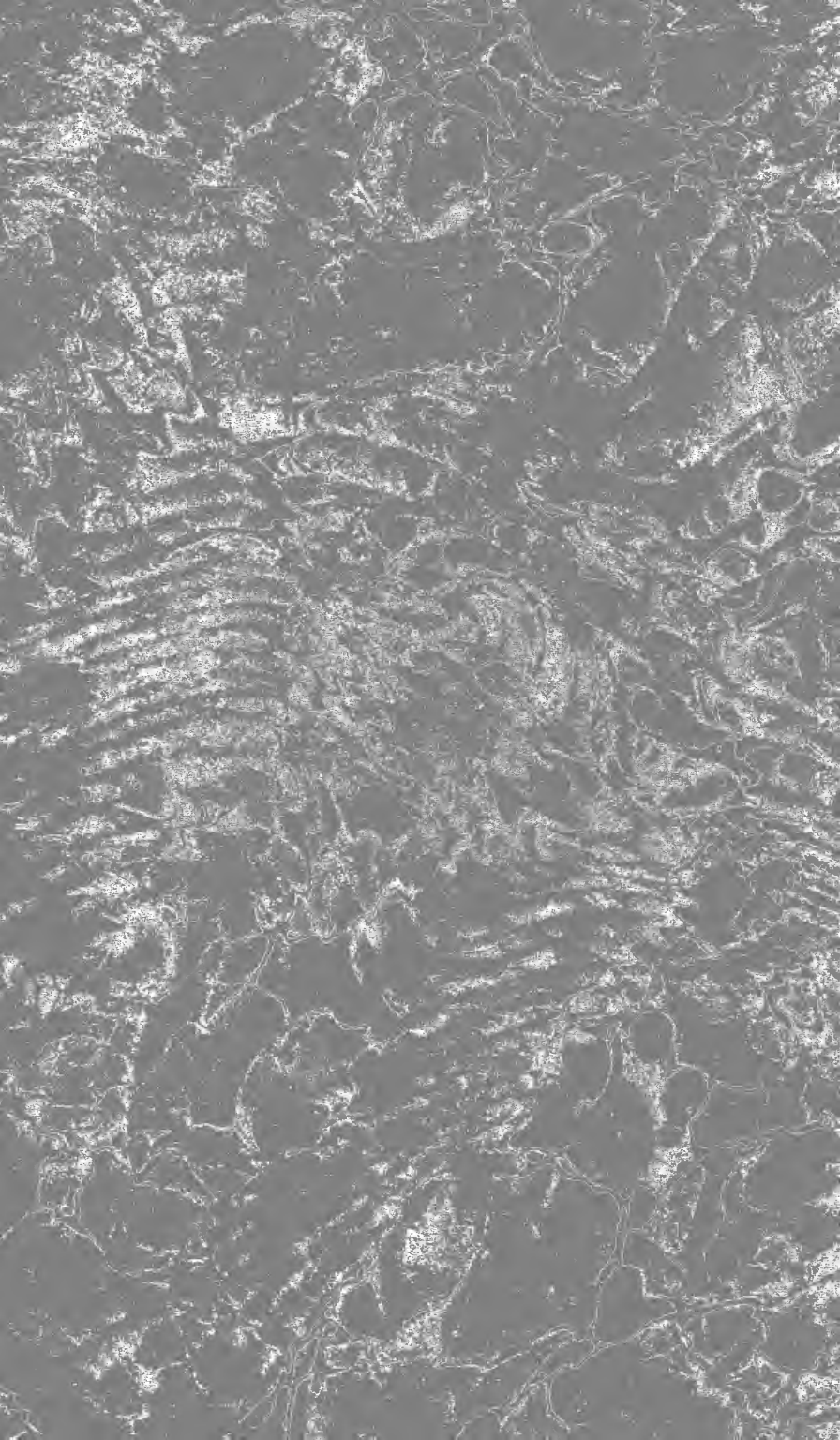
THE LAW RELATING TO ENGINEERING.

By

L. W. J. COSTELLO.



With the Author's Compliments

October 1911

THE LAW RELATING TO ENGINEERING.

