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128 Md. 291, 97 A. 911

Court of Appeals of Maryland.
MAYOR AND CITY COUNCIL OF BALTIMORE
v.
CLARK.
No. 47, January Term, 1916.

April 5, 1916.

Appeal from Baltimore Court of Common Pleas; Walter I. Dawkins, Judge.

"To be officially reported."

Suit by Charles B. Clark against the Mayor and City Council of Baltimore. Judgment for plaintiff, and defendant appeals. Reversed, and new trial awarded.

West Headnotes

Damages 115 ⚿68
115k68 Most Cited Cases
The contractor for city sewer construction held entitled to interest, in the discretion of the jury, from the time provided for payment, on the amount found by the jury to be due for work done and material furnished.

Appeal and Error 30 ⚿1033(5)
30k1033(5) Most Cited Cases
That plaintiff's prayer was confusing, in including matters unnecessary to be found to entitle plaintiff to recover held not prejudicial to defendant.

Evidence 157 ⚿213(1)
157k213(1) Most Cited Cases
A rejected offer of settlement of a dispute under a contract is not admissible in an action on the contract.

Municipal Corporations 268 ⚿352
268k352 Most Cited Cases
A city sewer construction contract held not to provide for payment for excavation in rock for a greater depth than in earth unless actually made from necessity.

Municipal Corporations 268 ⚿352
268k352 Most Cited Cases
A city sewer construction contract held to provide for payment for only such part of additional width of excavation, where sheeting was required, as was necessary.

Municipal Corporations 268 ⚿358(1)
268k358(1) Most Cited Cases
The question whether extra concrete work was placed by the contractor for sewer construction where directed by the engineer, so as to entitle him to compensation, held, for the water engineer, under the provision of the contract for matters to be determined by him.

Municipal Corporations 268 ⚿358(1)
268k358(1) Most Cited Cases
Under a city sewer construction contract, held, the contractor was entitled to compensation for sheeting left in place if the engineer did not order it withdrawn, and not merely where he ordered it left.

Municipal Corporations 268 ⚿358(1)
268k358(1) Most Cited Cases
Under authority of the water engineer given by a contract for city sewer construction to determine questions relative to its execution, held, he could not disregard its provision for payment for sheeting not directed to be withdrawn from trench.

Municipal Corporations 268 ⚿358(1)
268k358(1) Most Cited Cases
Damages to the contractor for city sewer construction, from delay caused by the water engineer refusing to give written orders for extra work, as required by contract, held not within the matters left by the contract for determination by

such engineer.

Municipal Corporations 268 ⚿358(3)
268k358(3) Most Cited Cases
The decision of the water engineer, on matters as to which a city sewer construction contract provides it shall be final, can be attacked only for fraud or bad faith.

Municipal Corporations 268 ⚿360(2)
268k360(2) Most Cited Cases
A contractor for city sewer construction held authorized, after a dispute, in demanding written orders, required by the contract, for extra concrete, and so entitled to damages for delay from refusal to give them.

Municipal Corporations 268 ⚿360(2)
268k360(2) Most Cited Cases
Provision of city sewer construction contract as to matters to be included in contractor's estimate held not to include damages from refusal of engineer to give written orders for extra work, as required by contract.

Municipal Corporations 268 ⚿374(6)
268k374(6) Most Cited Cases
Certain matters held evidence for the jury as to bad faith of water engineer in his determination under a city sewer construction contract, preventing it being conclusive on the contractor.

Municipal Corporations 268 ⚿374(6)
268k374(6) Most Cited Cases
Prayer of plaintiff contractor for construction of city sewer, as to measure of damages for delay from refusal of engineer to give written orders for extra work, held too general, and to give no guide for estimating damages.

Trial 388 ⚿253(10)
388k253(10) Most Cited Cases
Prayers of plaintiff contractor for construction of city sewer held erroneous, in ignoring evidence of determination by defendant's water engineer, conclusive by provision of the contract, in the absence of fraud.

***913** Plaintiff's granted prayers and defendant's rejected prayers are as follows:

Plaintiff's first prayer: "At the request of the plaintiff, Clark, the court instructs the jury that, if they find from the evidence in this case the following facts: (1) That sheeting was required by the excavation work in building the sewer referred to in the evidence. (2) That, in order to do the excavation work involved (included) in preparing the trenches for said sewer, it was necessary for said Clark to excavate a trench outside of beyond the (neat) lines of a trench having a width at the bottom of 109 inches for the 69 inch sewer, and a width at the bottom of 96 inches for a 60 inch sewer. (3) That the water engineer of the city, or his representative, measured or estimated the material so excavated on the basis of a width of trench of a less area than the trench as actually excavated-then, by the true construction of the contract involved in this case, the plaintiff is entitled to be paid for all such material as was (reasonably) necessary to be so excavated for which the jury may find the plaintiff, Clark, has not been paid or allowed by the city, at the rate per cubic yard of $1.20 for loose rock, $2.75 for solid rock, and 60 cents for earth." Granted as modified.

Plaintiff's second prayer: "At the request of the plaintiff, Clark, the court instructs the jury that if they find from the evidence in this case that, in excavating the earth or loose or solid rock in constructing the trenches for the work involved in this suit, it was necessary for the plaintiff, Clark, to excavate the same below the grade established by the city's water engineer, and that the plaintiff, Clark, has not been paid for or allowed by the defendant, the city of Baltimore, for any material excavated below the grade established by the city's water engineer, then the plaintiff, Clark, is entitled to recover therefor to such depth as actually excavated, not exceeding

six inches below the established grade (payment therefor to be made at the rate of $1.20 for loose rock $2.75 for solid rock).” Modified and granted.

