

58, 1939

In the Privy Council

No.

of 1938

ON APPEAL FROM THE COURT OF KING'S BENCH, FOR THE
PROVINCE OF QUEBEC (APPEAL SIDE) CANADA.

BETWEEN

The People of the State of New York,

herein represented by the Attorney General of the State of New York, one of the United
States of America,

(Plaintiffs in the Superior Court)

(Appellants in the Court of King's Bench)

APPELLANTS

—vs—

Heirs of the late John M. Phillips,

in his lifetime of New York,

(Defendants in the Superior Court)

(Respondents in the Court of King's Bench)

—and—

***The Crown Trust Company et al., es=qual,
for the Heirs of the late Francis Phillips,***

a body corporate and politic duly incorporated, having its head office and principal place of
business in the city and district of Montreal, in its quality of curator to the minor child,
Helen Frances Phillips, of the village of Roslyn, in the state of New York and Elizabeth
Ellen Carroll Baines, wife separate as to property of Clarence L. Paulsen, merchant of the
city of Spokane, in the state of Washington, one of the United States of America, and the
said Clarence L. Paulsen, for the purpose of authorizing his said wife,

Defendants severing in their defence in the Superior Court)

(Defendants in the Court of King's Bench),

RESPONDENTS

—and—

The Montreal Safe Deposit Company,

a corporation having its head office in the city and district of Montreal,

(Tierce-saisie in all Courts)

TIERCE-SAISIE.

Record of Proceedings

LAWRENCE, JONES & Co.,

Agents for Appellants.

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PRINTERS — EDITORS

RECORD OF PROCEEDINGS.

Record of Proceedings

Containing the proceedings in the Court of King's Bench. (Appeal Side),
the Formal Judgments and Judges' Reasons

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Record of proceedings

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No. 1

The Inscription in Appeal Before the Court of King's Bench.

In the
Court of
King's Bench
—
No. 1
The
Inscription
in Appeal
Before the
Court of
King's Bench
10 December
1934

20 Plaintiffs, hereinabove described, hereby inscribe this case in Appeal, in the Court of King's Bench, Appeal Side, sitting in the City and District of Montreal, from the final judgment of the Superior Court of the District of Montreal, presided over by Mr. Justice Mercier, rendered on the 23rd day of November, 1934, dismissing Plaintiffs' action and maintaining with costs, the contestations of both Defendants.

30 AND the Plaintiffs-Appellants hereby give notice to Messrs. Cook & Magee, Attorneys for the Heirs of the Late John M. Phillips, and to Messrs. Hackett, Mulvena, Foster, Hackett & Hannen, attorneys for the Crown Trust Company and Elizabeth Ellen Carroll Baines,
40 wife of Clarence L. Paulsen, & vir, that the present Inscription has this day been produced at the office of the Superior Court, for the district of Montreal, and that on Wednesday the 15th day of December, 1934, at eleven o'clock in the forenoon, before the Prothonotary of the said Superior Court of Montreal, at his office in the Court House, said Appellants will give good and sufficient security that it will prosecute said appeal and will pay all costs which might be adjudged in the event of the said judgment being confirmed, and that the security which it will furnish is a bond of the United States Fidelity and Guaranty Company, a
40 body politic and corporate, having a place of business for the Province of Quebec in the City and District of Montreal, and duly authorized to act as surety before the Courts of this Province and will then and there justify its solvency if called upon to do so.

Montreal, December 10th, 1934

BERTRAND, GUERIN, GOUDRAULT & GARNEAU,
Attorneys for Plaintiffs-Appellants.

In the
Court of
King's Bench
—
No. 2
Surety Bond
of the
United States
Fidelity and
Guarantee
Company
15 December
1934.

No. 2

Surety Bond of the United States Fidelity and Guarantee Company.

UNITED STATES FIDELITY AND GUARANTY COMPANY 10
Home Office, Baltimore, Maryland

SECURITY IN APPEAL

CANADA
Province of Quebec
District of Montreal

SUPERIOR COURT
No. 81400-16-220-34 (76184) 20

No. 30804

Whereas, On the 23rd day of November, one thousand nine hundred and thirty four, Judgment was rendered by the Superior Court, for the Province of Quebec, sitting at Montreal in the District of Montreal in a certain cause between PEOPLE OF THE STATE OF NEW YORK,

(Plaintiffs in Superior Court)
APPELLANTS

vs

THE HEIRS OF THE LATE JOHN M. PHILLIPS, 30
(Defendants in Superior Court)
RESPONDENTS

and

THE MONTREAL SAFE DEPOSIT COMPANY,
Défendants en reprise d'instance.
Also Respondents. Tiers-Saisie 40

and

THE CROWN TRUST COMPANY, et al.
Defendants severing in their defense in Superior Court; and Defen-
dants en reprise d'instance, also Respondents.

and

THE ROYAL TRUST COMPANY,
Mise-en-cause.

Whereas, The said Judgment has been appealed from to the Court of King's Bench, sitting in Appeal, by the said Plaintiffs, thus rendering necessary the security required by Article 1214, of the Code of Civil Procedure;

In the Court of King's Bench

No. 2
Surety Bond of the United States Fidelity and Guarantee Company
15 December 1934.
(continued)

Therefore, these Presents Testify, that on the 15th day of December one thousand nine hundred and thirty-four, came and appeared before me, Deputy Prothonotary of the Superior Court, in and for the District of MONTREAL the UNITED STATES FIDELITY AND GUARANTY COMPANY, a body politic and corporate, duly incorporated under the laws of the State of Maryland, one of the United States of America, and having its head office in the City of Baltimore, in the said State, and having a branch office in the City of Montreal, and duly authorized to become surety before the Courts of the Province of Quebec, under and by virtue of Order-in-Council, dated at Quebec the 2nd day of October, one thousand nine hundred and three, under the provisions of the Act, 63 Victoria, Chapter 44, the same having been published in the Quebec Official Gazette as required by law, and by virtue of the license issued from the office of the Superintendent of Insurance at Ottawa, under the Insurance Act, 1917, and Amendments, certifying that the said Company has made the necessary deposit and has otherwise complied with the said Act and Amendments.

The said UNITED STATES FIDELITY AND GUARANTY COMPANY, hereby represented by W. R. CRAIG of the City of Montreal duly authorized by Resolution of the Board of Directors of the said Company, passed on the 20th day of April, 1932, at Baltimore, duly certified copy of which being hereto annexed and which said Company hereby acknowledges itself to be the legal surety of the said Appellant in regard to the said Appeal: hereby promises, binds and obliges itself that in case the said Appellant does not effectually prosecute the said Appeal, and does not satisfy the condemnation and pay all the costs adjudged, in case the Judgment appealed from is confirmed by the said Court of King's Bench, sitting in Appeal, then the said surety will satisfy the said condemnation in capital, interest and costs, and pay all costs which may be hereafter adjudged in case the Judgment appealed from is confirmed as aforesaid, by said Court of King's Bench, to the use and profit of the said Defendants or Respondents, his heirs, administrators, executors and assigns.

And the UNITED STATES FIDELITY AND GUARANTY COMPANY has signed these presents by its Representative.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Taken and acknowledged before me at Montreal this 15th day of December A. D. 1934.

C. E. Sauv , D. P. S. C.

By W. R. Craig,
Ass't. Resident Agent and
Attorney.

48840

EXTRACT FROM MINUTE BOOK
OF THE

UNITED STATES FIDELITY AND GUARANTY COMPANY.

In the
Court of
King's Bench
—
No. 2
Surety Bond
of the
United States
Fidelity and
Guarantee
Company
15 December
1934.
(continued)

10

At a special meeting of the Board of Directors of the UNITED STATES FIDELITY AND GUARANTY COMPANY, held at the head office of the Company, in the City of Baltimore, on the 20th day of April, A. D. 1932, it was

Resolved, That F. D. Knowles be and he is hereby elected Resident Agent and Attorney of the Company residing in the City of Montreal, Province of Quebec, and N. E. Salvas, K. G. Christie and W. R. Craig be and they are hereby elected Resident Assistant Agents, and Attorneys of said Company residing in the City and Province aforesaid and that the said Resident Agent and Attorney and Resident Assistant Agents and Attorneys be and each of them is hereby authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations of suretyship for or on behalf of the Company.

20

STATE OF MARYLAND,
CITY OF BALTIMORE.

30

I, J. E. Gittings, Assistant Secretary of the UNITED STATES FIDELITY AND GUARANTY COMPANY, do hereby certify that I have compared the foregoing extracts and transcripts of resolution from the Minute Book of the Board of Directors of the UNITED STATES FIDELITY AND GUARANTY COMPANY with the original as recorded in the Minute Book of said Company, and that the same are true and correct extracts and transcripts therefrom, and that the same resolution has not been revoked or rescinded and is in accordance with the constitution and by-laws of the Company.

40

Given under my hand and seal of the Company at the City of Baltimore, in the State of Maryland, one of the United States of America, this 7th day of August, A. D. 1934.

J. E. Gittings.
Assistant Secretary.

No. 3

The Factum of Appellant Before the Court of King's Bench.

In the
Court of
King's Bench
—
No. 3
The Factum
of Appellant
Before the
Court of
King's Bench
1st April 1938

10 This is an appeal from a judgment of the Superior Court, rendered by the late Mr. Justice Mercier, on the 23rd of November, 1934, dismissing Plaintiffs' action and maintaining with costs the contestation of both Defendants.

STATEMENT OF FACTS.

20 The Appellants, (Plaintiffs in the Superior Court) claim from the Respondents, the Heirs of the late John M. Phillips (Defendants in the Superior Court) the sum of \$3,203,957.61 as damages for moneys unlawfully obtained and withheld from the City of New York, by the late John M. Phillips, who in his lifetime supplied pipe for the construction of sewers in the Borough of Queens, City of New York, at such exorbitant and excessive prices, in many instances exceeding by 800 per cent, the fair prices for said pipe.

30 The said John M. Phillips with the assistance of corrupt City officials, contractors and other persons, was able to establish monopoly in the Borough of Queens as an exclusive pipe Vendor, and in conspiracy with the said officials and through the medium of his own ring of contractors, to defraud the City of New York of large sums of money on the sale of his pipe.

40 As a result of the conspiracy to defraud as a foresaid, the said John M. Phillips, together with Maurice E. Connolly, the President of the Borough of Queens, and Frederick C. Seely, assistant Engineer in charge of the designing department of sewers, were indicted for conspiracy before the grand jury of the County of Queens, New York. Phillips died on the 5th of July, 1928, after the inactment of the grand jury was returned, but before trial. The other two accused were convicted and sentenced to terms in gaol.

Shortly before his death, and while an investigation into his activities in the Borough of Queens was pending, Phillips secreted away in a safety deposit box, rented from the Montreal Safe Deposit Company, the Tiers-Saisis herein, the sum of \$312,000.00 which sum was seized by a writ of attachment before judgment. By consent of all the parties this money was converted into bounds and is held in trust by the Royal Trust

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Company, pending the final outcome of the litigation. Whence this action in the Superior Court of the District of Montreal.

THE PARTIES IN THE CASE.

The action was instituted by the Attorney General of the State of New York, on behalf of the People of the State of New York, under powers vested in that official under the Civil Practice Act of the State of New York. 10

The writ in this case was issued on the 9th of July, 1928, four days after the death of John M. Phillips, naming as Defendants, the heirs of the said John M. Phillips, collectively.

On the 22nd of April, 1929, by judgment of the Superior Court, the Crown Trust Company, curator to Francis Phillips, minor son of John M. Phillips emancipated by marriage, was authorized to sever its defence from that of the other defendants. 20

On the 9th of October, 1929, following the death of Francis Phillips, who died a minor, the Crown Trust Company was appointed curator to the property of his widow, also a minor emancipated by marriage, and to the property of their minor child and in this quality the Crown Trust Company appeared as Defendant en reprise d'instance.

The only reason for the appearance of the Crown Trust Company, curator to Francis Phillips, through the ministry of Messrs. Hackett, Mulvena, Foster, Hackett and Hannen, was, that it was claimed, that the money seized in Montreal, was the property of said Francis Phillips and not the property of John M. Phillips. 30

THE JOINT RECORD.

The joint record consists of 12 volumes, containing the proceedings, the depositions of witnesses, and the Exhibits. The first 3 volumes contain the pleadings, the proceedings and depositions and the remaining 9 volumes contain the Exhibits and the judgment. The index to the joint record is printed in a separate book. The record is a compendious one, due to the fact that a great deal of written evidence had to be introduced into the case, wherever same was available. The Respondents consented that the printing of some of the Exhibits in whole or in part be dispensed with. Save as aforesaid, the appellants were compelled to print all the Exhibits introduced in the case, either at the Trial or on Rogatory Commission. The nature of the Exhibits is such that the printing of 40

them was a heart-rending task necessitating pain-staking work and a great deal of time.

In referring to the Index, wherever the letter "C" precedes the number to the Exhibit, it means that such Exhibit was produced on Rogatory Commission. It is to be noted that most of the evidence in the case was taken before a Commissioner in the City of New York, in virtue of an open Rogatory Commission issued by our Superior Court. Forty-five witnesses were heard and 254 Exhibits produced under the said Rogatory Commission.

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ARGUMENT.

1.—*The judgment a quo*

The sole reason for the dismissal of the appellants' action, as appears from the judgment of the Court below, (vol. 12 pp. 5548 et sq.) is that the learned trial judge did not find that there was any proof of conspiracy. Therefore, the Appellant's main contention is that the learned trial judge's findings of fact are contrary to the weight of evidence.

Before we proceed to deal with our main contention, which will necessitate going into the whole evidence of the case, we wish to refer your Lordships to certain portions of the reasons of the judgment, dealing with proof of conspiracy, to which the Appellants take exception, on the ground that the learned trial Judge proceeded on wrong principles of law in deciding the case, as he did, on the evidence before the Court.

In this connection, the Appellants refer your Lordships, to that portion of the reasons for judgment, appearing in Vol. 12 at p. 5552 (20) wherein it is stated that the Court could not accept as evidence of conspiracy the proof of conviction of Maurice E. Connolly the President of the Borough of Queens, and Frederick Seely, assistant engineer, at the head of the designing department.

It is respectfully submitted that the Court could accept as a fact that Maurice E. Connolly and Frederick Seely, two of Phillip's co-conspirators, were convicted of a criminal offense which formed the basis of an action against the heirs of John M. Phillips and that the court should not have been influenced (as the judge admits he was (vol. 12, p. 5555 (10) by the fact that, two of the judges, of the Court of Appeal, which confirmed the conviction, dissented in favor of a new trial.

The Appellants further take exception to that part of the judgment, appearing in vol. 12 at pp. 5553 (10) and 5554 (20) wherein the trial Judge

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seeks to define conspiracy — and wherein he draws the conclusion that before the Plaintiffs could have succeeded in their action, they would had had to prove “une résolution d’agir concertée et arrêtée entre deux personnes ou plus.”

The Appellants respectfully submit that even in a criminal case of conspiracy it is not necessary, and in most cases impossible, to prove an agreement between co-conspirators to do an unlawful act, but that such an agreement may be inferred from the conduct of the parties, and in support of our contention, we beg to cite the following authors and jurisprudence on criminal conspiracy and the proof thereof: 10

RUSSELL on Crimes, 8th edition, volume 1, page 188, treating the question of evidence, in cases of conspiracy, states as follows:

“The existence of a conspiracy is, in most cases, a matter of inference deduced from criminal or unlawful acts done in pursuance of a common criminal purpose” (Citing *Rex vs Brisac*, 4 East, 164). 20

And further, on the same page, he states as follows:

“The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case.” (Citing *Rex vs Parsons*, 1, W. B. L. 392). 30

and further, at the same page,

“Although the common design is the root of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have the common design, and to pursue it by common means and so to carry it into execution, for in many cases of the most clearly established conspiracies, there are no means of proving such thing”. 40

Again, at the same page:

“It is not necessary to prove the existence of a conspiracy before giving in evidence of the acts of the alleged conspirators, and isolated facts may be proved as steps by which the conspiracy itself may be established”. (Citing *Ford vs Elliott*, 4 Ex. 78).

At page 189, RUSSELL again cites the case of Rex vs Duffield, 5 Cox, 404, in which Earle J. directed the jury:

10 "It does not happen once in a thousand times, when the offence of conspiracy is tried, that anybody comes before the jury to say that he was present at the time when the parties did conspire together... that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties".

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And again at page 191:

"The prosecutor may either prove the conspiracy which renders the act of the conspirators' admissible in evidence or he may prove the acts of the different persons, and thus prove the conspiracy".

20 In an old Canadian case of Rex vs Fellows, 19 U. C. Q. B. 48, it was decided that:

"Upon an indictment for conspiracy, it is clearly unnecessary to prove that all the defendants or any two of them actually met together and concerted to proceeding carried out; it is sufficient if the jury are satisfied from their conduct and from all the circumstances that they were acting in concert".

30 And in the case of Regina vs Connolly, 1 C. C. C. 468, it was decided that:

"In the charge of conspiracy, it is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design; but the jury may group the detached acts of the parties severally and view them as indicating a concerted purpose on the part of all, as proof of the alleged conspiracy".

40 And in a more recent case of Rex vs Simmington, 45 C. C. C. 249, it was decided that:

"The gist of the offence of conspiracy is the agreement between the parties but such agreement may be inferred from the overt acts of each alleged conspirator towards the common purpose, without further proof of an express agreement".

From the reading of the whole judgment and particularly pp. 5554 and 5555 of Vol. 12 it is quite apparent that the trial judge proceeded on

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the erroneous principle that the Plaintiffs had the burden cast upon them of proving their case beyond a reasonable doubt, as in a criminal case. It is contended by the Appellants that this being a civil action, a preponderance of evidence in favor of the Plaintiffs was sufficient to sustain a judgment in their favor; and that the Plaintiffs were in no way bound to call all the witnesses having a knowledge of the matters pertaining to their case, and especially co-conspirators who would naturally testify in favor of the Defendants.

10

The trial judge having decided that conspiracy was not proven, did not pass upon the question of damages.

THE RIGHT OF ACTION AND JURISDICTION OF THE COURT.

The Appellants' right of action is based on the Civil Practice Act of the State of New York, article 76, sections 1222, 1224, 1226 and 1229 in virtue of which the Attorney General of the State of New York may institute in lieu of the City of New York, an action in a foreign country in the name of the People of that State, to recover money or damages or other compensation, where any money held for or in behalf of a governmental or other public interest, by a domestic, municipal or other public corporation, Board of a City, other division of the State, has been without right, obtained, received, converted or disposed of within a period of ten years before the action is commenced.

Under section 902 of article 54 of the same Act, the moveable property of the Defendants may be attached before judgment whenever the latter are guilty of fraud.

The Appellants have specially pleaded the law of the State of New York in paragraphs 34 to 39 of their declaration, vol. 1 pp. 29 to 32, and have proven the said law by the evidence of the witness Charles E. Schneider, a member of the New York Bar (vol. III pp. 1206 et seq.).

In virtue of sec. 27 of our Civil Code, aliens although not resident in Lower Canada, may be sued in its courts, for the fulfillment of obligations contracted by them in foreign countries.

Being duly authorized under the law of the State of New York to institute action in foreign country, the Appellants are properly before our Courts, article 79 of our Code of Civil Procedure giving the right to all foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings to appear in our Courts. The Defendants are likewise properly before our Courts, as aliens, although not residents of this Province, may be sued before our Courts in virtue of

art. 94 ss. 4 which provides that in matters purely personal, the Defendant may always be summoned before the Court of the place where the whole or part of his property is situated, even though he never had a domicile in this province and the cause of action did not arise therein. In the present case the Defendants had assets within the Jurisdiction of our Court, which were seized by the Appellants.

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10 The action was instituted within six months of the death of John M. Phillips wherefore the Defendants were sued collectively as heirs, in accordance with the provisions of Arts. 135 and 135a of the Code of Civil Procedure.

Furthermore, the law of this province applies in matters pertaining to the distinction or nature of the property, contestation as to possession, the jurisdiction of the Courts and procedure, mode of execution and attachment. (Art. 6 C. C.).

20 In connection with the jurisdiction of our Courts, the Court below rightly decided that "qu'il s'agit, en l'espèce d'une jurisdiction exclusivement *ratione personae et que*, partant, aucune "exception déclinatoire" n'ayant été opposée par les défendeurs à l'action, cette Cour est régulièrement saisie du présent litige". (see Judgment vol. 12 at pp. 5551 (30) and 5552 (10)).

The Appellants respectfully submit that if they have succeeded in proving.

30 (1) that John M. Phillips charged excessive and exorbitant prices, greatly in excess of the fair and reasonable price, for the pipe which he supplied in connection with the contracts awarded by the City of New York for the construction of sewers in the Borough of Queens and.

(2) that Phillips, with the assistance of other persons, was able to do so by the connivance, express or implied, of the Borough officials, that they have established a case of unlawful conspiracy, and are entitled to recover from the Heirs of John M. Phillips as damages or compensation
40 to the State of New York, on behalf of the City of New York, moneys thus unlawfully disposed of by the Municipal Corporation and unlawfully received by the said John M. Phillips.

PHILLIPS'S PRICES AND THE FAIR PRICE.

Involved in this case, there are 20 different sizes of pipe, ranging from 24 inches to 96 inches in diameter. Classified according to the type

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of construction, there are, within the range of sizes above mentioned, two types of sewers:

- (1) the monolithic
- (2) the precast pipe.

A *monolithic sewer* is built by digging a trench into which wooden forms are placed to receive the concrete, out of which the sewer is constructed. The forms are built in sections. The concrete is poured into these forms, allowed to harden, the forms then taken away, moved on and the process repeated. The result is a solid concrete sewer cast in the sewer trench itself. 10

Precast pipe is built on the surface of the ground, as close to the line of the proposed sewer as is conveniently possible, by pouring concrete into cylindrical steel moulds. When the concrete has hardened, the moulds are removed, the pipe is allowed to cure and is then lowered into the sewer trench. The pipe is built in four foot sections and the sewer is constructed by joining end to end sections of this pipe. 20

In the specifications of the Borough of Queens, the monolithic type is designated as *Type "A"* and the precast as *Type "B"*.

All this has been proven, but as there is no controversy on these points we will not refer to the evidence.

It is also uncontroverted that between the years 1917 to 1927 all precast pipe that was used in connection with sewer contracts in the Borough of Queens was bought from Phillips. 30

The precast pipe supplied by Phillips was a product of the Lock Joint Pipe Company, of Ampere, New Jersey, whose exclusive representative he was in the Borough of Queens from 1917 to 1927 under three separate arrangements. The first arrangement was made in 1917 and lasted 2 years. Under this arrangement, the pipe was manufactured in the Borough of Queens by the Lock Joint Pipe Company, but was sold by Phillips, at prices determined by himself; the Company billed the buyers and after collecting and retaining their price, they paid the difference to Phillips. 40

In 1919 the second arrangement was made by Phillips with the Lock Joint Pipe Company whereby the Company sold its pipe direct to Phillips, and the latter resold the pipe at a price, determined by himself, and Phillips had to do his own collecting.

Under the last arrangement made by Phillips with the Lock Joint Company in 1921, which lasted until 1928, the Company rented its manu-

facturing equipment, in the Borough of Queens, to Phillips, at a stipulated rental, which varied between 25c. per foot on 24 inch pipe to \$2.10 per foot on 96 inch pipe, on all pipe manufactured and sold by Phillips in the Borough of Queens. So that from 1921 to 1927, Phillips *manufactured and sold* the Lock Joint Pipe Company's precast pipe in the Borough of Queens.

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10 All of the above appears in the testimony of Allan M. Hirsh, President of the Lock Joint Pipe Company since 1918 (Vol. 2 pp. 805 to 808) and is not disputed by the defendants.

The prices which Phillips charged for pipe supplied in connection with the 47 contracts between the years 1922 and 1927 on which the Appellants have based their claim for damages, have been proven by the testimony of the contractors who bought the pipe from Phillips.

20 For the convenience of the Court, we have made a tabulation, which is marked "A" and appended to our factum, which summarizes the figures proven in evidence.

We believe that the discussion of the prices charged by Phillips and their comparison to the prices charged by other pipe manufacturing companies, could be done best by reference to the said tabulation. We will accordingly proceed here to explain each column of the said table "A".

30 The first column gives the number of the exhibit wherein the original contract between the City of New York and the contractor who was awarded the contract for the construction of sewers in the Borough of Queens, is produced.

The second column gives the name of the contractor who performed the contract. This appears in the contract produced as an exhibit numbered under the first column.

40 The third column gives the year when the contract was awarded. This also appears from the contract produced as an exhibit.

The fourth column gives the number of linear feet of pipe of various sizes used in connection with the contract. The evidence as to this item is two fold:

Firstly, the contract itself produced as an exhibit, to which are attached the specifications, the bids, the engineers estimates, etc. mentions the number of feet of pipe of various sizes to be used.

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Secondly, the number of feet of pipe used is also proven by the evidence of the contractors who performed the contract and who actually bought the said pipe from Phillips.

PRICES CHARGED BY PHILLIPS.

Column No. 5 (in black face type) shows the prices paid by the contractor to Phillips per foot for the precast pipe supplied by Phillips in the construction of the sewers under each contract. 10

The evidence of payment to John M. Phillips for the precast pipe used in connection with each contract, has been introduced by the contractors who bought the pipe, in the form of cancelled cheques, photostatic copies of cancelled cheques, check stubs, original ledger sheets or photostatic copies of same, and in several instances, where documentary evidence was not available, by verbal testimony of the contractors.

There are 47 contracts in evidence as tabulated in table "A". The said contracts were carried out by eleven contracting firms. 20

The prices paid to Phillips for precast pipe used in connection with each of the said contracts, are proven by the following witnesses, representing each of the said contracting firms.

1.—*Awixa Corporation.*

On behalf of this Company, Claire D. Schlemmer, President of the Company, testified as to the sizes, quantities and prices of pipe bought from Phillips (Vol. 3, p. 1016 et seq.). 30

2.—*Duit Incorporated.*

Evidence of John J. Creem, President of the Company (Vol. 1, pp. 126 & 317).

3.—*Hammen Construction Company.*

Evidence of Paul W. Paulsen, New York Representative of the Company (Vol. 1, p. 427). 40

4.—*Oxford Engineering Company.*

Evidence of Geo. A. Everett, Vice President of the Company (Vol. 2, p. 867).

5.—*Everett Construction Company.*

Evidence of Geo. A. Everett, (Vol. 2, p. 867).

6.—*Pettracca & Peterson.*

Evidence of both members of this firm. Pettracca, (Vol. 3, p. 1128 et seq.) Peterson, (Vol. 2, p. 958 et seq.).

7.—*The Necaro Company.*

10 Evidence of James L. Carey, Vice President and General Manager of the Company (Vol. 2, p. 659).

8.—*Muccini & Decker.*

Evidence of Albert Decker, member of the firm (Vol. 2, p. 673).

9.—*H. J. Mullen Construction Company.*

Evidence of William H. Hastings, Treasurer of the Company (Vol. 1, p. 412).

20 10.—*Angelo Paino.*

Evidence of himself (Vol. 3, p. 1054 & 1089).

11.—*Kennedy & Smith Incorporated.*

Evidence of Covert F. Smith, President of the Company (Vol. 2, p. 859).

30 As the book-keeping methods of the different contractors varied, the method of proving the prices paid to Phillips on the various sizes of pipe varies. Some of the contractors called as witnesses, kept their books in such a way that the payments made to Phillips are entered for each size of pipe that was used in connection with each contract. Others simply had a record of a lump sum payment made for pipe to Phillips in connection with a given contract, without specifying the price for each size of pipe, where several sizes were used. That is why in certain cases, column No. 5, has the abbreviation "Av." preceding the figures. This means that the total amount paid by the contractor to Phillips for all the different sizes of pipe used, was divided by the total number of feet of pipe of various sizes used, and in that way the average price per foot was arrived at.

For example, let us take No. 1 being contract Exhibit C. 159. By referring to the exhibit itself, Vol. 7, at p. 3282, the specifications call for 3,913 linear feet of 7' 6" (90 inchpipe;)

In his testimony Claire D. Schlemmer, President of the Awixa Corporation, the contractor who performed the contract, states at p. 1031 vol. 3 (at bottom) and p. 1032 (top) that on this particular contract he

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used about 4000 feet of 90 inch pipe, which he bought from Phillips at \$32.50 per foot.

On the other hand, taking the next contract, exhibit C. 161, where the contract calls for 218 ft. of 30 in., 112 ft. of 36 in., 184 ft. of 39 in., and 181 ft. of 96 in. pipe, (Vol. 9 at p. 4415). The only evidence of payment for the above pipe is to the effect that for all of the above pipe the total sum of \$15,000.00 was paid to Phillips (Schlemmer, Vol. 3 at p. 1032.). In this case the total number of feet of all the four sizes of pipe used, viz: 695 feet were divided into the sum of \$15,000.00 giving the average price per foot of \$21.59 received by Phillips on that contract. 10

All the figures in column No. 5 showing prices charged by Phillips are taken from the evidence and reference will be made thereto further in our factum in connection with several contracts where Phillips excessive prices reach an exceedingly high percentage.

THE FAIR PRICE.

20

We now come to column 6 giving the fair price for all the sizes of pipe between 24 inches to 96 inches in diameter. In order to arrive at the fair price of the precast pipe sold by Phillips it was necessary to establish the prices at which other companies sold precast pipe, in order to be able to compare Phillips' prices for the same or a similar product.

It has already been pointed out that no other precast pipe was sold in the Borough of Queens between the years 1917 to 1927 except the Lock Joint Pipe Company's pipe under three different arrangements made with Phillips. From the year 1917 to the year 1921, under the first 2 arrangements it was possible to produce evidence given by the officers of the Lock Joint Pipe Company, showing at what prices their pipe was sold in Queens to Phillips. Since 1921, however, when Phillips began under his last arrangement with the Lock Joint Pipe Company, to manufacture their pipe in Queens it has not been possible to compare Phillips' prices for precast pipe in Queens with any other precast pipe sales in Queens itself, for the reason that every foot of precast pipe used in the construction of sewers in Queens was bought from Phillips. 30 40

There was only one course open to the Appellants, viz: to produce evidence of prices at which precast pipe was sold in the neighboring Borough and nearby States.

This evidence consists of (1) The prices at which the Lock Joint Pipe Company sold its pipe outside the Borough of Queens, in the states of New York, New Jersey, Pennsylvania, Connecticut and Massachusetts,

(Exhibit P. 15, Vol. XI p. 5352) (2) The prices at which the Lock Joint Pipe Company sold its pipe to Phillips in Queens during 1917 and 1918. Exhibit P 16 (Vol. XI, p. 5318) (3) The prices at which Lock Joint Pipe Company sold its pipe to Phillips in Queens in the years 1919 to 1921 (Exhibit P. 17, Vol. XI, p. 5360.) (4) The prices at which other companies, manufacturing precast pipe, which differed from the Lock Joint Pipe Company's pipe and from each other only with regard to the design of the joints, sold or offered to sell their products in New York State and vicinity (within a radius of 50 miles from Queens, during the years 1921 to 1927. Exhibit P. 18 (Vol. XI, p. 5362) and Exhibits C. 167 (a) to C. 167 (o) (not printed by consent of parties).

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Exhibit P. 15, P. 16 and P. 17 referred to in paragraphs 1, 2 and 3, were produced at the trial in the evidence of Herman F. Ahrens, Treasurer of Lock Joint Pipe Company, who had charge of all sewer pipe sales and collections from 1917 to 1928 (Vol. 3, p. 1260 et seq.).

20 Exhibit C. 167 (a) to C. 167 (o) (No. 4 above) were introduced by the witness, Mary E. Ryan, Secretary and Treasurer of Harry S. Hart, Inc., representing the Core Joint Company and the Newark Pipe Company. (see Vol. 2, p. 276 at p. 979). These exhibits consist of list of quotations of precast pipe of the Newark Pipe Company and the Core Joint Company between the years 1925 and 1928.

30 A summary of the said Exhibits C. 167 (a) to C. 167 (o) was introduced in the evidence at the trial as Exhibit P. 18, supra, by the same witness Mary E. Ryan (Mrs. Mooney) (Vol. 3, p. 1292).

Further, the prices at which the Federal Pipe was quoted and sold between the years 1921 to 1927, were proven by the witnesses, Daniel Rogge and Fred. H. Weaver, both connected with the Federal Concrete Company, manufacturers of precast pipe (Vol. 2, pp. 897 et seq. and pp. 926 et seq.).

40 In addition to the above, F. W. Hopkins, a certified accountant prepared from the original invoices, books of account, etc. of the Lock Joint Pipe Company, a statement showing the high, low and average prices charged by the Lock Joint Pipe Company, for pipe between the years 1918 to 1928 outside of the Borough of Queens. This statement was filed as Exhibit C. 234 (Vol. V, p. 2053) in the evidence of the said F. W. Hopkins (Vol. 3, p. 1161 et seq.).

From the above evidence of prices, at which the Lock Joint Pipe Company sold its pipe in Queens to Phillips from 1917 to 1921, and outside of Queens from 1917 to 1927, and at which the Core Joint, the New-

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ark and the Federal Companies sold their pipe in the territory surrounding Queens, during the years 1921 to 1928, the fair price was computed as follows:

First.—As to average sales value of pipe (by sizes, sold or quoted in the years 1917 to 1927 inclusive), where quantities of pipe were mentioned, they were multiplied by the sales value and total quantity, then divided into total sales value for an average. Where sizes and sales value per foot (without quantities) were mentioned, the total number of soles or quotations were divided into the total of sales value for an average. The mean was then calculated for the two averages. 10

Second.—Average sales value of pipe (by sizes) sold or quoted in the same years, computed from all prices in evidence by dividing the total number of sales or quotations into the total of sale quoted prices, gave the second average.

Third.—Average sales value of pipe (by sizes) sold or quoted in the same years, computed from all the prices in evidence by calculating or determining the mean of the highest and lowest price quoted, gave the third average. 20

From the foregoing three methods of averaging the values of pipe sold, a fourth average was determined by means of the addition of the three averages previously obtained, divided by three for a mean. So, the fair prices of pipe were then finally arrived at.

The fair price, as arrived at in the above manner, is applied in the appended Table "A" to the contracts for which Phillips supplied pipe, from 1922 to 1924, and appears in column 6 opposite each size of pipe used in a given contract. 30

On contracts tabulated, the date of which is subsequent to 1924, the fair price, as arrived at above, had to be changed, as from that year. The Lock Joint Pipe made and sold by Phillips in Queens, after 1924 differed in *two respects* from the Lock Joint Pipe Company's pipe sold elsewhere.

Until 1924, the Queens specifications called for a precast pipe of what is technically known as 1: 2: 4 mix, that is, a mixture of concrete containing one part cement, two parts sand and four parts stone. This was the standard mixture which the Lock Joint Pipe Company, as well as the Core Joint, Federal and Newark Pipe Companies always employed. In 1924, however, the Queens specifications were changed so as to require (1) a richer mixture of concrete known as 1: 1: 2 mix, that is, a mixture of concrete containing one part cement, one part sand and two parts gra- 40

vel; and (2) a heavier wire mesh reinforcement in pipe, which was to be laid at a depth greater than 16 feet below the surface of the ground. The heavier wire reinforcement was used by Phillips in all pipe manufactured after 1924, irrespective of the depth at which the pipe was to be laid.

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10 This is proven by the following witnesses: William H. Bertram, engineer; who after Seely's dismissal, took the latter's place as head of sewer department. (Vol. 1, p. 86 et seq.). Hirsh, President of the Lock Joint Pipe Company (Vol. 2, p. 789), and Earl L. Peterson, who since 1924 was superintendent in charge of the manufacture of pipe for Phillips (Vol. 2, p. 943).

20 In order to prove how much the above changes would add to the cost of the pipe, the Appellants called Allan M. Hirsh, the President of the Lock Joint Pipe Company, who testified (Vol. 2 at p. 796) that 14% added to the selling price of precast pipe made of the 1: 2: 4 mixture, would represent a fair selling price for the same size of pipe made of the 1: 1: 2 mixture. He further testified at p. 797, that the same equipment and personnel would be used in making the pipe with the above two changes.

Hirsh further testified, at p. 814, that his Company sold the wire reinforcement for the pipe to Phillips and charged Phillips 5c. per pound, delivered at the place of manufacture.

30 The testimony of Earl L. Peterson, Phillips' superintendent in charge of the manufacture of pipe in Queens, proves the exact cost of the heavier wire reinforcement. From a tabulation produced as Exhibit C. 162 (Vol. XI, p. 5333) in the evidence of the said Peterson, (Vol. 2, p. 951; which shows the increased weight of each size of pipe per foot, and given the cost of the wire reinforcement at 5c. per pound, it was a simple matter to compute the cost of the extra re-inforcement for each size of pipe. The cost of the heavier reinforcement varied from 3½ c. per foot
40 on 24 in. pipe to 60c. per foot on 96 in. pipe.

Therefore, from 1924 to 1927, to the fair selling price calculated in the manner already explained is added 14% for the richer (1-1-2) mixture, plus the exact increase for the heavier reinforcement for each size of pipe.

After making the calculations in the manner aforesaid the fair selling price prior to and after 1924, for each size of pipe, appears as follows:

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	24"	\$ 2.36	\$ 2.72	
	27"	2.62	3.03	
	30"	3.26	3.75	
	33"	3.58	4.10	
	36"	4.24	4.85	
	39"	4.17	4.77	10
	42"	5.18	5.95	
	45"	5.28	6.06	
	48"	6.58	7.54	
	51"	8.01	9.21	
	54"	7.82	8.99	
	57"	10.23	11.71	
	60"	9.74	11.16	
	63"	9.58	10.98	20
	66"	9.46	10.98	
	72"	13.61	15.74	
	78"	12.94	14.83	
	84"	16.37	19.47	
	90"	18.25	21.45	
	96"	22.45	26.19	

In perusing the above tabulation of fair prices for each size of pipe, it will be observed that in several instances, the computed fair price for a larger size of pipe turns out to be lower than the computed fair price for a smaller size of pipe. Mathematical uniformity of profit would, of course, mean that the fair selling price would increase with each corresponding size of pipe. As a practical matter, the evidence shows that certain sales of pipe were made at higher prices than the prices charged on certain sales of the larger size pipe. This is due to the fact that the normal fluctuations, shown in the prices charged by other Companies, are inherent in the pipe business, and the charges would naturally be subject to the exigencies of a competitive market. But, when all the prices charged by other companies are taken together, it will be seen that the percentage of fluctuation is small, and that during the entire period 1917 to 1927 and during any portion of the said period, the prices charged by these other companies are surprisingly uniform, whereas the prices charged by Phillips greatly exceeded the *highest* of the prices charged by other companies, and the fluctuation in the Phillips prices, were not due to the normal exigencies of a competitive market, but to other reasons, with which we shall deal later in our argument.

A much simpler comparison of prices can be made, though not as exact as the method explained above and used in table "A", by comparing the prices charged by Phillips to the prices charged by the Lock Joint Pipe Company, year by year from 1922 to 1927, being the years of the contracts in evidence on which the Appellants base their claim.

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10 It must be remembered that the pipe which Phillips was making and selling in Queens, during 1922, 1923 and part of 1924 was the Lock Joint Pipe Company's pipe, in every detail the same pipe which the Lock Joint Pipe Company was selling elsewhere. After 1924 by adding to the price charged by the Lock Joint Pipe Company, the 14% for the richer mixture and the cost of the heavier wire reinforcement, we can keep up the comparison up to 1927.

We have accordingly appended Table "B" where we have tabulated from the evidence mentioned above, all the sales of the Lock Joint Pipe Company outside of Queens, from the years 1922 to 1927, showing 20 the prices on each size of pipe sold in a given year by the Lock Joint Company and comparing the said prizes with those charged by Phillips in the same years.

Having thus established a basis for the comparison of the prices charged by Phillips with the prices charged by other companies for the same or a similar pipe, let us now take from the contracts tabulated in Table "A" several instances showing how much Phillips was paid for his pipe over and above the fair price.

30 Let us take from Table "A" contract exhibit No. C. 57 in the 4th line. The Awixa Corporation built this sewer in 1926. The contract shows that 5478 feet of 54 in. pipe was used. Schlemmer testified that his company paid Phillips for the pipe in connection with this contract at the rate of \$30.00 per foot. (Vol. 3 at p. 1035).

40 The fair price for the said size of pipe is \$8.99 per foot. The Lock Joint Pipe Company sold the same pipe (with the exception of the richer mixture and a heavier reinforcement as explained above) in the same year to a contractor in Cartaret, New Jersey, for \$5.90 a foot (Exhibit P. 15, Vol. XI at p. 5356) Phillips, therefore, pocketed in this contract the sum of \$115,092.78 over and above a fair profit.

Going down to line No. 16 in our table to contract produced as Exhibit No. C. 96, Muccini & Decker built this sewer in 1927. They used 2266 feet of 36 in. pipe for which they paid Phillips \$51,000.00 at the rate of \$22.50 per foot. (See Exhibit C. 86 Vol. 7 at p. 3372) produced by the witness Albert Decker (Vol. 2, p. 682). The fair price for said pipe was \$4.85 per foot.

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The Lock Joint Pipe Company sold in the same year (1927) their own 36 inch pipe in the State of New York and elsewhere at \$3.50 per foot. (Exhibit P. 15 Vol. XI at p. 5356). Thus on this contract Phillips netted \$40,009.90 above a fair profit.

Coming down to line No. 22, in our tabulation, Exhibit C. 78. The contract called for 3621 feet of 54 in. pipe. The same contractors paid Phillips \$45.00 per foot (Exhibit C. 86 Vol. 7, p. 3369) on pipe on which 10 a fair profit could have been made if \$8.99 per foot was charged, which is the fair price.

The Lock Joint Pipe Company sold the same size pipe in the same year (1925) in Bridgeport, Conn. at \$6.25 per foot. (Exhibit P. 15, Vol. XI, p. 5355). Thus Phillips received in excessive profit the sum of \$130,447.21.

Then let us come down to lines Nos. 24, 25 and 26, contracts Exhibits Nos. C. 55, 56 and C. 58. The work on all three of the above contracts 20 was done by Muccini & Decker in 1926.

All three contracts called for 42 in. pipe totalling 18,008 feet. The fair price for 42 in. precast pipe would have been 5.95 per foot. Muccini and Decker paid for every foot of 42 in. pipe which they used at the rate of \$45.00 per foot (Exhibit C. 86 Vol. 7 at p. 3370). Thus Phillips reaped in excessive profit on Contract Exh. C. 55, the sum of \$142,622.50; on contract Exhibit C. 56, the sum of \$256,949.00 and on contract No. C. 58, the sum of \$304,180.90 besides getting the sum of \$17,534.30 in excessive profit 30 on the last mentioned contract, by selling 677 feet of 33 in. pipe at \$30.00 per foot on which the fair price was \$4.10 per foot. The total paid Phillips above a fair margin of profit on the 3 contracts was the princely sum of \$721,286.70.

In the same year (1926) the Lock Joint Pipe Company was making a fair profit by selling its own 42 in. pipe in New Jersey at \$3.95 per foot in contrast to Phillips' price of \$45.00 per foot (Exhibit P. 15, Vol. XI, p. 5356).

In all the 47 contracts produced by the Appellants between the years 1922 and 1927, Phillips received in excessive profits over and above the fair price, the huge sum of \$3,203,957.61 as appears from the appended tabulation. 40

The Appellants submit that they have established with greater exactness than is possible in most claims for damages, the loss suffered by the City of New York as a result of the exorbitant prices for pipe, which

Phillips sold in the Borough of Queens. The evidence of the Appellants, proving the high prices charged by Phillips and the computation of the fair price from the sales of pipe of other Companies, was not contradicted.

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EVIDENCE OF CONSPIRACY.

10 Having established the enormous profits made by Phillips by selling precast pipe in the Borough of Queens, at prices in many instances ten times higher than the prices charged by other makers and sellers of precast pipe, which in itself constitutes an over act of conspiracy to defraud, a natural question suggest itself; how was Phillips able to charge such exorbitant prices? The answer to this question, will necessitate the examination of the evidence relating to Phillips' activities in the Borough of Queens from 1917 to 1927.

20 The Appellants have not and do not now pretend that there is much evidence proving directly an unlawful agreement between John M. Phillips, Maurice E. Connolly, the President of the Borough of Queens, and Frederick C. Seely, Engineer in charge of sewers, and others, although there is some evidence in proof of such an agreement between Phillips and Seely, to which we will refer later, but the Appellants do pretend that there is evidence, in abundance, proving such acts and conduct on the part of the parties above mentioned, from which it is impossible to draw any other inference than that the said parties acted in concert, and that
30 Phillips mulcted the City of New York of millions of dollars, with the approval, consent and assistance of the Borough President and the Engineer in charge of sewers, and other persons.

We will start the analysis of our evidence by showing how sewer contracts are awarded in the Borough of Queens.

40 According to the Greater New York Charter, produced as Exhibit P 19, (Vol XI p. 5428) all sewer contracts are required to be awarded on the basis of competitive bidding, advertisements for bids having first been published in the "City Record". Sec. 419 of the said Charter provides that all work done for, or materials supplied to the City, involving an expenditure of more than \$1,000.00, shall be by contract founded upon sealed bids, publicly advertised for by the Borough President. Sections 433, 434 of the same charter, provide that before the Borough President advertises for bids, the proposed sewer must be authorized by the Local Board of the district in which it is to be built and by the Board of Estimate and Apportionment of the City of New York, the function of the latter being to ascertain whether the proposed sewer will conform to the general drainage plan laid out for the Borough, and to determine what

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portion, if any, of the cost of the sewer shall be borne by the City at large, and what portion by the property owners benefited by the sewer (Sec. 436) In connection with the latter question, the Borough President was required, through the Engineers to submit to the said Board estimates of the probable cost of the proposed sewer.

After the sewer was authorized as above, the rest was in the hands of the Borough President, who advertised the contract, received bids, etc. 10
The President had sole power to award the contract to the lowest bidder or to reject all bids and readvertise the contract for new bids. (See 419)
This power was absolute without any limitation or control.

Payments for sewer construction were made to contractors by the Comptroller of the City of New York upon certificates signed by Connolly or his subordinates, approving the work done and recommending payment. All of the above is amply proven by the charter and by the evidence of several officials, but as it is not in dispute, we will make no references to the evidence. 20

In the Borough of Queens prior to 1917, sewers having an interior diameter from 24 in. could be built only out of monolithic construction. (Evidence of City Engineer Bertram (Vol 1 p. 89 et seq.).

In August 1916, Di Cola & Martino, sewer contractors, were the low bidders for the constructions of a monolithic sewer on Collins Ave. in Queens (Exhibit C 169, Vol 4 p. 1761).

They had figured their bid too low, which meant that if the contract was awarded to them, they would lose money. Their bonding agent, Thomas F. Purcell, decided to try and have their bid rejected (Vol. 1, p. 345) Purcell attempted to have the bid rejected through a leader of the Democratic Party Assembly District, named Keating. (Vol. 1, p. 348). Three months passed by, but Connolly, the President of Queens, did not reject the bid. About this time Phillips appears. He sees Purcell and asks him "to give him the job of having the job rejected." (Vol. 1, p. 345). Purcell told Phillips to "go ahead and have it rejected" (p. 345). A short time after that Phillips informed Purcell that the bid was rejected. Connolly had rejected Di Cola & Martino's bid on November 29, 1916 (Exhibit C 21, Vol. 4 p. 1762) Phillips then requested Purcell to introduce him to one Joseph L. Sigretto, a sewer builder in East Orange, N. J. which Purcell did. (Vol. 1, p. 348 & 349) Sigretto formerly built sewers in Queens, but had left Queens in 1915. Phillips came with Purcell to see Sigretto and tried to induce the latter to come back to Queens to build sewers. He told Sigretto that the "boss" Connolly would like to see him back again. Sigretto said he would not believe it unless Phillips proves it to him (vol. 1 p. 391) Sigretto then showed Phillips the specifications for the manu- 30
40

10 facture of the Lock Joint Pipe Company's pipe and told Phillips that, if these specifications go into the Queens' specifications, Sigretto will know that Connolly wants him back. Phillips takes the specifications and two days later comes back to Sigretto with the specifications of the Borough of Queens changed to permit the use of precast pipe as an alternative to the monolithic. Sigretto is satisfied, puts in his bids and is awarded the two contracts for Collins and Hull Avenues (Vol. 1, p. 392) For the first time in Queens precast pipe is used in the construction of sewer. (Exhibits C 8 and C 9, vol. 4 pp. 1779 & 1610). A short time before the contract for the Collins & Hull Ave. were awarded to Sigretto, the officials of the Lock Joint Pipe Company had been negotiating with Connolly for the introduction of precast pipe into the Queens specifications. Not only was precast pipe accepted, but the specifications of Queens were so framed that upon reading said specifications and comparing them with the specifications of the Lock Joint Pipe Company, we find that they are identical; practically word for word the same specifications.

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20 The only difference being the elimination in the Queens specifications of the patented feature of the Lock Joint Pipe, relating solely to the make up of the joint. This was so, because sec. 1554 of the Greater New York Charter, forbids the use of any patented article.

(Evidence of Hirsh, Vol. 2, pp. 799 to 802 and Exhibit C 9 Vol. 4, p. 1610 also Exhibit C 125 Vol. XI p. 5294).

30 Immediately following the introduction of the Lock Joint Pipe into Queens as aforesaid, Phillips is introduced to Hirsh, at that time the Treasurer of the Lock Joint Pipe Company.

The introduction is made by Sigretto, who up to that time had an arrangement with the Lock Joint Pipe Company as to the sale of its pipe in Queens.

At this meeting of Phillips and Hirsh, Sigretto requests Hirsh to inform Phillips that the arrangement between Sigretto and the Lock Joint Pipe Co. was terminated. (Hirsh, Vol. 2, p. 803).

40 Sometime after this meeting of Hirsh, Sigretto and Phillips, the latter came to the office of the Lock Joint Pipe Company and asked Hirsh if the Company had made any arrangement for the sale of its pipe in Queens. Upon being told that no arrangement had as yet been made Phillips suggested that he be allowed to sell the Lock Joint Company's pipe in Queens. (Hirsh, vol. 2, p. 805). Arrangements were accordingly made, and from this time until his death, Phillips was the exclusive Vendor of the Lock Joint Pipe Company's precast pipe in the Borough of

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Queens, under three successive arrangements, already explained earlier in our argument.

As early as 1916 then, Phillips, as the above evidence proves, had intimate connections with Connolly, the President of the Borough of Queens, who "co-operated" with Phillips in the introduction of precast pipe into Queens. As a result of this close "co-operation" with the President of the Borough, Phillips was beginning to lay the foundation for the monopoly which he acquired in Queens for the sale of precast pipe, a monopoly which was maintained until Phillips, Connolly & Seely were indicted before a Grand Jury for conspiracy to defraud, a monopoly, which cost the People of the City of New York several million dollars in illegal and exorbitant prices paid to Phillips for precast pipe as we have already shown. 10.

We will now proceed to show by the evidence in the case, how with the assistance of Connolly, the President of the Borough of Queens, and Seely, the Engineer in charge of sewers, Phillips maintained this monopoly of sole vendor of precast pipe in the Borough of Queens, at his own prices, during a period of some ten years. 20

In 1919, a large sewer was to be built on Linden Street in Queens. Part of this sewer was to be built as a tunnel and part as a regular open cut sewer construction.

John F. O'Rourke, then president of the O'Rourke Engineering Construction Company, saw Seely, the Engineer in charge of sewer construction in Queens, with the view of inducing the latter to specify O'Rourke's tunnel blocks for the construction of the tunnel portion of this sewer as an alternative to cast-iron pipe tunnel construction, which had hitherto been used in Queens. (Evidence of J. F. O'Rourke, (Vol. 2, p. 562 at p. 564) 30

After having explained the advantages of tunnel blocks, O'Rourke invited Seely to take a trip with him to Detroit, Mich., where a large concrete tunnel was under construction, that, having seen the construction, Seely would appreciate the advantages of concrete tunnel blocks. Seely was receptive to the proposition and told O'Rourke that he was too busy (Vol. 2, p. 566). 40

Having heard that Phillips was a man of influence in Queens, O'Rourke saw Phillips and told him about his proposition which he had made to Seely, and asked Phillips to help him get the Borough Engineers to go to Detroit and to have the tunnel blocks specified in Queens (Vol. 2 p. 567)

Phillips having agreed, it took no time to have Seely agree to the proposed trip to Detroit. (Vol. 2, p. 566)

Upon their return, at Seely's request O'Rourke prepared certain descriptions to embody in the specifications, and they were incorporated by Seely in the Linden Street contract (p. 572)

10 The form which the specifications for the Linden Street sewer took is very significant. The contract called for two alternative types of construction, designated Type A and Type B respectively. Type A comprised a cast-iron pipe tunnel in combination with monolithic construction in the open cut part of the sewer. Type B called for a concrete block tunnel in combination with precast pipe construction in the open cut part of the sewer. (Vol. 2, p. 577 and Exhibit C 17, Vol 5, p. 2271). Thus, O'Rourke's tunnel blocks were tied to Phillips' precast pipe, although there was no reason why monolithic construction in the open cut part of the sewer should not have been specified in connection with a concrete
20 block tunnel, or similarly why precast pipe in the open cut part should not have been specified in connection with a cast iron pipe tunnel (Vol 2, p. 577.) The result of the specifications was, therefore, that any contractor who wanted to use Phillips' precast pipe would also have to use O'Rourke's tunnel blocks, and vice-versa (p. 577)

Besides the interest that Phillips had in selling the pipe for this contract, he had a further interest in seeing to it that O'Rourke's tunnel blocks were used, since O'Rourke had promised to pay Phillips \$50,000.00 if the tunnel blocks were introduced into the sewer, (pp. 582, 583 and see
30 evidence of William F. Matthews, a friend of Phillips, Vol. 2 at p. 626). When it came to the bidding one Angelo Paino a sewer contractor was to bid on the whole job and O'Rourke had a sub-contract with Paino for the tunnel. (p. 574).

When the bids were opened, the result was different from what Phillips and O'Rourke had planned. A contracting firm called Booth and Flynn, had underbid Paino (p. 577). Had the contract been awarded to a firm whose bid was the Type A construction, both O'Rourke and Phillips would have been out of luck, because the former's tunnel blocks could
40 not have been used, nor the latter's precast pipe (p. 578).

Connolly, the Borough President, came to the rescue and rejected the bids. (Exhibits C 65 and C 66, Vol 5 pp. 2267 & 2268) Phillips told O'Rourke that Connolly had rejected the bids because they were too high. (Vol. 2, p. 578).

The contract was, thereupon re-advertised for bids. This time O'Rourke Engineering Company bid on the whole contract instead of do-

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ing the tunnel work under a sub-contract. They had bid less than Booth & Flynn's former bid and were awarded the contract on January 8, 1920 (Vol. 2, p. 581 and Exhibit C 17, Vol 5, p. 2271)

O'Rourke then assigned the open cut portion of the work to John J. Creem and the latter paid Phillips \$25,000.00: Creem claimed that this sum was paid to Phillips as commission on the contract for pipe, so that Creem could buy his pipe for the job direct from the Lock Joint Pipe Company instead of from Phillips (Creem, Vol. 1, p. 322) 10

Of the \$50,000.00 which O'Rourke promised to Phillips, he paid only \$8,500.00 by 2 cheques made out at Phillips request to one William F. Mathews, a friend of Phillips. He did not pay any more, and in his evidence (at p. 582) he gives the reason for his refusal to make further payment to Phillips: "the investigations broke loose and I saw the views that were taken of things like that ... I refused to pay him any more than what I had already paid him." 20

In this one contract, we have proof enough of overt acts on the part of Phillips co-conspirators, Connolly and Seely. The latter drew the specifications tying Phillip's pipe with O'Rourke's blocks, when there was no reason for this as O'Rourke himself admits, and Connolly rejected the bids when Phillips' plans went astray by the under-bidding of Booth & Flynn.

From 1923 to 1927 the Borough of Queens underwent a period of extensive sewer construction (Exhibit C 1, sheets Nos. 6, 7 and 8.) It was in these years, that the Phillips monopoly was at its height. It was during this period that Phillips made his enormous and fraudulent profits. The plans for the Rockaway and Jamaica sewer system were being then drawn. 30

In all the contracts awarded by Connolly for the construction of sewers in these two huge systems (Rockaway and Jamaica) during the years, 1924, 1925, 1926 and 1927, Phillips' precast pipe between the sizes 24 inches to 96 inches was used in all but one. This one exception was the Hammels Boulevard sewer. 40

On August 12, 1924, the bids for this sewer were opened. Patrick McGovern Inc. a well known contracting firm, put in the lowest bid. This firm had put in alternate bids on monolithic (Type A) and precast pipe (Type B) construction. Their bids on both types of construction were the lowest, but their bid on precast pipe was \$267,000.00 higher than their bid on the monolithic construction. (Exhibits C 34 and C 35, Vol. 8, pp. 3532 and 3533)

In the Spring of 1924, before the contract was advertised, Phillips told Paul Paulsen, a contractor who sought Phillip's permission to enter Queens, to give him an estimate for the building of this sewer, exclusive of the cost of precast pipe, (Vol. 1, p. 443-4) which Paulsen did. Phillips told Paulsen to bid on type B (precast pipe). The latter states at p. 445 Vol. 1, that Phillips told him "on more than one occasion that was necessary to bet the job." Phillips further told Paulsen not to bid Type "A" (monolithic) low, but to bid it higher than the precast (Type B). The evidence shows that the Phillip's groups of contractors always put in the monolithic bid at a higher figure than their precast bid. (Exhibit C 1, sheets nos. 5, 6, 7 & 8 and the various summaries of proposals produced in the case.) On this same occasion. Phillips gave Paulsen a quotation for the 60 in. and 65 in. pipe called for in the contract at \$25.00 per foot for both sizes (Vol. 1, p. 444) For the same job, Phillips gave McGovern a written quotation of \$32.00 a foot for the 60 in. pipe, \$29.00 a foot for the 54 in. pipe, and \$5.00 a foot for the 24 in. pipe. (Exhibit C 73, vol. 8, p. 3534) McDonald, McGovern's Engineer, testified that they used the above Phillips' prices in figuring their precast pipe bid and that they found they could build a monolithic sewer for less money. (Vol 2, p. 697) They accordingly bid on the monolithic construction \$267,000.00 lower than on the precast pipe, and Connolly prudently awarded the contract to the McGovern concern on August 28th, 1924. (Exhibit C 33, Vol. 8 p. 3535)

Evidently, it was better policy on the part of Connolly and Phillips to accept the interference of the powerful McGovern's firm in this one instance rather than to take the risk of rejecting the bid of this prominent firm. That this is so, is made very clear by what followed immediately after this award.

In the very next contract which was advertised for the construction of the 150th Avenue sewer, Phillips' friend Seely made such drastic and unnecessary changes in the plans for monolithic construction, by introducing stringent and useless requirements which would so greatly increase the cost and difficulty of monolithic construction as to make it practically impossible for anyone to undertake monolithic construction in competition with the precast pipe. These requirements of Seely were thereafter included in the plans for monolithic construction of all sanitary sewers, where monolithic construction was in competition with the precast pipe, with the result that a monolithic (Type A) bidder was never again low bidder on any contracts where the two types of construction were in competition. (See Evidence of Bertram, Vol. 1, p. 155 & 158).

These new requirements of Seely appear in the Plans, Profiles and Details for the construction of monolithic sewers of the 150th Avenue sewer and all the sewers that follow (Exhibits C 3, 4, 5, 6 Vols. 8 & 9, pp. 3999 to 4001 and p. 4429) and were explained in the testimony of Wm. H. Ber-

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tram, who succeeded Seely as head of the Designing Department in the Sewer Bureau of Queens, after the latter went to jail with his superior Connolly. These new requirements for monolithic construction called for (a) the insertion of a water-proofing membrane (a layer of three-ply tar fabric) in the center of the wall of the lower half (invert) of the sewer; (b) a condition, that the concrete in the outside half of the wall of the invert of the sewer, should be allowed to harden seven days after pouring and before the water-proofing fabric could be inserted, and that the concrete in the arch (upper half) of the sewer should be allowed to harden for 21 days before the arch forms could be removed. These requirements were limited to monolithic construction, and no water-proofing membrane was required in the precast pipe sewers. 10

The effect of these requirements is shown by the testimony of Charles Harrington, Patrick McGovern's engineer, who was in charge of the construction of the Hammels Boulevard sewer, the last sewer built where these requirements were not present. (Vol. 2, p. 639) Harrington explains that the Hammels Boulevard was built in 50 foot sections (p. 641). The concrete was allowed to harden from 24 to 48 hours, depending on the weather, before the arch forms were removed and moved on to construct the next section (p. 642). Using two sets of forms, McGovern, on the Hammels Boulevard job, built a 50 foot section of sewer in about three days and about 600 feet of sewer in a month (p. 643). 20

In his Evidence, Mr. Bertram, the engineer, who took Seely's place, says that it was Seely who gave instructions to him (Bertram) to make the above changes, soon after the McGovern job (p. 111 & 112, Vol. 1) Bertram says at p. 172 that in all his experience as Engineer, he never saw such requirements for monolithic construction as the water-proofing membrane in Exhibit C 3. He further states at p. 173 that he does not believe such water-proofing membrane is necessary, and that if it was necessary in the monolithic it would be equally necessary in the precast construction. 30

At p. 178, Mr. Bertram testifies that it would be a very costly operation to put it in.

He agrees with the McGovern Engineer, Harrington, that the longest time necessary for the concrete to set up would be four or five days (p. 180). In cross examination, at p. 268, Vol. 1 Bertram further states that the water-proofing membrane is objectionable from the structural point of view, in that it weakened the section by placing the membrane in the middle of the section. 40

These requirements introduced by Seely in the plans for the 150th Ave. sewer, were not the result of experience gained from the construction

of the Hammels Boulevard sewer, for they were dated December 8, 1924, whereas McGovern, who got his Hammels Boulevard Contract August 28, 1924, did not commence work until September 30, 1924, and completed the job only on May 1st, 1926. (Exhibit C 1 sheet No. 6) Furthermore, the completed sewer was found to be perfectly water tight and dry although it was built in a very wet district (pp. 640 & 646, Vol. 2).

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10 There is only one possible explanation, that these new useless requirements were introduced as a result of the fact that McGovern's bid on the Hammels Boulevard sewer had interfered with the plans of Phillips, Seely and Connolly, and warned them that the supremacy of Phillips precast pipe could not be safely assured unless steps were taken to prevent McGovern and other independent contractors from similarly intruding in the future with low and embarrassing bids.

20 If your Lordships will refer to Exhibit C 1, Vol. 3, p. 1442 et seq., which is a tabulation prepared by the Engineering Department of the Bureau of Sewers of Queens and introduced in evidence by the Engineer Bertram, in charge of the said department (Vol. 1, p. 98) and which tells the story of sewer construction in a concise form from 1907 to 1927, you will be impressed by two things, which are outstanding:

30 1.—That before 1917, the year when Phillips entered Queens with the precast pipe, it happened very often that the contractors' low bids on the monolithic construction, (the only one used before 1917) were in most cases less than the engineers' final estimates, and if they were higher, the difference was very slight. When we come to the period during which Phillips, with his contractors, exercised a monopoly over sewer contracts, we see tremendous differences between the engineers' estimates and the contractors' low bids, which were much higher, especially in the several contracts where we have shown that Phillips' excessive prices for his pipe reached a particularly high figure.

40 2.—Another significant fact comes to light, when you compare the contractors' low bids on both types of construction, the monolithic (Type A) and the precast (Type B). In practically every contract between 1917 to 1927 the bids of the Phillips group of contractors are higher on the Type "A" construction than on Type "B". This makes it very clear that this way of bidding was purposeful in order to shield Phillips high prices on the precast pipe. This is substantiated by the evidence of Paulsen (Vol. 1, p. 445) who states that Phillips told him on more than one occasion that it was necessary to bid on precast pipe to get the job, and to bid Type "A" higher than type "B".

Even in the contract awarded to Patrick McGovern, whose Type "A" bid was lower by \$267,000.00 than his Type "B" bid based on Phil-

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lips' prices for the precast pipe, we see that the other two contractors who submitted bids on both types of construction, namely; John D. Walsh, Inc. and Hammen Const. Co. both submitted higher bids on the Type "A" than on the Type "B". See: Exh. C 34, Vol. 8, p. 3532 and Exh. C 35, Vol. 8, p. 3533)

McGovern's bid shows up this whole scheme on the part of Phillips and his contractors, and it was to prevent a recurrence of such an em- 10
barassment to Phillips in the future that Seely "dolled" up the specific-
ations which would make it practically impossible to build a monolithic
sewer again.

If there was any possibility of doubt that this was so, we would on-
ly need to refer to the evidence of Paul Paulsen, one of Phillips' contrac-
tors, connected with the Hammen Construction Company. In January
1925, one month before the 150th Avenue sewer was advertised (Exh. C
178 — Vol. 9, p. 4192) Zorn a friend of Phillips brought Paulsen to 49 20
Jackson Ave. Phillips' hangout, where Paulsen met Phillips and Seely.
During the conversation, Seely pointed out and explained to Paulsen the
new type of water-proofing membrane that had been put in the plans
(Vol. 1, p. 457) and told Paulsen "if you can show me where you can
build a section of that in a shorter time than 21 days, you are a good one."
(Vol. 1, p. 459) Phillips then said to Paulsen "you want to get better ac-
quainted with Seely, he is a fellow that can doll them up" and he indicated
towards the plans. (p. 460). Phillips further told Paulsen to give Seely
\$1,000 (p. 460) In response to this, Seely said: "Don't do like those 30
screen people, they still owe me \$5,000.00". After which Paulsen went with
Seely into Art. Lithy's Drug Store, where Seely told him: "if you feel like
taking care of that \$1,000.00, you can leave it with Mr. Lehy, he is all-
right."

In 'cross examination, the respondents attorneys tried to discredit
the evidence of Paulsen, by the fact that his company went into bankrupt-
cy and that he had bridged some official. We do not doubt that many of
Phillips' friends and contractors were not paragons of virtue and honest- 40
ty, since Phillips picked them out for his nefarious scheme to swindle the
City of New York of several million dollars, but the evidence of these un-
necessary and ridiculous changes in the monolithic constructions imme-
diately after the McGovern job, both documentary and oral, corroborates
Paulsen's story in every way and points so strongly to conspiracy bet-
ween Phillips and Seely, that coupled with the enormously high prices
charged by Phillips, this episode constitutes an overt act of conspiracy
clearly and unequivocally.

Proceeding in chronological order, we come to the Jamaica Disposal Plant bids, which were received on May 7, 1925 (Exhibit C 239, p. 4369)

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This was an elaborate job costing more than a million and a half dollars (Exh. C 161 Vol. 9, p. 4397)

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10 In January 1925, months before the job is advertised, Seely calls at Phillip's hang-out in 49 Jackson Ave. where he exhibits the plans for this job to Paulsen and Phillips. Seely hands the plans to Paulsen who is requested by Phillips to make an estimate on the job. (Vol. 1, p. 461) When later Paulsen reports the figures to Phillips, the latter informs Paulsen that someone else is going to get the job (Vol. 1, p. 473)

20 Someone else does get the job, for on May 13th, 1925, Connolly awards this huge contract to Welsh Brothers. (Exh. C. 161 Vol. 9, p. 4397) William Welsh, President of the Company is a life long friend of Phillips and one of the guardians of Phillips' children. (Welsh, Vol. 2, p. 983)

In spite of the fact that the estimates of his engineers of the cost of this sewer are \$829,345, and although Welsh's low bid is over \$1,650,000.00 which is twice the amount, Connolly does not reject the contract, he awards it to Welsh Brothers (Exhibit C 161, Vol. 9, p. 4397 and Exhibits C 239 and C 240, Vol. 9, pp. 4369 & 4370)

30 On the 6th of July, the same year, without having done any work under the contract, Welsh Bros. assigned the contract to the Awixa Corporation. (Exhibit C 145, Vol. 9, p. 4456) Connolly approved the assignment the same day.

