CHAPTER XIX

LETTING TO LOWEST BIDDER

§ 121. Lowest Bidder—Who is Lowest Bidder—Rules Determining.

If these statutes regulating competitive bidding do not provide that public authorities, after inviting proposals by public notice, shall accept the lowest proposal, it is clear that the intention of the legislature is that they shall make such contract as in their judgment the public interests require.[1] But, on the other hand, where the intent of the statute is to require a letting to the lowest bidder, a contract not so let is illegal and void.[2]

§ 122. Limitations on Power to Reject Bids.

The duty of public officials in the examination of proposals and the awarding of contracts is judicial in its nature and character, and the award is the result of a judicial act.[3] The award of a contract when free from fraud,

[1] Knowles *v.* New York, 176 N. Y. 430, 68 N. E. 860; Baird *v.* New York, 96 N. Y. 567; Greene *v.* Mayor, 60 N. Y. 303; Talcott *v.* Buffalo, 125 N. Y. 280, 26 N. E. 263; Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101; Mayor *v.* County of Hampden, 141 Mass. 74, 6 N. E. 757; Schefbauer *v.* Kearney, 57 N. J. L. 588, 31 Atl. 454; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; State *v.* Lincoln County, 35 Neb. 346, 53 N. W. 147; Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. 94; Elliott *v.* Minneapolis, 59 Minn. 111, 60 N. W. 1081; Dillingham *v.* Spartanburg, 75 S. C. 549, 56 S. E. 381.

[2] Anderson *v.* Fuller, 51 Fla. 380, 41 So. 684; Phelps *v.* Mayor, 112 N. Y. 216, 19 N. E. 408; Walton *v.* Mayor, 26 N. Y. App. Div. 76; Moran *v.* Thompson, 20 Wash. 525, 56 Pac. 29; Weitz *v.* Indep. Dist. Des Moines, 79 Iowa, 423, 44 N. W. 696; Santa Cruz R. P. Co. *v.* Broderick, 113 Cal. 628, 45 Pac. 863; Chicago *v.* Hanreddy, 211 Ill. 24, 71 N. E. 834; LeTourneau *v.* Hugo, 90 Minn. 420, 97 N. W. 115.

[3] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101; East River G. L. Co. *v.*

collusion, corruption or bad faith is not the subject of judicial revision. When the statutes provide for the letting of the contract to the lowest and best bidder or the lowest responsible bidder, such language of course invests the authorities with a broader discretion than where it provides merely for an award to the lowest bidder, and when the authorities in the performance of their duty make the award, the courts may not substitute their discretion for that of the public body vested with it by law.[1]

But they may not arbitrarily refuse to accept the lowest bid without any facts tending to show that it is not that of a responsible bidder. Any arbitrary determination to accept the highest bid, without facts justifying it, cannot have the effect of a judicial determination.[2]

§ 123. Rejecting all Bids.

The mere fact that a party who has made proposals is the lowest bidder does not necessarily entitle him to the contract, nor does it constitute an award of the contract to him under the statutes regulating the letting of work upon competitive bidding.[3] Although the statute provides that the work shall be awarded to the lowest bidder, this language does not compel the making of a contract even with such lowest bidder. Where it appears that the best interests of the public body demand that none of the bids

Donnelly, 93 N. Y. 557; People *ex rel.* Coughlin *v.* Gleason, 121 N. Y. 631, 25 N. E. 4; Brown *v.* Houston, 48 S. W. (Tex.) 760.

[1] Inge *v.* Mobile, 135 Ala. 187, 33 So. 678; Talcott *v.* Buffalo, 125 N. Y. 280, 26 N. E. 263.

[2] Talcott *v.* Buffalo, *supra;* People *ex rel. v.* Kent, 160 Ill. 655, 43 N. E. 760; State *v.* McGrath, 91 Mo. 386, 3 S. W. 846; Interstate Vitr. B. Co. *v.* Philadelphia, 164 Pa. St. 477, 30 Atl. 383; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. 916; Inge *v.* Mobile, 135 Ala. 187, 33 So. 678; Schefbauer *v.* Kearney, 57 N. J. L. 588, 31 Atl. 454; People *ex rel.* Coughlin *v.* Gleason, 121 N. Y. 631, 25 N. E. 4; Kelling *v.* Edwards, 116 Minn. 484, 134 N. W. 221.

[3] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101.

should be accepted, the public authorities, acting in good faith, have the right to reject all bids and advertise over again.[1] By many statutes such power is expressly reserved as well as by the terms of the proposals. By statute it is also provided in many jurisdictions that without rejecting all bids an award may be made to one other than the lowest bidder by the vote or approval of the governing body, or governing financial board of the municipality.[2] But the opening of bids and the ascertainment of who is the lowest bidder, together with the announcement of that fact, do not constitute an award. The right to the award of a contract or to have a contract executed with such lowest bidder does not arise upon any of these facts. Public officers still have the right to reject all bids.[3] But after a bidder has been notified that his bid is the lowest and that a contract will be awarded to him, the public officials have no power to reject all bids and readvertise. The rights of the parties by such express acceptance become fixed.[4]

§ 124. Making Award on Contingency.

A public officer or head of department has no power to award a contract conditioned upon the consent or approval of other boards or officials.[5] A conditional acceptance of a bid can confer no rights upon a bidder.[6] An accep-

[1] Walsh *v.* Mayor, 113 N. Y. 142, 20 N. E. 825; Molloy *v.* New Rochelle, 198 N. Y. 402, 92 N. E. 94.

[2] Greater N. Y. Charter, § 419.

[3] Williams *v.* New York, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

[4] Lynch *v.* New York, 2 N. Y. App. Div. 213; Pennell *v.* Mayor, 17 *Id.* 455; Beckwith *v.* New York, 121 *Id.* 462; Williams *v.* New York, *supra.*

[5] Williams *v.* New York, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

[6] Williams *v.* New York, *supra;* North Eastern Cons. Co. *v.* North Hempstead, 121 N. Y. App. Div. 187.

tance, therefore, upon condition that an additional appropriation shall be made by some other body is in violation of the statute requiring a prior appropriation as an essential to the validity of public contracts.[1]

Acceptance upon condition that leave shall be granted by a board to issue bonds is invalid.[2] In like manner, a bid accepted upon condition that it was not to be binding in case certain legislation then pending was not passed is invalid and fraudulent, as a mere attempt to defeat a changed mode of entering into contracts from affecting these bids.[3]

§ 125. Award to Lowest Bidder—Competitive Bidding Statutes—Construed to Effect Purpose.

These provisions of law are of great importance to the welfare and interests of large public corporations acting through their public officers and agents and were designed to establish a policy which should be carried into effect without technicalities or a narrow interpretation which will render them of no avail.[4] They are not to be construed so as to prevent the public from doing the work itself through its own agencies.[5]

§ 126. Award of Public Contracts—When no Statutory Conditions Exist.

In the absence of any of the provisions or restrictions of the character mentioned in the preceding sections or of similar statutory or constitutional limitations a binding

[1] Williams *v.* New York, *supra.*

[2] North Eastern Cons. Co. *v.* North Hempstead, *supra.*

[3] Matter of Raymond, 21 Hun, 229, 85 N. Y. 646.

[4] Greene *v.* Mayor, 60 N. Y. 303, 318. See Knowles *v.* New York, 176 N. Y. 430, 68 N. E. 860; People *ex rel.* Lyon Co. *v.* McDonough, 173 N. Y. 181, 65 N. E. 963.

[5] Home Bldg. & Con. Co. *v.* Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

agreement may be made by a proposal and acceptance.[1] The only qualification is that the proposal of the contractor shall be definite and the acceptance by the public body shall be unqualified.[2]

§ 127. When not Required.

Where the governing body of a municipality or other public corporation does not abuse its discretionary powers and acts without fraud and within the scope of its corporate powers, if the charter or statute under which it acts does not prescribe the manner or mode of entering into a public contract, it may award such contracts without letting them to the lowest bidder.[3]

§ 128. When Competitive Bidding not Required—Monopoly—Patents—Professional Skill—Special Knowledge and Skill.

Statutes providing that public contracts must be based upon sealed bids obtained through public advertising do not apply if the subject-matter is such that the supply to be purchased is only obtainable from one person which has been granted an exclusive franchise or monopoly of the commodity needed.[4] Although there is more than one source of supply, if there is incongruity in competing for it, and its selection involves choice of quality, quantity and source resting largely upon special knowledge and skill it comes within the exceptions and the statute does not apply.[5] For similar reasons, such provisions fail of

[1] Denton *v.* Atchison, 34 Kan. 438, 8 Pac. 750; Middleton *v.* Emporia, 106 Kan. 107, 186 Pac. 981; U. S. *v.* Purcell En. Co., 249 U. S. 313, 63 L. Ed. 620.

[2] Howard *v.* Maine Industrial School, 78 Me. 230, 3 Atl. 657.

[3] Elliot *v.* Minneapolis, 59 Minn. 111, 60 N. W. 1081; Yarnold *v.* Lawrence, 15 Kan. 103.

[4] Harlem G. L. Co. *v.* Mayor, 33 N. Y. 309; Hartford *v.* Hartford Elec. L. Co., 65 Conn. 324, 32 Atl. 924.

[5] Gleason *v.* Dalton, 28 N. Y. App. Div. 555.

application in the instance of contracts for lighting streets.[1] The fact that a particular kind of steel specified can only be obtained from one source does not unlawfully limit competition where the bidder can buy it in the open market.[2] Therefore, if there is a monopoly of some process or article which can only be obtained from one source the public body may make a contract for it when it is in the public interest notwithstanding the provisions of the competitive bidding statutes. They have no application to such a case unless the unreasonable result of depriving public corporations of the use of all patented appliances or processes and of the benefits of modern invention is imported into the intent and design of such a statute.[3] If, however, the specifications name not a particular commodity but the product of a particular company and the article is a common article of manufacture and sale, the bid under such specifications violates the provision of law requiring work to be let to the lowest bidder.[4] The difficulty which this question of the purchase of patented articles has created has been solved by legislative bodies

[1] Blank *v.* Kearny, 44 N. Y. App. Div. 592.

[2] Knowles *v.* New York, 37 Misc. 195, 74 N. Y. App. Div. 632, 176 N. Y. 430, 68 N. E. 860. But here the statute requiring competition did not apply.

[3] Bye *v.* Atlantic City, 73 N. J. L. 402, 64 Atl. 1056; Milner *v.* Trenton, 80 N. J. L. 253, 75 Atl. 939; Holmes *v.* Comm. Coun. of Detroit, 120 Mich. 226, 79 N. W. 200; Swift *v.* St. Louis, 180 Mo. 80, 79 S. W. 172; Rackliffe G. Cons. Co. *v.* Walker, 170 Mo. App. 69, 156 S. W. 65; Field *v.* Barber A. P. Co., 117 Fed. 925, Rev. O. G. 194 U. S. 618; Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702; Hobart *v.* Detroit, 17 Mich. 246; La Coste *v.* New Orleans, 119 La. 469, 44 So. 267; Verdin *v.* St. Louis, 131 Mo. 36, 33 S. W. 480; Silsby Mfg. Co. *v.* Allentown, 153 Pa. St. 319, 26 Atl. 646; Perine Cont. Co. *v.* Quackenbush, 104 Cal. 684, 38 Pac. 533; State *v.* Bd. of Commr's Shawnee County, 57 Kan. 267, 45 Pac. 616; *Contra* Siegel *v.* Chicago, 223 Ill. 428, 79 N. E. 280; Fishburn *v.* Chicago, 171 Ill. 338, 49 N. E. 532; Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911.

[4] Smith *v.* Syracuse Imp. Co., 161 N. Y. 484, 55 N. E. 1077; Kansas City Hyd. P. B. Co. *v.* Nat. Surety Co., 157 Fed. 620; Nat. Surety Co. *v.* Kansas City Hyd. P. B. Co., 73 Kan. 196, 84 Pac. 1034; Atkin *v.* Wyandotte Coal & L. Co., 73 Kan. 768, 84 Pac. 1040.

in several ways. In some jurisdictions, if the owner of the patent files an agreement with the public to furnish the patented supply to the successful bidder at a stated price, purchase of patented articles is allowed.[1]

In others, the right to provide as compensation to the patentee a royalty reasonable in amount for the use of his material is provided as a term of the specifications, and as long as the patentee cannot hold the right to use the process so as to designate the contractor, there is no interference with the statutory competition contemplated.[2]

But in these jurisdictions, the doctrine above set out that competitive statutes can have no application, seems to be fully sustained. It is simply because the public authorities properly charged with the responsibility of selection of durable materials and supplies have hedged in the use of patented articles by the limitations named that these decisions have arisen. But their clear purport is to the effect that municipalities should be permitted to use patented articles either by direct purchase or under such conditions as the public bodies themselves may fix or the legislature may establish where it has dealt with the subject.

Where the contract is for a service continuous in its character but terminable at the pleasure of the public body, the mere fact that it may be continued so long as to cost in the aggregate more than the amount limited by

[1] Ford *v.* Great Falls, 46 Mont. 292, 127 Pac. 1004; Saunders *v.* Iowa City, 134 Iowa, 132, 111 N. W. 529; McEwen *v.* Cœur D'Alene, 23 Idaho, 746, 132 Pac. 308; Johns *v.* Pendleton, 66 Oreg. 182, 133 Pac. 817.

[2] Tousey *v.* Indianapolis, 175 Ind. 295, 94 N. E. 225; Reed *v.* Rackliffe G. C. Co., 25 Okla. 633, 107 Pac. 168; Warren Bros. *v.* New York, 190 N. Y. 297, 83 N. E. 59; Allen *v.* Milwaukee, 128 Wis. 678, 106 N. W. 1099. (These are cases where statutes regulating the matter of purchase of patented articles are directly construed. Some text writers discuss the "Wisconsin rule," but there is no judicial rule but a statute interpretation.

(See cases cited, *ante*, notes 1 and 2, where all of these courts except Indiana unanimously agree that competitive statutes could not apply to patents.)

statute for contracts let without competition, will not bring it within the statute. The statute was intended to apply to contracts for particular jobs involving liability to pay such amount, not to services for an indefinite period involving no obligation to continue the service.[1] It has no application to contracts for personal service,[2] nor to professional services.[3]

But bids requiring the use of certain kinds of material or better do not violate the provision of the statute.[4] In some jurisdictions the character of the use controls the right to purchase patented supplies, and accordingly a city acting for itself may buy and make use of patented articles for its municipal purpose, but not where it charges the property of individuals to pay therefor by assessment.[5]

§ 129. When not Required—Extra Work—Substitution of Materials.

Statutes regulating the award of contracts to the lowest bidder after advertising for bids do not prevent the public body from inserting in a contract for public work a provision for the payment of extra work which becomes necessary as the general work progresses.[6] Such extra work need not be let upon separate advertisement.[7] Sometimes, it is provided by statute that in the contract, a clause may be inserted to provide for additional work or

[1] Swift *v.* Mayor, 83 N. Y. 528, 537.
[2] Smithmeyer *v.* U. S., 147 U. S. 342, 37 L. Ed. 196, aff'g 25 Ct. Cl. 481.
[3] Smith *v.* Mayor, 5 Hun, 237; People *ex rel.* Smith *v.* Flagg, 17 N. Y. 584.
[4] Oak Park *v.* Galt, 231 Ill. 365, 83 N. E. 209; Muff *v.* Cameron, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116.
[5] Monaghan *v.* Indianapolis, 37 Ind. App. 280, 76 N. E. 424; Allen *v.* Milwaukee, *supra*.
[6] Clark & Sons Co. *v.* Pittsburg, 217 Pa. St. 46, 66 Atl. 154.
[7] *Idem*.

supplies not exceeding a stated percentage of the contract price,[1] or exceeding a sum provided by law.[2]

But contingencies for extra work must be provided for beforehand in the specifications and contract in order to permit payment therefor without advertised letting. A contract which leaves the payment for extra work to be agreed upon by private arrangement or agreement between the public body and the contractor is contrary to the express provisions of these statutes and is void, and no recovery can be had either upon the express arrangement made or upon an implied obligation. The addition of an entirely new work to a contract already awarded is for stronger reasons equally to be condemned.[3] When material provided by a contract let under the statute proves to be defective, these statutes forbid private substitution between the public officials and the contractor of new material or of a new form of construction in place of that provided by the contract.[4]

Where the statute providing for awarding of public contracts to the lowest bidder is limited in scope and does not include alterations or additions, these may be provided for without advertising.[5]

§ 130. When Bids not Required—Certificate of Head of Department—Prior Appropriation.

Contracts under certain stated amounts provided by law may be made by public officials without competitive bidding. Whatever is not included within the provisions

[1] Greater N. Y. Charter, § 419.

[2] Sadler *v.* Eureka County, 15 Nev. 39; McBrien *v.* Grand Rapids, 56 Mich. 95, 22 N. W. 206.

[3] Ely *v.* Grand Rapids, 84 Mich. 336, 47 N. W. 447.

[4] Cahn *v.* Metz, 115 N. Y. App. Div. 516.

[5] Escambia County *v.* Blount Cons. Co., 66 Fla. 129, 62 So. 650; Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

of these statutes may be let privately and without competition in the discretion of public officials.[1] In some jurisdictions the contract can only be let without competition provided the head of department has certified to the necessity of the work and the money for the expenditure has been appropriated.[2]

The object of these provisions of law is not to prohibit contracts, but to prohibit the expenditure of money therefor, unless the right thereto was certified and unless the fund existed from which payment might be made.[3] A contract made without the certificate and the appropriation is an absolute nullity, and no recovery can be had thereunder,[4] even though the city has had the benefit of the work done,[5] or the supplies furnished,[6] and a mere verbal order will not suffice or take the place of the formal certificate required by the statute.[7] As between the contractor and the city this certificate of the proper officer is conclusive, where there is no fraud or collusion, and where the facts indicate that the necessity certified was a possible incident of the work to be done or the supply to be furnished,[8] and even when signed by a subordinate, is presumed to be authorized.[9] Where employment is terminable at pleasure, though continuous in character, the fact that it might be continued to exceed the money limit placed upon non-competitive contracts will not bring

[1] People *v.* Kane, 43 N. Y. App. Div. 472, aff'd 161 N. Y. 380, 55 N. E. 946.
[2] People *v.* Kane, *supra;* Greater N. Y. Charter, §§ 149, 419; Dady *v.* New York, 65 Misc. 382, 148 N. Y. App. Div. 956.
[3] People *v.* Kane, *supra.*
[4] Donovan *v.* New York, 33 N. Y. 291.
[5] Donovan *v.* New York, *supra;* Walton *v.* Mayor, 26 N. Y. App. Div. 76.
[6] Keane *v.* New York, 88 N. Y. App. Div. 542.
[7] Dady *v.* New York, 65 Misc. 382, 148 App. Div. 956; Walton *v.* Mayor, 26 N. Y. App. Div. 76; Keane *v.* New York, *supra.*
[8] Brady *v.* New York, 112 N. Y. 480, 20 N. E. 390.
[9] Culp *v.* New York, 146 N. Y. App. Div. 326.

it within the terms of the statute requiring competition.[1] Supplies obtained upon distinct orders each involving an expenditure of less than the money limit for non-competitive bids but in the aggregate exceeding such amount can only be validly made upon public letting under competitive bids.[2]

§ 131. When Bids not Required.

When the provisions of statutes requiring public letting by competitive bidding are restricted in their scope to certain classes of public contracts, contracts which cover classes of work other than those described are under familiar canons of construction excluded from the operation of the statutes.[3] Therefore, statutes which provide for competitive bids for street work do not include lighting of streets.[4] The lighting contract of a public body will not be controlled by a statute requiring competitive bids for public works.[5] The renting of rooms is not included in such a statute affecting work or supplies.[6] Additions and alterations do not come within the terms of a statute requiring contracts for erecting or building of a house.[7]

§ 132. The Same—Emergency.

The provisions of such statutes do not apply to work

[1] Swift *v.* Mayor, 83 N. Y. 528; People *v.* Kane, 161 N. Y. 380, 55 N. E. 946.

[2] Walton *v.* Mayor, 26 N. Y. App. Div. 76. (The result reached in this case seems to be in conflict with the doctrine of Swift *v.* Mayor, *supra*, and People *v.* Kane, *supra*); Gamewell F. A. Tel. Co. *v.* Los Angeles, 187 Pac. (Cal.) 163.

[3] Davies *v.* New York, 83 N. Y. 207, 214; Elec. L. &c. Co. *v.* San Bernardino, 100 Cal. 348, 34 Pac. 819; Escambia County *v.* Blount Cons. Co., 66 Fla. 129, 62 So. 650; Walsh *v.* Columbus, 36 Ohio St. 169; Atlantic Gas & W. Co. *v.* Atlantic City, 73 N. J. L. 360, 63 Atl. 997.

[4] Elec. L. &c. Co. *v.* San Bernardino, *supra*.

[5] Atlantic Gas Co. *v.* Atlantic City, *supra*.

[6] Davies *v.* New York, *supra*.

[7] Escambia County *v.* Blount Cons. Co., *supra*.

done or materials furnished to meet an emergency creating a necessity for such work or materials which must be met at once.[1] Contingencies continuously arise in the administration of public affairs when services, materials and property above the prescribed limit for non-competitive bids are immediately needed and where competitive bids and written contracts are unserviceable or impossible. The statutes were never intended to apply to such cases. Whenever, therefore, the nature of the service or of the materials or property needed for public use, or the time within which these must be had is so short that recourse to competitive bids would cause irreparable mischief, the acts cannot apply. Such emergencies were not amongst the mischiefs these statutes were designed to correct.[2] The general law of the State must be regarded as an amendment of or at least a part of all municipal charters. When it imposes a duty on a public officer to provide services or supplies, or a place in which to render the services or use the supplies, for those whose care and treatment is intrusted to and charged upon certain public officers, it becomes the duty of such officers to comply with such general law whether or not there is any provision in the charter to raise money or contract debts for that purpose.[3] But such provisions of general law do not abrogate the methods of procedure required by municipal charters to make contracts, if all that the emergency requires can be

[1] Harlem G. L. Co. *v.* Mayor, 33 N. Y. 309; North River E. L. & P. Co. *v.* New York, 48 N. Y. App. Div. 14; Blank *v.* Kearny, 44 N. Y. App. Div. 592; Dady *v.* New York, 65 Misc. 382, 148 N. Y. App. Div. 956; Washburn *v.* Shelby County Comm'rs, 104 Ind. 321, 3 N. E. 757; U. S. *v.* Speed, 8 Wall. (U. S.) 77, 19 L. Ed. 449, aff'g 2 Ct. Cl. 429; Stevens *v.* U. S., 2 Ct. Cl. 95; Reeside *v.* U. S., 2 Ct. Cl. 1.

[2] Harlem G. L. Co. *v.* Mayor, *supra;* North River Elec. L. Co. *v.* New York, *supra;* Blank *v.* Kearney, *supra;* Matter of Plattsburgh, 157 N. Y. 78, 51 N. E. 512; Schneider *v.* U. S., 19 Ct. Cl. 547; Child *v.* U. S., 4 Ct. Cl. 176.

[3] Matter of Plattsburgh, *supra.*

had by compliance with the charter.[1] It was never intended, however, that public officers charged with a positive duty should wait until a board or other public body be called together to make an order or an appropriation before they would respond to their public duty and meet some critical emergency.[2] When the statute includes emergency contracts, a contract should follow its terms in order to be valid.[3]

§ 133. Competitive Bids—When Bids not Required—Monopoly—Patents.

When in the very nature of things competitive bids are impossible from the fact that a monoply of the particular supply exists either because one person controls the supply,[4] or has been granted an exclusive franchise[5] to sell it, or it results from a patent[6] and the patented article can only be had from one person, these statutes relating to competitive bidding do not apply.

Where competition is impossible in these circumstances, it cannot be supposed that the legislative purpose was to compel a public body to go through the useless and farcical form of a letting to the lowest bidder.

In some jurisdictions, the purchase of a patented article is controlled by special statute which must be followed.[7]

[1] Matter of Plattsburgh, *supra*.

[2] Washburn *v.* Shelby County Comm'rs, *supra;* Clark Co. *v.* Allegheny City, 143 Fed. 644.

[3] Newton *v.* Toledo, 8 Ohio C. Dec. 607.

[4] Detwiller *v.* Mayor, 46 How. Pr. 218; Gleason *v.* Dalton, 28 N. Y. App. Div. 555.

[5] Harlem Gas Co. *v.* New York, 33 N. Y. 309; Hartford *v.* Hartford Elec. Co., 65 Conn. 324, 32 Atl. 925; Purley Water Co. *v.* Vaughn, 115 Wis. 470, 91 N. W. 971.

[6] Baird *v.* Mayor, 96 N. Y. 567; *Re* Dugro, 50 N. Y. 513; Nicholson *v.* Painter, 35 Cal. 699; Kilvington *v.* Superior, 83 Wis. 222, 53 N. W. 487.

[7] Warren Bros. *v.* New York, 190 N. Y. 297, 83 N. E. 59; Allen *v.* Milwaukee, 128 Wis. 678, 106 N. W. 1099.

§ 134. Letting of Public Contracts—Competitive Bidding—When Bids not Required—Scientific Knowledge—Professional Skill.

When the services to be rendered require scientific knowledge and professional skill, this character of service need not be obtained through competitive bids.[1]

§ 135. Opening the Bids.

The provisions of competitive bidding statutes which require that all bids shall be publicly opened and declared by the officer advertising for bids or in the presence of certain officials or public body are not merely permissive but imperative and mandatory, and unless complied with will destroy the validity of any contract based upon such proceedings.[2] The officer appointed by law to perform this duty cannot delegate it to his subordinate.[3]

A delay of one day after bids were received for which an adjournment was taken to bring the officials together who were charged with the duty of opening the bids will not affect acceptance or rejection. The purpose of the statute is that the bids shall be examined within a reasonable time.[4]

Even where the statute provides for opening of bids and that the public officials shall then ascertain or determine whose is the most favorable proposal, this does not restrict them to an instant determination, but authorizes an adjournment for that purpose.[5]

[1] People *ex rel.* Smith *v.* Flagg, 5 Abb. Pr. 232; Peterson *v.* Mayor, 17 N. Y. 449; Horgan & Slattery, Inc. *v.* New York, 114 N. Y. App. Div. 555; Harlem G. L. Co. *v.* Mayor, 33 N. Y. 309; Schieffelin *v.* New York, 65 Misc. 609; Newport News *v.* Potter, 122 Fed. 321.

[2] People *ex rel.* Rodgers *v.* Coler, 35 N. Y. App. Div. 401; McCord *v.* Lauterbach, 91 *Id.* 315; Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432.

[3] People *ex rel.* Rodgers *v.* Coler, *supra.*

[4] McCord *v.* Lauterbach, *supra.*

[5] Lilienthal *v.* Yonkers, 6 N. Y. App. Div. 138, 154 N. Y. 766; Tingue *v.* Port Chester, 101 N. Y. 294.

If the minutes of the board or body do not show that bids were opened and declared this is prima facie proof that the statute was not complied with,[1] but where they do a contrary presumption arises.[2]

[1] Edwards *v.* Berlin, *supra.*
[2] City Street Imp. Co. *v.* Laird, 138 Cal. 27, 70 Pac. 916.

CHAPTER XX

FORM OF CONTRACT—WRITTEN CONTRACTS

§ 136. Necessity of Written Contracts—In General.

Public contracts need not necessarily be in writing to be valid, and unless a statute requires it the contract need not be in writing. Oral public contracts are valid and binding where they do not conflict with the requirements of the Statute of Frauds, and these will be satisfied even by the minutes of the public body signed by its clerk.[1] Indeed if the offer expressly or impliedly permits of acceptance in the ordinary way of commercial transactions by letter or telegram duly sent to the proposer before the offer is withdrawn, a contract becomes effective upon the mailing or sending.[2] In like manner where a proposal follows the advertisement in competitive bidding its acceptance makes a binding contract of the same force and effect as if a formal contract had been written out and signed by the parties.[3]

§ 137. The Same—Federal Statute.

The provisions of the federal statutes admit of the making of a valid executory contract in such circumstances where an emergency exists.[4] But a valid executory con-

[1] Argus Co. *v.* Albany, 55 N. Y. 495; Peterson *v.* N. Y., 17 N. Y. 449; New Athens *v.* Thomas, 82 Ill. 259; Athearn *v.* Ind. Sch. Dist., 33 Iowa, 105; Fitton *v.* Hamilton City, 6 Nev. 196; Dunlap *v.* Water Commr's, 151 Pa. St. 477, 25 Atl. 60; Hardwick *v.* Wolcott, 78 Vt. 23, 61 Atl. 471.

[2] Burton *v.* U. S., 202 U. S. 344, 385, 50 L. Ed. 1057; Haldane *v.* U. S., 69 Fed. 819.

[3] U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620; Garfielde *v.* U. S., 93 U. S. 242, 23 L. Ed. 779.

[4] Sec. 3709, U. S. Rev. Stat.; U. S. *v.* Purcell Env. Co., 249 U. S. 313, 63 L. Ed. 620; § 3744, U. S. Rev. Stat.

tract cannot be made by federal authorities under these statutes, which are mandatory.[1] It is the ultimate formal instrument which the statute contemplates shall be signed.[2] But a valid contract exists, even though this statute has not been complied with, if the contract is executed.[3] Advertisements, specifications, proposals and letters do not constitute the contract in writing which is required.[4] But although the parties intend a final written contract and conduct the preliminary negotiations through correspondence and definitely agree thereby to all the terms of such final agreement, one of the parties cannot escape or evade his obligation by refusing to sign the formal contract which the parties understood was to be subsequently drawn and executed.[5] Preliminary writings or memoranda made by the parties cannot be resorted to for the purpose of establishing the formal written contract which the statute requires.[6] The contract must be in writing and must be signed by the contracting parties.[7] A writing is not essential in the case of all government contracts, as there are many classes of contracts to which the provisions of the statutes do not apply.[8]

§ 138. The Same—State Statutes.

On the other hand, the State courts reach a different

[1] Clark *v.* U. S., 95 U. S. 539, 541, 24 L. Ed. 518; Henderson *v.* U. S., 4 Ct. Cl. 75; McLaughlin & Co. *v.* U. S., 37 Ct. Cl. 150.

[2] Monroe *v.* U. S., 184 U. S. 524, 46 L. Ed. 670, aff'g 35 Ct. Cl. 199.

[3] St. Louis Hay & Grain Co. *v.* U. S., 191 U. S. 159, 48 L. Ed. 130, aff'g 37 Ct. Cl. 281; U. S. *v.* R. P. Andrews & Co., 207 U. S. 229, 52 L. Ed. 185, aff'g 41 Ct. Cl. 48; U. S. *v.* N. Y. & P. R. S. S. Co., 239 U. S. 88, 60 L. Ed. 161.

[4] McLaughlin & Co. *v.* U. S., 36 Ct. Cl. 138; South Boston Iron Co. *v.* U. S., 118 U. S. 37, 30 L. Ed. 69, aff'g 18 Ct. Cl. 165.

[5] U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 589.

[6] South Boston Iron Co. *v.* U. S., *supra.*

[7] South Boston Iron Co. *v.* U. S., *supra;* Clark *v.* U. S., *supra;* U. S. *v.* Lamont, 2 App. D. C. 532.

[8] Secs. 3744, 3747, U. S. Rev. Stat.; Carlin Cons. Co. *v.* U. S., 224 Fed. 859.

conclusion with reference to the necessity for written contracts and generally hold with respect to these provisions of law which require contracts to be in writing that they are mandatory, cannot be waived and are in most instances in the nature of conditions precedent to the exercise by public bodies of the power to contract. They therefore hold these provisions of law applicable alike to contracts executed as well as executory. Accordingly since the manner of making public contracts is thus limited, where it is not followed the contract attempted to be made is illegal and no recovery may be had thereon even though there has been full performance and the public body has received and retained the benefits.[1] Nor will recovery of reasonable value be permitted.[2] This latter view does not prevail universally and there are many jurisdictions wherein recovery of reasonable value is allowed.[3] It is contended that while a contract is executory it might be demanded that it be executed according to legal requirements but that no such objection should be entertained or sustained after it has been executed, since the rule of ordinary honesty and morality is applied as strongly to public bodies as to individuals.[4] Implied liability is raised because of the receipt of money or property and the failure to return it or make compensation, and is founded in the general obligation

[1] Murphy *v.* Louisville, 9 Bush (Ky.), 189; Boston Elec. Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787; McBrian *v.* Grand Rapids, 56 Mich. 95, 22 N. W. 206; Schumm *v.* Seymour, 24 N. J. Eq. 143; McDonald *v.* Mayor, 68 N. Y. 23; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Smart *v.* Philadelphia, 205 Pa. St. 329, 54 Atl. 1025; McManus *v.* Phila., 201 Pa. St. 619, 51 Atl. 322; Watterson *v.* Mayor of Nashville, 106 Tenn. 410, 61 S. W. 782; Starkey *v.* Minneapolis, 19 Minn. 203; Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

[2] *Idem.*

[3] Cincinnati *v.* Cameron, 33 Ohio St. 336; Baxter Springs *v.* Baxter Springs L. & P. Co., 64 Kan. 591, 68 Pac. 63; Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835; Memphis G. L. Co. *v.* Memphis, 93 Tenn. 612, 30 S. W. 25; Jungdorf *v.* Little Rice, 156 Wis. 466, 145 N. W. 1092.

[4] Baxter Springs *v.* Baxter Springs L. & P. Co., *supra.*

to do justice which applies to public bodies as well as individuals.[1]

If the execution of a written contract is provided for, in terms, in the charter of a public corporation, but a written contract is not executed, yet the materials and work provided for are furnished and used, the neglect to execute a written contract will not prevent recovery of the reasonable value of whatever is furnished.[2]

§ 139. Oral Modification of a Contract Required by Law to be in Writing.

Where the statute requires that all contracts relating to the public affairs shall be in writing, signed and executed in the name of the public body, the power to change or modify such public contracts is controlled and limited and the power must be exercised in the manner pointed out by law.[3] An oral modification is invalid and ineffectual, as such provision is mandatory and cannot be waived or disregarded.[4] Where under the requirements of similar statutes provision is made for the modification and change of the contract in writing, such a provision may be waived.[5]

§ 140. Opening of Bids and Adoption of Resolution of Award—Whether Effective to Make Contract Where Writing Required.

Where these competitive bidding statutes require a contract in writing, the opening of the proposals or bids and the adoption of a resolution of award do not complete the

[1] Memphis G. L. Co. *v.* Memphis, *supra*.
[2] Central Bitulithic Pav. Co. *v.* Vil. of Highland Park, 164 Mich. 223, 129 N. W. 46; Carey *v.* East Saginaw, 79 Mich. 43, 44 N. W. 168. See Ft. Madison *v.* Moore, 109 Iowa, 476, 80 N. W. 527.
[3] McManus *v.* Phila., 201 Pa. St. 619, 51 Atl. 322.
[4] McManus *v.* Phila., *supra*.
[5] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312.

contract.[1] And where parties, although agreed on the terms, intend that they shall be reduced to writing before the bargain shall be considered complete, neither party is bound until that is done so long as the contract remains without any acts done under it on either side.[2]

§ 141. Contract Signed by Only One Party.

If a contract is prepared in writing and presented to a contractor already signed by the officials of the public body and he expresses his willingness to sign it, but before he is permitted to sign a public official takes it away, the minds of the contracting parties then meet upon the terms embraced in the writing and the contract is complete. When the contractor is directed to proceed with the work and he completes it, he is entitled to recover the compensation provided; or if there be none, its value. The writing is simply evidence of a contract. The contract consists of the actual agreement between the parties. If a contract is reduced to writing and signed by one of the parties and accepted and acted upon by the other it will bind as if signed by both of the parties.[3]

§ 142. Kind of Contract which Contractor Must Sign—Power of Public Body to Make Contract which Differs from Advertisement.

Where a contractor for public work bids upon certain plans, specifications and conditions set out or referred to in the notice or advertisement for bids he cannot be required to sign and execute a different form of contract

[1] Hepburn *v.* Phila., 149 Pa. St. 335, 24 Atl. 279; Smart *v.* Philadelphia, 205 Pa. St. 329, 54 Atl. 1025; *Contra*, Ft. Madison *v.* Moore, 109 Iowa, 476, 80 N. W. 527; Pennell *v.* Mayor, 17 N. Y. App. Div. 455.

[2] Jersey City W. Comm. *v.* Brown, 32 N. J. L. 504.

[3] Stivers *v.* Cherryvale, 86 Kan. 270, 120 Pac. 361; Hudson *v.* State, 14 Ga. App. 490, 81 S. E. 362.

than such as reasonably conforms to and keeps alive the substance of these plans, specifications, conditions of work and of payment and other conditions described. These terms and conditions cannot be varied to the hurt of the contractor or to his advantage and benefit.[1] Where the contract offered for signature contains substantial provisions beneficial to the contractor or detrimental to him which were not included in or contemplated by the terms and specifications upon which bids were invited, such contract is invalid as in violation of the provisions of law controlling competitive bidding.[2] The contract to be signed must be the contract which was offered in the advertisement.[3] The public body has no power to make material or substantial changes in the contract, after bids are opened, and award it as modified.[4] It would be destructive of all healthy competition and of the purposes of competitive bidding, if one of the competitors could be permitted after the bids were opened to alter his bid in such manner as to make it appear below others, and then make a contract at higher prices, with a large number of such prices not in

[1] Cotter *v.* Casteel, 37 S. W. (Tex.) 791; Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911.

[2] Cotter *v.* Casteel, *supra;* Diamond *v.* Mankato, *supra;* Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; McDermott *v.* Street & W. Comm. Jersey City, 56 N. J. L. 273, 28 Atl. 424; Shaw *v.* Trenton, 49 N. J. L. 339, 12 Atl. 902; Osborn *v.* Lyons, 104 Iowa, 160, 73 N. W. 650; Wells *v.* Raymond, 201 Ill. 435, 66 N. E. 210; Inge *v.* Bd. of Public Works, 135 Ala. 187, 33 So. 678.

[3] Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911; Nash *v.* St. Paul, 11 Minn. 174; Schiffman *v.* St. Paul, 88 Minn. 43, 92 N. W. 503; Wickwire *v.* Elkhart, 144 Ind. 305, 43 N. E. 216; Dickinson *v.* Poughkeepsie, 75 N. Y. 65.

[4] Inge *v.* Bd. of Public Works, *supra;* Wickwire *v.* Elkhart, *supra;* Le Tourneau *v.* Hugo, 90 Minn. 420, 97 N. W. 115; Fairbanks *v.* North Bend, 68 Neb. 560, 94 N. W. 537; Dickinson *v.* Poughkeepsie, *supra;* Addis *v.* Pittsburgh, 85 Pa. St. 379; Moran *v.* Thompson, 20 Wash. 525, 56 Pac. 29; Chippewa B. Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603; American Lighting Co. *v.* McCuen, 92 Md. 703, 48 Atl. 352; McBrian *v.* Grand Rapids, 56 Mich. 95, 22 N. W. 206; Goshert *v.* Seattle, 57 Wash. 645, 107 Pac. 860; State *ex rel. v.* Toole, 26 Mont. 22, 66 Pac. 496.

competition at all, and have inserted therein clauses for his advantage, in no manner considered by the other bidders or offered to them.[1] Nor may a public officer enter into private negotiations with a contracting firm for the purpose of reducing its original bid submitted at the time of open competition.[2] But this rule does not prohibit all variations from the specifications. It very properly allows a reasonable degree of latitude in the details involved in the execution of powers conferred by fundamental law which is essential to an intelligent and practical administration of public affairs. Certainly it could not be extended so far as to avoid an executed contract because of the use of words in the contract not found in the specifications, or for any mere irregularity not involving substantial rights.[3]

[1] Dickinson *v.* Poughkeepsie, *supra*.

[2] Louchheim *v.* Philadelphia, 218 Pa. 100, 66 Atl. 1121. (But there is a dictum to the contrary in Dickinson *v.* Poughkeepsie, *supra*.)

[3] Mankato *v.* Barber A. P. Co., 142 Fed. 329, 345.

CHAPTER XXI

MAKING THE AWARD

§ 143. Awarding Contract—Acceptance of Bids.

The receipt of bids, the opening and ascertaining of the lowest one and the announcement of the fact by the public bodies will not constitute an award either in fact or in law. The competitor who is lowest bidder acquires no rights from any or all of these facts to have a contract executed with him. The question of the acceptance of the bid, which is an offer, is a matter of discretion which they can exercise or not so long as they act in good faith.[1] The public body may reject all the bids and readvertise the work if in its judgment and discretion such course is for the best interests of the public. The whole matter of examining proposals and making awards is judicial in its nature.[2] If statutes do not interpose a barrier the public body may even make the award to one who is not the lowest bidder amongst those bidding.[3] Until an award is actually made there is no contract.[4] Where a binding contract can only be made in writing even after the award,

[1] Williams *v.* New York, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; New York *v.* Union News Co., 222 N. Y. 263, 118 N. E. 635.

[2] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101.

[3] Riehl *v.* San Jose, 101 Cal. 442, 35 Pac. 1013; Kundinger *v.* Saginaw, 132 Mich. 395, 93 N. W. 914; Elliott *v.* Minneapolis, 59 Minn. 111, 60 N. W. 1081; Warren *v.* Barber A. P. Co., 115 Mo. 572, 22 S. W. 490; Walter *v.* McClellan, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133; Terrell *v.* Strong, 14 Misc. 258; Schefbauer *v.* Bd. of Kearney Tp., 57 N. J. L. 588, 31 Atl. 454; Oakley *v.* Atlantic City, 63 N. J. L. 127, 44 Atl. 651; Ryan *v.* Paterson, 66 N. J. L. 533, 49 Atl. 587; North Yakima *v.* Scudder, 41 Wash. 15, 82 Pac. 1022; Waco *v.* Chamberlain, 92 Tex. 207, 47 S. W. 527.

[4] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101; Anderson *v.* Bd. &c. St. Louis P. S., 122 Mo. 61, 27 S. W. 610.

there is no contract until the writing is signed and executed, and no claim or responsibility enforceable against the public body.[1] If the offer and acceptance as shown by the minutes of the public body are not intended to constitute a contract until a formal writing is signed, the acceptance is not complete and the contract will not bind until such written instrument is executed.[2] So where by law no contract exists except where the contract is signed by a named public official, until he signs the acceptance is incomplete.[3] If the satisfactory testing of a machine purchased is made the basis of an offer there must be further action before the contract will be complete.[4] The minds of the parties must of course meet and the contract they meet upon must not be such a one as is invalid because of the failure to perform some condition precedent to the exercise of the power to contract, such as the making of a prior appropriation.[5] Acceptance or even performance cannot make such a contract valid.[6] So a conditional award may not be made depending upon the making of an appropriation by some other board or body.[7] But when an award has once been made the public body have no discretion to refuse to execute the contract. The rights of the parties then become fixed, and the power to cancel the award or reject the bids does not exist. The obligation of the contract made cannot thus be impaired at the option of one of the contracting parties. After a public body notifies a bidder that his

[1] Smart *v.* Philadelphia, 205 Pa. St. 329, 54 Atl. 1025.
[2] Santa Rosa Lighting Co. *v.* Woodward, 119 Cal. 30, 50 Pac. 1025.
[3] Press Pub. Co. *v.* Pittsburgh, 207 Pa. St. 623, 57 Atl. 75.
[4] Fleming Mfg. Co. *v.* Franklin, 103 N. W. (Iowa) 997.
[5] Hinkle *v.* Philadelphia, 214 Pa. St. 126, 63 Atl. 590; Rieser Co., Inc. *v.* New York, 84 Misc. 69; Williams *v.* New York, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.
[6] Wadsworth *v.* Bd. of Superv's, 217 N. Y. 484, 490, 112 N. E. 161; Hart *v.* New York, 201 N. Y. 45, 55, 94 N. E. 219.
[7] Williams *v.* New York, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

bid is the lowest and has been accepted and that a contract will be executed with him, it owes him the legal duty to execute the contract, and if it refuses to perform such duty the successful bidder may recover his damages.[1] The attempt by the head of department to reject all bids and rescind a contract after it has been awarded, because the financial head of the city has not certified that there is an appropriation available and applicable to the contract is of no avail, if in fact the fund exists and certification was not had merely because the contract was not presented.[2] And where the public body after it has given notice of an award attempts to reject all bids and readvertise, the successful bidder, by accepting a return of his deposit, does not waive his right to insist upon performance of the obligation which the public body incurred by notice of award.[3] The acceptance of the offer contained in the advertising for bids must be unconditional. If it be, upon condition that a bond be given there can be no mutual assent of the parties and no binding contract until that condition is satisfied.[4]

§ 144. The Same—Acceptance—Where Contract is Made by Ordinance.

A public contract made by ordinance or resolution of the governing body of a municipality is complete upon acceptance and binds both parties.[5]

[1] Lynch *v.* New York, 2 N. Y. App. Div. 213; Pennell *v.* New York, 17 *Id.* 455; Beckwith *v.* New York, 121 N. Y. App. Div. 462; Safety Insulated W. & C. Co. *v.* Baltimore, 66 Fed. 140.

[2] Beckwith *v.* New York, *supra.*

[3] Lynch *v.* New York, *supra.*

[4] Howard *v.* Maine Industrial School, 78 Me. 230, 3 Atl. 657.

[5] Curtis *v.* Portsmouth, 67 N. H. 506, 39 Atl. 439; Hunneman *v.* Grafton, 10 Metc. (Mass.) 454; Indianapolis *v.* Indianapolis G. Co., 66 Ind. 396; Argus Co. *v.* Albany, 55 N. Y. 495; People *v.* San Francisco, 27 Cal. 655.

§ 145. **The Same—Approval by Officials.**

In some instances it is essential where a contract is entered into by one official that there shall be, before the contract can be effective, an approval by some other official. This may take the form of a certification by the financial head that there is a fund in existence, or an approval by the corporation counsel of the contract as to form.[1] Where a statute provides that no contract thereafter made shall be binding or of any force unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, a balance of the appropriation or fund applicable thereto sufficient to pay the estimated expense of executing such contract as certified by the officer making the same, these provisions do not permit a head of department to rescind the contract in a case where the certificate was not made, because he never presented the contract to the comptroller for his signature and attempted to reject all bids after awarding the contract,[2] as long as such fund in fact existed.[3] The failure to obtain such an approval would be fatal to any contract intended to be carried out. Such language admits of no escape from this conclusion; but the true reason underlying the result reached was because the official by rejecting all bids put beyond his power every further step provided by law to be taken, and the rights of the parties then became fixed and gave a right of recovery.[4] Where a statute expressly requires the approval by a superior officer when the contract is entered into by a subordinate officer, without such approval a contract can-

[1] Sec. 149, Greater N. Y. Charter.
[2] Beckwith *v.* New York, 121 N. Y. App. Div. 462.
[3] Beckwith *v.* New York, *supra.*
[4] Beckwith *v.* New York, *supra*, and cases cited.

not become binding and effective.[1] If in the meantime pending approval a contractor undertakes the work and the work is subsequently stopped he cannot recover the loss of profits for the suspension,[2] or if he does the work and the approval is not given he may have no recovery.[3] There is authority, however, that approval may exist by implication or acquiescence.[4]

§ 146. The Same—Necessity of Prior Appropriation.

The requirement in a statute that an appropriation must exist before public bodies shall make a contract is mandatory and a contract entered into without such appropriation is void and admits of no recovery.[5] No implied contract can be sustained in the face of the express and imperative provisions of such statutes.[6] If in fact an appropriation or fund existed at the time the contract was made, the fact that the fund was subsequently exhausted will not

[1] Monroe *v.* U. S., 184 U. S. 524; Johnston *v.* Philadelphia, 113 Fed. 40; Cathel *v.* U. S., 46 Ct. Cl. 368; Little Falls Knitting Mills Co. *v.* U. S., 44 Ct. Cl. 1; Thompson *v.* U. S., 9 Ct. Cl. 187; U. S. R. S., § 3744, Comp. Stat. § 6895.

[2] Darragh *v.* U. S., 33 Ct. Cl. 377.

[3] Monroe *v.* U. S., *supra.*

[4] Wilder *v.* U. S., 5 Ct. Cl. 468; Ford *v.* U. S., 17 Ct. Cl. 60; Reeside *v.* U. S., 2 Ct. Cl. 1, s. c. 7 Ct. Cl. 82.

[5] Hilliard *v.* Bunker, 68 Ark. 340, 58 S. W. 362; Toomey *v.* Bridgeport, 79 Conn. 229, 64 Atl. 215; May *v.* Chicago, 222 Ill. 595, 78 N. E. 912; May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465; Green *v.* Everett, 179 Mass. 147, 60 N. E. 490; Bd. of Water Commr's *v.* Commr's, 146 Mich. 459, 85 N. W. 1132; Williams *v.* New York, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; Dady *v.* New York, 65 Misc. 382, 148 N. Y. App. Div. 956; Roberts *v.* Fargo, 10 N. D. 230, 86 N. W. 726; Clark *v.* Portsmouth, 68 N. H. 263, 44 Atl. 388; Kearney *v.* Downing, 59 Neb. 549, 81 N. W. 509; Pryor *v.* Kansas City, 153 Mo. 135, 54 S. W. 499; Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577; Findlay *v.* Pendleton, 62 Ohio St. 80, 56 N. E. 649; Hinkle *v.* Philadelphia, 214 Pa. St. 26, 63 Atl. 590; Indianapolis *v.* Wann, 144 Ind. 175, 42 N. E. 901; McNeal *v.* Waco, 89 Tex. 83, 33 S. W. 322; Bradley *v.* U. S., 98 U. S. 104, 25 L. Ed. 105, aff'g 13 Ct. Cl. 166; Hooe *v.* U. S., 218 U. S. 322, 54 L. Ed. 1055, aff'g 43 Ct. Cl. 245.

[6] Hooe *v.* U. S., *supra;* U. S. *v.* McDougall, 121 U. S. 89, 30 L. Ed. 861, aff'g 21 Ct. Cl. 511.

defeat a recovery,[1] as a contractor cannot be bound to know at his peril the state of the treasury as to its general appropriations or whether there is or will be on hand a balance to pay him.[2] A contractor has the right to rely upon the presumption that the head of a department is acting within the prescribed limits of his authority.[3] But if the appropriation is made for a single specific purpose or work the contractor is bound to know the amount and keep within it as he will not be permitted a recovery beyond it.[4] If a contract obligation exceeds the constitutional debt limit no recovery can be had against the public body for the breach of such a contract.[5] When the statute or act which authorizes the work places no limit on the amount to be expended and the cost of the contract and extra work exceeds the appropriation, a recovery may be had.[6] An award of a contract conditioned upon some other board or body making an appropriation or an additional appropriation is invalid. The appropriation must precede the contract in point of existence.[7] So when an appropriation for only part of the cost of a contract exists, an agreement to enter into a contract to complete the work, when requested to do so, on condition that a further appropriation be made, is void.[8] Where limitations on amount of

[1] Chicago *v.* Berger, 100 Ill. App. 158; Dougherty *v.* U. S., 18 Ct. Cl. 496; Leavitt *v.* U. S., 34 Fed. 623; Van Dolsen *v.* Board of Education, 162 N. Y. 446, 56 N. E. 990.

[2] Dougherty *v.* U. S., 18 Ct. Cl. 496. See Louisville *v.* Gosnel, 61 S. W. (Ky.) 476.

[3] Leavitt *v.* U. S., 34 Fed. 623.

[4] Curtis *v.* U. S., 2 Ct. Cl. 144, 152; Trenton Co. *v.* U. S., 12 Ct. Cl. 147; Dougherty *v.* U. S., 18 Ct. Cl. 496; O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323.

[5] Dhrew *v.* Altoona, 121 Pa. St. 401, 15 Atl. 636.

[6] Grant *v.* U. S., 5 Ct. Cl. 71.

[7] Williams *v.* New York, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; Johnston *v.* Philadelphia, 113 Fed. 40.

[8] Johnston *v.* Philadelphia, *supra*.

expenditure exist to the effect that beyond a certain amount, contracts may not be made unless in writing and after advertisement for proposals, or that they must be authorized by the council or by a majority vote of the electors resident in the municipality, the public body, board or officials who have the contract in charge may not render their acts valid and defeat the purpose of the statute by dividing the contract price into several parts through repeated purchases. The limits of authority may not be avoided by splitting up the time of the use of goods or things or the amounts or numbers of purchases.[1] But recovery may be had for value of goods or things hired or purchased up to the amount limited for which a valid contract could have been made, but not beyond it.[2]

[1] Walton *v.* Mayor, 26 N. Y. App. Div. 76; May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465; Fire Exting. Mfg. Co. *v.* Perry, 8 Okla. 429, 58 Pac. 635.
[2] May *v.* Gloucester, *supra*. See § 130, *ante*.

CHAPTER XXII

REJECTION OF BIDS—REMEDY OF LOWEST BIDDER—RELETTING

§ 147. Remedy of Lowest Bidder Where No Award is Made.

If the right to reject bids is conferred by statute upon the public body or the advertisement reserves such right, the public body may reject all bids, but the exercise of such power must be in good faith, with moral honesty and not arbitrary.[1] Even if such right is not reserved or saved in any fashion the public authorities may in the public interest reject all bids.[2] Or if there be no statutory objection the award may be made in good faith to one not the lowest bidder.[3] As stated before this award is a judicial act, the exercise of a discretion vested by law in certain administrative officers, and the exercise of this discretion and judgment cannot be controlled by mandamus so as to compel the execution of a contract.[4] If the public body

[1] People *ex rel.* Assyrian A. Co. *v.* Kent, 160 Ill. 655, 43 N. E. 760; McGovern *v.* Trenton Bd. of Public Wks., 57 N. J. L. 580, 31 Atl. 613; People *v.* Troy, 78 N. Y. 33; Bradley *v.* Van Wyck, 65 N. Y. App. Div. 293; People *ex rel.* Shay *v.* McCormack, 167 *Id.* 854.

[2] Yarnold *v.* Lawrence, 15 Kan. 103; Trapp *v.* Newport, 115 Ky. 840, 74 S. W. 1109; Walsh *v.* New York, 113 N. Y. 142, 20 N. E. 825; Erving *v.* New York, 131 N. Y. 133, 29 N. E. 1101; Chippewa B. Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603; Colorado Pav. Co. *v.* Murphy, 78 Fed. 28.

[3] Bradley *v.* Van Wyck, 65 N. Y. App. Div. 300.

[4] People *ex rel.* Shay *v.* McCormack, *supra;* People *ex rel.* Francis *v.* Comm. Council of Troy, 78 N. Y. 33; People *ex rel.* Lunney *v.* Campbell, 72 N. Y. 496; State *ex rel.* Walton *v.* Hermann, 63 Ohio St. 440, 59 N. E. 104; Johnson *v.* Sanitary Dist., 163 Ill. 285, 45 N. E. 213; Talbot Pav. Co. *v.* Detroit, 91 Mich. 262, 51 N. W. 933; Capital Print Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160; Amer. Pav. Co. *v.* Wagner, 139 Pa. 623, 21 Atl. 160; Molloy *v.* New Rochelle, 198 N. Y. 402, 92 N. E. 94.

makes an award to one who was not the lowest bidder, rejecting the latter's bid in violation of the statute or charter provisions, this action will not give a cause of action to the person making the lowest bid for damages for failure to award the contract to him. In such a case there is no contractual relation, since the contractor's bid was never accepted. Therefore such an action cannot be sustained as upon contract. Furthermore, since these statutes are not enacted for the benefit of the bidder or of the unsuccessful bidder, but for the benefit of public taxpayers, they cannot recover by virtue of the statute.[1] The courts will not, where bids are rejected, attempt to control the discretion of public officials or bodies by judicial revision, but will leave the exercise of discretion to those in whom by law it is vested. But where the public body acts to make an award, and the statute requires that it be made to the lowest bidder, the award to one who is not the lowest bidder is not the exercise of any discretion, but is made in disobedience to law. The rejection of all bids might be a judicial act. The award to one in violation of law is not. In such case there is no discretion but to follow the law, and where the command of the statute is disregarded and disobeyed the courts will compel obedience to it by mandamus provided parties act in time and before the contract awarded to another is completed. It is a legal discretion and not a personal discretion which is vested in public bodies in such circumstances.[2] When

[1] Molloy *v.* New Rochelle, 123 App. Div. 642, 198 N. Y. 402, 92 N. E. 94; Palmer *v.* Haverhill, 98 Mass. 487; Talbot Pav. Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979; Beckwith *v.* New York, 121 N. Y. App. Div. 462.

[2] Talbot Pav. Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979, 91 Mich. 262, 51 N. W. 933; Borem *v.* Comm'rs Darke County, 21 Ohio St. 311; *Quære* Walsh *v.* Mayor, 113 N. Y. 142, 20 N. E. 825; People *ex rel.* Coughlin *v.* Gleason, 121 N. Y. 631, 25 N. E. 4; Molloy *v.* New Rochelle, *supra.*

the statute makes the measure of power an award to the lowest bidder, both power and discretion are limited accordingly, but in such case the public body may in good faith and for the public interest make no award. In such a situation, although it might have no authority to make any award to any other bidder, it cannot be forced by court interference to make the award to the lowest bidder.[1] Even where the statute or charter gives to the public body the choice of a bidder and authority to make the award to the one who is the lowest responsible bidder or the lowest and best bidder, or the most favorable bidder, the powers thus vested call for a judicial determination and they may not arbitrarily reject the lowest and accept a higher bid.[2] In order to give its action any legal effect it must in the exercise of its authority make a determination based upon facts. An arbitrary determination without any facts justifying it cannot have the effect of a judicial determination, but is a clear violation of law.[3] Public officers in reaching a proper decision as to which of the contractors measure up to these varying standards of bidders have the right in making the judicial determination called for, to consider their capacity and ability to perform the work, their financial responsibility, their skill and integrity and similar qualifications. It is by a consideration of these that they are to exercise their jurisdiction and determine who is the best lowest bidder, the most favor-

[1] Rice *v.* Bd. of Town of Haywards, 107 Cal. 398, 40 Pac. 551; Anderson *v.* Bd., etc., of St. Louis Pub. Schools, 122 Mo. 61, 27 S. W. 610; State *ex rel.* Peo. L. Co. *v.* Holt, 132 Wis. 131, 111 N. W. 1106; State *v.* New Orleans, 48 La. Ann. 643, 19 So. 690; Walsh *v.* Mayor, *supra.*

[2] People *ex rel.* Coughlin *v.* Gleason, *supra;* Gilmore *v.* Utica, 131 N. Y. 26, 29 N. E. 841; Faist *v.* Hoboken, 72 N. J. L. 361, 60 Atl. 1120; Berry *v.* Tacoma, 12 Wash. 3, 40 Pac. 414; Trapp *v.* Newport, *supra;* Gunning Gravel Co. *v.* New Orleans, 45 La. Ann. 911, 13 So. 182.

[3] People *ex rel.* Coughlin *v.* Gleason, *supra;* Murray *v.* Bayonne, 73 N. J. L. 313, 63 Atl. 81.

able or most responsible lowest bidder.[1] If these and other facts are considered and no fraud is shown, and there is no abuse of power, the action of the public body is final, and the exercise by it of the discretion vested in it by law may not be interfered with or usurped by the courts.[2]

§ 148. Remedy of Lowest Bidder where Award is Made but Public Body Refuses to Execute Contract—Mandamus to Compel Execution.

Sometimes in public contract cases it appears that a prospective contractor is the lowest bidder for a contract under an advertisement for proposals, that his bid has been accepted and the contract has been awarded to him, and that he has furnished the security required by law and has conformed to the other provisions of law upon the subject. These circumstances make out a bidder's clear legal right to the contract. Even if the proceedings are all regular and conducted according to law, and the bidder has in all respects conformed to provisions and requirements of the advertisement and the charter, he may not have a writ of mandamus to compel the execution of a contract to him.[3] The reason for this rule is that he has a right of action against the public body for all damages which he has sustained by reason of the refusal to execute

[1] Gilmore *v.* Utica, *supra;* Inge *v.* Bd. of Pub. Wks., 135 Ala. 187, 33 So. 678; Madison *v.* Baltimore Harbor Bd., 76 Md. 395, 25 Atl. 337; State *v.* Hermann, 62 Ohio St. 440, 59 N. E. 104; Philadelphia *v.* Pemberton, 207 Pa. St. 814, 57 Atl. 516.

[2] Johnson *v.* Chicago San. Dist., 163 Ill. 285, 45 N. E. 213; Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814; Madison *v.* Harbor Bd., *supra;* State *v.* Hermann, 63 Ohio St. 440, 59 N. E. 104; Peckham *v.* Watsonville, 138 Cal. 242, 71 Pac. 169; Barber A. P. Co. *v.* Trenton, 74 N. J. L. 430, 65 Atl. 873.

[3] People *ex rel.* Lunney *v.* Campbell, 72 N. Y. 496; People *ex rel.* Dowdney *v.* Thompson, 99 N. Y. 641, 1 N. E. 542; Molloy *v.* New Rochelle, 198 N. Y. 402, 92 N. E. 94; People *ex rel.* Buffalo Pav. Co. *v.* Mooney, 4 N. Y. App. Div. 557; People *ex rel.* Ajas *v.* Bd. of Educ., 104 *Id.* 162; People *ex rel.* Fisher *v.* Lennon, 147 *Id.* 640, 206 N. Y. 691, 99 N. E. 1115.

and carry out the contract.[1] Public bodies possess the same legal right which private persons possess to violate, abandon or renounce their contracts upon the usual terms of compensation for damages which the law recognizes and allows.[2] This right exists subject to the rare exception where specific performance might be allowed in an appropriate case. This right to pay damages rather than render performance could be urged as a further reason for refusing mandamus in such cases. It is said, however, that the matter is one resting in the sound discretion of the court to which the application is addressed to grant or refuse mandamus under the circumstances and that the exercise of such discretion is not subject to review.[3] In the cases where an award is made to one bidder and there is a refusal to execute any contract with any bidder, the public body must be left free under the foregoing principles to pay damages, and the determination of public officials that this is for the best interests of the public body should not be interfered with by the courts. If, however, the withholding or granting of mandamus rests in discretion, it would seem the court should exercise its discretion against public officials who have no option under a statute but to make an award to the lowest bidder. When they undertake to violate that statute and make an award to some one other than the lowest bidder, the court's discretion should be exercised against officials who possess no discretion but are violating the law. This seems to be the modern tendency.[4]

[1] Lynch *v.* Mayor, 2 N. Y. App. Div. 213; Pennell *v.* Mayor, 17 *Id.* 455; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Lord *v.* Thomas, 64 N. Y. 107.

[2] Lord *v.* Thomas, *supra;* Danolds *v.* State, *supra.*

[3] People *ex rel.* Lunney *v.* Campbell, *supra.*

[4] Molloy *v.* New Rochelle, 198 N. Y. 402, 92 N. E. 94 (*Quære*); Talbot Pav. Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979, 91 Mich. 262, 51 N. W. 933; Boren *v.* Comm'rs Darke County, 21 Ohio St. 311.

§ 149. Rights of Unsuccessful Bidder.

The provisions of the statutes relating to the award of public contracts are for the benefit of the property owners and taxpayers of the public body and not in the interest or for the benefit of contractors or bidders for public work. An unsuccessful bidder may not maintain a suit for their violation.[1] Nor may he maintain a taxpayer's action for like reasons, unless he has property that will be injured by the violation of the provisions of law relied on.[2] He must show that he had an interest in the performance of the duty imposed by statute, and that the duty was imposed for his benefit. Until he does, the courts must withhold their hands.[3] Neither can the lowest bidder compel the issue of a writ of mandamus to force public officers to enter into a contract with him.[4] Nor can he maintain an action at law for damages for their refusal to enter into a contract with him.[5] For like reasons he has no standing in equity to obtain injunction or other relief.[6] Where of course a bidder is a taxpayer and is affected as such by a refusal to award a contract or because of an illegal award to another, he may bring a taxpayer's action.[7] Such an action is, however, an equitable action to be governed by equitable principles,

[1] Colorado Pav. Co. *v.* Murphy, 78 Fed. 28.