Plaintiff's fourth prayer: “At the request of the plaintiff, Clark, the court instructs the jury that if they find from the evidence in this case that the defendant's water engineer. Quick, did by two letters dated October 8, 1908, and October 19, 1908, order in writing certain additional concrete outside of the lines called for by the plans offered in evidence, said concrete to be placed where directed either by said Quick, or his representatives, Sudler or Beatty, and that the plaintiff, Clark, did in consequence of said letters between the dates of October 8, 1908, and December 12, 1908, at places authorized by any one or any of said Quick, Sudler, or Beatty, certain extra concrete work for which he has not been fully paid or allowed by the defendant, then the plaintiff is entitled to recover therefor at the rate per cubic yard of $8 for invert work and $9 for arch work, provided the jury find further that defendant's water engineer or his representative failed or refused to measure or estimate all of such extra concrete, as so directed to be done, and shall further find that the same has not been paid for or allowed to the plaintiff by the defendant in the payments made to said plaintiff.” Granted as modified.

Plaintiff's fifth prayer: “At the request of the plaintiff, Clark, the court instructs the jury that if they find from the evidence in this case that the plaintiff, Clark, put certain sheeting in the trenches for the erection of the diversion sewer referred to in the evidence, and that the plaintiff, Clark, has not been fully paid by the defendant, the city of Baltimore, for all sheeting which the defendant engineers saw in the trench and in their discretion did not order to be withdrawn therefrom, then the plaintiff, Clark, is entitled to be paid for all such sheeting which the jury find was so left in the said trenches and was not ordered to be withdrawn by the defendant's engineers, and for which he has not been paid; if the jury so find, at the rate of $40 per thousand feet board measure. Provided, however, the jury further find that the said timber was left in the exercise of such discretion by the defendant's water engineer or his representative, and shall further find that the said engineer or his representative, in computing the monthly and final estimates for sheeting, did not measure the entire amount of such sheeting or did not have reasonably adequate information upon which to prepare such estimates and did not exercise reasonable diligence to secure such adequate information, and made (gross) errors in allowing to plaintiff, Clark, for sheeting in such estimates.” Granted as modified.

Plaintiff's sixth prayer: “At the request of the plaintiff, Clark, the court instructs the jury that if they find from the evidence in this case that on or before October 11, 1909, the defendant's water engineer or his representative, with full knowledge of all matters connected with the work involved in this suit, prepared and gave to the plaintiff, Clark, a final estimate of all work done, showing a balance of $6,008.67 due to the plaintiff, and the city's water board, with a full knowledge of all matters connected with the work involved in this suit, did on or about October 13, 1909, unconditionally accept the said work and that the said water board did on or about November 27, 1909, make a payment of $3,000 on account of said final estimate, then the plaintiff, Clark, is entitled to a verdict for the unpaid balance of said final estimate, to wit, $3,008.67.” Granted.

Plaintiff's seventh prayer: “At the request of the plaintiff, Clark, the court instructs the jury that if they find from the evidence that the city's engineers on the work referred to in the evidence required the plaintiff to do certain extra concrete work and failed or refused to give the plaintiff orders in writing therefor, and that the plaintiff was by such failure or refusal, if the jury so find, delayed in the execution of the

work required by him to be done under the contract between the parties to this case, and was thereby damaged, then the plaintiff Clark, is entitled to recover therefor in this action." Granted.

Plaintiff's eighth prayer: "At the request of the plaintiff, Clark, the court instructs the jury that the measure of damages for any delay caused to said Clark by the defendant, or its agents, in the premises, (if the jury so find), is the allowance of such sum to the plaintiff as is reasonably necessary to place him in the same condition he would have been in if he had been allowed to proceed without any interference by the defendant or its agents in the premises." Granted.

Plaintiff's ninth prayer: "At the request of the plaintiff, Clark, the court instructs the jury that, if they find a verdict in favor of the plaintiff, Clark, then they may (are entitled) in their ***914** discretion allow the plaintiff, Clark, interest upon such amount as they may find to be due to the said plaintiff at (the same at) the rate of 6 per cent. per annum, said interest to commence from 30 days after the material and work had been furnished in conformity with the terms of the contract between the parties and (30 days) after the completion and acceptance of the work in writing by the city's water board." Granted as modified.

Defendant's first prayer: "The court instructs the jury that, under the contract offered in evidence, the water engineer was authorized to determine all questions in relation to the amount and quality of the several kinds of work which were to be paid for under said contract, and to determine all questions in relation to said work and the construction thereof, and decide all questions which might arise relative to the execution of said contract on the part of said contractor, and that the estimate and decision of said water engineer, by the agreement of the parties, was made final and that such estimate and decision of the amount and quality of the several kinds of work to be paid for under said contract is a condition precedent to the plaintiff's right to recover, and that upon the undisputed evidence in this case the said water engineer did, on the 11th day of October, 1909, render his decision upon every question in dispute between the parties, and did send a statement to the city comptroller showing his decision, and that according to said decision and the evidence there is now due the contractor (plaintiff) the sum of $3,008, with or without interest thereon, in the discretion of the jury, from the time when the same was due and payable; that there is no evidence in this case legally sufficient to show that the said water engineer, or any engineer representing the defendant on the work mentioned in the evidence, was guilty of any fraud or bad faith in the rendering of said decision, and therefore the same is binding, in this case, and the verdict of the jury should be in accordance therewith." Refused.