40 The Awixa Corporation was so sure of getting the assignment from Welsh Brothers and having it approved by the Borough President Connolly, that on the 26th of June 1925, ten days before the assignment and its approval by Connolly, it took over a contract which Welsh Bros. had made with the Sanitation Corporation involving the obligation to pay for materials to be used in the disposal plant amounting to more than \$500,000.00 (Exhibit C 201, Vol. 9, p. 4445) and (Evidence of Schlemmer, Vol. 3, p. 1027).

The Awixa Corporation pays to Welsh Brothers for the assignment of this job, the sum of \$75,000.00 and a further sum of \$25,000.00 to Peter B. Campbell, a notary public of Phillip's office as a commission (Vol. 3, p. 1017, Evidence of Schlemmer).

From the evidence above pertaining to this transaction, it is quite apparent that Connolly did not always reject the bids because they were high. It is also clear that Welsh Brothers had no intention of performing

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this contract, but were awarded it so that a nice fat sum could be obtained for its assignment, and that the hidden hand directing all these machinations and defrauding the City of New York of millions of dollars, is the hand of John M. Phillips with Connolly and Seely as his secret partners.

The same story was repeated when in April 1926 four large sewer contracts are awarded by Connolly to the Highway Improvement & Repair Company. Exhibits C 56, 57 & 58, Vol. 10, pp. 4767, 4782 and 4797) 10

The Highway Improvement & Repair Company was a road building concern which had never done any sewer work. (Evidence of Turner, Vol. 2, p. 725). Clifton E. Turner, the President at the time of this Company, is also a friend of Phillips and named in Phillips' Will as guardian for Phillips' children. (Vol. 2, p. 723).

The Engineer's estimates submitted to Connolly amounted to \$1,687,000.00, but Connolly did not reject the Highway Improvement Company's bid of \$2,569,000, which exceeded the engineers' estimates by \$882,000. Phillips, excess profits on these four contracts, as appears in our Table "A" was \$835,000. The difference between the engineers' estimates and the Highway Improvement Company's bid went into Phillips' pockets as illegal profits made by exhorbitant prices paid to Phillips by the contractors buying the precast pipe for this contract. 20

In addition to that, Phillips' friend Turner, President of the Highway Improvement & Repair Company, received the sum of \$60,000.00 by assigning all four contracts. Three of them went to Muccini & Decker (Exhibits C 91, 92 & 93, Vol. 10, pp. 4817, 4823 & 4829) from whom Turner received \$36,000.00 (Vol. 2 p. 744) and one to the Awixa Corporation (Exh. C 90, Vol. 10, p. 4834) from whom Turner received \$24,000.00 (Vol. 2, p. 748) 30

On the 26th of July 1926, Connolly awarded three contracts to the Riverdale Construction Company. (Exh. C 110, C 111, C 112, Vol. X, pp. 4957, 4959 & 4961). The Company assigned the said contracts. Exh. C. 116, C 117 and C 118, Vol. X pp. 4911, 4979 & 4983) The Riverdale Company's low bid exceeded the engineer's estimates by eighty-two per cent. (Exh. C 113, C 114 and C115, Vol. X, pp. 3896, 4904 and 4911) 40

Connolly received the summaries of bids on which he generally endorsed his instructions either to award or to reject the bids. This appears from the summaries produced as Exhibits in connection with each contract. The engineers' estimates appeared on these summaries. Yet notwithstanding the fact that in a number of the largest contracts in Queens during the years of intense construction (1925 to 1928) there was a chal-

lenging discrepancy between the amount of his engineers' estimates and the amounts of the low bids, Connolly awarded contract after contract.

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10 A further point to be noted is that in the majority of the contracts which we have in evidence, had fair prices been paid by the contractors for the precast pipe, their low bids would have corresponded very closely to the engineers' estimates. In other words, the excess of the low bids over the engineers' estimates, approximates very closely the difference between the fair price and the price charged by Phillips for precast pipe.

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20 The defendants in their pleadings and in cross-examining the appellant's witnesses as well as in their argument in the Court below, attempted to explain these discrepancies by the fact that ground conditions in Jamaica area were such that the contractors had to make their bids far above the estimates of the Borough Engineers in order to meet the added cost of construction due to wet ground. In other words, Respondents claimed that ground water and not Phillips' exorbitant prices for pipe, was responsible for the big difference between the engineers' estimates and the contractors' low bids.

30 This contention has absolutely no evidence to support it. Take for example, the Hammels Bouleyard Sewer, awarded to Patrick McGovern, with which we have already dealt above, there was evidence that a great deal of ground water had been encountered. The engineers' estimate for the job was \$749,116. Patrick McGovern's successful bid for monolithic construction was \$805,151.40 (Exhibits C 33, C 34 & C 35 Vol. 8 pp. 3535, 3552 & 3533)

Although his bid was only about 7.5% above the engineers' estimate, McGovern's estimate for the job included a profit. On the other hand, using the prices of pipe quoted to him by Phillips, McGovern's bid for the same sewer, based on precast pipe construction exceeded the engineers' estimate by \$323,035.40 or about 40%.

Phillips' organization and methods of business.

40 We will proceed to disclose evidence relating to Phillips, the man himself, his methods of doing business, his associates and his business organization. We will let Phillips' friends and business associates tell their own story.

William F. Matthews, physician and friend of Phillips, (Vol. 2, p. 617) testifies that from 1916 to 1920, Phillips had no office and kept no books, that he "had everything in his head that he carried on" p. 621.

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That "if anybody had business in the Borough Hall, they had to see him (Phillips). He was a political power, and they had to see him" p. 621.

That Phillips did not make uniform quotations on prices of pipe for the same job to all the contractors p. 625.

Matthews ceased going with Phillips when the Meyer investigation into the affairs of Queens started in 1921, p. 633 and that during the said investigation Matthews went away to Kentucky where he remained two weeks. 10

Matthews who was a physician, received from Phillips \$500.00 a month for supervising the building of Phillips' pipe, p. 620.

We wish to recall that it was to Dr. Matthews that O'Rourke made two initial payments on account of the \$50,000. he had agreed to pay Phillips for the latter's help in introducing the tunnel blocks which were coupled to Phillip's Precast pipe in Queens. 20

Fred R. Curran, a newspaper reporter, (Vol 1, p. 182) testifies that he was employed as secretary to Phillips from May 1925 until the latter's death in 1928.

That Phillips had office space in an office rented by Thomas B. Coldicott, son-in-law of Andrew Zorn, at 49 Jackson Avenue, and that Phillips did not have his name on the office door, p. 184, nor did he have his name in the telephone book, p. 185. Phillips used Curran's bank account, where Phillips money would be put in and Curran would draw cheques on Phillips instructions p. 185. In this way, Curran handled through his bank account about \$200,000.00 (pp. 186, 187) Phillips paid Curran a salary of \$500.00 a month, and besides that Phillips gave Curran about \$17,000.00 so that the latter could buy himself a home, pp. 185, 186. 30

Curran also stated that Phillips kept no books, p. 187. He further testifies that Phillips spent about \$30,000.00 in Connolly's election campaign in Queens, p. 188. 40

Andrew Zorn, a cement agent, was a companion of Phillips for 45 years, (Vol. 3, p. 1147) He received a salary of \$200. and later \$400.00 per month for seeing to it that Phillips got his cement shipments in time and helping Phillips with the payroll on Saturdays, p. 1148. Zorn says he was on Phillips' payroll but was not in his employ.

As to Zorn's duties, Curran, Phillips' secretary testifies (Vol 1,

p. 185) that he could not "clearly define them." "He was with Mr. Phillips at all times. As I understand it, he was a confidant of Mr. Phillips."

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10 We wish to point here to the evidence of Bertram, the engineer who worked under Seely and later replaced him, who states at p. 113 Vol. 1 that before the Meyer investigation in 1921 Phillips was seen in the designing department of sewers almost everyday — but that after 1921 Phillips was never seen in the Borough Hall, but that Zorn was there often after 1921 (p. 114)

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Zorn at p. 1151, Vol. 3, admits that Phillips stopped going to the Borough office in 1921, but that he (Zorn) kept on going almost every day.

In view of the above facts it is not hard to conclude why Zorn was on Phillips' payroll.

20 Another man on Phillips' payroll was one Peter P. Campbell, who according to Curran's account (Vol. 1, p. 184) was office manager for Phillips.

30 So that according to Curran p. 184, the office at 49 Jackson Ave. of which Phillips was not the tenant, and had no name on the door, nor telephone in his name, was occupied by Phillips himself, Curran, his secretary, Zorn, his confidant and Campbell, his office manager. It was there that Phillips' pipe business was conducted, it was there that the contractors used to meet for the purpose of preparing their bids, assigning contracts from one to another, and getting quotations on Phillips' pipe.

In connection with the various assignments of contracts from the original bidders, the papers, almost in every instance, were drawn and executed at 49 Jackson Ave. with Curran's name appearing frequently as witness, and Peter P. Campbell as a Notary Public.

40 In 1927, Peter P. Campbell started a subscription among Phillips' friends and contractors to give Phillips a token of their friendship. Several of the contractors testified as to their contributions. Schlemmer, President of the Awixa Corporation says that his firm contributed \$1,000.00 for a gold dinner set for Phillips. (Vol. 3, p. 1018) Peterson & Petracca, contributed \$500.00. (Vol. 2, p. 967) Clifton E. Turner, President of Highway Improvement Company, donated \$2,000.00 (Vol. 2, p. 723) and other in varying amounts, depending on how they felt toward Phillips, no doubt. In any event the subscription was successful in every way. Campbell bought a solid gold dinner set for which he paid about \$40,000.00 (Evidence of John F. Faber, jeweler, (Vol. 1, p. 331) at p. 333

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and 334. This present was to be given to Phillips. The investigation into the activities of Phillips and Company in Queens had started, which finally culminated in the indictment of that gentleman together with Connolly & Seely. John F. Faber, the jeweler who sold the set, was told by someone on the phone, to deposit it in a safe deposit vault at No. 149 Broadway, New York City, where it was put in the name of Francis Phillips, son of John M. Phillips. (Vol. 1, pp. 335 & 336) John M. Phillips had commenced the job of secreting away his assets.

10

Attachment of moneys seized before judgment.

On the 15th of December, 1927, a petition was filed with the Governor of the State of New York for an investigation into the affairs of the Borough of Queens.

The very next day of the filing of the above petition, Phillips started converting into currency the City of New York bearer bonds. Having thus realized a total sum of \$725,142.50 (Vol. 3, p. 1061) Phillips disposed of approximately half this amount in a way which the evidence does not disclose, and finally remitted the balance to his lifelong friend Thomas M. Cassidy, for the purpose of secreting this money away.

On a trip to Montreal on the 23rd of January 1928, Cassidy deposited the sum of approximately \$330,000.00 in currency. This money was part of the proceeds of the two last batches of bonds which Cassidy had sold at the request of and for John M. Phillips.

All the facts pertaining to the secreting of the moneys seized in the vaults of The Montreal Safe Deposit Company, and that the said moneys were the property of John M. Phillips, although the box was rented in the name of Francis Phillips, are proven, by officials of the Safe Deposit Company, by Thomas M. Cassidy, George Frenz, Andrew Zorn and Peter Campbell, all life long friends of Phillips. The latter three testified of a meeting between John M. Phillips, Cassidy and themselves, where the bonds were sorted and counted and remitted to Cassidy for the purpose of converting them into cash and where the trip to Montreal was planned for the purpose of renting a safety deposit box. At this meeting it was agreed that the box be opened in the son's name until the upheaval, arisen from a general investigation conducted in the affairs of Queen's County had straightened out. (Frenz, Vol. 3, p. 1415) (Campbell, Vol. 3, p. 1397) (Zorn, Vol. 3, pp. 1367, 1370, 1372)

The facts gave rise to the issue by the Appellants of a Writ of Attachment before judgment and to the seizure in the vaults of The Montreal Safe Deposit Company, rented in the name of Francis Phillips, of the

sum of \$312,000.00 in the form of 312 one thousand dollars american bills.

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The Appellants contend that with the evidence mentioned above, they have proven conclusively that John M. Phillips was secreting away his money in Montreal, which gave the right to the Appellants to issue a Writ of Attachment before judgment.

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10 As far as the Respondents, the Heirs of John M. Phillips are concerned, they admit that the attached money was the property of John M. Phillips.

With regard to the claim of the Crown Trust Company, Respondents severing in their defence, that the seized money was the property of Francis Phillips, we wish to say that there is no evidence of this fact. The Respondents severing in their defence, attempted to prove by verbal evidence that the moneys seized were given to Francis Phillips by way of a gift. This Court has finally determined on that point: that verbal evidence of a gift is inadmissible and permission to appeal to the Supreme Court was refused.

Furthermore, the judge in the Court below refused to decide that question in this case, because the issue was to be decided in a separate case. The Respondents severing in their defence, not having appealed against this decision, should not now be allowed to raise their separate issue.

30

SUBMISSIONS OF THE APPELLANTS

From the analysis of the evidence, the Appellants contend that it has been established that Phillips' prices for pipe which he sold to contractors building sewers in the Borough of Queens, were staggering when compared to the fair prices on which a reasonable profit could have been made, and this fact in itself is a clear overt act of conspiracy.

40 The Respondents have not submitted any evidence whatsoever to contradict the Appellants on the question of Phillips' excessive prices. The Respondents could have called engineers, manufacturers or sellers of precast pipe to justify the prices charged by Phillips for his precast pipe, but the Respondents have not called a single witness for that purpose. Phillips' extortionate prices are conceded.

In cross-examining some of the Appellants witnesses, the Respondents sought to show that prices for precast pipe varied from year to

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year, sometimes as high as 50 per cent. We have already dealt with the normal variations in pipe prices, we will only say here that this argument of the Respondents pales into insignificance in the light of the evidence of prices that were charged by Phillips. We may be surprised that from year to year, or in a period of years, prices on pipe varied as high as 50 per cent, which is the highest percentage shown in the normal variations of pipe prices of other companies making or selling precast pipe and in rare instances but one cannot help being stupefied and awe-struck when it has been shown that Phillips' price was 800 per cent higher than the highest normal price in many instances. That such a variation in prices of pipe is not normal, even our opponents will not have the temerity to contend. 10

The Respondents likewise attempted to prove on cross-examination of Appellant's witnesses, that Phillips made a better pipe, and for that reason had to charge a higher price. We will not go into a controversy as to whether it was necessary to change the specifications in 1924 to provide for a richer mix and a heavier reinforcement, as was done in Queens. All the other makers of precast pipe used the standard mix with satisfactory results. But we have established by uncontradicted evidence, the exact increase in cost due to the said richer mixture and heavier reinforcement and the said increase has been added to the prices charged by the Lock Joint Pipe Company for their pipe and to the prices of the other companies, when we have come to the establishment of a fair price. The prices charged by Phillips, however, cannot stand comparison with prices for cement pipe, be it the best pipe in the world. At the prices which were paid to Phillips, the Borough of Queens could have had sewers built of pipe of some precious metal instead of cement. 20 30

The Appellants contend that they have amply proven the damages sustained by the City of New York. In cases involving damages, it is seldom that damages are proven as exactly, or that a basis for assessing damages is established as accurately as we have done. We respectfully submit that your Lordships are in position to determine, from the evidence submitted, the quantum of the damages, with a degree of precision which is seldom possible in damage actions. We realize of course, that even with the most precise proof, the fixing of damages is to a certain degree arbitrary; and even if, due to certain discrepancies, in the calculations of the fair prices, or in the evidence establishing prices charged by Phillips, your Lordships found it necessary to reduce the amount of damages claimed such reduction would not be considerable. 40

On the question of conspiracy, the Appellants submit that the enormous prices charged by Phillips, coupled with the other overt acts on the part of the Borough officials, making it possible for Phillips to charge

such prices, is sufficient to give rise to their action to recover damages under the Civil Practice Act of the State of New York referred to in the beginning of our Factum.

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10 Although we have adduced proof linking Phillips with Connolly, the Borough President, and Seely, engineer in charge of sewers, so as to show that Phillips was enabled to charge his exorbitant prices with the help of the two Borough officials, we submit that it would be enough for the purposes of our action to have proven that this unlawful conspiracy existed only between Phillips and Seely, or only between Phillips and Connolly.

20 We wish to stress the fact that the evidence of the Appellants has not been contradicted in any way by the Respondents. The Respondents only called one witness who did not testify as to the facts of the case, but merely gave character evidence of one of the plaintiff's witnesses. Apart from that all evidence oral and documentary is the evidence of the Appellants. The facts proven in evidence by the Appellants must therefore stand, unless contradicted by other evidence, which has not been done in this case.

The evidence shows that Phillips established a monopoly in Queens for the sale of precast pipe, and that during 10 years every foot of precast pipe that went into the sewers in Queens came from Phillips. The Respondents produced no evidence to contradict this fact.

30 The evidence also shows that in connection with 47 contracts produced by the Appellants, Phillips charged extortionate prices to the contractors who put in their bids, on precast pipe, and that the contractors paid the said excessive prices to Phillips and collected the money from the City of New York to pay Phillips. This also is not contradicted by any evidence of the Respondents.

40 It has been proven by the Appellants that Seely by "dolling up" the specifications had prevented anyone from competing with Phillips in the sale and manufacture of pipe in Queens. This too is uncontradicted, although the Respondents in their cross-examination of the Appellant's witnesses, attempted to exonerate Seely by the fact that he had superior officers from whom he would have got his instructions. Those superior officers were available to the Respondents as witnesses, to come to Seely's rescue and to testify that instructions were given to Seely to make the questionable changes in the specifications. It is an audacious contention for the Respondents to say that the Appellants should have called Seely's superior officers to deny that they gave Seely instructions regarding the changes in the specifications. The Appellants did not need to do that. We have proven that Seely, who was the head of the designing depart-

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ment of the Bureau of Sewers in Queens, gave instructions to make said changes. If this is not true, it was up to the Respondents to call Seely's superior officers, who were all available as witnesses, to contradict the Appellants on that point, or at least they might have called Seely to deny it, but they have done neither and the Appellants evidence is uncontradicted.

The same reasoning is adopted by the Respondents with reference to the Borough president. The Respondents sought to make out that in awarding contracts for sewers, he was subject to the control of superior officers or bodies, and could not have awarded contract after contract, unless with the approval of those who had control over him. 10

In this connection it is only necessary to refer to the evidence of Bertram, the engineer who took Seely's place, when the latter was convicted of conspiracy, and who, while Seely was in office, served under him. At p. 257, Vol. 1, he states: "The Board of Estimate engineers never see the details. They see the plan and profile. By that I mean representing the surface and the elevation and the slope the sewer has. They do not care what kind of a sewer we put in there, whether we put a rubber one in or a brick one in, or anything else. Those things are left to the Borough President." 20

The Appellants are not concerned with Connolly's superior officers. We have established overt acts of conspiracy on the part of Connolly. It is even possible, and even probable that there may have been other officials of the Borough in this conspiracy. But, if the respondents wanted to exonerate Connolly of any complicity in the conspiracy, they had only to call these officials to contradict the evidence of the Appellants. Not having called any witnesses to deny the facts proven by the appellants' witnesses, the Respondents cannot put aside the evidence in the case by mere contrary assertions. 30

Although they have not called any witnesses to contradict the Appellants on any point at issue, the Respondents in their argument in the lower court, yet had the temerity to reproach the Appellants for not having called Phillips' co-conspirators to testify, and the Trial Judge was apparently impressed by this specious argument, as he mentions it in his judgment that the Plaintiffs should have called Connolly and Seely as witnesses. This is placing the cart before the horse. We take civil action against the heirs of Phillips alleging that Phillips conspired with Connolly and Seely and we should, according to the Respondents, have called Phillips' co-conspirators as our witnesses. We alleged a conspiracy between Phillips, Connolly & Seely and we have made proof linking the three of them in a series of overt acts, which show that they were all three pro- 40

secuting a common purpose, and it was up to the Respondents to call Phillips' former friends and co-conspirators to come forward and deny if they could the charges against them. The Respondents have not done so, and the evidence, such as it is, is uncontradicted.

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10 The Respondents took the position and apparently the Trial Judge took their view, that we were prosecuting this as a criminal action, where the action, where the prosecutor must produce all the witnesses who have a knowledge of the matters before the Court and that we had to prove our case beyond a reasonable doubt, and if there was a doubt in the mind of the judge, that John M. Phillips was guilty of conspiracy, that doubt should be resolved in his favor. But, this is a civil action and we submit that a preponderance of evidence in favor of the Appellants, is sufficient to sustain their action. That the burden of proof was upon the Appellants, we admit, but once that burden of proof had been discharged by evidence implicating Phillips with Connolly, Seely or others in a fraudulent conspiracy, then the burden shifted to the Respondents to produce
20 evidence in rebuttal of the facts proven.

The Respondents not having produced any evidence to contradict the proof of the Appellants, the facts brought out in the evidence of the Appellants must be held proven. Even the evidence of the Appellants' worst witnesses, uncontradicted by any other evidence, must stand, unless it is contradictory in itself.

30 A further point which the Appellants would wish to draw to your Lordships' attention, is the fact that the witnesses called by the Appellants in support of their claim, were all former associates and friends of Phillips, most of whom, as the evidence shows, had their finger in the pie. Former employees of Phillips, whom, the evidence shows, he treated very generously; the contractors who literally carried out his bidding and who were so well disposed towards him, that they all contributed \$40,000.00 to buy their benefactor a solid gold dinner set. These witnesses were certainly not unfriendly towards Phillips and perusing the evidence, it is to be noted that with the restrictions attached to examinations in chief, it was no easy task to get anything out of them, especially anything unfavorable to Phillips and which would also reflect on themselves. But, they
40 made very willing witnesses in cross-examination by the Respondents. With such witnesses, whatever the Appellants were able to prove against Phillips and his co-conspirators, may safely be assumed to be the truth.

Lastly, we would point out to your Lordships, the fact that the only witnesses examined at the trial, were John M. Smith Norris Constable, Arthur Carinther, Charles A. Schnieder, Herman F. Ahrens, and Mrs. Mooney. The first three gave evidence on the question of the deposit of the moneys with the Montreal Safety Deposit Company. Charles E.

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Schneider, testified as a member of the Bar of New York, proving the New York laws. The last two witnesses produced lists of prices of the Lock Joint Pipe Company's pipe from 1917 to 1927, and of Harry S. Hart Inc. from 1925 to 1928. All the other witnesses, 45 in number, were heard before a Commissioners in New York, appointed in virtue of a Rogatory Commission, issued by our Court. It is in the evidence of these witnesses, heard in New York, that is to be found the evidence relating to all facts connected with the conspiracy.

10

Contrary to the general rule, therefore, this Court is able to judge and appreciate all questions of facts pertaining to this case just as well as the trial court.

Earlier in our argument, we have cited authorities on the question of what constitutes proof of conspiracy in a criminal action. We wish to add to what has been cited above, the following case, *Paradis vs The King*, 1934 Canada Law Reports, p. 165. In this case Mr. Justice Rinfret of the Supreme Court of Canada, in delivering the judgment of that Court, at p. 168, has admirably summarized the law on that point he states:

“But the appellant sought to discount their evidentiary value on the ground — to quote the learned dissenting judge — that

“The language of the telegrams conveys no hint of any concealed, sinister purpose; one has to read into them what is not there to give them any such import. And that is all the writing connected with the accused that there is of record. No one professes to have been present when the alleged plot was formed between Paradis and Pépin or to have overheard it or even to have seen them together in conference before the fire.”

30

“We think the objection is untenable. *Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from “several isolated doings”. (Kenny — “Outlines of Criminal Law”, p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.”*

40

(N. B. Italics are ours)

We wish to refer also to the case of *Miller vs Regem* 52 B. R., p. 376, wherein Mr. Justice Howard of this Court, clearly expresses the same opinion, when he states at p. 384:

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10 “Anyone who has studied the record will agree that after what is irrelevant has been eliminated, it is very difficult to find and follow the thread of evidence from the inception of the scheme or plot to the full agreement of the plotters to commit the offence. That can be done only by inference from isolated facts, the relation of the conspirators to each other and the parts which they severally played in effecting the purpose for which the conspiracy was formed. Notwithstanding the appellant's express objection to proof by presumptions, that is a perfectly valid and proper form of proof under the criminal law as well as under the civil law.”

20 From the cumulative effect of all the acts of Phillips, Connolly, Seely, the contractors, and Phillips' employees and friends, interpreted in the light of the staggering prices charged by Phillips for his precast pipe, only one inference can possibly be drawn — that there was a secret understanding between Phillips, Connolly and Seely and other henchmen of the above three principals, (two of whom, Connolly and Seely, have been convicted of conspiracy in the Criminal Courts), to assist Phillips in the fraudulent business of extracting from the City of New York millions of dollars in the manner disclosed by the evidence in the case.

30 The Appellants conclude that they are entitled to judgment awarding damages for the sum of \$3,203,957.61 being the total of the excess of Phillips' price for pipe over the fair price. We have not gone into details to explain each contract, but the figures appearing in our Table “A” have all been taken from the evidence.

40 We have, however, referred in our Factum to contract Exhibit No. C 57 in the 4th line of Table “A” in which Phillips' excess over fair price is shown to be \$115,092.78. Then we have referred to contract Exhibit C 96 in the 16th line of Table “A” where the excess of Phillips' price over the fair price is \$40,009.90. Further, we have shown that in contracts Exhibit Nos. C 55, C 56 and C 58 (lines 24, 25 and 26 Table “A”) the total sum of the excess of Phillips' profit over the fair profit is the sum of \$721,286.70. The above 6 contracts alone prove damages to the City of New York amounting to one million dollars.

 Finally, we wish to submit for the consideration of your Lordships the question of costs.

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The only justification for a separate defence by the Crown Trust Company, es qual., representing Francis Phillips, was the fact, that it was claimed the moneys hidden in Montreal belonged to Francis Phillips and not to John M. Phillips. In spite of the fact that the trial judge decided in a separate case, to which he refers in his judgment, that the moneys seized in this case were the property of John M. Phillips and therefore the property of his heirs, yet the learned Judge awarded in our case, costs to the Respondents severing in their defence Their separate defence having failed, there was no justification for awarding to them costs against the Appellants in the Court below. 10

We also wish to point out as regards the Respondents, the Heirs of John M. Phillips, that even if they won, they would never have had the benefit of the moneys hidden in Montreal without the action of the Appellants in having seized before judgment the said moneys, which otherwise would have been taken by Francis Phillips, in whose name the safety deposit box was rented, and further secreted beyond the reach of the heirs of John M. Phillips. 20

We, therefore, submit that the disposition of the costs, by awarding same against the Appellants is unjust and that the judgment of the Court below should also be reversed in this respect.

Wherefore, the Appellants pray that their appeal be maintained and that the Respondents be condemned to pay to the Appellants the sum of \$3,203,957.61 or such other sum as to this Honourable Court may seem meet, with costs in this Court and in the Court below; that the seizure before judgment in the hands of The Montreal Safe Deposit Company, be declared good and effective, and that the bonds now held in trust for the parties by The Royal Trust Company, or the proceeds thereof, be turned over to the Appellants on account of the above mentioned claim in principal, interest and costs. 30

The whole respectfully submitted on behalf of the Appellants.

Montreal, April 1st, 1938. 40

BERTRAND, GOUDRAULT & GARNEAU,
Attorneys for Appellants.

AIME GEOFFRION, K. C.,
Counsel for the Appellants.

**Table "A" showing prices charged by John M. Phillips in comparison with fair price.
FROM 1922 TO 1927 ON FORTY-SEVEN CONTRACTS IN EVIDENCE.**

1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quantities (Feet) Sizes (Inches)	Price paid Prillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
1.—C. 159 Vol. 7 p. 3269	Awixa Corp.	1923	3950 90	\$32.50	\$18.25	\$128,375.00	\$ 72,087.50	\$ 56,287.50
2.—C. 161 Vol. 9 p. 4397	" "	1925	218 30 112 36 184 39 181 96		3.75 4.85 4.77 26.19		817.50 543.20 877.68 4,740.39	
		Total	695	Av. 21.59		15,000.00	\$ 6,978.77	8,021.23
3.—C. 160 Vol. 10 p. 4709	" "	1925	2228 33 3990 36		4.10 4.85		9,134.80 19,351.50	
		Total	6218	Av. 30.00		186,540.00	\$ 28,486.30	158,053.70
4.—C. 57 Vol. 10 p. 4797	" "	1926	5478 54	30.00	8.99	164,340.00	49,247.22	115,092.78

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1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quan- tities (Feet) (Inches)	Price paid Phillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
5.—C. 109 Vol. 10 p. 4974	Awixa Corp.	1926	896 27	Av. 24.58	3.03	167,000.00	2,714.88	137,505.27
			1611 30		3.75		6,041.25	
			4276 36		4.85		20,738.60	
		Total	6783		\$ 29,494.73	474,960.48		
						\$661,255.00	\$186,294.52	
6.—C. 19 Vol. 7 p. 3408 7.—C. 20 Vol. 10 p. 4569	Duit Inc. " "	1924	3758 96	Av. 43.21	35.00	366,000.00	93,707.82	282,433.01
			2300 48		7.54		17,342.00	
			1213 54		8.99		10,904.87	
		Total	8470		\$ 83,566.99	320,255.19		
						\$497,530.00	177,274.81	
8.—C. 36 Vol. 9 p. 4275	Hammen Const. Co.	1925	3472 84	37.00	19.47	\$129,944.00	\$ 67,599.84	62,344.16
9.—C. 137 Vol. 9 p. 4492	Oxford Eng. Co.	1925	4900 39	Av. 14.55	4.77	\$117,000.00	25,459.20	73,214.80
			3080 42		5.95		18,326.00	
		Total	8040				\$ 43,785.20	

1	2	3	4	5	6	7	8	9	
Commission Exhibit No.	Contractor	Year of Award	Pipe Quantities (Feet)	Pipe Sizes (Inches)	Price paid Prillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
10.—C. 105 Vol. 10 p. 4965	Everett Const. Co.	1926	2839	36		4.85		13,769.15	
			2801	43		5.95		16,665.95	
		Total	5640		Av. 35.46		\$190,000.00	30,435.10	159,564.90
11.—C. 128 Vol. 11 p. 5167	Petracca & Peterson	1927	1011	27	8.90	2.72	\$ 9,000.00	\$ 2,749.92	\$ 6,250.08
12.—C. 74 Vol. 10 p. 4616	Necaro Company	1925	318	27		3.03		963.54	
			3373	42		5.95		20,069.35	
			2469	48		7.54		18,616.26	
			1806	54		8.99		16,235.94	
		Total	7966		Av. 21.09		\$168,000.00	\$ 55,885.09	112,114.91
13.—C. 75	" "	1925	1631	36		4.85		7,910.35	
			3353	39		4.77		15,993.81	
		Total	4984		Av. 18.00		\$ 88,365.60	\$ 23,904.16	\$ 64,461.44
							\$256,365.60	\$ 79,789.25	\$176,576.35

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1	2	3	4	5	6	7	8	9
Commission. Exhibit No.	Contractor	Year of Award	Pipe Quan- Sizes tities (Feet) (Inches)	Price paid Prillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
14.—C. 97 Vol. 11 p. 5207	Muccini & Decker	1927	671 24	3.00	2.72	\$ 15,016.00	\$ 7,695.30	\$ 7,320.70
			435 33	9.00	4.10			
			542 48	17.00	7.54			
15.—C. 101 Vol. 11 p. 5286	" "	1927	260 24	3.00	2.72	\$ 19,000.00	9,624.04	9,375.96
			680 42	12.50	5.95			
			646 48	15.00	7.54			
16.—C. 96 Vol. 11 p. 5198	" "	1927	2266 36	22.50	48.5	51,000.00	10,990.10	40,009.90
17.—C. 95 Vol. 11 p. 5225	" "	1927	300 36	11.00	4.85	142,307.00	102,522.21	39,784.79
			3859 96	36.00	26.19			
18.—C. 141 Vol. 11 p. 5114	" "	1926	181 24	3.00	2.72	18,200.00	12,087.49	6,112.51
			264 33	7.00	4.10			
			515 36	8.00	4.85			
			1063 48	11.00	7.54			
19.—C. 142 Vol. 11 p. 5275	" "	1927	250 24	3.00	2.72	18,000.00	9,798.32	8,201.68
			250 30	7.00	3.75			
			250 33	8.00	4.10			
			320 36	9.00	4.85			
			260 39	10.00	4.77			
			527 45	12.00	6.06			
						\$263,523.00	152,717.45	110,805.54

1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quantities (Feet) Sizes (Inches)	Price paid Prillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
20.—C. 77 Vol. 8 p. 3641	Muccini & Decker	1924	781 54	12.00	8.99	\$ 97,000.00	76,757.06	20,242.94
			536 66	13.10	10.98			
			573 84	30.00	10.47			
			2012 96	31.50	26.19			
21.—C. 79 Vol. 10 p. 4599	" "	1925	564 33	7.50	4.10	66,000.00	46,494.58	19,505.42
			2807 72	22.00	15.74			
22.—C. 78 Vol. 10 p. 4553	" "	1925	3621 54	45.00	8.99	163,000.00	32,552.79	130,447.21
23.—C. 100 Vol. 10 p. 4660	" "	1925	583 36	12.50	4.85	12,740.50	4,535.20	8,205.30
			287 42	19.00	5.95			
24.—C. 55 Vol. 10 p. 4767	" "	1926	3650 42	45.00	5.95	164,250.00	21,627.50	142,622.50
25.—C. 56 Vol. 10 p. 4782	" "	1926	6580 42	45.00	5.95	296,100.00	39,151.00	256,949.00
26.—C. 58 Vol. 10 p. 4814	" "	1926	677 33	30.00	4.10	20,310.00	2,775.70	17,534.30
			7778 42	45.00	5.95	350,460.00	46,279.10	304,180.90
27.—C. 81 Vol. 11 p. 5097	" "	1926	2807 42	Av. 19.43	5.95	57,620.00	17,862.81	39,757.19
			154 48		7.54			
28.—C. 80 Vol. 11 p. 5083	" "	1926	488 66	21.48	10.98	10,680.00	5,358.24	5,321.76
29.—C. 138 Vol. 11 p. 5117	" "	1926	1524 84	27.56	19.47	42,000.00	29,672.28	12,327.72

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1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quan- Sizes tities (Feet) (Inches)	Price paid Phillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
30.—C. 99 Vol. 11 p. 5218	Muccini & Decker	1927	270 30 807 36	6.70 13.00	3.75 4.85	12,300.00	4,926.45	7,373.55
31.—C. 98 Vol. 11 p. 5192	“ “	1927	2776 54 1350 84	16.40 26.40	8.99 19.47	81,000.00	51,240.14	29,759.26
						<u>\$1,373,460.50</u>	<u>\$379,233.45</u>	<u>994,227.05</u>
32.—C. 31 Vol. 6 p. 2792	H. J. Mullen Cont. Co.	1922	4406 96 982 90 278 66	30.00 30.00 20.00	22.45 18.25 9.47	\$132,180.00 29,460.00 5,560.00	\$ 98,914.70 17,921.50 2,632.66	\$ 33,265.30 11,538.50 2,927.34
33.—C. 30 Vol. 10 p. 4642	“ “	1925	639 24 3295 27 3531 30	Av. 17.55	2.72 3.03 3.75	131,000.00	24,963.18	106,036.82
						<u>\$298,200.00</u>	<u>\$144,432.04</u>	<u>\$153,767.96</u>
34.—C. 204 Vol. 8 p. 3895	Angelo Paino	1924	260 33 184 36 20 45 2745 54 273 66	8.50 10.00 13.00 22.00 25.00	4.10 4.85 6.06 8.99 10.98	68,032.00	29,754.69	38,277.31

1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quantities (Feet) Sizes (Inches)	Price paid Phillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
35.—C. 205 Vol. 9 p. 4252	Angelo Paino	1925	2056 90 4264 96	Av. 38.00	21.45 26.19	240,464.00	155,775.36	84,688.64
36.—C. 206 Vol. 10 p. 4531	" "	1925	4850 66	46.39	10.98	225,000.00	53,253.00	171,747.00
37.—C. 207 Vol. 11 p. 5103	" "	1926	256 30 676 39 256 45 505 60 1516 78 448 90 1280 96	7.00 14.00 16.00 18.00 26.00 30.00 33.00	3.75 4.77 6.06 11.16 14.83 21.45 26.19	118,386.00	76,986.76	41,399.24
38.—C. 208 Vol. 11 p. 5186	" "	1927	70 38 2971 78 1833 84	Av. 30.77	4.85 14.83 19.47	150,000.00	80,087.94	69,912.06
29.—C. 209 Vol. 11 p. 5234	" "	1927	4057 33 1018 36	Av. 14.77	4.10 4.85	75,000.00	21,571.00	53,429.00
40.—C. 210 Vol. 11 p. 5246	" "	1927	1006 24 918 54 1951 84	Av. 19.35	2.72 8.99 19.47	75,000.00	48,975.11	26,024.89
						<u>\$951,882.00</u>	<u>\$466,403.86</u>	<u>\$485,478.14</u>

In the Court of King's Bench
 No. 3
 The Facium of Appellant Before the Court of King's Bench 1st April 1938 (continued)

1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quan- Sizes tities (Feet) (Inches)	Price paid Phillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
41.—C. 131 Vol. 8 p. 3770	Kennedy & Smith Inc.	1924	1291 84	27.00	19.47	95,000.00	59,968.18	35,031.82
			1044 78	23.00	14.83			
			636 66	20.50	10.98			
			772 54	18.00	8.99			
			695 48	12.25	7.54			
			39 39	10.25	4.77			
42.—C. 132 Vol. 9 p. 4037	" "	1925	1809 24	4.50	2.72	8,140.50	4,920.48	3,220.02
			1857 27	6.50	3.03	12,070.50	5,626.71	6,443.79
			1391 33	9.00	4.10	12,519.00	5,703.10	6,815.90
			1787 39	11.00	4.77	19,657.00	8,523.99	11,133.01
43.—C. 133 Vol. 10 p. 4676	" "	1925	572 33	Av. 15.28	4.10	12,500.00	3,030.64	9,469.36
			252 24		2.72			
44.—C. 140 Vol. 10 p. 4729	" "	1926	254 45	14.00	6.06	44,291.00	23,802.51	20,488.49
			815 51	17.00	9.21			
			1344 63	20.00	10.98			
45.—C. 134 Vol. 10 p. 4841	" "	1926	976 66	23.00	10.98	22,448.00	10,716.48	11,731.52
			1873 60	18.00	11.16	33,714.00	20,902.68	12,811.32
			532 54	13.00	8.99	6,916.00	4,782.63	2,133.32
			261 51	12.00	9.21	3,132.00	2,403.81	728.19
			871 30	7.00	3.75	6,097.00	3,266.25	2,830.75

1	2	3	4	5	6	7	8	9
Commission Exhibit No.	Contractor	Year of Award	Pipe Quantities (Feet) Sizes (Inches)	Price paid Prillips per foot	Fair price per foot	Total paid Phillips	Total Fair Price	Excess Paid Phillips
41.—C. 131 Vol. 8 p. 3770	Kennedy & Smith Inc.	1924	236 27	6.00	3.03	1,416.00	715.08	700.92
			276 39	8.00	4.77	2,208.00	1,316.52	891.48
			728 57	14.00	11.71	10,192.00	8,524.88	2,667.12
			736 66	20.00	10.98	14,720.00	8,081.28	6,638.72
			484 72	23.00	15.74	11,132.00	7,618.16	3,513.84
47.—C. 136 Vol. 11 p. 5172	" "	1927	320 27	Av. 16.31	3.03	85,000.00	35,736.61	49,263.39
			647 36		4.85			
			2321 45		6.06			
			1029 48		7.54			
			893 66		10.98			
						<u>\$401,153.00</u>	<u>\$214,640.04</u>	<u>\$186,512.96</u>

In the
 Court of
 King's Bench
 No. 3
 The Factum
 of Appellant
 Before the
 Court of
 King's Bench
 1st April 1938
 (continued)

TABLE "B" Comparaison, year by year (1922 to 1927) of Phillips' prices for Lock Joint Pipe sold in Queens, with the prices of the Lock Joint Pipe, outside of Queens.

		24"	27"	30"	33"	36"	39"	42"	45"									
LOCK JOINT PIPE CO.	1922	1.60	1.65	2.50	2.00	2.15	2.85	3.00	3.00	3.60	3.90	4.25	4.15	4.50				
J. M. PHILLIPS.								3.30										
LOCK JOINT PIPE CO.	1923	2.25	1.65	2.05		2.95	3.70	2.90	4.40		3.35	4.05		5.95				
J. M. PHILLIPS.																		
LOCK JOINT PIPE CO.	1924	2.15	2.10			3.00						5.30						
J. M. PHILLIPS.							8.50	10.00		10.25				13.00				
LOCK JOINT PIPE CO.	1925	1.90	1.80	2.45	2.25	2.55	2.50	3.40	3.00	3.35	3.50	3.25	4.50	3.80				
J. M. PHILLIPS.		17.55	4.50	21.09	17.55	21.59	17.55	30.00	7.50	21.59	30.00	21.59	14.55	14.55	4.55	21.09		
		15.28		6.50				9.00	15.28	18.00	12.50	18.00	11.00	19.00				
LOCK JOINT PIPE CO.	1926	1.80				2.20				3.15			3.95					
J. M. PHILLIPS.		3.00		24.58	6.00	24.58	7.00	7.00	30.00	24.58	35.46	14.00	8.00	35.46	45.00	45.00	16.00	14.00
LOCK JOINT PIPE CO.	1927	1.55		1.90	2.25	2.80	2.10	2.70				3.65	4.60					
J. M. PHILLIPS.		3.00	3.00	8.90	16.31	7.00	6.70	9.00	8.00	22.50	11.00	30.77	16.31	10.00	12.50		12.00	16.31
		3.00	19.35					14.77		9.00	13.00	14.77						

In the Court of King's Bench No. 3 The Factum of Appellant Before the Court of King's Bench 1st April 1938 (continued)

		48"	51"	54"	57"	60"	63"	66"	72"	78"	84"	90"	96"				
LOCK JOINT PIPE CO.	1922	5.35			5.60												
J. M. PHILLIPS.								20.00				30.00	30.00				
LOCK JOINT PIPE CO.	1923	5.20	5.70			7.55	8.80	9.00	12.10								
J. M. PHILLIPS.												32.50					
LOCK JOINT PIPE CO.	1924							9.25		13.75	15.25	18.25					
J. M. PHILLIPS.		12.25			12.00	22.00			13.10	25.00	23.00	30.00	27.00	35.00	31.50		
LOCK JOINT PIPE CO.	1925	5.00			6.25		8.75	13.65	8.65	12.40	13.75	13.50					
J. M. PHILLIPS.		43.21	21.09		43.21	21.09	43.21		46.39	22.00	37.00	38.00	21.59	38.00			
LOCK JOINT PIPE CO.	1926	4.90			5.90				8.80	9.75	12.00						
J. M. PHILLIPS.		11.00	19.43	17.00	12.00	30.00	13.00	14.00	18.00	18.00	20.00	21.48	23.00	23.00	26.00	27.56	30.00	33.00
LOCK JOINT PIPE CO.	1927	5.80	4.80				7.74			10.78	13.25	14.21					
J. M. PHILLIPS.		17.00	15.00		19.35				16.31		30.77	26.40	30.77	36.00			
		16.40	16.31									19.35					

In the
Court of
King's Bench

No. 3
The Factum
of Appellant
Before the
Court of
King's Bench
1st April 1938
(continued)

Evidence of prices paid to Phillips on the 47 contracts listed in Table "A" appended to Appellants' Factum.

(N.B. All references are to the exact page of the evidence where the
proof of payment appears.)

-
- No. 1.— *Contract Exh. No. C-159—(25th Street.)*
Testimony of Claire D. Schlemmer, President of Awixa Corp.
Vol. 3, pp. 1031 & 1032.
- No. 2.— *Contract Exh. No. C-161—(Horatmann Ave.)*
Testimony of Schlemmer,
Vol. 3, p. 1032.
-
- No. 3.— *Contract Exh. No. C-160—(158th Street No. 1.)*
Testimony of Schlemmer
Vol. 3, p. 1034.
-
- No. 4.— *Contract Exh. No. C-57—(Foch Blvd.)*
Testimony of Schlemmer
Vol. 3, p. 1035.
-
- No. 5.—*Contract Exh. No. C-109 —(Jamaica Ave. Cross Island Blvd
to Hollis Ct. Blvd.)*
Testimony of Schlemmer
Vol. 3, p. 1036.
-
- No. 6.— *Contract Exh. No. C-19—(Fisk Ave.)*
Testimony of John J. Creem, President of Duit Inc.
Vol. 1, pp. 326 and 327,
and Exh. No. C-26 (Vol. 8, p. 3759) being cancelled cheques
produced in the testimony of the said John J. Creem, Vol. 1
at p. 361.
-
- No. 7.— *Contract Exh. No. C-20—(Farmers Blvd. No. 3.)*
Testimony of John J. Creem,
Vol. 1, pp. 328 and 329
also Exh. No. C-27 (Vol. 10, p. 4745) being cancelled cheques,
produced by the said John J. Creem (Vol. 1, p. 362).

- No. 8.— *Contract Exh. No. C-36—(150th Ave., No. 2)*
Testimony of Paul W. Paulsen, New York Representative of
Hammen Construction Co.
Vol. 1, p. 473.
also Exh. No. C-42 (Vol. 9, p. 4428) being receipted invoice and
Exh. No. C-44 (Vol. 10, p. 4514) being cancelled cheque, re-
presenting part payment on this contract, produced by Paul-
sen (Vol. 1, p. 484)
Paulsen says at p. 486 of Vol. 1 that the full amount was paid
Phillips on this contract although he has no receipt or cheque
for the balance.
- No. 9.— *Contract Exh. No. C-137—(150th Street)*
Testimony of George A. Everett, Vice-President of Oxford
Engineering Co.
Vol. 2, p. 875.
Also produced Exh. C-151 (Vol. 11, p. 5029) cancelled cheques
for part payment.
- No. 10.— *Contract Exh. No. C-105—(Brinkerhoff Ave.)*
Testimony of Geo. A. Everett of the Everett Construction Co.
Vol. 2, p. 875 (bottom) and p. 876 (top)
also Exh. C-152 (Vol. 11, p. 5078) being 3 cancelled cheques
totalling \$170,000.00 given in part payment for pipe.
- No. 11.— *Contract Exh. No. C-128—(130th Street.)*
Testimony of Earl L. Peterson of the firm of Petracca and
Peterson.
Vol. 2, p. 965.
- No. 12.— *Contract Exh. No. C-74—(Amstel Ave.)*
Testimony of James L. Carey, Vice-Pres. and Gen. Manager
of the Necaro Company,
Vol. 2, p. 660.
- No. 13.— *Contract Exh. No. C-74—(150th Street.)*
Testimony of James L. Carey,
Vol. 2, p. 661.

In the
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No. 3
The Factum
of Appellant
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1st April 1938
(continued)

In the
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No. 3
The Factum
of Appellant
Before the
Court of
King's Bench
1st April 1938
(continued)

No. 14.— *Contract Exh. No. C-97—(38th Street)*

Testimony of Albert Decker of the firm of Muccini and Decker.

Vol. 2, p. 682 Decker produces original ledger sheets on which are entered all payments for pipe to Phillips, or to other persons at Phillips' request, in connection with the 18 contracts awarded to Muccini and Decker. These ledger sheets are produced as Exh. No. C-86 (Vol. 7, pp. 3368 to 3373). 10

Payment of \$15,016.00 for pipe on Contract Exh. No. C-97 (38 Street) appears on p. 3372 (sheet No. 4) of this exhibit. (the 10th figure from the top on the right hand side).

Also testimony of Decker (Vol. 2, p. 693.)

No. 15.— *Contract Exh. No. C-101—(21st. Street)*

See Exhibit C-86 Vol. 7 at p. 3372
ninth figure down on the right hand side). 20

Also testimony of Decker, Vol. 2 at p. 693.

No. 16.— *Contract Exh. No. C-96—(Beach 32nd Street)*

See Exh. C-86 (Vol. 7 at p. 3372 (the seventh figure from the top on the right hand side)

Also testimony of Decker, Vol. 2 at p. 693.

No. 17.— *Contract Exh. C-95—(Decker Street)* 30

See Exhibit C-86 (Vol. 7 at p. 3372 the 12th figure from the top on the right hand side)

Also testimony of Decker Vol. 2, p. 693.

No. 18.— *Contract Exh. No. C-141—(88th Street) (Sutter Ave.)*

See Exhibit C-86 (Vol. 7 at p. 3372, the second figure from the top on the right hand side)

Also testimony of Decker, Vol. 2, p. 693. 40

No. 19.— *Contract Exh. No. C-142—(45th Ave.)*

See Exhibit C-86 (Vol. 7 at p. 3372, the 13th figure from the top on the right hand side)

Also testimony of Decker, Vol. 2, p. 693.

- No. 20.— *Contract Exh. No. C-77—(Grand Ave.)*
See Exhibit C-86 (Vol. 7 at p. 3369, the first figure at the top right hand side)
Also testimony of Decker, Vol. 2, p. 693.
-
- 10 No. 21.— *Contract Exh. No. C-79—(Queen s Blvd.)*
See Exhibit C-86 (Vol. 7 at p. 3369, the second figure from the top at the right hand side)
Also testimony of Decker, Vol. 2, p. 691 (bottom) and p. 692 (top).
-
- No. 22.— *Contract Exh. No. C-78—(Farmer's Blvd. No. 4)*
See Exhibit C-86 (Vol. 7 at p. 3369, the 3rd figure from top on the right side)
Also Decker's testimony Vol. 2, p. 692.
-
- 20 No. 23.— *Contract Exh. No. C-100—(Folk Ave.)*
See Exhibit C-86 (Vol. 7 at p. 3369, the 5th set of figures from the top at the right hand side.
Also testimony of Decker, Vol. 2, p. 692.
-
- No. 24.— *Contract Exh. No. C-55—(Hampstead Ave.)*
See Exhibit C-86 (Vol. 7 at p. 3370, the 3rd figure from the top at the right hand side)
Also testimony of Decker, Vol. 2, p. 692.
-
- 30 No. 25.— *Contract Exh. No. C-56—(Springfield Blvd.)*
See Exhibit C-86 (Vol. 7 at p. 3370, the second figure from the top on the right hand side)
Also testimony of Decker, Vol. 2, p. 692.
-
- No. 26.— *Contract Exh. No. C-58—(Jamaica Ave.)*
See Exhibit C-86 (Vol. 7 at p. 3370, the 4th set of figures from the top on the right hand side)
Also testimony of Decker, Vol. 2, p. 692.
-
- 40 No. 27.— *Contract Exh. No. C-81—(Brinkerhoff Ave. No. 2)*
See Exhibit C-86 (Vol. 7 at p. 3370, the second last figure at the bottom on the right hand side)
Also testimony of Decker, Vol. 2, p. 692.
-

In the
Court of
King's Bench

No. 3
The Factum
of Appellant
Before the
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King's Bench
1st April 1938
(continued)

In the
Court of
King's Bench
—
No. 3
The Factum
of Appellant
Before the
Court of
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1st April 1938
(continued)

- No. 28.— *Contract Exh. No. C-80—(108th Street)*
See Exhibit C-86 (Vol. 7 at p. 3372, the 3rd figure from the top
on the right hand side)
Also testimony of Decker, Vol. 2, p. 693.
-
- No. 29.— *Contract Exh. No. C-138—(Monroe Street)*
See Exhibit C-86 (Vol. 7 at p. 3372, the 4th figure from the top 10
on the right hand side)
Also testimony of Decker, Vol. 2, p. 693.
-
- No. 30.— *Contract Exh. No. C-99—(Ditmars Ave.)*
See Exhibit C-86 (Vol. 7 at p. 3372, the 8th figure from the top
on the right hand side)
Also testimony of Decker, Vol. 2, p. 693.
-
- No. 31.— *Contract Exh. No. C-98—(Rockaway Blvd.)* 20
See Exhibit C-86 (Vol. 7 at p. 3372, the 6th figure from the top
on the right hand side)
Also testimony of Decker, Vol. 2, p. 693.
-
- No. 32.— *Contract Exh. No. C-31—(Norwood Place)*
See testimony of William H. Hastings, treasurer of H. G.
Mullen Construction Company. Vol. 1 at pp. 421 and 423.
Also Exhibit C-32 (Vol. 6, p. 2905)
-
- No. 33.— *Contract Exh. No. C-30—(158th Street No. 2)* 30
Testimony of William H. Hastings.
Vol. 1 at pp. 415 and 416
Also Exhibit C-32 (sheet No. 2) Vol. 6, p. 2907.
-
- No. 34.— *Contract Exh. No. C-204—(Broadway)*
Testimony of Angelo Paino, (Vol. 3, p. 1120 (at the bottom of
the page) and p. 1123 where Paino identifies photostatic co-
pies of 34 cheques produced as Exhibit C-228 (Vol. 7, p. 3374 40
et seq.) proving payment to Phillips by Paino of \$834,129.40
on account for all the contracts for pipe.
See also Paino's testimony in Vol. 3 at p. 1112 where Exh. C-
223 is produced being contract between Phillips and Paino
for pipe in connection with the Broadway job. (Vol. 8,
p. 3766).
-

- No. 35.— *Contract Exh. No. C-205—(150th Ave., No. 1)*
Testimony of Paino, Vol.3, pp. 1114 and 1115
Also Exhibit C-224 (Vol. 9, p. 4247).
-
- No. 36.— *Contract Exh. No. C-206—(Farmers Blvd., No. 1)*
Testimony of Paino, Vol. 3, pp. 1116 and 1117
also exhibit C-225 (Vol. 10, p. 4527).
-
- 10 No. 37.— *Contract Exh. No. C-207—(Hayes Ave.)*
Testimony of Paino, Vol. 3, pp. 1117 and 1118.
Also Exhibit C-226 (Vol. 11, p. 5048)
“ “ C-226a “ “ p. 5050).
-
- No. 38.— *Contract Exh. No. C-208—(124th Street)*
Testimony of Paino Vol. 3, p. 1118 (bottom) and p. 1119 (top)
Also Exhibit C-227 (Vol. 11 p. 5153).
-
- 20 No. 39.— *Contract Exh. No. C-209—(Sutphin Blvd.)*
Deposition of Paino, Vol. 3, p. 1057 and at p. 1123 at the bot-
tom and 1124 at the top. Except for the testimony of Paino
that the pipe in this contract was paid for, there is no evi-
dence in the record as to the exact amount.
-
- No. 40.— *Contract Exh. No. C-210—(Tuckerton Street)*
Deposition of Paino, Vol. 3, pp. 1123 and 1124. Except for the
testimony of Paino that the pipe in this contract was paid
for, there is no proof of the exact amount.
-
- 30 No. 41.— *Contract Exh. No. C-131—(Saul Street)*
Testimony of Covert F. Smith, President of Kennedy & Smith
Incorporated Vol. 2, pp. 859 & 860 and 864.
At p. 861, Smith Produces a statement, which he verifies con-
taining the quantities, the sizes and prices of pipe bought from
Phillips in connection with the seven contracts which are list-
ed in Table “A” of Appellants’ factum. The said statement is
produced as Exhibit C-146 and was replaced by Exhibit C-
153; it is to be found in Vol. 11 at p. 5330.
-
- 40 No. 42.— *Contract Exh. No. C-132—(Laburnum Ave.)*
See Exhibit C-153 (Vol. 11, p. 5330)
and testimony of Smith, (Vol. 2, pp. 859, 860, 861 and 864).
-

In the
Court of
King’s Bench
—
No. 3
The Factum
of Appellant
Before the
Court of
King’s Bench
1st April 1938
(continued)

In the
Court of
King's Bench
—
No. 3
The Factum
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Before the
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1st April 1938
(continued)

- No. 43.— *Contract Exh. No. C-133—(Woodside Ave.)*
See Exhibit C-153 (Vol. 11 at p. 5331)
and deposition of Smith Vol. 22 pp. 859, 860, 861 and 864).
-
- No. 44.— *Contract Exh. No. C-140—(North Conduit Ave.)*
See Exhibit C-153 (Vol. 11 at p. 5331)
Also deposition of Smith, (Vol. 2, pp. 859, 860, 861 and 864). 10
-
- No. 45.— *Contract Exh. No. C-134—(Hazen Street)*
See Exhibit C-153 (Vol. 11 at p. 5331)
Also deposition of Smith, (Vol. 2, pp. 859, 860, 861 and 864).
-
- No. 46.— *Contract Exh. No. C-135—(Polk Ave.)*
See Exhibit C-153 (Vol. 11, pp. 5331 and 5332)
Also deposition of Smith, (Vol. 2, pp. 859, 860, 861 and 864). 20
-
- No. 47.— *Contract Exh. No. C-136—(Grove St. or 40th Ave.)*
See Exhibit C-153 (Vol. 11, p. 5332)
Also deposition of Smith, (Vol. 2, pp. 859, 860, 861 and 864).
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I N D E X
TO THE FACTUM OF THE RESPONDENTS
THE CROWN TRUST COMPANY et al.

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No. 4

**The Factum of Respondents The Crown Trust Company et al.,
es-qual., for the Heirs of the late Francis Phillips, Before the
Court of King's Bench.**

In the
Court of
King's Bench
—
No. 4
The Factum of
Respondents
The Crown
Trust
Company
et al., es-qual.,
for the Heirs
of the late
Francis
Phillips,
Before the
Court of
King's Bench.
15 March 1938.

10 This Factum is complementary to the Factum on behalf of the heirs
of late John M. Phillips, submitted by Messrs. Magee, Nicholson & O'Don-
nell. The Defendants en reprise d'instance avail themselves of the argu-
ment and statement of fact advanced by Attorneys for the Heirs of the
late John M. Phillips in their factum.

The People of the State of New York, exercising the rights of the
City of New York, have brought an action against the Heirs of the late
John M. Phillips, for \$3,405,449.02. The People contend that the late John
M. Phillips conspired with Maurice E. Connolly, Frederick C. Seeley and
20 divers other persons to defraud the City of the amount claimed.

On the 23rd day of November, 1934, the Honourable the late Mr.
Justice Wilfrid Mercier dismissed the People's action with costs. This is
an appeal by the People from that Judgment.

1. THE FACTS

(In epitome)

30 The events giving rise to the Plaintiff's claim, took place in the Bo-
rough of Queens, City of New York, between 1917 and 1928. New York
City is divided into five Boroughs. Queens is of recent establishment. Its
population increased in a few years from Two hundred thousand to One
million and eighty thousand (Vol. I, p. 251). To meet the needs of this
rapid growth, many sewers were constructed. "We built more sewers in
one year than were built in all time previous" said one of the City engi-
neers, (Vol. I, p. 252). Elsewhere he said "this year we built more than
we ever did before, But we did build a high as seventeen miles in one
year during this period". (Vol. I, p. 252). Between the 23rd of Septem-
ber, 1917 and the 23rd November, 1927, three hundred and forty-seven
40 contracts for the construction of sewers were signed and executed (Vol.
I, p. 276). The aggregate of the low bids of the contractors to whom the
work was awarded amounted to Forty-one million, eight hundred and six-
ty-nine thousand, seven hundred and sixty-nine dollars and seventy four
cents (\$41,869,769.74), (Vol. I, p. 279). The sewers were built principally
in Jamaica, a part of the Borough of Queens, which comprised twenty-
four thousand square acres, and in Rockaway, another part of the same
Borough. The land was low and wet. Much of the construction work was

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carried on amid utmost difficulty and well below sea level. (Vol. I, p. 271).

John M. Phillips was a salesman of precast concrete sewer pipe. Later he became a manufacturer of this pipe. Before 1917 sewers had been constructed in Queens in masonry or in solid concrete. This type of construction is known throughout the case as "monolithic" or type "A".

About 1917 the Borough revised its sewers specification; Thereafter sewers might be built of reinforced concrete pipe called "precast" or of masonry or solid concrete called "monolithic". In the specifications "monolithic" is called "Type A" and "precast" "Type B". For some time previously the precast pipe had elsewhere been a competitor of masonry and solid concrete in sewer construction, but it was not until about 1917 that its use was approved by the Borough of Queens. It is contended that Phillips conspired with Connolly, who was the President of the Borough of Queens, and Seeley, who was an assistant engineer in the employ of the Borough, so to alter the specifications that all sewers would be constructed of the pipe manufactured by the Lock Joint Pipe Company the sale of which was promoted by Phillips. 10 20

In the summer of 1928, one of the periodical investigations for which New York is famous, was started. It was a political vendetta. Connolly and Seeley were tried and convicted. Phillips was not tried. He died on July 3rd, 1928. He left surviving him, his widow, a son, Francis, and a daughter, Helen, Francis was a minor, emancipated by marriage. The Crown Trust Company of Montreal was appointed Curator to his property on the 18th of April, 1928. He was killed in an aeroplane crash on the 26th of June, 1929. He left a widow, née Elizabeth Ellen (known as Ellen Carroll) Baines, also a minor, and a child Helen Frances Phillips. On the 9th of October, 1929, the Crown Trust Company was appointed Curator to the property of the minor Elizabeth Ellen Phillips, emancipated by marriage, and also to her child Helen Frances, issue of the marriage of Elizabeth Ellen Baines and the late Francis Phillips. 30

Within a few days of John Phillips' death this action was brought. The Plaintiff contends that as a result of the conspiracy between Phillips, Connolly and Seeley, the City of New York paid for work done and material and equipment supplied in the construction of sewers in the Borough of Queens, large sums of money in excess of the fair, reasonable and proper cost thereof. 40

The Plaintiff seized at the time of taking the action an amount of Three hundred and twelve thousand dollars cash in a safety deposit in the Montreal Safe Deposit Company, rented by and in the name of Fran-

cis Phillips, son of the late John M. Phillips, and alleged that the money was the property of John M. Phillips.

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The money had been deposited in the box on January 23rd, 1928. When the box was opened the funds were, by consent of Attorneys for the Plaintiff and Attorneys for the Estate John M. Phillips, deposited in the Royal Trust Company, where they still are.

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The heirs of John M. Phillips appeared in the action through Messrs. Cook and Magee, Subsequently Francis Phillips acting through his Curator, the Crown Trust Company, and represented by the undersigned, severed in his defence, alleging that the money found in the deposit box was his property and did not belong to the Estate of his father. Neither Francis Phillips nor his Curator authorized the deposit with The Royal Trust Company. The Crown Trust Company, et al., is therefore free to question the legality of the seizure in the hands of the Montreal Safe Deposit Company.

20

On November 13th 1929 the Crown Trust Company appeared as Defendant en reprise d'instance in its character of curator to the property of both Elizabeth Ellen Phillips and of her daughter Helen Frances Phillips. On the 5th of October, 1932, Elizabeth Ellen Phillips having become of age and having married Clarence L. Paulsen, a merchant of Spokane, Washington, was authorized by her husband to continue the defence on her own behalf.

30

The Defendants, en reprise d'instance, severing in their defence are, therefore, the Crown Trust Company representing the minor Helen Frances Paulsen, and Elizabeth Ellen Phillips Paulsen authorized by her husband, Clarence L. Paulsen, hereinafter called Respondents.

40

There is no issue in this case between the heir of John M. Phillips and Respondents. If Appellants are successful in the appeal, there can be no possible issue between the heirs of John M. Phillips and the Respondents; if Appellants lose, the Issues between the heirs of John M. Phillips and Respondents may be determined in the case of the Bank of Rockville Centre Trust Company against Chase National Bank of the City of New York es qual et al, S. C. No. 110169.

2. THE PLEADINGS

The Writ was issued in this case on the 9th of July 1928. Messrs. Cook & Magee appeared for the Defendants, the Heirs of the late John M. Phillips, on the 17th of July, 1928. In their declaration dated January 23rd, 1929, and which contains 33 pages of legal cap (Case Volume I, p.

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2)). Plaintiffs alleged the death of John M. Phillips, the indebtedness of Defendants to Plaintiffs in the sum of \$3,405,449.02;

that (par. 9) from January, 1917, to April 2nd, 1928, John M. Phillips, Maurice E. Connolly and Frederick C. Seeley, did unlawfully, wilfully, knowingly and corruptly, conspire, combine, confederate and agree together with each other, and with divers other persons, to Plaintiffs unknown, to cheat and defraud the City of New York out of property, and did cause the City of New York to pay large sums of money for work done and material and equipment supplied to construct pipe sewers in the Borough of Queens, in excess of the fair, reasonable and proper costs thereof. 10

that (par. 10, p. 3) they caused specifications for the construction of pipe sewers in the Borough of Queens to provide as an alternative to the use of a monolithic type of sewer, precast pipe, and did cause the specifications for precast pipe to be unlawfully and fraudulently framed and designed so as to tend to preclude the use of any precast pipe, but a precast pipe manufactured and sold by the Lock Joint Pipe Company of which John M. Phillips had the exclusive sale at all material times in the Borough of Queens (pars. 11, 12); 20

that Frederick C. Seeley fraudulently and wrongfully incorporated in the specifications, plans, profiles and details for the construction of pipe sewers in the Borough of Queens, such unnecessary and unreasonable requirements covering the method of construction of monolithic types of sewer as to prevent contractors submitting bids at a lower figure than bids for the construction of sewers of precast concrete sewer pipe (par. 12); 30

that said Seeley caused the plans and specifications for construction of pipe sewers in the Borough of Queens to require the construction of pipe sewers in the Borough of Queens to require in the monolithic type of construction thereof, the insertion of a so called water-proofing membrane in the invert of said sewer structure, and another specifications requiring in the monolithic type that arch forms be kept in place twenty-one days (par. 14). 40

That further, Maurice E. Connolly rejected all bids for sewer contracts when the lowest bidder was not favourable to John M. Phillips (par. 15), and awarded contracts for the construction of pipe sewers to bidders whose bid exceeded any fair and reasonable costs of construction of other sewers knowing that their bids were based upon the use of precast pipe purchased or to be purchased from the said John M. Phillips, at prices greatly in excess of any fair and reasonable price for the same. (par. 16).

that Connolly approved certain specifications for the construction of pipe sewers in the Borough of Queens in the year 1917 relating to the joints knowing that such specifications would preclude all bidders, except those using precast pipe manufactured by the Lock Joint Pipe Company (par. 18).

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10 In paragraphs 20 to 33 of their Declaration the Plaintiffs alleged particularly various contracts entered into by John M. Phillips with various contractors and contracting Companies in which it is alleged excessive prices were charged for precast sewer pipe. The Companies referred to are:

The Awixa Corporation, 5 contracts, (par. 20),
Duit Inc., 2 contracts, (par. 21),
Hammen Construction Company, 2 contracts (par. 22),
20 Welsh Brothers Contracting Company, 2 contracts (par. 23),
Oxford Engineering Company, 1 contract (par. 24),
Everett Construction Company, 1 contract, (par. 25),
Muccini & Decker, 18 contracts, (par. 26),
Angelo Paino, 8 contracts, par. 27),
Dominick Bonacci, 1 contract, (par. 28),
Necaro Company, 2 contracts, (par. 29),
H. J. Mullen Contracting Co., Inc., 2 contracts, (par. 30),
30 Kennedy & Smith Inc., 7 contracts (par. 31),
Carmine Petracca, 2 contracts, (par. 32),
Petracca & Peterson, 1 contract, (par. 33).