THE LAW RELATING TO ENGINEERING

A Course of

SIX LECTURES

Delivered at Caxton Hall, Westminster, in 1910-1911,
before
THE SOCIETY OF ENGINEERS (Incorporated),
17, Victoria Street, Westminster,
and
THE JUNIOR INSTITUTION OF ENGINEERS (Incorporated),
39, Victoria Street, Westminster.

BY

L. W. J. COSTELLO, M.A., LL.B.,

Of the Inner Temple and of the Midland Circuit, Esquire, Barrister-at-Law, formerly Lecturer in Law at University College, Nottingham.

With an Introduction by

The Rt. Hon. LORD JUSTICE FLETCHER MOULTON, M.A., F.R.S.,
Past President of the Junior Institution of Engineers.

Published by the above-named Societies.

London, 1911.

This little volume is inscribed
by kind permission to

EDWARD G. HEMMERDE, Esq., K.C.

Recorder of Liverpool.

INTRODUCTION.

THE profession of an Engineer involves much more than mere engineering knowledge or even executive skill. In a large proportion of the matters in which he is consulted he has the responsibility of giving advice, and that advice often relates to acts in which the rights of third parties are directly or indirectly involved. This consideration alone would make it desirable that he should have a sound knowledge of such branches of the law as bear upon the questions he has to resolve. But his need of clear legal conceptions does not depend on this alone. He has not only to administer, but often to frame, contracts of a character which, beyond doubt, renders them the most complicated of any that have to be interpreted and pronounced upon by our Courts, and their nature is such that he can only pass on the responsibility to professional lawyers to a small extent. The rest deals with matters so technical that it must remain in his hands.

In countries where law is embodied in codes it is both easy and customary for the various classes of the professional and commercial world to know almost by heart the portions that directly relate to their callings. But in England, where we prefer the elasticity of principles to a servile adherence to any verbal embodiment of them, the task is more difficult and less frequently accomplished. And yet the English system of case law is in my opinion easier and safer for the sensible layman than a codified system would be. With a little care he can familiarise himself with the principles on which our

Courts act, which are wide reaching and rest for the most part on the obvious necessities of the case viewed generally, though the consequences may be strange and even hard when applied to some particular and unusual state of facts. He will find himself more at home in applying principles such as these than in speculating on the interpretation which a Court will place on the specific language of a clause in a code which was probably drafted without any reference to such a case as that to which it is to be applied and to which its language must at any cost be made to fit.

But how is a man to acquire this familiarity with the principle of law which will be needful to him in his profession ? It is a thoroughly practical question. He does not seek to become a legal expert but to keep himself and his employers safe. The best motto for him to bear in mind is, "Forewarned is forearmed." Let him learn into what troubles others have come in the past, and how, if at all, the Courts have helped them. He will thus learn the dangers that beset him, the pitfalls of which he must beware. Like a sailor who knows all about the wrecks on a dangerous coast he will be aware of the rocks that have been most fatal and will avoid them. To give to him a judicious selection of the decided cases bearing on the matters with which one in his profession will have to deal—such cases being arranged in such wise that those that relate to each point come together—will be to help him in the best possible manner. He will, no doubt, be dismayed at learning of the countless possibilities of going wrong, but he will also learn what are the principles which, if faithfully adhered to, will lead him unharmed through them all.

These excellent Lectures delivered under the auspices of two Engineering Societies are directly intended to effect this. The perusal of them will benefit the most experienced, and will give invalu-

able training to the beginner. It may be that it will occasionally flit across their minds that the Courts have not always been consistent in their decisions, but this will in no substantial degree blur the clear impression that will be given to the mind of the reader of the principles to which the Courts loyally give adherence and which to the best of their powers they faithfully apply.

J. Fletcher Moulton.

57, Onslow Square, S.W.,
August 1st, 1911.

TABLE OF CASES.

LECTURE I.

Delivered October 10th, 1910.

Mr. F. G. BLOYD,

Vice-President of the Society of Engineers (Incorporated), in the Chair.