Defendant's second prayer: "The court instructs the jury that, under the contract offered in evidence, the water engineer was authorized to determine all questions in relation to the amount and quality of the several kinds of work which were to be paid for under said contract, and to determine all questions in relation to said work and the construction thereof, and decide all questions which might arise relative to the execution of said contract on the part of said contractor, and that the estimate and decision of said water engineer, by the agreement of the parties, was made final, and that such estimate and decision of the amount and quality of the several kinds of work to be paid for under said contract is a condition precedent to the plaintiff's right to recover, and that upon the undisputed evidence in this case the said water engineer did, on the 11th day of October, 1909, render his decision upon every question in dispute between the parties, and did send a statement to the city comptroller showing his

decision, and that according to said decision and the evidence there is now due the contractor (plaintiff) the sum of $3,008, with or without interest thereon, in the discretion of the jury, from the time when the same was due and payable; that then the decision of said engineer is binding upon the plaintiff, and the jury should be governed thereby in finding their verdict, unless the jury find that in making such decision the said water engineer was guilty of fraud or bad faith." Refused.

Defendant's third prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant, for and on account of any concrete or concrete work done by the plaintiff, as mentioned in the evidence, over and above that which has been allowed by the estimates of the water engineer offered in evidence." Refused.

Defendant's fourth prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant, for and on account of any lumber left in trench, or otherwise left or used in connection with the work mentioned in the evidence, over and above that which has been allowed by the estimate offered in evidence." Refused.

Defendant's fifth prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant, for and on account of any damage accruing to the plaintiff because of any delay in connection with the work under the contract mentioned in the evidence." Refused.

Defendant's sixth prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to prove that the defendant caused the plaintiff to suffer any delay in the prosecution of the work mentioned in the evidence, for which the plaintiff is entitled to recover any damage." Refused.

Defendant's seventh prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant, for and on account of any excavation work done by the plaintiff, as mentioned in the evidence, over and above that which has been allowed by the estimates offered in advance." Refused.

Defendant's eighth prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant, for and on account of any improper classification of any of the work done by the plaintiff, as mentioned in the evidence." Refused.

Defendant's ninth prayer: "The court instructs the jury that the plaintiff has offered no evidence legally sufficient to entitle him to recover any verdict against the defendant for or on account of any excavation work done or concrete used, or concrete work done below the subgrade line of the trench, mentioned in the evidence over and above that which has been allowed by the estimates offered in evidence." Refused.

Defendant's tenth prayer: "The court instructs the jury that as a matter of law the letters of October 8, 1908, and October 19, 1908, from Alfred N. Quick, to the plaintiff, offered in evidence, constitute no legal authority to the plaintiff for the doing of work for which the plaintiff is entitled to recover anything in addition to said amounts as may have been allowed under the estimates of the water engineer offered in evidence." Refused.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, and URNER, JJ.

Robert F. Leach, Jr., Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellant. Raymond S. Williams and James Morfit Mullen, both of Baltimore, for appellee.

THOMAS, J.

In June, 1908, the appellee entered into a contract with the mayor and city council of Baltimore to construct a diversion sewer, according to certain plans and specifications made a part thereof, and to furnish all labor and materials necessary for that purpose. The contract contained, among others, the following provisions:

> "The water engineer shall have the power to make such changes in the plans or additions thereto as may be found advisable during the progress of the work, and should such changes or additions involve the execution of a class of work ***915** not herein provided for, the contractor shall perform the same as directed and shall be paid therefor an amount equal to its actual cost to him for labor and materials plus twelve and one-half per cent. for profit. The contractor must submit to the water board satisfactory vouchers for all labor and materials furnished by him in the execution of such work, which shall be classed as 'extra work' and must be authorized in writing by the water engineer.
>
> Payments for work shall be made as follows: On or about the last day of each calendar month, the engineer in charge shall make an estimate of the value of the work done and material furnished to that date, and within thirty days thereafter there shall be paid to the contractor ninety per cent. of such valuation, less previous payments. Final payment of ten per cent. of the contract price may be withheld for a period of thirty days after completion and acceptance of the work in writing by the water board.
>
> The payment and acceptance of the amounts indicated by the engineer in charge shall not be considered as binding upon either the contractor or the mayor and city council of Baltimore should the mayor and city council of Baltimore have any doubt as to the accuracy and fairness of the estimate, in which event the water board may have a true and correct estimate made, upon which settlement shall be based, and which shall be final and conclusive.
>
> The water board shall act as agent for the mayor and city council of Baltimore in all dealings with the contractor; and the work shall be done under the supervision of the water engineer as president of the board. Whenever the word 'engineer' is used herein, it shall be understood as referring to a duly authorized representative of the water board."