(It is to be noted that Plaintiffs alleged *not that the City paid excessive prices for the sewers*, but that the contractors paid excessive prices for the pipe).

40 That (paragraphs 34 and 39) the relevant articles of the Civil Practice Act of the State of New York conferred upon the Attorney General of the State of New York the right to institute proceedings in the name of the People of the State of New York and to obtain an attachment before judgment.

That (paragraphs 40 to 43) the Defendants are secreting and making away with their property with intent to defraud the City of New York; that Francis Phillips, one of the Defendants, rented in his own name a safe deposit box in Montreal for the purpose of hiding, secreting

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and making away with monies and property belonging to the Estate of John M. Phillips, and that the monies actually found in the hands of the Montreal Safe Deposit Company were at all times the property of the Estate of John M. Phillips.

Plaintiffs, therefore, conclude that the seizure before judgment be declared good and valid and that Defendants be condemned to pay Plaintiffs the sum of \$3,405,449.02. (Case Vol. I, p. 32).

10

In due course the heirs of the late John M. Phillips, then acting through Messrs. Cook & Magee, filed a plea to the action in which, among other things, it was admitted that the amount of \$312,000.00 seized by Plaintiffs was the property of the late John M. Phillips. (Case Vol. I, p. 51).

Francis Phillips maintained that the monies in question belonged to him personally and not to the Estate of John M. Phillips. Consequently a Petition to interverne on his behalf was made on the 22nd of April, 1929, (Case Vol. I, p. 57). On June 26th, 1929, Francis Phillips died intestate and on the 12th of November 1929, by means of a Petition en reprise d'instance (Case Vol. I, p. 59). The Crown Trust Company entered the action as curator to the Estate of Francis Phillips' widow, a minor and to that of Helen Frances Phillips, his daughter.

By their plea (Vol. I, p. 62), Defendants severing in their defence denied all the allegations of the Declaration referring to the alleged fraud and conspiracy of John M. Phillips with Connolly and Seeley (par. 3), but admitted that Francis Phillips had rented in his own name a safety box in the Montreal Safe Deposit Company, and alleged that property placed therein by Francis Phillips was his own. (par. 4).

Defendants severing in their defence then alleged that John M. Phillips introduced into the Borough of Queens many new and improved methods and materials in the construction of sewers in that Borough (par. 5); that the construction of sewers in the Borough of Queens was exceedingly difficult and hazardous (par. 6); that the plans and specifications for the construction of sewers in the Borough of Queens, or for materials to be used therein were prepared by a competent engineer and approved both by governing bodies of the Borough, as well as of the City of New York (par. 7); that the reinforced concrete pipe sold by John M. Phillips, was of better quality, higher cost and better adapted to the requirements of sewer construction in the Borough than any other pipe then available (par. 8).

By their answer to plea (Case Vol. I, p. 36), Plaintiffs denied or substantially joined issue with the truth of all of the allegations of the

plea of Defendants severing in their defence. They further alleged (par. 8, Vol. I, p. 37) that Seeley, as assistant engineer in the department of sewers in the Borough of Queens was responsible for any plans and specifications for the construction of sewers in the Borough; the work done was carried out under his supervision and that he was convicted of fraudulent and wrongful practice.

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10 By their reply (Vol. I, p. 64) Defendants severing in their defence denied that the property contained in the safe deposit box belonged to John M. Phillips and joined issue with or denied the truth of the remaining allegations of Plaintiffs' answer to Plea.

On the 31st day of March, 1930, Plaintiffs applied to the Court for the issue of a Rogatory Commission to take the evidence of witnesses in the City of New York; the petition was granted (Vol. I, p. 42).

20 The testimony of nearly fifty witnesses was so taken on behalf of Plaintiffs.

The Commission was returned and opened in conformity with a judgment of the Superior Court on October 28th, 1931, (Vol. I, p. 43). The trial opened before Mr. Justice Mercier on the 5th of October 1932, and continued from time to time until judgment was rendered on the 23rd of November, 1934, dismissing Plaintiff's action and maintaining the pleas of the Defendants with costs.

30

3. JUDGMENT

In his judgment (Case Vol. XII, p. 5510), Mr. Justice Mercier made the following findings:

(Beginning at Vol. XII, p. 5448):

- a) The burden of proving their allegation of fraud and conspiracy rested on Plaintiffs (Vol. XII, p. 5549, line 37, Vol. XII, p. 5554, line 48).
- 40 b) No conviction for conspiracy had been had against John M. Phillips and proof of a conviction against Maurice E. Connolly and Frederick C. Seeley was irrelevant to the case (Vol. XII p. 5449, line 10, p. 5552, line 19 et seq.);
- c) In actions for damages resting on alleged criminal offences, the crime and offence must be clearly established (Vol. XII, p. 5555, line 5);
- d) The evidence produced by Plaintiffs contained none of the elements which would justify a finding of conspiracy and Plaintiffs have

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entirely failed to establish the allegation of fraudulent conspiracy (Volume XII, p. 5555, line 28 et seq) ;

e) Certain of the Plaintiffs' witnesses to wit: Paulsen Purcell, Weaver and Sigretto, gave evidence which the Court declared was subject to the greatest doubt and reserve (Volume XII, p. 5556, line 9 et seq) ;

f) Assuming that the evidence had disclosed that John M. Phillips had sold pipe to various contractors at high prices, this fact alone without proof of a conspiracy between him and his alleged conspirators would not be sufficient in itself to establish the charge of conspiracy against John M. Phillips (Vol. XII, p. 5556, line 16 et seq). 10

Having decided that there was no evidence of fraud or conspiracy, His Lordship did not consider, or make any finding upon, the question of the alleged damages.

In the result the action of Plaintiffs was dismissed with costs in favour of both Defendants. 20

4. ARGUMENT

It is respectfully submitted on behalf of Respondents that the judgment of Mr. Justice Mercier is well founded and that the Appeal of Appellants should be dismissed with costs.

Before discussing the evidence in detail Respondents again direct attention to the manner in which Plaintiffs made their case. 30

The trial Judge did not find it necessary to adjudicate specifically upon the numerous objections of counsel for Defendants made both at the trial, but especially upon the taking of the evidence of witnesses in New York before Commissioner Fales. These objections were directed to the introduction into the record by Counsel for Plaintiffs of documents and testimony which, upon an application of the rules of evidence, would have been excluded. 40

Respondents renew their objections to all of this testimony and evidence.

The Commissioner appointed to take the evidence of the witnesses in New York upon open rogatory commission allowed all questions and the production of all documents; he rejected nothing reserving that task to the Court. At Vol. I, p. 110 he said :

The Commissioner:—

“The Commissioner rules that he will accept the evidence; that the litigants who are here before the Commissioner have their rights before the *Superior Court in Montreal* on making such objections before me which will preserve their rights. I will take anything that appears to be relevant to the Commission.

10

Mr. Cook:—

Mr. Commissioner, may I ask that your ruling apply to all evidence that is given in connection with this matter:

THE COMMISSIONER:—

Yes. My ruling applies to all evidence heretofore given.

20 Mr. Cook:—

Or which may be given in the future?

Commissioner:—

Which may be given, except as otherwise ruled.”

And again at Vol. III, p. 1063:

30

“The Superior Court is not going to thank me for keeping out evidence. They can keep that out in their own turn where it is presented to them.”

Respondents ask the Court to rule upon the objections made and to exclude from the record all exhibits and testimony which are illegal or irrelevant and which were received by the Commissioner, not to form part of the record, but merely to enable the Court to decide whether or not such exhibits and testimony should be admitted to the record.

40

Defendants objected to the production of photostatic copies of alleged original contracts; they objected to testimony bearing upon alleged contracts which were not produced, and upon alleged statements of the supposed conspirators, Connolly Seeley and Phillips. Seely and Connolly were not called as witnesses, although there was no proof that they were not available—Phillips was dead. It is submitted that the numerous objections were well founded and that hearsay evidence of this type is entirely illegal and should have been rejected. The objections to the alleged declaration of Phillips are most important and should be carefully considered. Comment on testimony of this type is found in CORPUS-JURIS, Vol. XXII, page 291.

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“No. 319 STATEMENTS OF DECEDENTS. Exposed to all the infirmities just mentioned and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is willfully false, testimony as to the oral statements of deceased persons, is therefore regarded as the weakest kind of evidence and subjected to closest scrutiny.”

PORTIS vs HILL, 14 Tex., pp. 69 and 73, 65 Am. D. 99.

10

“The evidence of the oral admissions of a deceased party made in the hearing of a single witness, and so entirely unsupported, not to say contradicted, by the other evidence in the case, ought certainly to be received after such a lapse of time, with great caution, and due allowance for the frailty of memory, and the liability to mistake or forget the precise terms and true import of the language used.”

LEA vs POLK COUNTY COPPER CO., 21 How, (U.S.), 493 and 504.

20

LIPPERT vs PACIFIC SUGAR CORPORATION, 33 Cal., A. 198, 164, P. 810.

Respondents also renew their exceptions to the interlocutory rulings of the Court excluding certain evidence tendered by Respondents as to the ownership of the \$312,000. and as to the manner in which title was acquired.

Appellants rest their action on alleged fraud in the construction of sewers in the Borough of Queens, New York City. To succeed in their action the People of the State of New York must prove:

30

- (a) that Phillips was party to a conspiracy to defraud Appellants;
- (b) that the conspiracy resulted in loss to the Appellants.

Respondents submit briefly:

- (A) THAT THERE IS NO PROOF THAT PHILLIPS WAS IN CONSPIRACY WITH CONNOLLY AND SEELEY; and
- (B) THAT THERE IS NO EVIDENCE — THERE WAS NOT EVEN AN ATTEMPT TO MAKE EVIDENCE,—THAT APPELLANTS HAVE SUFFERED LOSS.

40

Even if it were conceded that the contractor sometimes paid high prices to Phillips for pipe, it would not follow that the City paid too much for its sewers. NO PROOF HAS BEEN OFFERED THAT THE COST TO THE CITY OF CONSTRUCTING SEWERS IN QUEENS

WAS GREATER THAN THE COST OF CONSTRUCTING LIKE SEWERS IN OTHER BOROUGHES, OR GREATER THAN IT SHOULD HAVE BEEN.

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THE CASE.

As a preliminary to the discussion of the evidence bearing upon the alleged conspiracy it is well that the Court should know something of the people who are to appear before it; something of the men whose integrity is impugned, and something of them who attack it, — and something about the City and the general conditions in which they lived.

GEOGRAPHICAL DIVISIONS AND MUNICIPAL GOVERNMENT OF THE CITY OF NEW YORK.

The City of New York is composed of five boroughs:— Manhattan, the Bronx, Brooklyn, Richmond and Queens. Queens is the most recently developed; its growth has been rapid. When Bertram (Vol. I, p. 251) entered the service of the City in 1907, the population of Queens was 200,000; in January, 1931, it was 1,981,000.

The City of New York is divided into sixty-seven Aldermanic Districts, of which five are in Queens. The City is also divided into twenty-four Districts of Local Improvement, two of which are in Queens, — they are Newton, or the Second District, which contains the 60th, 61st and 62nd Aldermanic Districts, — Jamaica, or the Third District, which contains the 63rd and 64th Aldermanic Districts.

MUNICIPAL GOVERNMENT — HOW CONSTITUTED.

Greater New York has what is called the Borough or Home Rule from the Government which aims at conferring upon each locality all the benefits of local enterprise and supervision under central control. Each Aldermanic District elects an Alderman. The Aldermen from these sixty-seven Districts when sitting together constitute the Board of Aldermen. The Board is presided over by a President elected at large. The Board has certain definite legislative powers. The Mayor is the chief executive officer of the City. Central Executive power is vested in a Board. The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, the Bronx, Queens and Richmond constitute this Board; it is called the Board of Estimate and Apportionment. These eight members of the Board have sixteen votes: the Mayor has three, the Comptroller three, the President of the Board of Aldermen three, the President of the Borough of Manhattan two, the President of the Borough of Brooklyn two, the President of the

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Bronx one, Queens one and Richmond one. A quorum of the Board consists of a sufficient number of members to cast nine votes, of whom at least two of the members authorized to cast three votes shall be present. This Board may be said to be the Board of Directors of the City of New York, nothing, of any importance can be done without its sanction and approval.

The Board of Estimate and Apportionment is sufficiently provided with engineers, auditors, inspectors and legal counsel to control the letting of contracts, work in progress, the payment therefore, the levying and collection of taxes, and the payment of the City's debts. 10

In each Borough there is a President who must live in the Borough. He is elected by the Electors of the Borough at all the elections whereat a Mayor of the City of New York is to be elected. He holds office for four years. He is the Chief Executive of the Borough. He has an office in the Borough Hall. He may appoint a Commissioner of Public Works for the Borough. Within his Borough he must take cognizance of all projects relating to public sewers and drainage of his Borough and shall initiate the making of all plans for the drainage of his Borough. The President of a Borough shall by virtue of his office be a member of the local Board of every district of Local Improvement. 20

In each and every District of Local Improvement there is a Board of Local Improvement known as the the Local Board. Each Local Board consist of the President of the Borough wherein the District is situate and of each member of the Board of Aldermen who represents an Aldermanic District within such Local Improvement District. 30

PROCEDURE.

The Local Board has power to initiate proceedings to construct sewers within its Districts. When a Petition for a local improvement within the jurisdiction of a Local Board has been received by the President of the Borough, it is his duty to appoint a time for a meeting of the proper Local Board. A Local Board, after the submission to it of such petition and after it has considered the petition, may then, as the petition shall ask, pass a resolution to construct sewers within its District. 40

If the Local Board shall by Resolution decide that proceedings be initiated for a local improvement within its jurisdiction it thereupon forthwith transmits a copy of such resolution to the Board of Estimate and Apportionment. Said Board shall promptly consider such resolution and approve or reject it and return said resolution, if approved, to the

President of the Borough where it originated, but no public work or improvement, involving an assessment for benefit, shall be so authorized until there has been presented to the Board of Estimate and Apportionment an estimate in writing in such detail as the Board may direct of the cost of the proposed work or improvement and a statement of the assessed value according to the last preceding tax roll.

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10 Section 444 of the City Charter imposes upon the Borough President the duty of preparing plans for the proper sewerage and drainage of his Borough.

Section 445 refers to a permanent plan for the drainage of any sewerage district and its approval by the Board of Estimate and Apportionment.

20 Section 446 decrees that it shall not be lawful to construct any sewer or drain in the City unless such sewer or drain shall be in accordance with the general plan approved by the Board of Estimate and Apportionment.

30 Bertram, a witness called by the Plaintiffs, who has been in the employ of the Borough of Queens since 1907, explains Vol. I, p. 252, that due to the rapid growth of Queens it had been impossible to provide these plans and that the Borough was handicapped by the lack of complete topographical maps. He also explains, Vol. I, p. 254 and following, exactly how the construction of a sewer is initiated and carried out. First, there is a petition to the local board by the rate payers. After notice given a meeting is held. After the Petition has been approved by the local board, Vol. I, p. 255, and has the approval of the rate payers and the Borough President, it is forwarded to the Board of Estimate and Apportionment and the proposal is examined by the Board's Engineers, as well as by the Board itself. The project is returned to the Borough with an intimation that it is accepted in principle and that the details must be worked out and re-submitted to the Board of Estimate and Apportionment, when the plans have been completed in detail, Vol. I, p. 257. These plans are prepared in the Borough office. At page 249 Bertram explains
40 that there was in the Borough a bureau of engineering construction. That was subdivided into the highway department and the sewer department. The sewer department was subdivided into a field force and an office force. The field force was again divided into maintenance of existing sewers and construction of new sewers, p. 249.

For the convenience of the Court we insert here excerpts from Exhibit C. 19, The Greater New York Charter.

EXCEPTS FROM THE GREATER NEW YORK CHARTER.
RESPONDENT'S EXHIBIT NO. 19 (Vol. XI, p. 5428)

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Section 2. The City of New York, as constituted by this act, is hereby divided into five boroughs, to be designated respectively, Manhattan, The Bronx, Brooklyn, Queens and Richmond.

4. For all purposes the local administration and government of the people and property within the territory hereby comprised within The City of New York shall be in and be exercised by the corporation aforesaid; and the board of aldermen as in this act constituted, subject to the conditions and provisions of this act, shall exercise all the powers vested in the corporation of The City of New York by this act or otherwise, save as in this act is otherwise specially provided. 10

17. The legislative power of The City of New York, except as otherwise provided, shall be vested in one house to be known and styled as "the board of aldermen of The City of New York." 20

18. The board of aldermen shall consist of members elected one from each of the aldermanic districts hereinafter provided for and of the president of the board of aldermen and of the presidents of the several boroughs. The president of the board of aldermen shall be chosen on a general ticket by the qualified voters of the city at the same time and for the same terms as herein prescribed for the mayor.

A majority of all the members of the board of aldermen shall constitute a quorum. 30

19. The City of New York is hereby divided into sixty-seven aldermanic districts as follows:

(The 60th, 61st, 62nd, 63rd and 64th are in the Borough of Queens.)

49. The board of aldermen shall have power to make, amend and repeal ordinances, rules, regulations and bylaws in relation to the construction, repair and use of vaults, cisterns, areas, hydrants, sewers and pumps. 40

94. The executive power of The City of New York, as constituted by this act, shall be vested in the mayor, the presidents of the several boroughs and the officers of the several departments. The mayor shall be the chief executive officer of the city; he shall be elected at the general election.

96. There shall be the following administrative department in said city.

Department of finance

97. The head of the department of finance shall be called the comptroller of The City of New York. He shall be elected at the general election....

(Whenever there be a vacancy in the office of mayor or whenever, by reason of sickness or absence from the City the mayor shall be prevented from attending to the duties of his office, the President of the board of aldermen shall act as mayor.) — See page 35.

20 226. The mayor, comptroller, *president of the board of aldermen*, and the presidents of the boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond shall constitute the board of estimate and apportionment. Except as otherwise specifically provided, every act of the board of estimate and apportionment shall be by resolution adopted by a majority of the whole number of votes authorized by this section to be cast by said board. The mayor, comptroller and the president of the board of aldermen shall each be entitled to cast three votes; the presidents of the Boroughs of Manhattan and Brooklyn shall each be entitled to cast two votes; and the presidents of the boroughs of The Bronx, Queens and Richmond shall each be entitled to cast one vote. A quorum of said board shall consist of a sufficient number of the members thereof to cast nine votes, of whom at least two of the members hereby authorized to cast three votes shall be present.

40 383. There shall be a president of each borough, who must be a resident thereof at the time of his election and remain a resident thereof throughout his term of office. The president and his successors shall be elected by the electors of the borough at all the elections whereat the mayors of The City of New York are respectively to be elected. The president shall hold his office for a term of four years, commencing on the first day of January next after his election.

383. The president of a borough shall, by virtue of his office, be a member of the local board of every district of local improvement in his borough, and chairman thereof, entitled to preside at its meetings and to vote as any other member.

425. For the purpose of home rule and local improvements the territory of the City of New York is hereby divided into twenty-four dis-

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tricts of local improvements. The first district shall consist of the county of Richmond, and shall be called Staten Island; the second district shall consist of the sixtieth, sixty-first and sixty-second aldermanic districts of the City of New York as constituted by this act, being part of the county of Queens, and shall be called Newton; the third district shall consist of the sixty-third and sixty-fourth aldermanic districts of the City of New York, being part of the county of Queens, and shall be called Jamaica; . . .

10

426. There shall be in each and every district of local improvements a board of local improvements, to be known and described as "the local board," to be entrusted with the powers by this act prescribed. . . . Each local board shall consist of the president of the borough wherein the district is situated, by virtue of his office, and of each member of the board of aldermen who represents an aldermanic district within each local improvement district, by virtue of his office and during his term as such member.

42. A local board, subject to the restrictions provided by this act, shall have power in all cases where the cost of the improvement is to be met in whole or in part by assessments upon the property benefitted to initiate proceedings for the following purposes: to construct tunnels and bridges lying wholly within the borough; to acquire title to land for parks and squares, streets, *sewers*, tunnels and bridges, and approaches to bridges and tunnels; to open, close, extend, widen, grade, pave, regrade and repair the streets, avenues and public places, and to *construct sewers within the district*.

20

The method of initiating local improvements is found at Sections 432, 433 and 434. (Vol. XI, p. 5453 et seq.).

30

The map or plan of The City of New York, establishing of grades, changes therein, maps sewer system and sewer districts — these works were in arrears. — See testimony of Bertram, Vol. I, p. 252 et seq.

It is charged that Phillips, who manufactured and sold pipe, conspired with Connolly, the Borough President, and Seeley, an assistant engineer of the Bureau of Engineering and Construction of the Borough of Queens, to exclude from the Borough of Queens all pipe not manufactured by Phillips and to prevent the construction of any sewer in which his pipe was not used.

40

ORGANIZATION OF BUREAU OF ENGINEERING
CONSTRUCTION OF THE BOROUGH OF QUEENS.

At the time of which we speak the consulting engineer of the Bo-

rough of Queens was Professor Burr, Vol. I, p. 274, of Columbia University, a man apparently held in the highest esteem. The engineer in charge of the Bureau of Engineering Construction was James Rice, Vol. I, p. 272; the man in charge of the office force was Tait, p. 250. Seeley's immediate superior as engineer was Perrine, p. 250—Vol. I, p. 711. He had over him five or six superior officers—Zorn, Vol. III, p. 1156. The conspiracy is said to have consisted (a) in charging the plans so that Phillips' pipe, the lock joint, would of necessity be used, and (b) by charging exorbitant prices for his pipe.

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Be it remarked that the plans and specifications had to have the approval of half a dozen Borough engineers, all of whom were superior to Seeley, to say nothing of the engineers in the employ of the Board of Estimate and Apportionment — Decker, Vol. I, p. 711.

Mr. Hackett:—

20 Q.—All the plans and specifications have to be approved, not only by the Borough staff, but by the staff of the City?

A.—Yes sir; Board of Estimates.

Moreover, all bids for work were opened in the presence of representative of the Board of Estimates and Apportionment — Bertram, Vol. I, p. 259.

30 THE ALLEGED CONSPIRATORS—CONNOLLY SEELEY and PHILLIPS

WHO ARE THEY AND OF WHAT ARE THEY ACCUSED?

40 CONNOLLY: we know very little. Only one witness says he ever saw Connolly with Phillips, that is, Purcell, who in 1916 or 1917, on the occasion of the transfer of a contract from Sigretto to Creem, Vol. I, page 372, saw them together, when Connolly ratified the transfer. It is not even suggested that there was any wrong in this transaction.

Appellants did not call Connolly to the witness stand. It is proved by Appellants' witness that Connolly and Phillips were frequently opposed to each other. This is not contradicted. Zorn, one of the Appellants' witnesses, testified that Connolly and Phillips were frequently opponents. ZORN, Vol. III, p. 1159:

Q.—And Connolly and Phillips were not always on the same side, either?

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A.— No.

Q.—They were on different sides of the fence?

A.—Absolutely.

Q.—You were the district leader, weren't you?

A.—Yes, sir.

10

Q.—In Queens Borough?

A.—No, not in Queens Borough. I was only the leader of a section of an assembly district, what they call Dutch Hills, that was my section.

Q.—Phillips was a very genial, friendly man, wasn't he, on many occasions?

A.—What?

20

Q.—A very friendly man, had a great many friends?

A.—Yes, he did. As a under-sheriff for 10 or 15 years, he made a lot of friends. He helped people with subpoenas and jury notices.

Q.—He was always willing to help his associates and friends, if he could?

A.—Yes.

Q.—Did you ever ask Connolly, on behalf of Phillips, to nominate people to jobs, in the Borough of Queens? ³⁰

A.—In behalf of Phillips?

Q.—Yes, or on your own behalf?

A.—Oh, yes.

Q.—And did he do so? Did Connolly do so?

A.—Well, most of the time we were better off if we didn't ask him. ⁴⁰

Q.—Better off if you didn't ask him?

A.—Yes. If we got a job, most of the time it would be without him knowing.

Q.—Most of the time it would be a refusal?

A.—Most of the time.

Q.—I understand that Connolly and Phillips were not on good terms, on occasions?

A.—On occasions, yes.

Q.—They were not on good terms?

A.—No.

10

Q.—They didn't pull together?

A.—If he nominated a candidate and we didn't like him, why, we went out against him. Many a times we had three candidates, each one for a different one. We could not unite on one.

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On another occasion Connolly and Phillips were political opponents.

20 *CURRAN, Vol. I, p. 192:*

Q.—He (Connolly) supported Mr. Hylan?

A.—Yes.

Q.—And who was Phillips supporting?

A.—Walker.

30 Q.—So Phillips and Connolly on that occasion were in opposition, as it were, and in all events, so far as their sympathies were concerned?

A.—You would think so, yes.

Appellants have argued that "Phillips was so closely connected with Connolly and so set in having him as the President of the Borough that in 1925 he gave \$30,000. to his Secretary to spend for the election of Connolly and his friends in Queens".

40 This is a fair sample of the liberties Appellants take with the facts and the evidence.

This is what *CURRAN*, under cross-examination, Vol. I, page 192, actually said:

By Mr. Cook:—

Q.—You paid thousands for election expenses?

A.—Not into the Party funds.

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Q.—Not into the Party funds?

A.—My personal cheque paid for that advertising direct to the newspapers, or to the advertising agencies.

Q.—I see, there were a number of papers interested?

A.—All the metropolitan papers; some of the foreign language papers. 10

Q.—For the general Democratic ticket?

A.—For the Democratic ticket.

Q.—Not for any candidate in particular?

A.—*Not for any particular candidate.*

Q.—So that although Mr. Connolly was elected as the President of the Borough of Queens — 20

A.—He just happened to be on the ticket.

Q.—He just happened to be on the ticket, but the subscription was not for Connolly's benefit alone?

A.—No, sir.

Q.—For the benefit of everybody who was on the ticket?

A.—From the Mayor down. 30

PAGE 193:

Q.—But Mr. Curran, this money that you speak of was spent for the general purposes of the Democratic Party?

A.—Yes, sir.

Q.—That is correct, for the general purposes of the Party?

A.—General purposes, by that you mean — I am confining myself to advertising? 40

Q.—Of course, surely, for the purposes of the Democratic Party generally?

A.—Yes, sir.

Q.—Throughout the whole City? the City ticket?

A.—Yes, sir.

It is insinuated that the modification of the specifications for sewer construction in Queens in such a way as to permit the use of pre-cast pipe was the result of some nefarious scheme. Precast pipe was rapidly replacing solid masonry in sewer construction throughout the country — Vol. II, p. 814.

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What are the facts?

10

Hirsch saw Connolly only once when he succeeded in having his pipe specified for use in Queens. This was long before Phillips had any association with the Lock Joint Pipe Company. Connolly seems to have been very circumspect; his questions to Hirsch, as testified to by Hirsch, indicate that he was a keen and careful administrator. He asked Hirsch if the specifications as drawn included any patented device which would preclude any contractor from making the pipe. Hirsch answered in the negative, Vol. II, p. 815.

20

Hirsch testified that he went to the Borough Hall with the then President of his Company, Mr. Merriwether, where he met Rice, the Chief Engineer, and later Connolly — Vol. II, page 799.

Mr. GOUDRAULT:—

Q.—What was the purpose of your visit there, Mr. Hirsch?

30

A.—The occasion of that business, we had been — precast pipe had been included in the specifications for sewers in Queens. The specifications had been prepared, and Mr. Merriwether asked me to go with him and see Mr. Rice and go over these specifications, the purpose being to see whether or not we could comply with those specifications for pipe which we manufactured.

Q.—And that was the time you saw Mr. Connolly for the first time?

A.—That was the time I saw Mr. Connolly, yes sir.

Q.—Who introduced you to Mr. Connolly?

40

A.—Mr. Rice.

Q.—What specifications do you refer to, Mr. Hirsch?

A.—Specifications as adopted by the Borough of Queens for pre-cast re-enforced concrete-pipe.

Q.—Did that conversation last very long, that first interview of yours, with Mr. Connolly?

A.—Not very, no.

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Q.—Do you recollect?

A.—I recollect the substance of it.

Q.—Would you state it in a few words?

A.—Mr. Rice introduced both Mr. Merriwether and me to Mr. Connolly.

By MR. HACKETT:—

10

Q.—Mr. Rice was the engineer?

A.—Mr. Rice was the engineer.

Q.—Chief engineer?

A.—Chief engineer. And the conversation was entirely with regard to pipe and the pipe specifications. Mr. Connolly was particularly anxious to know whether the specifications as drawn by Mr. Rice precluded the use of any but a patented article. I am sure that I told him, and I think Mr. Merriwether told him that in our opinion they did not preclude anything but patent articles, because there was nothing, so far as we knew, in the specifications calling for a patented article. 20

Q.—Did you tell that to Mr. Connolly yourself?

A.—I told that to Mr. Connolly. Mr. Connolly explained that of course they could not specify a patented article, I told him that in my opinion he was not specifying a patented article. 30

The date of this conversation is not very definitely fixed, but it must have been before December 1st, 1916, when the contracts were let for Moore and Mott Evenues, in the execution of which precast pipe was used. See Exhibit C-1 Vol. III, p. 1445.

At Vol. II, p. 815 HIRSCH, under cross-examination, said:

Q.—You have made some reference to a conversation between Mr. Merriwether, your president, and the engineer in chief of the Borough of Queens, concerning the use of your pipe, and it was your contention at that time that the only patented feature which might preclude it from use had been eliminated, is that correct? 40

A.—Eliminated from what?

Q.—From the specifications?

A.—For the Borough of Queens?

Q.—For the Borough of Queens.

A.—Yes.

Q.—Just make that clear, will you please?

10 A.—We presented to Mr. Rice our specifications for guidance. Our specifications, of course, described our pipe, and in describing our pipe naturally it had all of the features connected therewith, which included that part which was patented. Mr. Rice, as parts of the identical language of the two specifications will show, followed our specifications to a considerable extent. However, when we came to the question of joints —

Q.—Which was the only patented part of your pipe?

20 A.—Which was the only patented part of our pipe, that part of our specifications which did cover the patented feature was not included in Mr. Rice's specifications covering joints. and it was our contention at the time, and I have repeated it since, that the specification which was drawn by the Borough of Queens did not call for a patented article, and that anyone who was willing to do so and who had the desire to do so could make a pipe to fully comply with those specifications, and I know of no one who could have legally stopped them.

Q.—We had a man here yesterday who said that he told Phillips that he intended to make pipe on Queens specifications and it resulted in a row between him and Phillips, according to his testimony.

30 A.—Of course, that is something I know nothing about.

Q.—Your specification, or a specification, the substance of which come from your company, had been used in other boroughs and in other municipalities since 1910, I am instructed?

40 A.—Our specifications have been used to a very considerable extent all over the United States and in Canada. As a matter of fact, the extent of it is that the actual pipe is in 40 or more of the states of this country, and in Canada, both before and since the patent had expired.

Appellants imputed much rascality to Connolly, but it is strange that not one single act of Connolly has been proved which established dishonesty on his part, not one. He rejected low bids, as was his right, his duty even. In the case of Paulsen he did it on the recommendation of his engineer, Moore, because Paulsen had not respected his contract. In the case of Dicarrlo and Martino, because "they had made a mistake" — see Purcell, Vol. I, p. 378, — in their calculations and put in a low bid which

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would have entailed a loss to them. For that reason he released them. All the bids he rejected resulted in a saving of money to the City —

Out of the 222 contracts let during the period of twelve years in question, in only three instances were bids rejected by Connolly when the contract was not awarded to the lowest bidder. viz. Linden Street, October 1919, (Ex. C 1, contract no. 171, Vol. III, p. 1447), 150 Street; June 1925, (Ex. C1, contract no. 263, Vol. III, p. 1449; Brinkerhoff Avenue. 10 October 18th 1926, (Ex. C1, Contracts nos. 304 and 305, Vol. III p. 1449).

On the Linden Street contract the rejection of the first bids resulted in a saving to the City of nearly \$19,000.00.

The 150th Street bids were rejected because the Hammen Construction Company, the low bidder, was already in default under another contract which it was carrying out for the City. The reason for the rejection is fully explained in a letter to Connolly from the consulting engineer Moore against whose integrity nothing has been alleged. (Ex. C48, 20 Vol. IX, p. 4442).

In the case of Brinkerhoof Avenue contract, the original bids exceeded the preliminary estimates and varied considerably in amount. The work was advertised again. On a suggestion of consulting engineer Moore the bids were again rejected and the work was advertised as two separate contracts, one to include tunnel and the other open cut work. (Ex. C62, Vol. XI, p. 5027).

The lowest bid on the first letting of the combined work was \$349, 30 241.00.. After the contract was divided the low bids on both portions amounted to only \$248,425.00. The opinion and predictions of consulting engineer Moore were correct and in the result the City saved \$100,000,000, the difference between the lowest bid on the first letting and the lowest bid on the final letting (Ex. C60, Vol. X, p. 4853 C63, Vol. XI, p. 5020, C81, Vol. XI, p. 5097, p. 5100).

Chief engineer Tuttle in a report to the board of estimate and apportionment gave the reasons for the excess of the contractors low bid 40 over the engineers estimate with respect to the Brinkerhoff Avenue contract, and the whole matter was thoroughly discussed by the board. (Ex. D-10, Vol. XI, p. 5476).

It is submitted that the proof does not disclose a single act of Connolly's which was dishonest or improper. Appellant's have insinuated that he was dishonest and have drawn inferences and deductions from incidents which they have asked the Court to interpret as evidence of Con-

nolly's turpitude and evidence of a conspiracy between Connolly, Seeley and Phillips.

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SEELEY:

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10 Of him also little is known. Appellants did not call him as a witness. They relied upon the testimony of Paul W. Paulsen to draw Seeley into the alleged conspiracy.

Paulsen said:

1. that Phillips said to him — Vol. I, p. 460 — “You want to get better acquainted with Seeley, he is a fellow that can doll them up.”

(This is purported to have been said with reference to the plans).

20 2. that Seeley said to him — Vol. I, p. 460 — ‘Don't do like those screen people did, they still owe me \$5,000.’

the inference being that Seeley had attempted to get money improperly, from a supplier of materials to the City; but there is no proof.

3. that Seeley suggested that Paulsen pay him \$1,000. — Vol. I, p. 462 — and Paulsen testified that Seeley said, p. 462 —

“You can leave the \$1,000. with Mr. Lehy; he is all right.”

Paulsen admits, Vol. II, p. 532, that he did not pay the \$1,000. to Seeley and that Seeley did not ask him for it.

30

But who is Paulsen, upon whom Appellants rely to blacken the reputation of Seeley?

He was born in Denmark, Vol. II, p. 540. He came to the United States in 1907. He was the Manager and Vice-President of Hammen Construction Company, which is in the hands of a receiver, Vol. II, p. 529.

40 Paulsen told Mr. Cook, Vol. II, p. 530, that he bought all the machinery of Hammen Construction Company “and paid for it,” and admitted under cross-examination by Mr. Hackett that he had only paid for part of it, and that a note for \$18,000. was still unpaid, Vol. II, p. 597.

He took a contract to do work on 150th Avenue. The bids were open on the 13th February, 1925. He did not proceed with it or pay for the pipe he had bought from Phillips until Phillips began to remove it from the job, Vol. I, p. 477. See letter of Engineer Clifford Moore, Vol. IX, p. 4442, as to the way he conducted his business.

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He quarrelled with Phillips on many occasions, Vol. II, p. 551, and gave information to the prosecution in the case of the State against Connolly. He spent two days coaching the prosecution, Vol. II, p. 553.

He made a dishonest statement of his Company's assets to the Borough of Queens, Vol. II, p. 594, in order to induce the Borough to give him a contract.

Vol. II, p. 598:

Q.—You know that that statement was inaccurate and misleading, do you not?

A.—That is possible.

He admits having paid \$6,000. to corrupt a City official, Vol. II, p. 599 et seq.

He testified that Phillips introduced Decker to him as his engineer. He is flatly contradicted by the witness Decker, who was called by Appellants, Vol. II, p. 713.

The Court will, it is submitted, hesitate to place much confidence in a witness whose memory is as uncertain and whose conduct is as unsavory as that of Paulsen. Yet the Court is asked to believe that Seeley is a conspirator upon evidence of this kind.

See remarks of Mercier J. on Paulsen's testimony. Vol. XII, 30 p. 5556.

Most of Paulsen's evidence is objectionable and inadmissible because it is hearsay and not the best available.

Seeley is also charged with overt acts of conspiracy:

1. Going to Detroit with Major O'Rourke and subsequently recommending the use of O'Rourke's block in the construction of a tunnel.
2. Preparing a plan for a waterproofing membrane.

40

He went to Detroit with O'Rourke to see a tunnel in course of construction in which O'Rourke blocks were used. This is advanced as an act of conspiracy. It is established by Appellants' witnesses and contradicted:

- (a) that the blocks were very useful and an improvement on other types of constructions, Vol. II, p. 571;
- (b) that they were used in the Linden Street job to excellent advantage;
- (c) that Seeley had a half dozen superior officers, — Zorn, Vol. III, p. 1156.
- 10 Can it be supposed that he went to Detroit without their permission or that O'Rourke blocks were used without their approval?
- (d) O'Rourke says Seeley demurred at first when O'Rourke suggested that he go to Detroit, but that later he decided to go.

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20 True, in the meanwhile O'Rourke had spoken to Phillips, but it does not follow that Phillips had any communication with Seeley and there is no evidence that he was in communication with him, but even if he were, it was perfectly proper for Seeley to go to Detroit. His visit there was on the City's business and in the result it was favourable to the City's interests.

There is nothing whatsoever in the testimony of O'Rourke to justify any of the allegations against Seeley. It must be noted that he was Plaintiff's own witness. He makes the following remarks:

30 "I might add if you won't object to it, that no official, nor any official action is involved whatever in anything proposed to me by Phillips. It was never said that he could do this or do that or do the other thing, and I certainly would have had nothing to do with it if I had any idea that they were going to do any bribing of officials or anything that was not right." (Vol. II, p. 573, line 1).

"Seely, I am sorry to say, rather I am happy to say, was one of the finest chaps I have ever met — " (Vol. II, p. 568, line 33).

40 "There never was in all my relations with Seeley anything other than the ordinary business that takes place between the engineer and the contractor." (Vol. II, p. 570, line 24).

Another act of conspiracy charged to Seeley is the preparation of a waterproofing membrane.

WHAT IS THE WATERPROOFING MEMBRANE?

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It was a device to make the monolithic sewers absolutely water-tight by applying in the lower half of the sewer a coat of waterproofing between the outer and inner shell of the structure.

Bertram, who succeeded Seeley as assistant engineer, received from him a sketch of a waterproofing membrane for the monolithic main and manholes. 10

Vol. I, p. 152:

Q.—At whose orders was that design or waterproofing membrane put in, do you know?

A.—Yes, Mr. Seeley's —

Mr. Cook:—Wait a minute.

20

Mr. Goudrault:— What is objectionable to that?

Mr. Hackett: All that you cansay, Mr. Bertram, is what Mr. Seeley told you.

The witness:—Yes.

Mr. Hackett:— Whether the orders came to Mr. Seeley from his superior officers or not, you don't know?

30

The witness:—No, I don't know.

Mr. Goudrault:—I am asking from whom he himself received the orders.

Q.—You had instructions from Mr. Seeley, didn't you?

A.—Yes, from Mr. Seeley.

Q.—And you gave orders to your draftsmen and designers to go ahead and put in that waterproofing membrane? 40

A.—That is correct.

Bertram says he did not approve of it, yet it was incorporated in the specifications with the approval of the entire engineering corps of the City and Borough. Bertram says, at Vol. I, p. 270, under cross-examination, that he never protested the use of this membrane.

Mr. Hackett:—

Q.—Did you protest to anyone concerning the use of this waterproofing membrane?

A.—No.

10 Bertram thought the incorporation of the membrane would slow down the work and increase the cost. He also criticised it because the forms had to remain in place twenty-one days. He had to admit, however, that the same curing process of twenty-one to twenty-eight days was exacted of the precast pipe, — Bertram, Vol. I, p. 266.

Harrington, an engineer for Patrick McGovern, called by the Appellants, testified that if there were a sufficient number of forms the work should not be greatly retarded.

20 In the sewer which McGovern had built on Hamels Boulevard a steel waterproofing device had been used before the membrane had been specified.

Decker and Harrington did not share Bertram's opinions. Decker, a witness called by Plaintiff, says in cross-examination, vol II, pp. 710-711 :

30 Q.—And apart from the question of expense, this waterproofing device in the monolithic, known as the waterproofing membrane, would have made that monolithic type more impervious to water, wouldn't it?

A.—Yes, sir.

Q.—And would have precluded the possibility of water penetrating?

A.—Add to its efficiency, yes.

Decker had been in the employ of the City. He says, Vol. II, p. 711, line 13:

40 Q.—And when you were in the Sewer Department what position did you hold?

A.—I was draftsman, and then I became assistant engineer.

Q.—That was the position which Seeley later on held?

A.—No, sir, I was outside in the field.

Q.— But you were intimately acquainted with the operation of the Department?

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A.—Yes, sir.

Q.—And you were in the field service as assistant engineer, and had your superior officers, I suppose?

A.—Yes, sir.

Q.—Who checked you up quite carefully and quite regularly?

A.—Well, I will tell how that was arranged. I was called really, what you would call me, a division engineer. They had the Borough divided, I have forgotten, in three or four sections, — or a section engineer, rather. And I had charge of one section. 10

Q.—But under the direction.

A.—Under the engineer, absolutely.

Q.—Apart from the engineers of the Borough, there was also a corps of engineers from the City, the Board of Estimate & Apportionment, was there not? 20

A.—Yes, sir.

Q.—And they followed the plans and specifications in the execution of the work carefully?

A.—Yes, they have to check them first.

Q.—Yes. All the plans and specifications have to be approved not only by the Borough staff but by the staff of the City? 30

A.—Yes, sir. Board of Estimate.

Q.—And they are skilled men who are supervising the work in all the Boroughs of the City, are they not?

A.—Yes, sir.

Q.—Now, coming to the inside service, I understand that Seeley was an assistant engineer? 40

A.—Yes, I believe that was his title.

Q.—And did you know Mr. Rice?

A.—Yes. He was the chief engineer of everything.

Q.—Yes. And Mr. Perrine?

A.—Mr. Perrine was in charge of sewers.

Q.—And Mr. Blake?

A.—Mr. Blake had charge of the Highways Department.

Q.—And Mr. Bishop?

A.—He was in the Sewer Department also.

10 Harrington, another witness called by Appellants, explains how necessary it was that the sewers should be kept dry, Vol. II, p. 654. Instead of a waterproofing membrane his Company, Patrick McGovern, Inc., used steel water stops, Vol. II, p. 657.

PAGE 657:

Q.—And did you put some waterproofing in, of some kind?

A.—No, we put a steel water stop in there, but there was no waterproofing; no waterproofing in there.

Q.—You say there was a steel water stop at the joints?

20 A.—Yes, at the invert; a horizontal water stop at the bottom, below the flow time of the invert, an arch water stop that extended down.

One might say that each contractor and engineer has his own approved method.

30 It is to be noted here that none of Seeley's superior officers were called by the Appellants, and that Exhibits C-3, Vol. VIII, p. 3999, C-8, Vol IV, p. 1779 and C-10, Vol. XI, p. 5306 — plan for the sewers constructed at 150th Avenue, which is probably the first plan to contain this membrane, is signed by Perrine, Seeley's superior officer.

Consider the circumstances and inquire if the specification for this membrane, even if it had been prepared by Seeley, could be an element of conspiracy.

40 (1) The area in which the sewers were being built was extremely wet. Details of the difficulties and dangers of sewer construction in Jamaica and Rockaway will be recited at length in another paragraph. It was necessary that the sewers be dry and to this end extraordinary precautions had to be taken.

(2) Seeley had half a dozen engineers superior to him, to whom he was responsible, — Bertram, Vol. I, p. 274 et seq.; Decker, Vol. II. p. 711; Zorn, Vol. III, p. 1156.

(3) No change in the specifications could be made without the approval of these senior officers. — Bertram, Vol. I, p. 167 and Corporation Counsel Bertram, Vol. I, p.

(4) In fact, the very plan which contains the detailed design of

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the membrane is signed by Franklin Perrine, Seeley's superior. — See Plan, Exhibit C-3, Vol. VIII, p. 3999.

(5) Changes were being made in the specifications from time to time; some were good and retained, some bad and abandoned. — Bertram, Vol. I, p. 261.

(6) Plaintiffs have made a point that no monolithic sewer was built with this waterproofing membrane in it. The answer is found in the mouths of Plaintiffs' own witnesses. 10

First the monolithic type of sewer had enjoyed a monopoly in Queens until 1916 — Bertram, Vol. I, p. 262. Precast pipe had come into vogue and was rapidly displacing monolithic sewers — Hart, Vol. III, p. 844.

Second, in any event, precast pipe was particularly adaptable to wet work and the sewers which were built in Jamaica and Rockaway were all built in wet soil — Creem, Vol. I, p. 362. In such wet territory a man — to use the language of Creem, p. 362, — would be crazy to attempt to build a monolithic sewer where pipe alone could be used to advantage. 20

Appellants have made no evidence that the waterproofing membrane said to have been originated by Seeley has been abandoned or deleted from the specifications of the City.

To sum up against Seeley, — there are the charges of the unsavory Paulsen. But even if taken at their face value do they prove conspiracy with Phillips? It is submitted that they do not. The trial Judge found the veracity of Paulsen open to considerable doubt (Vol. XII, p. 5556 —2nd Considerant). 30

PHILLIPS

Phillips, Appellants offer to the Court as the arch-conspirator. He was a man of many natural gifts and possessed of a strong personality. Appellants' witnesses testify: 40

- (a) that he had a genius for construction work — Curran, Vol. III, p. 1323;
- (b) that he had dynamic energy — Creem, Vol. I, p. 368;
- (c) that he had great daring: he bet \$100,000. on one race and won as much as two to three hundred thousand dollars on a race, — Cassidy, Vol. III, p. 1076, Curran, Vol. I, p. 194;

- (d) that he liked display, politics and power, Vol. II, pp. 632, 633;
- (e) that he was generous to his family and friends, — Curran, Vol. I, p. 194, Cassidy, Vol. III, p. 1077, — and received from them a so-called “golden” dinner service;
- (f) that he bluffed and wheedled them into doing his will, — Purcell, Vol. I, p. 346, Matthews, Vol. II, p. 633.

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10 When his bluff was called, he acquiesced.

O'Rourke says Phillips claimed \$50,000. for his services.

When O'Rourke refused to pay, nothing happened.

Paino quarrelled with Phillips, began making pipe, and continued to get contracts in Queens,—Vol. III, pp. 1125-1126.

- (g) that he was indiscret and talked about his affairs to any persons who would listen, — Cassidy, Vol. III. p. 1076;
- 20 (h) that he surrounded himself with satellites and created the impression that he was omnipotent with the Borough President;
- (i) that he sometimes financed the contractors and on at least one occasion was in partnership with them.

He was in partnership with Sigretto, — See Exhibits C-83, C-84, C-85, Vol. V, p. 2049 et seq.

He financed Paulsen by giving him pipe on credit.

30 He financed Decker, Vol. II, p. 678.

THERE IS NO PROOF

- (1) that Phillips' relations with Connolly or Seeley were improper;
- (2) that the City paid more than it should for its sewers even though the price of pipe to the contractors may have been high;
- 40 (3) that the price of the contractors to the City which were for a lineal foot of constructed sewer, were in any way excessive or unfair;
- (4) that the City paid more for sewers in Queens than the price paid for like sewers build amid like difficulties elsewhere

WHO ARE HIS ACCUSERS:

PAUL W. PAULSEN, who admits corrupting civic officials;

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whose numerous companies are all in the hands of a receiver; who did not pay Phillips for his pipe until he threatened to remove it from the works; whose failure to carry out his contract in accordance with his undertaking entailed the rejection of his bid. He was hostile to Phillips He was contradicted flatly by Decker, Vol. II, p. 713, when he said that Decker was introduced to him as Phillips' engineer when it is established by Decker that he was in Florida at the time Paulsen was said to have met him. His testimony was adversely commented upon by the trial Judge, Vol. XII, p. 5556. 10

PURCELL, whose animosity to Phillips is patent when he says he would not believe him under oath, Vol. I, p. 346, and whose cross-examination shows that his own memory is not to be relied upon. He either forget or swore falsely, Vol. I, p. 383 et seq. He also was the subject of adverse criticism by the trial Judge. Vol. XII, p. 5556.

It is strange that out of the host of witnesses called by Appellants none but these two could be found to testify to anything that might give colour to Appellant's claim. 20

GENERAL CONDITIONS AFFECTING CONSTRUCTION OF SEWERS

—A—

These sewers were built in Jamaica and Rockaway. In Jamaica and Rockaway the land was low and the difficulties of constructing a sewer were great 30

Bertram, a witness called by Appellants:
Vol. I, p. 270:

Q.—I take it from what you have told us of the construction of the Jamaica sewer, that the trench in which the sewer is constructed, or sewer pipe laid, must frequently be very near sea level, and sometimes below it?

A.—Well, that 150th Avenue job, that's the one you are talking about, was through what might be termed tidal flats, or nearly so; creeks, tidal flats came up and passed right over the sewer. It was completely under water. 40

Q.—But when you tell us that the contents of the sewer has to be pumped to a higher level, you mean that it has to be raised before it can flow out to sea?

A.—It has to be raised at least to sea level.

Q.—To sea level?

A.—In fact, it had to be raised higher than sea level.

Q.—How many feet did you have to raise it?

A.—If I can look at the plan, I will tell you exactly.

10 Q.—Oh, tell me roughly.

A.—The bottom of the thing was down about 35 feet below sea level.

Q.—You see, what I am trying to get at is that laying a sewer in this part of New York is wet work.

A.—In this part, this Jamaica section, that lower section, extremely wet work.

20 Q.—I am reading to you from the contract that has been produced, a letter dated Long Island City, June 8, 1926, addressed to the Hon. Charles W. Berry, Comptroller, Department of Finance, Municipal Building, New York. I think we said yesterday that the Board of Estimate and Apportionment was comprised of the five Borough Presidents, of the mayor of the Comptroller, and the President of the Board of Aldermen?

A.—That is correct.

30 Q.—And this letter is addressed to the Comptroller at that time, Mr. Charles W. Berry?

A.—Yes.

Q.—And it is written, purports to be written, by Maurice E. Connolly, President of the Borough of Queens, and he refers to contract 71, 761, and says “The work in connection with this contract was of a very difficult nature. Large quantities of water were encountered, and it was also necessary to take care of the existing sewers encountered during the prosecution of the work.”

40 Is it correct to say that the construction of this sewer on Hammels Boulevard was fraught with extraordinary difficulty or was nearly all of the construction work in the Jamaica district about that type?

Mr. Goudrault:—Just to clear up that matter, is this contract referring to the 150th Avenue sewer, or the Hammels Boulevard sewer?

Mr. Hackett.—Hammels Boulevard.

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Mr Goudrault:—I think that the witness,—I may be wrong,
—but he has been under the impression, not having been told
that it was the Hammels Boulevard, has been giving his ev-
idence as to the 150th Avenue sewer.

The witness:—I had the impression that it was 150th Avenue you
were talking about, because that is not the Jamaica district. It is in Rock-
away. 10

Q.—It is Rockaway?

A.—Yes.

Q.—You have told us, Mr. Bertram, that the Jamaica district was
exceedingly wet all the way?

A.—I specifically mentioned the 150th Avenue.

Q.—Now, I have read to you a communication from Mr. Connelly 20
to Mr. Berry, the Comptroller of the Department of Finance, with regard
to Hammels Boulevard, showing that it too was not, although it was si-
tuated in Rockaway and not in Jamaica?

A.—It was very wet.

Q.—Was all of Rockaway very wet, or only part of it?

A.—Well, you are talking about the contracts in Rockaway proper.
Far Rockaway is not wet. That is, there is high land there, the surface
rises 30 or 40 feet above sea level, and the sewers go down 10 or 12 feet. 30
Now, Rockaway, all the way between Beach 32nd and Beach 149th, is all
wet. The surface of the sewers is 3 or 4 feet above sea level at the most,
in that area.

Q.—And Jamaica was all wet?

A.—The upper end of Jamaica is not wet at all. Those portions,
150th Avenue and 150 Street and 158th Street, and other contracts I can
think of in the lower sections of Jamaica, were wet.

Q.—But I got the impression that a great deal of the work in Ja-
maica, which is under review here, was in low land and wet? 40

A.—Well it was low and wet.

Q.—So the description that Connelly gives to Mr. Perry of the
Hammels Boulevard job is to your knowledge accurate?

A.—Yes. The fact that we had to take care of old sewers, and that
it was really wet there, is true.

Creem, a witness called by Appellants, speaks of

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Linden Avenue
Fisk Avenue
Farmers Avenue

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10 *Vol. I, p. 362*, he said:

Q.—Will you say if the work which you did on 51st Avenue and Linden Street and the work which Duit Inc. did on Fisk Avenue and Farmer Avenue was difficult of performance?

A.—Yes.

Q.—Why was it difficult?

20 A.—In detail — on 51st Street, the sewer was at a depth of over
50 feet in places. That of itself, as an open cut, is counted very hazard-
ous. Also, there was water encountered throughout, which had to be tak-
en care of and which added to the danger. In passing on to Linden Avenue
— that provided for two lines of 8 foot pipe, which, as I remember it,
made the trench some 24 or 25 feet in width or practically from curb to
curb, and some 35 feet to 40 feet deep in places, and having trees along
the edge it is very difficult to handle the immense amount of material
that was encountered. In passing on to Fisk Avenue, — that was very
wet and it was a material that would run through the slightest opening
30 and the last one, Farmers Avenue, we struck water about 4 feet or 5 feet
below the surface and still we had to go down 30 odd feet and there was
a tremendous head of water, which, being in sand, my recollection is that
we pumped about 8,000 gallons a minute 24 hours a day, in order to con-
struct the sewer.

Decker, of Muccini and Decker, called by the Appellants, speaks
at *Vol. II, p. 680* of sewers constructed on:

40 Union Avenue
Grand Avenue
Queens Boulevard
Farmers Boulevard
Laurel Hill
Poke Avenue
Springfield Boulevard

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Hampstead Avenue	
Jamaica Avenue	
Prinkerhoff Avenue (two contracts)	
58th Street	
51st Street	
Munro Street	10
Winchester Boulevard	
Beach 32nd Street	
Rockaway Boulevard	
Detmars Avenue	
121st Street	
Decker Street	20
92nd Street	
25th Street	
24th Street	

and says, at *Vol. II, p. 710*:

Q.—That was wet ground, was it not?

A.—It was full of water. You hit water three or four feet from the surface. 30

Q.—And it was imperative that the sewers be made watertight?

A.—Yes, sir. Most of the contracts I did with the pipe I even waterproofed the joints myself, and I waterproofed the manholes and I waterproofed all risers, at my own expense.

Q.—Because you wanted to be sure—

A.—I did not want to take a chance. 40

William H. Hastings, President of H. J. Mullen Contracting Company, Inc., a witness called by Appellants, spoke of sewers constructed on Norwood Place
159th Street

At *Vol. I, p. 423* he said:

Q.—We are now discussing the job which H. J. Mullen Contracting Co. did on 158th Street and on Norwood Place. Will you state whether

the execution of this work was difficult or otherwise?

A.—The execution of the job on 158th Street was a very difficult piece of construction.

Q.—Why was it difficult?

10 A.—We had 12 feet of water which we had to get out of our trench before we could lay any pipe.

Q.—Was the trench a deep one?

A.—The trench ran from 18 to 20 feet, and about 2,000 feet of it was alongside the trolley track of the trolley that runs to Rockaway Beach or Far Rockaway, and there were houses on either side and we had to shore and be careful our pumps did not suck the sand from the foundations of the buildings. It was a treacherous piece of work.

20 Q.—And the soil, the strata through which you were making your cut, was not very stable, was it?

A.—It was quicksand; sand saturated with water made it of quicksand nature.

Q.—And you had difficulties due to the proximity of these other works, in assembling your materials?

A.—Yes, sir.

30 Q.—And incidentally there was difficulty in manufacturing this pipe alongside, I suppose?

A.—Well, I didn't manufacture the pipe.

Q.—But it is apparent that there was trouble.

A.—Yes, sir.

40 Angelo Paino, a witness called by the Appellants, speaks at *Vol. III p. 1089*: of

- Myrtle Avenue
- Maurice Avenue Vol. III, p. 1095
- Weiss Avenue “ “ p. 1099
- Jamaica Avenue “ “ p. 1102
- Waller Avenue
- Metropolitan Avenue Vol. III, p. 1103

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Farmer Boulevard	“	“	p. 1106
150th Street	“	“	“
124th Street	“	“	“
Sutphin Boulevard	“	“	“
Tuckerton Street	“	“	“
Hayes Avenue	“	“	“
Broadway	“	“	“
Poke Avenue	“	“	“

10

At *Vol. III*, p. 1124 he says:

Q.—All the work, Mr. Paino was carried out in the Borough of Queens?

A.—Yes, sir.

20

Q.—And the Borough of Queens offered great difficulty to a contractor doing excavation, did it not?

A.—Yes, sir.

Q.—It was extremely wet, and the soil was shifty, and a contractor had to take great precautions?

A.—Yes, sir.

Q.—And likewise the pipe which was used in the construction of sewers was submitted to all the strains and stresses of a shifting sub-soil, wasn't it?

30

A.—I think they had to use a special cement too, and use more strength on account of the soil and the water pressure through the Jamaica system sewer; we had to use extra force and extra cement.

Q.—Yes; and in some places the strains and stresses were greater than in other places?

A.—Oh, yes.

40

Q.—Which might account for a variance in the price of the pipe?

A.—Yes, sir.

Paul W. Paulsen, a witness called by Appellants, described very vividly the difficulties of constructing sewers in Queens. At *Vol. I*, p.

433 he speaks of the sewer on 150th Avenue, Section 2, and part of Section 1, and on Amstel Boulevard, and says at pp. 443, 474, 475:
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Q.—Was that sewer to be constructed in a wet section of the Borough of Queens?

10

A.—Yes.

Q.—To what extent?

A.—It was approximately 15 feet below tide level.

Q.—You know the topographical situation and the geographical situation of the Borough of Queens?

A.—Fairly well.

20

Q.—Was that considered a wet section?

A.—Yes, very. Water was about four feet below the surface.
Vol. I, p. 474:

Q.—Did you state if that section of the 150th Avenue job was a wet job?

A.—Yes.

30

Q.—How much so in comparison to other jobs that you know of in the same section?

A.—About the same as section 1. It was approximately 18 feet below mean tide level.

Q.—What system did you use in building the sewer for keeping the water out of the trench?

A.—We used the well point system.

40

Q.—What do you mean by the well point system?

A.—It is a system of well points, hooked up to manifold pipes in turn connected to centrifugal pumps. It is a method of de-watering the ground in sand or quicksand.

Vol. I, p. 475:

Q.—To keep your trench so you could get into it you had to pump from well points at intervals of from four to five feet?

A.—Three feet apart — the pumps.

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Q.—That is indicative of exceedingly wet ground, is it not?

A.—Oh, yes.

Attention is called to the photograph, Exhibit C-10 and C-11, showing pumps at work. (Vol XI, pp. 5111, 5112).

Carmine Petracca, another witness called by the Appellants, spoke of Farmers Boulevard, Vol. III, p. 1128. He said at p. 1146: 10

Q.—You have a good deal of experience in sewer construction, Mr. Petracca?

A.—Yes.

Q.—The territory in the Borough of Queens is a very difficult territory in which to place sewers, is it not?

A.—Yes, sir.

Q.—Why? 20

A.—Well, I got a job that I didn't expect to strike any rock and water, in Ridgewood.

Q.—Frequently, your excavation was below the level of the sea?

A.—Yes, some of them.

Q.—And the soil is shifty and has to be held in place by —

A.—Good construction. 30

Q.—And the shifting of the soil subjects the pipe to a great many stresses and strains?

A.—Positively yes.

Q.—It has to be very good pipe?

A.—Sure.

Q.—And I suppose that in some places the strains upon this pipe are greater than elsewhere? 40

A.—Well, generally it is, the ground that you strike.

Q.—So you have had to get pipe that was specially suited for that very difficult work?

A.—In some places, Yes. We had to have a special pipe.

Q.—Yes. And I suppose the manufacturer was responsible for it if it failed?

A.—They guaranteed the pipe to stand the test and the weight.

Clair D. Schlemmer, a witness called by Appellants, said at *Vol. III* p. 1037:

10 Q.—Mr. Schlemmer, this work represented by the several contracts which have been under discussion today, was very hazardous work from the point of view of the contractor, was it not?

A.—Very hazardous.

Q.—You were going through a territory which was, —

A.—Wet.

20 Q.—(continuing) difficult to handle. You had the pump, you had to retain, and you had to meet a great many unknown quantities?

A.—Yes.

Q.—And you had taken the work for a definite figure?

A.—Yes.

Q.—Which entails on the part of the contractor a big hazard?

A.—Very hazardous. *For three years we did not stop a pump.*

30 Earl L. Peterson, another witness called by Appellants, said at *Vol. II*, p. 967:

Q.—From witnesses who have preceded you, we have learned that the construction of sewers in the Borough of Queens was all wet and very difficult work; is that your idea of it?

A.—A lot of it was, yes.

Q.—And a lot of it was way below sea level?

40 A.—Yes. There were some jobs that were below sea level.

Q.—And a lot of soil that you had to sink your shafts through was silt, clay and shifting, and had to be held back by dikes and pumped out by well points and was fraught with many of the incidents that go to make for very difficult work?

A.—A lot of it, yes.

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Phillips took all the hazards, financially and physically, of supplying pipe for this exceedingly difficult work. Appellants'

See Appellant's witness Petracca, Vol. III, p. 1146, witnesses testify that he made a special pipe for Queens, far better than the specification required, with a richer mix and more steel quoted above. 10

Appellant's witness Paino, Vol. III, p. 1140 et seq. quoted above.

Appellants' witness Earl L. Peterson (to be distinguished from Appellant's other witness, Paul W. Paulsen).

Vol. II, p. 946:

Q.—So according to the best of your recollection it would also be in 1924 that it was changed to a higher mixture, was it? 20

A.—To a richer mixture.

Q.—What mixture?

A.—It was changed to approximately a 1-1-2 mixture.

Q.—And did you use that 1-1-2 mixture in manufacturing Lock Joint pipe in the Borough of Queens until you left Mr. Phillips in 1926?

A.—Yes. 30

Q.—Do you know of any change in the present pipe that was being used for the construction of sanitary sewers in Queens?

A.—We had one more change.

Q.—What was that, Mr. Peterson?

A.—And that was in the reinforcement.

Q.—Do you remember approximately the year in which that change took place? 40

A.—Well, that was approximately about the same time. Maybe a little bit later, maybe another two months or so, after the mixture was changed.

Q.—That would be also in 1924?

A.—I think so, yes.

By Mr. Hackett:—

Q.—You said that the change was in the reinforcement?

A.—Yes, sir.

Q.—You put in more steel?

10

A.—Yes, sir.

Q.—That would be a better pipe?

A.—Yes.

Mr. Goudrault:—

Q.—Were those changes in the specifications?

A.—In the Queens specifications?

20

Q.—Yes.

A.—No, they were not. As far as I know there were no changes in the specifications during the time that I was there.

Q.—Were those changes left to the discretion of the contractor?

A.—Of the actual sewer diggers?

Q.—Yes.

30

A.—No.

Q.—I mean not the sewer diggers, the contractors who would put in their pipe in those sanitary sewers?

40

A.—The question that came up in my mind was, their specifications called for watertight construction. And it seemed to me, from my experience in making pipe, that we had to make a little better concrete than what they were making. And the same was true about reinforcement. I had a very good reason for changing the reinforcement, and that was this: that their specifications, as I interpreted them, was they had no latitude whereby a man could make a certain product to a certain depth of trench with the result that there was a changed load. Well, I was afraid that sometime or other a pipe with a less degree of reinforcement would be used in a trench where the load would be too heavy for that pipe. So I thought the only solution was that I could think of in that was to increase that reinforcement.

Q.—And you did?

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A.—(continuing) To such an extent that I was sure that I would not have any trouble with a failure of that pipe.

By Mr. Hackett:—

Q.—So you made a much better pipe than was specified?

A.—So I made a better pipe than was asked for.

Vol. II, p. 949:

Q.—How did you go about to decide how much heavier wire you were going to use?

A.—I did it by, — in a way it was more of a guess of what future conditions would be than anything, and from past experience as to the amount of cover and the different localities in which you would know they were building sewers, why you calculate your steel from that, from those depths. For instance, when they were striking a depth of considerable size, you would know most likely three or four months ahead how deep that was going.

Q.—Was that precast pipe that you were building for Phillips from 1924 until some time in 1926, for one or two or several jobs in the Borough of Queens?

A.—For several jobs.

Q.—Were these jobs of a similar depth?

A.—No. Varying depths.

Q.—For one or more contractors?

A.—We had several contractors.

Q.—Did you do this stronger wire reinforcement for all the pipes when you so decided that a stronger wire reinforcement should be made?

A.—Yes.

Q.—What was the purpose of that?

A.—It was the purpose, — as an illustration, take a 36 inch pipe. If that pipe was going into some particular trench that was about 12 feet deep, it is most likely it would not have required more than the standard reinforcement.

By Mr. Hackett:—

Q.—But if you dropped to 30 feet?

10

30

40

A.—If she dropped to 30, or if she dropped to 24. —

Q.—She had an overburden that was apt to collapse?

A.—She had an overburden. And so as not to take this 36 inches and maybe have it delivered on a job where the trench was 24, I decided that it would be better to make a 24 so that wherever that pipe went I was sure that it would be all right.

10

— C —

ANY CONTRACTOR COULD MAKE THE SEWER PIPE SPECIFIED FOR THE BOROUGH OF QUEENS

Appellants here attempted to prove that the specifications called for the lock joint pipe which Phillips was manufacturing and no other. Appellant's witnesses make it clear that the specifications gave Phillips no such monopoly.

20

HARRY HART, Vol. II, p. 857:

Q.—This specification in Queens, used by the Borough of Queens, did not give your Company the core joint?

A.—The core joint people didn't make plain pipe — they only made the big reinforced pipe.

Q.—But this specification didn't favor your Company in particular did it?

30

A.—Certainly not.

Q.—It specified a new type of pipe that was common on the market

A.—Had been on the market for ten years.

Q.—Had been on the market for ten years?

A.—Yes, sir.

40

Q.—But it had not won its way into all municipalities, as you have told us?

A.—No sir.

Q.—In fact there were other boroughs of the City of New York in which it had not at that time been accepted?

A.—Only one, I think.

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Joint Q.—It was to your knowledge that another company, the Lock
Company had erected a plant in Queens?

A.—It was not to my knowledge.

Q.—It was not?

A.—No sir.

sale? Q.—Any company could make this pipe that you were offering for 10

A.—Dozens of them were making it.

Q.—Dozen of them were making it?

A.—Yes sir.

Q.—And today I suppose scores of them are making it.

A.—Yes sir. 20

Q.—In your relations as a pipe seller I believe you have told us that
you know that the specifications for these various pipes have to have the
approval of the engineering departments both of the City of New York
and of the Borough in which the work is to be done?

A.—Yes sir.

Q.—That is your knowledge?

A.—To my knowledge, it is, yes sir. 30

Mr. Goudrault:—

Q.—Mr. Hart, you stated a few minutes ago that the specifications
call for the cement concrete pipe to be put in —

As a matter of fact, did you instal a plant in the Borough of
Queens for the sale of 'cement pipe?

A.—Never seriously. 40

Q.—So the pipe continued to be made where it was before.

A.—Unless you had a half a million dollars worth of business you
couldn't afford to build a plant.

