12. A commission of two per cent. is fixed upon all amounts that have to be paid on account of interest or cancellation.

13. In case that proposals be made to pay pounds or francs in places within the nation or abroad, all operations of exchange, deposits of securities and re-embursements, shall be made through a banker<sup>30</sup> residing there named by the Municipal Council and the lenders jointly, and he shall appoint a representative or general agent in this city at his own expense to communicate directly with the Most Excellent Municipal Council.

14. A term of 45 days shall be fixed within which the lender must produce the cash amount of the loan, counting from the date on which the bonds are held at his disposal or should be deposited in the<sup>40</sup>

manner before explained, if it should be cashed in some place within the nation or abroad.

15. That deposit may be made by the Most Excellent Municipal Council by means of one provisional bond for the nominal amount of the law, with power to exchange it for final bonds when these should be issued in the manner indicated in the seventh provision.

10

16. In case the proposals presented should be on the basis of the lender himself undertaking the execution of the works, it is understood that they will be altogether subject to the special bases and conditions for the execution of said works, approved by the General Government with the modifications explained.

17. In guarantee of the loan the Municipal Council will create a mortgage in favor of the lender on the works for collection and conduit, as well as on those of storage and distribution to be executed, and will attach for the same purpose the rent or present and future proceeds of the water, together with that of the slaughter houses for large and small cattle, and that of the Tacon Market; but with the express condition that these three last are to remain free and unattached as soon as the rent of the canal is sufficient to cover the amount of the cancellation and  
20  
30 annual interest.

The payment of the dues of publication necessary before giving him possession, according to provisions of the Royal Order of 5th June, 1878, will be chargeable against the person to whom adjudication is made.

Habana, March 11, 1882.

President of the Municipal Council,  
PEDRO BALBOA.

40

BASES FOR THE EXECUTION OF THE  
WORKS OF STORAGE AND DISTRIBUTION  
IN HAVANA OF THE VENTO  
WATER.

1st. The works, which form the object of the contract, are as follows: 10

a. The storage reservoir for receiving and distributing, consisting in two basins 72 metres square and six in depth, almost all excavated, bottom and walls of hydraulic mason work covered by arches of hydraulic plaster work on supports of hewn stone, a small building for the sluice gates for entrance, a brick fence, another larger building to cover the vault and receiving conduit which registers the distribution, together with the channels, sluice gates and necessary fittings. 20

b. The distribution by means of cast-iron pipes, the diameter of which varies from one metre to 0.050, in a length of 94 kilometres with a weight of some 4,300 metric tons; the transference and relaying of a certain number of existing pipes, and the other necessary works of connection, channels, registers, keys for controlling and supply.

c. Various small works on the outside of the vento conduit and for defence and enclosure of the channel of approach. 30

All the particulars and the exact dimensions of these works are specified and detailed in the memoranda of measurements, conditions, estimates, plans, etc., relating to each one of them, which documents may be seen in the office of the Secretary of the Most Excellent Municipal Council. 40

2nd. The estimated cost of these works is:

Storage, - - - - -	\$833,864 54
Distribution, - - - - -	1,259,335 67
Works additional to the above, - - -	68,000 00
Small works for defence and inclosure, - - -	38,000 00
	<hr/>
	\$2,199,200 00

3rd. The time calculated for the execution of all  
 10 the works is two years; but one more may be  
 allowed for completing the storage works in case at  
 the termination of the second year, counting from  
 the day on which the works of distribution are com-  
 menced, the latter are terminated and the water  
 running for the public.

4th. The works of storage must be commenced  
 within three months after the approval of the con-  
 tract is communicated to the contractor; and the  
 works of distribution within the first six months,  
 20 counting from the same day.

5th. The contractor binds himself to construct all  
 the works strictly, in accordance with the memor-  
 anda of measurement and conditions and the plans  
 representing the projects approved.

6th. The schedules of special conditions deter-  
 mined for the execution of these works will be oblig-  
 atory upon the contractor in all their parts and  
 articles, and similarly the schedule of general condi-  
 30 tions in so far as not clearly contrary to these bases  
 or the special stipulations of the contract.

7th. Upon the completion of the works and without  
 prejudice to the partial recognitions prescribed by  
 the schedules of conditions, a general examination  
 and measurement of the whole will be made by the  
 Directorate of the Canal, which will certify to its  
 state and construction, in order that a provisional  
 40 acceptance may be made.

8th. The final acceptance of the works will take place a year after their completion and provisional delivery, and during that year the preservation and up-keep of the works constructed by him and the repairs of any waste or imperfection that may occur shall be at the charge and account of the contractor.

9th. If before or after the commencement of the works any important variation or modification should have to be introduced into them by the Administration, the amount thereof shall be taken into account in the prices of the contract for the purpose of the corresponding credit to the administration or the contractor.

10. During the construction of the works of distribution, and the year of maintenance, the contractor shall be bound to carry out at the same prices as the Municipal Council does the construction and location of the pipe mouths or introduction of water through all the houses and public fountains of the city, it being understood that for the houses which have not requested or obtained the water, the works shall only be carried out in the corresponding part of the public road.

11. In case of the extension of the distribution of water to a greater number of houses or points not included in the present town, the Municipal Council will carry out the necessary works itself or through a special agreement with the contractor if the latter accede to the same.

12. The Municipal Council will pay the contractor monthly the part of the work which he has executed in accordance with the provisions of the schedules of conditions and in the form stipulated for payment in the general conditions of the loan.

13. If the contractor shall make default in any of the conditions stipulated on bases third and fourth,

there will be room for the rescission of the contract, unless he shall duly prove that it occurred through causes beyond his control in which case such delays as may be considered just and necessary may be allowed.

14. The Municipal Council of Havana shall grant the contractor all the support, and moral and official  
10 aid within its power to facilitate him in the fulfilment of his contract.

15. Fortuitous questions shall always be considered with regard to the provisions of the legislation in force and especially the Regulation of 19th June, 1868.

16. Any case of misunderstanding or disagreement between the contracting parties shall be submitted to the proceedings and jurisdiction prescribed by the Legislation in force.

Habana, 11th March, 1882.

20 The President of the Municipal Council,  
PEDRO BALBOA.

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**P 3.**

ORIGINAL OF P 2 IN SPANISH LANGUAGE.

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**P 4.**

AWARD (IN SPANISH) OF CONTRACT FOR  
LOAN AND WATER WORKS OF HA-  
VANA ON MARCH 28, 1882.

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## P 5.

## TRANSLATION OF ABOVE AWARD.

N. 0.009.125.

I, Don Augustin Maria Guaxardo Taxarda y Melo de Portugal, Chief the First Division of Loans, Civil Administration; Secretary of the Most Excellent Council of this Municipality,

Do CERTIFY, That in the papers of record in this office concerning the negotiation of a loan, there appears a document of the following tenor:

"In the Always Most Faithful City of Havana, on the twenty-eighth of March, one thousand eight hundred and eighty-two, there being present together in the Council Chamber the Councilors, Don Pablo Fapia, Don Ricardo Calderon, Don Pastor Elizalde, Don Francisco Ventosa, Don Jose Manuel Casuso, Don Francisco Du Quesne, Don Narciso Gelat, Don Miguel Garcia Hoyos, Don Jose Bruson and Don Juan J. Musset, members of the Committee on Estimates and Administration of the Revenues, under the presidency of the Most Excellent the Municipal Alcalde (Mayor), Don Pedro Balboa, and with the assistance of the undersigned secretary, for the purpose of proceeding with the sale announced for this day of the loan of five millions, six hundred thousand dollars, and twelve o'clock having struck, the hour fixed for the act, his Excellency the Mayor directed the undersigned to read the notice of such sale and the terms and conditions of the loan, published in the Official Gazette on the 11th, 12th and 14th instant, and in the Official Bulletin on the 12th, 14th and 15th. The crier then made the appropriate proclamations, repeating them three times at intervals of a quarter hour each, until one o'clock, at which time his Excellency declared that no more bids would be received. there having been presented

within the time two sealed papers, endorsed as follows: "Bid for the award of the loan of five millions, six hundred thousand dollars, to be sold by the Most Excellent Municipal Council." Immediately thereupon his Excellency announced that the competitors might call for such explanations as they desired. No question being suggested the award was proceeded with; that is to say the counting, allotment and numbering of the bids presented, as provided <sup>10</sup> in the form (or blank) on which the bids were to be made. There having been placed in one box two tickets numbered consecutively, and in another box the two papers above mentioned, the secretary took out one of the bids, and one of the two persons who had presented bids (took out) one of the tickets, and then there was written upon the bid the number upon the ticket, which proved to be the number "1;" the operation was then repeated with the other bid, the other ticket and the other bidder, the number in this case proving to be "2." His Excellency then <sup>20</sup> proceeded to open the bids in the order of their numbers and to read them aloud. The first one proved to be that of Don Emeterio Zorrilla, and was accompanied by a receipt signed by the Municipal Treasurer, certifying that that person (Zorrilla) had deposited municipal bonds to the amount of sixty-four thousand dollars; and the second that of Don Lino Martinez, which was likewise accompanied by a receipt of the Municipal Treasurer, certifying that <sup>30</sup> he (Martinez) had deposited the sum of sixty-four thousand dollars in money. The first proposal reads as follows:

"Don Emeterio Zorrilla, of Havana, being aware of the notice published in the Havana Gazette and in the Official Bulletin of the Province by the most Excellent Municipal Council, under date of the 11th instant, of the terms, conditions, and requisites upon which is to be awarded at public <sup>40</sup> auction the loan of five million, six hundred thou

sand dollars for the purposes set forth in the first of the published conditions: and (aware) likewise of the conditions, general and administrative, as to the measurements, prices, and the estimates and plans relative to the works for the accumulation and distribution in this city of the waters of the Vento, as the same are of record in the office of the Secretary of the Most Excellent Municipal Council; and (aware) finally, of all the rights and obligations<sup>10</sup> expressed in the documents under which the contract is to be made, he agrees to take said loan for his own account at the rate of eighty-one and one sixty-fourth per cent. in one sum in pounds sterling, he himself applying that sum to the purposes set forth in the first condition, and constructing the works according to the estimates and conforming in every respect to the above mentioned technical and general conditions. It being understood to be an absolute and indispensable condition that the Municipal Council will turn over to the bidder, should<sup>20</sup> his offer be accepted, the management of the mortgaged property and revenues. Havana, March 28, one thousand eight hundred and eighty-two. E. Zorrilla ("rubric.")"

