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Notice of Appeal.

(Filed April 29, 1927.)

New Jersey Supreme Court

HUDSON COUNTY.

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THE MAYOR AND ALDERMEN OF JERSEY CITY,
Plaintiff,

v.

J. RUFUS BESSON, Receiver of
Thomas Harrington's Sons
Company and National Surety
Company, a corporation,
Defendants.

Action at Law.

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To Thomas J. Brogan, Attorney of Plaintiff, or
to whom it may concern:

SIR:

Please take notice that the defendants in the
above entitled cause appeal to the Court of Errors
and Appeals in the last resort in all causes in New
Jersey from the whole of the judgment entered in
this cause.

30

Respectfully yours,

MARSHALL VAN WINKLE,
Attorney of J. Rufus Besson,
Receiver of Thomas Har-
rington's Sons Company.

FISK & FISK,
Attorneys of National Surety Company.

40

February 14, 1927.

Grounds of Appeal.

Service of the within notice of appeal acknowledged.

THOMAS J. BROGAN,
Attorney for Plaintiff.

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Grounds of Appeal.

(Filed April 29, 1927.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Plaintiff-Appellee,

v.

J. RUFUS BESSON, Receiver of
Thomas Harrington's Sons
Company and National Surety
Company,
Defendants-Appellants,

Action at Law.
On Appeal
from Supreme
Court.

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The defendants-appellants by their respective attorneys Marshall Van Winkle, attorney for J. Rufus Besson, Receiver of Thomas Harrington's Sons Company, and Fisk & Fisk, attorneys for National Surety Company state the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above stated cause.

1. The Court erred in admitting in evidence against the objection and exception of defendants-appellants Exhibit P-13, being record of the amount of wagons, teams, men, lifters, foremen alleged to have been employed by the plaintiff-ap-

Grounds of Appeal.

pellee for the removal of ashes and garbage from January 30, 1920, to March 10, 1920.

2. The Court erred in permitting the witness Richard Furey against the objection and exception of defendants-appellants to answer the following question:

"Q. This work done and the payments made as shown on Exhibit P-13, by the city between January 30, 1920, and March 10th, 1920, can you tell us whether or not those payments were made by the city with reference to the removal of ashes and garbage in Jersey City?"

3. The Court erred in admitting in evidence against the objection and exception of defendants-appellants Exhibit P-23 being warrants showing payments from January 29, 1920, to March 10, 1920.

MARSHALL VAN WINKLE,
Attorney for Defendant-Appellant
J. Rufus Besson, Receiver, etc.

FISK & FISK,
Attorneys for Defendant-Appellant
National Surety Co.

Service of the within grounds of appeal acknowledged April 28, 1927.

THOMAS J. BROGAN,
Attorney for Plaintiff-Appellee The
Mayor and Aldermen of Jersey
City.

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Summons.

(Filed May 13, 1921.)

STATE OF NEW JERSEY:

To THOMAS HARRINGTON'S SONS COMPANY
and NATIONAL SURETY COMPANY:

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[SEAL]

You are summoned to answer the annexed complaint of The Mayor and Aldermen of Jersey City in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, WILLIAM S. GUMMERE, Esq., Justice of the Supreme Court at Trenton, this 26th day of February, 1921.

ENOCH L. JOHNSON,
Clerk.

JOHN MILTON,
Counsel.

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Complaint.

(Filed May 13, 1921.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Plaintiff,

v.

THOMAS HARRINGTON'S SONS COMPANY, a corporation, and NATIONAL SURETY COMPANY, a corporation,

Defendants.

10

Action at Law.

Complaint

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The plaintiff, a municipal corporation of the State of New Jersey, situate in the County of Hudson in said State, says:

FIRST COUNT.

1. That on January 24th, 1917, the defendant Thomas Harrington's Sons Company entered into a contract in writing, under its corporate seal, with the plaintiff, whereby for and in consideration of the sum therein mentioned the said defendant Thomas Harrington's Sons Company, agreed to collect and remove all ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets of Jersey City, from the fifteenth day of January, 1917, to the thirtieth day of November, 1921, in accordance with the specifications and the

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40

Complaint.

proposal thereto annexed and made part of the said contract.

10 2. On January 24th, 1917, the defendants Thomas Harrington's Sons Company and National Surety Company by their obligation in writing under their respective corporate seals, bound themselves unto the plaintiff in the penal sum of fifty thousand (\$50,000) dollars, with the condition thereunder written that if the said Thomas Harrington's Sons Company should well and truly and in a good and sufficient manner perform the work mentioned in the contract and specifications above referred to for the collection and removal of ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets of Jersey City, 20 from the fifteenth day of January, 1917, to the thirtieth day of November, 1921, and complete the same in accordance with the terms and conditions therein stipulated, and in each and every respect comply with the provisions therein contained, then this obligation to be void, otherwise to remain in full force and virtue. A true copy of the above mentioned contract, specifications and bond or obligation is hereto annexed and made part of this 30 complaint.

3. That in and by said contract, the said Thomas Harrington's Sons Company agreed, *inter alia*, that if the work to be done under the specifications and contract should be abandoned or unnecessarily delayed, the said plaintiff should have the right and power to notify the said contractor to discontinue the work under the specifications and contract, or such part thereof as the plaintiff might designate, and the plaintiff should have power, by 40 contract or otherwise as it might determine, to

Complaint.

complete the work to be done under said contract or such part of it as the plaintiff might deem necessary, in such manner as plaintiff saw fit, and to charge the expense incurred by plaintiff in so doing to the Thomas Harrington's Sons Company, and the expense so charged should be deducted 10 and paid by said plaintiff out of such moneys as might be either due or which might at any time thereafter become due under said contract or any part thereof, and in case such expense was greater than the sum which would have been payable to the said Thomas Harrington's Sons Company under said contract, then the said Thomas Harrington's Sons Company should remit the amount of such excess to the plaintiff on notice from the plaintiff of the excess due. 20

4. That after the execution of said bond the said Thomas Harrington's Sons Company commenced the performance of said contract and the specifications forming part thereof hereinbefore referred to, and partially performed the collection and removal of ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets of Jersey City, from the fifteenth day of January, 1917, until on or about the twenty-sixth day of January, 1920, on which date the said Thomas Harrington's Sons Company abandoned the collection and removal of the ashes, garbage and kitchen refuse and waste paper, without separation, from all of the streets of Jersey City specified in said contract, and thereafter performed none of the conditions, covenants or agreements in and by said contract agreed to be performed in accordance with the conditions and requirements of said contract and the specifications forming part thereof. 30 40

Complaint.

5. That on or about January 29th, 1920, the de-
 fendants, after notice to them were present at a
 special meeting of the Board of Commissioners of
 Jersey City, at which meeting plaintiff notified the
 defendant, Thomas Harrington's Sons Company,
 10 that inasmuch as the said Thomas Harrington's
 Sons Company had unnecessarily delayed and
 abandoned all work under the said contract, the
 said Thomas Harrington's Sons Company should
 discontinue all work thereunder, and that plaintiff
 would complete the work remaining to be done
 under said contract.

Plaintiff thereafter, through its proper officers,
 servants and employees, entered into and executed
 a new contract with N. Scatuorchio & Sons Com-
 20 pany for the completion of the work which under
 the contract of the said Thomas Harrington's Sons
 Company remained unperformed and was unnec-
 essarily delayed and abandoned at a total expense
 to the plaintiff for the completion thereof of three
 hundred thousand twenty-eight and 24/100 (\$300,-
 028.24) Dollars, which sum the plaintiff is obli-
 gated to pay to the persons with whom the plain-
 tiff contracted to complete the remainder of said
 work; that the said sum of Three Hundred Thou-
 sand Twenty-eight and 24/100 (\$300,028.24) Dol-
 30 lars so to be paid by the plaintiff exceeds any and
 all money in plaintiff's hands retained from money
 due the said Thomas Harrington's Sons Company,
 and is greater than the sum which would have
 been payable to the said Thomas Harrington's
 Sons Company under said contract if it had com-
 pletely performed the same, to the extent of fifty-
 five thousand, seven hundred eight and 15/100
 (\$55,708.15) Dollars, and which excess the plain-
 40 tiff will be compelled to pay as aforesaid, all by

Complaint.

reason of the default and neglect of the said
 Thomas Harrington's Sons Company to perform
 said contract, and for which said defendants are
 liable to the plaintiff by reason of said bond to
 the extent of fifty thousand and 00/100 (\$50,000.00)
 dollars.

6. That the plaintiff has on its part performed
 all of the conditions and obligations imposed upon
 it by the terms of said contract, specifications or
 other obligation.

SECOND COUNT.

1. Plaintiff repeats the allegations set forth in
 Paragraph 1 of the First Count of this complaint.

2. A true copy of the above-mentioned contract
 and specifications is hereto annexed and made a
 part of this complaint.

3. Plaintiff repeats the allegations set forth in
 Paragraph 3 of the First Count of this complaint.

4. Plaintiff repeats the allegations set forth in
 Paragraph 4 of the First Count of this complaint.

5. That on or about January 29th, 1920, the
 defendant, Thomas Harrington's Sons Company,
 after notice to it, was present at a special meeting
 of the Board of Commissioners of Jersey City, at
 which meeting plaintiff notified the defendant,
 Thomas Harrington's Sons Company, that inas-
 much as the said Thomas Harrington's Sons Com-
 pany had unnecessarily delayed and abandoned
 all work under the said contract, the said Thomas
 Harrington's Sons Company should discontinue all
 work thereunder, and that plaintiff would com-
 plete the work remaining to be done under said
 contract.

Complaint.

Plaintiff thereafter, through its proper officers, servants and employees entered into a new contract with N. Scatuorchio & Sons Company for the completion of the work which under the contract of the said Thomas Harrington's Sons Company remained unperformed and was unnecessarily delayed and abandoned at a total expense to the plaintiff for the completion thereof of three hundred thousand twenty-eight and 24/100 (\$300,028.24) dollars, which sum the plaintiff is obligated to pay to the persons with whom the plaintiff contracted to complete the remainder of said work; that the said sum of three hundred thousand twenty-eight and 24/100 (\$300,028.24) so to be paid by the plaintiff exceeds any and all money in plaintiff's hands retained from money due the said Thomas Harrington's Sons Company, and is greater than the sum which would have been payable to the said Thomas Harrington's Sons Company under said contract if it had completely performed the same, to the extent of fifty-five thousand, seven hundred eight and 15/100 (\$55,708.15) dollars, and which excess the plaintiff will be compelled to pay as aforesaid, all by reason of the default and neglect of the said Thomas Harrington's Sons Company to perform said contract, and for which the said defendant, Thomas Harrington's Sons Company, is liable to the plaintiff by reason of its failure and neglect to properly perform the conditions of said contract and specifications to the extent of fifty-five thousand, seven hundred eight and 15/100 (\$55,708.15) dollars.

Judgment will be claimed upon the first count in the sum of fifty thousand and 00/100 (\$50,000.00) dollars.

Judgment will be claimed upon the second count

Exhibit P-1, Annexed to Complaint.

in the sum of fifty-five thousand, seven hundred eight and 15/100 (\$55,708.15) dollars.

JOHN MILTON,
Counsel.

Exhibit P-1.—Annexed to Complaint.

THIS AGREEMENT, made this twenty-fourth day of January, in the year of Our Lord, One thousand nine hundred and seventeen, BETWEEN, THE MAYOR AND ALDERMEN OF JERSEY CITY, party of the first part, and THOMAS HARRINGTON'S SONS COMPANY, a corporation of the State of New Jersey, party of the second part, WITNESSETH:

That the said party of the second part, for and in consideration of the price hereinafter mentioned hereby agrees to collect and remove all ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets of Jersey City, from the 15th day of January, 1917, to the 30th day of November, 1921, in accordance with the specifications and the proposal which are hereto annexed and made part of this agreement.

The said party of the first part agrees to pay to the said party of the second part for doing the work above mentioned, the price mentioned in the proposal of the party of the second part hereto annexed, or such percentage thereof, as the party of the second part is entitled to under the specifications hereto annexed.

All payments to be made under this contract, shall be made semi-monthly in sums not less than Five hundred dollars (\$500.00) in cash, on the certification of the Chief Engineer, provided the contract is being executed in accordance with the specifications and the directions of the Board of

Exhibit P-1, Annexed to Complaint.

Commissioners of Jersey City and the Chief Engineer, as provided for in said specifications.

10 It is hereby mutually agreed that the covenants and agreements herein contained shall apply to and bind the heirs, executors, administrators, successors, assigns and legal representatives of the respective parties hereto.

It is hereby agreed by and between the parties hereto that the specifications and proposal are hereby made a part of this contract as if the same were herein repeated at length.

20 IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by the Mayor of the City and by the Director of Streets and Public Improvements and has caused the seal of the City to be affixed hereto and the party of the second part has caused these presents to be signed by its President and its seal to be affixed hereto and attested by its Secretary, the day and year first above written.

M. M. FAGAN,
Mayor.

Witness:

30 MARGARET J. GILLIGAN
as to
THOMAS HARRINGTON'S SONS COMPANY.
Director of Street and Public Improvements.

M. I. FAGEN,
City Clerk.

By
30 (Seal) THOMAS HARRINGTON'S SONS Co.,
JAMES J. HARRINGTON, Pres.

40 Attest:
M. H. BROCKHURST, Secty. (Seal)

Exhibit P-1, Annexed to Complaint.

KNOW ALL MEN BY THESE PRESENTS, That We, Thomas Harrington's Sons Company, a corporation of the State of New Jersey, as principal and National Surety Company, a corporation of the State of New York, as surety are held and firmly bound unto the Mayor and Aldermen of Jersey City, in the sum of Fifty thousand (\$50,000.00) dollars lawful money of the United States of America, to be paid to the said the Mayor and Aldermen of Jersey City, their successors or assigns, for which payment well and truly to be made, we, and each of us, do bind ourselves and each of our successors or assigns, jointly and severally, firmly by these presents.

10

Sealed with our seals, dated this twenty-fourth day of January, nineteen hundred and seventeen.

20

The condition of the above obligation is such that if the above bounden Thomas Harrington's Sons Company, shall well and truly, and in good and sufficient manner, perform the work mentioned in the accompanying contract and specifications for the collection and removal of ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets of Jersey City, from the 15th day of January, 1917, to the 30th day of November, 1921, and complete the same in accordance with the terms and conditions therein stipulated, and in each and every respect comply with the provisions therein contained, then this obligation to be void, otherwise to remain in full force and virtue.

30

THOMAS HARRINGTON'S SONS Co.,
By JAMES J. HARRINGTON, Pres. [L. S.]
Residence—556 Montgomery St., J. C. (Seal).

Attest: M. H. BROCKHURST, Secty. [L. S.]
NATIONAL SURETY COMPANY,
By P. E. WILES, Resident Vice-Pres. [L. S.]

40

Attest: M. O'LEARY, Res. Asst. Secy. (Seal)

Exhibit P-1, Annexed to Complaint.

Signed, Sealed and delivered }
in presence of }

MARGARET J. GILLIGAN

as to

10 THOMAS HARRINGTON'S
SONS COMPANY.

(Seal)

State of New Jersey }
County of Hudson } ss.:
City of Jersey City }

20 On this 25th day of January, 1917, before me,
the subscriber, a Notary Public duly commissioned
and sworn, personally came M. O'Leary, who, be-
ing by me duly sworn, on his oath, saith; That he
is the Res. Asst. Secy. of the NATIONAL SURETY
COMPANY of the State of New York, and that he
resides in the City of Jersey City, N. J.; that he
knows P. E. Wiles Resident Vice President of the
NATIONAL SURETY COMPANY, and he knows, too, the
corporate seal of the said Company; that the seal
affixed to the foregoing instrument is such cor-
porate seal; and it was affixed by the said Res.
30 Vice-Pres. and the said instrument signed by the
said Res. Vice-Pres. as Res. Vice-Pres. of said Com-
pany, attested by deponent as Res. Asst. Secy. by
order of the Board of Directors of said Company
in deponent's presence as the voluntary act and
deed of said Company, that said Company has
duly complied with all the requirements of Chapter
134 of the Laws of the State of New Jersey of the
year 1902; that the good available assets of the
40 Company exceed its liabilities, as such liabilities
are ascertained in the manner provided in said

Exhibit P-1, Annexed to Complaint.

Chapter; that the NATIONAL SURETY COMPANY is
duly incorporated under the laws of the State of
New York; and is authorized by the laws of that
State and under its charter to become surety on
bonds and obligations such as are mentioned in
said Chapter; and has on deposit with the Super-
intendent of Insurance of the State of New York,
good securities worth at par and at market value
at least Two Hundred Thousand Dollars (\$200,-
000.) held for the security of its obligations and
has a fully paid up, safely invested, and unim-
paired capital of Three Million Dollars; and said
Company has appointed the Commissioner of
Banking and Insurance of New Jersey and his suc-
cessor in office as its true and lawful Attorney
in the State of New Jersey, upon whom process of
law can be served, and has filed in the office of
the Commissioner of Banking and Insurance, a
written instrument duly signed and sealed, certifi-
ing such appointment, together with the residence
and office of such Attorney, within the State of
New Jersey; and that the following is a true copy
of a By-Law duly adopted by the Board of Direc-
tors of the said NATIONAL SURETY COMPANY on the
6th day of February, 1912, at a regular Meeting,
to wit:

ARTICLE XIII.

SECTION 1. — Signatures required. — All bonds,
recognizances, or contracts of indemnity, policies
of insurance, and all other writings obligatory in
the nature thereof, shall be signed by the President,
a Vice-President, a Resident Vice-President, or
Attorney-in-Fact, and shall have the seal of the
Company affixed thereto, duly attested by the Sec-
retary, and Assistant Secretary, or Resident Assis-

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Exhibit P-1, Annexed to Complaint.

10 tant Secretary. All Vice-Presidents and Resident
 Vice-Presidents shall each have authority to sign
 such instruments, whether the President be absent
 or incapacitated, or not, and the Assistant Secre-
 taries and Resident Assistant Secretaries shall
 each have authority to seal and attest such instru-
 20 ments, whether the Secretary be absent or incapa-
 citated, or not; and the Attorneys-in-Fact shall
 each have authority, in the discretion of such At-
 torneys-in-Fact, to affix to such instruments an
 impression of the Company's seal, whether the
 Secretary be absent or incapacitated, or not, or
 to attach the individual seal of the Attorney-in-
 Fact thereto, or to use the scroll of the Attorney-in-
 Fact, or a wafer, wax or other similar adhesive
 substance affixed thereto, or a seal of paper or
 other similar substance affixed thereto by mucilage,
 or other adhesive substance, or use the word
 "Seal" or the letters "L. S." opposite the signature
 of such Attorneys-in-Fact, as the case may be.

M. O'LEARY,
 Res. Asst. Secy.

30 Sworn and subscribed in the City
 of Jersey City in the County of
 Hudson and State of N. J. this
 25th day of January, A. D. 1917
 before me a Notary Public duly
 commissioned and sworn.

ALBERT R. HASBROUCK,
 Notary Public
 of New Jersey.

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Exhibit P-1, Annexed to Complaint.

[LETTERHEAD OF THOMAS HARRINGTON'S SONS CO.]

SECTION OF THE BY-LAWS AND MINUTES
 OF
 THOMAS HARRINGTON'S SONS CO.

ARTICLE XI.

10

The board of directors may authorize and em-
 power the President or Vice-President, to carry on
 the business of the corporation to furnish bids for
 work, enter into contracts, under the corporate
 seal of the corporation, or otherwise; to collect
 debts due to the corporation and enforce obli-
 gations owing to it; authorize the drawing of
 checks, promissory notes and other negotiable in-
 20 struments in payment of, or on account of, debts
 due from the corporation to others; and generally
 to carry on and transact all the business and af-
 fairs for which the corporation was organized, as
 fully as said directors might do at a meeting of a
 full board.

20

RESOLVED, that James J. Harrington, President,
 in conjunction with Joseph T. Harrington, Vice-
 President, be and they are hereby authorized and
 empowered to carry on the business of the corpo-
 30 ration, to furnish bids for work, enter into con-
 tracts under the corporate seal of the corporation,
 or otherwise; to collect debts due to the corpora-
 tion, and to enforce obligations owing to it; to au-
 thorize the drawing of checks, promissory notes,
 and other negotiable instruments in payment of or
 on account of debts due from the corporation to
 others; and generally to carry on and transact all
 the business and affairs for which the corporation
 was organized, as fully as said directors might do
 at the meeting of the full board and that said

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Exhibit P-1, Annexed to Complaint.

officers report to this Board at each meeting of their transactions on behalf of the corporation between meetings.

Unanimously carried.

10 I hereby certify that the above is a true copy of the Sections of the By-Laws and Minutes of the directors meeting of the Thomas Harrington's Sons Co., in so far as the same pertain to the powers of the Officers to make bids and contracts binding said Company.

M. H. BROCKHURST,
(Seal) Secretary.

BOARD OF COMMISSIONERS OF JERSEY CITY

20 CITY CLERK'S OFFICE

MICHAEL I. FAGEN
City Clerk.

Jersey City, January 16th, 1917.

Hon. John Bentley,
Corporation Attorney

Sir:

30 This is to certify that the following is a copy of a resolution passed by the Board of Commissioners of Jersey City at the meeting held January 16th, 1917.

Very respectfully,

M. I. FAGEN,
City Clerk.

40 Resolved, that the contract for the collection and removal of ashes, garbage and kitchen refuse and waste paper from all the streets of Jersey City,

Exhibit P-1, Annexed to Complaint.

N. J., from January 15th, 1917, to November 30th, 1921, be and the same is hereby awarded to Thomas Harrington's Sons Company at the price named in their bid, viz.: \$590,000.00, they being the lowest responsible bidders for the five year period, and it appearing to this Board that the terms of such bid are most advantageous to the City from an analysis of the one year and five year bids, the five year period bid being lower than five one year period bids under normal conditions making the allowance for normal increase of population.

10

Further resolved, that the Corporation Attorney be and he is hereby requested to prepare and have executed the necessary contract for the doing of said work.

DEPARTMENT OF STREETS AND PUBLIC
IMPROVEMENTS

20

BUREAU OF ENGINEERING

PROPOSAL

For the collection and removal of ashes, garbage and kitchen refuse and waste paper from all the streets of Jersey City, N. J., for the periods hereinafter stated.

30

NOTICE:—The prices must be written in the proposal and also stated in figures.

To the Board of Commissioners of Jersey City:

Gentlemen— will contract to for the collection and removal of ashes, garbage, etc. (according to specifications for the same in the office of DEPARTMENT OF STREETS AND PUBLIC IMPROVEMENTS), for the following prices, viz:

40

Exhibit P-1, Annexed to Complaint.

For the period from January 15, 1917 to November 30, 1917 (without separation), for the sum of

For the period from January 15, 1917 to November 30, 1921 (without separation), for the sum of

10 \$590,000.00

Five hundred and ninety thousand (\$590,000.00) dollars, payable as follows:

Balance of year 1917, the sum of Seventy thousand dollars \$70,000.00

Year 1918, the sum of One hundred twenty-five thousand dollars \$125,000.00

Year 1919, the sum of One hundred thirty thousand dollars 130,000.00

20 Year 1920, the sum of One hundred thirty thousand dollars 130,000.00

Year 1921, the sum of One hundred thirty-five thousand dollars 135,000.00

Total \$590,000.00

Jersey City, Jan. 2, 1916.

THOMAS HARRINGTON'S SONS Co.,

By JAMES J. HARRINGTON, Pres.

30 556 Montgomery St., J. C.

Attest:

M. H. BROCKHURST,
Secretary.

(Seal)

NOTICE—No unbalanced bids will be received or considered.

Exhibit P-1, Annexed to Complaint.

AGREEMENT OF SURETIES ON OTHER SIDE.

THIS AGREEMENT made between National Surety Company of New York, a corporation authorized to do business in New Jersey, Surety for THOMAS HARRINGTON'S SONS COMPANY of the first part and the Mayor and Aldermen of Jersey City of the second part.