Q.—It was never built and the pipe continued to be made elsewhere?

A.—Yes, sir.

HIRSCH, Vol. II, p. 815:

Q.—You have made some reference to a conversation between Mr. Merriwhether, your president, and the engineer in chief of the Borough of Queens, concerning the use of your pipe, and it was your contention at that time that the only patented feature which might preclude it from use had been eliminated; is that correct?

10 A.—Eliminated from what?

Q.—From the specifications.

A.—For the Borough of Queens?

Q.—For the Borough of Queens.

A.—Yes.

20 Q.—Just make that clear, will you please?

A.—We presented to Mr. Rice our specifications for guidance. Our specifications, of course, described our pipe, and in describing our pipe naturally it had all of the features connected therewith, which included that part which was patented. Mr. Rice, as parts of the identical language of the two specification swill show, followed our specifications to a considerable extent. However, when we come to the question of joints —

Q.—Which was the only patented part of your pipe?

30 A.—Which was the only patented part of our pipe, that part of our specifications which did cover the patented feature was not included in Mr. Rice's specifications covering joints. And it was our contention at the time, and I have repeated it since, that the specifications which was drawn by the Borough of Queens did not call for a patented article, and that anyone who was willing to do so and who had the desire to do so could make a pipe to fully comply with those specifications, and I know of no one who could have legally stopped them.

40 Q.—We had a man here yesterday who said that he told Phillips that he intended to make pipe on Queens specifications and it resulted in a row between him and Phillips, according to his testimony.

A.—Of course, that is something I know nothing about.

Q.—Your specifiation, or a specification, the substance of which came from your company, had been used in other boroughs and in other municipalities since 1910, I am instructed?

A.—Our specifications have been used to a very considerable extent all over the United States and Canada. As a matter of fact, the extent of

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it is that the actual pipe is in 40 or more of the states of this country,
and in Canada, both before and since the patent had expired.

Q.—You exacted some financial assurance from Phillips when you
sold him large quantities of pipe?

A.—Well, we exacted the financial assurance of being paid if that
is what you mean.

10

Q.—Yes.

A.—Certainly.

Mr. Hackett:—That is all.

The witness;—There was no trouble at all about payments from Mr.
Phillips. Mr. Phillips paid very promptly.

Weaver, Vol II, p. 898:

Paino did manufacture precast pipe in Queens, Vol. III, p. 1100. 20

Q.—At certain times you built your own pipe, is that right?

A.—Yes, sir.

Q.—Do you remember for what contracts?

A.—Oh, many contracts, Queens Borough.

Paulsen intended to make some Vol. I, p. 493.

Welch bought some pipe from G. D. Raymond, Vol. II, p. 984. 30

Hart offered some of his pipe but could not afford to built a plant,
Vol. II, p. 859.

— D —

OTHER SUPPLIERS OF PIPE DID NOT SEEM WILLING
TO INCUR THE HAZARD OF SUPPLYING PIPE
FOR THIS DIFFICULT WORK

40

MacInnes, a witness called by Appellants, says: *Vol. II*, p. 637:

Q.—Now, did you get any other communication from any other pre-
cast sewer pipe people on that job?

A.—I did not.

Q.—Why not?

A.—I was unable to get anyone to give me a price.

Q.—Did you make any inquiries at the time?

A.—I believe we tried to get prices wherever we could for precast pipe at that time.

10 Q.—Do you remember, Mr. MacInnes, how many times that would be that you tried?

A.—No. As I remember it, we did not know — there were scarcely anyone who made that precast pipe.

Q.—Well, did you inquire?

A.—We tried to find somebody who would figure on it.

Q.—Companies?

20 A.—Yes, companies.

Q.—Do you remember how many?

A.—There was an independent company, I remember, that I tried to get. There could not have been more than two others that we had heard about, that we tried to get quotations from.

Q.—I see. Did they refuse to give you a price, quotations?

30 A.—As I remember it, yes, they did not want to figure.

Q.—Were there any reasons given?

A.—They did not give me any reasons.

PAUL W. PAULSEN Vol. I, p. 479.

Q.—Don't speak of others — you, personally.

40 A.—On that particular job 150th street we tried to get prices from other manufacturers. We did not succeed in getting a price from any other at that time.

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The uncertainties and the hazards of sewer construction in Queens were increased by the fact that the growth of Queens had been so rapid that the topographical maps and plans for sewer construction had not been completed.

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Bertram stated candidly, at Vol. I, p. 252 of his examination :

Q.—Is it correct to say that the construction came upon you with such a rush, and the urgency for immediate sewer service was so great, that in all instances the topographical maps and preliminary surveys were not complete?

A.—Well studies were made of the area a considerable time before we began to build any sewers. And when we got down to the production of these maps, we were handicapped by the lack of topographical maps; that is complete maps. 10

Evidence of difficulty and unexpected embarrassment is found in the record of the engineering department of the Board of Estimate and Apportionment over the signature of Arthur S. Tuttle, Chief Engineer of the City, i. e., the Appellants in this case. See the report of June 10th, 1926. Vol. XI, p. 5500. It is stated with reference to contracts which form the subject matter of this litigation :

“In the construction of the outlet sections of this sewer large volumes of ground water were encountered and, on the basis of the conditions there disclosed, the bids for the continuing upstream sections have been based on the assumption that similar conditions would here obtain with the result that the cost of the project has been very substantially increased as compared with the original estimates.” 20

On June 9th of the same year the same official reported as follows : (Vol. XI, p. 5473). 30

“The project as originally presented, was advanced by the Local Board on the ground of public necessity at the request of the Commissioner of Public Works and is unusually important in its character of a trunk sewer serving an area of upwards of 2800 acres, in which more than 4,000 building have been erected. In portions of this area serious flooding occurs during periods of storm, and although the sewer will ultimately constitute the sanitary element of a separate system of sewers, it will be used for the present for the removal of a limited amount of stormwater in addition to the house drainage. On May 13th, in view of the urgency of the project as a whole, preliminary authorization was given for the construction of the upstream section of this trunk because it was deemed that the Board would soon be in a position to authorize the construction of the link now under consideration, the unusual drainage condition obtaining in the tributary area has been called to the attention of the Board by 40

the Chairman of the 202nd Street Civic Association of Hallis (Referred to the Committee March 18, 1926—Cal. No. 166.)

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10 The Borough President states that the time to be allowed for the completion of the improvement is 150 days, and that no expense has been incurred for the preliminary work that is chargeable against the Street Improvement Fund.

.....

20 In the construction of the outlet sections of this sewer large volumes of ground water were encountered and, on the basis of the conditions there disclosed, the bids for the continuing upstream sections have been based on the assumption had similar conditions would here obtain, with the result that the cost of the project has been very substantially increased as compared with the original estimates.

30 It is the belief of your Engineer that the volume of ground water to be encountered in the section now under consideration should be very such less than in the sections where improvements have already been carried out, and, in order that prospective bidders may be given as much information as practicable upon which to base a reasonable bid, I would still further recommend that the Borough President be requested to open test pits along the line of the proposed sewer before advertising the contract, in order that the elevation of the water table may be fully disclosed, and to make this information available to all of the bidders." and again on June 10th he reported:

40 "Although the analysis of the cost of the present project did not reveal the likelihood of a deficit in so far as this particular link is concerned, the Board of Assessors was requested at the time when preliminary authorization would be deferred until the outlet sewer in the adjoining section of 109 Avenue and Brinkerhoof Avenue had been provided for. A favorable report concerning the Borough President's request for the authorization of the construction of the outlet has been prepared for the consideration of your Committee and, contingent upon final authorization being granted, I would recommend that final authorization of the tributary now under consideration be also accorded.

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In the construction of the outlet sections of this sewer large volumes of ground water were encountered and, on the basis of the conditions there disclosed, the bids for the continuing upstream sections have been based on the assumption that similar conditions would here obtain with the result that the cost of the project has been very substantially increased as compared with the original estimates.

10

It is the belief of your Engineer that the volume of ground water to be encountered in the sections now under consideration should be very much less than in the sections where improvements have already been carried out, and, in order that prospective bidders may be given as much information as practicable upon which to base a reasonable bid, I would also recommend that the Borough President be requested to open test pits along the line of the proposed sewer, before advertising the contract, in order that the elevation of the water table may be fully disclosed, and to make this information available to all of the bidders."

20

The evidence seems to make it clear that great works were hurriedly undertaken with inadequate information and great hazards to all concerned. Few were willing to assume these hazards. Phillips erected plants for the construction of precast pipe and made a pipe far better than the specification called for, and undoubtedly got a good price in return for his initiative foresight and courage.

30

It is to be recalled that all these transactions were carefully scrutinized by officials of the Borough and of the City, the Present Appellants, by engineers, overseers, legal officers, auditors and sundry others. It is unthinkable, if not impossible, that Phillips, Connolly and an underling in the engineering department of the Borough should have been able during ten years to have succeeded in levying toll upon the City of New York, guarded as it was on all sides. If there was a conspiracy it must have included many more and higher officials than Seeley and Connolly, and there is no proof of any such conspiracy.

40

Again let it be reiterated, conceding all that Appellants contend, they have not proved, or attempted to prove, that the People of the State of New York suffered any loss or damage. The only persons who may have suffered, if all the proof were made, are the contractors, and they are not claiming.

THE TRANSFER OF CONTRACTS

The occasional transfer of a contract from one contractor to another

was offered as proof of conspiracy. So customary is this type of transaction that on the form provided by the City is a transfer form. All of Appellants' witnesses testified that transfers of contracts are customary and frequently made. Not one has denied the propriety and universality of this practice.

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BERTRAM, Vol. I, p. 280:

10 Q.—Now, Mr. Bertram, a question was raised yesterday regarding the transfer of these various contracts. Mention was made of certain of the contracts being transferred. I suppose in every case the Borough of Queens was not interested in the transfer if they had proper bonding security?

A.—I know before a transfer was made the specifications required that it had the approval of the Borough President.

20 Q.—Have the approval of the Borough President. If you had the approval of the Borough President, and proper bonds from the bonding company to guarantee the performance of the agreement, you would not object to the transfer?

A.—You mean he wouldn't, the President?

Q.—Is it not true that those transfers were granted as a matter of course, provided the proper formalities were applied?

30 A.—I know a number of the contracts were transferred. One bidder would get the job and some other contractor would do the work. I know where one fellow bid and the other fellow did the work, yes; not once, but a number of times.

CREEM, Vol. I, p. 364:

Q.—You have known of men buying contracts before? There are excellent reasons for paying for contracts, are they not?

A.—Oh, yes.

40 Q.—At the time you purchased this contract, had you any reason to keep an organization together?

A.—Yes, I had a reason. I had sons coming along and I wanted to keep in the harness until I saw whether their minds led in that direction.

Q.—What I want to get at is this—does it sometimes happen that a man can, to advantage to himself, take a job even though the profit be not big if it is going to enable him to keep his organization together and keep working?

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A.—The plant is the big item there You might better have it working, and it will last longer.

Q.—Had you a plant available for this work?

A.—Yes.

Q.—And did that place you in a more favourable position to execute it than a man who might not have the plant? 10

A.—Yes.

CONSPIRACY.

Appellants' case rests upon an alleged conspiracy and to establish their case they must have proved an agreement between Connolly, Seeley and Phillips upon a common design. The evidence introduced by Appellants does not once bring these three alleged conspirators together and only one witness Paulsen brings Seeley and Phillips together in circumstances in any way extraordinary. Paulsen was an admitted corrupter and briber and was denied on material points by other witnesses introduced by Appellants themselves (Decker, Vol. II, pages 713, 717.) Moreover, as has been remarked above, the trial judge specifically set aside his evidence as subject to great doubt. 20

Having failed to bring the alleged conspirators together Appellants have relied upon certain isolated facts or circumstances and have attempted to weave these facts or circumstances into a definite pattern. In doing so, however, they have resorted not to legal modes of proof, but to unwarranted and at times fantastic speculation. 30

The facts upon which Appellants appear to have largely based their speculation are as follows:

1. THE PREPARATION BY SEELEY OF A WATER PROOF MEMBRANE FOR INTRODUCTION INTO THE SPECIFICATIONS FOR MONOLITHIC TYPE SEWERS.

2. THE INTRODUCTION BY SEELEY INTO THE SPECIFICATIONS FOR THE MONOLITHIC TYPE SEWERS OR REQUIREMENTS FOR CURING OF THE CONCRETE. 40

3. THE INTRODUCTION BY SEELEY INTO THE SPECIFICATIONS FOR PRECAST PIPE OF REQUIREMENTS FOR TROWELLING THE INVERT.

4. THE PRESENT OF SOME OF PHILLIPS' EMPLOYEES AS WITNESSES OF ASSIGNMENT OF VARIOUS CONTRACTS.

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10 It is difficult to see why from the evidence in the record Seeley should be blamed for this. He had many superior officers (Zorn, Vol. III, p. 1156, Bertram, Vol. I, p. 171).

Perrine, his immediate superior officer approved of the membrane. His signature is affixed to Exhibit C. 3, Vol. VIII, p. 3999.

Nobody has testified that the membrane did not have the approval of the entire engineering corps. Moreover Appellants did not call Seeley.

20 How the instructions were given is subject to difference of opinion amongst Appellants' witnesses. Bertram says he got typewritten inscriptions from Seeley as to the preparation of the membrane, but he could not produce the memorandum. (Vol. I, p. 206 to p. 208).

Sommerfelt says *he* got the instructions direct from Seeley in the form of a "scribbled" sketch (Vol. I, p. 230).

Which of these witnesses was right?

30 Bertram said he would not have made such a radical change without instructions from his superior officer (Vol. I, p. 167): "I would consult with my superior officer before I made any radical changes".

The force of Appellants' argument regarding the water proofing membrane is supposed to be drawn from the fact that the addition of this specification added so much to the cost of the monolithic type of sewers that contractors were obliged to use precast pipe manufactured by Phillips. (Par. 14, Vol. I, p. 5).

40 In the first place the proof does not show that Seeley, any more than anyone of his superior officers, finally approved this specification and was the one responsible for its introduction in the specification.

In the second place it is interesting to note, as was shown above, that the monolithic type of sewers had long been falling out of favour. The water proofing membrane was not inserted until the year 1924. Between April 1917 and December 1924 no less than 105 contracts had been

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entered into in Queens Borough, all of type B or precast pipe construction, Exhibit C1. During the same period only 14 contracts called for the monolithic type of sewers.

It is unfair to suggest that the insertion of the specification for water proofing membrane resulted in the exclusion of the monolithic type of sewers when the facts establish that other and independent factors had already begun to operate in that direction.

10

It is submitted that even if Seeley was responsible for the introduction of this water proofing membrane into the specifications, there is not proof that it was fraudulent; moreover that is no proof whatsoever of the participation of John M. Phillips in the alleged conspiracy.

Strangely enough Appellants have made no evidence that the water proofing membrane, said to have been originated by Seeley, has been abandoned or deleted from the specifications. (See Decker, Vol. II, p. 711, regarding the efficiency of the membrane).

20

II

THE INTRODUCTION BY SEELEY INTO THE SPECIFICATIONS FOR THE MONOLITHIC TYPE SEWERS OF REQUIREMENTS FOR CURING OF THE CONCRETE.

This charge is covered by the allegation of paragraph 19 of the declaration. The requirement was that the arch forms used in the construction of monolithic type of sewers should be kept in place twenty-one days. The object of this delay was to cure the cement. It should be noted that the delay required for the curing of precast pipe was from twenty-one to twenty-eight days (Bertram, Vol. I, p. 266). There is no reason whatsoever why the monolithic type of construction should not require as long a period for curing as the precast pipe, and the record does not indicate any reason for making such a distinction between these two types of concrete.

30

III

THE INTRODUCTION BY SEELEY INTO THE SPECIFICATIONS FOR PRECAST PIPE OF REQUIREMENTS FOR TROWELING THE INVERT.

This charge is covered by the allegations of paragraph 18 of the declaration and the suggestion is that this specification incorporated the

40

use of a patented article. As was shown above at p. 22 of this factum. Seeley had nothing to do with the introduction of this specification. The chief engineer Rice saw Hirsch of the Lock Joint Pipe Company, and it was these two who discussed the merits of this pipe and these specifications (Vol. II, p. 799 et seq.). The evidence is clear that the specifications did not include any of the patented part of the pipe. Hirsch testified to this fact. It is abundantly clear when reference is made to the testimony of Paino who stated that he made pipe in Queens according to these specifications, and to the evidence of the other witnesses including Paulsen, who would have been prepared to do so if the occasion had arisen, or if the circumstances had justified it.

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As Hirsch said: "Anyone could build the pipe". Mr. Hirsch was Appellants' own witness.

Moreover all specifications had to be submitted to Corporation Counsel for his approval, Bertram, p. 258.

IV

THE PRESENCE OF SOME OF PHILLIPS' EMPLOYEES AS WITNESSES OF ASSIGNMENTS OF VARIOUS CONTRACTS.

The Borough Hall was a place where contractors congregated and was therefore an excellent place for suppliers of material like Phillips to meet their customers. (Bertram Vol. I, p. 263; Matthews Vol. II, p. 623; Kraus Vol. I, p 440) There is no reason, in the face of this evidence to insinuate that the presence of Phillips at the City Hall was inspired by sinister motives.

As a supplier of materials Phillips was well known to all the contractors. Many of them were illiterate, without business offices, or organisation. Phillips was prepared to perform all manner of services for his customers actual and prospective. He was a politician. He had no education himself and surrounded himself with several men who appear to have taken complete charge of the details of his affairs.

The assignment of contracts was a quite usual proceeding. So usual that on the printed form of contract used by the City there was an "assignment form". There were any number of reasons why a contractor might be prepared to enter a transaction of this kind. The record is full of such reasons. Schlemmer said: "I had to get a job or let my organisation go." (Vol. III, p. 1038).

Creem said: "It pays to take a small profit job to keep organisa-

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tion together". (Vol. I, p. 364). And to the same effect Petracca, Vol. III p. 1146; Decker, Vol. II, p. 716; Bertram Vol. I, p. 281.

There was nothing unusual or unnatural in Phillips, the pipe salesman, the adviser and sometimes the financial backer performing such services for his customers

None of the Appellants' alleged acts of conspiracy have been proved if they are examined in the light of what is contained in the record. Phillips was a vigorous salesman and undoubtedly succeeded in selling much pipe to many contractors who needed his practical and financial assistance. Proof of this fact is for from establishing a criminal and fraudulent conspiracy with others to mulct the City of New York in the manner suggested by Appellants. 10

DAMAGE

Appellants have failed completely to establish a measure of damages. They have attempted to prove that Phillips charged unreasonable prices for his pipe and that in conspiracy with Connolly and Seeley prevented any other than favoured contractors from bidding with the alleged results that the City of New York paid more for its sewers than it should have. 20

The evidence has been discussed at length above. It does not disclose any conspiracy whatsoever.

Moreover it does not disclose that Phillips charged an unreasonable price for his pipe. Phillips made a much better pipe than the other manufacturers, containing a higher content of cement and more reinforcement, especially to meet the tremendously difficult conditions under which the pipe was to be used. He was responsible for the pipe. There is a singular unanimity amongst all Appellants' own witnesses upon the conditions existing in the Borough of Queens — the necessity of pumping, the necessity of excavation to great depths and shoring, the necessity of providing for great stresses and strains, etc. Other companies manufacturing the same product as Phillips were unwilling to incur the hazards involved in supplying pipe for this work, and the contractors although free to build their own pipe also preferred not to assume the risk. 30 40

Finally there is no evidence that the City suffered damage. It is not proved that the City paid too much for its sewers. On the contrary it is established by a report of the Chief Engineer of the Board of Estimate and Apportionment of the City of New York for the year 1926 that the actual cost of sewers built in Queens for the year 1902 to 1925 was

98.8% of the estimated cost; and that the cost of sewers built for the year 1926 was over \$300,000. less than the estimated cost. No more satisfactory refutation of Appellants' claim could be found.

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et al., es-qual,
for the Heirs

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10 The contractors' bids provided for so much finished sewer including excavation under the difficult circumstances referred to by all the witnesses, pumping, backfilling, pipe, etc. It is impossible to support appellants' contention that the price of pipe alone affected the price of a completed sewers. The other serious factors referred to must be taken into consideration. It does not follow that even if the contractors paid high prices for pipe that the City paid high prices for its sewers.

It is submitted therefore, that no conspiracy has been proved; that the price of Phillips' pipe was reasonable in the circumstances; and that in any event Appellants have failed to establish any damages.

20 *Ownership of money seized and Appellants' right to a Writ of attachment.*

30 The Respondents here pleading have contended that the monies seized were the property of Francis Phillips, the son of John M. Phillips. The other Respondents have contended that the monies were the property of John M. Phillips. Respondents have objected and hereby reiterate their objections to the judgments of the trial judge maintaining objections to the testimony of certain of the witnesses tending to establish the ownership of Francis Phillips. This controversy is largely raised in another suit. However, even if the Appellant are held entitled to judgment against the Estate of John M. Phillips, it is submitted that the monies in question did not belong to him at the time of his death, and that the appeal should be dismissed as against the Respondents severing in their defence.

CONCLUSIONS

In conclusion Respondents submit:

40 1. That Appellants have failed to establish any agreement or fraudulent conspiracy between Phillips, Seeley and Connolly or any others relating to the price of precast pipe in the Borough of Queens or otherwise.

2. That the trial judge was right in discounting the evidence of Appellants' witnesses and especially the evidence of the witnesses Purcell Weaver, Sigretto & Paulsen.

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3. That Appellants have not shown that the People of the State of New York have suffered any damage.

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4. That the monies seized in this action were the property of Francis Phillips to which Respondents severing in their defence are entitled.

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WHEREFORE Respondents pray that the appeal be dismissed 10
with costs.

The whole respectfully submitted.

Montreal, the 15th of March, 1938.

Hackett, Mulvena, Foster, Hackett & Hannen,
Attorneys for Respondents,

Crown Trust Company et al es qual. 20
for the Heirs of the late Francis Phillips.

30

40

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10 This is an appeal from a judgment of the Superior Court (Honourable Mr. Justice Mercier) rendered on the 23rd day of November, 1934. By the said judgment the action of the Appellants, The People of the State of New York, purporting to exercise the alleged rights of the City of New York, was dismissed with costs in favour of the Respondents.

I

INTRODUCTION

20 By their action, The People of the State of New York, suing the Heirs of the late John M. Phillips collectively under the provisions of Article 135 of the Code of Civil Procedure, ask for judgment in the sum of \$3,405,449.02. The action was instituted on or about the 9th of July, 1928, by means of a conservatory attachment under which the sum of \$312,000 in United States currency was seized in the hands of Montreal Safe Deposit Company. These monies, by agreement, were handed to and are still held by the Tiers-Saisie, The Royal Trust Company, pending the result of the present litigation.

30 Neither The People of the State of New York, nor the City of New York, had at any time any direct relations with the deceased Phillips and this peculiar action is therefore based, not upon any contractual relationship which exists or had existed between the Appellants and the Respondents, but upon the allegation that the latter are responsible in damages owing to the fact that Phillips, from whom they inherited, had, prior to his death, conspired with one, Connolly, then President of the Borough of Queens, and with a man named Seeley, the Assistant Engineer and a junior employee of the Borough, to cheat and defraud the City of
40 New York. Briefly, it is alleged that these three men, Connolly, Seeley and the deceased Phillips, conspired together so as to enable the latter to sell precast pipe for sewer purposes to various contractors at exorbitant prices, the result being that the City of New York had paid to such contractors in excess of the fair and market price the sum now claimed from the Phillips heirs. The general charge in reference to this conspiracy is set out in paragraph 9 of the Appellants' Declaration in the following words:—

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“9. That in or about the month of January, 1917, and continuing down to and including the second day of April, 1928, at the Borough of Queens, County of Queens, in the City of New York, the said John M. Phillips, Maurice E. Connolly and Frederick C. Seeley, did unlawfully, wilfully, knowingly and corruptly, conspire, combine, confederate and agree together with each other, and with divers other persons, to Plaintiffs unknown, to cheat and defraud the City of New York out of property, and did cause the City of New York, through its duly constituted officers, to pay large sums of money for work done and material and equipment supplied to construct pipe sewers in the said Borough of Queens, in excess of the fair, reasonable and proper cost thereof, in the manner and by means hereinafter set forth.” 10)

Minute details of the alleged conspiracy are given (See paragraphs 10 to 19 of the Appellants' Declaration). These may be summarized as follows:— 20)

(1) The specifications were so prepared that as an alternative to the use of monolithic type of sewer, precast pipe could be used.

(2) Connolly, in pursuance of this conspiracy, would reject all bids of contractors unfavourable to Phillips and would award contracts to other contractors friendly to Phillips, at excessive and exorbitant prices.

(3) On the 8th of December, 1924, a requirement was inserted in the specifications for the monolithic type of constructions, providing for a waterproofing membrane in the invert of the pipe and in the manholes and chambers connected with the monolithic sewer, thereby preventing bidders bidding on the monolithic type against the precast type of sewer. 30)

(4) All of which enabled Phillips fraudulently to sell his Company's pipe to the contractors at excessive prices, thereby securing for himself monies rightfully belonging to the City of New York in the amounts claimed. 40)

It may be noted that the contractors are not made parties to this suit; nor is it suggested that the City of New York has paid out one single dollar in excess of its obligations, assumed under contracts regularly entered into, still subsisting and the binding force of which is not questioned and which could not be questioned in this suit.

By their Plea (Vol. I, p. 50) the Respondents admitted that the monies seized were the property of the late John M. Phillips and denied the remaining allegations of the Declaration as to the merits of the Appellants' claims. The Respondents then made certain affirmative allegations which are herewith reproduced for the convenience of the Court as they set forth quite briefly the true position of the matter and the contention of the Respondents with respect thereto:—

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10 “(12) That the period referred to in Plaintiffs' action was a period of experiment during which many new and improved methods and materials in the construction of sewers were introduced in the Borough of Queens, the whole in an endeavour to meet the demand for sewer requirements then existing in the said Borough;

20 (13) That the construction of sewers in the Borough of Queens was exceedingly difficult and hazardous to a supplier of pipe because of the wet and shifting nature of the soil, the great depth beneath the surface of the ground and the level of the sea at which the pipes were laid and the consequent stress and strain to which they were exposed as well as the necessity that they be absolutely watertight;

(14) That during part of the period referred to in Plaintiffs' action the deceased, John M. Phillips, was interested in the sale and/or manufacture of reinforced concrete pipe which he sold and supplied to various contractors who entered into contracts of purchase therefor with him;

30 (15) That any such reinforced concrete pipe sold or manufactured by said Phillips and used in the Borough of Queens during the period aforesaid was of better quality, higher cost and better adapted to the requirements and peculiarities of sewer construction in the said Borough than any other available;

40 (16) That any sales of reinforced concrete pipe made as aforesaid between Phillips and various sewer-builders having contracts in the Borough of Queens were entirely a matter of contract and agreement between the said Phillips and any such contractors respectively as vendor and purchaser were freely entered into by both parties neither of whom was bound to contract with the other and all such contracts are in any event, matters foreign and irrelevant to any issues existing between Plaintiffs and the said Defendants, and Plaintiffs are not legally entitled to invoke or in any way discuss any such contracts of sale in the present action;

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(17) That any plans and specifications for the construction of sewers in the Borough of Queens, or for materials to be used therein were prepared by competent engineers, in accordance with the best principles of the engineering art, with the approval of the governing bodies of the Borough of Queens as well as of the City of New York, which bodies were constantly entitled to and did supervise and review the discretionary acts of any minor Borough official and employee in any way connected therewith; and the construction work was likewise carried out under the supervision of the said engineers and governing bodies; and especially were the plans and specifications concerning the making and use of reinforced concrete pipe right and power and such specifications could have been complied with by any manufacturer of pipe or contracting sewer-builder who desired to manufacture in conformity therewith; 10

(18) That the cost of the manufacture of any such pipe to and/or the price paid therefor by, any contractor using the same for the purpose of constructing sewers in the said Borough of Queens was altogether a matter of indifference to the authorities of the said Borough and the City of New York, who required no information as to such costs and prices and who were interested only in the price of the completed sewer and not in the costs of and the amounts paid by contractors for the various ingredients, materials and elements such as labour and other kindred factors which entered into the construction of any given sewer; and such costs and prices could not be determined from the bid or estimate submitted by the contractors, the form of which bid or estimate was duly and legally prepared with the consent and knowledge of the properly constituted executive authorities of the Borough of Queens and of the City of New York with the aid of efficient technical and legal advisers; 20 30

(19) That no right of action exists in favour of the Plaintiffs entitling them to advance the present claim or any portion thereof and the plaintiffs' action is unfounded both in law and in fact and should be dismissed." 40

It should here be mentioned that in 1907 the population of Queens County—now known as the Borough of Queens—consisted of approximately 200,000 souls (Vol. I, p. 251). This population increased with the most extraordinary rapidity. At the date of the examination of the witnesses in New York, in 1931, evidence was given to the effect that this population had, in the short space of ten years, increased to over 1,000,000

10 people. This increase naturally involved the rapid building of sewers for sanitary and other purposes and apparently between the month of September, 1907, and the month of November, 1927, no less than 347 contracts for the constructions of sewers had been entered into in the district in question, these sewers involving a cost to the Borough of \$41,869,769.74, this involving for the entire period of over twenty years payments in excess of the Engineers' estimates amounting to \$4,102,159.47 (Vol. I, p. 276 et seq.). It may here be pointed out that while in some cases the estimates of the Engineers would be increased, in others the cost of the work would be less than these estimates (See Exhibits C1, Vol. III, p. 1442 et seq. and Bertram, Vol. I, p. 315.). Prior to the Collins Avenue and Hull Avenue sewers—contracts for which were signed in April, 1917—(Exhibit C-1, Nos. 132 and 133; Vol. III, p. 1445)—all sewers in the Borough of Queens were—generally speaking—monolithic in character. After the date mentioned, however, the sewers were largely what is known as precast sewers, though an examination of the Exhibit C-1 will show that from time to time the monolithic type was also used.

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The difference between the monolithic and precast types is simple. The former was actually built or laid in the excavation itself. The latter, or precast type, was built in sections outside of the excavation in which it was to be used and lowered, when required, into this excavation and then cemented together. A graphic idea of the method whereby a sewer of precast pipe is constructed can be obtained by reference to Exhibits C-40 and C-41 (Vol. XI, p. 5111 and p. 5112). It is obvious that the precast pipe—again generally speaking—was the better type, and this form of construction rapidly superseded the type known as monolithic. One of the witnesses, Creem, explains the matter very clearly (Vol. I, p. 362). He illustrates by a reference to the 51st Street sewer. This was laid in places at a depth of over fifty feet; the work was very hazardous; water was encountered throughout, which had to be taken care of, and added to the danger, etc., etc., and he concludes at page 363 as follows: —

30

“Q. Would it have been, in your view, well to have built a monolithic sewer in the conditions which you have described?

40

A. Speaking in particular about the last job first—I had built in about 1910 a monolithic sewer in somewhat similar conditions to those that existed there and it convinced me that personally I would feel I was crazy if I ever attempted to build another under those conditions.”

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II

HISTORY OF THE CASE

The pretensions of the Appellants are fully set out in the Declaration, which consists of thirty-three printed pages (Vol. I, p. 2 to p. 34) and contains no less than forty-three paragraphs and many sub-paragraphs. It was served on the 11th of January, 1929, over six months after the attachment of the monies in Montreal. 10

The Respondents filed, by consent, a General Daniel, replacing it by a Special Plea which was filed on the 20th of November, 1929. This Plea was later replaced, on the 10th of December, 1932, by a Further Amended Plea.

Of the 11th of December, 1929, one Francis Phillips, a minor and represented by The Crown Trust Company, filed a separate defence, denying the right of the Appellants to the relief claimed, but alleging ownership in the monies under attachment in Montreal. 20

The Respondents were not made parties to these proceedings on behalf of Francis Phillips, but both the undersigned, as representing the Respondents in the case, and the representatives of Francis Phillips, who had in the meantime died, attended in New York on the examination of the witnesses called and examined by the Appellants under a Rogatory Commission. This examination began before Mr. De Coursey Fales on the 19th of January, 1931, and continued until the 11th of February, 1931. It was later continued in New York on the 14th of September, 1931, and concluded in New York on the 18th of September, 1931, forty-four witnesses having been examined on behalf of the Appellants. The evidence so taken in New York was very extensive. It appears in the Joint Case beginning at p. 82 of Volume I and continuing to p. 1179 in Vol. III. The Appellants also saw fit to produce some two hundred and forty-six (246) exhibits which were returned with the Rogatory Commission. At the hearing in Montreal the Appellants filed nineteen additional exhibits and examined six additional witnesses. 30

As will later be pointed out, the greater portion of this mass of testimony and evidence has proved quite irrelevant to the issues as finally submitted by Appellants. The Respondents in New York produced, through the witness Cassidy, photostats of seven Cashier's cheques (Exhibits Nos. D.P. 1 to D.P. 7) and in Montreal also produced twelve exhibits (Nos. D-1 to D-12), examining only six witnesses. The defences of the Respondents were fully established upon cross-examination of the Appel- 40

lants' own witnesses and by reason of the admissions of record herein (Vol. XII, p. 5558, et seq.).

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III THE JUDGMENT

10 On the 23rd of November, 1934, Judgment was rendered dismissing the action of the Appellants. The learned Trial Judge, the Honourable Mr. Justice Wilfrid Mercier, maintained the pleas of the Respondents; and all the conclusions prayed for by the Appellants' action, including those as to the seizure before Judgment which the Appellants had effected herein, were refused and dismissed. The Judgment appears in Vol. XII, at p. 5510 and following.

20 It may be well here to note that, in the recital of the pleadings as therein contained, the "*plaidoyer amendé*" of the Respondents "Heirs of John M. Phillips" (Vol. XII, p. 5542) is not that upon which the issues were finally decided. There was a "Further Amended Plea" which is set out in Vol. I, at p. 50 et seq.

The Trial Judge found, *inter alia*, that:—

30 1. The Appellants' action was based exclusively upon a pretended criminal conspiracy between the late John M. Phillips, and two alleged friends and co-conspirators, Maurice E. Connolly and Frederick Seeley, against the City of New York in the period from 1917 to 1927 (Vol. XII, p. 5551, line 15 et seq.).

40 2. The entire burden of proof as to the allegations of the Appellants' action rested upon them; and the action had to be determined only upon the evidence of record herein, without to findings made in another court at another time on another matter (Vol. XII, p. 5552, line 18 et seq.) affecting only Connolly and Seeley. Phillips was not concerned therewith (p. 5556, line 24 et seq.) as he died prior to the hearing in the matter referred to (p. 5549, line 11 et seq.).

3. To constitute a criminal conspiracy productive of any recourse by way of an action in damages there must be an agreement between two or more persons to undertake together to do an illegal act (p. 5553, line 10 et seq.); and the crime and the offence must be clearly established before the right to an indemnity accrues (p. 5555, line 4 et seq.).

4. The record is devoid of the elements necessary to declare that the alleged conspiracy was established; on the contrary, the Appellants

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have failed entirely to establish the fraudulent and harmful conspiracy which they had charged (p. 5555, line 29 et seq).

5. The Court was entitled to conjecture as to the reason why no attempt had been made by the Appellants to obtain the evidence of Connolly and Seeley who were available witnesses (p. 5554, line 43 et seq.).

6. The evidence of four of the Appellants' witnesses, Paulsen, Purcell, Weaver and Sigretto, should be received with considerable reserve, their credibility being highly suspect (p. 5556, line 5 et seq.). 10

7. Without positive proof of the existence of a fraudulent conspiracy the sole isolated fact that John M. Phillips may have sold precast pipe at high prices to a number of contractors who were carrying out the contracts referred to, does not establish or prove the offence or conspiracy which was charged against him.

Having decided to dismiss the Appellants' action the Trial Judge made no finding concerning the amount of the damages claimed. 20

Throughout the lengthy hearings, when the Appellants' evidence was being taken by Rogatory Commission the Respondent made frequent and repeated objections as to the nature and legality thereof. As the Trial Judge did not expressly adjudicate upon the said objections the Respondents consider it advisable that they should be renewed. The Respondents hereby declare that they renew the said objections and that they proceed under express reserve of each and all of them with the request that they be maintained and that the evidence of the Appellants in connection with which they were made be rejected. 30

IV . ARGUMENT

On behalf of the Respondents, the Heirs of the late John M. Phillips, we submit that the judgment appealed from is correct and should be confirmed because:— 40

(a) The conspiracy upon which the Appellants' entire case is founded has not been proved;

(b) The conduct of Connolly and of Seeley was in no way improper; and even if it had been, the late John M. Phillips—and in the instant case, his heirs—could be charged with no responsibility in connection therewith;

(c) The contracts for the sale and purchase of precast concrete pipe and its manufacture were matters between the late John M. Phillips and certain individual contractors and they were at all material times thoroughly right and proper. The cost of materials and labour to the contractors who undertook to construct the sewers and furnished surety bonds to guarantee the work and its completion, was not a matter of enquiry on the part of the City of New York which was only interested in the price per completed foot of sewer.

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(d) There is no proof that the cost of the sewers was excessive or improper; and especially is there no evidence whatsoever that the City of New York suffered any loss which the Appellants are entitled to claim from the Respondents. There was, in fact, no loss incurred;

(e) Any monies paid by the City of New York to the contractors were merely those owing under the proper legal obligations of the said City as evidenced in valid contracts duly assumed and formally executed, the binding force of which has not been and is not now questioned.

The cause of the several Respondents is common insofar as the action of the Appellants is concerned. By arrangement and for the purpose of avoiding repetition and of curtailing, in some degree, the verbal and written arguments which might otherwise be necessary, the Respondents, represented by the undersigned Attorneys, avail themselves of the arguments and of the reasons for the dismissal of the present appeal contained in the Factum filed by Mtres. Hackett, Mulvena, Foster, Hackett & Hannen, on behalf of the other Respondents, *The Crown Trust Company et al, es* *qualité*.

V

THE CLAIM OF THE APPELLANTS

Basing their claim entirely on the alleged fraudulent conspiracy between Connolly, Seeley and Phillips, the Appellants, by their Declaration, ask for Judgment in regard to 53 specific contracts, namely:

40	The Awixa Corp.	5 contracts	\$ 480,342.12
	Duit Inc. (J. J. Creem)	2 contracts	320,317.26
	The Hammen Construction Company	1 contract	70,121.44
	Welsh Bros. Contracting Company	2 contracts	11,304.32
	Oxford Engineering Co.	1 contract	76,002.00
	Everett Construction Company	1 contract	160,521.04
	Muccini & Decker18 contracts	1,126,439.30
	Angelo Paino	8 contracts	497,114.65

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Dominic Bonacci	1 contract	126,800.69
Necaro Company	2 contracts	179,921.23
Mullen Contracting Co. Inc.	2 contracts	152,916.39
Kennedy & Smith Inc.	7 contracts	192,318.32
Carmine Petracca	2 contract	33,878.49
Petracca & Peterson	1 contract	5,926.56
<hr/>		
Total	53 contracts	\$3,433,923.81

10

Notwithstanding the constant and continuous objections of the Respondents the Appellants, in addition, endeavoured to make evidence in New York regarding other contracts not even charged against the Respondents in the Declaration. No less than seventeen (17) of such contracts were mentioned, and among these were the contracts in reference to

- 51st Street C-2
- Hull Avenue C-8
- Collins Avenue C-9
- McComb Place C-28
- Atlantic Avenue and Hatch Avenue C-29
- 76th Street C-217
- 76th Street C-218
- Metropolitan Avenue C-221

20

Obviously all such evidence, introduced before any proof of the alleged conspiracy had been made, was merely for the purpose of atmosphere and was evidence of a highly improper character which would never have been permitted had the proceedings been under the control of a Judge rather than a Commissioner. 30

As it is now almost impossible to separate the wheat from the chaff the Respondents submit that the inclusion of this illegal evidence entitles them to ask for the rejection of the entire commission, or alternatively, that everything in it be received by the Court with the greatest caution.

By the conclusions of the Declaration the claim of the Appellants though detailed at the sum of \$3,433,923.81, was for some unknown reason limited to \$3,405,449.02,—a difference of \$28,474.79 in Respondents' favour. 40

On the authority of Exhibit C-1 it is claimed by the Appellants that the total expenditures on sewers from and including the first contract (No. 1), which was signed on the 23rd of September, 1907, to and including the last (No. 347), which was signed on the 23rd of November, 1927, amounted to the sum of \$41,869,769.74. The figures on this exhibit may be right or may be wrong. As to this the Respondents are not in a position to speak. We can say, however, that, at least in part, they disagree with

the report of the Chief Engineer of the Board of Estimate and Apportionment of the City of New York, dated 1926 (Exhibit D-1). An interesting Table (No. 24) appears on the last page of this report (p. 328), and the attention of the Court is particularly directed to this table, a photostatic copy of which is annexed to the present Factum as Appendix "A" (Despite the "Consent as to the Contents of the Joint Case" this Table was not printed by the Appellants.) It covers a period from 1902 to 1925 inclusive—a longer period than that covered by the action—and shows that the total estimated cost of sewers in the Borough of Queens during that period of twenty-three years amounted to \$30,116,717.50 and that the total actual cost of these sewers amounted to \$30,054,631.34. Again we comment on the inaccuracy of the Appellants' bookkeeping methods.

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Finally, on this point, the attention of the Court is directed to the evidence of Mr. Francis William Hopkins, a Public Accountant (Vol. III, p. 1161 et seq.). From the hundreds of documents rightly or wrongly injected into this unfortunate record and from the private access which Mr. Hopkins had to other documents inaccessible to the Respondents, the witness purports to furnish the Court with the average cost of the various sizes of precast pipe sold *outside of the Borough of Queens*. These prices varied from year to year, there being an approximate variation of 50% (Vol. III, p. 1175). Thus, in the year 1921, the cost of a 72" pipe was \$14.25, whereas in 1922 this cost was \$9.50. The futility of the witness's calculations in addition may be judged from the following questions submitted in cross-examination by Mr. Hackett, K. C.

30 "Q. So there was a little fluctuation there of 50 per cent?

A. 50% over the 1922 price.

Q. Yes?

A. That's right.

Q. That is what I was trying to make clear. And do you know anything of the tensile strength of pipe?

40 A. I know nothing whatsoever of the tensile strength of any kind of pipe.

Q. And nothing of the stress and strains to which pipe is subjected in different strata?

A. No, sir.

Q. Nothing of hazards which attach to the particular contracts under which this pipe was placed?

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A. No, sir.

Q. Or of the peculiarities of structure and mix that were executed for the Borough of Queens?

A. Nothing whatsoever along those lines. They are entirely outside of my province.”

The following further cross-examination is also illuminating as to the Appellants' methods and theories. Because of its importance the quotation is given in full (Vol. III, p. 1176 et seq.). The witness is questioned and replies as follows (Vol. III, p. 1177) :

“BY MR. COOK :

Q. So that is how you account for the variation in prices?

A. I don't account for the variation in the prices whatsoever. I am not prepared to account for the variation in prices. 20

Q. And you don't account for them?

A. I do not account for the variation in prices; *I do not guarantee these prices*. These are prices which were taken from records which, to me, as a man experienced in my profession — which I admit I am, with all due respect to the profession, from the original record, and I am not responsible for any prices or variations whatsoever. 30

Q. And you have not got those original records here?

A. I have not got those original records here.

Q. And there is no way of our checking those original records?

A. I don't know. 40

Q. Except by politely and with due deference accepting your statement, isn't that so, Mr. Witness?

A. Well, I don't know. I wouldn't be surprised, but what you might be able to be given the same access which I was given. I am not in a position to state that.

Q. You don't know that. At all events, the records are

not here in this room?

A. *I haven't seen them.*

Q. And all the figures you have given were for sales outside of the Borough of Queens?

A. Yes, sir.

10 MR. COOK: That is all."

With the above statements before us we will now attempt to deal with the extraordinary *finale* given to the Appellants' case by Mr. Hopkins and by his counsel at the argument before the Trial Judge. In order to do this, we particularly desire to direct the attention of the Court to the second or shorter of the two statements compiled by Mr. Hopkins. It is of extreme interest, and a copy is annexed as Appendix "B" to this Argument.

20 The statement in question deals with twelve contracts distributed among five contractors. We are informed that in connection with these twelve contracts Phillips received the sum of \$1,700,560.60; that a fair price for the pipe in question would be \$553,014.28 and consequently—on the assumption that a fraudulent conspiracy between Connoly, Seeley and Phillips has been established—the Appellants are entitled to recover the difference of \$1,147,546.32. The force of the argument in this regard is, however, lamentably weakened by the final note appearing on this document:—

30 "Had the highest prices (quoted for work outside of Queens and in evidence) been used to calculate the amount payable to Phillips for pipe, he still was over-paid by \$969,985.05."

And this apparently is the conclusion of the matter.

- (a) Amount claimed in regard to the 53 contracts complained of by Appellants in their Declaration \$3,438,923.81
- 40 (b) Amount asked for by the conclusions of Appellants' action \$3,405,449.02
- (c) Amount claimed by Appellants in regard to 12 of the aforesaid 53 contracts—(all claims in regard to the remaining 41 contracts apparently being abandoned) . \$1,147,546.32
- (d) Amount finally claimed by the Appellants owing to the admitted insufficiency of their proof and on the assumption that prices obtained by other contractors for their

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pipe to be used in other localities can be taken as a safe guide \$ 969,985.05

Let us now consider the claims in regard to the twelve contracts to which the matter was finally limited in the Superior Court. They are the following:

- (1) The Awixa Corporation Five Contracts
- (2) Duit Inc. Two " 10
- (3) Hammen Construction Co. One "
- (4) Oxford Engineering Co. One "
- (5) Everett Construction Co. One "
- (6) Necaro Company Two "

(1) THE AWIXA CORPORATION

These are claims in regard to the following contracts:—

Contract No. 66597—25th Street (C-159)	\$ 54,150.00	
" " 75044—Horstman Ave. (C-161, C-145, C-243) . .	10,006.62	20
" " 77420—158th Street (C-160)	159,343.90	
" " 79050—Foch Blvd. (C-57)	118,708.26	
" " 80311—Jamaica Ave. (C-109) (C-118)	138,133.34	
Total	\$480,342.12	

Mr. Hopkins generously reduces the amount claimed in regard to these five contracts to the sum of \$474,960.48

He omits to give details as to this reduction and falls into the fatal error of explaining his own methods, for he says: 30

“Evidence of payment introduced by witness Schlemmer without written proof by reason of the fact that the books and records of the Awixa Corporation had been stolen.”

What a misfortune! The people of New York are unable to obtain proof that the Awixa Corporation had been overcharged by Phillips and accordingly—as Phillips is dead—they base themselves on illegal verbal evidence as to the contracts of that Corporation and this forms the basis of a claim which is now made for the recovery of \$474,960.48. The inadmissibility of such evidence is elementary and we refer to the concluding remarks of the late Sir Elzear Taschereau in *Gagnon and Prince, 7 Canada S.C.R., p. 386.* 40

“The oath of the respondent cannot be construed in her favour. She swears that these items are correct, but

swears it, not of her own knowledge, but only because Hebert, the deceased person said it in his affidavit. It is unfortunate that Hebert died before he could be examined in this case, but, according to the Court of Appeal, it is not the respondent's misfortune, whose witness he would have been, that such should be the case, but the appellant's misfortune."

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10 In like manner, it is surely not the misfortune of the heirs of the late Mr. Phillips that this evidence was unavailable to the Appellants.

(2) DUIT INCORPORATED

(J. J. Creem)

This is a claim in regard to the following:

Contract No. 69176—Fiske Ave. (C-19)	\$ 31,792.68
“ “ 76066—Farmers Blvd. (C-20)	288,524.88
20 Total	<u>\$320,317.56</u>

This claim has been reduced to the sum of \$313,325.19, again with no details or explanation as to the reason of the reduction. We have it, however, from Mr. Hopkins' valuable statement that the evidence of payment is by checks or photostats. In the absence of admissions of what value is a photostats?

(3) HAMMEN CONSTRUCTION COMPANY

30 This is a claim in regard to the following:

Contract No. 74178—150th Ave. (C-36)	\$ 70,121.44
This claim has been reduced to	\$ 31,904.60

wih no details or explanations as to the reasons of this reduction. We have it, however, again from Mr. Hopkins' statement that there is "evidence of payment by checks for 1820 feet of pipe, whereas the contract calls for 3472 feet of pipe."

(4) OXFORD ENGINEERING COMPANY

40 This is a claim in regard to the following:

Contract No. 75939—150th Street (C-137	\$ 76,002.00
This claim has been reduced to	\$ 11,214.00

with no details or explanation as to the reasons for this reduction though we are told that

"evidence of payment is by check. Verbal testimony indicates a total payment for pipe \$117,000.00."

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(5) EVERETT CONSTRUCTION COMPANY

This is a claim in regard to the following:

Contract No. 80343—Brinkerhoff Ave. (C-105)	\$160,521.04
This claim has been reduced to the sum of	\$139,564.90

with no details or explanation as to the reduction, though Mr. Hopkins tells us that

“there is evidence of payment by check.”

10

(6) NECARO COMPANY

This is a claim in regard to the following:

Contract No. 77021—Amsdel Ave. (C-74)	\$113,782.64
Contract No. 77393—150th Street (C-75)	66,138.59
	<hr/>
Total	\$179,921.23

This claim has been reduced to \$176,576.35 with no details or explanation as to this reduction. Here also it is interesting to note Mr. Hopkins' statement:

20

“Evidence of payment.—Check stubs.”

The absurdity of this latter contention is apparent:

A writes a cheque in favour of B for \$100. A makes an entry on the stub of his cheque book to this effect. A then destroys the cheque. B dies and A takes a suit to recover from his estate payment of \$100 on the ground that this payment in the first instance was made by error. A relies on his own entry in his own cheque book to prove this statement. We suggest that even in the State of New York such a contention would be rejected.

30

The claims advanced in the Appellants' Declaration in connection with the 'contracts of

Welsh Brothers	\$ 11,304.32
Muccini & Decker	1,126,439.30
Angelo Paino	497,114.65
Dominic Bonacci	126,800.96
Mullen Construction Company	152,916.39
Kennedy & Smith	192,318.32
Carmine Petracca	33,878.49
Petracca & Peterson	5,926.56
	<hr/>
Total	\$2,146,698.72

40

are entirely abandoned.

A curious condition of affairs. Phillips was originally charged with conspiracy and fraud in regard to fifty-three (53) contracts and twelve (12) contractors were named in connection with these charges. Phillips was finally charged with conspiracy and fraud in regard to twelve (12) contracts and five (5) contractors only remain in the picture. The remaining forty-one (41) contracts and the remaining seven (7) contractors were quietly dropped, as appears by Mr. Hopkins' said statement—Appendix "B" hereto.

10

Further, by the Declaration the Appellants ask for Judgment in the sum of \$3,405,449.02, although the details of their claim exceed this amount by some \$28,000. It however appears from the evidence of Mr. Hopkins, the certified Public Accountant, and witness of the Appellants, that the real amount due from the estate of the late Mr. Phillips is \$1,147,546.32, though here again, owing to unfortunate defects in evidence, the Appellants recognize that they are only *legally* entitled to \$969,985.05. Counsel for Appellants assured the Court that whatever may happen to the balance of the claim this latter amount was certain. — Have we not the illegal evidence of the witness Schlemmer entitling us to recover \$474,960.48 in regard to the Awixa contracts? Have we not the photostats entitling us to recover a portion of \$313,325.19 in regard to Duit Incorporated? Is not the evidence in regard to the contracts of the Hammen Construction Company and the Oxford Engineering Company almost satisfactory? and surely the cheque stubs of the Necaro Company would justify the Court in declaring that the heirs of the deceased Phillips owe at least \$176,576.35.

20

All of the above is based, of course, on the assumption that the conspiracy and fraud of Connolly, Seeley and the late Mr. Phillips has been proved beyond question. This we emphatically deny. Even, however, had such conspiracy been established, the proof of the Appellants' damages is entirely insufficient to justify any condemnation whatever.

30

VI

SAFEGUARDS OF CITY OF NEW YORK AGAINST CONSPIRACY AND FRAUD

40

The Charter of the City of New York has been produced (Exhibit P-19) and the practice in regard to the letting of contracts has been fairly stated by Mr. Bertram, the Assistant Engineer of the Bureau of Designs. From the terms of the Charter, from a consideration of the various contracts of record and from the evidence of Mr. Bertram himself, it is, we submit, almost impossible that conspiracy and fraud of the character complained of could have been perpetrated. We will briefly review the procedure in every case necessary.

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Let us assume that a sewer is desired by the ratepayers of a certain locality.

(1) A study of the drainage district is first made to determine the streets along which the sewer is to be laid and the size of the pipe necessary. (Bertram, Vol. I, p. 253.)

(2) A Petition, certified by the Borough President, is then made to the Local Board. (Exhibit P-19, secs. 425, 426, Bertram, Vol. I, p. 254.) 10

(a) the Alderman of the district where the improvement is to be made;

(b) the Alderman of the contiguous districts

(3) A notice of the Petition and of the meeting of the Local Board is then sent to the ratepayers by the Borough President. (Bertram, Vol. I, p. 254.)

(4) If the Petition is approved by fifty per cent of the ratepayers—or by less, if there are no objections—and if approved by the Local Board, 20 it then goes to the Board of Estimate and Apportionment. This Board consists of representatives of the whole City as opposed to any individual Borough.

(5) The Engineers of the Board of Estimate and Apportionment then examine the merits of the Petition from a technical point of view. (Bertram, Vol. I, p. 255.)

(6) And the Board of Estimate and Apportionment, sitting in Committee, discusses the practicability of the scheme. (Bertram, Vol. I, p. 255.)

(7) The Board of Estimate and Apportionment also receives the reports of its Engineers and of its financial advisers and then, sitting as a Board, either approves or rejects the Petition. (Bertram, Vol. I, p. 255.) 30

(8) If approved, the Petition is returned to the Borough authorities interested, with information that the project, in principle, is approved and that monies will be available.

(9) The details are then worked out by the Borough employees and pass upon

(a) by the Chief Engineer of the Borough President's Office; 40

(b) by the Bureau of Engineering Construction; and

(c) by the Engineer in Charge of Sewers.

(Bertram, Vol. I, p. 255-6.)

(10) A survey of conditions is then made by the staff of the Engineer in Charge of Sewers, and plans and specifications are then prepared and re-submitted to the Board of Estimate and Apportionment whose En-

gineers examine such plans and specifications and who, after such examination, make their comments to the Board. (Bertram, Vol. I, p. 256-7, 273.)

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(11) The specifications are also submitted to the Corporation Counsel for his approval as to form (Bertram, Vol. I, p. 258). Two estimates, the preliminary and the final, are then submitted to the Board of Estimate and Apportionment showing the cost of the proposed sewer to the rate-payers.

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10 The above is the routine followed with regard to each proposed contract.

All matters are from the first, after full discussion, twice approved by the Board of Estimate and Apportionment and by its technical advisers, engineering, legal, and financial, and Mr. Bertram remarks at Vol. I, p. 258:

20 "Q. So after the project has run the gauntlet of these half dozen different public Boards and Board of Engineers and Financiers and Lawyers, you have the information necessary to call for tenders?"

A. We are then in a position to accept bids."

(12) Bids are then called for by publication in the City Record—the official City paper. These advertisements continue for ten days. Prospective bidders by attendance at the Borough Hall have the right to examine and procure copies of all papers, documents and plans. Thus Bertram says at Vol. I, p. 258:

30 "The plans are available from the day they are advertised. Contractors can get blueprints and get all these things and take them away with them and figure out what it is going to cost. On the 11th day, the bids must be in by eleven o'clock."

A formal Admission by the Appellants that all notices to bidders "were made and given after due compliance ... with all laws, by-laws and resolutions of any kind whatsoever required thereby to be complied with," appears in Vol. XII at p. 5559.

40 (13) The bids are publicly opened by the Commissioner of Public Works in the presence of representatives from (a) the Borough President's Office and (b) the Comptroller's Office. (Bertram, Vol. I, p. 259.)

(14) The bids are read aloud and the figures, details and information in regard to such bids are available to these representatives and to the Comptroller. (Bertram, Vol. I, p. 259.)

(15) The tenders, having been opened, may be accepted or rejected by the Borough President. (Exhibit P-19, section 419, Vol. XI, p. 5447.)

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(16) All contracts are executed in triplicate. (See any contract.) One is filed with the Comptroller of the City of New York,—Department of Finance,— one remains in the office of the Borough President and the third goes to the contractor. Even after a contract has been signed it is constantly considered by the financial authorities of the City, as progress payments are from time to time required until the work is completed and paid for. This fact necessarily means that all details in connection with the cost of the work are constantly under the supervision of the various officials of the City, as differentiated from the Borough. (Exhibit P-19, section 419, Vol. XI, p. 5447.) The witness, Schneider (Vol. III, p. 1300) said that there are a number of Chief Engineers in the employ of the City of New York. Each Department, Finance, Highways, etc., has its own Chief Engineer. Engineers, Assistant Engineers, Inspectors all report to their appropriate Superior Officers. He stated the general practice to be that "the course of the work is followed by an inspector and/or by an engineer, for the purpose of verifying both the way the work is proceeding and the amount that is payable for the work." (Vol. II, p. 1301, line 34.)

10

(17) Finally, we refer to Section 149 of the Charter of the City of New York. (Exhibit P-19, Vol. XI, p. 5433.)

20

".....All payments by or on behalf of the Corporation.....shall be made through the proper Disbursing Officer of the Department of Finance, on vouchers to be filed in said Department, by means of warrants drawn on the Chamberlain by the Comptroller and countersigned by the Mayor. The Comptroller may require any person presenting for settlement an account or claim for any cause whatever against the Corporation, to be sworn before himtouching such account or claim and when so sworn to answer orally as to any facts relative to the justness of such account or claim."

30

It will thus be seen that the matter of payments respecting contracts is one entirely removed from the Borough President and the Borough officials. The Comptroller of the City is constantly in a position to make comparative estimates of the cost of sewers in the five Boroughs. He is empowered by law to examine any contractor under oath as to the justness of this claim. Payments can only be made when the Comptroller is satisfied that the accounts are correct and then only "by means of warrants drawn on the Chamberlain by the Comptroller and countersigned by the Mayor."

40

The comparisons as to the costs of work in the various Boroughs were constantly and carefully made. A very illuminating and interesting document, "Table No. 24" of Exhibit D-1 annexed to this Factum as Ap-

pendix "A", shows the Relation Between the Estimated Cost and the Actual Cost of Physical Improvements Authorized Since January 1, 1902, and Reported to the Board of Assessors Prior to January 1, 1927." It clearly demonstrates the truth of the foregoing statement. By this table we see for a period of twenty-five years the comparative cost of all work—including sewers—in the five Boroughs constituting the City of New York. It is moreover, most interesting to note that the costs of improvements, and particularly of sewers, in the Borough of Queens compare very favourably with those of the other Boroughs and of the City of New York at large.

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The further sweeping Admission by the Appellants (at p. 5558 of Vol. XII) regarding the regularity of the issue and execution of the various Contracts discussed in the present suit places the entire matter beyond the realm of suspicion in any way whatsoever. The Appellants admit:

20 "That each of the contracts.....was entered into by and on behalf of the City of New York and of the said Borough of Queens after due compliance with the provisions of the Charter of the City of New York (Exhibit P-19) relating to contracts, as more fully set forth in Chapter 10 of the said Charter, and without limiting the generality of the foregoing the said contracts and each of them were and was founded on proper and adequate resolutions of all the said municipal authorities legally passed on sealed bids or proposals made in compliance with public notices duly advertised in the City Record and corporation newspapers for the period of time required by law; that the contractors' bids and the contracts were properly signed and executed by all parties in strict compliance with all the laws and regulations applicable to the City of New York; that security for the faithful performance of each of the said contracts in the manner prescribed and required by ordinance was given and maintained in each instance and the adequacy and sufficiency of the said security, in addition to the justification and acknowledgment thereof, was approved by the comptroller; that all such bids or proposals were publicly opened by the officer or officers advertising for the same in the presence of the comptroller and the bidders and otherwise in due compliance with all formalities provided by the Charter of the City of New York relating thereto."

We have above endeavoured to indicate the various safeguards devised by the Legislature of the State of New York for the protection of the City.

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And with these in mind let us now consider the evidence which we are told establishes the fraud of Connolly, Seeley and Phillips.

VII

ALLEGED PROOF OF CONSPIRACY

In view of the foregoing a successful conspiracy to defraud the City of New York would certainly appear difficult. Such a conspiracy, however, between Connolly, Seeley and Phillips is alleged to have begun in January, 1917 (Declaration par. 9), and in the Court below a number of incidents were discussed as evidencing such conspiracy. Among these the following were mentioned: 10

- (1) De Cola and Martino.—Collins Avenue contract. (p.22)
- (2) The relations between Sigretto and Phillips. (p. 23)
- (3) The assignment of the 51st Street contract by Sigretto to Creem. (p. 25) 20
- (4) The specifications for precast pipe. (p. 30)
- (5) The rejection of bids. (p. 34)
- (6) The 150th Avenue contract.—The waterproofing membrane. (p. 39)
- (7) The O'Rourke Construction Company.—Pretended payments for account of Phillips. (p. 44)
- (8) Assignments. — The Highway Improvement and Riverdale Construction contracts. (p.46) 30

These we will in turn consider,—

(1) DE COLA AND MARTINO *Collins Avenue Contract*

It is charged that in 1916 before the period covered by the action Phillips exercised his influence to have a tender for a contract for the Collins Avenue sewer by a firm of De Cola and Martino rejected. This, we are told, evidences the fraudulent relationship existing between Connolly, Seeley and Phillips. The charge is based on the evidence of Purcell, to whom we will again refer (Vol. I, p. 336 et seq.). The facts would appear to be as follows: 40

In the year 1916, two Italian contractors, De Cola and Martino, filed a bid for the contract for the construction of a sewer on Collins

10 Avenue. As theirs was the lowest tender they would in the ordinary course have been awarded this contract. Purcell had undertaken to furnish a bond for the fulfilment of the agreement (Vol. I, p. 342). The contractors, however, approached him and said "we are too low and do not feel that we can go ahead with this work" (Vol. I, p. 345) and Purcell testified "I had promised them that I would get them a surety bond. That was startling information to me and I decided that the best thing they could do was to try and have the contract rejected" (Vol. I, p. 345), and later says "They made a mistake." Vol. I, p. 379.)

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20 Purcell—anxious to be rid of his obligation in regard to the bond—then made enquiries as to how it would be possible to have the tender rejected (Vol. I, p. 348). He sought the assistance of "a man who was a political leader." (Vol. I, p. 348.)....."I think it was Keatingthe Leader of the Assembly District. He had spoken to a number of people about how you go about it to have a job rejected." Purcell stated that about this time he was approached by Phillips who solicited me to give him the job of having the job rejected." Later, at a date which he could not fix, Purcell said he was informed by Phillips that the bid had been rejected (Vol. I, p. 346). He verified the matter by telephone "within a few minutes" Vol. I, p. 381) and found such to be the case. He admitted that he had no reason to think that he might not have had this information himself had he taken the trouble to call the Borough Hall sooner. (Vol. I, p. 381.)

30 Apart from the question of relevancy, how can the foregoing in any way substantiate the allegations of the Appellants? The evidence proves nothing

Accepting Purcell's story at its full face value, there would be nothing wrong in the Borough of Queens allowing the withdrawal of a tender based on an erroneous calculation. On the other hand, the Borough might well have been embarrassed if the contractors had been obliged to stop work through lack of funds when the contract was incomplete.

40 There is no evidence that Phillips saw Connolly with respect to this matter. There is no evidence to show that Phillips was even remotely responsible for the rejection of the bid. Connolly had the Statutory right to reject tenders in the interests of the Borough and he did so in this case, on the 29th of November, 1916 (See Exhibit C-21, Vol. IV, p. 1762.)
The charge is childish.

(2) RELATIONS BETWEEN SIGRETTO AND PHILLIPS

The gravamen of this charge is to the effect that Phillips improperly had Sigretto removed as agent of the Lock Joint Pipe Company, had

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himself appointed in Sigretto's place and was thereby enabled to sell the Lock Joint pipe to the contractors at exorbitant prices

The numerous contracts between Joseph L. Sigretto and the Borough of Queens began with the contract for the sewer on Brevoort Street from Jamaica Avenue to Metropolitan Avenue. This was signed on the 23rd of May 1912 (Exhibit C-1, contract No. 25, Vol. III, p. 1443). It would seem that in all some thirty ((30) contracts were awarded to the Sigrette firm, the last being the 51st Street contract, No. 157, which was signed on the 12th of July, 1918. As the relationship between Phillips and Sigrette was created by the agreements of the 23rd of April, 1917 (Exhibits C-83, C-84 and C-85, Vol. V, p.2049, 2050, 2052), it is unnecessary to point out that with the great majority of these contracts Phillips had nothing whatever to do. 10

Purcell pretends that he introduced Phillips to Sigretto immediately on being notified by the Borough Hall that the De Cola and Martino tender had been rejected (Vol. I, p. 369). This introduction took place at East Orange, N. J., where Sigretto was working. No less than three times does Purcell state that he cannot remember any conversation between Sigretto and Phillips (Vol. I. p. 349). 20

“Q. Was there any conversation between Phillips and Sigretto after you introduced him?

A. There is no doubt there some conversation, but I don't recall what the conversation was.”

Purcell later endeavours to be helpful (Vol. I, p. 370-1). Phillips, he says, told him that he “wished to bring Sigretto back into Queens for the purpose of bidding on contracts.” So he interviews Sigretto with Phillips immediately after the 29th of November, 1916. Sigretto apparently considers the matter favourably, as five months later, on the 23rd of April 1917 he contracts in regard to McComb Place, Atlantic Avenue, Hull Avenue and Collins Avenue. (Exhibit C-1, contracts Nos. 129, 131, 133, and 132, Vol. III, p. 1445). There is nothing of record to show that Phillips was interested in the Collins Avenue contract. It is possible that he was. We know definitely, however, that Phillips and Sigretto were interested in the remaining three and the Exhibits C-83, C-84 and C-85 define the relationship of Phillips and Sigretto in regard to these contracts. These three partnership agreements were executed between Phillips and Sigretto on the 27th of April, 1917, or four days after the execution of the four agreements to which we have above referred. 30 40

It is difficult to follow Purcell's evidence. Why should Phillips have required an introduction to Sigretto,—an illiterate Italian contrac-

tor, unable to read or write? Surely a man of Phillips type, or any man, could have met Sigretto without the observance of social form. And what possible reason had Phillips for desiring Sigretto's presence in Queens, excepting that Sigretto, having already done a great deal of work in the Borough, understood possibly its requirements from a practical standpoint in regard to the construction of sewers. During the period from January, 1917, until November 1927 some two hundred and twenty-two (222) contracts for the construction of sewers were awarded (Exhibit C-1, Vol. III, p. 1442,) and the evidence of Sigretto is of little comfort to the Plaintiffs. He makes the following vague assertions (Vol. I, p. 391):

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“Q. How did you come to know Phillips? Do you remember?”

A. I was working in Jersey the first time I seen Jack Phillips. He come over to me on the job.

20 Q. Do you remember the year?

A. I do not. That must have been around 1915, 1915 or 1916; about 1915.”

The statement made later by Sigretto that when he first met Phillips he had been out of Queens “for over a year and a half” (Vol. I, p. 391) is flatly contradicted by an examination of Exhibit C-1. Purcell's statement as to interviews with Phillips and Sigretto is contradicted by the latter who says he only met Phillips on two occasions. The second interview took place two days after the first (Vol. I, p. 392) and *Purcell was not with Phillips*.