The second proposal is written in these terms:  
 "Document No. 1,071. Penalver, February 28, one thousand, eight hundred and eighty-two. Don Lino Martinez, a resident of Havana, on behalf of Messieurs Henry J. Overmann, representing Mr. E. C. Maddison, of London, and Walter H. Gilson in his own right and as representing Messrs. Daniel Runkle and James H. Lyles, of New York, being aware of the notice published in the Havana Gazette and in the Official Bulletin of the Province, by the Most Excellent Municipal Council, under date of the 11th instant, of the terms, conditions and requisites upon which is to be<sup>40</sup>

awarded, at public auction, the loan of five million, six hundred thousand dollars for the purposes set forth in the first of the published conditions; and (aware) likewise of the conditions, general and technical, as to the measurements, prices and the estimates and plans relative to the works for the accumulation and distribution in this city of the waters of the Vento, as the same are of record in the office  
 10 of the Secretary of the Most Excellent Municipal Council, and (aware) finally, of all the rights and obligations expressed in the documents under which the contract is to be made they jointly and severally agree to take said loan for their own account at the rate of eighty-one 1-35 per cent. (81 1-35 per cent.), in one sum, in pounds sterling, they themselves applying that sum to the purposes set forth in the first condition, and constructing the works according to the estimates and in conformity in every respect with the general and technical conditions already  
 20 mentioned, Havana, March 28, one thousand eight hundred and eighty-two. L. Martinez. (Here there is a "rubric").

We adopt and ratify the foregoing proposal made on our behalf by Don Lino Martinez, date as above. E. C. Maddison, p.p., H. J. Overmann, Walter H. Gilson, Daniel Runkle, p. p., W. H. Gilson, James H. Lyles, p. p., W. H. Gilson.

30 The reading of said two proposals having been finished, the committee resolved, subject to the approval of the Most Excellent Council, to award the loan to the persons represented by Don Lino Martinez, inasmuch as their proposal seems to them more advantageous for the municipality than that of Don Emeterio Zorrilla, and because the latter proposal is made upon a con-  
 40 dition which cannot be acceded to. This

decision having been announced by His Excellency the Mayor, President, Don Lino Martinez presented himself, and, having first proved his identity by the certificate referred to in the proper place, took the oath required by law and accepted the award of the loan on behalf of the aforementioned E. C. Maddison, Walter H. Gilson, Daniel Runkle and James H. Lyles, undertaking for his principals well and faithfully to perform, under the guaranty of the deposit which he has made; his Excellency the President having informed him that, according to the resolution passed by the Most Excellent Municipal Council on the 10th instant, his principals are to bear the expense of remittance and placing of the proceeds of the loan, while the Most Excellent Municipal Council will defray the expense of the repayment. The transaction being completed, there was drawn up this minute of the same, which is signed by his Excellency the Mayor-President with the other members of the Committee, and the said Don Lino Martinez and Don Emeterio Zorrilla, who likewise first proved his identity by his certificate, No. 1,113, issued by the "Alcaldia" of the Ward of Templete, on the seventeenth February of the present year, before me, the Secretary: all of which I certify, Pedro Balboa, Ricardo Calderon, Pastor de Elizalde Pablo de Tapia, J. Bruzon, Francisco Ventosa, Juan J. de Musset, Francisco Du Quesne, Jose Manuel Casuso, Narciso Gelat Miguel, Garcia Hoyo, E. Zorrilla, L. Martinez, A. Ma. Guaxardo ("rubrics").

I likewise certify that at folios 178 et seq. there appears the resolution of the Most Excellent Municipal Council, which is as follows: I certify that report having been made to the Most Excel-40

lent Municipal Council of the foregoing action awarding the loan of five million six hundred thousand dollars in specie, it was resolved, upon motion of Messieurs Calderon and Bruzon,—First, to declare unacceptable the proposal of Don Emeterio Zorrilla, and to return to him at once the deposit made by him in guaranty thereof, the said proposal not conforming to the prescribed model in that it  
 10 contains an unacceptable condition, namely, that the management of the property and revenues to be hypothecated to secure the loan, shall be handed over; and, Second, to approve the award of the loan made by the Committee to the individuals represented by Don Lino Martinez, to wit, Mr. Henry J. Overmann, representing Mr. E. C. Maddison, of London, and Mr. Walter H. Gilson, in his own right, and as representing Messieurs Daniel Runkle and James H. Lyles, of New York; proof to be duly made to the secretary of the authenticity of the signatures  
 20 appearing at the foot of the proposal of Mr. Martinez and Messieurs Overmann and Gilson, being to present their powers of attorney, duly translated, for examination by the First Syndic, to whom the papers in the matter will be transmitted within two days, for that purpose only, and notice being given to the Council, when its directions shall have been carried out. Havana, March 28, one thousand eight hundred and eighty-two. The Secretary, A. Ma. Guaxardo.”

30 “I likewise certify that at folio 190 there appear the report of the Syndic of the Municipal Council, and the decree of the Most Excellent Corporation, which are as follows:

Report of the Syndic: Your Excellency,  
 The First Syndic says that in pursuance of the directions in the foregoing decree contained, he has examined the power of attorney given by  
 40 Messieurs Daniel Runkle and James H. Lyles, to

Mr. Walter H. Gilson, and presented by the latter, and also that given by Mr. E. C. Maddison to Mr. Henry J. Overmann, and presented by said Overmann; and finds them sufficient for the purposes for which they were executed. Havana, March 29, one thousand eight hundred and eighty-two. Pastor de Elizalde. (There is a "rubric.") March 30, one thousand eight hundred and eighty-two.

10

Let report be made to the Most Excellent Municipal Council. Balboa. (There is a "rubric.")

Decree of the Most Excellent Municipal Council. I certify that at a regular session held by the Most Excellent Municipal Council yesterday, it made a decree in accordance with the suggestion made by the Syndic in his foregoing report. Havana, April 4, one thousand eight hundred and eighty-two. The Secretary, A. Ma. Guaxardo. (There is a "rubric.")

20

And at the request of Don Valentine E. Trau, as Attorney, in fact of Don Lino Martinez y Castellanos, and in compliance with an order this day made by his Excellency the Mayor, I issue the present with the vise ("visto bueno") of his Excellency and the seal of this office, at Havana, on the 5th day of April, one thousand eight hundred and ninety-two.

Vise

(Seal)

The Alcalde Municipal.

Sgd.

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A. MA. GUAXARDO.

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**P 6.**

RESCISSION OF AWARD, AUGUST 4, 1884,  
(IN SPANISH.)

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**P 7.**

## TRANSLATION OF P 6.

IN THE CITY OF HAVANA, on the 4th day of August, eighteen hundred and eighty-four, before me, the Secretary of the Most Excellent Council ("Ayuntamiento"), Don Agustin Ma. Guaxardo, there  
 10 appeared, on the one part his Excellency Senor Don Pedro Gonzalez Llorente, Mayor ("Alcalde Municipal") of this city, and as such representing the Most Excellent Council of the same; and upon the other part, Don Jose Manuel Mestre and Don Lino Martinez, attorneys-in-fact of Messieurs Daniel Runkle, James H. Lyles, and Walter H. Gilson in his own right and as assignee of Mr. Edward C. Maddison; and they declared:

20 That at its session of the tenth of July last, the Most Excellent Council Resolved the rescission of the contract for the loan of five millions, six hundred thousand dollars for the completion of the works for the storing and distribution of the water of the Vento, and for other purposes; the contractors consenting, the amount deposited being returned, the municipality being restored to its freedom of action, and the contracting parties being mutually declared free of all respon-  
 30 sibility under the contract so rescinded; and that to this end it should be proposed to the contractors that the contract be rescinded upon the terms set forth, it being understood that the contractors were to acquiesce, within two months, in such rescission, either in person or by attorneys-in-fact, thereto fully and duly authorized; and it being a further condition that, if such rescission should not have taken place within two months, for whatever reason, the  
 40 resolution should be treated as never having been

adopted, and consequently the parties should retain in their integrity the rights which they now have:

That the foregoing having been communicated to Don Lino Martinez, who had appeared as the attorney-in-fact of the contractors for the loan, he, the said Martinez, and Don Jose Manuel Mestre exhibited the powers of attorney which, for the purposes of such resolution had been given to them respectively, to the former by Mr. Daniel Runkle and Mr. James<sup>10</sup> H. Lyles, and to the latter by Mr. Walter H. Gilson in his own name and as assignee of Mr. Edward C. Maddison; it appearing that the persons so named are the contractors hereinbefore referred to; that the said powers having been first submitted to the Syndic, for his opinion as to their sufficiency, he reported that he deemed them sufficient for the purposes for which they had been executed; that a report having been made to the Most Excellent Council, accompanied by the said opinion of the Syndic, and the documents in the matter, the Most Excellent<sup>20</sup> Corporation decreed, on the 14th day of the same month of July, that the proposed action be had in this matter, and to that end, that by an instrument joined in by His Excellency the Mayor (Alcalde Municipal) as representative of the Corporation, the Secretary of the same, and the representatives of the contractors, there be entered of record the rescission agreed upon, of the contract for a loan in question, the amount deposited being returned, the Municipality being restored to its liberty of action, and<sup>30</sup> the contracting parties being mutually declared free of all responsibility under the contract so rescinded, and a report being thereafter made to the Corporation: That the Mayor ("Alcalde") having been of opinion that none of the powers contained a clause, authorizing the attorneys to make the declaration as to both parties being left free of all responsibility under the rescinded contract, he so stated to Messieurs Mestre and Martinez, who, recognizing that 40

the objection was well founded, applied for new powers ratifying the former ones and expressly providing for the making of the mutual release in question, and that accordingly the said Mestre and Martinez have exhibited the new powers granted to them by Messieurs Runkle, Lyles and Gilson on the 24th and 25th days of July before the notaries, Don Nestor Ponce deLeon, of the city of New York, and Don Merrill L. Laurence, of the city of Springfield, in which said powers there is contained a clause authorizing the execution of mutual general releases:

That in view of the foregoing, the Mayor ("Alcalde"), representing the Municipality, on the one part, and the said Mestre and Martinez, representing Messieurs Daniel Runkle, James H. Lyles and Walter H. Gilson, of the other part, rescind the said contract for a loan of five millions, six hundred thousand dollars; the sum of sixty-four thousand dollars in gold deposited by Don Lino Martinez Castellanos in the Municipal Treasury on the 28th of March, eighteen hundred and eighty-two, to secure the execution of the contract now rescinded being returned; the Municipality being to recover, as it now does recover; its freedom of action in the premises; and both parties being to be, as they now mutually declare one another to be, free of all responsibility on account of the contract so rescinded, and each of them accordingly obliging itself to refrain from making any claim at any time against the other, this being necessarily involved in the condition as to mutual release from responsibility, proposed by the Municipality and accepted by the contractors of the loan, a condition as to which reciprocity is the basis of said release, and an essential condition of that rescission which, in view of it, has been accorded by the Municipality and accepted by the contractors. The said Mestre and Martinez do

now receive from the Mayor (Alcalde Municipal) the said sum, of sixty-four thousand dollars in gold, which, as already stated, Mr. Martinez deposited in the Municipal Treasury to secure the execution of the contract hereby rescinded, such amount being delivered to them by the Mayor in strict fulfillment of what has been agreed to by the Most Excellent Council and accepted by the other parties; and Messieurs Mestre and Martinez waiving, as they hereby<sup>10</sup> waive, the plea of non-numerata pecunia with respect to the payment of the sixty-four thousand dollars in gold, which they have received in specie to their entire satisfaction. And that the foregoing may appear of record, they subscribe this document in duplicate (each party taking a copy) before me the Secretary of the Most Excellent Council, and there being likewise present Don Jose Maria del Rio and Don Julian Gonzales, Palacios, the Auditor and Treasurer, pro. tem., of the Municipality, who likewise sign: All of which I certify. (Three seals of the Mayor's office.) (Signed) The Mayor, Pedro<sup>20</sup> Gonzalez Llorente, Jose Manuel Mestre. L. Martinez. The Auditor, J. M. del Rio. J. Gz. Palacios. A. Ma. Guaxardo.

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**P 8.**

**FOUR POWERS OF ATTORNEY TO EXECUTE RESCISSION (IN SPANISH).**

1—JULY 24, 1884, RUNKLE & LYLES TO MESTRE & MARTINEZ.

2—JULY 25, 1884, GILSON, INDIVIDUALLY AND AS ASSIGNEE OF MADDISON TO MESTRE & MARTINEZ.

3—JUNE 26, 1884, FROM SAME TO MESTRE.

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4—MARCH 6, 1884, FROM RUNKLE & LYLES. INDIVIDUALLY AND AS MEMBER OF LYLES & GILSON TO MARTINEZ.

— — —  
**P 9.**

10 TRANSLATION OF ABOVE POWERS OF ATTORNEY.

TRANSLATION OF NUMBER 1.

In the City, County and State of New York United State of America, on the 24th day of July, 1884, before me Nestor Ponce de Leon, Notary Public of this State, residing in this City of New York, and in the presence of the witnesses, residents of the same, who subscribe, appeared Messrs. Daniel Runkle, residing in the State of New Jersey, United States of America and temporarily in this city, and James-H. Lyles, residing and engaged in business in this city and one of the acting partners of the commercial house which is carried on in this place under the firm name of Lyles & Gilson, both of full age, whom I do certify I know, and having assured me that they are in the full enjoyment of their civil rights, and, in my opinion, being possessed of the legal capacity necessary for the execution of this, Instrument of Power, nothing to the contrary being known to me, they said freely and spontaneously: That as contractors for the loan of five million, six hundred thousand dollars gold for the completion of the works for storage and distribution of Vento water in the City of Habana, Island of Cuba, which was adjudged in judicial sale in said City of Habana, on 28th March, 1882, to the present grantors, together with Messrs. E. C. Maddison, of London, and Walter H. Gilson, of New York, they granted and

conferred, and by these presents they do grant and confer all their power full, complete and sufficient, whatever is requisite in law or may become necessary upon Messrs. Jose Manuel Mestre, lawyer, and Lino Martinez, merchant, both of full age, residents of the City of Habana, in said Island of Cuba, as representing the grantors, their rights and actions to proceed to the execution of the provisions of the Powers which were executed in their favor respectively in this city on the 6th day of March and 26th of June of the present year, before the Notaries Public Nestor Ponce de Leon and Antonio C. Gonzalez, of which the necessary certified copies are annexed and which powers the grantors ratify in their entirety, further authorizing them to cancel the contract of loan of five millions, six hundred thousand dollars gold entered into with the Most Excellent Corporation of Habana, to receive the return of the deposit of sixty-four thousand dollars which the said contractors deposited as a guarantee with said Most Excellent Corporation, so as to leave the same every freedom of action in the matter, for that purpose executing any and all instruments, mutual and general discharges, and other documents legally necessary to give effect to the revision or cancellation of the contract and loan, so that the grantors and the said Messrs. Maddison & Gilson may remain free of said loan and the incidents thereof and acquitted of all responsibility in the matter and finally, to take and execute all other measures and proceedings that may be requisite or may become necessary for the purpose, and which the grantors might do if present; such power as may be necessary for the objects expressed being conferred upon them without limitation; with power to substitute this Power, in whole or in part, to revoke, substitute and to appoint others, with formal exoneration, and they promise to hold as subsisting and valid in all time whatever their said attorneys and substitutes may

do in virtue of the present Power and not to impeach the same for any reason. They thus executed and signed, together with the witnesses Fernando Dominguez and Leopold de Arrastia, both of full age, residents of the city, and subject to no legal disability to be such. And the grantors and witnesses being informed of the right to read this document for themselves, by their choice I proceeded to read  
 10 the same, which the first mentioned ratify and sign together with the witnesses. To all which I certify. Dated as above. Fernando Dominguez. (Rubric). Leopold de Arrastia (Rubric). Daniel Runkle. (Rubric). James H. Lyle. (Rubric). Nestor Ponce de Leon. (Rubric). Notary Public N. Y. C. 8., New York.

Examined in this Consulate General of Spain. Good for legalization of signature and seal, of Nestor Ponce de Leon, Notary Public in this city. New York, twenty-sixth July, 1884. For the Consul General, Vice Consul, Manl. de la Cueva. (Seal.)

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#### TRANSLATION OF NUMBER 2.

In the City of Springfield, County of Windsor and State of Vermont, United States of America, on the twenty-fifth day of July, in the year eighteen hundred and eighty-four, before me the undersigned Notary Public of this State of Vermont, and in pres-  
 30 ence of the witnesses, residents of the same, who subscribe, appeared Mr. Walter H. Gilson, of full age, resident of Jersey City, State of New Jersey and temporarily in this city, and one of the acting partners of the house of business, which is carried on in the City of New York under the firm name of "Lyle & Gilson," whom I do certify I know, and being in the complete enjoyment of his civil rights, and in my opinion possessed of the legal capacity  
 40 necessary for the execution of the present Power of

Attorney, nothing to the contrary being known to me, he freely and spontaneously declared:

That the Most Excellent Corporation of the City of Havana, Island of Cuba, in pursuance of the judicial sale, which took place on the twenty-eighth of March of the year 1882, for the purpose of completing the Works of Storage and Distribution of Vento water in said City of Havana, adjudged to the party now appearing and to Messrs. Edward C. Maddison, of London, England, Daniel Runkle, resident of New Jersey, and James H. Lyles, resident of the City of New York, the contract for the loan of five millions six hundred thousand dollars in gold of Spanish coinage. That in virtue of the provisions of said contract, the said contracting parties deposited as a guarantee with the Most Excellent Corporation of said City of Havana the amount of sixty-four thousand dollars in gold. That the said Mr. Edward C. Maddison in the City of London and on the 14th day of September, 1882, before Douglas John Newton, Notary Public of said City, granted and transferred to the party appearing all the right, title and interest which he had or held in said contract and deposit, all which appears from the certified copy of said instrument of grant and transfer, which he has exhibited to me, and after examining the same, I return to the party in interest.

