

File No. 10585 Continued.

OPINION.

in case any damages should be done to the Jewell Company's work, by reason of the crushed stone to be placed thereon by Messrs. Fisher & Carozza, then the City would look to Fisher & Carozza for compensation, instead of the Jewell Company.

354 The Jewell Company also asked that such part of their work, as was to be covered by the crushed stone should be finally accepted and paid for by the City. At the conference I stated that I thought the City was under no legal obligation to do this, but that it would meet with the Sewerage Commission to decide whether, as a matter of policy, they would be willing to do it anyhow.

General Leary now desires to know whether the Sewerage Commission can legally make a payment on account of this particular work, approximating 15%, without waiving any of the rights of the Commission under the contract, and without constituting a final acceptance of the work.

Section 49 of the Jewell Company's contract, page 25, provides that no order by the Commission for the payment of money nor any payment for nor acceptance of the whole or any part of the work by the Engineer or the Commission, nor any possession taken by the Commission or its employees, shall operate as a waiver of any portion of the contract, or of any power reserved therein, or of any right to damages therein provided.

355 I think that there would be no difficulty under this section, in making the payment proposed, at the same time reserving all rights, but in order to make the matter perfectly clear I would suggest that the receipt taken from the Jewell Company, for this payment, should provide in addition to its usual provisions, a clause substantially as follows:

"It is understood that this payment shall not constitute a waiver of any of the rights of the Sewerage Commission under their contract with the Jewell Company, nor shall it be constituted as an acceptance by the Sewerage Commission of the work or any part thereof on account of which said payment is made."

Inasmuch as the Jewell Company has, in my judgment no right to demand the additional payment which it now proposes to make them, it follows, of course, that the Sewerage Commission has a perfect right to ask that the payment, if made, be accepted by the Jewell