30 “Q. Was he (Phillips) alone the second time he came to you?”

A. When he come back he was alone. Purcell was not with him.”

40 Sigretto's statement that he must have met Phillips about 1915, combined with his statement that he bid on “two jobs coming out” (Vol. I, p. 392, would make it seem that he had actually met Phillips in October, 1915, when the contracts Nos. 93 and 97 were awarded. (Exhibit C-1, Vol. III, p. 1442). Sigretto cannot possibly have been speaking of the contracts which were awarded on the 23rd of April, 1917, as these were four in number (Exhibit C-1, contracts Nos 129, 131, 132 and 133, Vol. III, p. 1445).

The whole story of the pretended reason for Phillips' alleged visits to Sigretto in New Jersey is based upon the contradictory statements of

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Purcell and Sigretto, agreeing neither as to the time of the pretended interviews, as to their number, nor as to those who were present when they are supposed to have taken place. In any event all evidence in this regard is totally irrelevant. It was not until four or five months later that Phillips became associated with the Lock Joint Pipe Company. It was only "in the latter part of 1917" (Hirsh, Vol. II, p. 802) that the Lock Joint officials first met Phillips; and it was "some time after the meeting" (Hirsh, Vol. II, p. 805) before any discussion whatever took place as to Phillips representing that Company in Queens. Three partnership agreements of the 27th of April, 1917 (Exhibits C-83, C-84 and C-85, Vol. V, p. 2049, 2050 and 2052) contain the only satisfactory evidence as to the relationship between Phillips and Sigretto. These agreements contain nothing that is strange or sinister or improper. Phillips, we are told, was a human dynamo (Creem, Vol. I, p. 368). "He had great success as a builder in Queens County, and through New York City. He had carried on important construction work and erected important buildings..." (Curran, Vol. III, p. 1323, line 19). He was an experienced man, who since 1899 had been "contracting sewers, building sewer heads and doing anything he could in the contracting business" (Cassidy, Vol. III, p. 1071) and at this time it should also be remembered that it was Sigretto who was agent of the Lock Joint Pipe Company and not Phillips.

On the worst possible construction that can be given to the above facts they remain utterly harmless. How can they be said in any way to establish fraudulent conspiracy between Connelly Seeley and Phillips?

Evidence of the character above mentioned is, we submit, entitled to no consideration.

(3) ASSIGNMENT OF 51ST STREET CONTRACT
(*Sigretto to Creem*)

The Respondents fail to understand this charge. Apparently it is suggested that the assignment of this contract by Sigretto to Creem was fraudulent and again we are requested to infer a conspiracy in this regard between Connolly, Seeley and Phillips.

On the 3rd of September, 1918, a simple and straightforward arrangement was entered into between Sigretto and one John J. Creem. The latter had been a contractor for many years and had completed contracts for public works in the Borough of Queens and in the City of New York (Creem, Vol. I, p. 126).

On the 12th of July, 1918, Sigretto had contracted with the City of New York for the construction of a sewer on 51 st Street (Exhibit C-14,

Vol. V, p. 2066). Before any work had been done on this contract, Sigretto assigned it to Creem (Vol. I, p. 298) who did the entire work; the whole arrangements between the parties is evidenced by written documents. Exhibit C-2, which is dated 3rd of September, 1918 sets forth the detailed arrangements of the terms and conditions under which the assignment was made. Exhibit C-13, which was signed at the same time as Exhibit C-2, was a short form of assignment "merely the regular form that the City has, that it requires for any assignment of a contract." (Creem, Vol. I, p 295.)

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C-2 contained the following clause (Vol. V, p. 2159) :

"The obligation of this contract is dependent upon and shall be postponed until the consent of the City of New York, acting by and through the President of the Borough of Queens shall have been obtained and shall have been duly filed and recorded with the assignment hereof, and other necessary papers, in the offices of the said President of the Borough of Queens, the Comptroller and such other heads of departments or bureaus and County Clerk's offices as may be required by law."

An examination of Exhibit C-13 will show that all the requirements of the above clause were complied with. On the 4th of September, 1918, the National Surety Company, the London and Lancashire Company of America and The New Amsterdam Casualty Co. all of which Companies had undertaken to guarantee the completion and fulfilment of the original contract (C-14, Vol. V, p. 2066) consented to the assignment by the Sigretto Company to Creem and on the same date, September the 4th, 1918, the President of the Borough of Queens approved in quadruplicate the assignment "in accordance with the terms and conditions of Contract 49784"—Exhibit C-14. On the 5th of September, 1918, the day after its completion, the short form of assignment (Exhibit C-13, Vol. V, p. 2160) was received by the "Comptroller's Office, Department of Finance" and on the same day, the "Bureau of Audit, Division of Auditors and Examiners (liens and assignments)" likewise received the said document, all of which will appear from the impression of the rubber stamps which were affixed to the document.

The consideration paid by Creem for the assignment of this contract, which ultimately cost \$374,716.10, was roughly about eight per cent of the contract price,—See Exhibit C-2.

Creem testified (Vol. I, p. 303-4) with respect to the execution of assignment "... I imagine I had to sign it first, then Sigretto, and then it was taken to Connolly and to the different Surety Companies and

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was no use until they had all approved of it. ” At Vol. I, p. 303 Creem further testified that the approval of all parties “was on there when I paid my money. As I remember, to not leave that just as it stands. We waited for the completed document before we closed up.”

On the 5th of September, 1918, Sigretto and Company wrote to Creem (C-16, Vol. V, p. 2164) instructing him as to the manner in which the payments contemplated by the Agreement of Assignment (C-2, Vol. V, p. 2158) should be made. On the same day, Creem replied advising Sigretto and Company that he would act in accordance with their instructions. For some reason, which the record does not show, Sigretto and Company apparently owed money to Phillips and they instructed Creem to pay a certain portion of the consideration price of the assignment to Phillips “and charge same to our account” saying further “we should be glad to have you acknowledge receipt of this letter and to advise us that you will make the payment to Mr. Phillips after the payment of the \$6,900 to us as directed” (C-16, Vol. V, p. 2164). Creem (Vol. I, p. 303) testified that he had never seen John M. Phillips “or as far as I know ever heard of him” until the date the Agreement of Assignment was executed,—September 3rd, 1918.

At Vol. I, p. 364, appears the following testimony of Creem concerning this payment:

“Q. With regard to the payment which you said was made to Phillips of part of the money which you had undertaken to pay to Sigretto, you know nothing of the reasons for the payment or the relationship between Sigretto and Phillips?

A. No.

Q. For what reasons Sigretto may have owed money to Phillips? You know nothing of that?

A. No.”

It cannot for a moment be pretended that there is anything wrong or mysterious about the foregoing. The whole transaction is evidenced by written agreements which speak for themselves. (Exhibits C-13, 2, 15 and 16, Vol. V. pp. 2160, 2158, 2163, 2164). There is no evidence of any reason why the assignment should have been questioned. Nor is there a scintilla of evidence that Connolly knew anything concerning the arrangements between Sigretto and Creem for the payment of monies owing by Sigretto and Company to Phillips. Apart from the fact that there need

be nothing fraudulent or sinister about the assignment or transfer of any contract, Creem had his own particular reasons for acquiring the 51st Street contract (See Vol. I, p. 364) and perfectly valid and reasonable they were!

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10 Although the Appellants now suggest that the transaction is shrouded in mystery they did not ask the witness Sigretto why the 51st Street contract was assigned to Creem, nor was he asked for what reason his Company owed money Phillips, nor as to any dispute between Phillips and Sigretto. They prefer to ask the Court to conjecture and speculate as to possible reasons which might have motivated the transaction. And the Court is requested to accept this incident as evidence supporting the charge of conspiracy.

20 Remembering that, in April, 1917, Phillips was employed "to supervise and assist" in the execution of four contracts which had been awarded to Sigretto and Company at that time ((Exhibits C-83, 84, 85, Vol. V, p. 2049, 2050, 2052), and that this necessitated settlements from time to time, is not the obvious answer exactly what the record shows it to be?—Sigretto owed Phillips money and paid the debt by the assignment to Phillips of funds in the hands of a third party, Mr. Creem! The Respondents know of no law which prohibited Phillips and the Sigretto Company from entering into the agreements made in April, 1917 (C-83, 84 and 85, Vol. V, p. 2049, 2050, 2052), nor do they know of any law prohibiting a settlement of their respective obligations thereunder. This is exactly what must have occurred—if we in turn may be allowed a surmise—on September 5th, 1918, when the Sigretto Company instructed
30 Creem to pay Phillips for its account. Enough concerning a perfectly regular transaction which occurred almost six years prior to any of the contracts upon which Appellants now advance claims against Respondents.

Here reference may be made to a matter akin to the transfer by Sigretto to Phillips of the funds owing to the Sigretto Company by Creem—and of equally small importance—the payment spoken of by Mr. Hirsh, the President of the Lock Joint Company. (Vol. II, p. 812-3.)

40 "Q.....did you ever pay Phillips any money on account of any arrangement you had with Sigretto in the beginning?

Mr. O'Donnell: Objected to as entirely irrelevant.

The witness: Shall I answer that?

The Commissioner: Yes, you may answer that, subject to Counsel's objection.

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The witness (answering) : We paid Mr. Phillips some money arising out of the so-called Sigretto Agreement. There was an amount standing on our books that *we owed Sigretto and Mr. Sigretto told us to pay it to Phillips so we paid it to Mr. Phillips because Sigretto told us to pay it to him.*"

Certainly a matter irrelevant to the present action. Sigretto had evidently earned money acting for the Lock Joint Pipe Company, or at least had a credit balance in his favour with that Company and he assigned this balance to Phillips in payment of his own debt to the latter,—either under the agreements C-83, C-84 and C-85, or otherwise in a manner which is not disclosed. Considering the relations between Phillips and Sigretto this surmise is not unreasonable. 10

Sigretto, one of the Appellants' mostwilling witnesses, would gladly have given information concerning the transaction had there been anything with respect to it which bespoke fraud or conspiracy. It is significant that Appellants' Counsel refrained from asking any such question. 20 It is also significant that Appellants did not question Sigretto with respect to the reasons for the termination of his agency arrangement with the Lock Joint Pipe Company "some time after the meeting...." spoken of by Mr. Hirsh (Vol. II, p. 805) which occurred "in the latter part of 1917" (Vol. II, p. 802) when consideration was first given by the Lock Joint Company to the suggestion of Phillips becoming its agent. This was after the termination of Sigretto's Agreement. Phillips became the agent of the Lock Joint Company in the ordinary manner in which similar agreements are made every day. He solicited the agency and it was given to him. This does not indicate fraud and conspiracy. 30

It is only by a stretch of imagination that any connection whatsoever can be assumed to have existed between the Sigretto-Creem Assignment and the agency with the Lock Joint Company which Phillips eventually obtained many months after precast pipe had been allowed as an alternative specification in the Borough of Queens.

We conclude that the record in no way warrants the conjecture made by Appellants that Sigretto was "driven out" of Queens because: 40

(a) He was dismissed by the Lock Joint Company;
and

(b) during a certain period of time his Company performed no work in Queens.

The Lock Joint Pipe Company allowed Sigretto to leave their services for their own reasons, with which reasons Appellants were not ap-

parently concerned and as to which they did not enquire. The Sigretto Company got no contracts in Queens after a certain period for the obvious reason that it did not choose to bid. The record shows that on every occasion when its bid was the lowest, and all bids were not rejected, Sigretto and Company was awarded the contract in due course in the same manner as any and all other contractors.

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10 There is of course no evidence connecting Connolly, Seeley and Phillips with these matters.

(4) SPECIFICATIONS FOR PRECAST PIPE

It is charged that in February, 1917, Connolly approved the inclusion in the specifications of a specification for precast pipe (Declaration paragraph 18, Vol. I, p. 6). This, it is alleged, precluded all bidders excepting those using the Lock Joint product.

20 The Respondents submit that this charge is entirely unsupported. There is not one word showing that Connolly knew anything whatsoever of the matter.

It was frankly admitted in argument in the Court below that any other company or person could have made pipe which would satisfy the specification and numerous witnesses swore that such was a fact.

30 Exhibit C-1 shows that precast pipe was first used in Queens with respect to two contracts (Numbers 106—Moore Avenue, and 120—Nott Avenue, Vol. III, p. 1445) for which bids were opened on December 1st, 1916. From April 4th, 1917, beginning with the contract listed as No. 131 on Exhibit C-1, it was used on all but seventeen out of the remaining contracts shown on the said exhibit. In other words, of the two hundred and sixteen contracts which were let after Contract No. 131, one hundred and ninety-nine were "B" type.

40 For practically twelve years prior to the institution of the present action, the identical specification, couched in the same language, appeared in every contract. On the 23rd of April, 1917, the contracts for Collins Avenue (C-9, Vol. IV, p. 1610) and Hull Avenue (C-8, Vol. IV, p. 1779) and two other contracts for McComb Place and Atlantic Avenue, were let to Sigretto. They contained the specification in question and an examination of C-8 and C-9 will show that some two months prior to the execution of these contracts, the specifications, including those complained of, had been approved by Mr. Rice in the following terms:

"Approved February 15th, 1917 — James Rice, Engineer in Charge of Engineering Construction."

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From the first contract in which precast was used in 1916, until the present time, the specification has never been changed and precast pipe is still being used to-day (Bertram, Vol. I, p. 283). Two hundred and sixteen contracts were let after Type "B" was first used and in all of these the same wording was used, approved by all the City and Borough Boards, their technical Engineers and financial experts, over a period of twelve years. Surely the Appellants cannot now be heard to complain as to the requirements in the Queens specifications concerning the joints for "B" pipe! Each contract considered and re-considered; checked and re-checked by all the Borough Engineers and the Engineers attached to the Board of Estimate and Apportionment; each contract executed in triplicate and one part "filed with the Comptroller of the City of New York" in every case and used for the computation of progress and final payments

Let us consider Mr. Hirsh's testimony on this point: (Vol. II, p. 815.)

"Q. Are you familiar with the Borough system and the relationship between it and the Board of Estimate and Apportionment?"

A. I think so, generally.

Q. You know that there are corps of Engineers in each Borough, and in the City as well, and that they check and cross-check one another?

A.—Yes, sir.

Q. And that plans and specifications have to be passed upon by the Borough Engineers and then by the City Engineers?

A. Yes, sir.

Q. And that that work is checked both from a financial point of view and an Engineering point of view, and re-checked by both corps?

A.—That is my understanding.

Q. And you have been in work which has brought you into relation with them for 20 years or so?

A. We have done work under them."

And the witness Hart gave the following evidence: (Vol. II, p. 858.)

"Q. In your relations as a pipe seller I believe you

have told us that you know that the specifications for these various pipes have to have the approval of the Engineering Departments both of the City of New York and of the Borough in which the work is to be done?

A. Yes, sir.

Q. That is your knowledge?

10

A. To my knowledge it is, yes, sir.”

It is absurd, in the face of such evidence, to suggest that there is anything indicating conspiracy.

20 The specification complained of was used in the Borough of Queens many months before Phillips was in any way connected with the Lock Joint Company; with its preparation he was not concerned. The name of Seeley, — one of the alleged conspirators, — is never mentioned. Mr. Hirsh alone testified as to how the specification assumed its present form. It was drawn by Mr. Rice, one of the Borough Engineers,—a superior of Seeley,—the man in charge of Engineering Construction. The integrity and honesty of Rice is in no way impeached and, curiously enough, he was not called upon to testify.

Some of the pertinent parts of Mr. Hirsh's evidence on this point (which will be found at Vol. II, p. 799-800) are quoted here for the convenience of the Court:

30 “Q. Is that the first time that you recollect meeting Mr. Connolly, Mr. Hirsh?

A. Yes, sir.

Q.—You said that you were there with Mr. Merriwether. (Then President of Hirsh's Company.) Was anybody else there?

A.—Mr. Rice, the Chief Engineer.

40 Q. What was the purpose of your visit there, Mr. Hirsh?

Mr. Hackett: To sell pipe, wasn't it?

The witness: To lay the foundation for selling pipe.

Mr. Hackett: Of course.

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A. The occasion of that business, we had been . . . *precast pipe had been included* in the specifications for sewers in Queens. *The specifications had been prepared* and Mr. Merriwether asked me to go with him and see Mr. Rice and go over these specifications, the purpose being to see whether or not we could comply with those specifications for pipe which we manufactured.

Q. And that is the time you saw Mr. Connolly for the first time? 10

A. That was the time I saw Mr. Connolly, yes ,sir."

(It was also the first time Hirsh met Rice. Vol. II, p. 802.)

Hirsh further testified: (Vol. II, p. 800.)

"A. Mr. Rice introduced both Mr. Merriwether and me to Mr. Connolly.

Mr. Hackett: Mr. Rice was the Engineer? 20

The witness: Mr. Rice was the Engineer.

Mr. Hackett: Chief Engineer?

The witness: Chief Engineer. And the conversation was entirely with regard to pipe and the pipe specifications. Mr. Connolly was particularly anxious to know whether *the specifications as drawn by Mr. Rice* precluded the use of any but a patented article." 30

Again at Vol. II, p. 815, 816, Hirsh testified:

"Q. Just make that clear will you please.

A. We presented to Mr. Rice our specifications for guidance. Our specifications, of course, described our pipe, and in describing our pipe naturally it had all of the features connected therewith, which included that part which was patented. Mr. Rice, as parts of the identical language of the two specifications will show, followed our specifications to a considerable extent. However, when we came to the question of joints . . . 40

Q. Which was the only patented part of your pipe?

A. Which was the only patented part of our pipe, that part of our specifications which did cover the patented

feature was not included in *Mr. Rice's specifications covering joints*. And it was our contention at the time, and I have repeated it since, that *the specification which was drawn by the Borough of Queens did not call for a patented article and that anyone who was willing to do so and who had the desire to do so could make a pipe to fully comply with those specifications, and I know of no one who could have legally stopped them.*"

10

Also at Vol. II, p. 816.

"A. Our specifications have been used to a very considerable extent all over the United States and in Canada. As a matter of fact, the extent of it is that the actual pipe is in 40 or more of the States of this Country, and in Canada, both before and since the patent had expired."

20 A most significant question by Appellants' Counsel to Mr. Hirsh and his answer thereto appear at Vol. II, p. 802:

"Q.—At the time in 1917, was there a Pipe Company in the United States except your own, that made a joint that had an interior recess.

A.—I think so."

And the Appellants' line of examination is hastily changed.

30 "Anyone could build the pipe," said Hirsh. Paino did build it.—For "many contracts,—Queens Borough". . . "For that Weiss Avenue contract, also on a lot of contracts after that" (Vol. III, p. 1100). Creem built his own pipe until "I got the pipe from Phillips cheaper than I could manufacture" (Vol. III, p. 1101). Paino also started to build his own pipe. Paino, "then I got it from Phillips, because I couldn't build the pipe for the price it was quoted to me" (Vol. III, p. 1101.)

40 On two contracts carried out by Welsh Brothers Contracting Company (Exhibits C-139 and 143, Vol. XI, p. 5017, Vol. X, p. 4515) they "bought some of the pipe from G. D. Raymond, and some of it from John M. Phillips" (Vol. II, p. 984). Paulsen himself said "I estimated that I could manufacture pipe myself if I could not get a price later, if I was awarded the job" (Vol. I, p. 493). All of which corroborates Appellants' witness, Hirsh, that anyone could manufacture pipe to meet the Queens specification and that various people actually did.

There need be no mystery as to the reason of the popularity of the precast pipe. Its use was an improvement in sewer construction. It had

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been used in the other Boroughs and elsewhere for some time before it was allowed in Queens. In Queens it became immediately popular with the contractors. Bertram said "it had certain advantages" (Vol. I, p. 282). "The contractor would prefer to use them" Vol. I, p. 283) ". . . . The handling of precast pipe was easier than monolithic" (Vol. I, p. 283). At Vol. I, p. 289, ". . . . the pipe could be laid under water with greater ease. In a very wet trench it could be laid easier than the monolithic type" "It could be laid in colder weather". All very good reasons why precast construction predominated—and still does—to the almost entire exclusion of the more antiquated monolithic sewer. Again we quote Creem, a contractor in the sewer business for "over forty years" (Vol. I, p. 362), as follows (Vol. I, p. 363) :

"Q. Would it have been in your view, well to have built a monolithic sewer in the conditions which you have described?

A. Speaking in particular about the last job first I had built in about 1910, a monolithic sewer in somewhat similar conditions to those that existed there and it convinced me that personally I would feel I was carzy if I ever attempted to build another under those conditions."

(5) THE REJECTION OF BIDS

As part of the 'conspiracy, the Appellants allege in paragraph 15 of the Declaration (Vol. I, p. 6) that Connolly rejected all bids when the lowest bidder was not favourable to Phillips. Another allegation utterly unsupported by evidence!

From the beginning of 1917, to the end of the so-called conspiracy, two hundred and twenty-two contracts were let. (Exhibit C-1, Nos. 125 to 347 inclusively, Vol. III, p. 1445 et seq.). *During the whole eleven years, in only three instances were bids rejected by Connolly when the contract was not awarded to the lowest bidder.*

(a) *Linden Street*, October, 1919 (C-1, Contract No. 171).

(b) *150th Street*, June, 1925 (C-1, Contract No. 263).

(c) *Brinkerhoff Avenue*, October 18th, 1926 (C-1, Contracts Nos. 304 and 305).

Let us briefly examine each occasion and the result.

(a) *Linden Street.*

10 This is the first instance in which Connolly exercised the discretion allowed him by law and rejected bids. On the first advertising of this contract, a firm—Booth and Flynn—were low on Type “A” with a bid of \$894,945.45. All bids were rejected,—both “A” and “B”. (C-65 and C-66, Vol. V, p. 2268, 2267). On the second advertising, the O’Rourke Engineering and Construction Company bid \$876,061.80 and were awarded the contract on the 8th of January, 1920. The City thereby saved roughly Nineteen thousand dollars—\$18,883.65.

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The contract for the work was produced as Exhibit C-17 (Vol. V, p. 2271). It is interesting to note the terms of a letter dated January 8th, 1923, written to the Honourable Charles L. Craig, Comptroller, Department of Finance New York City, which is attached to the contract, and which reads in part as follows: (Vol. V, p. 2286).

20 “This contract was one of the largest and most difficult sewer contracts which we have had in recent years. The lowest bidder was O’Rourke Engineering Contracting Company of New York City, one of the oldest and most experienced of contracting firms in the City of New York. The work being of such magnitude and of such a difficult nature, the Contractor requested and was allowed to assign part of the contract to John J. Creem of Brooklyn.”

Result: City saved \$18,883.65.

(b) *150th Street.*

30 In 1925, six years after the Linden Street contract, the Borough President again exercised the discretion allowed him by law and rejected the bid of Hammen Construction Company for 150th Street. This bid, which was submitted on the first advertising of the contract, was for \$546,830.00. The reason for the rejection of the bid is fully explained in a letter of the Consulting Engineer, Moore, which was written to the Borough President on the 22nd of June, 1925. (Exhibit C-48, Vol. IX, p. 4442.) For the convenience of the Court it is here cited at length:

40 “Sir:

In regard to the progress being made on the Jamaica Sewer System I desire to call your attention to a condition which I feel you should be thoroughly acquainted with.

On February 27th, 1925, the contract for the 150th Avenue sewer, from 134th Street to Judith Place, was let to Hammen Construction Company for \$407,045, contract time 250 days.

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Commissioner Shugrue and I heard that this work was at a standstill for weeks and no effort was being made on the part of the contractor to progress same. We notified the contractor to call at the Borough Hall and explain why this work was not being pushed. He stated that he was getting the material ready, such as well-points pumps, etc., and said at that time (which is about four weeks ago) that he would have all of the material on the job the following Tuesday and would start to work in earnest inside of a week after that. 10

I had an inspection made last week and there were only about six men on the work and they were accomplishing practically nothing at all. It is now nearly four months since this contract was given to the Hammen Construction Company, and I know you are aware of how we urged the different members of the Board of Estimate and Apportionment, and the Engineer of the Board, to do everything in their power to help us get this work going.

The point I want to bring out is the fact that on June 17th we opened bids for sewer in 150th Street between 150th Avenue and North Conduit Avenue. The same Hammen Construction Company was low on this job with a bid of \$548,830. This job is approximately 15% larger than the one the Contractor has now under contract. You have not awarded this latter contract as yet, and I desire to know if, in your judgment, good faith has been shown on the previous contract, and if you think it good policy to go ahead and award this contract, in view of what we know has taken place on the contract already awarded to the Hammen Construction Company. 20 30

Respectfully,

(Sgd.) CLIFFORD B. MOORE,

Consulting Engineer."

Every word contained in the letter as to the default of the Hammen Construction Company and as to the facts therein recited is true. The Hammen Construction Company had been in default on the 150th Avenue (Section 2) contract for almost four months at the date Moore's letter was written. It would have been most improper to have granted another contract approximately 15% larger than that upon which they were already in default. Had the Borough President not acted upon Moore's letter he would have been severely criticised. The Hammen Company was clearly in default. In each of the bid forms as approved by Corporation Council of the City of New York appears the following sentences: 40

“The President expressly reserves the right to reject all bids if he shall deem it for the public interest so to do. *No bid will be accepted from, nor contract awarded to, any person who is in arrears to the City of New York upon debt or contract, or who is a defaulter, as surety or otherwise, upon any obligation to the City of New York.*”

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10 For almost four months the Hammen Company had been a *defaulter* upon the 150th Avenue contract within the meaning of this clause. Connolly had no right to accept any bid from the Hammen Construction Company.

On the strength of Moore's letter the bids were rejected and the contract was advertised the second time, bids therefor being received on the 9th of July, 1925. On the second letting, Oxford Engineering Company was low with a bid of \$546,325, the City thereby obtaining a presumably decent contract and saving a little money.

20 We will later comment on the character, financial and moral, of Paulsen the guiding light of the Hammen Construction Company. Mr. Connolly, as President of the Borough, deserves to be congratulated for his conduct in this matter.

(c) *Brinkerhoff Avenue.*

30 The third and last instance in which the Borough President exercised his discretion in rejecting bids occurred in the year 1926.

When the Brinkerhoff Avenue contract was first advertised, Sigretto and Company's bid of \$349,201 (C-60, Vol. X, p. 4853) was the lowest among five bids which ranged from that figure to \$429,232.

It was, however, considerably in excess of the estimate—\$162,372— or roughly 85%—and was accordingly rightly rejected with all others. (C-64, Vol. X, p. 4963.)

40 Again bids were called and on August 24th, 1926 (C-63, Vol. XI, p. 5020) five bids were received and opened. They varied from \$296,496 to \$429,232, the lowest bid on the second advertisement being that of Paulsen.

Shortly after these bids were received the Consulting Engineer, Clifford B. Moore, wrote to the Borough President the letter which has been produced as Exhibit C-62 (Vol. XI, p. 5027). It deals with the proposed Brinkerhoff Avenue contract and reads as follows:

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“On August 24, 1926, bids were received for the above proposed contract. There were five bidders and prices ranged from \$296,496 to \$429,232. This work included approximately 400 feet of tunnel work under the Long Island Railroad yard, three-quarters of this tunnel work is under compressed air, the remaining quarter under free air.

The bids were very much unbalanced, that is the lowest bidder had bid \$205 per lineal foot. The next high bidder had bid \$150 per lineal foot. Combining this tunnel construction with open cut work permits of unbalancing bids to an extent which I believe is not for the best interests in securing economical results. 10

I would respectfully recommend that these bids be rejected and the contract be re-advertised as two separate contracts, one to include the tunnel and the other open cut work.

I am convinced this will secure more balanced bids and probably a saving to the city. 20

Respectfully,
(Sgd.) CLIFFORD B. MOORE,
Consulting Engineer.”

The Engineers' final estimate for this particular contract was \$186,829 (See Exhibit C-63, Vol. XI, p. 5020). The lowest bid on the second letting was roughly \$110,000 in excess of the estimate of the Engineers. In these circumstances, Moore's letter was written suggesting, for the reasons given, that the contract be divided, remarking as he did in the last sentence of his letter, “I am convinced this will secure more balanced bids *and probably a saving to the City.*” 30

The Borough President, acting on the advice of the Consulting Engineer, rejected the bids and the contract was advertised a third time, bids being called for separately for the tunnel part and the open cut work. When the bids were opened on the 18th of October, 1926, the bids of the firm of Muccini and Decker, aggregating \$248,425, were lowest and the job was let on two contracts. 40

No. 81333—Exhibit C-81 (Vol. XI, p. 5097)—Sewer part alone	\$170,975.00
No. 81334—Exhibit C-82 (Vol. XI, p. 5100)—Tunnel only and shaft	77,450.00
	\$248,425.00

The opinion and the predictions of the Consulting Engineer, Moore, were correct and the City saved as a result of the rejection, \$100,816,—the difference between \$349,241, the lowest bid on the first letting, and \$248,425, the lowest bid on the third letting.

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Result: City saved \$100,816.

10 .. as a result of the rejection of bids:

Linden Street	\$ 18,883.65
150th Street	505.00
Brinkerhoff Avenue	100,816.00

Total saved City \$120,204.65

20 The reasons for the excess of the contractors' low bid over the Engineers' estimates with respect to the last contract (Brinkerhoff Avenue) were the subject of thorough discussion by the Board of Estimate and Apportionment. Chief Engineer Tuttle submitted a report dated June 10th, 1926, which will be found in the Minutes of the Board of Estimate and Apportionment (Exhibit D-4, Vol. XI, p. 5492). This report was submitted over four months before the third occasion on which bids were opened for the contract (October 18th, 1926).

30 Again quoting Tuttle "... it has been shown that the authorization as a whole will probably result in a deficiency..." (Vol. XI, p. 5493). And he continues to explain that, owing to the ground water "and on the basis of the conditions there disclosed, the bids for the continuing upstream section have been based on the assumption that similar conditions would here obtain *with the result that the cost of the project has been very substantially increased as compared with the original estimates.*" (D-4, Vol. XI, p. 5494).

We will refer later to the several reports of the Chief Engineer of the Board of Estimate and Apportionment, Mr. Tuttle, when dealing with the various contracts which were let for other sewers to be constructed under similar conditions.

40

(6) 150TH AVENUE CONTRACT — WATERPROOFING MEMBRANE

It is alleged that in the year 1924, "the exact time of which is to Plaintiffs unknown" (Declaration, par. 14, Vol. I, p. 5), the specifications for the monolithic type of pipe were changed by Seeley by the addition of what is called a waterproofing membrane. This, we are told, added to the

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cost of the monolithic type of sewer and resulted in preventing the contractors from using any other pipe than the precast type manufactured by Phillips or the Lock Joint Company.

We answer this charge by declaring it to be false. It is contradicted by the terms of Appellants' Exhibit C-1 (Vol. III, p. 1442 at p. 1445). The Atlantic Avenue contract (No. 131), Collins Avenue contract (No. 132), and the Hull Avenue contract (No. 133) were all signed on the 23rd of April, 1917. These contracts called for the precast type of sewer known as Type "B" and between the 23rd April, 1917, and the 8th of December 1924, no less than 105 contracts providing for this type of sewer—Type "B" — were executed. The monolithic type of sewer had already fallen into desuetude—and for very good and excellent reasons! (Creem, Vol. I, p. 362, and many other of Appellants' witnesses.) 10

Again, referring to Exhibit C-1, we find that during this period, namely between the 23rd of April, 1917, and the 8th of December, 1924, no less than 124 contracts for sewers were executed. Of these contracts, 105 called for the precast or "B" type. The remaining 19 contracts called for sewers of other construction and it is interesting to note that only 14 of such contracts called for the monolithic or "A" type. 20

Here again the allegations of the Appellants are conclusively contradicted by their own exhibits. Can it be argued that the inclusion in 1924 of the waterproofing membrane in the specifications for the monolithic pipe caused that type to be disregarded by the contractors—or that such inclusion was due to Seeley—or that Connolly and Phillips were *particeps criminis* in the change—or that the Appellants in any way suffered. The charge is utter nonsense. It is refuted by the terms of Exhibit C-1 itself and is in addition refuted by the evidence of record. Let us consider the evidence: 30

Bertram, in the employ of the City of New York since 1907 and in the Sewer Department of Queens since 1914, states that the construction of sewers and the materials used changed from time to time. (Vol. I, p. 261.)

"Q. Well, since you have been engaged in work incident to the construction of sewers, has there been *any modification in the method of construction?* 40

A. *The specifications have been altered from time to time to follow the best practice.*

Q. Changes in method as well as in material?

A. Yes.

Q. Continuing) . . . have been made from time to time, *in an effort to improve* the sewer system?

A. That's correct.

Q. Some of these modifications have proved useful and have been continued?

10 A. Yes.

Q. And some have proved less useful and have been discontinued?

A. That is correct."

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20 The waterproofing membrane was one of these modifications. The Appellants assume that it was put in the specifications by Seeley as a result of the award of the Hammels Boulevard contract (Exhibit C-33, Vol. VIII, p. 3535) to Patrick McGovern Inc. This contract was for the monolithic or Type "A" construction. There is no justification for such an assumption, because.

(a) Seeley had no discretion or power to alter plans or specifications.

(b) The plans and specifications for the waterproofing membrane were approved both by the Borough and City officials. We will separately deal with these points:—

30 (a) *Discretionary Power of Seeley.*

It is absurd to suggest that Seeley, holding a subordinate position in the Borough office, could in any way be responsible for the change in the plans and specifications claimed by the Appellants. *Thus Bertram*, specifically referring to the waterproofing membrane and to the instructions given to Seeley concerning this specification, testifies as follows:— (Vol. I, p. 165.)

40 "Mr. Hackett: You also stated that you didn't know which of Mr. Seeley's superior officers had given them to him?

The witness: That is true. *Idon't know who gave Seeley the orders.*

Mr. Goudrault: Mr. Seeley, he was the Assistant Engineer, Division of Sewers."

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Seeley might make recommendations or suggest improvements, but he had no authority to do more than that. (Bertram, Vol. I, p. 171.)

“Q. And Mr. Seeley, you said, was your superior officer?”

A. Yes.

Q.—And had in turn many superior officers of his own? 10

A. *He had four or five.*

Q. Yes. And from whom he got his instructions you have already told us you did not know?

A. I don't know where he got his instructions.”

Seely's position as an inferior was well recognized by all with whom he came in contact—either co-employees or members of the public.— 20

Sommerfeld, p. 229 (Vol. I.)

Q. Mr. Sommerfeld, I understand that Mr. Seely was the assistant engineer of the Sewer Division when you were there. That is correct, is it?

A. Yes.

Q. *And Mr. Seely was under Mr. Rice?* 30

A. Yes.

Q. Who was the engineer in charge of the Bureau?

A. Yes.

Q. *And Mr. Rice would give his orders to Mr. Seely and Mr. Seely would transmit them to you and to Mr. Bertram who has testified this morning?* 40

A. Yes, that is right.

Q. *And if Mr. Rice was not present or not available, Mr. Perrine would be in charge over Mr. Seely; is that right?*

A. Well, he might be in charge. I guess that is right.

Q. I merely want to get the personnel.

A. Yes, technically Mr. Perrine was over Seely; technically.

Q. Mr. Perrine was over Seely, and Mr. Rice was over Seely?

A. Yes.

Q. And you were over Mr. Bertram?

10 A. No. I wasn't over anybody.

Q. Perrine was Engineer of sewers?

A. That's it, yes.

Q. So that the order in which these gentlemen came was Mr. Perrine, Mr. Rice, Mr. Seely, Mr. Bertram and yourself?

A. Yes.

20 Kraus, p. 142, (Vol. I.)

Q. And who were the officials, will you mention them again, Mr. Kraus, if you please, that were over Mr. Seely?

A. Mr. Rice was in charge of a dual department consisting of the Bureau of Sewers and Highways.

Q. Yes.

30 A. And if my memory serves me I believe Mr. Perrine was the engineer of sewers at that time.

Q. Mr. Rice and Mr. Who?

A. Perrine. P e r r i n e .

Q. So that Mr. Rice and Mr. Perrine—Mr. Rice would be the head of the department, Mr. Perrine would be next or would be associated with Mr. Rice as head of the department; then would come Mr. Seely, and then would come yourself; is that correct?

40 A. I would consider them in that order, although it would be pretty difficult to differentiate, except by title.

Mc Donald, p. 698, (Vol. II.)

Q. You knew some of the engineers there?

A. Yes, sir.

Q. As a matter of fact, there were a great many there, were there not?

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A. *Oh yes.*

Q. Did you know Mr. Rice?

A. Yes, I know Mr. Rice.

Q. What was his position there?

A. *Mr. Rice was chief engineer.*

10

Q. He was over a man by the name of Seely?

A. Well, *I never met Mr. Seely in connection with this work.*

Q. You met Mr. Perrine?

A. Yes, sir.

Q. And do you know what his position was?

A. I believe he was *sewer engineer at that time.*

20

Q. Did you met Mr. Blake?

A. *I met Mr. Blake, yes.*

Q. Do you recall what his position was?

A. I believe he was highway engineer at that time.

Q. And of course these sewers that you were constructing were 30
built along the highways?

A. Yes, sir.

Q. And his department was vitally interested in the way that you
executed your work?

A. Yes, sir.

Q. Did you come into contact with any of what we call the *city* 40.
engineers as distinct from the borough engineers?

A. Why, there was a comptroller's engineer.

Elkin, p. 784 (Vol. II.)

Q. You knew Mr. Blake?

A. Yes, sir.

Q. He was also an engineer?

A. Yes, sir.

Q. And you knew Mr. Bishop?

A. Yes, sir.

10 Q. And Mr. Pine?

A. Yes, sir.

Q. Mr. Pine, I believe, was with the City as distinct from the Borough, wasn't he?

A. Well, there was a Mr. Pine in the sewer department.

Q. There was?

20 A. He was in the sewer department under Mr. Seely.

Q. Yes. And you know that plans and specifications have to be submitted to the engineers in both the department in Queens and in the Board of Estimate, of the City?

A. Yes, sir.

Q. And have to be approved by all those engineers?

30 A. They are made at the point of origin in Queens and submitted to the Board of Estimate.

Q. And men like Rice and Perrine had to pass upon the work of their subordinates?

A. Yes.

Q. And as a matter of fact they very carefully checked?

A. That is right.

40 Bertram replaced Seeley and the limitations of the latter's position are very clearly stated. (Bertram, Vol. I, p. 167.)

“Q. In your capacity of Assistant Engineer in the Division of Sewers of the Borough of Queens, did you have such power to give to one of your employees, designer or assistant designer, and make suggestions of this nature for the improvement of the works in the construction of sewers, improvement of the works, to the best of your knowledge of the question?”

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A. *Well, I would consult with my superiors before I made any radical changes."*

This Seeley was also bound to do. *And the witness Paulsen had similar ideas as to the limitations of Seeley's position. Thus he states:*

(Vol. II, p. 534.)

"I didn't see what Seeley could do."

10

So also the witness Hart. (Vol. II, p. 858.)

"Q. In your relations as a pipe seller I believe you have told us that you know that the specifications for *these various pipes have to have the approval of the Engineering Departments both of the City of New York and of the Borough in which the work is to be done?*

A. Yes sir.

20

Q. That is to your knowledge?

A. To my knowledge, it is; yes, sir."

Still another witness, Decker, an ex-employee of the City of New York, who worked in the Sewer Department of the Borough of Queens from 1907 to 1914, states: (Vol. II, p. 711.)

"Q. Apart from the Engineers of the Borough, there was also a corps of Engineers from the City, the Board of Estimate and Apportionment, was there not?"

30

A. Yes, sir.

Q. And they followed the plans and specifications in the execution of the work very carefully?

A. Yes. They have to check them first.

Q. Yes. All the plans and specifications have to be approved not only by the Borough staff but by the staff of the City?

40

A. Yes, sir. Board of Estimate.

Q. And they are skilled men who are supervising work in all the Boroughs of the City, are they not?

A. Yes, sir."

The careful manner in which the various contracts were checked

and re-checked will appear by an examination of practically any of the contracts filed. For instance, in the contract awarded to Oxford Engineering Company for 150th Street (Exhibit C-150 in Vol. XI, p. 5137 et seq.) appears the following, clearly indicating that the contract was checked on April 8th, 13th and 14th, 1927, respectively by three superiors of Seely (Perrine, Bishop and Rice) and also by a representative of the City Auditor's Department.

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10 At p. 5141.—

"CERTIFICATES TO BE SIGNED BY COMPETENT PERSONS COGNIZANT OF THE FACTS.

I HEREBY CERTIFY that I have carefully made the above estimate in the manner required by the Contract, and that the work was done and the materials delivered estimated, including the prices thereof, are in conformity with the Contract and Specifications thereof, and have not been heretofore certified for payment.

20

Approved April 8, 1927.

Date April 8, 1927.

"J. Franklin Perrine"

"William Bishop"

Engineer of Sewers

Engineer of Construction."

At p. 5142.—

On April 13th, 1927, the "Auditor, General Administration" certified that the matter was correct in all respects.

30

At p. 5146.—

James Rice, "Engineer in Charge Engineering-Construction" wrote Connolly, April 14th, 1927. —

40

"The work has been in charge of Engineers and Inspectors of this Bureau, it has been done in accordance with the terms of the contract, the payment was inspected and I hereby certify that the contract is entitled to payment.

I recommend that this certificate be forwarded for payment."

In like manner, see Exhibit C-45—the Contract for "150th Avenue Contract No. 2"—regarding which "J. Franklin Perrine, Engineer of Sewers" wrote detailed reports (p. 5064) and certified that the contractor was entitled to payment (p. 5069).

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Moreover (at p. 5070 and p. 5071) "James Rice, Engineer in charge of Engineering Construction" recommended payment of the said contract, and when reporting to the Borough President, who naturally and properly acted on the recommendation, he said in part.—

"The work has been in charge of Engineers and Inspectors of this Bureau, it has been done in accordance with the terms of the contract, the pavement was inspected and I hereby certify that the contractor is entitled to payment." 10

"I recommended that this certificate be forwarded for payment."

And similar certificates may be found in virtually all the contracts which were produced.

The matter is made even more abundantly clear by the evidence of many of the Appellants' own witnesses among whom were Carey, Decker, McDonald, O'Kourke and Elkin. 20

Carey was asked the following question (p. 666, line 38).—

"Q. Your work was pretty closely followed by the head men in the Borough, as well as the head men in the City?"
to which he replied (p. 667, line 10).—

"*The Witness*: I should say the work was most closely supervised, and followed, by both the Borough authorities and the Comptroller's department." 30

and, continuing:

"Q. And I suppose there was that healthy rivalry between the two which meant they checked each other very carefully?"

to which Carey's answer was (at line 21).—

"*The Witness*: I should say they cross-checked each other in the most scrutinizing manner." 40

Decker, p. 711, Vol. II.

"Q. Apart from the engineers of the Borough, there was also a corps of engineers from the City. The Board of Estimate & Apportionment, was there not?

A. Yes, sir.

Q. And they followed the plans and specifications in the execution of the work very carefully?

A. Yes. They have to check them first.

10 Q. Yes. All the plans and specifications have to be approved not only by the Borough staff but by the staff of the City?

A. Yes, sir. Board of Estimate.

Q. And they are skilled men who are supervising work in all the Boroughs of the City, are they not?

A. Yes, sir.

MacDonald, p. 699, Vol. II.

20 Q. Just tell us how they inter-relate and to what extent they check one another?

(objection omitted)

A. In our work we generally have monthly estimates, and the *Comptroller's engineer checks these estimates in the field with the engineer that makes them up. And then I understand that the final estimate is checked by the Comptroller's engineer before it is paid.*

30 Q. And the plans and specifications have to run the gauntlet of the two houses?

A. Yes, sir.

Q. The Borough house and the upper or Metropolitan house?

A. Yes, sir.

40 Q. And are submitted to the engineers of both the Borough and the City?

A. Yes, sir.

O'Rourke, Vol. II, p. 590.—

Q. From your experience with office routine, you knew that any change in specifications had to go before the superior?

A. Yes.

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Q. And had to have their approval?

A. Always.

Q. And *any modification in the specifications* or the plans,
of course *had to have the approval, the signed approval?*

A. Approval of the *Borough President*.

Q. Approved by the Borough President?

10

A. And by the *chief engineer*.

Q. The chief engineer, *and other superiors of Seely?*

A. Yes.

Elkin, Vol. II, p. 784.—

Q. You knew Mr. Blake?

20

A. Yes, sir.

Q. He was also an engineer?

A. Yes, sir.

Q. And you know Mr. Bishop?

A. Yes, sir.

Q. And Mr. Pine?

30

A. Yes, sir.

Q. Mr. Pine, I believe, was with the City as distinct from
the Borough wasn't he?

A. Well, there was a Mr. Pine in the sewer department.

Q. There was?

A. He was in the sewer department under Mr. Seely.

40

Q. Yes. And you know that plans and specifications have
to be submitted to the engineers in both the department in Queens
and in the Board of Estimate of the City?

A. Yes, sir.

Q. And have to be approved by all those engineers?

A. They are made at the point of origin in Queens and submitted to the Board of Estimate.

Q. And men like Rice and Perrine had to pass upon the work of their subordinates?

A. Yes.

10 Q. And as a matter of fact they are very carefully checked?

A. That is right.

(b) *Approval of Borough and City Officials.*

The "plan, profile and details" for the 150th Avenue sewer, dated December 8th, 1924, giving all details of the waterproofing membrane, was produced as Exhibit C-3 (Vol. VIII, p. 3999). The signature of Seeley's superior officer, "J. Franklin Perrine, Engineer of Sewers," appears thereon, also appears the following note:—

"Any modification of these plans must be submitted to the Engineer - in - Charge - Engineering Construction for his examination and approval."

In the year 1926, while work was proceeding on the 150th Avenue sewer, the plan was amended and the "amended plan" bearing date June 9th, 1925, has been filed as Exhibit C-6 (Vol. IX, p. 4429). The waterproofing membrane is again clearly shown on the amended plan which

30 bears the following signatures:

"Michael J. Shruge, President of the Borough.

James Rice, Engineer in charge of Engineering Construction.

J. Franklin Perrine, Engineer of Sewers.

40 Frederick Seeley, Assistant Engineer, Division of Sewers."

It is clear from the foregoing that all of the above-named Engineers,—all Seeley's superior officers,—were fully aware of the terms and provisions of the specifications appearing on the first sheet of the original plan (Exhibit C-3, Vol. VIII, p.3999). The waterproofing membrane appears on this plan, and as the amended plan, Exhibit C-6 (Vol. IX, p. 4429), specially refers to the original plan of the 8th of December, 1924, Exhibit C-3, further argument would appear useless.

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Bertram, when examined with respect to the original plan, Exhibit C-3, definitely declares that the Engineers of the Board of Estimate and Apportionment had duplicates in the office, of all the plans. (Vol. I, p. 273.)

“ . . . We send them blueprints . . .

Q. Yes, but they have in their office duplicates of your records? 10

A. Yes.

Q. Of all these?

A. Yes.”

And he says: (Vol. I, p. 256.) “. . . the plans are re-submitted to the Engineers of the Board of Estimate or at least sent to the Board of Estimate? . . . A. The Engineers examine them.”

An examination of the list of engineers attached to the office of the Chief Engineer of the Board of Estimate and Apportionment (see first page of Exhibit D-1, which Appellants also omitted to print) shows that the staff in this office consists of twenty engineers including a sewer specialist designated as “Assistant Engineer (Sewer Design).” Bertram further states: (Vol. I, p. 153). 20

“The plans and specifications are one. They are all part of the contract, even though they are not fastened together.”

And the 150th Avenue contract, which was awarded to the Hammen Construction Company, bears the following notation on the cover: 30

(Exhibit C-36 at Vol. IX, p. 4300.)

“Adopted by unanimous consent by the Board of Estimate and Apportionment, January 29th, 1925.”

The contract was signed on the 16th of March, 1925 (Exhibit C-36 at p. 4335). The whole matter — plans, specifications, quantities, estimates, etc.,—was therefore carefully considered by the Borough officials, re-considered, ratified and approved by the City officials, — the board of Estimate and Apportionment,—roughly two months before the contract was awarded. It cannot be suggested that Seeley was responsible in any way for the modified specification providing for the waterproofing membrane. And on this point also we urge that the Appellants have utterly failed in their proof. 40

(7) O'ROURKE CONSTRUCTION COMPANY

(*Pretended Payments for Account of Phillips*)

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10 It is charged that Phillips was instrumental in having certain cement blocks, manufactured by O'Rourke Engineering Construction Company, used in connection with a tunnel in Queens and that for this service he was paid a fee of \$50,000. Even if true, the charge would prove nothing as to the alleged conspiracy between Connolly, Seeley and Phillips. It is, however, quite unproved.

Mr. John F. O'Rourke testified that he saw Seeley in 1919

"in regard to explaining the merits of the concrete block tunnel shields and its application to the tunnel that they were at that time preparing plans."

(Linden Street Tunnel, Vol. II, p. 564.)

20 He interviewed Seeley at the latter's office in the Borough Hall. (Vol. II, p. 564.)

"Q. What did you do at that first meeting with Mr. Seeley?

A. I explained the method of building that type of tunnel and its advantages.

Q. What did Mr. Seeley say?

30 *Objection.*

A. That he would give it consideration. He was pleased with the idea."

The first meeting of O'Rourke with Seeley was short. "It does not take me long to tell anybody about a thing like that." "His attitude was more or less receptive." Seeley said "he was too busy to go to Detroit" (Vol. II, p. 566). "As an inducement, I told him about this tunnel that was being built in Detroit and *I invited him* to come out there to see it" 40 (Vol. II p. 566).

"I was of course anxious to get the demonstration if I could." And Seeley was persuaded to go to Detroit with O'Rourke. All the arrangements were made by O'Rourke. "I made arrangements as soon as I arranged with Seeley to go and it was arranged by Seeley to take Decker because he wanted Decker's opinion also. Then I procured the transportation and telegraphed to the Detroit people that I was going to be out there on Sunday" (Vol. II, p. 568). Referring to Seeley: "*I wanted*

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him to see that tunnel and he wanted to see it.—And there was nothing to talk about. There never was in all my relations with Seeley anything other than the ordinary business that takes place between the Engineer and the contractor” (Vol. II, p. 570). O'Rourke continues: “I was advised that Mr. Phillips was a man of influence, — I had never met him,—and that perhaps he could help me. And I saw Mr. Phillips. He was quite taken with the idea” (Vol. II, p. 567).

Certainly Phillips was taken with the idea. O'Rourke was the head of “one of the oldest and most experienced contracting firms in the City of New York” (See letter, January 8th, 1923 attached to Exhibit C-17. Vol V, p. 2286). Phillips was doubtless flattered. He was a keen business man and he availed himself of every opportunity to ingratiate himself with anyone who might be of use. There is not, however, one scrap of evidence that Phillips ever did anything whatever on O'Rourke's behalf. There is no evidence that Phillips ever saw or spoke to Seeley, and Connolly's name is not mentioned. 10

The matter as to the influence of Phillips may briefly be summed up by a citation from the evidence of Matthews. (Vol. II, p. 633.) 20

“Q.—He was apparently a man of considerable means at this time?

A. Yes, sir.

Q. And a great deal of agility?

A. He was a very clever man. 30

Q. And he succeeded in making people believe him?

A. He made people believe that he could get things done.

Q. Whether they were accomplished or not?

A. Whether they were accomplished or not.”

As a result of the visit to Detroit, the Engineers of the Borough were convinced as to the desirability of using the blocks, and certain descriptions to embody in the specifications were prepared by O'Rourke, at the request of the engineers (Vol. II, p. 571-2). The blocks were adopted as an alternative plan (Vol. II, p. 580). Specifications were prepared with O'Rourke's assistance for technical details (Vol. II, p. 580). And then Phillips, it is claimed, demanded for his services the sum of \$50000. O'Rourke continues: “There was never any agreement.” He did not pay the \$50,000, but testifies that he paid \$8,500 to one Matthews for the account of Phillips (Vol. II, p. 591). 40

10 Again the faithful 'cheque stubs are brought into evidence, this time the cheque stubs of the O'Rourke Construction Company (Exhibits C-68 and C-69, Vol. VI, p. 2578, 2588 dated respectively October 15th, 1920, and December 8th, 1920), and what do these cheque stubs show? The first that a cheque for \$3,500 had been issued to William F. Matthews, the second that on the 8th of December, 1920, a further cheque for \$5,000 had been issued in favour of Matthews. We will not again renew our argument as to the usefulness of cheque stubs as evidence of pay-
ment. In the present case the cheque stubs have not even the merit of bearing Phillips' name. But, say the Appellants, we have Mr. Matthews. He admits that he received the two cheques, the first for \$3,500 to use partly to pay Phillips' debts and after such payment by handing the balance to Phillips. As regards the second cheque, he handed it to one Zorn. Zorn says he remembers nothing about it.

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20 Finally, O'Rourke ends by giving Phillips a clean bill of health and we quote with satisfaction the following: (Vol. II, p. 573.)

“I might add, if you won't object to it, that no official, nor any official action is involved whatever in anything proposed to me by Phillips. It was never said that he could do this or do that or do the other thing and I certainly would have had nothing to do with it if I had any idea that they were going to do any bribing of officials or anything that was not right.”

30 And earlier in regard to Seeley the same witness says: (Vol. II, p. 568.)

“Mr. Seeley, I am sorry to say, rather I am happy to say, was one of the finest chaps I ever met.—and at Vol. II, p. 570—“There never was in all my relations with Seeley anything other than the ordinary business that takes place between the engineer and the contractor.”

40 When the important matter of having his Company's blocks accepted for the Linden Street contract had been arranged, O'Rourke states that Phillips *suggested* that he should be paid \$50,000—a suggestion that was not complied with, although the cheque stub of the 15th of October, 1920, for \$3,518 (Exhibit C-68, Vol. VI, p. 2578) and the cheque stub of the 8th of December, 1920, for \$5,000 (C-69, Vol. VI, p. 2588) in favour of William F. Matthews are proudly produced as indicating that O'Rourke was not without conscience and that he had fulfilled his moral obligation to a dead man by making payments to somebody else. Surely something more formal and convincing is needed to avail unfavourably against John M. Phillips—or his heirs.

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Here again the absence of any question to Seeley would seem, from the Appellants' point of view, to be unfortunate.

(8) ASSIGNMENTS—THE HIGHWAY IMPROVEMENT
AND RIVERDALE CONSTRUCTION CO.

In the Superior Court a lengthy argument was advanced by the Appellants in regard to the assignments of contracts by the Highway Improvement and Repair Company and the Riverdale Construction Company. The Respondents were unable properly to understand the tenor of the charges. It would seem, however, that the contentions of the Plaintiffs in regard to the eight agreements were that were let at grossly excessive prices and then fraudulently transferred to the two companies mentioned—All being for the benefit of and evidencing the conspiracy supposed to have existed between Connolly, Seeley and Phillips. 10

Since the hearing in the Superior Court the matter has been considerably simplified by the following Admission by the Appellants. It appears in Volume XII at p. 5559. The Appellants admit. 20

“(d) That Exhibits C-90, 91, 92, 93, 116, 117 and 118, being assignments of the contracts therein referred to, are in all respects proper and legal, duly made in conformity with all statutes, regulations, laws and by-laws of the City of New York and the said Borough of Queens after due compliance with the provisions of the Charter of the City of New York (Exhibit P-19) and without limiting the generality of the foregoing that the said assignments and each of them are in every way legal as to form and execution, that security and sureties in the manner prescribed and required by ordinance was given and obtained in each instance and the adequacy and sufficiency of the said security, in addition to the justification and acknowledgment thereof, was approved by the Comptroller and all other administrative and executive officers of the Government of the City of New York and the Borough of Queens, one of the Boroughs of the said City of New York.” 30

The facts of the matter are relatively simple and thoroughly innocent. 40

The Highway Improvement and Repair Company contracts appear on Exhibit C-1, as numbers 286, 287, 288 and 289 (Vol. III, p. 1449). These four contracts were signed on the 26th of April, 1926. The bids were open for these contracts on the 7th of April, 1926. The Appellants' complaint with respect to these contracts is that they were let at exorbitant prices

to a company which never intended to carry them out and had no financial standing. This contention is quite unfounded.

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10 Before awarding the contracts to this company, which had previously executed some 75 or 80 contracts in the Borough of Queens (Vol. II, p. 722), the Borough President sent for Turner and asked him if his company could go ahead with the work, if awarded. Turner said "I simply convinced him that we could go ahead with it" (Vol. II, p. 733). Knowing the past performances of this company, Connolly awarded the contracts without Phillips being even aware of the fact. Turner's company, the Highway Improvement and Repair Company, had tendered for the four contracts. And Turner says: (Vol. II, p. 728.)

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"Q. Was your company able to build those sewers when you put in those bids?....

20 A. Yes, sir, we had all the necessary equipment, such as cranes, pumps, well points, organization and capital." (Vol. II, p. 731.)

And the prices upon which Turner's company figured and bid were calculated by Turner and the Engineer of the Highway Improvement and Repair Company. There was no reference whatever to Connolly, Seeley or Phillips as to such prices. Here Turner says: (Vol. II, p. 730.)

"I believe it could be done for that.

30 Q. You relied on his (the Engineer's) knowledge of the matter?

A. Yes."

40 After the award of the contracts, Phillips requested Turner to go to his (Phillips') office and Turner did so. They had always been on bad terms (Vol. II, p. 738) and they quarrelled biterly. "Phillips (says Turner) did not like my attitude.... My attitude was that I would build the pipe or I wouldn't bother with it.... I would build the pipe myself if I felt like it." Phillips then insisted that Turner assign the agreements to Paino and Paulsen and Turner refused to do so (Vol. II, p. 738-9).

At a later date, through the efforts of Turner himself, the contracts of the Highway Improvement and Repair Company were assigned, as before stated, not to Paino and Paulsen but to different Contractors, namely Muccini & Decker and the Awixa Corporation. Phillips had nothing to do with these latter assignments (Vol. II, p. 753) and Turner obtained from the assignees the best possible price (Vol. II, p. 747). As consideration for the transfer the Highway Improvement and Repair Com-

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pany was paid by Muccini & Decker \$30,000 in cash. The transfer to the Awixa Corporation was on a percentage basis (Exhibit C-90, Vol. X, p. 4834) a refund to the Awixa Corporation being actually made at a later date (Vol. II, p. 752).

In regard to the four contracts which we have been discussing, it is well here to consider the final figures:

Foch Boulevard	\$ 638,042.40	10
Springfield Avenue	617,787.00	
Hempstead Avenue	365,852.93	
Jamaica Avenue	954,172.84	
<hr/>		
Total cost of work	\$2,575,855.17	

The Appellants in argument in the Court below expressed horror at the fact that the Highway Improvement and Repair Company (Turner) was paid somewhat less than \$60,000 for the assignment of these agreements. Bearing in mind the total cost of the work, the consideration paid for these assignments — less than 2.40 per cent — appears ridiculously low. If there is one single piece of evidence of record completely disproving the conspiracy charge it is the incident in reference to the assignment of these contracts. 20

The assignment of contracts in any of the Boroughs of the City of New York was a very common matter. If a contractor was finished with a contract and had no further work in sight it would be to his interest to pay for an assignment for the purpose of keeping his plant intact. That there was nothing peculiar in such assignments will appear by a reference to any of the contracts produced by the Appellants. In each and every of these agreements we have a printed form actually providing for liens and assignments and on this form all assignments were entered. In every case the form of the assignment was approved by Corporation Counsel and in every case it was a matter of total indifference to the City of New York whether the contractor performed the work himself or whether this work was performed by an assignee. In each case the sureties who had guaranteed the performance of the original contract were obliged to guarantee the performance by the assignee and in each case where there was an assignment not only did the City have the obligation of the original contracting parties and the guarantors, but in addition it had the obligation of the assignee. As to the foregoing, let us quote the following evidence: 30 40

Carey, Vice-President, Necaro Construction Company (at Vol. II, p. 664):

“Q. The assignment of contracts generally and in the Bo-

rough of Queens particularly, was not unusual?

A. It is a common trade custom.

Q. Sometimes something is paid for the assignment and
and sometimes not?

A.—Well, it is quite usual to sell it for a consideration.

10

Q. Yes. The purchaser may be in a position to perform the
work for any one of a number of reasons?

A. True.

Q. He may want to hold his organization together and be
willing to do it without profit?

A. There are many reasons, but it is quite usual for money
to pass in such a transaction.

20

Q. In the transfer that you got of a contract, you paid for it?

A.—Paid \$30,000 for it.

Q. Paid \$30,000. And to your knowledge that is an everyday
transaction among contractors?

A.—It is a continuous and frequent happening.

Q.—How many jobs did you do for the Borough of Queens?

30

A. I couldn't say. I judge above ten million dollars worth of
work.

Q. And that was done through the course of several years?

A. Yes, sir."

Turner, at Vol. II, p. 753:

40

"Q. You told us that in the office of Warren Brothers there
was a form for assignments?

A. Yes, sir.

Q. Assignments of contracts is a very ordinary thing in the
contracting business, isn't it?

A. It is being done every day.

Q. Every day?

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A.—Yes.

Q.—And contracts are bought and sold like apples on the street, almost?

A. Yes.

Q. I can tell you a number of witnesses have told us that.

A. Well, we do it very day. 10

Q. And there was nothing unusual about the acquisition of this, — about the sale of these contracts?

A. No, sir.”

Creem, at Vol. I, p. 363-4-5-6:

Vol. I, p. 363.

“Q. In so far as the assignments went, the performance of 20 this work was still guaranteed to the Borough or the City by the bonding companies?

A. Yes.

Q. So if the bonding companies were solvent, it made no difference to the City who did the job?

A. The Contractor is also a party to the bond, so the City had an interest in that respect.” 30

Vol. I, p. 364-

“Q. You have known of men buying contracts before? There are excellent reasons for paying for contracts, are there not?

A. Oh, yes.

Q. At the time you purchased this contract, had you any reason to keep an organization together? 40

A. Yes, I had a reason. I had sons coming along and I wanted to keep in the harness until I saw whether their minds led in that direction.

Q. What I want to get at is this——does it sometimes happen that a man can, to advantage to himself, take a job even though the profit be not big if it is going to enable him to keep his

organization together and keep working?

A. The plant is the big item there. You might better have it working, and it will last longer.

Q. Had you a plant available for this work?

A. Yes.

10

Q. And did that place you in a more favourable position to execute it than a man who might not have the plant?

A. Yes.

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Vol. I, p. CFE-F.

“Q. With regard to the Linden Avenue job—you have testified that it was originally awarded to the O'Rourke Construction Company.

20

A. Yes.

Q. Have you told the Commissioner why you approached Major O'Rourke for part of his work?

A. I don't remember whether I asked that question or not.

Q. Was there a particular reason arising out the job itself, that caused you to approach him?

30

A. It was a similar job to what I was just finishing on 51st Street and the same sized pipe and the same plant I could use and I could go right from one to the other.

Q. And the same conditions?

A. Yes, the same conditions.

Q. You said something in your examination in chief about tunneling and open cut?.....

40

A. O'Rourke is a tunnel man and I am an open cut man. I never built a tunnel and so far I know, he never did an open cut.

Q. Knowing that you felt that he would be glad to assign that portion which was an open cut?

A. Yes.

Q. And on approaching him you found that such was the case?

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A. Yes.

Q. You went direct to O'Rourke?

A. Yes.

Q. Did you pay him anything for the assignment?

A. Nothing

10

Q. The authorization of the assignment was treated apparently as a matter of course?

A. Yes.

Q. You had no difficulty in getting it through?

A. This was a little unusual, I guess, inasmuch as it was part of a contract. No, there was no difficulty, as I remember it. They seemed familiar with it in the City Departments.

20

Q. I suppose they knew that O'Rourke was primarily a tunnel man and that you were primarily an open cut man?

A. Yes."

BY MR. O'DONNELL.

"Q. It was to the advantage of both of you that you should do the open cut and he should do the tunnel work.

A. It should seem so."

30

This evidence might be multiplied indefinitely. The respondents will however, content themselves with a mere reference to similar statements by other witnesses, namely, *Decker* (at Vol. II, p. 716), "It is done every day... It is a matter of common practice." *Schlemmer* (at Vol. III, pp. 1038, 1036), *Petracca* (at Vol. III, pp. 113-4, 1146-7), *Bertram* (at Vol. I, p. 281) and *McDonald* (at Vol. II, p. 701). *Petracca*, Vol. III, p. 1146.

Q. It is quite customary for contractors to buy contracts or get assignments of contracts and pay for them? 40

A. Positively.

Q. If you are out of work and somebody has got a contract, it is to your advantage to buy it and pay for it?

A. Certainly. The City agreed and the bonding company agreed.

Q. And it was a practice that obtained, and was acquiesced in and tolerated by the contractors, by the City and by everybody?

A. Positively.

10 Q. You said that when you bought the contract from the Riverdale Company, you had no job?

A. No.

Q. And it was in your interest to get work to keep your organization together?

A. Certainly. I am looking for one now, but there is not much going on.

Schlemmer, Vol. III, p. 1038.

20 Q. And the purchase of contracts and the assignment of contracts is a very ordinary transaction between contractors, is it not?

A. A common practice.

Q. A common practice. I believe you said you had your plant near Jackson Heights, was it?

A. Yes. At Jackson Heights.

30 Q. At Jackson Heights, where you had just finished two jobs.

A. Yes.

Q. So it was very much in your interest to get a nearby job?

A. Yes.

40 Q. And that made it possible for you to do the work at a better figure than somebody who had to assemble a plant and bring it there?

A. Right.

Q. And that would in a way, explain the amount that you paid to Welsh Brothers for that particular job?

A. We were finishing a job, we had a lot of plant running into a great many thousands of dollars, and with nothing in sight,

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and we did not get that job, I was only a little high on that job, but I had to get a job or let my organization go.

Q. And is it not a fact that it is frequently in the interest of people who are contracting in a big way, to take work for a narrow margin of profit if they can hold their organization together as a consequence?

A. Exactly.

10

Bertram, Vol. I, p. 281.

Q. Is it not true that these transfers were granted as a matter of course, provided the proper formalities were applied?

A. I know a number of the contracts were transferred. One bidder would get the job and some other contractor would do the work. I know where one fellow bid and the other fellow did the work, yes: not once, but a number of times.

20

Q. And you don't know any case do you, Mr. Bertram, where the President of the Borough declined to sanction a transfer.

A. I wouldn't know anything about that.

MacDonald, Vol. II, p. 700.

Q. I understand that you had just finished a job across Jamaica Bay, and had all your plant available?

A. Yes, sir.

30

Q. And that of course enabled you to tender more cheaply than otherwise might have been the case?

A. Yes, sir.

Q. For the monolithic job?

A. Yes, sir.

p. 701, line 13:

40

“The witness: We had finished our job, and we had our plant and our organization, and we did not have anything else, so this job came up right in our back yard.”

And then, continuing at line 31 on p. 701.

Q. Haying a plant and an organization and anything else to do, it might be good business for a contractor, and in particular

for the McGovern concern, to take a contract in which there might be very little, if any, profit, for the purpose of keeping together its organization and using its plant pending something turning up?

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A. Well, I don't think we would take it if there was not any profit.

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10 Q. But you might do it at a very small margin of profit under those circumstances?

A. Yes, we would.

Q. It is generally in the interest of a contractor to keep together an efficient organization and to keep his plant working?

A. Yes, sir.

20 Q. Because it deteriorates much more rapidly as the result of rust and inactivity than as the result of use?

A. Yes, sir.

The charge in relation to the prices at which the Highway Improvement and Repair Company and Riverdale Construction Company received their contracts is answered by a reference to page 145 of the Report of the Chief Engineer of the Board of Estimate and Apportionment for the year 1926 (Exhibit D-1, Vol. XI, p. 5457, at p. 5468-9). Let us quote from his remarks, in regard to the four contracts of the Highway Improvement and Repair Company at page 145:

30

"In each of the four last projects the final estimate revealed a substantial increase over the preliminary estimate, the increase to a large extent being due to the fact that bids received in a number of contracts involving similar construction difficulties, due to the presence of ground water, indicated much higher prevailing prices for work of this nature."