That, Whereas it is agreeable to the interests of said contracting parties to rescind said contract and to withdraw the deposit before mentioned, the party appearing by these presents declares:

That for himself and as assignee of the said Mr. Edward C. Maddison, he grants and confers all his power, full, complete and sufficient and whatever may be necessary or required by law, upon Dr. José Manuel Mestre, of full age, lawyer, resident of said City of Habana, Island of Cuba, and Don Lino Martínez, resident and engaged in business in the said City of

Habana, for the purpose that as representatives of the grantor, his rights and actions, personally and as assignee of the said Mr. Edward C. Maddison, in the capacity of contractor the said loan, they may proceed to the execution of all that is provided in the powers that were executed in their favor in the City of New York on the sixth day of March and the twenty-sixth day of June, respectively, of the present year, before the Notaries Public Don Nestor Ponce de Leon and Don Antonio C. Gonzales, duly certified copies of which are annexed hereto which owns the grantor fully ratifies further authorizing them to annul the Contract of Loan of five millions six hundred thousand dollars gold entered into with the Most Excellent Corporation of the City of Havana to receive the return of the deposit of the sixty-four thousand dollars, gold, which the said contractors parties deposited as a guarantee with the said Most Excellent Corporation, leaving the same with complete liberty of action in the matter, and for that purpose executing any and all instruments, mutual and general discharges and other documents which may be legally required to give effect to the rescission and cancellation of the contract and loan, so that the grantor and the said Messrs. Lyles, Runkle and Maddison may be free from said loan and the incidents thereof, and acquitted of all responsibility in the matter, and finally to do and carry out all other acts and proceedings that may be requisite or become necessary, and which the grantor might do if present, the power that may be necessary for the objects declared being conferred upon them without limitation, with power to substitute to this Power, in whole or in part, to revoke substitutes and to name others, with formal exoneration he promises to hold as valid and subsisting in all time, whatever said attorneys and substitutes may do in virtue of the present Power and not to impeach it for any reason. He thus executed

and signed together with the witnesses, Almon E. Graham and Herman W. Harlow, both of full age, residents of this city, and not under any legal disability to act, as such. And the grantor and witnesses being informed of their right to read this document for themselves, by their choice I proceeded to read the same, and the first-mentioned ratifies and signs it, together with the witnesses. To all which I certify. Date as above. A. E. <sup>10</sup>  
 Graham, Herman W. Harlow, Walter H. Gilson.  
 Before me, Merrill D. Lawrence, Notary Public.  
 (Seal).

Examined in the Consulate General of Spain. Good for legalization of the signature of Mr. Charles W. Marsh, Associate Judge of the Court of Woodstock, County of Windsor, Registrar of Notaries, and good for the official seal, New York, twenty-ninth July, eighteen hundred and eighty-four. For the Consul-General, the Vice-Consul Manuel de la Cueva. (Seal). 20

### TRANSLATION OF NUMBER 3.

In the City, County and State of New York, United States of America, on the 26th day of June, in the year 1884, before me, Antonio C. Gonzalez, Lawyer and Notary Public of this State, residing in the city of New York, and in presence of the witnesses, residents of the same, who subscribe; appeared Mr. Walter H. Gilson, of full age, residing in the City of Jersey City, State of New Jersey, and one of the acting partners of the commercial house, which is carried on in this city, under the firm name of "Lyles & Gilson," and whom I do certify I know, and being in the full enjoyment of his civil rights and in my opinion possessed of the legal capacity necessary for the execution of this power, nothing to the contrary being known to me, and he declared: That the <sup>30</sup>  
40

Most Excellent Corporation of the City of Havana Island of Cuba, in pursuance of the judicial sale which took place on the twenty-eighth of March of the year 1882 for the completion of the works of storage and distribution of Vento water in said City of Havana adjudged to the party now appearing and to Messrs. Edward C. Maddison, of London, England; Daniel Runkle, resident of New Jersey, and  
 10 James H. Lyles, resident of the City of New York, the contract for the loan of five millions, six hundred thousand dollars in gold of Spanish coinage. That, in virtue of the provisions of said contract, the said contractors deposited as a guarantee with the Most Excellent Corporation of said City of Havana, the amount of sixty-four thousand dollars in gold.  
 That the said Mr. Edward C. Maddison, in the City of London, and on the 14th day of September, 1882, before Douglas John Newton, Notary Public of said city, granted and transferred to the party appearing  
 20 all the right, title and interest which he had or held in said contract and deposit, all which appears from the certified copy of said instrument of grant and transfer which he has exhibited to me, and which, after examining the same, I return to the party in interest. That whereas it is agreeable to the interests of said contracting parties to rescind said contract and to withdraw the deposit before mentioned, the party appearing by these presents declares:  
 30 That for himself and as assignee of the said Mr. Edward C. Maddison, he grants and confers all his power full, complete and sufficient, and whatever may be necessary or required by law upon Dr. Jose Manuel Mestre, of full age, lawyer and resident of said City of Havana, Island of Cuba, that as representing the grantor personally and as assignee of the aforesaid Mr. Edward C. Maddison in their capacities as contractors for the said loan, he may take and execute all measures and proceedings, that may  
 40 be required or may become necessary in order to

rescind or cancel in due legal form the contract entered into with the Most Excellent Corporation of the City of Havana, relating to the completion of the works of storage and distribution of the Vento water in the City of Havana, and also the adjudication of said loan which, in consequence thereof, the said Most Excellent Corporation adjudged to the before named contractors. To collect and receive from the said Most Excellent Corporation the share that belongs to the party appearing and to Mr. Maddison, whose assignee as already mentioned he is, of the deposit of sixty-four thousand dollars which they made with the Most Excellent Corporation above referred to, giving and executing the receipts, notes of payment, acquittances and other securities that may be required, and to execute in name of the party appearing personally and as assignee of Mr. Maddison any and all deeds and other documents that may be legally required to carry into effect the rescission or cancellation of the contract and loan in question, so that the grantor and said Mr. Maddison may be free from said loan and the incidents thereof and acquitted of all responsibility in the matter and finally to take and execute all measures and proceedings required or which may become necessary for the purpose, and which the grantor might himself do if present, the power requisite for the objects expressed being conferred without limitation, with power to substitute this power in whole or in part, to revoke substitutes and to name others, with formal exoneration, and he promises to consider as valid and subsisting whatever his said attorney and substitutes may do in virtue of the present power and not to impeach it for any reason. He thus executed and signed together with the witnesses, Emmett R. Olcott and C. H. Winfield, all of full age, residents of this city, and not under any legal disability to act as such. And the grantor and witnesses having been informed of their right to

read this document for themselves, by their choice I proceeded to read the same, which the first-mentioned ratifies and signs together with the witnesses, to all which I certify. Dated as above. (Signed) Walter H. Gilson, Emmett R. Olcott, C. H. Winfield. Antonio C. Gonzalez, Notary Public. The subscribing Notary Public of the City and State of New York certifies that the preceding is a faithful  
 10 and correct copy of the power referred, to executed before the Notary Public, Antonio C. Gonzalez, on the 26th of June of the present year, and which is copied in the copying book of the said Notary on pages 552-557 of the same, with which I have carefully compared it. New York, July 26th, 1884. Nestor Ponce de Leon. Rubric. Notary Public, N. Y. C. S.

Examined in this Consulate General of Spain. Good for Legalization of the signature and seal of Nestor Ponce de Leon, Notary Public, in this city. New York, twenty-  
 20 sixth of July, 1884. For the Consul General. The Vice Consul, Manl. de la Cueva. (Seal).

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**EX. P 9**

TRANSLATION OF NUMBER 4.

In the city, county and State of  
 30 New York, United States of America, on the sixth day of March, 1884, before me, Nestor Ponce de Leon, notary public of this city, and residing in the City of New York, and the subscribing witnesses appeared. Mr. Daniel Runkle, residing in the State of New Jersey, United States of North America, and temporarily in this city, and Mr. James H. Lyles, residing and engaged in business in this city and one of the acting partners of the commercial  
 40 house carried on in this place under the firm name

of "Lyles & Gilson," both of full age and whom I do certify I know, and having assured me that they were in the enjoyment of their civil rights they said:

That as contractors for the loan of five million six hundred thousand dollars (\$5,600,000) gold for the completion of the works for storage and distribution of water in the City of Havana, Island of Cuba, which was adjudged in judicial sale in said City of Havana on twenty-eighth of March, 1882, to the same persons who now grant these presents together with Messrs. E. C. Maddison, of London, and Walter H. Gilson, of New York, they gave and conferred, and by these presents they do give and confer all their power, full, complete, sufficient and whatever may be required in law or may become necessary, upon Don Lino Martinez, of full age, residing and engaged in business in the City of Havana, in order that as representative of the grantors, their rights and actions, he may take measures to withdraw, suspend and cancel the adjudication of said loan together with all the incidents thereof in due form and by means of the measures and proceedings that may be necessary, and also to withdraw collect and receive the deposit of the (\$64,000) sixty-four thousand dollars, which was made with the Most Excellent Corporation of Havana as a guarantee, making the notes of record and official papers proper according to the laws in force in said Island of Cuba, granting and executing the documents, receipts, notes of payment and other instruments of security necessary, that the grantors may be freed from said loan and its incidents and from all burden and responsibility in the matter, with power to substitute this power in whole or in part, to revoke substitutes and appoint others, with formal exoneration, and the grantors promise to hold as subsisting and valid whatever their said attorney and substitutes may do in accordance with

the present power, and not to impeach the same on any ground. They thus said, executed and signed, making the renunciations necessary in law before me and in presence of witnesses, residents of this place who subscribe, to all which I certify. Date as above, signed Daniel Runkle, James H. Lyles, Leopold de Arrastia, Rafael C. Palomino, Nestor Ponce de Leon, notary public. The subscribing  
 10 notary public of the City and State of New York certifies that the foregoing is a faithful and correct copy of the power referred to, executed before the subscribing notary on the sixth of March of the present year, and which is copied in the copying book of the notary, Antonio C. Gonzales, at pages 496 and 497 of the same, with which I have carefully compared it. New York, July 26th, 1884. Nestor Ponce de Leon. (Rubric). Notary Public, N. J., C. 8. (Seal).

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**P 10.**

AGREEMENT FOR DEPOSIT OF \$64,000 WITH  
 CITY OF HAVANA (IN SPANISH).