[2] *Idem.*

[3] *Idem.*

[4] Molloy *v.* New Rochelle, 198 N. Y. 402, 409, 92 N. E. 94; State *v.* Board of Fond Du Lac, 24 Wis. 683; Comm. *v.* Mitchell, 82 Pa. St. 343, 350; Kelly *v.* Chicago, 62 Ill. 279; State *v.* McGrath, 91 Mo. 386, 3 S. W. 846; Madison *v.* Harbor Board, 76 Md. 395, 25 Atl. 337; Colorado Pav. Co. *v.* Murphy, *supra.*

[5] Molloy *v.* New Rochelle, *supra;* Talbot Pav. Co. *v.* Detroit, 109 Mich. 657, 67 N. W. 979; East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557; Colorado Pav. Co. *v.* Murphy, *supra.*

[6] Colorado Pav. Co. *v.* Murphy, *supra.*

[7] Molloy *v.* New Rochelle, *supra;* Nathan *v.* O'Brien, 117 N. Y. App. Div. 664. See §§ 147, 148, *ante.*

and equity will not act where the remedy at law is adequate.[1]

§ 150. **Reletting.**

Where statutes require advertising for bids for the construction of public work and the award of the contract to the lowest bidder, if the statute does not in terms cover the reletting of the contract when abandoned, but is silent upon this subject, the public body may relet the contract without competition.[2] This is especially true where the original contract expressly provides that in case the contractor unnecessarily delays the work, defaults in other ways or abandons it, the public body may complete the same by contract or otherwise at the expense of the contractor.[3] In some jurisdictions, however, these statutes are declared to apply to unfinished improvements made so through abandonment by the contractor, and contracts relet without advertisement are held invalid.[4] But where by the contract the public body is authorized to finish the work as the agent of the contractor and for his account, even if the statute requires readvertising in case of abandonment, it can have no application where the public body itself finishes the work under such provision.[5] If the statute requires the abandoned work to be relet under advertisement this method must be pursued to create a valid contract. And of course without such a provision where the abandonment is at the time bids are made, the public body would have the right to reject all other

[1] Southern Leasing Co. *v.* Ludwig, 217 N. Y. 100, 103, 111 N. E. 470.

[2] Matter of Leeds, 53 N. Y. 400; Bass F. & M. Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593.

[3] Matter of Leeds, *supra;* Simermeyer *v.* Mayor, 16 N. Y. App. Div. 445.

[4] Chicago *v.* Hanreddy, 211 Ill. 24, 71 N. E. 834; Meuser *v.* Risdon, 36 Cal. 239.

[5] Simermeyer *v.* Mayor, *supra.*

bids and readvertise.[1] On the other hand, the public body may award to the next lowest bidder without readvertising in case the award is not accepted by the contractor, or after acceptance and part performance he abandons the work.[2] But this power may not be exercised with fraudulent disregard of public rights and a reletting made to one whose bid is higher than other bidders.[3]

Where the contractor defaults in his contract after some of the work has been performed and after he has earned and been paid certain installment payments, and the public body retains certain percentages of these installments, as security for the faithful performance of the contract, if the contract is relet, in order to hold such retained amounts, the contract as let must be identical with the original contract.[4] If the contract is relet at a less cost, the resulting saving does not give any benefit to the original contractor.[5]

[1] People *ex rel.* Frost *v.* Foy, 3 Lans. 398; State *ex rel.* Clough *v.* Shelby County, 36 Ohio St. 326; Goss *v.* State Capitol Comm., 11 Wash. 474, 39 Pac. 972; U. S. *ex rel.* Inter. Cont. Co. *v.* Lamont, 155 U. S. 303.

[2] Chicago San. Dist. *v.* McMahon & Co., 110 Ill. App. 510; Gibson *v.* Owens. 115 Mo. 258, 21 S. W. 1107; Kinsella *v.* Auburn, 54 Hun, 634; State *ex rel,* Xenia M. Co. *v.* Licking Co., 26 Ohio St. 531; *Contra* Twiss *v.* Pt. Huron, 63 Mich. 528, 30 N. W. 177.

[3] Mitchell *v.* Milwaukee, 18 Wis. 93.

[4] Williams *v.* U. S., 28 Ct. Cl. 518; Quinn *v.* U. S., 99 U. S. 30, 25 L. Ed. 269; U. S. *v.* Axman, 234 U. S. 36, 58 L. Ed. 1198, aff'g 193 Fed. 644; Dobson *v.* U. S., 31 Ct. Cl. 422.

[5] *Idem.*

CHAPTER XXIII

STIPULATIONS OF THE CONTRACT

§ 151. Legal Stipulations—Illegal Stipulations.

Public bodies have the right and the duty to insert in public contracts such reasonable stipulations as will tend to serve and protect the public interests and more effectually require the contractor to perform his duty with strictness and fidelity. It is usual to provide for the doing of the work under direction of the public engineer or architect, to whose orders and directions the contractor is subject. The manner of payment in installments is provided upon certificates of such officer, and all rights are reserved under what is usually denominated the estoppel clause until the issuance of a final certificate. It is proper to insert a stipulation reserving the right to annul the contract, change details of the contract or suspend the work. Provision may also be made for the doing of extra work at contract prices, and to add to or reduce the amount of work, and these and similar provisions are uniformly upheld.[1] Provisions requiring a contractor to meet all loss or damage arising out of the nature of the work done and to restore the surface of the street to the condition in which it was found, are valid.[2] Imposing liability for damages resulting from the negligence of the contractor is proper,

[1] New York *v.* Union News Co., 222 N. Y. 263, 118 N. E. 635; U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269; Matter of Merriam, 84 N. Y. 596; Milwaukee *v.* Raulf, 164 Wis. 172, 159 N. W. 819; Brady *v.* Mayor, 132 N. Y. 415, 30 N. E. 757; McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 322; State *ex rel.* Bartelt *v.* Liebes, 19 Wash. 589, 54 Pac. 26.

[2] Diver *v.* Keokuk Sav. Bk., 126 Iowa, 691, 102 N. W. 542.

as is provision that the contractor shall not assign any moneys due under the contract,[1] or shall not assign without the consent of the public body.[2] A stipulation that all disputes shall be submitted to the decision of a particular person, such as an architect, engineer or other officer, is valid.[3] A requirement that a contractor obtain his material from the public body is valid,[4] although a similar requirement to obtain it by purchase from citizens of the same body has been said to be invalid.[5]

§ 152. Legal Stipulations—Provision for Arbitration.

It is an incident or term of every contract that the parties shall have the right to resort to a court of law for a settlement and adjustment of their disputes. Any provision to the contrary is void because in contradiction to the rest of the contract. Parties cannot contract that the courts shall not have jurisdiction to enforce damages arising on a right of action. They cannot enter into a contract the breach of which gives a cause of action and then deny to the courts the right to hear it. Parties to a contract cannot, therefore, undertake by an independent stipulation or agreement for the settlement and adjustment of all disputes by arbitration and deny jurisdiction to the ordinary tribunals provided by law. They will be permitted, however, by the same agreement which creates an obligation and gives a right of action for its non-

[1] Hobbs *v.* McLean, 117 U. S. 567, 29 L. Ed. 940; Goodman *v.* Niblack, 102 U. S. 556, 26 L. Ed. 229.

[2] Burck *v.* Taylor, 152 U. S. 634, 38 L. Ed. 578; Fortunato *v.* Patten, 147 N. Y. 277, 41 N. E. 572; Hackett *v.* Campbell, 10 N. Y. App. Div. 523, 159 N. Y. 537, 53 N. E. 1125; O'Corr *v.* Little Falls, 77 N. Y. App. Div. 592, 178 N. Y. 662, 70 N. E. 1104; Burnett *v.* Jersey City, 31 N. J. Eq. 341.

[3] Jones *v.* New York, 60 N. Y. App. Div. 161, 174 N. Y. 517, 66 N. E. 1113.

[4] Matter of Merriam, 84 N. Y. 596.

[5] Diver *v.* Keokuk Sav. Bk., *supra*.

performance, to qualify the right, by requiring that before a cause of action shall arise certain facts shall be determined or amounts or values ascertained and arrived at, or that a third person must perform specific acts or determine certain questions, and they may make this a condition precedent to suit.[1] Where a stipulation or agreement submits all future controversies to arbitration, whether the rights impaired flow out of the contract or independently of it, as from negligence, such provision is invalid as ousting the courts of jurisdiction.[2] Agreements to submit all disputes to arbitration on questions of price, value, quantity or damage only, are valid and do not oust the courts. Provisions for arbitration which are indefinite, impracticable and unreasonable will not be sustained.[3] Provisions which withdraw all controversies arising under contracts from the courts and submit them to arbitration will not be enforced.[4] But where it limits the questions to the amount or quantity of work to be paid for, and to all questions relative to fulfillment, it does not offend the rule and the certificate of the engineer in these respects is a necessary precedent fact to a recovery.[5] In like manner provisions for the settlement of all disputes as to extra work will be upheld, if they merely qualify the right of action by providing a method under which certain facts shall be determined and amounts and values ascertained, as a condition precedent to action. But if their purpose and effect is to oust courts of jurisdiction they will be

[1] Seward *v.* Rochester, 109 N. Y. 164, 16 N. E. 348; Dhrew *v.* Altoona, 121 Pa. St. 401, 15 Atl. 636.

[2] Seward *v.* Rochester, *supra.*

[3] Des Moines *v.* Des Moines W. Wks. Co., 95 Iowa, 348, 64 N. W. 269.

[4] Nat. Cont. Co. *v.* Hudson Riv. P. Co., 192 N. Y. 209, 84 N. E. 965, 170 N. Y. 439, 63 N. E. 450; Seward *v.* Rochester, *supra.*

[5] Nat. Cont. Co. *v.* Hudson River Power Co., *supra.*

denied validity.[1] Though a contractor is not bound by the decision of an arbitrator in event of fraud or mistake so gross as to imply bad faith;[2] and of course the same rule applies in favor of the public body when the acts of the arbitrator establish fraud.[3]

§ 153. Legal and Illegal Stipulations—Terms which May be Inserted.

The contract may require a contractor to have a proper plant and adequate facilities to do the work[4] and it may provide that only a contractor who has done similar work will have his bid considered.[5] It may also provide that in doing the work the contractor shall limit the hours of labor,[6] and give preference in employment on the work to be performed to citizens of the State.[7] A provision naming citizens and residents of a municipality as the only kind of labor that may be employed has been declared invalid.[8] The contract may validly limit liability to pay for the work until there shall be funds in the treasury properly applicable to the public work.[9] The public body may even without statutory or charter authority insert a clause providing for the withholding of the contract com-

[1] People *ex rel.* Rapid Trans. Cons. Co. *v.* Craven, 210 N. Y. 443, 104 N. E. 922.

[2] Dinsmore *v.* Livingston County, 60 Mo. 241.

[3] O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323.

[4] Knowles *v.* New York, 37 Misc. 195, 74 App. Div. 632, 176 N. Y. 430, 68 N. E. 860.

[5] Nathan *v.* O'Brien, 117 N. Y. App. Div. 664.

[6] Medina *v.* Dingledine, 211 N. Y. 24, 104 N. E. 1118; People *ex rel. v.* Coler, 166 N. Y. 1, 59 N. E. 716; Cleveland *v.* Clement Bros. Cons. Co., 67 Ohio St. 197, 65 N. E. 885; *Re* Dalton, 61 Kan. 257, 59 Pac. 336; *Re* Broad, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011; Opinion of Justices, 208 Mass. 619, 94 N. E. 1044; Keefe *v.* People, 37 Colo. 317, 87 Pac. 791.

[7] People *v.* Crane, 214 N. Y. 154, 108 N. E. 427.

[8] Diver *v.* Keokuk Sav. Bk., 126 Iowa, 691, 102 N. W. 542; State *v.* Paterson, 66 N. J. L. 129, 48 Atl. 589.

[9] Kransbein *v.* Rochester, 76 N. Y. App. Div. 494, and cases cited.

pensation until laborers and material are paid.[1] And without like authority it may provide that, if the grades are changed during the process of the work, the contractor shall conform to the altered grade at the prices fixed so far as they apply, and such provision is not violative of the competitive bidding statute requiring a letting to the lowest bidder.[2] An agreement that the engineer or architect shall determine the quality or fitness of material is valid.[3] A provision that the price for laying sidewalks shall be uniform irrespective of location will be upheld.[4] Provision for payment of the prevailing rate of wages to those employed is valid,[5] although prior to the constitutional amendment upon the subject similar provisions were held invalid as being in violation of the Constitution.[6] A requirement that laborers shall be paid in cash and not in store orders is valid when inserted by virtue of a statute.[7] A contract which reserves a right to a water company to revoke its offer of free water to a public body whenever it should see proper to do so is valid, and when exercised will require payment for water thereafter used.[8]

Any stipulation which restricts the general rights of the public officials to contract, and in so doing excludes all persons not of a certain designated class is invalid, espe-

[1] State *ex rel.* Bartelt *v.* Liebes, 19 Wash. 589, 54 Pac. 26.
[2] Matter of Blodgett, 27 Hun, 12.
[3] Barlow *v.* U. S., 35 Ct. Cl. 514.
[4] Galveston *v.* Heard, 54 Tex. 420.
[5] Peo. *v.* Coler, 166 N. Y. 1, 59 N. E. 716; Bohnen *v.* Metz, 126 N. Y. App. Div. 807, 193 N. Y. 676, 87 N. E. 1115; Ewen *v.* Thompson Starrett Co., 208 N. Y. 245, 101 N. E. 894.
[6] People *v.* Orange County Road Cons. Co., 175 N. Y. 84, 67 N. E. 129; People *v.* Grout, 179 N. Y. 417, 72 N. E. 464.
[7] People *ex rel.* North *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.
[8] Spring Brook W. Co. *v.* Pittston, 203 Pa. St. 223, 52 Atl. 249.

cially where it tends to confer a monopoly and to impose an additional burden upon the taxpayers.[1] Contracts which provide that all loss or damage arising from the nature of the work done shall be sustained by the contractor are invalid as tending to increase the cost of the work.[2]

§ 154. Provisions as to the Qualifications of Those Employed on Public Work—Hours of Work, etc.

A provision in a public contract that the contractor shall prefer in employment, citizens of the State or of the United States will be sustained.[3] Indeed, the courts have declared that all persons engaged on public works are in a vital sense in the service of the State, and public bodies may therefore exclude aliens from employment on public work, either in its own employment or that of independent contractors, and it may lawfully and without invading constitutional limitations provide by law that none but citizens shall be employed on public work.[4] A provision in the contract prohibiting the employment of convict labor invalidates the contract.[5] A stipulation that a certain number of hours shall constitute a day's work is invalid;[6] and it is said that where it increases the cost of

[1] State *ex rel. v.* Toole, 26 Mont. 22, 66 Pac. 496; Paterson Chronicle *v.* Paterson, 66 N. J. L. 129, 48 Atl. 589; Atlanta *v.* Stein, 111 Ga. 789, 36 S. E. 932.

[2] Blochman *v.* Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; Inge *v.* Bd. of Public Wks., 135 Ala. 187, 33 So. 678; Stansbury *v.* Poindexter, 154 Cal. 709, 99 Pac. 182; City Street Imp. Co. *v.* Marysville, 155 Cal. 419, 101 Pac. 308.

[3] U. S. *v.* Realty Co., 163 U. S. 427, 41 L. Ed. 215.

[4] Atkin *v.* Kansas, 191 U. S. 207, 48 L. Ed. 148; Ellis *v.* U. S., 206 U. S. 246, 51 L. Ed. 1047; People *v.* Crane, 214 N. Y. 154, 108 N. E. 427; Givins *v.* People (Ill.), 62 N. E. 534; Philadelphia *v.* McLinden, 205 Pa. 172, 54 Atl. 719; *Contra*, Inge *v.* Bd. of Pub. Wks., 135 Ala. 187, 33 So. 678; Glover *v.* People, 201 Ill. 545, 66 N. E. 820; Chicago *v.* Hulbert, 205 Ill. 346, 68 N. E. 786.

[5] Inge *v.* Bd. of Public Wks., *supra*.

[6] People *v.* Orange County R. Cons. Co., 175 N. Y. 84, 67 N. E. 129; Glover

the work, and was not mentioned in the advertisement, and therefore violates the provisions of the statute requiring letting to the lowest bidder, it is invalid.[1] But if it did not affect the bid the clause will not be considered to defeat an assessment.[2] So with a clause which provided that no Chinamen should be employed and that eight hours should constitute a day's work.[3] Any stipulations which are unauthorized, either because not mentioned in the specifications or because illegally imposed upon the contractor, and which tend to increase the cost of the work, violate the statutes requiring the work to be let to the lowest bidder, and are invalid.[4] But when provisions of this sort are inserted in a contract because of the peremptory language of a statute, if the statute is invalid, they have no obligatory or binding force and it is presumed were so considered by the parties, and were disregarded in the making up of the estimate, so that the contract price was not influenced or increased thereby.[5] A requirement that only union labor shall be employed upon a public contract is invalid as in violation of constitutional limitations.[6] So a provision requiring a union label on all public printing is invalid.[7] A provision of an ordinance

v. People, 201 Ill. 545, 66 N. E. 820. See Peo. *ex rel.* Williams Eng. Co. *v.* Metz, 193 N. Y. 148.

[1] De Wolf *v.* People, 202 Ill. 73, 66 N. E. 868.

[2] Hamilton *v.* People, 194 Ill. 133, 62 N. E. 533.

[3] Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915.

[4] Anderson *v.* Fuller, 51 Fla. 380, 41 So. 684; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Allen *v.* Labsap, 188 Mo. 692, 87 S. W. 926.

[5] People *v.* Coler, 166 N. Y. 1, 59 N. E. 716; Cleveland *v.* Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885; People *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; Doyle *v.* People, 207 Ill. 75, 69 N. E. 639; Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768.

[6] State *ex rel. v.* Toole, 26 Mont. 22, 66 Pac. 496; Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756; Fiske *v.* People, 188 Ill. 206, 58 N. E. 985; Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314.

[7] Marshall & Bruce Co. *v.* Nashville, 109 Tenn. 495, 71 S. W. 815; Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556.

imposing a minimum wage to be paid for labor upon public work is valid.[1]

§ 155. Imposing Liability for Injury to Property—Increasing Cost.

Where a contract provides that a contractor shall be responsible for all loss or damage occasioned by neglect and that he shall assume all risk of damages for all private property along the line of the work, including liabilities which properly rest upon the public body, such a contract is invalid as tending to increase the amount of the bid for the contract, and therefore increase the cost of the work either to the public body or abutting property owners.[2] A stipulation against the employment of alien or convict labor, is a restriction upon a contractor which naturally tends to cause him to increase his price and such a provision invalidates the contract.[3]

§ 156. Stipulation to Maintain Pavement During Period of Years.

Under the general system for improvement of streets with pavements, the original cost of paving is paid as a local improvement and is borne by the adjoining owners within an area of assessment fixed for that purpose, and the further cost of maintaining and repairing the pavement is paid for by the public body at large by general taxation. In their effort to get the best pavement possible and to enforce the promises of contractors which precede the letting of every contract as to the durability of their

[1] Mallette *v.* Spokane, 77 Wash. 205, 137 Pac. 496; Clark *v.* State, 142 N. Y. 101, 36 N. E. 817.

[2] Inge *v.* Bd. of Public Works, 135 Ala. 187, 33 So. 678; Blochman *v.* Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; City Street Imp. Co. *v.* Marysville, 155 Cal. 419, 101 Pac. 308.

[3] Inge *v.* Bd. of Public Works, *supra*. See Holden *v.* Alton, 179 Ill. 323, 53 N. E. 566.

particular pavement, public bodies usually provide by a stipulation in the contract that the contractor will guarantee his work during a period of years, and that in case the pavement fails to conform to the guaranty he will make such repairs as are needed during such period. These stipulations have been a fruitful source of controversy and their validity has been questioned as in conflict with the various charter and statutory provisions for meeting the cost by this dual method of local taxation for construction and general taxation for maintenance. It is contended that the insertion of such a provision for maintenance of the pavement during a period of years after its acceptance by the public body invalidates the contract because it tends to increase the contract cost and thereby imposes upon the property in the locality the cost of repairs in violation of these charter or statute provisions which divide the cost of construction and maintenance by putting the former on the locality and the latter upon the general public body. By the weight of authority it has been declared that these provisions in contracts are in the nature of a guaranty of the quality and character of the work done, and neither violate the statutes distributing the cost between the municipality and the locality nor those which require a letting to the lowest bidder. So long as the time during which the guaranty continues is no longer than the ordinary durability of the pavement when laid with the best workmanship and material, it does not tend to increase the cost and is therefore not in violation of the statutes cited.[1] But the contrary view has been

[1] People *ex rel.* North *v.* Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; O'Keeffe *v.* New York, 173 N. Y. 474, 66 N. E. 194; Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311; Cole *v.* People, 161 Ill. 16, 43 N. E. 607; Allen *v.* Davenport, 107 Iowa, 90, 101, 77 N. W. 532; Osborn *v.* Lyons, 104 Iowa, 160, 73 N. W. 650; Hedge *v.* Des Moines, 141 Iowa, 4, 119 N. W. 276; Shank *v.* Smith,

taken that such stipulations tend to increase the cost of the work, and therefore contravene the statutes referred to and render the contract invalid.[1]

A clause by which the contractor agrees to maintain the pavement in good order for five years after its acceptance, and to make all repairs which may, from any imperfection in the work or material, or from any crumbling or disintegration, become necessary, is a guaranty of the quality of the materials used and the character of the work performed.[2] And a substantially similar clause for maintenance during eight years has been sustained.[3] Where the clause covers decay and disintegration from natural causes, and defects caused by traffic, it conflicts with those provisions of statute or charter which place the expense of repairs and maintenance upon the public body at large and makes the contract void.[4]

§ 157. Effect of Legal and Illegal Stipulations.

Where plans and specifications were consulted by a con-

157 Ind. 401, 61 N. E. 932; Barber A. P. Co. *v.* French, 158 Mo. 534, 58 S. W. 934; Barber A. P. Co. *v.* Hezel, 155 Mo. 391, 56 S. W. 449; Seaboard Nat. Bk. *v.* Woesten, 147 Mo. 467, 48 S. W. 939; Barber A. P. Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458; Sedalia *v.* Smith, 206 Mo. 346, 104 S. W. 15; Kansas City *v.* Hanson, 60 Kan. 833, 58 Pac. 474; Wilson *v.* Trenton, 60 N. J. L. 394, 38 Atl. 635, 61 N. J. L. 599, 40 Atl. 575; Robertson *v.* Omaha, 55 Neb. 718, 76 N. W. 442; Bacas *v.* Adler, 112 La. 806, 36 So. 739; McGlynn *v.* Toledo, 22 Ohio Cir. Ct. 34; Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509; Philadelphia *v.* Pemberton, 208 Pa. St. 214, 57 Atl. 516.

[1] Montgomery *v.* Barnett, 149 Ala. 119, 43 So. 92; Almeda P. Co. *v.* Pringle, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264; Excelsior P. Co. *v.* Leach, 34 Pac. (Cal.) 116; Brown *v.* Jenks, 98 Cal. 10, 32 Pac. 701; Gosnell *v.* Louisville, 104 Ky. 201, 46 S. W. 722; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125; Portland *v.* Bitum. Pav. Co., 33 Oreg. 307, 52 Pac. 28; McAllister *v.* Tacoma, 9 Wash. 272, 37 Pac. 447, 658; Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

[2] Wilson *v.* Trenton, *supra;* Barber A. P. Co. *v.* Ullman, *supra;* Kansas City *v.* Hanson, *supra;* Latham *v.* Wilmette, *supra.*

[3] People *ex rel.* North *v.* Featherstonhaugh, *supra.*

[4] Schenectady *v.* Union College, 66 Hun, 179; Bradshaw *v.* Jamestown, 125 N. Y. App. Div. 86; Portland *v.* Bitum. Pav. Co., 33 Oreg. 307, 52 Pac. 28; Brown *v.* Jenks, 98 Cal. 10, 32 Pac. 701; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125; Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603.

tractor before he made his bid and an examination of them would disclose apparent discrepancies in them, the contractor is bound by a reasonable provision that if any apparent discrepancies are found between the plans, working drawings and specifications, the decision of the architects as to their fair construction and true intent and meaning shall be binding.[1] Where it provides that after a decision by the architect or engineer a contractor may under protest complete the work under the interpretation given, this leaves the contractor's rights open without impairment.[2]

§ 158. **Covenants Implied by Law—Warranties.**

In every contract for the performance of public work there is an implied obligation on the part of the public body to give to its contractor access to the place at which the work is to be performed and reasonable facilities for performing it.[3] When, therefore, a public body advertises for bids for the privilege of picking over refuse from its streets at certain public dumps, and the contract grants it for the same dumps, the law will necessarily imply a covenant by the public body to deliver all its refuse gathered from its streets at those dumps, even if exact words to that effect are wanting. Such additional or correlative covenant being intended, the courts will supply it as indispensable to the effectuation of the contract.[4] Where the public body fails or neglects to acquire a necessary right of way for the work, it fails in its duty to put the contractor in a position to proceed with his work, and is liable the

[1] Kelly *v.* Public Schools of Muskegon, 110 Mich. 529, 68 N. W. 282.
[2] Galveston *v.* Devlin, 84 Tex. 319, 19 S. W. 395.
[3] New York *v.* Continental A. Co., 163 N. Y. App. Div. 486, aff'd 218 N. Y. 685, 113 N. E. 1052.
[4] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077.

same as when it fails to furnish a site to the contractor, for breach of an implied warranty in that regard.[1] A warranty that ground is of a specially stable character, or that it is free from quicksand, or of the character referred to in the plans and specifications, will not be implied in the absence of an express stipulation that there is a warranty in favor of the contractor, that the ground selected should be of a defined character, or unless an unavoidable implication to that effect arises. This rule applies even though a plan showing the character of the soil is submitted to the contractor and is considered by him in making his bid, since ordinarily the risk of subsidence of the soil is assumed by the contractor.[2] And where a contract expressly states that the nature of the underground has not been investigated, and the public body denies any responsibility for its character, but puts upon the contractor all losses resulting on account of the character of the ground or because its nature was different than estimated or expected, no warranty of the character of the soil can be implied.[3] In similar regard drawings which show the probable surface of rock do not imply a warranty as to the depth at which rock will be found, in the face of a provision that if its location should be found to differ from that indicated no liability should result and no warranty should be taken.[4] But positive assertions as to the nature of the work belong to a different category. Upon these a contractor has the right to rely without independent investigations to prove their falsity.[5] While ordinarily a contractor assumes subsidence

[1] Ash *v.* Independence, 79 Mo. App. 70.
[2] Simpson *v.* U. S., 172 U. S. 372, 43 L. Ed. 482, aff'g, 31 Ct. Cl. 217.
[3] Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604; Kelly *v.* New York, 87 N. Y. App. Div. 299, 180 N. Y. 507, 72 N. E. 1144.
[4] Kelly *v.* New York, *supra.*
[5] Hollerbach *v.* U. S., 233 U. S. 165, 58 L. Ed. 898; Capital City B. & P. Co.

of the soil in the particular site upon which he is to erect a structure, and assumes the adequacy of existing systems of drainage in such place where he is working, yet if in the process of constructing a public work such as a dry dock, the public body by contract provision directs the relocation of a sewer in such place and provides the character, dimensions and location of the sewer, the articles of the contract prescribing these import a warranty that if the specifications are complied with the sewer will be adequate, and this implied warranty will not be overcome by general clauses requiring the contractor to examine the site, to check up the plans and to assume responsibility for the work until completion and acceptance.[1] A contractor is not precluded from relying upon such implied warranties because of a statute requiring contracts to be reduced to writing or because of the parol evidence rule.[2] When in the course of the work unforeseen conditions arise without the fault of either party and are not covered expressly by the terms of the contract, and these render performance of the contract as planned impossible, make necessary substantial changes in the nature and cost of the contract, as well as substantially affect the remaining work, the law reads into the contract an implied condition when it was made that such a contingency will terminate the contract.[3]

§ 159. Covenants Implied by Law—Warranty of Performance.

The obligation of a contractor who undertakes work is to erect the structure or accomplish the work described in the

v. Des Moines, 136 Iowa, 243, 113 N. W. 835; U. S. *v.* Atlantic Dredg. Co., 253 U. S. 1, 64 L. Ed. 735; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

[1] U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166, aff'g 51 Ct. Cl. 155.

[2] U. S. *v.* Spearin, *supra*.

[3] Kinser Const. Co. *v.* State (N. Y. Ct. Cl.), 125 N. Y. Supp. 46, 54.

plans and specifications. If the work or structure does not accomplish the results expected by the public body the loss must fall upon it. There is no implied stipulation, that when the structure is erected or the work accomplished in accordance with the plans and specifications, it will be safe or suitable for the purposes intended, or will accomplish the results expected.[1] When the contractor is bound to build in accordance with the plans and specifications prepared by the public body, the contractor is not responsible for the consequences of defects in them.[2] If the contractor warrants the sufficiency of his work measured by the plans and specifications, this is not a warranty that the work when finished will accomplish or effect the purposes intended.[3] Where the specifications of a bridge provide it to bear stated live loads, and certain trusses become overstrained when subjected to such live loads after construction, but the work is performed strictly in accordance with the specifications, the contractor does not, by agreeing to build according to specifications, warrant, that when erected, the bridge will not be overstrained if subjected to such live loads.[4] The contractor's agreement merely warrants in such a case that he will comply with the specifications. So where the specifications describe the work contemplated as water-tight, if the specifications cannot effect this result,

[1] New York *v.* Penn. Steel Co., 206 Fed. 454; U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166; Gregory *v.* U. S., 33 Ct. Cl. 434.

[2] U. S. *v.* Spearin, *supra;* McKnight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72, 54 N. E. 661; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545; Bentley *v.* State, 73 Wis. 416, 41 N. W. 338; Dist. of Columbia *v.* Clephane, 110 U. S. 212, 28 L. Ed. 122, aff'g 2 Mackey, 155; Green Riv. A. Co. *v.* St. Louis, 188 Mo. 576, 87 S. W. 985; Gilliam *v.* Brown, 116 Cal. 454, 48 Pac. 486; Penn. Bridge Co. *v.* New Orleans, 222 Fed. 737; Conway Co. *v.* Chicago, 274 Ill. 369, 113 N. E. 703.

[3] Harlow *v.* Homestead, 194 Pa. St. 57, 45 Atl. 87; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545; Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663; Dwyer *v.* New York, 77 N. Y. App. Div. 224.

[4] New York *v.* Penn. Steel Co., 206 Fed. 454.

the obligation of the contractor is complete when he complies with the specifications.[1] But an express warranty that a public work when completed will prove satisfactory and accomplish the purposes and objects intended is binding, and the risk that the plans will effect this result is upon the contractor.[2] If he warrants all of the work to remain in good condition for one year from acceptance, this is a warranty against all defects whatever their origin, and applies alike to insufficiency of materials, unskillfulness of work, as well as to unfitness of plan and design, whether devised by the public body or the contractor. By such a provision the contractor necessarily warrants the sufficiency of the plan and the work to satisfy the result intended.[3] A warranty of this sort may be implied from the language of the contract.[4] But where such a warranty is verbal and was made before the signing of the written contract it cannot be superadded thereto or proved, since it is an integral part of such original contract and not a separate agreement on a matter consistent with the terms of such writing.[5] Where the public body agrees to furnish suitable plans, drawings and specifications, such language implies an undertaking on the part of the public body that its architect has sufficient learning, experience and skill to properly perform the work required of him, and that the plans, drawings and specifications are suitable and efficient for the purpose designed,[6] and the risk of sufficiency and efficiency is upon the public body where subsequently the

[1] Dwyer *v.* New York, *supra;* Harlow *v.* Homestead, *supra.*

[2] Lake View *v.* MacRitchie, *supra;* Shoenberger *v.* Elgin, 164 Ill. 80, 45 N. E. 434. See Thorn *v.* Mayor, L. R. 1 App. Cas. 120, aff'g 44 L. J. Exch. 62.

[3] Lake View *v.* MacRitchie, *supra.*

[4] Shoenberger *v.* Elgin, 164 Ill. 80, 45 N. E. 434, aff'g 59 Ill. App. 384.

[5] Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795.

[6] Bentley *v.* State, *supra.*

structure collapses.[1] Whenever the agreement is not to do a particular thing, but to do it in a particular way and to use the materials specified, as designed by the public body, the risk of effecting its purpose falls upon the public body and no warranty by the contractor of the sufficiency of the plan and specifications to produce the desired result can be implied. The converse warranty in fact arises in the circumstances against the public body.[2] Indeed, a warranty that work will remain in perfect order and water-proof for a stated period is a warranty as to material and workmanship but not of the plan.[3] It has, however, been declared that no warranty would be implied as to the sufficiency of something, which is not the thing contracted for, but a mere means to be employed in the construction of the work, and mentioned in the contract.[4] So where the State or other public body has warranted the sufficiency of the plan, if the trouble is not with it, but with conditions of the site which were not within such warranty, but which were equally relied upon as sufficient by the parties, the warranty will not apply.[5] A warranty of design or plan will not, however, be inferred but must be clearly expressed in the contract or as clearly implied from its language.[6]

§ 160. Reserved Right to Make Alterations and Suspend the Work.

A provision, whereby the public body reserves the right,

[1] Bentley *v.* State, *supra.*

[2] Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108, 28 L. Ed. 86; MacRitchie *v.* Lake View, 30 Ill. App. 393; Mac Knight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72.

[3] MacKnight F. S. Co. *v.* Mayor, *supra.*

[4] Thorn *v.* Mayor, *supra.*

[5] Kinser Cons. Co. *v.* State, 204 N. Y. 381, 97 N. E. 871, aff'g 145 N. Y. App. Div. 41.

[6] Conway Co. *v.* Chicago, 274 Ill. 369, 113 N. E. 703.

until completion and acceptance of the work, to make such additions to or deductions from the work or changes in the plans and specifications, as may be necessary, is a valid provision, and will authorize the public body in good faith to make the changes provided both in the plans and specifications, and in the work, when necessary, without rendering the contract invalid, and without subjecting the public body to claims for loss of profits, where such is provided.[1] Of course, in the absence of reserved rights of this character, the public body, even though it be the State or the Nation, may not exercise these privileges or powers, as they cannot rescind or suspend contracts, any more than private persons may, without compensation in damages.[2] Under such a clause the public body has the right, whenever the necessity for changes shall arise, owing to unforeseen conditions or contingencies, to stop the work in whole or in part, change the plans and eliminate such part as proves impossible of accomplishment. This is the function of such a clause, to make provision for contingencies which could not be foreseen by ordinary care and prudence.[3] Where accordingly in the course of construction of public work natural conditions of soil unexpectedly appear, and this contingency is not expressly covered by the contract, yet renders performance as planned impossible, and makes necessary substantial changes in the nature and cost of the work, and substantially affects the remaining work, the law will read into the contract an implied condition when it was made that such a contingency will terminate the

[1] Clark *v.* Mayor, 4 N. Y. 338, 342; Kinser Cons. Co. *v.* State, 204 N. Y. 381, 97 N. E. 871, 145 N. Y. App. Div. 481, 125 N. Y. Supp. 46; U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269.

[2] Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164.

[3] Kinser Cons. Co. *v.* State, *supra*.

entire contract.[1] The clause will not in every case have such effect. It depends upon whether the conditions amount to a substantial abrogation of the contract or relate only to an insignificant part of the contract. The contract will remain in full force so far as performed and so far as it may be still performed. It will excuse performance only to the extent performance becomes impossible whether it be all or only a part of the remaining work.[2] This provision places no limitation upon the right to make alterations other than necessity. Necessity is the sole basis and standard for the protection of both parties. It protects the contractor from arbitrary, capricious or unreasonable action by public officers. It guards the public body against unforeseen conditions, which would render the work impossible of performance as originally planned. While the necessity need not be absolute, it must be reasonable, for the law writes the word reasonably before the word necessary in this term of the contract, as unavoidably within the contemplation of the parties, especially where the extent of the work and the expense is enormous.[3] Both of the parties are in the same position at the time of discovery of these supervening conditions. Under the law they must both share the responsibilities arising from these conditions, which were not anticipated when the contract was made.[4] A change from one kind of construction to another, made for no reason but to save expense, and which destroys the essential identity of the thing contracted for, cannot be made or justified and will constitute a breach of the contract.[5] So where the change in plans is arbitrary, radical

[1] Kinser Cons. Co. *v.* State, *supra.*
[2] *Idem.*
[3] *Idem.*
[4] *Idem.*
[5] National Cont. Co. *v.* Hudson River W. P. Co., 192 N. Y. 209, 84 N. E. 965.

and subversive of the thing to be done and is made simply because the new construction is cheaper, a breach of contract results.[1] But when changes are made by the public body through its proper agent, and are dictated by impartial judgment and in good faith, they may be made within these limits without liability other than as provided in the contract.[2] However, a provision of this sort, which gives to a public body the power to direct in good faith changes in the work, will not authorize them to stop the work in an unfinished state and thus arbitrarily annul the contract.[3] But while such a rule that such clauses are valid applies ordinarily to public bodies it cannot have application in cases where the letting of public work is controlled by strict statutory or charter limitations requiring the work to be let to the lowest bidder under competitive bids, if the nature and effect of the clause, reserving a general power to change the work and materials, is to interfere with the free competition which the statute requires.[4]

§ 161. Reserved Right to Suspend Work—Who May Suspend Work—Effect.

While these provisions for suspension of the work are valid and enforceable,[5] they must be properly exercised.[6] If the power to suspend the work is committed to a particular officer it may not be delegated to or exercised by a subordinate in his department.[7] Where the contract pro-

[1] McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417.
[2] Kingsley *v.* Brooklyn, 78 N. Y. 200, 208.
[3] Clark *v.* New York, 4 N. Y. 338.
[4] Gage *v.* New York, 110 N. Y. App. Div. 403.
[5] Clark *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464; Wakefield Cons. Co. *v.* City of New York, 157 N. Y. App. Div. 535, 213 N. Y. 633; Wells Bros. Co. *v.* U. S., 254 U. S. 83, 65 L. Ed. —; Mechanics Bk. *v.* New York, 164 N. Y. App. Div. 128.
[6] Clark *v.* Pittsburgh, *supra;* Wakefield Cons. Co. *v.* New York, *supra.*
[7] Ryan *v.* New York, 178 N. Y. App. Div. 181, 189.

vides that the work may be suspended, if it is deemed for the interest of the city without compensation to the contractor, other than an extension of time specified for completion, the remedy thus provided for the consequences of its breach is exclusive.[1] A public body is not authorized, under a clause permitting suspension of the work when deemed for its best interests, to suspend the work merely because it had no appropriation to pay for engineering inspection, which it was bound to furnish, since the power given is not an arbitrary power and may not be so unreasonably exercised against a contractor.[2] But a plain and unrestricted covenant conferring right of delay without liability will not be treated as meaningless and read out of the contract.[3]

§ 162. **Reserved Right to Annul.**

While the validity of clauses which reserve these powers of suspension or annulment is questionable from the viewpoint of mutuality,[4] they are generally sustained as valid provisions. It is accordingly within the power of public bodies to provide by contract, that it shall have the right, for the best interests of the public body, or for any reason appearing sufficient to them, to suspend the progress of the work or annul the contract altogether, on giving the notice required by the contract, and that they shall have no liability other than to extend the time stated for completion.[5] But when this right is exercised the public body must keep within the conditions of its exercise as provided in the contract. If it is to be exercised because deemed for

[1] Mechanics Bk. *v.* New York, *supra.*
[2] Johnson *v.* New York, 191 N. Y. App. Div. 205.
[3] Wells Bros. Co. *v.* U. S., 254 U. S. 83, 65 L. Ed. —.
[4] U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269.
[5] Harder *v.* Marion County, 97 Ind. 455; Mechanics Bk. *v.* New York, 164 N. Y. App. Div. 128.

the best interest of the public body it cannot be exercised arbitrarily or unreasonably.[1] If its exercise must be upon stated notice, the giving of the notice is a condition precedent to a valid exercise of the reservation.[2] Of course if not otherwise provided the notice must be personal [3] and must usually be in writing.[4] Where this reserved right to annul is exercised, the contractor, whose contract is thus annulled, is entitled to recover from the public body the value of the actual benefits which it has received from the partial performance.[5] In the absence of evidence to the contrary its action in annulling will be presumed to be in good faith.[6] The action may not be for money due on the contract, where the action in revoking is improper or unauthorized, but must be for damages for breach of the contract.[7]

[1] Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132; Wakefield Cons. Co. *v.* New York, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; Smith Cont. Co. *v.* New York, 167 N. Y. App. Div. 253; Johnson *v.* New York, 191 N. Y. App. Div. 205; Newport *v.* Phillips, 19 Ky. L. R. 352, 40 S. W. 378.
[2] Indianapolis *v.* Bly, 39 Ind. 373.
[3] Haldane *v.* U. S., 69 Fed. 819.
[4] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101.
[5] Lyman *v.* Lincoln, 38 Neb. 794, 57 N. W. 531.
[6] Powers *v.* Yonkers, *supra;* Newport *v.* Phillips, *supra.*
[7] Newport *v.* Phillips, *supra.*

CHAPTER XXIV

MODIFICATION OF CONTRACT

§ 163. Right to Modify.

A public body has no right to make changes or demand that changes be made or allowed in a contract unless the contract expressly provides for such modification.[1] Of course any contract may be modified by the mutual consent of the parties [2] and where the contract itself provides that the public body may make modifications and may require the contractor to assent thereto, such right exists.[3] But the modification or change can only be made by authorized officials of the public body, to be enforceable.[4] But the exercise of such a right will not be extended so as to allow the making of radical changes or such as materially alter the character of the work [5] with-

[1] Roettinger *v.* U. S., 26 Ct. Cl. 391; Griffiths *v.* Chicago San. Dist., 174 Ill. App. 100; Nat. Cont. Co. *v.* Hudson River W. P. Co., 192 N. Y. 209, 84 N. E. 965; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417.

[2] Bradley *v.* McDonald, 218 N. Y. 351, 113 N. E. 340; Smith *v.* Parkersburg Bd. of Ed., 76 W. Va. 239, 85 S. E. 513; Stephens *v.* Essex Co. Pk. Commr's, 143 Fed. 844; U. S. *v.* Guerber, 124 Fed. 823.

[3] Smith *v.* Chicago San. Dist., 108 Ill. App. 69; Swift *v.* U. S., 14 Ct. Cl. 208; Conners *v.* U. S., 141 Fed. 16.

[4] Bonesteel *v.* Mayor, 22 N. Y. 162; Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Hague *v.* Philadelphia, 48 Pa. St. 527; Mott *v.* Utica, 114 N. Y. App. Div. 736; Markey *v.* Milwaukee, 76 Wis. 349, 45 N. W. 28; O'Hara *v.* New Orleans, 30 La. Ann. 152; Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954; People *ex rel.* Hanberg *v.* Peyton, 214 Ill. 416, 73 N. E. 770; Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78; Campau *v.* Detroit, 106 Mich. 414, 64 N. W. 336; Johnson *v.* Albany, 86 N. Y. App. Div. 567; Terre Haute *v.* Lake, 43 Ind. 480; U. S. Elec., etc., Co. *v.* Big Rapids, 78 Mich. 67, 43 N. W. 1030; Greenville *v.* Greenville W. Wks., 125 Ala. 625, 27 So. 764; Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312; Plumley *v.* U. S., 226 U. S. 545; Smith *v.* Salt Lake City, 83 Fed. 784.

[5] Allen Co. *v.* Silvers, 22 Ind. 491; Ely *v.* Grand Rapids, 84 Mich. 336, 47 N.

out compensation [1] or so as to deprive the contract of mutuality, but the reserved right to make changes in details, with increase in compensation to meet the changes does not deprive the contract of the element of mutuality.[2] Nor will the right be extended beyond the particular purposes set out in the contract.[3] So the right to stop the work will not arise from a reserved power to make certain changes.[4]

§ 164. Power to Modify.

No absolute power exists in public bodies to modify or change public contracts at the mere will of the body. Such contracts can be modified or changed only upon the same conditions as are imposed upon natural persons.[5]

But public bodies, from the fact that they possess the power to contract, have also the power to modify or change contracts the same as natural persons in the absence of statutory restriction.[6]

W. 447; Doland *v.* Clark, 143 Cal. 176, 76 Pac. 958; Detroit *v.* Mich. Pav. Co., 36 Mich. 335; Reno W., etc., Co. *v.* Osburn, 25 Nev. 53, 56 Pac. 945; Laver *v.* Ellert, 110 Cal. 221, 42 Pac. 806; McCartan *v.* Trenton, 57 N. J. Eq. 571, 41 Atl. 830; Lutes *v.* Briggs, 64 N. Y. 404; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

[1] McMaster *v.* State, *supra.*

[2] U. S. *v.* McMullen, 222 U. S. 460, 472, 56 L. Ed. 269.

[3] Nat. Con. Co. *v.* Hudson R. P. Co., *supra.*

[4] Clark *v.* New York, 4 N. Y. 338, 53 Am. Dec. 379.

[5] Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Quincy *v.* Bull, 106 Ill. 337; Vincennes *v.* Citizens G. L. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Indianapolis *v.* Indianapolis G. L. Co., 66 Ind. 396; State *v.* Heath, 20 La. Ann. 172; Davenport Gas L. Co. *v.* Davenport, 13 Iowa, 229; Hudson E. L. Co. *v.* Hudson, 163 Mass. 346, 40 N. E. 109; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Nebraska City *v.* Nebraska C. H. G. L. Co., 9 Neb. 339, 3 N. W. 870; Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809; Crebs *v.* Lebanon, 98 Fed. 549; Galveston *v.* Morton, 58 Tex. 409; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175.

[6] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312; Meech *v.* Buffalo, 29 N. Y. 198; Moore *v.* Albany, 98 N. Y. 396; Voght *v.* Buffalo, 133 N. Y. 463, 31 N. E. 340; Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12; Fitzgerald *v.* Walker, 55 Ark. 148, 17 S. W. 702; Doland *v.* Clark, 143 Cal. 176, 76 Pac.

If a public contract, because of changed circumstances or through some mistake becomes oppressive, it is within the power of the public body to modify it and allow additional compensation, or it may annul it.[1]

A modification of a contract or a waiver of conditions in a contract found to be prejudicial to its interests can be made by a municipal corporation or other public body by implication.[2] But they may not waive or change the requirement that the cost shall be within the appropriation, for this is a statutory, not a contract condition.[3]

§ 165. Consideration for Modification.

A wide divergence of opinion exists upon the question as to whether a new consideration is needed to support the modification or change of an existing contract. Some take the view that a modification creates a new agreement and therefore the new agreement needs a consideration to support it.[4] Others support the modified agreement upon the original consideration.[5] Still others assert that parties may by mutual agreement change or modify a contract without a new consideration, that a new con-

958; Shea *v.* Milford, 145 Mass. 528, 14 N. E. 769; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

[1] Meech *v.* Buffalo, 29 N. Y. 198; Bean *v.* Jay, 23 Me. 117, 121. But where there is constitutional restraint upon legislative awards to contractors and others and the Legislature is prohibited from recognizing claims founded on gratitude and charity it may not award extra compensation to a contractor. N. Y. Laws 1919, Chap. 459, declared invalid, Gordon *v.* State, 233 N. Y. 1 See Chap. 586, Laws of New York, 1918.

[2] Messenger *v.* Buffalo, 21 N. Y. 199; Randolph County *v.* Post, 93 U. S. 502, 23 L. Ed. 957; Newport News *v.* Potter, 122 Fed. 332.

[3] Lord *v.* New York, 171 N. Y. App. Div. 140; Bernstein *v.* New York No. 2, 143 *Id.* 543, 545; People *v.* Clarke, 79 N. Y. App. Div. 78.

[4] Wright *v.* Tacoma, 87 Wash. 334, 151 Pac. 837.

[5] Ft. Madison *v.* Moore, 109 Iowa, 476, 80 N. W. 527; Dyer *v.* Middle Kittitas I. Dist., 25 Wash. 80, 64 Pac. 1009; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; U. S. *v.* Cooke, 207 Fed. 682.

sideration is not needed.[1] But it is claimed that where the original contract does not contemplate a supplemental agreement, the original consideration will not support such an agreement, and the supplemental or modified agreement is void for want of any other consideration to support it,[2] though it is said consideration may be found in the mutual assent of the parties.[3] Again, it is said new consideration may be found in the acceptance and substitution of the new contract for the old.[4] Again, the consideration is rested on waiver. Where for instance a contractor threatens to breach his contract unless he be given additional compensation, and additional compensation is promised him, the consideration to support the new promise is based upon the proposition that since the contractor had the right to abandon his contract and leave the public body to sue for damages, the new promise induces the contractor to waive the right and so the giving up of the right is the consideration which moves to the public body. While a considerable body of respectable authority supports this view it is met by the argument that it cannot logically be said that one has a right to break a contract, for no one has a right to commit a wrong. But there is plenty of authority to sustain this right. A contractor can abandon his contract. It is true he must pay the damages. But he has the right to say he will pay such rather than go on with the contract. Having this right and about to exercise it, if it be more profitable for the public, rather than sue and be com-

[1] Shriner *v.* Craft, 166 Ala. 146, 51 So. 884, 28 L. R. A. N. S. 450; Dickey *v.* Vaughn, 198 Ala. 283, 73 So. 507; Straw *v.* Temple, 48 Utah, 258, 159 Pac. 44.

[2] State *v.* Sapulpa, 58 Okla. 550, 160 Pac. 489.

[3] *Idem.*

[4] Harrod *v.* State, 24 Ind. App. 159, 55 N. E. 242; Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604.

pelled to relet the contract, to choose to pay more to induce the contractor to go on, the promise is binding. It is not favoring the man who goes back on his bargain and who attempts to hold up the public body for more money to do the same work for which he already is under obligation, since the public body are not bound to submit, but are free to let the contractor go and sue him on his contract. But with modern methods of bonds to complete, the public simply call on the bondsmen to finish.[1]

§ 166. Parol Modification of Written Contract.

A written contract may be modified by a subsequent parol agreement unless a writing is required by statute.[2]

While contracts sometimes provide that they can only be modified in a particular way or method, oral modifications are nevertheless sustained.[3] A contract required by law to be in writing may be modified by an oral agreement, and where a vessel was delivered, approved and paid for, without protest on account of delay and the quartermaster general had waived orally the time limit in the contract, such oral agreement was within the scope of his official authority and amounted to a modification of the contract.[4] This is upon the theory that the statutory requirement being for the benefit of the government may be waived by it. But there is authority that where the contract is required by law to be in writing an oral modification is invalid.[5] Ordinarily a modification may be

[1] See Bd. of County Comm. *v.* Cincinnati S. H. Co., 128 Ind. 240, 27 N. E. 612; Finucane Co. *v.* Rochester Bd. of Educ., 190 N. Y. 76, 82 N. E. 737; Bradley *v.* McDonald, 218 N. Y. 351, 113 N. E. 340.

[2] New York *v.* Butler, 1 Barb. 325; *Contra*, Chambers *v.* Cameron Bd. of Ed., 60 Mo. 370, 379.

[3] Ritchie *v.* State, 39 Wash. 95, 81 Pac. 79.

[4] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312.

[5] McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 322.

implied from acts of the parties.[1] If a statute requires the contract to be in writing, all alterations must be in writing, and where the contract itself requires changes to be in writing, oral modifications are invalid.[2] The question whether there has been a modification is usually a question of fact to be decided by a jury from the particular facts and circumstances of each case.[3]

§ 167. Effect of Modification.

Where the agreement is modified, the new agreement takes the place of the old one.[4] Where work is being performed, for instance, under one contract and the parties thereto enter into a second contract modifying the first and extending the contract period, the work thereafter is performed under the first contract as modified by the second, and the contractor is not chargeable with the cost of inspection nor for liquidated damages during the extended period in accordance with a provision of the first contract before modification.[5] But the new contract must be valid, and where the attempt to modify results in an illegal agreement the prior contract still subsists and is not affected by the effort to change.[6] Where a contract is changed in many particulars, with the acquiescence

[1] Messenger *v.* Buffalo, 21 N. Y. 196; Newport News Co. *v.* Potter, 122 Fed. 321; Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809; Duncombe *v.* Ft. Dodge, 38 Iowa, 281.

[2] Terre Haute *v.* Lake, 43 Ind. 480; State *v.* Cowgill, etc., M. Co., 156 Mo. 620; Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628; Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; Ferris *v.* U. S., 28 Ct. Cl. 332; McLaughlin *v.* U. S. 36 Ct. Cl. 138; Dougherty *v.* Norwood Boro., 196 Pa. St. 92, 46 Atl. 384; Johnson *v.* Albany, 86 N. Y. App. Div. 567; North Pacific L. & M. Co. *v.* East Portland, 14 Oreg. 3, 12 Pac. 4.

[3] Cook County *v.* Harms, 108 Ill. 151.

[4] Hayden *v.* Astoria, 74 Oreg. 525, 145 Pac. 1072; Brabazon *v.* Seymour, 42 Conn. 551.

[5] Germann *v.* United States, 50 Ct. Cl. 175.

[6] Scott *v.* Atchison, 38 Tex. 384.

of the parties, the original contract is abrogated.[1] Where the work is deviated from in material matters so that the work is not reasonably to be recognized as the original contract, the latter is considered as abandoned.[2]

Whether a contract is modified or abrogated, when it was discovered that the work planned would be useless, is a question for the jury.[3] But slight changes made with the acquiescence of the parties will not abrogate the obligations of the parties, but the original contract will continue to be in effect as modified.[4]

Where the public body was responsible for damages resulting from the leakage of a coffer dam, its responsibility endures although the leakage continued during an extension of the contract time obtained at the request of the contractor.[5]

Where certain of the specifications in a school contract as to material to be used for the finish of the floors were waived at the request of the contractor, and because of the change the cost to the contractor was reduced, the public body were not entitled to a reduction of the contract price nor to a counterclaim to the amount of such expenses.[6]

[1] Hayden *v.* Astoria, 74 Oreg. 525, 145 Pac. 1072.
[2] Corson *v.* Dawson, 129 Minn. 453, 152 N. W. 842.
[3] Mather *v.* Butler County, 28 Iowa, 253.
[4] Cook Co. *v.* Harms, 101 Ill. App. 24; Gibbs *v.* Girardville Sch. Dist., 195 Pa. St. 396, 46 Atl. 91; Collins *v.* U. S., 34 Ct. Cl. 294.
[5] Collins *v.* U. S., 34 Ct. Cl. 294.
[6] Finucane Co. *v.* Rochester Bd. of Educ., 190 N. Y. 76, 82 N. E. 737. See Kingsley *v.* Brooklyn, 78 N. Y. 200.

PART III. CONSTRUCTION AND OPERATION OF CONTRACT

CHAPTER XXV

GENERAL RULES

§ 168. Construction and Operation—General Observations. While some of the courts have taken the pains to announce that public contracts are to be construed liberally in favor of the public, there is no justice in such an attitude, nor is there any occasion for thus attempting to make the various villages, towns, cities and counties, the State and the Nation, the wards of the court. As a matter of fact probably no contracting parties protect themselves more thoroughly and completely than these various public corporations. The contracts which they present to the contractor are ironclad, unvarying documents fortified and strengthened over a period of years to meet the last and every prior adverse decision from the courts. They are so fashioned in language and form, many of them, that none of the ordinary presumptions of contract law may be indulged in the case of public contracts.[1] Where individuals or private corporations contract, the form and substance of the contract is a matter of deliberation and discussion on both sides, and when completed is a mutual document. In the case of public contracts there is no opportunity for give and take, for usual bargaining, the contractor must take what is presented to

[1] State v. Sapulpa, 58 Okla. 550, 160 Pac. 489.

him. For these well-known reasons which are matter of common observation and knowledge, there is no occasion for the courts to take such a paternal attitude in behalf of those who so capably take care of themselves and whose officials do, and must, under the scrutiny of modern watchful public opinion, take close care of the public interests in all contracts which are made. One other observation might pertinently be made and that is that public bodies in general in all of their larger public operations are dealing with the strongest personalities in the contracting world. Men of real genius are at the head of wonderful organizations of skillful men which are kept together over a long period of years. They become efficient to the point of closest contact with perfection. They are financially strong and fully capable of meeting their obligations, and take a real pride in doing their work honestly and well and look with as much honest pride upon the tunnels, subways, bridges, buildings and various structures and works they have builded, as their masterpieces, the same as a sculptor or painter would look upon the product of his art or a judge would view his most masterly and rounded opinion.

Public work costs less than private work, the bidders taking less profit, because of the assured solvency of the public body. In countless instances the work has been done for less than cost. Public officials and public contractors are honorable and upright in their conduct in the making of contracts and the carrying out of the work. Cases where fraud and corruption arise are very exceptional.

§ 169. **Rules Should be Universal.**

Rules of interpretation of public contracts should be

universal in their application. They are founded in reason and sound common sense, and have as their touchstone the ascertainment of the intention of the parties. The moment courts, in their effort to be subtle or to work out what they think is just in a given case, depart from this standard they make a new contract for the parties, wrong their language and destroy the universality of the law by making it individual. So many cases arise in which individual treatment is accorded that after a while the rule involved in a given case is lost in a maze of unreal exceptions, which are invented to fit hard cases, or cases that may not even be properly so called, but in which the judge does violence to the contract and its language to work out what he thinks is just. There are and should be real exceptions; there is a tendency to abolish technicalities and it should be extended; there is a modern attitude of injecting equitable principles into the construction and interpretation of contracts and it should be encouraged, but there is also a language which is the only vehicle of expression capable of use in forming contracts and there is an intent which is the soul of language which animates and illumines it, and the ascertainment of this should be the single aim of the courts. To reach it, it is not necessary to do violence to language, common sense or common understanding, and when found it should be proclaimed and enforced. Such action will tend toward surer results, greater respect for the obligation of contracts, firmer assurance that contracts as written and intended will be enforced. Neither party will then be deprived of the just fruits or reward of honest effort spent or money expended in reliance upon a common understanding of his contract. And the law of contracts will thereby become more scientific and stable.

§ 170. General Rules Affecting Public Contracts.

It is fundamental that the primary object of construction in contract law is to discover the intention of the parties and to give it effect.[1] To do this, the entire agreement is to be considered as a whole, not what each part may mean, but what the agreement means considered as a whole.[2] And if possible the agreement should be construed so as to give effect to each provision of the contract. The intention must not be deduced from specific provisions or fragmentary parts. The true function of interpretation is to give force, effect and meaning to the words and clauses used in an instrument so as best to effectuate and carry into operation the reasonable intention of the parties.[3] In determining the meaning to be accorded to doubtful language, a construction should be given, if this can fairly be done, that will support rather than defeat the instrument.[4] The construction should not be strained in favor of, but most strongly against, the person undertaking or entering into the obligation.[5] Public contracts must be construed in the light of the facts surrounding the parties at the time of entering into or making the agreement. Courts should consider the occasion which gave rise to the contract, the relation of

[1] Akin *v.* U. S., 17 Ct. Cl. 260; U. S. *v.* Bethlehem Steel Co., 205 U. S. 105, 51 L. Ed. 731; Gt. Nor. Ry. Co. *v.* U. S. 236 Fed. 433; U. S. F. & G. Co. *v.* Bd. of Comm'rs of Woodson County, 145 Fed. 144; Turner *v.* Fremont, 159 Fed. 221, 170 Fed. 259; Loeb *v.* Montgomery, 184 Ala. 217, 61 So. 642; St. Louis *v.* St. Louis & San Francisco R. Co., 228 Mo. 712, 129 S. W. 691; Sterling *v.* Hurd, 44 Colo. 436, 98 Pac. 174; Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872.

[2] U. S. F. & G. Co. *v.* Bd. of Comm'rs of Woodson County, 145 Fed. 144; Loeb *v.* Montgomery, *supra;* St. Louis *v.* St. Louis & S. F. R. Co., *supra.*

[3] Turner *v.* Fremont, 159 Fed. 221; Loeb *v.* Montgomery, *supra;* U. S. F. & G. Co. *v.* Bd. of Comm'rs, *supra;* Merrill-Ruckgaber Co. *v.* U. S., 49 Ct. Cl. 553, aff'd 241 U. S. 387, 60 L. Ed. 1058.

[4] Loeb *v.* Montgomery, *supra.*

[5] Loeb *v.* Montgomery, *supra.*

the parties and the object to be accomplished.[1] Words should not be given a strained construction, but a reasonable one. A reasonable meaning of the words employed should by implication be read into the contract in order to attain a just result, one inherent in the very nature of the transaction.[2] If there is a latent ambiguity in the contract then what the parties do under it is of value in interpreting it. A practical construction put upon an agreement by the parties is an interpretation of their obscurely expressed ideas by their acts, allowing what they do to exemplify and disclose the intent underlying what they say.[3] Known, established and general usage and custom may be read into a contract to get at the meaning of its language when a doubt in regard to that meaning fairly arises on the whole instrument.[4] Acquiescence in regulations of departments for a long time will not be disregarded, without most cogent and persuasive reasons.[5] All of these aids to interpretation, however, fill no office and have no place at all when a contract is plain, unequivocal and free from ambiguity. Interpretation cannot control expression when it is clear and there is nothing to be construed. In such case, construction and interpretations by implication, or reading provisions in or out are not allowed. Implication cannot control express language. Expressum facit cessare tacitum.[6] These aids to interpretation and understanding should never be

[1] Loeb *v.* Montgomery, *supra;* Chicago Flour Co. *v.* Chicago, 243 Ill. 268, 90 N. E. 674; Jackson Co. L. H. & P. Co. *v.* Independence, 188 Mo. App. 157, 175 S. W. 86.

[2] St. Louis *v.* St. Louis & S. F. R. Co., *supra.*

[3] *Idem.*

[4] *Idem.*

[5] Gt. Nor. Ry. Co. *v.* U. S., 236 Fed. 433; U. S. *v.* Atlantic Coast Line R. Co., 206 Fed. 199.

[6] St. Louis *v.* St. Louis & S. F. R. Co., *supra;* Salt Lake City *v.* Smith, 104 Fed. 457.

pressed so far as to make in effect a new contract for the parties by adding vital and burdensome terms by implication.[1] It seems to be the settled policy of our law that contracts between private persons and municipalities shall be in writing. Such policy will have little effect to produce wholesome results if the obligations assumed by the parties are to be enlarged by implication.[2] The law permits parties competent to contract and free to do so, in the exercise of their judgment, to make their own contracts, and the proper function of courts is to enforce such contracts as made, where they do not conflict with any rule of law or good morals, or the declared public policy of the State or Nation.[3] When the intention of the parties is ascertained, it is ordinarily the duty of courts to give it effect. They have no function or right to assume a guardianship over those who have the requisite capacity to contract and are free to make such contracts as they choose.[4] The actual intent of the parties when ascertained must prevail over dry words, inapt expressions and careless recitations in the contract, unless that intention is plainly contrary to the plain sense of the binding words of the instrument.[5] A construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it. It should be construed so as to prevent its failure, and to give effect to the obligation of each party appearing upon it at the moment the contract itself takes effect—ut res magis valeat quam pereat.[6]

[1] St. Louis *v.* St. Louis & S. F. R. Co., *supra.*

[2] *Idem.*

[3] Parker Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872; Pacific Hdw. Co. *v.* U. S., 49 Ct. Cl. 327.

[4] Parker Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872.

[5] U. S. F. & G. Co. *v.* Bd. of Comm'rs, *supra;* Salt Lake City *v.* Smith, 104 Fed. 457.

[6] U. S. F. & G. Co. *v.* Bd. of Comm'rs, *supra.*

Words are to be construed in the sense in which the parties to the agreement used them when they agreed to them.[1] Lapse of time cannot change the substance of agreement.[2] The contract is always to be interpreted according to its true intent, although altered conditions may vary the form of fulfillment.[3] Words should be construed as known to be understood by the party for whose benefit they are used.[4] When there is doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear.[5] A construction given to a contract by the express declaration of one party and the silent acquiescence of the other, prior to and during its performance, cannot be repudiated after a party has acted upon the faith of it.[6] If there is a repugnancy between general clauses and more detailed, specific clauses, the latter will govern. This rule, like other rules of construction, is a mere aid to ascertain the intention of the parties, which is to be gathered from the whole instrument.[7] A reasonable construction put upon a doubtful contract by the parties, consonant with its language and followed for a long time, will be adopted.[8] No part of a contract will be rejected unless it is necessary so to do in order to prevent a defeat

[1] Salt Lake City *v.* Smith, 104 Fed. 457.

[2] Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720; Davin *v.* Syracuse, 69 Misc. 285, 145 N. Y. App. Div. 904.

[3] Virginia *v.* West Virginia, 238 U. S. 202, 236, 59 L. Ed. 1272.

[4] People *ex rel.* McDonough *v.* Bd. of Managers, 96 N. Y. 640; Clinton County *v.* Ramsey, 20 Ill. App. 577.

[5] Scully *v.* U. S., 197 Fed. 327; Bowers Hydr. Dredg. Co. *v.* U. S., 211 U. S. 176, 188, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214.

[6] Scully *v.* U. S., 197 Fed. 327.