40 These remarks apply equally to the Riverdale contracts which were the subject of even fuller consideration by the City authorities. This clearly appears from the minutes of the Board of Estimate and Apportionment (Exhibit D-4, Reports Nos. 33214, 33213, Vol. XI at p. 5492 and p. 5496), dated June 10th, 1926, to which the Court is respectfully referred.

Before the Riverdale contracts were let (July 29th 1926) it was well understood by the Engineers that the estimates would be exceeded on account of the difficult character of the work.

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The charges against Phillips appear to be political in character. In conclusion on this point may we refer to *the evidence of Matthews* (Vol. II, p. 632) :

“Doctor, we have been told that there were investigations and you have told us that Mr. Phillips was interested in politics. It is to your knowledge that there were political feuds?

A. All the time. They never ceased.

10

Q. They never ceased. And when the Phillips group was in, there were many other groups trying to get them out?

A. That is right.

Q. And investigations and other methods of attack were both usual and continuous?

A. That is right.”

20

And to *the evidence of Bertram* at Vol. I, p. 273:

“Q. In the course of your examination you made reference to several investigations. There was the Meyer Investigation, and the Sherman was it? Clarence something?

A. Clarence Shearn and Scudder.

Q. Meyer?

A. The Meyer was years before these others. Scudder, Shearn and finally Buckner, were all practically the same investigation.

Q. But investigation seems to be almost a chronic disease with Municipal politics in New York, is it not?

A. Yes It is right at this time, anyway.

Mr. Goudrault: Very necessary sometimes.

Mr Hackett: I am not commenting on the necessity of it, but it seems to be an incident of the political life of this City. Parties come in and parties go out, and investigations follow regularly.

A. Well, at intervals of five or six years, they make investigations.”

Again we emphasize that there is nothing in the Evidence showing

any conspiracy between Connolly, Seeley and Phillips. The basis of the Appellants' case has, in proof, utterly failed.

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VIII

CHARACTER OF APPELLANTS' WITNESSES

10 We are told that conspirators do not express themselves in writing. In the present case this is unquestionably true. There is not one scrap of writing emanating from Connolly, Seeley or the deceased Phillips tending directly or indirectly to establish their alleged conspiracy. Phillips is dead. His evidence, therefore, was not available, but this misfortune to the Respondents did not apply to the Appellants in regard to either Connolly or Seeley. We are informed that both of these gentlemen are in the Penitentiary. Possibly so, but this fact should have made it all the more easy for their evidence to have been placed in the record by the Appellants. No attempt whatever to obtain this evidence has been made.

20 On the contrary, the Appellants—possibly wisely—have contented themselves with the evidence of witnesses as to statements by Phillips during his lifetime, and very thin and unsatisfactory evidence it is. Let us consider somewhat in detail the statements of Paulsen, Weaver, Purcell and Sigretto.

30 *PAUL W. PAULSEN.* The evidence of Paulsen, who is described as one of the chief witnesses of the Appellants, will be found in Vol. I at pages 427-447; 452-453; 455-489; 492-494; 497-498; and in Vol. II at pages 501-511; 521-556; 593-615.

In 1920, this man, living in Detroit, formed a partnership with two others, John J. Hammen and Fred Bisballe, under the name of Hammen & Company (Vol. I, p. 427). In 1924 the assets of this firm were transferred to Hammen & Company Incorporated, the head office of the company being in Detroit (Vol. I, p. 427). This company went into the hands of Receivers in 1928. He was Vice-President. The company operated in Michigan only.

40 The Hammen Construction Company was also incorporated and operated in New Jersey, New York, Kentucky, Milwaukee and Wisconsin (Vol. I, p. 428).

In 1925 and 1926 the Hammen Construction Company built sewers in Queens and after 1926 the witness also carried on business under the name of The Paulsen Construction Company.

Thus, we have this eminent financier, in the short time mentioned,

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appearing as the leading light in the following commercial enterprises:

- (1) Hammen & Company (the partnership);
 - (2) Hammen & Company Incorporated (Detroit);
 - (3) Hammen Construction Company (New Jersey, New York, Kentucky, Milwaukee and Wisconsin);
 - (4) The Paulsen Construction Company;
- all of which are now apparently bankrupt.

10

Paulsen states that he first met Phillips in 1923, being introduced to him by Andrew Zorn (Vol. I, p. 428). Phillips asked him if he could build *wet work* (Vol. I, p. 429) and subsequently he again met Phillips at No. 49 Jackson Avenue. Zorn Decker and Bert Decker were there (Vol. I, p. 430). He says he was introduced to Decker by Phillips, who told him that Decker was his Engineer. Decker was never Phillips' Engineer and he denies this statement (Vol. II, p. 713) and the point is of consequence merely because Decker is the only living witness who can contradict this statement. And he does so (Decker, Vol. II, p. 717),—"I never met Paulsen to my knowledge until *after* he won the contract," i.e. after 1925.

20

About six months later Paulsen was taken to No. 49 Jackson Avenue by Zorn. Phillips was there and later Seeley and Decker came in (Vol. I, p. 457).

(Vol. I, p. 460):

30

“Q. What did Phillips say?

A. He says “You want to get better acquainted with Seeley, he is a fellow that can doll them up,” and he indicated towards the plans.”

.....After objection the examination proceeds. (Vol. I, p. 460.)

Q. Anything else?

A. Phillips also told me as I was to give him, Phillips, \$1,000.

40

Q. Give whom \$1,000?

A. Give Seeley \$1,000.

Q. Did he say what for?

A. No.

Q. Tell us the rest.

A. Seeley said, 'Don't do like....'

Further objection...

10 Seeley said, 'Don't do like those screen people did. They
still owe me \$5,000.'

(Vol. I, p. 460-461):

Q. You remember the date of this talk?

A. The date?

Q. Yes.

20 A. I don't remember the date. It was in the month of
January.

Q. The year?

A. 1925."

The attention of the Court is also directed to the cross-examina-
tion of Paulsen at Vol. II, p. 606 and following This makes the matter
clear. At Vol. II, p. 610, he says:—

30 "Q. But you did not pay him \$1,000?

A. No.

Q. And you did get the contract?

A. I did.

Q. Well, why do you drag Phillips into this matter here,
then, in this way?

40 A. I am not dragging him."

The absurdity of this testimony is apparent. On the day when
Paulsen meets Seeley *for the first time*, Phillips, who is dead and can-
not contradict the witness requests Paulsen to pay Seeley \$1,000. At this
time the 150th Street contract is about to be let. Paulsen does not pay
Seeley any money, but he is awarded the contract in question. This, say
the Appellants, proves Phillips' guilt.

Paulsen also had an agreement with Phillips in regard to the pipe

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which was required by him for use on Section 2 of the 150th Avenue sewer. This agreement has been produced by the Appellants as Exhibit C-38 (Vol. IX, p. 4194). He swears that he did not pay Phillips according to its terms, as when the contract was signed it was agreed verbally that the terms of payment should be otherwise than stipulated. Let us quote the witness on this point: (Vol. II, p. 611.)

“Q. Did you make a verbal agreement with Phillips on the 16th or 17th of February, 1925, modifying the terms of this written contract? Yes or no? 10

A. He agreed to accept payment from us. Not to regard this contract, he says. This was a standard form he used, and that he would accept payment from us as we received it from the City. Which he later on reneged on.

Q. He reneged on his contract?

A. That was not a contract; that was merely an agreement. 20

Q. And do you except anybody to believe that statement, Mr. Paulsen?

A. I know. It wouldn't be the first time he done that.

And later: (Vol. II, pp. 611-612.)

Q. And you took the pipe and Phillips said that if you did not pay for it according to the terms of this agreement C-38, he would take it off the work? 30

A. Yes.

Q. Is that right? He did?

A. He did at a later date, when we got a job on 150th Street.

Q. And he said, furthermore, If I do take it off the work, it will cost you \$100 a foot to get it back'?

A. That is what he told me. 40

Q. That is what he told you?

A. Yes, that is right.

Q. And he did take it off?

A. Yes, he rolled part of it off.

Q. And he gave it back to you?

A. No, he merely took it, he rolled the pipe pipe probably fifty feet away from the place the pipe was the first time.

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Q. And you got the pipe?

A. Yes.

10 Q. And you got the pipe and put it in and did not pay \$100
a foot?

A. No.

Q. You paid your contract price, whatever it was?

A. Yes.

Q. What was the object of bringing that in?

A. That was the conversation there was at that time.

20

Q. I see. And Mr. Phillips is dead?

A. Yes.

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Lastly, when questioned as to a bribe paid by him to an official in Jersey City in connection with a contract of the Hammen Construction Company, Paulsen denies that he paid an official \$10,000, but in the next breath admits a payment of \$6,000 (Vol. II, p. 599). He refused at first to give the name of the official to whom this money was paid (Vol. II, p. 600). He did not think it necessary. The Commissioner ordered him to answer and he did so. The money was paid to Mr. Mahoney and was for an official in Jersey City, Mr. Brogan, who at that time was Corporation Counsel. "I never had no discussion whom that was to be destined, except to Brogan." (Vol. II, p. 601.)

Enough of Paulsen. We repeat our submission to the lower Court that he is utterly unworthy of belief.

40

FRED H. WEAVER, Describes himself as "the guy with a weather-beaten face" (Vol. II, p. 919). He was an agent for the sale of various brands of pipe, such as the Core Joint, Newark and Federal Pipes. He pretends to have been the inventor of some of the latter (Vol. II, p. 899, 914). His interests were adverse to those of Phillips, who was successfully dealing with the Lock Joint Pipe. This has been described as the oldest and best pipe on the market. The various brands of pipe invented and/or sold by Weaver were apparently quite unsuccessful. His companies could not compete with the Lock Joint Company and were in consequence, in financial difficulties. The inferior quality of Weaver's pi-

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pes and the weak financial position of his companies may be suggested as fair reasons why his goods were not acceptable to the Contractors either in Queens or elsewhere. This explanation is surely more reasonable than the suggestion of fraud and conspiracy which is now made against Phillips, Connolly and Seeley in regard to the Lock Joint Pipe.

Weaver's evidence appears in Volume II at pages 897 and following. He was Vice-President of the Federal Concrete Pipe Company (Vol. II, p. 897), having previously been connected with the Core Joint Pipe Company from 1914 to 1920. The Federal Company sold pipe in Mount Vernon ((Vol. II, p. 911-912) and in the Bronx (Vol. II, p. 912). The President of this company was a gentleman named Paino—"crooked Paino"—says genial Weaver (Vol. II, p. 922). Apparently his President and associate was tried for bribery, convicted and sentenced to Sing Sing Penitentiary. On appeal, however, the verdict was quashed. (Vol. II, p. 919). Weaver, though still at liberty, does not appear to have been much better than his associate Paino, because he states at Vol. II, p. 925-6:

"Q. Now, just name several of the cases in which you exercised political influence to get jobs.

A. In the Bronx.

Q. The Bronx, yes. Where else?

A. Mount Vernon.

Q. Where else?

A. Portchester.

Q. Well, how much did it cost you in the Bronx?

A. Nothing.

Q. How much did it cost you in Portchester?

A. Nothing.

Q. How much did it cost you in Mount Vernon?

A. I refuse to answer that question.

Q. Well, I am going to ask the Commissioner to tell you to answer, unless you think better of it now? What do you say?

A. No, sir, I will not answer it.

Q. Well, what was the name of the official whom you corrupted in Mount Vernon?

A. I refuse to answer that.

Q. Well, I understand that it was the President of the Board of Aldermen. Will you contradict that?

10

A. I refuse to answer that. *I don't tell tales out of School.*

Q. I understand. But you won't go so far as to say that that was the only time you corrupted a municipal official, will you?

A. No, I can't say that that is."

Enough of Weaver.

THOMAS F. PURCELL. The evidence of this witness appears in Vol. I, p. 336-350, and later in Vol. I, p. 369-389. This man is a Bonding Agent. He met Phillips in 1908, or thereabouts. Also knows Sigretto. And he volunteers the information that:

"Phillips was a man who, of course I would not believe, even under oath" (Vol. I, p. 346),

and that:

"I never had any friendship for him" (Vol. I, p. 383, line 3).

30 These remarks evidence the animus of the witness and the attention of the Court is again directed to Counsel's objection to such statements, which cannot be checked owing to Phillips' death.

We have above commented in detail as to the alleged relations between Sigretto, Phillips and the witness. It is difficult to understand why Purcell should have been examined, excepting that he refers at Vol. I, p. 372-373 to an alleged interview between Sigretto, Phillips, Connolly and himself:

40

Q. Did you know Mr. Maurice E. Connolly, Mr. Purcell?

A. Yes slightly.

Q. Did you ever see him with Mr. Phillips?

A. Oh, yes.

Q. Can you fix any particular time?

A. Yes.....not the time but I can fix the place. I could

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fix the time if I had the contract which was signed that day.

Q. What contract are you referring to, do you remember?

A. I think it was the 51st Street contract. I am not sure.

Q. Do you remember the place?

A. City Hall Park, New York City.

10

Q. Who else was present?

A. Mr. Sigretto was present...he was not standing with Mr. Phillips and Mr. Connolly, but standing off a few feet.

Q. Were you with these people or were you away from them?

A. I was called there by Mr. Sigretto.

Q. Did you meet them on that occasion?

20

A. Yes.

Q. Who went with you to where they were standing? Did anybody go with you to meet Mr. Connolly and Mr. Phillips, who were together?

A. As I recall Mr. Sigretto and Mr. Phillips went with me.

Q. Will you tell us then what happened?

30

A. The purpose of the visit was either the modification of a contract or the signing of a contract, I can not recall which.

Q. What conversation did you have or hear or engage in with Mr. Connolly and Mr. Phillips and Sigretto and yourself on that occasion in the City Hall Park?

A. I can not recall the conversation at this late date.

Q. Will you tell us exactly what happened after you and Sigretto joined Mr. Phillips and Mr. Connolly?

40

A. There was some discussion about Mr. Connolly signing the paper, and Mr. Connolly suggested that we must have a Notary Public. I offered my services to both Mr. Connolly and Mr. Phillips and said I would get a Notary Public.

Q. Did you see the Notary Public?

A. I brought him there and brought him back.

Q. Who was he?

A. Francis J. Hogan. ”

The witness speaks in the vaguest way of this interview, which apparently occurred in 1917. At Vol. I, p. 373, he says:

10

“Q. What was your interest in that document?

A. I was in the bonding business and my impression is that my company was on the bond. It may have been the signing of the contract, or a modification of the contract and it would be necessary to get Mr. Connolly’s consent to that modification.”

20

As far as we know this is the only evidence in the record as to any meeting between Connolly and Phillips. Nothing whatever improper has been suggested in regard to this meeting and it is, we submit, absurd of the Appellants to pretend that any claim whatever can be based on such a meeting,—even were the evidence of Purcell true,—which in view of his animosity to the deceased, and the vagueness of his replies, is questionable.

30

The object of obtaining Connolly’s signature as President of the Borough of Queens was to obtain his approval of a modification of the Collins Avenue contract (C-9, Vol. IV, p. 1610). This change was considered necessary as a result of conditions created by the War. The modification was, in addition, made subject to the approval of the Comptroller of the City of New York and subject to the consent of the Surety Companies to the change. It was entirely proper.

We quote from the words of the agreement of the 14th of February, 1918, between the City of New York and Sigretto, forming a part of Exhibit C-9 (Vol. IV at p. 1619) :

40

Whereas the contractor has requested and the City is willing in view of the abnormal conditions prevailing due to the present War and the inability to procure coal for the operation of the plant necessary in the construction of this sewer, that the contract be modified so that partial payments may be made to the contractor as the work progresses for reinforced concrete pipe delivered on the site of the work, although not incorporated in the sewer structure.....”

And then the contract No. 47340 dated April 23rd, 1917 (Exhibit C-9,) is declared to be modified, the essential conditions of the modification being as follows (Vol. IV at p. 1620) :

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“No payment will be made by the City for any reinforced concrete pipe so delivered but not incorporated in the sewer structure unless and until the contractor shall have furnished to the Comptroller of the City satisfactory written evidence that the contractor is the sole owner of said materials, free and clear from all liens or other incumbrances. Said materials upon being estimated for payment shall become the property of the City. The contractor, however, shall not by reason of said payments be relieved from responsibility for said materials and the protection thereof and shall make good any loss or damage thereto and shall be responsible for the entire work until the same is finally accepted by the City as provided in the contract.” 10

It being further provided (Vol. IV at p. 1620) :

“This agreement shall take effect if and when and only when the written consents of the National Surety Company and the United States Fidelity and Guaranty Company, the sureties upon the said contract, are obtained and attached hereto and the Comptroller of the City has approved the Schedule of Prices.” 20

Seeley's name is not mentioned in connection with the above and again we fail to understand what possible inference as to fraud and conspiracy on the part of Connolly and Phillips can be drawn from the facts so clearly evidenced by the written documents. At this time Phillips was associated with Sigretto in this and other contracts. He was Sigretto's Superintendent (See agreements 27th April, 1917, — C-83, C-84 and C-85. Vol. V, p. 2049-2050-2052). It was therefore entirely proper that he should be present with Sigretto when the modification of the agreement of the 23rd of April 1917 (C-9, Vol. IV, p. 1610), was executed by Connolly and Sigretto. Mr. Hogan, a Notary Public, was also present and everything shows that the agreement was entered into in the utmost good faith. We utterly fail to understand the force of the charge. 30

The modification was agreed to by the sureties of Sigretto, as appears by the annexed approval of the National Surety Company and of the United States Fidelity and Guaranty Company.

It would seem also that on the 14th of May, 1918, a further modification of the agreement of the 23rd of April, 1917, was also executed without the signature of Connolly, the latter modification being signed by the Acting President of the Borough. (See Exhibit C-9, Vol. IV, p. 1610.) 40

JOSEPH L. SIGRETTO. The evidence of this witness appears in Vol. I at pages 389-405; 407-412; and in Vol. II at pages 819-833.

He is an ignorant, illiterate and vindictive Italian Contractor, unable to read or write. He denies his own contracts and repudiates his own signature (Vol. I, p. 404-5).

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10 The attention of the Court is directed to his cross-examination in regard to contracts C-83, C-84 and C-85 appearing in Vol. II, p. 823 et seq. The illiteracy of the witness strongly appears at Vol. II, p. 821 et seq. He admits to the signing of two out of three contracts to which his name is affixed and the matter is summed up as follows:—
BY MR. HACKETT. (Vol. II, p. 823).

“Q. So then, Mr. Sigretto, you wish your testimony to be this: That of the three documents before you, two are forged, and you can not say which two are forged as regards your own signature, but you are perfectly certain that all three bear the signature of Mr. Phillips?”

20 A.—Yes.

Q.—And that is your testimony?

A.—Yes.”

Later, when cross-examined by Mr. Cook, the witness says: (Vol. II, p. 823.)

30 “Q. Mr. Sigretto, I show you Exhibits C-83, C-84 and C-85. You are, I understand, unable to read these contracts?”

A. Correct.”

And later (Vol. II, p. 824-5) :

“Q. Well, Mr. Sigretto, when Mr. Hackett examined you regarding these three exhibits, C-83, C-84 and C-85, you said that there was one original and two forgeries?”

A. I didn't say forgeries; I beg your pardon.

40 Q. What did you say?

A. I didn't say nothing of the kind. I said it looked like my signature but I always signed two contracts. And the other one I don't know. Put it any way you want it but I didn't say that word.

Later (Vol. II, p. 825) :

“I signed two, but I never signed the third one.”
All of which is of little importance, excepting as indicating that

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any statements of the witness — if any of importance were made — can not be regarded as of value.

We have endeavoured briefly to illustrate the character of the evidence upon which the Appellants rely. The law in regard to such evidence is clear. The Courts are always unwilling to accept such evidence, especially if it places upon the name of a deceased an infamous stigma. Abundant authority exists in support of this assertion. Thus, in *Volume 22 of Corpus Juris* we find the following at page 291: 10

“319. *Statements of Decedents.* Exposed to all the infirmities just mentioned and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons, which is therefore regarded as the weakest kind of evidence and subjected to closest scrutiny.”

And reference is made at page 292 to the following cases: 20

LEA vs POLK COUNTY COPPER CO., 21 *How (U.S.)*, 493 and 504.

“Courts of Justice lend a very unwilling ear to statements of what dead men had said.”

HOFFMAN vs CONDON, 134 *App. Div.*, 205 and 206, 118 *N.Y.S.*, 899.

“The testimony of witnesses who swear to the admissions of a dead man is weak, and should not be acted upon without great caution.” 30

PORTIS vs HILL, 14 *Tex.*, pages 69 and 73, 65 *Am. D.* 99.

“The evidence of the oral admissions of a deceased party made in the hearing of a single witness, and so entirely unsupported, not to say contradicted, by the other evidence in the case, ought certainly to be received after such a lapse of time, with great caution, and due allowance for the frailty of memory, and the liability to mistake or forget the precise terms and true import of the language used.”

LIPPERT vs PACIFIC SUGAR CORPORATION, 33 *Cal.*, A. 198. 40
164, p. 810.

“Unsupported testimony of one person as to declarations of a decedent is weakest of all evidence.”

The castigation of the evidence of the four witnesses aforesaid by the Trial Judge as stated in the Judgment is fully warranted. It appears in Vol. XII, p. 5556, beginning at line 5:

“CONSIDERANT que le tribunal ne peut, davantage, rester silencieux à l'égard de certains témoins des demandeurs, savoir les témoins Paulsen, Purcell, Weaver et Sigretto dont les témoignages, étant considérée la transquestion sévère qu'ils ont subie, chacun, doivent être acceptés avec beaucoup de circonspection et sous bénéfice d'inventaire, leur véracité ayant été mise considérablement à l'épreuve”:

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The evidence referred to is of the weakest possible kind and we submit that it is altogether insufficient to support any reasonable inference of fraud, conspiracy or dishonesty on the part of Connolly, Seeley and Phillips or any one of them.

IX

SUBMISSIONS OF RESPONDENTS

20

The heirs of the late John M. Phillips submit the following points for the consideration of this Honourable Court:

(1) No conspiracy has been proved against Connolly, Seeley and Phillips. That a conspiracy existed between them could never have been anything more on the part of the Appellants than a matter of mere conjecture which their exhibits and the evidence of their own witnesses must need have entirely destroyed. No correspondence between any of the alleged conspirators has been produced. Apart from the vague and unsatisfactory evidence of Purcell, there is nothing of record to show that Phillips ever met Connolly or ever had business relations with him. And nothing in the evidence of Purcell suggests that even if there were a meeting between Connolly and Phillips in 1917 regarding the Collins Avenue contract, that such a meeting was in any way improper. The reverse has in fact abundantly been proved. The only interview between Phillips and Seeley is that testified to by Paulsen. Phillips is dead, Seeley was not examined and the evidence of Paulsen, a self-confessed briber, is utterly unbelievable. The evidence of Connolly and Seeley could have been obtained by the Appellants had they so desired. The absence of such available evidence may be unfortunate for the Appellants, but surely it is not a misfortune for which the heirs of a dead man should be held accountable.

40

The evidence of Paulsen to the effect that Phillips asked him to give Seeley \$1,000 cannot seriously be considered and the date at which Paulsen fixes this interview is contradicted by Decker. The latter knew Paulsen but had only met him after the 150th Avenue contract (second section)

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had been awarded. Paulsen is utterly insolvent, the companies for whom he worked have been paid by the City of New York, but have not in turn paid their liabilities. Added to this, Paulsen admits that although he did not pay Seeley \$1,000, he was awarded the 150th Avenue contract some time later. And lastly, we repeat that he is a self-confessed briber of public officials, having paid \$6,000 to one of the officials in Jersey City. He was not shocked at the idea of bribing public officials.

(2) During the period covered by the action—the instances in which Connolly exercised the discretion allowed him by law in rejecting bids proved in the only three cases in the record in which we have such a rejection, to have saved the City money. The bids which were rejected were replaced by bids which were lower and the new contracts were awarded on the lower figures. 10

(3) The specifications which were alleged to have been drawn to the detriment of the City and to the prejudice of contractors other than friends of Phillips were right and proper. The ground in which the sewers in question were to be laid was extremely wet and the construction of sewers in this territory was extremely difficult. It was absolutely essential that waterproof sewers should be laid and the evidence of Bertram, Creem and various other contractors is to the effect that this was highly desirable in the Jamaica and Rockaway systems for the further reason that there was a *considerable lift* from the sewers to the disposal plant. 20

The specifications as drawn, with respect to the waterproof membrane, although possibly designed by Seeley, were approved by any number of superior officers, not only of the Borough, but of the City itself. Engineers attached to the Borough and City Departments, especially the Department of the Board of Estimate and Apportionment, had frequently examined specifications and had ample opportunity to revise or reject them. 30

It is in evidence that *precast pipe*, although not used in Queens until 1917, had been built and used successfully all over the Country as far back as 1910 and that prior to its being used in Queens it was used in every other Borough in the City of New York except Richmond. It tended to increase competition in that it allowed for alternative bids — monolithic and precast—and the evidence of various contractors, especially Creem, who used the precast pipe, was to the effect that it was far more satisfactory than the monolithic, especially in wet territory such as that in which the Rockaway and Jamaica systems were built. 40

The allegations that the specifications were drawn in such a way as to preclude the use of precast pipe other than that manufactured by

the Lock Joint Company is flatly denied by Mr. Hirsh, President, who stated that the only patented feature of his pipe was not required by the Queens specifications and that any pipe manufacturer was at liberty to manufacture a pipe which would satisfy the Queens specifications; and further, in any event, that in 1925 the patent on the joint of Lock Joint Company expired.

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10 There is evidence to the effect that certain contractors, — Turner and Paulsen, — threatened to manufacture their own precast pipe and not to purchase it from Phillips.

There is evidence in certain instances that the contractors completed and filed their bids without having enquired as to the price of the pipe. Carey, was awarded a contract by the City at a fixed price before he even enquired as to the cost of the material which he was to supply.

20 (4) The pipe supplied by Phillips was the best of its kind procurable. It is admitted by various experts (Peterson, Vol. II, p. 945 et seq.; Hart, Vol. II, p. 858; Ahrens, Vol. III, p. 1262; Weaver, Vol. II, p. 917) that the Lock Joint Company was the oldest and most thoroughly established precast pipe manufacturing company in the country and Phillips, after the third arrangement with that company, manufactured a better pipe than any which had previously been supplied by the company itself. The richness of the mixture was increased and the wire reinforcing was strengthened.

30 Peterson, Phillips' Superintendent, who had an extensive experience with lock joint pipe and with other precast pipes, testified that the pipe which Phillips supplied, despite the fact that there was no obligation to make it in the manner in which it was made, was a far better pipe than that actually required by the Queens specifications. In other words, Phillips treated the purchasers and the City with great generosity, giving them more than his contracts called for. This in a measure is explainable by the fact that the hazard of making a weak pipe and the possibility that it might fail, with its consequent loss, was upon Phillips. In order to preclude such an event, Phillips saw to it that the pipe which he supplied was
40 far better than the specification requirements.

Peterson testified that immediately upon his making the suggestion to Phillips that the quality and strength of the pipe should be increased, Phillips agreed, and at his own expense allowed the mixture to be increased 1.2.4 to 1.1.2 and added further wire meshing. (See evidence of Peterson.)

(5) *Specifications re "inner recess."* It was alleged that this re-

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quirement constituted a *loading of the specifications*, but Peterson, Hirsh and Weaver all admitted that pipe of this nature could be more thoroughly joined than those such as the Core Joint and the Federal Pipe, which were linked together by pouring the grout into the recesses from the top of the pipe. The open inner recess required by the Queens specifications made it possible to thoroughly trowel the cement, or grout in such a way that it could be easily seen that there were no air spaces, something that could not be determined in the case of the other two pipes above mentioned, inasmuch as the grout was poured through the small opening on the top. 10

The requirement regarding the leaving of the forms in place for twenty-one days on the monolithic, to allow for the curing of the cement and to ascertain that it was properly set, was not unreasonable. A specification of the same nature appears in the requirements for the precast pipe, inasmuch as it had to be dried and the cement allowed to set for twenty-one days before it could be used. The essential difference in the construction of the two types of sewer naturally made this specification more difficult to carry out in the case of the monolithic, which had to be built in the trench. 20

The Borough was only interested in obtaining the best possible sewer and was not concerned with the amount of equipment which any particular contractor might have for the purpose of constructing either of the particular types of sewer. Naturally, a contractor who was not sufficiently supplied with forms for the monolithic would not be in a position to carry out his contract as quickly as one who had sufficient forms to allow him to proceed without having to wait to use the forms which had been left in place further along the line of the sewer while the cement was curing and drying. 30

The fact that Phillips was the only man who actually supplied precast pipe in Queens makes it arguable that he was the only pipe manufacturer who was willing to assume the risk of building pipe which could be used in the very wet territory where the Rockaway and Jamaica sewers were to be built.

Paulsen testified that he requested two other pipe manufacturers to quote him prices for pipe and they refused to do so. This refusal may well have been due to Paulsen's financial standing, but it may also equally well have been due to the difficulties connected with the building of a pipe which would stand up under the extremely difficult conditions attached to the supplying of pipe for the Rockaway and Jamaica sewer systems. On this point it is interesting to note that the best conditions for laying in pipe are about six feet beneath the surface. Pipes laid close to the surface are 40

dangerous and pipes laid 20, 30 or 40 feet below the surface, owing to the pressure on them, are also dangerous. The Jamaica and Rockaway systems called for pipes to be used in trenches, in some instances 30 or 40 feet deep, where water was encountered at the four-foot level and persisted to the level at which the pipe was actually laid. Not only did the pipe have the pressure from the inside, but it had the pressure from the outside also and that is why Phillips insisted on having his pipes re-enforced, although the specifications did not call for such re-enforcement. The presence of water and the depth at which these sewers were laid also explained why contractors were prone to bid on precast pipe, which could be laid more easily, at these depths and in this watery territory, than could the monolithic.

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Creem testified that he had built a monolithic sewer some years ago, but that he would consider himself a very foolish man to build another when precast pipe could be obtained.

20 (6) *Concerning the assignment of various contracts.* Practically all the witnesses examined with regard to transactions of this nature testified that it was a common thing among contractors to assign contracts to each other. The consideration to be paid or given by the assignee would depend upon the particular circumstances in each case and in some cases it might be to the advantage of the assignor to transfer a contract to a capable contractor who would carry it out and so relieve him of his obligation and to make this assignment without receiving any monetary consideration. In other cases it might be to the advantage of the assignee, who had a plant and equipment which he desired to retain, to undertake to pay a consideration, in order that he might obtain the contract. In any event, the Borough could in no way be affected by such transfers, inas-
30 much as in each case these transfers had to be warranted as an obligation by a surety company and in fact the City merely obtained another party who was responsible to it, for the carrying out of the contracts which had been awarded by it to the assignor.

40 (7) It should be remembered that the period covered by the investigation was one during which intensive development took place in the Borough of Queens. The population increased from about two hundred thousand to over a million within comparatively few years. The demand and necessity for sewers made it imperative that the building of the Rockaway and Jamaica sewers should be carried out with the least possible delay and it is of record that sewers were laid in territory which had not been properly surveyed owing to the extreme necessity for immediate laying of the sewers. In many instances the improvements were carried out under great handicaps before "comprehensive drainage systems" (Vol. XI, p. 5472) or "detailed drainage plans" (Vol. XI, p. 5470)

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had been provided. "We were handicapped by the lack of topographical maps; that is, complete maps" (Bertram, Vol. I, p. 252). "The whole area . . . had not been finally mapped" (*idem*, p. 253). This is pertinent with regard to the estimates prepared by the Borough Engineers and may in some way account for any possible differences between their figures and the final figures on which the various contracts were completed.

(8) It should also be remembered for the purpose of argument that there are admissions by Bertram and various contractors and Engineers that the method of sewer construction has greatly changed during the past fifteen years and that the several changes which appeared in the Queens specifications from time to time might or might not have been improvements. This was largely a matter of opinion and the justification for the changes could only be determined subsequently when they had been used or put into practice. Some of the changes in the specifications have proved to be fully warranted, e.g., specifications for the precast pipe (See evidence of Creem). Also the fact that it is still used, almost to the entire exclusion of the monolithic.

(9) It should also be remembered that Seeley was simply a technical man in a subordinate position. His designs had to be approved by his superior officers and he was not in a position to exercise any discretion as to improvements which might be advised by him. His designs had also to be examined and approved by the technical advisors and Consulting Engineers attached to the City of New York.

(10) Connolly merely exercised a discretion which was allowed to him by law when he either vetoed or accepted the bids and his discretion was subject to scrutiny, over a period of fifteen years by his superior officers.

(11) It should also be remembered that from the manner in which the bids were made it was impossible for the Borough President or anyone to determine what the cost of the materials which were to be incorporated into the sewer amounted to, inasmuch as the bids called for a price *per completed foot of sewer*. In consequence it made no difference to the City as to what an individual contractor might pay per foot for pipe which was to be used by him in the building of the sewer which he had undertaken to construct and for which a surety bond had to be furnished by him.

(12) The obvious bad faith and disreputable character of some of the leading witnesses who testified on behalf of the Appellants should be noticed. Particular attention in this regard has above been directed to the evidence of Paulsen, Purcell and Weaver and the ignorance and contradictions appearing in the evidence of Sigretto all of whom evidenced bias and animus against Phillips.

10 (13) Altogether apart from any questions of fact—the present case, as presented, purports to be a claim for damages. These are claimed with respect to payments which have been made on and pursuant to the terms of contracts which are treated by the Appellants as being and which still are valid and subsisting. The Court has not been asked to annul or cancel any of the said contracts. The City of New York, auteur of the present Appellants, whose rights do not exceed those of the City, has at no time repudiated or cancelled or asked for cancellation. So long as the contracts remain valid and binding payments made pursuant to their terms are necessarily deemed to have been properly owing and cannot in any way form the subject-matter of a claim in damages based upon any alleged fraud in connection with the contract.

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United Shoe Machine Co. Brunet, 1909 A. C. p. 148; *Lord Atkinson*, at p. 171.

20 "Of these the last (avoidance, cancellation and repudiation of the contracts there under consideration) is the most vital, in the sense that it is the condition precedent which must be fulfilled before the defendants can escape from the obligations of the contracts they have entered into, however fraudulent those contracts may be.

30 A contract into which a person may have been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the person defrauded, after he has had notice of fraud. Unless and until he makes his election, and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation) the contract remains as valid and binding as if it had not been tainted with fraud at all; *Clough vs London and North-Western Ry. Co.* (1871) L. R. 7 Ex. 26, approved by Lord Blackburn in *Erlanger vs New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, at p. 1277-1278, and by Lords Watson and Davey in *Aaron's Reefs vs Twiss* (1896) A. C. at p. 290 and 224. In the first-mentioned case Mellor, J., says (L. R. 7 Ex. at p. 34: "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejection, when his tenant has committed a forfeiture. If with knowledge of the forfeiture he, by the receipt of rent or other unequivocal act, shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease."

40 This doctrine was followed in the case of

The Nova Scotia Construction Company Limited vs The Quebec Streams Commission, 1933 S. C. R. p. 220.

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Cannon J. — (for the Court at p. 222) . . .

“Can a *quantum meruit* be recovered in this case?

The contract would first have to be set aside either by mutual consent of the parties or by a judgment. Arts. 1022 (3) and 1138 C. C. The works have been executed and the case of United Shoe Machine vs Brunet is authority to the effect that, even in case of false and fraudulent representations a contract is not void, but merely voidable at the election of the person defrauded, after he has had notice of the fraud. 10

Unless and until he makes his election, and by word or act repudiates the contract or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all. 20

In the present case, the appellant asked for an extension of time, as provided in the contract to complete the works, which was granted; but never at any time did elect to have the contract cancelled for the error alleged in the declaration, and the action itself does not pray for such cancellation by the Court. On the contrary, appellant elected to treat the contract as subsisting, claiming that it executed it in its entirety and cannot and does not now ask to avoid it. Art. 1000 C. C. Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.” 30

By their novel action the Appellants are virtually asking the Courts to rewrite the contracts freely, voluntarily and deliberately made by the City of New York and to reduce the contract price of the sewers constructed thereunder. As to this aspect of the matter the remarks of Cannon, J. (*idem* p. 225) seem apposite:—

40

“We agree with the arguments and conclusions contained in the very able and complete judgment of the learned trial judge and the clear-cut exposition of the law of contracts of the province of Quebec of the ex-Chief Justice Lafontaine and we concur when he says:

un principe primordial doit dominer tout le litige.
C'est celui de la sécurité des contrats que les tribunaux ont

pour mission de maintenir, et non pas de refaire pour venir en aide à un contractant malheureux.

Plaintiff can get no relief from the courts.”

(14) During the course of the trial astonishment was expressed by the learned Trial Judge at the absence of the evidence of Connolly and Seeley. Neither of these men was called as witnesses, though at the time the examination was held in New York they were actually in the State, being in fact prisoners in Sing Sing Penitentiary. No attempt whatever was made to obtain their story, nor was any attempt made to examine any of the superior officers of Seeley—James Rice, Engineer in charge of Construction; Franklin Perrine, Engineer in charge of the Sewer Bureau; Clifford B. Moore, Consulting Engineer of the Borough; Arthur Tuttle, Chief Engineer of the Board of Estimate and Apportionment. The apparently deliberate effort on the part of the Appellants to keep all such evidence out of the record gives an unpleasant and sinister aspect to the claim as now presented. The failure of the Appellants to call particularly Connolly and Seeley is commented upon by the learned Trial Judge (Vol. XII, p. 5554). His Lordship's conclusion in this respect agrees entirely with the submission of the Respondents.

There is one reason only why these witnesses were not examined. The Appellants well knew that such witnesses would not have supported their contentions. The evidence of these witnesses is therefore carefully omitted and in its place the Court is asked to accept evidence such as that of Paulsen, Weaver, Purcell, Sigretto and others of similar unreliability. On such evidence the Court is now seriously requested to render Judgment against the heirs of a dead man incapable of self-defence, to maintain attachments against his property, to assist in making the defence of his heirs as idfficult as possible and to place a stigma on his name that will necessarily attach to these heirs for many years.

X

CONCLUSIONS

For all of the foregoing reasons, as well as those referred to and set out in the Judgment appealed from the Respondents respectfully submit that the present Appeal should be dismissed with costs and the Judgment rendered in the Superior Court should be confirmed.

Montreal, March 19th, 1938.

MAGEE, NICHOLSON & O'DONNELL,

*Attorneys for Respondents,
The Heirs of the late John M. Phillips.*

LOUIS S. ST. LAURENT, K. C.,

Counsel for Respondents.

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APPENDIX "A"

TABLE No. 24.

Relation Between the Estimated Cost and the Actual Cost of Physical Improvements Authorized Since January 1, 1902, and Reported to the Board of Assessors Prior to January 1, 1927.

Borough	Total 1902 to 1925 Inclusive			1926			Total			Actual Cost in Per Cent of Estimated Cost
	No.	Estimated Cost	Actual Cost	No.	Estimated Cost	Actual Cost	No.	Estimated Cost	Actual Cost	
MANHATTAN:										
Sewers	355	\$5,174,965.00	\$5,257,974.89	6	\$470,800.00	\$498,869.79	361	\$5,645,765.00	\$5,756,844.68	102.0
Grading	146	2,698,576.05	2,807,373.26	3	109,800.00	91,794.34	149	2,808,376.05	2,899,167.60	103.2
Paving	260	3,779,987.60	3,267,770.66	12	1,160,800.00	1,090,869.62	272	4,940,787.60	4,358,640.28	89.2
Total	761	\$11,653,528.65	\$11,333,118.81	21	\$1,741,400.00	\$1,681,533.75	782	\$13,394,928.65	\$13,014,652.56	97.2
BROOKLYN:										
Sewers	1,913	\$28,742,630.00	\$26,517,574.34	83	\$3,427,400.00	\$2,915,959.31	1,996	\$32,170,030.00	\$29,433,533.65	91.5
Grading	1,479	9,495,627.00	8,198,013.27	65	1,580,300.00	1,611,573.41	1,544	11,075,927.00	9,829,586.68	88.7
Paving	1,820	19,512,953.00	18,762,887.51	186	2,393,900.00	2,146,066.59	2,006	21,906,853.00	20,908,954.10	95.2
Total	5,212	\$57,751,210.00	\$53,478,475.12	334	\$7,401,600.00	\$6,693,599.31	5,546	\$65,152,810.00	\$60,172,074.43	92.4
THE BRONX:										
Sewers	687	\$17,759,938.00	\$17,610,743.94	39	\$1,345,100.00	\$1,090,479.87	726	\$19,105,038.00	\$18,701,223.81	97.9
Grading	680	16,074,100.00	13,866,886.80	42	860,800.00	578,555.95	722	16,934,900.00	14,445,442.75	85.3
Paving	568	14,187,462.00	12,738,363.06	39	1,583,400.00	1,303,426.32	607	15,770,862.00	14,041,789.38	89.0
Total	1,935	\$48,021,500.00	\$44,215,993.80	120	\$3,789,300.00	\$2,972,462.14	2,055	\$51,810,800.00	\$47,188,455.94	91.1
QUEENS:										
Sewers	856	\$21,761,017.50	\$22,023,009.28	51	\$8,355,700.00	\$8,031,622.06	907	\$30,116,717.50	\$30,054,631.34	99.8
Grading	510	5,791,453.30	4,932,438.84	49	8,062,300.00	6,716,153.94	559	13,853,733.30	11,648,592.78	84.1
Paving	436	10,818,272.00	9,655,756.58	85	3,721,600.00	3,412,803.60	521	14,539,872.00	13,068,560.18	89.9
Total	1,802	\$38,370,742.80	\$36,611,204.70	185	\$20,139,600.00	\$18,160,579.60	1,987	\$58,510,342.80	\$54,771,784.30	93.6
RICHMOND:										
Sewers	182	\$2,497,246.75	\$2,879,293.13	26	\$1,043,600.00	\$1,037,882.41	208	\$3,540,846.75	\$3,917,175.54	110.6
Grading	85	335,900.00	320,804.79	7	54,900.00	62,432.24	92	390,800.00	383,237.03	98.1
Paving	83	1,358,880.00	1,460,933.61	15	413,700.00	348,747.37	98	1,772,580.00	1,809,680.98	102.1
Total	350	\$4,192,026.75	\$4,661,031.53	48	\$1,512,200.00	\$1,449,062.02	398	\$5,704,226.75	\$6,110,093.55	107.1
ENTIRE CITY:	10,060	\$159,989,008.20	\$150,299,823.96	708	\$34,584,100.00	\$30,937,236.82	10,768	\$194,573,108.20	\$181,257,060.78	93.2

APPENDIX "B"

(1) STATEMENT prepared by Francis William Hopkins, Certified Public Accountant, in support of Plaintiffs' Case.

COMMISSIONERS EXHIBIT NO.	CONTRACT NO.	YEAR OF AWARD	CONTRACT PRICE	PIPE		PRICE PER FOOT PAID PHILLIPS	TOTAL PAID PHILLIPS	FAIR PRICE PER FOOT	TOTAL FAIR PRICE	EXCESS PAID PHILLIPS	In the Court of King's Bench No. 5 The Factum of the Respondents the Heirs of the late John M. Phillips, Before the Court of King's Bench 19 March 1938. (continued)
				QUANTITIES FEET	SIZES (INCHES)						
C 159	66597	1923	\$309,866.85	3950	90	\$32.50	\$128,375.00	\$18.25	\$72,087.50	\$56,287.50	AWIXA CORPORATION
C 161	75044	1925	1,651,231.40	218 112 184 181	30 36 39 96			3.75 4.85 4.77 26.19	817.50 543.20 877.68 4,740.39		Evidence of payment introduced by witness Schlemmer without written proof by reason of the fact that the Books and Records of the Awixa Corp. had been stolen
		TOTAL		695		Av. 21.59	15,000.00		\$6,978.77	8,021.23	
C 160	77420	1925	740,754.00	2228 3990	33 36			4.10 4.85	9,134.80 19,351.50		Pages of the Record: 1495 671 1072 1498 1499 1502 1504
C 57	79050	1926	638,766.00	6218	54	30.00	186,540.00		\$28,486.30	158,053.70	
C 109	80311	1926	399,089.00	896 1611 4276	27 30 36			8.99	\$49,247.22	115,092.78	
		TOTAL		6783		Av. 24.58	167,000.00		29,494.73	137,505.27	
			\$3,739,707.25				\$661,255.00		\$186,294.52	\$474,960.48	Av. = Average
C 19	69176	1924	\$339,783.00	3758	96	Av. 33.17	\$124,600.00	26.19	\$93,707.82	\$30,892.18	DUIT, INC.
C 20	76066	1925	1,104,117.00	2300 1213 4957	48 54 60			7.54 8.99 11.16	\$17,342.00 10,904.87 55,320.12		Evidence of payment by checks or photostats. Pages of Record: 438 384 385 440 388
		TOTAL		8470		Av. 43.21	366,000.00		\$83,566.99	\$282,433.01	Av. = Average
C 36	74178	1925	\$407,045.00	1820	84	37.00	\$490,600.00	19.47	\$177,274.81	\$313,325.19	HAMMEN CONSTRUCTION CO.
			\$1,443,900.00				\$67,340.00		\$35,435.40	\$ 31,904.60	Evidence of payment by check for 1820 feet of pipe whereas the contract calls for 3472 feet of pipe—Record Pages 629, 632.
C 137	75939	1925	\$546,325.00	4960 3080	39 42			4.77 5.95	\$25,459.20 18,326.00		OXFORD ENGINEERING CO. Evidence of payment by check. Verbal Testimony indicates a total payment for pipe—\$117,000.00 Record Page 1248.
		TOTAL		8040		Av. 6.84	\$55,000.00		\$43,785.20	\$11,214.80	

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COMMISSIONERS EXHIBIT NO.	CONTRACT NO.	YEAR OF AWARD	CONTRACT PRICE	PIPE		PRICE PER FOOT PAID PHILLIPS	TOTAL PAID PHILLIPS	FAIR PRICE PER FOOT	TOTAL FAIR PRICE	EXCESS PAID PHILLIPS	EVERETT CONSTRUCTION CO. Evidence of payment by check Record Page 1241.	NECARO COMPANY Evidence of payment—check Stubs. Record Pages 911 et seq.
				QUANTITIES FEET	SIZES (INCHES)							
C 105	80343	1926	\$377,372.00	2839	36	Av. 30.15	\$170,000.00	\$4.85	\$13,769.15	\$139,564.90		
				2801	42			5.95	16,665.95			
				5640					\$30,435.10			
C 74	77021	1925	\$992,268.00	318	27	Av. 21.09	\$168,000.00	\$3.03	\$ 963.54	\$112,114.91		
				3373	42			5.95	20,069.35			
				2469	48			7.54	18,616.26			
				1806	54			8.99	16,235.94			
				7966					\$55,885.09			
C 75	77393	1925	471,150.00	1631	36	Av. 18.00	88,365.60	\$4.85	\$ 7,910.35	64,461.44		
				3353	39			4.77	15,993.81			
				4984					\$23,904.16			
							\$256,365.60		\$79,789.25	\$176,576.35		
TOTAL									\$7,977,767.25	\$1,700,560.60	\$553,014.28	\$1,147,546.32

RECAPITULATION

CONTRACTOR	NUMBER OF CONTRACTS	YEARS	TOTAL CON-TRACT PRICE	TOTAL PAID PHILLIPS	TOTAL FAIR PRICE	EXCESS PAID PHILLIPS
Awixa Corporation	5	1923 TO 1926	\$3,739,707.25	\$661,255.00	\$186,294.52	\$474,960.48
Duit Incorporated	2	1924/25	1,443,900.00	490,600.00	177,274.81	313,325.19
Hammen Construction Company	1	1925	407,045.00	67,340.00	35,435.40	31,904.60
Oxford Engineering Company	1	1925	546,325.00	55,000.00	43,785.20	11,214.80
Everett Construction Company	1	1926	377,372.00	170,000.00	30,435.10	139,564.90
Necaro Company	2	1925	1,463,418.00	256,365.60	79,789.25	176,576.35
TOTAL	12		\$7,977,767.25	\$1,700,560.60	\$553,014.28	\$1,147,546.32

NOTE:— Had the highest prices (quoted for work outside of Queens and in evidence) been used to calculate the amount payable to Phillips, for pipe, he still was overpaid by..... \$969,985.05

(Prepared by Francis Wm. Hopkins, C.P.A. 2/2/33)

No.5a

SUPPLEMENTARY FACTUM OR MEMORANDUM OF NOTES OF
THE RESPONDENTS, THE HEIRS OF THE LATE JOHN M.
PHILLIPS BEFORE THE COURT OF KING'S BENCH.

In the
Court of
King's Bench
—
No. 5A
Supplementary
Factum or
Memorandum
of Notes of
the
Respondents
the Heirs of
the late John
M. Phillips
before the
Court of
King's Bench.
March 1938.

“EXCESSIVE BIDS” IN 1926

The excess of certain of the bids over the estimates in the year 1926 is not due to the cost of pipe but is directly attributable to the general difficulty of the working conditions and the unfavourable physical nature of the area wherein the sewers were laid — matters which were well understood by the City and Borough officials as well as the contractors who bid on the work.

The Appellants endeavoured to support their claim by singling out a number of contracts awarded in 1926 wherein the bid prices exceeded the amounts of the estimates. These are unduly emphasized. In direct contrast, the Court's attention was not directed to and nothing was said by the Appellants of the many instances during the same period of time when the bids were considerably below the estimates although the identical pipe was used in all cases. (See C-1

Sheet No. 6 in 37 instances bids were lower than the estimates and the general average for the sheet was 99.83% of the estimates;

Sheet No. 7 on 25 contracts bids were lower than estimates;

Sheet No. 8 in 21 cases (that is, all but 6) the bids were lower than the estimates and the average for the entire sheet was 86.11% or 13.89% below the estimates).

The record discloses very good reasons why the bids in certain cases exceeded the estimates. On the other hand, there is no evidence

In the Court of King's Bench

No. 5A
Supplementary Factum or Memorandum of Notes of the Respondents the Heirs of the late John M. Phillips before the Court of King's Bench. March 1938. (continued).

whatsoever to justify the conclusion that the suppliers of materials, including Phillips, were responsible for this situation.

Beginning at Sheet 3 of Exhibit C-1, it is interesting to note that, even before precast pipe was used, whenever there was work in Ward 4—the particularly wet area — the bids usually exceeded the estimate (see first column to extreme left marked “Ward”). In 1916, before it is pretended that Phillips had any alleged connection whatsoever with the Lock Joint Company or its product (prior to the Hull and Collins Avenue jobs — C-1, No. 132 and No. 133 — which went to Sigretto) the fifteen contracts preceding the two last mentioned, were all in excess of the estimates (See Exhibit C-1; Contracts Nos. 116-130 inclusively). Their percentages are respectively 113, 128, 117, 145, 138, 127, 116,, 115. 129. 115, 117, 118, 115, 126, 112.

Sheet 4 of C-1 containing a list of contracts also made for the most part before Phillips' connection with Lock Joint Company, shows that all low bids on twenty contracts — No. 134 to No. 154 — were in excess of the estimates, the average figures being 125.29%. In four individual instances they were respectively 224%, 163%, 155% and 154%.

From April 1918 until October 31st, 1922, the low bids only exceeded the estimates by 3.76% (Sheet 5). During the height of the alleged conspiracy they were.—

Sheet 6	99.83%
Sheet 7	116.466%
Sheet 8	86.11%

In most instances shown on Exhibit C-1 Sheet 7, where the bids exceeded the estimates, the work will be found to have been carried out in Ward 4 — the wet area. Particularly is this the case re.—

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- Farmers Boulevard (4 contracts Nos. 268 to 271)
- 158th Street (3 contracts Nos. 280 to 282)
- 150th Street (contract No. 279)
- Foch Boulevard No. 286.
- 10 Springfield Boulevard " 287.
- Hempstead Avenue " 288.
- Jamaica Avenue " 289.
- Brinkerhoff Avenue " 296.
- Jamaica Avenue " 297.
- Farmers Boulevard " 298.
- 109th Avenue " 299.
- Brinkerhoff Avenue (Con. 2.) " 305.

20 In Ward 4, in certain instances, even when no "B" type bids were called for and when no precast pipe was used and when therefore Phillips was in no way whatsoever connected with the projects the bids exceeded the estimates (See C-1: No. 266—Baisley Boulevard— 115% and No. 282—158th Street — 118%).

The excess of the contractors' bids over the estimates may be accounted for in no small measure by the conditions encountered on 150th Avenue (C-1, No. 189) by Paino Bros. Work started on this contract on April 6th, 1925.

30 The conditions there revealed as to the difficulty of work no doubt influenced other bidders on later contracts in the same general area.

It was the first contract let in the Jamaica trunk sewer system. As to the difficulties encountered, the following extract from a letter to the Comptroller of Finance Dept., dated October 20th, 1926, is very enlightening (Vol IX, p. 4261)

40 "This was the first contract let in connection with the Jamaica trunk sewer system. The condition of the subgrade after excavation had been made was a great deal worse than we had anticipated. There was on this contract a head of water about 22 feet and the water percolated to the trench in great quantities. The contractor tried to remove this water by the ordinary means of pumping, but was bothered by a continual boiling of the bottom, so much that he was unable to reach the sub-grade. After working over three months by this method he had laid only 150 feet of sewer. He

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then resorted to well points, which greatly relieved this condition. The bottom was so bad, however, that we found it necessary to order in long piles, a timber foundation and a concrete cradle. All of this naturally slowed up the progress of the work.

In addition, the contractor was bothered by the tides which backed up to the creeks around the contract to the site of the work. On two occasions abnormal tides broke over the dams, which he had erected, and completely flooded the sewer trench". 10

The plans for the 150th Avenue sewer clearly indicate the unfavourable physical conditions of the territory wherein the work was carried out. All along the line of the sewer, no less than seventeen times words such as "swamp", "creek", "mud", "mud flat", "rushes" appear on the plans, particularly Sheets 2 and 3, Exhibit C-18, (Vol. XI, at p. 5321 (a) and p. 5322).

(The said plans are erroneously headed in the Joint Case as "Plan 20 (158th Avenue". The marking on the plans themselves show that (they are for 150th Avenue)

Seeley's superior officer, Perrine, "Engineer Sewers" wrote a detailed report to Commissioner Shugrue, another superior of Seeley, wherein the extreme difficulties of the job are clearly set out. The report is dated 22nd October, 1926, and appears in Vol. XI, at p. 5064 as follows.—

"Memorandum for Commissioner Shugrue

30

Attached to the accompanying payment, which is the Final on 150th Avenue Contract No. 1, you will find a statement of the amount this contract exceeded the figure as submitted by the contractor at the time of the letting.

This contract was the first, which was let, in connection with the Jamaica trunk system, and was the one in which there was so much trouble in getting started. The excavation at the start revealed that there would be a head of about 20 feet of water. This head caused a boiling of the bottom of the trench and particularly with the method that the contractor was using, which was steel sheeting. The contractor worked for months trying to get bottom to deposit the concrete, but apparently was unable to do so. 40

After much consultation between ourselves and experts hired by the contractor, it was decided to use well points to reduce

the head of water and to proceed the work. It was also determined that it would be necessary to order in piles to insure the stability of the sewer structure and to carry the sustained load. Therefore, piles were ordered to be placed with a concrete cradle and timber. It was found that piles about 40 feet in length were necessary.

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10 The piles concrete foundation, timber, etc, according to our method of letting contracts at the present time, are paid for as indeterminate quantity. As all of the extras on this contract are indeterminate quantities, it increased the amount to be paid to the contractor, as noted over the amount as bid. These quantities with the prices are clearly set forth in the accompanying statement of excess quantities."

20 A number of contracts were awarded in the same ward 4 shortly after the letting of the 150th Avenue job. Paino's difficulties were undoubtedly reflected in the bids made on such later contracts. In explanation of the bids thereon Arthur Tuttle, Chief Engineer of the City of New York admits this to have been the case. The reasons which he assigns for it are very simple.—

"It would appear, however, that bidders for contracts subsequent to the one first let endeavoured to protect themselves against loss by including in their bid what they deemed as ample allowance for difficult working conditions".

30 (Vol. XII, p. 5507, line 32 et seq)

This concise, yet complete finding by the Engineer in Chief of the City of New York makes it unnecessary to conjecture further as to the reason for high bids in this particularly wet area. His statement is virtually an estoppel to the action as brought by the Plaintiffs on behalf of the City of New York.

Among the contracts later than Paino's were.—

40	C-1. No. 262	- Horstman	signed	June 1st.	Walsh Bros.	200%
	No. 266	- Baisley	signed	Aug. 19th	Necaro.....	115%
			(no type "B")			
	No. 268	- Farmers	No. 1.	Aug 11th,	Paino	156%
	No. 269	- "	No. 2.	" 12th,	Bonacci	139%
	No. 270	- "	No. 3.	" 12th,	Duit Inc	154%
	No. 271	- "	No. 4.	" 12th,	Muccini & Decker	158%
	No. 279	- 150th St.	Dec	5th,	Necaro	150%
	No. 280	- 158th St.	" 1	" 7th,	Awixa	177%

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No. 281 - 158th St. No. 2 Dec 3rd, Mullen Co. 179%
No. 282 - " " 3 " 23rd, Marina Paino . . 118%
etc. etc.

Experts from the various exhibits of the Appellants clearly set forth moreover, the difficulties and the reasons for the expense involved in connection with the construction of these sewers.

Speaking of one of the Farmers Boulevard contracts (Exhibit C-206, Vol. X, p. 4537) the following extracts from a letter to the Comptroller of the Department of Finance from the President of the Borough of Queens dated October 30th, 1926, is very enlightening.— 10

“This contract is one of the main trunk sewers of the Jamaica district, on which large volumes of ground water were encountered. The ground water from the excavation had to be pumped and find its way to the natural water course for this section. This water course was of a restricted capacity and therefore, the contractor could only open a relatively small amount of trench at anyone time; otherwise, the volume of water contributed to the natural water course would have caused flooding of the lower reaches of the area. This large volume of water and the necessary pumping also naturally slowed up the work and caused the contract to be overtime; and it is for the above reasons that an extension of time was granted.” 20

Let the Appellants' witness, Mr. J. J. Creem, speak, His testimony is most descriptive. He is an able contractor of “over forty years experience” (Vol. I, p. 362). Mr. Creem vividly depicts the difficulties of certain sewer construction work which was done in Queens. The extremely unfavourable physical condition of the area as described by Mr. Creem makes it easy to understand the reluctance of contractors to bid on the work other than at figures which them themselves regarded as safe. 30

Creem, Vol. I, p. 362.—

Q. Will you say if the work which you did on 51st Avenue and Linden Street and the work which Duit Inc. did on Fisk Avenue and Farmers Avenue was difficult of performance? 40

A. Yes.

Q. Why was it difficult?

A. In detail - on 51st Street the sewer was at a depth of over 50 feet in places. That of itself, as an open cut, is counted

10 very hazardous. Also, there was water encountered throughout, which had to be taken care of and which added to the danger. In passing on to Linden Avenue - that provided for two lines of 8 foot pipe, which, as I remember it, made the trench some 24 feet or 25 feet in width or practically from curb to curb, and some 25 feet to 40 feet deep in places, and having trees along the edge it is very difficult to handle the immense amount of material that was encountered. In passing on to Fisk Avenue (C-1, No. 236)— that was very wet and it was a material that would run through the slightest opening and the last one, Farmers Avenue (C-1, No. 270) we struck water about 4 feet or 5 feet below the surface, and still we had to go down 30 odd feet and there was a tremendous head of water, which, being in sand, my recollection is that we pumped about 8,000 gallons a minute 24 hours a day, in order to construct the sewer.

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20 Q. Your excavation was frequently below sea level, was it not?

A. I don't know. That does not have any bearing. If you work on the shore at sea level, and then you go back a mile in from the shore, the water is 10 feet higher there than it is at the seashore. As you go away from the sea, you will find the ground water much higher than towards the sea.

30 Q. In any event, none of these jobs could have been successfully performed by a constructor who had not a good deal of skill and experience in dealing with difficult work of that kind?

A. I should say that all four came under the head of difficult work.

40 The Farmers Avenue contract referred to by Mr. Creem (C-1, No. 270) was one of the biggest sewer contracts carried out in Queens. It involved work which cost well in excess of One million dollars. Compared with the total the cost of the pipe itself was a relatively small item - less than one third - It was awarded on the 3rd of August, 1925, roughly four months after the 6th of April, 1925, when Paino started work on the 150th Avenue job (where he was able to construct only one hundred and fifty feet of sewer after working three months). Upon reading the evidence of Creem it is fair to conjecture that his low bid exceeded the estimates, not by reason of the cost of the precast pipe purchased from Phillips but because of Creem's own shrewd appraisal of the difficulties of the situation and the hazards of the work which he offered to undertake.

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Even Bertram (Vol. I, p. 282 and p. 283) was forced to admit that sewer work in the Rockaway and Jamaica sections was "difficult and expensive". He said that there any sewer (either "A" or "B" type) was "a difficult job".

Frederick F. Fuess, Assistant Engineer of the City of New York, made a report (No. 30958) to the Board of Estimates and Apportionment, on the 23rd September, 1925, regarding the various sewers mentioned on the plans for 158th Street (See List of Sewers on C-10, Vol. XI, p. 5306). This report appears as part of Exhibit D-2 (Vol. XI, p. 5455), being formal Minutes of the Meeting of the said Board. The report was approved by Arthur S. Tuttle, Chief Engineer of the City of New York (p. 5456). The following relevant extract is pertinent:

"The cost of the improvement is now estimated to be \$965,000 or about 2½ times the amount of preliminary estimate. The great excess being wholly due to the fact that the experience with contracts now in force relating to the construction of the outlet section of these sewers indicates that the pumping in volume will be necessary through practically the entire sewer length which comprises about four miles. For this reason, the unit prices quoted are based upon the assumption that the tight steel sheeting will be used which, it is anticipated, can be driven three times. The item, however, is a contingent one and it is more than likely that the expense involved in keeping the sewer trench free from ground water will be less than is now anticipated and that this view point may be reflected in the bids."

Similar remarks in reports from the same gentleman appear in Vol. XI, at p. 5494, line 10; and at p. 5498, line 9, and in Vol. XII, p. 5501 at line 43. In passing it might be well to point out that the Appellants did not see fit to examine either of these Engineers, officials of the City of New York as distinguished from the Borough of Queens, persons of high office and entirely independent of the Borough administration. In the light of their written reports, which are of record in the present case - and which remain uncontradicted - it must be assumed that the Appellants concluded that any evidence to be given by Mr. Tuttle and Mr. Fuess would be fatal to Appellants' contentions. Mr. Tuttle understood the situation. His descriptive remarks re Jamaica sewers are to be found in Volume XII, p. 5507, line II and following.

The difficulty of the work is also described in a letter dated September 28th, 1928, to the Comptroller of the City of New York from *Connolly's successor*, B.M. Patten, the then President of the Borough of Queens, Referring to a sewer in the same general area he wrote, in part, (Vol. XI, p. 5090).

“The construction of this sewer was a difficult job as it was for the most part built across the Corona swamps. This necessitated driving piles of considerable length and also a great number of piles. This caused slow progress and delay.

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10 Due to the muddy swamp the fill called for sank and required filling again and again to bring to grade as specified. The mud waves in turn caused the closing of the winding creek. The filling had to be stopped and new lines dug to keep the creek running, causing further delay.”

To like effect is an extract from a letter dated 13th January, 1927, written to the Comptroller of the Department of Finance of New York regarding the contract for 150th *Street* (not Avenue) sewer which was let to the Oxford Engineering Company (Exhibit C-137, Vol. IX, p. 4500). This contract was also carried out in the Fourth Ward (C-1, No. 263, top p. 7).

20

“Extraordinary quantities of water were encountered throughout this entire contract, and while it was the intention of the contractor to start in two or three places, he was unable to do so for the reason that there was no place to dispose of the water. It was necessary that he begin at the outlet and to build the sewer continuously, in order to use the completed part of the sewer to drain off the water. This necessitated slow work and the use of one machine and one gang only....”

30

The following extracts from the testimony of Peterson, MacDonald and Schlemmer speak for themselves.

Peterson, p. 969:

Q. And this area through which this pipe was being laid was extremely wet.

A. Yes, it was.

40

Q. It was. And the sewer being below the sea level or at least the pipe being below sea level, the sewage had to be raised at a given point in order that it might flow out to sea?

A. That is right.

MacDonald, p. 699.—

Q. Restricting your evidence to sewers, will you say whether or not the work in that area was difficult of execution?

A. It was.

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Q. Why?

A. Well, it was in beach sand and very close to the water, and about 30 feet below high water.

Q. And it was a difficult job to make water tight, wasn't it?

A. Yes, sir.

Q. And inasmuch as the sewer, according to evidence already made here, was below tide water, the contents of the sewer had to be pumped at a certain point to a higher level? 10

A. Yes, sir.

Q. From an economic point of view it was imperative that the sewer be made watertight?

A. Yes, sir.

Q. So that no seepage into the sewer take place? 20

A. Yes, sir.

Q. And it was also necessary to take precautions to make the sewer impervious throughout the whole district?

A. Yes, sir.

Schlemmer, p. 1037.—

Q. Mr. Schlemmer, this work represented by the several contracts which have been under discussion to-day, was very hazardous work from the point of view of the contractor, was it not? 30

A. Very hazardous.

Q. You were going through a territory which was -

A. Wet.

Q. (Continuing) - difficult to handle. You had to pump. 40
You had to retain, and you had to meet a great many unknown quantities?

A. Very.

Q. And you had taken the work for a definite figure?

A. Yes.

ard? Q. Which entails on the part of the contractor, a big haz-

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A. Very hazardous. For three years we did not stop a pump.

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10 Q. Yes. Now in work of that description, I am informed that contractors figure on profits of from 25 to 50 per cent, and notwithstanding that, they are sometimes stuck. Is that correct?

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A. Yes, that is true. On this first job, the Jackson Heights job, we lost a lot of money.

THE SO-CALLED "FAIR SELLING PRICE"

20 At the verbal argument the Respondents submitted that the record does not contain the elements or factors necessary to draw comparisons between the prices Phillips is alleged to have charged and the so-called "fair selling price" which the Appellants suggest they have established. While in many cases, regarding Phillips' sales of pipe to contractors, the terms and conditions as to delivery, payment, guarantees and additional services to be rendered by Phillips such as providing sealing forms, are in the record, no proof was made with respect to the same items regarding the figures which the Appellants asked the Court to accept as a basis of comparison.

30 In most cases the figures were obtained from alleged quotations only and not from actual sales. The Appellants found their case upon the testimony of a number of disgruntled competitors of Phillips. The witness Rogge, Weaver and Hart, agents for less popular makes of pipe, even possibly of an inferior quality to that delivered by Phillips, were obviously delighted to testify against him some years after his death, in the hope, possibly, of currying favour with the then reigning administration with a view to getting future contracts.

40 To judge the prices of Phillips' pipe by those quoted by Weaver and Rogge regarding Federal and Core Joint Pipe would be highly unfair.

One has but to read the evidence of Weaver to see that it is that of a vindictive and unsuccessful competitor of Phillips and the Lock Joint Pipe.

The Core Joint and the Federal Pipe Company were ultimately both virtually bankrupt and doing no business (Weaver p. 924, line 36; also pp. 916 and 917). The President of the latter was indicted for bribery and Weaver admitted that the Company did not pay any taxes.

