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New Jersey Court of Errors and Appeals

Summons.

10

(Filed, April 19, 1924)

THE STATE OF NEW JERSEY,

To Commissioners of Sewerage, District
#1, of the Township of Union, in
the County of Union, New Jersey,

(Seal) You are summoned to answer the
annexed complaint of T. Foster Cal- 20
lahan, Incorporated, in an action at
law in the New Jersey Supreme
Court. And take notice that unless
you file your answer to said complaint with the
clerk of the said Supreme Court, at Trenton,
within twenty days after service upon you of this
writ, and the annexed complaint, plaintiff may
proceed against you in the suit and judgment may
be entered against you.

30

Witness, William S. Gummere, Chief Justice of
our said Supreme Court, at Trenton, this tenth
day of April, nineteen hundred and twenty-four.

EDWARD J. KELLEHER,
Clerk.

JOHN F. RYAN,
Attorney.

40

Complaint.*(Filed, April 19, 1924)*

NEW JERSEY SUPREME COURT

UNION COUNTY

10

T. FOSTER CALLAHAN, INCORPORATED, a corporation,
Plaintiff,

vs.

COMMISSIONERS OF SEWERAGE DISTRICT #1 OF THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION, NEW JERSEY,
Defendant.

Action at Law.
Complaint.

20

Plaintiff, a corporation of the State of New Jersey, with its principal office in the City of Elizabeth, New Jersey, says that:

FIRST COUNT:

1. On August 19th, 1922, plaintiff and defendant made and entered into a certain written contract, by the terms of which plaintiff was to construct certain sewers in the Township of Union, Union County, New Jersey.

2. Plaintiff has completed the said sewers agreeably to the terms of the said contract.

3. By the terms of the said contract plaintiff was to be paid, in addition to the contract price, \$4.00 for each cubic yard of rock and \$5.00 for

40

Complaint

each cubic yard of quicksand, each as described in the said contract, encountered and excavated by plaintiff in the performance of the said contract, subject to the decision of Henry Kreh, Jr., the engineer named in said contract, relative to the character and the amount of such rock and quicksand, and provided that said engineer should by order in writing approve plaintiff's bills for such rock and quicksand. 10

4. In performing said contract plaintiff excavated 6246.7 cubic yards of such rock and 368.3 cubic yards of such quicksand.

5. Said engineer, in violation of said contract, and in plain disregard of his duty thereunder, wilfully, fraudulently, deliberately, arbitrarily and in bad faith refused to make a proper measurement or estimate of the number of cubic yards of rock and quicksand encountered by plaintiff as aforesaid, and declined to approve plaintiff's bills for the aforesaid number of cubic yards of rock and quicksand, but unjustly and in disregard of plaintiff's rights, arbitrarily, and in bad faith, determined upon and recommended payment for a number of yards of rock and quicksand, far less than the number actually encountered by plaintiff as aforesaid. 20 30

6. Plaintiff at the time protested as it has protested ever since against non-payment by defendant for the first-mentioned number of cubic yards of rock and quicksand, at the aforesaid rate, and has demanded payment therefor, which payment has been refused by defendant.

Complaint

SECOND COUNT:

For the purposes of this count, paragraphs 1 and 2 of the First Count are here repeated.

10 3. Defendant, by its agents or servants, to wit, the said engineer, delayed plaintiff's performance of the said contract in that on several occasions the said engineer failed, among other things, to give grade for the laying out of the work on the ground.

4. By reason of the said delay plaintiff was obliged to keep idle certain steam shovels, used by plaintiff in performing the said contract.

20 5. Plaintiff was damaged, by reason of the said delay, in the sum of \$5,000.00, which plaintiff was obliged to pay for the use of the said steam shovels, while the same were idle as aforesaid.

Plaintiff demands of the defendant on the first count the sum of \$15,000.00 and on the second count the sum of \$5,000.00 as damages, together with interest and costs of suit.

JOHN F. RYAN,
Attorney of the Plaintiff.

30

40

Answer.

(Filed, April 28, 1924)

NEW JERSEY SUPREME COURT

UNION COUNTY

T. FOSTER CALLAHAN, INCORPORATED, a corporation,
Plaintiff,

vs.

COMMISSIONERS OF SEWERAGE DISTRICT #1 OF THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION, NEW JERSEY,
Defendant.

Action at Law
Answer.

10

20

Defendant, a corporation, answering said plaintiff, says:

FIRST DEFENSE TO FIRST COUNT:

1. It admits Paragraph 1.
2. It admits Paragraph 2.
3. It admits Paragraph 3.
4. It denies Paragraph 4.
5. It denies Paragraph 5.
6. It denies Paragraph 6.

30

SECOND DEFENSE TO FIRST COUNT:

Defendant says that the contract sued upon provides that one Henry Kreh, Jr., shall be the engi- 40

Answer

neer and one Alexander Potter, the consulting engineer, and that both had been appointed by this defendant to act for it in their respective capacities in supervising the work and in measuring and certifying the amount of work done and
 10 also provides that, in order to avoid litigation, the contractor has a right to appeal to the consulting engineer on any major matter that may arise in connection with the interpretation of the contract and that the decision of the consulting engineer, after a full hearing of the contractor and engineer, shall be final and conclusive, and that the said plaintiff at no time appealed to the consulting engineer from the decision of the en-
 20 gineer as to the amount of either rock or quicksand excavated.

DEFENSE TO SECOND COUNT:

1. The paragraph first set out, which bears no number but which repeats paragraphs 1 and 2 of the first count, is admitted.
2. The second count has no paragraph 2.
3. Paragraph 3 is denied.
- 30 4. Paragraph 4 is denied.
5. Paragraph 5 is denied.

JOHN K. ENGLISH,
 Attorney of Defendant.

Notice and Grounds of Appeal.*(Filed, October 13, 1925)*

NEW JERSEY SUPREME COURT

UNION COUNTY

10

T. FOSTER CALLAHAN, INCORPORATED, a corporation,
Plaintiff-Appellant,

vs.

COMMISSIONERS OF SEWERAGE DISTRICT #1 OF THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION,
20 Defendant-Respondent.

Notice and Grounds of Appeal.

To:

John K. English, Esq.,
Attorney of Defendant:

30 Take notice, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment in this case, upon the following ground:

The Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

40

JOHN F. RYAN,
Attorney of Appellant.

Notice and Grounds of Appeal

Endorsement:

NEW JERSEY SUPREME COURT

UNION COUNTY

<p>T. FOSTER CALLAHAN, INCORPORATED, a corporation, Plaintiff-Appellant, vs. COMMISSIONERS OF SEWERAGE DISTRICT #1 OF THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION, Defendant-Respondent.</p>	}	10
	}	20

JOHN F. RYAN,
Attorney of Appellant,
80 Broad Street,
Elizabeth, N. J.

Service of a true copy of the within notice and grounds of appeal is acknowledged this 9th day of October, 1925.

30

JOHN K. ENGLISH,
Attorney of Defendant.

40

Testimony.

NEW JERSEY SUPREME COURT

UNION COUNTY

10 T. FOSTER CALLAHAN, INCOR-
 ATED, a corporation,
 Plaintiff,

vs.

COMMISSIONERS OF SEWERAGE
 DISTRICT #1 OF THE TOWN-
 SHIP OF UNION, IN THE COUNTY
 OF UNION, NEW JERSEY,
 20 Defendant.

Before: HON. PETER F. DALY, J., and a Jury.
 Elizabeth, New Jersey,
 October 15th, 1924.

Appearances:

John F. Ryan, Esq., attorney for Plaintiff.

30 John K. English, Esq., attorney for Defendant.

(A jury was impaneled and sworn.)

The Court: Adjourned until tomorrow morning
 at half-past nine, gentlemen.

Testimony

October 16th, 1924.

9:30 a. m.

(The opening statement on behalf of the plaintiff was made to the jury by Mr. Ryan.)

(The opening statement on behalf of the defendant was made to the jury by Mr. English.) 10

Mr. Ryan: If your Honor please, counsel consents to the introduction of the contract in this case without formal proof.

The Court: It is admitted.

Mr. Ryan: I would ask leave of the Court to read from special provisions of the contract, because it is very lengthy.

The Court: Very well. 20

Mr. English: Read the stipulation in the record. (Contract marked Exhibit P-1.)

Mr. Ryan: Gentlemen of the Jury, this is the contract to which I referred in my opening, upon which this suit is based. Now, it is a very lengthy document and there are some special provisions upon which we particularly rely, and I would like to read those in calling them to your attention.

On page 10—

The Court: Are they numbered? 30

Mr. Ryan: Yes, your Honor.

The Court: Very well.

Mr. Ryan: Section 10, on page 10, reads as follows:

“Wherever the word ‘engineer’ is used, it refers to Henry Kreh, Jr., 208 Broad Street, Elizabeth, New Jersey, or his authorized representative; and whenever the words ‘consulting engineer’ are used, they refer to Alexander Potter, 40

Testimony

50 Church Street, New York City, both appointed by the Sewer Commission to act for them in their respective capacities in supervising the work, and in measuring and certifying the amount of work done."

10 Now, in Section 11 of page 11 we have the following clause:

"It is expressly understood and agreed that the work included in this contract shall be done under the supervision and to the entire satisfaction of the engineer mentioned above, and the contractor hereby agrees to accept as final all decisions of the engineer as to the fitness of material furnished or work done, and immediately to replace all work rejected by said engineer."

2.) On page 12 we have Section 13, reading as follows:

30 "The engineer shall have the final decision on all matters of dispute involving the character and amount of work, and the compensation to be made therefor, or any question arising under this contract. He shall have the option of making changes in the line, grade, form, plan, position, dimensions or material of the work hereinafter contemplated, either before or after its construction has begun. Important changes, such as involve a material increase in the cost shall not be done without the approval of the Commissioners. If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages for anticipation of profits for work dispensed with. If they increase the amount of work, the increase shall be paid for according to the quantity of work actually done, and at the
40 prices established for such work under the con-

Testimony

tract, except where in the opinion of the engineer, the contractor is clearly entitled to extra compensation.

In order to avoid litigation, the contractor has a right to appeal to the consulting engineer on any major matter that may arise in connection 10 with the interpretation of this contract, and the decision of the consulting engineer, after a full hearing of the contractor and engineer shall be final and conclusive."

Now, on page 21, no paragraph number, but the heading "Rock Excavation," we find this language:

"Rock excavation shall include the excavation and removal of all boulders or pieces of rock each 20 of which contains eight cubic feet or more of any hard pan; firmly cemented gravel; rock in ledges; solid rock, or masonry removed from retaining walls or culverts."

That is the definition of rock under this contract.

On page 22 we read:

"All rock encountered in the trench shall be exposed for measurement."

That is the first paragraph and there is no number 30 on it.

"All rock encountered in the trench shall be exposed for measurement. Rock shall be stripped in sections which, unless otherwise permitted, shall not be less than fifty feet in length, and the engineer shall then be notified in order that he may measure the same. Rock excavated or blasted before such measurement is made will not be paid for."

Testimony

Then on page 23, the second paragraph, we read:

10 “The contract price for rock excavation shall cover the excess cost of all labor and materials required to excavate and remove all rock and boulders greater than eight cubic feet in volume; also firmly cemented gravel and ledge rock, and any other labor and materials as specified under ‘excavation.’ ”

Then we come to the subject of quicksand on page 23, and it says:

20 “Where quicksand is encountered in the trenches, a separate classification will be made and a distinct unit price bid for this material. Material to be classed as quicksand includes not only quicksand properly so-called, but any other semi-fluid material which in the sole judgment of the engineer is equally difficult to handle.

“The price bid for quicksand shall cover the excess cost of all labor and material required for excavation, back filling, regrading, removing water, careing for structures and bracing.”

Then on page 44, paragraph 23—page 45, rather, paragraph 23—

30 Mr. English: Paragraph 24.

Mr. Ryan: 23 in my copy.

Mr. English: Number 24 starts page 45.

Mr. Ryan: (Reading):

40 “Should the said Sewer Commission be prohibited or enjoined with the work by reason of litigation, or by reason of its inability to procure any right-of-ways, or should the Sewer Commission for any reason delay the work, or the laying out of the same on the ground, the contractor shall be limited to the exact cost to him of such

Stipulation.

delay without profit, direct or indirect. He will not withdraw from his contract except by the consent of the Sewer Commission and the time for the completion of the work is to be extended to such time as in the opinion of the engineer shall make good the loss of such delay, at which 10 time the duration of such allowance or extension shall be certified to by the engineer."

And on page 47, or rather the last page—that section, I will call to your attention later.

Gentlemen, Mr. English and I have agreed to stipulate this matter and present it to the jury in this shape. It is rather complicated and there are uninteresting facts or figures and calculations; so, so far as the first question is concerned, 20 it is presented to you in this shape:

STIPULATION

"It is hereby stipulated and agreed by the parties in this action and their respective attorneys, that whereas the contract sued upon if not annexed to the complaint, it shall be introduced in evidence by the plaintiff; and, furthermore, the formal proof thereof is not required. It is further 30 stipulated that the amount of rock excavation allowed by the engineer and paid for was 3,716 cubic yards, and that the claim of the plaintiff is that the amount should be 6,246.7 cubic yards, and therefore that the present claim of the plaintiff is for a payment for an additional 2,530.7 cubic yards; also that the amount of quicksand allowed by the engineer and paid for was 213 cubic yards, and that the claim of the plaintiff is 40 that the amount should be 368.3 cubic yards; and

Charles A. Lakens—Direct

therefore, that the present claim of the plaintiff is for a payment for an additional 155.3 cubic yards.

10 “Whereas, in accordance with the contract a certain amount allowed to be due to the plaintiff was withheld for a given time, this amount shall not be in any way considered in the present suit. This suit, under Count No. 1, relates to the allegation only that the plaintiff excavated more rock and more quicksand than the engineer allowed, and to the claim of fraud on the part of said engineer.”

20 CHARLES A. LAKENS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Ryan:

Q. Mr. Lakens, where do you live? A. 189 Lincoln Avenue, Elizabeth.

Q. How long have you lived in Elizabeth? A. For four—practically five years.

30 Q. What is your business, Mr. Lakens? A. Contracting.

Q. Have you any technical education? A. Yes.

Q. What does it consist of? A. Civil engineer.

Q. Where did you graduate? A. University of Virginia.

Q. Charlottesville, Virginia? A. Charlottesville, Virginia.

Q. Have you any connection with the plaintiff corporation in this suit? A. Yes, president.

40 Q. You are the president? A. Yes.

Charles A. Lakens—Direct

Q. Who supervised the work which the plaintiff did in this case? A. I did, most of it.

Q. Anybody else with you? A. There were two—not supervising, no. I say I supervised the entire job. There was a sub-foreman and so forth, but I supervised the entire construction of 10 the work.

Q. I see. How long did it take to complete this job, Mr. Lakens? A. Approximately nine months, nine working months. We were there over a year, or about a year, but that let out the winter work; the actual construction work was in process about nine months.

Q. Do you know what hard-pan is? A. Yes.

Q. Can you describe or define hardpan to the jury, and the Court, please? A. Hardpan is a dense boulder-clay substance that is found, usually, under a layer of soil in the ground. It is a stage of earth that is practically in the stage of transforming from earth to rock. Geologically, it is called a metamorphic rock. Metamorphic is a term—is a Greek word that means in the process of changing. By that they mean that it is changing from earth to rock, and it is a dense, compact substance mostly consisting of boulders and hard 30 clay firmly cemented together.

Q. What are its physical characteristics? A. It is very dense and very hard to excavate; it gets back to almost rock.

Q. Do you know how much you were paid for rock excavation on this job? A. If I may refer to notes—

Q. I think that is permitted.

Mr. English: It is cared for in the stipulation. 40

Mr. Ryan: Yes.

Charles A. Lakens—Direct

Q. Do you know how many cubic yards of rock the plaintiff corporation actually excavated in the construction of this sewer? A. How much they excavated?

Q. Yes. A. Yes.

10 Q. How do you know that? A. I know that from measurements that I actually took each day on the job during the course of the supervision of the job.

Q. Were you on the job every day? A. Every day.

Q. Did you make any records of the amount of cubic yards of rock excavation? A. Yes, each day.

Q. Each day? A. Each day.

20 Q. Have you those records with you? A. I have.

Q. What do they show as the total rock excavation? A. (Referring to document.) These records show that the total rock excavation was 6246.7 cubic yards.

Q. Now did you ever have any conversation with anyone concerning rock excavation on this job? A. Yes, I had numerous conversations.

30 Q. With whom were these conversations held? A. Mr. Kreh, Mr. Catley, the Sewerage District's Inspector and Mr. Potter, the consulting engineer.

Q. And when did you first talk with Mr. Kreh about this rock excavation? A. After we had excavated approximately 500 feet at the very beginning of the job.

Q. 500 feet of trench? A. We had approximately 500 feet of trench open when the contro-
40 versy started.

Charles A. Lakens—Direct

Q. Do you mean by that 500 lineal feet? A. Lineal feet, yes.

Q. Do you know, Mr. Lakens, what 500 lineal feet of trench amount to in cubic yards? A. Cubic yards—that particular trench amounted to— 10
run about a half a cubic yard to the foot. I think that was the average. As I remember it, it was an average of somewhere around seven feet, between seven and eight feet. That would give you approximately a cubic yard—a half a cubic yard to the running foot.

Q. What would be the total number of cubic yards? A. In that 250.

Q. 250 feet. Where did that conversation take place? A. Which conversation do you mean?

Q. The first one you had with Mr. Kreh? A. 20
On the job, right at the side of the excavation.

Q. What did he say to you or what did you say to him; just tell the jury what was said. A. We were digging and we ran into this extremely hard substance in excavation, and I asked Mr. Kreh what he was going to do in reference to payment on rock. Mr. Kreh told me that he was going to do absolutely nothing in payment of rock, that he could not pay for that as rock. He said his 30
Commissioners would not allow him to, and he maintained that it was not ledge rock, and it was not ledge rock; but it was this hardpan, big boulders, clay, firmly compacted. I put up the plea that I wanted to be paid not for ledge rock but for hardpan, and Mr. Kreh told me that there was no classification in the specification for hardpan. I assured him that there was; told him that they did and I would come down after the work 40
stopped at 4:30 and would show him the clause

Charles A. Lakens—Direct

in the contract that provided for the payment of hardpan. So Mr. Kreh said, before he left the job, "Well," he said, "if it is hardpan, I suppose we will have to pay you for hardpan, but," he says, "there is no hardpan in the contract."

10 So that night at 4:30 the job closed; I went down to Mr. Kreh's office. He had a set of specifications in the file and produced them and I looked over the contract and showed him and called his attention to the fact that there was a clause in the contract that we were to be paid for hardpan. Mr. Kreh then, of course, acknowledged the specifications and said that he would not pass any decision on it, he would go and call
20 Mr. Potter, the consulting engineer, to which I was agreeable. And Mr. Potter, the consulting engineer, came out from New York and spent quite some time on the job, looked over the material, and in instances got down in the ditch with a pick, tested the material. He went over the entire operation of the shovels with myself and Mr. Lawrence, the man from whom we leased the shovels, and made notes and data to substantiate his decision. And after going through all this,
30 Mr. Potter said, "yes; it undoubtedly was hardpan," and we were to be paid for it on the basis of hardpan.

Then, when the first estimate went in, including this hardpan, to the Sewerage—Mr. Kreh presented the plea to the Sewerage Commissioners, Mr. Potter went up to the meeting in Union—as a matter of fact, he called a special meeting with the Sewerage District Commissioners and explained this thing to them, about the fact that we were
40 to be paid not only for rock and ledge-rock but

Charles A. Lakens—Direct

for hardpan. Mr. Potter told them that it was a case of it being in the contract and they must pay it cheerfully, because there was no question about it being there; that if we did not collect it, if they were not satisfied to pay it and pay it cheerfully, that we had other redress; that there was no doubt but what we could collect it, but each and every month thereafter the Sewerage Commissioners would squabble and quarrel about this hardpan, they were satisfied to pay for rock but they were not satisfied to pay for hardpan. Mr. Kreh and myself and Mr. Potter, no one seemed to be able to define this thing and make the Township Committee understand that hardpan was to be paid for as rock and they constantly, throughout the job, bore down and brought pressure to bear on the engineers in the job to keep cutting this down. I think one reason for it was that they were very much afraid that the contract was going to run over their appropriation which they had made before the job was let at all. They had appropriated, I am sure, a hundred thousand dollars; they floated a bond issue, and of course, if this hardpan was to be paid for throughout the job there, it would undoubtedly amount to a great deal in 25,000 cubic yards of excavation that we had to handle; that they would run over their appropriation and were very much afraid of this, because Mr. Kreh, on numerous occasions, asked me, and I believe asked other people and spoke to other people, about whether or not the job was not going to run over their appropriation.

Q. Now when you went to Mr. Kreh's office, did

Charles A. Lakens—Direct

I understand you to say you went to Mr. Kreh's office? A. Yes.

Q. What was your purpose in going there? A. To show Mr. Kreh or to point out, rather, to Mr. Kreh that this hardpan actually was in the specifications and in the contract.

10 Mr. Ryan: Just pardon me a minute, if your Honor please. The specifications and the contract are practically identical and I made the error of having the specifications in my hand at the time they were offered in evidence instead of the contract, and I would like to correct that now, please.

The Court: Very well.

20 Mr. Ryan: Gentlemen of the jury, I would like to say that the language of the specifications and the contract is substantially and practically the same, so I will not take up any time reading it further.

Q. Now, Mr. Lakens, did you call Mr. Kreh's attention to this contract when you went to his office? A. I did.

Q. Did you point out any particular section? A. I did, yes; I pointed out the section that defines the "Rock."

30 The Court: Let him see the section that he pointed out so the jury may follow him.

Q. Well, then, will you just point out in that contract, if you can, please, the section to which you called Mr. Kreh's attention (handing Exhibit P-1 to the witness).

The Court: The same pages and section number?

40 The Witness: Yes, they are, your Honor.
Mr. Ryan: I believe it is.

Charles A. Lakens—Direct

The Court: Then that will be page 21.

The Witness: I have it.

The Court: Then read it; just read what you say you pointed out to Mr. Kreh.