Under the head of "Specifications," the contract contained the following provisions:

> "Diversion sewer with vitrified brick invert and concrete walls and arch, shall be built as shown on the plans," etc.
>
> "Excavated material will be classified for payment as 'earth,' 'loose rock,' and 'solid rock.' 'Earth' shall include macadam stones, loam, sand, clay, 'soft rotten rock,' gravel or other earthy material, including boulders of volume not greater than two cubic feet. 'Loose rock' shall include seamy hard rock that may be economically loosened with pick or bar in pieces of no greater volume than two cubic feet, and also boulders that may be economically broken up for removal by mudcapping or otherwise without drilling. 'Solid rock' shall include solid ledges or large boulders requiring to be drilled and blasted for removal.
>
> Excavated material will be paid for on 'place measurement,' and prices shall include back fill and disposal of surplus material at points designated, etc.-Payments will be based on widths of trenches as follows:
>
> In Earth..
> For 69-in. sewer.
> ' 60-in. '.
> ' 18-in. vitrified pipe42 in..
> ' 12-in. ' '36 in..
> For bell mouth and drops.
>
> Material excavated outside of the above lines unless authorized in writing by the water engineer will not be paid for except where sheeting is required, when the additional width necessary will

be allowed.

> The depth of trenches in earth shall be to the grade established by the engineer, in loose or solid rock, excavation may extend not more than six (6) inches below the established grade; whenever excavation extends below the established grade the contractor at his own expense shall refill up to the grade line with approved material, furnishing a solid foundation.
>
> Proper and sufficient sheeting and bracing shall be used where necessary and cradles or platforms shall be laid in the bottom of the trench should the engineer so direct. Sheeting shall be withdrawn at the discretion of the engineer. Sheeting left in place and timber in platform or cradles will be paid for at the proposal prices per foot B. M."

Under the head of "Conditions of Agreement," the contract also provided:

> "It is agreed by and between the parties to this contract, that the water engineer shall determine the amount and quantity of the several kinds of work which are to be paid for under this contract, and shall determine all questions in relation to said work and the construction thereof, and decide every question which may arise relative to the execution of this contract on the part of the contractor, and his estimate and decision shall be final and conclusive, unless modified, changed or disapproved by the said water board."

The contractor agreed to include in his estimate all the labor and all the material necessary to construct the sewer in a substantial and workmanlike manner according to the plans and specification.

> "The said estimates to include every item of cost in the construction and erection of the said diversion sewer, together with any additional expense which may accrue to said contractor for any part of the work, consequent upon any delays or difficulties encountered of any character whatsoever, and the contractor will not find the said water board liable for any expense over and above the prices as are hereinafter set forth; and the contractor further agrees that no claim for extra work shall, under any circumstances, be allowed or considered, unless ordered as such, in writing, by the water engineer and approved by the water board.
>
> And the contractor agrees to receive, and the mayor and city council to pay, as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, the prices set forth below for each of the various classes or kinds of work to be done or materials to be furnished, to be paid in the following manner, viz.: Monthly payments equal to ninety (90) per cent. of the value of the work when completed as estimated, on or about the twentieth day of each month, by the water engineer or his appointed representative, and final payment of (10) ten per cent. reserved upon the expiration of thirty (30) days after all material and work shall have been furnished in conformity with the terms of this contract, and the water board shall have accepted the same, the said water board will pay to the said contractor whatever money is due or payable to him for the completion and performance of said work, said prices as follows," etc.

In this clause the city agreed to pay for excavating earth 60 cents per cubic yard, for excavating loose rock $1.20 per cubic yard, for excavating solid rock $2.75 per cubic yard, for sheeting and other lumber left in the trench $40 per thousand, for the 60-inch sewer in place $6.25 per lineal foot, and for the 69-inch sewer in place $7.25 per lineal foot; and the contract contained the further provision:

> "And the contractor agrees that all estimates

shall be made by the water engineer or his representative, and that payment will be made on the said estimates made by the said water engineer."

***916** The appellee began the work under the contract in July, 1908. Monthly estimates of the work done, etc., were made out by P. A. Beatty, the resident engineer, and the appellee was paid the amount of the estimates, less the 10 per cent. retained by the city under the terms of the contract. In August, 1908, after receiving the first estimate, the appellee complained of the classification of the material excavated, and wrote Mr. Beatty asking for a reclassification. This letter was referred to Mr. Quick, the water engineer, who wrote the appellee that, as he had receipted for the work done in July, it was too late to ask for a reclassification of the excavation allowed in that estimate, but that he would be glad to consider any complaint of any subsequent classification, and, in answer to a further request of the appellee for a reclassification of said material, Mr. Quick wrote him that he had referred the matter to Mr. Sudler, engineer in charge, and requested him to meet the appellee and go over the matter with him.

On October 8, 1908, Mr. Quick wrote the appellee as follows:

"Mess. J. B. Clark & Co. 10 E. Lexington Street, City-Gentlemen: We have found it necessary to have additional concrete outside of the lines called for by the plans governing your contract. I understand that you have agreed to put in this concrete at $8.00 a cubic yard. Therefore, you are hereby authorized to place such extra concrete in the arch or sewer invert where directed either by myself, Mr. Sudler or Mr. Beatty, at eight dollars ($8) per cubic yard. Please advise me in reply to the above by return mail if you will undertake this work as directed. Yours truly, [Signed] Alfred M. Quick, Water Engineer."

To that letter the appellee replied as follows:

"Baltimore, October 12, 1908. Mr. Alfred M. Quick, Water Engineer, City Hall, City-Dear Sir: Your letter of October 8th with reference to extra concrete. The price of $8.00 per cubic yard for invert concrete is very satisfactory to us. The cost of arch concrete will be greater on account of richer cement mixture and more difficult form work. We would suggest that $9.00 per cubic yard for arch work would leave us fair profit and would be slightly lower than figured in our bid for similar work. [Signed] C. B. Clark & Co."