10

WITNESSETH: that the party of the first part for and in consideration of the acceptance of the above proposal of the said THOMAS HARRINGTON'S SONS COMPANY by the party of the second part, and for the further consideration of one dollar to them paid by the party of the second part, the receipt whereof is hereby acknowledged, agrees that the said THOMAS HARRINGTON'S SONS COMPANY within ten days after notice by mail or otherwise so to do shall and will execute and deliver a contract, based upon said proposal and the Specifications for the work contemplated therein, with the party of the second part, to do all the work and furnish all the materials required by said proposal and Specifications, which contract shall be in the form in common use by the party of the second part and shall contain such terms and conditions as are usually required in contracts made by the party of the second part, and as may be required by the Law Department or any member thereof of the party of the second part; and further that the party of the first part shall within ten days after notice by mail or otherwise so to do, execute and deliver to the party of the second part, the bond or bonds required to be annexed to such contract, in the penal sum of FIFTY THOUSAND (\$50,000.00) dollars, condition for the faithful performance of such contract, or such condition as may be re-

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Exhibit P-1, Annexed to Complaint.

quired by the specifications, by the said THOMAS HARRINGTON'S SONS COMPANY.

10 And the party of the first part further agrees that if the said THOMAS HARRINGTON'S SONS COMPANY shall neglect or refuse to execute such contract and bond within said time, or if the said party of the first part shall neglect or refuse to execute and deliver said bonds within such time, we, the said party of the first part will, upon demand, pay to the Mayor and Aldermen of Jersey City the sum of Five Thousand Dollars or such amount of money as it may necessarily expend in doing the work and furnishing the materials necessary therefor, specified in said specifications, or may be obliged to pay any higher bidder to whom the contract may be awarded, over and above the amount which it would have been required to pay to the said THOS. HARRINGTON'S SONS Co. had said THOS. HARRINGTON'S SONS Co. executed such contract and bonds and performed the work and furnished the materials required thereby.

20 Witness our hands and seals the 27th day of December, 1916.

30 NATIONAL SURETY COMPANY,
By FRANK W. STUCKY,
Res. Vice-Pres.

Attest:

(Seal) M. O'LEARY,
Res. Asst. Secy.

40 This proposal must be enclosed by itself in a sealed envelope properly endorsed and directed. A Certified Check accompanying this Bid will be accepted in place of Bond.

Exhibit P-1, Annexed to Complaint.

State of New Jersey, }
County of Hudson, } ss.:
City of Jersey City, }

10 On this 27th day of December, 1916, before me, the subscriber, a Notary Public duly commissioned and sworn, personally came M. O'Leary, who, being by me duly sworn, on his oath, saith: That he is the Res. Asst. Secy. of the NATIONAL SURETY COMPANY of the State of New York, and that he resides in the City of Jersey City, N. J.; that he knows Frank W. Stucky, Resident Vice President of the NATIONAL SURETY COMPANY, and he knows, too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and it was affixed by the said Res. Vice-Pres. and the said instrument signed by the said Res. Vice-Pres. as Res. Vice-Pres. of said Company, attested by deponent as Res. Asst. Secy. by order of the Board of Directors of said Company in deponent's presence as the voluntary act and deed of said Company, that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902; that the good available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the NATIONAL SURETY COMPANY is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; and has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars (\$200,000)

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Exhibit P-1, Annexed to Complaint.

held for the security of its obligations and has a
 fully paid up, safely invested, and unimpaired
 capital of Three Million Dollars; and said Com-
 pany has appointed the Commissioner of Banking
 and Insurance of New Jersey and his successor in
 10 office as its true and lawful Attorney in the State
 of New Jersey, upon whom process of law can
 be served, and has filed in the office of the Com-
 missioner of Banking and Insurance, a written in-
 strument duly signed and sealed, certifying such
 appointment, together with the residence and office
 of such Attorney, within the State of New Jersey;
 and that the following is a true copy of a By-Law
 duly adopted by the Board of Directors of the
 said NATIONAL SURETY COMPANY on the 6th day of
 20 February, 1912, at a regular Meeting, to wit:

ARTICLE XIII.

SECTION 1.—Signatures required.—All bonds, re-
 cognizances, or contracts of indemnity, policies of
 insurance, and all other writings obligatory in the
 nature thereof, shall be signed by the President,
 a Vice-President, a Resident Vice-President, or
 Attorney-in-Fact, and shall have the seal of the
 Company affixed thereto, duly attested by the Sec-
 30 retary, and Assistant Secretary, or Resident Assis-
 tant Secretary. All Vice-Presidents and Resident
 Vice-Presidents shall each have authority to sign
 such instruments, whether the President be absent
 or incapacitated, or not, and the Assistant Secre-
 taries and Resident Assistant Secretaries shall each
 have authority to seal and attest such instruments,
 whether the Secretary be absent or incapacitated,
 or not; and the Attorneys-in-Fact shall each have
 40 authority, in the discretion of such Attorneys-in-

Exhibit P-1, Annexed to Complaint.

Fact, to affix to such instruments an impression
 of the Company's seal, whether the Secretary be
 absent or incapacitated, or not, or to attach the
 individual seal of the Attorney-in-Fact thereto, or
 to use the scroll of the Attorney-in-Fact, or a
 wafer, wax or other similar adhesive substance
 affixed thereto, or a seal of paper or other similar
 substance affixed thereto by mucilage, or other ad-
 10 hesive substance, or used the word "Seal" or the
 letters "L. S." opposite the signature of such At-
 torneys-in-Fact, as the case may be.

M. O'LEARY,
 Res. Asst. Secy.

Sworn and subscribed in the City
 of Jersey City in the County of
 Hudson and State of N. J. this
 20 27th day of December, A. D. 1916,
 before me a Notary Public duly
 commissioned and sworn.

ALBERT R. HASBROUCK,
 Notary Public
 of New Jersey.

BOARD OF COMMISSIONERS,
 30 JERSEY CITY, N. J.

SPECIFICATIONS

FOR THE

COLLECTION AND REMOVAL OF ASHES, GAR-
 BAGE and KITCHEN REFUSE, and WASTE PA-
 PER, FROM ALL THE STREETS OF JERSEY
 CITY, N. J., FOR THE PERIODS HEREINAFTER
 STATED.
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Exhibit P-1, Annexed to Complaint.

SEALED BIDS OR PROPOSALS.

10 Sealed bids or proposals for the work named in these specifications will be received by the BOARD OF COMMISSIONERS in the City Clerk's Office in the City Hall, Jersey City, New Jersey, on the date advertised for receiving bids, at which time and place the said bids will be publicly opened and read.

20 The award of contract if awarded will be made to the lowest responsible bidder with adequate security as soon thereafter as practicable. The person or persons to whom said contract may be awarded will be required to attend at the office of the Corporation Attorney with the sureties offered by him or them and execute the contract in conformity with these specifications within five days from the date of service of notice to the effect that the contract has been awarded and the sureties accepted; in case of failure so to do he or they will be considered as having abandoned it and in default to the City.

30 BIDDERS shall have the option of submitting bids for the carrying out of the terms of the contract either for the period from January 15, 1917, to November 30, 1917, or for the carrying out of the terms of the contract for the period from January 15, 1917 to November 30, 1921. If a bidder desires he may submit bids for both periods.

40 THE BIDDERS must submit with their proposal surety in the sum of \$5,000 as a bond or sureties' agreement for the execution of the contract. The said surety of \$5,000 will be in addition to the bond in the penal sum of \$50,000 which will be required for the faithful performance of the con-

Exhibit P-1, Annexed to Complaint.

tract. The \$5,000 surety accompanying the proposal will be cancelled upon the execution and acceptance of the contract.

Whenever in these specifications the word "STREET" is used the term includes all public highways, avenues, streets, lanes, alleys, and places within the limits of Jersey City. 10

Whenever in these specifications the word "CONTRACTOR" is used it signifies the person or persons to whom the contract is awarded, together with his employees and outfit, for the uses and purposes hereof.

SECTION 1.—During the term of the contract the contractor shall call regularly twice during each week at all stores, dwellings, hotels, restaurants, fire houses, schools, hospitals, all municipal buildings, office buildings and all other buildings, and carefully collect and remove in a quiet and cleanly manner all the ashes, garbage and kitchen refuse that may be offered him or delivered to him or placed in vessels or receptacles at the curb in front of any of the hereinbefore enumerated buildings. The said vessels or receptacles shall be entirely emptied, if practicable, and shall be carefully handled, not banged. Only such receptacles as conform to the following provision of ordinance adopted by the Board of Street and Water Commissioners in April, 1912—"That hereafter all ashes or garbage deposited on the sidewalk shall be placed in a round or barrel-shaped receptacle of iron in usable condition, not less than ten inches nor more than twenty-six inches high and not less than nine inches nor more than eighteen inches in diameter" shall be returned uninjured to the place where found without damage either to 20 30 40

Exhibit P-1, Annexed to Complaint.

the receptacle, to the sidewalk, or premises, or ground about or around the same.

10 SECTION 2.—The contractor shall conform in all respects with Chapter 253 of the Laws of 1913, page 479, commonly known as the “Eight Hour Work-day Law”, and shall not violate any of the provisions thereof and, if under extraordinary circumstances it shall become necessary for the workmen employed by the said contractor to work more than eight hours per calendar day, the said contractor shall keep a separate account of the number of hours in excess of eight hours which his said employees shall work and shall hand such account to the inspector for the removal of ashes and garbage on the day following such work and shall pay his said employees for such extra work within two weeks of the doing of such work and in default thereof, upon the certification by the said inspector of the collection of ashes and garbage, the said Board of Commissioners shall deduct such extra compensation from the moneys due said contractor, and in addition thereto shall fine the said contractor the penalty set out in said statute, deducting the same from any moneys coming due to him. 20 The said contractor may work his said employees eight hours during the hours between five A. M and eight P M and shall cause no interference or annoyance to householders or other interests, traffic or pedestrians at any time. 30

SECTION 3.—Upon the award of the contract the contractor shall file in the office of the Director of Streets and Public Improvements of the City a written designation of the routes to be followed by him in making the collection and removal of ashes, garbage, kitchen refuse and waste paper. 40 No departure therefrom shall be allowed.

Exhibit P-1, Annexed to Complaint.

SECTION 4.—All sweepings and refuse from residences and places of business, other than dirt or waste paper and except as limited by Section 12 of these specifications, shall be classified as ashes and garbage and removed as such.

SECTION 5.—The contractor will be required to remove all waste paper or paper boxes and rags which are found in receptacles or properly tied in bundles or deposited in bags furnished by the resident or owner of said property placed at the curb. 10

SECTION 6.—All waste paper thus collected by the contractor will not be allowed to be dumped either upon private or public property from which they may be blown upon the public thoroughfares. Such paper shall be so carried from the point of collection to the dumping ground that it may not be blown from the vehicle. 20

SECTION 7.—The vehicles used by the contractor under these specifications shall bear on each side in front, and on the rear, distinctly discernible, the number of each vehicle, on a sign of iron (continuously attached to the vehicle) with a blue enamel background with white figures, six (6) inches high by five (5) inches broad, and the same shall be distinctly discernible under all conditions and at all times. The name of the contractor shall also be placed on each vehicle and be distinctly discernible at all times. All the vehicles used under these specifications shall also be fitted at all times with suitable side pieces, and canvas covers properly and permanently secured to each vehicle, ready at all times to be used as a cover over the top of the load, and sufficient in size to avoid scattering and littering the streets with ashes, garbage and kitchen refuse and waste paper, *et al.* All the 30 40

Exhibit P-1, Annexed to Complaint.

10 employees of the contractor under this contract (superintendents, drivers, and helpers, *et al.*) shall at all times be courteous to citizens and others, and shall not use loud or profane language or be boisterous or noisy, and shall wear a metal badge, circular in shape, 2½ inches in diameter with a plain Roman numeral thereon not less than ¾" high, breadth in proportion, also with the initial of the contractor thereon; the said badge shall be worn continuously and conspicuously by said employees while on duty.

20 SECTION 8.—All ashes, garbage and kitchen refuse, and waste paper collected by the contractor under this contract shall be removed at once to such place or places as the contractor may have authority to use for a dumping ground.

SECTION 9.—The contractor in collecting, removing and dumping all ashes, garbage and kitchen refuse and waste paper shall not violate the Health Laws, City Ordinances, or commit trespass and shall protect the public health.

30 SECTION 10.—The contractor must furnish at his expense, competent labor, and all materials, suitable vehicles, etc., necessary for the faithful carrying out and completing the contract.

SECTION 11.—The contractor shall not sublet the work or any portion thereof, or assign this contract, except with the consent of the BOARD OF COMMISSIONERS expressed by resolution of the Board.

40 SECTION 12.—In the collection of ashes and garbage, it shall not include the removal of any waste paper, rubbish or refuse belonging to or resulting from the construction, alteration, or repairs to any

Exhibit P-1, Annexed to Complaint.

10 building or sidewalk, neither shall it include ashes or refuse which may be the result of the manufacture of any material; neither shall the collection be required of steam ashes from factories and manufacturing establishments or commercial plants.

SECTION 13.—If the work to be done under these specifications and the contract to be entered into shall be abandoned, or if the contract to be entered into shall be assigned, except as herein specified, or if any time the Inspector of the Collection of Ashes and Garbage shall be of opinion and shall so certify in writing to the BOARD OF COMMISSIONERS OF JERSEY CITY that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is wilfully violating any of the conditions or covenants of these specifications, or of said contract, or executing said contract in bad faith, said Board shall have the power to notify the contractor to discontinue all work or any part thereof under these specifications and thereupon the contractor shall cease to continue said work or such part thereof as the Board may designate and the said Board shall thereupon have power to complete the work and provide all materials and labor necessary therefor and charge the expense of the same to the contractor and the expense so charged will be deducted and paid by the City out of any moneys then due or such moneys as may at any time thereafter become due to the contractor under and by virtue of this agreement or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed by the contractor then the said contractor shall be entitled

Exhibit P-1, Annexed to Complaint.

to receive the difference; and in case such sum shall exceed the amount payable as aforesaid then the contractor shall pay the amount of such excess to the City on notice from said Board of the excess so due.

10 SECTION 14.—Said Board shall have authority of direction and regulation of, in, or about dumping grounds and collection vehicles while in transit, and means and methods employed hereof as far as the requirements, terms and conditions of this contract apply.

20 SECTION 15.—The contractor may and shall have the right, privilege and authority to enter upon and use the property owned by the Mayor and Aldermen of Jersey City situated at Droyer's Point and also at the foot of Yale Avenue, at the South Cove, and the property of the City in Blocks 602 and 603, on the Official Assessment Map of Jersey City, for the purpose and use of dumping or depositing thereon the ashes, garbage, sweepings, refuse and all other matter to be collected and disposed of under these specifications; provided, however, that the property last mentioned may be used for such purpose for only one year from the date of the contract.

PAYMENTS.

30 1. Payments will be made semi-monthly upon the certification of the same by the Chief Engineer as certified to him by the City Inspector in charge of the collection and removal of ashes, garbage, kitchen refuse, and waste paper, that the work and requirements hereof have been carefully and completely performed under and in accordance with these specifications in sums not less than five hundred dollars (\$500.) in cash.

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Exhibit P-1, Annexed to Complaint.

BOND.

1. The contractor or contractors to whom the contract shall be awarded, to give either a bond in legal form of a surety company authorized to do business by and operating in accordance with the Laws of the State of New Jersey or a certified check; or by the consent in writing of two (2) responsible real estate owners of Hudson County, that they will become surety in the sum of Fifty thousand dollars (\$50,000.) for the faithful performance of the contract, which two (2) responsible sureties must qualify under oath that they are each worth the penal sum of said bond, and which said bond shall be cancelled and certified check returned (upon the completion of the work required to be done under these specifications and the contract to be awarded), provided, that when a bond other than a surety Company bond is given, the form of the said bond shall be approved by the Corporation Counsel, and the sufficiency of the surety approved by the City Comptroller.

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NOTICE TO CONTRACTORS.

PROPOSALS WILL BE SUBMITTED AS FOLLOWS, VIZ.:

1. ~~The~~ for the removal of Ashes, Garbage and Kitchen Refuse, and waste Paper without separation.

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A. It is understood that the term "GARBAGE AND KITCHEN REFUSE" is intended to include matter which was purposed for food, which would include decayed or rejected vegetables or meats. Receptacles or packages which contain food, meats or vegetables need not be accepted.

B. Proposals will not be received later than the time fixed in advertisement.

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Exhibit P-1, Annexed to Complaint.

C. Bidders must state prices in writing as well as show them in figures.

D. Proposals must be made on blank forms obtained at the OFFICE OF THE CHIEF ENGINEER.

10 E. The Sureties' Agreement must be properly signed and acknowledged.

F. Any proposals not conforming with all these requirements will be deemed informal and rejected.

G. The contract will be required to furnish a statement with WEEKLY REPORT, of the number of loads of ashes, garbage and kitchen refuse, and waste paper, removed either separately or collectively.

20 If there is any dispute as to what shall be classified as "ASHES AND GARBAGE," etc., under the terms of these specifications, and meaning and intention shall be determined by the INSPECTOR FOR THE REMOVAL OF SAID ASHES AND GARBAGE, &C.

Bidders shall have the option of submitting bids for the carrying out of the terms of the contract either for the period of one year from January 15th, 1917, to November 30th, 1917, or a bid for the carrying out of the terms of the contract for the period from January 15th, 1917, to November 30th, 1921. If a bidder desires he may submit bids for both periods.

Answer of Besson, Receiver.

NEW JERSEY SUPREME COURT.

(Filed July 28, 1921.)

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Plaintiff,

v.

THOMAS HARRINGTON'S SONS COMPANY, a corporation, and NATIONAL SURETY COMPANY, a corporation,

Defendants.

Action at Law.
Answer of J. W. Rufus Besson, Receiver of Thomas Harrington's Sons Co.

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The defendant J. W. Rufus Besson, Receiver of the defendant Thomas Harrington's Sons Co. answering the complaint says:

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FIRST DEFENSE TO FIRST AND SECOND COUNTS.

1. This defendant will object that the complaint discloses no cause of action.

(a) The plaintiff had not sustained any loss at the time this action was brought. This action is prematurely brought.

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(b) The plaintiff had no right, under the contract made by it with the Thomas Harrington's Sons Co., to enter into a contract with N. Scaturchio & Sons as set forth in the complaint, on any abandonment or unnecessarily delaying of the work under the contract entered into by the Thomas Harrington's Sons Co. with the plaintiff; upon any such abandonment or unnecessarily de-

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Answer of Besson, Receiver.

laying, the plaintiff should have completed the work to be done under said contract made by said Thomas Harrington's Sons Co. with the plaintiff, under the provisions of Section 13 of the specifications annexed to and made part of said contract, so made by the said Thomas Harrington's Sons Co. with the plaintiff.

FIRST DEFENSE TO FIRST COUNT.

1. This defendant admits paragraph one of the first count.

2. This defendant admits paragraph two of the first count.

3. As to Paragraph Three, defendant refers to the said contract and specifications for the true construction of the same. It denies that plaintiff had the right on an abandonment of the work under said contract, or on an unnecessarily delaying of the said work, by the said Thomas Harrington's Sons Co. to act as stated in said Paragraph Three.

4. Defendant admits that the said Thomas Harrington's Sons Co. commenced the performance of the said contract and the specifications forming part thereof, and that it partially performed said work; but denies that it abandoned the said work under the said contract and thereafter performed none of the conditions, covenants or agreements, in and by said contract agreed to be performed by said company.

5. This defendant denies that notice was given as stated in Paragraph Five. It admits that plaintiff entered into and executed a new contract with N. Scatuorchio & Sons Co. as stated in Paragraph Five, and for the amount as therein stated. It de-

Answer of Besson, Receiver.

nies all of Paragraph Five not hereby expressly admitted.

6. This defendant denies Paragraph Six.

SECOND DEFENSE TO FIRST COUNT.

1. This defendant avers that the said Thomas Harrington's Sons Co. performed all of the conditions and obligations imposed upon it by the terms of said contract, specifications or other obligations until the plaintiff compelled it to cease the work under said contract.

THIRD DEFENSE TO FIRST COUNT.

1. This defendant avers that the plaintiff violated Section 13 of the specifications annexed to and made part of the contract made with the plaintiff and said Thomas Harrington's Sons Co., in that instead of the plaintiff completing the work to be done under the said contract, it awarded a contract for the doing of said work to said N. Scatuorchio & Sons Co.

FOURTH DEFENSE TO FIRST COUNT.

This defendant avers that the plaintiff in inviting bids for the performance of the uncompleted work under said contract, exacted a bond from bidders in a sum greatly in excess of \$50,000 namely, in the sum of \$268,000. This kept contractors from bidding for the completion of the work under the said contract so made by the plaintiff with the said Thomas Harrington's Sons Co. and induced and compelled bidders to name a price for the completion of said work under said contract greatly in excess of what otherwise would have been named. Such action was in violation of Section 13 of the specifications

Answer of Besson, Receiver.

annexed to and made part of the contract made by plaintiff and said Thomas Harrington's Sons Co.

FIFTH DEFENSE TO FIRST COUNT.

10 The said contract made with said N. Scatuorchio & Sons Co. for the completion of the work under said contract, represents a large profit to the said Scatuorchio & Sons Co. and a profit in excess of \$55,708.15, in violation of Section 13 of the said specifications.

SIXTH DEFENSE TO FIRST COUNT.

20 This defendant avers that the reasonable cost of the completion of the work to be done under said contract so made with plaintiff and Thomas Harrington's Sons Co. would represent an expense to the City of no more than \$55,708.15.

DEFENSES TO SECOND COUNT.

The first, second, third, fourth, fifth and sixth defenses to the first count are here repeated as defenses respectively, to the second count.

MARSHALL VAN WINKLE,
Attorney for J. W. Rufus Besson, Receiver.

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Answer of National Surety Company.

NEW JERSEY SUPREME COURT.

(Filed Aug. 3, 1921.)

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Plaintiff,

v.

THOMAS HARRINGTON'S SONS Co.
and NATIONAL SURETY Co.,
Defendants.

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Action at Law.

Answer of National Surety Company.

The defendant, National Surety Company, a corporation, having an office in Jersey City for the transaction of business in New Jersey, answering the complaint says:

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FIRST DEFENSE TO FIRST AND SECOND COUNTS.

1. This defendant will object that the complaint discloses no cause of action.

(a) The plaintiff had not sustained any loss at the time this action was brought. This action is prematurely brought.

(b) The plaintiff had no right, under the contract made by it with the Thomas Harrington's Sons Co., to enter into a contract with N. Scatuorchio & Sons as set forth in the complaint, on any abandonment or unnecessarily delaying of the work under the contract entered into by the Thomas Harrington's Sons Co. with the plaintiff; upon any such abandonment or unnecessarily delaying, the plaintiff should have completed the

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Answer of National Surety Company.

work to be done under said contract made by said Thomas Harrington's Sons Co. with the plaintiff, under the provisions of Section 13 of the specifications annexed to and made part of said contract, so made by said Thomas Harrington's Sons Co. with the plaintiff.

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FIRST DEFENSE TO FIRST COUNT.

1. This defendant admits paragraph one of the first count.

2. This defendant admits paragraph two of the first count.

3. As to paragraph three, defendant refers to the said contract and specifications for the true construction of the same. It denies that plaintiff had the right on an abandonment of the work under said contract, or on an unnecessarily delaying of the said work, by the said Thomas Harrington's Sons Co. to act as stated in said paragraph three.

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4. Defendant admits that the said Thomas Harrington's Sons Co. commenced the performance of the said contract and the specifications forming part thereof, and that it partially performed said work; but denies that it abandoned the said work under the said contract and thereafter performed none of the conditions, covenants, or agreements, in and by said contract agreed to be performed by said company.

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5. This defendant denies that notice was given as stated in paragraph five. It admits that plaintiff entered into and executed a new contract with N. Scaturchio & Sons Co. as stated in paragraph five, and for the amount as therein stated. It de-

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Answer of National Surety Company.

nies all of paragraph five not hereby expressly admitted.

6. This defendant denies paragraph six.

SECOND DEFENSE TO FIRST COUNT.