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**P 11.**

30 TRANSLATION OF ABOVE DEPOSIT  
 AGREEMENT.

BE IT KNOWN by these presents which shall have all the force of a public document, that we, whose signatures are below attached, viz:

Lino Martinez, of Havana, party of the first part, and Walter H. Gilson, of New York, party of the second part, for himself and as representative of  
 40 Daniel Runkle, of Asbury, New Jersey, and James

H. Lyles, of New York, which Power of Attorney was dated 3rd of January, 1882, and deposited in the offices of the Notary Public, Carlos Amores y Sanz have agreed conjointly to the following:

1. Lino Martinez deposits of his capital in the Treasury of the Municipality of Havana the sum of \$64,000 in Spanish gold, as a guarantee for the propositions which Messrs. Gilson, Runkle & Lyles and Maddison & Co., of London, have presented to the Municipality of Havana for the loan of \$5,000,000.<sup>10</sup>

2. Messrs. Gilson, Runkle & Lyles undertake to deliver the above named sum to Mr. Martinez at any time he may ask for the same if it should be demanded by the Municipality in consequence of their not having carried out the contracts for the water works, or for any cause that the Municipality might retain said deposit.

3. Messrs. Gilson, Runkle & Lyles, as a remuneration and for the payment of interest to Mr. Martinez for the said deposit, assign to him from now the amount of \$25,000 in Spanish gold, which Mr. Martinez is to receive monthly at the rate of 1 1/37-1000 per cent. from the amounts as they are paid for the works.<sup>20</sup>

This is without prejudice to any other agreement entered into between the above named.

In witness whereof we set our hand and seal to this to be made a notarial document at any time it should become necessary, signed in duplicate before witnesses this 27th day of March, 1882.<sup>30</sup>

W. H. GILSON,  
 JAMES H. LYLES,  
 pp. W. H. GILSON,  
 DANIEL RUNKLE,  
 pp. W. H. GILSON,  
 LINO MARTINEZ.

Witnesses:

I. D. STABLE,  
 H. I. OVERMAY,  
 VALENTINE N. FRAU.

**P 12.****AGREEMENT OF SEVERANCE**

of April 16, 1882.

ARTICLES OF AGREEMENT made and entered into this fifteenth day of April in the year eighteen hundred and eighty-two, between the firm of Maddison & Company, bankers of the City of London, England, by Henry J. Overmann, their Attorney, hereto lawfully authorized parties of the first part; <sup>10</sup> Walter H. Gilson, of Jersey City, in the State of New Jersey, United States of America, party of the second part; James H. Lyles, of Brooklyn, in the State of New York, United States of America, party of the third part, and Daniel Runkle, of Asbury, in said State of New Jersey, party of the fourth part.

WHEREAS, The parties to these presents have heretofore undertaken to loan or procure to be loaned to the Municipality of the City of Havana, <sup>20</sup> in the Island of Cuba, the sum of five million, six hundred thousand dollars, lawful money of the United States of America or thereabouts, and to erect certain water works and storage reservoirs in and about said City of Havana, for the purpose of supplying said city with water.

AND WHEREAS, Proposals to that end have been submitted by the parties hereto to the Municipal authorities of said City of Havana, and have been <sup>30</sup> accepted by them as so submitted.

AND WHEREAS, in such submission and in all matter connected with said proposals and said undertakings on the part or in behalf of the parties hereto, said parties of the third and fourth parts have been represented by said party of the second part under and by virtue of certain powers of Attorney, granted to said party of the second part by said parties of the third and fourth parts severally <sup>40</sup> for that purpose.

AND WHEREAS, It has been agreed by and between the parties hereto that said enterprise and award shall be severed as between them, so that said parties of the first part shall alone make or procure to be made to said City of Havana said loan of five million, six hundred thousand dollars or thereabouts, and said parties of the second, third and fourth parts shall be, in no way, responsible therefor, and said parties of the second, third and fourth parts shall alone undertake the erection and completion of said water works and storage reservoirs, and said parties of the first part shall be, in no wise, responsibility therefor.<sup>10</sup>

AND WHEREAS, In pursuance of said agreement or arrangement said parties of the second, third and fourth parts have taken from said City of Havana, in their own names, a contract or undertaking for the erection and completion of said water works and storage reservoirs at a compensation therein fixed and determined, and said parties of the first part have entered into a contract or undertaking with said City of Havana, in their own name, for making or procuring to be made said loan upon the terms therein specified.<sup>20</sup>

NOW THEREFORE THIS AGREEMENT WITNESSETH, That the parties hereto, in consideration of the premises and of the sum of one dollar, lawful money of the United States of America, paid to each of said parties by each of the others the receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree to and with each other, as follows:<sup>30</sup>

First. That said parties of the first part will and do hereby assume and take upon themselves the obligation to make or procure to be made to said City of Havana said loan of five million, six hundred thousand dollars or thereabout as aforesaid, according to the terms and conditions of the contract or<sup>40</sup>

undertaking to that end entered into by and between them and said City of Havana, and that they will identify and save harmless the said parties of the second, third and fourth parts, and each and every of them of and from all and every obligation, responsibility or liability, in respect to said loan which they or either or any of them may have heretofore incurred either to said City of Havana or to any  
 10 other person or persons whatever, by reason of said proposal or any other matter or thing whatever.

Second. That said parties of the second, third and fourth parts will and do hereby assume and take upon themselves the obligation to construct and complete said water works and storage reservoir, according to the terms and conditions of the contract or undertaking to that end entered into between them and said City of Havana; and that they will identify and save harmless the said parties of the first and each and every of them of and from all  
 20 and every obligation, responsibility or liability, in respect to the construction and completion of said water works and storage reservoirs, which they or either or any of them may have heretofore incurred either to said City of Havana or to any other person or persons whatever by reason of said proposal or any other matter or thing whatsoever, except as hereinafter provided.

Third. That as the construction of said water works and storage reservoir progresses under the  
 30 terms of said contract, or undertaking in relation thereto, said parties of the first parts will pay or cause to be paid to said parties of the second, third and fourth parts, from time to time, as and when required by said contract or undertaking, the full consideration of two million two hundred thousand dollars in lawful money of the United States of America, as agreed in, and by said contract or undertaking, to be paid for the construction and completion  
 40 of said water works and storage reservoirs.

Fourth. And the said parties of the second, third and fourth parts agree to, and with each other, that they will jointly and in equal parts undertake the construction and completion of said water works and storage reservoirs, for the consideration aforesaid, and will bear equally among themselves all the costs and expenses thereof, including all sums paid or incurred in any and all negotiations carried on before the granting of said contract aforesaid, and will divide equally between themselves all profit, gain or increase that may arise from the execution of said contract to construct and finish said water works and storage reservoirs.

Fifth. And said parties of the third and fourth parts do severally, each for himself, not jointly, the one for the other, ratify and confirm each and every act and thing done or performed by said party of the second part, under or by virtue of the powers of attorney granted to him by them as hereinbefore set forth.

Sixth. And it is mutually understood and agreed by and between all the parties hereto that this agreement and everything therein contained shall enure to the benefit of and be binding upon the successors, heirs, executors administrators or assigns of each and every of them parties hereto.

IN WITNESS WHEREOF the parties to these presents have hereunto severally set their hands and seals the day and year first above written.

WALTER H GILSON,	[L. S.]	30
JAMES H. LYLES,	[L. S.]	
DANIEL RUNKLE.	[L. S.]	
MADDISON & C	[L. S.]	
opp. H. I. OVERMANN,		
Attorney.		

Sealed and delivered in the presence of

EVERETT HOWLAND,

ERNEST J. MOLINA,

As to Gilson, Lyles Madison & Co.

ANTONIO C. GONZALEZ,

As to Mr. Runkle.

## STATE OF NEW YORK,

CITY AND COUNTY OF NEW YORK, SS.;

On this 19th day of April, 1882, before me personally appeared Daniel Bunkle known to me and to me known to be one of the individuals described  
 10 in and who executed the foregoing agreement, and he acknowledged to me that he executed the same, and on the same day also before me personally came Everett Howland and Ernest J. Molina (the subscribing witnesses to the signatures of Walter H. Gilson, James H. Lyles and Henry I. Overmann, Attorney in fact of Maddison and Company) with whom I am personally acquainted, who being by me duly sworn, did depose and say: and first the said Everett Howland said that he resided in the city of Brooklyn, County of Kings, in the State of New York, and the said Ernest I. Molina said that  
 20 he resided in the City of New York; and both deposed that they knew Walter H. Gilson, James Lyles and Henry I. Overmann, Attorney in fact of Maddison & Company, and knew them to be the persons described in and who executed the said agreement, viz: the said Walter H. Gilson, and James H. Lyles in their own behalf and the said Henry I. Overmann as the act and deed of the firm of Maddison & Company; that they saw them severally execute and deliver the said agreement,  
 30 and that they, Everett Howland, Ernest I. Molina, thereupon subscribed their names as witnesses thereto.

IN WITNESS WHEREOF I have hereunto set my hand and official seal at the City of New York the day and year last above written.

[L. S.]

ANTONIO C. GONZALEZ,  
 Notary Public N. Y. C.

## DEFENDANT'S EXHIBITS.

### D 1.

LETTER FROM MARTINEZ TO MAYOR OF  
HAVANA, NOVEMBER 9, 1881, (IN SPAN-  
ISH.

10

### D 2.

#### TRANSLATION OF D 1.

To the Honorable the Municipal Mayor:

Mr. Lino Martinez, a resident of this city, appears before you with due respect and doth state: That it has come to the knowledge of various bankers abroad that the Honorable Common Council of this city intends to make a loan for the purpose of completing the works of the Vento Canal, of covering deficit in its estimate and other of its needs; that so understanding they have organized themselves into a syndicate and have formally authorized the the subscriber to appear before you and make proposals for the sum of £1,300,000, which as it appears is the amount decided upon. The undersigned would have immediately presented such proposals to the consideration of the corporate body if he had not been informed that in accordance with the provisions in the pre-30  
ises in force the Honorable Common Council could not enter into the operation except through public bidding, it being prohibited to accept, without such pre-requisite, however advantageous might be any offer that in such regard might be made; and as such information may be mistaken he applies to your Excellency and requests that such statement having been made you will be pleased to bring it to the knowledge of the Honorable Com-40

mon Council, so that if it be authorized to treat immediately with the undersigned he may be in a position to present in detail the proposals to which he has already referred, reserving otherwise his right to make the same during the public bidding so soon as the same may be announced.