ALTHOUGH this short course of lectures is described as being on "the Law relating to Engineering or Engineers," I have to inform you at the outset, paradoxical as it may seem, that there is no law relating to engineers, by which I mean that there are no rules of law or Acts of Parliament applying to engineers as such. The nature of their avocation and the forms of the contracts to which they frequently become parties, or by virtue of which they undertake certain duties, brings them principally in touch with those branches of the general law which deal with the relationship of principal and agent and with arbitrations. There are no rules of law and no set of regulations applying to engineers such as exist with regard to many other professions, nor is there indeed any domestic tribunal to concern itself with the doings of the general body of members of your particular profession. Barristers are under the jurisdiction of the Benchers of their Inn and Solicitors are amenable to the Law Society. Physicians, Surgeons and Dentists, and even Veterinary Practitioners are all subject, not only to their own disciplinary bodies, but also to the provisions of special statutes passed to regulate the exercise of

those particular professions. Engineers on the other hand are not even subject to any definite code of professional etiquette, though, as you may read in the excellent little book recently published by my friend Mr. Valentine Ball, serious suggestions for the adoption of such a code have from time to time been put forward, and it is evident from the speech of Sir Alexander Kennedy, quoted on page 4 of Mr. Ball's book, that the leaders of your profession are keenly alive to the situation and evince in every way an earnest desire that the profession of an engineer should be at least as scrupulously honourable as any of those to which I have referred.

Let us first of all enquire what it is that we mean by the term "engineer," for the expression is, I fear, somewhat vague owing to the fact that it bears a very large variety of meanings. Etymologically the word "engineer" or "enginer" as it was in old English is derived from the French "Ingénieur" and may mean (1) a person skilled in the principles and practice of engineering (2) one who manages an engine or more simply an engine driver or (3) used metaphorically "one who carries through some enterprise by skilful or artful contrivance." With these last two significations we are not now concerned; we have only to deal with the law affecting those persons who practice the science of engineering as a profession; though these again may be subdivided into "civil or military" and "civil or mechanical" or in other words "professional and practical," because there are many people who call themselves engineers who are nothing more or less than contractors ready to tender for and carry into execution the works designed by the civil engineer properly so-called.

The epithet "civil" has in modern usage to a large extent lost its old antithetic force, and civil engineering in these days refers strictly to the construction of works of public utility, such as railways, canals, aqueducts, bridges, lighthouses, docks, embankments, breakwaters, dams, sewers, tunnels, etc., as well of factories and such like edifices. It is indeed somewhat difficult to set a limit to what is or is not included in the term engineering, and in one dictionary we find it defined as "the science and art of utilizing the forces and materials of nature" which, it must be admitted, is a fairly wide definition and almost as nebulous as Justinian's definition of Jurisprudence which according to him is "the knowledge of things divine and human, the science of the just and the unjust." In a comprehensive sense, however, engineering no doubt includes among other things architecture as a mechanical art, in distinction from architecture as a fine art; chemistry as applied in connection with applied mechanics; transportation, including the building and propulsion of ships and other vehicles; the building of docks, roads, bridges, canals and public works generally; water works; gas lighting and electric lighting; the preparation of materials, machinery and manufacturing, etc. Perhaps the best short definition to be found is that given by the Frenchman, O. Masselin, quoted by Mr. Hudson in his book on Building Contracts, at p. 30. "The civil engineer" he said "is a man who has "or *professes* knowledge of the design and construction of works not falling within the definition of dwelling houses and churches or like edifices, i .e., of bridges, docks, harbours, canals, railways, roads, embankments, water, drainage, and gas works and factories."

It is with this kind of engineer that we are concerned in these lectures. His business may be to advise only, or to make plans and specifications only, or (and this is the most usual) to design plans, draw specifications and so forth, and then to supervise the construction of the works according to the plans he has made. As will be seen hereafter, it is necessary that the engineer should have a certain amount of knowledge in regard to the "Building Laws"; the Law of Easements and so forth : at any rate sufficient knowledge of these branches of the law to protect his employer and to put himself upon enquiry in the matter. It is not with these however that I am going to deal in this series of lectures, but rather with the law affecting the engineer in his relations with his employer and the contractors than with those branches of law which the engineer ought to know as part of his professional training. These can perhaps be dealt with in a later series. In general, the position of an engineer in its legal relations, especially as regards the employer and the contractor, is very much the same as that of an architect, and many of the authorities to which I shall have occasion to refer hereafter will be cases in which architects have been concerned, though you will understand that the same principles apply to engineers.