[7] English *v.* Shelby, 116 Ark. 212, 172 S. W. 817.

[8] Covington *v.* So. Covington & C. S. R. Co., 147 Ky. 326, 144 S. W. 17; McLean County Coal Co. *v.* Bloomington, 234 Ill. 90, 84 N. E. 624.

of the purposes sought by the parties to the contract.[1] The entire instrument, whether on one piece of paper or on several, and all writings on the same subject when referred to and made a part of the contract, should be considered in interpreting each part.[2] Words should be given their ordinary and generally accepted meaning and understanding.[3] When a written contract is silent in regard to a matter, it is not to be lightly presumed that it was intended to imply an agreement upon that point, unless such implication clearly appears from the whole instrument. Courts must be careful not to make it speak where it was intentionally silent, or to extend it beyond what was intended by the parties.[4]

§ 171. Ambiguity.

When there is ambiguity in a contract, it becomes open to interpretation by aid of extrinsic evidence, so as to give effect to the mutual intention of the parties. Whether an instrument is ambiguous or plain is a matter of impression rather than definition, because every provision of the contract may be as clear as language can make it, yet the complete result may be doubtful from lack of harmony in its various parts.[5] But language cannot be deemed ambiguous where its intent harmonizes with other provisions of the contract and disagrees with none.[6] But if there is no ambiguity, no provisions equivocal in character, and the

[1] Alton *v.* Ill. Trans. Co., 12 Ill. 38, 52 Am. Dec. 479; McLean County Coal Co. *v.* Bloomington, 234 Ill. 90, 84 N. E. 624.

[2] Sexton *v.* Chicago, 107 Ill. 323; McLean County Coal Co. *v.* Bloomington, 234 Ill. 90, 84 N. E. 264.

[3] Tecumseh *v.* Burns, 30 Okla. 503, 120 Pac. 270; State *v.* Seattle Elec. Co., 71 Wash. 213, 128 Pac. 220.

[4] East Ohio Gas Co. *v.* Akron, 81 Ohio. St. 33, 90 N. E. 40; Churchyard *v.* The Queen, L. R. 1 Q. B. 173, 195; Pitt Cons. Co. *v.* Dayton, 237 Fed. 305.

[5] Butte Water Co. *v.* Butte, 48 Mont. 386, 138 Pac. 195.

[6] Day *v.* U. S., 48 Ct. Cl. 128.

result intended is plain, there is no room for construction and the contract as written must be carried out.[1] It is only where it is indefinite or uncertain in its meaning, or there are latent ambiguities that parol proof is admissible and proper, not to contradict or impeach the writing or documentary and record evidence, but to explain the apparent inconsistencies and repugnant provisions, and thus give effect to the writing as a whole. When the ambiguity is patent, it cannot be cured by oral or extrinsic evidence.[2]

Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed.[3] They always receive a strict construction against those for whose benefit they are introduced.[4] Equity will relieve against them when this can be done without doing violence to the contracts of the parties, and certainly will not enforce them if they are couched in ambiguous language.

§ 172. What Law Governs Interpretation.

Public contracts are no different from private contracts. The obligation of each endures under the law, and the former are governed by the same canons of interpretation as apply to contracts between natural persons.[5]

The law in force at the date of execution of the contract

[1] St. Louis *v.* St. Louis & S. F. R. Co., 228 Mo. 712, 129 S. W. 691; Roanoke *v.* Blair, 107 Va. 639, 60 S. E. 75.

[2] Mobile County *v.* Linch, 198 Ala. 57, 73 So. 423; Douglass *v.* Morrisville, 89 Vt. 393, 95 Atl. 810.

[3] Mt. Morris *v.* King, 77 Hun, 18.

[4] Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

[5] Long Beach Sch. Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499; Sexton *v.* Chicago, 107 Ill. 323; Leavenworth *v.* Rankin, 2 Kan. 357; Vincennes *v.* Cits. G. L. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Davies *v.* East Saginaw, 66 Mich. 37, 32 N. W. 919; Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981; Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204; People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164; Phelan *v.* New York, 119 N. Y. 86, 23 N. E. 175; Skelsey *v.* U. S., 23 Ct. Cl. 61; Harvey *v.* U. S., 8 Ct. Cl. 501.

controls its interpretation.[1] Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters relating to its performance are controlled by the law which prevails at the place of performance. Matters respecting the remedy, the bringing of suits, character of evidence and limitation of actions depend upon the law of the forum.[2] It has been said, however, that contracts are to be construed liberally in favor of the public when their subject-matter concerns the public interest.[3]

§ 173. Courts Possess no Power to Make New Contract for Parties.

The courts have no power to change or modify the terms of the contract which the parties have made and which by law establishes their rights, duties and liabilities. They have no right or authority to make a new contract by construction,[4] nor under the guise of construction impose conditions or obligations not expressed in or clearly implied from the contract. But where a contract provides for the extension of its operation to new parties upon reasonable terms and regulations, the parties will not be permitted to destroy its effectuation or enforcement by failing to act. Under these circumstances a court of equity will state what these terms and regulations are. This is not making a new contract for the parties, but the carry-

[1] Piedmont Pav. Co. *v.* Allman, 136 Cal. 88, 68 Pac. 493; Philadelphia *v.* Jewell, 135 Pa. St. 329, 20 Atl. 281; U. S. *v.* Dietrich, 126 Fed. 671.

[2] Burton *v.* U. S., 202 U. S. 344, 50 L. Ed. 1057; Scotland County *v.* Hill, 132 U. S. 107, 117, 33 L. Ed. 261, aff'g 25 Fed. 395; Ill. Surety Co. *v.* John Davis Co., 244 U. S. 376, 381, 61 L. Ed. 1206, aff'g 226 Fed. 653.

[3] Joy *v.* St. Louis, 138 U. S. 1, 38, 47, 34 L. Ed. 843, aff'g 29 Fed. 546.

[4] Conway &c. Co. *v.* Chicago, 274 Ill. 369, 113 N. E. 703; Gamewell &c. Co. *v.* LaPorte, 102 Fed. 417.

ing out of the intention of the parties and the enforcement of the very contract intended.[1]

§ 174. Construction Should Effect Reasonable Result and Lawful Purpose.

A construction which is lawful, which preserves good faith, and frees the contract from the imputation of impairing rights will be accepted, if possible, in preference to a contrary construction. For where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.[2] If of two constructions possible, one will render the contract valid and the other void, the former will be adopted if it can be done without violence to the ascertained intention of the parties.[3] It is presumed that the parties to a contract intended a lawful purpose, that they knew the law and intended to obey it.[4] The language of contracts should not be given a strained construction, but should be interpreted to accomplish a reasonable rather than an unreasonable result.[5] When there is doubt or uncertainty as to the meaning of words in an instrument,

[1] Joy *v.* St. Louis, 138 U. S. 1, 34 L. Ed. 843, aff'g 29 Fed. 546; Providence *v.* St. John's Lodge, 2 R. I. 46. See Jones *v.* Lanier, 198 Ala. 363, 73 So. 535.

[2] Hobbs *v.* McLean, 117 U. S. 567, 29 L. Ed. 940; U. S. *v.* Cent. Pac. R. Co., 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180; Finley *v.* Sch. Dist., 51 Mont. 411, 153 Pac. 1010; Foard County *v.* Sandifer, 105 Tex. 420, 151 S. W. 523; Lamar W. Co. *v.* Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756.

[3] Finley *v.* Sch. Dist., *supra.*

[4] Foard County *v.* Sandifer, *supra;* Tomlinson *v.* Hopkins County, 57 Tex. 572.

[5] Ryan *v.* Dubuque, 112 Iowa, 284, 83 N. W. 1073; McCain *v.* Des Moines, 128 Iowa, 331, 103 N. W. 979; Conway Co. *v.* Chicago, 274 Ill. 369, 113 N. E. 703; Jersey City *v.* Flynn, 74 N. J. Eq. 104, 70 Atl. 497, mod. 76 N. J. Eq. 607, 76 Atl. 3; St. Louis *v.* St. Louis & S. F. R. Co., 228 Mo. 712, 129 S. W. 691; Royalton *v.* Royalton & W. T. Co., 14 Vt. 311; U. S. *v.* Cent. Pac. R. Co., 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180; Bayne *v.* U. S., 195 Fed. 236, 241.

if possible, they should not be so construed as to place one of the parties entirely at the mercy of the other.[1]

§ 175. Meaning and Kind of Notice.

When a contract requires a notice to be given for the purpose of creating a liability or imposing an obligation, personal notice is intended and should be given, unless the parties expressly stipulate that the notice shall be served or given in some other way such as mailing. Of course where the party to whom the notice must be given conceals himself or resorts to trick or artifice to avoid the service of a personal notice, reasonable efforts to serve the notice personally will operate to satisfy the duty imposed.[2] So where a statute requires notice to be given to a party as a basis of a forfeiture of some right or interest, it means a notice in writing in the absence of some provision in the statute which prescribes a different method of giving the notice.[3]

[1] Dunning *v.* County of Orange, 139 N. Y. App. Div. 249, 204 N. Y. 647, 97 N. E. 1104.

[2] Haldane *v.* U. S., 69 Fed. 819.

[3] Erving *v.* Mayor, 131 N. Y. 133, 29 N. E. 1101. See Becker *v.* Churdan, 175 Iowa, 159, 157 N. W. 221.

CHAPTER XXVI

SPECIAL CIRCUMSTANCES

§ 176. Usages of Trade or Business.

The signification or import of words or expressions in any trade or business may be so fixed by usage that, in order to arrive at the true intent of the parties in entering a contract, resort must be had to proof of the technical meaning of such words or expressions. But the usages of trade fall into the same class as all other rules of construction. They are mere aids to explain, not express and clear stipulations, but those of doubtful and equivocal character, and to ascertain the meaning of words of doubtful signification or which may be understood in different senses. Such extrinsic evidence is admissible because, like all rules of interpretation, it is presumed the parties knew of their existence and contracted with reference to them. But if the usages are inconsistent with the contract or expressly or by necessary implication contradict or vary it, they will not be received in evidence. A usage or trade meaning will not be given effect when this defeats the plain language of the agreement.[1] If a contract gives to words used a plain and unambiguous signification, the abstract or commercial meaning of those words is irrelevant and is not admissible. The commercial meaning of words cannot be imported, through expert testimony, into a contract for the purpose of destroying its plain and obvious intendment.[2]

[1] Dillow & Co. *v.* Monticello, 145 Iowa, 424, 124 N. W. 186.

[2] Bowers Hydr. Dredging Co. *v.* U. S., 211 U. S. 176, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214.

It is a universal rule that usages and customs are never allowed to operate against express contracts.[1] To permit evidence of a usage or custom, it must be so general as to raise the presumption that the parties had knowledge of it and contracted with reference to it. The party claiming such a usage must prove it.[2] But in giving proof of a custom a party is not permitted to prove his construction of the contract.[3] To prove such usage or custom it is not necessary to specially plead it.[4]

§ 177. Inconsistent Provisions—Conflicting Clauses.

When repugnancy is found between clauses of a contract, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other, which tends to defeat a full performance, and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire agreement. The secondary must give way to the essential.[5] The first of two contradictory provisions ordinarily will prevail, but not where it is provided by statute that when an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent. The statute supercedes the common law.[6] Where there is a conflict so irreconcilable between essential provisions of the assumed contract and material parts of the specifications, and the specifications cannot in reason be ignored, or treated as abrogated, the contract is void for uncertainty

[1] Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.
[2] Fellows *v.* Dorsey, 171 Mo. App. 289, 157 S. W. 995.
[3] Indep. Sch. Dist. *v.* Swearingen, 119 Iowa, 702, 94 N. W. 206.
[4] Becker *v.* Churdan, 175 Iowa, 159, 157 N. W. 221.
[5] Morrill & W. Cons. Co. *v.* Boston, 186 Mass. 217, 71 N. E. 550.
[6] Urbany *v.* Carroll, 176 Iowa, 217, 157 N. W. 852.

and may not be enforced.[1] Where a contract contained a provision that no extra work should be allowed or paid for and the contract required a contractor to go down to solid rock to erect abutments and the contractor refused to sign the contract, and an added stipulation was inserted to the effect that if rock was not found as shown by the plans and borings he should be paid for any extra work, this clause operated to abrogate or limit the "no extra" clause so far as it was inconsistent with it.[2]

§ 178. General Words and Expressions are Controlled by Specific.

General expressions are restricted, under a familiar maxim, by specific terms which succeed them, and are not permitted to control the specific provisions of the contract.[3] A general clause of a contract, which provides that everything necessary to make structures or work complete and ready for use shall be furnished by the contractor whether specified or not, must be governed by specific provisions which describe exactly and in detail what is to be furnished.[4] Where a contract provides that the contractor shall be liable for all damages to person and property arising from his negligence or of his employees and for all violations of law, city ordinances or government regulations, and generally provides that the contractor shall be liable for all accidents causing loss to the city, this latter general clause will be controlled by the specific language, which limits the liability of the contractor by the restriction contained in the specific and particular

[1] U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535.

[2] Capital City B. & P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835.

[3] Erickson *v.* U. S., 107 Fed. 204; Johnson County *v.* Wood, 84 Mo. 489; English *v.* Shelby, 116 Ark. 212, 172 S. W. 817; Vulcanite Pav. Co. *v.* Philadelphia, 239 Pa. St. 524, 86 Atl. 1086.

[4] Erickson *v.* U. S., *supra.*

statement that he shall be liable for all accidents caused by negligence.[1] So where a government contract provides in general language that no claim shall be made against it on account of any excess or deficiency in quantities, and that bidders are expected to examine the maps and drawings and to visit the locality of the work and to make their own estimates of facilities and difficulties attending the work, these provisions cannot prevail so as to deprive a contractor of damages suffered because of a positive statement in the specifications indicating the specific character of filling back of an old dam.[2]

§ 179. Prior Negotiations—Reference to in Construction of Meaning of Language Used.

Verbal agreements between the parties to a written contract made before, or at the time of execution, of the contract are in general inadmissible to vary its terms or to affect its construction. All such verbal agreements are to be considered as merged in the writing. Oral agreements subsequently made on a new and valuable consideration, and before the breach of the contract, stand upon a different footing. Such agreements may vary any of its terms or may waive or discharge it altogether.[3]

But previous and contemporaneous transactions may very properly be taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties have used particular words.

This is not for the purpose of making a contract for

[1] New York *v.* American Railway T. Co., 66 Misc. 166, 143 N. Y. App. Div. 928.

[2] Hollerbach *v.* U. S., 233 U. S. 165, 58 L. Ed. 898. See U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166; U. S. *v.* Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 735; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

[3] Riley *v.* Brooklyn, 46 N. Y. 444; Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181.

the parties, but to understand what contract was actually made. In such cases of doubt as to the meaning of language actually used, reference is sometimes had to prior negotiations.[1]

§ 180. **Verbal Agreements Merged.**

All verbal agreements between the parties to a public contract in writing made before or at the time of execution of the instrument are considered as merged in the writing.[2] Subsequent oral agreements stand upon a different footing and if made upon sufficient consideration may alter, vary, waive or discharge the prior writing.[3]

§ 181. **Insertion of Writing in Printed Form.**

Words written in ink in a printed form are given more force, since they are presumed to express the deliberate intention of the parties more fully, than the adopted provisions of printed or even typewritten forms.[4] The general rule is that where a printed form is used to be filled up by writing, the written part will control in the construction of the contract.[5]

§ 182. **Grammatical Construction.**

Punctuation is not allowed to conclusively determine the character of a writing. The presence or absence of a comma or other mark of punctuation is a rather unreliable standard by which to interpret a writing. So it is held

[1] U. S. *v.* Bethlehem Steel Co., 205 U. S. 105, 51 L. Ed. 731; Simpson *v.* U. S., 199 U. S. 397, 50 L. Ed. 245; Brawley *v.* U. S., 96 U. S. 168, 24 L. Ed. 622, aff'g 11 Ct. Cl. 522; English *v.* Shelby, 116 Ark. 212, 172 S. W. 817.

[2] Hawkins *v.* U. S., 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

[3] Hawkins *v.* U. S., *supra*. See Simpson *v.* U. S., 199 U. S. 397, 50 L. Ed. 245.

[4] Sprague Elec. Co. *v.* Hennepin County, 83 Minn. 262, 86 N. W. 332.

[5] Chicago *v.* Weir, 165 Ill. 582, 46 N. E. 725; People *v.* Dulaney, 96 Ill. 503.

generally that punctuation may be disregarded entirely or it may when useful be resorted to as an aid in construction, which it only is at most.[1]

§ 183. **Construction against Party Who Draws Contract.** When there is ambiguity or obscurity in a contract, which the other party to the instrument does not explain, it will be construed against the party drawing the contract.[2] Ambiguous, doubtful or obscure expressions are interpreted against the party who prepared the contract and used the language.[3] Language in deeds or grants is construed, where it admits of two constructions, against the grantor even though it be the public.[4] In some jurisdictions public contracts are construed, not contra proferentum, but liberally in favor of the public.[5] An examination of these decisions shows that such rule only applies to cases involving the grants of valuable franchises, but the rule cannot justly be extended to other public contracts, and as to these the same rule of construction applies as is invoked in the case of private contracts. In some States the matter is controlled by statute, which provides that all uncertainty in a public contract is presumed to be caused by the private party contracting with a public body or officer.[6]

[1] De Soto County *v.* Dickson, 34 Miss. 150; Commonwealth *v.* Grant, 201 Mass. 458, 87 N. E. 895; Cochran *v.* Vermilion County, 113 Ill. App. 140.

[2] McClintic M. Cons. Co. *v.* Hudson County Bd., 83 N. J. Eq. 539, 91 Atl. 881.

[3] Gibbons *v.* U. S., 15 Ct. Cl. 174, 109 U. S. 200, 27 L. Ed. 906.

[4] Alton *v.* Ill. Trans. Co., 12 Ill. 38, 52 Am. D. 479; Duryea *v.* Mayor, 62 N. Y. 592; Carthage T. P. Mills *v.* Carthage, 200 N. Y. 1, 93 N. E. 60.

[5] Muncie Nat. Gas Co. *v.* Muncie, 160 Ind. 97, 66 N. E. 436; Omaha W. C. *v.* Omaha, 147 Fed. 1; Joy *v.* St. Louis, 138 U. S. 1, 34 L. Ed. 843, aff'g 29 Fed. 546.

[6] State *v.* Sapulpa, 58 Okla. 550, 160 Pac. 489.

§ 184. Construction—Sale of Goods—Warranty as to Quality or Quantity.

Where a contract is made to sell or furnish certain goods, identified by reference to independent circumstances, such as a lot on deposit in a warehouse, or all that may be manufactured in a named establishment, or that may be shipped in certain vessels and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.[1] But when no such independent circumstances are referred to and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract.[2] A contract to deliver eight hundred eighty cords of wood more or less as shall be determined to be necessary is not for the delivery of any particular lot or any particular quantity, and the quantity designated is to be regarded merely as an estimate of what may be required.[3] A contract for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the Post Office Department during a period of four years from a stated date, is an absolute contract entitling the contractor to supply such department all needed during that period, and may not be revoked.[4]

[1] Brawley *v.* U. S., 96 U. S. 168, 24 L. Ed. 622, aff'g 11 Ct. Cl. 522.
[2] Brawley *v.* U. S., *supra;* U. S. *v.* Purcell Env. Co., 249 U. S. 313, 63 L. Ed. 620.
[3] Brawley *v.* U. S., *supra.*
[4] U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620.

§ 185. Operation—Construction—Clause of Contract to Maintain Repairs in Pavement.

Where a contract contains a clause which provides that during a certain period after acceptance by the public body the contractor will maintain and repair the pavement, the effect of which is to guarantee the durability of his work, and it provides for the serving of written notice of defects, he can only be held to make such repairs as he is called on to make by notice as indicated.[1] If the provision is that should the paving become defective from improper material or construction, repairs may be made by the public body at the expense of the contractor, the latter can only be made liable for defects which are the result of improper material or construction.[2] And a contractor will not be liable for repairs if the public body in making the repairs substitutes a new kind of pavement.[3] In like manner if the public body allows the pavement to fall into a deep state of disrepair, so that it is in abnormal condition, it must restore it to a normal condition before it can properly require the contractor to make repairs.[4] The clause will not be extended to include damage caused by the bursting of a water main.[5] When a city includes a repair clause in its paving contract which imposes the duty upon the paving contractor to keep it in repair during a certain period, this will operate to relieve a railroad company having the statutory duty to pave between its tracks from the duty of repairing such pavement and from lia-

[1] O'Keeffe *v.* New York, 173 N. Y. 474, 66 N. E. 194; Warren-Scharf A. P. Co. *v.* St. Paul, 69 Minn. 453, 72 N. W. 711.

[2] American Bond Co. *v.* Ottumwa, 137 Fed. 572; Dist. of Columbia *v.* Clephane, 2 Mackey, 155, aff'd 110 U. S. 212, 28 L. Ed. 122; Morley *v.* St. Joseph, 112 Mo. App. 671, 87 S. W. 1013.

[3] Dist. of Columbia *v.* Clephane, *supra.*

[4] State *v.* New Orleans & C. R. Co., 52 La. Ann. 1570, 28 So. 111.

[5] Green River A. Co. *v.* St. Louis, 188 Mo. 576, 87 S. W. 985.

bility for defects during such period.[1] Where a public service company under its franchise contract agrees to repave between and next its rails with the same material used by the city in repaving, it is for the city where unrestrained by contract to determine what kind of pavement public convenience and necessity demand, and courts cannot control its determination as arbitrary and unreasonable.[2]

[1] Binninger *v.* New York, 177 N. Y. 199, 69 N. E. 390.
[2] Milwaukee Elec. R. Co. *v.* Milwaukee, 252 U. S. 100, 64 L. Ed. 476.

CHAPTER XXVII

WHERE SEVERAL INSTRUMENTS FORM CONTRACT

§ 186. Several Instrumental Parts of One Transaction Read Together.

It is a general rule that written instruments executed at the same time, or about the same time, between the same parties and relating to the same subject-matter, may be read together for the purposes of construction and interpretation and to arrive at the intention of the parties.[1] But where they do not relate to the same subject-matter and are not executed about the same time, the rule can have no application. The identity of parties and subject-matter is not controlling where the intention is that the contracts shall be separate contracts.[2] Even where the contracts are connected one with the other by reference but only for limited purposes, the union of contracts will not be extended beyond the purposes intended.[3] So where the resolutions of a public board, recorded on the minutes of that body, are made a part of a contract, the contract and the record will be read together, according effect to each provision, if practicable.[4] If the written contract makes both the drawings and specifications a part of it, and there is no inconsistency between the drawings and

[1] McMaster *v.* State, 108 N. Y. 542, 550, 15 N. E. 417; New Britain *v.* New Britain Tel. Co., 74 Conn. 326, 329, 50 Atl. 881, 1015; Atcheson *v.* Hutchison, 51 Tex. 223.

[2] McMaster *v.* State, *supra.*

[3] Beattie *v.* McMullen, 80 Conn. 160, 67 Atl. 488; Guerini Stone Co. *v.* Carlin Cons. Co., 240 U. S. 264, 60 L. Ed. 636.

[4] Mobile County *v.* Linch, 198 Ala. 57, 73 So. 423.

the specifications, but one is incomplete because not showing certain materials to be used, one will be considered as supplemental to the other, and all will be read together.[1] Where the contract mentions a specific and definite date to commence work and to complete it, a general statement in the specifications fixing a different time from the time fixed in the contract and imposing damages for delay cannot apply and the contract will control.[2] But if there is inconsistency between the specifications and the contract and the former cannot be ignored, the contract is void.[3] Where a subcontract to furnish stone for abutments of a bridge provided that the stone must comply with the original contract, which was made a part of the subcontract for greater particularity and to make the provisions of the subcontract clear, and only such parts of the original contract as might be applicable were incorporated, such a reference to the original contract will not bind the subcontractor to comply with the provisions requiring extras to be on the written order of the engineer.[4] A letter written by a contractor to the public body and attached to the written contract before it is executed amounts to a modification of the formal terms of the contract to the extent at least of showing how such terms must be construed.[5] A letter which is delivered to a public body contemporaneously with the accepted proposal will be read as part of the contract and explanatory thereof, and will limit the place where the work is to be done as therein described.[6]

[1] Smith *v.* Bd. of Educ. of Parkersburg, 76 W. Va. 239, 85 S. E. 513.
[2] Miller *v.* Hamilton, 216 Fed. 131. See Dean *v.* Mayor, 167 N. Y. 13, 60 N. E. 236.
[3] U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535.
[4] Beattie *v.* McMullen, *supra.*
[5] Sanborn *v.* U. S., 46 Ct. Cl. 254.
[6] N. Y. Metal Ceiling Co. *v.* New York, 133 N. Y. App. Div. 110.

§ 187. Several Statutes Constituting Agreement will be Construed Together.

Where several acts of Congress taken together constitute the contract between the United States and its contractor, they are to be construed together as one act, and one part will be interpreted by another.[1] In like manner an ordinance made part of a contract will be read with it.[2]

§ 188. Agreement to Agree to do Something.

An agreement to do a certain thing and an agreement to agree to do it are legally identical,[3] and in contemplation of law, the refusal to carry out the latter agreement carries the same consequence in damages.[4]

§ 189. Instruments Annexed or Referred to.

Where other instruments are made a part of the contract by annexation or reference they will be interpreted as part thereof.[5] But maps, profiles, estimates and proposals constitute no part of the consummated agreement between the parties, except as they are referred to in the contract and by such reference incorporated into and made a part of it.[6] Accordingly reference for a limited purpose will make the principal contract a part of a subcontract or other contract only for that purpose.[7] Where there is a

[1] U. S. *v.* Cent. Pac. R. Co., 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180.

[2] State *ex rel.* Keith *v.* Comm. Council, 138 Ind. 455, 37 N. E. 1041.

[3] North Bergen Bd. of Educ. *v.* Jaeger, 67 N. J. L. 39, 50 Atl. 583.

[4] Lynch *v.* Mayor, 2 N. Y. App. Div. 213; Pennell *v.* Mayor, 17 *Id.* 455; Williams *v.* New York, 118 *Id.* 756, 763, 764, 192 N. Y. 541, 84 N. E. 1123.

[5] Riley *v.* Brooklyn, 46 N. Y. 444; Dean *v.* New York, 167 N. Y. 13, 60 N. E. 236; Barry *v.* New York, 38 N. Y. App. Div. 632; Cent. Bit. Pav. Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663. See Isaacs *v.* Dawson, 70 N. Y. App. Div. 232, 174 N. Y. 537, 66 N. E. 1110.

[6] Riley *v.* Brooklyn, *supra;* Dunn *v.* New York, 205 N. Y. 342, 98 N. E. 495.

[7] Beattie *v.* McMullen, 80 Conn. 160, 67 Atl. 488; Guerini Stone Co. *v.* Carlin Cons. Co., 240 U. S. 264, 60 L. Ed. 636; People *ex rel.* Williams Eng. Co. *v.* Metz, 193 N. Y. 148, 85 N. E. 1070, 194 N. Y. 145, 86 N. E. 986.

difference or discrepancy between the contract and a plan or specifications, the contract will control.[1] Where there are differences between several sets of plans furnished by a public body as a guide for estimates of work proposed to be let, the one furnished to a contractor which he made the foundation of his contract will control. Since such differences in plans are traceable to the fault of the public body, it will not be permitted to take advantage of its own wrong to the prejudice of the contractor.[2]

§ 190. Reference to a Prior Abandoned Contract.

Where a public body makes a contract to complete a prior abandoned contract, the new contract is independent of the old and stands the same as if no other had been made. The new contractor is entitled to nothing for what the former contractor did and is responsible for no default of his. Reference to the old contract in the new is only to measure the amount of work to be done thereunder. There is no privity of contract by which he can claim to be exempt from the application of a statute passed after the execution of the abandoned contract.[3]

[1] Dean *v.* Mayor, 167 N. Y. 13, 60 N. E. 236; Palladino *v.* Mayor, 56 Hun, 565, 125 N. Y. 733, 26 N. E. 757; Harvey *v.* U. S., 8 Ct. Cl. 501; Miller *v.* Hamilton, 216 Fed. 131.

[2] Sexton *v.* Chicago, 107 Ill. 323; Beckwith *v.* New York, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121; Dean *v.* Mayor, *supra.*

[3] People *ex rel.* Williams Eng. Co. *v.* Metz, 193 N. Y. 148, 85 N. E. 1070, 194 N. Y. 145, 86 N. E. 986.

CHAPTER XXVIII

PARTS IMPLIED

§ 191. Existing Law Part of Contract.

The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.[1] But where the parties do not intend the erection of a fence around a reservoir and no mention of it is made in the contract, the provisions of a statute relating to the erection of fences will not be injected into a contract, for this would be to add a term to the contract not agreed upon by the parties, and this the court cannot do.[2] Where a railroad company entered into a contract to grade a street over which the county at the time of the contract had jurisdiction, the law will presume that the parties contracted with reference to the facts and the law as they existed at such time.[3]

§ 192. Terms Implied in Contracts.

There are many terms of a contract which, while not actually expressed therein, will be implied by law. Although not actually uttered, terms which the law implies and which the parties intended to express but failed, will be

[1] Rees *v.* Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72; U. S. *v.* Dietrich, 126 Fed. 671; Armour P. Co. *v.* U. S., 153 Fed. 1, 19; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 550, 18 L. Ed. 403; Jefferson Bd. of Education *v.* Littrell, 173 Ky. 78, 190 S. W. 465; Milwaukee *v.* Raulf, 164 Wis. 172, 159 N. W. 819; Gregg School Township *v.* Hinshaw, — Ind. App. —, 132 N. E. 586.

[2] Mayor &c. Jersey City *v.* Jersey City W. S. Co., 76 N. J. Eq. 607, 76 Atl. 3.

[3] Ettor *v.* Tacoma, 77 Wash. 267, 137 Pac. 820.

included therein by force of law.[1] The law existing at the time and place of the contract is part of it.[2] Provisions of law or of the Constitution specially applicable to the subject-matter of the contract are a part of it, need not be referred to therein, and the parties are presumed to have contracted with reference to these. Under such existing laws the terms of a contract for the rendering of a public service are subject to the right of government to regulate the service and the rate of charge.[3] Although the general rule is as stated above, that necessary implications are as much a part of it, as though plainly expressed in it, yet in order to apply this rule the implication must arise from the language employed in the instrument, or be indispensable to effectuate the intention of the parties. When the language employed is obscure, imperfect or ambiguous, the instrument is open to construction and then the prime object is to ascertain the intention of the parties. In such case the court can go no further than to collect the intention from the language employed, as applied to the subject-matter in view of the attending circumstances. The court cannot by implication put into a written instrument what the parties have left out of it, though by mistake, nor can it reject what they have put into it, unless repugnant to some other part.[4]

When a written contract is silent in regard to a matter of great importance to the parties, it is not lightly to be presumed the parties intended to imply an agreement

[1] New York *v.* Delli Paoli, 202 N. Y. 18, 94 N. E. 1077; Kinser Cons. Co. *v.* State, 125 N. Y. Supp. 46, 54, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871; Crocker *v.* U. S., 21 Ct. Cl. 255; Taylor *v.* Dist. of Columbia, 17 Ct. Cl. 367.

[2] See § 191, *ante*.

[3] State *ex rel.* Ellis *v.* Tampa W. Wks. Co., 56 Fla. 858, 47 So. 358, 57 Fla. 533, 48 So. 639.

[4] Caverly Gould Co. *v.* Vil. of Springfield, 83 Vt. 396, 76 Atl. 39.

upon that point. The implication must appear from the whole instrument. The courts when called upon to imply an obligation or duty not appearing in the terms of a contract, must take great care that they do not make the contract speak where it was intentionally silent, or that they make it speak contrary to the intention of the parties.[1] Implications contrary to the express terms of a contract will not be indulged. A contractor will not be required to do something entirely outside of the contract, especially where it is apparent, not only from the nature of the transaction, but from the words of the stipulations of the contract, that such obligation belongs to the public body.[2] There is an implied undertaking on the part of each party to every contract that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part.[3] The law implies good faith in the making and performance of contracts.[4] In like manner the law implies the term reasonable, and eliminates unreason from many contracts as unavoidably intended by the parties and shown from the surrounding circumstances.[5] In connection with the implication of existing law as part of every contract it is to be remembered that the general law of the State is part of or an amendment of all municipal charters and is to be read into every public contract with the charter provisions affecting such contracts in so far as applicable.[6]

[1] East Ohio Gas. Co. *v.* Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. N. S. 92; Churchyard *v.* Queen L. R., 1 Q. B. 173, 195.

[2] Gibbons *v.* U. S. 15 Ct. Cl. 174, aff'd 109 U. S. 200, 27 L. Ed. 906; Preston *v.* Syracuse, 158 N. Y. 356, 53 N. E. 39.

[3] Cameron Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162.

[4] Gardner *v.* Cameron, 155 N. Y. App. Div. 750.

[5] Ferguson Cont. Co. *v.* State, 70 Misc. (N. Y.) 472; Kinser Cons. Co. *v.* State, 204 N. Y. 381, 97 N. E. 871; Jersey City *v.* Flynn, 74 N. J. Eq. 104, 70 Atl. 497; State *ex rel.* Ellis *v.* Tampa W. Wks Co., 56 Fla. 858, 47 So. 358.

[6] Matter of Plattsburgh, 157 N. Y. 78, 51 N. E. 512.

In every contract for the performance of construction work or the erection of public buildings there is an implied term that the public body for whom the work is contracted to be done will not obstruct or delay the contractor, but on the contrary will always facilitate the performance of the work to be done by him.[1] A contractor may therefore recover loss entailed while awaiting the location of his work by the engineer.[2] But a public body does not insure that immediate possession and use of the site shall be given to the builder. Its undertaking is that so far as its own acts are concerned possession and use shall be given. If this is prevented by a trespasser, the public body is not liable in damages.[3]

[1] Ryder Bldg. Co. *v.* Albany, 187 N. Y. App. Div. 868.
[2] U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.
[3] Porter *v.* Tottenham Urban Council, 84 L. J. K. B. 1041.

CHAPTER XXIX

EXTRINSIC CIRCUMSTANCES

§ 193. Construction by the Parties.

Where the language used by the parties to a public contract is indefinite or ambiguous and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.[1] There is no surer way to find out what the parties mean than to see what they have done, to get at the intention behind what they say, as illuminated by what they do. Some courts have extended this rule and declare that where work is performed in accordance with a plan and with materials supposed and understood to be what was required by contract and to be paid for at the contract price, but such work and materials are furnished in variance from the literal meaning of the contract, the practical construction which the parties put upon its terms and according to which the work was done, cannot be ignored or disregarded, but must prevail over the literal meaning of the contract.[2] This is not the prevailing rule. Since this rule of construction is like all others, a

[1] Shipman *v.* Dist. of Columbia, 18 Ct. Cl. 291, 119 U. S. 148, 30 L. Ed. 337; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50, 19 L. Ed. 594; Bd. of Comm'rs of Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Stover *v.* Springfield, 167 Mo. App. 328, 152 S. W. 122; Douglass *v.* Morrisville, 89 Vt. 393, 95 Atl. 810; Ferguson Cont. Co. *v.* State of N. Y., 70 Misc. 472, 489; Beaver Eng. & Cont. Co. *v.* New York, 192 N. Y. App. Div. 662; Nicoll *v.* Sands, 131 N. Y. 19, 29 N. E. 818.

[2] Dist. of Columbia *v.* Gallaher, 124 U. S. 505, 31 L. Ed. 526, aff'g 19 Ct. Cl. 564; Bowers Hydr. Dredging Co. *v.* U. S. 211 U. S., 176, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214; O'Dea *v.* Winona, 41 Minn. 424, 43 N. W. 97.

mere aid to ascertain the intention of the parties, its application should find no instance, except in cases of ambiguity, indefiniteness or obscurity. Practical construction should, therefore, not prevail over a clear and definite term of a contract and only becomes important or entitled to consideration in cases of doubt.[1] Nevertheless it is declared that when the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one. But the doctrine is never applied unless the door is opened by an ambiguity, which is the foundation of the principle upon which the doctrine is rested. The ambiguity required to exist must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind before the principle of practical construction can be applied.[2] A practical construction cannot be adopted if inconsistent with a fair and reasonable rendering of the contract itself.[3] Such a construction is, however, presumed to be right because made by the parties themselves when under the influence of conflicting interests. This is true whether the construction is by contemporaries or successors, since it is self-interest which makes construction safe. If the parties do not know what they meant, who can know? Practical construction therefore by uniform and unquestioned acts from the inception of the contract, especially where long

[1] Barber A. P. Co. *v.* St. Paul, 224 Fed. 842; Packwaukee *v.* Amer. Bridge Co., 183 Fed. 359; Covington *v.* South Covington &c. St. Ry. Co., 147 Ky. 326, 144 S. W. 17; Butte Water Co. *v.* Butte, 48 Mont. 386, 138 Pac. 195; Reed *v.* Trenton, 80 N. J. Eq. 503, 85 Atl. 270; Bounds *v.* Hubbard City, 47 Tex. C. A. 233, 105 S. W. 56.

[2] New York *v.* New York City Ry. Co., 193 N. Y. 543, 86 N. E. 565.

[3] Merrifield *v.* Canal Commr's, 212 Ill. 456, 72 N. E. 405.

continued, is entitled to great, if not controlling weight, for it shows how the makers understood their own contract.[1] There can be no sound basis for a claim of practical construction in the absence of knowledge of the facts and circumstances to which the construction relates. No practical construction, therefore, will arise from the fact that a public body overpaid its contractor, if when such overpayments are discovered, further payments are refused.[2] Parties may be bound by estoppel to accept a practical construction put upon a contract by themselves.[3]

§ 194. **Evidence to Aid Construction.**

As shown in the preceding sections, where the terms of a contract are uncertain or obscure, the court may avail itself of all lawful aids through evidence which will shed light upon the intention of the parties and upon the rights granted upon the one side and the obligations assumed upon the other.[4] All of this should, of course, be done fairly, without enlarging rights or increasing obligations and with the sole purpose in mind of enforcing the contract of the parties and not of making a new contract for them.

Thus the manner in which a prior contract between the same parties with precisely the same terms as the one sued upon was understood, may be shown for the purpose of ascertaining the proper execution of the second contract.[5] It will not be supposed that contractors agreed to

[1] Carthage T. P. Mills *v.* Carthage, 200 N. Y. 1, 93 N. E. 60.

[2] Burroughs *v.* Sch. Dist., 155 Wis. 426, 144 N. W. 977.

[3] Walker *v.* U. S., 143 Fed. 685. See Bowers Hyd. D. Co. *v.* U. S., *supra;* State *ex rel.* South Bend *v.* Mountain Spring Co., 56 Wash. 176, 105 Pac. 243.

[4] St. Louis *v.* St. Louis & S. F. R. Co., 228 Mo. 712, 129 S. W. 691; Stover *v.* Springfield, 167 Mo. App. 328, 152 S. W. 122; Douglass *v.* Morrisville, 89 Vt. 393, 95 Atl. 810; County *v.* Katz-Craig Cont. Co., 181 Iowa, 1313, 165 N. W. 422.

[5] Bray *v.* U. S., 46 Ct. Cl. 132.

bear losses which might occur by reason of defects in a plan imposed upon them against their objections, especially when such defects might have been foreseen and guarded against by the public body through the exercise of ordinary care and skill.[1] Where in the plans and specifications it is provided to build a dam to lines and levels and in another place to build it upon solid rock and in some places the lines and levels do not meet solid rock, evidence to determine the true interpretation of the contract may be resorted to.[2] Warrants issued by public bodies are admissible to show the construction which the parties themselves placed upon the contract while it was being performed and was in force.[3] While it is a general rule, that the construction of a written instrument is a question of law for the court,[4] when its interpretation depends upon the sense in which the words were used, or the sense in which the promisor had reason to believe the promisee understood them, or depends upon facts aliunde in connection with the written language to ascertain the intent of the parties, the question becomes a mixed question of law and fact,[5] and is to be determined by a jury.[6] In other words, when in the construction of a contract a legal principle is not involved, but merely a determination as to whether facts presented in evidence come within the provisions of the contract, legally construed, such a question of construction is a question of fact to be determined

[1] Moore *v.* U. S., 46 Ct. Cl. 139.
[2] Douglass *v.* Morrisville, *supra.*
[3] Mobile County *v.* Linch, 198 Ala. 57, 73 So. 423.
[4] Trustees of Easthampton *v.* Vail, 151 N. Y. 463, 45 N. E. 1030; Fellows *v.* Dorsey, 171 Mo. App. 289, 157 S. W. 995; Keefer *v.* Sunbury School Dist., 203 Pa. St. 334, 52 Atl. 245.
[5] Trustees of Easthampton *v.* Vail, 151 N. Y. 463, 45 N. E. 1030.
[6] Norton *v.* Shields, 132 Fed. 873, 143 Fed. 802; Kieburtz *v.* Seattle, 84 Wash. 196, 146 Pac. 400.

by a jury.[1] But evidence under this rule may not go to the extent of allowing parties to prove their construction of a contract.[2]

§ 195. Subject-Matter of Contract—Scope and Extent of Meaning—Conditions at Site.

If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular site and find all the materials, and do all the labor, his agreement is to erect and complete. No matter what the expense he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the public body. If it cannot be erected without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or sinking the building or structure, the rule is the same. He must overcome them because he has agreed to do so. There is no distinction between accidents that could be foreseen when the contract was made and those that could not, between accidents by the fault of the contractor and those where he is without fault, they all rest upon the simple principle that where his promise is absolute, it must be performed, if performance be not absolutely impossible.[3] Of course, each case depends upon the terms of the contract involved. In like manner where a contractor constructed a road across a swamp and agreed to keep it in repair for a year and after the road was finished it sank from its new grade, by reason of the

[1] Tomasek *v.* Edwardsville, 183 Ill. App. 493; Internat. Cont. Co. *v.* U. S., 47 Ct. Cl. 158.

[2] Indep. Sch. Dist. *v.* Swearingen, 119 Iowa, 702, 94 N. W. 206.

[3] Trenton *v.* Bennett, 27 N. J. L. 513.

instability of the ground, he is required to restore the road to the grade required by the contract without additional compensation. This is because his agreement was absolutely made with full knowledge of the existence of the swamp or of all the facts at his command, and when his work of refilling is done it is but the performance of his contract for which he received the agreed price.[1] Where, however, under such a contract a street has been completed and accepted and the street sinks and there is no agreement to keep in repair, the contractor is not bound to again fill in the street.[2] There are many circumstances which change such a result as where representations or warranties of conditions at the site are made by the public body, upon which the contractor has the right to rely,[3] or plans showing the results of examinations of the site are made the basis of bids.[4] Where the contractor agrees to clear the site and to grade the surface for a specified distance around the building, a reasonable construction requires him to remove any high ground within the foundation walls, and he cannot allow a mound to remain in the center of the site higher than the floor of the structure, or put the cost of its removal upon the public body.[5] Where the plans require a cellar of a stated depth, he must find a foundation to hold the building even if to do so he must dig deeper than the cellar level.[6] Under a contract with a public body for the equipping of a pier

[1] Riley *v.* Brooklyn, 46 N. Y. 444. See Tompkins *v.* Dudley, 25 N. Y. 272.
[2] Duncan *v.* Cordley, 199 Mass. 299, 85 N. E. 160, 17 L. R. A. N. S. 697.
[3] Hollerbach *v.* U. S. 233 U. S. 165, 58 L. Ed. 898; U. S. *v.* Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 735; U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166; Christie *v.* U. S., 237 U. S. 234, 59 L. Ed. 933; Sexton *v.* Chicago, 107 Ill. 323; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665; Bd. of Water Comm'rs *v.* Robbins, 82 Conn. 623, 74 Atl. 938.
[4] Faber *v.* New York, 222 N. Y. 255, 118 N. E. 609.
[5] Fonder *v.* U. S., 48 Ct. Cl. 198.
[6] Trenton *v.* Bennett, *supra.*

by which the public body agreed to build hatchways and to select a pattern of elevators, if alterations in the hatchways became necessary to permit the elevators approved by the public body to be operated therein, the obligation rested on the latter to make such alterations rather than the contractor.[1] Subsidence of soil at the site is ordinarily assumed by one who undertakes to erect a structure upon a particular site,[2] but not unforseen conditions due to the fault of the public body, through its negligent omission to repair its own structures at the site.[3] He has the right to assume that a means existing to perform some work in connection with the contract will be in working order and will operate to do what is expected of it.[4] And when such an instrumentality is required to be built at the site, the contractor who builds it has the right to expect it to be sufficient to accomplish the purpose at the site for which it is provided.[5]

§ 196. Representations of Fact as to Conditions of Work under Contract—Person Making Them Bound and Must Bear Loss.

Where a contract or specifications forming part of it speak with certainty as to a part of the conditions or the substance or character of materials to be encountered in the course of the performance of the work, the public body is bound thereby. If the public body by these writings assures the contractor of the character or nature of conditions or materials, such will be presumed to be a matter

[1] North Eastern Cons. Co. *v.* New York, 217 N. Y. 320, 112 N. E. 53.

[2] Simpson *v.* U. S., 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217; Dermott *v.* Jones, 2 Wall. (U. S.) 1, 17 L. Ed. 762; U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166.

[3] Sundstrom *v.* State, 213 N. Y. 68, 106 N. E. 924.

[4] Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204.

[5] U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166.

concerning which it speaks with knowledge and authority.[1] Such positive assertions of the nature or condition of the work are representations upon which a contractor has a right to rely without an investigation to prove their falsity, and this is true although there may be general language in portions of the contract requiring an independent investigation of the facts.[2] When loss results from representations which prove mistaken, these positive statements of fact must be taken as true and binding upon the public body, and accordingly such loss must be borne by it rather than by the contractor.[3] Where the matters set out do not amount to representations and the burden is put upon the contractor by the contract he must take the burdens which he thus assumes.[4] Where the contractor has been misled by erroneous statements in the specifications he may have relief in equity.[5] In a contract to reconstruct a building partially destroyed by fire, where the contract called for the uninjured parts to remain and the government actually stripped and dismantled the burnt building, what was left standing constituted under the circumstances a representation that it

[1] Hollerbach *v.* U. S., 233 U. S. 165, 58 L. Ed. 898; U. S. *v.* Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 735; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119; Christie *v.* U. S., 237 U. S. 234; Y. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166; Dd. of Water Comm'rs *v.* Robbins, 82 Conn. 623, 74 Atl. 938; Sexton *v.* Chicago, 107 Ill. 323; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665; Faber *v.* New York, 222 N. Y. 255, 118 N. E. 609; Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204; King *v.* Duluth, 78 Minn. 155, 80 N. W. 874; Capital City B. & P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835.

[2] Hollerbach *v.* U. S., *supra*. U. S. *v.* Spearin, *supra*, Long *v.* Athol, *supra*, U. S. *v.* Atlantic Dredging Co., *supra*.

[3] Hollerbach *v.* U. S. *supra*. Sexton *v.* Chicago, *supra*. Bd. of Water Comm'rs *v.* Robbins, *supra*.

[4] Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604; Semper *v.* Duffey, 227 N. Y. 151, 124 N. E. 743; Simpson *v.* U. S., 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217; Callahan Con. Co. *v.* U. S., 47 Ct. Cl. 177; Lewman *v.* U. S. 41 Ct. Cl. 470; Foubnation Co. *v.* State, 193 N. Y. App. Div. 513.

[5] U. S. *v.* Utah &c. Stage Co. Co., 199 U. S. 414, 424, 50 L. Ed. 251, aff'g 39 Ct. Cl. 420; Long *v.* Athol, *supra*.

had been adjudged so far uninjured that it was to remain, upon the faith of which a contractor might rely in making his estimate.[1] But a contractor may not rely upon representations or expressions of opinion made by an engineer, nor may he rely upon the knowledge or conduct of individual members of a board. Neither the engineer nor the individual members can bind the public body. It is represented only by its entire board, not by the individuals who compose the board, and can only be bound by the action of the board directly or through agents empowered to act or speak for it.[2]

[1] U. S. *v.* Gibbons, 109 U. S. 200, 27 L. Ed. 906, aff'g 15 Ct. Cl. 174.
[2] San. Dist. of Chicago *v.* Ricker, 91 Fed. 833.

CHAPTER XXX

PRIVITY OF CONTRACT

§ 197. Who may Enforce—Contract for Benefit of Third Persons.

One who is a stranger to a contract, to its consideration and obligations, has no right to enforce it. He can neither claim a benefit nor sustain a liability under it.[1] Such was the rule of the common law. A more liberal modern rule provides that where a contract is made between two persons upon a valuable consideration whereby a third person is to be paid money or receive some benefit such third person may enforce the contract although not named therein.[2] But to entitle such third person to recover it is necessary that the contract should have been entered into for his benefit, and if it appears from the terms used that the contract was solely for the benefit of the parties thereto, third persons cannot recover under its provisions.[3] Although the distinction was formerly made only in favor of a simple contract, the rule now is that the doctrine applies to written agreements under seal, even though the

[1] Evans *v.* U. S., 42 Ct. Cl. 287; St. Louis *v.* Wright Cont. Co., 202 Mo. 451, 101 S. W. 6.

[2] Coster *v.* Mayor, 43 N. Y. 399, 411; Little *v.* Banks, 85 N. Y. 258; Smyth *v.* New York, 203 N. Y. 106, 96 N. E. 409; Bradley *v.* McDonald, 218 N. Y. 351, 361, 113 N. E. 340; Rigney *v.* N. Y. C. & H. R. Co., 217 N. Y. 31, 111 N. E. 226; Pond *v.* New Rochelle W. Co., 183 N. Y. 330, 76 N. E. 211; Schnaier *v.* Bradley Cont. Co., 181 N. Y. App. Div. 538; Searles *v.* Flora, 225 Ill. 167, 80 N. E. 98; Albin Co. *v.* Comm., 128 Ky. 295, 108 S. W. 299; St. Louis *v.* Von Phul, 133 Mo. 565, 34 S. W. 843; St. Louis *v.* Wright Cont. Co., 202 Mo. 451, 101 S. W. 6; Gorrell *v.* Greensboro W. S. Co., 124 N. C. 328, 32 S. E. 720; Nashville *v.* Toney, 10 Lea (Tenn.). 643.

[3] Searles *v.* Flora, *supra;* Decatur *v.* Jaudon, 136 Ga. 854, 72 S. E. 351; St. Louis *v.* Wright Cont. Co., 202 Mo. 451, 101 S. W. 6.

third person is not privy to the consideration.[1] To apply this doctrine, in the case of residents of a city under a public contract made by a municipality with its contractor, it should appear, that there was an intent on the part of the municipality to secure some benefit to its residents and further, that there was some obligation or duty owing from the municipality to the resident, which gives the latter a legal or equitable claim to the benefit of the contract, and which makes him in privity with the municipality so as to enable him to bring his action against the contractor.[2] Where a contract between a city and a railroad company contained a covenant that the latter would pay damages resulting to any person or property from the work to be done, including damages resulting from change of grade of the street, which it would pay at its own expense and assume such liability, the intent on the part of the municipality to benefit abutting property is clear. The words can be read in no light but to show an intent that the railroad should pay change of grade damages and these could only relate to those whose property abutted the work. The obligation or duty essential to exist between the municipality and the landowner arises from the fact that the municipality is under some obligation to protect its inhabitants and when it enters into a contract for public work, which may result in damage to one of such inhabitants, for which otherwise he would be without a remedy, the municipality may require the contractor to compensate the person injured.[3]

[1] Coster *v.* Albany, *supra;* Rigney *v.* N. Y. C. & H. R. Co. *supra;* Pond *v.* New Rochelle W. Co., *supra.*

[2] Smyth *v.* New York, *supra;* Rigney *v.* N. Y. C. & H. R. Co., *supra;* Schnaier *v.* Bradley Cont. Co., *supra.*

[3] Rigney *v.* N. Y. C. & H. R. Co., *supra;* Schnaier *v.* Bradley Cont. Co., *supra.*

In like manner the contractor with the city for construction of the first subway in New York was held liable for the negligence of a subcontractor which caused the explosion of a dynamite magazine and destroyed part of the Murray Hill Hotel, under a clause which made the principal contractor liable for all damages done to abutting property resulting from negligence during the performance of the work.[1] Similarly where a water, light or railroad company in consideration of the right to lay and maintain its water, light or rail lines through the streets of a municipality, enters into a contract to furnish the public service undertaken at a rate not to exceed a sum stated, an individual resident may have an injunction restraining the company from enforcing collection of a rate in excess of that fixed by the contract.[2] Where the provisions of a public contract which impose upon the contractor responsibility for all damages is merely a contract of indemnity, to save the public body harmless, no action upon such a contract or its covenants may be maintained by third persons who otherwise would have no cause of action.[3]

[1] Smyth *v.* New York, *supra.*
[2] Pond *v.* New Rochelle W. Co., *supra.*
[3] Corrigan Trans. Co. *v.* Sanitary Dist., 125 Fed. 611, 137 Fed. 851.

CHAPTER XXXI

QUALITY OF CONTRACT

§ 198. Joint and Several Contracts.

An obligation entered into by more than one person is presumed to be joint, and a several responsibility will not arise, except by words of severance.[1] But a contract may not be joint when interpreted with reference to the nature of the work. Where a contract does not require a public body to place curbstones around all the trees upon a street, its terms cannot be construed as requiring that the entire work proposed should be finished as a condition precedent to the right to recover of any abutter for the work done, against his premises.[2]

§ 199. Entire or Severable Contracts.

There is no general rule which can be formulated and applied in every case to determine whether a contract is entire or severable. Like other questions of construction, it is one to be determined by the intention of the parties as gathered from the light shed by the surrounding circumstances.

Some of the tests suggested are whether the consideration is single or is capable of apportionment, and whether the work is single or divisible.[3] It is no doubt the general

[1] Phila. *v.* Reeves, 48 Pa. St. 472; Henry *v.* Mt. Pleasant Tp., 70 Mo. 500; New Orleans *v.* Ripley, 5 La. 122, 25 Am. D. 175. See Geer *v.* Tenth Sch. Dist., 6 Vt. 76; U. S. *v.* Price, 9 How. (U. S.) 83, 13 L. Ed. 56.

[2] Springfield *v.* Harris, 107 Mass. 532.

[3] Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Coburn *v.* Hartford, 38 Conn. 290; Bridgeport *v.* Scott Co., 94 Conn. 461, 109 Atl. 162; McCauley *v.* Brooks,

rule that where the considerations moving from each party to the other are practically concurrent, the contract is indivisible, and a failure by the public body to pay the consideration is, therefore, a bar to an action for not rendering the service which the contractor is obligated to render under the contract, when the action is brought by the party failing to pay.[1]

§ 200. Entire and Severable Contracts—Divisibility of Consideration Determining.

So, where the compensation for the whole job of repairing a bridge is to be determined by the amount of lumber wrought into the bridge, the contract is entire.[2] Again, where the contract is to pay weekly estimates only when the work progresses in accordance with the contract, a contractor who encounters difficulties in loose soil may not stop this work and go on with rock excavation and recover. Such a contract is indivisible, which must be performed or broken as a whole, and the fact that payments are to be made in installments will not of itself make the contract severable.[3] A contract to pay when the contract shall be wholly carried out, completed and accepted, the subject of which is to furnish, deliver, set and fix complete all the iron work in a city hall, is not divisible, merely because the amount to be paid is made up by stating the estimated cost of each story separately and the roof, and then adding the whole together. If there is nowhere an agreement to receive and pay for the work by stories, but on the con-

16 Cal. 11; Young *v.* Chicopee, 186 Mass. 518, 72 N. E. 63; Nat. Cont. Co. *v.* Comm., 183 Mass. 89, 66 N. E. 639; U. S. Trust Co. *v.* Guthrie Center, 181 Iowa, 992, 165 N. W. 188. See Quigley *v.* County of Sumner, 24 Kan. 293.

[1] State *ex rel.* South Bend *v.* Mountain Spring Co., 56 Wash. 176, 105 Pac. 243.

[2] Young *v.* Chicopee, 186 Mass. 518, 72 N. E. 63.

[3] National Cont. Co. *v.* Comm., 183 Mass. 89, 66 N. E. 639.

trary the payment is to be made of the aggregate amount when the contract is wholly carried out, the contract is entire.[1] Where the method of payment or the severance of items of price or work amount to an apportionment of the consideration to separate portions of the contract, this will make the contract severable.[2] When a contract is for an entire term of five years, the payments by the State to be made in monthly installments, and the consideration consists not merely of these payments, but of many improvements to be made, the contract is incapable of apportionment, and the contract is entire.[3] If a contract is to erect a schoolhouse and the contract price is payable in installments as the work progresses, such a division is made, not to apportion the price to different parts of the work, but to meet the wants of and aid the contractor in completing the work. It is not intended to sever the entirety of the contract and make the payment of the installments, payments for such parts of the work, as might be done when they were payable. The consideration of the covenant to complete is the whole price and a contractor cannot, therefore, after payment of part of the installments, refuse to go on and complete and yet retain that part of the price he has received.[4]

§ 201. Entire and Severable Contracts—Divisibility of Work or Objects of Contract as Determining.

Where a contract consists of three separate items of employment, the validity of the latter two of which depends upon the adoption of preliminary plans and the voting of bonds or the raising of funds by some other methods

[1] Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.
[2] State *v.* Scoggin, 10 Ark. 326.
[3] McCauley *v.* Brooks, 16 Cal. 11, 38.
[4] Trenton *v.* Bennett, 27 N. J. L. 513; Tompkins *v.* Dudley, 25 N. Y. 272.

for the construction of a waterworks system, the contract is divisible, the latter part being dependent upon terms and conditions which never became effective.[1] If a contract is made for the preparation of plans and specifications and for superintending the erection of a building and one sum is to be paid for the entire service, this is an entire contract in object and price covering all of these services.[2] Where a contract provides for the construction of several objects of work, and there is but one written instrument covering all the undertakings, if it sets forth several contracts, each of which relates to each undertaking or one contract covering several independent and separable subjects, it may be held good as to some and invalid as to others.[3] But where the performance of several items of work cannot be enforced because the contract as to them is invalid, and the contract is indivisible, no part of the contract can be separately enforced.[4] Where covenants are severable they are enforceable. A covenant to supply free water to a house is no longer binding if the house is so enlarged as to lose its identity and the measure of what would be a reasonable supply is no longer ascertainable. But a similar covenant to supply a reasonable amount of free water to farm buildings is severable and enforceable.[5]

§ 202. Entire and Severable Contracts—Estoppel.

Where by his own act a contractor places the construction of divisibility upon a contract and operates under such a construction for many years, he will be estopped from

[1] Tecumseh *v.* Burns, 30 Okla. 503, 120 Pac. 270.
[2] Spalding County *v.* Chamberlin, 130 Ga. 649, 61 S. E. 533.
[3] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Uvalde A. P. Co. *v.* New York, 128 App. Div. 210, 198 N. Y. 548, 92 N. E. 1105.
[4] Ness *v.* Board of Comm'rs, 178 Ind. 221, 98 N. E. 33.
[5] Hadham Rural Council *v.* Crallan, 83 L. J. Ch. 717.

pleading its indivisibility, and he cannot claim the benefit of that portion of the contract which subserves his interest and repudiate that portion which provides for the performance of a duty on his part.[1]

[1] State *ex rel.* South Bend *v.* Mountain Spring Co., 56 Wash. 176, 105 Pac. 243.

CHAPTER XXXII

COVENANTS AND CONDITIONS

§ 203. Dependent and Independent Covenants.

Whether a covenant is a dependent or an independent covenant must be determined according to the meaning and intention of the parties to it.[1] This intention must be gathered from the contract according to the ordinary rules of construction, and one of the infallible tests is whether or not a breach can be compensated for in damages. If it can be, then the covenants are held to be independent and a party must pay for what he receives under the contract, but may recoup the damages he has suffered by a breach upon the part of the other party. If a breach cannot be compensated for in damages, then the covenants are dependent, and must of necessity be so, else there could be no remedy at all. Where it is therefore the intention to rely upon a provision for performance and not on a remedy for non-performance, then performance is a condition precedent, and must be shown before recovery can be had upon the contract.[2] If the intent of the parties is that performance by the public body shall be conditioned on performance by the contractor, the covenants are independent. Where a franchise was granted upon condition that

[1] Curran Print. Co. *v.* St. Louis, 213 Mo. 22, 111 S. W. 812; Daly *v.* Carthage 143 Mo. App. 564, 128 S. W. 265; Quinlan *v.* Green County, 157 Fed. 33, 19 L. R. A. N. S. 857, aff'd 211 U. S. 582, 53 L. Ed. 335; Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311.

[2] Daly *v.* Carthage, *supra.*

certain enlargements and improvements of a water system should be made, the covenant is dependent, cannot be compensated in damages and no recovery can be had for water furnished until its performance.[1] But where a water company agreed to furnish water of a certain pressure, this provision must be considered as an independent collateral covenant which it was not necessary to prove was performed to entitle a recovery. The furnishing of water was the principal thing, to which everything else is subordinate under such a covenant, and if the principal covenant or guaranty is not performed, the public body may recoup any damages which it suffers by reason of defective performance.[2] The requirement that a bond shall be given for the faithful performance of a contract, to be approved by the comptroller and mayor of a city, in the absence of provision in the ordinance showing it to be a condition precedent, is a mutual and independent covenant, and where a good and sufficient bond is tendered and approved by the comptroller, but the mayor refuses to approve, the cancellation of his name by the comptroller upon the contract is nugatory and the contract is complete without the mayor's approval.[3] Where a purchaser of lands from a county engaged to introduce certain settlers within a certain time and made certain engagements as to reclaiming, and the performance of these was not made a condition but rested in covenant, the agreement, although a part of the consideration of the contract, is independent, and non-performance raises an action merely and will not annul the entire contract. It is, therefore, only where covenants are mutual and dependent that the failure of one party to perform absolves the

[1] Daly *v.* Carthage, *supra.*

[2] Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311. See Comanche *v.* Hoff, 170 S. W. (Tex.) 135.

[3] Curran Print. Co. *v.* St. Louis, *supra.*

other and authorizes him to rescind the contract.[1] Where a railroad company contracts with a municipality in consideration of permission to use its streets to keep the space between the tracks in repair under the direction of such competent authority as the common council might designate, the failure of the common council to make the designation is not an indispensable prerequisite to the performance of such covenant. It is not a condition precedent, but a mere reservation of a right of supervision.[2] Where in a contract a city undertakes as a fundamental, single and indivisible agreement to deliver all its ashes, rubbish and street sweepings from a certain territory at fourteen specified dumps with picking privileges, and in return for which the contractor, by like single and indivisible agreement, promises to perform labor at the entire collection of dumps and make payment for the privilege in an undivided sum of money, one agreement in its entirety is the foundation for and consideration of the other. When the city fails to furnish four out of the fourteen dumps, the city commits a material breach of its contract. The default is not of a covenant which is incidental, inconsequential or subordinate, but of a mutual and dependent covenant which lies at the basis of the entire agreement, goes to its entire consideration, affects the contractor's entire obligation thereunder and gives him a right of rescission.[3]

§ 204. Conditions Precedent and Subsequent.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it, depends upon the order in which

[1] Emigrant Co. *v.* County of Adams, 100 U. S. 61, 25 L. Ed. 563.
[2] Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 475.
[3] Clarke Cont. Co. *v.* New York, 229 N. Y. 413, 128 N. E. 241.

the parties intend the several stipulations to be performed. Calling stipulations conditions is not conclusive. If, from the contract or other circumstances, it appears that it was not the intention of the parties to make their performance conditions precedent, they will not be considered such.[1] Conditions are not favored, and a provision will not be construed to be a condition, unless the intention to make it such is manifest. The judicial inclination is to construe the language of an agreement as a covenant if it can be so resolved.[2] The destructive results, which follow a construction that particular language constitutes a condition, will not be permitted unless the essential features of a condition appear.[3] Acceptance of a contract is acceptance of its conditions whether a party expressly binds himself to them or not.[4]

A conditional contract is one, the performance of which, depends on a condition. Whether a given stipulation is to be considered a condition precedent, a condition subsequent, or an independent agreement, is purely a question of intent to be determined by examining not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required to be done and the subject-matter to which it relates.[5] No particular form of words is necessary to create the condition. It is likewise a difficult question oftentimes to decide whether a stipulation is a covenant or a condition. The difference relates largely to the remedy. If the breach of a contract pertains to the validity of the instru-

[1] Quinlan *v.* Green County, 157 Fed. 33, 19 L. R. A. N. S. 857, aff'd 211 U. S. 582, 53 L. Ed. 335.
[2] *Idem.*
[3] *Idem.*
[4] Storm *v.* U. S., 94 U. S. 76, 24 L. Ed. 42; Quinlan *v.* Green County, *supra.*
[5] Quinlan *v.* Green County, *supra;* Bucksport & B. R. Co. *v.* Brewer, 67 Me. 295; Skowhegan W. Co. *v.* Skowhegan, 102 Me. 323, 66 Atl. 714.

ment or is a ground for forfeiture, it is a condition. On the other hand, if the remedy for the breach is merely an action for damages, the stipulation breached is a covenant. The breach of a covenant is not ground for termination. A party must perform, and sue later for damages for breach of the covenant.[1]

A contract to supply street lamps, connect them with necessary gas mains, and supply the necessary gas for street lighting was affected by an order made under the Defense of the Realm Act restricting lighting and later extinguishing all lighting. Where the contract price was an annual sum per lamp it was impossible to allocate payments to these respective items. Since the order did not make lighting permanently unlawful, or the contract absolutely impossible of performance, the supplying of gas could not be held to be a condition precedent to the right of the company to recover the payments provided by the contract.[2] While sometimes the words "upon condition," "provided that," "so that" and other like phrases, may be helpful in determining whether particular language imports a condition,[3] they are not conclusive.[4]

[1] Daly *v.* Carthage, 143 Mo. App. 564, 128 S. W. 265; Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311.