The Witness: (Reading) "Rock excavation. Rock excavation shall include the excavation and removal of all boulders or pieces of rock each of which contains eight cubic feet or more of any hardpan; firmly cemented gravel; rock in ledges; solid rock, or masonry removed from retaining walls or culverts." 10

Q. Now, was there any such substance in the digging that you had accomplished at that point?

A. There was.

Q. (Continued.) As defined? What was it? A. There was hardpan there. 20

Q. Entirely hardpan? A. Well, in the hardpan there may have been some—well, there were some boulders, yes. Well, hardpan, as I said before, was practically all boulders and clay firmly compacted.

Q. Now, when that section was called to Mr. Kreh's attention, did he say anything? I mean, did he say anything to you? A. He said that— he said that he was not going to pay for this hardpan. 30

Q. Well, he said that, as I understand it, before you called this section to his attention, is that true? A. Yes.

Q. And what did he say afterwards? A. When he found that out he said, "Well, if the town had to pay for all that material as hardpan, that it would break the town."

Q. What did you say to that? A. I said—I re- 40

Charles A. Lakens—Direct

plied that it didn't make any difference to him about breaking the contractor, just so he didn't break the township.

Q. I see. Now, as I understand it, 500 lineal feet of trench had been opened up to the time that
10 this matter was brought to his attention and you went to his office? A. That is approximately, yes.

Q. Now, on the whole job, how many lineal feet of trench were to be excavated according to the terms of this contract? A. About 40,000—thirty-eight or forty thousand feet.

Q. Could you tell us how many cubic yards of digging would be encountered in 40,000 lineal feet
20 of trench, per sewer? A. I can and I can't. That depends entirely on the depth—the average depth of the trench. On this particular job the average cut was—

Q. Perhaps I can help you, Mr. Lakens. A. (Continued) Eight feet.

Q. Can you tell us the average depth of trench on this sewer?

The Court: He was telling you.

A. The job—this particular job averaged about
30 an eight-foot cut, and in that it would run a little better than a half a cubic yard to the foot on an eight-foot trench. That made approximately twenty-two to twenty-five thousand cubic yards of earth that we had to excavate in these trenches.

Q. Under this entire contract? A. Yes.

Q. Now, did you have any other conversation with Mr. Kreh concerning the extras for the digging of rock and quicksand in this case? A. Yes. Mr. Kreh and I disagreed and argued almost
40 every time we saw each other.

Charles A. Lakens—Direct

Q. How often did you see Mr. Kreh? A. Well, that is hard to say over a period of nine months. Sometimes for a short while each day. Then again I would not see him for two or three days unless I went to the office to see him.

Q. Well, from week to week, how often would 10 you see Mr. Kreh during the course of this work?

A. You mean on the job?

Q. Yes. A. (Continued.) Or all told?

Q. On the job there? A. On the job there I think I can safely say that Mr. Kreh spent not over three hours a week on the job there.

Q. Well, would those three hours be in one visit or different times? A. No, that is allowing approximately a half an hour a day.

Q. Then do I understand you to mean that Mr. 20 Kreh was there every day on the job? A. No, he was not.

Q. What did Mr. Kreh have to say in subsequent conversations concerning hardpan, if he had anything to say, after the time that you went to his office and pointed this out in his contract?

A. Each time that Mr. Kreh came on the job he would argue about how much hardpan was there. There were many instances when he said there 30 was absolutely none and we had measured, the township inspector and myself, had said that there was.

Q. Whom do you mean by the township inspector? A. Mr. Catley.

Q. What is his first name? A. E. C. Catley, I believe.

Q. E. C. Catley? A. Yes.

Q. You say that Mr. Kreh would argue? Well, can you tell us with whom he would argue? A. 40

Charles A. Lakens—Direct

With me, on almost every occasion and on numerous occasions with the inspector.

- Q. I see. Well, now, just explain to the jury how those arguments arose or what the subject matter of those discussions was. A. It was a natural thing in the course of events that when Mr. Kreh came on the job and we were digging this hardpan, for me to inquire as to how much hardpan Mr. Kreh was allowing us in those particular ditches; with Mr. Catley and myself, having been on the job practically nine hours each day watching the shovels perform and seeing what they were able to do and what they could not do, were in a good position to see just what kind of hardpan were in these ditches, and we had agreed on figures, and practically—I had made my notes and Mr. Catley had made whatever notes he had to make; Mr. Kreh invariably wanted two or three feet, or four feet, five feet. In instances, Mr. Kreh would say, “No, he couldn’t allow any of them.” And there were, I believe, five or six different occasions were Mr. Kreh said that we had absolutely no hardpan, when I appealed to the consulting engineer, asked Mr. Kreh to have Mr. Potter come out. Mr. Potter on, I believe, five or six occasions, did come out. I know he did come out, but I am not positive just how many times, but I will say that on each and every instance that Mr. Potter was called in in consultation, after going over the trench work thoroughly, watching the machines work in the material, and getting down into the ditch and testing it with a pick himself—he did it in every instance—that what we asked for in hardpan was not excessive, and instructed Mr. Kreh and Mr. Catley, the in-

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spector, on those occasions to allow us just what we had asked for. There were cases where there were five or six feet, one place on Liberty Avenue, there were eight feet, Mr. Kreh was going to allow us absolutely nothing for; Mr. Potter came out and after thoroughly going over the thing and substantiating our argument said there was no question about it being hardpan and that it had to be paid for as hardpan. 10

Q. Did you make requests at any time or make a request of Mr. Kreh to come up—to provide you with measurements on this rock or quicksand? A. Yes—I beg your pardon.

Q. Did you make any requests of Mr. Kreh to come to the work and provide you with measurements of rock and quicksand? A. There were several times when we ran into exceptionally hard digging that I called up Mr. Kreh and asked him to come up and look at the work, yes. 20

Q. Called him up how? A. Called him on the 'phone from his office, and asked him to come up in the field and actually look at the material.

Q. Did Mr. Kreh answer the 'phone? A. Yes, sometimes.

Q. How do you know that he answered the 'phone? A. I beg your pardon? 30

Q. How do you know that he did? A. I know his voice over the 'phone. I have known Mr. Kreh for a long while and he must have answered the 'phone, because in almost every instance he did come up on the work when I called.

Q. He came up? A. Yes.

Q. Did he make the measurements? A. Measurements, no.

Q. Well, did he come there—what was your 40

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purpose in calling him up? A. The purpose in calling him up was that as I saw the matter, it was a kind of interpreting this material from day to day, and I didn't want Mr. Kreh to think—or didn't want Mr. Kreh, rather, not to see it. I was confident that the material was there and I asked Mr. Kreh on all these occasions to come up and actually see it.

Q. And you wanted Mr. Kreh to see that your excavation was actually effected, is that so? A. Yes.

Q. And would Mr. Kreh come up in response to those telephone calls? A. Yes, almost every instance. There may be once or so that I wasn't able to get him on the wire; he was out, but in most every instance he did come up.

Q. How long did it take him to get there? A. Well, that is hard to say.

Q. Well, did he come immediately? A. Well, I would say during the course of the day he would come. I wouldn't say that he came immediately, no.

Q. When he got there what would be the condition of the trench, that is, so far as excavation was concerned, of rock or quicksand? A. Shovels were in operation trying to excavate this material.

Q. When these discussions occurred between Mr. Kreh and yourself and Mr. Catley, the town inspector, where was the rock and hardpan? A. I beg your pardon?

Q. When Mr. Kreh would come up there, as you testified before, there were repeated discussions almost every day between Mr. Kreh and yourself and Mr. Catley, concerning the amount

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of rock or quicksand excavated. What was the position of this rock or quicksand; where was it?

A. It was in the trench that we were trying to excavate. In most every instance up there there was a layer of clay or soil at the depth of about two feet, two feet and a half, and from there on 10
down was all this hard, red clay, gravel and boulders, with the exception of a few streets.

Q. Was that true in every instance? A. You mean did I call Mr. Kreh—

Q. When Mr. Kreh would have these discussions or arguments between himself and you and Mr. Catley concerning the amount of rock or quicksand excavated, was the rock still unexcavated in every instance? A. No. A lot of times 20
it was excavated. Of course, up to the point where the shovel was, it was excavated.

Q. And would any discussion arise concerning the amount of rock or quicksand which had been already excavated? A. Yes, always.

Q. What was the substance of that discussion? A. Mr. Kreh would just simply say that he could not see any rock or any quicksand. No, I beg your pardon, on quicksand he would say that there was no rock or hardpan there in his judgment. 30

Q. And were the trenches always open at that time? A. Yes—no, the trenches were closed up just as rapidly as we could close them.

Q. So then is it true that this discussion would arise concerning rock excavation in some part of the trenches that had already been refilled? A. Yes.

Q. Can you tell exactly whether or not material is hardpan after it has been excavated and exposed to the air on the side of the trench? A. 40
No, you cannot.

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Q. Why not? A. There is really—because the minute I wouldn't say the minute, but after hardpan is cast on the bank or on the side and is taken out of its original place and the air strikes it, it dries, it decomposes; and with the excep-
10 tion of the stone, it practically goes to pieces in a lot of instances.

Q. Now, Mr. Lakens, you say that it took eighty days—how many days to complete this contract?
A. Approximately nine months.

Q. Do you know how many days you were allowed under the terms of the contract to complete it? A. Ninety working days.

Q. Can you assign any reason why it took so long? A. Yes.
20

Q. What is the reason? A. The reason, this hard material that we were excavating.

Q. I see. A. (Continued.) Ordinarily, an average digging of trenching machines (we used all Keystones)—a trenching machine would dig from fifteen—would safely average 1500 feet a week; that is 250 feet in a day in an eight-foot trench. That is a very—I think conservative estimate of what they should do.

Q. Under all conditions? A. Yes.
30

Q. And if the machine averages 250 feet a day—is that what you said? A. Yes.

Q. How long would it take, how many machine days or shovel days would it take to complete the excavation necessary to perform this contract? A. 160 working days.

Q. 160 working days? A. I think, yes.

Q. That is shovel days? A. Shovel days.

Q. And how many shovels did you have on this
40 job? A. Two, most all of the time; and part of the time three.

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Q. Why did you have two shovels instead of one? A. In order that we could complete our work in the specified time. We only had ninety days in which to do it, and if we could have gotten our average of 250 feet a day, we would very nicely have completed the work in eighty days and ended the trench excavation. 10

Q. Do you know how many lineal feet of trench you averaged per day per shovel on this work? A. Yes; 82 feet a day.

Q. 82 feet a day? A. That was our average on the job.

Q. How do you account for the poor average of 82 feet a day for each shovel? A. The material that we were excavating.

Q. Any other reason? A. No, none that I know of. 20

Q. Due to delay? A. I beg your pardon?

Q. Due to delay of any kind? A. No. That average of 82 feet a day, Mr. Ryan, is figuring days that we actually worked.

Q. Oh, I see. A. I based that on shovel days that we actually worked, not on any time that we did not work.

Q. The time that you were not working is not estimated in this average? A. No, is not in that 82 foot a day average. 30

Q. What was the condition of these steam shovels? A. One steam shovel was brand new and the other two—I believe, at that time one was eight months old; I think the other was practically a year old. At the time that we got them on the job, the oldest shovel, I think, was a year or a year and a half old. 40

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Q. Well, what was its condition? A. They were in very good condition.

Q. Very good shape? A. They were in good condition, yes.

10 Q. Who operated the shovels? A. Very competent engineers.

Q. Stationary engineers, do you mean? A. Steam shovel operators, yes. I say they were competent, they were not on my particular payroll, but I say that they were competent because they had worked for me in other towns.

Q. You knew these men, did you not? A. Yes, I knew the men; they had worked for me in other towns and I knew what they could do.

2, Q. Who paid these men? A. Mr. Lawrence, the man we hired these shovels from paid them and we reimbursed him.

Q. Well, did you have any trouble with the shovels? A. Yes, a lot of trouble with them.

Q. What trouble was that? A. Due to this hard excavation they pulled cables apart; we bought five new buckets on the job.

30 Q. What is a cable? A. The cable is the steel wire that runs over the drum to the boom and to the bucket of the shovel and it works as a drag line. The bucket goes out and this cable pulls it in and pulls it through the substance that you are excavating and that takes the strain of the digging.

Q. It is the motive power of the whole shovel? A. It is not, no.

Q. At least the motive power of the whole engine is transmitted through this cable? A. It is transmitted through this cable, yes.

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Q. How many of those did you say were broken? A. We broke 42 cables on this job.

Q. How many? A. 42.

Q. And when you broke the first one, who replaced that cable? A. I beg your pardon?

Q. When you broke the first cable, who replaced it? A. The engineer on the shovel. 10

Q. The engineer on the shovel? What kind of a cable was it, do you know? A. A three-eighths ply steel cable, or three-quarter inch, rather.

Q. Do you know where he got it? Was it a new cable? A. Yes, they were all new.

Q. That is, the 41 replaced? A. Everyone that was replaced, yes, was a new cable.

Q. Did you have any other trouble with these shovels? A. Yes, we broke five buckets. 20

Q. And who replaced those? A. We had to pay for them. They came new from the Keystone people.

Q. I am not asking you who paid for them. I am asking you who replaced them? A. The engineer put them on the shovel, put them in place.

Q. They were new buckets? A. New buckets, yes.

Q. You say you hired these shovels from Mr. Lawrence? A. Yes. 30

Q. Who is Mr. Lawrence? A. President of G. W. Lawrence Company, in Newark, who is an excavation contractor.

Q. I see. And what were you to pay as compensation for the use of these shovels? A. \$50 a day.

Q. Do you know how much you paid for the use of the shovels on the entire job? A. Yes. We paid—we paid to Mr. Lawrence \$23,140 some 40

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dollars. That was for rent of the plant and the operators, and above that it was up to us to furnish our fuel, which was essential in the operation of the shovels. Counting fuel and the extra labor around the shovel cost us \$27,000 for our
10 shovel excavation.

Q. Did you work every day with these shovels?

A. Every day that we could, yes.

Q. Was there anything to prevent you from working at any time? A. No, only bad weather. That is omitted and it is not figured in the contract. So far as the shovels' condition was concerned, there was never anything wrong; they were always in shape to work, with the exception
20 of the time they pulled themselves apart trying to dig this hardpan.

Q. How long were these shovels put out of commission when these various breaks would occur?

A. Oh, an hour, an hour and a half.

Q. I see. A. (Continued.) An hour and a half or so during the day. It takes approximately twenty minutes to half an hour to replace a cable. Of course, a bucket was a different proposition; that was more extensive work.

30 Q. You say you did not work these shovels every day; you did not work the shovels every day; is that true? A. No.

The Court: Every day he could; he has told us that three times.

Q. Was there any other reason besides bad weather for not working these shovels? A. Yes.

Q. What was it? A. The time that we were not allowed to work them by Mr. Kreh's order; he was ordered from the Township to stop us
40 from work.

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Q. Will you tell the Court and jury—just explain those circumstances, what conversation you had with Mr. Kreh pertaining to that? A. We worked along until about the middle of January and then Mr. Kreh came up and said that we had better shut down the job, it was winter and he didn't want the job to go on during the winter. We agreed to shut down during the winter months, and the first week in March the weather was very good, it was clear, and it was warmer and there was no reason why we couldn't go to work. We had this contract with Mr. Lawrence, that in order to hold the machines we had to go to work, and if we didn't pay him—to have his shovels around on the job in the good weather and not working—in order to hold these shovels we had to either pay for them or release them entirely. We took the shovels on and started out to work. Mr. Kreh came up, or some member of the Township Committee saw the shovels out in the road ready to go to work, got very excited, went down to Mr. Kreh and told him they didn't want us to work; that the streets, due to the spring thaw, were not in very good condition. Those streets were unpaved streets and unimproved streets. He said that if we were to dig up any more that it would make them impassable and they couldn't get traffic through, and therefore they wouldn't allow us anyway to open up any more trenches.

Q. Did Mr. Kreh say that to you? A. Yes. They wouldn't allow us to open any more trenches until the streets dried out.

Q. Did any of the Commissioners say anything to you with relation to this matter? A. Yes,

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there were numerous times that the Commissioners were around.

Q. I mean with relation to this specific matter of stopping the work? A. They didn't see me; they didn't see me particularly, but they went to
10 the engineer on the shovel, the operator on the shovel.

Q. What did you say to Mr. Kreh, if anything, after he spoke to you and told you that? A. Mr. Kreh and I rode over the streets that we had sewer trenches in and had completed, and over the streets that we were to go into and excavate.

Q. Yes. A. (Continued.) And from observation the streets that we had completed were really
20 in better shape—in better condition for travel and traffic than the streets that we were contemplating opening up, but the Commission, I suppose, and Mr. Kreh—Mr. Kreh through their order wouldn't allow us to open any trenches.

Q. Now, when was this? When did that happen? A. The early part of March, the first week in March.

Q. How long did you stop work as the result of that direction of Mr. Kreh's? A. I have got the dates and so forth down here (indicating
30 book), if I may refer to them.

Q. Did you make a memorandum of that at the time? A. Yes, I have got it in my field book.

Q. What is that book you have in your hand? A. That is my field book notes that I made in the field.

Q. Each day on the job? A. Each day on the job, yes.

Q. Referring to that book, can you tell us how
40 many days the steam shovels were left idle as a

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result of Mr. Kreh's direction? A. (Referring to book): Yes. There were 49 working days that we were held up on the job there, but not in this one instance.

Q. I see. A. (Continued.) In this particular instance we were ready on the 8th day of March to go to work with three shovels. Mr. Kreh ordered us not to go to work. That was from the 8th of March until the 20th of March, there was one shovel idle, then that shovel was allowed to go to work in Style Street. 10

Q. How many days was that? A. That is twelve days on that shovel. Then the other shovel was from March 8th, until April 10th before we could go to work; then he went in to Carnegie Place to go to work. 20

Q. Yes. And how many days was that? A. Well, I haven't got this carried out here now; I have got it all totaled, with Sundays omitted.

Q. What is the total exclusive of Sundays? A. Exclusive of Sundays there were 49 shovel days.

Q. And does that include the entire delay or the entire number of days that these steam shovels were idle by reason of Mr. Kreh's direction?

A. No. Then there was another time, from April 24th to April 29th that we stood at the intersection of Burnett Avenue and Vauxhall Road, Mr. Kreh wouldn't allow us to open up the intersection. 30

Q. Were these shovels then lying idle on the job all during that time? A. Yes, sir; yes.

Q. Weren't they taken away by Mr. Lawrence to different jobs? A. There were several different times that we were delayed and saw that the delay was going to drag out and Mr. Law- 40

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rence, yes, did on different occasions take the shovels away for a week or ten days at a time, to relieve us of the responsibility of the shovels and not be piling up this deficit that we were undoubtedly piling up.

10 Q. Do your books show that total of days that Mr. Lawrence relieved you of the shovels? A. No, it does not—yes, it does but it would be quite a job to find it out. You see, I have got this from day to day the shovels were actually on the job.

Q. Then what is that number of days that Mr. Lawrence took those shovels? A. I would say that Mr. Lawrence relieved us of the shovels approximately thirty-five or forty days.

20 Mr. Ryan: If your Honor please, I offer the witness' field book made on the job, for the purpose of showing the amount of rock and quicksand excavated, and the number of days the steam shovels were used. Mr. English consents.

The Court: Very well.

Marked Exhibit P-2.

30 Q. Did you have any conversation with Mr. Catley on this work, while the work was in course of construction concerning rock and quicksand excavation? A. Yes, I—

Mr. English: Just yes or no.

The Witness: Yes.

Q. How often? A. Every day.

Q. What would he say?

Mr. English: I object.

The Court: The objection is sustained.

40 Mr. Ryan: I was going to refer to a clause in the contract that appoints the in-

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spector as the agent of the Township of Union.

The Court: That may be.

Mr. Ryan: (Continued.) And of the engineer.

The Court: I know, but he has not any- 10
thing to say as to what was rock and what was hardpan or what was dirt, if that is your purpose.

Mr. Ryan: That was my purpose, for the reason that the engineer relied upon him to make up his estimate of rock and quicksand.

Mr. English: Which he did not do.

Mr. Ryan: We will prove that. Shall I 20
proceed, your Honor?

The Court: Yes.

Q. How long have you been in the contracting business, Mr. Lakens? A. Six years.

Q. Six years. Where? A. New York City and I have been here in this particular location in business about four years.

Mr. Ryan: That is all.

The Witness: (Continued.) Previous to that I was in New York City. 30

CROSS-EXAMINATION by Mr. English:

Q. Mr. Lakens, when were you graduated from College? A. I beg your pardon?

Q. When were you graduated from college? A. 1917.

Q. May I ask your age? A. Thirty-two; thirty-two in next coming December.

Q. Did you measure the rock on this job with a rule? A. Yes. 40

Charles A. Lakens—Cross

Q. Every time? A. Most every instance, yes.

Q. Most every instance? A. I would say every day I did, yes.

Q. What do you mean by saying "most every instance?" A. Well, by that I meant to say that
 10 you could not go along the trench and measure every inch of it or every foot of it as you went along. I would measure it at the beginning of the day's work and measure it at the end of the day's work and take the average.

Q. Take an average? A. Yes.

Q. Then it was partially an estimate, was it?
 A. Partially an estimate; it was entirely an estimate.

Q. There isn't anyone who can measure every
 20 inch, is there? A. No, certainly not.

Q. Engineers and other people always make an estimate of those things, do they not? A. Surely.

Q. You say you were delayed because of the failure to give grades and because the engineer stopped you? A. Yes, sir.

Q. You didn't start until a month after the contract was signed, did you? A. No, sir.

Q. Then you put only one shovel on, didn't
 30 you? A. A month after the contract was signed?

Q. Yes. A. No. We started earlier than that.

Q. Are you sure? A. Quite sure.

Q. Well, are you sure? A. Yes.

Q. Do you know how soon you did start after the contract was signed? A. I would say approximately three weeks, not over three weeks.

Q. You say that if the digging is good you could go 250 feet per day, is that correct? A.

40 That would be an average.

Charles A. Lakens—Cross

Q. Is that one shovel or all your shovels? A. Each and every shovel.

Q. Now, when was it that Mr. Kreh ordered the shovels to stop? A. I think in the middle of—about the middle of January or about the first week in January. 10

Q. And you say because of his order one shovel was delayed from March 8th to the 20th, another from March 8th to April 10th, is that correct? A. Yes, sir.

Q. As a matter of fact, hadn't your shovels been laid up because the weather wasn't fit to use them, just before that? A. They had during the winter, yes.

Q. And didn't you take them out, and after you started, decide that you had taken them out a little too early? A. I beg your pardon? 20

Q. Didn't you decide that the weather was not yet fit to use the shovels? A. I did not, no; not at any time.

Q. Didn't you say to Mr. Kreh that you had agreed—didn't you agree with Mr. Kreh that you wouldn't use the shovels during those periods that you have mentioned? A. I did not.