The engineer resembles an architect in that no qualification for his profession is necessary, either in the nature of a university degree or membership of a recognised body. There is no public examination for engineers and no English diploma.

Membership of an engineering institution or society or even any special professional training is not necessary in order to maintain an action for the

recovery of fees. It is only if the engineer wishes to act as an appraiser of real or personal property under section 4 of 46 Geo. III, c. 43 that he must be licensed under section 6 of that Act in order to recover, unless of course he happens to be a licensed auctioneer as well, which is not likely. See Palk v. Force, (1848) 17 L. J. Q.B. 299.

It follows from what I have just said that any one is at liberty to undertake engineering work, but of course if he should prove negligent or incompetent in performing it, he will be liable to his employer for any damage or loss the latter may sustain by reason of his not possessing and using ordinary care and skill. In Lanphier v. Phipos, (1838) 8 Car P 475, Tindal, C. J. said "Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not undertake, if he is an attorney, that at all events you shall gain the cause, nor does a surgeon undertake that he will perform a cure, nor does the latter undertake to use the highest possible degree of skill. There may be persons of higher education and greater advantages than he has, but he undertakes to bring a *fair*, *reasonable* and *competent degree* of skill."

So in the same way an engineer cannot guarantee that his work will be perfect or everlasting, but he must display a reasonable and competent degree of skill. In Jenkins v. Betham, (1854) 15 C.B. 168, it was held that a man who holds himself out as a valuer of ecclesiastical property is not bound to possess *precise and accurate* knowledge of the law respecting the valuation of dilapidations, but he is bound to bring to the performance of the duty he undertakes a knowledge of the general rules applic-

able to the subject. Whenever a person holds himself out as possessing certain knowledge and represents himself as understanding a subject and qualified to act in the business in which he professes to act, he always impliedly undertakes to supply skill and knowledge. The whole law on this subject was tersely summed up by Mr. Justice Brett in Turner v. Goulden, (1873) L.R. 9 C.P. 57 : 60 where he said "when a person undertakes to carry on a business for reward he is bound to bring to the exercise of it an ordinary degree of skill and to act with reasonable care and diligence," and the case of Harmer v. Cornelius, (1858) 28 L.J. C.P. 85 not only decides that a person who undertakes the duties of a skilled occupation must have reasonable skill, but also that when such a person (in this case a scenic artist) is engaged for a definite period, his incompetence is a sufficient justification for his dismissal even before the expiration of that period.

The skill which must be shown includes judgement, see per Bayley J. in Duncan v. Blundell, (1820) 3 Stark N.P. 6., and also honesty (Moneypenny v. Hartland, (1826), 2 Car & P. 378) but if there were an ambiguity in the contract the engineer would not be liable if he acted honestly even though the employer intended him to act according to a different construction of its terms. The skill shown need not be of an extraordinary character, (Rich v. Pierpoint, (1862) 3 F. & F. 351) and if the employer knows that the engineer has only had a limited experience he cannot expect from him the skill of a more experienced man : see Henry v. The Belfast Board of Guardians (1879) quoted in Macassey & Strahan, p. 39., nor can he complain if damage or loss occurs to him because he has directed

the engineer to use some new invention, *e.g.*, a patent concrete roofing (as in Turner v. Garland & Christopher, (1853), see Hudson Vol. II p. 2) which proves inadequate or unsuitable. Of course it would be otherwise if the engineer himself experimented with some new invention without being authorised so to do by the employer. In that case he clearly would be liable to the employer for any loss which occurred : see Slater v. Baker & Stapleton, (1767) 2 Wilson 359, where it was said "for anything that appears to this Court, this was a first experiment made with this new instrument : and if it was, it was a rash action, and he who acts rashly acts ignorantly." This case, though an old one, seems still to be good law, so that rising young geniuses in the engineering profession must walk warily and not be too anxious to introduce new methods or untried inventions into their designs without the express authority of their clients, as otherwise they will be liable for any loss or delay which may in consequence occur.