[2] Leiston Gas Co. *v.* Leiston-cum-Sizewell Urban Council, 85 L. J. K. B. 1759. See Metropolitan Water Board *v.* Dick, 87 L. J. K. B. 370, aff'g 86 L. J. K. B. 675, for the effect upon the contract where a like order made the contract unlawful.

[3] Curran Printing Co. *v.* St. Louis, 213 Mo. 22, 111 S. W. 812.

[4] Green County *v.* Quinlan, 211 U. S. 582, 53 L. Ed. 335, aff'g 157 Fed. 33, 19 L. R. A. N. S. 857; Bell *v.* Boston, 101 Mass. 506. See Mercer County *v.* Coovert, 6 Watts & S. 70; State *v.* Collins, 6 Ohio, 126.

CHAPTER XXXIII

TIME IN CONTRACT

§ 205. Time of Performance.

If a contract is silent as to the time of performance or payment, the law implies that a reasonable time was intended.[1]

§ 206. Duration of Contract.

Where contracts are made by ordinance, for a named period, as for example, a contract, designating a paper for the publication of legal notices, and the publication continues after such period the contract is valid. If it does not appear that the designation was revoked, or the employment terminated, the presumption is that the employment continues. Until rescinded in terms the resolution lasting as an expression of determination to have its work done at certain rates and as to all but the party, is perpetual until rescinded by action of the city. Its continuance beyond the named period gives a valid basis to constitute a binding continuing contract.[2]

If there is no hint at any limitation of time in a grant but the public body grants all the right and authority that it has the capacity to grant, to a railroad, lighting, water, telephone or other public service company to construct, hold and operate its lines on certain named streets, such a grant is perpetual if the public body has authority

[1] McArthur *v.* Cheboygan, 156 Mich. 152, 120 N. W. 575; Boesen *v.* Potter County, 173 S. W. (Tex.) 462; Gustavino *v.* U. S., 50 Ct. Cl. 115.

[2] Argus Co. *v.* Mayor, 55 N. Y. 495; Matter of Phillips, 60 N. Y. 16.

to make a perpetual grant.[1] A contract which on its face purports to endure forever and to confer a perpetual franchise, will not be construed as a grant for a definite period, namely, limited to the life of the company holding the grant, since it is ultra vires and void.[2] While it is the policy of the law to declare contracts of this character unenforceable if for an indefinite time or an unreasonable period, upon the theory that a municipality exercising its power to contract may not for an unreasonable time fasten upon its residents rates and obligations impossible of change,[3] yet where these contracts are not malum in se, there is a strong tendency to sustain the grant as valid to the extent at least that it does not transcend a reasonable or lawful period. Since it is only the excess which offends the policy of the law, grants will be declared invalid only as to the time unauthorized.[4] Any rights of duration or occupation must appear in plain terms and not equivocally, as any ambiguity in the terms of a grant will be resolved in favor of the public body. Whatever is not unequivocally granted is withheld and nothing will pass to a grantee by mere implication.[5] Where parties express no period of duration and no definite time can be implied from the nature of the contract or the circumstances surrounding its making, it

[1] Covington *v.* So. Covington St. Ry. Co., 246 U. S. 413, 62 L. Ed. 802; Northern Ohio Trac. Co. *v.* Ohio, 245 U. S. 574, 62 L. Ed. 481; Ownesboro *v.* Owensboro W. Wks. Co., 243 U. S. 166, 61 L. Ed. 650; Ownesboro *v.* Cumberland T. & T. Co., 230 U. S. 58, 57 L. Ed. 1389.

[2] Westminster *v.* Westminster W. Co., 98 Md. 551, 56 Atl. 990.

[3] Home Tel. Co. *v.* Los Angeles, 211 U. S. 265, 53 L. Ed. 176, aff'g 155 Fed. 554; Mobile Elec. Co. *v.* Mobile, 201 Ala. 607, 79 So. 39 L. R. A. 1918 F. 667.

[4] Mobile Elec. Co. *v.* Mobile, *supra;* Columbus Water Wks. *v.* Columbus, 48 Kan. 99, 28 Pac. 1097; Oregon S. Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315.

[5] Knoxville W. Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353; Blair *v.* Chicago, 201 U. S. 400, 50 L. Ed. 801; Mitchell *v.* Dakota Tel. Co., 246 U. S. 396, 62 L. Ed. 793.

is unreasonable to impute an intention to make its duration perpetual. The only reasonable intention to impute is that the contract may be terminated by either on his giving reasonable notice of his intention to the other.[1]

[1] Childs *v.* Columbia, 87 S. C. 566, 70 S. E. 296.

CHAPTER XXXIV

COMPENSATION

§ 207. Construction—Compensation—Rules Controlling.

Where the compensation specified in a contract is a percentage of the contract price, or of the total cost of construction, the recovery is limited to the amount specifically named in the contract as the sum contemplated by the parties, and it will not be extended so as to give a percentage of a sum paid for superior efficiency of an article sold or to cover damages paid by the public body for its breach of the contract beyond the contract price.[1] The contract price will generally control so far as it can be made applicable.[2] Where no price is mentioned, the law implies a price which is reasonable.[3]

[1] Chicago *v.* Hunt, 227 Ill. 130, 81 N. E. 243; Boller *v.* New York, 117 N. Y. App. Div. 458.

[2] Quigley *v.* Summer County, 24 Kan. 293; Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

[3] Murtagh *v.* Dist. of Columbia, 10 D. C. 455; Elgin *v.* Joslyn, *supra;* Eigemann *v.* Posey County, 82 Ind. 413.

CHAPTER XXXV

ASSIGNMENT OF CONTRACT

§ 208. **Operation—Assignment of Contract.**

The general rule is that an executory contract not necessarily personal in its character, which can, consistent with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable in the absence of other agreement in the contract.[1] If the service to be rendered or the condition to be performed is not necessarily personal, involves no relation of confidence or the exercise of personal skill or science, or such as considering the contract obligation can only be performed by the original contractor, its assignment will not operate as a rescission of or constitute a cause for terminating the contract.[2] The assignment may include all contingent and incidental benefits or results of an executory contract, as well as the earnings under it and thus entitle the assignee to the damages flowing from its violation. This right of action for damages for the breach would survive to the personal representative of the injured party, and such survival is one test of assignability.[3] Moneys due and to grow due may be assigned even before the doing of the work or the performance of the conditions upon which the payments depend. These expectancies, as well as existing rights of action, may be assigned and

[1] Devlin *v.* Mayor, 63 N. Y. 8; Munsell *v.* Lewis, 2 Denio, 224; St. Louis *v.* Clemens, 43 Mo. 395; Philadelphia *v.* Lockhardt, 73 Pa. St. 211; Chapin *v.* Pike, 184 Mass. 184, 68 N. E. 42; Ernst *v.* Kunkle, 5 Ohio St. 520.

[2] Devlin *v.* Mayor, *supra.*

[3] Devlin *v.* Mayor, *supra.*

the rights of the assignees protected and enforced.[1] If the contract is personal, and performance by the party is of its essence, then it cannot devolve upon his representatives and so cannot be assigned, at least without consent.[2]

Therefore the general rule is that public contracts can be assigned without violating public policy so long as the public body retains the personal obligation of the original contractor and his sureties for its faithful performance. In the absence of contract or statutory provision prohibiting it, such an assignment is valid.[3]

§ 209. Operation—Assignment of Contract—Statute and Contract Prohibition.

In most cases where public contracts are now let by the Nation, State or municipality, provision is inserted therein under statutory sanction forbidding their assignment.[4]

In the case of government contracts it is provided that if the contract is assigned the government is discharged from all liability thereunder and the contract becomes invalidated.[5]

Some provisions of contract require that the consent of the public body shall be obtained in writing to the assignment and that in the absence of such consent no right

[1] Field *v.* Mayor, 2 Seld. (N. Y.) 179; Hall *v.* Buffalo, 2 Abb. N. Y. Ct. of App. Dec. 301; Devlin *v.* Mayor, *supra.*

[2] Devlin *v.* Mayor, *supra;* White's Ex'rs. *v.* Commonwealth, 39 Pa. St. 167; Pike *v.* Waltham, 168 Mass. 581, 47 N. E. 437; Delaware County *v.* Diebold Safe Co., 133 U. S. 473, 488, 33 L. Ed. 674.

[3] Devlin *v.* Mayor, *supra;* Harris *v.* Baltimore, 73 Md. 22; Fortunato *v.* Patten, 147 N. Y. 277, 41 N. E. 572; Murphy *v.* Plattsmouth, 78 Neb. 163, 110 N. W. 749.

[4] See various statutes and charters.

[5] Burck *v.* Taylor, 152 U. S. 634, 38 L. Ed. 578; Hobbs *v.* McLean, 117 U. S. 567, 29 L. Ed. 940; Goodman *v.* Niblack, 102 U. S. 556, 26 L. Ed. 229; Francis *v.* U. S., 11 Ct. Cl. 638, aff'd 96 U. S. 354, 24 L. Ed. 663; Dulaney *v.* Scudder, 94 Fed. 6; R. S. of U. S., §. 3737, Comp. Stat., § 6890.

under the contract nor to any moneys to grow due by its terms may be asserted against the public body. These provisions do not render assignments void which are made without obtaining the consent of the public body.[1] They are inserted solely for the benefit of the public body and will operate to prevent any claim being asserted against it in the absence of consent.[2] While it is a shield to protect the public body, it cannot be used as a weapon between several assignees to defeat the rights of a senior assignee who fails to secure the necessary consent.[3] Such a provision of the contract forbidding assignment without the consent of the public body may be waived.[4] It has the right to refuse to recognize an assignment made without its consent or to refuse to have any dealings with the assignee under it. Where it deals with and recognizes him, makes payments to him and accepts the work, the failure to consent in writing to the assignment becomes immaterial and the assignee acquires equitable rights which entitle him to the money in the possession of the public body.[5] These provisions have been variously construed. Some authorities favor a strict construction of the terms. Others favor a liberal construction toward the public body. A prohibition against assigning the contract has been considered to prevent an assignment of

[1] Fortunato *v.* Patten, 147 N. Y. 277, 41 N. E. 572.

[2] Fortunato *v.* Patten, *supra;* Welles *v.* Portuguese Am. Bk., 211 Fed. 561; Dulaney *v.* Scudder, 94 Fed. 6, 10; Federal Mfg. & P. Co. *v.* U. S., 41 Ct. Cl. 318; Omaha *v.* Standard Oil Co., 55 Neb. 337, 75 N. W. 859; Burnett *v.* Jersey City, 31 N. J. Eq. 341.

[3] Fortunato *v.* Patten, *supra;* Dulaney *v.* Scudder, 94 Fed. 6.

[4] Brewster *v.* Hornellsville, 35 N. Y. App. Div. 161; Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380.

[5] Staples *v.* Somerville, *supra;* Taber *v.* Ferguson, 109 Ind. 227, 9 N. E. 723; McCubbin *v.* Atchison, 12 Kan. 166; Bk. of Harlem *v.* Bayonne, 48 N. J. Eq. 246, 21 Atl. 478; Dickson *v.* St. Paul, 97 Minn. 258, 106 N. W. 1053; Norton *v.* Roslyn, 10 Wash. 44, 38 Pac. 878; Ocorr & Rugg *v.* Little Falls, 77 N. Y. App. Div. 592, 608, 178 N. Y. 622, 70 N. E. 1104.

a single installment.[1] But it would seem that one could assign the benefits of performance, so long as he retained the burdens and the obligation of performance, without violating a provision which did not at the same time forbid an assignment of the moneys to grow due.[2] Such an assignment is not an assignment of the contract.[3] An assignment of part of the contract or an equitable assignment does not fall within the prohibition of such a provision.[4] Neither does a judicial sale of the contract,[5] nor a partnership change,[6] nor an assignment in bankruptcy [7] nor a voluntary assignment.[8] Contracting with a third party to furnish material for the work does not violate the federal statute.[9] The defense of the invalidity of such an assignment to be availed of must be pleaded.[10]

[1] Omaha *v.* Standard Oil Co., *supra.*

[2] Lowry *v.* Duluth, 94 Minn. 95, 101 N. W. 1059; Dickson *v.* St. Paul, *supra.* Fortunato *v.* Patten, *supra;* Snyder *v.* New York, 74 N. Y. App. Div 421; Episcopo *v.* Mayor, 35 Misc. 623.

[3] Brace *v.* Gloversville, 167 N. Y. 452, 60 N. E. 779; Snyder *v.* New York, *supra.*

[4] Ocorr & Rugg *v.* Little Falls, *supra;* Hinkle Iron Co. *v.* Kohn, 229 N. Y. 179, 128 N. E. 113.

[5] St. Paul &c R. Co. *v.* U. S., 112 U. S. 733, 28 L. Ed. 861, aff'g 18 Ct. Cl. 405. See Prairie State Bank *v.* U. S., 164 U. S. 227, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185.

[6] Hobbs *v.* McLean, 117 U. S. 567, 29 L. Ed. 940.

[7] Erwin *v.* U. S. 97 U. S., 392, 24 L. Ed. 1065 aff'g 13 Ct. Cl. 49

[8] Goodman *v.* Niblack, 102 U. S. 556, 26 L. Ed. 229.

[9] U. S. *v.* Farley, 91 Fed. 474.

[10] Burke *v.* Mayor, 7 N. Y. App. Div. 128.

CHAPTER XXXVI

EXTRA WORK

§ 210. What It Is.

The term extra work usually includes all work required by a change of plan. It is difficult to conceive of extra work without a change of plan, and the fair construction of contracts which have inserted a provision for extra work is to include all work within such term which is necessitated by such changes, whether termed incidental or fundamental.[1] Extra work is work arising outside and entirely independent of the contract, something not required in its performance. Additional work on the other hand, is something necessarily required in the performance of the contract and without which it could not be carried out. The necessity for additional work, usually arises from conditions which cannot be anticipated and which are not open to observation and cannot be discovered until the specified work under the contract is actually undertaken.[2] Extra work has again been defined to consist of labor or materials not called for by the original contract.[3] It denotes something done or furnished in addition to, or in excess of, the requirements of the contract, something not required in its performance.[4] These questions relating

[1] Peole *ex. rel.* McCabe *v.* Snedeker, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133.

[2] Shields *v.* New York, 84 N. Y. App. Div. 502.

[3] Casgrain *v.* Milwaukee, 81 Wis. 113, 51 N. W. 88; Malloy *v.* Briarcliff Manor, 145 N. Y. App. Div. 483; U. S. Wood Preserving Co. *v.* New York, 138 *Id.* 841. See Coryell *v.* Dubois Borough, 226 Pa. St. 103, 75 Atl. 25.

[4] Fullerton *v.* Des Moines, 147 Iowa, 254, 126 N. W. 159.

to extra work depend for their decision upon the terms of particular contracts. Where the construction of an entire work is provided for at a fixed compensation, the hazards of it are assumed by the contractor, and if it turns out that he has made a mistake in his estimate or that the work is more expensive or difficult than he anticipated, he cannot ask for compensation for such unforeseen difficulties under the guise of extra work.

§ 211. Whether Work Is, Depends upon True Construction of Contract—Entirety.

Whether work is extra work depends upon a proper construction of each contract, its objects and purposes, the intention of the parties and what was within the contemplation of the parties as the work to be done.[1] Even though a contractor is to do a particular work for a sum total, payable in installments, so that the contract is an entire contract, this fact is not always controlling. The manner and means of doing the work may determine the question of extra work. If the contract is absolute to deliver a completed structure, that result must be accomplished even though parts of the work may have to be done several times and no claim for extra work may arise. But if the contract is to build a completed structure with materials furnished by the public body and the work proves insufficient, whether it be a tunnel which caves in because the timbering furnished by the public body is insufficient or the sand or cement or brick so furnished and used in a tunnel or a wall of a structure proves inferior and therefore the work becomes insecure, or because work done by some other contractor proves

[1] Uvalde Asphalt Pav. Co. *v.* New York, 154 App. Div. 112, 211 N. Y. 560, 105 N. E. 1100; U. S. *v.* Gibbons, 109 U. S. 200, 27 L. Ed. 906, aff'g 15 Ct. Cl. 174.

unstable,—in these and like cases the work to be done over again is clearly not within the contract, not within the contemplation of the parties, and its character as extra work cannot be governed by any principle of entirety of contract. The contractor is entitled to be paid where the extra work is caused by the fault of the other party.[1] So, where there is error in fixing grades and the public body has full knowledge of it and compels a contractor to proceed against his objection and extra work is thus occasioned, the public body is liable.[2]

§ 212. May not be Claimed where Work is Included in Contract or is Voluntarily Performed.

Work included in a contract, work or materials voluntarily performed or furnished without request and without knowledge of the public body afford no basis for a claim of extra work.[3] If on a reading of the entire contract it would appear that the intention of the parties was to include the work in dispute within the contract, it cannot be claimed to be extra work.[4] A practical con-

[1] Becker *v.* New York, 53 N. Y. App. Div. 301, 170 N. Y. 219, 63 N. E. 298; Becker *v.* New York, 77 N. Y. App. Div. 635, mod. O. G. 176 N. Y. 441, 68 N. E. 855.

[2] Idem.

[3] Duncan *v.* Miami County, 19 Ind. 154; West Chicago P. C. *v.* Kincade, 64 Ill. App. 113; Davies *v.* East Saginaw, 66 Mich. 37, 32 N. W. 919; O'Brien *v.* Mayor, 65 Hun, 112, 139 N. Y. 543; Gartner *v.* Detroit, 131 Mich. 21, 90 N. W. 690; Erickson *v.* U. S., 107 Fed. 204; Shipman *v.* Dist. of Columbia, 18 Ct. Cl. 291, 119 U. S. 148, 30 L. Ed. 337; McFerran *v.* U. S., 39 Ct. Cl. 441; Braden *v.* U. S., 16 Ct. Cl. 389.

[4] Langford *v.* Manchester, 196 Mass. 211, 81 N. E. 884; Palladino *v.* New York, 56 Hun, 565, 125 N. Y. 733, 26 N. E. 757; Crocker *v.* Buffalo, 90 N. Y. 351; Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Burns *v.* New York, 69 N. Y. App. Div. 214; Costa *v.* Cranford, 75 N. J. L. 542, 68 Atl. 160; Morgan *v.* Baltimore 58 Md. 509; Merrill Ruckgaber Co. *v.* U. S., 241 U. S. 387, 60 L. Ed. 1058, aff'g 49 Ct. Cl. 553; Sells *v.* Chicago, 201 Fed. 874; Conners *v.* U. S., 141 Fed. 16; Beattie *v.* McMullen, 82 Conn. 484, 74 Atl. 767; Geary *v.* New Haven, 76 Conn. 84, 55 Atl. 584; Rathbun *v.* State, 15 Idaho, 273, 97 Pac. 335.

struction by the parties as to whether work is extra work or is included in the contract will be given consideration in deciding the question.[1]

§ 213. Duty to Make Claim for Payment or Protest.

It is highly important, especially in public contracts, that claims growing out of changes in the contract should be promptly asserted, so that the public authorities will know what a public work is costing as it progresses and not be subjected to large increases in cost based upon stale claims presented years after the event.[2] Where a contractor accepts progress payments running over a long period of time, without a suggestion by way of presentation of a bill, reservation of a claim or protest of any sort, indicating that there has been any loss or disadvantage or that the contractor had any claim growing out of compliances with directions of the engineer upon the work, the public body cannot be held liable. The reasonable time to make the claim is before the work is done. If, therefore, a contractor is ordered to make changes and makes them without protest and later accepts payments and gives a receipt in full without protest or reservation, he ratifies the changes and cannot recover for same as extra work.[3] When, however, extra work is done by a contractor with knowledge of the public body to whom the contractor makes a claim that he expects to be paid therefor, an implied promise will arise to pay for such extra work.[4] Unless he objects, the contractor's assent is presumed

[1] Dist. of Columbia *v.* Gallaher, 124 U. S. 505, 31 L. Ed. 526, aff'g 19 Ct. Cl. 564; Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982.

[2] Ryan *v.* New York, 179 N. Y. App. Div. 181; Driscoll *v.* U. S., 34 Ct. Cl. 508. See Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

[3] Peck *v.* U. S., 14 Ct. Cl. 84; Martin *v.* U. S., 5 Ct. Cl. 215.

[4] Gibbons *v.* U. S., 15 Ct. Cl. 174, aff'd 109 U. S. 200, 27 L. Ed. 906; Cooper *v.* U. S., 8 Ct. Cl. 199.

where the change ordered is of a kind that would not reasonably be assumed to increase the cost. But where it will necessarily increase the cost, his assent is not presumed, and if he does not expressly assent he may recover the amount of such increase.[1] But in municipal contracts, if the work is clearly outside the contract and the competitive bidding statutes control, this rule cannot apply.[2]

§ 214. Authority of Engineer or Architect to Order.

The engineer or architect appointed by the public body to supervise the work is its special agent merely and has no power to bind the public body beyond the express authority conferred upon him by the contract. The acts of an architect or engineer in ordering extra work are their individual acts and cannot be regarded as the acts of the public body, except in so far as they are authorized by resolution or by contract.[3] An oral promise by the architect, even if founded upon a sufficient consideration, to pay for the work sued for as extra work, if made without authority, is not binding upon the public body.[4] Unless authority is shown in an engineer or architect, none will be implied.[5] If extra work is performed with the knowledge or consent or at the direction of the public body, it becomes liable therefor.[6]

[1] Ford *v.* U. S., 17 Ct. Cl. 60; Dale *v.* U. S., 14 Ct. Cl. 514; Merch. Exch. Co. *v.* U. S., 15 Ct. Cl. 270.

[2] Borough Cons. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480.

[3] Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Allen *v.* Melrose, 184 Mass. 1, 67 N. E. 1060; People *ex rel.* McCabe *v.* Snedeker, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133; Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Beattie *v.* McMullen, 82 Conn. 484, 74 Atl. 767; Sexton *v.* Cook County, 114 Ill. 174, 28 N. E. 608; Eigemann *v.* Posey County, 82 Ind. 413; Wood *v.* Ft. Wayne, 119 U. S. 312, 30 L. Ed. 416; Dale *v.* U. S., 14 Ct. Cl. 514; Merchants' Exch. Co. *v.* U. S., 15 Ct. Cl. 270; Dialogue *v.* U. S., 22 Ct. Cl. 196; Collins *v.* U. S., 34 Ct. Cl. 294.

[4] Stuart *v.* Cambridge, 125 Mass. 102.

[5] Dillon *v.* Syracuse, 9 N. Y. Supp. 98.

[6] Gibson County *v.* Motherwell I. & S. Co., 123 Ind. 364, 24 N. E. 115;

§ 215. Order or Request for Extra Work—Must Come from One with Authority.

A departure from the terms of a contract can find no legal justification unless it is done at the direction or by the request of one clothed with authority to change its provisions. Therefore, any change or modification of a contract by which extra work is entailed must be directed or requested by those empowered to change or add to the terms of a contract or at least must be done by the acquiescence of the public body.[1] The authority of the officer will not be implied.

§ 216. Provision for Order in Writing.

Where the contract provides that changes increasing the cost of work, or increasing or diminishing the cost must be agreed on in writing with the contractor and the architect or engineer, and there is a failure to comply with these provisions, no recovery may be had.[2] In like manner

O'Dea *v.* Winona, 41 Minn. 424, 43 N. W. 97; Steffen *v.* St. Louis, 135 Mo. 44, 36 S. W. 31; Messenger *v.* Buffalo, 21 N. Y. 196.

[1] Bonesteel *v.* Mayor, 22 N. Y. 162; People *ex rel.* McCabe *v.* Snedeker, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133; Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Wormstead *v.* Lynn, 184 Mass. 425, 68 N. E. 841; Boston Elec. Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787; Addis *v.* Pittsburgh, 85 Pa. St. 379; Leathers *v.* Springfield, 65 Mo. 504; West Chicago Pk. Comm. *v.* Kincade, 64 Ill. App. 113; Griffith Co. *v.* Los Angeles, 54 Pac. (Cal.) 383; Ferris *v.* U. S., 28 Ct. Cl. 332; Merchants' Exch. Co. *v.* U. S., 15 Ct. Cl. 270; Murphy *v.* U. S., 13 Ct. Cl. 372; Plumley *v.* U. S., 226 U. S. 545, 57 L. Ed. 342; Phœnix B. Co. *v.* U. S., 211 U. S. 188, 53 L. Ed. 141, aff'g 38 Ct. Cl. 492; Bd. of Imp. Comm'rs *v.* Galbraith, 123 Ark. 619, 185 S. W. 474.

[2] Duncan *v.* Miami County, 19 Ind. 154; Russell *v.* Sa Da Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. N. S. 68, 9 Jur. N. S. 718, 7 L. T. N. S. 804; Heard *v.* Dooly County, 101 Ga. 619, 28 S. E. 986; Archer *v.* Franklin County, 78 Wash. 20, 138 Pac. 299; Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. 139; Johnson *v.* Albany, 86 N. Y. App. Div. 567; McLaughlin *v.* Bayonne, 75 N. J. L. 106, 66 Atl. 1070; Condon *v.* Jersey City, 43 N. J. L. 452; McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 322; Duluth *v.* McDonnell, 61 Minn. 288, 63 N. W. 727; King *v.* Duluth, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 83 N. W. 526; Watterson *v.* Nashville, 106 Tenn. 410, 61 S. W. 782; Monarch *v.* McDonogh Sch. Fund, 49 La. Ann. 991, 22 So. 259; Capital City &c. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835.

where, as in some contracts, there must be in addition the approval by a particular officer, without such the contractor cannot recover, although it may be a hard case, since the extra work is not ordered in the manner required by the contract.[1] And a contractor may not rely upon the oral order of the engineer.[2] These provisions of the contract that the extra work shall be ordered in writing and that unless so ordered the public body shall not be liable therefor, constitute a condition precedent to any payment for extra work.[3]

§ 217. The Same—Engineer or Architect may not Waive.

The provision of a public contract that a contractor will not make any claim for extra work unless it is performed in pursuance of written contracts or orders cannot be waived by the engineer or architect in charge of the work.[4]

§ 218. The Same—Waiver—Estoppel.

When the public body itself having the power to make the contract authorizes and directs the doing of extra work, it will be estopped from contending that the contractor may not recover therefor, because the contract requires that an agreement or an order in writing should be

[1] Plumley *v.* U. S., 226 U. S. 545, 57 L. Ed. 342; Hawkins *v.* U. S. 96 U. S. 689, 24 L. Ed. 607 aff'g 12 Ct. Cl. 181; Millen *v.* Boston, 217 Mass. 471, 105 N. E. 453.

[2] Bd. of Commrs. *v.* Galbraith, 123 Ark. 619, 185 S. W. 474; Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443; Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Cashman *v.* Boston, 190 Mass. 215, 76 N. E. 671; Stuart *v.* Cambridge, 125 Mass. 102; Abells *v.* Syracuse, 7 N. Y. App. Div. 501; Cincinatti *v.* Cameron, 33 Ohio St. 336; McManus *v.* Philadelphia, 201 Pa. St. 619, 51 Atl. 322; Carson *v.* Dawson, 129 Minn. 453, 152 N. W. 842.

[3] O'Brien *v.* New York, 139 N. Y. 543, 35 N. E. 323; Millen *v.* Boston, 217 Mass. 471, 105 N. E. 453; Plumley *v.* U. S., 226 U. S. 545, 57 L. Ed. 342.

[4] Malloy *v.* Briarcliff Manor, 145 N. Y. App. Div. 403, 491; Van Buskirk *v.* Bd. of Educ. Passaic Tp., 78 N. J. L. 650, 75 Atl. 909.

made concerning it.[1] Such waiver may be shown by oral evidence.[2]

§ 219. Ratification of Act of Engineer in Failing to Issue Written Order.

A public body may ratify the act of its engineer or other officer who fails to order in writing extra work as required by the terms of its contract. Having full knowledge of the situation, if the public body recognizes the claim as valid by paying a part thereof and by accepting the work as performed, this will amount to a ratification of the act of the engineer in orally ordering the extra work, since this is equivalent to an original authority in writing.[3] But declarations of one or more or even all of the council members that they would be willing to consent to changes and allow extra pay for increased work, will not bind. The public body is bound by the council acting as a body when duly convened, not by the several members acting as individuals.[4] But while ratification may under some circumstances be inferred from receipt of benefits of performances, it will not be inferred unless by some express act of the council or governing body. No inference that it intends to accept any work performed without its authority or consent will be indulged even from the fact that the work done or structure erected is afterwards used by the

[1] Dwyer *v.* New York, 77 N. Y. App Div. 224; Hasbrouck *v.* Milwaukee, 21 Wis. 217; Elgin *v.* Joslyn, 36 Ill. App. 301, aff'd 136 Ill. 525, 26 N. E. 1090; Gibson County *v.* Motherwell I. & S. Co., 123 Ind. 364, 24 N. E. 115; Bartlett *v.* Stanchfield, 148 Mass. 394, 19 N. E. 549; Douglass *v.* Morrisville, 89 Vt. 393, 95 Atl. 810; Abell *v.* Syracuse, 7 N. Y. App. Div. 501; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Van Buskirk *v.* Bd. of Educ. Passaic Tp., 78 N. J., L. 650, 75 Atl. 909; Braden *v.* U. S., 16 Ct. Cl. 389; Riverside Tp. *v.* Stewart, 211 Fed. 873.

[2] Long *v.* Pierce County, *supra.*

[3] Abells *v.* Syracuse, 7 N. Y. App. Div. 501.

[4] Murphy *v.* Albina, 22 Oreg. 106, 29 Pac. 353. See Rowe *v.* Peabody, 207 Mass. 226; 93 N. E. 604.

public.[1] An officer who has no authority to contract has no authority to ratify. The acceptance and use of a building into which has been put unauthorized extra work, will not bind the public body to pay for it, even though it is beneficial. The public body may not decline to use the building and refuse acceptance, on the ground that it contains such work, and since it is not bound to take out the extra or unauthorized work, acceptance and use of the building is not proof of ratification.[2] Certificates of performance and completion of a contract which is illegal are not conclusive evidence of the validity of the very contract which provides for them and cannot be considered as ratifying extra work improperly ordered.[3]

§ 220. Provision that Order in Writing must be Obtained Therefor—When not Applicable.

When the contract provides that the contractor shall make no claim for extra work unless the same is agreed upon in writing, such a provision can only relate to work not within the contract, but has no application to changes and alterations in the work intended to be covered by the agreement. Where these changes and alterations are made by competent authority, recovery may be had for them without a written order.[4] So where there is a change in the manner of doing the specified work, this is not a change or modification of the contract and a written order is not required.[5] Where conditions at the site prove to be not as

[1] Murphy *v.* Albina, *supra* and cases cited; Zottman *v.* San Francisco, 20 Cal. 86, 81 Am. Dec. 96.

[2] Boston Elec. L. Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. 787.

[3] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.

[4] Dwyer *v.* New York, 77 N. Y. App. Div. 224; Wood *v.* Ft. Wayne, 119 U. S. 312, 30 L. Ed. 416; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Carson *v.* Dawson, 129 Minn. 453, 152 N. W. 842. See Beattie *v.* McMullen, 80 Conn. 161, 67 Atl. 488; Roemheld *v.* Chicago, 231 Ill. 467, 83 N. E. 291; Clark & Sons Co. *v.* Pittsburg, 217 Pa. St. 46, 66 Atl. 154.

[5] U. S. *v.* Barlow, 184 U. S. 123, 46 L. Ed. 463.

represented, and a radical change of plan becomes necessary thereby, and it conclusively appears that the decision of the engineer that all work rendered necessary by such change was included in the contract is arbitrary and because of a mistake of fact, the refusal of the engineer to issue a written order which was requested will not bar a recovery.[1] Where the provision for written order relates to extra work it will not cover additional work[2] and where it is required for alterations or changes it is not essential for extra work.[3]

§ 221. Done by Order of Public Body—Liability.

Where a contractor is required to perform extra services not embraced within the contract and the changes are made by the order of the engineer and the public body, the latter having ordered and required a change is not in a situation to defeat a contractor who obeys its orders and requirements. The public body will not be permitted to repudiate its own acts at the expense of the contractor, who does what is exacted of him.[4]

§ 222. Caused by Acts of Public Body by Ordering Superior Grade of Work or Material than Required—Making Work More Expensive.

When a public body requires a contractor to do work superior in quality to that which the contract specifies or compels the use of materials of superior grade to that indicated in the contract, and the work or materials so furnished are not provided voluntarily, but under order of the

[1] King *v.* Duluth, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 63 N. W. 727.
[2] Shields *v.* New York, 84 N. Y. App. Div. 502.
[3] Beattie *v.* McMullen, *supra.*
[4] Bd. of Hamilton County *v.* Newlin, 132 Ind. 27, 31 N. E. 465. See cases *ante*, § 214 note 3.

engineer and against the protest of the contractor, the latter is entitled to recover their reasonable value.[1] Some jurisdictions deny the right of recovery upon the basis of an implied obligation to pay for the excess value, and place the liability to respond in damages for breach of contract.[2]

§ 223. Where Work Specified is Made More Expensive to do Through Act of Public Body—Where Less Expensive.

If a public body, by its own act, causes the work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable to him for the increased cost or extra expense.[3] Because, however, a public body prescribes a less amount of work to be done will not authorize a claim that the work specified shall be paid for at a less rate than the contract provides. The public body has a right to demand the very work specified, but, if it accepts anything less as sufficient, it has no right to insist upon a rebate for that reason.[4] But if it is expressly provided in the contract that where changes in the work reduce the

[1] Beattie *v.* McMullen, 80 Conn. 160, 67 Atl. 488; White *v.* New Orleans, 15 La. Ann. 667; Barlow *v.* U. S., 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; Hawkins *v.* U. S. 12 Ct. Cl. 181, 96 U. S. 689, 24 L. Ed. 607; Callahan Cons. Co. *v.* U. S., 47 Ct. Cl. 229.

[2] See cases § 230 *post.*

[3] Horgan *v.* Mayor, 160 N. Y. 516, 55 N. E. 204; Brady *v.* Mayor, 132 N. Y. 415, 30 N. E. 757; Mulholland *v.* Mayor, 113 N. Y. 631, 20 N. E. 856; Messenger *v.* Buffalo, 21 N. Y. 196; Lentilhon *v.* New York, 102 N. Y. App. Div. 548, 185 N. Y. 549 77 N. E. 1190; Dwyer *v.* Mayor, 77 N. Y. App. Div. 224; McCann *v.* Albany, 11 *Id.* 378, 158 N. Y. 634, 53 N. E. 673; Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; King *v.* Duluth, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 83 N. W. 526; O'Neill *v.* Milwaukee, 121 Wis. 32, 98 N. W. 963; Chicago *v.* Duffy, 218 Ill. 242, 75 N. E. 912; Bd. of Hamilton County *v.* Newlin, 132 Ind. 27, 31 N. E. 465.

[4] Kingsley *v.* Brooklyn, 78 N. Y. 200; Finucane Co. *v.* Bd. of Education, 190 N. Y. 76, 82 N. E. 737; Beinhauer *v.* Gleason, 15 N. Y. St. R. 227, 119 N. Y. 658, 23 N. E. 1150; Brabazon *v.* Seymour, 42 Conn. 551.

cost of the work, the contract price shall be reduced proportionately, such provision will be enforced.[1]

Where a contract is modified with the consent of the public body and certain requirements as to the drying and finishing of floors were eliminated which resulted in a saving of cost to the contractor, the public body is not entitled to a reduction of the contract price nor to a counterclaim for the amount saved. It is only where it can be shown that the materials become injured because of the omission, or were inferior to that required by the specifications that any basis for a claim by the public body could arise.[2]

§ 224. Where Public Body Increases Work to be Done—Changing Conditions at Site.

Where a contractor is obliged to remove filling or other obstructions placed upon the line of the work by other contractors, changing the condition of the site as it originally was, and increasing the amount of the contractor's work, the public body is liable for the additional cost. Such work cannot be considered either as an obstruction or incumbrance or as a change of condition within the contemplation of a clause of the contract putting upon the contractor the burden of meeting these.[3]

§ 225. Where Contract Requires Complete Performance for Gross Sum—Mistake in Plans.

It is a general rule that if a contractor interposes a gross bid for the entire performance of a given work, he assumes the risk as to the nature and quantity of the work to be

[1] Beinhauer *v.* Gleason, 15 N. Y. St. R. 227, 119 N. Y. 658, 23 N. E. 1150; Conners *v.* U. S., 141 Fed. 16; Dale *v.* U. S., 14 Ct. Cl. 514.

[2] Finucane *v.* Bd. of Educ., *supra*.

[3] Rogers *v.* New York, 71 N. Y. App. Div. 618, 173 N. Y. 623, 66 N. E. 1115; Thilemann *v.* New York, 82 N. Y. App. Div. 136; U. S. *v.* Gibbons, 109 U. S. 200, 27 L. Ed. 906, aff'g 15 Ct. Cl. 174.

performed, even though approximate estimates of the quantities which are materially wrong have been prepared by the public authorities for the guidance of bidders.[1] Accordingly if a contractor, to remove the walls of a reservoir for such gross sum is required to do considerable more work because the plan does not show correctly the angle of slope, he may not recover therefor,[2] even though the quantities could only be determined by a careful mathematical calculation from the plan on the assumption that it was drawn to scale.[3]

§ 226. Representations in Plans and Specifications which Prove Erroneous.

If a contractor in reliance upon a representation of existing conditions at the site of work set out in the specifications or plans is subsequently required, because the representations prove untrue, to perform extra work or incur additional expense, he is entitled to recover the reasonable value of such extra work or expense entailed.[4] So also if certain appliances are furnished by the public body and represented to accomplish certain results, within the contemplation of the contract, during its performance,[5] or are to be constructed to accomplish such a purpose[6] and they fail entirely or prove inadequate and

[1] Lentilhon *v.* New York, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190; Sullivan *v.* Pres. Sing Sing, 122 N. Y. 389, 25 N. E. 366. See Leary *v.* Watervliet, 222 N. Y. 337, 118 N. E. 849.

[2] Lentilhon *v.* New York, *supra.*

[3] Lentilhon *v.* New York, *supra.* See Athol *v.* Long, 196 Mass. 497, 82 N. E. 665.

[4] Christie *v.* U. S., 237 U. S. 234, 59 L. Ed. 933; Hollerbach *v.* U. S., 233 U. S. 165, 58 L. Ed. 898; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119; Faber *v.* New York, 222 N. Y. 255, 118 N. E. 609; King *v.* Duluth, 78 Minn. 155, 80 N. W. 874; Capital City B. & P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835.

[5] Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204.

[6] U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166.

thereby extra work and expense is put upon the contractor, he may recover therefor.[1] But such a recovery is not permitted to a contractor who claims to be misled by the specifications but who with full knowledge of the facts enters into the contract.[2]

§ 227. Omissions and Acts of Public Body—Insufficiency of Plans and Specifications.

When a contractor performs work under a contract, and he is required to take it down and do it over or do it in a different manner by reason of the insufficiency of the plans and specifications and not from a non-compliance with such plans and specifications, he is entitled to recover the value of extra work caused thereby.[3]

§ 228. Where Contract Provides for Change without Compensation and Extra Work is Caused by Error of Engineer.

Where labor not within the original plan, but caused by a deviation from it is imposed upon a contractor through an erroneous change of grade caused by the engineer but not occasioned by an intentional change from that indicated upon the plan and profile, such work is not within the terms of a provision permitting a change without compensation. If in the correction of the error the contractor performs extra labor and incurs increased expense, he is entitled to recover according to its value and amount, and is not confined to the rate of compensation provided for similar work by the special contract.[4]

[1] Horgan *v.* New York, *supra;* U. S. *v.* Spearin, *supra.*
[2] O'Rourke *v.* Philadelphia, 211 Pa. 79, 60 Atl. 499.
[3] Capital City B. &. P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835; Bd. of Comm'rs, Carroll County *v.* O'Conner, 137 Ind. 622, 35 N. E. 1006; Murphy *v.* U. S. 13 Ct. Cl. 372.
[4] Mulholland *v.* Mayor, 113 N. Y. 631, 20 N. E. 856.

Where extra work is made necessary because of improper and erroneous instructions of the engineers to a contractor in the blasting out of a tunnel, and extra back masonry is made necessary by reason of the negligence of such engineers, the cost of such extra work must be borne by the public body.[1]

§ 229. Caused by Errors of Engineer—Work under Special Statute.

To impose liability for acts of an engineer in charge of work, the claim must be consistent with the terms of a special statute under which the work is being performed, and the contract made pursuant thereto. When work is being done by an agency of the State whose powers are limited by the terms of such special statute, which provides that in no event shall the city be made liable in an action brought upon the contract made under the statute for any greater or other obligation than that expressed in the contract, a recovery must be one wholly within and justified by the contract terms. Where accordingly extra work is caused by erroneous grades and lines furnished by the engineer and assumed to be even radical and harmful to the contractor, no recovery can be had since the action brought is necessarily an action under the contract made pursuant to the statute, and since the statute prohibited recovery for such extra cost, except in so far as it was specifically stated in the contract, no liability could arise beyond its very terms.[2]

§ 230. Contractor Required to do Over Again Work Already Done in Accordance with Contract.

Where a contractor is directed by the engineer to do

[1] Chicago *v.* Duffy, 218 Ill. 242, 75 N. E. 912.

[2] O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323; Trenton Co. *v.* U. S., 12 Ct. Cl. 147.

work a second time, already done in accordance with the contract, he may under protest comply with the directions of the engineer and recover thereafter the reasonable value of the work on the theory of a breach of contract.[1] Or where the authority is not that of an engineer but one who has authority to make the contract and to waive its provisions or change it, he may also sustain a recovery upon the theory of implied contract.[2] Of course, he is not bound to do the work a second time, he can stop work and stand upon his contention that the work is properly done, and bring his action to recover for labor and materials furnished under the contract and claim his prospective profits.[3] Where he does the work under protest and brings an action for damages for breach of contract because he is unjustifiably required to furnish extra materials and do extra work in spite of his protest, there must be fair room for debate as to whether the directions of the engineer were or were not justified by the contract provisions. It does not matter that it turns out that the contractor was right and that the official had no right to call on him to furnish the materials and do the labor.[4] But if the thing required is clearly beyond the limits of the contract, the contractor may not even under protest do it and subsequently recover damages.[5] The duty of a contractor is to follow no directions which amount to

[1] Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; Dwyer *v.* Mayor of N. Y., 77 N. Y. App. Div. 224; Lentilhon *v.* New York, 102 *Id.* 548, aff'd 185 N. Y. 549, 77 N. E. 1190; People *ex rel.* Powers & M. Co. *v.* Schneider, 191 N. Y. 523, 84 N. E. 1118; Borough Cons. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480.

[2] People *ex rel.* McCabe *v.* Snedeker, 106 N. Y. App. Div. 89, 97, 182 N. Y. 558, 75 N. E. 1133.

[3] Gearty *v.* Mayor, *supra.*

[4] Borough Cons. Co. *v.* New York, *supra.*

[5] Borough Cons. Co. *v.* New York, *supra;* Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Leary *v.* Watervliet, 222 N. Y. 337, 118 N. E. 849.

material modifications of the contract, or plans and specifications. The engineer has no authority in this respect, in the absence of express authorization from the governing body or of acquiescence in a departure from the terms of the contract.[1]

§ 231. Where Work Done and Materials Furnished are Outside Terms of Contract.

Where public officers have power to bind the public body for work done and materials furnished beyond the provisions of the contract, a recovery for the reasonable value thereof may be had in the absence of any agreement as to the cost of such additional labor and material.[2] The public body becomes liable upon an implied contract to pay the reasonable value of such extra work.[3] But the contract prices so far as the work is of the same character as that of the contract will govern and will afford the basis of recovery.[4] If these provisions cannot apply because the extra work done is different, then the rule of reasonable value applies and recovery is based upon such value.[5] If the method provided by the contract is that a particular officer shall estimate the amount of payment to

[1] Becker *v.* New York, *supra.*

[2] Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 33 L. Ed. 934; Thomas *v.* U. S., 32 Ct. Cl. 41; McFerran *v.* U. S., 39 Ct. Cl. 441; O'Hare *v.* Dist. of Columbia, 18 Ct. Cl. 646; Cooper *v.* U. S., 8 Ct. Cl. 199; Grant *v.* U. S., 5 Ct. Cl. 71; Gregory *v.* U. S. 33 Ct. Cl. 434; Callahan Const. Co. *v.* U. S. 47 Ct. Cl. 229; Bd. of Comm'rs Carroll County *v.* O'Conner, 137 Ind. 622, 35 N. E. 1006, 37 U. S. 16; Dwyer *v.* Mayor, 77 N. Y. App. Div. 224; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; Turner *v.* Grand Rapids, 20 Mich. 390; Hasbrouck *v.* Milwaukee, 21 Wis. 217.

[3] Bd. of Comm'rs Carroll County *v.* O'Conner, *supra;* Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

[4] Harrison County Comm'rs *v.* Byrne, 67 Ind. 21; Bd. of Comm'rs Carroll County *v.* O'Conner, *supra;* Bd. of Comm'rs Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Elgin *v.* Joslyn, *supra;* Clark *v.* Mayor, 4 N. Y. 338; Merchants Exch. Co. *v.* U. S., 15 Ct. Cl. 270.

[5] Akin *v.* Bloodgood, 12 Ala. 221; Elgin *v.* Joslyn, *supra;* Bd. of Fulton County *v.* Gibson, *supra.*

be allowed for extra work, this provision will bind.[1] Where the engineer refuses or fails to issue a written order for work of the character here considered, but does so under a claim that the work is included in the contract, and that question is debateable and not free from doubt, and the contractor does the work under protest, the contractor, when it eventually turns out that he was right, will not be precluded from recovering. His recovery will be by way of breach of contract, however, based both upon the ground of failure to perform his duty and issue the written order and for compelling the contractor to do something not fairly required by his contract. But where the engineer orders the contractor to do something clearly outside the contract he cannot do it even under protest and subsequently recover damages.[2] But if the public body, which has the power to make the contract, gives such a direction to a contractor, whether it insists that the work is within the contract and in fact it is clearly without the contract, is of no moment. The public body can waive the provision of the contract requiring a written order, a thing which the engineer cannot do. So that whether the work eventually is declared to be debateably or clearly outside the contract is of no concern to the courts. If the work was debateably outside or clearly without the contract provisions there is in either case a breach of contract for which the public body must respond in damages.[3]

[1] Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Hasbrouck *v.* Milwaukee, 17 Wis. 266.

[2] Uvalde Asphalt Pav. Co. *v.* New York, 154 N. Y. App. Div. 112, 211 N. Y. 560, 105 N. E. 1100; Borough Cons. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480 (act of engineer).

[3] Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804 (public body itself); Dwyer *v.* New York, 77 N. Y. App. Div. 224, (public body itself); Pacific Bridge Co. *c.* Clackamas County, 45 Fed. 217.

Thus where a contract calls for the grading of an existing street, the grade of which had not been legally changed when the contract was executed, and regrading was not called for by the contract, such work will not be considered as within the contemplation of the parties when the contract was made and therefore not included within the contract, and if the contractor is ordered to do such work, and performs it under protest, he may recover for a breach of his contract, in that he is required to do work not covered by his contract.[1] Where the action is thus for damages for breach of the contract, the contractor is entitled to recover according to its value and amount, and is not limited by the rate of compensation provided for similar work by the special contract.[2] Where a contract for street paving required a stated amount of sand beneath the pavement and the public body graded the street, so that, to conform the pavement to this grade, much more sand became necessary, the public body became liable for the extra material furnished.[3]

§ 232. Extra Work Caused by Failure of Public Body to Perform Its Part of Contract—or by Delay.

If the public body under its contract obligates itself to do part of the work or to furnish certain appliances at the site, or to construct them either independently, or under the contract, and it fails to do its part of the work or furnish the appliances, or if when the appliances are furnished or even constructed, they fail to operate or to accomplish the purpose which the parties intended and

[1] Uvalde A. P. Co. *v.* New York, 154 N. Y. App. Div. 112, 211 N. Y. 560, 105 N. E. 1100.

[2] Mulholland *v.* Mayor, 113 N. Y. 631, 20 N. E. 856.

[3] Messenger *v.* Buffalo, 21 N. Y. 196. See Allen *v.* Melrose, 184 Mass. 1, 67 N. E. 1060.

upon which as a basis the parties contracted, the public body is responsible for any extra work or expense entailed through its fault.[1] So, if it delays in the doing of that which the contract requires it to do, a similar liability follows.[2] If it undertakes to supply a part of the materials to be used upon the construction of a building or work and extra work or expense is caused in using it and installing it into the work because it is different than the kind which the contract requires, such added cost may be recouped from the public body.[3] Thus where brick is furnished by the public body which is different from the usual kind and extra expense is entailed in laying it, and the delay of the public body carries the performance of the contractor's work into the winter, and such fact causes further expense, the reasonable cost of these may be recovered.[4] But an allowance made to a contractor for delay caused by the removal of extra fill placed upon the line of the work by another contractor is not a defense to the contractor's claim for extra work in removing the fill.[5]

§ 233. Where Estimated Quantites are Approximate only and Work or Material Ordered is Within Contemplation of Parties.

If the proposals accompanying a contract for furnishing materials for a definite period state that an approximate estimate of quantities is given and the specifications indicate that these estimates are given only as a guide

[1] Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204; U. S. *v.* Spearin, 248 U. S. 132, 63 L. Ed. 166; Wood *v.* Ft. Wayne, 119 U. S. 312, 30 L. Ed. 416; Owen *v.* U. S. 44 Ct. Cl. 440; U. S. *v.* Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 735.

[2] Owen *v.* U. S., 44 Ct. Cl. 440 ;Wood *v.* Ft. Wayne, 119 U. S. 312, 30 L. Ed. 416; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

[3] Owen *v.* U. S., *supra.*

[4] *Idem.*

[5] Thilemann *v.* New York, 82 N. Y. App. Div. 136.

to the bidder, but are in no way to bind or limit the public body as to the amount which is to be ordered, the contract entered into will bind the contractor to furnish all the classes of materials which might be required by the public body during the year and will bind the public body to pay the price agreed for all materials ordered and accepted. In such a situation the vital and essential term of the contract is to deliver all the material which the public body requires for the purposes stated. When, therefore, it orders quantities in excess of the estimated quantities the contractor is bound by the contract prices and is not entitled to be paid at market rates.[1]

§ 234. Exceeding Appropriation.

In those jurisdictions in which recovery is denied, except upon a contract in writing, the municipality may not appropriate compensation for extra work except upon a contract in writing. No claim for such extra work can bind the municipality to pay for work done under the written contract but outside of it for which the municipality has paid the price stipulated in the contract. Such payment would be in excess of the original appropriation and cannot be lawfully made, and the fact that there is a further appropriation, is of no avail since there is no written contract to support its payment.[2]

§ 235. Where Contract Makes Provision for Extra Work at Contract Prices, these Control.

Where a change in plan is not radical, and the contract provides that alterations may be made by order of the engi-

[1] National Bldg. Supply Co. *v.* Baltimore, 100 Md. 188, 59 Atl. 726. See First Nat. Bk. *v.* Syracuse, 122 N. Y. App. Div. 172, 195 N. Y. 587, 89 N. E. 1100.

[2] O'Rourke *v.* Philadelphia, 211 Pa. St. 79, 60 Atl. 499. See Grant *v.* U. S. 5 Ct. Cl. 71.

neer, and if the public body increases the amount of the work, such increase shall be paid for according to the quantity actually done and at the price fixed by the contract, no claim for extra compensation may be made since such work is covered by the contract and the prices fixed by it.[1]

§ 236. Provision that Same Shall be Paid for at Contract Price only Applies to Reasonably Proportionate Increase.

The provision in public contracts that the contractor shall perform such extra work or make alterations in connection with the work specified in the contract as the engineer or other officer may direct, is limited in its meaning and effect by reason, and by the object of the contract to such extra work of proportionately small amounts as is necessary to the completion of the work contemplated by the parties [2] and to such modifications of the contemplated work as do not radically change its nature and its cost.[3] This restriction is as effectually a part of the contract as if it were written into the agreement in so many words.[4] Therefore, where material quantities of extra work or of alterations are required, substantially variant in character and cost from that contemplated by the parties when they made their agreement, such will be considered to constitute new and different work not governed by the terms of the agreement, for which the contractors may recover its reasonable value.[5] Sometimes under a reserved power to

[1] Allen *v.* Melrose, 184 Mass. 1, 67 N. E. 1060.

[2] Salt Lake City *v.* Smith, 104 Fed. 457, 465; County of Cook *v.* Harms, 108 Ill. 151; Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954; Elgin *v.* Joslyn, 136 Ill. 525, 531, 26 N. E. 1090.

[3] County of Cook *v.* Harms, *supra;* Salt Lake City *v.* Smith, *supra;* McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; National Cont. Co. *v.* Hudson River W. P. Co., 192 N. Y. 209, 84 N. E. 965.

[4] Salt Lake City *v.* Smith, *supra.*

[5] Salt Lake City *v.* Smith, *supra;* McMaster *v.* State, 108 N. Y. 542, 15 N. E.

order extra work, attempts are made to make radical changes in the character of the work so that it no longer resembles the work contracted to be done. Such reserved right does not authorize a reduction in the number of wings or stories planned in a public building, or a change from stone to wood or to brick. It will not authorize a complete change in plan which is subversive of the very contract purpose, or a change in the general character of the building or work intended. While it is difficult to draw the line of limitation between what it will authorize and what it will not, it will of course include such changes as frequently occur in the process of constructing buildings or public works, in matters of taste, arrangement and details.[1] A public body contracting to build a masonry dam may not change it, under such a reserved right to make alterations, from a masonry dam to an earth dam with a masonry core.[2]

§ 237. Unforeseen Obstructions or Difficulties—Outside Contract.

A provision in a contract that all loss or damage arising out of the nature of the work to be done under the contract, or from any unforeseen obstructions or difficulties which may be encountered in its prosecution, only applies to the work to be done and to the unforeseen obstructions or difficulties which may be encountered under the agreement. Where an unforeseen obstruction which subjects a contractor to a large amount of extra work is entirely outside of the contract, it stands entirely unaffected by

417; National Cont. Co. *v.* Hudson River W. P. Co., 192 N. Y. 209, 84 N. E. 965; County of Cook *v.* Harms, *supra;* Chicago *v.* McKechney, *supra.*

[1] McMaster *v.* State, *supra;* Nat. Cont. Co. *v.* Hudson River W. P. Co., *supra.*

[2] Nat. Cont. Co. *v.* Hudson Riv. W. P. Co., *supra.*

such a provision and if it relates to a duty owed by the public body to the contractor or the failure of appliances furnished for his use, it will render the former liable for the extra work caused.[1]

If a contractor in the course of performance of his work encounters extraordinary conditions or unforeseen difficulties and obstructions, and on account of these the work proves more expensive, he cannot thereby recover additional compensation. Ordinarily he assumes the risk and perils of the work and unless there be some representation or warranty by the public body he cannot escape them and shift the cost in violation of the obligations of his contract.[2] This is especially true in those cases where his contract is an absolute contract to do all the work and furnish all necessary labor and material,[3] and in those cases where the burden is placed upon him by the terms of the contract to satisfy himself of the accuracy of statements or of estimates and the public body disclaims any liability for discrepancies.[4] Where such extra cost is consequent upon performance of the exact terms of the contract, the contractor cannot claim payment for extra work.[5] So where a contract puts the risk from sudden influx of water into the work upon the contractor and obligates him to be prepared to remove it promptly, if the work is more laborious or more expensive than he

[1] Horgan *v.* New York, 160 N. Y. 516, 55 N. E. 204.

[2] Riley *v.* Brooklyn, 46 N. Y. 444; Penn. Bridge Co. *v.* Kershaw County, 226 Fed. 728; Devlin *v.* Mayor, 4 Duer, 337; Chicago *v.* Duffy, 179 Ill. 447, 53 N. E. 982; Leavitt *v.* Dover, 67 N. H. 94, 32 Atl. 156; Owens *v.* Butler County, 40 Iowa, 190.

[3] McCauley *v.* Des Moines, 83 Iowa, 212, 48 N. W. 1028; Trenton *v.* Bennett, 27 N. J. L. 513.

[4] Mairs *v.* Mayor, 52 N. Y. App. Div. 343, 166 N. Y. 618, 59 N. E. 1126; Semper *v.* Duffey, 227 N. Y. 151, 124 N. E. 743; Kelly *v.* New York, 87 N. Y. App. Div. 299, 180 N. Y. 507, 72 N. E. 1144.

[5] Slattery *v.* Mayor, 31 N. Y. App. Div. 127, 165 N. Y. 618, 59 N. E. 1130.

anticipates he cannot rightfully ask the public body to carry a burden for him which he assumed.[1]

Where a contractor agreed to keep an excavation clear of water, from whatever source, during the work, and he was required to make good any damage which his work might sustain from any cause before final acceptance, he could not make a claim against the public body for damage caused by a freshet in the river at the site of the work, and for the cost of recleaning or repainting his work.[2] A contractor takes the risk of the prices of labor and materials which he is bound to furnish to complete a specified job agreed to be done at a fixed price. It is of necessity one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices.[3]

§ 238. Caused by Failure of Contractor to Properly Perform His Contract.

If a contractor fails to perform his contract in the manner required, but on the contrary performs his work in violation of the terms of his contract, or defectively, and extra work becomes necessary on this account, he is not entitled to recover therefor.[4]

So where a contract provided that brick which was to be placed in the walls of a school building should be thoroughly wet before being laid in the walls, and part of the walls were constructed, when the architect dis-

[1] Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014.

[2] Johnson *v.* Albany, 86 N. Y. App. Div. 567.

[3] Chouteau *v.* U. S., 95 U. S. 61, 24 L. Ed. 371. See Gordon *v.* State, 233 N. Y. 1.

[4] Phœnix Bridge Co. *v.* U. S., 211 U. S. 188, 53 L. Ed. 141, aff'g 38 Ct. Cl. 492; Bowe *v.* U. S., 42 Fed. 761; Archer *v.* Franklin County Sch. Dist., 78 Wash. 20, 138 Pac. 299.

covered this provision had been disregarded, and he ordered the wall torn down and replaced according to the contract, no recovery for extra work occasioned will be permitted.[1]

If a contract allows false work to be used in constructing a bridge over a navigable river during the non-navigable period, the duty is imposed after that period, if the exigencies of the situation require it, to perform the work in some other suitable manner consistent with the non-interruption of navigation in the river. Therefore if a contractor is required to erect a lift span, he may not recover therefor as the work was not extra work but clearly within the contract.[2]

§ 239. **Decision of Engineer.**

The stipulation in public contracts that all questions and differences which may arise between the public body and the contractor under the contract shall be referred to the engineer, and his decision shall be final and conclusive, does not give the engineer jurisdiction to determine that work, which is not done under the contract or specifications, and which is not governed by them, was performed under and is controlled by the agreement, and his decision to that effect is not binding.[3] Not having jurisdiction of that question, he cannot confer it upon himself by erroneously deciding that he has it.[4]

Where the contract provides for a decision by the engineer on the question of extra work it is binding and conclusive,[5] unless it is unjust, partial, dishonest, arbitrary

[1] Archer *v.* Franklin County Sch. Dist., *supra.*
[2] Phœnix B. Co. *v.* U. S., *supra.*
[3] Salt Lake City *v.* Smith, 104 Fed. 457; U. S. *v.* Smith, 256 U. S. 11.
[4] Salt Lake City *v.* Smith, *supra.*
[5] Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Hasbrouck *v.* Milwaukee, 17 Wis. 266; Kennedy *v.* U. S., 24 Ct. Cl. 122.

or palpably wrong.[1] The question whether it is just and impartial or arbitrary is for the jury.[2] In a case, however, where the action is not under the contract for extra work but to recover damages for breach of the contract, the production of a certificate is not necessary, since the provision requiring a certificate has no application.[3] But this provision of a contract may be waived, and is waived by a modification which provides that, in event of differences the contractor shall do the work under protest. Such a provision will leave the adjudication of the contractor's rights open without impairment until after the full completion of the contract.[4]

§ 240. **Conditions Precedent to Recovery for Extra Work.** Any limitations upon the time within which or the manner in which claims for extra work shall be presented or sustained must be complied with before recovery is allowed, as these are generally held to be conditions precedent to such recovery.[5] The valuation of the work claimed as extra by the engineer is such a condition precedent.[6] But since conditions are not favored it must appear that it was intended to be a condition precedent before the courts will so declare it.[7] The obtaining by arbitration of an adjustment of value of extra work will

[1] Long *v.* Pierce County, *supra;* King *v.* Duluth, 78 Minn. 155, 80 N. W. 874; O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323.

[2] Long *v.* Pierce County, *supra.*

[3] Gearty *v.* Mayor, 171 N. Y. 61, 74, 63 N. E. 804.

[4] Galveston *v.* Devlin, 84 Tex. 319, 19 S. W. 395.

[5] Johnson *v.* Albany, 86 N. Y. App. Div. 567; Ryder Bldg. Co. *v.* Albany, 187 *Id.* 868; Capital City B. & P. Co. *v.* Des Moines, 136 Iowa, 243, 113 N. W. 835; Burnham *v.* Milwaukee, 100 Wis. 55, 75 N. W. 1014; Beattie *v.* McMullen, 82 Conn. 484, 74 Atl. 767; Stroebel Steel Cons. Co. *v.* Chicago San. Dist., 160 Ill. App. 554.

[6] Kennedy *v.* U. S., 24 Ct. Cl. 122.

[7] Strobel *v.* Sanitary Dist. Chicago, 160 Ill. App. 554.

not be considered a condition precedent to a right of action.[1]

§ 241. Contractor not Bound to Perform or Public Body to Let it to Him Unless Contract so Provides.

A contract which provides for a certain definite work to be done and which does not directly or by implication obligate the contractor to do extra work, leaves the parties to the contract free in the matter of extra work. The public body may let it to the contractor, if the contractor is willing to perform it. But the public body may if it chooses let such work to another person and, on the other hand, the contractor if requested to do such work is not obligated to perform it. It is matter for new agreement of the parties.[2]

[1] Preston *v.* Syracuse, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39; Milwaukee *v.* Hasbrouck, 17 Wis. 266.

[2] See Morgan *v.* Baltimore, 58 Md. 509; Collins *v.* U. S., 34 Ct. Cl. 294.

PART IV. RESCISSION

CHAPTER XXXVII

RESCISSION OF CONTRACT

§ 242. Rescission—Right of Public Bodies to Rescind Contracts.

Public bodies have no sovereign right to rescind agreements at their mere pleasure. Such contracts can only be rescinded under the same conditions and subject to the same liability as natural persons.[1] There is not one law for the sovereign and another for the subject. When the sovereign engages in business and the conduct of business enterprise and contracts with individuals, when such contract comes up before the court for construction, the rights and obligations of the parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law and the sovereign is merged in the dealer, contractor and suitor.[2] After a contract has been lawfully entered into, it cannot be annulled by a public body by reconsidering its approval. A contract creates fixed and perfect legal obligations, wholly detached from a *locus pœnitentiæ* and not subject to reconsideration. It is a contradiction in terms to speak of a contract revocable at will of a contracting party.[3] Mere negotiations which contemplate a written contract,

[1] People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164.
[2] People *v.* Stephens, 71 N. Y. 549; People *ex rel.* Graves *v.* Sohmer, *supra.*
[3] People *ex rel.* Graves *v.* Sohmer, *supra;* Safety I. W. Co. *v.* Baltimore, 66 Fed. 140.

followed by a vote of the governing body to accept a bid, will not constitute a contract for the work and may later be reconsidered.[1] Public contracts may be discharged by mutual agreement of the parties[2] and of course are discharged by performance, by operation of law and by breach. One contract substituted for another discharges the latter.[3] Discharge by breach may occur by one party renouncing or repudiating the contract and refusing to be further bound by it.[4] A public body may discharge and terminate a contract by making it impossible for it to perform its part of the contract,[5] but it may not thus discharge its liability under the contract.[6] A contract which is void may be rescinded for that reason.[7]

§ 243. Reserved Right to Terminate.