Q. Because the weather was not yet fit? A. No, I did not. If the weather was not fit, why did they stop the work? 30

Q. Never mind asking questions, just answer questions and we can't get in an argument. A. I don't care to.

Q. Now, you say that some members of the Township Committee talked to the shovel operator but not to you, and because of what they said you stopped work, is that correct? A. No, I did not; I did not say that. 40

Charles A. Lakens—Cross

Q. What was the effect of the members of the Township Committee talking to the shovel operator? A. They asked him if he was going to work and the shovel operator said that he was, and then the Township Committee went down to Mr. Kreh's office or got in communication with him and ordered him to order us to stop work.

10 Q. I see. That is what you think? A. That is what I know.

Q. But you were not there, were you, when they did that? A. I wasn't there, I was there when Mr. Kreh ordered me not to stop, yes.

The Court: Ordered you to stop?

The Witness: Or ordered me to stop; I beg your pardon.

20 Q. You say Mr. Potter came out three times? A. No, I didn't say three times.

Q. How many times? A. I said, I think, five or six times. I wouldn't say the exact number of times.

Q. And who called him out there? A. I did indirectly. I asked Mr. Kreh to have Mr. Potter come out.

Q. You did not say that directly to Mr. Potter? A. No.

30 Q. And what were the disputes about on those occasions? A. The material that we were excavating, the nature of the material that we were excavating.

Q. Now, that was the whole dispute, was it not, Mr. Lakens? You did not state that Mr. Kreh arbitrarily refused to say that there were so many cubic yards of real rock when there were that many, but he erred in judgment and refused
40 to call something hardpan if that was hardpan; that is your claim, is it not? A. Yes.

Charles A. Lakens—Cross

Q. That is your claim? A. No, that is a fact.

Q. Well, which is it? A. There were times when Mr. Kreh was on the job that he would not allow, according to his judgment, hardpan.

Q. Well, you do not mean to say that when your measurement showed more rock than his, he arbitrarily refused to allow the right amount? 10

A. Absolutely, yes.

Q. You mean to say— A. (Continued.) If my judgment was correct and his incorrect, he refused to allow the proper amount, yes.

Q. It was a question of judgment of what was rock entirely, was it not? A. Yes.

Q. That is the whole dispute so far as the rock is concerned, is it not? A. Yes.

Q. Now, what is the dispute so far as hardpan 20 is concerned? A. Well, hardpan under the classification in the contract is rock.

Mr. English: I beg your pardon; just let me withdraw that question.

Q. So far as quicksand, what is the dispute? A. Exactly the same dispute.

Q. That is, what you called quicksand sometimes, he did not? A. No, he called it—

Q. What? A. Yes. No, he allowed quicksand but he didn't allow the quantity that was there. 30 Our contract called for payment on quicksand; for actual amount of material taken out, and there were places where we had to build a manhole that we had to sheathe it ten feet square, and I know that Mr. Kreh allowed us nothing for that manhole, other than the two foot of trench that we excavated.

Q. There was material that you excavated on those occasions that you called quicksand and he 40

Charles A. Lakens—Cross

did not call quicksand, was there not? A. I beg your pardon, he did call it quicksand.

Q. Then, do you know why he did not allow it? A. I suppose it was an oversight, I don't know.

10 Q. An oversight? A. Either that or a misinterpretation of the contract.

Q. Well, which? Did you call it to his attention? A. I beg your pardon?

Q. Did you call it to his attention? A. Yes, we disputed quicksand numerous times.

20 Q. Do you not see that one of those imputes dishonesty and the other an error of judgment? Now, which did he do; did he dishonestly refuse to say that there was quicksand or was there a question of judgment between you and him? A. It is hard to say that a man deliberately and dishonestly passed judgment on anything. It is not for me to say whether Mr. Kreh was dishonest about this thing or not.

30 Q. Well, I mean as to the reasons he gave. Did he simply arbitrarily discard it, or did he say that in his judgment that was not quicksand? A. Oh, he said it was quicksand but his estimate—according to his estimate we were not paid for the amount that I know actually was there.

Q. Do you know what particular quicksand he omitted to account for in his estimate? A. I believe I do, yes.

40 Q. Well, what was it? A. In one instance, there was a manhole that we excavated in order to get the excavation out. We had to build a manhole, we had to excavate and sheathe a hole ten feet square, and there, I am pretty sure, Mr. Kreh allowed us nothing but the two foot width

Charles A. Lakens—Cross

in depth; and along Burnett Avenue, where we were digging this quicksand, I know that there were instances where we had four and five foot trenches in width and I know that Mr. Kreh did not allow that.

Q. Have you any written record of the differences between you and Mr. Kreh as to quicksand? 10

A. Yes.

Q. Is it in your field book which is in evidence?

A. It is in my field book and I also have notes here.

Q. Is the record of the differences between you and Mr. Kreh in regard to rock in the field book?

A. Yes.

Q. You have his allowance in your field book? 20

A. No, I haven't his allowance in my field book.

Q. But by comparing your field book with his figures it would readily be shown? A. It would show, yes.

Q. How often did Mr. Kreh come to the job?

A. Sometimes—some weeks he may have been there, some weeks he was there every day, other weeks he was not there. Sometimes I didn't see Mr. Kreh on the job for two or three days at a time.

Q. Do you know Mr. Wacker? A. Yes. 30

Q. What is his position? A. Mr. Kreh's assistant.

Q. Assistant on this job, was he not? A. Yes. He did the field work on the job.

Q. Was there any day during the progress of the work that either Mr. Kreh or Mr. Wacker was not there? A. Yes, absolutely.

Q. Wasn't one of them there every day? A. No, they were not. 40

Charles A. Lakens—Cross

Q. Are you sure? A. I am positive, yes.

Q. How many days were there that neither of them appeared? A. Well, that—that I wouldn't swear definitely. I know one time they went on a fishing trip together and were gone two or three
10 days at a time.

Q. Was there any day when you were excavating rock that neither of them appeared? A. Yes.

Q. Do you know what days they were? A. If I know? No, I wouldn't say just exactly what dates they were.

Q. Was there any day when you were excavating rock and called for them to come and make measurements, or when you called for Mr. Kreh, when they refused to come or failed to come? A.
20 Yes, I can remember two instances when I called Mr. Kreh's office for him to come up, that I couldn't get in touch with him and he did not come up then until the next day.

Q. Until the next day? A. Yes.

Q. Then during this whole period of nine months, there were two occasions when he was a day late; is that it? A. When I called for him.

Q. When you called for him? A. Yes.

Q. What was it Mr. Kreh said to you about breaking the Township but not caring for the contractor? A. He didn't say anything to me about not caring for the contractor. He said to me that if he had to pay for all that material, that is, hardpan, it would break the Town.
30

Q. Did you not say on direct-examination that Mr. Kreh said to you he didn't care what happened to the contractor, but he could not break the Township? A. No, I did not.

Q. I understood you to say that. What did you
40

Charles A. Lakens—Cross

say about breaking the contractor. A. I said that I replied to Mr. Kreh that he evidently did not care about breaking the contractor; all he was interested in was the Township.

Q. Oh, yes. What did Mr. Kreh say to you about the appropriation? A. On numerous occasions he asked me what I thought the entire cost of the job would be, and whether or not I thought the cost of it was going to exceed the appropriation. 10

Q. Anyone else say that to you, anybody connected with the defendant? A. No, I don't think so.

Q. Did you not say there was an argument, or several arguments before the Sewerage Commission as to whether they would come within the appropriation or not? A. No, I did not. 20

Q. Mr. Kreh asked you— A. (Continued) If I did, I don't recall it.

Q. Mr. Kreh asked you whether you thought you would come within the appropriation? A. Yes, Mr. Kreh.

Q. Do you not know, as a matter of fact, that there was no appropriation and could not be under the statute, for a job of this kind? A. I understood from Mr. Kreh that the Township arranged for a hundred thousand dollar bond issue which they floated in order to pay all the expenses of this particular job, and that was to include not only the price of the contract but the engineer's fees, all the advertisements and the consulting engineer's fee, and absolutely everything. 30

Q. And you do not know, as a matter of fact, there was no such arrangement at all about the bond issue, do you? A. No, that is only hearsay from Mr. Kreh. 40

Charles A. Lakens—Cross

Q. And you do not know that there never was, even up to now, an appropriation, did you? A. That, no.

Q. And yet you say Mr. Kreh spoke of an appropriation? A. Yes, he said that it was a hundred thousand dollars.

10 Q. All right. A. (Continued) On more than one occasion.

Q. You say that some of this hardpan consisted of stones, cemented together with dirt? A. Clay, yes.

Q. And when exposed to the air, they would fall apart, all but the stones themselves? A. Would disintegrate themselves.

20 Q. The stones would not, would they? A. No, certainly not.

Q. And you say that this was in a process of changing and eventually would be only hard, solid rock, of clay and the stone? A. I didn't say that it would; I said that it was in the process of changing, yes. Hardpan—the geological definition of hardpan is that it is a metamorphic rock, and "metamorphic," as you know, is from a Greek word meaning that it is in a process of change.

30 Q. Then if it was in a process of changing, it eventually would change, would it not? A. Some time, yes, I suppose it would.

Q. Do you remember the occasions when Mr. Potter came out? A. Yes, I do.

Q. Do you remember the dates? A. No, I wouldn't say that I remember the dates.

Q. Have you any record of the dates that he came? A. I could tell approximately, not exactly.

40 Q. Well, does not your field book show? A. The exact dates that Mr. Potter came?

Charles A. Lakens—Cross

Q. Yes. A. No.

Q. No other memorandum shows? A. (Witness shakes head in the negative.)

Q. To the job is where he came, is it not? A. Yes, he came to the job.

Q. And what was the occasion of his coming? 10
A. Mr. Kreh and I disagreed as to what material we were excavating and I insisted that Mr. Kreh bring Mr. Potter out to decide the issue. According to my contract, I had that right.

Q. That, as to what was hardpan? A. Yes.

Q. Now, it is sometimes difficult to decide what is hardpan, is it not, under these specifications?

A. There is really one way that you can judge it and that is by actually seeing the shovels work and excavate and see the amount of effort that it takes to remove it. 20

Q. You cannot tell by looking at the substance; you can only tell by the strain of the machine; is that it? A. Absolutely; you cannot tell unless you see them working at it.

Q. And on the occasion of every one of these disputes did you give Mr. Kreh an opportunity to see them working at it? A. He had every opportunity in the world to see it. 30

Q. Did you call him in to look at it on those occasions? A. Absolutely; that is why I called him.

Q. Now, when Mr. Potter came, the excavating had been done, the material thrown out, was it not? A. No. Each time that Mr. Potter was out he saw the shovels working and he saw the efforts that it took to remove the stuff.

Q. When he came out to settle the dispute between you and Mr. Kreh he had no more data to 40

Charles A. Lakens—Cross

form a judgment from than Mr. Kreh did, did he? A. But he stayed there and collected data.

Q. Well, I say, Mr. Kreh had done the same thing? A. He did not, no; I beg your pardon.

Q. What is that? A. I beg your pardon; I don't
10 think Mr. Kreh did.

Q. Do you mean Mr. Kreh saw the stuff on the bank and disputed with you, and then you called Mr. Potter and he saw the shovels working; is that it? A. Yes, Mr. Potter saw the shovels working. Mr. Potter passed judgment on material that we were actually excavating at the time he was there.

Q. Yes, but how could he pass judgment on
20 the material that Kreh had differed with you about? A. He got down in the ditch and took a pick and tried it.

Q. The same kind of substance? A. Yes.

Q. Did not Mr. Kreh try the substance to see what it was like? A. Only on one occasion that I remember; that Mr. Potter asked Mr. Kreh to go down and try it, and Mr. Kreh did.

Q. Now, after the first decision by Mr. Potter as to what was hardpan, did not Mr. Kreh fol-
30 low Mr. Potter's directions as to what was hardpan? A. No, he would not.

Q. He ignored them absolutely? A. Yes. I wouldn't say absolutely, but in part; because if he ignored them absolutely we would not have a yard of rock that we were paid for, but he did pay for some.

Q. What I mean to say is, did Mr. Kreh disobey the judgment of Mr. Potter after the first
40 interview, or was the difficulty that you found some other substance that Potter had not yet

Charles A. Lakens—Cross

passed on? A. No, it was the same. All the material that we excavated in the job was the same, practically the same substance. It was all the same material.

Q. Then the difficulty was that Mr. Kreh did not agree with you; he called in Mr. Potter. Mr. Potter said, "Stuff of this kind, Mr. Kreh, is hardpan"? A. Yes. 10

Q. Then Mr. Potter went home and in spite of his instructions, Kreh arbitrarily refused to consider anything of that kind hardpan; is that it? A. Yes, he did on numerous occasions all through the job, because we were digging practically the same material all the time.

Q. Then he fraudulently refused to obey his consulting engineer, did he not? A. He didn't refuse. I don't know whether that was fraudulent or whether it was a disagreement of judgment, but he did not follow Mr. Potter's judgment at all. 20

Q. Didn't follow it at all, did he? A. No, he did not.

Q. Now, on the first occasion that Mr. Potter came, Mr. Kreh himself summoned him, without your request, did he not? A. No, I beg your pardon. 30

Q. Did you request him? A. I demanded it.

Q. Did you demand it on every occasion? A. I think I did.

Q. Now, in regard to quicksand, was Mr. Potter called in? A. No, Mr. Potter was not.

Q. What did you mean by your statement that Mr. Potter and Mr. Kreh could not seem to make the Commissioners understand that this was hardpan and should be paid for? A. Because 40

Charles A. Lakens—Cross

they took the trouble to call a special meeting, and Mr. Potter put the case before the Commission, explaining the entire contract and work we were doing, and the excavation that we were removing and—

10 Q. Were you ill during any part of the progress of this work? A. I beg your pardon.

Q. Were you sick during any part of the progress of the work? A. No, not to my knowledge. I was ill many a day on the job, but not that I stayed away from the job.

Q. Yes, away from the job? A. No.

20 Q. Now, you said, I think, that Mr. Kreh and Mr. Potter had trouble in convincing the Sewer Commission that this was hardpan? A. I did—not that it was hardpan, but that they were to pay for hardpan as rock; that was the difficulty. Not that it was hardpan. I don't think they ever had any trouble convincing them it was hardpan, because I think all the native people there realized what the substance was, but the question was they did not feel they were obligated, according to the contract, to pay us for hardpan on the rock basis.

30 Q. And Mr. Kreh tried to convince them that they were? A. Yes, and Mr. Potter did. Mr. Potter took the trouble to call a special meeting to tell them.

40 Q. But I am talking now about Mr. Kreh. Then your statement is that Mr. Kreh took the advice of Potter and was told that this disputed stuff was hardpan; Mr. Kreh then told the Commissioners it was hardpan and ought to be paid for, and when he could not convince them, he refused to allow for it at all; is that it? A. No, I didn't say that.

Charles A. Lakens—Cross

Q. I mean this disputed stuff? A. I beg your pardon?

Q. I mean this disputed stuff, that is what I am talking about. A. No, there was a certain amount of it in certain streets where Mr. Kreh did allow hardpan, and also there were places we dug ledge rock. 10

Q. No, but you said that he tried to convince the Sewer Commissioners that this matter in dispute was hardpan and should be paid for as such, did you not? A. To the amount of his estimate, yes.

Q. Only to the amount of his estimate? A. Yes.

Q. Will you look at these bills numbered in pencil from one to ten inclusive, and twelve and thirteen, and see whether you swore to them (handing documents to witness)? Shall I hand them to you one at a time? A. Yes. 20

Q. Did you look at them all? A. Yes, sir.

Q. Were they sworn to by you? A. Yes, sir.

Q. I show you those numbered 11, 14, 15, 16 and 17, and ask you if that is your signature on the affidavit of each of Mr. T. F. Callahan (handing documents to witness)? A. Here is one that is not signed at all. Yes, these are Mr. Callahan's signature, as I remember it. 30

Q. Now I show you the one that is numbered 16 and ask you if you know what that is? A. What this one is?

Q. I ask you if you know what it is? A. What it is?

Q. Yes. A. Yes.

Q. What is it? A. Final estimate on the Springfield Avenue system.

Q. Well, is it the final estimate? Is not that 40

Charles A. Lakens—Cross

the one that was made out first as a final estimate, which was revised later and is now represented by No. 17 that you inspected? A. Yes.

Q. You know that, do you not? A. I beg your pardon?

10 Q. You know that? A. Know what?

Q. You know that that was revised and that does not count at all? A. No, that does not.

Q. That is the reason it is not sworn to? A. Yes.

Q. Now, how was it revised? A. Revised because there was placed on the estimate, in going over it, from my field book—Mr. Kreh had omitted in his estimate certain numbers of piece of pipe that I knew we had in, on my check on the actual
20 footage of pipes and manholes that did not agree with Mr. Kreh's. In going over it he saw that I was right and he revised the estimate.

Q. Now, this is dated November 13th, 1923, and it is approved for payment with the initial of the Sewer Commissioners, but not sworn to. You examined this revised estimate, which was the final estimate of the amount due, on both of these jobs, did you not? A. I did, yes.

30 Q. And how long did you keep them before you asked that it be revised? A. I think about a week. I wouldn't swear to that.

Q. And you had that for a week, and you then went back to the engineer and said, "We are about to get our final payment but it is not correct; there is some pipe you did not allow." Is that right? A. Yes, sir.

40 Q. You then caused to be made out a new, revised or final estimate—a revised, final estimate

Charles A. Lakens—Cross

with no changes in regard to anything except pipe, did you not? A. Yes, sir.

Q. And you did not make any claim then for rock or quicksand at all, did you? A. I did. I made a claim for extra rock, extra quicksand, every time the estimates were in. I did on that final estimate. Mr. Kreh told me, point blank, that all the work was there that he was going to allow, and that he was not going to put any more in. 10

Q. To whom did you make the claim in regard to the final estimate? A. I made a claim on each and every estimate that was made out on the entire job, to Mr. Kreh directly.

Q. I am talking about the final estimate. A. Mr. Kreh. 20

Q. Where? A. In his own office.

Q. Who was present? A. On that particular occasion I wouldn't say who was there.

Q. Don't you know? A. Well, you wouldn't know in the course of nine months, seeing nine or ten different faces in there.

Q. I do not want to argue, please; I just want to know who was present, if you know? A. I don't know. 30

Q. Do you know whether Mr. Wacker was present or not? A. Mr. Wacker was there when the estimate was made up; whether or not he was there later, I wouldn't say.

Q. And who was present when—you did not swear to this final one, did you? A. No.

Q. You sent Mr. Callahan for that? A. On one or two, yes.

Q. What is Mr. Callahan's position in the company? A. Secretary. 40

Charles A. Lakens—Cross

Q. And you allowed this sworn bill to go in, this final one, and accepted your check, did you, and use it? A. Yes.

Q. And you swore to all these other bills that you have mentioned, being all the bills there except the five that Callahan swore to? A. I beg your pardon?

Q. I say you swore to all the bills except the five that Callahan swore to? A. Yes.

Q. Although they were not true? A. They were true as far as they went, yes.

Q. True as far as they went? A. Yes. I swore to those statements and received checks in accordance with those estimates, yes.

Q. And the final estimate the same way? A. Yes.

Q. You say you kept this final estimate for a week, then you went back to Mr. Kreh and told him that there was some pipe that had been miscalculated? A. Yes, sir.

Q. And you showed him where it was and it was immediately allowed, was it not, without any question? A. It was, yes.

Q. How much did that amount to? A. Offhand, I don't know; I think it is somewhere around a thousand dollars.

Q. And after that week when you went back, did you then make any remonstrance against the calculation of rock or quicksand? A. Yes.

Q. To whom? A. To Mr. Kreh.

Q. You are sure of that? A. Yes. This rock and quicksand—well, I wouldn't say quicksand so much as the rock. The rock was always a controversy; there never was a statement or a bill either one, nor an estimate from Mr. Kreh

Charles A. Lakens—Cross

that he and I did not argue about this rock and differ on it.

Q. Now, did you make any remonstrance then about the delay in giving grades at the time of the final estimate? A. No.

Q. That one week after you looked at your final estimate and it was now about to be revised and paid and settled, and you went back to Mr. Kreh, did you raise any question then about the delay in grades? A. No, I wouldn't say that I did. 10

Q. Did you raise any question about delay for any other reason, by orders of anyone not to continue? A. No.

Q. Did you raise any question about anything at all concerning the work except the rock and the pipe? A. Yes, I did. 20

Q. Well, what? A. I think there was an item of \$1700, I think, or \$2700 that was erroneously charged against us as having been paid that was not; and we were shy that on the check—I took that up with Mr. Frieberger, the clerk, and he immediately went to correct it.

Q. That was corrected, was it? A. That was corrected, yes.

Q. Then, so far as miscalculation or misstatement were concerned, outside of clerical errors, the only question you raised then, after having this for a week, was on rock? A. Yes, that was— 30

Q. Now, do you not remember where you sat and in what room when you made that remonstrance? A. I beg your pardon?

Q. Do you not remember what room you were in, where you sat or stood, and who was present when you had that dispute? A. Mr. Kreh and I sat at his desk, going over the final estimate in his 40

Charles A. Lakens—Cross

private office; I wouldn't say private office, because it is all one room.

Q. What is that? A. We sat at Mr. Kreh's desk in his outside office there, going over that estimate.

10 Q. Did not Mr. Wacker go over the estimate too, in your presence? A. He checked over the pipe, for Mr. Wacker never at any time had anything to do with calculating or estimating rock. Mr. Wacker, on all the estimates, made up the pipes and made up the manholes, but in each instance he had absolutely nothing to do with the rock. That was entirely up to Mr. Kreh to check over the daily reports.

20 Q. That is all very interesting, Mr. Lakens, but it is not responsive to the question. I want to know whether Mr. Wacker was present when this revised, final estimate was made and agreed to be used? A. At times, yes.

Q. No, but there was only one time the final estimate was made? A. They were a week making it up.

Q. One minute. The final estimate was made; you kept it a week? A. Yes.

30 Q. And you went back and you said, "Here is a clerical error as to a credit, and there is a mistake as to pipe"? And they looked over the books and says, "You are right; we will correct them at once"? A. Yes.