1. This defendant avers that the said Thomas Harrington's Sons Co. performed all of the conditions and obligations imposed upon it by the terms of said contract, specifications, or other obligations, until the plaintiff compelled it to cease the work under said contract.

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THIRD DEFENSE TO FIRST COUNT.

1. This defendant avers that the plaintiff violated Section 13 of the specifications annexed to and made part of the contract made with the plaintiff and said Thomas Harrington's Sons Co., in that instead of the plaintiff completing the work to be done under the said contract, it awarded a contract for the doing of said work to said N. Scaturchio & Sons Co.

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FOURTH DEFENSE TO FIRST COUNT.

This defendant avers that the plaintiff in inviting bids for the performance of the uncompleted work under said contract, exacted a bond from bidders in a sum greatly in excess of \$50,000, namely, in the sum of \$268,000. This kept contractors from bidding for the completion of the work under the said contract so made by the plaintiff with the said Thomas Harrington's Sons Co. and induced and compelled bidders to name a price for the completion of said work under said contract greatly in excess of what otherwise would have been named. Such action was in violation of Section 13 of the specifications annexed to and

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Answer of National Surety Company.

made part of the contract made by plaintiff and said Thomas Harrington's Sons Co.

FIFTH DEFENSE TO FIRST COUNT.

10 The said contract made with said N. Scatuorchio & Sons Co. for the completion of the work under said contract represents a large profit to the said N. Scatuorchio & Sons Co. and a profit in excess of \$55,708.15, in violation of Section 13 of the said specifications.

SIXTH DEFENSE TO FIRST COUNT.

20 The defendant avers that the reasonable cost of the completion of the work to be done under said contract so made with plaintiff and Thomas Harrington's Sons Co. would represent an expense to the City of no more than \$55,708.15.

FISK & FISK,
Attorneys for Defendant
National Surety Company.

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Reply.

(Filed August 5, 1921.)

NEW JERSEY SUPREME COURT.

THE MAYOR AND ALDERMEN OF JERSEY CITY,

Plaintiff,

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v.

J. RUFUS BESSON, Receiver of
Thomas Harrington's Sons
Company and National Surety
Company, a corporation,
Defendants.

Action at Law.

Reply

The plaintiff, The Mayor and Aldermen of Jersey City, replying to the answer of the National Surety Company, one of the defendants herein, says:

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1. It denies each and every allegation set forth in the answer.

JOHN MILTON,
Attorney for Plaintiff.

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Reply.

(Filed August 8, 1921.)

NEW JERSEY SUPREME COURT.

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THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Plaintiff,

v.

J. W. RUFUS BESSON, Receiver of Thomas Harrington Sons' Company and National Surety Company, a corporation,

Defendants.

Action at Law.
Reply to Answer of J. W. Rufus Besson, Receiver of Thomas Harrington Sons Company.

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Plaintiff denies every affirmative allegation contained in the answer of J. W. Rufus Besson, Receiver of Thomas Harrington's Sons Company.

JOHN MILTON,
Attorney for Plaintiff.

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Order Amending Pleadings.

(Filed July 14, 1926.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Plaintiff,

v.

J. W. RUFUS BESSON, Receiver of Thomas Harrington's Sons Company, a corporation, and National Surety Company, a corporation,

Defendants.

Action at Law.

Order Amending Pleadings.

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This matter coming on for trial before the Honorable Willard W. Cutler and a jury in the Hudson Circuit on July 6th, 1926, and application being made at the trial by the plaintiff for leave to amend its complaint, it was during said trial, on motion of Charles A. Rooney, appearing for Thomas J. Brogan, attorney for plaintiff,

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ORDERED that Paragraph Five of the First Count of the complaint be and the same is hereby amended to read as follows:

5. On or about January 29th, 1920, the defendants after notice to them, were present at a special meeting of the Board of Commissioners of Jersey City, at which meeting plaintiff notified the defendant Thomas Harrington Sons Company that

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Order Amending Pleadings.

10 inasmuch as the said Thomas Harrington Sons Company had unnecessarily delayed and abandoned all work under the said contract, the said Thomas Harrington Sons Company should discontinue all work thereunder, and that plaintiff would complete the work to be done under said contract. Plaintiff, thereafter, through its proper officers, servants and employees, completed, or caused to be completed, the work under the contract to the said Thomas Harrington Sons Company, which remained unperformed and was unnecessarily delayed and abandoned at a total expense to the plaintiff for the completion thereof in the sum of three hundred thousand twenty-eight dollars and 24/100 (\$300,028.24). Said sum of three hundred
 20 thousand twenty-eight and 24/100 (\$300,028.24) dollars expended and incurred by the plaintiff exceeds all money in plaintiff's hands retained from money due to said Thomas Harrington Sons Company, and is greater than the sum which would have been payable to the said Thomas Harrington Sons Company under said contract if it had completely performed the same to the extent of fifty-five thousand seven hundred eight and 15/100 (\$55,708.15) dollars, which excess the plaintiff has paid as aforesaid, all by reason of the default and neglect of the said Thomas Harrington
 30 Sons Company to perform said contract, and for which said defendants are liable to plaintiff by reason of said bond to the extent of fifty thousand (\$50,000.00) dollars, besides interest thereon from the 21st day of November, 1921; and it is

FURTHER ORDERED that Paragraph Five of the Second Count be and the same is hereby amended to read as follows:

40 That on or about January 29th, 1920, the de-

Order Amending Pleadings.

10 fendant, Thomas Harrington Sons Company, after notice to it, was present at a special meeting of the Board of Commissioners of Jersey City, at which meeting plaintiff notified the defendant, Thomas Harrington Sons Company, that inasmuch as the said Thomas Harrington Sons Company had unnecessarily delayed and abandoned all work under the said contract, the said Thomas Harrington Sons Company should discontinue all work thereunder, and that plaintiff would complete the work remaining to be done under said contract.

20 Plaintiff thereafter, through its proper officers, servants, and employees, completed, or caused to be completed, the work under the contract to the said Thomas Harrington Sons Company which remained unperformed and was unnecessarily delayed and abandoned at a total expense to the plaintiff for the completion thereof of the sum of three hundred thousand twenty-eight and 24/100 (\$300,028.24) dollars. Said sum of three hundred thousand twenty-eight and 24/100 (\$300,028.24) dollars, so expended by the plaintiff exceeds any and all money in plaintiff's hands retained from money due the said Thomas Harrington Sons Company, and is greater than the sum which would have been payable to the said Thomas Harrington
 30 Sons Company under the said contract if it had completely performed the same to the extent of fifty-five thousand seven hundred eight and 15/100 (\$55,708.15) dollars, and which excess the plaintiff has been obliged to expend and incur, all by reason of the default and neglect of the said Thomas Harrington Sons Company in performing said contract, and for which the said defendant, Thomas Harrington Sons Company, is liable to the plaintiff by reason of its failure and
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Order Amending Pleadings.

neglect to properly perform the condition of said contract and specifications to the extent of fifty-five thousand, seven hundred eight and 15/100 (\$55,708.15) dollars; and it is

10 FURTHER ORDERED that the demand in the end of the complaint be and the same hereby is amended to read as follows:

Judgment will be claimed upon the First Count in the sum of fifty thousand (\$50,000) dollars, together with interest. Judgment will be claimed upon the Second Count in the sum of fifty-five thousand, seven hundred eight and 15/100 (\$55,708.15), together with interest, and it is further, on application of the defendants, ordered that the defendants' answers be amended by a denial of the matter set up in the plaintiffs' amended complaint.

Signed July 12, 1926.

WILLARD W. CUTLER,
Judge.

30

40

Postea.

(Filed July 14, 1926.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Plaintiff,

v.

J. W. RUFUS BESSON, Receiver of Thomas Harrington's Sons Company, a corporation, and National Surety Company, a corporation,

Defendants.

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Action at Law.

Postea.

20

This case was tried before the Honorable WILLARD W. CUTLER and a jury in the Hudson Circuit on July 6th, 7th and 8th, 1926. The complaint and answers amended during trial. The jury after considering the evidence returned a verdict in favor of the plaintiff and against both defendants and assess the damages of the plaintiff at the sum of fifty thousand (\$50,000) dollars debt and fourteen thousand three hundred twenty-four dollars and ninety-seven cents (\$14,324.97) damages, total of sixty-four thousand three hundred twenty-four dollars and ninety-seven cents (\$64,324.97).

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Signed July 13, 1926.

WILLARD W. CUTLER,
Judge.

A true copy.

EDWARD J. KELLEHER,
Clerk.

40

Judgment.

(Entered July 14, 1926.)

NEW JERSEY SUPREME COURT.

10	THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,	Plaintiff,	Action at Law. On Postea.
		<i>v.</i>	
	J. W. RUFUS BESSON, Receiver of Thomas Harrington's Sons Company, a corporation, and National Surety Company, a corporation,	Defendants.	Thomas J. Brogan, Attorney.
20			

Judgment entered this fourteenth day of July, A. D. nineteen hundred and twenty-six in favor of plaintiff and against the defendants for the sum of fifty thousand dollars debt, and fourteen thousand three hundred and twenty-four dollars and ninety-seven cents damages, making a total of sixty-four thousand three hundred and twenty-four dollars and ninety-seven cents, and fifty-two dollars and ninety-four cents costs.

\$50,000.00	Debt
14,324.97	Damages
<hr style="width: 50%; margin-left: 0;"/>	
\$64,324.97	
52.94	Costs
<hr style="width: 50%; margin-left: 0;"/>	
\$64,377.91	

WM. S. GUMMERE,
C. J.

40 A true copy.
EDWARD J. KELLEHER,
Clerk.

Case.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

Before.—Hon. WILLARD W. CUTLER, Judge, and a Jury.

10	THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,	Plaintiff,	Action at Law. On Postea.
		<i>v.</i>	
	THOMAS HARRINGTON'S SONS COMPANY, a corporation, and NATIONAL SURETY COMPANY, a corporation,	Defendants.	Thomas J. Brogan, Attorney.
20			

Jersey City, N. J., July 6, 1926.

APPEARANCES:

THOMAS J. BROGAN, Esq. (By Mr. ROONEY), for the plaintiff.

FISK & FISK, Esqs. (By Mr. ANDERSON), for the defendant National Surety Co. 30

MARSHALL VAN WINKLE, Esq., for the defendant Thomas Harrington's Sons Company.

Mr. Rooney: I offer in evidence the specification, contract and bond between Thomas Harrington's Sons Company, and Jersey City, dated January 24, 1917.

Mr. Anderson: I object to the endorsement of the payments in ink on the back of the last sheet 40

Case.

of the contract, which is evidently not part of the contract as executed, and I object to the specifications on the front of the document offered as not being part of the contract as executed. There are specifications annexed to the entire contract.

10 Mr. Rooney: I think your Honor could tell the jury to disregard the endorsements.

The Court: The endorsements are not part of the contract?

Mr. Rooney: No, sir.

The Court: Then they should not go in.

Mr. Rooney: But your Honor will accept the contract and specifications?

The Court: Yes.

Mr. Rooney: I offer them.

20 (Marked Exhibit P-1.)

Mr. Rooney: I also offer contract dated March 9, 1920, between the Mayor and Aldermen of Jersey City, and Michael Scatuorchio, party of the second part, for the removal of garbage from the date of the contract to November 30, 1922, in the sum of two hundred and sixty-eight thousand dollars, bond and specifications attached.

30 Mr. Anderson: I object to this for several reasons. The first reason is that under the Commission Government Act it was provided that no contract of this kind could be entered into without first advertising for competitive bids, and there has been no advertising for competitive bidding in this case.

I object on the further ground that the requirements as to the bond have not been met.

The Court: I think it may be offered.

Mr. Anderson: Exception.

(Admitted and marked Exhibit P-2.)

40 Mr. Rooney: Before offering the next exhibit

Maximilian T. Rosenberg, direct.

I would like to ask leave to amend the complaint to add the words: "Together with interest."

Mr. Anderson: I object to the amendment so far as my client is concerned, to include the count for interest.

Mr. Van Winkle: The receiver has no objection. 10

The Court: I will allow the amendment.

Mr. Rooney: Now I would like to offer in evidence the interrogatories and the replies thereto.

(Admitted and marked Exhibit P-3, Interrogatories.)

(Exhibit P-4, Answers.)

Mr. Rooney: I would like also to read to the jury the deposition of Mr. Maximilian T. Rosenberg, taken by consent. I offer it in evidence. 20

(Admitted and marked Exhibit P-5.)

(Read to jury, as follows:)

"MAXIMILIAN T. ROSENBERG, sworn as a witness on the part of the plaintiff, testifies as follows:

"Direct examination by Mr. Rooney:

"Q. You are a member of the bar of New Jersey? A. Yes. 30

"Q. How long have you been actively practising your profession in New Jersey? A. I was admitted as an attorney November, 1881, and counsellor November Term, 1884.

"Q. You were actively practising your profession in Jersey City in December, 1919, and January, 1920? A. I think so,—more or less actively.

"Q. Do you recall, Mr. Rosenberg, in January, 1920, having consulted with the city officials of Jersey City, concerning the performance of a con- 40

Maximilian T. Rosenberg, direct.

tract for the removal of garbage by Thomas Harrington Sons Company? A. I have a general recollection on the subject.

10 "Q. Would you refresh your recollection by referring to the minutes of a meeting of the Board of Commissioners of Jersey City held on January 29, 1920? A. If you will hand it to me, I will look at it.

"Q. I show you a printed copy of the minutes. A. Yes; I remember that circumstance.

"Mr. Rooney: I will ask to have the printed copy of the minutes of the meeting of the Board of City Commissioners marked for identification.

20 "(Marked P-1 for identification.)

"Q. You remember that meeting? A. My recollection after reading that over, is that that is substantially correct. I am not sure that the remarks which are attributed to me there are absolutely true, but the proceedings seem to me to be correct in substance.

"Mr. Rooney: I offer in evidence the minutes which have been marked P-1 for identification.

30 "Mr. Anderson: I object."

The Court: Why did you object to this exhibit?

Mr. Anderson: These minutes were shown to Mr. Rosenberg to refresh his recollection. After reading the minutes he said he remembered the circumstance. He testified from recollection after having read those minutes. The minutes are admissible for that purpose. I object on the further ground
40 that they have not been proved.

Maximilian T. Rosenberg, direct.

The Court: I will admit them.

Mr. Anderson: Exception to your Honor's ruling.

(Received in evidence and marked Exhibit P-6.)

10 "Q. Do you recall having attended that meeting of January 29, 1920? A. I do.

"Q. And were you there with Joseph Harrington? A. Yes.

"Q. Joseph Harrington at that time was president of the Thomas Harrington Sons Company? A. That is my recollection.

20 "Q. (Showing witness.) Did you at that meeting offer this communication? A. No. Mr. Harrington did. It is signed by Mr. Harrington and I think he offered it."

Mr. Anderson: I ask that that be struck out, what the witness thinks.

The Court: Did you make an objection then?

Mr. Anderson: No, I did not.

The Court: Then it may stand.

"By Mr. Anderson:

30 "Q. What is the nature of that paper? A. That is the statement by which he gave up the contract. It is the same statement as printed in the minutes as I recall.

"Mr. Rooney: I offer in evidence this communication from Joseph Harrington, president of Thomas Harrington Sons Company, which has been marked P-2 for identification.

40 "Mr. Anderson: I object to this paper being received in evidence."

Maximilian T. Rosenberg, direct.

The Court: Do you object?

Mr. Anderson: Yes. Mr. Rosenberg simply said, "I think he offered it."

The Court: I will admit it.

Mr. Anderson: Exception.

10 (Admitted and marked P-7 in evidence.)

"By Mr. Rooney:

"Q. Your appearance at this meeting of the City Commission on January 29, 1920, was pursuant to a notice that you had received from the city officials? A. I don't remember receiving any notice. It seems to me that if any notice was received, it must have been by the Harrington Company.

20 "Q. Do you remember seeing such a notice? I show you a notice signed by Michael I. Fagen, directed to Thomas Harrington Sons Company, dated January 28, 1920, and ask you if that is a copy of the notice? A. It is very likely that I saw that notice at the time.

"Mr. Rooney: I ask that this copy be marked for identification.

"(Marked P-3 for identification.)

"Mr. Rooney: I offer P-3 for identification in evidence.

30 "Mr. Anderson: I object. I might state here with reference to this and other exhibits offered, that this is a taking of testimony by consent for the purpose of enabling Mr. Rosenberg to depart for Europe and not be present at the trial on July 6, and I reserve the right to object to all exhibits offered in evidence, among other reasons, for the reason that there is no official authorized at this hearing to receive or reject ex-

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Maximilian T. Rosenberg, direct.

hibits in evidence. I shall further object to their materiality and relevancy at the trial."

Mr. Rooney: I offer Exhibit P-3 for identification in evidence.

The Court: What is your specific objection to this? 10

Mr. Anderson: That it does not appear to be the original document because it does not bear the signature of Michael I. Fagen; it is simply a typewritten signature.

The Court: I will rule upon that later.

"Q. Do you recall having appeared at the office of Commissioner Fagen in the City Hall on January 28, 1920, the day before this meeting? A. Yes; I recall that.

20 "Q. You at that time conferred with John Milton, who was corporation counsel of Jersey City, and Commissioner Fagen, Director of Streets and Public Improvements, concerning the Thomas Harrington Sons' contract? A. There were two conferences, as I now recall, on successive evenings—I think on two successive days. Mr. Milton, who was then Corporation Counsel, was there; Commissioner Fagen was there, and Mayor Hague was there part of the time.

30 "Q. Was Andrew Boyle, Supervisor of Removal of Garbage of Jersey City, also present at any of these conferences? A. My impression is that he was there for part of one conference. That is all I can remember.

40 "Q. You appeared at these conferences in behalf of Thomas Harrington Sons Company? A. I appeared at the request of Mr. Joseph Harrington, who was at that time president of the Thomas Harrington Sons Company. I remember he called

Maximilian T. Rosenberg, direct.

for me at the office and we went up together. I went at his request.

"Q. You stated at the meeting held January 29, 1920: 'We are here to answer that notice.' Will you kindly tell me what notice you referred to?

10 "Mr. Anderson: I object on the ground that anything that Mr. Rosenberg may have said or done at that meeting or at the conference is not binding upon the Surety Company.

"A. I imagine it must have been in answer to the notice which appears in the minutes.

"Q. Copy of which has been marked P-3 for identification? A. I should say so.

20 "Mr. Anderson: I ask that the answer be stricken out on the ground that it is not a statement of fact. It is a statement, as the witness puts it, of his 'imagination.'"

Mr. Anderson: I renew that objection.

The Court: I will allow it to stand.

Mr. Anderson: Exception.

Mr. Rooney: May I now renew my offer of Exhibit P-3 for identification?

The Court: I will allow it now.

30 (Marked Exhibit P-8.)

Mr. Anderson: Exception to the receiving of this exhibit.

40 "Q. Do you recall, at the conference in Commissioner Fagen's office, that Andrew Boyle, Inspector of Garbage Removal in Jersey City, was called into the office and that a report was submitted by him in your presence concerning the compliance of Thomas Harrington Sons Company with their contract?

Maximilian T. Rosenberg, direct.

"Mr. Anderson: I object upon the ground that it is not binding upon the Surety Company.

"A. I do not remember. I remember seeing Boyle there.

"Mr. Anderson: Objection withdrawn. 10

"Q. Do you recall Boyle having come into the office?

"Mr. Anderson: Same objection."

Mr. Anderson: My objection is that it is not binding upon the Surety Company.

The Court: I think it is competent.

"A. Yes. My recollection is that Boyle was there part of the time at the interview. 20

"Q. Do you know what the nature of the consultation was?

"Mr. Anderson: My objection, on behalf of the Surety Company to the entire line of testimony is that anything that Mr. Rosenberg may have said or done at this consultation or conference or commissioners' meeting, is not binding upon the defendant, National Surety Company." 30

The Court: It may be answered.

40 "A. I had been consulted a few days before, as I recall, by Mr. Harrington concerning the situation, and about two days—I think it was—before this action by the Commissioners he called for me late one afternoon, around four o'clock, and we went up to the City Hall together. We then had a conference with Commissioner Fagen and Mr. Milton, and it may have been that Mr. Boyle was present for a time at that interview, or the

Maximilian T. Rosenberg, direct.

10 next one. The next interview—it might have been I think the following evening, or the evening before this meeting—the situation was that it was in January, a very severe winter, Mr. Harrington had a strike on his hands, and he had taken the contract at pre-war prices, and his cost for labor and materials had risen to such an extent—to say nothing of the very hard winter, much snow and the strike—that he couldn't go on with the contract; and these matters were stated to Commissioner Fagen and Mr. Milton. Mayor Hague was present at either one or both of these conferences for a short time—I now don't remember—and everyone realized the situation. It was generally realized that Harrington Company could not carry on the contract, and there was some discussion as to whether or not, there being some idea that an act would be passed that might permit the City to increase the compensation, they could carry on; and I think it was finally determined by Mr. Harrington that he could not carry on. The City was very anxious to take it over. Mr. Fagen was getting complaints all over about garbage removal, and he admitted, I think,—I do not want to bind Commissioner Fagen by anything I say—

20 he admitted and everybody admitted that it was practically impossible for the Harrington Company to keep on with this contract. There was some sort of understanding—the City could not be bound by it, but there was a sort of an understanding that the City was not going to be unduly hard on the Harrington Company if they abandoned the contract at that time so that a new contract might be passed and entered into with either them or other contractors at an advanced price. As the

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Maximilian T. Rosenberg, direct.

proceedings of that meeting show, it was a pretty desperate situation.

“Q. Joseph Harrington was present at these conferences? A. Oh, yes.

“Q. It was at the last conference prior to the meeting of January 29, 1920, that this notice Exhibit P-3 was given to Harrington? 10

“Mr. Anderson: I object. The witness has testified that he does not know when that notice was given to Mr. Harrington.

“The Court: He may answer.

“A. I will say again that I don't remember whether it was or was not given to him at that time.

“Q. Do you know whether a notice was given to Harrington at that time? You were his attorney? 20

A. I was there as Mr. Harrington's attorney, but I don't remember now whether that notice was then given to him or was given to him at a time when I was not there. My impression is that he got it, that he must have had it, but, Mr. Rooney, you are asking me now to testify to a matter which took place six years and a half ago. I am giving you what I remember, but I cannot remember when that notice was served upon him, whether 30 it was there at that time or some other place at some other time.

“Q. You did know, before the meeting of January 29, 1920, however, that such a notice had been served on him, didn't you? A. I knew that such a notice had been served because I remember we discussed the matter in the meeting of the 29th, and I might go further and say that on the morning of the 29th, before going up to the City Hall, I discussed the matter with Colonel Fisk and Mr. 40

Maximilian T. Rosenberg, direct.

Field of the Commercial Trust Company, who agreed that the situation was such that nothing else could be done but what we were going to do.

“By Mr. Anderson:

10 “Q. What was it you were going to do? A. Ap-
 pear before the City Commission and have Mr.
 Harrington present the statement which he pre-
 sented.

“By Mr. Rooney:

“Q. But you do know that there was a notice
 requiring the Harrington Company to appear be-
 fore the City Commission on January 29th? A.
 My recollection is that there was such a notice.

20 “Q. Requiring it to show cause why the con-
 tract should not be discontinued because of de-
 fault having been made by the Harrington Com-
 pany in its performance? A. Oh, yes; I recall that
 there was such a notice. It says so in the minutes.

“Q. Did you say that you consulted with some
 people about it the morning of the meeting and
 that you appeared at the meeting in response to
 the notice? A. I appeared at the meeting with
 Mr. Harrington, at his request.

30 “Q. Did you state at the meeting of January
 29, 1920: ‘Yes, sir; we are here today to answer
 to that notice and Mr. Harrington has here a
 statement which I desire to file with the City Clerk
 if he will please read it to the Commission’? A.
 If the minutes say so, I cannot say it was not said.
 I am perfectly willing to assume, in the absence
 of anything else, that those minutes are correct.