In answer to the appellee's letter of October 12th Mr. Quick wrote him:

"Gentlemen: In reply to yours of the 12th instant, in which you say that $8.00 is a satisfactory price to you for the extra concrete for the invert, but suggest $9.00 for the concrete in the arch of the sewer, I would say that we agree to allow $9.00 the price you suggest; so therefore you will proceed with the extra concreting on the basis of $8.00 per cubic yard for the concrete used in the invert and $9.00 a cubic yard for that used in the arch. Yours truly, [Signed] Alfred M. Quick, Water Engineer."

On December 10, 1908, Mr. Beatty wrote the appellee that, in order to avoid the use of concrete outside of the section authorized by the plans, he should bring up the bottom of the trench to the grade of the bottom of the sewer with suitable material properly rammed and compacted, and giving him the following directions in order to avoid the use of concrete on the sides of the trench:

"Where the section has run wide in rock, you have the option of filling with concrete to the sides of the trench-for which no excess will be allowed except at those points and in such quantities as I shall authorize in writing-or of forming over such openings to the height of the upper line of brick invert (to which point the

> concrete invert is always brought in the first operation) in such a manner as to give the full outside lines of the sewer section. This forming will be of one-inch plank where the voids are small and irregular and the points of rock afford frequent support. Of two-inch plank where the voids are large and much stiffness required to maintain line. Before the concrete is placed, the voids shall be thoroughly filled with rammed material suitable to make compact work. The inspector shall direct where the two-inch plank shall be used, and should a discussion arise, the engineer will inspect the point and decide upon the thickness of the forming necessary. The inspector will keep an accurate record of all material thus used for forming and you will be paid for such as must remain in the work. The intention being to avoid the claims for excess concrete at points not authorized by the engineer-and to use as little forming lumber as practicable in holding the concrete to the neat lines."

In reply to this letter of Mr. Beatty, the appellee wrote him, on December 15th, that the method suggested by him for avoiding the use of concrete on the sides of the trench would delay the concrete work and would cost him more than the amount of timber involved would be worth, and asking him to suggest some other method that would compensate him. On December 10, 1908, the appellee wrote Mr. Quick inclosing a statement of accounts for extra concrete and other items, for which he asked payment in his November estimate, and stating that the same had been taken up with the resident engineer, who, because of his "lack of authority to handle same," had referred the appellee to him. On December 11th the appellee also wrote Mr. Quick complaining that Mr. Beatty, in computing the excavation allowed him, had "figured only on 109-inch width of trench allowed for rock excavation in connection with 69-inch sewer," stating that under the terms of the contract when sheeting is required additional width necessary should be allowed, that, owing to the formation of the rock he was required to excavate, it was not possible to sustain the sides of the cut "otherwise than by a slope," and asking that he "be allowed to consider sections to be computed for settlement."

In reply to these several claims of the appellee, Mr. Quick wrote him on January 5, 1909, as follows:

> "I have carefully considered your claim for extra compensation on your contract with the city for building the diversion sewer around the Forest Park Reservoir. With regard to your first claim for certain allowances for extra concrete, we told you exactly where the extra concrete was to be placed, and gave you no reason to suppose that the same order applies to other places. This applies to all voids whether in the side or bottom of the trench. *** The simple fact is that you were directed to place a certain amount of extra concrete, both in the sides and bottom of the trench, and you have ***917** been paid for every yard of such concrete, and you should not have put in any extra concrete which you were not authorized to put in by us. *** As to your third claim, the specifications state distinctly that 'cradles and platforms shall be laid in the bottom of the trench should the engineer so direct. Sheeting shall be withdrawn at the discretion of the engineer, sheeting left in place and timber in platform or cradles will be paid for at proposal price.' You have been paid for every foot of timber in cradles and platforms and every foot of timber in sheeting which you have been directed by us, under the authority of the specifications giving us that discretion, to leave in. That is the only thing we have to be sure of in regard to this claim. *** In regard to the eighth claim: You have been allowed through rock a width of 109 inches from the bottom of the trench up to within 10 feet of the surface and a width of 121 inches for the

remaining 10 feet. This is a liberal allowance for sheeting in either rock or earth, and is all that you are entitled to under the specifications. While we do not admit that the sides of a trench must be excavated to any definite slope in this seamy or irregular rock, or indeed in any rock, even if such were the case the above statement would hold good, since the character and structure, or difficulties encountered in excavating the rock do not under the specifications enter into the question, a definite or maximum width of trench for which payment will be made being specifically stated. I see no objection, however, to allowing you 'loose rock' price for material in such slips as, in the judgment of the engineer in charge, may not be due to a want of care in excavating the trench or failure to properly sheet the same, and I shall instruct Mr. Beatty to make such an allowance. Yours truly, Alfred M. Quick, Water Engineer."

On January 28, 1909, Mr. Quick again wrote the appellee, stating that he had taken up the matter of his claims with the city solicitor and the water board, and that the water board had authorized him to settle the claims for extra concrete and additional excavation upon the terms set out in the letter, with the expectation that he would proceed at once to complete the work. This offer of settlement, so far as the offer to pay for extra concrete was concerned, was not accepted by the appellee. No concreting was done by the appellee after December 12, 1908, and the work under the contract was not resumed until March, 1909.