Q. And you said something more about rock on that occasion, you say? A. Yes.

Q. But nothing else? A. No.

40 Q. Now, do you not remember whether Mr. Wacker was present? A. Mr. Wacker was present in going over the pipe items, yes, as he and

Charles A. Lakens—Cross

another man (I can't tell you his name) made up and checked merely the pipe items.

Q. He was not present during the discussion?

A. No, sometimes—no, I don't think he was.

Q. Do you know whether he was or not? Do you? A. No, I wouldn't say that he was or was not. 10

Q. Now, this is sworn to November 23rd. When did you first make a protest to the Commissioners? A. I don't recall the date exactly. I wrote a letter some time later; I don't know just when it was.

Q. Well, you got your final estimate, you kept it a week and then you went back and remonstrated against the pipe, got the correction; mentioned rock, and then you said nothing more for two months; is that true? A. Yes. I wouldn't say it was two months, I don't know. It was some time later; that I will say. 20

Q. That letter will show. Were you ever delayed in your shovels by lack of fuel? A. Maybe fifteen minutes or so, once in a great while, yes.

Q. How long were you delayed when shovels or scoops broke? A. A few hours each time.

Q. Where would you get shovels in a few hours? A. I beg your pardon? 30

Q. How would you get new shovels in a few hours? A. Didn't get new shovels at any time.

Q. Repaired the old ones? A. Yes, certainly. No, I got new buckets, not new shovels.

Q. New buckets? A. New ditching buckets; got those in irrespective of whether we had a break on the job at the time.

Q. You could get them in a few hours? A. Oh, yes; easily enough. 40

Charles A. Lakens—Re-direct

Q. Was there ever any delay because of failure of the engineer to give a grade? A. I beg your pardon?

Q. Was there ever any delay to the shovels because the engineer did not give you a grade?

10 A. Yes.

Q. You have not testified as to that, have you?

Mr. Ryan: Yes, he has.

Mr. English: Did he?

A. He would not give us stakes, and then we couldn't go to work, and all those delays he wouldn't give us stakes.

Q. You mean where he refused to let you go ahead? A. Yes.

20 Q. And ordered you to stop? A. Yes.

Q. Was there not some occasion when you left the trenches open for a very long distance, endangering people's lives and Mr. Kreh asked you to fill those trenches before you dug any more?

A. No, the shovels were never stopped.

Q. What? A. I say the shovels were never stopped because of the embankment.

Q. Are you sure of that? A. Positive.

Mr. English: That is all.

30 Mr. Ryan: May I touch one or two points, your Honor, on re-direct?

The Court: Yes.

RE-DIRECT EXAMINATION by Mr. Ryan:

Q. Mr. Lakens, when Mr. Kreh would come to the work for the purpose of making his estimates, would he inquire of you for any data that you had on rock or quicksand excavation? A. He didn't make any estimates on the job.

40 Q. Did he get any data there concerning rock

Charles A. Lakens—Re-direct

and quicksand excavation? A. None that I know of. He got all his data on rock and quicksand and so forth from the engineer inspector on the job, Mr. Catley. He turned in his daily reports, that was the only source of information that he had.

10

Q. Do you know what Mr. Catley's reports amount to in rock and quicksand excavation?

Mr. English: I object.

Q. Just answer yes or no.

Mr. English: If he answers yes or no, I do not object.

Mr. Ryan: He is going to.

The Court: Answer yes or no.

A. No.

Q. No, you do not know. At this meeting which Mr. Potter and Mr. Kreh attended, the special meeting called by the Commissioners of the Sewer District, when was that called, if you know? A. I believe sometime in October; I am not sure.

20

Q. How far had the work progressed at that point? A. Up to about the corner of Liberty Avenue or up to the corner of Vauxhall Road and Burnett Avenue.

Q. I mean in days. A. I beg your pardon?

Q. I mean in number of days. A. I guess two weeks.

30

Q. I see. Did you take any part in the discussion at that meeting? A. No. I was present; I did not have any discussion; I did not say anything.

Q. Mr. English asked you some questions concerning rock and hardpan, and he asked you whether or not the difference between your figures on rock and hardpan and quicksand excavation

40

Charles A. Lakens—Re-direct

and the figures allowed you by Mr. Kreh, the engineer, were the result of a mistake of judgment on Mr. Kreh's part; do you know whether or not it was a mistake of judgment? A. I would say it was not a mistake of judgment.

10 Q. Do you recall what Mr. Kreh said to you in the office, in his office at the time you pointed out the paragraph concerning the rock excavation on page 21 of the contract? You testified before that he said that if he were to allow you extras for that—under that for hardpan, that it would break the Town? A. Yes.

20 Q. With that in mind, what do you say was Mr. Kreh's attitude toward this? In other words, was it purely a mistake of judgment on his part or was it a variance between your figures and his, or something else? A. I would say it was a case of self-preservation, yes.

Q. You wrote such a letter as that (handing document to witness)? A. I did, yes.

Q. What did you do with the letter? A. I sent it to the Commissioners of Sewerage District No. 1 of the Township of Union.

30 Mr. English: Here is the original, if you would rather have it (handing document to counsel).

Q. This is the original of that letter, is it not; that is your signature (handing document to witness)? A. Yes.

Mr. Ryan: If your Honor please, I offer the letter from the plaintiff corporation to the defendants, under date of January 23, 1924.

40 The Court: If there is no objection, it is admitted.

Eardley C. Catley—Direct

Mr. English: No objection.

Marked Exhibit P-3.

Q. Did you receive a reply to that letter, Mr. Lakens? A. I did.

Q. And this is the letter (handing document to witness)? A. Yes. No, Mr. Ryan, I do not think that is. That is the previous letter. 10

Mr. Ryan: That is all.

EARDLEY C. CATLEY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

20

Direct-examination by Mr. Ryan:

Q. Mr. Catley, where do you live? A. I am living in Keansburg.

Q. Where? A. Keansburg.

Q. New Jersey? A. Yes, sir.

Q. What is your business? A. I am inspector down there on a job, sewer job.

Q. How long have you lived there? A. Two weeks.

Q. Where did you live prior to that? A. In Long Island. 30

Q. What is your business generally? A. On construction work.

Q. In what capacity? A. Superintendent.

Q. How long have you been at that business? A. Twenty-five years.

Q. Did you act in that capacity on the construction of a sewer in Union County, in Union Township? A. I acted as inspector. 40

Eardley C. Catley—Direct

Q. And by whom were you employed? A. By Mr. Kreh.

Q. When did you start work there? A. I don't know exactly when it was; sometime in September, two years ago.

10 Q. Were you on the work from the start to the finish? A. Every day with the exception of a few days I was sick and one or two days—one or two afternoons Mr. Kreh allowed me to go away.

Q. Had you been connected with Mr. Kreh in that capacity at any other time? A. Never.

Q. Can you tell me how long you have been connected with those things? A. Twenty-five years, at least.

20 Q. Twenty-five years? A. Yes, on different kinds of construction; not always on sewers.

Q. Yes. You have had experience before in sewer construction? A. Yes.

Q. You know what hardpan is? A. I do.

Q. Did you see any of it in the construction of this sewer in Union Township? A. Lots of it.

30 Q. Did you receive any directions from Mr. Kreh at the time you were employed by him as to what should be your duties there? A. Yes. I made a daily report. My duties were to see that the pipe was laid properly and the joints joined properly and sand or quicksand, rock or anything I was to make a note of it, which I did.

Q. Who told you that? A. Mr. Kreh.

Q. Can you tell the jury the language that he used? A. No, I don't remember that.

Q. (Continued) In giving you that direction? A. No, I don't remember that.

40 Q. Did you make such reports? A. Every day.

Eardley C. Catley—Direct

Q. When you made the reports, what would you do with them? A. Give them to Mr. Kreh.

Q. Where? A. When he would come out on the job.

Q. How often was that? A. When I would give him the—how often would I— 10

Q. How often would he come out on the job? A. That I don't know.

Q. You don't know the number of times. But did he come there every day? A. If he did, I didn't see him.

Q. Did anybody else approach you as representing Mr. Kreh? A. Mr. Wacker was there giving grades.

Q. Did Mr. Wacker come every day? A. He 20 may have; I didn't see him every day.

Q. He didn't come to you every day for these reports, then, did he? A. Oh, no.

Q. Then is it true that you would make up these daily reports and sometimes you would have more than one day's report to turn in? A. Frequently.

Q. How many at a time would you say? A. Well, I didn't count them; sometimes ten or twelve of them. 30

Q. Did you have any conversations with Mr. Kreh on the occasions that he would come there to get these reports?

Mr. English: I object.

The Court: That is very general.

Mr. English: Objection is withdrawn.

Q. Answer the question.

Mr. English: Yes or no.

The Witness: Repeat it, please.

(Question repeated by the stenographer.) 40

A. On what subject?

Eardley C. Catley—Direct

Q. Concerning the reports. A. No, I just handed them to him; told him there was my daily reports.

Q. And what did those reports contain?

Mr. English: I object.

10 The Court: The reports are the best evidence, even if they were admissible.

Q. Did Mr. Kreh make any comment upon the reports to you after they were delivered by you to him? A. Not that I remember.

Q. Did you ever hear any discussion concerning rock and quicksand excavation? A. Oh, yes.

Q. In which Mr. Kreh would participate? A. Yes.

20 Q. How often? A. That I can't say.

Q. Well, was it once a week or oftener? A. Well, I don't remember.

Q. Was it a rare occasion or more or less regular? A. Oh, no. No, there was always more or less controversy about it.

Q. More or less constant, you said?

The Court: "Controversy about it," he said.

30 Q. And who participated in that discussion with Mr. Kreh? A. Mr. Lakens.

Q. Anybody else? A. I don't remember.

Q. Did you have any discussion with Mr. Lakens concerning rock? A. Quite frequently, yes.

Q. Every day? A. More or less.

Q. What was the occasion of that? A. He would always say he didn't think I was giving him enough.

40 Q. And what would he do after you—do you know what he did after you would make up your

Eardley C. Catley—Direct

report on rock and quicksand excavation each day? A. What Mr. Lakens would do?

Q. Yes. A. No, I don't know what he did.

Q. Did Mr. Kreh dispute with you the amount—
A. Yes.

Q. The amount of rock and quicksand excavation? A. On more than one occasion, yes. He told me that he didn't think there was that amount that I gave them, and therefore I gave what he suggested. 10

Q. What was the condition of the trench or excavation at the time that these discussions would arise; was the excavation completed or not yet undertaken? A. I don't quite understand.

Q. Was the material already excavated or not yet excavated at the time of the discussion? A. It was excavated as we went along; didn't jump over any of it. 20

Q. And thrown up on the side of the trench?
A. Thrown up on the side.

Q. Is there any difference in the characteristics, the physical characteristics of hardpan before and after excavation? A. Yes, it is pretty solid in the ditch, but when it is pulled out with a shovel it is pretty well chewed up. If a man were to try to take it out with a pick and shovel, he would not make very much headway. 30

Q. You could not take it out with a shovel? A. No, you would have to use a sledge hammer or a ball point.

Q. Or a steam shovel? A. Or a steam shovel.

Q. What does it look like in the trench; can you describe its appearance as it is in the trench?

A. You mean the color or the substance?

Q. Anything about it? A. Gravel and clay. 40

Eardley C. Catley—Direct

Q. Firmly cemented? A. Yes, small boulders in it.

Q. And what does it appear like after it has been excavated? A. Well, with just the gravel and clay thrown up on the bank, it all comes apart
10 when it has been pulled out with a shovel; those teeth cut it up.

Q. Do you know what this sheet is, Mr. Catley (handing document to witness)? A. No, I don't know anything at all about that.

Q. You know what this is (handing document to witness)? A. Yes; one of my daily reports. Those are my figures and letters.

Mr. Ryan: Is there any dispute about
20 these reports being the inspector's reports?

Mr. English: No.

Mr. Ryan: If your Honor please, we have several hundred sheets of reports, inspector's reports, not in plaintiff's possession. We noticed them for trial and I think rather than take the time of the Court and jury, that during recess time we can stipulate the amounts in the report, the totals, and save a great deal of time.

Mr. English: What is the purpose of
30 introducing those reports? To show this witness's measurement of rock?

Mr. Ryan: We have not offered them.

Mr. English: It has already been ruled that he had nothing to do with that. Of course, you are welcome to them or anything you want to legally show by them.

Mr. Ryan: The purpose of this, if your
40 Honor please, is to show that the inspector's reports make up a certain total. The

Argument

inspector has already testified that he was the representative and hired by Mr. Kreh, and the contract also specifies that he was to be so hired by Mr. Kreh and by the Township.

Mr. English: But not as a judge of rock. 10

Mr. Ryan (Continued): That Mr. Kreh delegated the authority to Mr. Catley to make up his daily estimates on report of rock and quicksand, and that Mr. Kreh relied entirely upon Mr. Catley's reports; that he had no other data whatever upon which to make estimates, and then to show that there is a great variance, not only between the contractor's claims and the inspector's reports, but even between the inspector's reports, upon which Mr. Kreh relied, and the amount actually allowed by Mr. Kreh and recommended for payment by the Township. 20

Mr. English: Here is the false premise with the statement that Mr. Kreh had no other data: The testimony is that he went out there every day, practically; either he or Mr. Wacker. He did not rely— 30

Mr. Ryan: That is the defense.

Mr. English: No, it came out in your own case. He did not rely on this man at all. He made his measurements, he went out there, he or Wacker, as we will claim, every day, and as the plaintiff admits, practically every day, so that there was no authority delegated to this man at all. The contract does not say measurements shall be taken; the contract says that Mr. Kreh, the engi- 40

Argument

neer, shall be the judge as to quicksand and rock.

The Court: Yes, but it is admitted that the engineer looked to this man every day to receive a report from him. Why?

10

Mr. English: His report contains very many more things in addition to this; how far they had got along; whether they were working steadily; whether there were any steam shovels broke, and all such things as that; and then at the end of the day he went out himself to make his measurements.

Mr. Ryan: We are only concerned with the excavation shown in the reports.

20

The Court: Let me look at one of those.

(Document handed to the Court by Mr. Ryan.)

The Court: What part of the contract refers to the inspector? Oh, well, go on with your case and look that up. Is there any objection to these reports?

Mr. English: No, I do not think so, your Honor, if they would be put in at a reasonable time, but not take several days.

30

Mr. Ryan: It will not take any time if there is no objection.

The Court: Put them in in a bunch; mark them all as one exhibit.

Mr. English: Keep them in order, if you can.

The Court: Go on with this witness.

Q. Then, Mr. Catley, you had discussions each day, as you testified, with Mr. Kreh? A. Oh, I won't say every day; more or less. There was
40 always discussion about the amount of rock.

Eardley C. Catley—Direct

Q. In your reports? A. No, I made my reports every day. I measured both ends of the ditch and I averaged them.

Q. Yes? A. If it was very long I would take it in several places.

Q. Yes? A. (Continued) And take the aver- 10
age.

Q. And then you would write those measurements down; is that it? A. Put them down and make a copy of them to go—

Q. Just a moment. In what would you write those measurements? A. In a book.

Q. Then you would compute a total after you had completed the measurements in the book; is that so? A. No, I did not compute the yardage. 20

Q. Not the yardage, but in lineal feet? A. In lineal feet, yes.

Q. And then would you do anything before— anything further on that report prior to the time that Mr. Kreh got there? A. No, I would just merely copy it.

Q. Then these papers here, these daily reports (indicating), they were not yet written up at the time that Mr. Kreh would come to get his daily report; is that so? A. No. 30

Q. Then you told Mr. Kreh what your estimate of rock and quicksand was for the day as he came there; is that so? A. Yes, sir.

Q. And then did you offer him one of those reports? A. No. No, I didn't carry those with me; I carried a book.

Q. Then you made up these reports? A. Yes.

Q. After first talking with Mr. Kreh. Did you put in these reports the same amount or the same 40

Eardley C. Catley—Direct

total that you would have in your field book? A. Exactly.

Q. Exactly? A. Exactly, yes.

Q. Did you put in the reports each day the same figures that you originally put in your field book before Mr. Kreh would get there? A. Every night I made a daily report of the work done, the number of feet of pipe laid and what rock or hardpan there was in the ditch.

Q. Now, then, there were some occasions, as you testified before, when Mr. Kreh would dispute with you the number of cubic yards of rock? A. Not cubic yards, because I didn't—

Q. Or lineal feet of rock or quicksand? A. Yes.

Q. Would that dispute have any effect upon your daily report? A. Yes. If he told me to put in a certain amount, I put in what he told me to put in.

Q. Regardless of what your computation had been in your field book? A. Yes.

Q. Then it is not true that these daily reports contain the same figures, same data? A. Exactly the same as in my book.

Q. Except in instances where Mr. Kreh directed you to make the figure less than the daily report, is that not true? A. If he told me there was a certain number of feet in a ditch of hardpan or shell, I would put that in my daily report.

Q. Regardless of what your measurements had indicated before? A. Yes, I was under his instructions. That would go in my daily report.

Q. And the figure that you had in your field book originally was less than the figure which the contractor claimed; is that true? A. That I don't know.

Eardley C. Catley—Cross

Q. Or do you know? A. I don't know, no.

Q. You do not know whether the contractor revised his figure to coincide with your figure in your daily field book, after his daily discussions with you, concerning— A. That I don't know.

Q. I see. Did Mr. Kreh ever give you any reason for reducing your figures on rock or quicksand excavation? A. Well, he said there wasn't that amount there. 10

Q. Did he ever assign any reason for his judgment that it was not there? A. No.

Q. Could you, yourself, at the time these discussions arose between you and Mr. Kreh have determined whether or not a given number of yards, cubic yards of rock or quicksand had been excavated? A. No, I had not. 20

Q. And the reason for that is the change in the character of the hardpan between the hardpan in the soil and exposed to the air after it had been dug up; is that so? A. Yes.

Mr. Ryan: That is all.

CROSS-EXAMINATION by Mr. English:

Q. Now, Mr. Catley, in your field book, you put down what you observed, did you not? A. I did, yes. 30

Q. Have you your field book with you? A. No, I haven't got it.

Q. Do you know where it is? A. They could be obtained, though.

Q. Why didn't you bring it today? A. I didn't think it necessary.

Q. You said at first that the reports that you sent in contained the same figures as your field book, did you not? A. Exactly; as nearly as I could write them. 40

Eardley C. Catley—Cross

Q. That means, however, that your field book was after you had made your changes, does it not? A. Made no changes in the field book at all. I would do it in the nighttime, after the work was done, go over the job and see how many
10 feet of pipe laid.

Q. Then the field book, if you had it, would not show any erasure, would it? A. It may have, I don't know.

Q. Well, in that regard erasures made so as to coincide with Mr. Kreh's idea, it would not show erasures there, would it? A. No, no.

Q. When Kreh told you you were wrong, you did not rub out something and put something else in, did you? A. I certainly did not, because I
20 did not put it in the book—I didn't put it in until the night.

Q. Now, what did you have with you on the job? A. I had a book.

Q. A book? A. A book, yes; a note book.

Q. But that book was not a field book? A. It was a field book.

Q. That is the book that you called a field book, the one you carried in the field? A. Yes.

Q. Or out of doors? A. Yes.
30

Q. And would you write in it? A. I would write in it, yes.

Q. Before Mr. Kreh got there? A. No.

Q. You would not write in that until you got home; is that it? A. I would when I would go over the job, as it was completed.

Q. At home? A. No.

Q. When? A. In the field. •

Q. At what time of day would you go over it?
40 A. Different parts of the day, according to when the work was finished.

Eardley C. Catley—Cross

Q. Now, tell us, Mr. Catley, just what books and what papers you had when you were on the job, whether you had anything outside of a field book? A. No.

Q. Only a field book? A. Only a field book.

Q. Then, you measured at the end of each day 10 and then Mr. Kreh would come out and see you, would he not? A. No.

Q. How soon would he come? A. I don't know. Not very often. He might have been on the job and not seen me. I didn't see Mr. Kreh every day.

Q. Then you would not see him for several days? A. Perhaps not for several days.

Q. During that time where did you keep the memorandum or the measurements of the amount 20 of work? A. In the day in my field book and copied it every night on one of those reports.

Q. What is that? A. I copied it every night on one of those reports, the day's work.

Q. Now, if you put this in the field book on the first day and the second day and the third day and you did not see Mr. Kreh until the fourth day and he said you were wrong about day number one, or number two or number three, would you change 30 the figures? A. Those—

Q. Now, listen. Would you change the figures in the field book? A. I had no necessity to change them.

Q. Just answer, please, Mr. Catley; would you or would you not? A. If I was told to by him, yes, I would.

Q. Then why did you say a moment ago that you did not make any changes in the field book and there were not any erasures? A. Mr. Kreh 40

Eardley C. Catley—Cross

might meet me—see me one day. He would not ask me how many feet I gave him the day before. That is how there were no changes made in the book.

Q. Mr. Kreh would not see you for several days
10 after you had made measurements, would he? A.
No.

Q. In the meantime you had made entries in the field book, had you not? A. And also in those daily reports.

Q. And also in those daily reports? A. Daily reports.

Q. Then Mr. Kreh would come and say, "You are wrong, Mr. Catley"? A. No, he did not say
20 that; he would look at the ditch and then ask me how many feet I would give them there. I would say, perhaps, "two or three," whatever it might be, and he would say, "There isn't that in it." I would say, "Very well, it is up to you, Mr. Kreh."

Q. Then you would not change either— A. The notes were not in the book at the time.

Q. You had not made the entry in the book?
A. No, not until the ditch was finished, then I
30 would get the length of the ditch.

Q. Then you did not measure at the end of each day? A. I did measure the end of each day.

Q. And if you did not see Mr. Kreh until the end of the fourth or fifth day, where did you carry those figures, if you did not enter them in the field book? A. I put them in the field book, as I am telling you, every day; every night, every evening—

Q. Now, Mr. Catley, let us understand this, to
40 make this clear. A. I am endeavoring to understand.

Eardley C. Catley—Cross

Q. You measured the rock at the end of each day, did you not? A. Yes.

Q. Did you write it down? A. Wrote it down, yes.

Q. Where? A. In the field book.

Q. You are sure of that, are you? A. Certainly I am. 10

Q. Now, you did not see Mr. Kreh that day or the next day and sometimes for four or five days; that is correct, is it? A. Yes.

Q. Then when you did not see Mr. Kreh, those figures would be in the field book, would they not? A. They would be and would not be changed.