As matter of Grace, etc.,

L. MARTINEZ.

10

HAVANA, November 9, 1881.

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**D 3.**

LETTER FROM LINO MARTINEZ TO  
DANIEL RUNKLE OF FEBRUARY 16,  
1892.

Sheet No. 1.

LINO MARTINEZ,  
New York, Havana.

20

P. O. Box 4051 Ap. 684  
Cable address  
Lartinez, Havana.

HAVANA, February 16, 1882.

MR. DANIEL RUNKLE,  
New York.

DEAR SIR:—

By some of your letters to Mr. Gilson, I have had the opportunity to learn what you think in regards  
30 to the obligation I contracted with you in reference to the \$100,000, object of our contract celebrated in New York.

In order to have a better knowledge of this obligation I have thought it necessary to write you this, because by what I learn from your letters I infer that you suppose that I am compelled to do more than what in reality I am.

When I asked you in New York for \$100,000 for  
40 rewards, presents C. C. without being obliged to

reader accounts of its investment, it was with the understanding that I would have no other duty, but to be the mediator with those persons who only accept a present in confidence, and without which attraction the affair would have never come to an end.

Sheet No. 2.

February 16th, 1882. 10

I knew perfectly well that many of these accounts, that I had to offer, would have to be paid in signing the contract, and as by our covenant I shall not receive the amounts, but during two years, it must come out of my private money, otherwise nobody would have accepted to help us, to collect their reward in two years.

Notwithstanding this difficulty, that for any one else that had no funds at his disposal, would be of great importance, I have not said anything to you and I am ready to avoid the difficulty.

I would have said nothing to you if I had not<sup>20</sup> read in Mr. Gilson's letter that you believe that I am obliged to make the deposit of \$65,000, required and all what it is necessary.

This, I would think it proper, if I had received the \$100,000, but as nothing has been given to me, I do not suppose this obligation concerns me.

Therefore

Sheet No. 3.

February 16th, 1882. 30

Therefore, I wish you to thoroughly understand that I am not a man that fails his compromises and that I am not obliged to deposit money for anybody.

However all this, I am working in accordance with Mr. Gilson, so that at the necessary time the deposit may be ready and I do not believe that for this new difficulty should be lost, such a splendid and well worked affair that it is near the end. 40

We have very short time to avoid difficulties it has been approved by the principal officers, and next week we must be ready to present it officially.

I remain

Yours respectfully  
L. MARTINEZ.

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**D 4.**

LETTER FROM MARTINEZ TO MESTRE, OF  
MARCH 11, 1882, (IN SPANISH)

**D 5.**

TRANSLATION OF D 4.

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Telegraphic address: "Lartinez."  
L. MARTINEZ, Havana.  
J. D. STABLE.

Apartado 684. Mercaderes 22.  
Havana.

HAVANA, March 11th, 1882.

MR. JOSE M. L. MESTRE,

Dear Sir:—We have the pleasure of enclosing herein a copy of the Official Gazette that will be published today after the sailing of this steamer,  
30 "City of Alexander," containing the bassettes of the municipal loan for you to please deliver to Mr. Runkel. At the same time we request you to address the enclosed letter to London.

Wishing you a pleasant voyage, etc., etc.

(Signed) L. MARTINEZ.

J. D. STABLE.

P. S.—We have the satisfaction of informing you that the Messrs. Maddison & Co., will make for their  
40 account the deposit for the proposals.

NOTE: There was no Exhibit D 6.

**D 7.**

TRANSLATION OF SPANISH AGREEMENT  
OF SEVERANCE OF MARCH 29th, 1882.

BE IT KNOWN, by these presents, which shall<sup>10</sup>  
have all the force of a public document, that we the  
undersigned have agreed to the following: H. J.  
Overmann as representative of Messrs. Maddison  
& Co., of London, party of the first part and W. H.  
Gilson, for himself and as representative of Messrs.  
D. Runkle and J. H. Lyles, parties of the second  
part, having undertaken conjointly to make the  
loan of \$5,600,000 cash, which was adjudicated to  
them by the Honorable Municipality of the City of  
Havana under the terms and conditions of the  
judicial proceedings, have agreed to the following<sup>20</sup>  
in order to determine their respective rights and  
obligations.

1. H. J. Overmann, as representative of Messrs.  
Maddison, of London, declares, that notwithstand-  
ing their obligations, which Messrs. Gilson, Runkle  
and Lyles have contracted towards the municipal-  
ity, the loan is to be for the exclusive and sole ac-  
count of the said Maddison & Co., so that in no  
event Messrs. Gilson, Runkle and Lyles shall be<sup>30</sup>  
responsible for the consequence of this operation,  
which Messrs. Maddison & Co., shall have in the  
carrying out of the business, be it in London, or in  
any other place that may exist, to suit Maddison &  
Co., to place the bonds of the Honorable Municipal-  
ity, of Havana emits, and to obtain and place at  
at their disposal the cash for \$5,600,000 according  
to the agreements of the sale, making Messrs. Mad-  
dison & Co., responsible to Messrs. Gilson, Runkle<sup>40</sup>

and Lyles for all damages they may have by reason of their not carrying out all the conditions and stipulations, entered into between the Honorable Municipality and the contractors of the loan above referred to.

2. H. J. Overmann, representing Messrs. Maddison & Co., hereby declares that it was agreed upon that Gilson, Runkle and Lyles, should be the contractors for the water works and storage of waters, in Havana, according to the conditions stipulated, and which is a part of this proposal to be made for the sum of \$2,200,000.

3. Consequently H. J. Overmann, representative of Maddison & Co., declares that his principals will carry out the agreements and obligates them in the most solemn manner towards Messrs. Gilson, Runkle and Lyles, to authorize them and does hereby authorize them to execute the above named works, according to the stipulations for the estimated \$2,200,000, which he obligates himself to pay over to Gilson, Runkle and Lyles, who undertake to conclude the works according to the agreement and conditions prescribed by the Honorable Municipality, and who if they should fail to forfeit their part, bind themselves to pass over to Maddison & Co., any damages, which the Honorable Municipality may reclaim and which shall be for account of Messrs. Gilson, Runkle and Lyles.

4. Mr. Gilson for himself and as representative of Runkle and Lyles declares, that the stipulation in the foregoing paragraph was agreed upon between Messrs. Maddison & Co., of London, previous to the signing of the proposals made to the Honorable Municipality of the City of Havana for the emission of the loan of \$5,600,000, awarded to them at the public roll, the day before yesterday and that he consequently accepts for his principals the obligations which they have contracted with Messrs. Maddison & Co., that at the same time they undertake

the obligation relating to the bringing of the water to the City of Havana under the terms and conditions stated in the foregoing paragraph.

In witness whereof we sign this; and without prejudice to sign it before a notary public, in triplicate in the City of Havana, the 29th day of March, 1882.

N. B. The power of attorney to H. J. Overman was dated the 9th of March, 1882. 10

The power of attorney of Mr. D. Runkle and of James H. Lyles in favor of W. H. Gilson, was dated at New York, 22nd March, 1882.

H. J. OVERMANN;  
H. J. MADDISON & CO.,  
WALTER H. GILSON.

WITNESSES.

E. C. CASMELLA,	JAMES H. LYLES,	
J. J. RADRIZNEZ DEL VALLE,	PP. W. H. GILSON,	
E. RODS, CABRERA,	DANIEL RUNKLE,	
	PP. W. H. GILSON.	20

**D 8.**

AGREEMENT BETWEEN GILSON AND  
MARTINEZ FOR AGENCY OF HAVANA  
LOAN, NOVEMBER 11, 1882.

AN AGREEMENT made the 11th day of November, 30  
1882, between Walter Holman Gilson, of the City of  
New York, in the United States of America, but at  
present resident at 21 Montague Street, Bloomsbury,  
in the County of Middlesex, in England, gentleman  
in the one part, and Lino Martinez, of the City of  
Havana, in the Island of Cuba, but at present resid-  
ent at the Westminster Palace Hotel, in the City of  
Westminster, in England, gentleman of the other  
part. WHEREAS, On the 28th day of March last, in 40

the said City of Havana, a contract was entered into by Edward Charteris Maddison, the said Walter Holman Gilson, Daniel Runkle and James H. Lyles, with the Municipality of the said City of Havana, for a loan to the said City of Havana, the nominal amount of such loan being 7,000,000 dollars, representing at the issue price about 5,600,000 dollars net, as also for the construction of certain water works  
10 at the cost of 2,200,000 dollars or thereabouts. AND WHEREAS, All interest in the said contract, so far as regards the said loan, was afterwards transferred by the said Walter Holman Gilson, Daniel Runkle and James H. Lyles to the said Edward Charteris Maddison, and subsequently by the said Edward Charteris Maddison to the said Walter Holman Gilson, who is now as he doth hereby declare solely entitled to all the rights and interest of the contractors in the said loan. AND WHEREAS,  
20 The said Lino Martinez, who has acted as the agent of the contractors in Havana, in connection with the obtaining the said contract, and it is intended that the said Lino Martinez shall continue to act in manner and upon the terms hereinafter mentioned. Now it is hereby agreed by and between the parties hereto, as follows:

1. The said Lino Martinez shall be and continue the Financial Agent of the said Walter Holman Gilson in the City of Havana, so far  
30 as relates to the said loan and as such agent shall be the one entitled to draw all bills of Exchange or other like documents to be drawn on Messrs. J. S. Morgan & Co., of London, or other the banking house or firm, by whom the loan may be issued, including the bills drawn for the portion of the said loan to be applied in payment for the construction of the water works and to disburse the funds arising from the sale and negotiation of  
40 the said bills, such funds being applied in such man-

ner as may be needful under the said contract, or as the said Walter Holman Gilson shall direct.