The sewer was completed in September, 1909, the work was accepted by the water board October 11, 1909, and the final estimate of the work, etc., dated October 11th, signed by Mr. Beatty, resident engineer, Mr. Sudler, assistant engineer, and approved by Mr. Quick and the water board, shows that the total value of the work done was $60,086.64, and that the balance due the appellee, being the amount retained by the city, was $6,008.67, of which balance $3,000 was paid the appellee in November, 1909, and the balance was retained by the city until the final adjustment of the "disputed points between" the appellee and the city and the execution of a proper release by the appellee.

This suit was brought by the appellee in the court of common pleas in May, 1910; but the trial of the case, which resulted in a judgment in favor of the appellee for $13,666.63, did not take place until October, 1915. The claim of the plaintiff is for excavation in addition to that allowed in the estimates as follows: For excavation below the grade line established by the engineer as the bottom of the trench, $661.41; for excavation beyond the width of trench fixed by the specifications, in addition to that allowed in estimate, $2,754; and for error in classification of material excavated, $5,483.90. The plaintiff also claims $883.55 for extra concrete placed in voids below the grade line and on the sides of the trench from October 8 to December 10, 1908; $1,246.88 for sheeting left in the trench; $3,180 damages due to delay in the prosecution of the work caused by the city; $3,008.70, the balance due him on the final estimate; and interest on these several amounts from November 15, 1909.

In the record of nearly 400 pages there are 37 exceptions to the rulings of the court below on the evidence, and one to its action on the prayers. Only two of the exceptions to the evidence were pressed in this court, and in disposing of these and the prayers we shall not attempt to discuss the evidence in detail, or to refer to it further than is necessary in considering the legal propositions involved.

[1] [2] [3] The contract, as we have seen, provided that the water engineer should "determine the amount and quantity of the several kinds of work" to be paid for under the contract determine all questions in "relation" to the "work" and "the construction thereof," and "decide every

question" relative to the execution of the contract "on the part of the contractor," and that his estimate and decision should be final and conclusive, unless modified, changed, or disapproved by the water board. Now, it must be conceded that all of the work for which the appellee claims payment in this suit, and all the items of his claim, except the item of balance due on the final estimate and damages due to delay caused by the appellant, are embraced in the broad terms of the above provision, and were passed on by the water engineer. The effect of such an agreement, and of the decision of the person to whom such authority is committed, has been frequently considered and decided in this state, where the agreements have been enforced and the decisions of the engineer have, in the absence of fraud or bad faith, been uniformly upheld. See A. & B. R. R. Co. v. Ross, 68 Md. 310, 11 Atl. 820, M. & C. C. of Balt. v. Talbott, 120 Md. 354, 87 Atl. 941, and M. & C. C. of Balt. v. Ault, 126 Md. 402, 94 Atl. 1044, and the cases therein cited. The appellee recognizes the force of these decisions, but contends, in respect to the claims for additional excavation, that under a proper construction of the contract he was entitled, where sheeting was required, to the "additional width" of trench "necessary," and in loose and solid rock to six inches below the established grade; that the water engineer was not authorized to construe the contract ***918** or to deprive him of the benefit of those provisions; and that he was not allowed the six inches below the grade line or the additional width according to actual measurements of the trench. We cannot agree with this construction of the provisions referred to. It was the evident intention of the parties to the contract to limit the depth of the trench to the grade established by the water engineer; but realizing that that line could not be rigidly adhered to in excavating solid or broken rock, they made provision for an allowance for excavation below that line, not exceeding six inches, when necessary. They clearly did not intend to establish a different grade for loose and solid rock excavation, but simply to provide for an allowance for increased depth that was likely to occur in loose or solid rock excavation, and only when it did occur. The resident engineer testified that, while he did not allow for excavation six inches below the grade, "the plaintiff in order to do the work had to blast out in irregular spaces below the estimated line," and that he "gave him the breakage line." The provisions for additional width necessary where sheeting was required did not require the engineer to allow the entire width to which the trench was excavated, but only such additional width as was necessary, and there is evidence to show that the water engineer did, where sheeting was required, allow such additional width as he deemed necessary. But apart from the fact that there is evidence tending to show that these allowances were made, the parties to the contract expressly agreed that the water engineer should determine the amount and quantity of the work to be paid for under the contract, and that his decision should be final unless modified by the water board.

In Talbott's Case the contract contained a similar provision, and the contractor contended that it was for the court and not the engineer to construe the contract; but the court held that the decision of the engineer was final, and, speaking through Chief Judge Boyd, said:

> "That section in terms authorizes the engineer to determine the amount of the work which is to be paid for under the contract. It would be difficult to imagine any question which might have arisen which more clearly comes within that provision that the one we are now considering. If he could not determine whether the amount was to include the 13 or 12 inch sewer plus the half inch of plastering on it, or was not to so include the half inch, then what could he determine under that provision?"

In Ault's Case, where the court was construing a like provision, we said:

> "One of the provisions of the contract to be fulfilled by the contractor was that the work was to be completed within 150 working days, and it is clear that the harbor engineer was authorized to decide whether that provision had been complied with, and in doing so to determine the number of days for which they were entitled to credit, in order to decide how many working days they were engaged in the work. *** But he was authorized to decide what delays the contractors were subjected to and the extent of those delays, otherwise he would be unable to decide whether the contractors had fulfilled the contract."

In the case at bar, unless the water engineer could decide the amount of excavation to be paid for under the contract, it is difficult to see what he could determine under the provision in question. As the water engineer decided that the appellee was not entitled to an allowance for the additional excavation claimed, and as there is no evidence to show that his decision was tainted with fraud or bad faith, we must hold that his determination of the matter is final, until modified by the water board.