40 “Q. Did you state at that meeting, in answer
 to this question from Mr. Milton: ‘You are here
 to make any statement of defense that you can,’

Maximilian T. Rosenberg, direct.

the following: ‘Yes, sir; I may say this, that I
 think Mr. Harrington and all will agree that con-
 ditions are such in Jersey City at this time that I
 think immediate action is necessary and the Com-
 mission are alive to that situation.’ A. If the min-
 utes say so, I very likely said so. 10

“Q. Can you tell us the conditions you referred
 to?

“Mr. Anderson: I object.”

The Court: Do you object?

Mr. Anderson: I withdraw the objection.

“A. The conditions that I have just stated: that
 Mr. Harrington had taken this contract at pre-
 war prices, labor had gone up tremendously; ma-
 terials and supplies had gone up; it was one of the
 severest winters that we had had in many years;
 on top of that he had a strike on his hands; and
 the garbage had been accumulating because he
 could not get the work done because of the snow
 and the other difficulties; and it was a situation
 where, if the City would take over the matter and
 relet the contract at what would be a living price
 to them or a new contractor, or do the work it-
 self, it would be a good thing for the City. Sani-
 tary conditions were such that something had to
 be done. Mr. Harrington agreed to that, and I
 thought that was so, and I had no hesitation in
 saying it. 20

“Q. Do you know how long those conditions had
 existed? A. No. 30

“Mr. Rosenberg: Over how long a period
 were those conferences between you and
 the City officials concerning the perform-
 ance of this contract? 40

William E. Jewell, direct.

"A. About three or four days.

"Q. That is, prior to the meeting of January 29?

A. With the City officials I should say only about two days, but my recollection is that Mr. Harrington had spoken to me about it a day or so before that, but I think it was only about two or three days that we conferred with the City officials.

"Mr. Anderson: I have no questions.

"Mr. Van Winkle: And I have none.

"(Deposition closed.)"

Mr. Rooney: I offer in evidence the minutes of the meeting of the City Commissioners.

(Marked in evidence Exhibit P-8.)

(Read to jury.)

Mr. Rooney: I offer in evidence the minute book of the Thomas Harrington Company, produced by the defendant in response to my notice to produce.

Mr. Anderson: I object, on the ground that they have not been proved.

The Court: I will allow them to be used.

Mr. Anderson: Exception.

(Marked in evidence Exhibit P-9.)

30 WILLIAM E. JEWELL, sworn.

Direct examination by Mr. Rooney:

Q. Are you employed in the office of the Director of Streets and Public Improvements of Jersey City? A. Yes, sir.

Q. How long have you been employed there? A. Seventeen years.

Q. And in what capacity are you employed? A. Chief bookkeeper of the department.

40 Q. Have you the records with you showing the

William E. Jewell, cross.

payments to Thomas Harrington Sons Company under their contract of January 24, 1917, for the removal of ashes and garbage in Jersey City? A. Yes.

Q. Referring to those records can you tell us the total amount which was paid to Thomas Harrington & Sons Company up to January 28th, 1920? 10

Mr. Anderson: I would like to examine the witness to find out what he knows about it.

The Court: You may.

Cross examination by Mr. Anderson:

Q. Let me see the records you have, please (witness complies). What do you mean by certification? A. That is made up by the Engineering Department, and signed by the Inspector of Ashes and Garbage, that the work has been performed. 20

Q. That is it shows that at a certain time so much work has been done which entitled him to a payment? A. Yes, sir.

Q. And then who gets that certificate? A. The certificate comes into the Director's office and the Director looks over it and signs it if it is correct, and it goes to the City Clerk's office or to the Comptroller's office first to be entered, and then to the City Clerk's office to have a check drawn. 30

Q. And does the certificate come to you? A. No, sir. The original certificate stays in the City Clerk's office. I have a copy of it.

Q. Well, they are prepared in duplicate when they are sent in? A. Triplicate.

Q. And one of the copies comes to you? A. Yes, sir.

Q. Then do you have anything to do with the making out of the checks to pay that certificate? A. No, sir. 40

William E. Jewell, cross.

Q. Then, how do you know that the check is made? A. The City Clerk notifies me of that.

Q. And you make your entries in the books of payments made when you do not actually know that the payments actually have been made? A. I know because I see the checks sometime—not always—I have nothing to do with the checks, I have no right to handle the checks.

Q. In other words, you make these entries although you have no personal knowledge that the payments have been made? A. I could see that the certificate went to the City Clerk's office for payment.

Q. You knew that the certificate had gone through to the City Clerk's office? A. Yes, sir.

Q. But whether or not payments have been made you would not know? A. The City Clerk could verify that.

Q. You know through your report sheet? A. Yes, sir.

Q. And this is the entire listing of the payments made to Harrington Sons Company on account of their contract? A. Yes, up to here. This is the last payment, \$345,000.

Q. And where is the sheet that precedes this first report sheet? A. I didn't bring that.

Q. So that these sheets merely show the total paid to Harrington Sons Company and not the itemized statement? A. Yes, but I can get the itemized statement if you desire it.

Mr. Anderson: I must object to this witness testifying to these amounts because apparently from his own testimony these sheets are made up merely from certificates

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William E. Jewell, redirect.

that come in to him and he does not know whether the payments have ever been made or not.

Mr. Rooney: You can at least admit the amount that was received under the contract. I don't see why we should be called upon to prove that. There is no question that he was paid the sum of \$345,000.

Mr. Anderson: The difficulty with that is that the Harrington Company is in the hands of a receiver. The receiver is sick, he has the books, and there is no way the Surety Company can know except from Harrington's books whether these figures are correct or not. That is our difficulty.

Mr. Rooney: Hasn't the receiver the books in his office?

Mr. Anderson: I don't think he has. I have inquired several times and I cannot find them.

Mr. Rooney: All right, we will prove the entire system, then.

Direct examination by Mr. Rooney (continued):

Q. Just tell us what you know about these payments, what your part in it is? A. What do you mean?

Q. What are the records which you have there? A. This is the record of how much money was paid to Harrington Sons Company from January 28, 1920, on the contract for the removal of ashes and garbage, which amounts to—

Mr. Anderson: I object to that on the ground that what he has there is carried forward in lead pencil, from totals which evidently come from some other docu-

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William E. Jewell, redirect.

ments; furthermore on the ground that he has no actual knowledge of the payments; he does not know that payments were made.

The Court: I think he ought to have the rest of the sheets.

10 Q. Are these the certificates you refer to? A. I think they are.

Q. Are they normally in your custody? A. This is the triplicate copy of the certificate. The way the payments are made—these are all the certificate of the Harrington Sons Company, number 79 certificate was dated January 24th; when it was paid, about the 28th—there is about four days' difference—this shows the amount of the payment; this shows the amount of the debt before this payment goes in, and this shows the total amount paid on the contract.

Mr. Anderson: Isn't this what you mean? That this triplicate copy of the certificate comes to you, and from this a check is drawn?

The Witness: Three copies come to me.

Mr. Anderson: One goes out with the check?

30 The Witness: Yes.

Mr. Anderson: And this one stays on file in your office?

The Witness: Yes.

Mr. Anderson: As your warrant for drawing the check?

The Witness: Yes.

Mr. Anderson: That is as far as your knowledge goes?

40 The Witness: Yes. The original certificate is signed by Michael I. Fagen.

John Milton, direct.

Q. Do those papers which you now have constitute your entire record concerning payments made to the Harrington Company? A. Yes, sir.

Q. What do those papers that you have in your hand consist of? A. Certificate of payment for the contract of Thomas Harrington Sons Company. 10

Q. What are the other papers? A. My ledger sheet, which I carry them on.

Q. Your ledger sheet is compiled from these certificates? A. Yes, sir.

Mr. Rooney: I would like to offer the certificate and the ledger sheet.

Mr. Anderson: I object on the ground first that they are not evidential of payment having been made. This witness has no knowledge that the payments were made. The certificates are simply evidence that the Harrington Company was entitled to a specific amount of money on a certain date. The ledger sheet is merely a record of the amount of that certificate, and neither one is evidence of payment. 20

Mr. Rooney: I will withdraw this witness.

30 JOHN MILTON, sworn.

Direct examination by Mr. Rooney:

Q. You are the present Prosecutor of the Pleas of Hudson County? A. Yes, sir.

Q. And you were formerly Corporation Counsel of Jersey City? A. Yes, sir.

Q. And you were Corporation Counsel of Jersey City in January, 1920? A. I was.

Q. Do you recall, Mr. Milton, around January 40

John Milton, direct.

28, 1920, having had any conference with Mr. Max T. Rosenberg? A. I would not be able to fix the date, Mr. Rooney, but I recall a conference, yes.

10 Q. Will it refresh your memory to refer to the minutes of the meeting of the Commissioners of Jersey City held on January 29, 1920? A. It would, if those minutes were the subject matter of the Harrington contract.

Q. I show you those minutes? A. Yes, I have read them.

20 Q. Did you confer with Joseph Harrington and Mr. Rosenberg prior to your meeting of January 29th? A. My recollection, Mr. Rooney, is that on the same day, immediately preceding the hearing, or on the afternoon of the day, before the meeting, I attended a conference in the office of Commissioner Fagen, at which Mr. Rosenberg and one of the Harringtons—I could not tell you now which one—one of the Harringtons were there.

Q. Was anything said by Mr. Harrington or Mr. Rosenberg concerning the performance of this contract? A. Oh, yes.

30 Q. Do you recall what was said by them concerning their ability to carry out the terms of the contract? A. Why, in general, Mr. Rooney, either Mr. Harrington or Mr. Rosenberg said that the company could no longer go on with the contract. As I now remember it, it was because of the fact that costs of material and labor, particularly labor, had gone against the company, and I think they may have run into bad weather which made the removal of the garbage unexpectedly expensive. Mr. Rosenberg, as I recall it, came there in response to a notice which had been served upon his client that day, and stated his intention, or rather the
40 intention of his client, to appear the next day or

John Milton, cross.

that afternoon—I have forgotten just how long before the official meeting of the board that this conference took place. And Mr. Rosenberg stated, that it was the intention of himself and his client to appear before the meeting of the Commission and state that they could not carry on the contract. That is the thing in substance. 10

Q. Did you attend a meeting the following day, that is January 29, 1920? A. Well, I attended the meeting whenever it was held, immediately after this conference with Mr. Rosenberg, but I cannot tell you now if it was the 29th or not.

Q. That was the meeting at which the contract was cancelled? A. Yes.

20 Q. Do you recall whether representatives of the Surety Company and of the contractor were there? A. Why, Mr. Rosenberg was there for the contractor, and there was some one there on behalf of the Surety Company. He stated he was there on behalf of the Surety Company.

Mr. Rooney: That is all.

Cross examination by Mr. Anderson:

Q. Were you in court when Mr. Rosenberg's testimony was read, Mr. Milton? A. No, sir.

30 Q. For your information, preparatory to something else, Mr. Rosenberg said, "We then had a conference with Commissioner Fagen and Mr. Milton, and it may have been that Mr. Boyle was present for a time at that interview or the next one." Then he goes on and discusses the severe winter, the rise in costs, and so forth, and then he said: "It was generally realized that the Harrington Company could not carry on the contract, and there was some discussion as to whether or not,
40

John Milton, cross.

there being some idea that an act would be passed that might permit the city to increase the compensation, they could carry on." Do you remember that being discussed? A. I do not, Mr. Anderson, no sir.

10 Q. And was such an act passed, to your knowledge?

Mr. Rooney: I object, immaterial and irrelevant.

The Court: I don't think it is competent.

20 Q. Well, was there any application by the Harrington Company to your knowledge, either to you or to the city officials for relief under an act passed by the Legislature to relieve contractors owing to the high price of material?

Mr. Rooney: I object. Immaterial, and also on the additional ground that it is highly prejudicial.

The Court: I will allow it.

Mr. Rooney: Exception.

30 A. I am going to give you my recollection, Mr. Anderson, and if I may I will state the reason for my recollection. If you will refer to the same statute which I have in mind, the probability is that there was no application, at least none I know of, because the statute to which you refer was drawn by me, that is, the bill was drawn by me, and I caused its introduction into the Legislature at the request of some contractors who had contracts for the erection of school buildings. I am not certain of this, but I think that the statute is limited to contracts of the Board of Education, if you and I are talking about the same act. There were some

40

Andrew J. Boyle, direct.

other acts passed about the same time, or a year or two previous.

Q. The act I am referring to covers all municipal boards of freeholders, and so forth. A. Then no such application for relief was made, to my knowledge.

10

Mr. Rooney: May I have the same objection to this entire line?

The Court: He said no application was made.

A. Of course I call your attention to the fact that this statute did not become a law until April, 1920, and as I understood Mr. Rooney's questions, they were directed to January, 1920. For this reason I don't think any application for relief was made.

20

Q. I draw your attention to Mr. Rosenberg's testimony to the effect that some relief would be granted under an act which was to be passed in the future. I have no recollection of any such discussion on application for relief.

Mr. Anderson: That is all.

ANDREW J. BOYLE, sworn.

Direct examination by Mr. Rooney:

30

Q. Where do you live? A. 2787 Boulevard.

Q. By whom are you employed? A. By the City of Jersey City.

Q. In what capacity? A. Inspector of removal of ashes and garbage.

Q. How long have you been employed in that capacity? A. Going on twenty-nine years.

Q. Were you inspector of removal of ashes and garbage during the years 1919 and 1920? A. I was.

40

Andrew J. Boyle, direct.

Q. I show you a report, Mr. Boyle, signed "Andrew Boyle, Inspector of Ashes and Garbage," to the Board of Commissioners of Jersey City, dated January 28, 1920, and ask you if this report was submitted by you? A. Yes.

10 Mr. Rooney: I offer that in evidence.

Mr. Anderson: I think that is admissible for one purpose only, and that is to show that under the contract the inspector of garbage removal certified to the Board of Commissioners that there was a delay in the performance of the contract. I don't think it is admissible to prove the fact of the delay.

20 The Court: I think it is competent.

Mr. Anderson: Exception.
(Marked Exhibit P-10.)
(Exhibit P-10 read to the jury.)

Q. Now, Mr. Boyle, in your capacity of inspector of removal of ashes and garbage, do you have occasion to inspect the conditions around Jersey City concerning the removal of ashes and garbage? A. I do.

Q. And did you in 1919 and 1920? A. I did.

30 Q. Can you tell us what the conditions were in December of 1919 and January, 1920, concerning the removal of ashes and garbage by the Harrington Company? A. Well, until the first of December, 1919, the collections were all right, but from December 1st, from that date on until the date of the special meeting of the City Commissioners, there was no complete collection on any route in Jersey City.

40 Q. What do you mean by complete collection, Mr. Boyle? A. That is, there are routes laid out

Andrew J. Boyle, direct.

and there are certain days on which the ashes must be collected on those routes. Monday, Wednesday and Friday, and Tuesday, Thursday and Saturday, two collections in each part of Jersey City, and on none of those routes was there a complete collection for the week, that is, there was not any two collections. Part of a collection on this route, and part on another. 10

Q. Can you tell us during this period whether this garbage was allowed to accumulate in the streets? A. Of course, I mean there was not a complete collection. There was no place for it to go but to remain on the street.

Q. Well, was there a large or a small collection of garbage on the street? A. Well, as we progressed during December it was getting worse and worse all the time. 20

Q. You mean the contractor was falling behind all the time? A. Yes, and it got so bad that where a district would become very badly infested we were compelled to remove the entire plant from one section to another.

Q. What do you mean by that? A. Well, now, in the Bergen section, which is the largest district, the Bergen and Greenville section, known as number one, the congestion on account of the lack of collections would be larger than in Jersey City, or route number two, and while we were in a fairly good condition in Jersey City, we removed the Jersey City plant to the Bergen and Greenville sections so as to relieve them there, and tried to make a little headway. 30

Q. Well, can you tell us for how long a period the ashes and garbage in any given vicinity was allowed to remain on the streets? A. Well, as I said a moment ago, the collections began to go 40

Andrew J. Boyle, direct.

bad from December 1st, up to the time the contract was revoked by the City Commissioners.

Q. Each district, as I understand then, had two definite days a week allotted to it for the removal of the ashes and garbage by the contractor, is that correct? A. Yes.

10

Q. And of course the people in the city conformed to these regulations and put their barrels out for collection on those particular days? A. Yes, sir.

Q. And would you say that the contractor was at any time a week or more behind in the collection of the garbage that was out in the streets? A. In some parts of the city, yes, at least a week.

20

Q. And in other parts, and at other times it was allowed to accumulate for days on the streets before it was collected.

Mr. Anderson: I think Mr. Rooney ought not to lead.

Mr. Rooney: I withdraw the question.

Q. You say your inspection of the collections took in the entire city, Mr. Boyle, am I correct? A. Yes.

30

Q. And you had seven inspectors working under you? A. Yes.

Q. Now, Mr. Boyle, without any effort to try to lead you or draw your attention to any particular conditions, just tell us the conditions which existed in Jersey City concerning the collection and removal of ashes and garbage by the Harrington Company from December 1st, 1919, to January 29th, 1920. A. Well, in answer to that, Mr. Rooney, would you be kind enough to allow me to use my book so as to refresh my memory?

40

Andrew J. Boyle, cross.

Q. Yes. When did you make that? A. At that time.

Q. And have you that with you? A. Yes, I have.

Mr. Anderson: May I examine the witness on this book?

The Court: Yes.

10

Cross examination by Mr. Anderson:

Q. Suppose you show me what you propose to look at? A. (Witness indicates.)

Q. In whose handwriting is this? A. This is in the handwriting of Mr. McLaughlin.

Q. Not in your handwriting? A. No, sir.

Mr. Anderson: I object to the witness using this book to refresh his recollection.

20

Direct examination by Mr. Rooney (resumed):

Q. In the handwriting of whom? A. Mr. McLaughlin, the Clerk in the office.

Q. Is Mr. McLaughlin here? A. No, sir.

Q. Was it made at that time?

Mr. Anderson: Don't lead, Mr. Rooney, please.

Q. When was it made? A. It was made on December 1st.

30

Q. And these entries were made at the time the conditions existed? A. Absolutely.

Q. How do you know that? A. Because I was there and those entries were made from memorandums handed to me by my assistants.

Q. Under whose supervision were they made? A. Mine.

Mr. Rooney: Now, if the Court please, I

40

Andrew J. Boyle, cross.

ask that the witness be allowed to refresh his recollection.

The Court: Why isn't it competent when they were made under his direction?

10 Mr. Anderson: The handwriting in the book is not the witness' handwriting. The entries, he says, were made from reports made by his inspectors.

The Court: Find out how they were made.

Q. From what were these records compiled? A. These records were compiled from my supervision, by my inspectors. I would not attempt to put any record in there that was handed to me, even by my assistants, unless I knew that those records were correct.

20 Mr. Anderson: I am not charging you with anything personal, Mr. Boyle. This is a legal matter.

The Court: What became of the reports which you refer to?

The Witness: I don't know. This is back six years.

The Court: Were they kept or not?

The Witness: I don't know.

30 Mr. Anderson: May I examine the witness?

The Court: Yes.

Cross examination by Mr. Anderson:

Q. How many inspectors did you have at that time? A. Five at that time.

40 Q. So that each one was assigned to a particular district? A. No. There were two in the Hudson City District, there was only one in Jersey City, and there were two in the Bergen and Greenville section.

Andrew J. Boyle, redirect.

Q. Now, what were their duties? A. To see that the ashes were picked up, and to report on what streets, if any, the ashes were not removed. They handed me their reports.

Q. And those reports were in writing? A. Yes, sir.

Q. And they were turned over to Mr. McLaughlin, the clerk? A. Yes, I turned them over to him.

Q. They were handed to you and you looked at them? A. Yes, sir.

Q. And you handed them to Mr. McLaughlin to put in this book? A. Yes.

Q. And this book was kept by Mr. McLaughlin? A. Yes, this part you referred to now.

Mr. Anderson: I object to the use of the book.

Mr. Rooney: I am not offering it in evidence. I am simply asking that the witness may use it to refresh his recollection. Furthermore, I understand that under the cases it is not necessary for a witness to have actually made a memorandum himself to use it to refresh his memory.

(Argued.)

The Court: Before you can use it you will have to prove it by Mr. McLaughlin.

Mr. Rooney: May I ask an exception?

Direct examination by Mr. Rooney (continued):

Q. Is Mr. McLaughlin still employed by the City? A. Yes.

Q. Where is Mr. McLaughlin at present? A. In the Chief Engineer's office in the City Hall.

Q. Well, Mr. Boyle, without using this book can

Andrew J. Boyle, recross.

10 you tell us the condition that existed in Jersey City, during December of 1919 and January, 1920, that came under your actual supervision and knowledge? A. Well, the conditions were very bad for the reason that the regular collection of ashes and garbage was not being carried on as it had been. On no route, to my recollection, can I say that there was a complete collection. On some of the routes, particularly the largest route we have, the Bergen and Greenville section, that was the most congested, and at times when Jersey City was pretty well up, we would go and remove the plant from Jersey City up to the Bergen section for a day or two, and then get it back again.

20 Q. Now, tell us what the conditions of the streets were during the period, in Jersey City, with reference to garbage and refuse. A. They were bad with reference to the non-collections.

Q. And over how long a period did that exist prior to January 29th, 1920? A. Well, it continued almost continuously from that time up to the time of the special meeting.

Mr. Rooney: That is all.

30 *Cross examination by Mr. Anderson:*

Q. The winter of 1919 and 1920 was a pretty hard winter, wasn't it? A. Very severe.

Q. One of the worst winters we have had in years? A. Yes, sir.

Q. And the severity of the winter started in December, and ran through until March, 1920, did it? A. February, 1920.

40 Q. Almost continuous snow, and the streets were clogged up? A. True.

Jeremiah Casey, direct.

Q. And do you know anything about the labor conditions in Jersey City during that season?

Mr. Rooney: I object on the ground it is irrelevant, incompetent and immaterial.

The Court: Objection sustained.

10 Q. When the City took over the collection of the garbage did you have charge of it? A. Yes, I had supervision.

Q. And what did you find as to the ability to get labor? A. I didn't have any trouble, I managed to get it.

Q. How did you manage to get it?

The Court: How is that material?

Objection sustained.

Mr. Anderson: There was no objection 20 to that, your Honor.

Mr. Rooney: I object.

The Court: Here is a contract on a bond given for fulfillment. If it was not fulfilled the bond is forfeited, that is all there is to it.

Mr. Anderson: I will abandon this line of testimony. That is all.

JEREMIAH CASEY sworn. 30

Direct examination by Mr. Rooney:

Q. By whom are you employed? A. The City of Jersey City.

Q. In what capacity? A. Assistant Inspector, removal of ashes and garbage.

Q. Can you tell us what the duties of an assistant inspector of removal of ashes and garbage are? A. To see that the routes are clear of ashes 40

Jeremiah Casey, direct.

and garbage, that the ashes and garbage are picked up.

Q. You check up on the removal by the contractor? A. Yes, the number of loads and men.

10 Q. Were you so employed by the City in 1919 and 1920? A. I was.

Q. Do you recall what districts or sections of the City you worked in in December, 1919 and January of 1920? A. District number two.

Q. Where is that? A. That takes in the lower part of Jersey City and the Lafayette section.

Q. Did you have any actual knowledge concerning the collection of ashes and garbage during December of 1919 and January of 1920? A. Yes, I had.

20 Q. Tell us what the conditions were so far as the removal of ashes and garbage were concerned during those two months. A. Part of the month of December he gave two collections and the other part one. In January he didn't give any two collections at all to any part of the route.

Q. And what became of the garbage and refuse? A. It remained in the barrels or receptacles wherever it was put out on the sidewalk.

30 Q. And over how long a period were they allowed to accumulate on the sidewalk before they were removed by the contractor? A. Well, when he gave it up it was not picked up until the new contractor started. Such accumulations that had gathered, we could not get them all picked up.

Mr. Rooney: That is all.

Mr. Anderson: No questions.

40

William Brennan, direct.

WILLIAM BRENNAN, sworn.