Q. For each day? A. For each day.

Q. And you would copy them on your report to Mr. Kreh? A. Which I did. 20

Q. Then you talked to Mr. Kreh? A. Yes. We wouldn't speak of this ditch, only the one we were looking at, at the time.

Q. Now, then, Mr. Kreh would come and all these measurements, according to your measurements, would be in the field book and your report ready to be handed in? A. Yes.

Q. Now, what correction would Mr. Kreh make? A. None whatever.

Q. Suppose Mr. Kreh disagreed with you, what change would there be? 30

The Court: I have got him now, Mr. English.

Mr. English: Have you, sir?

The Court: I have got him now, but it has been difficult. As I understand his testimony now, it is to the effect that he made up a field book at the end of each day and

Eardley C. Catley—Cross

from the field book he copied the result of that day's work on one of these reports.

The Witness: That is right.

Mr. English: All right.

10 The Court: But if it happened that the engineer himself should be around there and say, "Now, how much are you giving this man just upon this particular piece of work?" and he said, "Well, three feet," and the engineer said, "Well, I think you are giving him too much," then he would go according to the engineer's judgment.

The Witness: That is it exactly.

20 Mr. English: On that particular day alone?

The Court: Is that right?

The Witness: That is correct.

The Court: That only happened infrequently?

The Witness: Yes.

Q. That only happened once in awhile, would it not? A. Yes.

Q. And on that day when he spoke to you you had not completed your measurement in the field book, had you? A. That is it.

30 Q. When did that happen? A. Oh, that I can't say.

Q. As to the days that had gone by, he would not speak of it at all? A. He would not speak of it. In all probability the ditch would be filled in.

Q. The job was going on at three different places at one time, was it not? A. Yes.

40 Q. And if you did not see him for days, you did not know whether he had gone each day and

George W. Lawrence—Direct

measured it? A. I can't know, I don't know anything about it.

Q. You don't know anything about that? A. I couldn't be in more than one place at once.

Q. No, I do not believe you could. Now, you say that probably the ditch had been filled in, 10 but you do not know whether it was filled in or not, do you? A. That, I can't say, no.

Mr. English: That is all.

GEORGE W. LAWRENCE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows: 20

Direct-examination by Mr. Ryan:

Q. Mr. Lawrence, where do you live, please?

A. Maplewood.

Q. How long have you lived there? A. Sixteen years.

Q. What is your business, Mr. Lawrence? A. Contractor.

Q. Where is it located? A. In Newark. 30

Q. What kind of contractor, anything in particular? A. Steam shovel excavation.

Q. Do you know Mr. Lakens? A. I do.

Q. Did you have any business with him in connection with this contract? A. Considerable.

Q. (Continued.) Which is the basis of this suit? A. Yes.

Q. Concerning steam shovels? A. Yes.

Q. How many steam shovels did Mr. Lakens hire of you? A. Two and three. 40

George W. Lawrence—Direct

Q. What was the rate per day? A. \$50 a day.

Q. Do you know how long they kept them—they used them? A. No, they had them approximately a year on and off.

10 Q. Do you know how much, that is the total sum of money, that they paid you for the use of these steam shovels? A. Accurately I do not. I didn't figure it up.

The Court: Until half-past one, gentlemen.

After recess.

20 GEORGE W. LAWRENCE resumed the stand:

Direct-examination (continued) by Mr. Ryan:

Q. Mr. Lawrence, you have testified this morning that you are the person from whom the steam shovels were hired by the plaintiff corporation in the performance of the contract? A. I did.

30 Q. Do you know the total sum of money that was paid to you by the plaintiff corporation for the use of those shovels? A. We billed them. It is somewhere around \$20,000, I don't remember the exact amount.

Q. I show you a bill dated October 14th, 1922 (handing document to witness). Do you know what that is? A. That is a bill for plant rent.

Q. Does it pertain to the charges made by you for these steam shovels? A. Yes.

40 Q. And what is this bill dated September 16th, 1922 (handing document to witness)? A. Plant rent and labor.

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Mr. Ryan: If your Honor please, we have a number of bills presented by Mr. Lawrence to the plaintiff corporation and paid by them. Mr. English consents to their admission in evidence.

The Court: Very well.

10

Q. Did you see any of this work done, Mr. Lawrence? A. I saw most of it done.

Q. I beg your pardon? A. I saw most of it done.

Q. You were on the scene of the job? A. Every day.

Q. What was the occasion of your presence there? A. Look after my own equipment.

Q. See that it was being properly used? A. Exactly. 20

Q. These engineers who were operating these steam shovels were your own men and under your direction? A. Were my own men.

Q. Have you any technical education, Mr. Lawrence? A. Yes, sir.

Q. What is the extent of it? A. Mining engineering.

Q. You have a degree as a mining engineer? A. Yes, sir.

30

Q. From what University? A. Idaho.

Q. How long ago did you graduate? A. In 1900.

Q. How long have you lived in Maplewood? A. Sixteen years.

Q. You know what hardpan is? A. I do.

Q. Have you done much excavating in the Township of Union? A. Considerable.

Q. In what part of Union? A. Well, in all the sections that this contract that is involved 40

George W. Lawrence—Direct

now—that we are talking about, and Union County, throughout the County in various places.

Q. And for what purpose was that excavating done? A. In Union Township it was sewers.

Q. For sewers? A. Yes.

10 Q. Can you tell us in terms that the jury might understand, that is, not technical terms, what constitutes hardpan? A. One point removed from rock.

Q. One point removed from rock. And what are the physical characteristics of hardpan?

Mr. English: I object on the ground that the engineer was constituted the judge of the contract, with an appeal to the consulting engineer.

20

The Court: The objection is overruled; you may take an exception.

Mr. English: All right, except.

Mr. Ryan: I will withdraw the portion the stenographer has already taken down and re-frame it.

Q. What are the physical characteristics of hardpan before excavation? A. It is a very, very hard, compact clay. You generally find it about two or three feet underneath the soil.

30

Q. Is there any difference in its characteristic before and after excavation? A. Well, there is this difference in it: In excavating you naturally have teeth on the bucket, and to excavate that stuff you practically chew it all up, and when it is on top of the ground it looks nothing like it did in the bank. It is powdered.

Q. How does it compare with firmly cemented rock, ledge rock or shell rock in digging? A.

40 Well, ledge rock and shell rock, you cannot dig it without shooting it.

George W. Lawrence—Direct

Q. You cannot dig it either with picks and shovels, is that true? A. Well, you could if you stayed at it long enough.

Q. Is it practical to dig hardpan with picks and shovels? A. No, it is not.

Q. Could you determine whether or not any particular substance is hardpan after excavation as accurately as you could determine prior to excavation? A. I could not. 10

Q. Could you determine it at all after excavation? A. I doubt it.

Q. Does it undergo some change after excavation? A. The first change takes place in it being all chewed up, by piling it up. It comes out in little slivers and it is all broken and it has a tendency to disintegrate after it is exposed to the air. 20

Q. How did your shovels stand up under this work? A. Considering the work they stood up pretty well.

Q. Did you have trouble with them? A. Lots of it.

Q. What was the nature of the trouble? A. Breaking cables, breaking buckets; we cracked two booms; broke pinions on it and pulled the main shaft out and so on and so forth. 30

Q. How many buckets were replaced? A. To my recollection there were four or five buckets replaced on that job.

Q. What would cause such destruction on a steam shovel? A. Well, you get in this ground and you go there to dig it and you pull into the ground and it comes or something breaks, either one way or the other.

George W. Lawrence—Direct

Q. Have you been using these steam shovels since? A. Every day.

Q. How long since is that? A. Well, we got through with that job somewheres in the fall of '23. They are all out now and all have been out.

10 Q. Have you had any trouble with these steam shovels since that time? A. Not recently.

Q. You say you saw this work every day? A. Every day.

Q. Do you know the amount of lineal feet required to be done under the terms of this contract? A. Only as I heard it; approximately 40,000.

20 Q. Well, suppose I should say to you that this contract required the opening of a trench at an average depth of eight feet or 40,000 lineal feet; could you tell us, basing your answer upon a fair average of trench work for a steam shovel per day, how long it should take to accomplish that work? A. Why, I would say about four months.

Q. Can you tell us in terms of days, working days for each shovel? A. Well, we figure about 250 feet a day for a machine in ordinary digging.

30 Q. That is a matter of computation. Have you computed, before going on the stand, that that would amount to 160 shovel days? A. No, I computed nothing.

Q. Should this work with two steam shovels, averaging 250 days, take in the neighborhood of eight months to complete under ordinary circumstances? A. I would say no.

40 Q. What would you say would be the occasion of such a length of time required in the performance of this contract? A. Perfectly simple; you

George W. Lawrence—Direct

were held up by the nature of the ground; you could not dig it.

Q. Did you see practically all of the trench work done in this sewer? A. I would say practically all, yes.

Q. Did you estimate, or did you calculate the amount of rock encountered in the digging of this sewer? A. I did not. 10

Q. Do you know how many yards, cubic yards of rock or hardpan was encountered by the contractor in the digging of this sewer? A. No, I do not.

Q. Do you know what percentage of the digging of this sewer was made up of hardpan? A. Well, my observation of the job was, we seemed to hit it about two to three feet under the natural soil. 20

Q. And through what extent of the 40 thousand lineal feet of sewer did that condition prevail? A. Well, I would say the first two sections ran very much that way.

Q. And how many sections were there? A. Three.

Q. What was the condition in the third section? A. Well, they hit it about a little lower down at that, say four feet, something like that. 30

Q. And did that prevail throughout the third section? A. Yes.

Q. What percentage of all the material excavated would you say was hardpan or rock? A. Well, if I was the contractor I would say half of it.

Q. Then if 23,000 yards, cubic yards of excavation had been accomplished by the contractor, would you say that 6,246.7 cubic yards of rock 40

George W. Lawrence—Direct

was a conservative estimate? A. Well, that is either rock or hardpan; I wouldn't say now. Which item do you want me to say?

Q. I mean rock within the definition of this contract, that is including hardpan, gravel or
10 firmly cemented soil. A. Did you ask me 6,000 yards?

Q. Yes. Is that a conservative estimate? A. I would say exceedingly so.

Q. Exceedingly conservative? A. Yes, sir.

Q. Are you familiar with the topography of the soil in Union Township? A. Well, not—just in a general way I am.

Q. By reason of your experience? A. Yes.

20 Q. Is that so? A. That is all.

Q. What does your experience teach you in that regard? A. Well, I don't know just what you mean by that.

Q. I mean with relation to hardpan and rock and gravel and digging of a difficult character. A. Well, digging of a difficult character slows you up about fifty per cent.

30 Q. But I mean, what is your experience as to its prevalence throughout the Town? A. It seemed to lie throughout the entire town.

Q. And this condition is general throughout Union Township? A. As far as my experience went, it is.

Q. And your experience covers the entire section covered by this sewer contract? A. Right.

Q. What is the life, ordinarily, of one of these cables on a steam shovel? A. Well, in ordinary digging, we figure six weeks.

40 Q. How long did these cables last on steam shovels on this job? A. Well, I don't know; it

George W. Lawrence—Direct

seems to me we were putting them on about every week.

Q. Was five or six buckets on the steam shovels on this job for the period which they were used unusual? A. You mean only to last that long?

Q. Yes. A. Decidedly so. We are using them 10 now, the same type all year, and we will probably use them the next year.

Q. Mr. Lawrence, you took these shovels off this job at different times, did you not? A. On two or three occasions I took them off.

Q. Where did you send them? A. On one occasion I sent one over to South Orange and early in the spring I sent one up to Mountainside and another one to Newark. In other words, in the 20 spring there were three of them there and I took two away.

Q. Do you know how many days, that is, counting a day for each shovel, that these shovels were removed from this work? A. Well, roughly speaking, the one I sent over to South Orange when we first started there to relieve the burden there, he was gone twelve days and I brought him back in the early spring. I sent one down to Newark; he was there about ten days; and up 30 in Mountainside, I guess we were there about two weeks; something like that.

Q. And what is the total in days, about? A. Well, it would be 12 and 17 and 22—that would be 44 days.

Q. How did you come to take them off the work? A. Why, when we started there we came in there with two machines, and the two of them were sitting there doing nothing, and just what it was—no stakes or this or that or the other ac- 40

George W. Lawrence—Cross

ording to the various stories we got, and I suggested to the contractor that I take them away and relieve him of that burden of paying for them. As long as he had them on his job he had to pay for them.

10 Q. At the different times that you would notice these shovels idle and make these suggestions to the contractor, what was the condition of the weather, if you know? A. Well, when I took the shovels away the weather was wonderful.

Q. And what was the condition of the top soil? A. Well, when I took them away in the fall it was very good; in the early spring there was some mud.

20 Q. Then, were weather conditions and the condition of the ground suitable or unsuitable for work of that kind? A. Well, I would say they were suitable. It was within season and we worked; that is all.

Mr. Ryan: Cross-examine.

CROSS-EXAMINATION by Mr. English:

Q. Mr. Lawrence, you have said, I think, that in your opinion it is impossible to dig hardpan with pick and shovel, is that correct? A. Yes, 30 sir, that is correct.

Q. Was not that the way it was always done before steam shovels were invented? A. That is true, to a certain extent.

Q. Well, is it not fully true, that it could be done no other way? A. Well, it depends. If we are talking financially, it is impossible to do it today.

Q. You mean it costs more, is that it? A. Ex- 40 actly.

George W. Lawrence—Cross

Q. But it can be done? A. It can be done; that is to a certain—

Q. Then when you said it was impossible, you did not mean it could not be done, did you? A. There are certain exceptions. The regular rule is that it cannot be done with a pick and shovel. 10

Q. Is it not always done when they have no—
A. No, it is not.

Q. How is it done? A. Within my knowledge it is done with powder; what they did years ago, I don't know.

Q. Would you consider it advisable to blast a material of this kind if you had no steam shovel?

A. That depends. If it would shatter the trench and widen it out two or three feet, I would say it would not be advisable to blast. 20

Q. Then you would do it with a pick and shovel?

A. You would have to do it if you did not have a steam shovel.

Q. You have said that in your opinion it is impossible to determine what is hardpan after it is taken out and thrown aside, is that correct? A. That is my opinion.

Q. The layer or stratum of hardpan would run across the trench, would it not; you dig through it? A. You would have to dig through it. 30

Q. Then there would be an evidence of the stratum on the side of the trench of the same nature, would there not? A. Yes, sir.

Q. And anyone examining the side of the trench where that hard pan had been dug from, could determine whether it was hardpan or not? A. What was in the trench, the side of the walls could be determined by looking at it.

Q. And what was taken out immediately ad- 40

George W. Lawrence—Cross

joining, within the sixteenth of an inch of it, would be of the same nature as dirt that was left? A. Well, I wouldn't get as near as a sixteenth of an inch.

10 Q. Well, it was absolutely joined, fastened to it, was it not? A. What, the soil? I am talking on top of the trench, you are talking in the trench.

Q. All right. I am talking about this: If you dig through a stratum, you take out a section of that stratum of a certain width— A. Yes, sir.

Q. And you throw it on the side? A. Yes, sir.

Q. And you cut down a bank of the trench right through the stratum, do you not? A. Yes, sir. In other words, you leave a bank.

20 Q. Now, if your stratum is three feet down, then you would find in the side of the side of the bank three feet down the same kind of material that was dug out, would you not? A. Surely.

Q. And could not one examine there and thus determine the nature of the material taken out? A. I could determine it in the trench but I would not undertake to determine it after it is thrown on top.

30 Q. But you would examine in the trench where it came from and know that was the same, would you not? A. That is what I would do.

Q. You said that you moved the shovels because there were no stakes or this, that or the other thing? A. Well, there was no profiles, and there were no stakes and there wasn't this and there wasn't that; that is the stories that I got.

40 Q. Don't you know the profiles were prepared three months before the work was done, complete? A. No, I don't know anything about it.

George W. Lawrence—Re-direct

Q. Do you, as a matter of fact, know that there was a failure to place stakes and delay on that account? A. That is why I moved out; that is what I was told.

Q. You do not know it of your own knowledge? A. No, sir. 10

Q. You know that Mr. Lakens makes no such claim, do you not? A. I don't know anything about it.

Q. You just heard somebody say that? A. No, Mr. Lakens told me we couldn't work with this line and that those stakes were not ready.

Q. Yes, but you did not know it except what somebody told you? A. That is all.

Q. Are you an officer of the G. D. Lawrence Company? A. President of it. 20

Q. Mr. Lakens is an officer of that company? A. No, sir.

Q. Is he a stockholder in that company? A. No, sir.

Q. Not connected with it in any way? A. He is now superintendent for me.

Q. He is superintendent for the G. D. Lakens Company? A. No, G. W. Lawrence Company.

Q. For the G. W. Lawrence Company? A. Yes, sir. 30

Q. Of which you are president? A. Yes, sir.

Mr. English: That is all.

RE-DIRECT-EXAMINATION by Mr. Ryan:

Q. You have no interest whatever in this issue, have you, Mr. Lawrence? A. None whatever.

Mr. Ryan: That is all.

George W. Lawrence—Re-cross
Henry Kreh—Direct

A Juror: May I ask a question?

The Court: Certainly.

A Juror: How much does one of those trench machines cost?

10 The Witness: \$7400.

A Juror: For each one of them?

The Witness: Yes, sir. We had on that job about \$30,000 worth of equipment.

Mr. Ryan: Just a moment, if your Honor please.

RE-DIRECT-EXAMINATION by Mr. Ryan:

Q. Is \$50 a day the fair and usual price for a steam shovel? A. No, it is low.

20 Q. What is the usual price? A. Sixty.

RE-CROSS-EXAMINATION by Mr. English:

Q. Why did you charge only fifty? A. It was getting in the fall and we were running out of work and we thought it was a winter job and we were glad to get them out at that rate at that time.

30

HENRY KREH, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Ryan:

Q. Mr. Kreh, did you prepare the specifications for this job? A. No, sir.

Q. Do you know who did? A. Yes, sir.

40 Q. Who prepared them? A. Mr. Alexander Potter.

Henry Kreh—Direct

Q. What is your official connection with the Township of Union, Mr. Kreh? A. Township engineer.

Q. Have you any interest in this contract? A. Any interest?

Q. Yes. A. As Township engineer, whatever 10 affects the Township, yes.

Q. What interest is that? A. Why, that I stake out the sewer and do the work for the Township and act as their engineer.

Q. In other words— A. (Continued.) As a Sewer Commission engineer.

Q. In other words, to see that the contract is faithfully executed? A. Yes, sir.

Q. Have you any personal interest in this contract, Mr. Kreh? A. No, sir. 20

Q. You are paid for your services, of course, by the township? A. Five per cent of all money paid I get.

Q. What is that, please? A. My compensation is five per cent for all money paid to the contractor.

Q. You estimated the approximate cost of this sewer, is that part of your duty? A. Yes.

Q. What was your estimate, Mr. Kreh? A. A 30 hundred thousand dollars.

Q. And if the sewer cost \$100,000, then you were to get \$5,000, is that so? A. That was the rate; that would figure out mathematically correct, yes.

Q. Five per cent of the cost? A. Five per cent.

Q. Can you explain to us the nature of the proceedings leading to your recommendation or certification to the Township of Union as to the approximate cost of this sewer? A. Why, about 40

Henry Kreh—Direct

a year before this sewer was actually contracted for, I made a survey for the Township of this district, this Vauxhall district, making certain recommendations as to how it could be sewerred and the outlay; the way it might be obtained and
 10 approximately what the sewer would cost. I have such a report.

Q. You made that recommendation in writing?

A. Oh, yes, I made a report.

Q. And after that recommendation was made, then—

Mr. Ryan: Strike that out, please.

Q. Is it usual and incident to the ordinary duties of a township engineer to make that approxi-
 20 mation of the cost of such an undertaking as this?

A. I was not employed for this.

Q. Well, then, the Commissioners of the Sewer District. A. This is the Sewer District, which is a small part of the Township and a separate corporate body.

Q. Then that is part of your duties, usual and incident to your duty as the engineer hired by the Commissioners of Sewerage District No. 1? A. No.

30 Q. Just a minute, please. (Continued.) To approximate the cost of this sewer, is that so?

A. No, I was hired for that particular purpose.

Q. By the Commissioners to make a report to them? A. I was picked out of two or three other engineers.

Q. What I have in mind is this: That is commonly the purpose for which an engineer, in the first instance, would be retained, is that so? A. Yes.

40 Q. That is usual? A. That is usual, yes.

Q. Did you ever hear of a contract for the con-

Henry Kreh—Direct

struction of a sewer like this being contemplated without such an estimate being made by some competent engineer before the bids were accepted? A. No.

Q. Then, after you made this recommendation, Mr. Kreh, as to the approximate cost of this sewer, have you any further interest in the contract, aside from seeing that it is faithfully executed, and that, of course, you receive your five per cent commission on the actual cost? A. Not that I know of. 10

Q. Well, are you interested as a reputable engineer in seeing that the cost of this sewer does not exceed the cost of your estimate or approximation? A. No.

Q. You have no interest— A. I was not limited in any way, no. 20

Q. You are not limited, of course, as a matter of fact or in any other manner, but are you interested as an engineer, for the sake of your reputation as a skillful, competent engineer, in seeing that the cost of this sewer is within your estimate or approximation? A. Not necessarily. There are many jobs that I have estimated, all have run way over the cost I originally estimated.

Q. As a usual thing in your profession, engineers are supposed, with their technical education, fairly to approximate the actual cost of sewers? A. Certainly. 30

Q. Is there a difference, Mr. Kreh, between your actual estimates, quicksand and rock, and the reports turned in by Mr. Catley? A. There is.

Q. And that difference obtains in the case of each, quicksand or rock? A. Rock; the quicksand I have not calculated. 40

Henry Kreh—Cross
Motion for Non-suit

Q. You have not calculated the quicksand? A.
(Continued.) To see whether that is different.

Q. And can you tell us, Mr. Kreh, what the difference is between Mr. Catley's reports and the
10 amount actually certified by you and paid for?

A. 904 yards, as near as I can figure it.

Mr. Ryan: 904 yards of rock. That is
all.

CROSS-EXAMINATION by Mr. English:

Q. Just tell us how much that sewer cost? A.
About \$87,000.

Mr. English: That is all.

20 Mr. Ryan: Plaintiff rests.

MOTION FOR NON-SUIT

Mr. English: If the Court please, I move for a non-suit in this case. In regard to Count No. 1 I make my motion, first, on the ground: That under the contract, in case of dispute of the nature of the one in question, naturally, as to what constituted rock or hardpan within the meaning of the specifications, has to do with the interpretation of the contract, and that the interpretation
30 of the contract was left, by its terms, to the supervising engineer. That if at any time, not the first or the second or the third time, but if any time, such a dispute arose, it was incumbent upon the plaintiffs immediately to appeal to him who had been constituted, if I may say so, the appellate tribunal. This was not a case of an arbitrary refusal to measure a given amount of rock,
40 so that the supervising engineer could not determine the question.