Before speaking of the authority and duties of an engineer it is necessary to say a word or two as to the manner in which his employment may be entered upon. As a rule, when an engineer is engaged by a private individual no particular formality is required. The contract of employment, like the majority of other kinds of contracts, may be entered into without any special formality. The mere agreement of the parties to it is sufficient, and generally speaking no writing is necessary. It may in fact be made either verbally or in writing. What usually happens is that the employer has an interview with the engineer, at which he makes known his requirements and gives his instructions, and the engineer

makes a note in his diary of what passes so that in the event of any dispute afterwards there will be some permanent record as evidence of what was actually agreed, but in all cases however it would be more satisfactory for the engineer to insist on having a written retainer. When the employment is such that the work to be executed is not to be completed within a year from the commencement of the employment and particularly in cases where the engineer has accepted a permanent appointment lasting longer than one year, a mere verbal agreement is never sufficient. It is not entirely invalid but cannot be enforced at law, for the fourth section of the Statute of Frauds provides that "no action shall be brought . . . . . upon any agreement which is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

This section only applies if the contract is not to be completely performed by both sides within the year; if therefore one party does all he has to do under the contract inside this year, *e.g.*, if the employer paid the engineer a lump sum down (Smith v. Neale, (1851), 2 Q.B. 67), or if by any possibility the contract could be performed by both sides within the year (Peter v. Compton, (1690), Skin. 353), then the statute does not apply and writing is not required, but if on the other hand the year is exceeded by ever so little, as for example in the case of an engagement for a year from to-morrow then there must be writing (Britain v. Rossiter, (1879), 11 Q.B.D. 123).

The memorandum is only required to be signed by the party to be charged, so that if only one party signed he could be sued but not the other. It must contain however the names or a sufficient description of both parties ; (Lavery v. Pursell, (1888), 39 Ch. D. 508) ; the subject matter of the agreement and also the consideration to be paid for the work that is to be done. The requirement of this note or memorandum is merely a matter of evidence so that if it is procured at any time before action brought it will be sufficient. It need not be made at the actual time when the agreement is entered into. In entering into business relations with corporations further precautions are required whether the employment is for a specific period or only for a particular undertaking. This question will however be dealt with in a subsequent lecture.

Whenever an engineer is employed no doubt the remuneration he is to receive is expressly provided for in the contract between him and his employer, but if this is not so there is an implied agreement that he shall be paid a reasonable remuneration : Manson v. Baillie, (1855), 2 Mac. H.L. Cases 80 ; this is always the case whenever a professional man is engaged.

As to what is reasonable depends upon the nature and character of the work, the time occupied therewith and to some degree upon the standing of the engineer. If by the terms of the contract it has been left to the employer to settle what fee shall be paid to the engineer the Court will not allow the former to act unfairly, but would leave the question of what is reasonable for a jury to decide, having regard to all the circumstances of the case : Bryant v. Flight, (1839), 5 M. & W. 114. The

person employing the contractor is liable for the engineer's fees wherever the latter is his servant and agent, and no doubt if the engineer is specially employed to do additional work in the way, for example, of measuring for extras and omissions or deviations, he must, on the authority of the case of Beattie v. Gilroy, (1882), 10 Ct. of Session Cas. 226, look to the employer and not to the contractor for further remuneration. If the amount of the remuneration to be paid for the extra work has not been fixed the engineer is entitled to receive what is reasonable. The Institution of Civil Engineers has no fixed scale analogous to that of the Royal Institute of British Architects, and indeed even if they had such a scale, it would not be binding on the employer unless specifically agreed to by him. What is called Ryde's scale also, though perhaps useful as a guide, is not judicially recognised, and indeed scales of remuneration drawn up by members of a class who are to receive the remuneration have never been favourably viewed by the Courts and in Drew v. Josolyne (1888), 4 Times L.R. 717 Ryde's scale was in fact strongly condemned, and again in Stenning v. Mitchell decided in 1904, quoted in Emden's Building Contracts at p. 661 Farwell J. said "Ryde's scale has certainly not been established as the customary scale of the fees which surveyors can insist on receiving."