Where the public body reserves the right to terminate the contract, the exercise of the option pursuant to such provision will be strictly construed.[8] It may reserve the arbitrary right of termination[9] or the right to annul for failure to properly perform the work.[10] If the public body reserves the privilege to terminate in the event that the work is not done satisfactorily, reasonable grounds must exist for such dissatisfaction and the exercise of the right must

[1] McCormick *v.* Oklahoma City, 203 Fed 921.
[2] Bd. of Commr's *v.* Speer, 124 Ark. 337, 187 S. W. 315.
[3] Bd. of Commr's *v.* Speer, *supra.*
[4] U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168.
[5] Kingsley *v.* Brooklyn, 78 N. Y. 200, 216.
[6] Kingsley *v.* Brooklyn, *supra;* Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277.
[7] East St. Louis G. L. Co. *v.* East St. Louis, 47 Ill. App. 411; McKee *v.* Greensburg, 160 Ind. 378, 66 N. E. 1009; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.
[8] Cody *v.* N. Y., 71 N. Y. App. Div. 54; People *v.* Coler, 56 N. Y. App. Div. 98; Morgan *v.* Baltimore, 58 Md. 509.
[9] Bietry *v.* New Orleans, 24 La. Ann. 21.
[10] Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132.

be free from arbitrary action.[1] The language of the contract may be sufficiently broad to admit of absolute termination by the public body whose judgment may not be questioned, or it may be lodged with the engineer in charge to decide whether the contractor is proceeding with proper speed and diligence. His decision is final in the absence of fraud or bad faith.[2] But where his action has no sufficient basis to rest upon or is without any support, it will not be sustained.[3] The public body cannot exercise a reserved power of annulment because of default in performance if this has been occasioned by the public body.[4] If the power can only be exercised by giving notice, the exact notice provided must be given.[5]

§ 244. Abandonment of Right of Rescission.

The public body will be deemed to abandon its right to declare a forfeiture of the contract where it fails to expressly declare the contract forfeited, but on the other hand tacitly acquiesces in the abandonment of the contract by the contractor, and the acts of the parties will be considered to have effected a mutual abandonment and a forfeiture will not be permitted.[6] Where all the work under several contracts has been abandoned by mutual agreement, no recovery may be had in an action for anticipated profits on the work so abandoned.[7]

[1] Harder *v.* Marion Co. Commr's, 97 Ind. 455; Starin *v.* U. S., 31 Ct. Cl. 65; Wakefield Con. Co. *v.* New York, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; Smith Con. Co. *v.* New York, 167 N. Y. App. Div. 253.

[2] Taylor *v.* New Castle County, 17 Del. 555, 43 Atl. 613; Davis *v.* State, 146 Ala. 120, 41 So. 681; Jones *v.* New York, 32 Misc. 221, 60 N. Y. App. Div. 161.

[3] Wakefield Con. Co. *v.* N. Y., *supra;* Smith Con. Co. *v.* N. Y., *supra.*

[4] King *v.* U. S., 37 Ct. Cl. 428.

[5] Indianapolis *v.* Bly, 39 Ind. 373; Henderson Bridge Co *v.* O'Connor, 88 Ky. 303, 11 S. W. 18; Gallo *v.* N. Y., 15 N. Y. App. Div. 61.

[6] Satterlee *v.* U. S., 30 Ct. Cl. 31.

[7] Badger Mfg. Co. *v.* U. S., 49 Ct. Cl. 538.

§ 245. Grounds for Rescission.

Where one party sees fit to rescind or abandon a contract he must base such action on sufficient grounds.[1] Where a contract contains stipulations which permit a public body to abrogate it in certain specified cases but do not confer arbitrary power to annul it, the public body may not terminate it upon the theory that the contractor was not a proper person to perform the work.[2] Mistake is of course an appropriate ground for rescission in equity[3] but it must be such a mistake as relates to material matters and not merely be the assumption of a bad bargain.[4] When a contract has been executed and is rescinded for mistake the one who has performed is entitled to recover the fair and reasonable value of the services rendered or of materials and supplies furnished under it,[5] or he may recover back the money paid or the property delivered under it.[6] Even though the contract is not completed there may be rescission for a unilateral mistake in the offer or proposal and in the preliminary negotiations so far as they have proceeded.[7] So also misrepresentations or fraud, when they affect a material term of the contract, furnish good ground for rescission to the innocent party.[8] One induced by fraud to enter into a contract relying upon such inducement may rescind the contract.[9] He may, however, if he chooses,

[1] Becker *v.* Philadelphia, 16 Atl. 625, 5 Pa. C. C. 97.

[2] Purcell Envelope Co. *v.* U. S., 47 Ct. Cl. 1, s. c. 249 U. S. 313, 63 L. Ed. 260.

[3] Indianapolis Bd. *v.* Bender, 36 Ind. App. 164, 72 N. E. 154; Gibbs *v.* Gerardsville Sch. Dist., 195 Pa. St. 396, 46 Atl. 91; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665; Clarke Con. Co. *v.* N. Y., 229 N. Y. 413, 128 N. E. 241.

[4] Southington *v.* Southington W. Co., 80 Conn. 646, 69 Atl. 1023.

[5] Long *v.* Athol, 196 Mass. 197, 82 N. E. 665.

[6] Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886.

[7] Harper *v.* Newburg, 159 N. Y. App. Div. 695.

[8] Hingston *v.* L. P. & J. A. Smith Co., 114 Fed. 294; Ricker *v.* Chicago San. Dist. 91 Fed. 833.

[9] Crocker *v.* U. S., 240 U. S. 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85.

on discovering the fraud, affirm the contract and sue for damages, or he may seek rescission by a repudiation of the contract, tendering back what he has received under it and he may then recover what he has parted with or its equivalent value.[1] Mere inadequacy of consideration, however, is not regarded even in equity as a sufficient ground for rescission.[2]

§ 246. What Default Authorizes Rescission.

Where a default in performance is partial and is such as may be compensated in damages, the contract is not ended.[3] A slight or casual breach will not justify rescission. The breach must be substantial and go to the very foundation of the contract and be such as to defeat its very objects before it will justify rescission.[4] Where the contract specifies the time within which it must be completed and it is not performed within the time limited, or within a reasonable time, if there be no specific provision, such failure to complete will warrant a rescission of the contract.[5] So also a failure to properly perform the contract, if not contributed to by the public body will justify the latter in terminating the contract.[6] Where wrongful acts of the public body or its officers bring about the default, of course, the right of rescission does not exist.[7]

[1] New London City Bd. *v.* Robbins, 82 Conn. 623, 74 Atl. 938.

[2] Quigley *v.* Sumner County Commr's, 24 Kan. 293; Stewart *v.* State, 2 Harr. & G. (Md.) 114.

[3] Roettinger *v.* U. S., 26 Ct. Cl. 391; Amsterdam *v.* Sullivan, 11 App. Div. 472, 162 N. Y. 594, 57 N. E. 1123.

[4] Lewman *v.* U. S., 41 Ct. Cl. 470.

[5] Weeks *v.* U. S., 45 Ct. Cl. 409; Clark *v.* U. S., 3 Ct. Cl. 451.

[6] National Contr. Co. *v.* Comm, 183 Mass. 89, 66 N. E. 639; Richman *v.* New York, 89 Misc. 213; Portland *v.* Baker, 8 Oregon, 356; Milliken *v.* Callahan Co., 69 Tex. 205, 6 S. W. 681; Watson *v.* DeWitt Co., 19 Tex. C. A. 150, 46 S. W. 1061; Amsterdam *v.* Sullivan, *supra*.

[7] King *v.* U. S., 37 Ct. Cl. 428; Roberts *v.* Bury Imp. Comm'rs., L. R. 5 C. P. 310.

And in like manner the contractor may not himself terminate or abandon the contract except there be some wrongful act or default by the public body.[1] He, however, has the right of rescission if the public body fails or refuses to fulfill its own contract obligations and to perform those acts which it is their duty to perform and which are conditions precedent to performance by the contractor or which prevent him from proceeding with performance.[2] If the public body defaults in furnishing necessary material which it is bound to furnish under the contract, the contractor is justified in treating the contract as terminated.[3] Where, accordingly, a contractor breaches his contract with a city for the reduction of garbage by refusing to receive further garbage, the liability of the contractor and his sureties accrues at once, since such refusal under a contract which required him to take all the garbage was the breach of a *dependent* covenant which entitled the public body to treat the entire contract as broken and to recover immediately the damages for a total breach.[4]

If the public body fails to furnish the necessary dumps under a garbage contract, which from its terms was entire, this gives the contractor the right to terminate and rescind the entire contract.[5] Where a contract to excavate a portion of a drainage canal provides for forfeiture in case the contractor becomes in default in the progress of the work, such provision will be enforced since the inconvenience to

[1] Chicago San. Dist. *v.* Ricker, 91 Fed. 833; Lynip *v.* Alturas Sch. Dist., 24 Cal. App. 426, 141 Pac. 835; Becker *v.* Philadelphia, 5 Pa. C. C. 97, 16 Atl. 625.

[2] Clark *v.* N. Y., 3 Barb. 288; Jungdorf *v.* Little Rice, 156 Wis. 466, 145 N. W. 1092.

[3] McConnell *v.* Corona City W. Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. N. S. 1171; Clarke Cont. Co. *v.* New York, 229 N. Y. 413, 128 N. E. 241; Mahon *v.* Columbus, 58 Miss. 310, 38 Am. Rep. 327.

[4] Bridgeport *v.* Ætna Indem. Co., 91 Conn. 197, 99 Atl. 566.

[5] Clarke Con. Co. *v.* City, *supra*.

the public from the failure to complete cannot be measured in money loss.[1]

§ 247. Waiver of Right to Rescission.

The right to rescission may be waived by the party who is entitled to it by his failure to avail himself promptly of such right [2] or by words or conduct which show an intention not to exercise it. Such party cannot stand by and permit the adverse party to change his position or give up substantial rights upon the theory that the contract is still in force and then afterwards claim the contract is terminated. So he may not bring an action to enforce the contract after knowledge of his right to rescission, for this is an affirmance of the contract which will bar later rescission.[3] In like manner acts which indicate a ratification of a voidable contract will prevent a later rescission.[4]

Even the reserved right under a contract to annul it may be waived.[5] Where the public body accepts work in an incomplete condition and uses it, the right to rescind the contract for failure to complete the work is thereby waived.[6] Where the right to supervise and inspect the work as it progresses is given by contract to the public body, with the power to approve or reject the material or work, after the building has been completed and the public body has the use of it, it cannot rescind the contract and refuse to pay the compensation on the ground of defects in the material or workmanship which was approved, as the work was done by its representative.[7] And after the

[1] Harley *v.* San. Dist., 226 Ill. 213, 80 N. E. 771.
[2] Bader *v.* New York, 51 Misc. 358.
[3] People *v.* Stephens, 71 N. Y. 527.
[4] Ferrari *v.* Escambia County, 24 Fla. 390, 5 So. 1.
[5] Taylor *v.* New York, 83 N. Y. 625.
[6] Packwaukee *v.* Amer. B. Co., 183 Fed. 359; Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343.
[7] Packwaukee *v.* Amer. B. Co., 183 Fed. 359.

ground for termination exists if the public body fails to terminate it expressly but on the other hand acquiesces in the continuance of the work it waives the right to rescind.[1] The waiver of time limit fixed by the contract is a waiver of the right of forfeiture, but the public body may grant or refuse to grant an extension of time, irrespective of damages resulting therefrom.[2] The right of a contractor who agreed to dress building stone delivered to him by the other party to the contract, to rescind it on account of delay in the delivery of the stone was lost, where he failed to act promptly, but on the contrary received and dressed a large quantity of the stone after shipments had been resumed.[3] If a contractor fails to proceed with the speed required to finish the work within the time limited under the contract and the public body acquiesces in the continuance of the work thereafter, there is a waiver of the right to terminate the contract.[4]

§ 248. Restoring Status Quo.

When the parties cannot be placed in statu quo the contract will be rescinded in equity only where the clearest equities demand it.[5] Both at law and in equity the general rule is that the party who rescinds a contract must place the other party in status quo ante.[6] Where accordingly one party has received and retained the benefits of substantial partial performance of the contract by the other party who has failed to completely fulfill his covenants, the first party cannot retain the benefit and repudiate the

[1] Rosser *v.* U. S., 46 Ct. Cl. 192; Carland *v.* New Orleans, 13 La. Ann. 43.
[2] Rosser *v.* U. S., *supra.*
[3] Graham *v.* U. S., 188 Fed. 651, aff'd 231 U. S. 474, 58 L. Ed. 319.
[4] Foster *v.* Worthington, 58 Vt. 65, 4 Atl. 565.
[5] U. S. *v.* Norris, 222 Fed. 14; Harper *v.* Newburgh, 159 N. Y. App. Div. 695.
[6] Chance *v.* Bd. of Comm'rs Clay County, 5 Blackf. 441, 35 Am. Dec. 131.

burdens, but is bound to perform his part, and his remedy for the breach is limited to compensation in damages.[1] But the rule that neither party to a transaction will be allowed to take advantage of its invalidity while retaining the benefits applies only to voidable contracts and not to a transaction which is absolutely void.[2] And it is the general rule that one seeking to rescind for mistake or fraud must restore the status quo and rescission can only be had where the status quo can be restored. But there are some exceptions to this rule, in so far as it applies to mistake[3] and, apparently against the current of authority, there are some exceptions likewise in the case of fraud,[4] under which it is determined the party suing to rescind a fraudulent contract need not offer to return what has been received under the contract.[5] But the prevailing rule is otherwise,[6] for a man does not become an outlaw because he has committed a fraud and while he may not be able to take advantage of his own fraud and use it as a ground to rescind the contract, where the other who has the right does rescind, the courts endeavor to do substantial justice by requiring him to do what equitably he should and restore or offer to restore what has been received under the contract as a condition of rescission.

A public body is, however, sufficiently restored to status quo upon a cancellation of the contract because it induced a contractor by mutual mistake as to the amount of work

[1] *Idem.*

[2] Independent Schl. Dist. *v.* Collins, 15 Idaho, 535, 98 Pac. 857, 128 Am. St. R. 76; Bartlett *v.* Lowell, 201 Mass. 151, 87 N. E. 195.

[3] U. S. *v.* Morris, *supra;* Harper *v.* Newburgh, *supra.*

[4] Continental Securities Co. *v.* Belmont, 150 N. Y. App. Div. 298, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. N. S. 112.

[5] *Idem.*

[6] Stotts *v.* Fairfield, 163 Iowa, 726, 145 N. W. 61; Northampton *v.* Smith 11 Metc. 390.

to be done, to enter into the contract, where it is required to pay merely the value of work then done.[1]

§ 249. **Effect of Rescission.**

Rescission wholly terminates a contract[2] and no suit thereafter may be maintained to enforce it or for damages for the breach of the contract since it is ended.[3] Sometimes in the giving of notice to rescind terms are used, the effect of which would be to put an end to the contract and all rights under it, when such is very far from the real intention of the party electing to rescind and who uses such language to give expression to his purpose. But the mere use of words such as "rescind" and "cancel" which literally and strictly construed would effect a complete end and destruction of the contract will not control the courts where the real intention of the party rescinding is to be released from further obligation to comply with the terms because of the default of the other party, and to hold such party to the payment of damages. Courts will consider not only the language, but all the circumstances including the effect of a complete rescission, and as to whether the innocent party intended such a result in reaching a conclusion as to the proper construction of such language; and words will not be permitted to prevail over intent.[4] Such words as "cancel" or "annul," if ill chosen, will be taken to mean a refusal to perform further because of the default of the other party and not to rescind or avoid.[5] If their real effect was given to them, as used in the notice of refusal to be obligated by its terms because of the other

[1] Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.
[2] Hayes *v.* Nashville, 80 Fed. 641.
[3] East St. Louis G. Co. *v.* E. St. Louis, 57 Ill. App. 411; Newport *v.* Phillips, 19 Ky. L. R. 352, 40 S. W. 378.
[4] Hayes *v.* Nashville, *supra.*
[5] U. S. *v.* O'Brien, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.

party's default and the contract was made naught, all rights under the contract would be ended, whereas the contract provides in terms that rights shall arise on annulment, which, but for this provision in the contract the public body annuling would not have.[1] A contract may be abandoned but kept alive as an enforceable obligation to which the party abandoning may still look for the purpose of determining the compensation he may be entitled to by virtue of its terms for the very breach which gave him such right of abandonment.[2]

The implied obligation to restore the status quo survives rescission and may be enforced after rescission has occurred.[3] So also as to the right to receive payment of money due pursuant to the terms of a contract which was earned prior to its disaffirmance.[4] The agreement to terminate a contract does not imply a surrender of all claims for its breach up to that time.[5] When a contract is rescinded and the work or supplies are used by the public body and it receives the benefits of these, it is liable on quantum meruit.[6] Where a contract is avoided for fraud and the public body retains the supplies furnished under the contract a recovery of their value may be had.[7] Where the public body continues to receive the benefits of the contract, even after rescission, it becomes liable on implied contract to pay for the same.[8]

A public body may abandon or terminate a contract and

[1] U. S. *v.* O'Brien, *supra.*
[2] Hayes *v.* Nashville, *supra.*
[3] Crocker *v.* U. S., 240 U. S. 74.
[4] People *v.* Republic Sav. L. Ass'n, 97 N. Y. App. Div. 31.
[5] U. S. *v.* O'Brien, *supra;* Hayes *v.* Nashville, *supra.*
[6] Greenlee County *v.* Cotey, 17 Ariz. 542, 155 Pac. 302; Watson *v.* DeWitt County, 19 Tex. Civ. App. 150, 46 S. W. 1061; Crocker *v.* U. S. 240 U. S., 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.
[7] Crocker *v.* U. S., *supra.*
[8] State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15; U. S. Water Works *v.* DuBois, 176 Pa. St. 439, 35 Atl. 251. See Roettinger *v.* U. S., 26 Ct. Cl. 391.

prevent the further performance of it by the contractor, upon the usual terms which the law imposes in such cases, namely: the recovery of compensatory damages,[1] if any have arisen. In case it turns out that the public body have wrongfully prevented the contractor from performing, it is liable in damages for breach of contract.[2] Where a contractor voluntarily substitutes one contract for another he relinquishes any damage incurred under the old contract.[3]

A contractor has no action for damages by reason of the exercise by the public body of its reserved right to annul the contract when not satisfied with the work.[4] While as stated above, rescission ends a contract and all rights under it, an attempted rescission which proves ineffective does not impair such right of action.[5]

Where a contract provides that out of installment payments a certain amount shall be retained until the contract is completed and for the forfeiture of such amount, in case of annulment of the contract for the contractor's failure to duly and properly perform, the right to retain such money must be clearly shown and brought within the terms of the contract, as forfeitures are not encouraged.[6] Nevertheless such provisions are valid, and when the forfeiture comes clearly within the terms of the contract the provision of the contract will be upheld and enforced.[7]

[1] Damon *v.* Granby, 2 Pick. 345; Lord *v.* Thomas, 64 N. Y. 107; Parr *v.* Greenbush, 112 N. Y. 246, 19 N. E. 684.

[2] Wakefield Cons. Co. *v.* N. Y., 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; Smith Cont. Co. *v.* N. Y., 167 N. Y. App. Div. 253; Amsterdam *v.* Sullivan, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123; Wells *v.* West Bay Bd. of Educ., 78 Mich. 260, 44 N. W. 267.

[3] Braden *v.* U. S., 16 Ct. Cl. 389.

[4] Harder *v.* Marion County, 97 Ind. 455.

[5] Greenville *v.* Greenville W. Wks. Co., 125 Ala. 625, 27 So. 764. See Nat. Cont. Co. *v.* Hudson R. P. Co., 192 N. Y. 209, 84 N. E. 965.

[6] Harley *v.* Chicago San. Dist., 226 Ill. 213, 80 N. E. 771; Bietry *v.* New Orleans, 22 La. Ann. 149; Henegan *v.* U. S., 17 Ct. Cl. 273.

[7] Harley *v.* Chicago San. Dist., *supra;* Williams *v.* U. S., 28 Ct. Cl. 518.

PART V. PERFORMANCE AND BREACH

CHAPTER XXXVIII

PERFORMANCE—TO SATISFACTION OF ADVERSE PARTY OR THIRD PERSON

§ 250. Performance to Satisfaction of Other Party or Engineer.

In most public contracts it is provided that the contractor shall complete the entire work in a thoroughly skillful and workmanlike manner, and satisfactory to the public body and their engineer. By reserving to the public body a general direction and superintendence the contractor agrees to conform to its reasonable directions, acting with an honest and just regard to its interest. But the public body and its engineer may not act arbitrarily or capriciously but must act reasonably and in accordance with fairness and good faith,[1] and where the public body ought in reason to be satisfied with the work, the courts will say that it is satisfied with it.[2] In some jurisdictions the rule is announced that where the work or materials are to be furnished to the satisfaction of a third party designated as arbiter, it is not a question of the good faith of the dissatisfaction claimed but the party hurt must show that the expression of dissatisfaction was the result

[1] Chapman *v.* Lowell, 58 Mass. 378; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; Sidney School Furn. Co. *v.* Warsaw Sch. Dist., 130 Pa. St. 76, 18 Atl. 604; Parlin & Orendorff Co. *v.* Greenville, 127 Fed. 55; G. A. Webb Co. *v.* Trustees Morgantown Sch., 143 N. C. 299, 55 S. E. 719.

[2] Brooklyn *v.* Brooklyn Cty. R. Co., 47 N. Y. 475; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804.

of fraudulent collusion between the arbiter and the public body.[1] And again it is declared that, where appliances or apparatus are purchased, and installed upon the understanding that they are not to be accepted unless they operate satisfactorily in the judgment of the public body upon tests, the latter is not obliged to accept and pay for them unless they are satisfactory when tested. In such cases the question of reasonableness or the good faith of the public body is not in concern.[2] When work is to be performed to the satisfaction of an engineer who is named as arbiter and he announces his decision, it becomes binding upon the public body.[3] There are two general classifications which may be made of contracts to be performed to the satisfaction of a public body. The first is where it absolutely reserves to itself the right of decision without being required to disclose the reasons thereof, and the right to examine into the decision by the other party or by the courts is excluded. Since this is a competent matter for parties to insert in a contract, when it exists it becomes the law of the contract and binds the parties.[4] The other classification is where the public body is held to have undertaken to act reasonably and fairly and to decide the question of satisfaction upon reasonable, just and sensible grounds. The decision in this latter class is open to judicial revision, and where the public body ought reasonably to be satisfied it will be held to be satisfied.[5] When a garbage furnace meets the test provided and complies with the specifications, a public body cannot defeat the con-

[1] Hostetter *v.* Pittsburgh, 107 Pa. St. 419.

[2] U. S. Elec. F. Alarm Co. *v.* Big Rapids, 78 Mich. 67, 43 N. W. 1030; Manning *v.* Sch. Dis. Ft. Atkinson, 124 Wis. 84, 102 N. W. 356.

[3] Omaha *v.* Hammond, 94 U. S. 98, 24 L. Ed. 70.

[4] Parlin & Orendorff Co. *v.* Greenville, *supra;* U. S. Elec. F. Alarm Co. *v.* Big Rapids, *supra;* Manning *v.* Sch. Dist. Ft. Atkinson, *supra.*

[5] Parlin & Orendorff Co. *v.* Greenville, *supra.*

tractor's recovery by capriciously and unreasonably refusing to express their satisfaction with the work.[1]

§ 251. Decision of Engineer—Duty of Engineer.

Wherever parties agree upon some designated person whose judgment is to determine questions arising under a public contract and they confide to his judgment, skill and decision the determination as to the character, amount and value of work to be done, and as to its completion, they must abide by the judgment and decision of this tribunal of their own selection or impeach it on recognized grounds. But the very extent of his power and the conclusive character of his decision implies the corresponding duty that his adjudication shall be made not capriciously or fraudulently but reasonably and with due regard to the rights of both contracting parties.[2] He must not be affected by outside influence or suggestion.[3] But in reaching this personal determination he may rely upon information obtained from other persons, where the contract does not require him personally to see that the work is done or the materials used.[4] He must act honestly and in good faith. He may not act whimsically or arbitrarily.[5] Who the designated person shall be is in the keeping of the parties and there is no objection to the parties choosing, from among suitable persons upon whose judgment and certified estimates payments shall be made, one who happens to be a public officer, since when acting as arbiter he acts individually.[6]

[1] *Idem.*

[2] Ripley *v.* U. S., 223 U. S. 695, 56 L. Ed. 614; Baltimore *v.* Ault, 126 Md. 402, 94 Atl. 1044.

[3] Baltimore *v.* Ault, *supra.*

[4] State *v.* Blanchard Cons. Co., 91 Kan. 74, 136 Pac. 905; Jones *v.* New York, 60 N. Y. App. Div. 161, 174 N. Y. 517.

[5] Baltimore *v.* Ault, *supra;* Evans *v.* Middlesex County, 209 Mass. 474, 95 N. E. 897; Lewman *v.* U. S., 41 Ct. Cl. 470.

[6] State *v.* Blanchard Cons. Co., *supra.*

§ 252. Validity of Stipulation Requiring Certificate of Engineer.

A contractor may lawfully consent that provision be inserted in his contract for public work that material or work shall not be paid for until approved by some officer, engineer or architect. Stipulations providing for such a person as arbiter, to decide all disputes arising during performance of the work, or to issue progress certificates showing his approval of the performance of the work, and of its final completion, are valid and binding.[1] So long as the person nominated acts in good faith and not arbitrarily and there is no fraud or palpable error in his decisions or certificates they are conclusive.[2] The powers conferred by these stipulations are, however, in derogation of the common-law right of trial by jury and should not be unduly extended. Parties are not permitted to oust the courts of jurisdiction by the scope and extent of the stipulation.[3] But, when general language confers upon the engineers power to determine all the questions that may arise under the contract, which might prove objectionable, it will be limited by the more specific language which refers to them the decision as to the amount or the quantity of the work which is to be paid for, and all questions relative to the fulfillment of the contract by the contractor.[4] Where the power conferred limits the decision of the engineer to disagreements or differences arising as to the true meaning of the drawings or specifications, the engineer has no power to determine a claim of the public body resulting from the

[1] Ruch *v.* York City, 233 Pa. St. 36, 81 Atl. 891; Clark & Sons Co. *v.* Pittsburgh, 217 Pa. St. 46, 66 Atl. 154.

[2] Ruch *v.* York City, *supra.*

[3] Seward *v.* Rochester, 109 N. Y. 164, 168, 16 N. E. 348; Ruch *v.* York City, 233 Pa. St. 36, 81 Atl. 891; Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982.

[4] Nat. Cont. Co. *v.* Hudson River W. P. Co., 170 N. Y. 439, 63 N. E. 450.

contractor's delay.[1] The provision that such certificates must be obtained before suit and as a condition of suit will not invalidate such stipulations.[2]

§ 253. Powers of—Certificate of Engineer not Extended Beyond Submission.

The provisions of public contracts requiring submission of disputes to an arbiter appointed thereby is in derogation of the right to trial by jury, which will not be taken away from litigants by implication. In order to oust the jurisdiction of the courts it must clearly appear that the subject-matter was within the intended submission.[3] An agreement of submission will not be extended by implication beyond its plain words; and a provision therein to submit questions that may arise as to fulfillment of a contract will not give the right to pass on a claim for damages for non-fulfillment.[4] While such a submission may include the power to determine the right of a party to liquidated damages under the contract, this power will not be implied.[5] Accordingly, any decision of the engineer as to matters not properly submissible to him under a contract will not be binding upon the parties.[6]

§ 254. Approval of Engineer—Power to Modify or Alter Terms of Contract.

An engineer or architect is merely the special agent of the public body appointing him, and unless expressly

[1] Chandley *v.* Cambridge Springs, 200 Pa. St. 230, 49 Atl. 772.
[2] Nat. Cont. Co. *v.* Hudson River W. P. Co., *supra;* Bray *v.* U. S., 46 Ct. Cl. 132.
[3] Ruch *v.* York City, 233 Pa. St. 36, 81 Atl. 891; Ætna Indem. Co. *v.* Waters, 110 Md. 673, 73 Atl. 712.
[4] Ruch *v.* York City, *supra;* Somerset Borough *v.* Ott, 207 Pa. St. 539, 56 Atl. 1079.
[5] Ruch *v.* York City, *supra.*
[6] *Idem.*

authorized to do so by the terms of the contract possesses no power to alter, change or modify the contract between the parties. If he does and issues a certificate after such change, stating that the work has been completed according to the contract, it will not bind the parties.[1]

Where a public contract provides that the work shall proceed under the direction of a certain officer, engineer or architect, this will not authorize material or essential changes or modifications of the terms of the contract.[2] This power is limited to such changes as are contemplated by the parties at the time the contract was made and he cannot increase or diminish the quantities of work to be done beyond this limit or substantially or radically alter the character of the work without paying the reasonable value of changes directed.[3] Where an engineer is empowered to make changes in details of a contract by which a given result is to be accomplished, he has no power to make changes which alter or destroy the essential identity of the thing to be effected.[4] The engineers in charge of a reservoir dam construction cannot change the specifications of the work by increasing it in particulars by one hundred fifty-five per cent to five hundred per cent without an abrogation of the original contract to the extent of such changes.[5]

[1] Williams *v.* Bd. of Carden Bottom L. Dist., 100 Ark. 166, 139 S. W. 1136.

[2] Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855; Bonesteel *v.* Mayor, 22 N. Y. 162; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Bond *v.* Newark, 19 N. J. Eq. 376; Ruch *v.* York City, 233 Pa. St. 36, 81 Atl. 891; Williams *v.* Bd. of Directors Carden B. L. Dist., 100 Ark. 166, 139 S. W. 1136.

[3] Hayden *v.* Astoria, 74 Oreg. 525, 145 Pac. 1072; National Cont. Co. *v.* Hudson Riv. P. Co., 192 N. Y. 209, 84 N. E. 965; McMaster *v.* State, *supra;* Cook *v.* Harms, 108 Ill. 151; Smith *v.* Bd. of Educ., 76 W. Va. 239, 85 S. E. 513; Salt Lake City *v.* Smith, 104 Fed. 457; Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 33 L. Ed. 934.

[4] Nat. Cont. Co. *v.* Hudson Riv. W. P. Co., 192 N. Y. 209, 84 N. E. 965; McMaster *v.* State, *supra;* Dunning *v.* Orange County, 139 N. Y. App. Div. 249, 204 N. Y. 647, 97 N. E. 1104; County of Cook *v.* Harms, 108 Ill. 151, 159; Salt Lake City *v.* Smith, *supra.*

[5] Hayden *v.* Astoria, *supra.*

And an architect has no power, to be exercised at his pleasure, to make such material alterations and changes in drawings as he might think proper.[1] If such power existed, drawings and specifications would be useless adjuncts to a contract.[2] But on the other hand, where the specifications refer to a building instead of buildings but actually refer to rear walls in the plural, a contractor will be required to underpin the walls of two buildings of which he knew by inspection, since this ambiguity gave rise to a dispute upon which the decision of the architect was final.[3]

§ 255. Decision of Engineer—Power to Require Doing of Work Apparently or Doubtfully Outside Terms of Contract.

Where an engineer or other officer or representative of a public body without collusion and against the contractor's opposition requires the latter to do something as covered by his contract, and the question whether this requirement is embraced within the contract is fairly debateable and its determination is surrounded by doubt, the contractor may comply with the demand under protest, and subsequently recover damages, even if it turns out that he was right and the thing required was not covered by the contract.[4] On the other hand, if the thing required is clearly beyond the limits of the contract, the contractor may not even do it under protest and subsequently recover damages.[5] In this latter case the reason for such rule is that the engineer

[1] Smith *v.* Bd. of Education, *supra.*

[2] *Idem.*

[3] Merrill-Ruckgaber Co. *v.* U. S., 49 Ct. Cl. 533, aff'd 241 U. S. 387, 60 L. Ed. 1058.

[4] Borough Const. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480; Beckwith *v.* New York, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; Lentilhon *v.* New York, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190.

[5] Borough Const. Co. *v.* New York, *supra*; Becker *v.* New York, 176 N. Y. 441, 68 N. E. 855.

would be making a new contract for the parties which he is without power to do. This can be done only in the manner prescribed by statute.[1] In the latter case the contractor must refuse to proceed. In the former case he may refuse to proceed, stop work as ordered by the engineer, stand upon his contention that the work required to be done or to be done over again is either outside the contract or has been properly done already, as the case may be, and bring his action to recover for labor and materials performed and furnished under the contract and claim his prospective profits.[2] But in those cases where there is doubt that the thing required to be done is embraced within the contract the contractor is not compelled to refuse obedience to the order of the engineer and incur the hazard of becoming a defaulter upon his contract. He may do the work under protest and recover damages for the breach of his contract. The hazards of an incorrect decision cannot fairly be placed upon the contractor. But he must protest or the officer or engineer will have the right to assume that the contractor acquiesces in his decision and performs the work under the contract. He cannot apparently accept the decision to do the work, and afterwards attack the decision as incorrect and seek to recover for it.[3] Where, however, the contractor makes his protest under the claim that the true construction of the contract does not require him to do the work he may recover for the work done,[4] or for damages for breach of the contract.[5]

[1] Becker *v.* New York, *supra.*

[2] Gearty *v.* Mayor, *supra;* Borough Const. Co. *v.* New York, *supra;* Beckwith *v.* New York, *supra;* Roehm *v.* Horst, 178 U. S. 1, 44 L. Ed. 953, aff'g 91 Fed. 345.

[3] Bowe *v.* U. S., 42 Fed. 761, 778.

[4] Callahan Const. Co. *v.* U. S., 47 Ct. Cl. 229; Federal Cont. Co. *v.* Coal Cr. D. & L. Dist., 166 Ill. App. 369; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

[5] Borough Const. Co. *v.* New York, *supra;* Gearty *v.* Mayor, *supra.*

§ 256. Effect of Failure of Engineer to Notify Contractor During Progress of Work that Work Does not Comply with Contract.

Where a contract appoints someone qualified to judge the work and its progress, and charges him with the duty of inspecting the work and reporting upon it and requires him to notify the contractor if any of the work or materials fail to comply with the plans and specifications and such person inspects the work and allows it to proceed and fails to notify the contractor during its progress that the work does not comply with the contract, this operates as an acceptance of the work and, in the absence of a provision in the contract saving the public body against such consequences, is conclusive. One appointed to accept or reject work must do so when the work is being done. He may not allow the contractor to believe that the work is satisfactory and when finished reject it.[1]

§ 257. Certificate of Engineer—Certificate of Performance —Condition Precedent to Payment.

Where the contract provides that payment is not to be made until the officer appointed by the contract certifies that the work has been performed in accordance with the contract, the procuring of such certificate is a condition precedent to payment, and where such officer refuses to issue the certificate and there is no fraud, or such gross mistake as to imply fraud and no failure to exercise an honest judgment, no action will lie for the compensation provided by the contract.[2]

[1] Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151; Pauly Jail Bldg. & Mfg. Co. *v.* Hemphill County, 62 Fed. 698. See Lamborn *v.* Marshall, 133 Mich. 250, 95 N. W. 78. See § 261.

[2] Kihlberg *v.* U. S., 97 U. S. 398, 24 L. Ed. 1106, aff'g 13 Ct. Cl. 148; Sweeney *v.* U. S., 109 U. S. 618, 27 L. Ed. 1053, aff'g 15 Ct. Cl. 400; Phelan *v.* Mayor, 119 N. Y. 86, 23 N. E. 175; O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323.

§ 258. Certificate of Engineer, Valuation of Extra Work, Condition Precedent to Payment.

It is sometimes provided in public contracts that the prices and quantities of extra work shall be agreed upon in addition to the provision that the order therefor shall be in writing. When a contract so provides in effect it requires a valuation of the extra work before payment therefor can be required, and the decision of the engineer upon this question is final and conclusive when given.[1]

§ 259. Certificate of Engineer—Condition Precedent to Suit.

Where a final certificate of the proper performance of work is required by contract to be obtained from an engineer or architect, or disputes are referred to him by contract stipulation for his decision, these requirements are binding and constitute a condition precedent to the maintenance of any action to enforce payment from the public body.[2] The jurisdiction of the engineer is limited, however, by the terms of the contract and relates usually to disputes arising during the performance of the contract. Such stipulations will not be extended to cover questions arising after the completion of the contract. Nor will it be interpreted to deprive the parties of their rights to a judicial construction of the contract, involving matters of law, or relating to the question of the due compensation to which he was legally entitled under the contract or

[1] Kennedy *v.* U. S., 24 Ct. Cl. 122.

[2] Sweeney *v.* U. S., 109 U. S. 618, 27 L. Ed. 1053, aff'g 15 Ct. Cl. 400; Kihlberg *v.* U. S., 97 U. S., 398, 24 L. Ed. 1106, aff'g 13 Ct. Cl. 148; Barlow *v.* U. S., 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; Amer. Bond. & T. Co. *v.* Gibsonl Co., 127 Fed. 671; Brown *v.* Baton Rouge, 109 La. 967, 34 So. 41; Nationa Cont. Co. *v.* Comm., 183 Mass. 89, 66 N. E. 639; Dinsmore *v.* Livingston County, 60 Mo. 241; Montgomery *v.* N. Y. 151 N. Y., 249, 45 N. E. 550; Dwyer *v.* Bd. of Educ., 27 App. Div. 87, 165 N. Y. 613, 59 N. E. 1122; Phelan *v.* Mayor, 119 N. Y. 86, 23 N. E. 175; Hostetter *v.* Pittsburg, 107 Pa. St. 419.

under evidence as to the acts of the parties not in terms covered by the contract.[1] Where the contract provision is for a final certificate and the public body acting under other provisions exercises its right to stop the work for delay and completes the work, if the contractor brings suit for a balance claimed to be due he is not obliged to obtain the certificate of the engineer as a condition precedent thereto.[2] Where the arbitration clause is of doubtful application it will not be extended to a dispute between the parties as to whether liquidated damages should be paid because a building was not completed on the date fixed in the contract.[3] Agreements which provide for arbitration of matters arising during the course of the work and which cannot be left until the work is completed, must be upheld. Even though the terms of a contract are rigorous, if there is nothing to show that the engineer acted in bad faith, it must be presumed that he acted with appropriate regard to his duties between the parties.[4] If the action is not upon the contract but for breach of it, as where the contractor is compelled to do work over which was properly done under the contract and sues for his damage, a certificate is not necessary.[5]

§ 260. Appeal from Decision of Engineer.

The duty to appeal to a chief engineer or other officer from the resident engineer or engineer in charge of work, where it exists, must be exercised. But such duty will not be unduly extended to cover matters which are not affected

[1] Gammino *v.* Dedham, 164 Fed. 593.
[2] Clark & Sons Co. *v.* Pittsburgh, 154 Fed. 464, 164 Fed. 441.
[3] Maurer *v.* Sch. Dist., 186 Mich. 223, 152 N. W. 999.
[4] Gearing *v.* U. S., 48 Ct. Cl. 12.
[5] Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804; Borough Cons. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480; Faber *v.* New York, 222 N. Y. 255, 118 N. E. 609; *Contra*, Amer. Bond Co. *v.* U. S., 127 Fed. 671.

by such provision of a contract.[1] The basic principle in all contract questions relating to the power of decision by an engineer is that he possesses no power and has no jurisdiction over matters not expressly committed to him by the contract.

§ 261. Decision or Certificate of Engineer—Refusal to Make.

When a contract makes it a condition precedent to a contractor's right to require payment that the work should be fully completed as set out in the contract, and such completion certified by a designated officer, if in contemplation of the contract it ought to be given, it is unreasonable to refuse it.[2] The engineer must issue the certificate when, in the contemplation of the contract the state of things exists, beyond dispute, to which he is to certify, namely, the due completion of the contract. A contractor is accordingly excused from obtaining the certificate when the refusal to issue it is unreasonable or it is in bad faith refused. The refusal to accept the work cannot be arbitrary, unreasonable or unjust if it ought to be accepted.[3] The substantial performance of a contract entitles a contractor to recovery. So the question of reasonableness of a refusal to certify and approve work substantially performed is for a jury to decide.[4] But the decision of the engineer when honestly made is binding. If he passes work and in good faith approves it expressly

[1] Ripley *v.* U. S., 223 U. S. 695, 56 L. Ed. 614.

[2] Ripley *v.* U. S., 223 U. S. 695, 56 L. Ed. 614; Scully *v.* U. S., 197 Fed. 327; Bowery Nat. Bk. *v.* Mayor, 63 N. Y. 336; MacKnight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72, 54 N. E. 661; McGuire *v.* Rapid City, 6 Dak. 346, 43 N. W. 706; Schmidt *v.* North Yakima, 12 Wash. 121, 40 Pac. 790; Walsh Const. Co. *v.* Cleveland, 271 Fed. 701, 711.

[3] Bowery Nat. Bk. *v.* Mayor, *supra;* MacKnight Flintic S. Co. *v.* Mayor, *supra:* Scully *v.* U. S., *supra.*

[4] Elizabeth *v.* Fitzgerald, 114 Fed. 547.

or by implication during its progress, this decision is not open to his objection. He cannot reëxamine his own conclusions after the work is done and refuse a certificate. After he examines work day by day and approves of it, he may not thus lead a contractor into the belief that it is satisfactory and when the work is completed reject it.[1] The fact that an officer approves a quarry will not prevent his passing upon the quality of the stone from it when the contract so provides. While his decision upon the quality of stone is final when exercised, he cannot exercise it in advance or forestall his judgment or that of other competent officers who might be designated by the government, where the contract provision is appropriate to that end.[2] The general rule is, therefore, that where a certificate of completion is unreasonably or in bad faith refused the contractor may recover without it upon proof of performance and of such refusal.[3] When the parties to a contract put a practical construction upon the contract to the effect that as to extra and additional work no certificate determining the amount or value thereof is required, this is a waiver of the contract provision requiring a certificate, and the contractor may recover notwithstanding the refusal to issue it.[4]

§ 262. Decision or Certificate of Engineer—Power to Change Decision Once Made.

The power to determine questions by the engineer is derived from the contract. It is not a continuing power.

[1] Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78; Wildey *v.* Sch. Dist., 25 Mich. 419, 424; Schliess *v.* Grand Rapids, 131 Mich. 52, 90 N. W. 700; Brady *v.* Mayor, 132 N. Y. 415, 30 N. E. 757.

[2] U. S. *v.* Barlow, 184 U. S. 123, 133, 46 L. Ed. 463.

[3] Bowery Nat. Bk. *v.* Mayor, *supra;* Whiteman *v.* Mayor, 21 Hun, 117, 121; Ross *v.* New York, 85 N. Y. App. Div. 611.

[4] Bradley *v.* MacDonald, 218 N. Y. 351, 385, 395, 113 N. E. 340.

He may not, therefore, find work finished or satisfactory one day and so certify and revoke his certificate and find to the contrary later. When he once makes his finding and issues his certificate his power to determine that question is exhausted. His power ends with decision. He may not subsequently modify, revoke or annul that decision or make a new one on the same question.[1]

§263. Certificates of Engineer—Conclusive in Absence of Mistake, Bad Faith, etc.

When parties to a contract make the production of a certificate from an architect, engineer or other officer that the work is completed according to contract, a condition precedent to payment, they are bound by this provision as much as any other term of the contract. It is not enough for a contractor to show that he has completed the work. His agreement is that someone else should decide this. He is therefore concluded by his agreement and cannot by bringing an action withdraw the decision of this question from the person designated, and refer it to a legal tribunal for determination.[2] It is usually provided that the decision or approval of this arbiter shall be final and conclusive when given. Such a term of the contract will be enforced by the courts as the law of the contract and the intention of the parties will be carried out. These stipulations are binding and conclusive upon the parties in the absence of fraud or such gross mistake as necessarily implies bad faith.[3] Or, to put it in other language, the

[1] St. Charles *v.* Stookey, 154 Fed. 772, 780.

[2] Smith *v.* Brady, 17 N. Y. 173.

[3] Barlow *v.* U. S., 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; Bowers Hyd. D. Co. *v.* U. S., 41 Ct. Cl. 214, aff'd 211 U. S. 176, 53 L. Ed. 136; U. S. *v.* Cooke, 207 Fed. 682; U. S. *v.* Hurley, 182 Fed. 776; Guild *v.* Andrews, 137 Fed. 369; Bray *v.* U. S., 46 Ct. Cl. 132; Henegan *v.* U. S., 17 Ct. Cl. 273; Lawrence *v.* New York, 29 N. Y. App. Div. 298, 162 N. Y. 617; Jones *v.* New

certificate is ordinarily conclusive, in the absence of proof of corruption, or bad faith, or misconduct on the part of the person designated, or palpable mistake appearing on the face of the certificate.[1] A decision by the engineer as to the value of extra work, if this question is submissible to him under the contract, is conclusive.[2] So long as the engineer acts honestly and with reasonable efficiency his action is binding upon the parties. His decision made in good faith and not whimsically will be conclusive even though somewhat ignorantly or mistakenly made.[3] And of course a certificate procured by collusion and conspiracy between the contractor and the architect will not bind the public body.[4] In determining the question as to whether the action of the engineer is in bad faith and the result of failure to exercise an honest judgment, if an engineer commits gross mistakes, which an engineer of his experience and competence, acting honestly, would not be reasonably supposed to make, which are not reconcilable with mere negligence or errors of judgment, and which materially favored one party to the contract at the expense of the other, a strong implication of bad faith will arise, which unexplained will be considered conclusive.[5]

York, 32 Misc. 211, 60 N. Y. App. Div. 161, 174 N. Y. 517; O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323; Burke *v.* Mayor, 7 N. Y. App. Div. 128; Snyder *v.* N. Y., 74 N. Y. App. Div. 421; City St. Improv. Co. *v.* Marysville, 155 Cal. 419, 101 Pac. 308; McGuire *v.* Rapid City, 6 Dak. 346, 43 N. W. 706; Beattie *v.* McMullen, 82 Conn. 484, 74 Atl. 767; Caldwell *et al. v.* Pierce, 154 Ky. 328, 157 S. W. 692; Hatfield Sch. Dist. *v.* Knight, 112 Ark. 83, 164 S. W. 1137; Malone *v.* Phila, 12 Phila., 270; Wildey *v.* Sch. Dist., 25 Mich. 419.

[1] Everard *v.* Mayor, 89 Hun, 425; Sewer Comm'rs *v.* Sullivan, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123; Malloy *v.* Briarcliff Manor, 145 N. Y. App. Div. 483; Uvalde Cont. Co. *v.* New York, 160 N. Y. App. Div. 284; Quinn *v.* Mayor, 16 *Id.* 408.

[2] Bd. of Educ. of Paola *v.* Shaw, 15 Kan. 33; Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Swift *v.* New York, 89 N. Y. 52.

[3] Evans *v.* Middlesex County, 209 Mass. 474, 95 N. E. 897.

[4] School District *v.* Randall, 5 Neb. 408.

[5] Guild *v.* Andrews, 137 Fed. 369.

§ 264. The Same—Conclusiveness—Estoppel Clause.

In many public contracts a clause is inserted to the effect that the public body will not be precluded or estopped by any return or certificate made by the engineer or other public representative from at any time showing the true and correct amount and character of the work which shall have been done and materials which shall have been furnished by the contractor. After a certificate of the engineer has been given and the work has been accepted, the public body are bound by it as much as the contractor, in the absence of fraud or palpable mistake, and unless such be claimed, the public body cannot under such an estoppel clause question anything except the amount of work done. While it may show that the work accepted was not the work that was agreed to be done and that the materials put into it were different from those required by the contract, or were less in amount than the public body was apparently entitled to under the certificate, yet it is not free to show, in spite of the certificate, that the materials which were put into the work and accepted were not proper because of some defect in them, or in the way in which the work was done, if the materials furnished are of the general description and kind called for under the contract.[1]

§ 265. The Same—When not Binding or Conclusive.

The estimate of an engineer is only binding and conclusive as an adjudication, upon the condition that it is made according to the terms of the submission. In order to prevent the courts from considering the question, it must clearly appear that the subject-matter of the con-

[1] Brady *v.* Mayor, 132 N. Y. 415, 30 N. E. 757; O'Brien *v.* Mayor, 139 N. Y. 543, 35 N. E. 323; Quinn *v.* Mayor, 16 N. Y. App. Div. 408; Devlin *v.* New York, 124 *Id.* 184.

troversy was within the prospective submission.[1] The engineer may not introduce new terms into the contract. He has no power to determine what he thinks the contract ought to be. If he attempts to exercise such power his estimates or decisions are not conclusive.[2] The general rule is that he cannot bind the parties as to matters outside the contract.[3] His authority will not be extended to disputes arising under a subsequent independent verbal agreement relating to extra work.[4] His power of decision will not cover questions of law, as for instance, the question of ultimate liability to pay [5] or the amount of compensation due.[6] The power to construe the contract itself will not be considered as granted to the architect or engineer by inference or implication, or anything short of a distinct waiver. The power to determine the meaning and construction of drawings and specifications will not submit to his decision the contract rights of the parties.[7] So also questions of law as to the liability of a contractor to pay liquidated damages for failure to do certain work in time [8] or damages for the non-fulfillment of the contract,[9] are outside the scope of his power. Where a person designated to act as arbiter is an employee of the public body, a letter sent by him giving notice to repair certain

[1] Dhrew *v.* Altoona, 121 Pa. St. 041, 15 Atl. 636; Ruch *v.* City of York, 233 Pa. St. 36, 81 Atl. 891.

[2] Dhrew *v.* Altoona, *supra.*

[3] Ruch *v.* City of York, *supra;* Harlow *v.* Homestead, 194 Pa. St. 57, 45 Atl. 87; Dyer *v.* Middle Kittitas Irrig. Dist., 40 Wash. 238, 82 Pac. 301; Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464; Gammino *v.* Dedham, 164 Fed. 593.

[4] Douglass *et al. v.* Morrisville, 84 Vt. 302, 79 Atl. 391.

[5] *Idem.*

[6] Gammino *v.* Dedham, *supra.*

[7] Ætna Indem. Co. *v.* Waters, 110 Md. 673, 73 Atl. 712; Baltimore *v.* Schaub Bros., 96 Md. 534, 54 Atl. 106; Gammino *v.* Dedham, *supra.*

[8] King Iron & B. Co. *v.* St. Louis, 43 Fed. 768, 10 L. R. A. 826.

[9] Ruch *v.* City of York, *supra.*

work, is not action as arbiter but as agent of the public body, and his decision is not binding.[1] And wherever under the contract, matters within the scope of his authority come up for decision, these are not conclusive when not the result of honest judgment, made in good faith and free from fraud, or mistake amounting to fraud.[2] Any decision which is not his judgment, but the mere expression of the views or the influence, whether intentionally or innocently exercised, of others, is outside the contract and without force.[3]

§ 266. The Same—Not Conclusive—When Based on Erroneous Construction of Contract.

Where an engineer under an erroneous construction of the contract and of the rights of the parties thereunder, deliberately excludes from his final certificate work actually done by the contractor, and required by the contract, his decision is not final and binding upon the contractor, but may be attacked for palpable error, and the latter has a right to recover notwithstanding the provisions of the contract in regard to the final certificate.[4]

§ 267. The Same — Conclusiveness — Where Contract Illegal.

If a contract turns out to be illegal after performance and certificates of performance have been issued under the contract, such certificates of performance and completion

[1] St. Charles *v.* Stookey, 154 Fed. 772.

[2] Baltimore *v.* Ault, 126 Md. 402, 94 Atl. 1044; Evans *v.* Middlesex, 209 Mass. 474, 95 N. E. 897; Wildey *v.* Frac. Sch. Dist., 25 Mich. 419; McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038; Burns *v.* New York, 31 Misc. 315, 69 N. Y. App. Div. 214; Penn. B. Co. *v.* Kershaw, 226 Fed. 728.

[3] Baltimore *v.* Ault, *supra.*

[4] Burke *v.* Mayor, 7 N. Y. App. Div. 128; Uvalde Cont. Co. *v.* New York, 160 *Id.* 284; Croton Falls Cons. Co. *v.* New York, 168 *Id.* 261; Malloy *v.* Briarcliff Manor, 145 *Id.* 483; Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804.

are not conclusive evidence against the public body that the contractor is entitled to be paid. The certificate issued under a contract cannot have any greater validity than the contract itself of which it is a mere part.[1]

§ 268. The Same—When Provision not Applicable.

Where the public body has an absolute right under the terms of a contract to oust the contractor from the work and it acts under this power, the arbitration clause of the contract cannot apply and its election to act under the ouster clause is a waiver of arbitration. In like manner the provision for a final certificate to be obtained, upon completion of the work, before a contractor is entitled to final payment does not apply where the public body takes over and completes the work. The obtaining of it is not, therefore, a condition precedent to suit by the contractor for any balance claimed to be due under the contract.[2] Where a contract required a contractor to obtain his final estimate from certain architects, and in case the architects were discharged to obtain it from the public board itself, and the architects were discharged several months before the contractor instituted his suit, and he made repeated demands before suit for payment from the public board, which were refused, the failure to produce the architects' final certificate or explain its absence becomes of no consequence.[3]

It is unnecessary to produce a certificate where a contractor is driven from the work which, up to the time it was stopped, was properly performed.[4] Where a con-

[1] Hart *v.* New York, 201 N. Y. 45, 55, 94 N. E. 219.
[2] Jonathan Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 *Id.* 464.
[3] Germain *v.* Union Sch. Dist., 158 Mich. 214, 122 N. W. 524.
[4] Clark & Sons Co. *v.* Pittsburgh, *supra;* Kingsley *v.* Brooklyn, 78 N. Y. 200, 216; O'Corr & Rugg Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 178 N. Y. 622.

tract provided for payment of material only after it was accepted by the supervising architect and the contractor puts it beyond the power of the vendor to furnish evidence of inspection or approval by an arbiter the production of the certificate is not obligatory.[1] If performance of an act required to be performed in connection with the execution of a contract is prevented by the other party, non-performance is excused.[2]

§ 269. The Same—When Production not Required—When Provision not Applicable.

The provisions of the contract and specifications which make the engineer the arbiter with reference to the work done under the contract and which require his certificate for work so done before a contractor will be entitled to payment do not apply to actions for breach of the contract. In an action for a breach of warranty or for damage for false representations as to conditions at the site, such provisions will not apply as such an action is not for work done under the contract, but for damages for its breach.[3] When a contractor is required to do work a second time which was already done in compliance with the contract, the action is in like manner for breach of the contract and the provision regarding a certificate has no application.[4] So when he is required to do work, not called for by his contract but not clearly outside of it, and he performs it under protest and he sues for breach of the contract, not for extra work done under it, a certificate is unnecessary.[5] Generally when the action is to recover

[1] U. S. *v.* Jack, 124 Mich. 210, 82 N. W. 1049.
[2] Kingsley *v.* Brooklyn, *supra*; U. S. *v.* Jack, *supra*.
[3] Faber *v.* New York, 222 N. Y. 255, 118 N. E. 609.
[4] Gearty *v.* Mayor, 171 N. Y. 61, 63 N. E. 804.
[5] Borough Cons. Co. *v.* New York, 200 N. Y. 149, 93 N. E. 480.

damages for breach of the contract, the provision requiring a certificate has no application.[1] Usually it has no application where a public body gives notice that it will take charge of the work and complete the contract, and the contractor sues to recover a claimed balance.[2] In such case he is not required to produce the certificate. And the omission to procure a certificate as to the value of extra work cannot affect the right of recovery where the suit is not upon the contract but in assumpsit. Even if a contractor does not fully perform his special contract, he still may have resort to the courts upon the common counts.[3]

§ 270. The Same—Waiver.

These provisions of the contract providing for a certificate of completion which constitute a condition precedent to payment may be waived, since they are inserted for the benefit of the public body.[4] Either party to a contract is at liberty to insist upon a strict performance of the contract terms, but he may likewise waive any of its provisions made for his benefit.[5] This waiver may be either express or implied.[6] A statutory duty to obtain such a certificate may not be waived.[7] It is only contractual stipulations that may be so treated. The public body alone can

[1] Fontano & Robbins, 18 App. D. C. 402; Gearty *v.* Mayor, *supra;* Borough Cons. Co. *v.* New York, *supra;* Markey *v.* Milwaukee, 76 Wis. 349, 45 N. W. 28.

[2] Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464.

[3] Bd. of Comm'rs Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982.

[4] Bradley *v.* McDonald, 218 N. Y. 351, 113 N. E. 340; Bowery Nat. Bk. *v.* Mayor, 63 N. Y. 336; Bader *v.* New York, 51 Misc. 358; Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464; Clark *v.* Pope, 70 Ill. 128; Douglass *v.* Morrisville, 84 Vt. 302, 79 Atl. 391.

[5] Bradley *v.* McDonald, *supra.*

[6] Preston *v.* Syracuse, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39; Maurer *v.* Sch. Dist., 186 Mich. 223, 152 N. W. 999.

[7] See O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262.

waive a provision of this kind; it cannot be waived by the engineer.[1]

§ 271. Acceptance of Work as Waiver of Certificate of Engineer.

In construction contracts where someone is appointed by the contract to supervise the work on behalf of the public body, the acceptance, by such appointee of the work of construction as it progresses, is ordinarily conclusive upon the public body.[2] But in determining this question recourse must be had to the extent of power conferred upon the engineer, and the terms of the contract. Where a contract provides that the contractor shall be responsible for the work as a whole until accepted by the public body, acceptance by the engineer will not bind or operate as a waiver of the condition which makes payment dependent upon the obtaining of a certificate.[3] Where an engineer expressly consents to unauthorized performance and material deviations from specifications and accepts a different class of work than that provided, such acts will not bind the public body. Acceptance of the work and payment of the contractor after a test will not conclude the public body, when made in ignorance of facts, which, if known, would have precluded acceptance or at least justified refusal of acceptance. When subsequently discovered the public body has a right to recover the damages sustained by breach of the contract, as the acceptance during progress of the work did not effect an estoppel or constitute a waiver of more complete performance, and such action survives such acceptance and final payment.[4]

[1] Malloy *v.* Briarcliff Manor, 145 N. Y. App. Div. 483, 491.
[2] U. S. *v.* Walsh, 115 Fed. 697; Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78.
[3] Sterling *v.* Hurd, 44 Colo. 436, 98 Pac. 174.
[4] U. S. *v.* Walsh, *supra*.

CHAPTER XXXIX

PERFORMANCE—PARTIAL PERFORMANCE

§ 272. Performance—Partial Performance—Entire Contract.

The complete performance of an entire public contract is usually a condition precedent to a contractor's right of recovery and to the maintenance of an action therefor.[1] A party to an entire contract who has partly performed it and subsequently abandons the further performance according to its stipulations, voluntarily and without fault on the part of the other party or his consent thereto, can recover nothing for such part performance.[2] Where a contract required rock to be excavated two feet below the line of the curbstone grade, and a contractor excavated only one foot, and instead of depositing rock in the street and in the river in continuation of the street as provided in the specifications, sold and disposed of it for his own benefit, this is a palpable and willful violation of the contract and non-performance in such important particulars as will prevent recovery.[3] Where a contract calls for drawing of plans and superintending the erection of a court house, and the latter services are not rendered and no good excuse is given for not rendering them, no

[1] Bonesteel *v.* Mayor, 22 N. Y. 165; Clark *v.* Bd. of Comm'rs of Osage County, 62 Okla. 7, 161 Pac. 791; MacFarland *v.* Barber A. P. Co., 29 App. D. C. 506.

[2] Spalding County *v.* Chamberlin & Co., 130 Ga. 649, 61 S. E. 533; Clark *v.* Bd. of Comm'rs Osage County, 62 Okla. 7, 161 Pac. 791; Douglas *v.* Lowell, 194 Mass. 268, 80 N. E. 510.

[3] Bonesteel *v.* New York, *supra.*

recovery is permitted, since the contract is entire.[1] When a contract is terminated by the public body against the will of the contractor, who is prevented from further performance, he is not confined to the contract price, but may bring his action for breach of the contract and recover as damages all that he may lose by way of profits, in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts and recover the actual value of the work done. In the latter case no recovery is allowed for prospective profits, but the actual value of the labor and materials is the rule of damage.[2] Of course any contractor who performs the part of an entire contract which is profitable to him and abandons the part which is unprofitable should have no aid in court. Willful abandonment of a contract without cause will never receive the protection of the courts. To grant protection would be to permit a man to profit by his own wrong. Some courts, in order to carry out equitable principles and prevent injustice, are prone to consider, in modern times, that the entirety is destroyed by part performance and raise an implied promise to pay for the benefits received. But this is a mild fiction. The better rule is, if the contract is in fact entire, that the law leave the loss where the contract places it.[3]

Where a contract has been partially performed and the contractor fails to complete the contract in accordance

[1] Spalding County *v.* Chamberlin, *supra.*

[2] Devlin *v.* New York, 63 N. Y. 8; Clark *v.* Mayor, 4 N. Y. 338; Jones *v.* Judd, 4 N. Y. 411; Masterson *v.* Brooklyn, 7 Hill, 61, 75; Sauer *v.* Sch. Dist. McKees Rocks, 243 Pa. St. 294, 90 Atl. 150; Glidden St. Bk. *v.* Sch. Dist., 143 Wis. 617, 128 N. W. 285. But see Carlin *v.* New York, 132 N. Y. App. Div. 90.

[3] Dermott *v.* Jones (Ingle *v.* Jones), 2 Wall. (U. S.), 1, 17 L. Ed. 762; Davidson *v.* Gaskill, 32 Okla. 40, 121 Pac. 649, 38 L. R. A. N. S. 692; National Cont. Co. *v.* Comm., 183 Mass. 89, 66 N. E. 639.

with its terms, the measure of damage is the cost of completion.[1]

Where the contract is still executory on the part of the injured party, his damage is the difference between the cost of completion and the contract price.[2]

§ 273. Acceptance of Benefits.

Even though the work done or the structure erected pursuant to a contract, is not done in accordance with its terms, if what has been done is accepted, it is fair and right that the public body receiving the benefits should pay what these are worth. In many instances public work is done under a special contract which does not conform to its terms either in point of time or in any other respect, yet if the party accepts the work as done the contractor may recover its value upon the common counts.[3] This principle is also applied in cases where the contract cannot be rescinded, but from its nature the work performed must enure to the benefit of the other, and where it would be unjust for such party to retain the benefits without compensation. In these cases the contractor must deduct from his contract price such a sum as will enable the public body to complete the contract according to its terms, or if that is impossible or unreasonable such sum as will fully compensate for the imperfection or insufficiency in work or materials. The contractor must also deduct such additional or consequential damages

[1] Boise City *v.* Nat. Surety Co., 30 Idaho, 455, 165 Pac. 131; New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905; Newton *v.* Devlin, 134 Mass. 490.

[2] Nat. Cont. Co. *v.* Hudson R. W. P. Co., 118 N. Y. App. Div. 665, reversed O. G. 192 N. Y. 209, 84 N. E. 965; Smith *v.* Copiah County, 239 Fed. 425, aff'd 239 Fed. 432; Peirce *v.* Cornell, 117 N. Y. App. Div. 66.