Motion for Non-suit

In the second place, there is absolutely no fraud on the part of the engineer shown.

In regard to the second count, if the Court please, there were two parties to this contract, the Sewerage District and the contractor. No act of the other contracting party has been testified to which in any way interfered with the work done or to be done by the plaintiffs. 10

In regard to both counts, I offer this, if the Court please, as a further reason for my application for non-suit, namely, that the bills are sworn to by the president of the plaintiff company, except in five instances. He has identified the signature of the secretary of the company in those five instances on those affidavits that he swore to, these bills constituting the monthly bills or estimates with two exceptions, and those two being the final estimates. 20

(After further argument.)

Mr. English: I think they are estopped as to both of their counts because of the fact that they swore to the bills and they took their money and they cashed their check and sat still for a further two months.

I may add just this further point, that if they are obliged to show fraud by the engineer, it is almost the same as accusing a gentlemen occupying a professional position with what is virtually a crime, and they must prove it by more than the preponderance of a doubt, and the question as to whether the fraud has been proven is a condition precedent to their proceeding with their testimony and submitting to the jury, and a question which should be passed upon by the Court. 30

The Court: (To Mr. Ryan.) I will hear you. 40

(After argument by Mr. Ryan.)

Ruling of the Court

The Court:

In this contract between the plaintiff and the defendant for the building of a sewer in the Township of Union there is a clause, under a title of "Rock Excavation" which stated a definition of
10 rock excavation, that it should include the excavation and removal of all boulders or pieces of rock, each of which contains eight cubic feet or more of any hardpan, firmly cemented, gravel rock and ledges, solid rock or masonry removed from retaining walls or culverts, and this suit, under its first count, charges that through false and fraudulent estimates, made by the engineer in active charge of the work, the defendant has failed to
20 pay him for the actual amount of rock excavation which he actually excavated; and it seems from the evidence that in the early part of the operation of this work there was a dispute between the engineer in charge of the work and the contractor as to what constituted rock excavation, and the difference reached such a stage that the consulting engineer was called in to pass on what was rock excavation. It is claimed by the plaintiff and contended that he has proved it by
30 evidence, so far as we have gone, that when the consulting engineer gave his decision it was in harmony with his contention as to what constituted rock excavation, but there is no proof whatever that the engineer actively in charge of the work ignored that part of the decision of the consulting engineer, so far as what he had to pass upon at that time was concerned.

Section 13 on page 12 of this contract provided
40 that the engineer should have the final decision

Ruling of the Court

on all matters of dispute involving the character and amount of work, and the compensation to be made therefor, or any question arising under this contract. That section further provided that:

“In order to avoid litigation, the contractor has a right to appeal to the consulting engineer on any major matter that may arise in connection with the interpretation of this contract, and the decision of the consulting engineer, after a full hearing of the contractor and engineer, shall be final and conclusive.” 10

There is no evidence that the decision of the consulting engineer in the interpretation of this contract, whenever his decision was called for, was not final and conclusive as between the parties, because there is no evidence that what he stated as his interpretation of any matter that was presented to him was not followed. 20

There is absolutely no evidence that the question of quantities was ever presented to the consulting engineer. It might well be questioned whether, under the language of this contract, the consulting engineer had any further authority than to explain the meaning of words, particularly technical words or business words, words such as are used generally in construction work of this kind. Be that as it may, the fact remains that as to quantities, he was never consulted; as to the correctness of the estimates made by the engineer he was never consulted, and his decision was never asked for, according to the evidence. The only evidence, as has already been stated, is that he was called for four or five or six times to look 30 40

Ruling of the Court

at the work that had gone before and to pass on whether or not certain work was the excavation of what was known as rock excavation; but as I stated before, there is no evidence that what he passed upon as rock excavation was not fully included in the estimates made by the engineer. So much for that. What was the authority of the engineer? As already read, the engineer shall have the final decision on all matters of dispute involving the character and amount of work. The dispute in this case is as to the amount of work, the amount of work in connection with rock excavation and quicksand, and the engineer, by their contract, was made the final arbiter as to what was the correct amount. What was the amount which had to be paid for, not by him, the engineer, but by the Sewerage Commission? What does the law say about it, the finality of the award of such an arbiter? It is substantially similar to the builder of a house, where the architect is made the final arbiter as between the builder and the owner, and the law of this state is settled in that respect, and they are the very same principles involved and the very same kind of a decision involved as in the case of the construction of a house. The Courts have substantially said this; "that where the owner of a house and the builder of a house, agree that the architect should be final in any dispute that arises, that that is final unless you can show that the architect has made a dishonest decision."

Now, dishonesty means something that is more than a mere mistake. A dishonest man means a man that is guilty of moral turpitude, or rather violates moral turpitude by his act.

Ruling of the Court

The decision which has already been cited, which seems to be the leading decision in this State, is the one that has already been cited by Mr. English and which I had before me before he read it, the case of Chism against Schipper, 51 Law, Page 1, written by Chief Justice Beasley, 10 and in speaking about an award made by an arbiter, such as the engineer made in this case, by agreement between the parties, says—

“Awards authorized by them will, for all useful purposes, be in truth finalities; they cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons; such awards can be vitiated by fraud alone, 20 and which must be proved to the satisfaction of a jury under a watchful judicial supervision.”

Now, then, the question is, as has already been suggested, not a question simply of who is right as to the proper amount or proper number of yards of rock excavation that there actually was; it is not a question of whether the engineer or the contractor is right in that respect; it is not that alone—not by any means. These men by their contract, or rather the defendant and the plaintiff 30 by their contract said that should not be made the question, as to who was correct, but that the engineer named in the contract should say what was the amount.

Referring to this case, there was a dissenting opinion, where the Judge went so far as to say that when they went into such an agreement as that, that even though there was fraud, that the 40

Ruling of the Court

parties were bound by it, since they had put in black and white such an agreement as that. Justice Beasley was saying that that was giving to the language of the contract a literal construction that there was any violation of the true
10 spirit of the words of the contract; but it means something, and it means something that is very strong, and something so strong that it does keep the people out of courts, and it does make final, unless there is evidence that the arbiter, in this case the engineer, was fraudulent in this conduct in making these estimates. And fraud must be something that must be affirmatively proved, and where is the evidence in this case that from the
20 evidence that we now have would justify a jury in finding that this engineer was dishonest? Mistaken—that is not the question. Perhaps he was mistaken. The question is whether he was dishonest in making these estimates.

It has been argued that fraud might be inferred; that the circumstances are such that the jury's mind would be constrained to an inevitable conclusion, as it were, by the force of the circumstances, that there was fraud on his part. The
30 evidence from which it is contended that this inference would flow is that there is a difference so big between what the contractor was paid upon the basis of the engineer's estimates, and what he himself claims, that it shows errors so big and so glaring that the inference of fraud is inevitable; but where is there proof that there is error, simply because a contractor says, "I say there were so many yards of hardpan," and he said, "There
40 were only so many yards of hardpan," is not

Ruling of the Court

proof that there was a grossly erroneous difference. There must be some other proof before it can go to the jury on the ground of fraud. Is there any other proof?

There was an inspector on the job. There is not a word said in the contract, so far as we have been able to find it at the present time, providing for an inspector; so that he had no real official authority. He was simply, as it is common knowledge, an inspector to go on the job; he has no authority at all except as a sort of a spy or watchman on the thing to report to some superior officer, but who has no authority himself to direct or control the work, who cannot speak for the principal in an effective way, but evidently this man, who, to my mind, differs from the ordinary kind of man that they have as an inspector—mere inspectors; he is no doubt a man of experience and he did make reports to the engineer from time to time. He had a field book and he made his own estimates, as it seems, of just the character of the work that was being done, and the extent, in that he measured them in cubic yards, he would say, "It started at a certain point and ended at a certain point and was about a certain depth." But he had no right, under the contract, to say what the quantities were, no matter what his purpose in being there was. Certainly, it did not go any farther than to assist the engineer, as far as the engineer might give value to what he did.

Even assuming that the contractor is right as to the amounts, and I am not saying that is so, but for the purposes of this case, even assuming that it was so, I cannot see where is any proof

Ruling of the Court

here that this engineer, when he made these estimates, knew he was wrong, and knowing that he was wrong, still made a wrongful estimate, and that is what it practically and substantially would have to be before there was fraud upon his part.

- 10 Now, it has been argued that he had an interest in this to be fraudulent, to do this contractor out of his just dues for his own personal benefit. What are the reasons given? He made an estimate as to the approximate cost, and, according to the evidence, as we know as a matter of general knowledge, when such work as this is proposed, the scientific or professional man that is to have charge of it, gives an estimate. No one
- 20 supposes that is going to be exactly met; it may be more and it may be less, and it is generally more than the estimate. In this case he made an estimate of \$100,000; the sewer actually cost \$85,000 as it stands. That is ignoring these claims. It is argued that he made his estimate on the basis of calling this so-called hardpan nothing more than ordinary dirt; that is, that he did not include in rock this so-called hardpan, and that
- 30 finding that to be so, why, because of his reputation and his future, he was going to do this man out of being paid for that which the consulting engineer said was rock under the specifications—do this man out of his honest reward for his labor. It seems to me that is very far fetched, the charge against this man that you have seen on the witness stand—this engineer.

- Look at it the other way: He was to get five per cent as his compensation on as much as it cost,
- 40 and therefore, the more it cost the bigger would

Ruling of the Court

be his compensation. It could be ably argued that he padded this amount so as to make his amount larger, and one argument, to my mind, is just as baseless as the other.

Since they agreed under this contract to make the estimates as to quantities made by the engineer final as between them, unless the engineer made estimates which he knew were wrong—mind you, which he knew were wrong, and therefore made estimates that were fraudulent—were dishonest, why, they are bound by the estimates that he made. That is the law as I understand it. 10

As I understand the evidence, there is no evidence that would justify any jury in finding that this engineer was dishonest and was fraudulent in making the estimates that he did make. 20

And therefore, as to the first count of the complaint, I am constrained to grant the motion for a non-suit. Now, if there is anything further to be said as to the second count, because of delay, I will hear you, Mr. Ryan, but I do not see it.

The Court: (After further argument.) Let me have that section of the contract that refers to delays. 30

(Document handed to the Court by Mr. Ryan.)

The Court: Under the second count of this complaint, there is a claim for damages on the ground that the work of the contractor was delayed by the defendant. The contract itself provides that should the said Sewer Commission be prohibited or enjoined with the work by reason of litigation or by reason of its inability to procure any right- 40

Ruling of the Court

of-ways, or should the Sewer Commission for any reason delay the work or the laying out of the same on the ground, the contractor shall be limited to the exact cost to him of such delay without profit, direct or indirect.

10 I know of no testimony that would justify a finding that the Sewer Commission, as a Sewer Commission, officially and after proper action, in any way delayed the prosecution of this work. There is some indefinite evidence as to the Chairman of the Sewer Commission being on the job at one particular time, but even from that uncertain evidence, taking it from the most extreme viewpoint that you could in favor of the plaintiff,
20 it cannot be said that the Sewer Commission, as a Sewer Commission, delayed the work. The complaint narrows itself to the charge that the delay was occasioned by the delay to furnish grades. I know of no evidence that justifies a conclusion that there was any failure to furnish grades.

The complaint also asserts: "Or for other things," to which to my mind, is an expression that is meaningless. Where you say, for example, in a complaint that the delay was due to
30 a failure to do a specific thing and then simply add "or for other things," such a general addition as that means nothing. However, for the purpose of this motion, I will not treat that as radically as I think it deserves, and will take the evidence as it is and assume for the purposes of this motion that there is some evidence to the effect that the engineer, in the management of this work, gave certain orders to the contractor which
40 compelled the contractor to take off the steam

Ruling of the Court

shovels and that that occasioned him certain expense for the time that those steam shovels were idle, and he had to pay for them while they were idle, when, as a matter of fact, they would have been busy if the orders had not been given. So, taking up the question of the engineer, and for the purposes of this motion, as I have stated, assuming that that would be a question of fact to go to the jury: It seems sometimes in its practical effect very harsh indeed, that a mistake or a matter of poor judgment upon the part of an engineer working actual damage to a contractor cannot be recovered for so far as the contractor is concerned, but as I understand the law, that is the situation. It seems especially harsh when we know that, as a matter of fact, the selection of the engineer is, in the first place, the selection of the builder, or in this case, of the municipal body, but when the contractor enters into a contract, he does that which he is not compelled to do, and our law says that when there is a selection of an engineer or an architect in the construction of work and the owner and builder sign such a contract as that, which provides that such engineer or architect shall have the scientific or professional direction of the work, shall pass upon measurements, shall pass upon quantities; shall pass upon how the work shall be done, that any mere mistake of judgment upon his part, or even a gross mistake of judgment, why, there is no redress for the injury flowing therefrom, so far as the contractor is concerned. That is the law.

And the only time that a contractor or a builder has redress is when you can show that after the

Ruling of the Court

man which he has agreed upon shall be the boss of the situation has been dishonest—actually dishonest in his work. So it is in the building of a house: A man arranges to build a house, he selects an architect, he, the owner; but the contractor signs that contract and agrees that that architect, for illustration, shall pass upon whether the work is done right or not; shall pass upon the quantities of work done; shall furnish certificates as to the work having been done according to the contract and specifications and as to the amount of the work. If he does not furnish a certificate, why, the contractor has no redress, unless you can show that he fraudulently withheld a certificate. Fraud means dishonesty; it means simply this:

In a case like this, that a man knowing what is right, does what is wrong; or a man knowing what is wrong, actually does it knowing that it is wrong.

It seems hard in its effect at times, particularly if the facts justify the fact that there has been substantial loss because of a gross error of judgment. So, in this case, assuming now that the engineer, who was not the agent of either one side or the other exclusively, but who was the arbiter between the two by their contract, by their agreement, suppose he delayed the work ignorantly but not maliciously or fraudulently, and that meant injury to the contractor. Unless he did it fraudulently, the contractor has no redress for the loss from such a delay as that. I am not saying that that is so in this case, but assuming for the purposes of this motion, that the jury could find it

Ruling of the Court

so, yet the contractor would have no redress unless he could show that the arbiter that had been selected had been fraudulent in his order. That is the situation.

I think it but fair to emphasize that I do not believe, or that I am not saying that it is so, that he was grossly in error in his delay. I do not say that there was any delay that was not necessary to the proper prosecution of the work. So much for that. 10

Take this receipt: The contractor in this case gives a receipt which, on its face, is the final payment so far as his work on this contract is concerned, with the exception of what he specifically contended it did not cover. He goes to a municipal body or its Sewer Commission and presents his bill; he has the bill for at least a week; looks over it, finds there is some error in mere computation of figures; they agree he is right about that, that is, in the additions or something like that, the mere arithmetic of it; he also claims there is some difference in the actual lineal distance as to feet, and the Sewer Commission looks that over and agrees that there are some mistakes there, and a new bill is made out accordingly, and that bill on its face represents, it seems to me, everything that this man was claiming then, except what he might have said was due him outside of what was contained in that bill. He claimed for what outside of that bill? This question of rock which was included in the first count of the complaint, and that was disposed of yesterday. 20 30 40

Stipulations

Therefore, everything was included excepting the dispute as to rock. There is not a thing said that he has been damaged by any delay, according to the evidence; and we do not know how long after it was before this claim was first presented, if it ever was presented to them before it was put to them in the shape of a lawsuit.

Taking all these things together, the Court has nothing left to do excepting to grant the motion as to the non-suit as to the second count of the complaint.

Mr. Ryan: I ask an exception, please.

The Court: Yes, on both of them.

Mr. Ryan: Both of them.

Stipulations
NEW JERSEY COURT OF ERRORS AND APPEALS

30	T. FOSTER CALLAHAN, INC., a corporation, Plaintiff-Appellant, vs. COMMISSIONERS OF SEWERAGE DISTRICT #1 OF THE TOWNSHIP OF UNION IN THE COUNTY OF UNION, NEW JERSEY, Defendant-Respondent.	}	On Appeal Stipulations
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It is hereby stipulated by and between counsel for the respective parties hereto:

Stipulations

1. The contract sued upon, introduced in evidence as Exhibit P-1, is not to be printed as part of the State-of-the-Case, but those extracts from it—read into the evidence by counsel for plaintiff (appellant) immediately after the opening of the trial in the court below are to be taken and considered as the essential portions of the contract, and that for the purposes of this appeal said extracts in the opinion of counsel contain sufficient of said contract to present to the appellate court (when read with the remainder of the printed record) the question of the legality of the trial court's ruling in granting defendant's motion for non-suit. 10

2. The field book, introduced as Exhibit P-2, need not be printed, as its contents are not considered indispensable in considering the case on appeal and in arriving at a conclusion as to the legality of the trial court's ruling on the motion for non-suit. 20

3. These stipulations to be made and considered part of the printed case.

Dated, Elizabeth, N. J., October 13, 1925. 30

JOHN F. RYAN,
Attorney of Plaintiff-Appellant.
JOHN K. ENGLISH,
Attorney of Defendant-Respondent.

Exhibit P-1

(Not printed, by consent. See Stipulation, p. 109).

10

Exhibit P-2

(Not printed, by consent. See Stipulation, p. 110).

Exhibit P-3

20

T. FOSTER CALLAHAN, JR.
Secretary

Charles A. Lakens
Pres.

T. FOSTER CALLAHAN

Incorporated
CONTRACTING ENGINEERS
564 Cherry Street

30 Phone 437

Elizabeth, N. J. January, 23, 1924.

Commissioners of Sewerage District #1,
of the Township of Union,
in the County of Union, N. J.

Gentlemen:

We desire to invite your attention to certain
40 matters in connection with our contract with you

Exhibit P-3

for the construction of sanitary sewers in the Township of Union. We have not been paid for the cubic yards of rock and quicksand actually encountered in the performance of the work. The reason as we understand it, being the great variance between the reports to you by the Engineer 10 and the measurement made on the work of the quicksand and rock actually dug.

We consider that we are entitled to an allowance for such work of approximately \$10000.00 (Ten Thousand Dollars) in excess of that allowed according to the reports of the engineer. In addition thereto we were delayed in the progress of our work on several occasions by reason among other things of the engineers failure to give 20 grades, to the end that the steam shovels, for which we were paying Fifty Dollars (\$50.00) per day, were kept idle resulting in a loss to us of approximately Three Thousand Five Hundred Dollars (\$3500.00).

We would greatly appreciate an expression of your attitude towards our contention, in the hope that these matters can be amicably adjusted.

Very truly yours,

30

T. FOSTER CALLAHAN, Inc.
CHARLES A. LAKENS,

Pres.

40

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New Jersey
Court of Errors and Appeals

T. FOSTER CALLAHAN, INC., a corporation,

Plaintiff-Appellant,

vs.

COMMISSIONERS OF SEWERAGE
District No. 1 of the Township of Union in the County of Union, New Jersey,
Defendant-Respondent.

On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

Plaintiff (appellant) on August 19, 1922, entered into a written contract with the defendant, by the terms of which plaintiff was to construct certain sewers in the Township of Union, Union County, New Jersey. It has completed the said sewers agreeably to the terms of said contract. By the terms of the said contract plaintiff was to be paid, in addition to the contract price \$4.00 for each cubic yard of rock and \$5.00 for each cubic yard of quicksand, as described in the said contract, encountered and excavated by plaintiff in the performance of said contract, subject to the decision of one Henry Kreh, Jr., the engineer

named in said contract, relative to the character and amount of such rock and quicksand, and provided that said engineer should, by order in writing, approve plaintiff's bills for such rock and quicksand (Case p. 11, ll. 35 to 40; p. 12, ll. 1 to 40; p. 13, ll. 1 to 15). Under the terms of the said contract, rock excavation included the excavation and removal of all boulders or pieces of rock each of which contained eight cubic feet or more of any hardpan; firmly cemented gravel; rock in ledges; solid rock, or masonry removed from retaining walls or culverts (Case p. 13, l. 20). By stipulation entered into between counsel for plaintiff and defendant below, it was agreed that the amount of rock excavation allowed by the engineer and paid for was 3716 cubic yards; that the claim of the plaintiff was for 6246.7 cubic yards, or a difference of 2530.7 cubic yards, for which payment was demanded; that the amount of quicksand allowed by the engineer and paid for was 213 cubic yards, that the claim of the plaintiff was for 368.3 cubic yards or a difference of 155.3 cubic yards, payment for which was also demanded. This stipulation was read into the record at the trial (Case, p. 15, l. 22). From time to time during the performance of said work by plaintiff, disputes arose between plaintiff and said engineer, as to the amount of the rock and quicksand actually excavated and the compensation therefor to which plaintiff was entitled, which disputes continued intermittently, if not daily, for a period of approximately nine months (Case, p. 25, l. 2); and thereafter, on April 19, 1924, plaintiff commenced suit against defendant in the New Jersey Supreme Court (Case, p. 2) and charged in its complaint (Case, p. 3) that the said engineer in violation of said contract and in plain disregard of his

duty thereunder, wilfully, fraudulently, deliberately, arbitrarily and in bad faith refused to make proper measurement or estimate of the number of cubic yards of rock and quicksand encountered by plaintiff as aforesaid and declined to approve plaintiff's bills for the aforesaid number of cubic yards of rock and quicksand and that he unjustly and in disregard of plaintiff's rights, arbitrarily, and in bad faith, determined upon and recommended payment for a number of yards of rock and quicksand far less than the number actually encountered by plaintiff as aforesaid; and further charged in the second count of its complaint (Case, p. 4) that the defendant through said engineer delayed plaintiff's performance of the said contract in that on several occasions the said engineer failed to give grade for the laying out of the work on the ground; and that by reason of the action of said engineer in refusing to make proper measurements or estimates of the number of cubic yards of rock and quicksand encountered by plaintiff and as a result of his refusal to approve plaintiff's bills for excavating said rock and quicksand, and as a result of the delay caused plaintiff by his failure to give grade as aforesaid, plaintiff had been damaged in the sum of \$20,000.00, demand for which, together with interest and costs, was made in the said complaint (Case, p. 4).

On April 28, 1924, defendant filed its answer (Case, p. 5) and on September 20, 1924, plaintiff filed its reply (Case, p. 7).