[4] What we have said applies with equal force to the claim for extra concrete from October 8 to December 10, 1908. While there is some confusion in the language of the contract as to the authority of the water engineer to order the extra concrete work without the approval of the water board, that authority seems to have been accorded him by the construction placed upon the agreement by both of the parties to it, and we think the appellee was authorized by the letters of October 8 and October 19, 1908, to do the extra concrete work as therein mentioned. But these letters only authorize the extra concrete to be placed "where directed either by myself (Mr. Quick), Mr. Sudler or Mr. Beatty," and the only question presented by this claim is entirely one of fact. The city contends that the appellee was allowed in the estimates for all concrete that was placed "where directed" by the engineers, while the appellee contends that he was not, and the city further contends that the appellee placed such concrete at points where he was not directed to place it. This matter was submitted to the water engineer, and he decided that the appellee had been allowed all concrete placed at points where he was authorized to place it, and there is no evidence to show that his decision was affected by fraud or bad faith.

[5] [6] The claims for lumber or sheeting and for erroneous classification of the excavated material present different propositions. The contract provides that proper and sufficient sheeting "shall be used when necessary. *** Sheeting shall be withdrawn at the discretion of the engineer. Sheeting left in place and timber in platforms and cradles will be paid for at proposal prices per foot B. M." Under this paragraph of the contract, the appellee was clearly entitled to be allowed for all sheeting left in place that the engineer did not order withdrawn. Now, the evidence tends to show that he was not allowed for any timber or sheeting, except what the engineer ordered to be left in the trench, and he was not paid for sheeting which was left in the trench and not ordered to be withdrawn, and in the letter of January 5, 1909, to the appellee, Mr. Quick states that the appellee had been paid for every foot of sheeting "which you have been ***919** directed by us, under the authority of the specifications giving us that discretion, to leave in." This evidence therefore shows, or tends to show, that the appellee was not allowed for sheeting for which he should have been paid under the terms of the contract. Now, it is true the water engineer passed upon and decided against this claim of the appellee, but in doing so he disregarded, overlooked, or misconstrued the plain provision of the agreement. He had a right to decide what sheeting was not ordered withdrawn by the engineer and left in the trench, in order to decide the amount of

sheeting the appellee was to be paid for; but he was not authorized by the contract to decide the amount of sheeting the engineer ordered to be left in the trench as the basis of the allowance to the appellee, and his decision was not therefore within the terms of the submission to his determination or binding upon the appellee. The sheeting to be paid for under the contract was the sheeting the engineer did not order withdrawn, and by the terms of the agreement the water engineer was authorized to determine the amount to be paid for that sheeting. In Talbott's Case, where the court decided that it was the duty of the city under the contract to remove certain pipes the presence of which greatly increased the cost of the work done by the contractor, Chief Judge Boyd said:

> "We have not in this connection discussed the powers of the engineer, as we do not think he had authority to disregard the provisions of section 155 and thereby prevent recovery by plaintiffs for the extra cost."

And in Ault's Case the court said:

> "He (the harbor engineer) could not, of course, deprive the city *** of the stipulation in regard to liquidated damages, or withhold from the contractors credit for any delays for which they were not responsible. These rights were secured to the city and to them by the contract."

[7] The contract provided in reference to classification of excavated material that it should be classified as earth, loose rock, and solid rock, and what should be included in each of those terms, and the city contracted to pay for excavating earth 60 cents per cubic yard, for loose rock $1.20 per cubic yard, and for solid rock $2.25 per cubic yard. It is quite evident that this classification provided for in the contract was based upon the difficulty the contractor would encounter and the expense he would incur in excavating the different materials mentioned, and it is equally apparent that errors or negligence on the part of the engineer in classifying the material were calculated to work a serious loss to the contractor. The plaintiff offered evidence tending to show that the course the resident engineer pursued in classifying the material excavated was highly improper, and that it was impossible for him to arrive at a proper classification by the method he adopted. This evidence, which we need not refer to more specifically, may be true or it may not be true. It was for the jury to determine its weight. The evidence also tends to show that the decision of the water engineer was based mainly, if not entirely, upon the classification made by the resident engineer. This evidence was, we think, evidence tending to show, and from which the jury might have found, that the decision of the water engineer in respect to the classification of the material was affected by bad faith. Not bad faith in the sense that he purposely or intentionally wronged the appellee, or knowingly disregarded his rights, but in the sense that his decision was based upon a classification characterized by gross negligence or incapacity on the part of the resident engineer. In Wilson v. York & Md. R. R. Co., 11 Gill & J. 58, the plaintiff asked the court to instruct the jury, as a modification of defendant's second prayer, that gross negligence on the part of the engineer would, in contemplation of law, amount to fraud, or want of bona fides. The court granted the defendants' prayer, and refused "the plaintiff's prayer of modification," adding the following qualification thereto:

> "If the jury should think that there was gross negligence on the part of the engineer, in making the estimate of the water expenses under the contract, it is evidence, from which the jury may infer, that he did not act fairly and bona fide in making the said estimate."

On appeal, Judge Stephen said in regard to this ruling of the lower court:

> "But we think the court were right in rejecting the plaintiff's prayer of modification of the

> defendant's second prayer, and were right in their qualification of the same, because we do not think that gross negligence would in construction of law amount to fraud, but was only evidence to be left to the jury, from which they might infer fraud, or the want of bona fides in the making of said estimate."