[3] Baltimore *v.* Kinlein, 118 Md. 336, 84 Atl. 483; Skowhegan Water Co. *v.* Skowhegan, 102 Me. 323, 66 Atl. 714.

which his breach may have occasioned to the public body. The contractor must also deduct all payments made.[1] The same general principles will likewise apply where the work has proved impossible of performance through no fault of the public body.[2] The recovery allowed will be upon quantum meruit, but no recovery for loss of profits will be permitted.[3]

§ 274. **Entire Contract—Willful Refusal to Perform.**

A public contract for the complete construction of a building, structure or work is an entire contract, and the willful refusal by the contractor to complete the building entitles the public body to a return of the installments paid.[4]

§ 275. **Breach by Both Parties.**

Where both parties break the contract, and the breaches by the public body are a perfect or partial excuse for the contractor's failure, the latter's breaches are not a complete defense to his action to recover the value of labor performed and materials furnished. A party to a contract, whose failure to perform it has contributed to the failures of the other party to perform, cannot urge that the failures of the latter are an absolute defense to an action brought by him to recover for partial performance.[5]

[1] Kelly *v.* Bradford, 33 Vt. 35; Skowhegan Water Co. *v.* Skowhegan, 102 Me. 323, 66 Atl. 714; Baltimore *v.* Kinlein, 118 Md. 336, 84 Atl. 483; Sherman *v.* Conner, 88 Tex. 35, 29 S. W. 1053; Sherman *v.* Conner, 72 S. W. (Tex.) 238; Lyman *v.* Lincoln, 38 Neb. 794, 57 N. W. 531; Manning *v.* Ft. Atkinson Sch. Dist., 124 Wis. 84, 102 S. W. 356. See Roettinger *v.* U. S., 26 Ct. Cl. 391; Ward *v.* Kropf, 207 N. Y. 467, 101 N. E. 469.

[2] Kinser *v.* State, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

[3] Kinser *v.* State, *supra.*

[4] Trenton *v.* Bennett, 27 N. J. L. 513, 517, 72 Am. Dec. 373; Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; U. S. *v.* U. S. Fid. & G. Co., 236 U. S. 512, 525, 59 L. Ed. 696.

[5] Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

§ 276. **Suspension of Work.**

When a contractor is entitled to receive an installment payment under his contract and the public body refuses to make the payment and the contractor thereupon suspends the work and does not resume it until the installment is paid, the acceptance of payment of the principal of the installment is a waiver of the right to payment of interest, as damages for failure to make the deferred payment. If the failure to pay the money constitutes a breach of the contract, the contractor to protect himself in his damages must pursue one of two remedies: he must stop the work, repudiate the contract and recover the contract price for the work done, or he must continue the work and sue for the past due installment and recover interest thereon as his measure of damages for withholding payment.[1]

§ 277. **Measure of Recovery where Part of Work is Performed by Strangers.**

If a contractor with a public body is engaged to excavate and remove certain earth and payment is provided for by a unit price for each yard of earth excavated, and some of the earth included in his contract is removed and carried away by a stranger to the contract, who was excavating on adjoining land, before the contractor entered upon the performance of the work, and neither party to the contract took any step to prevent such stranger from removing the earth, the contractor may not adopt the acts of the stranger as his own and recover for the material excavated by such stranger.[2]

§ 278. **Illegal Contract.**

Where a contract is illegal in part and, although there is

[1] Mechanics' Bank *v.* New York, 164 N. Y. App. Div. 128.
[2] St. George Cont. Co. *v.* New York, 205 N. Y. 121, 98 N. E. 387.

but one written agreement covering several undertakings, it may safely be said that such instrument sets forth several contracts, one relating to each undertaking, or else that it sets forth a contract covering several independent and separable subjects, in either event it may be held valid as to some and invalid as to other parts and recovery will be permitted upon the former.[1] Where chattels or supplies have been delivered under a void contract the contractor may recover them in replevin, where the public body refuses to pay for them because the contract is void.[2]

§ 279. Prevention of Performance Because of Invalidity of Contract after Partial Performance.

Where a public contract becomes invalid because of a failure to observe some requirement of law, and, after a partial performance, complete performance is prevented by law, a recovery may be had for benefits conferred by part performance, upon the principle of the maxim that no one shall be made rich by making another poor. The recovery, however, is not upon the basis of the contract, which is invalidated, but upon an implied agreement founded upon a moral obligation to account for the moneys or property received or the value of the work where the public body subsequently appropriates and utilizes the work. Under such circumstances the contractors acquire a right and the public body becomes subjected to a liability, by virtue of a new and quasi-contractual relation founded in justice.[3]

§ 280. Interference with Contractor during Performance—Remedy in Equity—Injunction.

If during performance of a contract public officials

[1] Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219.
[2] LaFrance Eng. Co. *v.* Syracuse, 33 Misc. 516.
[3] Ward *v.* Kropf, 207 N. Y. 467, 101 N. E. 469.

interfere with a contractor and interrupt the performance of his obligations, or violate or refuse to perform conditions precedent which must be performed by the public body and the contractor has no adequate remedy at law because the damages which he would be entitled to recover are not capable of any accurate determination, and would have to be ascertained upon a basis so uncertain as not to afford adequate redress or would not place him in the same position which he occupied at the time of the breach, an injunction will be granted to restrain such interference or refusal.[1] The law should prevent the commission of wrongs whenever a party presents a clear right and its violation. It is not enough to redress the wrong merely after it is committed. Whenever it is possible and equitable a party should be compelled to perform his just obligation, and the courts should interfere to prevent a violation of rights. Accordingly where a public body attempts to impose new and burdensome conditions upon the contractor and requires him to abandon the method of doing the work provided by the contract and his remedy at law would be inadequate, the interference will be enjoined.[2] Where a contract provides for the erection of certain structures at the joint expense of the contracting parties but directs that these structures shall not be erected until other work is furnished and until their erection is by vote of commissioners determined to be necessary, and it is impossible to ascertain the damages which would be suffered from a violation of the contract terms, an injunction will lie.[3] An injunction against a breach of

[1] Dailey *v.* New York, 86 Misc. 86, 170 N. Y. App. Div. 267, 218 N. Y. 665, 113 N. E. 1053; Erie R. R. Co. *v.* Buffalo, 180 N. Y. 192, 73 N. E. 26; Walla Walla *v.* Walla Walla W. Co., 172 U. S. 1, 43 L. Ed. 341, aff'g 60 Fed. 957.

[2] Dailey *v.* New York, *supra.*

[3] Erie R. R. Co. *v.* Buffalo, *supra.*

contract is in a sense indirectly accomplishing specific performance, and while it is true that specific performance will usually not be granted and cannot be granted where compensation at law is obtainable, nevertheless, even if reasons exist for refusing that remedy, it is no objection to the grant of injunction where the equities justify it.

CHAPTER XL

SUBSTANTIAL PERFORMANCE

§ 281. Performance—Rule Affecting Substantial Performance.

Substantial performance of a contract by one party coupled with a retention of benefits by the other will authorize an action by the former to recover the contract price. In such a case recovery may be had on an averment by the contractor of full performance, though the proof falls short of showing it, and the remedy of the public body is by counterclaim for its damages or by an independent action before it is sued to recover such damages as it has sustained through the contractor's failure to completely fulfill his covenants.[1] This rule is founded in justice, for if one party has received the benefit of substantial performance by the other, without paying the price agreed upon and the latter cannot or does not return these benefits, it would be manifestly unjust to permit him to retain them without paying or doing as he promised. It is in order to avoid such an injustice that a contractor who has substantially performed is permitted to enforce specific performance of the covenants of the public body, or to recover damages for their breach upon an averment of performance without proof of complete fulfillment.[2] The

[1] Omaha Water Co. *v.* Omaha, 156 Fed. 922; St. Charles *v.* Stookey, 154 Fed. 772; Walsh Const. Co. *v.* Cleveland, 271 Fed. 701; Ætna Iron Works *v.* Kossuth County, 79 Iowa, 40, 44 N. W. 215; White *v.* Braddock Sch. Dist., 159 Pa. St. 201, 28 Atl. 136; Sch. Directors *v.* Roberson, 65 Ill. App. 298.

[2] St. Charles *v.* Stookey, *supra;* Newport *v.* Newport B. Co., 90 Ky. 193, 13 S. W. 720.

foregoing statement of principles is of course a modern modification of the common-law rule which required the express stipulations of the contract to be strictly performed and admitted of no recovery for substantial compliance. This rule, however, has been much relaxed and the modern tendency is not to require in all cases that the performance shall be literal and exact. The more equitable rule stated has been generally adopted which permits recovery by one who in good faith attempts to perform his contract and does so substantially although there may be a slight deviation, or some technical or unimportant omission or defect. But a failure to carry out a material part of the contract is not a substantial performance, and at least substantial performance is still indispensable to recovery under the modified rule. And indeed to permit a recovery upon the theory of substantial performance even deviations may not be intentional.[1] But where the public body can refuse to accept the work and does refuse to accept it or returns it, it is not bound to pay unless it exactly conforms with the contract. It is only where contracts for personal services or construction contracts are not fully performed but the public body accepts the fruits of the contract, and receives and retains its benefits so far as performed and furnished that it is bound to pay what these are reasonably worth. The law implies a promise to pay this for the partial performance which is accepted. This implied liability arises from the subsequent transactions or conduct of the parties, and if the party for whom the work was done does not intend to be bound by it as performed,

[1] Denton *v.* Atchison, 34 Kan. 438, 8 Pac. 750; Monteverde *v.* Bd. of Superv's Queens County, 78 Hun, 267; Smith *v.* Scott's Ridge Sch. Dist., 20 Conn. 312; Buckley *v.* Marin County, 25 Col. App. 577, 144 Pac. 545; Ætna Iron Wks. *v.* Kossuth County, 78 Iowa, 40, 44 N. W. 215; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545; Cranford *v.* Dist. of Columbia, 20 Ct. Cl. 376.

the law will not make a different contract for him than that into which he entered. So if he does not accept the services or work and does not receive or retain any of the benefits this implied liability cannot arise.[1] A contractor in order to recover must honestly and in good faith have endeavored to comply with the terms and conditions of his contract.[2] The substitution of material one fourth in wearing quality of that provided by contract and one-half of the dimension required cannot be considered a substantial compliance or an inadvertent or unintentional deviation.[3] This is so because the term substantial performance means strict performance in all essentials necessary to the full accomplishments of the purposes for which the thing contracted for was designed. Failure as to any of such features whether in good faith or bad faith, any departure from the contract not caused by inadvertence, or unavoidable omission, any defect so essential as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished, is inconsistent with substantial performance of the contract.[4] Substantial performance is performance with immaterial omissions for which compensation is made pro tanto. Omissions which relate to matters so essential as to defeat the objects of the parties or deviations from the plan which cannot be remedied without a partial reconstruction of a work or building cannot be said to be so unsubstantial as to be capable of compensation, without injustice, by deductions from the price. The parties are bound by their agreement and cannot escape because of impossibility to

[1] Denton *v.* Atchison, *supra.*
[2] Buckley *v.* Marin County, *supra;* Filbert *v.* Philadelphia, *supra.*
[3] Denton *v.* Atchison, *supra.*
[4] Manning *v.* Ft. Atkinson Sch. Dist., 124 Wis. 84, 102 N. W. 356; Smith *v.* Russell, 140 N. Y. App. Div. 102.

substantially comply with its terms. When, therefore, the action is on contract and not for quantum meruit recovery is not permitted unless a substantial performance is shown.[1] Care must be taken to not unduly extend the rule. The rule is liberal to a contractor since it allows recovery, although performance is not exact, and it cannot be extended without danger to the integrity of the contract, which is and should be the measure of the rights of the parties.[2] Otherwise the court is in effect making a new contract for them, compelling the public body to take whatever is tendered as performance and making the contractor secure in his compensation although the objects of the contract are not accomplished either literally or substantially. But the rule has no application where there is a willful and intentional even though slight departure from the terms of the contract.[3] The question whether there has been substantial performance of a contract is ordinarily a question of fact to be decided by a jury.[4] The measure of recovery is the contract price less the damage caused by failure to strictly perform.[5]

§ 282. Quantum Meruit.

If a contractor substantially performs his contract recovery may be had by him upon the contract, as shown, upon an allegation of performance even though the proof falls short of it. Under the same equitable rule when a con-

[1] Littell *v.* Webster County, 152 Iowa, 206, 131 N. W. 696; McCain *v.* Des Moines, 128 Iowa, 331, 103 N. W. 979.

[2] Bigler *v.* New York, 9 Hun, 253.

[3] Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151; Kelly *v.* Bradford, 33 Vt. 35. See Bonesteel *v.* N. Y., 22 N. Y. 165.

[4] Monteverde *v.* Queens Co., 78 Hun, 267; Russell *v.* Iredell County, 123 N. C. 264, 31 S. E. 717; Elizabeth *v.* Fitzgerald, 114 Fed. 547.

[5] Ætna Iron & Steel Wks. *v.* Kossuth City, 79 Iowa, 40, 44 N. W. 215; Walsh Const. Co. *v.* Cleveland, 271 Fed. 701.

tractor in good faith endeavors to perform his contract he may recover upon quantum meruit, where there has been a substantial compliance with the terms of the contract, for the value of the benefits conferred, where these have been accepted by the public body.

CHAPTER XLI

PERFORMANCE—DELAY IN PERFORMANCE

§ 283. Performance—Time of Performance—Delay.

Delay and time necessarily run together, and consideration of the element of delay brings up the question of how essential the element of time is in the contract. Time is not generally an essential element of contract, and where it is not of the essence of the contract, a mere failure to perform, within the period specified, will not avoid the agreement.[1] A contract is not rendered void ab initio merely because the time fixed by it for completion of the work elapses before the work is actually commenced.[2] If time is made of the essence of a contract and the time is exceeded and the work not finished, no recovery may be had.[3] Time is of the essence where a particular ordinance which provides for an improvement limits the time for completion or a general ordinance exists which requires work to be done within the agreed time.[4] But if the contract provides for liquidated damages in case the work or structure is not completed in time, this renders the contract indefinite as to time and time will not be considered of the essence.[5] Where the public body is the cause of the delay, the contractor is not obliged to abandon the work

[1] Baltimore *v.* Raymo, 68 Md. 569, 13 Atl. 383.
[2] *Idem.*
[3] Baltimore *v.* Raymo, 68 Md. 569, 13 Atl. 383; Carland *v.* New Orleans, 13 La. Ann. 43; Wheless *v.* St. Louis, 90 Mo. App. 106; Chandley *v.* Cambridge Springs, 203 Pa. St. 139, 52 Atl. 87.
[4] Springfield *v.* Schmook, 120 Mo. App. 41, 96 S. W. 257 and cases cited.
[5] Heman *v.* Gilliam, 171 Mo. 258, 71 S. W. 163.

and bring suit for damages, but may complete the work and then bring action.[1] If the contractor delays because a public body has not sold bonds, he is responsible, as he cannot put any blame upon the public body for not having funds in its treasury in advance of the time it is due to him. Where, however, the delay is caused by the failure of the public body to make payments, the contractor is relieved of responsibility therefor.[2] Where the public body is at fault for delays, it cannot hold the contractor liable in the amount of stipulated damages for any delays which have been due to its fault, or to the fault of persons for whose conduct the public body is responsible.[3] But where the responsibility of the contractor and the public body for delays is capable of apportionment, each must bear the responsibility for his own delays.[4] If the public body is principally at fault and it is impossible to apportion the responsibility between it and the contractor, the contractor is relieved entirely and the stipulated damage clause becomes abrogated.[5] Instances arise where the public body agrees to afford full opportunity to commence and prosecute the work. Until this condition precedent to performance is fulfilled the contractor's agreement as to time does not accrue.[6] So where the public body postpones commencing the work to a more unfavorable season of the year, and the situation of the parties is so changed that they could not have intended the stipulation as to time to remain in force, no responsibility

[1] Chickasha *v.* Hollingsworth, 155 Pac. (Okla.) 859.

[2] Chandley *v.* Cambridge Springs, *supra.*

[3] Wallis *v.* Wenham, 204 Mass. 83, 90 N. E. 396; Amoskeag Mfg. Co. *v.* U. S., 17 Wall. (U. S.) 592, 21 L. Ed. 715; Erickson *v.* U. S., 107 Fed. 204; Dist. of Columbia *v.* Camden Iron Wks., 15 App. D. C. 198.

[4] Wallis *v.* Wenham, *supra;* Chandley *v.* Cambridge Springs, *supra; Contra,* Mosler Safe Co. *v.* Maiden Lane S. D. Co., 199 N. Y. 479, 93 N. E. 81.

[5] Wallis *v.* Wenham, *supra;* Deeves *v.* New York, 17 N. Y. Supp. 460; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

[6] *Idem.*

for stipulated damages can rest upon the contractor.[1] To the extent that the public body delays the work, the parties are taken to have understood and intended that the time limit for completion is extended by the amount of such delays.[2] In some jurisdictions it is declared, where acts of the public body cause delay, that this abrogates the stipulated damage clause and leaves the contractor responsible only for actual damages.[3] And it is also denied that there can be any apportionment of fault, or of the delays caused by mutual default.[4]

Damages may be recovered for unreasonable delay on the part of the public body in allowing the contractor to proceed, for delay in performing conditions precedent to his duty to proceed, or for unreasonable interference with the contract work or with other contractors over whom control has been reserved.[5]

Delay in performance sometimes occasions increased cost in the price of labor and materials, and when a contractor does not complete he is left without compensation for his own time and services and for the use of his plant upon the contract work which he would usually receive in the shape of profits. Where these results ensue from delay caused by the public body without right the contractor is

[1] Wallis *v.* Wenham, *supra*; King Iron B. &. Mfg. Co. *v.* St. Louis, 43 Fed. 768.

[2] White *v.* Braddock Sch. Dist., 159 Pa. St. 201, 28 Atl. 136; Chicago, B. & I. Co. *v.* Olson, 80 Utah, 533, 83 N. W. 461; Wallis *v.* Wenham, *supra;* Callahan Cons. Co. *v.* U. S., 47 Ct. Cl. 229.

[3] McClintic Marshall C. Co. *v.* Bd. of Chosen Freeholders, 83 N. J. Eq. 539, 91 Atl. 881; U. S. *v.* United Eng. Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; Mosler Safe Co. *v.* Maiden Lane Safe D. Co., 199 N. Y. 479, 93 N. E. 81.

[4] Mosler Safe Co. *v.* Maiden Lane S. D. Co., *supra.* See Delafield *v.* Westfield, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

[5] McMaster *v.* New York, 108 N. Y. 542, 15 N. E. 417; Thilemann *v.* New York, 82 N. Y. App. Div. 136; Rogers *v.* New York, 71 *Id.* 618, aff'd. 173 N. Y. 623, 66 N. E. 1115; Lentilhon *v.* New York, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190.

entitled to sue and recover these damages. Accordingly if in fact the cost of labor and material has risen, this is a recoverable item.[1] The value of his services and his time upon the work may also be recovered.[2] Where he has employees whom he must keep upon salary during this period he may likewise recover such amounts as he expends, and the value of the use of his plant and machinery is also considered a loss which may be recovered.[3] He must, however, allow for any compensation actually received during this period for their services from other sources.[4] But where the contractor subsequently completes performance he may not recover for his own time and services since he will find such compensation in his profits.[5] Where of course the public body under a reserved power or otherwise rightfully delays the work, no recovery may be had for such delay.[6]

§ 284. Varying Causes.

Where delay is occasioned in the performance of work upon a public building, because another contractor doing special work in the building had not finished his work on time, the contractor for the building may not claim damages against the public body if his failure to have his work ready on time delayed the other contractor.[7] But where the delay is the delay of the public body or its architect or agent, because it fails to do the things which under the

[1] King *v.* Des Moines, 99 Iowa, 432, 68 N. W. 708; Allamon *v.* Albany, 43 Barb. 33; Kelly *v.* U. S., 31 Ct. Cl. 231; Bitting *v.* U. S., 25 Ct. Cl. 502; Langford *v.* U. S., 95 Fed. 933.

[2] Kelly *v.* U. S., 31 Ct. Cl. 361.

[3] Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859; Cotton *v.* U. S., 38 Ct. Cl. 36.

[4] Cotton *v.* U. S. *supra.* See Figh *v.* U. S. 8 Ct. Cl. 319.

[5] Langford *v.* U. S. *supra.*

[6] Cumberland Co. Bd. *v.* Poxson Co., 196 Fed. 156, 201 Fed. 656.

[7] Churchyard *v.* U. S. 100 Fed. 920.

contract it was obliged to do, it is liable.[1] Where several contracts are made with a contractor each of which provided the public body would require completion in a certain time after a designation of the day and place of commencing each contract, and the public body fails to give the notice, no liability for delay will arise.[2] Where a public body delays and suspends work because of contemplated changes of purpose in regard to the use of stone and the site, the enforced suspensions and delays are unjustifiable and are not covered by a stipulation that the stone shall be furnished as "required."[3] But a contractor cannot complain of delays which occur in the completion of work when the delay is occasioned by the exercise of a power which the contract warrants.[4] A provision that a contractor shall stand loss from unforeseen obstructions or difficulties encountered in the work will not be extended to apply to obstructions and difficulties at a changed place of work, resulting from increased depth of water and quicksand.[5] Loss from delays caused by failure to deliver pipes which is cast upon the contractor will not include defects in them which cannot be discovered until they are being put in place.[6]

§ 285. Rejection of Materials.

Provisions in a contract, which name an inspector to see that the work corresponded with plans and specifications, and make his certificate that the work has been

[1] W. G. Cornell Co. *v.* Schuylkill County, 222 Fed. 876; United States *v.* United Eng. Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; U. S. *v.* Smith, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

[2] McClintic Marshall C. Co. *v.* Bd. of Freeholders, 83 N. J. Eq. 539, 91 Atl. 881.

[3] U. S. *v.* Mueller, 113 U. S. 153, 28 L. Ed. 946, aff'g 19 Ct. Cl. 581.

[4] Montgomery *v.* Mayor, 151 N. Y. 249, 45 N. E. 550.

[5] Wood *v.* Ft. Wayne, 119 U. S. 312, 30 L. Ed. 416.

[6] *Idem.*

faithfully performed in accordance with the contract a condition precedent to payment, in effect constitute him a judge as to these matters. If he arbitrarily rejects materials and thereby causes delay to the contractor the latter's remedy is to disregard his rejections, go on with the work and rely on the fact that the work done and materials furnished are up to the requirement of the contract, should the public body refuse payment. The contractor cannot if he acquiesces in the inspector's rejection of materials and procures other materials, maintain an action against the public body for damages, where the execution of the work is thus delayed, on the ground that the delay was caused by such officers. For by force of the contract these officers were invested with the power of supervision and an action will not lie, especially when the delay is occasioned in the exercise of this very power of supervision which the contract warrants and which the contractor seems to recognize.[1] To protect himself the contractor must stand upon his own rights under the contract.

§ 286. Waiver.

When the contract provides for stipulated damages for each day the completion of the work is delayed beyond the time fixed, there is no waiver of the time of performance because a public body prevents a contractor from continuing work after the time for completion has expired. The very purpose of the provision is to prevent any question on this subject. This is especially true where the contract provides that acceptance of any part of the work shall not be deemed a waiver of the right to enforce the provisions

[1] Montgomery & Mayor, 151 N. Y. 249, 45 N. E. 550, aff'g 9 Misc. 331; Camden I. Wks. *v.* New York, 104 N. Y. App. Div. 272, modified 185 N. Y. 617, 78 N. E. 1101.

of the contract.[1] Making a part payment of the amount due after the time specified for the completion of the building, is not inconsistent with a claim for damages on account of delay in completion where enough is retained to cover the damages claimed on that account by the public body.[2] Waiver of performance of the contractor's agreement as to time of completion and payment after such time do not constitute waiver of a provision for stipulated damages.[3] Of course a public body may waive its claim for damages on account of delays of the contractor.[4] Strict performance of the element of time may be waived and it is waived where the public body urges a contractor to go on with the work after the contract time has expired and makes part payment.[5] Thereafter the public body may only claim such damages as it may suffer by reason of the delay. Where the time to complete is expressly extended and the contractor does not complete the work or deliver the goods within the extended time, he will be held to the full obligation of the contract for any delay beyond the extension.[6] Where the public body reserves the right to increase the height of a building but fails to ask that this be done until the time for entire completion had so nearly expired that this work could not be done in time, the provision for liquidated damages for failure to complete in time is waived.[7]

[1] Macey Co. *v.* New York, 144 N. Y. App. Div., 408, 208 N. Y. 514, 101 N. E. 1110.

[2] Lawrence County *v.* Stewart, 72 Ark. 525, 81 S. W. 1059; Stephens *v.* Essex County Pk. Comm., 143 Fed. 844.

[3] Stephens *v.* Essex County Pk. Comm., *supra.*

[4] Rosser *v.* U. S., 46 Ct. Cl. 192.

[5] Phillips Cons. Co. *v.* Seymour, 91 U. S. 46, 23 L. Ed. 341.

[6] Laidlaw D. G. Co. *v.* U. S., 47 Ct. Cl. 271.

[7] Maurer *v.* Sch. Dist., 186 Mich. 223, 152 N. W. 999.

CHAPTER XLII

DEFECTS IN PERFORMANCE

§ 287. Defects in Performance.

Defects like delays have numerous causes, and liability for defects depends upon responsibility for these varying causes, upon the acts of each party which proximately produced them. The defect may be caused by the public body in furnishing improper, insufficient or defective plans.[1] It may furnish defective materials, or allow work done to become defective by providing in the contract improper or insufficient means for its protection, but if those provided are followed the contractor is relieved.[2] In such cases the public body is chargeable with resulting defects and cannot shift the risk to the contractor. The contractor may not properly be held responsible when later a bridge collapses,[3] because of defects in the plans furnished, or mortar or concrete disintegrates because directed to be laid in freezing weather[4] or a building falls because materials were unsuitable or defective.[5] So where work already exists to which new work or structures are to be added the contractor cannot be held responsible because the public body fails to remove defective work. If founda-

[1] Hills *v.* Farmington, 70 Conn, 450, 39 Atl. 795; Indep. Sch. Dist. *v.* Swearngin, 119 Iowa 702, 94 N. W. 206; Bd. of Comm. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006; Dwyer *v.* New York, 77 N. Y. App. Div. 224; MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661; Dist. Columbia *v.* Clephane, 13 D. C. 155, 110 U. S. 212, 28 L. Ed. 122; Dale *v.* U. S., 14 Ct. Cl. 514; Penn. Bridge Co. *v.* New Orleans, 222 Fed. 737. See Kinser *v.* State, 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

[2] Schliess *v.* Grand Rapids, 131 Mich. 52, 90 N. W. 700.

[3] Penn. Bridge Co. *v.* New Orleans, *supra.*

[4] Schliess *v.* Grand Rapids, *supra.*

[5] Manville *v.* McCoy, 3 Ind. 148; Bentley *v.* State, 73 Wis. 416, 41 N. W. 338.

tions left prove insufficient the contractor is relieved.[1] If a bridge proves an utter failure, because the public authorities insisted upon the use of old material in a bridge and would not consider plans which did not include its use, it matters not that the contractor drew the plans, where the public body limited his manner of drawing them and then adopted them as their own in an attempt to get other bridge builders to bid for the work. Under such circumstances the public body is responsible.[2] Where of course a building or structure collapses without fault of the public body but because of defective work done by the contractor or defects in the plans which he has adopted as sufficient, the contractor will be responsible.[3] If the contractor fails to perform his work in accordance with specifications the public body is not obligated to accept the work, and upon refusal is not even liable upon a quantum meruit. The public body may likewise refuse to accept defective performance, and no liability either upon the contract or upon quantum meruit can arise against it.[4]

The damages recoverable for defective performance consist of the difference in value between what is tendered as performance and what is due and required by the terms of the contract.[5] If the contractor is justified in abandoning the work the public body may not recover any damages for his failure to fully perform.[6]

[1] Gibbons *v.* U. S. 15 Ct. Cl. 174, aff'd 109 U. S. 200, 27 L. Ed. 906.

[2] Holland *v.* Union County, 68 Iowa, 56, 25 N. W. 927.

[3] Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663; Shoenberger *v.* Elgin, 164 Ill. 80, 45 N. E. 434. See Thorn *v.* Mayor, L. R. 1 App. Cas. 120, aff'g 44 L. J. Exch. 62; DeMoth & Rose *v.* Hillsboro Indep. Sch. Dist., 186 S. W. (Tex. C. A.,) 437.

[4] Bonesteel *v.* New York, 22 N. Y. 162; Denton *v.* Atcheson, 34 Kan. 438, 8 Pac. 750.

[5] Converse Br. Co. *v.* Geneva County, 168 Ala. 432, 53 So. 196; Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342.

[6] San Francisco Bridge Co. *v.* Dumbarton L. Co., 119 Cal. 272, 51 Pac. 335.

CHAPTER XLIII

PERFORMANCE—EXCUSE FOR NON-PERFORMANCE—IMPOSSIBILITY OF PERFORMANCE

§ 288. Impossibility of Performance—Unforeseen Conditions.

Where an executory contract is made wherein a contractor absolutely agrees to perform some act which is possible in itself, he is not excused if he is unable to execute it through unforeseen conditions, accident or misfortune, but he must perform or pay damages.[1] The only way he can protect himself is by appropriate stipulations in his contract against these contingencies.[2] There are, however in the nature of many contracts implied conditions by which a contractor is relieved from his unqualified obligation because the law at its making has qualified it. And, when in such event, without his fault, performance is rendered impossible, it may be excused.[3] When it is inherently known to and contemplated by the parties at its making that the fulfillment of the contract is dependent upon the continuance or existence of certain things or conditions essential to its due execution, if before default they cease to exist and thereby, without fault, performance becomes impossible, the contractor is relieved from the consequences of his failure to perform, by virtue of this implied condition, to which his contract is made subject

[1] Kinser Cons. Co. *v.* State, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871; Jones *v.* U. S., 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733.
[2] Kinser Cons. Co. *v.* State, *supra;* Jones *v.* U. S., *supra.*
[3] Kinser Cons. Co. *v.* State, *supra.*

by force of law.[1] It is because the parties intended the exception that the law implies the condition.

There are accordingly many exceptions to the rule that accident or unforeseen conditions, arising without the fault of either party, will not excuse performance of an absolute executory contract. Four have been stated to be the quantum of exceptions.[2] But a fifth at least should be added.[3] These exceptions are as follows: 1. Where performance of the contract is absolutely impossible. 2. Where it becomes legally impossible. 3. Where the specific thing which is essential to the performance of the contract is destroyed. 4. Where through sickness or death personal services become impossible. 5. Where conditions essential to performance do not exist.

§ 289. **Where Performance is Absolutely Impossible.**

It is a truism that impossible conditions cannot be performed. A contract requiring the performance of these contradicts itself. If therefore a person contracts to do something absolutely impossible at the time, not subsequently, the contract will have no binding force, because no man can be obliged to perform an impossibility.[4] It is only where the thing is possible in itself and the party absolutely engages to perform it, that performance will not be excused by the occurrence of inevitable accident or other contingency or difficulty, although it was not foreseen by the party and was beyond his control.[5] But the impossibility which releases a contractor from the obliga-

[1] Kinser *v.* State (N.Y. Ct. Cl.) 125 N. Y. Supp. 46.
[2] *Idem.*
[3] Jones *v.* U. S., *supra.*
[4] Jones *v.* U. S., 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162.
[5] Jones *v.* U. S., *supra.*

tion to perform his contract must be a real impossibility and not a mere inconvenience.[1]

§ 290. Where Legal Impossibility Arises—General Rule. Where the performance of a contract which was lawful in its inception becomes unlawful or legally impossible of performance by reason of any subsequent act or event, the contract is thereby dissolved or terminated, in so far as it remains executory, and both parties are excused from its further performance.[2]

§ 291. Legal Impossibility—Operation of Law—Frustration of Objects. Where a contract for public work provides that the contract price is not to be paid until the final completion of the work and after part performance further execution becomes impossible by the act of the law, the performance of the required condition becomes ineffective and the contractor is entitled to recover without showing a compliance in this regard.[3] Where a contractor with the State sublet a part of his work and subsequently when the work was partly performed the contractor was prevented by authority of the State, through the passage of a statute from completing performance, the subcontractor may only recover under the contract for the work done.[4] But neither the contractor nor the subcontractor can claim loss of profits against the other, since neither party is at fault and there is no breach of the agreement by either party.[5] But where the performance by the contractor is

[1] Smoot's Case, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107.

[2] Brick Presb. Church *v.* New York, 5 Cow. 538; Jones *v.* Judd, 4 N. Y. 411; U. S. *v.* Dietrich, 126 Fed. 671; Anglesea *v.* Rugeley, 6 Q. B. 107, 114; Brewster *v.* Kitchin, 1 Ld. Ray, 317, 321.

[3] Jones *v.* Judd, 4 N. Y. 411.

[4] *Idem.*

[5] Jones *v.* Judd, 4 N. Y. 411; Devlin *v.* New York, 63 N. Y. 8.

prevented by the act or omission of the public body he has his election to treat the contract as rescinded and recover on quantum meruit, for the value of his labor and materials furnished, or he may sue upon the contract and recover for the work completed according to the contract and for loss in profits, or otherwise which he sustained.[1] Where a contract was made by the United States with a contractor who later became a member of Congress, his position as a public official immediately terminated the contract as partly performed, by virtue of section 3739 of the Revised Statutes, which became a part of the contract at the time it was made, and dissolved it when he became an officer of the government authorized to make contracts.[2] This rule that where a contract becomes impossible of performance by operation of law, performance is excused, is based upon an implied condition of the contract. So whether the illegal situation is forced into a contract by act of the legislature making further performance illegal, or by act of a court through process of injunction or otherwise, the result is the same.[3]

Where an act or thing contracted to be done is subsequently made unlawful by act of the legislature, the promise is avoided. And where performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation.[4] But,

[1] Danolds *v.* State, 89 N. Y. 36; Lord *v.* Thomas, 64 N. Y. 107; Jones *v.* Judd, 4 N. Y. 411.

[2] U. S. *v.* Dietrich, 126 Fed. 671.

[3] Advertiser Co. *v.* State, 193 Ala. 418, 69 So. 501; Burkhardt *v.* Georgia Sch. Tp., 9 S. D. 315, 69 N. W. 16; Jones *v.* Judd, *supra.* See Webb Granite & Cons. Co. *v.* Worcester, 187 Mass. 385, 73 N. E. 639. See Wade *v.* Brantford, 19 U. C. Q. B. 207.

[4] Advertiser Co. *v.* State, *supra;* Monaca *v.* Monaca St. Ry. Co., 247 Pa. St. 242, 93 Atl. 344.

because the public body happens to be a party to a contract, it does not surrender its sovereign right and duty to legislate, and therefore the passage of a general law which affects the contractor and the general public equally is not a breach and will not relieve from performance.[1] The adoption of new rules governing the inspection and acceptance of work or supplies or goods purchased, so long as they are reasonable and intended to prevent frauds, which were constantly perpetrated, do not constitute a breach or excuse performance.[2]

The law of the land constitutes a part of every contract. When performance of a contract becomes impossible nonperformance is excused by reason of an implied condition of the contract. Where the legal impossibility arises by operation of law from the exercise of a power conferred upon a public body or one of its boards or agents, nonperformance is excused. Thus when the performance of a contract of employment as a teacher becomes impossible by reason of the exercise of a power conferred upon health authorities to close a school to prevent an epidemic, the contract becomes unenforceable and no recovery may be had by such teacher during the period of suspension.[3] If, however, a school house is burned down the obligation to teach continues, since another place to hold school may be obtained, and so the public obligation to pay survives.[4]

Where the construction of a reservoir contract was suspended under the Defense of the Realm Act which made it illegal to continue, the performance was thus

[1] Denning *v.* U. S., 1 Ct. Cl. 190; Jones *v.* U. S., 1 Ct. Cl. 383.
[2] U. S. *v.* Wormer, 13 Wall. 25; Smoot's Case, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107.
[3] Gregg School Tp. *v.* Hinshaw, — Ind. App.—, 132 N. E. 586.
[4] Smith *v.* Pleasant Pl. Sch. Dist., 69 Mich. 589, 37 N. W. 567; Cashen *v.* Sch. Dist., 50 Vt. 30.

rendered illegal and the object of the contract frustrated by an interruption which changed its conditions vitally and fundamentally and so the contract became determined.[1]

§ 292. Act of God—Inevitable Necessity.

Where an obligation or duty is imposed upon a person by law, he is absolved from liability for non-performance of the obligation if his performance is rendered impossible without his fault by an act of God or an unavoidable accident, sometimes alluded to as inevitable necessity.

This rule does not generally apply to contract obligations. The general rule as to these is that a contractor, who makes an absolute agreement to do a lawful act, is not relieved from liability for a failure to fulfill his promise by a subsequent impossibility of performance caused by an act of God or unavoidable accident. The reason for the rule is that he voluntarily agrees to perform the act without any reservation or exception, which if he desired, he could make in his agreement.[2] Nevertheless, as said above, when it is the law that creates the duty or charge and the party is unable to perform it without default on his part, the law excuses. The law never exacts performance, where it will involve a violation of law. Against

[1] Metropolitan Water Bd. *v.* Dick, 87 L. J. K. B. 370, aff'g 86 L. J. K. B. 675. See Leiston Gas Co. *v.* Leiston-Cum-Sizewell Urban Council, 85 L. J. K. B. 1759.

[2] School Dist. *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Dewey *v.* Alpena Sch. Dist. 43 Mich. 480, 5 N. W. 646, 38 Am. R. 206; Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162; Phœnix B. Co. *v.* U. S., 38 Ct. Cl. 492; Dermott *v.* Jones (Ingle *v.* Jones), 2 Wall. (U. S.) 1, 17 L. Ed. 762; Jones *v.* U. S., 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; Link Belt Eng. Co. *v.* U. S., 142 Fed. 243, 247; U. S. *v.* Lewis, 237 Fed. 80; Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198; Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604; Trenton *v.* Bennett, 27 N. J. L. 515; Mitchell *v.* Hancock County, 91 Miss. 414, 45 So. 571; Dist. Tp. of Union *v.* Smith, 39 Iowa, 9; Monaca *v.* Monaca St. Ry., 247 Pa. St. 242, 93 Atl. 344; Gathwright *v.* Calloway County, 10 Mo. 663; Hall *v.* Sch. Dist., 24 Mo. App. 213.

predicaments not of his own creation, such as the parties never understood as possible, legitimate consequences of the contract, a contractor is not bound to protect himself.[1] Thus where a railroad company may not proceed to carry out its contract and construct its road without the consent of certain municipalities, through whose territory it had contracted to build, the obligation which the law put upon it not being fulfilled without its fault, it is relieved of the obligation.[2] The rule that an act of God or inevitable necessity will not relieve from an absolute promise is not applied to executory contracts for personal services, nor for the sale of specific chattels, nor for the use of particular buildings, because in these contracts there is in their very nature an implied condition that if the person or thing shall not be in existence at the time stipulated for performance it shall not be required.[3] An implied condition exists in executory contracts to the effect that their performance shall not be rendered impossible, by the intervention of unforeseen, accidental and uncontrollable superior agencies and that their performance is excused when prevented by such agencies, as where there is a contract for the delivery of specific property at a future time and before the time for delivery arrives the property is destroyed by inevitable accident.[4] But it is an important element of that rule that the intervention of such causes will not excuse performance when the essential purposes of the contract are still capable of substantial accomplishment, even though a literal performance has become physically impossible.[5]

[1] Monaca *v.* Monaca St. Ry. Co., *supra;* Meriwether *v.* Lowndes County, *supra*; Mitchell *v.* Hancock County, 91 Miss. 414, 45 So. 571.

[2] Monaca *v.* Monaca St. Ry. Co., *supra.*

[3] Cameron-Hawn Realty Co. *v.* Albany, *supra.*

[4] Bd. of Educ. Bath Tp. *v.* Townsend, 63 Ohio St. 514, 59 N. E. 223. See Willington *v.* West Boylston, 21 Mass. 101.

[5] Bd. of Educ. Bath Tp. *v.* Townsend, *supra.*

§ 293. The Same—Inevitable Necessity—Destruction of Subject.

One who voluntarily enters into an absolute contract to perform certain work, furnish certain materials or supplies or erect a completed structure is bound to do it unless it is absolutely impossible.[1] If one contracts to erect a building upon the land of a public body, performing the labor and supplying the material, and before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the contractor, and he must rebuild. The reason is that the thing may be still done and he has contracted to do it. His contract is to deliver a completed structure and this may be done by erecting it over again.[2] If he agrees to erect and complete a building upon a particular site, no matter what the expense, he must provide such a foundation, upon that spot, as will sustain it. If he does not and the building falls down or is blown down he must reërect it as it matters not whether the consequence occurs through his fault or without his fault. Such a contract is absolute, clear and unqualified, and must be performed.[3] Sometimes contracts of this nature are subject to implied conditions which will excuse performance. Where, from the situation of the parties at the time the contract was

[1] Krause *v.* Crothersville, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111; Board of Educ. Bath Tp. *v.* Townsend, 63 Ohio St. 514, 59 N. E. 223; Young *v.* Chicopee, 186 Mass. 518, 72 N. E. 63; Sch. Dist. *v.* Dauchy, 25 Conn. 530; Eaton *v*, Sch. Dist., 23 Wis. 374; Trenton *v.* Bennett, 27 N. J. L. 513; Kinzer *v.* State 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871; Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162; Livingston County *v.* Graves, 32 Mo. 479; Bentley *v.* State, 73 Wis. 416, 41 N. W. 338; Chapman *v.* Montgomery W. P. Co., 126 Fed. 372; Dale *v.* U. S., 14 Ct. Cl. 514; Jones *v.* U. S., 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; Sickels *v.* U. S., 1 Ct. Cl. 214.

[2] Trenton *v.* Bennett, *supra.*

[3] *Idem.*

made, it is apparent that they must have known that its performance would be impossible unless a thing then in existence should continue to exist, or some condition or thing should come into existence before performance and remain in existence during performance, there arises an implied condition of the contract that if that thing or condition is destroyed or prevented from coming into existence before the time of performance, without the fault of the party bound to go forward with performance, either by act of God or by an unavoidable accident, such party will be absolved from liability for failure to perform.[1] But if a contract is to expend labor upon a specific subject, the property of another, or to bestow labor and materials upon a particular building or chattel as to shoe his horse, or slate or paint his building or put an annex or addition thereto or make repairs or alterations therein, it is obvious that its destruction prevents a compliance with the undertaking. So, if the horse dies or the building is destroyed by fire, lightning, flood or tornado before the work is done, the performance of the contract becomes impossible and with the principal substance perishes the incident. In such a case the contractor is relieved from further performance.[2] He may not sue on the contract for he has not performed the contract so that its stipulations may be availed of, but he may sue on quantum meruit for the reasonable value of the work done.[3] Where, however, the contract provided for payment of a stated sum during the progress of the work and such sum has been paid, no further recovery will be permitted

[1] Krause *v.* Crothersville, *supra;* Young *v.* Chicopee, *supra;* Trenton *v.* Bennett, *supra.*

[2] Trenton *v.* Bennett, *supra;* Krause *v.* Crothersville, *supra;* Young *v.* Chicopee, *supra.*

[3] Krause *v.* Crothersville, *supra;* Young *v.* Chicopee, *supra.*

even on quantum meruit.[1] The liability imposed upon a public body only extends to require payment for such labor and materials as have actually been made a part of the structure destroyed.[2] A contractor agreeing to deliver a certain kind of hay during a certain period is excused from performance, within these principles, where there is an entire failure of the crop of that particular kind of hay during the period.[3] But unforeseen difficulties or hardships will not excuse him.[4] A strike at the mines will not relieve from an absolute contract to furnish coal.[5] Where a contractor absolutely agrees to construct a tunnel, and agrees to take all responsibility for losses on account of the nature or character of the soil, for which the public body denied all responsibility, and where he is warned that there may be such difficulties, and later he encounters them and abandons his agreement, he cannot excuse it because the nature of the ground makes performance practically impossible or impracticable without a very large and disproportionate expense.[6] Courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts nor dispense with performance. The party who creates a duty or charge upon himself is bound to a possible performance of it, because he promises it and fails to protect himself by suitable conditions or qualifica-

[1] Krause *v.* Crothersville, *supra.*

[2] Young *v.* Chicopee, *supra.*

[3] Browne *v.* U. S., 30 Ct. Cl. 124.

[4] Penn. Bridge Co. *v.* Kershaw County, 226 Fed. 728; U. S. *v.* Gleason, 175 U. S. 588, 44 L. Ed. 284; Lewman *v.* U. S., 41 Ct. Cl. 470; Dewey *v.* Union Sch. Dist. of Alpena, 43 Mich. 480, 5 N. W. 646; St. Joseph County *v.* South Bend & M. St. Ry. Co., 118 Ind. 68, 20 N. E. 499.

[5] Peabody *v.* U. S., 45 Ct. Cl. 532.

[6] Rowe *v.* Peabody, 207 Mass. 266, 93 N. E. 604. See Kinser *v.* State, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

tions.[1] Parties who fairly and voluntarily assume hard bargains cannot claim relief from them for that cause.[2] Nor will the law relieve a man from a contractual obligation because he believes with good cause that the person with whom he has contracted will be unable to perform.[3]

One making an absolute contract is bound to respond in damages for its non-performance. If after he has substantially but not completely finished a structure and before its delivery it is destroyed by fire, he is liable to an action for money advanced upon the contract and damages for its non-performance.[4]

§ 294. Cancellation of Contract Rendering Performance of Subcontractor Impossible.

Parties cannot be relieved of contracts fairly made with full knowledge of the facts, although they mistake their rights or fail sufficiently to qualify and limit their liabilities.[5] If a contractor makes an absolute contract with a subcontractor to do certain work, and he fails to provide in it that in case his principal contract with the public body is terminated under a reserved power so to do or for other cause, a contingency which may be foreseen and provided against in the subcontract, and later the contract is cancelled by the issuance of a certificate by the engineer that the contract is not progressing so as to indicate its completion within the time limited for performance the subcontractor may recover his damages.[6] The contractor may protect himself by providing that his

[1] Cameron Hawn R. Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162.
[2] Southington *v.* Southington Water Co., 80 Conn. 646, 69 Atl. 1023.
[3] Coonan *v.* Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745. But see Cramp & Sons Co. *v.* U. S., 50 Ct. Cl. 179.
[4] Tompkins *v.* Dudley, 25 N. Y. 272.
[5] John Soley & Sons *v.* Jones, 208 Mass. 561, 95 N. E. 94.
[6] *Idem.*

promise is dependent upon the continued existence of the principal contract. Such a condition may be implied if the principal contract is in its entirety incorporated into the subcontract by reference, but it will not be read into the latter by implication. By an absolute promise the contractor will make himself responsible for the continued existence of the subject-matter of the contract until its performance is completed without fault by the subcontractor.[1]

Where the contract is not dissolved, a subcontractor is not limited to compensation for the fair value of the work done with a reasonable profit for such work and also upon the work remaining to be done. Nor is he restricted to a sum which would be proportionate to the contract price which the contractor would receive from the public body. On the contrary, he is entitled to the benefit of his contract, after deducting from it the reasonable cost of completing the work.[2] But the rule is otherwise where further performance is prevented, by authority of the State through passage of a statute.[3]

§ 295. Sickness—Death.

The act of God in the death of a party will not dissolve the contract or excuse performance except in the case of a contract requiring personal service, and then the law will imply an exception.[4] If personal services are not contemplated or required, performance is not excused because of sickness or other disability.[5] Contracts of this character

[1] John Soley & Son *v.* Jones, *supra.*

[2] *Idem.*

[3] Jones *v.* Judd, 4 N. Y. 411. See Devlin *v.* New York, 63 N. Y. 8. See § 291.

[4] Devlin *v.* Mayor, 63 N. Y. 8; Hall *v.* Sch. Dist., 24 Mo. App. 213; Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162. See Willington *v.* West Boylston, 21 Mass. 101.

[5] West Chicago Park Commr's *v.* Carmody, 139 Ill. App. 635.

for personal services, whether of the contracting party or of a third person, requiring skill and which can only be performed by the particular person named, are not in the nature of an absolute obligation under all circumstances. There is an implied condition that the person shall be able to perform the services at the time fixed for performance, and if he dies, or without fault on the part of the promisor he becomes disabled, the obligation to perform is extinguished.[1] But sickness will not admit of recovery upon an entire and indivisible contract which has not been performed.[2]

§ 296. Where Conditions Essential to Performance do not Exist.

Where a contractor enters into a contract to perform public work and contingencies arise which the contract does not expressly cover, and which render performance of the contract as intended and planned impossible, and make necessary substantial changes in the nature and cost of the work and bear materially upon the remainder of the work, the law reads into the contract, as of its inception, the implied condition that such contingency will terminate the contract.[3] It is not necessary that the parties had the contingency in mind, for had they considered it, they would have provided against it. It is not something which the parties omitted and the courts will feel justified in supplying, but something which will be implied by force of law.[4]

In such a situation the contract is at an end and both

[1] Devlin *v.* Mayor, *supra;* Cameron-Hawn Realty Co. *v.* Albany, *supra;* Jones *v.* Judd, 4 N. Y. 411; People *v.* Manning, 8 Cowen, 297.

[2] Davidson *v.* Gaskill, 32 Okla. 40, 121 Pac. 649.

[3] Kinser Cons. Co. *v.* State, 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

[4] *Idem.*

parties are excused from further performance. Where the work has been stopped, under a stop order issued by the public body because of natural conditions of the soil which render further performance impossible, the contractor is entitled to recover for work done and for benefits received by the public body under the contract down to the time the conditions were discovered and for such damages as may have resulted from the stop order. He may not recover for loss of profits or items of expense which he would have been entitled to recover had there been a breach.[1]

§ 297. Physical Impossibility—Impracticability.

Where a contract contemplates the doing of work or the furnishing of a commodity so long as it is reasonably possible to do so, the rule that where a contracting party undertakes to do something which he afterwards finds to be impossible, he nevertheless must suffer the consequences of the violation of his contract, has no application.[2] Where the nature of the venture is uncertain and this was clearly in the minds of the parties, and the contract was not to furnish a commodity at all events, but if reasonably possible, he is entitled to have these facts considered in determining his liability.[3] Indeed there are some contracts into which the law itself will write the word reasonably, as unavoidably within the contemplation of the parties. Where a contract provides for additions and changes in the work as are necessary, the law implies the term "reasonably" before the term "necessary." This protects the contractor against unreasonable action, and the public body against unforeseen conditions which defeat the origi-

[1] Kinser *v.* State, *supra.*

[2] Jackson County Light H. & P. Co. *v.* Independence, 188 Mo. App. 157, 175 S. W. 86.

[3] *Idem.*

nal plan. Reasonable necessity will not require absolute or physical impossibility, but even though possible from an engineering standpoint, if the expense to perform it, under the conditions revealed is so enormous as to make it impracticable, performance is impossible within the meaning of the contract.[1]

[1] Kinser Cons. Co. *v.* State, 205 N. Y. 381, 97 N. E. 871.

CHAPTER XLIV

PERFORMANCE—EXCUSE FOR NON-PERFORMANCE OCCASIONED BY ACT OF PUBLIC BODY

§ 298. Non-Performance Occasioned by Act of Public Body.

Good faith is an essential element of all contracts and is an implied condition of every contract.[1] There is an implied undertaking upon the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement.[2] It is a violation of these conditions for one to voluntarily put it out of his power to perform a contract. A party who prevents performance by his own act is in no position to object that the contract remains unperformed, and when performance is thus rendered impossible by the act of the public body or its agents, non-performance is excused.[3]

Where the officers and agents of a public body arrest a contractor's work and prevent the fulfillment of his contract and this is done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the public body in its corporate capacity shall be liable for the acts thus done.[4]

A contractor thus prevented from proceeding may abandon his contract and justify his conduct because of the acts

[1] Gardner *v.* Cameron, 155 N. Y. App. Div. 750.
[2] Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162.
[3] Murphy *v.* St. Louis, 8 Mo. App. 483.
[4] Kingsley *v.* Brooklyn, 78 N. Y. 200; Mahan *v.* Mayor, 10 Misc. 664; U. S. *v.* United Eng. Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; U. S. *v.* Peck, 102 U. S. 64, 26 L. Ed. 46; Soulard *v.* St. Louis, 36 Mo. 546; Hawks *v.* Charlemont, 107 Mass. 414.

of the public body.[1] Where a contractor with the government agreed to furnish hay contemplated to be obtained from a certain source, and the supply of hay which he depended upon was taken away by the government, this hindrance to the performance of his contract excused his non-performance.[2] If suspension of work is caused by the direct act of the public body, and is not occasioned by unwillingness of the contractor to comply with his contract, the contractor is likewise excused.[3] But interference by the public body to prevent the contractor from doing his work improperly may not be claimed as an excuse for failure to perform.[4] Under some circumstances the contractor is limited to a recovery upon quantum meruit and may not sue upon the contract.[5] But a contractor whose executory contract is unjustifiably abrogated is entitled, notwithstanding the wrongful acts of the public body, to the profits and advantages which would have enured to him as the direct and immediate fruits of the contract, had he been permitted to perform it. Where he is wrongfully deprived of the gains and profits of his executory contract he may recover as an equivalent, and by way of damages, the difference between the contract price, the amount which he would have earned and been entitled to recover on performance, and the amount which it would have cost him to perform.[6] His loss consists, where he has partly performed, of two items or grounds of damage, first, what he has already expended

[1] Devlin *v.* Mayor, 63 N. Y. 8; Jones *v.* Judd, 4 N. Y. 411; Mahan *v.* Mayor, *supra;* U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168.

[2] U. S. *v.* Peck, 102 U. S. 64.

[3] Wood *v.* U. S., 49 Ct. Cl. 119.

[4] Douglas *v.* Lowell, 194 Mass. 268, 80 N. E. 510.

[5] Glidden State Bk. *v.* Sch. Dist. of Jacobs, 143 Wis. 617, 128 N. W. 285.

[6] Masterson *v.* Mayor, 7 Hill, 61; Clark *v.* Mayor, 4 N. Y. 338; Devlin *v.* Mayor, 63 N. Y. 8; Long Island C. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483.

toward performance, less the value of materials on hand, second, the profits that he would have realized, so long as they are not too speculative and remote. If he undertakes to prove profits, these will be measured by the difference between the cost of doing the work and what the contractor was to receive for it.[1]

§ 299. Abandonment of Contract by Public Body During Performance—Remedy of Contractor—Damages —Injunction.

Public bodies cannot be compelled to proceed with the prosecution of a public work at the instance of a contractor with whom the public body has made a contract for such work. Public bodies stand in this respect in the same position as individuals, and may at any time violate, abandon or renounce their contracts or enterprises which they have undertaken. They may refuse to allow the contractor to proceed, or may assume the control of the work and perform the work included in the contract by their own immediate servants or agents, or they may let a new contract for its performance by other persons. All of this may be done, although there has been no default upon the part of the contractor, upon the usual terms of compensation in damages which are recognized and allowed by law.[2] The public body may thus violate its contract, but the obligation remains and cannot be impaired by the refusal of the public body to perform.[3]

If in such a case the public body undertakes to let a

[1] U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168; Speed's Case, 2 Ct. Cl. 429, aff'd 8 Wall. 77, 19 L. Ed. 449, S. C. 7 Ct. Cl. 93.

[2] Lord *v.* Thomas, 64 N. Y. 107; Danolds *v.* State, 89 N. Y. 36; Wakefield Cons. Co. *v.* New York, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; Sewer Commr's *v.* Sullivan, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123.

[3] Lord *v.* Thomas, *supra;* Danolds *v.* State, *supra;* U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168.

new contract to complete a work under authority of law, the courts will not enjoin it from proceeding to execute the authority conferred by advertising for new bids.[1] A threat to abandon work not followed by actual abandonment by the contractor or injury to the public body will not justify expulsion from the work or forfeiture of the rights of the contractor. As long as the work continues and no injury or change of situation occurs by reason of what is merely said, the public body has no right of complaint and may not act as if an actual abandonment had taken place. If it does, the contractor may recover the damages he sustains.[2]

[1] Lord *v.* Thomas, *supra.*
[2] Sewer Commr's *v.* Sullivan, *supra.*

CHAPTER XLV

PERFORMANCE—ACCEPTANCE OF

§ 300. Acceptance of Work.

If a contract is not completed within the time specified or not properly performed, but is accepted by the proper public authorities, such acceptance is binding in the absence of fraud.[1] If at the time of acceptance the public body has a right of action against the contractor for failure to comply with the contract, because of defective construction or because of failure to complete in time, such action is not waived or barred by reason of the acceptance.[2]

The mere use and occupancy of a building, bridge or roadway erected or repaired not in conformity with the contract is not to be considered an acceptance of the work as a fulfillment of the contract. Acceptance cannot result from the mere use of the work or structure by the public,[3] nor even from a making of repairs to it after such use.[4] If a contractor neglects and refuses to complete his contract in a material point, the public body does not waive its performance by taking possession of and occupying the structure in its defective condition. The public body are not put in the absurd alternative either of losing and

[1] Mesabo City Water Co. *v.* Mesabo, 136 Mo. 498, 38 S. W. 89; Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243.

[2] Mesabo City Water Co. *v.* Mesabo, *supra.*

[3] New York *v.* Dexter, 59 Misc. (N. Y.) 157; Douglas *v.* Lowell, 194 Mass. 268, 80 N. E. 510; Taft *v.* Montague, 14 Mass. 282, 7 Am. Dec. 215; Reed *v.* Bd. of Educ., 4 Abb. App. Dec. 24; Wildey *v.* Fractional Sch. Dist., 25 Mich. 419; Smith *v.* Scott's Ridge Sch. Dist., 20 Conn. 312.

[4] Taft *v.* Montague, *supra.*

abandoning the structure or of occupying it at the peril of paying for work not performed and of waiving thereby the performance of substantial covenants of the contract.[1] It is not a waiver of defects to use and occupy a structure.[2] A public body is entitled to retain without compensation the benefits of a partial performance, where from the nature of the contract it must receive such benefits in advance of performance, and by its terms or just construction it is under no obligation to pay until performance is complete.[3] Even payment and acceptance will not prevent recovery by the public body for latent defects discovered after payment and acceptance. The right of action for damages therefor will survive.[4] The acceptance of work as it progresses which is approved and passed by the officers of the public body is, however, binding as an acceptance.[5] Where an individual owner of property questions the validity of an assessment therefor he is bound by acceptance of the work by the public authorities. In the absence of fraud or collusion such acceptance is conclusive evidence that the work was performed according to the requirements of the contract.[6]

§ 301. Waiver of Strict Compliance.

It is elementary that strict compliance with the terms of a public contract on the part of one party may be waived by the other, so long as the requirement or term

[1] Reed *v.* Bd. of Educ., *supra.*
[2] *Idem.*
[3] Bonesteel *v.* Mayor, 22 N. Y. 166.
[4] U. S. *v.* Walsh, 115 Fed. 697.
[5] Brady *v.* New York, 132 N. Y. 415, 30 N. E. 757; Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78.
[6] Emery *v.* Bradford, 29 Cal. 75; Dixon *v.* Detroit, 86 Mich. 516, 49 N. W. 628; State *v.* McCardy, 87 Minn. 88, 91 N. W. 263; Chance *v.* Portland, 26 Oreg. 286, 38 Pac. 68; Mason *v.* Des Moines, 108 Iowa, 658, 79 N. W. 389.

waived is one made by the contract itself.[1] While statutory provisions may not be waived by a public body, the terms of the contract may be waived.

[1] Capital City B. Co. *v.* Des Moines, 127 N. W. (Iowa) 66; Atkinson *v.* Davenport, 117 Iowa, 687, 84 N. W. 689; People *ex rel.* Ready *v.* Mayor, 65 Hun, 321, 144 N. Y. 63, 38 N. E. 1006; Central Bitulithic Pav. Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311; Farrelly *v.* U. S., 159 Fed. 671; Ittner *v.* U. S., 43 Ct. Cl. 336.

CHAPTER XLVI

PERFORMANCE AND BREACH

§ 302. Performance—Discharge of Contract—By Breach—Failure to Make Payment.

When a public body employs a contractor to perform certain work and agrees to compensate him by installment payments to be made periodically or as the work progresses, the failure to make a payment at the time when it becomes due is such a breach of a material term as justifies the contractor in refusing to complete the contract and entitles him to recover the value of his work up to the time of the abandonment.[1] This is especially true in building and construction contracts calling for the performance of labor and furnishing of materials covering a long period of time and involving large expenditures. A provision for payments on account as the work progresses in such a contract must be deemed so material that a substantial failure to pay will justify the contractor in declining to proceed.[2] It must have been in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. A substantial compliance with the stipulation

[1] Devlin *v.* New York, 124 N. Y. App. Div. 184; Price *v.* New York, 104 *Id.* 198, 182 N. Y. 516, 74 N. E. 1124; Peet *v.* East Grand Forks, 101 Minn. 518, 112 N. W. 1003; Sch. Dist. *v.* Hayne, 46 Wis. 511, 1 N. W. 170; San Francisco Bridge Co. *v.* Dumbarton L. Co., 119 Cal. 272, 51 Pac. 335; Guerini Stone Co. *v.* Carlin Cons. Co., 248 U. S. 334, 63 L. Ed. 275; Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561; Dyer *v.* Irrig. Dist., 25 Wash. 80, 64 Pac. 1009; Greenlee County *v.* Cotey, 14 Ariz. 542, 155 Pac. 302.

[2] Guerini Stone Co. *v.* Carlin Cons. Co., *supra.*

for advance payments is a condition precedent to the obligation of the contractor to continue with the work.[1] A contractor's remedies are twofold. He may stop work, repudiate the contract and recover the contract price for the work done or he may continue to work and sue for the past due installment.[2] No good reason exists for limiting the contractor upon a breach to the contract prices unless they are made to control. He should have the reasonable value of work done up to the time of the breach.[3] But the breach may be waived and is waived if not availed of at the time of the breach. By proceeding with the work the contractor waives the damage which he suffers.[4] Where of course the stipulation for payment is treated as a subsidiary or unsubstantial term of the contract it is declared that the failure to pay is not sufficient ground for abandonment, but that the sole remedy is an action for damages for breach of the covenant. How this term of the contract can be regarded as other than substantial is difficult of conception. If the contract provides for the issue of a certificate by the engineer before an installment payment shall be due, this is a condition precedent unless it is withheld fraudulently, arbitrarily or unreasonably.[5] Where the public body has thirty days by express charter provision to pay all claims presented to it, a delay for that time after presentation of claim will not justify an abandonment by the contractor or constitute a breach of the contract.[6] And where a contractor has

[1] Guerini Stone Co. *v.* Carlin Cons. Co., *supra;* Canal Co. *v.* Gordon, *supra.*

[2] Mechanics Bank *v.* New York, 164 N. Y. App. Div. 128; Cranford Co. *v.* New York, 150 N. Y. App. Div. 195; County of Christian *v.* Overholt, 18 Ill. 223.

[3] Greenlee County *v.* Cotey, *supra.*

[4] Mechanics Bk. *v.* New York, *supra.*

[5] Devlin *v.* New York, *supra.*

[6] Cranford Co. *v.* New York, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082.

accepted several previous payments, which were delayed, apparently without any protest, this establishes a course of dealing indicating that a reasonable delay was recognized as an incident of payment and a contractor may not depart from acquiescence in such a course of dealing unless he gives reasonable notice of his intention so to do.[1] In some jurisdictions the payment of installments is not considered a condition precedent to further performance, unless made so by express provision of the contract.[2] And where the contract is entire the failure to make a payment because the work is not progressing in accordance with the contract is justified, and the failure to pay can in no sense be considered a breach. In other words, a contractor cannot claim a default for failure to pay while he is likewise in default under the contract.[3] Where under a contract to furnish coal the engineer issues his certificates showing payments to be due and the public body fails to make the payments, the estimates and certificates are conclusive upon the parties; and the contractor for failure to pay may claim a breach, and give notice of election to terminate the contract and sue for the amounts due for the deliveries, together with interest and the amount of percentage retained.[4] Some cases attempt to draw a distinction between the effect of a default in payment of an installment when it becomes due arising from mere temporary inability and a deliberate refusal to pay. They recognize that the former may be a breach which will justify a contractor in abandoning the work and recovering for what has been performed, but they assert that he

[1] Cranford Co. *v.* New York, *supra;* Williams *v.* New York, 130 N. Y. App. Div. 182.
[2] County of Christian *v.* Overholt, *supra.*
[3] National Cont. Co. *v.* Comm., 183 Mass. 89, 66 N. E. 639.
[4] Price *v.* New York, *supra.*

will not be entitled to prospective profits. These authorities agree that mere delay in paying installments may be so inexcusable or unreasonable or may point to such an utter inability to perform as to be equivalent to a refusal to perform. They then declare, in such a case, as in the case of a deliberate refusal to pay, he may recover prospective profits. This reasoning seems to be based upon a supposed difference in the obligation to pay under a public contract from that under a private contract. They contend that a contractor who deals with a public body must not look for the same promptitude in payment as if he had a private contract, that he must expect occasional delays and inconvenience.[1] There can be no just foundation for such a distinction. A contractor who receives the obligation of a public body should not be compelled to finance the work. He has no right to assume an implied privilege in a public contract to commit breaches of the obligation to pay. The obligation to pay is just as binding in one kind of a contract as in another unless it is waived, and no good reason exists for creating an exception in favor of public contracts. A contractor has a right to rely upon the expressed obligation, and if the public body fails to provide in its contract against delay in payment no different rule should exist in its favor. When there is a failure to make periodical payments provided, if the contractor does not elect to treat such failure as a breach, but continues with the work and disregards the breach so far as it might excuse him from further performance, he waives it and may not later assert it as a breach when the public body annuls the contract.[2]

[1] Jones *v.* New York, 47 N. Y. App. Div. 39.
[2] Farrelly *v.* U. S., 159 Fed. 671.