The amount to be paid, unless expressly contracted for, is really left in the first place to the engineer employed. If the client were to dispute the amount or to allege that it was exorbitant then it would be necessary to call expert witnesses to prove that after all the amount charged was fair and proper in the circumstances of the case. Sometimes

engineers are engaged and no works are carried out ; in this event the remuneration, unless previously agreed upon, would again have to be decided by what was reasonable. If the agreement between the engineer and the employer is simply that the former is to prepare drawings and specifications, the engineer is entitled to the agreed or a reasonable remuneration. Even if the drawings and specifications are not used by the employer the engineer's right to remuneration is in no way interfered with unless of course the plans were unfit for use. When an engineer has completed what he undertook to do, even though the employer will not or cannot utilize his work, the latter must still perform his side of the contract and pay for it : See Prickett v. Badger (1856), 1 C.B., N.S. 296. If the engineer upon request submits preliminary drawings, the question whether they are to be paid for depends upon the terms under which they were ordered. If payment is to depend upon the approval or satisfaction of the employer, this must first be obtained before payment can be had : Moffat v. Dickson, (1853), 22 L.J. C.P. 265. If drawings are sent in, in response to a general invitation to compete, the drawings need not be paid for unless they are used, failing an express promise to the contrary ; but if such drawings are in fact used at all, even for a purpose different from that for which the competition was held then they must be paid for : See Landless v. Wilson (1880) 8 Court of Sess. Cases 289. If however an engineer submits plans on the express condition that they are not to be paid for, but that in the event of the works being carried out he is to receive remuneration for supervising their erection in accordance with such plans, he cannot complain and has no legal remedy if the works are

not proceeded with: see Moffatt v. Laurie (1855) 15 C.B. 583. If on the other hand however an engineer is employed to make plans and also to supervise, he will still be entitled to remuneration even though the employer does not have the works executed; See Burr v. Ridout, The Times, 22nd February, 1893. The engineer would in such circumstances have an action for damages for the breach of the contract in regard to his supervising of the works. See also Horton v. Hensley, The Times, 19 February, 1908.

If the contract between the employer and the engineer is silent as to the time and manner of payment of fees the engineer will generally speaking be entitled to be paid from time to time in instalments as the work proceeds; unless he has undertaken to supervise the execution of an entire contract and to have his fees by way of commission on the total price of it, in which case he may not be able to recover anything until the whole work is finished.

Here let me add a word as to the ownership of drawings after a work has been completed. In an action brought by an employer against an architect to recover plans, it was held that the custom set up by the defendant, entitling him as architect to the property in the plans after the execution of the work, was unreasonable; and that the plans and specifications became the property of the employer. Collins, M.R. in giving judgment said, "the contract results in the making of plans, the property in which passes to the building owner on payment of the remuneration provided under the contract. The case cannot be distinguished from that of a contract to paint a picture or to design a coat of arms as to which no question of ownership could

arise." This is the case of Gibbon v. Pease, heard in the Court of Appeal, and reported in [1905], 1 K. B. 810. The decision in the previous case of Ebdy v. McGowan, reported in The Times of 17th Nov. 1870 was there considered and approved.

When once an employer has paid the engineer his fees he cannot recover them back unless he can show a total failure of consideration, so it was laid down in the case of the Columbus Company v. Clowes, [1903], 1 K. B. 244 the facts of which were as follows: In 1897 the plaintiffs became the lessees of a piece of land situate in Carmelite Street, and they employed the defendant as their architect to prepare plans and specifications for a factory and offices to be erected on that site and to engage a quantity surveyor to take out the quantities from such plans. The defendant neglected to measure the site and acting on information which was unauthorised by the plaintiffs prepared plans on the assumption that the site was smaller than it really was. The plaintiffs having paid the defendant £200 for the plans and also £200 to the quantity surveyor were unable to raise funds to build on the site and ultimately in 1901 parted with it. It was then discovered that the plans and quantities were incorrect as they did not cover the whole of the site. The plaintiffs accordingly brought this action against the Architect, claiming the return of the money paid as having been paid upon a consideration which had wholly failed, or in the alternative damages for negligence. It was held that there had not been a *total* failure of consideration but that as the defendant had been negligent the plaintiffs were entitled to damages, which however, as the plaintiffs had suffered no real damage, since they never were in a financial posi-

tion to use the plans, were only nominal. The plaintiffs were however entitled to £40 which a quantity surveyor would charge for adapting the bills of quantities to the proper plans.