Direct examination by Mr. Rooney:

Mr. Anderson: We will stipulate that his testimony and the testimony of the other inspectors will be the same as that of the last inspector. 10

Q. By whom are you employed? A. The City of Jersey City.

Q. And were you so employed in 1919 and 1920? A. Yes, sir.

Q. In what capacity? A. Assistant inspector, removal of ashes and garbage.

Q. Did you have charge of a district in 1919 and 1920? A. Yes.

Q. What district did you have charge of? A. 20 Number one, Bergen and Greenville.

Q. That comprises all of the Bergen and Greenville section? A. Yes, sir.

Q. Were you actually acquainted with the conditions concerning the removal of ashes and garbage during December, 1919, and January, 1920? A. Yes, sir.

Q. Can you tell us whether or not during that period the contractor in charge of the work made two collections a week in your district? A. He did not. 30

Q. How often did he collect garbage during December of 1919? A. Well, with the exception of possibly a very few days, once a week was the most. Sometimes it would run a little behind that, eight or nine days, part of it.

Q. And are the Bergen and Greenville sections of Jersey City well built up? A. Very well at that time. 40

William Brennan, cross.

Q. A great many families live there? A. Yes.

Q. Well, now, during January of 1920, did he make his regular twice a week collections? A. No, sir.

10 Q. How many collections did he make? A. Well, most of the routes would receive one, some parts might not receive one in eight or nine days.

Q. Did you have regular trips during the week for the collection of ashes and garbage on that contract? A. Yes, sir.

Q. And it was the custom of the people to put their receptacles out on those particular days? A. Yes, sir.

20 Q. And after they were put out during December, of 1919, and January of 1920, over how long a period were they allowed to stay on the street before they were removed? A. If they were put out on the regular days it might be that the collections would not be made until five or six days later.

The Court: Can you tell us whether or not ashes and garbage were allowed to remain on the streets during that period?

The Witness: Absolutely.

Q. Large or small quantities? A. Lots of it.

30 Q. And that was the particular condition in the Bergen and Greenville sections at that time? A. Yes, sir.

Q. That comprises quite a large section of Jersey City too, doesn't it? A. The biggest there is, yes, sir.

Mr. Rooney: That is all.

Cross examination by Mr. Anderson:

40 Q. What was the condition of the streets in your

Thomas Morrissey, direct.

section with respect to snow and ice during that period?

Mr. Rooney: I object.

The Court: Objection sustained.

Mr. Anderson: Exception. That is all.

10

THOMAS MORRISSEY, sworn.

Direct examination by Mr. Rooney:

Q. You were assistant inspector of the removal of ashes and garbage in Jersey City in 1919 and 1920? A. Yes, sir.

Q. What district were you in during December, 1919, and January, 1920? A. Number two.

Q. Is that what is known as the lower Jersey City and Lafayette section? A. Yes, sir.

20

Q. Were you familiar with conditions concerning the removal of ashes and garbage in that section during December of 1919 and January of 1920? A. Yes, in the latter part of December it started to go back.

Q. How do you mean it started to go back? A. Well, the first part they used to give two collections a week, and the last part they only would give one or a half of one.

Q. A week? A. Yes, sir.

30

Q. How about January, 1920? A. It was in very bad shape, it was all over the streets.

Q. Garbage was all over the streets? A. Yes, sir.

Q. Did the contractor make his twice-a-week collections during that month? A. No, sir, he did not.

Q. How many collections did he make? A. He might clean up one route, and then leave that go until he came back five days afterwards.

40

William Floyd, direct.

Q. And was the garbage allowed to accumulate on the streets during that period? A. Yes, sir.

Q. And what would you say about the condition in your district with reference to garbage there? A. Oh, it was terrible. You would have
10 to be there every day stopping the boys from dumping it into the streets, the way it was.

Mr. Rooney: That is all.

Mr. Anderson: No questions.

WILLIAM FLOYD, sworn.

Direct examination by Mr. Rooney:

Q. You are one of the assistant garbage inspectors? A. I am.

20 Q. Did you have charge of a district in 1919 and 1920? A. In Greenville, Section No. 1.

Q. That takes in the Bergen section and all Greenville out to the car barns? A. Yes, sir.

Q. Greenville out to the car barns? A. From Highland Avenue.

Q. Were you familiar with conditions in December, 1919, and January, 1920? A. I was.

30 Q. Did the contractor, during December, 1919, remove the ashes and garbage twice a week from your district? A. He did not, no, sir, not regularly.

Q. Did he do it in January, 1920,—remove it twice a week? A. No.

40 Q. Can you tell us whether or not the ashes and garbage were allowed to accumulate on the street? A. In the month of December it started to be back. He did not make the regular collections twice a week. He started at Highland Avenue on Monday, and it would be Friday before

Bernard J. Rosengarten, direct.

he got around there again. That is the way it was going along in the month of December.

Mr. Rooney: That is all.

Mr. Anderson: No questions.

BERNARD J. ROSENGARTEN, sworn. 10

Direct examination by Mr. Rooney:

Q. Where are you employed? A. In the City Clerk's office.

Q. In what capacity? A. Stenographer and clerk, assistant to the City Clerk.

Q. And in such capacity as assistant to the City Clerk, have you charge of the records concerning the payment of checks and warrants by the City? A. No, not the payment of checks. The
20 Assistant City Clerk or the Acting City Clerk has charge of that.

Q. Do you know the signature of Mr. Furey, who was the Assistant City Clerk, Acting City Clerk? A. Yes, sir.

Q. Do you know whether Mr. Furey is still alive? A. No, sir, he is dead.

Q. When did he die? A. The first of January, 1926.

30 Q. Are you also familiar with the signature of Frank A. Dolan, who was at one time the City Clerk? A. Yes, sir.

Q. Is Mr. Dolan still alive? A. Mr. Dolan is also dead.

40 Q. I show you some sheets, Mr. Rosengarten, and ask you if you can identify these signatures as being those of Mr. Furey, Assistant City Clerk, and Frank A. Dolan, who was also City Clerk? A. Yes, sir, they are the signatures of the respective men.

Bernard J. Rosengarten, direct.

Q. What are these sheets which I have just shown you, bearing the signatures of Mr. Dolan and Mr. Furey? A. These sheets are originals of warrants payable to contractors for supplies or labor furnished the City.

10 Q. And the custom is to turn a check out from the City Clerk's office, and have whoever receives it sign that sheet? A. Sign for it, yes.

Q. These papers which you have produced are the records of the office of the City Clerk? A. Yes, sir.

Mr. Rooney: I offer these in evidence.

20 Mr. Anderson: I object on the ground that there has been no proof that the signatures presumed to be for the Harrington Company are the signatures of that company by any one authorized to act for the company.

The Court: I will allow it.

Mr. Anderson: Exception.
(Marked Exhibit P-11.)

30 Mr. Rooney: I also offer in evidence as part of the system, claim voucher sworn to by Thomas Harrington Sons Company, pertaining to the amount due under the original contract, which are the basis of the payments made, on the sheets which are already in evidence.

Mr. Anderson: Of course there is no proof of the signatures, but if that is correct with this list I have no objection. We will have to check up with this. I object to it until it is checked up.

40 Q. Have you with you any records showing the

Michael I. Fagen, direct.

payments for work done, including February, 1920, and March, 1920?

Mr. Anderson: I object to this line of testimony now on the ground that it is incompetent, under the plaintiff's complaint.
(Argued.)

The Court: We will adjourn at this time, and I will hear you further in the morning.

JERSEY CITY, N. J.,
July 7, 1926, 10 A. M.

Trial of the case resumed.

20 Mr. Rooney: I would like to offer this formal amendment to Paragraph 5 of the First Count, and Paragraph 5 of the Second Count. I have a typewritten copy here, and it might save reading it into the record, by handing it to your Honor.

Mr. Anderson: The National Surety Company amends its answer by making a general denial of the amendments as set out in the document handed to the Court.

MICHAEL I. FAGEN, sworn.

Direct examination by Mr. Rooney:

30 Q. You are Director of Streets and Public Improvements of Jersey City? A. Yes.

Q. And you were the Director of that department in 1919 and 1920? A. Yes, sir.

Q. Your department handles the removal of ashes and garbage from the streets of Jersey City? A. Yes, sir.

40 Q. I suppose, Commissioner, as head of that de-

Michael I. Fagen, direct.

partment, you take a personal interest in the removal of it? A. I do, yes.

Mr. Anderson: We admit to that.

10 Q. Do you recall the condition which existed in Jersey City in December, 1919, and January, 1920, concerning the removal of ashes and garbage by the Harrington Company, contractors? A. They were not being removed regularly as called for by the contract between the City and Harrington. They were removed intermittently and not by route. Sometimes the ashes would be removed today when they should have been removed yesterday, and sometimes the ashes would be—
20 for this period of late December and January and February, they would go from one day to one week and two weeks off the route, and in the latter part with one removal for the whole week.

Q. And during that space of time did the ashes and garbage accumulate on the public streets? A. The city streets were strewn with garbage and ashes, barrels standing out overflowing. The children were upsetting barrels. In other words, the ashes were not being collected throughout the City with any kind of regularity; and were standing
30 on the streets and not being taken away.

Q. And over about how long a period prior to January 29th, 1920, that is the date of the special meeting at which the action was taken in regard to the Harrington Company, did this chaotic condition exist? A. Going back from recollection, and with no specific dates, as far as the length of time only, I would say that it continued, approximately, during December, and growing worse and worse until it came to the week of about February 20th,
40 around that, when it ceased to function at all. No teams were out.

Michael I. Fagen, direct.

Q. This special meeting might refresh your recollection; that was held on January 29th, 1920, at which action was taken in regard to the contractor, the Harrington Company? A. As I said before, my recollection, without referring to documents,
10 would be that practically for a period of one week the ashes were not removed at all in the City of Jersey City.

Q. Commissioner, were you present at the special meeting of the Board of Commissioners held on January 29th, at which action was taken upon the contract with the Harrington Company? A. Yes.

Q. Would it refresh your recollection to refer to the minutes of that meeting? A. Refreshing my memory as to particular dates could be done by
20 these minutes. On what points do you desire me to refresh my memory.

Q. You said something about there not having been any removals by the contractor for about a week prior to January 29th, 1920. Do you mean February 20th or January? A. February.

Q. Well, the contract was revoked by the City in January, wasn't it, Commissioner, at this meeting? A. Oh, yes, January 29th.

Q. So that Harrington did not do any further work on his contract after that date? A. No.
30

Q. Then during what period do you mean the ashes and garbage were not removed during a week? A. During the month of December and during the month of January up to practically the last week that he had his outfit and was removing in the intermittent manner he had been doing it at that time. Then ceased for about a week previous to the rescission of the contract by the Board of Commissioners. That meeting was held on January 29th.
40

Michael I. Fagen, direct.

10 Q. Then subsequent to that meeting, Commissioner, did the City arrange to do some of this garbage removal work direct while advertising for another contractor to do the work? A. The Board of Commissioners passed a resolution authorizing me, as the Director of Streets and Public Improve-
ments, to contract, or otherwise, to remove the ashes and garbage, and also to remove the nuisance of the existing conditions in regard to ashes and garbage.

20 Q. Do you know, Commissioner, over about how long a period the City itself did that removal work? A. The exact time I could not say; up to the time a contract was entered into by the Board of Commissioners of Jersey City with Michael Scatuorchio for the removal of ashes and garbage by him, as a contractor for the City. The City removed all the ashes and garbage during that period, and removed them by employing the plant of the Harrington Company, that is the horses and trucks that he was using and that he owned, or that this corporation owned, and paying for them—I do not know if I can give you the exact figures from memory, but as my memory serves me—

30 Mr. Anderson: I object to any testimony from this witness, unless he is testifying to facts. If he knows he may say so, but I object to his guessing as to the figures.

Q. Do you recollect how much the City spent for this work prior to the awarding of the new contract? A. I will not say positively—

40 Mr. Anderson: I object to this as not the proper method of proving the payment by the City for that work. The best evidence

John C. McLaughlin, direct.

would be by the production of the warrants by which the City made the payments.

The Court: He has a right to testify if he recalls; he was the person in charge.

Mr. Anderson: He is testifying now to information he gets from examining documents in the possession of the city. He is not testifying from personal knowledge. 10

The Court: I don't know about that.
(Question repeated.)

A. I could not give you the total.

Q. Now, did the city advertise and award this contract to Scatuorchio under competitive bidding, to complete the work? A. Yes, sir.

Q. And this extra work done by the city was in the interim between the default of the Harrington Company and the awarding of the new contract to Scatuorchio? A. Yes; it was pursuant to an emergency resolution passed by the Board, directing me, as I have testified previously. 20

Mr. Rooney: That is all.

Mr. Anderson: No questions.

JOHN C. McLAUGHLIN, sworn.

Direct examination by Mr. Rooney: 30

Q. Where are you employed? A. The engineering bureau.

Q. In the year 1920, where were you employed? A. In 1920, in the engineering bureau.

Q. What department, Streets and Public Improvements of Jersey City? A. Yes, sir.

Q. Do you know Andrew J. Boyle, Inspector of Ashes and Garbage, and so forth, of Jersey City?

A. Yes, sir. 40

John C. McLaughlin, cross.

Q. Mr. Boyle produced yesterday on the stand a book which I now show you, and stated that you, Mr. McLaughlin, of the Department of Streets and Public Improvements, made the entries in that book. I show you this book and ask you if you are the Mr. McLaughlin referred to? A. Yes, sir.

10 Q. Will you examine this book and say if you made these entries? A. Yes, sir, this is my work.

Q. First let me ask you, what is this book? A. This book was gotten up for the purpose of keeping records for the ashes and garbage department.

Q. What are these records that you speak of? A. Why, they are the reports of the inspectors on the streets, taken every day.

Q. And under whose supervision was this book compiled? A. Under the supervision of Mr. Boyle.

20 Mr. Rooney: I would like to offer the book in evidence.

Mr. Anderson: I would like to examine the witness on it.

The Court: You may.

Cross examination by Mr. Anderson:

Q. Is this book entirely in your handwriting, Mr. McLaughlin? A. Up to 1920, this is in my handwriting, up to this point here.

30 Q. This is your writing; it stopped on what date? A. It stopped here, on January 17, 1920.

Q. Everything after that date is not in your handwriting? A. That is right; everything after that was done by somebody else.

Q. Now, up to January 17, 1920, the information that you put in this book came to you how? A. It came through Mr. Boyle, but he got that information from the inspectors, they collected that

40

Richard Furey, direct.

data during the day, and they handed it in, and this book was compiled from those records.

Q. Was that data in writing? A. Yes, sir.

Q. And they were the inspectors' reports, were they? A. Yes, sir.

Q. And you took those inspectors' reports and put the information in this book, is that right? A. Yes, sir.

Q. And you had nothing to do with the actual inspections that were made? A. Nothing at all.

Mr. Anderson: I object to the book going in evidence, and I object to the use of the book on the ground that this witness has no knowledge of the accuracy of the information compiled in this book.

Mr. Rooney: I will not press my offer at this time. I will ask to have the book marked for identification.

(Marked P-12 for identification.)

Mr. Rooney: You say you made these entries up to when?

A. Up to January 17, 1920.

Mr. Rooney: Under the supervision of Andrew Boyle?

A. Yes, sir.

Mr. Rooney: That is all.

RICHARD FUREY, sworn.

Direct examination by Mr. Rooney:

Q. Where are you employed? A. Department of Streets and Public Improvements, Jersey City.

Q. And you were employed there in 1919 and 1920? A. Yes, sir.

40

Richard Furey, cross.

Q. I show you a book which has been marked Exhibit P-12 for identification, and ask you if you made any entries in this book? A. Yes, sir.

Q. When did your entries start? A. I started to make them the 30th of January, 1920.

10 Q. And over how long a period did they continue? A. I kept on working on them until such time—in fact after the contract with Scaturchio, I still remained with Mr. Boyle and was helping him out.

Q. What is this book an entry of? A. This book is just an entry of the amount of wagons, men and loads made each day in the different sections of the city by the contractors, and also the removal of ashes and garbage.

20 Q. And under whose supervision were they made? A. Mr. Boyle's.

Q. That is Mr. Andrew J. Boyle, who was here yesterday? A. Yes, sir.

Mr. Rooney: That is all.

Cross examination by Mr. Anderson:

Q. You say your entries started January 30, 1920? A. Yes, sir. This is where I actually started; this is where I received the book.

30 Mr. Anderson: The witness is referring to January 30th, 1920?

The Witness: Yes.

Q. The entries subsequent to January 30th, 1920, are in your handwriting? A. Up to August of 1920, then from that time on I went back to the engineering department.

Q. These ran from January 30th to August, 1920, is that right? A. Yes, sir.

40 Q. Now then, during that period of time, from

Richard Furey, redirect.

what source did you get the information that you put in this book? A. From the inspectors' reports that were handed to me by Mr. Boyle.

Q. Then you took those and put this information in the book? A. Yes, sir.

The Court: What became of the inspectors' reports? 10

The Witness: Why, they remained in the office, Judge, and where they went from there I don't know.

Redirect examination by Mr. Rooney:

Q. Do you know where they are at the present time? A. No, sir.

Q. By the way, while you are on the stand, did you have any connection with the garbage removal work done by the city between the 30th day of January, 1920, and the 10th day of March, 1920? A. Yes, sir. 20

Q. What did you have to do with reference to this? A. I was timekeeper at the time.

Q. What were your duties as timekeeper? A. To go out in the field and make a personal check of each man and wagon, and automobile, and keep the time, for the payroll. 30

Q. Did you make your records at that time as to how much money was expended by the city? A. Yes, sir.

Q. I show you a sheet marked "Record," and ask you what that sheet is? A. This is an exact copy of the record of the amount of wagons, teams, men, lifters, foremen, and every man, however employed, during the time that we were removing the ashes and garbage.

Q. From what was this taken? A. Taken from my time sheets. 40

Richard Furey, recross.

Q. Have you the time sheets with you? A. No, sir.

Q. Where are they? A. They are in the office also.

10 Q. Have you made a search for them? A. Why yes, but we could not locate them.

Q. Did you make any other compilation like this? A. I made the original copy which was a copy exactly like this, a pencil copy; the only difference is the weight records have been added to this. I didn't have the weight records on my pencil copy.

Q. And at the time this copy was made from your pencil copy, did you check it back? A. Yes.

20 Q. So that you can tell us if this is a true and accurate record? A. Yes, because I rechecked this against the pencil copy when I got it back.

Q. Is that the only detailed record which your office now has concerning these payments and the number of wagons and men hired, and so forth? A. That is all.

Mr. Rooney: I would like to offer this in evidence.

Mr. Anderson: I would like to cross examine the witness.

30 The Court: You may.

Recross examination by Mr. Anderson:

Q. You say you started to keep this time book referred to before on January 30th, 1920? A. Yes, sir.

Q. And you were then what is known as time-keeper? A. Yes, sir.

40 Q. That meant that you had to go out with Mr. Boyle, or alone, and check up on the men who

Richard Furey, recross.

were working on the garbage removal? A. Yes, sir.

Q. And you had some method of keeping a record of your work day by day, isn't that so? A. Yes, sir.

10 Q. Now, what method did you use? A. Well, the method I used was—the inspectors in the field had time sheets, and when I went there for them in the morning they would give me the time sheets, and I would go back and make a personal check of each man—I kept my own book also. I had a book corresponding to the inspector's time book.

Q. Now, you say you checked up the inspectors' time sheets in the morning; what do you mean by that? A. The exact time, the numbers and names of the men, and the wagons that they had under 20 their supervision.

Q. So that on these time sheets would be the information that on that particular day so many men and so many wagons started to work at such an such an hour? A. The name and number of each man. Every man was on that time sheet, and the number of wagons and automobiles.

Q. Would they show that those men started to work on such and such a day at such and such an hour? A. Yes, sir. 30

Q. And you were there, and that is how you accepted it as correct? A. I made a personal check-up of each man in the field.

Q. What time during the day? A. Well, both in the morning and the afternoon, twice a day I checked the men.

Q. Well, some time during the day you went along on those routes and checked up as to what men were on the job? A. Yes, sir.

Q. Then you noted that in your time book? A. 40 Yes, sir.

Richard Furey, recross.

Q. But, as to when they started to work, or how long they had been working, you relied upon the inspectors' time sheets, is that right? A. Well, in some cases I had been there. Of course I could not be in all parts of the city at one time.

10 Q. So that you had to rely upon the inspector's work of the fact that such and such men and such and such wagons were on the job, is that so? A. Yes.

Q. And if you had no personal information as to when the men started to work and when they quit work, you relied upon the city inspector's written report? A. Mr. Boyle and myself, in conjunction with keeping time, kept after them all the time. I was in the field most of the time.

20 Q. You could only have personal knowledge of conditions as they were at a particular time, and at a particular place, when you were there yourself, isn't that so? A. Of course, if I was in the Bergen section checking the men, we will say around eight o'clock in the morning, it would not be possible for me to be in Greenville at eight o'clock in the morning.

30 Q. Certainly not. So that whatever was going on at eight o'clock in the morning in Greenville, while you were in Bergen, you accepted the inspector's report as to what was happening in Greenville, isn't that so?

Mr. Rooney: I object. This man has testified that he made an inspection.

The Court: The question is proper on cross examination.

40 A. Well, if I was in the Bergen section at eight o'clock in the morning, as soon as I had completed my work in the Bergen section I would immedi-

Richard Furey, recross.

ately go to the adjoining section and check up the time.

Q. Well, when you got there you would not know what had been going on while you were not there; you would not know what had happened prior to your arrival, and you took the City Inspector's report for that, isn't that so? A. I would have to. I would take his report and check back on the report he gave me. In other words, I would take his time book and my time book and see if they agreed as to the men. Then I would go back and check up what was on the place and put it in my book.

Q. Then at the end of the day or the beginning of the next day, the inspector's report and your report of the day's work would be turned in? A. 20 You mean the pink slip?

Q. I don't know what color they were. A. Yes, sir. They would hand the reports in.

Q. And those reports were collected? A. Yes, sir.

Q. Now, when did you make up the original of this schedule you have produced? A. I made this up from day to day, as I went along. I kept the original of it as the work progressed; I kept a copy of the amount of wagons, how much we paid them, the amount of garbage removed, and so forth, by the day. 30

Q. Do you do that now in your department? A. Do I do it now?

Q. Yes. A. I am not timekeeper in this department now.

Q. Did you do it from January 30th up to August 1st? A. No, sir.

Q. Then why did you check these time sheets for the department from January 30th to March 40

Richard Furey, recross.

10th? A. Because the City was handling the contract at that time, and the Commissioner wanted to know the exact amount of money spent and where it was going.

10 Q. Where is the original of your schedule? A. Why, that has been destroyed; it was a pencil copy.

Q. And you made up this schedule from your own time book? A. Yes.

Q. And from the inspector's reports? A. From my own time book.

20 Q. When you say you made up this schedule from your own time book, you do not mean the information which you yourself gathered when you were actually at the various points? A. From my time book which I checked against the books of the timekeeper, which agreed with the inspector's reports. I kept my separate time book, and from that time book I made up my reports.

Q. Where did you get the information that you put in the time book? A. From personal supervision and checking up of the men.

30 Q. And the inspectors' reports? A. Well, I would not say the inspectors' reports; I made a personal check of the men myself, and knew everything that was in the field.

Q. In addition to the matter that went into your time book at the times that you yourself were personally at the various points along the route, the time book included information that came to you from some sources other than your own knowledge, isn't that so? A. I know this, that the time entries I had in my book I was sure of; I was sure that the men were on the job, and I was sure that the men were there.

40 Q. How were you sure? A. Because I checked

Richard Furey, recross.

the men. Naturally if a man is there in the morning, and again at nine o'clock, and I see him there again I know he is on the job.

10 Q. Do you assume that he is there at eight o'clock? A. I assume that he is there at eight o'clock.

Q. And you assume he will be there the rest of the day? A. I check him again in the afternoon, and if he is still there in the afternoon, naturally he has been there.

20 Q. But you assume when you make your first check in the morning that they had been there since eight o'clock? A. As I said before, we first supervise the work by going around in the morning, and seeing that the work was being properly carried on.