2. A commission of one half per cent. on the amount of the bills so drawn shall be allowed for drawing the same and disburse the proceeds thereof, and which shall be divided equally between the said Lino Martinez and Walter Holman Gilson, such division to take place and be made immediately upon the receipt of funds, available for the payment of the said commission, and the like commission shall be paid and allowed, in respect of any of such bills as by agreement between the said Lino Martinez and Walter Holman Gilson shall be drawn by any other person than the said Lino Martinez.

3. The said Lino Martinez, in the event of his absence from Havana or inability personally to act, shall be at liberty to appoint a suitable representative to act for him and in his stead as such agent, and all acts of such representative shall, for all purposes, be treated as if the acts of the said Lino Martinez.

4. No commission or brokerage is to be paid to brokers on the sale or negotiation of bills, except in cases of absolute necessity.

As witness the hands of the parties the day and year first above writren.

WALTER HOLMAN GILSON,  
L. MARTINEZ.

Witness to the signatures of }  
WALTER HOLMAN GILSON }  
and LINO MARTINEZ. }

30

C. M. M. RAWLINS,  
Solicitor,  
66 Gresham House,  
Old Broad Street, London.

J. IVES TAYLOR,  
Same place, his clerk. 40

To all to whom these presents shall come I, John William Peter Jauralde, of the City of London, Notary Public, duly admitted and sworn, do hereby certify that the foregoing agreement was on the day of the date hereof signed by Walter Holman Gilson and Lino Martinez, the parties therein named and described before me the said Notary and in the presence of Cyril Mortimer Murray Rawlins and  
 10 James Ives Taylor, both of this city, subscribing.

WITNESS THERETO (the word "about" having been previously interlined)

In Faith and Testimony whereof I have hereunto set my hand and seal of office at London, this 11th day of November, in the year of our Lord 1882.

[L. S.]

J. W. P. JAURALDE,  
 Notary Public.

Vo Bo per eegalizarion de la firma y sello que anteceden y que sol al parever los que usa en sus Actos Oficiales.

20

Mr. John W. P. Jauralde, Notario Publico, de eita ciudad al que come lal se du entera fe y credito.

London 13 de Novemre. de 1882.

El. Consul General,  
 ISIDORO MILLAS.

[L. S.]

No. 491.  
 Drhos 8-9.  
 Arto. 133.

30

### D 9.

#### AGREEMENT BETWEEN GILSON AND MARTINEZ AS TO APPLICATION OF PROFITS OF HAVANA LOAN NOVEMBER 11, 1882.

AN AGREEMENT made this eleventh day of  
 40 November, one thousand eight hundred and eighty-

two between Walter Holman Gilson, of the City of New York, in the United States of America, but at present resident of 21 Montague Street, Bloomsbury, in the County of Middlesex, in England, gentleman of the one part, and Lino Martinez of the City of Havana, in the Island of Cuba, but at present resident at the Westminster Palace Hotel, in the City of Westminster, in England, gentleman of the other part. WHEREAS, By an agreement of even <sup>10</sup> date herewith and made between the parties hereto having reference to the contract dated the twenty-eighth day of March last for a loan to the City of Havana, and for the erection of certain water works, and which contract, so far as relates to the said loan is now vested in the said Walter Holman Gilson, it has been agreed by and between the said parties thereto and hereto that the said Lino Martinez shall be and continue the Financial Agent of the said Walter Holman Gilson, in Havana, for the purposes and on the terms therein mentioned. AND WHERE <sup>20</sup> AS, in consideration of the services rendered and expenses incurred by the said Lino Martinez in procuring the said contract, it has been agreed that the profits arising from the issue of the said loan shall be dealt with in manner hereinafter appearing. Now it is hereby agreed by and between the parties hereto as follows:

1. Out of the first profits arising from the said loan (including all profit in exchange) there shall be <sup>30</sup> paid through the said Lino Martinez, and in the order hereinafter named, so far as regards the right of priority of payment out of such profits the various expenses following:

1st. The commissions of one hundred and five thousand dollars, Spanish gold in, Havana, payable to Emetrio Zorilla, and twenty thousand dollars Spanish gold in Havana to Antonio Bermudez. <sup>40</sup>

2ndly. The sum of twenty thousand dollars Spanish gold, in Havana, for press expenses.

3rdly. The sum of twenty thousand dollars Spanish gold, in Havana, in full for all other the expenses of the said Lino Matinez and Walter Holman Gilson, and to be divided between them in the proportions of three-fifths to the said Lino Martinez and two-fifths to the said Walter Holman Gilson.

2. Of any balance of profits remaining after payment thereof of the various expenses aforesaid, the said Lino Martinez shall be entitled to receive one-third and the remaining two-thirds shall belong and be paid to the said Walter Holman Gilson, he paying and discharging thereof all right of participation therein by Edward Charteris Maddison, or his firm of Maddison & Co., or any other parties.

As witness the hands of the parties the day and year first above written.

20 WALTER HOLMAN GILSON,  
LINO MARTINEZ.

Witness to the signatures of }  
WALTER HOLMAN GILSON }  
and LINO MARTINEZ. }

C. M. M. Rawlins,

Solicitor,

69 Gresham House,  
Old Broad Street, London,

J. IVES TAYLOR,

Same place, his clerk.

30 To all to whom these presents shall come I, John William Peter Jauralde, of the City of London, Notary Public, duly admitted and sworn, do hereby certify that the foregoing agreement was on the day of the date hereof signed by Walter Holman Gilson and Lino Martnez, the parties therein named and described before me the said Notary, and in the presence of Cyril Mortimer Murray Rawlins and  
40 James Ives Taylor, both of this city subscribing.

WITNESSES THERETO, In faith and testimony whereof I have hereunto set my hand and seal of office at London, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-too.

[L.S.]

J. W. P. JAURALDE,  
Notary Public.

Vo Bo por legalizacion de la firma y selloque<sup>10</sup> anteceden, y que al parecer los que usa en sus Actos Oficiales Mr. John W. P. Jauralde, Notario Publico de eeta Ciudad al que como tal se du entera fe y credito.

Londres 13 de Novrem, re de 1882,  
El Consul General,  
ISIDORO MILLAS.

No. 495.  
Drhos 84.  
Arto 133.

20

**D 10.**

LETTER FROM MARTINEZ TO GORDON,  
SEPT. 10, 1883.

LONDON, Sept. 10th, '83.

PANMURE GORDON, ESQ.,  
HOLTON COURT, E. C.

30

MY DEAR MR. GORDON:—

RE-HAVANA LOAN.

As I do not quite understand the *modus operandi* of this negotiation and from the interviews I had to-day, especially that with Mr. Betzold, my fears are increased in regard to the business being lost, I have considered it advisable to write you this letter.<sup>40</sup>

making a thorough study of the situation, the conditions to be fulfilled and the risks that threaten us in this business. I do it by writing because I think I can express myself better and you will understand it so also.

The Municipality require to know something final before the 20th inst. because they do not believe at all our promises as none of them have been fulfilled.

In order to quiet their impatience, I announced then a short time ago our plan to carry out the negotiation, by transferring the business to Messrs. James Perry & Co., but M. Sagasta cabled from Madrid asking if they would accept the transfer in favor of Messrs. Morgan & Co.

This made them doubt of the negotiation I had announced with Messrs. J. Perry & Co., and your people. The Municipality asked for an explanation to that and as I learn by to-day's mail from Havana no ratification has been sent from Madrid. Now they do not believe in our negotiation and only think that we are trying once more without a firm basis to revive the business with Messrs. Morgan.

As the Municipality do not wish to lose any more time with Messrs. Morgan & Co., they cabled back to Madrid saying that they would not accept the transfer in favor of Messrs. Morgan & Co.

They are tired of this game and if we do not offer them something sure before the 20th inst. I believe it is useless to be wasting any more time over this tiresome business.

For this reason, the *modus operandi* that can save the business and make use of the good disposition of the Municipality, is the following:

That as soon as the contract between Messrs. J. Perry & Co. and Mr. Gilson be signed, to telegraph to the city announcing it and asking:

1st. To confer to Messrs. Morton, Rose & Co. the same concessions granted Messrs. Morgan & Co.

2ndly. To name them agents for the service of the loan.

3rdly. To approve of the definite bond.

4thly. To name a depository for the provisional bond in accord with Messrs. Morton, Rose & Co.

These are, as I understand, the sole conditions required by Mr. Bischoff and advised by Mr. Underdown.

In order to be able to carry this out in time it is necessary that Messrs. Morton, Rose & Co., name immediately an agent in Havana, so that he (the agent) may telegraph them that the conditions have been fulfilled and may tell the city that the business is dealt with seriously. 10

In this manner Messrs. Morton, Rose & Co., will know within very few days that the city is willing to accede to everything asked for, and they (Messrs. M., R. & Co.), will then be able to decide definitely about the business.

Though in order to satisfy the requirements of the city we may proceed by telegraph, giving all the information they want, the issue will not have to be made at once, as the bonds must be deposited for forty-five days and the draft shall not have to be cashed before sixty or eighty days after the forty-five have elapsed.

If on the contrary they wish to act differently, not saying anything by telegraph before the 20th instant or send an agent there, who would take a month to give a report, or pretend that the city may grant everything without knowing in the proper manner that there are probabilities to do the business, we lose our time, because the city will have upset the whole concern by that time. 30

I wish to have it fully understood by all parties that I have explained the real position of the business in time, so that in case of failure no one can blame me or my adviser for the non-success.

You can make the use you consider fit of this letter, its only object being the aforementioned.

I will see you at your office to-morrow afternoon.

In the meanwhile, I remain,

Yours Very Sincerely,

L. MARTINEZ.

10

**D 11.**

LETTER FROM MARTINEZ TO LYLES RE.  
QUESTING POWERS OF ATTORNEY,  
MARCH 8, 1884.

HAVANA, March 8th; 1884.