The cause being thus at issue was noticed and brought on for trial at the October Term of the New Jersey Supreme Court (Union County) before Daly, J., and a jury, and after the introduc-

tion by plaintiff of testimony in the cause, defendant, through its attorney, moved for non-suit (Case, p. 96). After hearing the argument of counsel for the respective parties, the Court below ruled in favor of defendant (respondent), to which ruling exception was duly taken by plaintiff (Case, p. 110). On October 9, 1925, notice and grounds of appeal were served on defendant's attorney, and filed in the office of the Clerk of the New Jersey Supreme Court on October 13, 1925 (Case, p. 8).

The contract itself is not printed in full in the state of the case, although it was introduced in evidence as Exhibit P-1, it having been stipulated by counsel for the respective parties that the extracts from said contract read into the evidence at the trial below are to be taken and considered as the essential portions of the contract—sufficient, when read with the other evidence, to present to this Court the question of the legality of the Trial Court's ruling; and under the terms of the same stipulations the field book, introduced as Exhibit P-2, has not been printed. These stipulations have been made part of the printed case and will be found at pages 110 and 111.

The portions of the contract which are considered essential are set out in the printed case on page 11, commencing at line 35, and on pages 12, 13 and 14, and the first ten lines of page 15.

The case is now before this court on appeal, where it is desired to test the legality of the ruling of the Trial Court directing a judgment of non-suit against the plaintiff and in favor of the defendant.

ARGUMENT.**I.****The Trial Court erred in directing judgment of non-suit against plaintiff and in favor of defendant below.**

The pertinent provisions of the contract entered into between plaintiff and defendant are as follows:

Wherever the word "engineer" is used, it refers to Henry Kreh, Jr., 208 Broad Street, Elizabeth, New Jersey, or his authorized representative; and wherever the words "consulting engineer" are used they refer to Alexander Potter, 50 Church Street, New York City, *both appointed by the Sewer Commission* (the defendant) *to act for them* in their respective capacities in supervising the work, and in measuring and certifying the amount of work done (Case, p. 11, ll. 35 to 40; p. 12, ll. 5 to 10).

It is expressly understood and agreed, that the work included in this contract shall be done under the supervision and to the entire satisfaction of the engineer mentioned above, and the contractor hereby agrees to accept as final all decisions of the engineer as to the fitness of material furnished or work done, and immediately to replace all work rejected by said engineer (Case, p. 12, ll. 10 to 20).

The engineer shall have the final decision on all matters of dispute involving the character and amount of work, and the

compensation to be made therefor, or any question arising under this contract. He shall have the option of making changes in the line, grade, form, plan, position, dimensions and material of the work hereinafter contemplated, either before or after his construction was begun. Important changes, such as involve a material increase in the cost, shall not be done without the approval of the Commissioners. If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages for anticipation of profits for work dispensed with. If they increase the amount of work, the increase shall be paid for according to the quantity of work actually done, and at the prices established for such work under the contract, except where in the opinion of the engineer the contractor is clearly entitled to extra compensation.

In order to avoid litigation, the contractor has a right to appeal to the consulting engineer on any major matter that may arise in connection with the interpretation of this contract, and the decision of the consulting engineer, after a full hearing of the contractor and engineer shall be final and conclusive (Case, p. 12, ll. 20 to 40; p. 13, ll. 5 to 14).

Rock excavation shall include the excavation and removal of all boulders and pieces of rock each of which contains eight cubic feet or more of any hardpan; firmly cemented gravel; rock in ledges; solid rock or

masonry removed from retaining walls or culverts (Case, p. 13, ll. 18 to 23).

All rock encountered in the trench shall be exposed for measurement. Rock shall be stripped in sections which, unless otherwise permitted, shall not be less than fifty feet in length, and the engineer shall then be notified in order that he may measure the same. Rock excavated or blasted before such measurement is made will not be paid for (Case, p. 13, ll. 30 to 40).

The contract price for rock excavation shall cover the excess cost of all labor and materials required to excavate and remove all rock and boulders greater than eight cubic feet in volume; also firmly cemented gravel and ledge rock, and any other labor and materials as specified under "excavation" (Case, p. 14, ll. 5 to 15).

Where quicksand is encountered in the trenches a separate classification will be made and a distinct unit price bid for this material. Material to be classified as quicksand includes not only quicksand properly so called, but any other semi-fluid material which in the sole judgment of the engineer is equally difficult to handle.

The price bid for quicksand shall cover the excess cost of all labor and material required for excavation, back filling, regrading, removing water, caring for structures and bracings (Case, p. 14, ll. 16 to 27).

Should the said Sewer Commission be prohibited or enjoined with the work by

reason of litigation, or by reason of its inability to procure any right of ways, or should the Sewer Commission for any reason delay the work, or the laying out of the same on the ground, the contractor shall be limited to the exact cost to him of such delay without profit, direct or indirect. He will not withdraw from his contract except by the consent of the Sewer Commission, and the time for the completion of the work is to be extended to such time as in the opinion of the engineer shall make good the loss of such delay, at which time the duration of such allowance or extension shall be certified by the engineer (Case, p. 14, ll. 35 to 40; p. 15, ll. 5 to 12).

The contract on which suit was brought in this case is one entered into between a private corporation as contractor and a quasi-municipal body, and while as a matter of law "a contract is a contract," the contention of plaintiff and the theory on which suit was brought should have been given careful consideration and close scrutiny, to the end that plaintiff might be accorded his "day in court" and thus obtain a jury verdict on the question of fact involved. Plaintiff below contended in the first count of its complaint (Case, p. 3, ll. 18 to 32) that the engineer had abused his authority under the contract in that he had, in plain disregard of his duty thereunder, wilfully, fraudulently, deliberately, arbitrarily and in bad faith refused to make a proper measurement or estimate of the number of cubic yards of rock and quicksand encountered by plaintiff in the performance of the contract. It seems fundamental, and is certainly well settled, that the ac-

tion or conduct of an architect or engineer occupying the position of the engineer in this case, can be assailed on such grounds; and it is no answer to say that the parties by their contract had made him the final arbiter and were therefore bound by his decision, no matter how grossly erroneous or fraudulent or tainted with fraud and bad faith. And yet it would appear from an examination of the record in this case (which will be referred to in more detail subsequently) that that may have been the prevailing "atmosphere" throughout the trial. As a matter of fact, the Trial Court, during the argument on the motion for non-suit referred (though only incidentally) to the dissenting opinion of Magie, J., in *Chism vs. Schipper*, 51 N. J. L. 1; 16 Atl. 316, containing the far-reaching and now rejected doctrine that merely because the parties to such a contract, as that in the instant case, have constituted an architect an umpire or final judge in matters in dispute, his decision can never be attacked by either party, no matter what fraud or bad faith could be shown on the part of such architect. Chief Justice Beasley wrote the controlling opinion in the *Chism case*, and it is respectfully submitted that that decision is the law in this State to this day. If a party to such a contract feels himself aggrieved by the fraudulent action or bad faith of such architect or engineer, he may always question it; and as a matter of mere justice, and even in strict legal contemplation, there is nothing unusual or incomprehensible or mysterious about such a doctrine. The rule that the contractor will not be bound by the decision of an architect, engineer, or other person appointed as umpire by the contract, in case of fraud or mistake so great as to imply bad faith on his part seems to be uni-

versally accepted. A few of the many cases applying the rule are:

Louisville E. & St. L. R. Co. vs. Meyer,
30 L. ed. 689.

Edwards vs. Hartshorn, 1 L. R. A. (N. S.) 1050.

Fletcher vs. New Orleans & N. E. R. Co., 19 Fed. 731.

St. Louis & P. R. Co. vs. Kerr, 48 Ill. App. 496.

Baltimore, O. & C. R. Co. vs. Scholes,
14 Ind. App. 524; 56 Am. St. Rep.
307; 43 N. E. 156.

Crauford vs. Wolf, 29 Iowa 567.

Moran vs. Schmitt, 109 Mich. 282; 67 N. W. 323.

Dinsmore vs. Livingston County, 60 Mo. 241.

Chism vs. Schipper, 51 N. J. L. 1; 16 Atl. 316; 2 L. R. A. 544; 14 Am. St. Rep. 668.

Dorwin vs. Westbrook, 86 Hun 363; 33 N. Y. Supp. 449.

This is also shown to be the rule, and various applications of it are made in *Page on Contracts*, vol. 3, sec. 1467.

Of course, the difficult point to determine is, naturally, what constitutes fraud, or such mistake as to imply bad faith. Some of the authorities adopt the rule that fraud, gross mistake, or failure to exercise an honest judgment in his estimate or award will not be binding.

See See:

Martinsburg & P. R. Co. vs. March,
114 U. S. 549; 29 L. ed. 255; 5 Sup.
Ct. Rep. 1035.

Chicago, S. F. & C. R. Co. vs. Price,
138 U. S. 185; 34 L. ed. 917; 11 Sup.
Ct. Rep. 290.

McCoy vs. Able, 131 Ind. 417; 30 N. E.
528; 31 N. E. 453.

Baltimore, O. & C. R. Co. vs. Scholes,
14 Ind. App. 524; 56 Am. St. Rep.
307; 43 N. E. 156.

Norfolk & W. R. Co. vs. Mills, 91 Va.
613; 22 S. E. 556.

In the argument on the motion for non-suit, counsel for the defendant advanced as one of his "points" the contention that the complaint in this case practically accused the engineer with what "is virtually a crime," and that plaintiff must prove his case by more than a preponderance of the evidence. Assuming for the purpose of argument that the complaint charges a crime, or "virtually a crime" (which is certainly not admitted), plaintiff was not required to go further than to make out its case by a fair preponderance of the evidence. It has been expressly so held in *Blackmore vs. Ellis*, 70 N. J. L. 264; 57 Atl. 1047, citing *Kane vs. Hibernian Ins. Co.*, 39 N. J. L. 697 and numerous other cases.

And while this theory was not depended upon by the Trial Court in its ruling, it was one of counsel's points, and is properly a part of the record. It is not "argument of counsel"—the incorporation of which in the record is prohibited by the Practice Act and Supreme Court Rules; and it is considered permissible to advert to it here as bearing on the possible influence it may have had upon the final decision (Case, p. 97, ll. 29 to 39).

Nor was it necessary to impute moral turpitude to the engineer. The rule of law is that even when the engineer acts strictly within the scope of his authority (the contract and terms of agreement), fraud, or mistake so gross as to amount to fraud, or necessarily to imply bad faith, will vitiate the estimate and set aside his decision.

Mills vs. Norfolk & W. R. Co., 90 Va. 523; 19 S. E. 171; 91 Va. 613; 22 S. E. 556.

In the last cited case, Keith, president, Supreme Court of Appeals of Virginia, in concurring with Cardwell, J., who wrote the controlling opinion, said, *inter alia*:

I do not understand that it was necessary to impute moral turpitude to the plaintiff-in-error, its officers or agents, but the construction of this contract claimed by the plaintiff-in-error seems to me to be flagrantly and obviously erroneous and unjust.

A jury may infer fraud from the circumstances attending a transaction, without any direct or positive proof.

Cole vs. Taylor, 22 N. J. L. 59.

It is a question of fact, and one which is "peculiarly within the province of the jury."

Chism vs. Schipper, 51 N. J. L. 1; 16 Atl. 316.

Though fraud is not presumed and must be proved, it may be deduced from circumstances and conditions which afford strong presumption of its existence.

Buchanan vs. Buchanan, 73 N. J. Eq. 544; 68 Atl. 780; *reversed on other grounds*, 75 N. J. Eq. 274; 71 Atl. 745.

In *Berkowitz v. Lyons*, 98 N. J. L. 198, at page 301 (a case involving somewhat different facts), Minturn J., who delivered the opinion of the Court, said, among other things:

Want of ownership of a chattel and actual misrepresentation of fact are not the sole basis of actionable fraud, since the deceit and fraud practiced can as well effectuate its baneful purpose by conduct as it can by words. *Acta exteriora indicant interiora secreta.*

And further says, at page 202:

It (the basis of fraud) may consist in the creation of a false impression by words or acts, or by any trick or device, a deep laid scheme of swindling, or a direct falsehood, a combined effort of a number of associates, or the sole effort of a solitary individual.

Citing:

12 R. C. L., p. 232.

The learned Justice further says:

An issue of that nature necessarily involves the determination of a question of fact, and its solution is peculiarly for the jury.

Citing:

Cole vs. Taylor, 22 N. J. L. 59.

Crosby vs. Wells, 73 N. J. L. 790.

Bingham vs. Fish, 86 N. J. L. 316.

In the case of *Crosby vs. Wells*, 73 N. J. L. 790, at page 807, the Court says:

Fraud is complex, involving a mental state as well as an open act. The mental state, in turn, has usually at least three elements—knowledge, intent and design. Knowledge is the receiving of an impression—the state of being aware (*Wigm. Evid.*, secs. 244, 245, 300); intent is the state of mind which precedes or accompanies an act—volition (*Id.* secs. 242, 300); and design is the conceived plan or system by which the intent is to be carried out or attained (*Id.* secs. 237, 300). As this mental state can in itself be neither seen nor handled, the existence of its elements must be shown by acts of the person charged or occurrences in which he has borne some part.

That is the way in which, it is respectfully submitted, plaintiff in the instant case made out its *prima facie* case.

Fraud may be proved by circumstantial evidence.

12 R. C. L., p. 440, sec. 185.

Indeed, from its nature, it is difficult to prove it by direct evidence, and it is seldom that it can be so proved. Hence, it is more often shown by circumstances than in any other way. It is impossible, however, to enumerate the facts from which it may be inferred. Each case must depend on its own facts, and all the facts and circumstances connected with and surrounding the transaction are to be considered

together in determining whether it was fraudulent.

12 R. C. L., pp. 440, 441; sec. 185.

Whether or not there has been fraud in any given case is generally a question of fact.

12 R. C. L., p. 444; sec. 188.

Citing:

Roberts vs. James, 83 N. J. L. 492; 84 Atl. 244; Ann. Cas. 1914-B, 859.

An enlightening case in this State is that of *Cox vs. Drake, et al.*, 46 N. J. L. 167—a case evidently tried in the lower court without a jury. That case was taken to the Court of Errors and Appeals on writ of error. The Court, in the course of its opinion says, at page 168:

The only matters open for review on writ of error are questions of law. Whether the transaction by which the acknowledgment of satisfaction was obtained was fraudulent is a question of fact, subject, however, to this only, that whether there was any evidence of fraud is a question of law. This, therefore, is the sole inquiry upon which we can legally enter. Although the evidence of fraud may have been slight, although the weight of the evidence may have been the other way, still the decision of the tribunal whose province it was to pass upon the evidence with regard to the *fact* of fraud is not subject to our review.

Citing:

Cole vs. Taylor, 22 N. J. L. 59.

In other words, the true doctrine in this state seems to be this: What constitutes fraud is a question of fact, and therefore, for the jury. Whether there is any legal evidence of fraud is a question of law, and for the Court.

The motion for non-suit below required the Trial Court to pass upon the legal question of whether there was any legal evidence of fraud. That question was determined adversely to plaintiff (appellant). It is submitted that this ruling was erroneous, and that there was sufficient evidence produced by plaintiff to require defendant to proceed to its defense.

The issue is thus clearly raised; and that is the sole point involved on this appeal.

Was there any legal evidence of the fraud charged by plaintiff? It seems unavoidable that reference will have to be made to the testimony in some detail, though every effort will be made to curtail quotations and to set out the testimony synoptically, eliminating much of it altogether.

CHARLES A. LAKENS, a witness for plaintiff, testified that he was a graduate civil engineer, and president of plaintiff company; that he supervised the work performed by plaintiff, and that the work required approximately nine working months to complete; that hardpan was encountered in the excavation work; that hardpan is a dense boulder-clay substance that is found, usually, under a layer of soil in the ground (Case, pp. 16 and 17); that he was "on the job" every day and knew from actual measurements taken by him how many cubic yards of rock, within the meaning of that term as used in the contract, had been made by plaintiff; that the total rock excavation

was 6246.7 cubic yards (Case, p. 18); that he had a conversation with Mr. Kreh, the engineer in charge of the work (Case, p. 19); that plaintiff was digging and ran into an extremely hard substance in excavation; that he asked Mr. Kreh what he was going to do in reference to payment on rock; that Mr. Kreh said he was going to do absolutely nothing concerning payment for rock; that he could not pay for hardpan as rock; that the Commissioners would not allow it; that witness "put up the plea" that he wanted to be paid not for "ledge rock" but for "hardpan"; that Mr. Kreh said there was no classification in the specifications for hardpan; that witness assured him there was and offered to go to said Kreh's office after work stopped at 4:30 and *show him the clause in the contract* that provided for the payment of hardpan; that Mr. Kreh said, "Well, if it is hardpan, I suppose we will have to pay you for hardpan, but *there is no hardpan in the contract*" (Case, p. 19, and lines 5 to 10 at top of page 20). That witness, in accordance with this arrangement, went to Mr. Kreh's office; that Mr. Kreh had a set of specifications in the file and produced them; that witness looked over the contract and showed Kreh that there was a clause in the contract that plaintiff was to be paid for hardpan; that Mr. Kreh then acknowledged the specifications but said he would not pass any decision on it, but that he would call Mr. Potter, the consulting engineer; that Mr. Potter came out from New York and spent quite some time "on the job"; looked over the material and in instances got down in the ditch with a pick and tested the material; that after going through this Mr. Potter said it undoubtedly was hardpan and that plaintiff was to be paid for it on the

basis of hardpan (Case, p. 20). That a special meeting of the Sewerage Commissioners was called; that Mr. Kreh, Mr. Potter and the witness were present at that meeting; that Mr. Potter, the consulting engineer, explained to the Commissioners that plaintiff was to be paid not only for rock and ledge rock, but also for hardpan; that Mr. Potter told them it was a case of its being in the contract and "they must pay it cheerfully, because there was no question about its being there; that if they did not pay it cheerfully, plaintiff had 'other redress,'" and that there was no doubt that plaintiff could collect it (Case, pp. 20 and 21); that each and every month thereafter the Sewerage Commission would "squabble and quarrel about this hardpan"; they were satisfied to pay for rock but they were not satisfied to pay for hardpan (Case, p. 20, l. 20); that nobody, whether the witness, Mr. Kreh or Mr. Potter, "seemed able to define this thing" and make the Township Committee understand that hardpan was to be paid for as rock, and that they constantly "throughout the job, bore down and brought pressure to bear on the engineers on the job to keep cutting this down"; that witness thought one reason for this was that the Commissioners were very much afraid that the contract was going to run over their appropriation; that witness was sure they had appropriated a hundred thousand dollars; that they had floated a bond issue and that if the hardpan was to be paid for throughout "the job there, it would undoubtedly amount to a great deal in 25,000 cubic yards of excavation" (Case, p. 21, ll. 20 to 25); that they would run over their appropriation and were very much afraid of this, because "Mr. Kreh on numerous occasions asked me, and I believe asked

other people and spoke to other people, about whether or not the job was going to run over their appropriation" (Case, bot. p. 21); that the purpose of the witness in going to Mr. Kreh's office was to point out to him that hardpan actually was mentioned in the specifications and in the contract (Case, top. p. 22); that he pointed out the section which defined rock (Case, p. 22, l. 28); that when the section was called to the attention of Mr. Kreh he said "he was not going to pay for this hardpan" (Case, p. 23, l. 30); that Kreh said, "Well, if the town had to pay for all that material as hardpan, it would break the town" (Case, p. 23, ll. 34 to 40); that the witness said in reply to this remark "that it didn't make any difference to him about breaking the contractor, just so he didn't break the township" (Case, p. 24, ll. 5 to 8). That on the whole job about thirty-eight to forty thousand lineal feet of excavation had been made; that its average depth was eight feet (Case, p. 24, ll. 15 to 25); that that made approximately twenty-two to twenty-five thousand cubic yards of earth excavated "under the entire contract" (Case, p. 24, l. 30). That witness had conversations with Mr. Kreh concerning the extras for rock and quicksand (Case, bot. p. 24) and that these disputes and "arguments" ensued almost every time "we saw each other" (Case, bot. p. 24) and continued, "sometimes for a short time each day," and "then again I would not see him for two or three days unless I went to the office to see him" (Case, top p. 25). That Mr. Kreh spent not over three hours a week on the "job there" (Case, p. 25, l. 15); that that was allowing approximately a half hour a day; that after the time witness went to Mr. Kreh's office and pointed out the clause

in the contract and specifications concerning hardpan, Mr. Kreh would, each time "he came on the job," argue about how much hardpan was there; that there were many instances in which he said there was absolutely none, "and we had measured, the township inspector and myself, had said that there was" (Case, p. 35, l. 30); that the name of the township inspector was E. C. Catley; that Mr. Kreh would argue with the witness on almost every occasion, and on numerous occasions with the inspector (Case, p. 25, l. 40 and p. 26, l. 5). That it "was a natural thing in the course of events when Mr. Kreh came on the job and we were digging this hardpan, for me to inquire how much hardpan Mr. Kreh was allowing us in those particular ditches; with Mr. Catley and myself having been on the job practically nine hours each day watching the shovels perform and seeing what they were able to do and what they could not do, we were in a good position to see just what kind of hardpan were in these ditches, and we had agreed on figures"—"I had made my notes and Mr. Catley had made whatever notes he had to make; Mr. Kreh invariably wanted two or three feet, or four feet, five feet. In instances Mr. Kreh would say, 'No, he couldn't allow any of them.' And there were, I believe, five or six different occasions where Mr. Kreh said we had absolutely no hardpan, when I appealed to the consulting engineer—asked Mr. Kreh to have Mr. Potter come out. Mr. Potter on, I believe, five or six occasions, did come out. I know he did come out, but I am not positive just how many times, but I will say that on each and every instance that Mr. Potter was called in in consultation, after going over the trench work thoroughly, watching the machines

work in the material, and getting down into the ditch and testing it with a pick himself—he did it in every instance—that what we asked for in hardpan was not excessive and instructed Mr. Kreh and Mr. Catley, the inspector, on those occasions, to allow us just what we had asked for. There were cases where there were five or six feet; one place on Liberty Avenue, there were eight feet, Mr. Kreh was going to allow us absolutely nothing for; Mr. Potter came out and after thoroughly going over the thing and substantiating our argument said there was no question about it being hardpan and that it had to be paid for as hardpan” (Case, p. 26, ll. 5 to 40; p. 27, ll. 5 to 13). That there were several times when witness “ran into exceptionally hard digging” and that he called Mr. Kreh and asked him to come up and look at the work; that Mr. Kreh came but made no measurements (Case, p. 27, ll. 18 to 40). That the purpose in calling Kreh was “as I saw the matter, it was a kind of interpreting the material from day to day, and I didn’t want Mr. Kreh not to see it. I was confident that the material was there and I asked Mr. Kreh on all these occasions to come up and actually see it” (Case, p. 28, ll. 5 to 12); that Mr. Kreh did come on almost every occasion; that when he got there the shovels were in operation “trying to excavate this material” (Case, p. 28); that when Mr. Kreh would “come up there” and these repeated discussions would take place, the rock or quicksand was in the trench “that we were trying to excavate.” In most every instance “up there, there was a layer of clay or soil at the depth of about two feet and a half, and from there on down was all this hard, red clay, gravel and boulders, with the exception of a few streets” (Case, p. 29, ll. 5 to 12); “that

when Mr. Kreh would have these discussions or arguments concerning the amount of the rock or quicksand excavated, the rock in many instances had been already excavated. Of course, up to the point where the shovel was, it was excavated" (Case, p. 29, ll. 12 to 20); that discussions would always arise concerning the amount of rock or quicksand which had been already excavated. "Mr. Kreh would just simply say that he could not see any rock or any quicksand; that there was no rock or hardpan there, in his judgment (Case, p. 29, ll. 20 to 28). That the trenches were closed up as rapidly as witness could close them; so that it was true that discussions would arise concerning rock excavation in some parts of the trenches that had already been refilled"; that "you cannot tell exactly whether or not material is hardpan after it has been excavated and exposed to the air" (Case, bot. p. 29), because "after hardpan is cast on the bank or on the side and is taken out of its original place and the air strikes it, it dries, it decomposes; and, with the exception of the stone, it practically goes to pieces in a lot of instances" (Case, p. 30, ll. 5 to 12). That it took approximately ninety working days to complete the contract; that the reason for this was "this hard material we were excavating; that were it not for this, it would take 160 shovel days"; that there were two shovels "on the job" most all of the time, and sometimes three; that they used more than one shovel in an attempt to complete the contract in the specified time (Case, pp. 30 and 31); that the shovels used were in good condition, one "brand new" and the other two—"I believe at the time one was practically a year old and the other eight months old." "At the time we got them on the job, the oldest shovel,