Q. But owing to the physical limitation, however, of only being able to be in one place at one time, you were compelled to rely upon the inspectors' reports for the times you were not around, isn't that so?

Mr. Rooney: I object on the ground that that has been answered three or four times.

30 The Court: You may proceed if you want to.

40 Q. Now, in your time book you put down the route you were on, on particular days, and the equipment that was there? A. In my time book I kept an exact copy of all the men, all the wagons and everything that was in the field. For instance, if I take the Bergen section, I had all the men that were in the Bergen section, the wagons, the foremen, and everything that is on this work in the Bergen section. The next page—this was a loose-

Richard Furey, recross.

leaf time book—on the next page I kept the Greenville section, and so on, then Hudson City.

10 Q. What do you mean by an exact copy; a copy of what? A. In my time book I kept the exact time of the men that were in the field, that is what I meant by exact copy. I was not taking the report for the time the men were there; I went out personally and made a personal check of the time, as any timekeeper would on any job.

Q. But you only know the men were there at the time you yourself saw them on the job, isn't that so? A. Naturally, if I check a man up and I find him in the field I realize he is there.

Q. And you assume he is there after that time?

20 Mr. Rooney: I object on the ground that it has already been answered, and furthermore, it is argumentative.

The Court: Let him proceed with his examination.

A. Of course if I was not there at the time he went to work, naturally I would have to assume he started in to work at eight o'clock in the morning.

30 Q. And if you finished checking a certain section at two o'clock in the afternoon, you assumed that the men who were there continued to work until five o'clock, isn't that so? A. I would say that in addition to this, as I said before, I will take their time, and we made it our business to see that they were there by continuously going around and revisiting.

40 Q. And your inspectors were obliged to turn in daily reports as to what men were on the work, when they quit and how long they worked? A. Yes, sir.

Richard Furey, redirect.

Q. And your time book was prepared with that information that was a check-up? A. I would not say, with reference to a check-up only; my time book is my own personal record.

Mr. Rooney: I offer this sheet in evidence. 10

Mr. Anderson: I object, first on the ground that it is not the best evidence; that it is not the original document; it is a copy. Second, on the ground that it was evidently compiled by this witness from sources other than his own personal knowledge and information, and I object to its being used to refresh his recollection on the same grounds.

The Court: What has become of your notebook, the book you had? 20

The Witness: When I finished the time keeping I left everything I had right in the office, Mr. Boyle's office. I had no further use for it because I went back to the engineering department.

The Court: What became of the time sheets you spoke of, made by the inspectors?

The Witness: They were left in the same place. 30

Redirect examination by Mr. Rooney:

Q. Have you made a search for these papers, Mr. Furey? A. Yes, sir. We looked all over for them and we have been unable to find them.

The Court: The pencil memorandum you say was destroyed?

The Witness: Yes, sir.

The Court: And this is a copy of that pencil memorandum? A. Yes, sir. 40

Bernard J. Rosengarten, direct.

The Court: You made that and checked it back from your own time sheet?

The Witness: Yes, sir.

The Court: I think I will admit it.

10 Mr. Anderson: Exception to your Honor's ruling, and I would like to call your Honor's attention to this: That this witness' testimony has been limited to the time keeping, and this sheet contains the prices and so forth, and without waiving any rights under my exception, I don't think that this is admissible.

The Witness: I also paid the men off weekly.

20 The Court: Then these figures are figures that you actually compiled?

The Witness: My actual figures, yes, sir.

The Court: Without that explanation it would not be competent.

Mr. Anderson: Then my exception will go to the admission of the entire document.

The Court: It will be admitted.

(Admitted and marked Exhibit P-13 in evidence.)

30 BERNARD J. ROSENGARTEN, recalled.

Direct examination by Mr. Rooney:

Q. While you were on the stand before there were some sheets from the City Clerk's office which were offered in evidence; have you those with you, Mr. Rosengarten? A. I have.

40 Q. These are the sheets which you produced yesterday, and which were offered in evidence and marked Exhibit P-11? A. Yes, sir.

Bernard J. Rosengarten, cross.

Q. In addition to those you produced some certificates also, I believe? A. Yes, sir.

Q. What are these certificates? A. These certificates authorizing the City Clerk's office to make payments to the contractor.

Q. And they are what might be termed sworn proof of claim? A. Yes, sir. 10

Q. Sworn to by the claimant? A. Sworn to by the claimant, yes, sir.

Q. And have you checked over these claims with the payments of the Harrington Sons Company, and the sheets which were marked in evidence here? A. What do you mean by that?

Q. I mean are these all of the claims of the Harrington Company which I hold in my hand, made under the contract with the Harrington Company in 1917? A. They are, with the exception of one. There is one missing which I could not account for, not being directly in charge. 20

Q. What is the date of that, do you know? A. I do not recall the date, but there is one of those vouchers missing.

The Court: Is it entered on your sheet?

The Witness: Yes, sir.

The Court: In other words, you have all of the vouchers except one? 30

The Witness: Except this one voucher, yes, sir.

Mr. Rooney: If the Court please, I would like to offer the vouchers.

Cross examination by Mr. Anderson:

Q. There is nothing here except in relation to the Harrington contract, is there? A. The Harrington contract. 40

Bernard J. Rosengarten, redirect.

10 Q. This claim made by the Harrington Sons Company, taking the one dated February 21, 1917, for removal of ashes and so forth, \$8,090.75, contains a copy of the resolution ordering a warrant drawn for this amount, and the claim is sworn to by the Harrington Company? A. Yes, sir.

Q. So that when you produce these documents they are really the sworn claims on which the Harrington Company made application to the city for payment, isn't that so? A. Yes, sir.

The Court: It will be admitted.
(Admitted and marked Exhibit P-14.)

Redirect examination by Mr. Rooney:

20 Q. Have you also the city warrants? A. They are in the custody of the City Clerk's office. They are in the custody of Mr. McLaughlin.

Q. Have you also with you any statements from the City Clerk's office showing the payments on work done by the city from January 30, 1920, to March 5, 1920, for the removal of ashes and garbage? A. Yes, I have the vouchers and payroll for this.

30 Mr. Anderson: By vouchers you mean the sworn claims which were just offered?
The Witness: Yes, sir.

Q. By the way, Mr. Rosengarten, have you entered up or compiled the total payments which were made to the Harrington Company on Exhibits P-11 and P-14, or has the Comptroller done that?

40 Mr. Anderson: I object to the question on the ground that up to this time there has been no evidence of any payments of

Bernard J. Rosengarten, redirect.

these amounts on these sheets or on these sworn claims. This witness cannot testify to such a payment.

10 Q. Have you compiled the total sums shown on these sheets? A. No, sir, I have not. The Comptroller's office has.

Q. Now, Mr. Rosengarten, I understand that you produced the vouchers and receipts showing the payment of moneys by the city from January 30th, 1920, to March 5th, 1920?

Mr. Anderson: I object to the question on the same ground.

The Court: He may answer.

Mr. Anderson: Exception.

20 A. Yes, sir, I have.

Q. What are those sheets which you have in your hand? A. Sheets showing the register of warrants drawn and paid to the claimants.

Q. They are the same type of sheets which were produced by you yesterday and marked Exhibit P-11? A. Yes, sir.

Mr. Rooney: I offer this in evidence, if the Court please.

30 Mr. Anderson: I object on the ground that they are not proper evidence of payment by the city.

The Court: I will allow them.

Mr. Anderson: Exception.

(Admitted and marked Exhibit P-15.)

Mr. Rooney: I also offer the vouchers in connection with this sheet.

(Admitted and marked Exhibit P-16.)

Bernard J. Rosengarten, recross.

Q. Have you also any general account sheets with you, concerning payments by the city to Michael Scatuorchio, under his contract of March 8, 1920, to November 30, 1921? A. Yes, sir, I have the sworn vouchers for payment due the contractor.

10

Q. That is, due to M. Scatuorchio & Sons? A. Yes, sir.

Q. And that is under the contract for the completion of the Harrington contract? A. For the year 1920, for the completion of the contract.

Mr. Rooney: I would like to offer this in evidence.

Mr. Anderson: I would like to cross examine on this.

20

The Court: You may.

Cross examination by Mr. Anderson:

Q. By these sworn vouchers, you mean, Mr. Rosengarten, that M. Scatuorchio & Sons filed sworn claims with the city for the payment of various amounts of money from time to time, and these vouchers are the claims upon which they said they were entitled to payments, is that correct? A. Those vouchers are submitted to us by the Department of Streets, certified to us for payment, and the City Clerk draws his warrant on those certified bills.

30

Q. And these are what you call vouchers? A. Yes, sir—no, they are not totalled.

The Court: Have you withdrawn your objection?

Mr. Anderson: Leave it open until we see what the total is.

40

Bernard J. Rosengarten, redirect-recross.

Mr. Rooney: You have the vouchers there for the year 1921?

The Witness: Yes, sir, these are the vouchers for the entire contract, from March, 1920, to November, 1921.

Mr. Rooney: I will offer these.

10

(After discussion.)

Let them be marked.

(Admitted and marked Exhibits P-17 and P-18.)

Mr. Rooney: Do you wish to check these figures over, Mr. Anderson?

Mr. Anderson: I would like to do that during the noon recess.

Direct examination by Mr. Rooney, continued:

20

Q. What are these other sheets you have with you? A. This is the register of the claim warrants, from the City Clerk's office.

Q. And they show payments to Scatuorchio for the entire time of the contract? A. No, not for 1920. I have not been able to obtain the 1920 sheet, due to the clerk being on his vacation. I just got out the ones I was able to find.

Mr. Rooney: I offer those for 1921.

30

Mr. Anderson: I would like to examine the witness.

The Court: You may.

Recross examination by Mr. Anderson:

Q. You characterize these twenty-five sheets as what? A. Claim warrant registers.

Q. And where do they come from? A. From the City Clerk's office.

Q. Do you have anything to do with the preparation of these documents? A. No, sir.

40

Bernard J. Rosengarten, redirect.

Q. You do not touch them at all except that you found them in the City Clerk's office and brought them here? A. Yes, sir.

10 Mr. Anderson: I object to them first on the ground that they are not proper evidence of payment of money, and also as to warrant No. 545, that there are no signed receipts; the same as to warrant No. 828; the same as to warrant 1191; the same as to warrant 2458; also 2704; also 4710; also 5318; also 5319; also 5715; also 6307; also 7429; also 8946; and further on the ground that there has been no proof of any kind that the signatures of M. Scatuorchio & Sons appearing here, or Michael Scatuorchio, are the signatures of those persons, or of that firm.

20 The Court: I will admit it as part of the record.

Mr. Anderson: Exception.

(Admitted and marked Exhibit P-19.)

Redirect examination by Mr. Rooney:

30 Q. Have you any other records concerning payments to M. Scatuorchio or the Harrington Company, or payments by the city for this extra work? A. No, sir, I have not.

Q. Do you know what the number of M. Scatuorchio's contract is in the city files? A. 1920 and 1921 contract?

Q. Yes.

Mr. Anderson: What is your purpose?

Mr. Rooney: Simply for the purpose of checking it up with the other city departments, following our offer.

40

Bernard J. Rosengarten, redirect.

A. Contract No. 2321.

Q. That is the Scatuorchio contract? A. M. Scatuorchio & Sons' contract.

Q. What is the number? A. That is No. 2321. That is the number that is put on it by the Law Department when executing the contract. 10

Q. And is that the number by which the contract goes through the files of the department?

Mr. Anderson: Objected to as immaterial.

Q. Can you tell by referring to the Harrington contract, what the number of that contract is? A. That is contract 2225.

Q. And that goes through the department under that number? A. Exactly.

Q. Have you any file with you today, from the City Clerk's office, with reference to advertising for bids for the removal of ashes and garbage for the period from March, 1920 to November, 1921? A. I have. 20

Q. Will you produce them, please? A. Here they are.

Mr. Rooney: I would like to offer in evidence affidavit of Edward E. Ward, bookkeeper of the Jersey City Journal, showing publication. 30

Mr. Anderson: I object on the ground it has not been proved.

The Court: Sustain the objection.

Q. Do you know whether or not this was published in the Jersey Journal for a week, or for four weeks, or whatever time it was, or from January 1st, 1920? A. Yes, sir, that was published, because our office checks the ads after we insert them.

Q. Is that a printed copy of the ad which was 40

Bernard J. Rosengarten, recross.

published? A. This is a printed copy of what appeared in the paper.

Q. In the Jersey Journal? A. Yes, sir.

Mr. Rooney: I will offer that now.

Mr. Anderson: May I cross examine?

10

The Court: Yes.

Cross examination by Mr. Anderson:

Q. You say now, under oath, from personal knowledge, that that ad appeared in the Jersey Journal? A. Yes, sir.

Q. You recall that particular ad? A. After looking at it, I do.

Q. You checked it personally and watched its publication? A. Yes, sir, that was my duty.

20

Q. And after the lapse of over six years you can say that that particular ad appeared in the Jersey Journal during that particular week? A. Yes, sir. I have it down here; I have a notation on my envelope.

Q. So that you are depending upon some memorandum to refresh your recollection: You are not testifying from personal knowledge? A. That is all endorsed on the envelope.

30

Q. In 1920, were you charged with the duty of checking publications? A. Yes, sir.

Q. And you have been ever since? A. Yes, sir, with the exception of the time I was away on vacation.

Q. And you still say you have a personal recollection of this ad? A. I do.

Mr. Anderson: That is all.

40

John L. Johnson, direct.

Mr. Rooney: I now offer it.

The Court: It may be received.

(Affidavit marked Exhibit P-20.)

Mr. Rooney: You said something, Mr. Anderson, before about totalling payments under the Scatuorchio contract; you wanted to know if we had made those totals. The total is \$268,000.

10

Mr. Anderson: I am letting them go in without examination on your sayso. You have offered them in evidence, and they are in. That is all so far as this case is concerned.

JOHN L. JOHNSON, sworn.

Direct examination by Mr. Rooney:

20

Q. By whom are you employed? A. The City of Jersey City.

Q. How long have you been employed by the City? A. Ten years.

Q. In what office are you employed? A. City Comptroller.

Q. In what capacity? A. Auditor.

Q. What are your duties as auditor? A. As an auditor, check all receipts and disbursements.

30

Q. Have you any records with you, Mr. Johnson, showing the payments made to Thomas Harrington Sons Company, under its contract made with Jersey City in 1919, for the removal of ashes and garbage? A. I have records showing the amount of \$344,000.

Mr. Anderson: I object and ask that that be stricken from the record. His answer should have been yes or no.

40

John L. Johnson, cross.

Q. What are those records? A. I have warrants here from 1918 to 1920, inclusive.

Q. All of the warrants you have produced refer to payments to the Thomas Harrington Sons Company? A. Yes, sir.

10 Q. You also keep a record in your office concerning the making of these warrants, and whether or not they are returned stamped as paid? A. These are all returned warrants, paid by the bank.

Q. Well, have you any record in addition to those warrants? A. We have an outstanding warrant book, if they are not returned.

Q. Can you tell us what these warrants total?

Mr. Anderson: I want to object. I want an opportunity to examine him.

20 The Court: You may examine him.

Cross examination by Mr. Anderson:

Q. Do these warrants you have produced refer to all of the years of the Harrington contract? A. All but 1917.

Q. 1917 is missing? A. Yes, sir.

Q. What is the grand total of all these warrants you have produced? A. The grand total of these warrants produced is \$274,872.

30 Mr. Anderson: I object to the warrants on the ground that there has been no proof of the endorsement purporting to be that of Thomas Harrington Sons Company.

Mr. Rooney: With reference to that objection I make this statement to the Court, that yesterday I showed Mr. Anderson the vouchers which we had, and showed him a number of them which had been endorsed "for deposit Thomas Harrington Sons Com-

40

John L. Johnson, redirect.

pany", and I asked him did he want us to prove them—

Mr. Anderson: If Mr. Rooney takes that position, I withdraw my objection.

(Admitted and marked Exhibit P-21.)

Redirect examination by Mr. Rooney:

10

Q. Now, Mr. Johnson, what is this warrant book which you refer to? Tell us what your system is for keeping track of the warrants? A. The vouchers are issued in triplicate. The original is sworn to by the party furnishing labor or materials to the City. After being approved by the department it is then sent to the Comptroller's office and charged against its particular appropriation or account. It is returned back to the department and turned in to the meeting with a list of claims which they wish paid, with a resolution. The City Clerk then draws the warrants and lists the same on this white sheet. A blue sheet, which is the Comptroller's, and a yellow sheet for the Treasurer's office.

20

We get a bank balance twice a month. The warrants, when they are returned by the bank are first checked back by the City Treasurer; after he arrives at his balance they are handed over to Mr. McLaughlin to verify his figures. As a rule any warrants which are outstanding would be checked in blue, and that warrant would be entered in the outstanding warrant book. If that was returned at a later date, the date of return would be stamped after the warrant.

30

Q. Are you the person having charge of this warrant book, and also of the missing warrant book? A. Yes, sir.

40

John L. Johnson, recross.

Q. Have you those books with you? A. We have the voucher book and the warrant book and the outstanding warrant book for 1917.

Q. Will you produce those, please, for the year 1917? A. Here they are.

10 Q. What is the book which you have produced and which you have before you? A. The warrant book.

Q. What is the warrant book? A. Record of payments made by the City.

Q. The issuance of warrants and checks for them? A. Yes, sir.

Q. And have you charge of that book? A. Yes, sir.

20 Q. Will you turn to the year 1917, and see if any warrants were issued on that book to Thomas Harrington Sons Company under their garbage contract? A. I have it here.

Mr. Anderson: I would like to examine the witness.

The Court: You may.

Cross examination by Mr. Anderson:

Q. This book comes from where? A. The book is in our office.

30 Q. That is the Comptroller's office? A. Yes, sir.

Q. And do you know what the duty of the Comptroller is? A. To audit all receipts and disbursements.

Q. You are an auditor? A. Yes, sir.

Q. Did you actually make these entries in this book? A. These are made out by the City Clerk's office.

40 Q. These sheets come to you from the City Clerk's office? A. Yes, sir.

John L. Johnson, recross.

Q. These sheets are copies of the sheets Mr. Rosengarten has produced, are they not? A. Yes.

Q. Except that they do not show a purported signature of the person who receives the warrant?

A. That is right.

Q. And following the warrant number and the payee stands a voucher number of the department that the expense is allotted to, and what contract or work it relates to, and the amount? A. Yes, sir.

Q. And these are made up in the City Clerk's office when the warrant is prepared? A. Yes, sir.

Q. And the City Clerk keeps the original of these sheets and sends you a copy, a duplicate, to your office? A. The Comptroller's or Treasurer's office.

Q. And they are then put in the warrant book? A. After being checked.

Q. What do you mean by being checked? A. As to the correct amount of money, the proper payee, the proper warrant number, and the voucher number.

Q. And what do you have to check against? A. The white voucher.

Q. That is what is known as the proof of claim? A. The proof of claim, yes, sir.

Q. You do not actually see the warrant itself? A. Oh, yes.

Q. When do you see that? A. When these sheets come down to our office, there is the blue sheets and the yellow sheets.

Q. The white sheets stay in the City Clerk's office? A. Yes. The claim or voucher, as we term it, we check it back as to the correct amount of money, the payee and the proper account number, to see that they are O. K., and see that it is en-

John L. Johnson, redirect.

tered against the claim in the voucher book. We put a date on it, sign the warrant, and the warrant and the yellow sheet are sent to the treasurer's office.

10 Mr. Anderson: I object to the witness using this book for the purpose of proving any payment made to Thomas Harrington Sons Company, on the ground that it is not evidence of any such payment.

Redirect examination by Mr. Rooney:

20 Q. As I understood you, Mr. Johnson, what becomes of a warrant after it is given to the City Clerk and the City Clerk hands it over to the claimant against the city— A. I assume they rush to the bank with it and deposit it.

Q. But we cannot assume that the Harrington Company did that, because they may have buried it some place. You say you get statements twice a month from the bank? A. Yes.

30 Q. And with those statements, do they have the cancelled warrants with them? A. It is customary for the bank, I believe, to take each day's payments in sets and list them with an adding machine, and they simply charge you with the total. When the City Treasurer gets back the warrants, he checks against the adding machine totals, and then he checks the warrants against his warrant book, and after he arrives at a balance he passes them over to us and we do the same thing.

Q. Does this book which you have produced show that you actually checked off the cancelled paid warrants by the city for each of the entries in there? Is that so? A. Yes, sir.

40 Q. Is that correct? A. Correct.

Q. And if a warrant has not come in you put

John L. Johnson, recross.

it in some other book? A. If the warrant is outstanding it would be listed in the outstanding warrant book. If returned at a later date, the date of return would be stamped in after the warrant number and amount.

Q. And this book that you have shows that? 10

Mr. Anderson: Please don't lead him. Ask him what it does show.

A. It shows on this payment this warrant was returned with the February 28th bank balance.

Q. What do you mean, as paid by the bank?

A. Indicates it came through the bank at that time.

Mr. Rooney: That is all.

Recross examination by Mr. Anderson: 20

Q. Do you mean to say that all these warrants that do not have the blue check were deposited?

A. No, the ones with the blue check were outstanding at the time of that balance.

Q. What office were you in in 1917? A. The Comptroller's office.

30 Q. Looking at these blue and black checks on these sheets, do you know they are your check marks? A. Well, they might not be my check marks. One man would call them off and another man would check.

Q. And you either called or checked off? A. Yes, sir.

Q. During the entire year 1917? A. Well, except when I was away on my vacation.

The Court: When was your vacation?

The Witness: In August, I believe. 40

John L. Johnson, redirect.

Q. Who was the man who worked with you?

A. Mr. Orr.

Q. And he is still there? A. Yes, sir.

Q. And you can say from personal recollection, just from looking at these sheets now, that you and Mr. Orr called and checked these warrants?

10

A. Yes, sir, I would say that they look like our checking.

Q. Your memory goes back six or seven years?

A. It goes back that far, yes, sir.

Q. These checks have such a distinctive appearance that you can tell whether they are yours or his? A. Absolutely. When you are working with a man ten years you can pretty nearly tell, that is, you might not be positive, but you would feel that you were.

20

Q. Then I understand you to say that you can take this book, and looking at these check marks say that the warrants that are checked had not come back during the period designated, and that all the other warrants had come back? A. Yes, sir.

Mr. Anderson: That is all.

Mr. Rooney: I offer the book.

Mr. Anderson: I renew my objection.

30

The Court: I will allow it to come in under the system of doing business by the city.

Mr. Anderson: Exception.

(Admitted and marked Exhibit P-22.)

Redirect examination by Mr. Rooney:

Q. Can you refer to any records to save time, showing what these warrants were, and what the amounts of them were, paid out during 1917? A. Here is the total here, \$70,000.

40

John L. Johnson, redirect.

The Court: Just even money?

The Witness: Just even money, yes, sir.

Q. What was the total you had for the payments made to the Harrington Company subsequent to that? A. \$274,872.61.

Q. In other words, your records show that from the beginning of the Harrington Company's contract, there was paid to them a total of \$344,872.61, is that correct? A. Yes, sir.

10

Mr. Anderson: Of course that is all subject to the objection I made to this entire line of testimony?

The Court: Yes.

Q. Do you know where the warrants are for the year 1917? A. No, sir, I do not. I believe they were destroyed, but I am not in a position to say.

20

The Court: How long do you keep the records?

The Witness: We did have them for about thirty years, but they cluttered up our vaults so that we destroyed them back of a period of six years, I think—I am not certain—we have them from 1918 on.

Q. You have quite an accumulation of warrants and vouchers down in your vaults, have you? A. Yes, sir.

30

Q. Now, have you any warrants with you showing payments made by the city for the period from January 29, 1920, to March 10th, 1920, for the removal of ashes and garbage? A. Yes, sir, I have.

Mr. Rooney: I would like to offer the cancelled vouchers in evidence.

Mr. Anderson: Subject to any objection

40

John L. Johnson, redirect.

I may want to make. What is the total of these warrants?

The Witness: \$32,025.73.