J. H. LYLES, ESQ.

New York.

MY DEAR MR. LYLES:

Your favor of 1st inst. came duly to hand in which  
20 you announce by next mail the remittance of the  
power to rescind the contract.

You speak in that letter of a current report of my  
being in negotiations with the Spanish Bank, and  
and I must tell you in reply, that if it were possible  
for me to do such a thing, I would gladly offer you  
a share of the benefits, but unfortunately it is not so.  
The impossibilities to do the business under the  
present circumstances, are quite out of question.  
No one can do it at present, not even the Spanish  
30 Bank, but in case they should undertake it they will  
not need or have any of us. I am well aware of it  
for I have offered the business to them twice and  
they have refused it. What would I get by another  
trial? Another refusal only.

Up to the present time I know not whether Mr.  
Gilson sends the power or not, and I beg you to do  
your best and ask Mr. Runkle to use his influence  
with Mr. Gilson so as to get this document from  
40 him.

He must know by this time that there is no hope to save the business and that it is of the greatest impossibility to do it even with the money on hand.

If under this circumstances he does not send the power, it is because he feels pleasure in causing me prejudice as a reward for all my sacrifices, and will prove to be a man who does not keep his word.

Enclosed you will please find the certificate of Mr. Fay's shares. I have made the transfer like the 10 other one.

I am, dear friend,

Yours very sincerely,

L. MARTINEZ.

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**D 12.**

LETTER IN SPANISH FROM MARTINEZ  
TO EMMETT R. OLCOTT ON MARCH  
27th, 1884.

20

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**D 13.**

TRANSLATION OF D 12.

Telegraphic address "Lartinez."

No. 1.

LINO MARTINEZ,  
P. O. Box 684,  
Havana.

30

HAVANA, March, 27th, 1884.

MR. EMMETT R. OLCOTT,  
35 Broadway,  
New York.

MY DEAR SIR:—

Having been informed by the letters of Messrs.  
Runkle, Lyles & Gilson, that you are the lawyer

who took part in the drawing up of the powers of attorney for the rescission of the contract for the municipal loan in this city, I have not hesitated to apply to you to-day by cable to ask you to inform those gentlemen of the necessity I am in of having those documents in order to save the deposit of \$64,000 (sixty-four thousand dollars, gold) that I made to make the proposals to such loan and that  
 10 was guaranteed by contract of March 27, 1882.

Mr. Mestre, to whom the powers of attorney of Mr. Runkle and Mr. Lyies have been forwarded, has asked me for a letter declaring that I do not propose to avail myself of the rescission of any right to my own advantage, and also that I release the contractors from all liability therein, and I have not had any question in telling it to him since I have not to their prejudice any plan, project or idea, of other business negotiations. I send you herewith a copy of that letter.

20 This is a copy of the telegram:  
 "RUNKLE, LYLES, GILSON, care OLCOTT:  
 35 Broadway, New York.

Urge forwarding pending powers, I protest damages delay.

MARTINEZ."

I have done in this manner all that it has been possible for me to avoid damages and claims, but if  
 30 I do not have the powers I have asked for in time, that is, of all contractors, I will find myself in the unfortunate, but necessary, position of enforcing my rights.

I hope that your valuable information will avoid all difficulties and make a happy ending to an incident, the settlement of which without doubt is legal as well as proper.

I am, Yours, etc.,

[Signed] L. MARTINEZ.

**D 14.**

LETTER PRESS COPY OF LETTER (ON  
THIN PAPER IN SPANISH) DATED  
MARCH 27, 1884, SENT BY MARTINEZ  
TO MESTRE.

10

**D 15.**

COPY OF D. 14 IN SPANISH.

Habana, 27 de Marzo de 1884.

Sr. Dn. Jose Manuel Mestre,

Presente.

Muy Sor. mio:

Accediendo a los deseos de V. para satisfaccion  
de sus representados en las negociaciones del  
empr̄estito Mpl. de esta Ciudad, tengo el mayor<sup>20</sup>  
gusto de dirigirle la presente, en la que declaro que  
no tengo por objeto al concurrir en representacion  
de ellos a la rescision del contrato del empr̄estito, el  
utilizar derechos ni obtener ventajas de esta rescui-  
sion para la, tuturo por que otras negociaciones en  
proyecto a ella me guien, ni tengo por tanto idea  
alguna que realizar conforme de los actuales contra-  
tos y que no me anima otro deseo que el de salvar<sup>30</sup>  
el deposito por mi constituido y garantizado por  
ellos. Ygualmente hago constar en esta carta que  
relevo de toda responsabilidad ulterior respecto a la  
fianza, a sus representados los Sres. Contratistas.  
desde el momento en que rescindido el Contrato del  
empr̄estito los, \$64,000 oro del deposito hayan sido  
recuperados por mi, para cuyo acto deberan todos  
los Sres. Contratistas proveerme oportunamente de  
poderes especiales al efecto, y de no hacerlo así,<sup>40</sup>

seran responsables de los dnaos y perjuicios que por demora resultaren, ademas de lo estipulado en el contrato del 27 de Marzo de 1882.

Soy de V. con la mayor consideracion, atto. S. S.

Q. B. S. M.

L. MARTINEZ.

10

**D 16.**

TRANSLATION OF D 14.

HAVANA, March 27th, 1884.

MR. JOSE MANUEL MESTRE,

Present.

MY DEAR SIR:—

In accordance with your wishes in order to satisfy the persons represented by you in the matter of the Municipal Loan of this city, I have the greatest  
 20 pleasure in addressing this to you, wherein I declare that I have no purpoze in concurring in representing them in the rescission of the contract for the loan to utilize any rights nor to obtain any advantages of this rescission hereafter on account of any other negotiations in view leading to such course, nor do I have consequently any idea to carry out to the injury of the present contractors, and no other desire moves me than that of saving the deposit  
 30 made by me and guaranteed by them.

I also certily by this letter that I release the contractors represented by you from all ulterior liability as to the obligation, from the moment in which the contract for the loan being rescinded the sixty-four thousand dollars in gold of the deposit have been recovered by me; for which purpose all the contractors should provide me in due course with  
 40 special Powers of Attorney in that regard, and not doing so they will be liable for the damages that

may result by reason of the delay besides that stipulated in the contract of March 27th, 1882.

I am, with greatest consideration, etc., etc.,

Yours faithfully,

L. MARTINEZ.

**D 17.**

10

LETTER FROM MARTINEZ TO RUNKLE,  
APRIL 19, 1884.

Telegraphic address "Lartinez."

LINO MARTINEZ,

P. O. Box 684.

Havana.

HAVANA, April 19, 1884.

DANIEL RUNKLE, ESQ.

20

New York.

DEAR SIR:—

With none of your favors at hand since my letter to you, jointly with Mr. Lyles, on the 23rd of Feb., I take this pleasure in order to inform you as to how matters stand at present.

The postponement and delays in sending the powers to Mr. Mestre have created new difficulties which will surely cause great delays, and more still, a danger, because if the Municipality should change their mind the deposit would be in peril to be lost. Had I received the powers in time there would not be such risk at present.

Should the deposit be forfeited I would have to blame the postponers of the powers for the troubles and difficulties that may arise.

I remain, dear sir, yours very truly,

L. MARTINEZ,

40

**D 18.**

TELEGRAM FROM MARTINEZ TO RUNKLE  
& LYLES, CARE OF OLCOTT, MARCH 27,  
1884, (IN SPANISH).

## TRANSLATION.

10 "I urge the forwarding of the powers of attorney  
"pending: I protest against damages caused by  
"delay."

**D 19.**

## TELEGRAM.

HAVANA, July 22, 1884.

OLCOTT,  
35 Broadway, N. Y.

20 Send anyhow first steamer power according tele-  
gram eighteenth.

MESTRE-MARTINEZ.

**D 20.**

## TELEGRAM.

HAVANA, July 23, 1884.

30 OLCOTT,  
35 Broadway, N. Y.

Telegraph if power is coming to-morrow,  
steamer.

MESTRE-MARTINEZ.

**D 21.**

## TELEGRAM IN SPANISH.

40

**D 22.**

## TRANSLATION OF D 21.

HAVANA, July 18, 1884.

To Olcott, 35 Broadway, N. Y.

The powers received are insufficient. It is urgent to send by to-morrow's steamer, new Spanish power in Spanish for Runkle, Lyles and Gilson, Maddison to Martinez-Mestre, confirming the power of March 6th and June 26th, amplifying them specifically to cancel the contract to loan, to accept return of deposit, giving Common Council liberty of action and to execute a general release, all well explained.

MESTRE.

MARTINEZ.

**D 23**

20

NOTE OF RUNKLE TO GILSON, DATED  
JUNE 25, 1884.

NEW YORK, June 25, 1884.

Four months after the surrender and payment to Lino Martinez, of the Island of Cuba, by the Honorable Common Council of the City of Havana, in said Island of Cuba, of the deposit of sixty-four thousand dollars made through him, I promise to pay to the order of Walter H. Gilson the sum of seventeen hundred and fifty dollars at the office of Olcott, Mestre & Gonzalez, 35 Broadway, New York City.

(Signed)

DANIEL RUNKLE.

(Endorsed)

WALTER H. GILSON,  
L. GILSON.

## BILL OF PARTICULARS.

Served by Plaintiff, below.

## NEW JERSEY SUPREME COURT.

10	LINO MARTINEZ VS DANIEL RUNKLE.	} On Contract.
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TAKE NOTICE that the following is a bill of particulars of the demand and a copy of the contract on which the declaration in the above stated case is founded.

20 Here follows copy of the contract between Runkle and Martinez, dated November 2nd, 1881, being Exhibit P 1 (see page 94a this book).

Yours truly,

BABBITT & LAWRENCE,  
Attorneys of Plaintiff.

Dated October 15, 1890.

To WALLIS, EDWARDS & BUMSTED,  
Attorneys of Detendant.

30

40