§ 303. Breach During Performance—Refusal to Accept Goods.

Where the public body refuses to accept goods which are tendered under a contract, the contractor cannot keep them until the price falls or if they are perishable until they are damaged and then charge the loss. He must dispose of them within a reasonable time after the breach. He may elect to keep them as his own in which event he can recover the difference between the contract price and the market price at the time of the breach. Or he may elect to sell them. In this latter case he must sell them within a reasonable time, giving notice of his intention so to do to the public body, and he can then recover the difference between the contract price and the selling price of the goods.[1]

§ 304. Renunciation—Anticipatory Breach.

The positive refusal to perform a contract is a breach of it, although the time for performance has not arrived, and liability for the breach at once occurs.[2] The measure of damages for such a breach is the difference between the contract price and the cost of performance.[3] In a mutually executory contract, if before the time for performance has arrived on his part, one of the parties notifies the other that he will not perform it, the other party is free to consider himself absolved from all obligation to perform the agreement. He may sue at once for

[1] Hughes *v.* U. S., 4 Ct. Cl. 64; Friedenstein *v.* U. S., 35 Ct. Cl. 1; Guy *v.* U. S., 25 Ct. Cl. 61; Grover *v.* U. S., 5 Ct. Cl. 427, 3 Ct. Cl. 404.

[2] U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620; Roehm *v.* Horst, 178 U. S. 1, 44 L. Ed. 953, aff'g 91 Fed. 345; Bridgeport *v.* Ætna Indem. Co., 91 Conn. 197, 99 Atl. 566; Washington County *v.* Williams, 111 Fed. 801; Hayes *v.* Nashville, 80 Fed. 641.

[3] U. S. *v.* Purcell Env. Co., *supra;* U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168.

all damages occasioned by the anticipatory breach, or if he so elects he may treat the declaration as brutum fulmen and wait for the time of performance to arrive, treating the contract in the meantime as binding. This rule has its limitations. It only applies to contracts which are mutually executory, such as in the case of public contracts, those for the performance of work, labor and services and for the sale and delivery of material and supplies. It will not apply to money contracts purely where one party has fully performed his undertaking, and there only remains the obligation of the other side to pay a certain sum of money at a stated time or times.[1] Nor can it apply to even a contract for services or labor which have been fully performed on one side and there remains only payment therefor. There can be no repudiation or abandonment of a contract by a party who has fully performed it.

If a contractor is to manufacture goods or fabricate or improve building material, and during the process of manufacture or improvement, the contract is repudiated, he is not bound to complete the manufacture or continue the improving of material, and estimate his damages by the difference between the market price and the contract price, but the measure of his damages is the difference between the contract price and the cost of performance.[2] In order to give effect to a renunciation it must operate to breach the entire contract or a covenant going to the whole consideration and therefore become a total breach.[3]

[1] Washington County *v.* Williams, *supra.* See Hayes *v.* Nashville, *supra;* (really a case of services with indemnity deposit for breach).

[2] U. S *v.* Purcell Env. Co., *supra;* Hinckley *v.* Pittsburgh B. S. Co., 121 U. S. 264, 30 L. Ed. 967; Masterson *v.* Brooklyn, 7 Hill, 61.

[3] Bridgeport *v.* Ætna Indem. Co., *supra.*

§ 305. **The Same—Remedies.**

Where one party repudiates a contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover on quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the last case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to eventuate such recovery the party suing must allege and prove performance on his part, or a legal excuse for non-performance.[1] For, ordinarily, upon rescission of a contract the recovery is limited to the value of the work and services and materials furnished, and damages for the breach, since the loss of expenditures or of profits are not allowable. Prospective profits are recoverable only where the contractor is prevented from going on, either by some affirmative act of the public body, as being ordered to desist from further work, or by the omission to perform some condition precedent to the further prosecution, as to do or furnish something necessary to its further progress.[2] While these general rules

[1] Lake Shore & M. S. R. Co. *v.* Richards, 152 Ill. 59, 38 N. E. 773.

[2] U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168; Lake Shore & M. S. R. Co. *v.* Richards, *supra*.

apply it is clear upon principle and authority and the rule is almost universally recognized that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party.[1] There must not necessarily be physical prevention. Any acts, conduct or declarations evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance by the other party.[2] And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will no longer be bound, or by acts and conduct which clearly evince that the determination has been reached and is being acted upon. The mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract will not, of themselves, amount to a breach so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of a contract. It gives, however, to the other party the right to elect to treat it as brutum fulmen or as a final assertion of his adversary not to be bound longer by the contract, and a wrongful renunciation of the contractual obligations. In event of the latter election, it becomes a breach and he can recover upon it as such.[3] Upon election to treat the renunciation, whether by declaration or acts and conduct as a breach of the contract, the rights of the parties are then fixed and the

[1] Christian County *v.* Overholt, 18 Ill. 223.
[2] Lake Shore & M. S. R. Co. *v.* Richards, *supra.* [3] *Idem.*

contract relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages. Anticipatory breach thus gives rise to an immediate cause of action, even though, as that term implies, the time for performance has not arrived.[1] Even upon grounds of convenience or expediency, which of course however just or equitable cannot be made the basis of judicial decision, such a rule commends itself. For it is inequitable and without purpose to require one party to continue to perform, notwithstanding repudiation by the other. The damages are greatly enhanced and the injured party always has the hazard of his adversary's insolvency. It is more reasonable and just, upon a repudiation by one party, to permit the other party to cease performance, stop expenditure, and thus curtail damages, and to allow recovery once for all of the damages that the injured party will sustain through non-performance by the other; the locus pœnitentiæ being kept open until the injured party elects to treat the contract as abandoned by the other and brings suit as for non-performance.[2]

§ 306. The Same—Failure to Make Installment Delivery or Payment Under a Contract.

Not every refusal or omission of one party to do something which he ought to do will justify the other in repudiating the contract. There must be an absolute refusal to perform his part of the contract. It is a clearly recognized principle that if there is only a partial failure of performance by one party for which there may be compensation in damages the contract is not ended. There is no absolute rule which can be laid down in express terms

[1] Lake Shore & M. S. R. Co. *v.* Richards, *supra;* U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620.

[2] Lake Shore & M. S. R. Co. *v.* Richards, *supra.*

as to when a breach of contract on one side exonerates the other from performance of his part of the contract. Where a contract is for delivery of goods in installments and installment payments are provided for, parties often treat a refusal to pay as a breach and abandonment of the contract and decline to deliver more. And where one installment of deliveries is not made, the party bound to receive deliveries refuses to receive any subsequent installments asserting a breach and termination of the contract from failure to deliver one installment. The rights of the parties arising from such acts and conduct are not easy of adjustment and decision, and each case is to be determined from the particular circumstances involved. Clearly if one party states that he will not pay for any of the deliveries, such would be a total breach and the seller would be no longer bound to deliver. Whether mere non-payment on one hand or non-delivery on the other will amount to a repudiation or abandonment of the contract which will justify a termination of the contract by the other party, depends on whether such act evinces an intention to wholly abandon the contract, to no longer be bound by it and set the other party free, and this is usually a question of fact to be answered by a jury. Non-delivery of a single installment will not necessarily intimate that the party not delivering does not intend to be any longer bound, but in particular contracts and under particular circumstances it might be sufficient. The same is true of non-payment. A single failure to make an installment payment is of itself not necessarily evidence of an intention no longer to be bound by the contract, but other circumstances would justify a court in drawing such inference even from a single failure to pay one installment. Ordinarily defaults by one in making particular payments,

deliveries or acceptances of deliveries will not release the other party from his duty to make the other deliveries or payments or acceptances stipulated in the contract unless the conduct of the party in default evinces an intention to abandon the contract, or a design no longer to be bound by its terms. The reason for the rule is that a party complaining of a breach under the circumstances should be required to rely upon the normal principle of compensation to recompense him and not be permitted to reap the abnormal advantage which might come to him, by reason of changes in market conditions, from an option to rescind or repudiate the bargain. In the absence of any expression of intention in such a contract, it will be deemed that a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one installment will not entitle the other party to refuse delivery or acceptance of the installments that remain. Parties may by appropriate language make each delivery, or each installment of payment, a condition precedent to further continuance of the contract. In such a case the contract might properly be terminated by the party aggrieved. In like manner if by the non-delivery of part of the goods contracted for the whole object of the contract is defeated, the party making default renounces on his part all the obligations of the contract. Where the question arises as to whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it by the person in default and whether the acts and conduct of the parties evince an intention no longer to be bound by it, questions of ability, solvency and intention enter into its determination by a jury. Sometimes the act of terminating a contract by the one injured by default in non-delivery or non-payment is spoken of as a

rescission, but a rescission of a contract, strictly speaking, can only be accomplished by the mutual agreement of the parties. Such termination is rather to be viewed as the right of one party to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it. See note *Infra.*

§ 307. **Renunciation of Continuing Contract.**

Where a continuing contract has not been fully performed on either side, the repudiation of the contract by one party, or his refusal of further performance, will authorize the other party to treat the contract as at an end, and will give to the latter a right of action for damages for its breach. The injured party will not be confined to the contract price for work done and materials received under the contract but may recover the entire damages resulting from the breach in terminating the contract. The innocent party if he be the contractor is not bound to go on manufacturing, or improving material for the work as a condition precedent to obtaining the proper relief, and depend upon getting the difference between the market value and the contract price. He may do this at the risk of finding no market for it, or of being unable to collect the amount that might become due. The law is not so unreasonable. He has the right to treat the re-

NOTE.—No decisions involving public contracts have been found directly on the questions here considered and no citations therefore are available. For cases arising between private individuals involving the questions, see Norrington *v.* Wright, 115 U. S. 188, 29 L. Ed. 366; U. S. *v.* Smoot, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107; Lake Shore & M. S. R. Co. *v.* Richards, 152 Ill. 59; West *v.* Bechtel, 125 Mich. 144, 84 N. W. 69; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401; Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159. See English cases cited in American cases.

The rule in New York has been to the effect that non-delivery of a single installment was ground for rescission. This rule has been superseded by the Personal Property Law, § 126, and even the sale of water by a municipality is a sale within this statute.

pudiation as a total breach of an entire contract, and to sue immediately and recover at one time all the damages resulting from it, without waiting for the time for full performance, to elapse.[1] If one party voluntarily disables himself or puts it out of his power to perform before the time of performance arrives or further perform during the time of performance, the other party has an immediate right of action for all damages occasioned by this breach.[2] The same result is reached where a party prevents performance by the other, and the injured party is entitled to a recovery based upon the same measure of damages.[3]

§ 308. Performance—Breach—Abandonment—When Justified.

In these instances of breach of contract which have been adverted to in the foregoing sections, it is pointed out that a breach of contract gives the party injured by it the privilege of refusing to further proceed and of abandoning the contract. A breach which will justify abandonment must be of a material term of the contract, one which the parties looked upon as a condition precedent to further continuance of performance. It must go to the substance of the contract. Not every act or omission of a party will permit the other party to repudiate and end the contract. Breaches of this character amounting to a partial failure of

[1] Masterson *v.* Brooklyn, 7 Hill, 61; Clark *v.* Mayor, 4 N. Y. 338; Jones *v.* Judd, 4 N. Y. 411; Devlin *v.* Mayor, 63 N. Y. 8; Lord *v.* Thomas, 64 N. Y. 107; Royalton *v.* Royalton & W. T. Co., 14 Vt. 311; Seaton *v.* Second Municipality, 3 La. Ann. 45; Chicago *v.* Tilley, 103 U. S. 146, 26 L. Ed. 371.

[2] Bridgeport *v.* Ætna Indem. Co., 91 Conn. 197, 99 Atl. 566; Beckwith *v.* New York, 121 N. Y. App. Div. 462; Masterson *v.* Hill, *supra;* James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246; Royalton *v.* Royalton &c. T. Co., 14 Vt. 311; Gilman *v.* Lamson County, 234 Fed. 507; U. S. *v.* Purcell Envelope Co., 249 U. S. 313, 63 L. Ed. 620.

[3] Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Lord *v.* Thomas, 64 N. Y. 107; Parr *v.* Vil. of Greenbush, 112 N. Y. 246; Danolds *v.* State, 89 N. Y. 36.

performance and relating to covenants and stipulations of the contract which are not in the nature of conditions precedent are to be compensated in damages for which an action may be brought. But if the breach goes to the substance of the contract, an abandonment is justified and immediate suit may be brought for the entire damage.[1] Not every unfounded or illegal claim a party may make during the prosecution of a large contract will justify the other in abandoning the contract as for a breach.

If claims are made under rights reserved by the contract and these are untenable and erroneous, there is nevertheless a locus pœnitentiæ, some reasonable time allowed to a party making such a claim to become aware that he is in error and recede from his position. It is only where he shows an unwillingness to carry out his contract or such reasonable time elapses and his erroneous attitude is not changed that abandonment is justified.[2] A slight or partial neglect to observe some of the terms or conditions of a contract will not justify a rescission or abandonment.[3] In cases where abandonment occurs and the contract is terminated, although the injured party declares that he has annulled or cancelled the contract, this will not have the technical effect of a rescission and release each party from every obligation of the contract as if it had never been made. There is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party

[1] U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168; U. S. *v.* Purcell Env. Co., 249 U. S. 313, 63 L. Ed. 620; Guerini Stone Co. *v.* Carlin Cons. Co., 248 U. S. 334, 63 L. Ed. 275; Greenlee County *v.* Cotey, 17 Ariz. 542, 155 Pac. 302; Peet *v.* East Grand Forks, 101 Minn. 518, 112 N. W. 1003; Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

[2] National Cont. Co. *v.* Hudson Riv. W. P. Co., 192 N. Y. 209, 84 N. E. 965.

[3] Elgin *v.* Joslyn, *supra*.

declaring its abandonment to look to the contract to determine the damages to which he is entitled under it for the breach which gave him the right of abandonment.[1] A notice of annullment under the circumstances means simply that the public body will proceed no further with the contractor under the contract, not that the contract is rescinded or avoided. The obligations of the contract, so far as they apply to a default, remain in full vigor. The public body has the right, unless some other measure of damage is provided, to let the work of completion to another contractor and to charge the original contractor with the reasonable difference in cost.[2]

§ 309. Executory Contract—Making New and Modified Contract—Consideration.

When a party to an executory contract breaches it by refusing to perform except upon the payment of additional compensation, it is optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated and enter into a new contract with the defaulting party. If the innocent party elects not to hold him answerable in damage but because of the importance to him that the work should be done makes a new contract, he cannot be heard to say that it is without consideration. The abandonment of the old contract and the making of the new promises, one for the other in the new contract, constitute a sufficient consideration. The mutual releases from the obligations of the original agreement also furnish a basis to support the new contract. If, therefore, in the new agreement the innocent party in order to derive the

[1] Hayes *v.* Nashville, 80 Fed. 641; U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269.

[2] U. S. *v.* McMullen, 222 U. S. 460, 56 L. Ed. 269; U. S. *v.* O'Brien, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.

benefits of performance makes new and additional promises to the defaulting party, and he in consideration of the promises completes the work, the promises will bind.[1]

§ 310. Effect of Breach.

When a contractor abandons a public construction or building contract or even a contract for personal service without excuse or justification, the general rule is that where the contract is entire, and contracts of this character are usually regarded as entire, there can be no recovery.[2] Even if there has been a substantial performance by the contractor where the abandonment is willful, or there has been a willful and intentional deviation from the terms of the contract, the contractor is without remedy.[3] For a substantial compliance resulting from a bona fide intention to perform the contract, the contractor is permitted to bring an action and may have the contract price less a deduction for the value of the part unfinished. Neither is the public body liable for partial performance of a contract unless it accepts the benefits of such partial performance. This, however, means an intentional acceptance from which would arise an implied promise to pay for the value of such benefits. The acceptance rule cannot be held to apply to those cases where a public body is forced to accept the benefits, as where its bridge is repaired or its land or streets are improved and it is impossible to return what has been received. There must be a voluntary retention of the benefits.[4]

[1] Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Dyer *v.* Middle Kittitas Irrig. Dist., 25 Wash. 94, 64 Pac. 1009; Peet *v.* East Grand Forks, 101 Minn. 518, 112 N. W. 1003; Bader *v.* New York, 51 Misc. 358. See Admiral Realty Co. *v.* New York, 206 N. Y. 110, 99 N. E. 241. See § § 97, 165, *ante*.

[2] Poynter *v.* U. S., 41 Ct. Cl. 443; Clark *v.* Sch. Dist., 29 Vt. 217.

[3] Dermott *v.* Jones, 2 Wall. (U. S.) 1, 17 L. Ed. 762.

[4] Douglas *v.* Lowell, 194 Mass. 268, 80 N. E. 510.

Sometimes the further completion of the work and making use of the abandoned work will give rise to an action on quantum meruit, but not where the cost of completion exceeds what was due.[1]

§ 311. The Same—Willful Breach.

On the other hand, the willful or intentional breach of the contract by the public body of its contract affords the contractor the right to a recovery of the value of his contract. Where the breach consists in preventing the performance of the contract, without fault of the other party who is willing to perform it, the contractor may recover what he has already expended towards performance, together with the profits which he would realize had he been allowed to perform.[2]

Of course, when the party injured by the stoppage of a contract elects to rescind it, then he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits. The recovery is then for the value of his services actually performed as upon a quantum meruit and no question of losses or of profits enters into it.[3]

Where the contractor voluntarily and willfully fails to complete a work or structure to be done under a special contract for an entire sum, he is without any remedy. This rule applies even in the case of a willful default in the performance of a stipulation or covenant not going to the essence of the contract. Any recovery permitted is restricted to an honest and bona fide intention to follow the

[1] Winamac Sch. Dist. *v.* Hess, 151 Ind. 229, 50 N. E. 81.

[2] U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168; Clark *v.* Mayor, 4 N. Y. 338; Devlin *v.* New York, 63 N. Y. 8; Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Cranford Co. *v.* New York, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082.

[3] U. S. *v.* Behan, *supra;* Clark *v.* Mayor, 4 N. Y. 338. But see Carlin *v.* New York, 132 N. Y. App. Div. 90.

contract. Contractors have no right to break contracts and claim the contract price. Where the failure to perform is intentional it is such bad faith as admits of no recovery.[1]

Where a contract is to erect a building for an entire sum to be paid in installments as the work progresses, where the contractor *willfully* refuses to complete, this entitles the public body to a repayment of all installments received by the contractor. Interest may be allowed on the installments from the time when under the contract the work should have been completed, and this rule as to interest is not affected by a delay in bringing suit.[2] But the question as to whether there has been willful and intentional failure to perform a contract is usually a question of fact[3] although under some circumstances it might be resolved as a question of law. A refusal to install ventilators in a school building is not wilful and intentional as matter of law, were a contractor first figured the cost from a picture of the school building which did not show them, and where, when he was shown plans and specifications which included them he stated that he had not figured on them and was told by a trustee who principally had charge of the erection that he might omit them. A jury would be justified in finding that he omitted them in good faith and that their absence was not a structural defect rendering the building less substantial, since they could easily be supplied after the building was erected.[4] But if the contract is divisible, the voluntary abandonment of it will not preclude a recovery for so much as has been performed less such

[1] Bonesteel *v.* Mayor, 22 N. Y. 162; Tompkins *v.* Dudley, 25 N. Y. 272; Homer *v.* Shaw, 177 Mass. 1, 58 N. E. 160; Homer *v.* Shaw, 212 Mass. 113, 98 N. E. 697.

[2] U. S. *v.* U. S. F. & G. Co., 236 U. S. 512, 59 L. Ed. 696; Tompkins *v.* Dudley, *supra.*

[3] Smith *v.* Russell, 140 N. Y. App. Div. 102.

[4] *Idem.*

damages as the other party suffers from the breach which he may justly counterclaim.

§ 312. Rescission for Breach.

The right to rescind a contract is an extreme right, and its exercise will not be warranted by every breach. The existence of the right cannot, however, be denied or its exercise refused where a contract is entire, and is broken by either party in matter of time or in the manner of performance from the inception of carrying it out.[1] But where the contract is divisible or is made up of several distinct and similar acts to be separately and successively performed, the right to rescind depends upon whether the conduct of the party in default shows an intention to abandon or no longer be bound by the contract. And the failure to perform must be of such a character that it defeats the very object of the contract.

A slight or partial neglect to follow some term or condition will not justify rescission.[2]

§ 313. Prevention of Performance—Direction to Discontinue Work.

A contractor cannot compel a public body to continue in the work of construction of a building or other structures. A public body, just as an individual may abandon an enterprise which it has undertaken and refuse to allow a contractor to proceed; it may make a new contract or complete the work itself without there being any default on the part of the contractor. But while it is free to violate the contract, while it may refuse to perform or arrest performance it can in no way destroy or get rid of the obligation of the contract. The original contractor has

[1] Norrington *v.* Wright, 115 U. S. 188, 29 L. Ed. 366, aff'g 5 Fed. 768.
[2] Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

his claim for damages which in the case of the State or nation the legislature or Congress would doubtless recognize or in those instances where the right to sue has been conferred, the contractor may sue and recover his damages including prospective profits where the public body prevents performance.[1] While the contract is executory, a public body has the power to stop performance on the other side by an explicit direction to that effect, subjecting itself to such damages as will compensate the contractor for being stopped in the performance on his part at that particular stage of the work. The party thus forbidden cannot go on afterwards and increase the damage. In such case the just claims of the contractor are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted. The refusal to permit further performance is not a rescission of the contract, but simply a breach for which in an appropriate action he is entitled to recover these damages.[2]

Where the contract is partly performed and the contractor is prevented from completing the remainder, the contractor is entitled to the contract price for the part which he has performed in accordance with the contract rate, and he is entitled to damages for being prevented from completing the remainder of the contract.[3] Consequently

[1] Lord *v.* Thomas, 64 N. Y. 107; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Parr *v.* Greenbush, 112 N. Y. 246, 19 N. E. 684.

[2] Nebraska City *v.* Nebraska City G. L. & C. Co., 9 Neb. 339, 2 N. W. 870.

[3] Cranford Co. *v.* New York, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082; Kehoe *v.* Rutherford, 56 N. J. L. 23, 27 Atl. 912; Harrison *v.* Clarke, 78 N. J. L. 236, 73 Atl. 43; Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581; Rittenhouse *v.* Baltimore, 25 Md. 336, Clark *v.* New York, 4 N. Y. 338, 53 Am. Dec. 379; Guerini Stone Co. *v.* Carlin Cons. Co., 240 U. S. 264, 60 L. Ed. 636; United States *v.* Behan, 110 U. S. 338, 28 L. Ed. 168 U. S. *v.* Smith, 94 U. S. 214, 24 L. Ed. 115, aff'g 11 Ct. Cl. 707; Kellogg B. Co. *v.* U. S., 15 Ct. Cl. 206; Ferris *v.* U. S., 28 Ct. Cl. 332; Harvey *v.* U. S., 8 Ct. Cl. 501. See Carlin *v.* New York, 132 N. Y. App. Div. 90.

the items which chiefly make up this loss, the outlays which were reasonably made in preparing for performance and the expected profits which were to be gained from performance, are elements of damage and are recoverable as such.[1] In addition to these chief items of loss he may recover such other items as are included in his special loss. For instance, he may recover a fair allowance for his own time,[2] and where he has brought material to the site or has it on hand for the contract, he may have any loss that has resulted to him thereon. Where the expense connected with getting ready to perform is about the same as actual performance, he may recover from the public body the contract price.[3]

§ 314. Stopping Work Because of Dissatisfaction with Progress.

Where a public contract provides that if the engineer shall be of the opinion and shall so certify in writing to the public body or officer, that the performance of the contract is unnecessarily or unreasonably delayed, the contract may be cancelled, this does not confer upon the engineer the right to cancel it at his option.[4] The matter is one of discretion, and the discretion is one which depends upon his honest judgment. If, therefore, he forms his opinion, capriciously or arbitrarily without regard to the facts, his

[1] Beattie *v.* N. Y., etc., Cons. Co., 196 N. Y. 346, 89 N. E. 831; Long Island Cont. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Dailey *v.* New York, 170 N. Y. App. Div. 267, 218 N. Y. 665, 113 N. E. 1053; Beckwith *v.* New York, 121 N. Y. App. Div. 462; U. S. *v.* Behan, *supra;* Guerini Stone Co. *v.* Carlin Cons. Co., *supra;* Houston Cons. Co. *v.* U. S., 38 Ct. Cl. 724; Ferris *v.* U. S., 28 Ct. Cl. 332.

[2] U. S. *v.* Behan, *supra;* Houston Cons. Co. *v.* U. S., *supra;* Taylor *v.* Spencer, 75 Kan. 152, 88 Pac. 544.

[3] Hardy *v.* U. S., 9 Ct. Cl. 244.

[4] Wakefield Cons. Co. *v.* New York, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; Smith Cont. Co. *v.* New York, 167 N. Y. App. Div. 263.

certificate is not made in good faith, and is not binding or conclusive.[1] The contractor is then entitled to show the facts and have a determination by a jury as to whether there are any facts upon which the judgment of the engineer could be based, or where he relies upon the reports of subordinates or others, whether the facts are misrepresented to him.[2] If reports to him are untrue or inadequate, and he relies upon them without personal investigation, no matter how implicitly he believes them, his certificate cannot be conclusive.[3] When only one-fifth of the contract time has expired, most of it during a severe winter, and a considerable amount of work has been actually performed and no facts are shown which justify the engineer's conclusion, but it appears that the real reason is not that the contractor has failed to proceed with due diligence down to the time of termination, but rather that he was not ready to prosecute the work with sufficient speed when the contract was terminated, the jury may find that the opinion was arbitrary and not based upon an honest consideration of the facts.[4] The contractor cannot be deprived of the opportunity to complete his contract until the conditions provided by contract for cancellation are fulfilled.[5] If the right to terminate the contract is reserved to be exercised in case of delay, and it merely authorizes the public body in the event the contractor failed to complete any one section of the work to discontinue such work and employ others to do that work, this clause does not

[1] Wakefield Cons. Co. *v.* New York, *supra;* Smith Cont. Co. *v.* New York, *supra.*

[2] Wakefield Cons. Co. *v.* New York, *supra;* Smith Cont. Co. *v.* New York, *supra.*

[3] Wakefield Cons. Co. *v.* New York, *supra;* Smith Cont. Co. *v.* New York, *supra.*

[4] Wakefield Cons. Co. *v.* New York, *supra.*

[5] *Idem.*

contemplate an entire abrogation of the contract as the contractor is still entitled to the contract price less the amount expended to complete a particular part suspended.[1] When the entire contract is improperly abrogated, whether the occasion is that no sufficient basis for its termination exists or no power exists to terminate it entirely, the contractor is entitled to recover his damages as for a breach of the contract.[2] Where the sole material express promise is to complete work by a certain date, if then completed the public body has no concern with intermediate delays. These clauses reserving the right to annul do not, however, import a promise to exercise such diligence as will satisfy the engineer. It is one thing to reserve the right to let further continuance of a contract depend upon the judgment of the engineer; it is quite another to make his dissatisfaction with the progress to be conclusive of a breach. When, therefore, the contractor had sufficient time left in which to complete when he was turned away from the work and the contractor might have completed in time, the contract cannot be said to be breached so as to allow the public body to recover the difference in cost of completion.[3] When the contract provides for approval by a higher officer of the decision of annulment by a resident engineer, yet if upon annulment the contractor refuses to go on, there is no need of performing the useless ceremony of obtaining such approval and the contractor may not avail himself of it when sued for a breach of contract based upon his refusal.[4]

[1] Cody *v.* New York, 71 N. Y. App. Div. 54; Wakefield Cons. Co. *v.* New York, *supra;* Smith Cont. Co. *v.* New York, *supra.*
[2] U. S. *v.* O'Brien, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.
[3] Wakefield Cons. Co. *v.* New York, *supra.*
[4] Graham *v.* U. S., 231 U. S. 474, 58 L. Ed. 319, aff'g 188 Fed. 651.

§ 315. Abandonment.

The obligation of performance on one side of a contract is as strong as a similar obligation on the other side. The duty is mutual and reciprocal. Whether the obligation is to deliver goods within a certain time, or perform work to the satisfaction of the public body, there is a like duty to receive the goods when delivered, or to show why work, which a contractor claims has been completed, is not satisfactory.[1]

When goods under a contract are tendered and refused during the life of the contract, the contractor is not bound to deliver after the contract has expired. If he does, however, it will be at the contract price. If he fails to deliver or tender again it cannot be said he has abandoned his contract.[2] So if he leaves his plant on the work this is equivalent to a tender of readiness to perform any further work that might be required, and it becomes the duty of public officers to point out what omissions or defects exist. If they fail to do this, after a reasonable time he can remove his plant and claim that the public body is satisfied with his performance and recover accordingly.[3] The agents of a public body may not lead him to understand that he has complied with the terms of his contract and later claim a reduction when it has become too late for him to remedy the situation.[4]

§ 316. Failure to Object or Take Advantage of Breach During Performance.

Where a contract is breached during performance the injured party must take advantage of it. If he fails to do

[1] Gibbons *v.* U. S., 2 Ct. Cl. 421; Kimball *v.* U. S., 24 Ct. Cl. 35. See § 308.
[2] Gibbons *v.* U. S., *supra.*
[3] Kimball *v.* U. S., *supra.*
[4] Merrian *v.* U. S., 20 Ct. Cl. 290.

this he cannot later assert the breach.[1] If later the contract is rescinded or annulled he cannot set up the breach which he has waived.[2] If instead of claiming a forfeiture as a result of a breach, the public body rests upon a clause which enables it to go on and complete the work and charge the expense to the contractor, such action will prevent it from later insisting when the contractor sues for a claimed balance, that the contract was forfeited. The only remedy of the public is to counterclaim the cost of completing the work.[3]

§ 317. Conditions Precedent.

The breach of a contract by failure to fulfill a condition precedent will prevent any recovery by the dilatory party either on the contract or on quantum meruit. Such breach gives to the injured party the right to rescind the contract or treat it as broken and recover damages as for a total breach.[4]

But performance of even conditions precedent may be waived.[5]

§ 318. Performance—Covenants to Keep in Repair.

An unconditional express covenant to keep in repair is equivalent to a covenant to rebuild and it will bind the contractor to make good any injury which human power can remedy even if caused by storm, flood, fire, inevitable accident or even the act of a stranger.[6] A covenant to

[1] Farrelly *v.* U. S., 159 Fed. 671; Mills Co. *v.* State, 110 N. Y. App. Div. 843, 187 N. Y. 552; Taylor *v.* New York, 83 N. Y. 625; Kennedy *v.* New York, 99 N. Y. App. Div. 588; York *v.* York Ry. Co., 229 Pa. St. 336, 78 Atl. 128.

[2] Mills Co. *v.* State, *supra;* Farrelly *v.* U. S., *supra.*

[3] Taylor *v.* New York, *supra.*

[4] Bridgeport *v.* Ætna Indemnity Co., 91 Conn. 197, 99 Atl. 566.

[5] Bradley *v.* McDonald, 218 N. Y. 351, 113 N. E. 340; Mayor *v.* Butler, 1 Barb. 325.

[6] Meriwether *v.* Lowndes County, 89 Ala. 362, 7 So. 198; Riley *v.* Brooklyn, 46 N. Y. 444; Mitchell *v.* Hancock County, 91 Miss. 414, 45 So. 571.

surrender leased premises at the expiration of the lease in the same condition as at its execution, allowing for reasonable use and wear and excepting damage by the elements, will not bind to restore the premises to their former condition. Whether damages flow from a reasonable use, keeping in mind the purposes of the lease, is a question for the jury.[1] Where there is a technical or implied surrender of the premises upon each renewal of the lease, such surrender will not be made to work injustice to the parties in hostility to their real intention. A surrender of the lease during its term and an acceptance by the public body will not extinguish rights of action already accrued, whether for damages or rent in arrears.[2] Of course acceptance of possession with full knowledge of the facts or full opportunity to know and without protest or claim of damage for breach or violation of covenants may constitute an admission of performance of the covenant and a waiver of any right of action.[3]

§ 319. **Covenant to Renew Lease.**

Covenants by a landlord for continual renewals of lease are not favored since they tend to create a perpetuity. They are nevertheless valid, if explicit. [4] When, therefore, a public body in executing a lease manifests an intention to bind itself to grant future renewals, and this intention is not left to conjecture or implication, but is clearly and specifically provided by the terms of the lease, a covenant for future renewals will be enforced.[5]

A general covenant in a lease to renew upon the same

[1] McGregor *v.* Bd. of Education, 107 N. Y. 511, 14 N. E. 420.
[2] *Idem.*
[3] *Idem.*
[4] Burns *v.* New York, 213 N. Y. 516, 108 N. E. 77; Drake *v.* Board of Education, 208 Mo. 540, 106 S. W. 650.
[5] Burns *v.* New York, *supra.*

terms, conditions and agreements as contained in the original lease is not sufficient to show an intention to grant renewals in perpetuity. The covenant for renewal must contain language which shows an intention to include in renewal leases a particular covenant in regard to future renewals.[1] Such a covenant will bind the public body until the lands are required for public purposes.[2] The right to such renewals may be lost and the covenant for renewals waived by acts of the parties which amount to a practical construction of the covenant.[3]

§ 320. **Money Due—Set-off.**

Where a contractor is owed money by a public body for performance of one contract and he becomes liable to the public body in damages for breach of another contract the public body have the right to retain the money due under one contract and charge it as a set-off against such liability. While it might assert such liability in an action it is not essential. It may refuse to pay under one contract what it must eventually recover as damages for a breach of the other.[4]

[1] Burns *v.* New York, *supra.*

[2] Burns *v.* New York, *supra;* Storms *v.* Manhattan Ry. Co., 178 N. Y. 493, 71 N. E. 3.

[3] Syms *v.* Mayor, etc., of New York, 105 N. Y. 153, 11 N. E. 369.

[4] Barry *v.* U. S., 229 U. S. 47; Wilds *v.* Bd. of Education, 227 N. Y. 211, 125 N. E. 89; Modern Steel Structural Co. *v.* Van Buren, 126 Iowa, 606, 102 N. W. 536.

CHAPTER XLVII

PERFORMANCE—NON-PERFORMANCE—COMPLETION BY PUBLIC BODY

§ 321. Completion by Public Body.

Where a contractor with a public body fails to complete an undertaking assumed by him, the right of the public body to complete the undertaking whether it be a building or other structure or work cannot be made to depend upon a provision of the contract authorizing completion, but rests upon the elemental ground that a party to a contract not broken through his fault is entitled to its benefits. And if an expenditure of money is necessary to protect and complete that which is already in the possession of the public body as a result of part performance, such expenditure may be made and recovery had for it.[1] The public body is entitled to the benefit of its bargain and to have the work or structure completed at no greater cost to it than the contract price.[2] But in endeavoring to fulfill the contract, the public body may not proceed in a reckless or extravagant manner and charge the contractor for expenses unreasonably or unnecessarily incurred.[3] It is, however, entitled to the reasonable cost of the work necessarily done.[4] But this includes the doing over again of work

[1] Ludowici Caladon Co. *v.* Indep. Sch. Dist., 149 N. W. (Iowa) 845.

[2] Ludowici Caladon Co. *v.* Indep. Sch. Dist., *supra;* Ætna Iron Wks. *v.* Kossuth County, 79 Iowa, 40, 44 N. W. 215.

[3] Mayor &c. of New York *v.* Second Ave. R. R. Co., 102 N. Y. 572, 7 N. E. 905; Camden *v.* Ward, 67 N. J. L. 558, 52 Atl. 392.

[4] Mayor &c. N. Y. *v.* Second Ave. R. R. Co., *supra;* Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132.

already done where necessary.[1] It is the duty of the public body to take all proper measures to diminish and reduce the quantum of damages.[2] It may deduct the cost of completion from any unpaid balance of the contract price.[3] But the work of completion with which the contractor is to be charged must be the same work which he had agreed to perform.[4] Where the public body voluntarily undertakes to raise a caisson, the property of the contractor, thereby saving to him the benefits of his contract, it can only charge against him what it would reasonably have cost to do such work.[5] But while a public body may complete unfinished work at the expense of the contractor, it is not restricted to that remedy but may recover from the contractor or his surety the damages incurred.[6]

§ 322. The Same—Property in Materials.

When a contractor is to furnish materials and labor for the purpose of erecting a structure or work on premises of another, the materials are the property of the contractor until affixed to the land or are delivered to and accepted by him, and this rule is not altered by the fact that the materials were purchased with the intention of putting them into the structure or work or that they were brought upon the land of the public body, or that certain preliminary work had been done upon them in order to adapt them for annexation to the structure, or that they have been tentatively affixed to the structure or work for the

[1] Powers *v.* Yonkers, *supra.*
[2] Rowe *v.* Peabody, 207 Mass. 226, 93 N. E. 604.
[3] Powers *v.* Yonkers, *supra;* Jones *v.* New York, 32 Misc. 211, 60 App. Div. 161, 174 N. Y. 517, 66 N. E. 1113; Wells *v.* Bd. of Educ. West Bay City, 78 Mich. 260, 44 N. W. 267; McGowan *v.* U. S., 35 Ct. Cl. 606.
[4] U. S. *v.* Axman, 234 U. S. 36, 58 L. Ed. 1198, aff'g 193 Fed. 644.
[5] Snare & Triest Co. *v.* U. S., 50 Ct. Cl. 370.
[6] U. S. *v.* U. S. Fidelity & G. Co., 236 U. S. 512, 59 L. Ed. 696.

purpose of seeing whether they would fit and afterwards removed or that the public body has made payments to the contractor as the work progressed.[1] Under this rule if a contractor abandons his work and leaves materials and appliances at the site and they are used by the public body in completing the work, the contractor may recover their value or the value of their use.[2] And under the same principle the contractor cannot compel the public body to use material left behind which the public body does not desire to use or accept.[3] This is especially true where the contract creates liability only for material in place. When accordingly a surety of the contractor completes the work which had been stopped and possession taken by the public body and such surety uses material which had previously been rejected by the public body and sold under execution by the sheriff but which was still allowed to remain on the site by a purchaser and was there when the surety undertook the work, the public body had no interest in such material since it did not pass the inspection required by the contract, and the surety of the contractor acquired no rights in it and was liable for appropriating it.[4]

When a construction contract has been annulled and relet to a new contractor and the government retained certain property and material at the site, without the consent of its true owner, and turned it over to the new contractor, whom it advised that it would not be liable under any circumstances for the seizure of the property, no liability on the part of the government can arise. Where the govern-

[1] Rochelle *v.* Evens & H. F. B. Co., 164 Ill. App. 412. See Muscrelli *v.* Mercantile Trust Co., 219 Pa. St. 602, 69 Atl. 40.

[2] Bayley *v.* Anderson, 71 Wis. 417, 36 N. W. 863; Elliott *v.* Wilkinson, 8 Yerg. (Tenn.) 411.

[3] Dyer *v.* Middle Kittitas Irrig. Dist., 40 Wash. 238, 82 Pac. 301.

[4] Muscrelli *v.* Mercantile Trust Co., *supra*.

ment did not undertake to transfer title or guarantee possession, the implication of a contract that the government would pay is clearly rebutted and no implied contract can arise. The new contractor alone can be held liable for the conversion of the property.[1] Where appliances of a defaulting contractor are taken over by the government with knowledge of a chattel mortgage against some of them and the mortgagee entitled to possession demands these and the government refuses and retains them for use, and the mortgagee consents to the use upon an expectation and promise of payment, an implied contract to pay therefor will arise against the government.[2] But where a contract for the erection of a public building provided that in case of abandonment the public body might complete the structure, using for the purpose such material as was found upon the line of work, and when the contractor abandoned it the public body took possession and completed the building, the possession of the materials before the subsequent bankruptcy of the contractor gave the public body complete title against his trustee and such materials could be applied in reduction of the contractor's liability to the public body under the contract, not by virtue of any lien, but in the nature of a payment.[3] Such a clause in a contract cannot create a lien upon future acquired property, and where a trustee in bankruptcy is appointed before possession is taken under it and the rights of creditors intervene, the public body can acquire no title.[4] These clauses which provide that, in case of default in a public building contract by the contractor, the public body may complete and use materials brought by the con-

[1] Ball Engineering Co. *v.* White, 250 U. S. 46, 63 L. Ed. 835.
[2] U. S. *v.* Buffalo Pitts Co., 193 Fed. 905, aff'd 234 U. S. 228, 58 L. Ed. 1290.
[3] Wilds *v.* Bd. of Education, 227 N. Y. 211, 125 N. E. 89.
[4] Titusville Iron Co. *v.* New York, 207 N. Y. 203, 100 N. E. 806.

tractor on the ground, being accountable to him for any excess of unpaid contract price over the cost of completion, are not for a forfeiture, which must therefore be construed strictly against the public body, since they do not involve the taking of any property of the contractor by way of penalty or punishment. They are in the interest of both parties and are to receive a construction which will accomplish that purpose.[1] Where the materials left behind by the contractor are less in value than the cost of completing the abandoned work beyond the contract amount, the contractor may not recover for such materials.[2]

§ 323. Property in Excavated Materials at Site—Chattels at Site.

If a contract to grade and improve a street provides that the contractor shall remove surplus earth and contains no reservation of title in the public body, or stipulation or direction as to what should be done with it, except to remove it from the line of work, this implies that a contractor may do what he wishes with it. The provision operates as an abandonment or transfer by the public body of all rights thereto and it becomes part of the contractor's compensation for doing the work, and his property, as soon, at least, as it is loaded upon vehicles for the purpose of removal. Where the public body changes the plan so that performance becomes impossible, the contractor is entitled to recover the difference between the cost of performance and the contract price, including as part thereof the market value of the surplus top soil after deducting the reasonable expense of marketing it.[3] The

[1] Wilds *v.* Bd. of Educ., *supra*, and cases cited.
[2] Sch. Town of Winamac *v.* Hess, 151 Ind. 229, 50 N. E. 81.
[3] Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483. See Welch *v.* McNeil, 214 Mass. 402, 101 N. E. 985.

clause requiring consent of the engineer to remove earth is not applicable to such as under the terms of the contract is made the property of the contractor.[1] When, in constructing a Barge Canal, the State requires buildings to be removed from the site and these buildings are made the property of the contractor to dispose of as he sees fit, the contractor may sell the buildings and the purchaser has a right to enter upon the premises to remove them.[2] Where buildings alone are thus conveyed, they stand in contemplation of law, severed from the soil and will vest as chattels in the grantee even before actual severance.[3]

[1] Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Hood *v.* Whitewell, 66 Misc. 49, 140 App. N. Y. Div. 882.
[2] Hood *v.* Whitewell, *supra.*
[3] *Idem;* Schuchardt *v.* New York, 53 N. Y. 202.

tractor on the ground, being accountable to him for any excess of unpaid contract price over the cost of completion, are not for a forfeiture, which must therefore be construed strictly against the public body, since they do not involve the taking of any property of the contractor by way of penalty or punishment. They are in the interest of both parties and are to receive a construction which will accomplish that purpose.[1] Where the materials left behind by the contractor are less in value than the cost of completing the abandoned work beyond the contract amount, the contractor may not recover for such materials.[2]

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[1] Wight v. Bd. of Educ., supra, and cases cited.
[2] Sch. Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81.
[3] Long Island Const. & S. Co. v. New York, 204 N. Y. 73, 97 N. E. 4; Welch v. McNeil, 214 Mass. 402, 101 N. E. 985.

clause requiring [illegible]
not applicable [illegible]
is made the proper [illegible]
structing a barge canal [illegible]
removed from the site [illegible]
erty of the contractor [illegible]
may sell the buildings [illegible]
upon the premises to remove them. [illegible]
are thus conveyed, they must be severed [illegible]
from the soil and will [illegible]
before actual severance.[1]

[1] Long Island Commercial Co. [illegible]
v. Whitewell, 60 Misc. 40, [illegible]
[2] Hood v. Whitewell, supra.
[3] *Idem*; Schuchardt [illegible]

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...mber Co.
...Ind. App.
...; Knapp *v.*
..., 107 Mich.
...25; State *ex*
...t. *v.* Livers,
...V. 806; Smith
... Gallucci, 82
..., 72 Neb. 100,
...ila. *v.* Stewart,
...2, 54 Atl. 719;
...ykes, 67 Minn.
...63, 42 S. E. 858;
...1; U. S. Gypsum
... *v.* Ætna Indem.
...Oreg., 328, 48 Pac.

...lliams *v.* Markland,
... Neb. 644, 65 N. W.

...iss. 626, 61 So. 700.

CHAPTER XLVIII

BOND OF CONTRACTOR

§ 324. Statutory Bond—Power of Legislature to Require. The legislatures of the States under their general power to change or repeal the common law may create new rights and impose new obligations unknown at common law, and when in the exercise of their sovereign power they enact that municipalities or the agents of the State or of the Nation shall require a bond of all public contractors for the faithful performance of public work and for the payment of all wages or moneys due to laborers and material men or subcontractors, these enactments are a valid exercise of legislative power.[1]

§ 325. Public Body has Implied Right to Require Bond for Faithful Performance and to Pay Laborers and Material Men. Even where express authority has not been conferred upon public bodies to require the contractor to give a bond to pay laborers and material men, these public bodies have implied power to insert in the contract or in the usual contractor's bond for faithful performance, the additional obligation that the contractor shall pay all laborers and material men who have claims, and that to the accomplishment of this object the public body may retain sufficient money due the contractor with which to pay such claims.[2]

[1] Wilson *v.* Whitmore, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; St. Paul *v.* Butler, 30 Minn. 459 16 N. W. 362; Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369; Grant *v.* Berrisford, 94 Minn. 45, 101 N. W. 940.

[2] McDonald *v.* New York, 29 Misc. 504; Baker *v.* Bryan, 64 Iowa, 561, 21

This power is sustained as an exercise of that right which all public bodies possess to insert such reasonable provisions in their contracts as they may deem advisable; and in this instance such a provision enures to the benefit of a public body since if laborers and material men are secure, a better quality of labor and of material will be attracted to the work because of the assurance thus afforded. Furthermore, it gives credit to the contractor and enables him to procure labor and purchase material more readily and on better terms than otherwise. Greater competition in bidding results, so that it is not only to the interest of the public body, but its plain business duty to secure these advantages by the insertion of such a provision in the bond.[1] The consideration which supports the contract supports the bond which is required as a condition or term in awarding the contract.[2] Public bodies have the implied power also without statutory grant to require a bond to secure subcontractors as well as laborers and material men.[3]

N. W. 83; Denver *v.* Hindry, 40 Colo. 42, 90 Pac. 1028; People's Lumber Co. *v.* Gillard, 136 Cal. 55, 68 Pac. 576; Amer. Surety Co. *v.* Lauber, 22 Ind. App. 326, 53 N. E. 793; King *v.* Downey, 24 Ind. App. 262, 56 N. E. 680; Knapp *v.* Swaney, 56 Mich. 345, 23 N. W. 162; Detroit Bd. of Educ. *v.* Grant, 107 Mich. 151, 64 N. W. 1050; Devers *v.* Howard, 144 Mo. 671, 46 S. W. 625; State *ex rel. v.* Webster, 20 Mont. 219, 50 Pac. 558; Kansas City Sch. Dist. *v.* Livers, 147 Mo. 580, 49 S. W. 507; Dolly *v.* Crume, 41 Neb. 655, 59 N. W. 806; Smith *v.* Bowman, 32 Utah, 33, 88 Pac. 687; Puget Sound State Bk. *v.* Gallucci, 82 Wash. 445, 144 Pac. 698; Amer. Rad. Co. *v.* Amer. Bond Co., 72 Neb. 100, 100 N. W. 138; State *v.* Liebes, 19 Wash. 589, 54 Pac. 26; Phila. *v.* Stewart, 195 Pa. 309, 45 Atl. 1056; Phila. *v.* McLinden, 205 Pa. 172, 54 Atl. 719; *Contra*, Lyth *v.* Hingston, 14 N. Y. App. Div. 11; Park *v.* Sykes, 67 Minn. 153, 69 N. W. 712; Gastonia *v.* McEntee & Co., 131 N. C. 363, 42 S. E. 858; Union Sheet Metal Wks. *v.* Dodge, 129 Cal. 390, 62 Pac. 41; U. S. Gypsum Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238; R. Connor Co. *v.* Ætna Indem. Co., 136 Wis. 13, 115 N. W. 811; Hamilton *v.* Gambell, 31 Oreg., 328, 48 Pac. 433.

[1] St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 843.

[2] Young *v.* Young, 21 Ind. App. 509, 52 N. E. 776; Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562; Kauffmann *v.* Cooper, 46 Neb. 644, 65 N. W. 796; Gastonia *v.* McEntee & Co., *supra*.

[3] National Surety Co. *v.* Hall-Miller Dec. Co., 104 Miss. 626, 61 So. 700.

§ 326. **Construction.**

There should be no favoritism or tenderness shown to a company organized to act as surety for hire.[1] While it is a well-settled rule that a surety is entitled to a somewhat rigid construction of his contract, before applying such rule his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties. It is not until this is ascertained that its language is to be regarded as strictissimi juris.[2] The liability of a surety is, however, not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. He has the right to stand on its terms.[3] For the purpose of determining the intention of the parties the bond and the contract will be read together, where the bond refers to and embodies the contract within it.[4] But some authorities deny the application of the rule strictissimi juris to surety companies organized for the purpose of conducting an indemnity business at established rates of compensation.[5]

§ 327. **Validity of Bond of Contractor where Contract is Void—Where Statute not Followed.**

Even though the contract pursuant to which a bond to

[1] Richardson *v.* Steuben County, 226 N. Y. 13, 122 N. E. 449; Vil. of Argyle *v.* Plunkett, 226 N. Y. 306, 124 N. E. 1; Getchell *v.* Peterson, 124 Iowa, 599, 615, 100 N. W. 550; U. S. F. & G. Co. *v.* U. S., 191 U. S. 416, 48 L. Ed. 242.

[2] Wilson *v.* Whitmore, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; U. S. use of Hill *v.* Amer. Surety Co., 200 U. S. 197, 50 L. Ed. 437.

[3] Glenn County *v.* Jones, 146 Cal. 518, 80 Pac. 695; Greenfield & Co. *v.* Parker, 159 Ind. 571, 65 N. E. 747; Sterling *v.* Wolf, 163 Ill. 467, 45 N. E. 218.

[4] Searles *v.* Flora, 225 Ill. 167, 80 N. E. 98; U. S. use of Hill *v.* Amer. Surety Co., 200 U. S. 197, 50 L. Ed. 437; Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562.

[5] U. S. F. & G. Co. *v.* U. S., 191 U. S. 416, 48 L. Ed. 242; U. S. use of Dist. of Col. *v.* Bayly, 39 App. D. C. 105.

pay laborers and material men is given turns out to be void, this fact cannot be set up by the sureties to defeat the claims of laborers and material men, since a guaranty of payment of an obligation or the performance of an undertaking imports an agreement that the instrument is valid and the undertaking legal.[1] The sureties are bound by the recitals in the bond of due execution of the contract.[2] Again, the contract between the material man or laborer and the contractor is independent of the public contract, and so the invalidity of the latter can have no effect upon the contract between laborers or material men and the public body.[3] If the contract becomes void for omission to record it as required by law, this will not prevent a recovery upon the bond given to accompany the contract.[4] Unless a statute makes a bond which fails to follow it void, if a bond is taken under the statute with a condition in part prescribed by statute and in part not provided, a recovery may be had upon the bond for a breach of the part provided by statute so long as it is clearly separable from the other part.

The super-additions will be regarded as surplusage.[5] A bond voluntarily given may be enforced according to its term even though it exceeds the requirements of an ordinance providing for it.[6] Of course those who furnish

[1] Kansas City Hyd. P. B. Co. *v.* Nat. Surety Co., 140 Fed. 507; Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271; Philadelphia *v.* McLinden, 205 Pa. 172, 54 Atl. 719; Kansas City *ex rel.* Diamond B. & T. Co. *v.* Schroeder, 196 Mo. 281, 93 S. W. 405; *Contra*, Portland *v.* Bitum. Pav. Co., 33 Oreg. 307, 52 Pac. 28.

[2] Bell *v.* Kirkland, *supra*.

[3] Kansas City *ex rel.* Diamond B. & T. Co. *v.* Schroeder, 196 Mo. 281, 93 S. W. 405; Kansas City H. P. Co. *v.* National Surety Co., 157 Fed. 620; National Surety Co. *v.* Kansas City Hyd. B. Co., 73 Kan, 196, 84 Pac. 1034; National Surety Co. *v.* Wyandotte C. & T. Co., 76 Kan. 914, 92 Pac. 1111.

[4] Kiessig *v.* Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418, 99 Cal. 452, 34 Pac. 106; Summertown *v.* Hanson, 117 Cal. 252, 49 Pac. 135.

[5] Detroit Bd. of Educ. *v.* Grant, 107 Mich. 151, 64 N. W. 1050.

[6] Philadelphia *v.* Nichols Co., 214 Pa. St. 265, 63 Atl. 886.

materials with knowledge of or participation in the illegality of a contract cannot recover on the bond which accompanies the contract.[1]

§ 328. Effect of Naming Different Obligee than Statute Provides.

Where these various material men's statutes require a bond to be given to the State, the Nation or some subdivision or branch of either and the bond fails to indicate the obligee named in the statute, this will not defeat a recovery. The bond will become thereby invalid as a statutory bond, but will be considered good as a common-law bond.[2] In such cases the obligor by his consent to make a board of education, for example, the trustee for the interested parties instead of the State as required by statute makes the bond a good common-law obligation and himself liable thereon.[3]

§ 329. Statutory Provision Requiring—Waiver of Bond of Contractor.

Where a statute requires that a bond shall be given in all cases where municipalities make improvement contracts, which bond shall be conditioned for the faithful performance of the work in accordance with the plans and specifications and the terms of the contract, and the intent of the statute is to make this requirement for the protection of the State which pays the larger part of the cost of the improvements, the requirement must be strictly followed, since the municipal officers have no power to expend the money of the State for other purposes than that for which

[1] National Surety Co. *v.* Wyandotte Coal Co., 76 Kan. 914, 92 Pac. 1111; National Surety Co. *v.* Kansas City H. P. B. Co., 73 Kan. 196, 84 Pac. 1034.

[2] Detroit Board of Education *v.* Grant, 107 Mich. 151, 64 N. W. 1050; Stephenson *v.* Monmouth Min. & Mfg. Co., 84 Fed. 114; Huggins *v.* Sutherland, 39 Wash. 552, 82 Pac. 112.

[3] Detroit Bd. of Education *v.* Grant, *supra.*

it was appropriated and possess no power to waive any of the requirements of the statute designed to safeguard the interests of the State and the taxpayers.[1]

§ 330. Public Officials have Discretion as to Sufficiency of Bond of Contractor.

Statutes requiring the giving of a contractor's bond usually provide that the contractor shall execute a bond with sufficient sureties or contain similar language. Such language confers a discretion upon the public officials to pass upon the adequacy of the bond and the qualification of the sureties, and when such discretion is conferred it will not be controlled or interfered with by the courts, unless there is an abuse of discretion or corrupt conduct.[2]

§ 331. Kind of Labor or Material Included in State Statutes.

The general rule is that the bond is only liable for labor and materials furnished or supplied which have gone into and become a part of the work.[3] Accordingly it is generally ruled under bonds given on State and city work that no recovery can be had for machinery used or repaired in the prosecution of the work. A contractor is presumed to be prepared with machinery, tools and appliances necessary to carry out his contract. These are furnished upon his own credit presumably and not upon the implied credit of the public. They survive the performance of the work, do not become a part of it and may be used upon other

[1] Kelly *v.* Torrington, 81 Conn. 615, 71 Atl. 939.

[2] Boseker *v.* Wabash County, 88 Ind. 267; Vincent *v.* Ellis, 116 Iowa, 609, 88 N. W. 836; State *ex rel.* Woodruff & Co. *v.* Bartley, 50 Neb. 874, 70 N. W. 367; People *ex rel.* J. B. Lyon Co. *v.* McDonough, 76 N. Y. App. Div. 257, 173 N. Y. 181, 65 N. E. 963; People *ex rel.* McKone *v.* Green, 52 How. Pr. 304; People *ex rel.* Belden *v.* Contracting Bd., 27 N. Y. 378.

[3] Beals *v.* Fidelity & D. Co., 76 N. Y. App. Div. 526, 178 N. Y. 581, 70 N. E. 1095.

work.[1] But materials furnished under a public contract, suitable for the work to be performed, and delivered at the site will justify recovery upon the bond without a showing that they actually were used in the construction.[2] The scope and purpose of the contract and bond will largely control the character of labor and material to which the bond will be extended. It will include the labor at a quarry where the contractor agreed to get out and furnish stone, even though the laborers did not know the structural destination of such stone.[3] Thus labor in the operation of a pile driver was brought within the bond.[4] A watchman employed to guard material at the site of work can sue upon the bond for wages due.[5] And the wages due to a blacksmith engaged in sharpening tools are likewise included.[6] Lumber used in false work erected in the course of construction of a permanent bridge is included within the bond.[7] Where the bond covers any claim for which if established the public body might become liable, it is broad enough to cover materials used in erecting a temporary fence needed in a public improvement.[8] Explosives used to blast rock in the course of construction

[1] Kansas City use of Kansas City H. P. B. Co. *v.* Youmans, 213 Mo. 151, 112 S. W. 225; Alpena *ex rel.* Besser *v.* Title G. & S. Co., 159 Mich. 329, 123 N. W. 1126; Alpena *ex rel.* O'Brien *v.* Same, 159 Mich. 334, 123 N. W. 1127; Empire State Surety Co. *v.* Des Moines, 152 Iowa, 552, 131 N. W. 870; 152 Iowa, 531, 132 N. W. 837, Fid. & D. Co. *v.* Hegewald Co., 144 Ky. 790, 139 S. W. 975; Standard Boiler Wks. *v.* Nat. Surety Co., 71 Wash. 28, 127 Pac. 573.

[2] Red Wing Sewer P. Co. *v.* Donnelly, 102 Minn. 192, 113 N. W. 1; Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271.

[3] Combs *v.* Jackson, 69 Minn. 336, 72 N. W. 565; Duby *v.* Jackson, 69 Minn. 342, 72 N. W. 568.

[4] Geo. H. Sampson Co. *v.* Comm., 202 Mass. 326, 88 N. E. 911.

[5] Friedman *v.* Hampden County, 204 Mass. 494, 90 N. E. 851.

[6] French *v.* Powell, 135 Cal. 636, 68 Pac. 92.

[7] Empire State Surety Co. *v.* Des Moines, 152 Iowa, 531, 131 N. W. 870, 152 Iowa, 552, 132 N. W. 837.

[8] Friedman *v.* Hampden County, *supra.*

of a public work are materials within the bond, since they are used directly upon the work in the process of construction to bring it into proper form and condition and are entirely consumed in the use.[1] In like manner coal used upon the work is also material or supplies necessary for the construction of the work and so comes within such terms of a bond.[2] When, however, the terms of the bond relate to the materials supplied in accordance with the contract and specifications, which do not include coal, even though it is necessarily used as an aid to the work it is not within the bond.[3] Provisions or board furnished to men or merchandise or goods given through store orders as wages are not included usually within a bond. Money loaned to furnish the pay roll for labor upon the work is not within the bond.[4] Hay and grain used to feed teams used upon the work for purposes of construction are, however, covered by the bond.[5] So are the teams furnished,[6] but money expended for cartage, towing or dockage is not one of the objects intended by the bond and will not support a suit.[7] A claim for the rental of scrapers is not labor performed or materials furnished on a public work.[8] Planks used for sheathing and left in place together with piles driven into the work come within the bond.[9]

[1] Geo. H. Sampson Co. *v.* Comm., *supra;* E. I. Du Pont De Nemours P. Co. *v.* Culgin Pace Cont. Co., 206 Mass. 585, 92 N. E. 1023; Kansas City use of Kansas City H. P. B. Co. *v.* Youmans, 213 Mo. 151, 112 S. W. 225.

[2] Zipp *v.* Fid. & D. Co., 73 N. Y. App. Div. 20; National Surety Co. *v.* Brotnaber L. Co., 67 Wash. 601, 122 Pac. 337; *Contra*, George H. Sampson Co. *v.* Comm., *supra*.

[3] Philadelpia *v.* Malone, 214 Pa. 90, 63 Atl. 539; Alpena use of Gilchrist *v.* Title G. & T. Co., 168 Mich. 350, 134 N. W. 23.

[4] Cadenasso *v.* Antonelle, 127 Cal. 382, 59 Pac. 765.

[5] National Surety Co. *v.* Bratnaber L. Co., *supra*.

[6] French *v.* Powell, 135 Cal. 636, 68 Pac. 92.

[7] Alpena *ex rel.* Beaudrie *v.* Murray Co., 159 Mich. 336, 123 N. W. 1128.

[8] Hall *v.* Cowen, 51 Wash. 295, 98 Pac. 670.

[9] Geo. H. Sampson Co. *v.* Comm., *supra*.

§ 332. What Labor and Materials Included under Federal Act.

Technical rules otherwise protecting sureties from liability are never applied in proceedings under the federal act.[1] The federal act requiring a contractor to furnish a bond to pay for labor and materials used on the work is not limited to labor and materials directly incorporated into the public work but includes anything which is an integral part of the work, and necessarily involved in it, anything indispensable to the prosecution of the work and used exclusively in its performance.[2] The act is to be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.[3] Where a contractor runs a boarding house not as an independent enterprise, but as an indispensable and integral part of the work, groceries sold to the contractor and consumed by the laborers are materials supplied and used in the prosecution of the work, and recovery for their value may be had against the bond.[4] Coal furnished to operate engines on dredges has been considered material used in the prosecution of the work.[5] Claims allowed against the bond include not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which enter into the construction of a ship.[6] Where the work contracted for was building a breakwater, recovery was allowed for labor at a quarry operated fifty miles

[1] Illinois Surety Co. *v.* Davis Co., 244 U. S. 376, 61 L. Ed. 1206, aff'g 226 Fed. 653.

[2] Brogan *v.* National Surety Co., 246 U. S. 257, 62 L. Ed. 703.

[3] *Idem.*

[4] *Idem.*

[5] City Trust S. & D. Co. *v.* U. S., 147 Fed. 155; U. S. use of Lyman Coal Co. *v.* U. S. F. & G. Co., 82 Vt. 94, 71 Atl. 1106, 83 Vt. 278, 75 Atl. 280.

[6] Title G. & T. Co. *v.* Crane Co., 219 U. S. 24, 34, 55 L. Ed. 72, aff'g 163 Fed. 168; Amer. Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717.

distant. This included the labor not only of men who stripped the earth to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars and track equipment used to haul stone to the quarry dock. It included also the wages of the men who drove the horses which hauled the cars on the track.[1] Rental for cars, track and other equipment used by a contractor in facilitating his work as well as the expense of loading this equipment and the freight paid to transport it to the site of use was allowed against the bond.[2] Since the basis of recovery is supplying labor and material for the public work, he who supplies them to a subcontractor may claim under the bond,[3] even if the subcontractor has been fully paid.[4] But money loaned to meet the pay roll of the contractor will not give rise to a claim under the act.[5] Patterns furnished to the molding department of a contractor building a government vessel are within the bond.[6] Freight and demurrage paid on timber used on the work may constitute the subject of suit under the federal act.[7]

§ 333. Limitations on Proceedings under Federal Act.

The material men's act of 1894 as amended by act of 1905 is intended to be highly remedial. Its purpose is to give a remedy to material men and laborers on the bond of

[1] U. S. Fid. Co. *v.* Bartlett, 231 U. S. 237, 58 L. Ed. 200, aff'g 189 Fed. 339.

[2] Illinois Surety Co. *v.* Davis Co., 244 U. S. 376, 61 L. Ed. 1206, aff'g 226 Fed. 653. See U. S. *ex rel.* McAllister *v.* Fid. & D. Co., 86 N. Y. App. Div. 475.

[3] U. S. *v.* Jack, 124 Mich. 210, 82 N. W. 1049.