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(Vol. II, p. 922, line 40). It evidently had a hard time endeavouring to introduce its pipe. The comparatively low prices quoted by it are accounted for by the fact that it was attempting to break into the market with a pipe of an unknown quantity having somewhat uncertain features. (Weaver, Vol. II, p. 919, line 11). Weaver, moreover, would not swear that the quotations given by him were not carefully selected and that there were not in fact higher quotations than those to which he testified (918, line 10 et seq). Moreover, it is in no way established that any of these would be competitors could or would have completed the contracts which Phillips carried out even if they had been able to convince the contractors that the pipe which they were endeavouring to sell was as satisfactory as that of Phillips who was representing a company and making a type of pipe which was the oldest and best known in the industry. Other very obvious reasons for the willingness of contractors to deal with Phillips were his financial stability, his efficient methods and his ability to carry out any contractual obligations which he assumed in connection with his sales of precast pipe. 10

The contractors knew that when they dealt with Phillips their contract would be treated in a business-like way. The sizes of pipe which they required on any particular contract were virtually "built to order". Delivery was made along the line of the work in many cases - from the description of the ground and the area in which the contract was being carried out a most difficult thing to do. Each contract was virtually "a special order". Phillips erected plants at various places in Queens to make the different sizes of pipe. 20

Peterson, - Phillips' Superintendent - states (p. 950, line 3) "I think at one time I had something like eighteen plants running". Phillips carried on business on a large scale. The total value of the sales of his pipe are not of record but on the forty-seven contracts listed on Table "A" to the Appellants' Factum, it is shown that he did well in excess of Five million dollars worth of business in a little over two years. 30

It is not, therefore difficult to understand why the contractors wished to deal with Phillips. When considering the prices allegedly charged by Phillips (and in many cases there is no satisfactory or legal proof thereof) it should not be forgotten that Phillips was not merely selling various pieces of nondescript pipe in four foot lengths at so-much per foot. A number of very substantial services entered into the consideration price. He was selling a tried and tested article with a reputation for quality which was guaranteed by him, which was made pursuant to the individual order given to him by each contractor; it was delivered by him at the spot where it was to be used, in many instances at very inaccessible places in exceedingly wet and swampy land; he furnished the 40

10 sealing forms and extended credit to the contractor in large sums for varying lengths of time - in some instances running into years, during which time the hazards of failure and bankruptcy on the part of the contractor and many other dangers of financial loss were borne by Phillips. It would be scarcely astonishing if certain consideration were not to be included in the sale price of the pipe for all of the foregoing services, not the least of which was the desire of the contractors to deal with a supplier of materials whose name stood for the certainty that his contracts would be carried out promptly and efficiently. Even if the prices charged by Phillips exceeded certain theoretical figures computed by the Plaintiff's witness, Hopkins, one would not necessarily venture to say, on that score alone, that the prices were too high particularly when the parties immediately interested in the matter were content therewith. The contractors and the City have never complained in this regard.

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20 The following excerpt from another of the Appellants' exhibits (C-17 in Volume V, p. 2286) explains in no small measure the difficulties of building pipe in the times covered by the present action - Benjamin Marium, the acting President of Queens, wrote to the Comptroller on the 8th of January, 1923, with references to the Linden Street job which was still in progress. His letter reads in part (at p. 2287) as follows.

30 "During the time that the work was in progress, there were disturbances in both the labour market and the material market and it was very difficult to obtain either material or labour in sufficient quantity to carry on the work satisfactorily. Most of the labor on this contract had to be imported from the Borough of Brooklyn. There was much congestion on the railroads at that time, making the movement of material very slow and at one time it was impossible to obtain cement at all."

40 During such times and under such conditions Phillips was making pipe and carrying out his obligations. Naturally some remuneration, commensurate with the risks and hazards such as those referred to above, is not unreasonable even if it were necessary to assign any reason for the prices at which Phillips sold his article. The psychology of the buyer who is prepared to pay for the tried and tested article manufactured by an old firm of repute is not difficult to understand. The testimony of Peterson, at p. 969, line 34 and p. 970 regarding the quality of Phillips' article is self explanatory.

There is no evidence whatsoever upon which the Court might found presumption "*graves précises et concordantes*" that there was any conspiracy or that Phillips controlled the bids of the contractors.

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An examination of Exhibit C-1 shows that from the 1st. of July, 1907, to the end of November, 1927, 347 sewer contracts were awarded in Queens. An examination of pp. 3 to 8 of the said exhibit discloses moreover, that on the 222 different sewer contracts let in the eleven year period under review (January 1st, 1917 to April 2nd, 1928) there were made 1648 separate bids. Beginning at No. 125 on Sheet 3 of Exhibit C-1 and continuing to No. 347 on Sheet 8, the bids on the said 222 contracts are as follows:—

Page	No. of Bidders	
	Type "A"	Type "B"
3	40	6
4	60	78
5	193	247
6	141	283
7	161	242
8	44	153
	Total.....	639
		1009

10

20

Total both types 1648

An average of practically eight bids per contract! In other words, when a contractor using Phillips' pipe was awarded a contract at a given price there were usually seven other bidders in each instance who tendered at prices in *excess of the contractor to whom the job was awarded*. Rather than to ask the Court to conclude (without any evidence whatsoever to support it) that such seven contractors who made this large number of bids were all parties to a conspiracy to defraud the City of New York, would it not have been advisable for the Appellants to have established that the said bids were unfair and unreasonable. Here again it is well to point out that no engineers, *independent experts or otherwise, and none of Seeley's superior officers, were examined as to the computation of the estimates*. A further examination of C-1 shows that on its own merits precast pipe had supplanted the monolithic pipe to the extent that on at least nineteen separate occasions after precast pipe came into vogue in Queens (although the specifications permitted of alternative bids) there were no bids on Type "A" (See C-1: Nos. 144, 179, 197, 213, 227, 237, 239 261 323, 329, 331, 332, 333, 334, 335, 336, 337, 338, 339; p. 34).

Coming now to the so-called "fair selling prices" which the Appellants have asked the Court to accept as the basis of the comparison by Phillips' prices are to be condemned, the Respondents reiterate the

assertions made at the argument - the statements and figures regarding prices contained in Tables "A" and "B" appended to the Factum of the Appellants and the Lists at pp. 18 and 19 thereof are not candid; they are unreliable and in some respects untrue.

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The most glaring example of such inaccuracies will be found with respect to the three largest sizes of pipe used - 84", 90" and 96".

10 At p. 19 of Appellants' Factum, lines 8, 9 and 10 the "fair selling prices" for these three sizes of pipe prior to and after 1924 (when the Appellants admit that an allowance of an additional 14% increase in prices was or should be made for the extra cement and wire reinforcement that Phillips provided) are set out as follows:—

	Size of Pipe	Prior to 1924	Subsequent to 1924.
	84"	\$16.37	\$19.47
20	90"	18.25	21.45
	96"	22.45	26.19

The Appellants now pretend to be horrified at prices varying from \$19.35 to \$38.00 for the above three sizes of pipe which they pretend were charged by Phillips according to the theoretical calculations made by their expert, Hopkins, which are shown on Table "B" annexed to the Factum. Many of the figures included in the said Table were so-called "average prices" calculated in a manner to suit the Appellants' convenience when they failed to make definite and legal proof as to the exact amount paid for the pipe. Particularly is this the case with regard to the "average" price of \$38.00 pretended to have been paid by Paino for 90" and 96" pipe. (See Table "A" item No. 35, Exhibit C-205). This it will be remembered, was the contract between Paino and the City for the construction of the 150th Avenue sewer - a particularly difficult contract with respect to the delivery of pipe along the side of the work).

40 Very carefully did the Appellants omit to disclose to the Court that, as far back as October 25th, 1918, the City of New York was evidently aware of the prices then current for precast pipe! And that the prices for the aforesaid three sizes of pipe were then respectively:—

For the 96" pipe	....	....	....	\$34.00
90" pipe	....	....	....	32.00
84" pipe	....	....	....	30.00

These prices were, moreover, acknowledged by the City to be correct for use in the computation of "85% Progress Payment Certificates".

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The evidence on this point is most clear and satisfying. *It will be found in Volume V, at p. 2073, being part of Exhibit C-14.* One has but to place the said prices in a fourth column alongside of those mentioned in the Appellants' Factum at p. 19 to realize the inaccuracy, the unfairness and unjustness of the evidence upon which the Appellants' would rest their case.

The aforesaid prices of \$34.00; \$32.00 and \$30.00 were evidently those which prevailed before the mix of the cement in Phillips' pipe was changed to the 1: 1: 2 proportion which the Appellants concere increased the cost of the pipe by 14%. On the Appellants own admission therefore, on a comparative basis, the said prices should be increased after 1924 by the addition of 14% which would bring them to \$38.76, \$36.48 and \$34.20 respectively. 10

It will be noted, moreover, that the price for the aforesaid "85% Progress Payment Certificate" for the 84" sewer, was later found to be wrong and on the 14th of May, 1919, the Comptroller was notified that there had been a typographical error and that the price of \$80.00 per lineal foot "should have been \$86.00 per lineal foot" for the 84" sewer (Vol. V, p. 2076). 20

The point to be emphasized with respect to the foregoing is that the prices set out in Exhibit C-14 (Volume V, p. 2073) are all higher than any of those shown as "fair selling prices" for the corresponding sizes of pipe on Hopkins' Schedule "A" or those set out on p. 18 and p. 19 of the Appellants' Factum or on Table "B" annexed thereto or on the Appellants' Exhibits P-15, (Volume XI, p. 5352) and P-18, (p. 5362). 30

The question may well be asked as to why these prices (\$34.00), \$32.00 and \$30.00, or with the 14% increase allowance, \$38.76, \$36.48 and \$34.20) were carefully omitted from all of the aforesaid compilations and particularly from Hopkins' computation. It is now easy to understand why Hopkins would not swear as to the accuracy of his table or its figures and why he said "I do not guarantee these prices" (Volume III, p. 1177, line 13).

The answer, the Respondents suggest, is that the figures were not mentioned for the express purpose of endeavouring to show Phillips' prices in the worst possible light when some ten years after the formal agreement wherein the City acknowledged such prices as the then current fair prices, a political vendetta commenced between certain Borough officials and those who, for political or other reasons, desired to displace or even replace them. 40

The prices paid by Creem directly to the Lock Joint Company, which Company Creem said "made pipe and billed me and I paid for it", were acknowledged by the City of New York in 1918 to be \$34.00, \$32.00 and \$30.00 and Plaintiffs' witness, Ahrens of the Lock Joint Company swore that his company never sold pipe at unfair prices (Vol. III, p. 1284, line 2). A fair conclusion of the matter is that the prices of the Lock Joint Company, of Hart and of the others on which Hopkins' theoretical computations were based, were carefully handpicked, low prices - in most cases *mere quotations* as distinguished from actual sales. This conclusion is further supported with regard to two other sizes of pipe - 42" and 48" - the "fair selling prices" of which are set out at p. 18 of Appellants' Factum as follows:—

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	Size of Pipe	Prior to 1924	Subsequent to 1924.
	42"	\$5.18	\$5.95
	48"	6.58	7.54

Here again the Respondents ask why quotations of \$7.50 and \$9.25 respectively for the said sizes of pipe given by the Hart Co., to Paulsen, as testified to by Mary Ryan (Exhibit P-18: Vol. XI, p. 5365, lines 10 and 11) are not accepted as the "fair selling prices" in lieu of the lower figures set out in the Appellants' Factum at the page cited? The inevitable answer is that already suggested. The object of the testimony was to make the worst possible case against Phillips. On the other hand, the result of such conduct on the part of the Plaintiffs is that the Court has been requested to accept, as evidence of "fair selling prices", statements which are absolutely unreliable.

The cursory analysis of prices which the Respondents make in the present memorandum is not in any way to be interpreted as an admission of the relevancy or legality of the so-called "fair selling prices" which the Respondents have denied throughout. We are merely endeavouring to indicate that each contract had its own difficulties; and any shrewd business man calculated accordingly.

It is fair to assume that the price charged by Phillips for each contract depended upon the particular difficulties of the work in each individual instance as we have already suggested. The extension of credit in large sums for a long period of time and the ever-varying difficulties of delivering the pipe at the site of the contract could be assigned as fair reasons for any variation in prices. The latter assumptions would certainly be more fair to the heirs of a deceased than to conclude, as the Appellants ask, that the prices varied by reason of a conspiracy which has in no way been established.

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In any event, from the record, it would seem that each contractor had his own reasons for buying Phillips' pipe. The Appellants did not ask very many of the contractors what such reasons were but those who were accorded an opportunity to explain, for instance, Paino, Creem, O'Rourke, indicated that they did so because they could not get delivery elsewhere or that they did not wish to make it themselves, or that it was cheaper than they could manufacture it for themselves. And again we say that there is in the present record no possible way of making a satisfactory comparison of the actual prices charged by Phillips and those for which his competitors later suggested they might have been willing to have carried out the contracts had the contractors been prepared to deal with them which is by no means at all certain. 10

Let us, without burdening the present notes, review the facts relating to some of the various contracts and contractors. An exhaustive study would be merely confirmatory of the general characteristics which follow. 20

THE PAINO CONTRACTS

Take, for instance, the case of Paino. He carried out many contracts for the City. Some he completed with Phillips' pipe and some with pipe of his own construction and manufacture.

(a) BROADWAY:

As to the pipe for this contract (C-204, Volume VIII, p. 3895) Phillips' agreement with Paino was made on the 5th November, 1924, (Volume VIII, p. 3766). 30

Paino said with respect to the prices charged for Phillips' pipe "That is why I could not use my pipe. That was cheaper than I could make it for". (Vol. III, p. 1113). Again at p. 1114 line 28. —

"Q. You were satisfied to pay these prices?

A. Yes". 40

The Court is respectfully requested to refer to and examine the conditions of Phillips' contract with Paino in this instance which will be found in Volume VIII at pp. 3766 to 3768. It will be seen that under the heading "Terms" (p. 3767) Phillips financed Paino and agreed to wait for his payment until the City had paid Paino. This meant an extension of credit in the sum of \$71,525. upon which there was still a balance owing more than a year later, on the 24th December, 1925, as appears from the

10 account rendered to Paino on the business-letterhead of Phillips which is reproduced at p. 3769 of the Joint Case. The contract moreover, shows that delivery was to be made "along the entire line of the work" and the quality was guaranteed to meet the specifications. Moreover, the contract provided for a saving of equipment to Paino in that Phillips agreed to lend "sealing forms for making joints". No evidence was made by the Appellants as to the terms of payment or the conditions existing at the place of delivery with regard to the mere quotation prices for the pipe which they suggest are indicative of the "fair selling price". The Respondents are at a loss to understand how any possible comparison of prices can be made in the circumstances, with so many essential factors missing.

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(b) 150TH AVENUE:

20 As to the pipe to be furnished for this difficult contract (C-205) bearing in mind the large size of the pipe and the place where it had to be delivered (on one of the worst contracts let in Queens as already above described — see p. 13 et seq) can it be said that Phillips' prices were unfair in the circumstances? Phillips' contract with Paino is dated 26th February, 1925, (C-224, Volume IX, p. 4247). The pipe used was of the largest sizes being 90" and 96" in diameter. It was for delivery at the site of the job in the swamps and wet which there prevailed; it was guaranteed to meet specifications; it was a contract for a large quantity of pipe of better quality than that of the Lock Joint Company set out in Exhibit P-15, (Volume XI, p. 5352 and following) and the contract was made by Paino with the supplier upon whom he was certain he could rely for delivery and it involved the extension of further credit to Paino by Phillips
30 in the sum of \$240,160.

We again emphasize that there is no proper basis of comparison.

40 The theoretical "fair selling price" mentioned on p. 19 of Appellants' Factum was arrived at by Hopkins who used records which were not produced before the Court (Volume XII, p. 1177) and none of the terms and conditions of the mere "quotations" relied upon by Hopkins are of record for comparative purposes. Moreover Exhibit P-15, (at Volume XI, p. 5355) shows that the Lock Joint Company made no 90" or 96" pipe whatsoever in the year 1925. The nearest approach to it was a relatively small amount of 84" pipe which it is pretended was delivered in Worcester, Mass. No evidence whatsoever was made as to the physical conditions at the site in Worcester where delivery was made, the difficulties of the work, or the terms of payment.

Likewise Exhibit P-18, Hart & Co's lists of "sales and quotations" (Volume XI, p. 5362 et seq.) shows that this company sold no pipe larger

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than 42" in 1925 and that there was only one sale of this size—on the 27th of June (p. 5363, line 22). There is no evidence whatsoever as to the quantity sold nor the details of the conditions of payment and delivery. Mrs. Mooney (Mary Ryan) agreed that "the prices varied according to the place where delivery of pipe had to be made" (Volume III, p. 1298, line 3). As a matter of fact, Hart, whose prices were used for comparative purposes, was forced to admit at the time he testified, that (Volume II, p. 235, line 18 and following) he had never sold any reinforced concrete pipe prior to 1930. 10

"Q. Have you ever sold any reinforced pipe?

A. We have last year. Not previous to that.

Q. Not previous to that?

A. No, sir.

It would seem to the Respondents that this gentleman is scarcely 20 a witness upon whom much reliance should be placed with respect to testimony as to the fairness of the pipe price allegedly charged by the deceased Phillips a considerable number of years previous.

(c) *Farmers Boulevard:*

The contract for this sewer was awarded on the 6th of August, 1925. It is Exhibit C-266 (Volume X p. 4531 e seq.). Phillips' proposal to Paino for pipe for this contract is Exhibit C-225. It will be found in the same volume at p. 4527. By its terms (p. 4528) it may be seen that here 30 again Phillips financed Paino to the further extend of \$225,000 and he agreed to wait for payment of his pipe until "after you (Paino) have received payment". Similar guarantees were again given to Paino as to the quality of the article, as to the place of delivery and sealing forms were loaned. In the circumstances what comparison can be made by reference to Hart's prices and to those to the Lock Joint Company? Hart sold no pipe whatsoever in 1925 over 42". (Volume XI, p. 5363, line 21) and then there was only one sale—on the 27th of June.

Again, no evidence of any of the relevant details which would be 40 necessary in order to make a fair comparison!

(d) *Hayes Avenue:*

This contract was let in 1926. It is Exhibit C-207. (Volume XI, p. 5103). Phillips' contract with Paino is Exhibit C-226 (Volume XI, p. 5048). Here again, a few months after extending credit to Paino in the

large sums above mentioned on the other contracts, Phillips financed the contractor to the extent of \$119,520. (p. 5049). It will be noticed that Phillips' prices of \$33.00 and \$30.00 in 1926 for the 96" and 90" pipe compare very favourably with those acknowledged and accepted by the City of New York in 1918 as set out in the 51st Street contract "85% Progress Payment Certificate". And it should be remembered that, according to the Appellants' own calculations and admissions, from and after 1924, Phillips was entitled to an extra 14% allowance for the additional concrete and reinforcement incorporated in his pipe.

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This contract between Paino and Phillips was made on the 20th October, 1926. On November 21st, 1927, the contractor was still indebted to Phillips in the sum of \$4,664. (p. 5051).

Again, the same remarks apply to the quotation prices of Hart and the Lock Joint Company upon which the Appellants would rely for purposes of comparison. In 1926 the Lock Joint Company made 90" or 96" pipe whatsoever (P-15, volume XI, p. 5356) and the Hart Company dealt in nothing over 48". The record is devoid of any details as to the terms of payment and delivery, etc., all of which, we submit are necessary for the purpose of arriving at any fair comparison.

(e) 124th Street, Sutphin,

Tuckerton.

These contracts (Exhibits C-208, 209 and 210) were let in 1927. A similar analysis of these could be made and the same remarks as above apply thereto. The Hart Company made only one sale of 60" pipe (Vol. XI, p. 5368) and nothing over that size in 1927.

In conclusion, with respect to the contracts carried out by Paino—a man who fought with Phillips and who only bought pipe from him when his price was right, according to Paino's own practical appraisal—we submit that the evidence of Paino, the realist, who purchased and paid for pipe which he used—and which was one hundred per cent perfect, should be accepted, rather than the evidence of Hopkins, the theorist, whose complex computations and "fair price" charts he would not even undertake to swear to as correct (Volume III, p. 1177).

Incidentally, the activities of Paino, (recited in our Factum at p. 33, line 31 et seq., and as above set forth) blast all suggestion of the existence of a monopoly by Phillips.

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APPELLANTS HAVE NO CLAIM AGAINST THE LATE JOHN M. PHILLIPS OR HIS HEIRS.

There is absolutely no evidence whatsoever that Phillips is in any way responsible to the Appellants. Despite the reckless allegations of the Declaration the evidence shows that he had nothing whatsoever to do with the bids made by the various contractors who tendered on work in Queens. Some of them—Elkin, for instance,—never met him, and a number of them only dealt with him regarding precast pipe after they had obtained their contracts from the City of New York and had been committed to carrying them out at fixed prices—Creem, Carey, O'Rourke, Turner, Schlemmer. 10

The record makes it amply clear moreover, that there is no direct relationship between the cost of the sewer and the charge for pipe which was incorporated therein. This is quite evident with respect to the Brinkerhoff Avenue contract where Paulsen, who obtained a price of \$7.50 and \$9.25 per foot for pipe from Hart & Co. (Mrs. Ryan, p. 982, line 34) bid against Muccini & Decker who allegedly paid Phillips \$19.50 per foot. Paulsen's bid was \$48,071 in excess of that of Muccini & Decker to whom the contract was eventually awarded. Paulsen bid \$296,496.00 (our Factum p. 37, line 31) and the bids of Muccini & Decker totalled only \$248,425 (our Factum p. 38, line 33). 20

The situation cannot be more clearly explained than in the apt manner in which Chief Engineer Tuttle sets it forth: 30

“... I would say that the whole story as to cost might be summarized by emphasizing the fact that the cost of constructing trunk sewers in one locality is not comparable with that in another unless the working conditions are the same. In all Boroughs it is the practice to pay for sewer construction on the basis of the cost of a single linear foot, this cost including the furnishing of all the material as well as the work of excavating, pumping, sheeting, bracing and backfilling. In some of the work the cost of the material undoubtedly makes up the major portion of the total expense, while in others it may become a minor matter. Any comparative statement limited to the cost per foot of sewer construction in one locality has, therefore, very little value in so far as it relates to another locality unless similar conditions obtain. 40

(Volume XII, p. 5506, line 39.)

Mr. Tuttle further clarifies the matter (Vol. XII, p. 5508) when he says:—

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10 "I might add that this office makes a compilation each year as to the cost of work carried out in the entire City in comparison with that disclosed by the final estimates. The records have been published in my Annual Reports up to the close of the year 1925, and an examination of them will show that the total final estimates for sewer improvements in the Borough of Queens are within the total cost of the work done. Of course there are exceptions where costs greatly exceed the estimates while, on the other hand this condition appears to have been more than offset by cases where the costs are lower than anticipated."

(NOTE. The comparative Table of final estimates referred to by Mr. Tuttle is found in D-1 at p. 328. A photostatic copy thereof is annexed to our Factum as Appendix "A")

20 Not a single contractor was asked if he would have undertaken to do the job for anything less if he had been able to purchase pipe at a lower figure or if his labour or any other ingredients had cost him less money.

30 Again, we point out that there is not one word of evidence to establish that the City of New York has suffered damages in an ascertainable amount whatsoever. The only proof attempted by the Plaintiffs was that based upon the theoretical computations of the witness Hopkins which have been discussed above. The Appellants ask the Court to permit them to subtract the figures arrived at by this accountant gentleman as the "fair selling price" from prices allegedly paid to Phillips and to say that the difference between the two figures represents the amount of damages—all without establishing any common grounds of comparison, by reason of the fact that the record is devoid of all evidence relating to any sales of pipe other than those of Phillips himself.

40 It is, moreover, very difficult to understand how any claim whatsoever can be advanced with respect to most of the contracts mentioned in the present suit by reason of the fact that they were awarded at figures lower than the estimates made by the City and Borough officials as will appear from the following:

I. MUCCINI AND DECKER CONTRACTS.

(a) *Grand Avenue* — (C-1, No. 248)

By Paragraph 26 (a) of their Declaration the Appellants claim that Phillips overcharged the contractors \$21,250.96 on this contract which

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was awarded to Muccini & Decker on the 17th of September, 1924, on a bid of \$240,883.91 or 86% of the estimate which estimate was \$279,940.25. In 1925 Muccini & Decker paid (according to their records, not the records of Phillips,) a lump sum of \$97,000 for precast pipe (C-86: Vol. VII, p. 3369).

Phillips evidently waited a year for payment and, at the end of 1925, was still owed \$122,300 on this and four other contracts, totalling \$389,700.63, for which he had supplied pipe to Muccini & Decker in 1925 (p. 3369). In the interval he took all credit and other risks and, despite the fact that the bid was 14% under the estimate, the State of New York, by its action, concludes that the Phillips' Heirs should be condemned in its favour for a sum of \$21,251.96. 10

(b) *Queens Boulevard* — (C-1, No. 256)

By paragraph 26 (b) of their Declaration, the Appellants claim \$23,464.33 from the Heirs of the late Mr. Phillips. The record is absolutely devoid of a single word of evidence respecting this contract. Decker testified as to a number of contracts between his firm and Phillips but did not mention this one. In any event it was awarded at 77% of the estimate price. The bid of the Decker firm using Phillips' pipe was 23% under the estimate computed by the City of New York. The Respondents submit that, by no stretch of imagination can it therefore be pretended that the City suffered damages in this case. 20

(c) *Rockaway Boulevard*—(C-1, No. 320, p. 7)

A claim of \$34,615.42 is advanced by Paragraph 26 (1) of the Declaration regarding this contract. The only proof relating to the matter is that the contract was filed; the contractors were asked if the work had been done and if they had been paid for their work to which questions they replied affirmatively. Here again the claim of the Appellants is utterly incomprehensible. The estimate was \$250,466. The bid \$165,616.20. The completed job cost \$173,202.06. In other words, with Phillips' pipe being used by the contractor, the contract was awarded at 56% of the estimate and was actually carried out at a sum of \$77,263.04 below the estimate. But, to mention the said figures, clearly disproves the claim. 30 40

(d) *121st Street*—(C-1, No. 319, p. 7)

The Appellants claim \$9,708.62—Declaration, Paragraph 26 (n). Here again the facts negative the claim. This contract was also awarded at 60% of the estimate and was actually carried out at a cost of \$23,352.76 below the estimate. The estimate was \$68,521.30. The bid was \$45,168.54.

The cost was \$47,123.77. And Phillips' pipe was here used in a contract executed at a saving totalling practically one-third of the estimated cost. Such proof surely dispels any suggestion of damages!

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(e) *Ditmars Avenue* — (C-1. No. 318, p. 7)

10 This contract was let to Muccini & Decker at 91% of the estimate. The estimate was \$38,862.50 and the contractors bid of \$35,556. was the lowest of six bids. Notwithstanding these facts the Appellants suggest to the Court by Paragraph 26 (r) of their Declaration, that the late Mr. Phillips' Estate should be mulcted in their favour to the extent of \$7,489.35.

(f) *108th Street* — (C-1, No. 308, p. 7)

20 A claim of \$5,243.68 is advanced with respect to this contract. Declaration 26 (i). Here again we fail to understand how a claim for damages can be attempted. The bid was \$16,456. under the estimate, an equivalent of 89% thereof!

(g) *Brinkerhoff Avenue* — (C-1, No. 303, p. 7)

30 \$40,463.21 is claimed from the Heirs Phillips (Declaration, Paragraph 26 (h).) This contract is that upon which Paulsen bid after having obtained prices elsewhere than from Phillips for his precast pipe — from Hart at \$7.50 and \$9.25 per foot. Despite the computation of the Appellants that Muccini & Decker paid Phillips an average of \$19.43 per foot their bid was considerably below that of Paulsen as above pointed out.

40 While it is scarcely necessary for the purpose of the Respondents similar remarks can undoubtedly be made concerning the balance of the contracts carried out by Muccini & Decker. As Chief Engineer Tuttle has said, for good reason, in certain cases estimates were exceeded by bids, but the foregoing evidence merely goes to demonstrate clearly the truth of the proposition advanced by the Respondents that there is no direct relation between the cost of the pipe and the amount for which the contractors were prepared to carry out the completed contracts.

II. PETRACCA AND PETERSEN

130th Street Contract (C-1, No. 315, p. 7)

By their Declaration (Paragraph 32a) Plaintiffs claim \$5,926.56 as damages on this contract. Here again their unsatisfactory bookkeep-

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ing methods and the inaccuracies of Hopkins' computations are clearly evidenced. The pretended claim as set out in Table "A", (Item ii) annexed to Plaintiffs' Factum is shown at the sum of \$6,250.08 which does not agree with the Declaration. Peterson, a former superintendent of Phillips', thought Phillips' pipe "was the best sewer pipe in the country" (p. 970, lines 18 et seq.). He had made it himself for Phillips and regarded it as "a pipe vastly superior to the one specified" (p. 968, line 14). When Peterson himself went into the contracting business and was awarded the above contract he used Phillips' pipe and asked for quotations from no other company (p. 965, line 16). He and his partner, Petracca, were content to pay a lump sum of \$9,000. for the pipe required on their contract. There is not a word of proof as to how the bid in this case was computed. With Phillips' pipe used to carry out the job the bid was 85% of the estimate and was the lowest of seven bids. The estimate was \$34,918.30. The low bid was \$29,677.25 and the final cost of the contract was \$32,388.70. It was a relatively small contract and was finally executed at \$2,529.60 below the estimate. Again surely no damages exist here.

10

III. EVERETT CONSTRUCTION COMPANY.

20

Brinkerhoff Avenue — (C-1, No. 296, p. 7)

The Plaintiffs' claim (Declaration 25a) is \$160,521.04. This amount does not agree with Hopkins' computation (Appellant's Factum, Table "A", Item 10). The Everett Construction Company obtained this contract by an assignment from Riverdale Construction Company (p. 869, line 35). In other words it had already been awarded at a fixed price before the Everett Company came into the picture. The bid of the assignor, Riverdale Construction Company was made up in its own office (p. 774, line 29) "by the estimators who are in our office..." (idem, line 40). Elkin, the superintendent of the company, said "I helped to make up" (idem, line 30) Mr. Elkin testified (p. 780):

30

"Q. Did you know John M. Phillips?

A. No, sir.

Q. *You never met Mr John M. Phillips?*

40

A. No, sir."

The price of precast pipe in the estimates used by Elkin and his company were supplied by Decker (p. 783) who "financially interested in these jobs if we got the jobs" (p. 777). On such evidence Phillips could hardly be said to be responsible for the amount of the bids complained of.

IV. OXFORD ENGINEERING COMPANY

150th Street — (C-1, No. 263, p. 7)

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Again, another discrepancy between the claim in the Declaration (Paragraph 24a) and Table "A" to Appellant's Factum (Item 9). This contract was awarded in 1925 to the Oxford Company on its low bid. According to Everett the Vice-President of the said company — which was
10 in liquidation a year later, in 1926 — Phillips quoted a lump sum of \$117,000. for the pipe required on the said contract. "Mr. Deegan and I got the price and Mr. Deegan turned it over to the rest of the members of the Corporation and they accepted it" (p. 869). Phillips "guaranteed the pipe to be watertight" and also "guaranteed delivery of the pipe close to the trench" (p. 871). He evidently extended credit as he only "wanted \$25,000 in cash" (p. 871, line 31). In the case of this company there was a definite credit hazard as the company was in liquidation the following year. The work on this contract was only completed on October 14th,
20 1926. If Phillips' pipe price was used in computing the amount of the bid, it was in any event only 1% above the estimate. In such circumstances, with no further enquiry made by the Plaintiffs as to costs of working conditions, how can any valid comparison be made and how can it be pretended that there was anything wrong in the premises.

V. THE NECARO COMPANY CONTRACTS.

The testimony of Mr. Carey, Vice-President and General Manager of the above company, which had completed "above ten million dollars worth of work" (p. 665, line 5) in Queens, affords little consolation to
30 the Plaintiffs. Two contracts are complained of. One with regard to Amstel Avenue (C-1, No. 276, p. 7) and the other concerning 150th Street No. 2, (C-1, No. 279).

The bids on these contracts were made and delivered before Mr. Carey or any of his partners knew Phillips! (Carey p. 667, line 40.)

40 "Q. In both cases, Mr. Carey, I understand you purchased the pipe from Phillips after the contracts had been awarded to your company?

A. That I believe is correct. But I —

Q. That is what I understand.

Mr. Goudrault: Let him answer.

Mr. Cook: He is answering.

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Mr. Goudrault: No, you are interrupting him.

What is your answer?

The Witness: *That I believe is correct.*

Mr. O'Donnell: You did not have anything to do with Phillips before you made your bids?

10

The Witness: *Nobody* representing us, including myself, saw Phillips or anyone representing him; and I, and I believe that is true of all of my partners, had never met Phillips, *until some time following the delivery of bids.*"

The unfairness of the Appellants is again most pointed. No mention whatsoever is made by them of a number of other contracts which the Necaro Company carried out on bids which were considerably under the estimates. The attention of the Court is directed particularly to C-1, Numbers 301, 302 and 231, the bids wherein were respectively 87%, 85% and 90% of the estimates. Even on Contract No. 301, when bids were not called for 'type "A" the Necaro Company's bid was greatly below the estimate and all were executed with the same pipe! In any event Carey's evidence is clear — Phillips had no connection with or bearing upon the bids made by his company. How then can the Appellants pretend to claim damages from his heirs?

VI. THE AWIXA CORPORATION CONTRACTS

30

This company built the Jamaica disposal plan having bought the contract from Welsh Brothers "after we had been second bidder on it". (Schlemmer p. 1017, line 9). "Our bid was \$1,697,000 and the Welsh bid was \$1,651,000. That is in round figures" (*idem*, line 43). A relatively small amount of pipe was required and it was purchased from Phillips for a lump sum of \$15,000. On the evidence it is clear that Schlemmer only negotiated with Phillips after his company had acquired the contract for the job from Welsh Brothers. In other words both Welsh Brothers and Awixa Corporation were bound to carry out their contract at a fixed price before Schlemmer negotiated with Phillips (p. 1029, line 20) whose only interest in this contract, which exceeded a million and a half dollars, was the sale of 695 feet of pipe for a relatively negligible sum of money in comparison with the total cost of the sewer — something less than 1%. The point is that, despite the charge of the Appellants, the Awixa Corporation's bid was in no way based on Phillips' prices.

40

Likewise, regarding the Jamaica Avenue contract which "was bought from the Riverdale Construction Company" Phillips' prices in no

way influenced the bid of the Awixa Corporation as it, and is assignor, Riverdale Construction Company, had already bound themselves to the City of New York to carry out the contract at a fixed price before the pipe was purchased from Phillips (p. 1036).

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10 “Q. Do you remember the price you paid Phillips for the pipe used in that particular job?

 A. That is the one we had this morning, that we paid him \$167,000, a flat sum.

Mr. Hacketts After you had beat him down from a higher price —

The Witness: From about \$174,000 down to \$167,000.

20 *Mr. Hackett:* And you beat him down after the assignment had been ratified by Connolly?

The Witness: Yes.”

30 The evidence shows conclusively that the Awixa Corporation purchased these contracts based upon its own figures and that subsequently it made the best arrangement it could for the acquisition of the materials to carry out the contracts. Such was undoubtedly the situation with regard to any of the contracts in which it was interested. Phillips was in no way shown to have influenced this corporation's bids which were in competition with those of other contractors.

VII. HIGHWAY IMPROVEMENT AND REPAIR COMPANY CONTRACTS.

40 The Court will remember the testimony of Mr. Turner, President of the above company, which had carried out about “75 or 80” construction contracts in Queens from 1924 on (Vol. II, p. 722, line 8). His testimony was unequivocally to the effect that Phillips had nothing whatsoever to do with the amounts of his company's bids on the contracts which it was awarded. Gonzalez, the Company's Engineer, “was in charge of all the estimations” (p. 729, line 31). The bids were prepared in Turner's office by the said Engineer with whom the price of materials was discussed. Turner relied on Gonzalez's knowledge of the matter and between them they agreed on the prices (pp. 729 and 730). Phillips had nothing whatsoever to do with the bids. It was only after the contracts had been awarded to Turner's company that he had any discussion with Phillips regarding them. A description of his discussions with Phillips will be found at p. 736, lines 36 and following to end of p. 738. The computations of the Tur-

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ner Company as to the cost of precast pipe were clearly made independently of Phillips. Ultimately the contracts were assigned and Turner swore that Phillips had nothing to do with the assignments (p. 753, line 35). In such circumstances we fail to see how the Heirs of the late Mr. Phillips are liable to the Appellants.

VIII. CREEM AND DUIT, INC., CONTRACTS.

Creem will be remembered as the contractor who acquired the 51st Street contract by assignment from Sigretto in September, 1918. The assignment was completed before Phillips and Creem ever met. Creem, referring to Phillips, said "never saw him, or, as far as I know, ever heard of him" (p. 303, line 34). No arrangement whatsoever had been made for the purchase of pipe prior to Creem's acquisition of the contract after which, it will be remembered, he made arrangements to deal directly with the Lock Joint Company under circumstances which have already been discussed. Later, in the years 1924 and 1925, Creem carried on business under the corporate name of "Duit Inc" of which he was President (p. 326) and Treasurer (p. 327, line 24). The price of \$35.00 for 96" pipe, paid to Phillips by Creem in these later years when dealing directly with him regarding the Fisk Avenue contract in 1925, compares favourably with that accepted and acknowledged by the City in 1918 regarding the 51st Street contract.

(a) *Fisk Avenue* — (C-1, 236, p. 6)

The bid of Creem's Company was 94% of the estimate. The Appellants by their Declaration (Paragraph 21a) claim \$31,792.68 on this contract, which claim does not agree with that of \$37,822.18 set out as Item 6 on Table "A" to their Factum. Merely another instance of unreliable calculation.

In any event the City can scarcely be said to have suffered damage when it awards a contract at a figure of 6% below its own estimate of the fair cost of the job.

On the basis of similar reasoning by the Appellants, one wonders why they omit to advance a similar claim on the Way Avenue contract (C-1, No. 233) where the bid of Duit Inc — again using Phillips' pipe — was 95% of the estimate.

(b) *Farmers Boulevard* — (C-1, No. 270, p. 7)

The total amount of the work involved in this contract was \$1,122,508.43 (Creem p. 367).

Creem paid a lump sum of \$366,000 to Phillips for the pipe used on this contract (p. 329) and Creem evidently arranged to assist Phillips in the matter of financing the making of the pipe as Creem testified "Phillips was not able to finance all the pipe making and he borrowed money and assigned the payments. The cheques were drawn to 'Daniel J. Creem', Assignee of Phillips" (p. 329, line 23).

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10 One has but to read the evidence of Creem to realize that he was in no sense a philanthropist. A shrewd, astute business man, it can scarcely be assumed that, when he undertook to pay Phillips \$366,000 for the pipe required for this contract, he was overpaying him, particularly when he assisted Phillips to finance the undertaking. In any event, the Appellants made no attempt to elicit from Mr. Creem any information as to the manner in which he and his company compiled their bids. Again, for the further reasons already discussed, no proper comparison of costs, could be made by taking the bare quotations of Hart or of the Lock Joint Company. As a matter of fact the latter Company had no sales of 96" pipe in
20 1924 (p. 5354) at which time Phillips was, in any event, making better pipe than the Lock Joint Company and his undertaking was to deliver it alongside the trench under the there prevailing adverse physical conditions which Creem described. (Volume I at the bottom of p. 362 and at the top of p. 363). Moreover, the Hart Company made no sales of 60" pipe in 1925; and the Lock Joint Company had only two, for relatively small amounts in South Amboy, N. J., (Vol. XI, p. 5355, line 40) the prices of which, as a matter of fact, varied 40% for the same diameter of pipe when sold by the same vendor to the same purchaser for delivery in the same City at identical times. This proof — adduced by the Plain-
30 tiffs themselves — establishes beyond dispute that pipe prices fluctuated with other suppliers even as they may have with Phillips. This is true of any commodity but it establishes with finality that comparisons are worth less in the absence of identical conditions.

On the evidence of record, we submit Your Lordships cannot reasonably be asked to conclude that Phillips' prices to Creem and Duit Inc. were anything other than proper.

40 IX. H. J. MULLEN CONTRACTING COMPANY CONTRACTS.
(a) *Norwood Place* (C-1, No 198, p. 5)

The bid for this contract was 85% of the estimate. The estimate was \$365,872.85. The bid was \$311,855. The final cost was \$313,214.68. In other words, it was carried out with Phillips' pipe at \$52,567.97 below the estimate. Again there can be no damage in this instance.

The unfairness of the Appellants is once more emphasized by their

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failure to refer the Court to the Liberty Avenue contract (C-1, No. 184) carried out by the same company, likewise using Phillips' pipe, when their low bid was only 61% of the estimate. This contract was carried out at a final cost of \$65,466.56 less than the amount of the estimate. No evidence was made by the Appellants as to why the alleged prices were paid to Phillips and no proper proof was made of the actual payments. The witness Hastings stated that cheques evidencing the payments existed but that they were in the hands of the Department of Justice at Washington (p. 422). No attempt was made by the Appellants to obtain the said cheques. 10

(b) *158th Street* — (C-1, No. 281, p. 7)

For this job a lump sum price was paid to Phillips "for the pipe he actually furnished" (p. 426, line 33). Said Hastings, "the execution of the job on 158th Street was a very difficult piece of construction . . . we had 12 feet of water which we had to get out of our trench before we could lay any pipe . . . it was a treacherous piece of work" (p. 423). The attention of the Court is particularly directed to Mr. Hastings' description of this contract at p. 423 and p. p. 424. It was carried out at a time when "there was a good deal of labour unrest and uncertainty as to prices" all of which Hastings admitted had a bearing upon pipe prices (p. 424, line 33 and following). Hastings did not at any time disclose to Phillips the amount of his bid. He paid nothing for obtaining the contract. He paid Phillips a lump sum for the pipe which he actually furnished. "The pipe was delivered to the job and these conditions would hamper the delivery of the pipe to the job" (p. 426, line 5). 20 30

In the light of the difficulties which Phillips encountered with respect to financial hazards, to labour and material costs, and with respect to delivery, the record contains no evidence, we respectfully submit, concerning these particular contracts which would justify the conclusion to which the Appellants have asked the Court to come. 40

In conclusion, we aver that the Appellants have entirely failed to establish that Phillips' prices were unfair or exorbitant and they have also failed to prove that the City of New York suffered any damages for which it, or its "auteurs" are entitled to claim from the Respondents.

THE WHOLE RESPECTFULLY SUBMITTED.

MAGEE, NICHOLSON & O'DONNELL,
*Attorneys for Respondents,
The Heirs of the late John M. Phillips.*

LOUIS S. ST. LAURENT, K. C.,
Counsel for Respondents.

No. 6

Reply to Memorandum of Further References and Notes of the Respondents: the Heirs of the late John M. Phillips, Before the Court of King's Bench.

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10

During the argument in this Court, it was agreed that a few further references to evidence would be supplied by the parties. It was, therefore, a great surprise to us to have discovered that the attorneys for the Respondents: the Heirs of the late John M. Phillips, have produced what is virtually a new Factum consisting of 50 type written pages.

20

We believe that the Appellants are entitled to make a motion to have the said additional Factum struck out, but, as this would entail considerable delay, we would content ourselves with a brief general reply covering the points raised in the said additional Factum, which can be done in very few words.

30

The Respondents vainly seek to explain the high prices charged by Phillips for pipe and to discredit the Appellants' calculations of the "fair price". They are indignant that in establishing a basis of comparison between Phillips' prices and the prices charged by other companies manufacturing precast pipe, the Appellants have produced evidence of prices charged by other companies besides the Lock Joint Pipe Company. If your Lordships would compare Exhibit P. 15, Vol. 11, page 5352, which is the list of sales of the Lock Joint Pipe Company outside the Borough of Queens, from the year 1917 to 1927, with the prices at which pipes were sold or quoted by the other companies, you will notice that the prices of the Lock Joint Pipe Company are lower than the prices charged by other companies. The Appellants introduced evidence of prices charged by other companies as well as the Lock Joint Pipe Company in fairness to the Respondents. If the fair price was calculated and based solely on the prices charged by the Lock Joint Pipe Company, the average fair price would have been lower than it is now.

40

The Respondents devote a great deal of their time to criticizing what they call the "theoretical computation" of Mr. Hopkins the accountant. What Mr. Hopkins did was simply to make a mathematical computation from the evidence of prices submitted by the officials of the different precast pipe manufacturing companies including the Lock Joint Pipe Company. Anybody could have done the same thing from the evidence produced. If our opponents could find any error in the mathematical computation it was up to the mto point it out.

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We wish to point out to your Lordships the fact that the evidence of the prices charged by the Lock Joint Pipe Company with which apparently our opponents can find no fault, has been given by Herman F. Ahrens, Vol. 3, pages 1264 and 1265. This witness, the Treasurer of the Lock Joint Pipe Company, has produced exhibit P. 15 at the trial of this action, showing the prices at which the Lock Joint Pipe Company sold their pipe outside of the Borough of Queens. These prices, as given by the said witness, have been placed in tabular form in our table B in order to make the comparison easier between the prices of the Lock Joint Pipe Company and the prices charged by Phillips. 10

At page 1284, Vol. 3, this witness states that all the sales, which appear on Exhibit P. 15, were actually made by the Lock Joint Pipe Company, therefore our opponents are wrong when they say that the prices which we have proven to have been charged by other companies were based on quotations and not on sales. The same witness, Vol. 3, page 1283, states that the figures given by him include a profit. He further explains, at the same page, that in working out the prices, they "find 20 out the sizes, the quantities, where the work is to be done, the way the work is to be done, and pick out a manufacturing site on or near it, get prices on sand, stone, cement, labor, etc., in that particular place". He further states, at page 1265, that the prices are those of the pipe "delivered on the job" and at page 1270, he states that "the strata, the strains and the hazards have nothing to do as regards the sales end of it."

It has been established very clearly in evidence that the subterranean conditions: wet ground, rock or any other difficulties encountered in the laying of the pipe, would only increase the cost of labor 30 to the contractors, but would have nothing to do with the prices of the pipe which was manufactured near the place where it was to be laid and sold to the contractors to be placed by them in the sewer.

The Respondents not having produced any evidence to contradict the Appellants' witnesses on specific facts now seek to defend themselves by endless references to a lot of statistical compilations hoping in that way to confuse the issues and to muddle up the real facts of the case. It is not necessary for us to stress that a statistical report such 40 as Exhibit D. 1 would have no evidentiary value.

The Respondents further picked out a number of small contracts in Exhibit C-1 to show that in some case the engineers' estimates exceeded the low bids. These contracts are not the evidence, and in any event an examination of Exhibit C-1 would reveal that wherever there was an excess in the engineers' estimates over the contractor's low bids, such excess was small. We do not say that Phillips charged exorbitant pri-

ces in all the contracts in which he sold pipe but he did charge fantastic prices on the majority of the 47 contracts which we have in evidence.

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The small contracts, where the quantity of pipe used is not great, would not have been worth his while. He picked out the big contracts where the quantity of pipes to be used ran into many thousands of feet thus unabling him to reap such huge profits out of one single contract.

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The Appellants submit that it would have been enough for the purposes of their action if they had proven that only on one contract Phillips with the connivance of the corrupt Borough officials had overcharged by many thousands of dollars on the pipe prices. It would only have reduced the quantum of the damages claimed. The Appellants have proven that he has done so in 47 contracts.

The whole respectfully submitted.

20

(SGD) BERTRAND GOUDRAULT & GARNEAU

Attorneys for Appellants.

AIME GEOFFRION,
Counsel for Appellants.

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No. 7

FORMAL JUDGMENT OF THE COURT OF KING'S BENCH.

In the
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—
No. 7
Formal
Judgment
of the
Court of
King's Bench.
29 June 1938.

CANADA
Province of Quebec
District of Montreal

COURT OF KING'S BENCH
(Appeal Side)

10

MONTREAL, Wednesday the twenty-ninth day of June, one thousand nine hundred and thirty-eight.

PRESENT: — BERNIER, LETOURNEAU, HALL, WALSH,
and ST-JACQUES, J. J.

No. 956.

THE PEOPLE OF THE STATE OF NEW YORK,
(Plaintiffs in the Court below)

APPELLANTS, 20

— and —

HEIRS OF THE LATE JOHN M. PHILLIPS,
(Defendants in the Court below)

— and —

THE CROWN TRUST COMPANY et al., es-qual. for the Heirs of the
late FRANCIS PHILLIPS,
(Defendants severing in their defence,
and en reprise d'instance),

RESPONDENTS, 30

— and —

THE MONTREAL SAFE DEPOSIT COMPANY,

TIERS-SAISIS.

THE COURT having heard the parties by their respective Counsel upon the merits of the present appeal, examined the record and proceedings in the Court below, and deliberated:

CONSIDERING that there is no error in the judgment appealed from, to wit: the judgment rendered by the Superior Court sitting at Montreal, in the district of Montreal, on the twenty-third day of November, one thousand nine hundred and thirty-four. 40

DOTH AFFIRM the same with costs to the Respondent against the Appellant.

A.—Rives HALL,
J. K. B.

No. 8

THE NOTES OF HON. MR. JUSTICE BERNIER.

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The notes of
Hon. Mr.
Justice
Bernier.

10 La présente action en dommages intentée par The People of the State of New-York contre les Héritiers de feu John M. Phillips, est la résultante de deux actes d'accusations pour conspiration criminelle portés contre Maurice F. Connely, président du Borough de Queens, dans la cité de New-York, et Frédérick Seeley, ingénieur civil du même Borough.

John M. Phillips était un entrepreneur important de New-York; de 1917 à 1927, il avait eu des relations avec les deux personnages au sujet de contrat très considérables dans la municipalité.

20 Les actes d'accusation contre Connely et Seeley avaient été trouvés bien fondés, et ils avaient été condamnés au pénitencier. Quant à Phillips, il était décédé avant sa mise en accusation.

Les condamnations contre Connely et Seeley furent plus tard portées devant la Cour d'Appel de l'Etat de New-York; elles furent maintenues par une majorité seulement des juges qui présidaient au procès; deux d'entre eux furent dissidents, étant d'opinion d'ordonner un nouveau procès.

30 La présente action, au montant de \$3,405,449.02, est instituée contre les Héritiers et les Légataires de la Succession du dit John M. Phillips.

Une preuve très considérable, soit documentaire, soit testimoniale, a été produite au dossier; elle porte spécialement sur l'octroi de soumissions pour la construction de tuyaux en béton appelés "Monolithic", ou "Precasts", sur leurs spécifications, sur les nécessités de l'insertion de celles-ci, enfin sur les entrevues entre les entrepreneurs et les officiers de la municipalité et avec Phillips pour l'obtention des contrats.

40 John M. Phillips aurait agi d'abord comme agent d'une grande compagnie pour la fourniture de tuyaux d'égouts communément appelés "Precast"; plus tard, ce fut lui-même qui en faisait directement la vente aux entrepreneurs; plus tard encore, il en faisait la manufacture et la vente.

L'accusation contre Phillips consisterait en ce qu'il aurait, à différentes reprises, et de concert avec Connely et Seeley, vendu à des prix exorbitants et frauduleusement, son tuyau "precast", en écartant ou

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faisant écarter les soumissions pour les tuyaux "Monolithic". Connely, en sa qualité de président du Borough de Queens agissant en conspiration avec Phillips, aurait fait rejeter des soumissions d'entrepreneurs qui ne seraient pas les amis de Phillips, et il aurait accordé des contrats, à des prix excessifs et exhorbitants, aux seuls amis de ce dernier.

En 1924, les conspirateurs auraient fait insérer dans les spécifications exigées pour les tuyaux "Monolithic", certaines conditions qui auraient littéralement empêché les entrepreneurs de produire des soumissions. 10

En un mot, les contrats ainsi accordés, surtout depuis 1917 à 1927, l'auraient été au détriment de le Cité de New-York, par conspiration criminelle entre Connely et Seeley et Phillips; et au bénéfice personnel de ceux-ci.

Au cours du procès devant la Cour Supérieure, une Commission Rogatoire fut ordonnée et tenue à New-York; un grand nombre de témoins y furent entendus, et une masse de documents y fut produite. 20 Après le rapport de cette Commission et le transfert des interrogatoires et des exhibits, la cause s'est instruite devant feu l'Honorable Juge Mercier; par son jugement, la présente action fut rejetée avec dépens.

Dans son jugement, le savant juge de la Cour Supérieure déclare qu'il s'est évertué à découvrir si, dans toute la preuve documentaire et orale de la cause, les éléments constitutifs d'une conspiration criminelle alléguée par les demandeurs, avaient été établis à l'égard de feu John M. Phillips; il déclare qu'il n'a pu, malgré toute l'attention qu'il a donnée 30 à l'analyse de la preuve, trouver l'existence des éléments d'une conspiration; il ajoute que le Tribunal est, au contraire, obligé de déclarer que les demandeurs ont entièrement failli d'établir cette prétendue conspiration frauduleuse et dolosive, laquelle, si elle avait été prouvée, aurait ouvert la porte à l'action en dommages-intérêts qu'ils intentent contre les héritiers de la Succession de feu John M. Phillips.

Dans leur défense, les intimés avaient d'abord nié toute conspiration de John Phillips avec Connely et Seeley; ils alléguaient ensuite que si telle conspiration n'était pas prouvée, il s'en suivait que la présente 40 action en dommages devait être rejetée; ils alléguaient encore que les demandeurs s'étaient abstenus de faire produire comme témoins, devant la Commission Rogatoire tenue à New-York, les deux accusés, Connely et Seeley, alors qu'il leur était loisible de le faire, vu qu'ils étaient au pénitencier; ils ajoutaient enfin que les quatre principaux témoins des demandeurs savoir: Paulsen, Purcell, Weaver et Sigretto y avaient rendu des témoignages très peu croyables, et tout à fait suspects.

Au cours du procès, les demandeurs ont produit 53 contrats pour la fourniture de tuyaux d'égouts, au coût global de \$3,433,923.81; cependant, ces contrats n'ont pas été encore annulés comme frauduleux et illégaux.

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10 Il a été aussi produit au dossier, la Charte de la Cité de New-York; on y trouve les conditions exigées pour l'octroi de contrats. L'assistant-ingénieur de la ville a référé aux différentes clauses de cette charte, pour indiquer de quelle manière devaient se faire les soumissions, par quels officiers de la cité elles devaient être examinées, à quels départements elles devaient être soumises, comment elles devaient être accordées, etc; et j'avoue qu'après avoir parcouru ces clauses, il me semble qu'il devait être bien difficile d'obtenir, par la fraude, des contrats dont le coût exorbitant d'exécution devait nécessairement attirer l'attention des autorités chargées de les accorder.

20 Les enquêtes ont particulièrement porté sur les relations que Phillips auraient eues avec Connelly et Seeley, et avec les quatre susnommés témoins, ainsi qu'avec des officiers de certaines compagnies, comme celle de "De Cola et Martino", etc.

J'ai lu et relu avec attention les témoignages de ces quatre témoins, Paulsen, Weaver, Purcell et Sigretto.

30 On y voit qu'ils cherchent à incriminer John M. Phillips, en alléguant que certaines sommes d'argent lui auraient été données, à l'occasion de quelques contrats; toutefois, l'animosité avec laquelle ils ont rendu leur témoignage, les aveux de corruption que quelqu'un d'entre eux aurait pratiquée à l'égard de certains hauts personnages dans la vie publique et municipale, l'ignorance d'un autre, sur les faits qu'il aurait dû savoir, démontrent que le Tribunal de première instance avait raison de dire qu'il fallait prendre leurs témoignages comme très suspects.

40 Naturellement, le décès de Phillips empêchait sa contradiction personnelle ou une explication de ces faits; mais, pourquoi les demandeurs n'ont-ils pas fait venir du pénitencier les deux autres prétendus conspirateurs, Connelly et Seeley, pour les corroborer? La chose était pourtant bien facile.

De plus, le fait que la Cour d'Appel, revisant le jugement qui avait condamné ces deux personnages, s'était divisée, laisse un doute sérieux quant au bien fondé du premier jugement. Evidemment nous n'avons pas à reviser le jugement qui a condamné Connelly et Seeley; cette Cour doit examiner la preuve qui vient devant elle au sujet de Phillips, et la décider, quant à lui, en regard de nos lois civiles; car il s'agit uniquement

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d'une action civile en dommages-intérêts, dont la base est un prétendu acte dommageable causé aux demandeurs, au moyen d'une conspiration criminelle à laquelle aurait pris part Phillips, et qui aurait pour sanction, un jugement ordonnant le paiement, ou le remboursement du dommage causé.

On peut se demander quel serait le verdict rendu par un jury, soit devant la Cour Criminelle, soit devant nos Cours civiles, et si cette cause, telle qu'elle est, avait été portée devant des jurés; après la lecture et l'analyse de toute la preuve produite au dossier, un verdict de non-culpabilité en matière criminelle, ou de rejet de l'action en matière civile, aurait été, dans mon opinion, bien fondé. 10

En effet, je ne trouve pas qu'il ait existé une conspiration pour commettre un acte illégal, dans toute la preuve qui a été produite; je ne trouve pas que le fait pour Phillips d'avoir reçu, pour les services qu'il a rendus dans certaines circonstances, ou comme gratuité pour appui bénévole auprès des autorités municipales, en rapport avec certains contrats, certaines sommes d'argent, soient des actes illégaux; Il n'occupait aucune fonction publique et municipale, comme celle d'ingénieur ou de surintendant de la Cité, ni de Conseiller Municipal; la Compagnie pour laquelle il avait d'abord agi comme agent pour la fourniture de matériaux, lui payait un tant pour cent, sur les contrats qu'il apportait à sa compagnie; plus tard, la compagnie lui envoyait ses propres tuyaux, et il les vendait au prix qu'il jugeait à propos, payant à la Compagnie le prix qu'elle réclamait, et gardant pour lui-même, - mais à la pleine connaissance de la compagnie, - ce qu'il jugeait juste; plus tard, alors qu'il manufacturait lui-même, il vendait au prix que voulaient accepter les acheteurs. 20 30

On allègue que le coût de tous ces travaux était très élevé, et même exorbitant; la chose est possible; mais ceci était l'affaire des autorités municipales qui, lors de la présentation des soumissions, avaient toute l'autorité qu'il fallait en vertu de la Charte, pour les admettre ou les refuser.

Dans l'analyse de la preuve que j'ai faite au sujet du rejet de certaines soumissions, je n'ai trouvé absolument rien qui put incriminer Phillips, de conspiration criminelle avec Connely et Seeley. Enfin comme le dit le savant juge de la Cour Supérieure dans son jugement, il est incontestable qu'en matière de crime et d'offenses criminelles "productifs d'actions en dommages-intérêts", le crime et l'offense doivent être clairement établi pour donner lieu à l'ouverture d'une action en indemnité. 40

Je suis d'opinion que le jugement de la Cour Supérieure doit être maintenu, et que l'appel doit être rejeté avec dépens.

No. 9

THE NOTES OF HON. MR. JUSTICE LETOURNEAU.

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Hon. Mr.
Justice
Letourneau.

10 Les notes de mes collègues les juges Hall et St-Jacques, que j'ai eu l'avantage de lire, rendent bien l'opinion que je me suis faite. Et ce que dit M. le juge St-Jacques d'une objection des Intimés à l'effet que, vu sa nature, l'action appartiendrait plutôt à la cité de New York, s'applique tout aussi bien à une autre objection des mêmes Intimés et que nous retrouvons cette fois formulée en leur mémoire, à savoir qu'en matière de contrat, des dommages et l'exécution même de ces contrats en sauraient coexciter (UNITED SHOE MACHINE CO. vs BRUNET, 1909 A. C., p. 330, voir 338 et 339), puisque là également, ce n'est plus le *droit commun* qui gouverne, pas plus celui de notre Code Civil que tout autre, mais bien plutôt ce paragraphe 1222 de l'article 76 du CIVIL PRACTICE ACT de l'ETAT de New York, selon que prouvé et interprété dans la cause par l'avocat C. A. Schneider: "Where any money ...ê..... *us* heretofore being, or is hereafter, without right, obtained, received, etc. an action. may be maintained by the People of the State, etc ."

Mais alors, il n'est que plus strictement nécessaire, plus impérieux d'avoir une preuve certaine que les deniers ont bien été obtenus *sans droit* without right, et il ne doit sur le point subsister aucun doute.

30 Dans l'espèce je reconnais que les prix de Phillips, l'auteur des Intimés, ont été plutôt très élevés. Non toutefois sans que cela puisse encore se justifier autrement que par une *conspiration* ou fraude: la qualité du tuyau était d'après la preuve supérieure et l'on savait qu'en contractant avec le représentant de LOCK JOINT PIPE COMPANY, l'on était vis-à-vis quelqu'un de solvable qui sûrement livrerait à temps et qui, au besoin accorderait crédit.

40 Il y a plus encore, c'est que Phillips avait réussi à s'imposer à tous par son audace et son génie, et il semble que l'on ait généralement cru qu'il valait mieux l'avoir pour soi que contre soi. On allait à lui et eprsonne n'osait lui faire concurrence , mais il serait impossible d'assurer, avec la seule preuve qu'il y a au dossier, que tout ceci ait été le résultat d'une *conspiration*, et ne soit pas plutôt venu du prestige, politique ou purement personnel, que cet habile homme avait su acquérir.

Il y a sans aucun doute toute une série de circonstances dont les avocats des Appelants ont très bien tiré parti dans leur mémoire d'abord et à l'argumentation ensuite; mais encore une fois, rien n'établit de façon

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certaine que ces circonstances aient résulté d'une conspiration, de la conspiration invoquée par la poursuite; car, si toutes ne sont pas simples coïncidences, il faut reconnaître que le prestige et le génie en affaires que possédait l'auteur des intimés, ont pu les faire naître savoir: au bon moment devenir l'agent vendeur exclusif de la Lock Joint Company; défier en quelque sorte toute concurrence en s'imposant de rendre le produit meilleur; être en état de faire à temps une livraison toujours certaine et de faire crédit aux entrepreneurs; et enfin, obtenir de ceux-ci qu'ils soumissionnent de façon à favoriser le produit que l'on veut vendre, savoir de façon à ce que le *precast* (type B) apparaisse à meilleur marché Il y a là tout un mode d'opérer qui, pour n'être pas irréprochable n'en reste pas moins assez éloigné, ou en tout cas distinct, de la conspiration sur laquelle se prétendent fondés les Appelants.

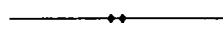
10

Tout ceci pour marquer que la plupart des circonstances invoquées comme *overt acts*, s'expliquent autrement que par une *conspiration*; qu'elles n'impliquent pas en tout cas celle sur laquelle se fonde la demande.

20

Pour ce qui est du reste, je crois que les notes de mes collègues auxquelles je me suis référé au début, que les précisions qui s'y trouvent, servent mieux que tout ce que je pourrais dire à justifier ma conclusion, à établir qu'il n'y a pas *mal jugé*.

Je rejetterais l'appel, avec dépens.



30

No. 10

THE NOTES OF HON. MR. JUSTICE HALL.

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The late John M. Phillips, a man of considerable energy, was, for many years, actively interested in politics, and on contracts for the building of sewers in the Borough of Queens, one of the outlying and newer districts of the City of New York.

40

In 1917 he secured the agency for the sale of sewer pipe manufactured by the Lock Joint Pipe Company, the sales being made directly by the Company to the contractors.

In 1921, a second oral agreement was made, in virtue of which the pipe was invoiced directly to Phillips at the Company's price, and he made separate agreements with the contractors at his own price. This

agreement was later, in 1924, replaced by a third oral agreement, in virtue of which the Company rented to Phillips the right to manufacture the pipes at his own expense.

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10 During this time, one Maurice E. Connolly, was President of the Borough of Queens, whose official office was in the Borough Hall, where contractors were in the habit of congregating to bid upon proposed contracts, to consult with the engineers on the execution of their contracts, and to interview suppliers of material, agents for Bonding Companies, and other individuals.

Frederick E. Seeley, was an assistant engineer appointed by the President of the Borough, that is, Connolly, to the engineering staff of the department of sewers.

20 By the present action, it is alleged that Phillips, Connolly and Seeley conspired together and with other persons, to cheat and defraud the City of New York, by causing it to pay large sums of money for work done, and material and equipment supplied to construct pipe sewers in the Borough of Queens, in excess of the fair, reasonable and proper cost thereof, the claim amounting to the sum of \$3,405,449.02.

30 When the action was instituted on the 8th July, 1928, Phillips had already died, and, it is alleged, that shortly before his death, he caused to be transferred to the City of Montreal the sum of \$312,000 in American currency, which was deposited in a safety deposit box rented by his son, Francis Phillips, in his own name. A seizure before judgment was placed upon this money concurrently with the issue of the action, and when the heirs of the late Mr. Phillips entered a defence, his son, Francis Phillips, intervened to contest both the principal action, and the claim of the principal defendants, alleging that the money belonged to him, alone.

Francis Phillips was subsequently killed in an aeroplane accident, and his heirs, his widow and her infant daughter, are represented in the present proceeding by the Crown Trust Company.

40 It will be noted that we are not at present concerned with the controversy between the heirs of the late John M. Phillips and the heirs of the late Francis Phillips, the present issue have to do solely with the claim of the City of New York that the conspiracy above referred to resulted in a loss of \$3,405,449.02, which it claims it is entitled to recover from the defendants as heirs of the late John M. Phillips.

While the writ was issued, and the seizure was made in July, 1928, the declaration was not filed until the 23rd January, 1929.

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The contention is that the first step in the conspiracy was the adoption by the Borough of Queens of certain specifications for the construction of pipe sewers to provide for the use of a precast pipe, and that those specifications were unlawfully and fraudulently framed and designed so as to preclude the use of any precast pipe other than that manufactured and sold by the Lock Joint Pipe Company, of which Phillips was the exclusive agent for the sale, as well as, later, for the manufacture. It is further alleged that Phillips, having thus secured a monopoly, sold his pipe to the different contractors at exorbitant and extortionate prices, in excess of the fair, reasonable and true market value, in order that he and his fellow-conspirators might defraud the City of New York of the monies paid in excess of such fair and reasonable price. 10

Seeley's participation in the conspiracy is alleged to have been the fraudulent incorporation in the specifications and plans for the construction of pipe sewer, unnecessary and unreasonable requirements covering the method of construction of monolithic types of sewers so as to prevent contractors submitting bids for that type of sewer at a lower figure than bids for the construction of sewers of precast pipe, to the end and purpose that the low bidders on contracts should be those whose bids were based upon the use of precast pipe. In this connection, it is charged that Seeley caused to be inserted in the specifications particulars of a so-called waterproofing membrane, which was not only useless but expensive, and that the forms for the concrete should be kept in place twenty-one days, an excessive period which added greatly to the expense of the work. 20

30

CHANGE OF SPECIFICATIONS

The starting point in the alleged conspiracy is found in the adoption by Connolly, as President of the Borough, of the specifications providing for the use of the precast pipe manufactured by the Lock Joint Pipe Company, which it is alleged (declaration par. 18) was arranged in order to exclude all bidders except those using the Lock Joint Pipe Company's pipe. 40

It is essential, therefore, to consider in some detail, the manner in which those specifications were introduced to Connolly.

It may be noted by way of preface, that the precast pipe, called "type B", was undoubtedly a great improvement in the construction of the sewers, especially in districts such as the Borough of Queens, where the trenches had to be excavated to a great depth where the contractors

encountered large quantities of water which interfered with the construction of a concrete sewer in the excavation itself.