This statement of the court was quoted with approval in Lynn v. B. & O. R. R. Co., 60 Md. 404, 45 Am. Rep. 741.

[8] [9] In regard to the claim for damages, the water engineer wrote the appellee on October 8th and 19th to do the extra concrete work where directed by him or Mr. Sudler or Mr. Beatty. Thereafter a dispute arose between the appellee and the resident engineer in reference to allowance for this extra concrete, and the engineer insisted that he had allowed the appellee for all concrete that he ordered to be placed in the trench. As we have said, the evidence shows that no concrete work was done by the appellee after December 12, 1908, until the work was resumed in March, 1909, and the plaintiff offered evidence tending to show that the reason the work was not done during that interval was that he could not get from the engineer orders in writing for the extra concrete work he was required to do under the directions given him in the letters of October 8th and 19th; that he was damaged by this delay to the extent of his claim for $3,180; and that the delay was caused by the refusal of the engineer to give him ***920** written orders for the extra concrete work he was required to do. In view of the provisions of the contract, and the dispute that arose between the resident engineer and the appellee, we think the latter was justified in demanding written orders for the extra concrete work, and that, if the delay in the work was caused by the refusal of the engineer to give him written orders for this work, he was entitled to recover whatever damage he sustained by reason of such delay. The provision in the contract requiring the estimate of the contractor to include in his estimate every item of cost in the construction of the sewer, "together with any additional expense which may accrue to said contractor for any part of the work, consequent upon delays or difficulties encountered of any character whatsoever," was evidently not intended to cover delays of the kind referred to in this case.

The right of the plaintiff to recover the balance of $3,008 due on the final estimate, with interest in the discretion of the jury, was conceded by the defendant's prayers, and was not disputed in this court.

[10] [11] [12] [13] It follows from what has been said that there was error in the granting of the plaintiff's first, second, and fourth prayers as modified. These prayers entirely ignore the effect of the evidence showing that the water engineer determined the amount and quantity of the excavation the appellee was to be paid for under the contract, and the amount of the extra concrete he was to be paid for. The reporter is requested to set out the granted prayers of the plaintiff and the rejected prayers of the defendant in his report of the case. We find no reversible error in the granting of the plaintiff's fifth prayer as modified. The concluding of portion of this prayer was not necessary to entitle the plaintiff to recover for the sheeting left in the trench, and was calculated to confuse the jury, but not to the prejudice of the defendant. We see no objection to the plaintiff's sixth prayer, and the right of the plaintiff to recover the balance due on the final estimate seems to have been conceded. The plaintiff's seventh prayer was properly granted; but there was error in the granting of his eighth prayer, which is entirely too general, and fails to give the jury any guide by which to estimate the damages caused by the delay referred to. The plaintiff's ninth prayer was calculated to mislead the jury. The express promise of the defendant was to make the final payment after the expiration of 30

days after the work had been completed and accepted by the water board, and we think the plaintiff was entitled to interest, in the discretion of the jury, from that date on the amount the jury found to be due for work done and materials furnished by him under the contract.

[14] It also follows from what we have said that there was no error in the rejection of the defendant's first and second prayers. The decision of the water engineer in respect to the two claims for excavation and the claim for extra concrete was binding upon the plaintiff; but, as we have said, there was evidence tending to show that his decision in regard to the claims for sheeting and erroneous classification of the excavated material was not, for the reasons we have stated, binding upon the plaintiff, and the damages caused by the delay referred to were not within the terms of the submission to his determination. The defendant's third, seventh, and ninth prayers asserted that the plaintiff had offered no evidence legally sufficient to support his claims for excavation and extra concrete work, and we think they should have been granted. The fact that the water engineer passed upon these claims is conceded, and we have said that his decision was binding as to them; there being no evidence that it was affected by fraud or bad faith. The defendant's fourth, fifth, sixth, eighth, and tenth prayers are disposed of by what we have said in regard to the claims therein referred to, and were properly refused. What we have said in reference to the prayers disposes of the defendant's special exceptions to the plaintiff's prayers.

[15] The first and second exceptions are to the admission in evidence of Mr. Quick's letter of January 28th to the appellee and the resolution of the water board authorizing a settlement of the plaintiff's claims. They were objected to by the defendant on the ground that they were offers of compromise. An examination of the letter and resolution convinces us that these objections should have been sustained. They were simply an offer of settlement of the disputed claims of the appellee. It is true the resolution does disclose that the water engineer had consulted the city solicitor before recommending the proposed compromise authorized by the water board; but the evidence also shows that the water engineer had rejected the claims of the plaintiff in his letter of January 5th, and there is no evidence to show that he had consulted the city solicitor before doing so. The fact that the work was resumed in March upon terms somewhat similar to the terms of the proposed compromise does not make the letter and resolution admissible as the basis of the subsequent dealings of the parties.

The other exceptions to the evidence were not pressed in this court. Some of the evidence referred to may not have been admissible; but the rulings were not such as were calculated to seriously prejudice the defendant, and would not constitute reversible error.

The conclusion we have reached is the result of a careful examination of all the evidence, and of the authorities we have referred to and those cited and relied upon by ***921** the parties, and, because of the errors indicated, we must reverse the judgment of the court below and remand the case for a new trial.

Judgment reversed, with costs to the appellant, and new trial awarded.

Md. 1916.
City of Baltimore v. Clark
128 Md. 291, 97 A. 911

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