10 Mr. Anderson: I object to the receipt of the warrants on the ground that there has been no evidence in the case, no proper evidence in the case, connecting this extra work with the uncompleted term of the Harrington contract. I do not object to the signature and endorsement; I suppose they all have bank stamps on them.

Mr. Rooney: If that is the basis of your objection, I can tie that up.

The Court: It will have to be tied up, of course, if you have not done it already.

20 Mr. Rooney: Does your Honor accept them in evidence?

The Court: I will accept them subject to being tied up by additional proof if you have not done it already.

(Admitted and marked Exhibit P-23.)

Mr. Anderson: I desire to note an exception to your Honor's ruling.

30 Q. Now, have you with you the cancelled warrants and vouchers showing payments to Michael Scaturchio under his garbage contract, March, 1920, to November 30th, 1920? A. Yes, sir.

Q. Will you produce those cancelled vouchers?
A. Here they are, right here.

Mr. Rooney: I would like to offer those warrants in evidence.

Mr. Anderson: No objection.

(Admitted and marked Exhibit P-24.)

Mr. Rooney: That is all.

40 The Court: Mr. Rooney, were there any

Richard Furey, direct.

unreturned warrants entered in the warrant book?

Mr. Rooney: Mr. Johnson, this book which you have produced for the year 1917, which you say shows a total of \$70,000 in warrants issued to the Harrington Company, does that show that any of these warrants to the Harrington Company were not returned? 10

The Witness: No.

Mr. Rooney: They all went through the bank?

The Witness: Yes, sir.

Mr. Rooney: That is all.

RICHARD FUREY, recalled.

20

Q. This work done and the payments made as shown on Exhibit P-13, by the city between January 30, 1920, and March 10th, 1920, can you tell us whether or not those payments were made by the city with reference to the removal of ashes and garbage in Jersey City?

Mr. Anderson: I renew the objection I made to this document before, earlier in the trial. I suppose your Honor will make the same ruling? 30

The Court: Exactly.

Mr. Anderson: Exception.

A. Yes, sir, they were.

Q. And all these payments were made for the removal of ashes and garbage throughout the city during that period? A. Yes, sir.

Mr. Rooney: That is all.

40

Richard Furey, cross.

Cross examination by Mr. Anderson:

Q. How do you know that? A. Because I paid the men.

10 Q. Well, you know that you actually took the warrants from the City Clerk, or wherever you got them, and handed them over to the men? A. Yes, sir.

20 Q. But the question is broader than that. It covered not only payments, but covered the actual work which was purported to have been done as shown by the schedule Exhibit P-13. Do I understand you are changing your testimony or adding to it, to the effect that your knowledge is confined to what you found at particular times and particular places in the city when you were on your rounds of inspection?

Mr. Rooney: I object on the ground that it has already been answered about five or six times.

The Court: He may answer.

Q. What you said about that before still stands, is that so?

Mr. Rooney: Said about what?

30 Mr. Anderson: About his personal knowledge of the work that was done, shown on the schedule.

A. Well, yes, of course—if I understand what you mean—do I really know if the work was performed?

40 Q. No, the question is this: We have a schedule here from January 30th to March 10th, it shows so many horse-drawn trucks, without drivers, so many auto trucks with drivers, so many without

Richard Furey, redirect.

drivers, so many foremen, so many drivers, at a certain rate per day, and at so much money? A. Yes, sir.

10 Q. What I am getting at is this: Is your knowledge confined to what you saw yourself on your trips of inspection around the city, or is it based partly on the reports that were turned in to you by the City's inspectors of garbage? A. I would not say based upon reports turned in to me. This report is based upon my personal supervision of the work, as I said before, and the check-up of the work.

20 Q. But owing to your inability to be in more than one place at one time, you cannot say that such a statement is accurate because it is made up from knowledge gained from some one else?

Mr. Rooney: I object, because that has already been answered about six or seven times.

The Court: He may answer.

A. Well, of course, it is impossible for me to be in two or three places at one time, so I naturally must accept the time of the timekeeper on the job, or the inspector on the job as to the time the men started. I must accept his time as to their starting.

30 Q. You must accept his word as to everything that happened when you were not there? A. Yes, but that is very seldom.

Mr. Anderson: That is what I have been trying for some time to get out. That is all.

Redirect examination by Mr. Rooney:

40 Q. You had no definite time to make these inspections, did you? A. No, sir.

Richard Furey, redirect.

Q. You dropped in on those people any time?
A. I would start out in the morning; I had no particular time to be at any particular place. We would go out and visit any place where we thought it was necessary to go.

10 Q. In other words, was it possible for the men of a given gang or crew to know that at ten o'clock in the morning you were going to be with that particular crew? A. Absolutely not.

Q. Did you ever vary your program in making inspections, and so forth? A. Of course we visited different gangs at different times, and as soon as the time was all taken, I would keep on and continue to supervise the work and revisit the men.

20 The Court: This paper refers entirely to work done by the city in the removal of garbage and ashes between these dates?

The Witness: Yes, sir.

The Court: This is money the city paid out to do that work?

The Witness: Yes, sir.

Mr. Rooney: That is all.

(Witness excused.)

30 Mr. Rooney: The plaintiff rests its case.

Motion for a Nonsuit.

Mr. Anderson: I move for a nonsuit on the following grounds:

40 FIRST.—That the plaintiff has not proved that prior to the letting of the Scatuorchio contract for the finishing of the unexpired term of the Harrington contract, that it advertised specifications, or had the bidders enter into competitive bidding as a means of re-letting this contract.

Motions.

SECOND.—That under the specifications in the Harrington contract that called for a bond of fifty thousand dollars, which bond was furnished, and the specifications under the Scatuorchio contract for the finishing of the Harrington contract, the city called for the following: "The bidder must submit with his proposal an agreement executed by a surety company authorized to transact business in New Jersey, that it will execute a bond for the faithful performance of the contract, and in accordance with Chapter 75, P. L. 1918 of New Jersey, which bond shall be in the full amount of the contract or bid." 10

Accompanying the proposal of Scatuorchio is the agreement of the American Surety Company to write a bond on that contract for \$268,000. That was a material modification of the terms under which the Harrington contract was let, of such a nature as to relieve the National Surety Company from liability on its own bond. 20

THIRD.—The plaintiff has proved payment on account of the Harrington contract of only the sum of \$274,872.61, leaving a difference between that amount and the amount of the Harrington contract, \$590,000, of \$315,127.39, more than enough money to cover the amount which the City says it expended in completing the contract, and therefore the City has suffered no damage. 30

FOURTH.—The City by its delay in the prosecution of this case, during which time the Thomas Harrington Sons Company became insolvent, has imposed a loss upon the surety, rendering the surety unable by resort to the assets of the Thomas Harrington Sons Company which it had, to col- 40

Motions.

lect from the company the loss which the surety company may sustain.

FIFTH.—There is no evidence in the case of any performance by M. Scatuorchio & Sons of the contract of \$268,000 proved by the City.

10 Those are the grounds of my motion for nonsuit.

(Argued.)

MOTIONS FOR DIRECTION OF VERDICT.

The Court: The motion is refused. I think there is enough to go to the jury.

Mr. Anderson: The defendant surety company rests its case.

20 I move for a direction of verdict in favor of the National Surety Company upon the same grounds which formed the basis of my motion for nonsuit.

Mr. Van Winkle: The defendant, the Receiver of the insolvent corporation, has no motion to make, except upon the ground—I did not listen with attention to all the testimony concerning the figures; I was necessarily absent part of the time—
if the figures do not prove a loss then I will move for a nonsuit on the ground that the case has not been proved to that extent. If the figures are right
30 I have no motion.

Mr. Rooney: On behalf of the Mayor and Aldermen of Jersey City, the plaintiffs, I desire to move for the direction of verdict as against both defendants on the ground that it has been proved that a bond was executed, that the provisions of the bond were not carried out, that the contractor defaulted in his work, and abandoned his contract, not alone by testimony offered by the City, but out of the mouths of the defendants; that the City
40 has proved the \$55,000 of damages, in excess of \$5,000 over the bonds, the last payment having been made in November, 1921.

Motions.

I therefore move for the direction of a verdict on the ground that the answer does not set up a defense; that no defense has been proved, and consequently the abandonment and breach of the bonds have been conclusively proven.

The Court: I will refuse the motions to direct a verdict on each side. Both of you may have an exception. 10

Mr. Anderson: The bond is in the sum of fifty thousand dollars. The bond is not in the usual form of having a penal sum of double the amount; it is limited to the sum of fifty thousand dollars, and this being a contract obligation under no circumstances can the surety company, irrespective of what the amount of the judgment may be against Thomas Harrington Sons Company, be obligated to pay more than the sum of fifty thousand dollars. Of course, after judgment is rendered, interest would start to run on the amount of judgment from the date of the recovery of the judgment. 20

Mr. Rooney: We will not ask for the interest on the entire sum; we won't ask them for the interest pending this Scatuorchio contract, but we are at least in all fairness entitled to interest from November 30th, 1921, the date when this last payment on the Scatuorchio contract was made, on the full amount of default, \$55,000. 30

The Court: You cannot recover more than the fifty thousand dollars outside of your interest?

Mr. Rooney: That is correct, fifty thousand dollars, plus interest.

The Court thereupon charged the jury as follows: 40

Charge.

The Court: Members of the Jury:

10 On the 24th day of January, ~~1927~~¹⁹¹⁷, the Thomas Harrington Sons Company entered into a contract with the Mayor and Aldermen of Jersey City to remove all ashes and garbage and kitchen refuse and waste paper, without separation, from January 15, 1917, to November 30, 1921, according to the specifications shown by that contract, for the sum of \$590,000, to be paid semi-monthly in sums not less than five hundred dollars. You will have that contract before you and see the specifications and terms on which the ashes and garbage were to be removed.

20 To secure the faithful performance of this contract, the company entered into a bond for fifty thousand dollars with the National Surety Company of the State of New York, to the Mayor and Aldermen of Jersey City, the condition of the bond being that the above bonded Thomas Harrington Sons Company shall well and truly, and in a good and sufficient manner perform the work mentioned in the accompanying contract and specifications for the collection and removal of ashes, garbage and kitchen refuse and waste paper, without separation, from all the streets in Jersey City, from the 30 15th day of January, 1917, to the 30th day of November, 1921, and complete the same in accordance with the terms and conditions therein stipulated, and in each and every respect comply with the provisions therein contained.

40 It is immaterial in this case whether the weather was good or whether it was not, or whether the conditions increased the expenses of the company in performing its duty; when it entered into that

Charge.

contract with the Mayor and Aldermen of Jersey City, it was obliged, under our law, to comply with the terms of that contract.

The Thomas Harrington Sons Company commenced this work in accordance with the terms of the contract, and insofar as it appears there was no difficulty or complaint made until December, 1919, when the plaintiff contends that the company failed to perform the contract and did not remove the ashes as it agreed to do. The ashes and garbage accumulated in the month of December, and in January, 1920, and that such condition continued until the 29th day of January, 1920, when a meeting was held between the Commissioners of Jersey City and representatives of the defendant company, and the company was notified that it had unwarrantedly delayed the collection of garbage and the performance of the work under its contract, and that thereafter the City would complete the contract of the defendant Harrington Sons Company.

The City thereupon advertised for bids for the completion of this contract. You see, the contract of Harrington Sons Company did not expire until November 30th, 1921, and this was in the last of January, 1920, and finally after bids were advertised a new contract was entered into with M. Scaturchio & Sons for \$268,000. In other words, they agreed to complete the contract that Harrington Sons Company had failed to complete for that sum of \$268,000.

In the meantime the ashes and garbage was remaining on the streets of Jersey City and the City itself went on and completed the collection of this garbage from the 29th day of January, 1920, until some time in March when the new contract

Charge.

went into effect, and according to the evidence of the plaintiff, it expended during that time in collecting the garbage and waste refuse in the streets of Jersey City, \$32,025.78, as I recall the figures, but you will have the papers before you and will determine what the amount was.

10

Now, the City claims that they were obliged to expend more money than the original contract called for in order to complete the work, and that therefore the surety and the company are obliged to make good to the City that sum. The original contract, according to the contract itself, was \$590,000. The Harrington Sons Company was paid from January 1st, 1918, up to the time when they defaulted on their contract, \$274,872.61, as I recall the evidence, and then in the year 1917, during that year, from the date of the contract up to January 1st, 1918, they were paid \$70,000, making the total amount that they had received on their contract \$344,872.61. That would leave \$245,127.39 as the money which the City had on that contract.

20

In other words, they had agreed to do the work for \$590,000; they had received \$344,872.61, and there was still due if they fulfilled their work, \$245,127.39. The new contract called for \$268,000. The work which was done by the City itself between the time when the old contract was completed and the new contract begun, cost \$32,025.78, so that the difference between the two would be \$54,898.40. Those are the figures which I have, but you have the vouchers before you and can tell just exactly what the amount was, and that is your duty to determine how much the City has lost.

30

In this case, however, there was a bond, and the bond is limited to \$50,000, so that even if you

40

Charge.

find that the City was out \$54,898, all they can recover in this case is the \$50,000. But if they are entitled to recover on this bond, they would recover the amount of the bond, fifty thousand dollars, if it was that much,—if there was that much due; if you find there was not fifty thousand dollars due, then whatever debt you find was due for this, then the plaintiff can recover such amount.

10

In addition to that they are entitled to damages for the retention of that debt; that would be the interest on that sum, whatever you find it would be, from the time the contract was entered into down to the present time, at six per cent.

That, gentlemen of the jury, is the case which you have to determine. The plaintiff must establish its case by a preponderance of the evidence. You have all the papers and vouchers before you; determine the amount that is due the City, if you find there is a default on this bond.

20

The debt is the amount that is due the City. It cannot be over fifty thousand dollars, and whatever sum you find there is due the City, if you find there is a sum due the City, then in addition to the debt, there will be the retention, which is really the interest from November 30, 1921.

If you find fifty thousand dollars, your judgment would be debt, \$50,000, damages, interest at six per cent. from November 30, 1921, down to the present time, and the two together would be the total sum of \$50,000, plus interest, but if the debt was not \$50,000, then you will state the debt in the sum which you will determine.

30

The Court: I refuse to charge other than as I have charged.

40

Plaintiff's Requests to Charge.

10 1. Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract, and if any casualty shall occur which shall increase the labor and expenditure of the contractor, the loss must fall on him who engaged to do the work.

2. In arriving at your verdict, if you find the damage suffered by the plaintiff equal or exceeding the penal sum of the bond (to wit, \$50,000), you should also assess damages for the non-payment of the penal sum, that is the interest thereon from the time it was due to the date of the trial.

20 **Request to Charge on Behalf of the Defendant National Surety Company.**

Under no circumstances can the ^{NATIONAL}~~American~~ Surety Company be held liable for more than the amount of its bond, viz., fifty thousand dollars.

30

40

[6948]

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EXHIBIT - P-13

RECORD
OF COLLECTION AND REMOVAL OF ASHES AND GARBAGE BY CITY
FROM JANUARY 30TH 1920 TO MARCH 10TH 1920 BOTH INCLUSIVE

DATE	WEATHER	HORSE DRAWN TRUCK WITH DRIVER			HORSE DRAWN TRUCK WITHOUT DRIVER			AUTO TRUCK WITH DRIVER			CARRIAGES WITHOUT DRIVER			TOURING CAR WITHOUT DRIVER			GENERAL FOREMAN			SPECIAL FOREMAN			FOREMEN			DRIVERS			LIFTERS			ON DUMPS			TOTALS							
		LOADS	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT	Nº	RATE	AMOUNT										
JAN. 30	Clear Cold					41	9.50	389.50					2	5.00	10.00	1	10.00	10.00	1	6.72	6.72			3	5.84	17.52	41	5.50	225.50	32 1/2	5.00	161.25					820.49					
" 31	Very Cold. Cloudy 4" above					41	"	389.50					2	"	10.00	1	"	10.00	1	"	6.72			3	"	17.52	39 1/2	"	217.25	33 1/2	"	167.50					818.49					
FEB. 1	Snow A.M. Very Cold Cloudy					28	"	266.00					2	"	10.00	1	"	10.00	2	6.72	13.44			6	5.84	35.04	56	"	308.00	53	"	265.00					907.48					
" 2	Cloudy Cold					43	"	408.50	4 1/2	30.00	135.00		2	"	10.00	1	"	10.00	1	"	6.72	1	8.00	8.00	3	"	17.52	43	"	236.50	66 1/2	"	332.50					1164.74				
" 3	Cloudy Cold Rain					42	"	399.00	8	"	240.00		2	"	10.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	42	"	231.00	61 1/2	"	307.50	1	6.00	6.00	6		1235.74			
" 4	Cloudy Cool Hail Sleet					42	"	399.00	11	"	330.00		2	"	10.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	41 1/2	"	228.25	59 1/2	"	297.50	4	"	24.00	6		1330.99			
" 5	Cold, Heavy Snow, Hail															1	"	10.00	1	"	6.72			3	"	17.52							4	"	24.00	6		58.24				
" 16	Clear Cold					37	"	351.50					1	"	5.00	1	"	10.00	1	"	6.72			3	"	17.52	37	"	203.50	42 3/8	"	211.88	4	"	24.00	6		830.12				
" 17	Clear Cool					40	"	380.00	2	30.00	60.00		1	"	5.00	1	"	10.00	1	"	6.72			3	"	17.52	40	"	220.00	56	"	280.00	4	"	24.00	6		1003.24				
" 18	Clear Moderate					39	"	370.50	3	"	90.00		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	39	"	214.50	61	"	305.00	4	"	24.00	6		1051.24			
" 19	Clear Cool Cold P.M.					38	"	361.00	4	"	120.00		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	38	"	209.00	62	"	310.00	4	"	24.00	6		1071.24			
" 20	Clear Cold					37	"	351.50	6	"	180.00		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	37	"	203.50	64	"	320.00	4	"	24.00	6		1126.24			
" 21	Cloudy Raw Snow P.M.	4		15.00	60.00	38	"	361.00	8	"	240.00		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	37 1/2	"	206.25	67 1/4	"	338.75	4	"	24.00	6		1277.24			
" 22	Clear Moderate																																									
" 23	Cloudy Raw Rain P.M.	4			60.00	40	"	380.00	2 1/2	40.00	100.00		1	"	5.00	1	"	10.00	2	6.72	13.44	2	8.00	16.00	6	5.84	35.04	80	"	440.00	171	"	855.00	8	"	48.00	6		2146.48			
" 24	Part. Cloudy Snow P.M.	4			60.00	37	"	351.50	2 1/2	33.00	82.50		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	37	"	203.50	76 1/2	"	382.50	4	"	24.00	6		1344.74			
" 25	Clear Cool	9			135.00	38	"	361.00	2 1/2	33.00	82.50		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	38	"	209.00	73 3/4	"	368.75	4	"	24.00	6		1420.99			
" 26	Clear Cold	10			150.00	34	"	323.00	2 1/2	33.00	82.50		1	"	5.00	1	"	10.00	1	"	6.72	1	"	8.00	3	"	17.52	34	"	187.00	82	"	410.00	4	"	24.00	6		1447.24			
" 27	"	6			90.00	30	"	285.00	1 1/2	33.00	49.50		1	"	5.00	1	"	10.00	1	7.56	7.56	1	"	8.00	3	"	17.52	30	"	165.00	74 3/8	"	370.62	4	"	24.00	6		1256.95			
" 28	Cloudy Cool	10			150.00	32	"	304.00	1 3/4	30.00	45.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	32	"	176.00	82 3/8	"	411.88	4	"	24.00	6		1379.46			
" 29	"																																									
MAR. 1	Clear	10			150.00	36	"	342.00	1	33.00	33.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	36	"	198.00	83	"	415.00	4	"	24.00	6		1510.08			
" 2	"	11			165.00	37	"	351.50	1	33.00	33.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	37	"	203.50	84	"	420.00	4	"	24.00	6		1545.08			
" 3	Clear Moderate Thaw	11			165.00	39	"	370.50	1	33.00	33.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	39	"	214.50	81 1/2	"	407.50	4	"	24.00	6		1562.58			
" 4	Cloudy Raw	10			150.00	38	"	361.00	9 3/4	33.00	322.50		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	38	"	209.00	84	"	420.00	4	"	24.00	6		1537.58			
" 5	Cloudy Heavy Rain & Wind Snow P.M.	8 1/2			127.50	28	"	266.00	7	30.00	210.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	28	"	154.00	59 3/4	"	298.75	4	"	24.00	6		1128.33			
" 6	Clear Cold Windy																																									
" 7	Clear Cold																																									
" 8	"	11			165.00	29	"	275.50	1	33.00	33.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	29	"	159.50	78 1/2	"	392.50	4	"	24.00	6		1307.58			
" 9	Clear Moderate	11			165.00	31	"	294.50	1	33.00	33.00		1	"	5.00	1	"	10.00	1	"	7.56	1	"	8.00	3	"	17.52	31	"	170.50	78	"	390.00	4	"	24.00	6		1395.08			
" 10	"																																									
					1792.50			8692.50			5156.00				155.00						270.00						508.08			5392.75			8850.63			564.00			69.75			31830.50

OF COLLECTION AND RE
FROM JANUARY 30th 1921

DATE	WEIGHT	AMOUNT	REMARKS
11/30	100	100	Clear Cold
11/27	100	100	Very Cold Cloudy
11/24	100	100	Green Am. Very Cold Cloudy
11/21	100	100	Cloudy Cold Rain
11/18	100	100	Cloudy Cold Windy
11/15	100	100	Clear Cold
11/12	100	100	Clear Cold
11/9	100	100	Clear Cold
11/6	100	100	Clear Cold
11/3	100	100	Clear Cold
10/31	100	100	Clear Cold
10/28	100	100	Clear Cold
10/25	100	100	Clear Cold
10/22	100	100	Clear Cold
10/19	100	100	Clear Cold
10/16	100	100	Clear Cold
10/13	100	100	Clear Cold
10/10	100	100	Clear Cold
10/7	100	100	Clear Cold
10/4	100	100	Clear Cold
10/1	100	100	Clear Cold
9/28	100	100	Clear Cold
9/25	100	100	Clear Cold
9/22	100	100	Clear Cold
9/19	100	100	Clear Cold
9/16	100	100	Clear Cold
9/13	100	100	Clear Cold
9/10	100	100	Clear Cold
9/7	100	100	Clear Cold
9/4	100	100	Clear Cold
9/1	100	100	Clear Cold
8/28	100	100	Clear Cold
8/25	100	100	Clear Cold
8/22	100	100	Clear Cold
8/19	100	100	Clear Cold
8/16	100	100	Clear Cold
8/13	100	100	Clear Cold
8/10	100	100	Clear Cold
8/7	100	100	Clear Cold
8/4	100	100	Clear Cold
8/1	100	100	Clear Cold
7/28	100	100	Clear Cold
7/25	100	100	Clear Cold
7/22	100	100	Clear Cold
7/19	100	100	Clear Cold
7/16	100	100	Clear Cold
7/13	100	100	Clear Cold
7/10	100	100	Clear Cold
7/7	100	100	Clear Cold
7/4	100	100	Clear Cold
7/1	100	100	Clear Cold
6/28	100	100	Clear Cold
6/25	100	100	Clear Cold
6/22	100	100	Clear Cold
6/19	100	100	Clear Cold
6/16	100	100	Clear Cold
6/13	100	100	Clear Cold
6/10	100	100	Clear Cold
6/7	100	100	Clear Cold
6/4	100	100	Clear Cold
6/1	100	100	Clear Cold
5/28	100	100	Clear Cold
5/25	100	100	Clear Cold
5/22	100	100	Clear Cold
5/19	100	100	Clear Cold
5/16	100	100	Clear Cold
5/13	100	100	Clear Cold
5/10	100	100	Clear Cold
5/7	100	100	Clear Cold
5/4	100	100	Clear Cold
5/1	100	100	Clear Cold
4/28	100	100	Clear Cold
4/25	100	100	Clear Cold
4/22	100	100	Clear Cold
4/19	100	100	Clear Cold
4/16	100	100	Clear Cold
4/13	100	100	Clear Cold
4/10	100	100	Clear Cold
4/7	100	100	Clear Cold
4/4	100	100	Clear Cold
4/1	100	100	Clear Cold
3/28	100	100	Clear Cold
3/25	100	100	Clear Cold
3/22	100	100	Clear Cold
3/19	100	100	Clear Cold
3/16	100	100	Clear Cold
3/13	100	100	Clear Cold
3/10	100	100	Clear Cold
3/7	100	100	Clear Cold
3/4	100	100	Clear Cold
3/1	100	100	Clear Cold
2/28	100	100	Clear Cold
2/25	100	100	Clear Cold
2/22	100	100	Clear Cold
2/19	100	100	Clear Cold
2/16	100	100	Clear Cold
2/13	100	100	Clear Cold
2/10	100	100	Clear Cold
2/7	100	100	Clear Cold
2/4	100	100	Clear Cold
2/1	100	100	Clear Cold
1/28	100	100	Clear Cold
1/25	100	100	Clear Cold
1/22	100	100	Clear Cold
1/19	100	100	Clear Cold
1/16	100	100	Clear Cold
1/13	100	100	Clear Cold
1/10	100	100	Clear Cold
1/7	100	100	Clear Cold
1/4	100	100	Clear Cold
1/1	100	100	Clear Cold

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New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN OF
JERSEY CITY,
Plaintiffs-Respondents,

v.