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Creem, one of the wealthiest and most experienced contractors, who did work for the Borough, asserts that he considered that he would be crazy to attempt to build the old style sewer in such conditions.

10 In the tabulation showing all the sewer contracts in the Borough of Queens from 1902 to 1925 (Exh. C-1), it appears that, during the earlier years, no particular type of sewer was specified, and that the first time when the type 'B' pipe was used was in May, 1916. It was used on a second occasion in December, 1916, but it was not directly specified until April, 1917, when a contract was awarded to Joseph L. Sigretto for the construction of the Collins Avenue sewer.

20 These specifications were approved on the 15th February, 1917, by Mr. James Rice, the chief engineer of the Borough of Queens. (Vol. IV p. 1786).

30 The specifications was adopted by the Borough at the instance of the Lock Joint Pipe Company, itself, and Mr. Hirsh, the present President, testifies to the interview which he and his predecessor in office, Mr. Merriweather, had with Connolly and the chief engineer, Mr. Rice. The specifications were prepared by the Company, and were presented to Mr. Rice for his information. Apparently Mr. Rice redrafted the specifications in order to conform to the requirements of the Borough, as it was essential that they should not call for any patented article. Mr. Hirsh testifies that Connolly was particularly anxious to know whether the specifications as drawn by Mr. Rice precluded the use of any patented article. Mr. Hirsh testifies that Connolly was particularly anxious to know whether the specifications as drawn by Mr. Rice precluded the use of any patented article. (Vol. II p. 800), and he adds that the specifications which was drawn by the Borough of Queens (that is by the chief engineer Rice) did not call for a patented article, and that any one who was willing to do so could make a pipe to comply fully therewith.

40 As a matter of fact, it is clearly established by the proof that some of the various contractors did build this pipe for themselves, and other bought some of their pipe from other manufacturers. There can be no doubt, therefore, that the specifications did not infringe the law prohibiting the Borough from specifying any patented article.

It is, however, unnecessary to labor this point, as the specifications then adopted ran the gauntlet of the complicated and efficient procedure required by the City of New York for the advertising, approval

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and award of contracts, which was by no means restricted to the officials of the Borough. In particular, the specifications for these various pipes must have the approval of the engineers attached to the Board of Estimate and Apportionment, a department of the City of New York.

It is perhaps unfortunate that Mr Hirsh is unable to recall the exact date of his interview with Connolly. But as the specifications had been adopted with the approval of Mr. Rice as early as February, 1917, some two months before Phillips had anything to do with the Lock Joint Pipe Company, it is obvious that the latter did not in any way participate in that transaction. 10

I am unable to discover in Mr. Hirsh's recital anything to justify even a suspicion that Connolly was induced by improper considerations to approve those specifications.

It is obvious that Mr. Rice, the chief engineer of whose integrity there is not the faintest suggestion of a suspicion, was the individual whose approval was a fundamental necessity, and the specifications was adopted by Connolly only after he had been assured that Mr. Rice's redraft of the specifications provided for a pipe which could be manufactured by any one. 20

On this point, therefore, I have no hesitation in expressing the opinion that the appellants have failed to establish any conspiracy between Connolly and Phillips. Insofar as concerns Seeley, there is no reference to him whatever in this connection, and it is obvious that he had nothing whatever to do with the adoption of these specifications, which were introduced by his superior officer, Mr. Rice. 30

Counsel for the appellants, in their factum, admit that this was done before Phillips acquired any interest in the Lock Joint Pipe:—

“Immediately following the introduction of the Lock Joint Pipe into Queens as aforesaid, Phillips is introduced to Hirsh, at that time the Treasurer of the Lock Joint Pipe Company.

The introduction is made by Sigretto, who up to that time had an arrangement with the Lock Joint Pipe Company as to the sale of its pipe in Queens.” (Factum p. 24) 40

The only comment to be made on this statement is that Phillips' introduction to the Lock Joint Pipe Company was not “immediately” after the adoption of the new specifications, which, as noted above, was in February, 1917, but was not until some time in the autumn of that year.

RE-APPEARANCE OF SIGRETTO

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10 A contractor, Joseph L. Sigretto, had been awarded, from time to time several contracts in the Borough of Queens, but, in the fall of 1916, he was engaged in New Jersey where he was using the Lock Joint Pipe Company's pipe, and had not been actually operating in Queens for approximately a year and a half, although he had recently bid for a contract. In August, 1916, a contract for a monolithic sewer was awarded to DiCola & Martino for \$108,639.

The next lowest bid was that of Sigretto himself for \$138,272. Di Cola & Martino discovered that they had figured their bid too low, which meant, that, if the contract was awarded to them, they would lose money. Their bonding agent, Thomas F. Purcell, decided to try and have their bid rejected, and when three months had passed without any satisfactory result, Phillips called on Purcell and asked to be given the duty of having the bid rejected.

20 There is no evidence that Phillips ever saw or communicated with Connoly in this connection, but Purcell testifies that, a short time afterwards, Phillips informed him that, the bid had been rejected and, on applying to Borough Hall, he received information confirming Phillips' report. He (Purcell admitted that he had no reason to think that he might not have had this information himself had he taken the trouble to call the Borough Hall sooner. (Vol. I, p. 381).

30 Phillips was undoubtedly a politician of considerable influence, which he may have exercised in this instance, but at that time he had no interest in, or connection with, the Lock Joint Pipe Company, or in the precast pipe manufactured by it.

40 When the DiCola & Martino bid had been rejected in November, 1916, according to Purcell, Phillips asked for an introduction to Sigretto, with the object of inducing him to return to the Borough of Queens. Although Sigretto had not had a contract in that Borough form some time, it is evident that he was not a stranger, because he had submitted a bid on that very contract for Collins Avenue, and had been the next lowest bid to DiCola & Martino. When Phillips was introduced to Sigretto and suggested that he should return to the Borough of Queens, the latter made his acceptance of the suggestion conditional upon the adoption by the Borough of the specifications for the Lock Joint Pipe, a copy of which he handed to Phillips.

It is impossible to discover from the evidence whether this interview between Phillips and Sigretto preceded the interviews which Messrs.

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Merriwether and Hirsh had with Connolly and his chief engineer, Rice, when they were endeavouring to persuade Connolly to adopt the specifications for their pipe. In any event, it was about the same time, and when Phillips reported that the Lock Joint specifications had been approved, Sigretto agreed to submit a bid for the Collins Avenue contract. His bid for the monolithic sewer 16th Aug., 1916, had been \$138,272, and a new bid after the introduction of the specifications for the present pipe was \$143,030, although the total final cost was \$163,173

10

It is interesting to note that at this time, Phillips had as yet nothing to do with the Lock Joint Pipe Company, and that, in estimating the cost for the purpose of his bid, Sigretto must have secured his prices from the Lock Joint Pipe Company itself, of which he had already been a customer and agent for some time.

The new contract for Collins Avenue, was awarded to Sigretto on the 23rd April, 1917, at the same time as two other smaller contracts for McCombe Place, No. 47,341, and Hull Avenue No. 47,339. After he signed these contracts with the Borough of Queens, Sigretto entered into three separate contracts with Phillips on the 27th April, 1917, agreeing to pay him 5% of each payment made by the City up to an aggregate of 50% of his (Sigretto's) net profits for the contracts in question.

It would appear from the evidence that Phillips first became aware of the possibilities of the precast pipe from his association with Sigretto, and, in the fall of the year 1917, was introduced to Mr. Hirsh. It was on the occasion of that interview that Phillips secured the agency for the Lock Joint Pipe Company, with which he had three successive oral arrangements.

It is evident, therefore, that Phillips had nothing to do with the furnishing of pipes to Sigretto for those contracts, and as the appellants make no claim in this connection - the first contract in connection with which they claimed an excessive charge of pipes was that awarded to the Mullen Contracting Company on the 22nd May, 1922 - the evidence was introduced presumably for the purpose of indicating Phillips' participation in the affairs of Queens Borough.

40

As special emphasis has been laid on the fact that, in connection with the contracts in which Phillips supplied the pipe, the final cost of the work greatly exceeded the final estimate of the Borough engineers, it is interesting to observe that the final estimate of the Collins Avenue sewer was \$111,509, while the total final cost was \$163,173.

It may be opportune to point out in this connection that, according

to the photostatic copy of the list of contracts (Exh. C-1), the contractors' bids and the final cost very frequently exceeded the engineers' estimates, although the discrepancy may not have been so large in the earlier cases as it was in some of the contracts in which Phillips' pipes were used. It is probably permissible to say that this is a very common experience in the execution of public works.

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10 It may also be pointed out that Exhibit C-1, which is a tabulation of the sewer contracts in the Borough of Queens from July 1st, 1907, until December 27th, 1927, the final estimates of all the contracts were approximately \$38,000,000, while the contractors' low bids amounted to \$42,000,000.

20 There is a notable discrepancy between this tabulation and table 24 of Exhibit D. 1, which presents in summary form the estimated cost and actual cost of sewers in Queens Borough from January 1st, 1902 until January 1st, 1927. This table accompanied a report of the chief engineer of the Board of Estimate & Apportionment, the official who had supreme control over the whole City of New York.

According to this table, the estimated cost of sewers in that Borough during the twenty-five years was \$30,000,116; actual cost \$30,054,000. Both of these tables emanate from the official records of the Borough, the only differences being that the first - Exhibit C-1 - was specially prepared for the purpose of this action, while the second, - Exh. D.-1, was incorporated in a routine report.

30 In the absence of any satisfactory explanation of the difference in these figures, it is somewhat difficult for this Court to rely with entire confidence upon the accuracy of the much criticised photostatic exhibit.

I am unable to discover in the testimony offered in connection with these Sigretto contracts any satisfactory proof that there was any conspiracy between Phillips and Connolly.

40 It was doubtless through his association with Sigretto that Phillips' attention was drawn to the possibilities of the introduction of the precast pipe, particularly that manufactured by the Lock Joint Pipe Company, into the Borough of Queens. But he did not meet Mr. Hirsh until the latter part of the year 1917 (Hirsh p. 802), when he succeeded in securing the agency for those pipes in the Borough of Queens, and having Sigretto's agency terminated.

According to Mr. Hirsh there were three oral agreements between the Company and Phillips. From the fall of the year 1917 until the fall

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of 1918, the Company sold its pipe to Phillips at a fixed price, but delivered and invoiced the shipments direct to Phillips' customers, and, on receipt of payment, it would deduct the Company's price and remit the balance to Phillips. No details of these transactions are given as, of course, they do not enter into the present action.

The second agreement was from 1918 until 1921, in virtue of which the Company invoiced the pipe directly to Phillips, who was to make his own deliveries to his customers and do his own collecting. This arrangement was also outside the present issues. 10

The third and last agreement prevailed from 1921 until Phillips' death in 1928, and was a rental of plant and forms by the Company to Phillips, in consideration of a stipulated sum per linear foot of pipe manufactured. Mr. Hirsh (p. 808) says that this was not a royalty because they were giving something more tangible than the use of a patent, but Phillips himself did the manufacturing, purchased his own materials, and very early began to use a richer mixture of cement, 1-1-2 instead of 1-2-4, and using a heavier reinforced mesh. 20

It may be noted in passing that, according to the appellants' witnesses, these changes would have increased Phillips' costs of manufacturing by only 14%, an insignificant matter in comparison with the very much higher prices which he charged.

There was, of course, nothing whatever illegal or improper in these arrangements made by Phillips with the Lock Joint Company, and the evidence in that connection is quite irrelevant to the charge of conspiracy between Connolly, Seeley and Phillips. 30

We must, therefore, look elsewhere in the record for any evidence of this conspiracy.

REJECTION OF BIDS

It is argued by the appellants that such an inference must be drawn from the fact that Connolly, on several occasions, rejected bids when the lowest bidder was not a protégé of Phillips, or when the bid was for type 'A' monolithic sewer, in the construction of which, of course, the Lock Joint Pipe would not be used. 40

There has been a wealth of testimony in this connection, although during the entire period from 1917 to 1928, low bids were rejected by Connolly on only three occasions. The Linden street contract in 1919;

the 150th street contract in 1925, and the Brinkerhoff Avenue contract in 1926.

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10 Although the rejection of these low bids, and the call for new tenders resulted in the work being ultimately awarded to contractors who would make use of the Phillips' pipe the evidence satisfactorily discloses that, in each case, the rejection of the bids was in the interests of the Borough, and on the recommendation of the consulting engineer.

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20 Some time prior to the first award of the Linden street contract, one of the oldest and most experienced contracting firms in the City of New York, the O'Rourke Engineering Company, wished to introduce into the Borough of Queens a concrete block for the building of tunnels which they had found efficient. Having learned that Phillips had some influence in the Borough, O'Rourke secured his assistance in this connection, and was successful in persuading Seeley to accompany him to Detroit, where the method of operation could be observed. Seeley was much impressed, and, on his return, prepared certain descriptions to be embodied in the specifications for the Linden street contract, which comprised a tunnel section as well as an open-cut section.

There is nothing in the evidence which justifies even a suspicion that Seeley was induced for any improper consideration to avail himself of this new device, and Mr. O'Rourke adds that the condification of the specifications was approved by Seeley's superior, who were convinced of the desirability of the alternate design for tunnels. (O'Rourke p. 571 & foll.).

30 As it is customary, in the contracting business, to pay for services such as those rendered by Phillips, O'Rourke paid him \$8,500. It is true that Phillips wanted \$50,000, but O'Rourke considered that the smaller sum was all that he ought to have. There was, as O'Rourke asserts, nothing wrong in this payment at all.

40 Having thus secured the introduction of his tunnel blocks, O'Rourke tendered for the Linden street contracts, but another firm, Messrs. Booth & Flynn, made a lower bid on type "A" of sewer, for \$895,000.

The bids, both for type 'A' and for type 'B' were rejected by Connolly as President of the Borough, and he gave notice to that effect to the Hon. Charles L. Craig, comptroller of the City of New York.

The letters do not disclose thereasons for which Connolly rejected these bids, but Mr. O'Rourke reports that he was informed by Phillips that it was because the bids were too high.

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New bids having been called for, O'Rourke decided to tender for the entire contract, both the tunnel portion and the open-cut, and as he proposed to use precast pipe he obtained a quotation from Phillips, who specified a price of \$40 or \$45 a foot. In spite of that very high price which he was prepared to pay for his pipe, O'Rourke was successful and secured the contract for \$876,000, approximately \$18,800 less than the bid of Messrs. Booth & Flynn for type 'A' sewer, and, as a result, the Borough, by reason of Connolly's rejection of the first bid, made a saving of that amount. 10

As O'Rourke was primarily interested in the tunnel, and the use of his tunnel blocks, he assigned the open section of the contract to John J. Creem. At that time (1920), it will be recalled that Phillips was the sole agent of the Lock Joint Pipe Company, and was authorised to sell the pipe in the Borough of Queens at his own price. He had given his quotations to O'Rourke, but Creem, who had had previous dealings with the Lock Joint Pipe Co. itself, preferred to buy direct, and compensated Phillips by paying him, in lieu of commission, the sum of \$25,000. 20

Counsel for the appellants suggest that, in this transaction, we have proof of overt acts on the part of Phillips and his co-conspirators Connolly and Seeley.

I am unable to discover any evidence of collusion between Phillips, Connolly and Seeley in this connection. The rejection of the first bids was a normal proceeding, which resulted in a considerable saving to the City. There was nothing whatever improper in O'Rourke's dealings with Phillips, nor is there any justification for criticising Creem because he consented to pay \$25,000 to Phillips in order to secure the right to purchase his pipe directly from the Lock Joint Pipe Co. 30

The second instance of the rejection of bids was in connection with the contract for 150th street, which had been awarded to the Hammen Construction Company in the year 1925. In justification of this rejection, it is necessary only to refer to a letter written by the Consulting Engineer, Clifford B. Moore to Connolly. The Hammen Construction Company were already engaged in a prior contract; they were almost four months in default, and it would obviously have been reckless for the President of the Borough to enter into a new contract with that Company. In fact, it is specifically provided by a paragraph in the bid forms that no bid will be accepted from, nor contract awarded, to any person who is in default. 40

Counsel for the appellants have laid particular stress upon the fact that the Hammen Construction Company ultimately filled their con-

tract within the contractual delays, but that fact does not in any way rebut the clear evidence that, when the bid on the now contract was made, the Company was in default. Had the Borough President not acted upon Moore's letter, he would have been open to criticism.

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10 Paulsen, the representative of the Hammen Company, evidently represented the rejection of his bid, and appeared in the present proceedings as the most vindictive witness against Phillips.

After a careful perusal of his deposition, and a review of the financial position of the different Companies in which he was interested, I am disposed to agree with the learned Trial Judge's estimate of his credibility.

20 On the second letting of this contract, the Oxford Engineering Company, was the successful bidder at a figure approximately \$500 less than the Hammen bid.

The third instance of rejection of bids was in connection with the Brinkerhoff Avenue contract.

There was, in the first instance, so great a discrepancy between the lowest and highest bids, all of which were considerably in excess of the engineer's estimate of the probable cost, that Moore, the consulting engineer, again wrote Connolly advising that the bids be rejected and the contract re-advertised.

30 This contract was also in two sections, a tunnel and an open-cut, and Moore suggested that, in the third call for bids, there should be separate bids and two contracts.

Acting on this advice, Connolly was ultimately successful in securing contracts for the entire work at a saving of approximately \$100,000.

40 In none of these instances is there the slightest evidence of any impropriety on the part of Connolly, nor is there any proof that Phillips had anything to do with the rejection of the bids.

It is, of course, quite true that he derived some advantage from the fact that the precast pipe was ultimately used.

WATERPROOFING MEMBRANE.

It is charged by the appellants that, in pursuance of the conspiracy, on or about the 8th December, 1924, Seeley fraudulently incorporated

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in the plans and specifications for the construction of sewers, such unnecessary and unreasonable requirements covering the monolithic type of sewers as to prevent contractors submitting bids for that type at a lower figure than bids for the construction of sewers of precast pipe, with the object of making certain that the low and successful bidders should be those who proposed to make use of the precast pipe.

On reference to the tabulation of contract (Exhibit C-1) it will be observed that, between April, 1917, when the precast pipe was first introduced, and the 8th December, 1924, when the specifications for the waterproofing membrane in connection with type 'A' sewers were adopted, 124 contracts for sewers were executed. Of these contracts, 105 called for the precast or type 'B'. Of the remaining 19 contracts, only 14 called for the monolithic or 'A' type. 10

During all this time Phillips had been the exclusive agent for the Lock Joint pipe under the three agreements with the Lock Joint Pipe Co. above referred to. 20

It may, therefore, be assumed that it was Phillips who supplied the pipe in the case of those 105 contracts, and of those only three are referred to in support of the appellants' allegations that he charged exorbitant prices.

Those three contracts are:—

- (1) Norwood Place, awarded to Mullen Construction Company, on the 22nd May, 1922, for the sum of \$311,855; 30
- (2) 25th street, awarded to Awiza Corporation on the 16th August, 1923, for \$309,866;
- (3) Fisk Avenue, awarded to Duit Inc., on the 15th March, 1924, for \$339,000.

As the appellants conted that the difference between the estimates prepared by the Borough engineers and the contractors' bids, was due to the excessive cost of pipes, it is interesting to note, in connection with the Mullen contract, that the preliminary estimate was only \$81,600, while the final estimate was \$365,782. The only conclusion to be drawn from such a huge increase in the estimates is that the character and extent of the contract were changed and it is interesting to observe that Mullen's bid of \$311,855 was \$54,000 less than the engineer's estimate. 40

It is, doubtless, true that Phillips was exerting his utmost energy

to assist the contractors so as to advance the sale of his pipe, but there can be no possible doubt but that the precast pipe was much more suitable for the construction of sewers in low-lying and wet areas such as those found in the Borough of Queens.

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10 In the summer of 1924, the Borough obtained authorisation for the construction of a sewer on Hammel's Boulevard, for which the final estimate of the Borough engineers was \$947,116. Among the contractors who bid was Patrick McGovern, who, as he proposed to tender for both type 'A' and type 'B', applied to Phillips for quotations on the cost of pipe, and was given the following prices:—

60 inch	\$32.00
54 inch	29.00
24 inch	5.00

20 Basing his estimate for a type 'B' sewer on those figures, McGovern tendered for the contract at a price of \$1,072,000. But, at the same time, he tendered for a type 'A' sewer at \$805,000, and was awarded the contract for type 'A'.

30 Among the other bidders had been Paulsen of the Hammen Construction Company, with whom Phillips had had previous dealings. It is probably true that Phillips had a preference for Paulsen, in spite of the fact that he had had trouble with his payments, and in June, 1924, had found it necessary to enforce payment by removing his pipes from Paulsen's locality. Nevertheless, Phillips gave Paulsen a quotation for the 60 inch and 65 inch pipe, called for in the contract, at \$25 per foot. In spite of that very great advantage in the cost of his material, Paulsen's bid, on behalf of the Hammen Construction Company, for the type 'B' sewer was \$120,000 higher than that of McGovern.

McGovern, therefore, secured the contract for a type 'A' sewer, and Phillips lost the business that he would have secured had the sewer been constructed of precast pipe.

40 It is argued by the appellants that McGovern was a contractor of such financial resources that the alleged conspirators, Connolly, Phillips and Seeley, decided to award him the contract without resorting to their levice of rejecting the bids, and re-advertising the contract, and it is further argued that the introduction of the waterproofing membrane shortly afterwards was prompted with the undoubted object of adding so greatly to the cost of type 'A' sewers that thereafter it would be impossible for any contractor to bid for that type lower than for type 'B'.

There is no doubt that, so far as the evidence in the present issues

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is concerned, Seeley prepared a sketch of the proposed waterproofing membrane, and instructed his draftsman to introduce it into the plans for later contracts, but there is an entire absence of proof that Seeley devised the alteration on his own responsibility, or in furtherance of a conspiracy between himself, Connolly and Phillips.

It is important to note that the plan for this waterproofing membrane (Exh. C-3; p. 3999) was signed not only by Seeley, but also by J. Franklin Perrine, his superior officer, and, on a later occasion, on the 9th June, 1925, when these plans were modified (Exh. C-6; p. 4429), the drawings again showed the waterproofing membrane, and they were signed by the chief engineer, James Rice, as well as by Perrine. But these plans also had to run the gauntlet of examination by the engineers of the Board of Estimate & Apportionment, to whom duplicates were sent, and who, according to Bertram, examined them, although he adds that they are not concerned with the details. Nevertheless, the fact remains that this waterproofing membrane did appear upon the plans and profiles submitted to the Board of Estimate & Apportionment, and were examined and approved by the officials of Greater New York, as well as by Seeley's superiors in the Borough of Queens.

Counsel for the appellants (Factum p. 22) frankly admit that there is not much evidence proving directly an unlawful agreement between Phillips, Connolly and Seeley, but, it is argued, that the parties acted in consort is to be inferred from their conduct and their participation in the specific overt acts above referred to.

From the analysis of these alleged overt acts, it appears that Phillips had nothing to do with the adoption by the Borough of Queens of the specifications for precast pipe; that there is no direct evidence that either Phillips or Seeley conferred with Connolly in connection with the rejection of bids, which, moreover, in the three particular instances cited, resulted in more advantageous contracts for the Borough; that there is no evidence of Connolly's participation in Seeley's introduction of the waterproofing membrane, which was adopted with the knowledge and approval of Seeley's superior officers.

There being, therefore, no direct evidence of conspiracy, and the pretended overt acts being insufficient to justify an inference of concerted action, I concur with the learned Trial Judge in the opinion that the appellants have failed to establish the basis of their action.

The appellants, however, contend that, as Connolly and Seeley were convicted of conspiracy in criminal proceedings in the City of New York, and as Phillips had been indicted with them, although he died before he

was actually arraigned, the conviction and sentence is conclusive proof of the alleged conspiracy.

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10 It is hardly necessary to point out that there are fundamental differences between a criminal prosecution for conspiracy, and a civil action for damages caused by the actual accomplishment of the alleged conspiracy. In the present issues we are concerned only with the testimony offered in the civil action, which, although voluminous, was evidently much less extensive than that offered in the criminal courts of New York. The conviction, therefore, of Connolly and Seeley is not relevant to these proceedings.

20 It must be admitted that Phillips was successful in securing a virtual monopoly for the supply of precast pipe to the Borough of Queens in connection with the sewer contracts referred to, and that he charged the contractors unusually high prices. But it appears from the evidence that in many, if not all, of these instances, the engineers of the Board of Estimate & Apportionment, a department of Greater New York, entirely independent of the Borough of Queens, must have had some knowledge of the prices the various contractors were paying for their pipe, and it is rather remarkable that scores of contracts should have been approved by officials, of whose integrity there is not the slightest doubt.

30 Mr. Hopkins, an accountant, has prepared a comprehensive statement showing the prices paid to Phillips in various contracts, and the prices alleged to have been charged by the Lock Joint Pipe Company, both in the Borough of Queens and elsewhere.

According to this statement, the highest price charged by the Lock Joint Pipe Company for 96 inch pipe was \$26.19 per foot. But Creem asserts that he paid them \$30; and, in addition, paid Phillips his commission of approximately \$4 per foot, making the total cost \$34 a foot instead of \$26.19, which evidently Creem did not consider an exorbitant price. (Creem p. 321 and 323).

40 In the Horstman Avenue contract No. 75,044, June 1st, 1925, (Exh. C-161 Vol. 9, p. 4397) the preliminary estimate was \$829,000, the low bid \$1,650,000.

Welsh Brothers, the successful bidders, assigned to the Awixa Corporation the contract, which was duly forwarded to City Comptroller for registration.

A resolution of the Board of Estimate and Apportionment adopted April 24th, 1925, shows that the final estimates had been increased to \$922,300.

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In the file there appears (p. 4415) a statement of unit prices for reinforced concrete pipe sewer.

3 foot precast pipe	\$ 32.60
3 foot 3 inch pipe	36.00
8 foot pipe	150.00

The price is, of course, the total for the completed sewer, and includes the excavation of the trench as well as the pipe itself. But it is obvious that the engineers of the City must have been, or should have been, qualified to appreciate the approximate cost of the pipe when they were given the total price of the completed sewer. 10

Four contracts were awarded to the Highway Improvement & Repair Company on the 7th April, 1926, the final estimate of which aggregated \$1,687,000, while the final bids were \$2,569,000.

Appellants submit that the excessive cost was due to the exorbitant prices charged by Phillips for his precast pipe, but again, among the documents filed with the Comptroller of the City of New York, are to be seen the unit prices for the completed sewer. For instance, Hempstead Avenue, contract 79,048, awarded to the Highway Improvement & Repair Company, but assigned to Muchino & Decker, the 3 foot 6 reinforced concrete pipe sewer is priced at \$93 per linear foot (p. 4774); Springfield Boulevard (contract 79,049) also assigned to Muchino & Decker, the 3 foot 6 reinforced concrete pipe sewer was estimated at \$90 per foot; and the Foch Boulevard sewer (contract 79,050) the 4 foot 6 sewer was specified at \$110 per linear foot. 20 30

The record discloses that, in nearly all these contracts, the engineers of the Board of Estimate & Apportionment were duly given the contractor's estimated cost of the completed sewer.

While it is true that the cost of the excavation of the trench might vary very greatly owing to difference in depth and characteristics of the soil, nevertheless it should have been quite possible for the engineers in checking over the contracts to arrive at an approximate price for the cost of the precast pipe itself, and had the very great difference between the estimate of the Borough engineers and the excessive bid been due, as is suggested, solely to the exorbitant prices charged by Phillips for his pipe, it is difficult for me to exonerate the engineers of the Board of Estimate & Apportionment from justifiable criticism. 40

There is, however, in some of the contracts, still more definite evidence of the fact that the prices of the pipe were brought to the attention of the City's engineers. In the Sigretto contract for 51st street (C. 14, Vol.

V, p. 2073), it is specifically stated that the cost of 8 foot pipe was \$34, and of 7.6 pipe \$32. In the appellant's tabulation of fair prices, on which the action is based, the corresponding prices are \$22.45 and \$18.25. (Appellant's Factum p. 19).

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10 The aforesaid prices of \$34; \$32 and \$30 were evidently those which prevailed before the mix of the cement in Phillips' pipe was changed to the 1: 1: 2 proportion which the appellants concede increased the cost of the pipe by 14%. On the appellants own admission, therefore, on a comparative basis, the said prices should be increased, after 1924, by the addition of 14%, which would bring them to \$38.76, \$36.48 and \$34.20 respectively.

These prices were known to, and approved by the engineers, but they were carefully ignored by Mr. Hopkins in the preparation of his statement. Nor can it be successfully argued that the excess of the bids over the estimates was due, either solely or chiefly, to the Phillips' prices for pipes.

20 In 1927, when his Department had been criticised for the alleged excessive cost of sewers, Mr. Arthur Tuttle, the chief engineer of the City of New York, wrote a letter to Mr. Richard Gipson, President of the Chambre of Commerce, in which he explains the difficulty of the work in certain conditions. He says:—

30 "In all Boroughs it is the practice to pay for sewer construction on the basis of the cost of a single linear foot, this cost including the furnishing of all the material as well as the work of excavating, pumping, sheeting, bracing and backfilling. In some of the work the cost of the material undoubtedly makes up the major portion of the total expense, while in others it may become a minor matter. Any comparative statement limited to the cost per foot of sewer construction in one locality has, therefore, very little value in so far as it relates to another locality unless similar conditions obtain."

40 "It would appear, however, that bidders for contracts subsequent to the one first let endeavored to protect themselves against loss by including in their bid what they deemed as ample allowance for difficult working conditions."

It is not, however, in my opinion necessary to enter into a detailed examination of the different contracts in which the bids were higher than the estimates. It is sufficient to say that, as above indicated, the present record does not disclose any satisfactory proof of the alleged conspiracy or of the unfair prices.

I conclude, therefore, that the appeal should be dismissed, with costs.

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I concur with Mr. Justice Hall; I would dismiss the appeal.

J. C. WALSH,

J. K. B.

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THE NOTES OF HON. MR. JUSTICE ST-JACQUES.

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Les demandeurs n'ont pu poursuivre la succession Phillips devant les tribunaux de la province de Québec que parce qu'ils ont joint à leur action une saisie-conservatoire sur la somme de \$312,000 qui avait été déposée dans un coffret de sûreté au bureau de la Montreal Safe Deposit Company, à Montréal.

20

La juridiction de la Cour supérieure pour entendre et juger cette demande n'est pas contestée.

L'action n'est pas basée sur les dispositions de la loi de notre province. Si elle l'était, ce serait uniquement l'article 1053 C. C. qui déterminerait les droits des demandeurs; la cité de New-York seule aurait pu instituer cette procédure.

30

C'est sur une disposition spéciale de la loi de l'état de New-York que l'action est fondée.

Le paragraphe 1222 de l'article 76 du "Civil Practice Act" de cet Etat décrète ce qui suit:

40

"Where any money, funds, credits, or other property held or owned by the State, or held or owned officially or otherwise for or in behalf of a governmental or other public interest, by a domestic, municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the State, or of a city, county, town, village or other division, subdivision, department, or portion of the

10 State, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages or other compensation for so obtaining, receiving, paying, converting or disposing of the same, or both, may be maintained by the people of the State in any court of the State having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority, and whether an action therefore in favor of the latter is or is not pending when the action in favor of the people is commenced”.

Le paragraphe 1224 donne aux demandeurs le pouvoir d'instituer cette action particulière, non seulement devant les tribunaux des États-Unis, mais aussi devant les tribunaux des pays étrangers.

20 Les appelants n'allèguent pas qu'ils sont les propriétaires des deniers déposés dans le coffret de sûreté où ils ont été saisis. Ils ont simplement voulu, par la saisie-conservatoire, assurer l'exécution du jugement qu'ils pourraient obtenir contre la succession Phillips.

En réalité, ce n'est qu'une action en dommages que les demandeurs exercent. Normalement, une telle action ne pourrait être instituée que par le véritable créancier, c'est-à-dire par la cité de New-York. Il faut une loi spéciale pour instituer une telle procédure. Si cette loi n'existait pas, l'action serait sans fondement, car personne ne peut plaider au nom d'autrui, si ce n'est le Souverain, par ses officiers reconnus.

30 Quel est le véritable caractère de cette action?

Il n'est peut-être pas nécessaire de le définir pour la solution du présent litige. Ce n'est, il me semble, qu'une action publique, car la loi n'exclut pas le recours de droit commun que peut exercer la cité de New-York pour recouvrer des entrepreneurs, avec qui elle a contracté, les dommages qu'elle peut avoir subis, ou pour leur demander le remboursement des sommes qu'elle aurait payées sans y être tenue.

40 Le dossier fait voir, en effet, qu'au moment de l'audition de la présente cause, vingt-six actions instituées par la cité de New-York contre les entrepreneurs qui ont fait affaires avec Phillips, et avec lesquels la cité avait fait des contrats, étaient actuellement pendantes devant les tribunaux de l'état de New-York. Ces actions ont pour objet de faire rembourser à la Cité les prix excessifs qu'elle aurait payés (Voir volume 3, page 1251, témoignage de C.-A. Schneider, avocat). Ce témoin nous apprend aussi qu'une action a été prise dans l'état de New-York contre la succession Phillips et que la demande est basée sur la prétendue fraude qui aurait été commise par Phillips à l'égard de la cité de New-York. Le montant réclamé dans cette cause n'est pas révélé par le dossier.

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Cela crée une situation assez étrange qui ne fait peut-être pas obstacle, d'une façon absolue, à la demande formée devant la Cour supérieure, à Montréal; s'il est vrai que la cité de New-York a poursuivi non seulement la succession Phillips, mais aussi les constructeurs de canaux d'égout, et qu'elle demande et obtienne par les jugements qui seraient rendus, le remboursement des sommes qui lui auraient été frauduleusement extorquées, et si les jugements sont acquittés, la Cité n'a sûrement plus de créance contre la succession Phillips. 10

Et alors qu'advient-il de la demande faite par l'état de New-York, en vertu de cette loi spéciale sur laquelle l'action est fondée? S'il y avait condamnation, qui recueillerait le montant de cette condamnation?

Ce serait une véritable action pénale, car la loi et l'équité s'opposent à ce que la cité de New-York puisse recouvrer de deux sources différentes, et par des moyens distincts, le remboursement de sommes plus élevées que celles qu'elle aurait démontré lui avoir été extorquées. 20

J'ai tenu à faire ces observations préliminaires sur la nature de l'action instituée par les appelants, bien que pour la juger, je prendrai comme acquis qu'elle est autorisée par la loi qu'ils invoquent, et cela malgré l'habile et forte argumentation de monsieur St-Laurent, conseil des intimés, au sujet de la portée de cette loi.

Quoi qu'il en soit, les conclusions prises par les demandeurs ne peuvent être accordées que s'ils ont réussi à prouver :

1. qu'il y a eu entente frauduleuse, c'est-à-dire conspiration entre Phillips et les représentants de la cité de New-York pour lui faire payer dans la construction de ses canaux d'égout des prix dépassant ceux qu'elle aurait normalement dû payer; 30

2. que cette entente a réellement été mise à exécution, et que, de fait, la Cité a payé des sommes excessives.

A vrai dire, les allégations de conspiration jouent un rôle plutôt secondaire dans la présente cause, car la cité de New-York ne pouvait et n'a pu souffrir de dommages qu'à raison de l'exécution d'une entente frauduleuse. 40

Les appelants critiquent à tort le jugement de la Cour supérieure qui fait la distinction qui s'impose entre la conspiration, envisagée au point de vue criminel, et les effets civils qui peuvent découler de l'exécution de cette conspiration.

La distinction est essentielle à tous égards et particulièrement au point de vue de la preuve.

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En effet, il y a conspiration criminelle lorsque deux ou plusieurs personnes s'entendent pour commettre un acte illégal, ou pour faire un acte légal par des moyens illégaux.

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10 Dès que l'entente est établie en preuve, il faut conclure que le crime a été commis, peu importe qu'il ait été ou non exécuté.

Il en est tout autrement en matière civile. L'entente faite entre deux ou plusieurs personnes pour causer du dommage à un tiers ne donne à ce tiers aucun droit d'action. Il ne peut se plaindre devant les tribunaux civils et réclamer des dommages que s'il en a réellement soufferts.

20 C'est bien ainsi, d'ailleurs, que les demandeurs l'ont compris, puisqu'ils ont allégué, comme base de leur action, l'entente frauduleuse et la mise à exécution de cette entente.

Ont-ils réussi à faire une preuve telle qu'un tribunal puisse conclure, d'une façon positive et certaine, que grâce à la conduite de Phillips, à ses relations avec Connelly et Seely, à l'influence qu'il avait sur eux, ou aux manoeuvres dolosives qu'il a commises, la cité de New-York a dû payer, pendant la période de 1917 à 1927, des sommes excessives pour la construction de ses canaux d'égout et que la succession Phillips doit lui rembourser ces sommes?

30 La Cour supérieure n'a pas été satisfaite de la preuve faite par les appelants et elle les a déboutés de leur demande à raison de l'insuffisance de la preuve.

Les appelants disent à leur mémoire écrit (P. 7) :

40 "It is quite apparent that the trial judge proceeded on the erroneous principle that the plaintiffs had the burden cast upon them of proving their case beyond a reasonable doubt, as in a criminal case. It is contended by the appellants that this being a civil action, a preponderance of evidence in favor of the plaintiffs was sufficient to sustain a judgment in their favor".

Je ne puis pas admettre cette proposition telle que formulée.

Il ne serait pas juridique de condamner la succession Phillips à payer la totalité ou une partie des sommes réclamées, si les demandeurs n'ont pas prouvé hors de tout doute que la cité de New-York, grâce à

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une entente frauduleuse entre ses employés et Phillips, a été forcée de payer des sommes qu'elle ne devait pas.

Que la demande soit fondée sur l'article 1053 de notre Code ou sur les dispositions de la loi spéciale de l'état de New-York, cela ne fait pas de différence: il appartient aux demandeurs de prouver la fraude et le préjudice causé par cette fraude. En effet, le recours civil que peut avoir la victime d'une fraude exécutée contre elle se détermine et se mesure par le préjudice qu'elle en a subi. 10

Phillips n'a pas traité directement avec la cité; de 1917 à 1927, période mentionnée en la déclaration, il a vendu du tuyau pour les canaux d'égout aux entrepreneurs qui avaient fait des contrats avec la Cité.

Les demandeurs allèguent que ce tuyau aurait été vendu à des prix excessifs, exorbitants et hors de proportion avec les prix de vente de tuyau du même genre, aux mêmes dates et dans les localités avoisinant le Borough où se construisaient les canaux d'égout. 20

Même si les demandeurs avaient fait la preuve certaine de ce fait, il n'en résulterait pas nécessairement que la Cité a payé pour la construction des canaux d'égout un prix excessif et exorbitant, grâce aux manœuvres dolosives de Phillips et des employés de la Cité.

Ce qui doit être démontré, d'une façon positive, c'est que effectivement, pendant cette période, la Cité a payé, à cause du prix excessif chargé par Phillips pour la vente de ces tuyaux aux entrepreneurs, des montants qu'elle n'aurait pas dû payer si l'entente frauduleuse n'eût pas été mise à exécution. En d'autres mots, le terme de comparaison entre les prix payés par la Cité et ceux qui auraient dû l'être ne dépend pas uniquement du prix de vente des tuyaux par Phillips aux entrepreneurs. C'est le prix total, comprenant matériel et travail, qu'il faut envisager pour fixer la mesure du préjudice subi par la Cité. 30

Les demandeurs ont fait leur preuve presque en totalité devant un commissaire nommé par la Cour supérieure, et ce commissaire n'a pas voulu, avec raison, prendre la responsabilité de décider les nombreuses objections faites par les procureurs des intimés aux questions, illégales ou non, posées aux nombreux témoins interrogés devant ce commissaire. Il est résulté que le dossier a pris une apparence formidable, bien qu'en réalité la preuve orale, contenue dans trois volumes de cinq cents pages chacun, puisse se réduire d'une façon très sensible. Les objections, sans cesse réitérées, couvrent probablement plus d'un quart de ces trois volumes, et la preuve, illégale et inadmissible devant un tribunal de justice, en couvre au moins un autre quart. 40

Le procureur des appelants, qui a dirigé l'enquête à New-York devant le commissaire, avait assuré devant lui la transcription de la preuve faite à l'enquête municipale tenue quelque temps auparavant, ainsi que celle faite devant la cour criminelle au sujet des procès Connolly et Seeley, et il a suivi, d'aussi près que possible, la marche qu'on avait adoptée dans ces enquêtes pour établir ce qui s'était passé dans le Borough of Queens pendant cette période d'environ dix années.

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Il l'a fait avec ténacité, persistance et avec beaucoup de courtoisie à l'égard de ses confrères qui représentaient les intimés et qui n'ont cessé pendant cette enquête - je ne dis pas, sans raison - d'entasser objections sur objections à l'encontre de cette preuve dont une partie aurait été manifestement inadmissible devant le tribunal.

En somme, bien que très volumineuse en apparence, l'enquête faite devant le commissaire peut assez facilement se réduire aux points particulièrement examinés par mon collègue, monsieur le juge Hall, dans ses notes. Ce sont, du reste, les seuls points invoqués par les appelants pour conclure à la preuve d'une conspiration entre Phillips et les deux représentants de la Cité, Connolly et Seeley.

Dans une cause de conspiration criminelle, la preuve est presque invariablement tirée des circonstances. Les conspirateurs ne commettent jamais l'imprudence de mettre par écrit leur entente criminelle. Il est même très rare qu'on puisse en faire la preuve par des témoins qui ont oui les parties à cette entente. C'est presque toujours par les circonstances, c'est-à-dire par ce que l'on appelle les "overt act" que se déduisent les présomptions d'une entente frauduleuse.

Or, dans le cas actuel, les appelants ne peuvent réussir dans leur demande que s'ils ont prouvé des "overt act" qui non seulement peuvent faire présumer la conspiration, mais qui ont été véritablement la cause productive des dommages que la Cité de New-York aurait subis.

Phillips était sans doute un homme extrêmement intelligent, astucieux, audacieux même; il paraissait avoir créé l'impression que sans lui, ou sans son intervention, il n'était pas possible, ou extrêmement difficile, d'obtenir des contrats pour la confection de canaux d'égout dans le "Borough of Queens".

Avait-il toute l'influence qu'on semblait lui prêter? Ou avait-il réussi à créer une légende à ce sujet? Le dossier ne nous éclaire que d'une façon imparfaite sur ce point.

Les appelants sont forcés de reconnaître que la preuve directe

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d'une entente entre Phillips, Connolly et Seeley et d'autres personnes est bien minime (there is not much evidence); mais ils s'appuient sur les "overt act" pour en déduire la présomption d'une telle entente.

Il n'y a aucune preuve quelconque de rencontres ou d'entrevues entre Phillips et Connolly au cours desquelles il aurait été question de contrats de canaux d'égout.

Certains témoins relatent la teneur de conversations au cours d'entrevues entre Phillips et Seely. 10

La Cour supérieure a, avec raison, exprimé des doutes sérieux sur la crédibilité de certains de ces témoins. Il suffit de lire attentivement les témoignages de Sigretto, Purcell et particulièrement de Paulsen, pour se rendre compte de l'animosité qui existait entre eux et Phillips.

Paulsen, remarquablement intelligent bien que parfait illettré, ne peut pas s'empêcher de laisser voir, d'une façon claire, le sentiment d'inimitié qu'il entretient à l'égard de Phillips. Ce Danois, implanté aux Etats-Unis, et qui paraît avoir réussi merveilleusement à se familiariser avec les moeurs des entrepreneurs véreux, admet avoir cherché et réussi à corrompre les officiers municipaux d'autres Etats, et je ne puis blâmer la Cour supérieure d'avoir hésité à ajouter foi à tout son témoignage. 20

Sigretto, déçu dès 1917, n'a pas non plus pu s'empêcher de manifester les mauvais souvenirs qu'il a gardés de ses relations avec Phillips.

Quant à Purcell, qui se hâte de déclarer qu'il n'aurait pas cru Phillips, même sous serment, je me dispenserai de dire la même chose de son propre témoignage, bien que je concours entièrement dans ce qu'en a dit la Cour supérieure. 30

Les appelants avaient entrepris de démontrer que c'est par l'entremise et l'influence de Phillips que les spécifications préparées par les ingénieurs du Borough contenaient à peu près textuellement la description du mode de fabrication des tuyaux de la Lock Joint Pipe Company. Ils voulaient en conclure que l'insertion de cette clause dans les spécifications avait été faite intentionnellement pour éliminer la concurrence et permettre à Phillips d'avoir le monopole de la vente des tuyaux. 40

Or, sur ce point, le témoignage de monsieur Hirsh président et gérant de la Compagnie, me paraît absolument détruire la théorie des appelants.

C'est lui-même qui a fait auprès des autorités du Borough les démarches nécessaires pour faire connaître la valeur et le mode de fabrication du tuyau que vendait sa compagnie. Il a eu des entrevues avec le président et l'ingénieur en chef et il a réussi à les convaincre de la supériorité de ce tuyau sur celui fabriqué par d'autres compagnies.

In the
Court of
King's Bench
—
No. 12
The notes of
Hon. Mr.
Justice
St-Jacques.
(continued).

10 Il découle, d'une façon positive, du témoignage de monsieur Hirsh que Phillips n'a eu aucune part à ce succès obtenu par le président de la compagnie Lock Joint Pipe. Il n'a pas été l'initiateur de ce mouvement qui avait pour objet de faire adopter par les autorités du Borough la nouvelle méthode de construction des canaux d'égout, c'est-à-dire non plus la fabrication d'un tuyau dans la tranchée elle-même, mais la pose dans ces tranchées d'un tuyau fabriqué à l'extérieur, aussi près que possible de la tranchée et sur des données qui en assurent la plus grande efficacité.

20 Il est bien probable que Phillips a eu connaissance de ce succès obtenu par le président de la compagnie. C'est sans doute ce qui l'a induit à se faire accorder l'agence exclusive par la compagnie pour la vente de ce tuyau.

Sigretto était alors l'un des agents vendeurs de la compagnie Lock Joint Pipe. Phillips lui a suggéré de chercher à obtenir des contrats de construction, ce à quoi il a réussi. De son côté, Phillips est devenu le seul représentant autorisé pour la vente du tuyau de la compagnie Lock Joint Pipe.

30 Le témoignage de monsieur Hirsh repousse, d'une façon absolument satisfaisante, la présomption d'une entente frauduleuse que les appelants voulaient faire découler de l'entrée en relation d'affaires de Phillips avec les autorités du Borough.

Les prix de vente de ce tuyau aux divers entrepreneurs qui obtenaient des contrats de construction de canaux servent aussi de base aux appelants, et ils cherchent à en faire découler une forte présomption d'entente frauduleuse préjudiciable à la Cité.

40 Comment peut-on dire que les prix étaient excessifs, exorbitants, si l'on n'a pas une base absolument certaine pour faire la comparaison avec les prix du tuyau vendu et employé dans la construction de canaux d'égout semblables dans d'autres parties de la cité de New-York.

L'expert comptable qui a préparé le tableau sur lequel les demandeurs s'appuient a usé des éléments de preuve qu'il avait en mains

In the
Court of
King's Bench
—
No. 12
The notes of
Hon. Mr.
Justice
St-Jacques.
(continued).

La Cour n'a eu aucun contrôle sur les recherches ou les enquêtes faites par le comptable. Il a lui-même pris comme point de comparaison des données discutables et, dans plusieurs cas, inexactes.

Il est cependant admis, d'une façon incontestable, que le tuyau fabriqué par la compagnie Lock Joint Pipe présentait une particularité appréciable dans le mode de fabrication; il était, au point de vue des éléments, qui entrent dans la fabrication de ces éléments de première qualité. 10

Pendant toute cette période, de 1917 à 1927, ce tuyau a été examiné, inspecté par les ingénieurs et experts du Borough et toujours on l'a trouvé éminemment propre aux fins pour lesquelles il était fabrique.

La compagnie et, plus tard, Phillips, lorsqu'il eut loué l'outillage de la compagnie, fabriquaient ce tuyau sur place, à une légère distance des tranchées elles-mêmes. Les entrepreneurs étaient certains que la livraison serait faite en temps et que ce tuyau, de quelque grandeur qu'il fût, pouvait être enfoui dans les tranchées en toute sécurité; il avait la résistance nécessaire pour supporter le poids des matériaux dont on le recouvrait, quelles que fussent la profondeur et la nature du sol de cette tranchée. 20

Il serait extraordinaire que pendant cette période d'une dizaine d'années et plus, particulièrement de 1921 à 1927, les entrepreneurs aient pu faire accepter par les autorités du Borough des soumissions à des prix exorbitants et absolument disproportionnés avec la valeur des travaux. Il aurait fallu, non seulement la complicité de l'assistant ingénieur-civil et celle du président du Borough, Connolly, mais véritablement celle de tous les employés supérieurs de la cité de New-York elle-même qui avaient mission et le devoir de vérifier et de contrôler les soumissions, les contrats, le paiement des travaux, et ce, à tous les points de vue. 30

Il a été mis en preuve qu'en effet chacun des contrats passait par la filière d'inspection et de contrôle établie par la loi et les règlements de la cité de New-York.

La Cour d'appel est dans une position encore plus avantageuse, sur ce point, que ne l'était la Cour supérieure. 40

Les appelants ont admis que tous les contrats produits comme exhibits, au nombre de soixante-dix - si je ne me trompe ont été faits de la part de la cité de New-York et du Borough of Queens après observance complète des dispositions de la charte de la cité de New-York se rapportant à de tels contrats; qu'ils sont basés sur des résolutions légalement adoptées; que les soumissions des entrepreneurs et les contrats ont

10 été convenablement (properly) signés et exécutés par toutes les parties en conformité parfaite aux lois et règlements qui s'appliquent à la Cité; que toutes les soumissions ou propositions faites par les entrepreneurs ont été ouvertes publiquement par les officiers qui avaient donné les avis, et ce, en présence du contrôleur et des soumissionnaires, le tout en accord parfait avec les formalités exigées par la charte de la Cité; que les transports de contrats ont aussi été faits d'une façon légale et convenable à tous égards, le tout en accord avec la loi et les règlements de la cité de New-York et du Borough of Queens; et que tous et chacun de ces transports sont en tous points légaux et réguliers quant à leur forme et exécution (Vol. 12, pages 5558 et 5559).

In the
Court of
King's Bench
—
No. 12
The notes of
Hon. Mr.
Justice
St-Jacques.
(continued).

20 A moins qu'on ne dise que les représentants de la Cité et du Borough ont délibérément fermé les yeux pour ne pas voir ou ne pas apercevoir les fraudes commises par Connolly, à la suggestion et au moyen des artifices astucieux et frauduleux de Phillips, il ne me paraît pas possible de conclure que la cité de New-York ait été, pendant cette période, victime d'un véritable vol de \$3,000,000 et plus.

Arrivant, comme la Cour supérieure, à la conclusion que les demandeurs n'ont pas réussi à prouver les allégations fondamentales de leur action, je confirmerais le jugement et rejetterais l'appel avec dépens.

30

40

In the
Court of
King's Bench

No. 13
Notice of
Appeal to His
Majesty
in His Privy
Council
with Motion
to Fix Delay
to Furnish
Security
28 Sept. 1938.

No. 13.

**Notice of Appeal to His Majesty in His Privy Council
with Motion to fix Delay to Furnish Security.**

1. WHEREAS Appellants intend to appeal to His Majesty in his Privy Council from the judgment rendered in this case on the twenty-ninth day of June, 1938 by this Honourable Court dismissing the Appellants' appeal with costs; 10

2. WHEREAS the amount involved in the present case exceeds the sum of three million dollars (\$3,000,000.00) and that Appellants have the right to appeal "de plano" to His Majesty in His Privy Council;

3. WHEREAS Appellants are ready to give within the delay to be fixed by the judgment to be rendered herein good and sufficient sureties that they will effectually prosecute the said appeal, satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty in the event of the judgment being confirmed; 20

WHEREFOR Appellants pray that by the judgment to be rendered herein a delay be fixed within which the Appellants shall give such sureties and that such sureties be fixed to the sum of \$2,500.00. The whole with costs to follow.

Montreal, September 28th, 1938.

BERTRAND, GARNEAU et PIGEON, 30
Attorneys for Appellants.

NOTICE

To Messrs. Magee, Nicholson & O'Donnell,
Attorneys for Respondents, (The Heirs of the late
John M. Phillips)

and 40

To Messrs. Hackett, Mulvena, Foster, Hackett and Hannen
Attorneys for Respondents (The Crown Trust Company et al.,
es-qual, for the Heirs of the
late Francis Phillips)

Dear Sirs:

Take notice that the foregoing motion will be presented for adjudication to one of the Honourable Judges of the Court of King's Bench

(Appeal Side), sitting in and for the District of Montreal, in Chambers, at the Court House in the City of Montreal on the 4th day of October, 1938, at eleven o'clock in the forenoon and do govern yourselves accordingly.

In the Court of King's Bench

No. 13
Notice of Appeal to His Majesty in His Privy Council with Motion to Fix Delay to Furnish Security
28 Sept. 1938.
(continued).

Montreal, September 28th, 1938.

10

BERTRAND, GARNEAU et PIGEON,
Attorneys for Appellants



No. 14.

20

Judgment of Hon. Mr Justice Barclay on the above above Motion.

In the Court of King's Bench

No. 14
Judgment of Hon. Mr. Justice Barclay on the above Motion
4 Oct. 1938.

Having heard the parties by their respective Counsel on the motion of the plaintiffs-appellants to fix the security on an appeal to His Majesty in his Privy Council from the final judgment pronounced in this case by the Court of King's Bench (Appeal Side) on the 29th day of June, 1938, and to fix a delay within which security on the said appeal should be furnished;

30

SEEING the consent of the parties that the amount of the security should be fixed at \$5,000;

I, the undersigned, one of the Judges of this Court of King's Bench, DO FIX a delay expiring on the 14th day of October, 1938, within which the appellants may give, in conformity with the provisions of Article 1249 of the Code of Civil Procedure of the Province of Quebec, and in the manner and for the purposes therein mentioned, the security thus agreed upon of \$5,000; costs to follow.

40

(signed) GREGOR BARCLAY,

J. K. B.



In the
Court of
King's Bench

No. 15
Notice of
Furnishing
Security
7 Oct. 1938.

No. 15.
Notice of Furnishing Security.

To Messrs. Magee, Nicholson & O'Donnell,

Attorneys for Respondents, (The Heirs of the late
John M. Phillips)

10

and

To Messrs. Hackett, Mulvena, Foster, Hackett and Hannen

Attorneys for Respondents (The Crown Trust Company et al.,
es-qual, for the Heirs of the
late Francis Phillips)

Dear Sirs:

Take notice that on the 11th day of October, 1938, at 11 o'clock in
the forenoon, before a Judge of the Honourable Court of King's Bench
(Appeal Side), for the District of Montreal, sitting in Chambers, at the
Court House, the Appellants will furnish the security required for the
costs of Respondents in this case in their appeal to His Majesty in his
Privy Council. 20

The whole in accordance with the judgment of the Honourable Mr.
Justice Gregor Barclay, one of the judges of the Appeal Court, rendered
on the 5th day of October, 1938.

30

The said security to be in the sum of \$5,000.00 in the form of a sure-
ty bond of the United States Fidelity & Guaranty Company, a body politic
and corporate duly incorporated, having a business office in the City and
District of Montreal and duly authorized to become security before the
Courts of the Province of Quebec, and govern yourselves accordingly.

MONTREAL, October 7th, 1938.

BERTRAND, GARNEAU et PIGEON,

Attorneys for Appellants.

40



No. 16.

Surety Bond of The United States Fidelity and Guaranty Company.

In the
Court of
King's Bench

No. 16
Surety Bond
of The
United States
Fidelity and
Guaranty
Company
11 Oct. 1938.

10

WHEREAS the said judgment has been appealed to His Majesty in His Privy Council by the said PEOPLE OF THE STATE OF NEW YORK, thus rendering necessary the security required by law.

NOW, THEREFORE, THESE PRESENTS TESTIFY, that on the 11th., day of October, 1938, before a Judge of the Honourable Court of King's Bench (Appeal Side), for the District of Montreal, sitting in Chambers, at the Court House, and before the Clerk of the said Court:

CAME AND APPEARED:

20

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a body politic and corporate, duly incorporated under the laws of the State of Maryland, one of the United States of America, and having its head office in the City of Baltimore, in the said State, and having a branch office in the City of Montreal, and duly authorized to become surety before the Courts of the Province of Quebec, by virtue of Order-in-Council, dated at Quebec the 2nd., day of October, 1903, and under the provisions of "The Gurantee Companies Act, chapter 249, Revised Statutes of Quebec, 1925".

30

The said UNITED STATES FIDELITY AND GUARANTY COMPANY, herein represented and acting by R. C. HEY, of the City of Montreal, duly authorized by Resolution of the Board of Directors of the said Company, passed on the 16th., day of March, 1938, at Baltimore, duly certified copy of which being hereto annexed and which said Company hereby acknowledges itself to be the legal surety of the said Appellants in regard to the said appeal: hereby promises, binds and obliges itself that in case the said Appellants do not effectually prosecute the said Appeal and do not satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty in His Privy Council in the event of the said Judgment being confirmed, then the said surety will satisfy the said condemnation in capital, interest and costs, and pay all costs and damages which may be hereafter adjudged, not to exceed, however, in any case the sum of FIVE THOUSAND DOLLARS (\$5,000.00), in case the judgment appealed from is confirmed as aforesaid, by His Majesty in His Privy Council, to the use and profit of the said Respondents, their heirs, administrators, executors and assigns.

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In the
Court of
King's Bench

No. 16
Surety Bond
of The
United States
Fidelity and
Guaranty
Company
11 Oct. 1938.
(continued)

And the said UNITED STATES FIDELITY AND GUARANTY COMPANY has signed these presents by its Representative.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

Per R. C. HEY,

Resident Assistant
Agent and Attorney. 10

Taken and acknowledged before me
at Montreal, this 11th., day of Octo-
ber, 1938.

GREGOR BARCLAY,

J. K. B.

POULIOT & LAPORTE,

Clerk of Appeals.

20

No. 17.

**Consent of the Parties as to the Contents of the Trans-
cript Record in Appeal to His Majesty in
His Privy Council.**

In the
Court of
King's Bench

No. 17
Consent
of Parties
as to the
Contents
of the
Transcript
Record to His
Majesty
in His Privy
Council
6 Dec. 1938.

We, the undersigned, Attorneys for the parties herein, hereby agree
that the following documents shall compose the Transcript Record of pro-
ceedings for the Judicial Committee of His Majesty in His Privy Council, 30
viz. —

- 1.—All documents printed in the Record for the Court of King's Bench (Appeal side) as more fully set out in the "Index" forming part of the said Record, the whole under reserve of the rights of all parties to refer to any document in the original Record;
- 2.—The Inscription in Appeal before the Court of King's Bench (Appeal side).
- 3.—The Factum of the Appellants before the Court of King's Bench. 40
- 4.—The Factum of the Respondents, The Crown Trust Company et al, es-equal, before the Court of King's Bench.
- 5.—The Factum of the Respondents, the Heirs of the late John M. Phillips before the Court of King's Bench.
- 6.—Supplementary Factum or Memorandum of Notes of the Respondents, the Heirs of the late John M. Phillips before the Court of King's Bench.

- 7.—The Appellants' Reply to the Supplementary Factum of the Respondents, the Heirs of the late John M. Phillips, before the Court of King's Bench.
- 8.—The formal Judgment of the Court of King's Bench dismissing the Appellants' Appeal against the Respondents.
- 9.—The Notes of Honourable Mr. Justice Bernier.
- 10 10.—The Notes of Honourable Mr. Justice Hall.
- 11.—The Notes of Honourable Mr. Justice Letourneau.
- 12.—The Notes of Honourable Mr. Justice St. Jacques.
- 13.—The Notes of Honourable Mr. Justice Walsh.
- 14.—Notice of Appeal to His Majesty in His Privy Council with Motion to fix delay to furnish security.
- 15.—Judgment of Honourable Mr. Justice Barclay on the above Motion.
- 20 16.—Notice of giving security.
- 17.—Surety Bond of the United States Fidelity & Guaranty Co.
- 18.—Consent of parties as to the contents of the Transcript Record to His Majesty in His Privy Council.
- 19.—Fiat for Transcript Record to His Majesty in His Privy Council.
- Certificate of Clerk of Appeals.
- Certificate of Chief Justice.
- 30 Montreal, December 6th, 1938.

In the
Court of
King's Bench

No. 17
Consent
of Parties
as to the
Contents
of the
Transcript
Record to His
Majesty
in His Privy
Council
6 Dec. 1938.
(continued)

BERTRAND, GARNEAU & PIGEON,
Attorneys for Appellants.

MAGEE, NICHOLSON & O'DONNELL,
Attorneys for Respondents
The Heirs of the late John M. Phillips

40

HACKETT, MULVENA, FOSTER, HACKETT & HANNEN,
Attorneys for Respondents
The Crown Trust Company et al, es qual.

In the
Court of
King's Bench

No. 18
Fiat for
Transcript
of Record to
His Majesty
in His Privy
Council
14 Dec. 1938.

No. 18.

**Fiat for Transcript of Record to His Majesty in His
Privy Council.**

We require the preparation of the transcript of the record in appeal to His Majesty in His Privy Council, the said transcript to consist of and include only: 10

- 1.—All documents printed in the Record for the Court of King's Bench (Appeal side as more fully set out in the "Index" forming part of the said Record, the whole under reserve of the rights of all parties to refer to any document in the original Record;
- 2.—The Inscription in Appeal before the Court of King's Bench (Appeal side).
- 3.—The Factum of the Appellants before the Court of King's Bench. 20
- 4.—The Factum of the Respondents, The Crown Trust Company et al, es-qual, before the Court of King's Bench.
- 5.—The Factum of the Respondents, the Heirs of the late John M. Phillips before the Court of King's Bench.
- 6.—Supplementary Factum or Memorandum of Notes of the Respondents, the Heirs of the late John M. Phillips before the Court of King's Bench.
- 7.—The Appellants' Reply to the Supplementary Factum of the Respondents, the Heirs of the late John M. Phillips, before the Court of King's Bench. 30
- 8.—The formal Judgment of the Court of King's Bench dismissing the Appellants' Appeal against the Respondents.
- 9.—The Notes of Honourable Mr. Justice Bernier.
- 10.—The Notes of Honourable Mr. Justice Hall.
- 11.—The Notes of Honourable Mr. Justice Letourneau. 40
- 12.—The Notes of Honourable Mr. Justice St. Jacques.
- 13.—The Notes of Honourable Mr. Justice Walsh.
- 14.—Notice of Appeal to His Majesty in His Privy Council with Motion to fix delay to furnish security.
- 15.—Judgment of Honourable Mr. Justice Barclay on the above Motion.
- 16.—Notice of giving security.

- 17.—Surety Bond of the United States Fidelity & Guaranty Co.
18.—Consent of parties as to the contents of the Transcript Record to His Majesty in His Privy Council.
19.—Fiat for Transcript Record to His Majesty in His Privy Council.
Certificate of Clerk of Appeals.
10 Certificate of Chief Justice.
MONTREAL, December 14, 1938.

In the
Court of
King's Bench
No. 18
Fiat for
Transcript
of Record to
His Majesty
in His Privy
Council
14 Dec. 1938.
(continued).

BERTRAND, GARNEAU & PIGEON,

Attorneys for Appellants.

20



30 Record approved:

BERTRAND, GARNEAU & PIGEON,
Attorneys for Appellants.

40

MAGEE, NICHOLSON & O'DONNELL,
Attorneys for Respondents
The Heirs of the late John M. Phillips.

HACKETT, MULVENA, FOSTER, HACKETT & HANNEN,
Attorneys for Respondents
The Crown Trust Company et al, es qual.

In the
Court of
King's Bench

Certificate
of Clerk of
Appeals

Certificate of Clerk of Appeals.

We, the undersigned Alphonse Pouliot and Clovis Laporte, K. C., Clerk of Appeals of His Majesty's Court of King's Bench for the Province of Quebec, do hereby certify that the present transcript, from page one to page 295 contains.

10

True and faithful copies of all the original papers, documents, proceedings and of judgments of His Majesty's Court of King's Bench (Appeal side) for the Province of Quebec, sitting in the City of Montreal.

Fyled in the Appeal Office, in the said City of Montreal, as the Record of the said Court of King's Bench (Appeal side) in the cause therein lately pending and determined between The People of the State of New York, Appellants vs The Heirs of the Late John M. Phillips and The Crown Trust Company et al., es-qual., respondents and The Montreal Safe Deposit Company et al., tierce-saisie.

The record of the Superior Court proceedings will be send directly to the Registrar of His Majesty in His Privy Council.

In faith and testimony whereof, we have, to these presents, set and subscribed our signature and affixed the seal of the said Court of King's Bench, (Appeal Side).

Given at the City of Montreal, in that part of the Dominion of Canada, called the Province of Quebec, this 22nd day of December in the year of Our Lord one thousand nine hundred and thirty eight.

POULIOT and LAPORTE,

L. S.

Clerk of Appeals.

40

Certificate of Chief Justice.

In the
Court of
King's Bench

Certificate
of Chief
Justice

I, the undersigned Honourable Sir Mathias Tellier, Chief Justice of the Province of Quebec, do hereby certify that the said Alphonse Pouliot and Clovis Laporte, K.C., are Clerk of the Court of King's Bench, on the
10 Appeal Side thereof, and that the initials "P and L" subscribed at every eight pages and the signature "Pouliot & Laporte" of the certificate above written, is their proper signature and hand writing.

I do further certify that the said Pouliot & Laporte as such Clerk, are the Keeper of the Record of the said Court, and the proper Officer to certify the proceedings of the same, and that the seal above set is the seal of the said Court, and was so affixed under the sanction of the Court.

In testimony whereof, I have hereunto set my hand and seal, at the
20 City of Montreal, in the Province of Quebec, this 22nd day of December in the year of Our Lord one thousand nine hundred and thirty eight and of His Majesty's Reign, the third.

Sir Mathias TELLIER,

L. S.

Chief Justice of the Province of Quebec.

30

40

In the Privy Council

No.

of 1938

ON APPEAL FROM THE COURT OF KING'S BENCH, FOR
THE PROVINCE OF QUEBEC (Appeal Side) CANADA.

BETWEEN

The People of the State of New York,

herein represented by the Attorney General of the State
of New York, one of the United States of America,
(Plaintiffs in the Superior Court)
(Appellants in the Court of King's Bench)

APPELLANTS

—vs—

Heirs of the late John M. Phillips,

in his lifetime of New York,
(Defendants in the Superior Court)
(Respondents in the Court of King's Bench)

—and—

***The Crown Trust Company et al., es-qual.
for the Heirs of the late Francis Phillips,***

a body corporate and politic duly incorporated, having its
head office and principal place of business in the city
and district of Montreal, in its quality of curator to the
minor child, Helen Frances Phillips, of the village of
Roslyn, in the state of New York and Elizabeth Ellen
Carroll Baines, wife separate as to property of Clarence
L Paulsen, merchant of the city of Spokane, in the state
of Washington, one of the United States of America, and
the said Clarence L. Paulsen, for the purpose of authoriz-
ing his said wife,

Defendants severing in their defence in the Superior Court)
(Defendants in the Court of King's Bench),

RESPONDENTS

—and—

The Montreal Safe Deposit Company,

a corporation having its head office in the city and dis-
trict of Montreal,

(Tierce-saisie in all Courts)

TIERCE-SAISIE.

Record of Proceedings

LAWRENCE, JONES & Co.,
Solicitors,
Llyod's Bldg.
Leadenhall, st.,
LONDON, Eng.