[4] Mankin *v.* Ludowici-Celadon Co,. 215 U. S. 533, 54 L. Ed. 315, aff'g 158. Fed. 1021.

[5] Hardaway *v.* National Surety Co., 211 U. S. 552, 53 L. Ed. 321, aff'g 150 Fed. 465; Fidelity Nat. Bank *v.* Rundle, 107 Fed. 227.

[6] Title G. & T. Co. *v.* Crane Co., 219 U. S. 24, 34, 55 L. Ed. 72, aff'g 163 Fed. 168.

[7] U. S. use of Nicola *v.* Hegeman, 204 Pa. St. 438, 54 Atl. 344.

the original contractor and a reasonable time to enforce it, and in a single proceeding to unite all claimants.[1] Where there is a conflict in its provisions these will be adapted to fulfill its whole purpose, and those provisions fittest to accomplish that result will prevail.[2] The act provides for the execution of a bond by any person entering into any formal contract with the United States for any public work and that in any action instituted by the United States any person who has furnished materials or labor to the contractor may intervene and become a party to the action. If no action is brought by the government within six months from the completion and final settlement of the contract, then any person furnishing labor or materials may bring suit in the name of the United States in the district court of the United States in which the contract was to be performed and executed irrespective of the amount in controversy for his or their use and benefit against the contractor and his sureties.[3] No right of action accrues to a material man until the time reserved to the United States to sue has expired.[4] The provision of the statute requiring notice to be given to other creditors, by the creditor instituting the single proceeding allowed where the government has not sued, is directory merely. It was never intended to give to a surety company a right to have done that which it is its interest not to have performed. The provision for notice, therefore, is not of the essence of jurisdiction over the case nor a condition of liability of the surety on the bond.[5]

§ 334. Who are Beneficiaries under Statute.

Where the Nation, the State or a municipal subdivision

[1] A. Bryant Co. *v.* N. Y. Steam Fitting Co., 235 U. S. 327, 59 L. Ed. 253.
[2] *Idem.*
[3] *Idem.*
[4] Texas Cement Co. *v.* McCord, 233 U. S. 157, 58 L. Ed. 893.
[5] A. Bryant Co. *v.* N. Y. Steam Fitting Co., *supra.*

of the State seeks to protect its inhabitants in public contracts by covenants for their benefit, the persons intended as beneficiaries may sue directly to enforce such covenants, and may recover the loss suffered by them in so far as they are protected by such covenants. Where accordingly bonds are given upon public contracts for the payment of wages to laborers or to pay the claims of material men, these may sue upon such bonds and recover the amount of such wages or of the claims for material against the surety. But unless there is an intention to include them in the contract or the State has some interest in protecting them, the bond will not be extended to cover these claims.[1]

§ 335. Who are Beneficiaries under Statute—Subcontractors.

Bonds given by contractors to protect material men and laborers inure to the benefit of subcontractors under State and municipal statutes[2] and under the broad scope of the federal act are of course included.[3] Even in those States where a strict rule is followed excluding subcontractors from participating in the benefits of the bond, he is often let into these by a construction which makes him a material man.[4]

§ 336. When Bond Runs to Public Body—Rights of Laborers and Material Men.

Where the bond given by a contractor to pay wages of

[1] Wilson *v.* Whitmore, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; Fosmire *v.* National Surety Co., 229 N. Y. 44, 127 N. E. 472; Eastern Steel Co. *v.* Globe Indem. Co., 227 N. Y. 586, 125 N. E. 917; Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089. See Argyle *v.* Plunkett, 226 N. Y. 306, 124 N. E. 1.

[2] Combs *v.* Jackson, 69 Minn. 336, 72 N. W. 565; Daly *v.* Jackson, 69 Minn. 342, 72 N. W. 568; Philadelphia *v.* Nichols Co., 214 Pa. St. 265, 63 Atl. 886; Ihrig *v.* Scott, 5 Wash. 584, 32 Pac. 466; *Contra*, People use of Winkle T. C. Co. *v.* Cotteral, 119 Mich. 27, 77 N. W. 312.

[3] U. S. use of Croll *v.* Jack, 124 Mich. 210, 82 N. W. 1049.

[4] People use of Emack *v.* Thompson, 119 Mich. 21, 77 N. W. 314.

laborers and claims of material men runs to the State or the municipality, some jurisdictions hold that laborers and material men cannot sue upon the contract.[1] There is, however, a substantial current of authority which holds that in substance and in purpose the bond was given to pay obligations to these third persons, and they readily find the existence of an intention to benefit them and a duty, legal or equitable, which gives a just claim to enforce the bond directly and in their own names against the surety.[2] Some jurisdictions sustain the doctrine of the right of a laborer or material man to sue but hold that the bond sued on must show a promise to pay for labor and materials furnished, and an intention to benefit those furnishing labor and material and when these characteristics exist in the bond find no difficulty in enforcing it.[3]

When these bonds are given pursuant to a statute, the courts very generally carry out liberally the remedial purposes of the statute and allow the beneficiaries under the bond and statute to sue directly upon the bond.[4] Where the statutes either of the State or Nation do not admit of a mechanic's lien being filed against public work the courts

[1] Searles *v.* Flora, 225 Ill. 167, 80 N. E. 98; Fosmire *v.* Nat. Surety Co., 229 N. Y. 44, 127 N. E. 472; Eastern Steel Co. *v.* Globe Indem. Co., 227 N. Y. 586, 125 N. E. 917; Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089; Village of Argyle *v.* Plunkett, 226 N. Y. 306, 124 N. E. 1; Hipwell *v.* National Surety Co., 130 Iowa, 656, 105 N. W. 318; Elec. Appliance Co. *v.* U. S. Fid. & G. Co., 110 Wis. 434, 85 N. W. 648.

[2] Nat. Surety Co. *v.* Foster Lumber Co., 42 Ind. App. 671, 85 N. E. 489; Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562; Devers *v.* Howard, 144 Mo. 671, 46 S. W. 625; Sch. Dist. *ex rel.* Koken I. Wks. *v.* Livers, 147 Mo. 580, 49 S. W. 507; Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398; Doll *v.* Crume, 41 Neb. 655, 59 N. W. 806; Kauffman *v.* Cooper, 46 Neb. 644, 65 N. W. 796.

[3] Parker *v.* Jeffery, 26 Oreg. 186, 37 Pac. 712; St. Louis *v.* G. H. Wright Cont. Co., 202 Mo. 451, 101 S. W. 6; Wilson *v.* Whitmore, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; Montgomery *v.* Rief, 15 Utah, 495, 50 Pac. 623.

[4] Bohn *v.* McCarthy, 29 Minn. 23, 11 N. W. 127; Morton *v.* Power, 33 Minn. 521, 24 N. W. 194; Wilson *v.* Whitmore, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; Baum *v.* Whatcom County, 19 Wash. 626, 54 Pac. 29.

readily support the purpose of these statutes, requiring the giving of a bond to pay laborers and material men, as a substitute for a lien.[1] Thus where the condition of the bond is in effect to pay all laborers and material men for labor performed or materials furnished, the bond gives a clear right to such claimants to sue upon it.[2] Where a bond, read in its entirety, is inconsistent with an intention that a laborer and others in like position should have the right to sue on it, such right will be denied. Such intention is negatived when the dominant purpose of the bond is protection to the State or other public body. If laborers ignoring the people may sue in their own right as often as there is default, such dominant purpose may be defeated, by the exhaustion of the penalty of the bond and the leaving of nothing to satisfy any demands of the State.[3] Where a bond is conditioned for the payment of wages and nothing else the intention to confer a right of suit will be the more readily inferred since the State has an interest in those who labor upon public works. The intent to benefit them and the existence of the duty would then give a right of action upon a contractor's bond.[4] Of course where the people sue upon such a bond for the benefit of laborers the right of suit and the right of recovery exist in the State as trustee to collect moneys due such laborers

[1] King *v.* Downey, 24 Ind. App. 262, 56 N. E. 680; U. S. use of Vermont Marble Co. *v.* Burgdorf, 13 App. D. C. 506; Kansas City Hyd. P. B. Co. *v.* Nat. Surety Co., 149 Fed. 507; U. S. use of Hill *v.* Amer. Surety Co., 200 U. S. 197, 50 L. Ed. 437.

[2] Fitzgerald *v.* McClay, 47 Neb. 816, 66 N. W. 828; Hipwell *v.* National Surety Co., 130 Iowa, 656, 105 N. W. 318; Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562; U. S. Gypsum Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238; Gastonia *v.* McEntee Peterson E. Co., 131 N. C. 363, 42 S. E. 858; E. I. Du Pont De Nemours P. Co. *v.* Culgin Pace Cont. Co., 206 Mass. 585, 92 N. E. 1023; Nelson Co. *v.* Stephenson, 168 S. W. (Tex.) 61; Amer. Surety Co. *v.* Raeder, 15 Ohio C. C. 47, 61 Ohio St. 661, 57 N. E. 1130.

[3] Fosmire *v.* National Surety Co., 229 N. Y. 44, 127 N. E. 472.

[4] *Idem.*

and material men as well. Where the right is directly conferred upon a laborer or material man to sue in his own name upon a bond he can bring such suit provided he knew of the existence of the bond and furnished the labor or materials, relying upon it even where the bond runs to the State or other public body.[1]

§ 337. Condition of Bond of Contractor for Faithful Performance of Work—Indemnity for Public Body.

A bond conditioned for the faithful performance of the work is a bond for the indemnity of the public body merely and laborers and material men cannot sue upon such bond to recover wages or moneys due them,[2] unless it appears to have been the clear purpose and intent of the bond to permit of such suit to satisfy their claims as within the protection of the bond.[3]

§ 338. For Negligence in Doing Work.

Where a bond is taken by a municipality to protect itself against loss occasioned by the negligence of the contractor for his failure to comply with laws and ordinances, such bond cannot make the public body liable if it is otherwise not liable. Taking the bond cannot increase its liability nor will it give a right of action against the public

[1] Buffalo Cement Co. *v.* McNaughton, 90 Hun, 741, 156 N. Y. 702, 51 N. E. 1089.

[2] Searles *v.* Flora, 225 Ill. 167, 80 N. E. 98; Sterling *v.* Wolf, 163 Ill. 467, 45 N. E. 218; Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089; Noyes *v.* Granger, 51 Iowa, 227, 1 N. W. 519; Elec. Applicance Co. *v.* U. S. F. & G. Co., 110 Wis. 434, 85 N. W. 648; Lancaster *v.* Frescoln, 192 Pa. St. 452, 43 Atl. 961; Puget Sound B. & T. Co. *v.* Sch. Dist. Kings Co., 12 Wash. 118, 40 Pac. 608; Parker *v.* Jeffery, 26 Oreg. 186, 37 Pac. 712; Hart *v.* State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; Green Bay Lumber Co. *v.* Indep. Sch. Dist., 121 Iowa, 663, 97 N. W. 72. See Kansas City *ex rel. v.* Blum *v.* O'Connell, 99 Mo. 357, 12 S. W. 791.

[3] St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 843; Lyman *v.* Lincoln, 38 Neb. 794, 57 N. W. 531.

body or even permit suit against the surety by third persons injured since its purpose is to indemnify the public body.[1]

§ 339. Obligation of Public Body to Retain Money Due Contractor Who Fails to Pay for Labor and Material.

Simply because a public body exacts a bond to pay laborers and material men will not make it trustee for the purpose of enforcing the rights of other parties accruing because of the delinquency of the contractor. The first duty of a public body is to protect its own rights under a contract and not subordinate these to collateral rights of others. If it promises to pay money to its contractor it is under obligation so to do, and is powerless to do otherwise. The public body has no right, therefore, to withhold money due its contractor where he defaults in paying laborers or material men. Even if the surety requests the public body to withhold the money the latter has no obligation or right to do so and neglects no duty it owes the surety by refusing to enforce the contractor's obligation toward his materialmen or laborers.[2]

§ 340. Failure of Public Body to Hold Reserved Fund Retained under Contract will Release Surety—When not as to Laborers and Material Men.

The general rule applicable to hired and other sureties is that the surety is discharged from the bond if the public body for whom work is being performed fails to retain the percentage fixed by the contract.[3] But this violation of the

[1] Kansas City *ex rel.* Blum *v.* O'Connell, 99 Mo. 357, 12 S. W. 791; Terry *v.* Richmond, 94 Va. 537, 27 S. E. 429; Moss *v.* Rowlett, 112 Ky. 121, 65 S. W. 153; Redditt *v.* Wall, 55 So. (Miss.) 45.

[2] American Surety Co. *v.* Bd. of Waseca County, 77 Minn. 92, 79 N. W. 649; Philadelphia *v.* McLinden, 205 Pa. St. 172, 54 Atl. 719.

[3] Lucas County *v.* Robert, 49 Iowa, 159; Gray *v.* Sch. Dist., 35 Neb. 438, 53

contract by the public body will not release the surety as to laborers and material men for any moneys due to them, before such overpayment.[1]

§ 341. Obligation of Surety—Release of Surety Through Failure of Creditors of Contractor to File Claims and Secure Preference.

Where by statute subcontractors, laborers and material men are given a preference out of funds due a contractor upon public work provided they file a statement of their demand with the public officer through whom payment for the work is to be made, if these laborers, material men or subcontractors fail to file their claims this will not release the surety. A creditor does not release a surety by not enforcing his claim, unless he fails in some duty assumed to the surety by the contract, express or implied, or fails to sue when notified by a surety as provided by statute or fails to preserve some lien or security which he has for the principal's debt. His right of preference is not a lien, and the creditor is therefore not bound to any active diligence in enforcing his claim against the principal. It is the debt of the surety as well. While a creditor cannot do any act

N. W. 377; Glenn County *v.* Jones, 146 Cal. 518, 80 Pac. 695; Neilson *v.* Title G. & S. Co., 81 Oreg. 422, 159 Pac. 1151; O'Neill *v.* Title G. & T. Co., 191 Fed. 570; Prairie State Nat. Bk. *v.* U. S., 164 U. S. 227, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185; Morgan *v.* Salmon, 18 N. M. 73, 135 Pac. 553; Wasco Co. *v.* New England Equit. Ins. Co., 88 Oreg. 465, 172 Pac. 126, L. R. A. 1918 D. 732; Jersey City W. S. Co. *v.* Metropolitan Cons. Co., 76 N. J. L. 419, 69 Atl. 1088; National Surety Co. *v.* Long, 79 Ark. 523, 96 S.W. 745; Pauly Jail Bldg. & M. Co. *v.* Collins, 138 Wis. 494, 120 N. W. 225; New Haven *v.* Nat. Steam Economizer Co., 79 Conn. 482, 65 Atl. 959; Chicago *v.* Agnew, 264 Ill. 288, 106 N. E. 252. See Hipwell *v.* Nat. Surety Co., 130 Iowa, 656, 105 N .W. 318.

[1] U. S. Fid. & G. Co. *v.* American Blower Co., 41 Ind. App. 620, 84 N. E. 555; Conn *v.* State, 125 Ind. 514, 25 N. E. 443; Empire State Surety Co. *v.* Des Moines, 152 Iowa, 531, 131 N. W. 870; U. S. *v.* Nat. Surety Co., 92 Fed. 549; Kansas City Sch. Dist. *v.* Livers, 147 Mo. 580, 49 S. W. 507; Bethany *v.* Howard, 149 Mo. 504, 51 S. W. 94; Kauffman *v.* Cooper, 46 Neb. 644, 65 N. W. 796; Amer. Surety Co. *v.* Waseca Co., 77 Minn. 92, 79 N. W. 649.

injurious to the surety or inconsistent with the surety's rights, he may remain entirely passive and rely upon the undertaking of the surety. He is not bound to prosecute an action to obtain a lien. If the funds in the hands of the public body are exhausted in paying other claims the surety is still liable.[1]

§ 342. Discharge of Bond of Contractor—Effect on Claims of Laborers and Material Men.

If in the performance of public work a bond is required to pay claims of laborers and material men and by its own terms it is discharged upon acceptance of the work or structure, this operates as a release of the surety.[2] This applies in the case of a material man especially where the public body in good faith accepts a building, before the material man knew of the existence of the bond, or relied upon it in any way.[3] Public corporations are under no obligation to protect laborers or material men, and if they desire protection they must secure their claims in the manner provided by a particular statute or make their claims within the time limited therefor, and, where a bond is annulled by acceptance of the work, before such event occurs.[4]

§ 343. Effect of Renewal of Contract.

If a bond is given for a stated period, the limitation of time fixed in the contract and specifically mentioned will control and will measure the life of the bond. It will not be extended to include a renewal contract which in con-

[1] Whitehouse *v.* Am. Surety Co., 117 Iowa, 328, 90 N. W. 727; Read *v.* Amer. Surety Co., 117 Iowa, 10, 90 N. W. 590; Philadelphia *v.* Pierson, 217 Pa. St. 193, 66 Atl. 321; People *v.* Powers, 108 Mich. 339, 66 N. W. 215.

[2] Internat. Trust Co. *v.* Keefe Mfg. Co., 40 Colo. 440, 91 Pac. 915.

[3] *Idem.*

[4] Internat. Trust Co. *v.* Keefe Mfg. Co., *supra;* Empire State Surety Co. *v.* Des Moines, 152 Iowa, 531, 131 N. W. 870; Elec. Appliance Co. *v.* U. S. F. & G. Co., 110 Wis. 434, 85 N. W. 648.

templation of law constitutes a separate and distinct contract for the renewal period.[1] Of course if no new contract is required the obligation of the bond will continue during the renewal.

§ 344. Abandonment of Contract—Subrogation by Surety to Rights of Public Body—Priority of Assignments.

The provision in the contract that the public body will retain a certain percentage out of current estimates serves to secure the public body against non-performance of the contract and gives the public body the right to hold these funds in case the contractor abandons his work in order to pay any damage it may suffer thereby.[2] This right of the public body to retain these percentages enures from the time the contract is made; and until its claims and claims for labor and material as provided in the contract are paid, such right is superior to any equitable assignee of the contractor.[3] And so when the surety on the bond of the contractor pays debts incurred by the contractor for labor and material it is entitled to be subrogated to these rights of the public body against the fund in preference to such an equitable assignee,[4] because the surety's right of subrogation is bound up in the contract and dates back to the time when it entered into the contract of suretyship.[5] This is so for the further reason that

[1] U. S. use of Dist. of Columbia *v.* Bayly, 39 App. D. C. 105.

[2] First Nat. Bk. *v.* O'Neil Eng. Co., 176 S. W. (Tex.) 74; Wasco County *v.* New England Equit. Ins. Co., 88 Oreg. 465, 172 Pac. 126, L. R. A. 1918 D. 732; First Nat. Bk. *v.* City Trust Co., 114 Fed. 529, 531; Prairie St. Nat. Bk. *v.* U. S., 164 U. S. 227, 232, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185; O'Neill *v.* Title G. & T. Co., 191 Fed. 570; *Re* Scofield Co., 215 Fed. 45, 50.

[3] Wasco County *v.* New England Equit. Ins. Co., *supra.*

[4] Wasco County *v.* New England Equit. Ins. Co., *supra;* Prairie State N. Bk. *v.* U. S., *supra;* Reid *v.* Pauley, 121 Fed. 652; Hipwell *v.* National Surety Co., 130 Iowa, 656, 105 N. W. 318.

[5] Prairie State N. Bk. *v.* U. S., *supra;* Henningsen *v.* U. S. F. & G. Co., 143

this reserve fund is as much for the protection and indemnity of the surety as it is for the security of the public body, and an equity in such fund is raised in behalf of the surety.[1] The right of subrogation is particularly applicable to these funds. This right cannot be defeated by a bank which loans money to a contractor to carry on his work and takes an assignment to secure the loan, and the equity of the surety and his priority in these reserved moneys will be sustained as against such an assignee, even though the fund is thereby exhausted and nothing is left for the bank assignee.[2] The bank is bound to know of the rights of a surety under these circumstances and will be deemed to act with full knowledge of a surety's rights.[3]

Where, therefore, the surety on a contractor's bond completes work abandoned by a contractor, such surety is entitled to moneys under the contract, sufficient to save him from loss on his suretyship contract, and such right is superior to any assignment made by the contractor.[4]

§ 345. Liability of Public Officer for Failure to Take Bond Required by Statute.

Where a statute does not in terms impose liability upon public officers for failure to exact a bond from a contractor to pay claims of laborers and material men, no individual

Fed. 810, 208 U. S. 404, 411; First Nat. Bk. *v.* City Trust S. & D. Co., 114 Fed. 529; National Surety Co. *v.* Berggren, 126 Minn. 188, 148 N. W. 55; Wasco Co. *v.* New England Equit. Ins. Co., *supra*.

[1] First Nat. Bank *v.* City Trust L. D. & S. Co., 114 Fed. 529; O'Neil *v.* Title G. & T. Co., 191 Fed. 570; *Re* Scofield Co., 215 Fed. 45; First Nat. Bk. *v.* Pesha, 99 Neb. 785, 157 N. W. 924; Maryland Casualty Co. *v.* Washington N. Bk., 92 Wash. 497, 159 Pac. 689.

[2] Wasco County *v.* New England Equit. Ins. Co., *supra*.

[3] *Idem*.

[4] Prairie State Nat. Bk. *v.* U. S., *supra;* First Nat. Bk. *v.* City Trust S. D. & S. Co., 114 Fed. 529; Reid *v.* Pauly, 121 Fed. 652; First Nat. Bk. *v.* Sch. Dist., 110 N. W. (Neb.) 349; Gastonia *v.* McEntee P. Eng. Co., 131 N. C. 359, 42 S. E. 857; *Contra*, Dowling *v.* Seattle, 22 Wash. 592, 61 Pac. 709.

liability of the officers will ensue so as to make them subject to suit for such omission.[1] This is so because the duty imposed is upon him to act not individually but as a public officer. The neglect, therefore, is that of the public body, not of the officer.[2] But where the duty imposed by statute is a ministerial duty, the material men or laborers injured by breach of the duty may sue the officers for failure to perform it and recover of them individually.[3] But no recovery will be permitted unless after refusal to pay by the contractor upon demand, or upon proof of insolvency.[4] And if instead of complying with the statute the bond obtained is a good common-law bond no liability of the officer for not obtaining the statutory bond can arise,[5] especially where the public body does not prevent suit by those for whose benefit it was received.

§ 346. Obligation Assumed by Public Body for Failure to Require Contractor to Give Statutory Bond.

When the duty imposed by statute upon a public body to obtain a bond from a contractor for public work conditioned to pay the claims of laborers and material men is a public duty and not a corporate duty the public body is not liable for its failure to exact the bond.[6] Where of course, the statute imposes liability upon the public body

[1] Blanchard *v.* Burns, 110 Ark. 515, 162 S. W. 63; Hydraulic P. B. Co. *v.* Sch. Dist., 79 Mo. App. 665; Templeton *v.* Nipper, 107 Tenn. 548, 64 S. W. 889.

[2] Monnier *v.* Godbold, 116 La. 165, 40 So. 604; Blanchard *v.* Burns, *supra*.

[3] Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649; Plummer *v.* Kennedy, 72 Mich. 295, 40 N. W. 433; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; Alpena use of Zess *v.* Title G. & T. Co., 158 Mich. 678, 123 N. W. 536.

[4] Michaels *v.* McRoy, 148 Mich. 577, 112 N. W. 129.

[5] Stephenson *v.* Monmouth Min. & Mfg. Co., 84 Fed. 114.

[6] Freeman *v.* Chanute, 63 Kan. 573, 66 Pac. 647; Ihk *v.* Duluth, 58 Minn. 182, 59 N. W. 960; *Contra*, Northwest Steel Co. *v.* Sch. Dist., 76 Oreg. 321, 148 Pac. 1134.

for failure to require the bond, and an improper and insufficient bond is obtained the public body is liable.[1] If public corporations are not mentioned in a statute which imposes personal liability upon an owner of property under improvement for failure to exact a good and sufficient bond from the contractor they are by implication exempted.[2] But where recovery is allowed none can be had unless it is shown that the contractor is insolvent. If the material man or laborer should know from the public record that a bond has been given he is chargeable with his own negligence and cannot recover against the public body.[3]

§ 347. Condition Precedent to Liability—Limitations.

Where a statute provides that a verified statement of claim must be filed with the public body within a certain time after the completion of the work or structure, the right to maintain an action upon the contractor's bond is made to depend upon the giving of such notice and therefore it is a condition precedent to the maintenance of the action. This provision is for the benefit of sureties, and when no claims are filed within the time limited, their liability ceases.[4]

[1] Wilcox Lumber Co. *v.* Sch. Dist., 103 Minn. 43, 114 N. W. 262; Scott Graff Lumber Co. *v.* Sch. Dist., 112 Minn. 474, 128 N. W. 672; Crab Creek Lumber Co. *v.* Othello, 81 Wash. 52, 142 Pac. 429.

[2] Barrett Mfg. Co. *v.* Bd. of Comm'rs, 133 La. 1022, 63 So. 505; Wilcox Lumber Co. *v.* Sch. Dist., *supra; Contra*, Crab Creek Lumber Co. *v.* Othello, 81 Wash. 52, 142 Pac. 429; Fransioli *v.* Thompson, 55 Wash. 259, 104 Pac. 278.

[3] Woodward Lumber Co. *v.* Grantville, 13 Ga. App. 405, 79 S. E. 221.

[4] French *v.* Powell, 135 Cal. 636, 68 Pac. 92; Huggins *v.* Sutherland, 39 Wash. 552, 82 Pac. 112.

CHAPTER XLIX

LIQUIDATED DAMAGES

§ 348. **General Rule.**

It seems to be pretty generally recognized that these covenants and stipulations in public contracts are usually prepared by the public body and in most instances forced upon a contractor who must take them without bargaining, if he desires to be permitted to bid upon the contract. Nevertheless, if they are deliberately entered into with a full understanding of their purport, and the amount provided is not disproportionate to the actual damage or property loss suffered and is not unreasonable or oppressive, and when it is apparent that the intention of the parties was to provide compensation and nothing else, the modern tendency is to enforce them and not to construe them as a penalty, but rather to treat them as any other covenant in the contract whose true intent has been ascertained.[1] The modern rule affecting such stipulations is not to look upon them with disfavor or construe them strictly as penalties, but to look upon them with candor, if not with favor, when they are deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights. The reason for the rule is that such stipulations promote prompt performance of contracts and adjust in advance and amicably, matters, the settlement of which through the courts would

[1] Wise *v.* U. S., 249 U. S. 361, 63 L. Ed. 647; Hathaway &c. Co. *v.* U. S., 249 U. S. 460, 63 L. Ed. 707, aff'g 52 Ct. Cl. 267.

involve difficulty, uncertainty, delay and expense.[1] The question whether the stipulation is to be regarded as a penalty or as liquidated damages is to be determined from a fair and reasonable construction of the contract.[2] When the true intention of the parties is ascertained, effect will be given to the provision as freely as to any other in the contract, as long as the actual damages are uncertain in their nature or amount or are difficult of ascertainment and as long as the amount stipulated as damages is not so extravagant or disproportionate to the actual loss as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.[3] Each case must, of course, very obviously be determined by its own facts and circumstances.[4] It is incumbent upon the party claiming the stipulation to be one for liquidated damages to show that it was the intelligent and deliberate purpose of the contracting parties to so consider it. But when the intention of the parties has finally been determined as well as how they regarded the provision, whether it was considered in the light of a penalty, or as liquidated damages ascertained and fixed by the agreement, such intention should ordinarily control.[5] But if the covenant violates the tests above set forth, and by its consequences, and these seem to be the only available criteria, it shows

[1] Wise *v.* U. S., *supra.*

[2] Wise *v.* U. S., *supra;* U. S. *v.* Bethlehem Steel Co., 205 U. S. 105, 51 L. Ed. 731; Dist. of Columbia *v.* Harlan &c. Co., 30 App. D. C. 270; Phœnix I. Co. *v.* U. S., 39 Ct. Cl. 526; Little *v.* Banks, 85 N. Y. 258, 266; Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; New Britian *v.* New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881.

[3] Wise *v.* U. S., *supra.*

[4] Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044.

[5] Graham *v.* Lebanon, 240 Pa. 337, 87 Atl. 567; U. S. *v.* Bethlehem Steel Co., *supra;* Wise *v.* U. S., *supra;* Pacific Hdw. Co. *v.* U. S., 49 Ct. Cl. 327, 48 Ct. Cl. 399; Crane Co. *v.* U. S., 46 Ct. Cl. 343.

that it is a penalty, because it is oppressive, or unreasonable or that compensation was not the object which the clause was intended to fulfill and implied fraud circumvention or mistake arises, then the courts will even disregard the explicit words of the parties and treat the stipulation as a penalty.[1]

§ 349. **Construction of Stipulation for Liquidated Damages.** If a contract provides stipulated damages as a consequence of a breach, this is the one measure which the law will consider. Parties are free to make contracts as they see fit, and it is the duty of the courts to carry out their intention. If under the rules just considered the stipulation is in fact one which the courts can say is for specified damages, it will be enforced in that respect. The remedy which the parties themselves provide will ordinarily be exclusive and must be enforced according to its terms.[2] So where a contract to furnish armor and other material provides that the damage for delay shall be computed from the date set for final completion, the dates when installments become due will not be taken into account.[3] If the contract provides that should the contractor fail to commence with the performance of the work on the day specified, the contract may be annulled and all money or reserve percentage due or to become due shall be forfeited, even if it is otherwise provided that the public body may relet the work, this will not give it the right to charge the contractor with the excess cost on reletting. The

[1] Willson *v.* Baltimore, *supra;* McClintic Marshall C. Co. *v.* Bd. of Freeholders, 83 N. J. Eq. 539, 91 Atl. 881.

[2] Stone Sand & Gravel Co. *v.* U. S., 234 U. S. 270, 58 L. Ed. 1308; Carnegie Steel Co. *v.* U. S. 240 U. S. 156, 60 L. Ed. 576, aff'g 49 Ct. Cl. 403; Dennis *v.* U. S., 5 Ariz. 313, 52 Pac. 353; Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872.

[3] Carnegie Steel Co. *v.* U. S., 49 Ct. Cl. 403.

remedy of the contract is exclusive and will control.[1] It may be true that such damages are inadequate, but this fact will not permit of a strained construction of or destruction of the very terms of the agreement.[2]

§ 350. Time of Essence—Effect of Stipulation Providing Remedy for Breach of Time Clause.

Where a contract expressly determines the consequences of a failure to begin or complete work on time, time cannot be considered of the essence. The inherent right of annulment and the consequent right to recover all damages as for a complete breach arise out of the common law. If the parties elect to deal with the matter by express stipulation that is the end of it. It may very well be that time is made vital, but if the contract provides also for the consequences of a breach the benefits and burdens of the contract must be taken together. Common-law rights of annulment must give way to express provisions covering that right. Time of the essence becomes of no moment where the contract gives the mode of redress for a failure of observance of time, except to give the relief which the contract provides.[3]

§ 351. Money Contracts.

The rules governing the payment of liquidated damages do not apply to contracts calling only for the payment of money. Such a contract, if broken, is fully satisfied by payment of legal interest as damages during the period of delay or for the breach. Therefore any agreement to forfeit or pay a larger sum because of a default in the pay-

[1] Stone Sand & Gravel Co. *v.* U. S., 234 U. S. 270, 58 L. Ed. 1308.
[2] *Idem.*
[3] *Idem.*

ment of a lesser amount will be considered a penalty which no form of words will convert into liquidated damages.[1]

§ 352. When Provision is not Considered a Penalty.

If the damages are at all uncertain or difficult of ascertainment the parties should have the right to anticipate, stipulate and settle them, if they so choose, and their true intent in this respect should be enforced. If the sum is not greatly disproportionate to the actual damage suffered and is required to be paid for each default, or per diem, or otherwise periodically during the default it will be considered liquidated damages.[2] But if it is wholly disproportionate to the actual damage, no matter what the method of computation, it will be treated as a penalty.[3] If the contract provides for payments in installments as the work progresses and for the retaining of a certain percentage of each installment as security for full performance, the provision will not be treated as liquidated damages but rather as a penalty.[4] To construe such a provision as one fixing and settling the damage would more often work injustice than fairness since the nearer the completion of the work,

[1] Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872; Graham *v.* Lebanon, 240 Pa. St. 337, 87 Atl. 567; Loudon *v.* Taxing District, 104 U. S. 771.

[2] Heard *v.* Dooly County, 101 Ga. 619, 28 S. E. 986; Ludlow Valve Mfg. Co. *v.* Chicago, 181 Ill. App. 388; Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044; Summit *v.* Morris County T. Co., 85 N. J. L. 193, 88 Atl. 1048; White *v.* Braddock Boro. S. D., 159 Pa. 201, 28 Atl. 136; Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791; Malone *v.* Philadelphia, 147 Pa. 416, 23 Atl. 628; Stephens *v.* Essex Pk. Comm., 143 Fed. 844; Madison *v.* Amer. San. Eng. Co., 118 Wis. 480, 95 N. W. 1097.

[3] McCann *v.* Albany, 11 App. Div. 378, 158 N. Y. 634, 53 N. E. 673; Haliday *v.* U. S., 33 Ct. Cl. 453.

[4] Pigeon *v.* U. S., 27 Ct. Cl. 167; Davis *v.* U. S., 17 Ct. Cl. 201; Kennedy *v.* U. S., 24 Ct. Cl. 122; Satterlee *v.* U. S., 30 Ct. Cl. 31; Haliday *v.* U. S., *supra;* Smith *v.* U. S., 34 Ct. Cl. 472; Phœnix I. B. Co. *v.* U. S., 39 Ct. Cl. 526; Mundy *v.* U. S., 35 Ct. Cl. 265; Hughes *v.* U. S., 45 Ct. Cl. 517.

the less the damage and the greater the sum retained, while if default occur shortly after the work begins, the greater would be the damage and the less the retained percentage with which to satisfy it. Such a result negatives an intention to liquidate damages, especially where the right is reserved to recover damages in addition to the sums retained.[1]

§ 353. Where Character of Clause is Doubtful—Doubt as to Amount to be Paid.

If the clause under consideration as a stipulated damage clause creates a doubt as to whether the provision should be construed as a penalty or as liquidated damages, the courts will regard it as a penalty.[2] The general rule is that whether the amount stated is denominated as "liquidated damages" or as a "penalty," it is not conclusive and if the contract leaves the intention of the parties in doubt as to the amount to be paid for its breach, or the amount specified is beyond all reasonable proportion to the damages that may actually be sustained, the contract will be construed as a penalty only and not as liquidated damages, though it be specified as such.[3] In case the clause is thus treated as a penalty, only actual damages are recoverable.[4]

[1] Hughes *v.* U. S., 45 Ct. Cl. 517. See Stone Sand & Gravel Co. *v.* U. S., 234 U. S. 270, 58 L. Ed. 1308.

[2] Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872; Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; Thompson *v.* St. Charles County, 227 Mo. 220, 126 N. W. 1044; Moore *v.* Platte County, 8 Mo. 467; Phœnix I. Co. *v.* U. S., 39 Ct. Cl. 526; United Eng., etc., Co. *v.* U. S., 47 Ct. Cl. 489, aff'd 234 U. S. 236, 58 L. Ed. 1294.

[3] U. S. *v.* Bethlehem Steel Co., 205 U. S. 105, 51 L. Ed. 731; Willson *v.* Baltimore, *supra;* Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78; Salem *v.* Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169.

[4] Parker-Washington Co. *v.* Chicago, *supra;* Thompson *v.* St. Charles County, *supra;* Illinois Surety Co. *v.* U. S., 229 Fed. 527; Pacific Hardware Co. *v.* U. S., 49 Ct. Cl. 327, s. c. 48 Ct. Cl. 399.

§ 354. Effect of Calling Clause "Liquidated Damages."

In determining the question of whether a clause for settled damages shall be treated and regarded as a penalty, the form of instrument will not control; the intention of the parties is to be ascertained and will govern, for the courts look beyond the mere form of the instrument to the subject of contract and to the consequences which will probably flow from a breach of its terms and conditions. The mere calling of the clause a "liquidated damage" clause and asserting that it is not a penalty, will not alone guide the courts in deciding this question. Such language is not conclusive when the clause itself in its results violates the reasonable limitations heretofore described.[1]

§ 355. Where Subject-Matter of Contract is of Uncertain Value.

Where the subject-matter of the contract is of uncertain value or the damages to be paid for its breach are incapable of definite ascertainment by any fixed rule, the amount stipulated in the damage clause will be construed as settled or liquidated damages. The facts of each particular case must be considered to ascertain whether a particular case comes within this rule.[2]

§ 356. Contract Containing Several Distinct and Independent Covenants.

If the agreement contains several distinct and independent covenants of which there may be several breaches, and one sum is stated to be paid upon breach of perform-

[1] Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; Ward *v.* Hudson R. B. Co., 125 N. Y. 230, 26 N. E. 256; Caesar *v.* Rubinson, 174 N. Y. 492, 67 N. E. 58; Chicago House Wrecking Co. *v.* U. S., 106 Fed. 385. See Seidlitz *v.* Auerbach, 230 N. Y. 167, 129 N. E. 461.

[2] Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044.

ance, that sum is to be regarded as a penalty and not as liquidated damages.[1] In like manner where there are several undertakings or agreements in a contract of different degrees of importance and the damages for the non-performance of some of these is readily ascertainable and for others not, or the loss resulting from the breach of some of these is clearly disproportionate to the sum sought to be fixed as liquidated damages, and one sum is named as damages for a breach of any of these covenants, such sum will be regarded as a penalty only and will not be treated as liquidated damages for the breach of any single stipulation.[2] This rule is based upon the fact that breaches may vary in the extent of resulting damage, since each act performed is not usually of equal importance. One stated sum, therefore, could not reasonably have been indicated to cover any of these breaches of varying consequences. If this result, which the courts reach is to be obviated, it can only be overcome by providing a separate sum to be paid upon each separate breach. Of course, if it is apparent that the contract clause for stipulated damages relates to the performance of a single act or condition, this fact will aid the court in determining whether it was the intention of the parties to liquidate and settle the damages rather than provide a penalty.[3]

§ 357. When Courts Will Regard the Provision as a Penalty.

Whenever it is apparent that the damages or loss

[1] Lampman *v.* Cochran, 16 N. Y. 275; Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044.

[2] Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872; Daily *v.* Litchfield, 10 Mich. 29; Summit *v.* Morris County Traction Co., 85 N. J. L. 193, 88 Atl. 1048; Elyria *v.* Cleveland, etc., R. Co., 23 Ohio Cir. Ct. N. S. 578; Madison *v.* American San. Eng. Co., 118 Wis. 480, 95 N. W. 1097; Madler *v.* Silverstone, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. N. S. 1.

[3] Low *v.* Redditch Local Board, 1 Q. B. 127.

suffered are easy of ascertainment, the courts will incline to regard the clause for stipulated or settled damages, as a penalty.[1] The difficulty in ascertaining the damages suffered, is given great weight in determining whether the clause should be regarded as a penalty or as one providing for liquidated damages.[2] The courts incline toward treating it as liquidated damages in proportion to the degree of difficulty in ascertaining the actual damages, but where the amount of damages provided in the stipulation is unconscionable, it will be regarded as a penalty.[3] And where the sum provided is unreasonable in comparison with the actual damages or loss suffered, it will be treated as a penalty.[4] When the amount is out of all proportion to the actual damages suffered, the courts look upon it as a penalty to guarantee the performance and not as liquidated damages.[5] It seems to be equally well settled that when a sum, if it be at all reasonable, is stipulated to be paid as liquidated damages for the breach of a contract, it will be regarded as such and not as a penalty where from the nature of the covenant the damages arising from its

[1] Nevada County *v.* Hicks, 38 Ark. 557; Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774; Thompson *v.* St. Charles County, 227 Mo. 220, 126 N. W. 1044; St. Louis *v.* Parker-Washington Co., 271 Mo. 229, 196 S. W. 767; Davis *v.* U. S., 17 Ct. Cl. 201; Smith Co. *v.* U. S., 34 Ct. Cl. 472.

[2] People *v.* Love, 19 Cal. 676; Parker-Washington Co. *v.* Chicago, 267 Ill. 136, 107 N. E. 872; Ferber Con. Co. *v.* Bd. of Ed. of Hasbrouck Heights, 90 N. J. L. 193, 100 Atl. 329; Peekskill, etc., R. Co. *v.* Peekskill, 21 App. Div. 94, 165 N. Y. 628, 59 N. E. 1128; Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628; Davis *v.* U. S., 17 Ct. Cl. 201, 215; Phœnix I. Co. *v.* U. S., 39 Ct. Cl. 526; Maryland Dredging Co. *v.* U. S., 241 U. S. 184, 60 L. Ed. 945, aff'g 49 Ct. Cl. 710; U. S. *v.* U. S. Bethlehem S. Co., 205 U. S. 105, 51 L. Ed. 731.

[3] Salem *v.* Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; Davis *v.* U. S., 17 Ct. Cl. 201; Haliday *v.* U. S., 33 Ct. Cl. 453; Edgar *v.* U. S., 34 Ct. Cl. 205; Smith Co. *v.* U. S., 34 Ct. Cl. 472.

[4] Davin *v.* Syracuse, 69 Misc. 285, 145 N. Y. App. Div. 904; Cleveland *v.* Connelly, 33 Ohio Cir. Ct. 64; Davis *v.* U. S., 17 Ct. Cl. 201.

[5] Smith *v.* Copiah County, 239 Fed. 425, aff'd 239 Fed. 432; McCann *v.* Albany, 11 N. Y. App. Div. 378, 158 N. Y. 634, 53 N. E. 673.

breach are wholly uncertain and cannot be ascertained.[1] It has been said, however, that it is neither excessive nor exorbitant to fix twenty five dollars per day as damages for failure to deliver scows costing under the contract in excess of ten thousand dollars.[2]

§ 358. Bond Given to Promote a Public Interest.

It often-time happens that where franchises are conferred by a municipal corporation or by the government itself, a bond is required to secure the construction of the public work which is to be operated in exercise of the franchise. The condition of the bond generally is that if the construction is not fulfilled by a stated date, the bond is declared forfeited, although no pecuniary damages may be shown to be sustained by the government or its subdivisions. A distinction is made in these cases between private obligations and bonds given to the sovereign or its agent for the purpose of promoting a public interest or policy. In the latter instance there would be no intention to indemnify for the reason that the state can gain nothing in its political or sovereign character by the performance of the condition of the bond, or lose anything by default. If a municipality or the state or nation requires as a condition of the making of a contract for sale of franchises, the payment of a fixed sum in liquidated damages, the sum becomes forfeited in case the utility is not constructed and put into operation by the time limited in the contract. The reason for this rule is that the obligors become bound because of a penalty or forfeiture inflicted by the sovereign power for breach of its laws. Security is taken

[1] Willson *v.* Baltimore, *supra;* New Britain *v.* New Britain Telephone Co., 74 Conn. 326, 50 Atl. 881, 1015.

[2] Ellicott Machine Co. *v.* U. S., 43 Ct. Cl. 232.

before the offense is committed and retained upon its commission.[1]

§ 359. When Provision Will not be Considered a Penalty—Deposit Money.

Where in order to enter into a contract or make a proposal the public body requires a deposit to accompany the proposal for the performance of the proposal, and provides that in case the bidder fails to execute a contract the deposit shall be retained by the public body, this is usually considered as an intention to liquidate damages and the deposit will be so considered.[2] If a public body suffers no loss from the failure of the prospective contractor to carry out his bid, the public body will be required to repay the deposit even though the bidder's stipulation was that it should be retained as liquidated damages.[3] Where it appears from the surrounding circumstances that the deposit is in the nature of a penalty it may be enforced only to the extent of actual loss suffered by the public body from failure to enter into the contract.[4] When no loss is suffered by the public body or a loss less than the amount of the deposit, the whole amount of the deposit or such balance as the contractor is entitled to,

[1] Clark *v.* Barnard, 108 U. S. 436, 27 L. Ed. 780; U. S. *v.* Montell, 26 Fed. Cases No. 15798; Nilson *v.* Jonesboro, 57 Ark. 168, 20 S. W. 1093; Brooks *v.* Wichita, 114 Fed. 297; Fiscal Ct. *v.* Ky. Public Service Co., 204 S. W. (Ky.) 77; Salem *v.* Anson, 40 Oreg., 339, 67 Pac. 190, 56 L. R. A. 169; Peekskill, etc., R. Co. *v.* Peekskill, 21 N. Y. App. Div. 94, 165 N. Y. 628, 59 N. E. 1128; Grants Pass *v.* Rogue River Pub. Serv. Corp., 87 Oreg. 637, 171 Pac. 400; York *v.* York Rys. Co., 229 Pa. St. 236, 78 Atl. 128.

[2] Wheaton Bldg. & L. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598; Coonan *v.* Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745; Davin *v.* Syracuse, 69 Misc. 285, 145 N. Y. App. Div. 904; Hattersly *v.* Waterville, 16 Ohio Cir. Ct. 226; Turner *v.* Fremont, 159 Fed. 221; Morgan Park *v.* Gahan, 136 Ill. 515, 26 N. E. 1085.

[3] Graham *v.* Lebanon, 240 Pa. St. 337, 87 Atl. 567.

[4] Willson *v.* Baltimore, 83 Md. 203, 34 Atl. 774.

may be recovered.[1] But the fact that a city relets a contract to another bidder without re-advertising, will not have the effect of entitling the bidder to the return of his deposit where he fails to enter into the contract.[2] A check deposited for a stated purpose that it shall be as a surety for the making and execution of a contract, cannot be treated as liquidated damages. It is rather in the nature of an obligation to reimburse or compensate the actual loss resulting from a default.[3]

§ 360. Provisions for Payment in Event of Delay.

Where a public contractor fails to complete his work on time under a contract which contains a provision for the payment of certain moneys in the event of his failure to perform on time, such provision, if reasonable, is looked upon usually as one for liquidated damages and not as a penalty.[4] The reason for such rule is based upon the uncertainty of estimating the damages which a public body would suffer from such delay.[5] The rule is especially adaptable to contracts for the construction of large public works, where the reason for the rule appropriately applies.[6]

[1] Lindsey *v.* Rockwall County, 10 Tex. C. A. 225, 30 S. W. 380; Graham *v.* Lebanon, *supra.*

[2] Turner *v.* Fremont, *supra.*

[3] Barber Asphalt Paving Co. *v.* St. Paul, 136 Minn. 396, 162 N. W. 470, L. R. A. 1917 E. 370.

[4] Lincoln *v.* Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056; Mayor, etc., of Jersey City *v.* Flynn, 74 N. J. Eq., 104, 70 Atl. 497; Macey Co. *v.* New York, 144 N. Y. App. Div. 408, 208 N. Y. 514, 101 N. E. 1110; Malone *v.* Philadelphia, 147 Pa. St. 416, 23 Atl. 628.

[5] Malone *v.* Philadelphia, *supra;* Heard *v.* Dooly County, 101 Ga. 619, 28 S. E. 986.

[6] Lawrence County *v.* Stewart, 72 Ark. 525, 81 S. W. 1059; Heard *v.* Dooly County, *supra;* Winston *v.* Pittsfield, 221 Mass. 356, 108 N. E. 1038; Thompson *v.* St. Charles County, 227 Mo. 220, 126 S. W. 1044; McClintic-Marshal Con. Co. *v.* Hudson County, 83 N. J. Eq. 539, 91 Atl. 881; Malone *v.* Philadelphia, *supra;* Stephens *v.* Essex Co. Pk. Comm., 143 Fed. 844; Morris *v.* U. S. 50 Ct. Cl. 154; Link Belt Eng. Co. *v.* U. S., 142 Fed. 243; Motschman *v.* U. S., 47 Ct. Cl. 373; Baltimore *v.* Ault, 126 Md. 402, 94 Atl. 1044; Whiting *v.* New Baltimore, 127 Mich. 66, 86 N. W. 403.

Municipal, state and national contracts usually provide that a stated sum for each day's delay shall be paid by the contractor to the public body. Where the amount to be retained by the public body is out of all proportion to the damage,[1] or where the intention of the parties and the surrounding circumstances indicate a different character to the stipulation, it will not be regarded as one for liquidated damages, but rather as a penalty.[2] When the actual loss and damage can be shown the provision will be treated as a penalty.[3] In like manner if the contract provides that in case of annulment the retained percentages are to be treated as forfeited, such a clause will be regarded as imposing a penalty.[4] But these provisions for forfeiture of certain amounts in case of delay, do not apply to delays for which the contractor has an excuse, as where the delay was caused by the public body.[5] No forfeiture of the amount stipulated as liquidated damages can be effected, where a public work contracted for is not completed in time, if the warrants drawn on the state treasurer and delivered to the contractor, are not paid and his real reason for delay is that he cannot proceed because of lack of funds with which to pay labor and purchase materials.[6] If the initial delay was caused by the Government it cannot recover liquidated damages where the work was later completed, but there was also some delay by the contractor.[7] This is true, although the con-

[1] Moore *v.* Platte County, 8 Mo. 467.

[2] McCann *v.* Albany, 11 N. Y. App. Div. 378, 158 N. Y. 634, 53 N. E. 673.

[3] Smith Co. *v.* U. S., 34 Ct. Cl. 472.

[4] Satterlee *v.* U. S., 30 Ct. Cl. 31.

[5] U. S. *v.* United Eng., etc., Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; Morris *v.* U. S., 50 Ct. Cl. 154.

[6] Landry *v.* Peytavin, 7 Mart. (La.) 165.

[7] U. S. *v.* United Eng., etc., Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; Ittner *v.* U. S., 43 Ct. Cl. 336.

tractor unreasonably delays his completion, if prior to such delay the conduct of the Government prevented, by its delay, a strict performance.[1] In such a situation, the stipulation for damages is not revived against the contractor.[2] Where both parties are in fault, the same rule applies,—the stipulation for liquidated damages is no longer binding.[3] But the courts will undertake to apportion the damage where the contract provides that it shall be apportioned and impose damages on the contractor for such delays as are chargeable to him.[4] These stipulations do not apply where a contractor completely abandons the work, but only in cases where he finishes it.[5] When the public body completes the work it may not claim the amount stipulated in the contract as liquidated damages.[6] Where the delay is occasioned by extra work, if there is no provision in the contract to cover this class of work and hold the contractor to finish all of his work, including the extra work, within the time limited by the contract, a direction by the public body to perform extra work will operate to make the clause for stipulated damages inapplicable.[7] The general rule seems to be that where the parties are mutually responsible for the delay, by reason of which the date limited by the contract for its completion has passed, the obligation of the stipulation relating to liquidated damages is destroyed and unless the contract

[1] *Idem.*

[2] U. S. *v.* United Eng., etc., Co., *supra;* Ittner *v.* U. S., 43 Ct. Cl. 336; Dist. of Col. *v.* Camden Iron Works, 15 App. D. C. 198.

[3] U. S. *v.* United Eng., etc., Co., *supra;* Gustavino Co. *v.* U. S., 50 Ct. Cl. 115.

[4] Schmulbach *v.* Caldwell, 196 Fed. 16; Van Buskirk *v.* Passaic Bd. of Ed., 78 N. J. L. 650, 75 Atl. 909.

[5] Moore *v.* Bd. of Regents, 215 Mo. 705, 115 S. W. 6; Clarke & Sons *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464; Gallagher *v.* Baird, 54 N. Y. App. Div. 398, 170 N. Y. 566, 62 N. E. 1095.

[6] Moore *v.* Dis., etc., Bd. of Regents, 215 Mo. 705, 115 S. W. 6.

[7] Gammino *v.* Dedham, 164 Fed. 593.

provides in some manner for the substitution of another date, the stipulation cannot be revived and is not effective under the contract.[1]

§ 361. The Measure Provided by the Contract Controls.

Where the parties to a public contract provide by its terms a measure of damages, to be effective in the event of its breach, the agreement of the parties in this respect will ordinarily be enforced.[2] When the contract contemplates the likelihood of its cancellation and the power to cancel is reserved and an indemnity agreed upon as the amount to be paid for cancelling the contract, this will be taken by the courts as a measure of damages for illegally refusing to award the contract.[3] It is never necessary to give proof of actual damages in order to recover the amount fixed by the agreement as liquidated damages.[4] It will be presumed that some damages are suffered in a case where the clause of the contract providing for liquidated damages has appropriate application.[5] The amount fixed will not be increased by adding interest.[6]

§ 362. Waiver.

Whenever the parties to a contract provide time to be of the essence and stipulate for damages in the event that the contract is not completed in time, this provision may be waived, and an extension of the time to complete the contract will operate to waive the stipulation relating to

[1] Mosler Safe Co. *v.* Maiden Lane S. D. Co., 199 N. Y. 499, 93 N. E. 81.
[2] Dennis *v.* U. S., 5 Ariz. 313; Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.
[3] Garfielde *v.* U. S., 93 U. S. 242, 23 L. Ed. 779.
[4] Salem *v.* Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; U. S. *v.* Dieckerhoff, 202 U. S. 302, 50 L. Ed. 1041; Ellicott Machine Co. *v.* U. S., 43 Ct. Cl. 232.
[5] Davin *v.* Syracuse, 69 Misc. 285, 145 N. Y. App. Div. 904.
[6] Kinser Const. Co. *v.* State, 125 N. Y. Supp. 46.

damages. By being waived it becomes eliminated from the contract and no longer entitles the party in whose favor it is written to recover liquidated damages.[1] The clause will not be revived even to cover an unreasonable delay. When a contractor agrees to do a piece of work within a given time and the parties have stipulated a fixed sum, it is not disproportionate as liquidated damages. The other party, to enforce such payment, cannot prevent the performance of the contract within the stipulated time. If he does, even though there was further delay by the fault of the contractor, the rule of the original contract relating to liquidated damages becomes waived and annulled.[2] Once waived the clause cannot be revived in the absence of express provision of the contract.[3]

§ 363. Relief in Equity from Clause.

Where a provision in a contract provides for liquidated damages and there is real and substantial damage suffered and its admeasurement is so difficult that an agreed sum is not only fair but practically necessary, equity will leave the parties to their legal rights and will not grant relief against such a clause unless the amount fixed is so disproportionate to actual damages as to be unconscionable and to justify a finding that the formal agreement as to damages was a mere pretense to annul the doctrine of equitable relief.[4]

[1] Maryland Steel Co. *v.* U. S., 235 U. S. 451, 59 L. Ed. 312; Stroebel Steel Co. *v.* Chicago San. Dist., 160 Ill. App. 554.

[2] U. S. *v.* United Eng., etc., Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489.

[3] U. S. *v.* United Eng., etc., Co., *supra;* Maryland Steel Co. *v.* U. S. *supra;* Dist. of Col. *v.* Harlan, etc., Co., 30 App. D. C. 270; Camden I. Wks. *v.* New Orleans Sew. Bd., 141 La. 453, 75 So. 204; Wight *v.* Chicago, 137 Ill. App. 240, 234 Ill. 83, 84 N. E. 628.

[4] U. S. *v.* Rubin, 227 Fed. 938.

CHAPTER L

LIMITATIONS TO SUITS ON PUBLIC CONTRACTS

§ 364. Liability of Government and its Sub-Divisions to Suit.

The United States has power to make contracts[1] and may be liable in many ways on implied contracts.[2] The power to make contracts is an incident to sovereignty, in order to accomplish the objects of government.[3] When the nation or the state thus enters into a contract it lays aside its robe as sovereign and becomes bound by the same obligations as an individual and its contracts are governed by the same laws.[4]

But while the nation and the state may thus make contracts, neither can be sued[5] without consent on its part. And even after it has agreed that it may be sued the sovereign may defeat suit by failing to make an appropriation to pay the contract debt.[6] Where a municipality has power to make contracts, hold property and exercise the

[1] U. S. *v.* Rubin, 227 Fed. 938.

[2] U. S. *v.* Russell, 16 Wall., 80 U. S. 623, 20 L. Ed. 474, aff'g 5 Ct. Cl. 121; U. S. *v.* Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846, aff'g 16 Ct. Cl. 160; Dooley *v.* U. S., 182 U. S. 222, 45 L. Ed. 1074; U. S. *v.* Lynah, 188 U. S. 445, 47 L. Ed. 539.

[3] Dugan *v.* U. S., 3 Wheat, (U. S.) 172, 4 L. Ed. 362; Van Brocklin *v.* Tennessee, 117 U. S. 151, 29 L. Ed. 845; Moses *v.* U. S., 166 U. S. 571, 41 L. Ed. 1119, aff'g 3 App. D. C. 277; Dickson *v.* U. S., 125 Mass. 311.

[4] Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 14 L. Ed. 997; Davenport *v.* Buffington, 97 Fed. 234; Patton *v.* Gilmer, 42 Ala. 548, 94 Am. Dec. 665; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457; Carr *v.* State, 127 Ind. 204, 26 N. E. 778; Indiana *v.* Woram, 6 Hill 33, 40 Am. Dec. 378; People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164; Cleveland Term'l, etc., R. Co. *v.* State, 85 Ohio St. 251, 97 N. E. 967.

[5] County of Albany *v.* Hooker, 204 N. Y. 1, 97 N. E. 403; Cayuga Co. *v.* State, 183 N. Y. Supp. 646.

[6] Carr *v.* State, 127 Ind. 204, 26 N. E. 778.

power to tax, there arises in its favor the right to sue and against it the right to be sued.[1] Mere territorial subdivisions or boards which do not constitute a municipal corporation proper can neither be sued nor sue, unless the legislature expressly permits it.[2]

§ 365. Venue of Actions.

Actions against a municipal corporation must be brought in the county where it is situated[3] and if it is located in several counties, its principal office or place of business is in the county where its principal seat of government is located.[4] In New York certain municipal corporations are domestic corporations and are accordingly controlled by the general corporation law which fixes the venue of suits against domestic corporations.[5] It is implied in New York that the legislature has conferred upon every city in that state the attribute of residence in that county in which its principal place of business is located, so far as residence controls the jurisdiction of county courts.[6]

§ 366. Condition Precedent to Suit—Necessity to Present Notice of Claim.

The legislature possesses power to enact statutes imposing as a condition precedent to suit the filing of a notice of claim with the common council, financial, law or other

[1] McCloud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689; Anne Arundel Co. *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

[2] Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

[3] St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423, 429, 20 L. Ed. 192; Phillips *v.* Baltimore, 110 Md. 431, 72 Atl. 902; Piercey *v.* Johnson City, 130 Tenn. 231, 169 S. W. 765, L. R. A. 1915 F. 1029; Marshall *v.* Kansas City, 95 Kan. 548, 148 Pac. 637; L. R. A. 1915 F. 1025.

[4] Maisch *v.* New York, 193 N. Y. 460, 86 N. E. 458; Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370; Arlington *v.* Calhoun, 148 Ga. 132, 95 S. E. 991.

[5] Maisch *v.* New York, *supra;* Eldred *v.* New York, 159 N. Y. App. Div. 301.

[6] Maisch *v.* New York, *supra.*

officer of the city, and providing that no action may be maintained against the municipality until the claimant shall so present written notice of his claim containing a statement and the amount thereof duly verified, and it may prescribe a limit of time within which such claim may be presented.[1] Statutes of this sort passed by the legislature will be upheld, notwithstanding that such requirements did not exist at common law, as long as they are not unreasonable. They fall naturally into two classes depending upon the language and intent thereof as shown by the statute. One class is a statutory condition of the right, which imposes a condition of the very existence of the right and so is a condition precedent to any suit being maintained at all upon the contract. The other class creates a statute of limitations which acts on the remedy only and to be availed of must be pleaded and taken advantage of by demurrer or answer and if not so taken it may be waived. In this latter case the right of suit on the contract is independent of the statute. The enforcement of the right is regulated and limited. In the former class, the failure to give the notice and comply with the statute prevents the right of action from springing into being and failure to comply with the condition need not be pleaded and cannot be waived. Many of the statutes go to the extent of requiring the claimant to plead and prove the giving of the notice as part of his cause of action.[2] Where

[1] O'Connor *v.* Fond DuLac, 109 Wis. 253, 53 L. R. A. 831; Cunningham *v.* Denver, 23 Colo. 18, 45 Pac. 356; Ada Co. *v.* Bullen Br. Co., 5 Idaho, 188 47 Pac. 818, 36 L. R. A. 372; Miller *v.* Mullan, 17 Idaho 28, 104 Pac. 660, 32 L. R. A. N. S. 350; Schigley *v.* Waseca, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. N. S. 689; Frasch *v.* New Ulm, 130 Minn. 41, 153. N. W. 121, L. R. A. 1915 E. 749; MacMullen *v.* Middletown, 187 N. Y. 37, 79 N. E. 863; 11 L. R. A. N. S. 391; Winter *v.* Niagara Falls, 190 N. Y. 198, 82 N. E. 1101; Cole *v.* Seattle, 64 Wash. 1, 34 L. R. A. N. S. 1166; Hase *v.* Seattle, 51 Wash. 174, 98 Pac. 370; Collins *v.* Spokane, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. N. S 840.

[2] Winter *v.* Niagara Falls, 190 N. Y. 198, 82 N. E. 1101.

the statute requires that claimant shall present his claim within a stated period and he fails to do so, this operates under some statutes to extinguish the claim.[1] These statutes being derogatory of the common law are strictly construed and not extended beyond their fair purport or so as to include other cases than those expressed. Conformable to such principle the "claim" or "demand" of which a notice must be filed does not include a tort.[2] And it has also been determined that these statutes only apply to actions brought in the State Courts and have no application where suit is laid in the Federal Courts.[3] But a person having a claim against a county has the option of presenting it for audit or of suing upon it directly.[4] The presentation of an itemized, verified bill for audit, thirty days before action brought, is a condition precedent to the right to sue, and must be pleaded to be available. The failure of the public body to return an unverified statement of account, or to make objection on that ground is not a waiver of the defect.[5]

§ 367. Effect of Allowance or Rejection of Claim.

Municipalities, in passing on these claims thus presented to them under statutes referred to, act in a merely executive capacity and the allowance of the claim is not conclusive, as it would be if the board acted in a judicial capacity. Accordingly municipalities are not estopped by the allowance of the claim but, like every similar act of an individual or corporation, it is to be taken as an admission,

[1] Hay *v.* Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. S. 84.

[2] Shields *v.* Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293; McGaffin *v.* Cohoes, 74 N. Y. 387, 30 Am. R. 307.

[3] Gamewell Fire Alarm Co. *v.* Mayor, 31 Fed. 312.

[4] N. Y. Cath. Protectory *v.* Rockland Co., 212 N. Y. 311, 106 N. E. 80; Delano *v.* Suffolk Co., 192 N. Y. App. Div. 459, 229 N. Y. 610, 129 N. E. 928.

[5] Comm. Water Co. *v.* Castleton, 192 N. Y. App. Div. 697; Cotriss *v.* Medina, 139 N. Y. App. Div. 872, 206 N. Y. 713, 99 N. E. 1105.

which however is rebuttable; and it can later be shown that the allowance was made without a full knowledge of all the circumstances or that it was incorrectly or imprudently allowed.[1] If the board charged with the duty of passing on the claim, allows a claim which is illegal or one which a court will not enforce, such action can have no effect. The governing body or other board of a municipality have no power or ability to give validity to a claim which it otherwise did not possess.[2] Where a claim is once passed on it cannot be reconsidered.[3]

§ 368. **Rights and Remedies Available to Public Bodies.** Public bodies may, for the purpose of protecting their property, and in general in the transaction of business of a private character, avail themselves of all the rights and remedies afforded to an individual.[4] Where a contract specifically provides for the consequences of its breach the remedy thus provided is exclusive.[5] The usual measure of damages is compensation which will make the hurt party whole, as nearly as is possible, and this rule applies alike to public and private contracts.[6] But the contractor is not limited to suit upon the contract since he may also sue on assumpsit for the amount due under the contract.[7]

[1] Huntington County *v.* Heaston, 144 Ind. 583, 41 N. E. 457; Jackson County *v.* Nichols, 12 Ind. App. 315, 40 N. E. 277; Clark *v.* Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; State *v.* Minden, 84 Neb. 193, 120 N. W. 913; People *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485.

[2] Berka *v.* Woodward, 125 Cal. 119, 57 Pac. 777; Huntington Co. *v.* Heaston, *supra*.

[3] McConaughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Re Equit. T. Co. *v.* Hamilton, 226 N. Y. 241, 123 N. E. 380.

[4] Buffalo *v.* Bettinger, 76 N. Y. 393; Buffalo Cement Co. *v.*. McNaughton, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089.

[5] Mechanic's Bank *v.* New York, 164 N. Y. App. Div. 128.

[6] Newport *v.* Newport L. Co., 17 Ky. L. R. 31, 30 S. W. 606.

[7] Bigelow *v.* Perth Amboy, 25 N. J. L. 297; Charlotte *v.* Atlantic Bitulithic Co., 228 Fed. 456.

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