J. RUFUS BESSON, Receiver of
Thomas Harrington's Sons
Company, and NATIONAL
SURETY COMPANY, a corpora-
tion,
Defendants-Appellants.

Action at Law.
On Appeal from
Supreme Court.

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of the Case.

By contract (Ex. P-1) dated January 24, 1917, Thomas Harrington's Sons Company, a corporation, contracted with the Mayor and Aldermen of Jersey City to remove all ashes, garbage, kitchen refuse and waste paper from all the streets of Jersey City from January 15, 1917, to November 30, 1921.

The defendant-appellant National Surety Company with Thomas Harrington's Sons Company entered into a bond (attached to Ex. P-1) in the sum of \$50,000.00 conditioned for the performance of the contract.

Thomas Harrington's Sons Company abandoned the contract on January 29, 1920, without legal

justification and did no further work on it after January 29, 1920 (Fagen, p. 91).

On January 29, 1920, the City of Jersey City after notice to both defendants revoked the contract (Fagen, pp. 90-91).

Between January 30, 1920, and March 10, 1920, the City alleges that it removed the garbage, ashes, etc. (Furey, pp. 97, 102).

The City then awarded a contract to one Scatuorchio to complete the work under the Harrington contract (Fagen, p. 93). This contract is dated March 9, 1920 (p. 52), and was performed by Scatuorchio.

The Harrington contract (Ex. P-1) provides (Par. 3, p. 11) that the contract price is the price mentioned in the proposal annexed thereto.

The price mentioned in the proposal is \$590,000 (Ex. P-1, pp. 19-20).

It is not disputed by appellants that the Harrington Company for the time it performed the contract (except the year 1917) had been paid by the City the sum of \$274,872.61 (Johnson, pp. 116 and 122-123) and that for the year 1917 it received the sum of \$70,000 (Johnson, pp. 122-123) making a total of \$344,872.61 received by the Harrington Company (p. 123).

The City alleges that for the work of removal which the City alleges it did between January 29, 1920, and March 10, 1920, it paid direct \$32,025.73 (Johnson, pp. 123-124).

It is not disputed by appellants that the amount paid by the City to Scatuorchio for completion of the Harrington contract March 10, 1920, to November 30, 1921, is \$268,000 (Rosengarten, p. 115; Johnson, pp. 124-125).

Summarized the figures are:

Received by Harrington to Jan. 29, 1920	\$344,872.61
Paid by City direct Jan. 29, 1920, to	
March 10, 1920 (alleged)	32,025.73
Received by Scatuorchio	268,000.00
	<hr/>
	\$644,898.34
Harrington contract price	\$590,000.00
	<hr/>
Excess (alleged)	\$ 54,898.34

The foregoing figures were the basis of the Judge's charge to the jury (p. 134).

This appeal involves only the item of \$32,025.73 alleged to have been expended by the City direct for the alleged removal of ashes, garbage, etc., from January 29, 1920, to March 10, 1920, between the date of abandonment of the contract by Harrington and the date of the re-letting of the contract to Scatuorchio.

Appellants contend that the evidence offered by the City to prove the doing of the work and the amount expended between January 29, 1920, and March 10, 1920, was illegally and erroneously admitted by the Trial Judge and that the evidence of payment of the \$32,025.73 by the City for the alleged work between those dates was also illegally and erroneously admitted by the Trial Judge because there was no legal evidence upon which the jury could have found that the City had done the work or employed the labor, etc., which made up that amount between those dates.

Briefly the evidence illegally admitted to show the doing of the work, etc., by the City between those dates was testimony by a witness, Furey, who had no personal knowledge of the doing of all or some of the work, etc., and Exhibit P-13,

"Record" compiled by Furey from sources which were all or partly not within his knowledge and which he did not know to be correct.

Specification of Grounds of Appeal Asserted and Intended to Be Urged.

I.

The Court erred in admitting in evidence against the objection and exception of defendants-appellants Exhibit P-13, being record of the amount of wagons, teams, men, lifters, foremen alleged to have been employed by the plaintiff-appellee for the removal of ashes and garbage from January 30, 1920, to March 10, 1920.

II.

The Court erred in permitting the witness Richard Furey against the objection and exception of defendants-appellants to answer the following question:

"Q. This work done and the payments made as shown on Exhibit P-13, by the City between January 30, 1920, and March 10, 1920, can you tell us whether or not those payments were made by the City with reference to the removal of ashes and garbage in Jersey City?" (p. 125).

III.

The Court erred in admitting in evidence against the objection and exception of defendants-appellants Exhibit P-23 being warrants showing payments from January 29, 1920, to March 10, 1920 (p. 124).

ARGUMENT.

Exhibits P-13 and P-23 were illegally admitted in evidence and the witness, Furey, was illegally permitted to testify relative to Exhibit P-13.

The single controversy brought up by this appeal relates to the period of time between January 29, 1920 and March 10, 1920, the first date being the date of abandonment of the contract by the Harrington Company and the second date being the date of commencement of performance by Scaturchio under the re-let contract.

Between January 29, 1920 and March 10, 1920, the City attempted to prove that it had carried on the work of removing the garbage, ashes, etc., directly by hiring teams, wagons, motor trucks, lifters, etc., for which the City claimed it paid direct \$32,025.73.

By the admission of Exhibit P-13 and Furey's testimony relative thereto and by the admission of Exhibit P-23 the City was illegally permitted to prove the number of teams, wagons, trucks, carriages, drivers, lifters, foremen, etc., it claims to have used and the amounts paid to or for the same between the above dates.

Exhibit P-13, according to Furey's testimony, is a sheet marked "Record" being an exact copy of the record of the amount of wagons, teams, men, lifters, foremen and every man alleged to have been used or employed by the City during the time that the City alleges it moved the ashes and garbage (Furey, p. 97).

Furey was shown a book marked for identification P-12 and testified that he made the entries in this book commencing January 30, 1920, and that this book is an entry of the amount of wagons,

men and loads made each day in the different sections of the City showing the removal of ashes and garbage made under the supervision of the witness Boyle (Furey, pp. 96-97).

This book is marked P-12 for identification (p. 95) and was not offered or received in evidence.

Furey received the information that he put in the book from inspectors' reports that were handed to him by Boyle and does not know what became of the inspectors' reports (Furey, p. 96-97).

The inspectors' reports were not offered or received in evidence.

It appears from Boyle's testimony that he had seven garbage inspectors working under him and that the entries in the books were compiled from reports to Boyle by the garbage inspectors, and that Boyle did not know what became of the reports. That the inspectors made reports in writing which Boyle turned over to the witness McLaughlin and which were put in the book by McLaughlin (Boyle, pp. 76-79; McLaughlin, pp. 94-95).

The Trial Judge refused to permit the use of the book until it was proven by McLaughlin (p. 79).

Four of the inspectors, Casey, Brennan, Morrissey and Floyd, were sworn and there is nothing in their testimony relative to removal of garbage or ashes between January 29, 1920 and March 10, 1920.

The witness McLaughlin testified that the entries in the book made by him stopped on January 17, 1920, and that after that date it is not in his handwriting (McLaughlin, p. 94).

Furey testified that his entries in the book commenced January 30, 1920, and ran from January 30th to August, 1920, and that the information he put in the book he took from inspectors' reports that were handed to him by Mr. Boyle (pp. 96-97).

Furey further testified that from January 30, 1920 to March 10, 1920 he was timekeeper (p. 97).

Also that Exhibit P-13, the record of the number and amount of wagons, teams, etc., was taken from his time sheets which cannot be located, and that Exhibit P-13 is a copy of the original thereof made by him in lead pencil (pp. 97-98).

From Furey's re-cross examination commencing at page 98 it appears that he received time sheets from the inspectors in the field, and that the information which went into Exhibit P-13 as to the number of men working, number of teams, horses, etc., being used, which is the basis of Exhibit P-13, was derived mainly, if not wholly, from the reports made by the garbage inspectors.

"Q. So that you had to rely upon the inspector's word of the fact that such and such men and such and such wagons were on the job. Is that so? A. Yes" (p. 100).

It appears that the entries which Furey made in his own time book were entries of conditions which he found at particular moments of time at various places in the City.

He attempted to say (p. 102) that he made up Exhibit P-13 from his own time book and would not say that Exhibit P-13 was made up in part from the inspectors' reports.

He assumes (p. 103) that because he found men on the job at a particular time during the day that they were there the entire day, and that finding the men at work during the day he assumes that they were there since eight o'clock in the morning.

He admitted (p. 104) that if he was not there when the men went to work that he would have to assume that they went to work at eight o'clock in the morning. That (p. 104) the inspectors were

obliged to turn in daily reports as to the work, teams, wagons, etc.

He admits (p. 105) that his time book was prepared with reference not only to the personal record made by him at particular moments of time when he arrived on the various routes but also from the inspectors' reports.

It is apparent from Furey's cross examination (pp. 98-106) that Exhibit P-13 was not made by Furey solely from records kept by him in his own time book which was limited of course to the number of men, foremen, wagons, teams, etc., which he found employed at particular points of time when he personally saw them on various days during this period, and that all the rest of Exhibit P-13 is made up from the reports made by the garbage inspectors and of which Furey had no personal knowledge, either as to the correctness or as to the accuracy of the same.

Exhibit P-13 was offered on page 105 and objection was made to the same on the ground that it was compiled by the witness Furey from sources other than his personal knowledge and information, and objection made to its being used to refresh his recollection (p. 105) on the same grounds.

On page 106 exception was taken to the admission of the entire document.

The time sheets made by the inspectors could not be found (p. 105).

No testimony relative to the time sheets was given by the inspectors, Casey, Brennan, Morrissey or Floyd.

The witness Johnson (pp. 123-124) produced warrants for payments made by the City from January 29, 1920 to March 10, 1920; Exhibit P-23 showing a total of \$32,025.73, the admission of which is the basis for the third ground of appeal.

Objection was made to the receipt of these war-

rants (p. 124) on the ground that there was no evidence in the case connecting the work with the incompleting term of the Harrington contract. Against this objection Exhibit P-23 was admitted in evidence subject to being tied up by additional proof of work done under the Harrington contract, and exception was taken by the appellants to the ruling (p. 124).

Furey was then recalled (p. 125) and asked the following question:

"Q. This work done and the payments made as shown on Exhibit P-13 by the City between January 30, 1920 and March 10, 1920, can you tell us whether or not those payments were made by the City with reference to the removal of ashes and garbage in Jersey City" (p. 125)?

Appellants renewed the objection made to the use of Exhibit P-13 earlier in the trial (pp. 105-6) and the Court made the same ruling upon which exception was taken (p. 125). This is the basis of the second ground of appeal.

On cross examination of Furey it was again developed (pp. 126-128) that Furey in compiling Exhibit P-13 acted upon the reports of the garbage inspectors of the correctness of which he had no personal knowledge and that to that extent the facts set out in P-13 are hearsay.

No objection is made by the appellants to the admission of the warrants constituting Exhibit P-23, being the warrants showing payment of the sum of \$32,025.73, in so far as they are documents showing payment by the City of that amount, but objection is made under the third ground of appeal to the legality of the admission of Exhibit P-23 because its admission depends upon the erroneous receipt of Exhibit P-13 in evidence which

is the first ground of appeal and the testimony of Furey complained of in the second ground of appeal.

It is apparent therefore that Exhibit P-13 and Exhibit P-23 and Furey's testimony set out in the second ground of appeal were erroneously received and if they had been excluded the excess proved by the City to finish the Harrington contract would have been \$32,025.73 less and the verdict would have had to be \$32,025.73 less than it was and less also interest on the \$32,025.73 for the length of time for which the jury was allowed to award interest.

The effect of the illegal evidence was to permit the City for the period from January 30, 1920 to March 10, 1920 to illegally prove the number of trucks, drivers, carriages, autos, foremen, lifters, etc., and the amounts paid for or to the same, totaling \$32,025.73.

Goodman v. Lehigh Valley R. R. Co., 82 N. J. L. 450 at 454;
Titus v. Gunn, 69 N. J. L. 410.

MARSHALL VAN WINKLE,
FISK & FISK,
Attorneys for Defendants-Appellants.

119 MAY 1 1927

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New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN OF
JERSEY CITY,
Plaintiff-Respondent,

vs.

J. RUFUS BESSON, Receiver of
THOMAS HARRINGTON SONS COM-
PANY and NATIONAL SURETY
COMPANY, a corporation,
Defendants-Appellant.

Action at Law.

ON APPEAL
FROM THE
SUPREME
COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

Facts.

This action was brought by The Mayor and Aldermen of Jersey City, Plaintiff-Respondent, against the Defendants-Appellant to recover on a bond in the penal sum of Fifty Thousand Dollars (\$50,000.00) executed by the Defendants-Appellant, Thomas Harrington Sons Company as principal and the National Surety Company as surety to secure the faithful performance of a contract dated January 15th, 1917, between Thomas Harrington Sons Company and The Mayor and Aldermen of Jersey City for the removal of ashes and garbage in the City of Jersey City for a period beginning on that date and ending November 30th, 1921, for the agreed price of \$590,000.00. The contract and bond are set forth in Exhibit P-1, which is annexed to the complaint (Contract at p. 11 and Bond at p. 13).

The jury returned a verdict in favor of the plaintiff and against both defendants in the sum of \$50,000.00 debt and \$14,324.97, damage for the detention, or a total of \$64,324.97, upon which judgment was entered (Case, p. 50).

It was not disputed that the defendant, Thomas Harrington Sons Company abandoned the contract without legal justification on January 29th, 1920, and did no further work on it after that date (Case, Fagen, pp. 90-91; Appellants' Brief, p. 1). On January 29th, 1920, after notice to both defendants the contract was terminated by The Mayor and Aldermen of Jersey City (Fagen, pp. 90-91; Boyle, pp. 74-75; Defendants'-Appellant Brief, p. 2). Prior thereto and for a period of about two months prior to January 29th, 1920, the ashes and garbage had been allowed to accumulate on the public streets of Jersey City (Boyle, pp. 75-76; Casey p. 81; Brennan, p. 83; Morrissey, p. 85; Floyd, p. 86).

Subsequent to the abandonment and termination of the contract the defendant Thomas Harrington Sons Company the City advertised for new bids for the completion of the contract and on March 9th, 1920, awarded the contract to Michael Scatuorchio for the balance of the term of the defendant's contract for the total sum of \$268,000.00 (Rosengard, pp. 113-114-115; Exhibit P-20; Exhibit P-2; p. 52, lines 20-39). In the interim, that is between January 29th, 1920, and March 10th, 1920, the City expended the sum of \$32,025.73 as follows: \$31,830.50 for work done by it during that period through labor and equipment hired direct and the balance of the sum in legal advertising for a new contract to complete the Harrington term (Johnson, p. 123, line 33; p. 124, lines 1-28; Exhibit P-23; Furey, pp. 125-126-127). It is admitted that the defendant Harrington Sons Company received the sum of \$344,872.61

on account of the contract (Appellants' Brief, p. 2; Case, Johnson, p. 123, lines 10-15). It is also admitted that the City paid Michael Scatuorchio the sum of \$268,000.00 for the period from March 10th, 1920, to November 30th, 1921 (Appellants' Brief, p. 2; Case, Rosengard, p. 115, line 8; Johnson, p. 124, line 28; Exhibit P-24).

It is also admitted that the City actually expended the sum of \$32,025.73, as shown by warrants offered in evidence (Exhibit P-23 and Appellants' Brief, p. 9). These payments therefore may be compiled as follows:

Payment to Scatuorchio	\$268,000.00
Payment to Harrington..	\$344,872.61
Work done by City and advertising	32,025.73

Total amount paid by the City.....	\$644,898.34
Amount of Harrington Contract..	590,000.00

Excess paid by City over contract price	\$54,898.34
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This appeal taken by the defendants involves only the item of \$32,025.73 expended by the City direct for the removal of ashes and garbage from January 29th, 1920, to March 10th, 1920. The basis of this objection is set forth in the first ground of appeal on objection and exception to Exhibit P-13 which showed the number of teams and men employed by the City during that period and the total amount paid therefor.

Grounds To Be Argued.

The objection of the defendants as embodied in the three grounds of appeal may be tersely summarized by referring to the last paragraph of the appellants' statement of the case in their brief, page 3, wherein they say: "Briefly the evidence

illegally admitted to show the doing of the work, etc. by the City between those dates was testimony by a witness, Furey, who had no personal knowledge of the doing of all or some of the work, etc. and Exhibit P-13, record compiled by Furey, from sources which were all or partly not within his knowledge, and which he did not know to be correct." The defendants therefore waive the third ground of appeal, their objection to the admission of P-23, which consists of paid warrants issued for the doing of the work. The only exhibit printed in the state of the case is P-13 and the appellants at page 3 of the index to the State of the Case say: "The remaining exhibits are not involved in the question raised by this appeal." See also appellants' brief, p. 9, stating that no objection is made to Exhibit P-23 as documents showing payment by the City of the sum of \$32,025.73. The appeal is therefore confined to the admission of Exhibit P-13.

POINT I.

Exhibit P-13 was properly admitted in evidence.

This exhibit was an office record of the Department of Streets and Public Improvements of Jersey City. It is a compilation of records made by the witness, Furey, from pencil notes, which were destroyed (p. 102, lines 8-12; p. 98, lines 8-30; p. 97, lines 30 to end; p. 105, lines 30 to end; p. 106, lines 1-30). This record was the compilation of his personal check of the number of teams and men working during the period from January 29th, 1920 to March 10th, 1920. The time charts which he kept and the original pencil sheets have been destroyed or lost and could not be located by

him after diligent search (p. 98, lines 1-25). The record which he offered therefore is the only permanent record of the labor and materials used. Furey had charge of the payment of the money and knows that the amounts claimed by the City were actually paid for the removal of ashes and garbage during that period (Furey, p. 106, lines 17-30; p. 101, lines 25-32; p. 99, lines 30-35; p. 97, lines 18 to end). This being an office record proven by the person who actually compiled it from sources which he himself checked was properly admissible as evidence. *Cochrane vs. Rutter*, 76 N. J. L. 375, cited with approval in this Court *Auto Car Sales Co. vs. Scheurer*, 97 N. J. L. 560; also 27 A. L. R., p. 1458, note subd. C.

POINT II.

Proof of payment of the amounts expended by the City in excess of the defendant, Harrington's contract was properly made.

Under section 13 of the specifications (see Exhibit P-1, which is annexed to complaint, p. 31, line 11) the City was authorized to complete the contract either by labor or equipment hired by itself or by awarding a new contract. This section states in part (p. 31, line 29, to p. 32, line 1):

"The said Board shall thereupon have power to complete the work and provide all materials and labor necessary therefor and charge the expense of the same to the contractor, and the expense so charged will be deducted and paid by the City out of any moneys then due or such moneys as may at any time thereafter become due to the contractor under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would

have been payable under this contract if the same had been completed by the contractor then the said contractor shall be entitled to receive the difference; and in case such sum shall exceed the amount payable as aforesaid then the contractor shall pay the amount of such excess to the City, on notice from the Board of the excess so due."

It has been definitely settled by this Court that under this type of specification the City is not called upon to show the reasonableness of the amount expended by it for work, labor and materials, or the actual work, labor and materials involved, *but the sole test is the amount paid by the City. Camden vs. Ward*, 67 N. J. L., p. 558; *Moriarity vs. Bd. of Com. of Orange*, 89 N. J. L., p. 385. It is not argued that the City did not actually pay the sum of \$32,025.73. No proof was offered at the trial to controvert this proof by the City and the defendants admitted the payment in their brief (p. 9).

The method of proof presented by the City to show the payments made by it to do the work from the 29th of January, 1920 to the 10th of March, 1920, did not depend solely upon the witness Furey and Exhibit P-13, which was objected to, but by following the entire system of municipal payments of its obligations. The plaintiff was held to this strict proof by the defendants not only in the matter of the work done by the City from January 29th, 1920 to March 10th, 1920, but also to show every payment made to the defendant, Harrington Company, on account of its contract and to Scatuorchio, the contractor, who subsequently finished the garbage removal for the contract period.

The routine of proving payments was as follows:—Payments to the defendant, Harrington Company were proven, first, by the City Clerk producing the warrant sheets (Exhibit P-11)

showing receipts signed by the person to whom the warrants were delivered (Rosengard, pp. 77-78). Also the sworn claims of the claimant on file in that office (Rosengard, pp. 107-108; Exhibit P-14). Secondly, by the City Comptroller's Office showing a system of issuing warrants and checking same off when returned by the bank as paid. These entries are kept in a book which was admitted under Exhibit P-22. The City's financial system which was complied with in the proof is set forth at page 117, Johnson. The paid warrants were also produced (Exhibit P-21; Johnson, p. 117).

By the same system the payments to Scatuorchio of the \$268,000.00 were also proven (Rosengard, pp. 110-111-112; Exhibits P-17-18-19; Johnson, p. 124, line 28; Exhibit P-24).

The item of \$32,025.73 was proven in exact accord with the foregoing system (Rosengard, pp. 108-109). At page 109, line 21, Rosengard was questioned as follows:—

“Q. What are those sheets which you have in your hand?

A. Sheets showing the register of warrants drawn and paid to the claimants.”

The sheets were then offered in evidence and marked Exhibit P-15. The sworn vouchers were also offered in evidence and marked Exhibit P-16 (Rosengard, pp. 109-110; 107, lines 1-12).

The Comptroller's Office then produced the paid warrants for these items, which were marked Exhibit P-23 (Johnson, p. 123, line 32; p. 124). Johnson at page 123 was questioned as follows:—

“Q. Now have you any warrants with you showing payments made by the City for the period from January 29th, 1920, to March 10th, 1920, for the removal of ashes and garbage?

A. Yes, sir, I have.”

Then offered in evidence as Exhibit P-23.

In addition to that the system was further strengthened by the witness, Furey (pp. 125-126), who states that these payments were made for the removal of ashes and garbage for the period from January 29th, 1920, to March 10th, 1920. This is based upon his actual knowledge because he paid the men (p. 126, line 5). Furey, also personally checked all of the work (p. 127, lines 8-16).

Much of the work done by the City for the period between January 29th, 1920, and March 10th, 1920, was performed by the Harrington Sons Company for which payments were made to the defendant company as shown in warrants (Exhibit P-23). The defendants are therefore in a poor position to object to this method of payment (*Camden vs. Ward, supra*).

Under the foregoing circumstances proof of payment was sufficiently made without Exhibit P-13, which was objected to and its receipt in evidence, even if improper, would not be a substantial error.

It is therefore respectfully urged that the City properly proved the payments made by it and that the only test was whether or not the City incurred the expense or paid the money, and inasmuch as the payment of this money is admitted the plaintiff has fulfilled its obligations under the contract and bond and the judgment under review should be affirmed.

Respectfully submitted,

THOMAS J. BROGAN,
Attorney of Plaintiff-Respondent.

CHARLES A. ROONEY,
Of Counsel.