I think was a year or a year and a half old" (Case, p. 31, bot. 10 lines). That the shovels were in very good condition, that they were operated by very competent engineers; that they were operated by stationary engineers; that said engineers were competent and that they had worked for witness in other towns; that witness knew the men and knew what they could do; that these men were paid by Mr. Lawrence; the man from whom the said shovels were hired (Case, p. 32, ll. 5 to 25). Witness had "a lot of trouble" with the shovels, due to the hard excavation (Case, p. 32, l. 30). That plaintiff broke 42 cables on the job (Case, p. 33, l. 7). That plaintiff was required to replace and pay for certain buckets which were also broken in said excavation work. That plaintiff paid said Lawrence \$23,140 odd dollars for rent of the plant and the operators engaged in said excavation work; that counting fuel and the extra labor around the shovel cost \$27,000, or "shovel excavation" (Case, p. 33, l. 40; p. 34, ll. 5 to 10). That in addition to being delayed by bad weather plaintiff was not allowed to work due to Mr. Kreh's order; "we worked along until about the middle of January and then Mr. Kreh came up and said that we had better shut down the job; it was winter weather and we did not want the job to go on during the winter. We agreed to shut down during the winter months, and the first week in March the weather was very good; it was clear, and it was warmer and there was no reason why we could not go to work. We had this contract with Mr. Lawrence that in order to hold the machines we had to go to work, and if we did not pay him—to have his shovels around on the job in the good weather and not working—in order to hold these shovels we had

to either pay for them or release them entirely. We took the shovels on and started out to work. Mr. Kreh came up, or some member of the township committee saw the shovels out in the road ready to go to work, got very excited, went down to Mr. Kreh and told him they did not want us to work; that the streets, due to the spring thaw, were not in very good condition. Those streets were unpaved streets and unimproved streets. He said that if we were to dig up any more that it would make them impassable and that they could not get traffic through, and therefore they would not allow us any way to open up any more trenches until the streets dried out (Case, p. 35, ll. 5 to 38). That in a certain particular instance plaintiff was ready to go to work with three shovels on the 8th day of March; that Mr. Kreh ordered plaintiff not to go to work; that was from the 8th of March until the 20th of March; there was one shovel idle; that that was 12 days as to that shovel; "then the other shovel was from March 8th until April 10th before we could go to work; then he went into Carnegie Place to go to work" (Case, p. 37, ll. 5-20). Then there was another time from April 24 to April 29 that "we stood at the intersection of Burnett Street and Vauxhall Road—Mr. Kreh would not allow us to open up the intersection" (Case, p. 37, l. 30).

It is respectfully submitted that the cross-examination of this witness will show that the testimony given by him on direct-examination was in no way impugned.

If, upon the conclusion of witness's direct-examination any question remained concerning the sufficiency of plaintiff's case regarding its claim for quicksand, then, it is respectfully submitted

that witness's cross-examination on the matter of quicksand conclusively disposed of that question (Case, p. 43, ll. 25 to 40; p. 44, ll. 1 to 40; p. 45, ll. 1 to 15).

Practically all of the above extracted testimony was corroborated by Eardley C. Catley and George W. Lawrence, who were called as witnesses by plaintiff.

In addition, Henry Kreh, the engineer named as umpire in the contract referred to, was also called by plaintiff as a witness. He testified that the specifications for the work were prepared by Mr. Alexander Potter; that he was township engineer for the Township of Union; that he estimated the approximate cost of the sewer in question and that he was to be paid for his services at the rate of five per cent of all money expended by the Township in work of the character in question. That if the sewer cost \$100,000 he would receive \$5,000 compensation; that a year before the sewer was actually contracted for he made a survey for the district referred to; "this Vauxhall district, making certain written recommendations as to how it could be sewered, and the outlay; the way it might be obtained and approximately what the sewer would cost" (Case, bot. p. 93; top p. 94); that he was picked out of "two or three other engineers" for that special purpose; that there was a difference between his actual estimates of quicksand and rock and the reports turned in by Mr. Catley, the inspector for the township (Case, bot. p. 95); that the difference between said Kreh's certified amounts and said Catley's reports amounted to 904 yards of rock.

This is in substance the testimony which was produced by plaintiff, and it is respectfully submitted that it makes out a *prima facie* case.

In the case of *Cox v. Drake, et al.*, 46 N. J. L. p. 167, referred to above, the testimony adduced at the trial was summed up by the Appellate Court in this manner:

This testimony furnished legal evidence of fraud. If it be true, Cox falsely represented to Aaron the negotiations which had transpired between himself and Abram, and the statement which the latter had made concerning Aaron's interest in the claim. By these means he wrought upon Aaron's fears, and misled his judgment until he secured a compromise on better terms than those he had shortly before offered to Abrams.

Can it be said that if the production of such slight proof constituted legal evidence of fraud, and that the finding by the Court (sitting as a jury) of the fact of fraud, based on such evidence, would not be disturbed, that in the case at bar the mass of evidence introduced constituted no legal evidence of fraud, and that plaintiff below was not entitled to a decision on the question of whether fraud and bad faith had in fact been shown?

And it should be recognized that the motion for non-suit was based on the alleged failure of plaintiff below to make out a *prima facie* case. What evidence, favorable to plaintiff, might have been developed on cross-examination of defendant's witnesses (if any), had it been compelled to proceed to its defense, is, of course, impos-

sible to say, but it is manifest that this is the class of case where much might and probably would be developed on cross-examination. Plaintiff did, in fact, call as its own witness, the very person (the engineer) against whom its accusations were made, and succeeded in developing on direct-examination, considerable evidence favorable to plaintiff, as will appear from a reference to his testimony (Case, pp. 92 to 96) and the extract of it given above. Yet defendant as to this witness made no effort to conduct a cross-examination, which is indeed significant, when the latitude allowed in the way of leading questions and the other privileges of cross-examination are kept in mind.

If this case had been allowed to go to the jury, either party might have advanced a motion for a new trial, on the ground that the verdict was against the weight of the evidence, and reserved the right of appeal; but as the case stands, plaintiff is confined to its contention that there was error in the judgment of non-suit—which, in a case so difficult to prove, and yet which, it is submitted, was so abundantly made out, seems to work an unusual and particularly severe hardship on plaintiff.

However, whether or not the last thought advanced is entirely proper and relative, it is at least advanced in sincerity. It appears to counsel that this is an unusual case; that plaintiff had a particularly difficult task imposed upon it; that a *prima facie* case was nevertheless made out, and that the case should have been allowed to go to the jury.

The ruling of the Trial Court on the motion for non-suit will be found at pages 98 to 110, inclusive. It is submitted that an examination of the reasons for the judgment, as given by the Trial Court, will indicate that it assumed as fact matters which were not only in dispute by the pleadings themselves, but the dispute of which, between the parties, constituted the whole reason for the action.

A trial judge may not assume as a fact that which is disputed, and by his charge *or otherwise* withdraw any such matter from the consideration of the jurors, thus affecting their determination.

Crosby vs. Wells, *supra* (at p. 811) citing numerous New Jersey cases.

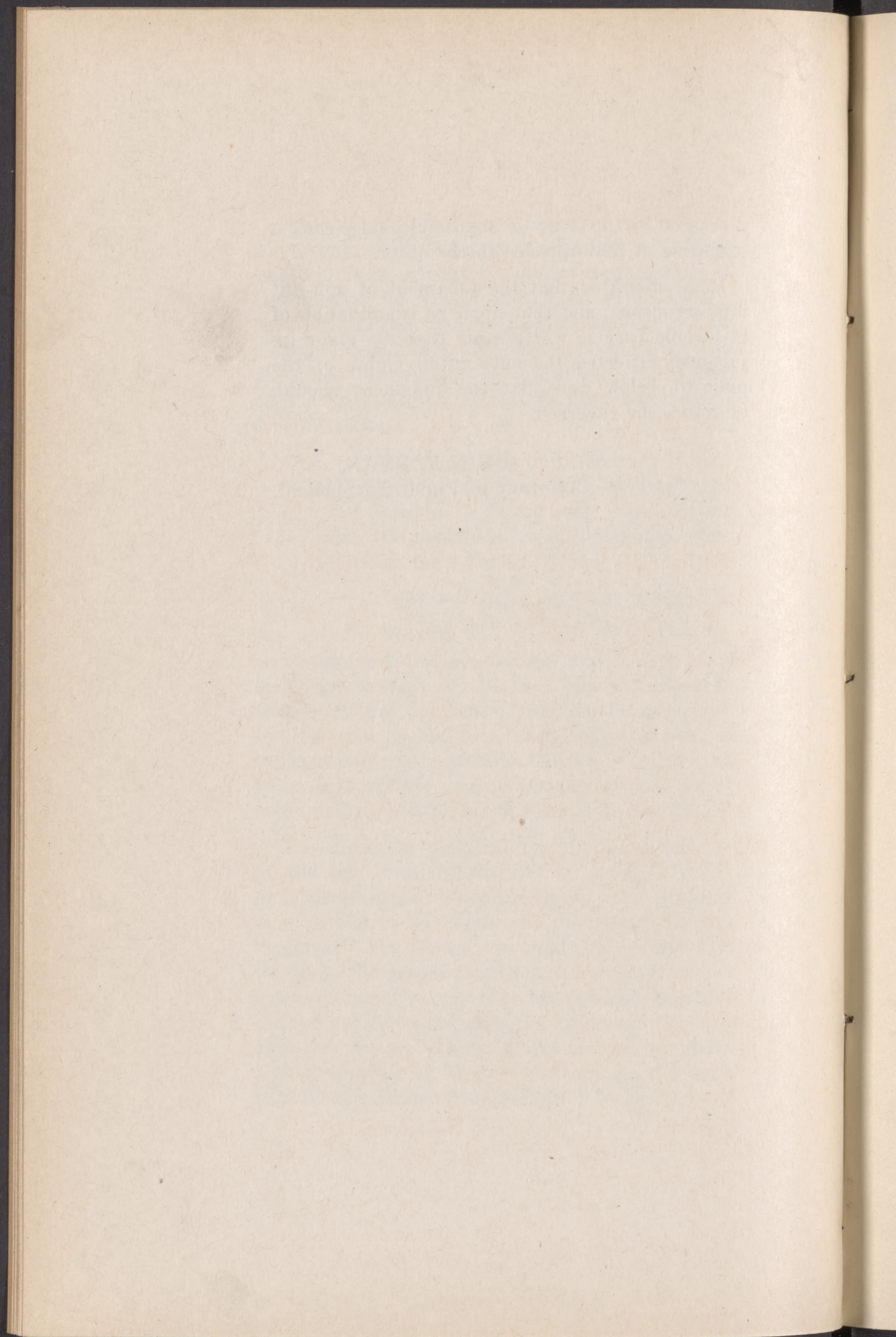
At page 104, line 40, and 105, line 5, the Court said that in view of the fact that the engineer was to get five per cent of the amount expended by the commissioners as his compensation, it could be ably argued that he "padded this amount so as to make his amount larger, and one argument, to my mind, is just as baseless as the other."

It would seem plaintiff was penalized because he did not bring accusations of several frauds or a whole series of frauds against the engineer in question. No doubt if the engineer had "padded" his report, the plaintiff in the suit would be the present defendant. At any rate, it seems illogical to say that because the engineer did not practice a fraud on the Sewerage Commission, he was not guilty of fraud against plaintiffs in the suit at bar, for the very good reason that the simultaneous perpetration of both frauds

discussed by the Court is impossible, since each is exclusive of and opposed to the other.

It is submitted that the judgment of non-suit was erroneous, and that upon an examination of the whole case it will appear that the error injuriously affected the substantial rights of the plaintiff below and that the judgment should, therefore, be reversed.

JOHN F. RYAN,
Attorney of Plaintiff-Appellant.



New Jersey Court of Errors and Appeals

T. FOSTER CALLAHAN, INC., a corporation,

Plaintiff-Appellant,

vs.

COMMISSIONERS OF SEWERAGE DISTRICT NO. 1 OF THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION, NEW JERSEY,

Defendant-Respondent.

On Appeal.

BRIEF OF DEFENDANT-RESPONDENT.

Under a written contract plaintiff constructed for defendant a sewer, the work being divided into two portions territorially, and one portion was finished and paid for some months before the completion of the other portion. At the end of each month plaintiff was paid in accordance with estimates by the engineer as to the amount of work done at such time and upon the completion of each of the two portions a final bill or, as it is called, an estimate, was made up and agreed to and check was given.

Plaintiff sued, claiming in the First Count of the declaration that more rock had been excavated and more quicksand encountered than had been allowed on final settlement, and in the Second Count that it had suffered damage because the engineer had delayed the work by failure to indicate the manner of doing the same or, as it is technically called, to give grades, in certain instances.

On motion of defendant a non-suit was allowed as to each count and the plaintiff now appeals from such decision.

We contend that the granting of a non-suit was proper for the following reasons:

As to First Count of Complaint.

1. The consulting engineer, Mr. Potter, by the terms of the contract, was made the judge in any dispute concerning any major matter that might arise in connection with the interpretation of the contract (Case, p. 13, l. 8) and thus was the one to decide disputes as to measurements of rock and quicksand. He was consulted and gave directions to the engineer as to what material, within the meaning of the contract, should be counted as rock (Case, p. 20, l. 21, *et seq.*) showing that both parties considered him as the final arbiter in such matters. There is no evidence that the engineer, Mr. Kreh, then or at any time thereafter, failed to measure either rock or quicksand in accordance with the interpretation of the contract by Mr. Potter, and the latter was not appealed to by the plaintiff in regard to the measurements of rock or quicksand to which the complaint is directed.

2. If the above is not correct, then the decision as to measurements lay with Mr. Kreh, the engineer (Case, p. 12, l. 20, *et seq.*).

The complaint correctly conceives the law concerning the duties and powers of an engineer and charges fraud in very strong language, stating that the engineer "wilfully, fraudulently, deliberately, arbitrarily and in bad faith refused to make a proper measurement or estimate" (Case, p. 3, l. 20). But no fraud whatever is shown or attempted to be shown—the only argument being that because a mere inspector, working under the engineer and having no duty except to watch the work and report to him, differed slightly with the engineer's estimates and that, as the en-

gineer had made an estimate of the total cost of the sewer, he must have acted fraudulently in order to make the cost agree with his estimate and thus save his reputation. Fraud cannot be proven in any such manner. The argument would be absurd on its face even if it did not ignore first the fact that the sewer cost less than the estimate (Case, pp. 93 and 96) and secondly the fact that, as the engineer received five per cent. of the cost as his compensation, the temptation, if he were dishonest, would be to defraud the defendant, not the plaintiff.

The law of this State is fully settled to the effect that, when by a contract for work the engineer mentioned therein is made the arbiter as to certain matters, his decision is final, unless he is shown to have acted fraudulently. The leading case is *Chism v. Schipper*, the language of which in regard to arbiters and to such engineers is as follows:

“The awards authorized by them will, for all useful purposes, be in truth finalities; they cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons; such awards can be vitiated by fraud alone, and which must be proved to the satisfaction of a jury under a watchful, judicial supervision.”

Chism v. Schipper (by Beasley, C. J.), 51 N. J. L., p. 1 at p. 17.

To the same effect are:

Welch v. Hubschmitt, 61 N. J. L., p. 57;

Lanstra v. Bunn, 81 N. J. L., p. 680.

The rule is also given in 9 Cyc., page 701.

It is also found in R. C. L.

“There is another class of cases where the article sold or the work to be done or

performed is to be subject to the approval of, or to be satisfactory to, some third person, and in many instances that person is the agent or employee of one or the other of the parties to the contract. In cases of this character the approval of the party so designated becomes a condition precedent to a recovery for the price. In the absence of fraud or bad faith in the conduct of such party, in respect of the fact of his approval or the withholding it, his judgment or determination is to be accepted as final and conclusive. No mere error or mistake of judgment will vitiate his determination. The very object of his appointment is to prevent and exclude contention and litigation; and hence nothing short of fraud or *mala fides* in the exercise of his power to reject or approve the article contracted for, will dispense with the strict legal effect of the condition precedent."

6 R. C. L. Title—Contracts—par. 335, page 956.

The only grounds on which the decision of the engineer can be impeached are fraud, a failure to exercise an honest judgment and such gross mistake as implies bad faith.

"Therefore, if the architect or engineer fails to exercise his honest judgment or makes such gross mistake as imply bad faith, his decision, report, certificate or opinion may be impeached."

(Citing *Chism v. Schipper, supra.*)

and again

"The decision of an architect or engineer is to be treated precisely like an award under a submission to arbitration; it cannot be impeached for mistake arising from an error of judgment on the part of the architect or engineer. Nor can the decision be impeached for error in drawing conclusions from evidence and observation. To avoid it, the mistake must be one which shows that

he was misled and so far misapprehended the case that he failed to exercise his judgment upon it, as where he is imposed upon by false measures or false weights or there is obvious error in figures."

6 R. C. L.—Title—Contracts—Section 341.

It is interesting to note that even Mr. Lakens, the president of the corporation plaintiff, is unwilling to charge Mr. Kreh with fraud (Case, pp. 44 and 51).

3. Plaintiff is estopped by its receipts in full to press its present claim.

"To treat receipts merely as evidence of the payment of so much money as is acknowledged to have been received in them is to leave the party who has taken them to be called to account in the same manner as one who had taken a receipt for the same sums, expressly to apply on account, and is, in effect, to deprive the former of all benefit he has attempted to derive from a receipt in full."

and again:

"The receipt, however, remains evidence of the facts stated in it until those facts be clearly disproved, and a mistake or fraud shown, and when executed with a knowledge of all the circumstances, and without mistake or surprise on one part or fraud or imposition on the other, is a good defense to a claim."

Both above citations from 21 R. C. L. Title—Payment—Section 136.

The rule should be applied more stringently in the present case than is usual for the following reasons:

1. Because the monthly bills and final bills, called in the testimony "estimates," were not only signed but sworn to, each by an officer of the plaintiff corporation (Case, p. 56).

2. Because the final bills or estimates were retained by plaintiff a full week before signing (Case, pp. 54 and 58).

3. Because a slight error of calculation was found in one of the bills, showing that plaintiff had read them carefully, and this was corrected (Case, pp. 54 and 56).

4. Because after receiving its final check plaintiff waited two months before making claim of error (Case, p. 59).

As to Second Count of Complaint.

1. This count charges specifically that the defendant delayed work through the failure of the engineer to give grades. There is no evidence that he did so fail. The only testimony in this regard is the hearsay testimony of the witness Lawrence (Case, p. 91) and the witness Lakens does not mention the matter at all.

2. Even if the engineer had failed to give grades, unless he did so fraudulently, this count would not lie, as the engineer had general supervision of the work and it was his duty to see to it that the same was done in a good and workmanlike manner. He had a right to direct that the contractor should not continue to dig and leave open many miles of trenches, to the great hazard of the public and that it should proceed to fill at any given time before proceeding with further excavation. Indeed the contract, itself, provides that the work shall be done under his supervision and to his entire satisfaction (Case, p. 12, l. 14).

3. Even if the engineer had failed fraudulently to give grades, the redress of the plaintiff would have been to have reported to the other contracting party.

4. An attempt was made at the trial to explain the delay, not by proof of a failure to give grades, but because of an arbitrary order by the defendant to cease work. This claim is not at all within the charge of the complaint but, even if it were, the evidence would be valueless. The only testimony in this regard is the hearsay testimony of the witness Lakens (Case, pp. 36 and 42). Even if there were evidence that a member of the Township Committee or of the Sewerage Commission had ordered cessation of work, this could not be construed as the act of the corporation, defendant-respondent.

5. The contract provides for damages caused by delay and declares that no claim shall be made in this regard except after the issuance of a certificate by the engineer (Case, p. 14).

6. The giving of a final receipt bars plaintiff's claim and especially so in view of the following facts:

1. The receipted bills were sworn to (Case, p. 56).

2. Plaintiff held the final bill a week for inspection (Case, pp. 54 and 58).

3. When receiving final payment, plaintiff made no claim of delay caused by failure to give grades or by anything else (Case, p. 57).

4. After receiving final check plaintiff waited two months before claiming error.

Respectfully submitted,

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Attorney for and of Counsel
with Defendant-Respondent.