With regard to the termination of an engineer's employment it may be said that in the absence of any legal justification, an engineer who has been retained generally cannot be dismissed without reasonable notice. Want of skill or negligence would be a sufficient reason for determining an engineer's contract and so apparently would, for example, a conviction for dishonesty even though that did not directly affect the employer: see Parsons v. The London County Council (1893) 9 T.L.R. 619, but as already pointed out if the retainer was to design and supervise the execution of specified works, the abandonment of such works by the employer would not justify him in dismissing the engineer: see Turner v. Goldsmith, [1891], 1 Q.B. 544.

Even if the dismissal was justifiable the engineer would still be entitled to all the remuneration which had accrued due up to the time of his dismissal, but if the work was of such a character that the employer could exercise an option as to whether he would accept it or not, he would not be obliged to pay for it unless he did in fact take the benefit of it: Read v. Rann, (1830) 10 B. & C. 438.

The scope and extent of an engineer's authority as between his employer and the contractor is largely determined by what is usual in the employment of engineers unless of course it is expressly extended or curtailed by the terms of the contract between the employer and the contractor. If in point of fact the engineer's authority is given in any

written document, that document must then be construed by the Court according to the ordinary rules of construction applicable to cases of principal and agent. The authority must in that event be exercised strictly in accordance with the powers conferred by the written instrument, so that where for example a contract between a firm of contractors and a company for whom they were constructing a railway required the engineer's certificate to be given in writing it was held that the contractors could not maintain a claim against the company merely on verbal promises by the engineer : see Sharp v. The San Paulo Railway Co. (1873) 8 Chancery App. 597 where the Master of the Rolls, Lord Romilly said "that it was quite clear that the engineer had no power to vary the contract, he had power to give directions . . . . within the limits of the contract and if the contractors thought that things were not within the contract they were not bound to do them." So also in Lawson v. The Wallasey Local Board (1882) 52 L.J.Q.B. 302 where the plaintiff had contracted with the defendants to dredge a portion of the River Mersey within a certain time and the contract contained a provision that if a temporary staging was not removed by the defendants in sufficient time to enable the plaintiff to complete his contract within the time agreed upon he was to be entitled to such extension of that time as the engineer should deem reasonable, it was held that the engineer had no authority to award the plaintiff compensation for a delay in the removal of the staging. Denman J. in the course of his judgment said : "The engineer had no authority to bind the defendants by any such contract. He merely had authority to extend the time for the performance of

the contract." See also Roberts v. The Bury Commissioners (1870) L.R. 5 C.P. 310 upon this point. The engineer is, generally speaking, the agent of the employer for all purposes connected with the work to be done and that without any limitations, and as between the contractor and the employer the authority of the engineer cannot be limited without the contractor being made aware of the fact: Kimberley v. Dick, (1871), 13 Equity Cases 1. The authority of the engineer arises from the mere fact of his appointment and from common knowledge as to the nature of an engineer's profession, but he must not travel outside the scope of his employment and so, in Betts v. Pickford, (1906), 75 L.J. Ch. 483, where an architect gave permission for some roof timbers and stanchions projecting from adjoining premises to be built into a new warehouse the erection of which he was supervising, it was held that he had exceeded his authority. Mr. Justice Kekewich in the course of his judgment (p. 48) remarked "what is within the scope of an architect's authority I am not called upon to say, but I will say this much, that I apprehend his authority is strictly limited by the nature of his employment, that is to say as defined by any letters or agreement constituting his employment."

An engineer is of course the agent of the employer to make plans and drawings, but where plans and a specification for the execution of certain work are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification. The engineer has, in fact, no authority to warrant the

sufficiency of his plans, or guarantee to the contractor that the work can be executed from them : Thorn v. The Mayor and Commonalty of London, (1876), L. R. 1 App : Cases 120, which was a case dealing with the erection of Blackfriars Bridge in the year 1864. In that case, Lord Chelmsford said : "It is also said that it is the usage of contractors to rely on the specification and not to examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description." The engineer, too, has no authority to warrant the accuracy of the quantities : Scrivener v. Pask, (1866) 1 C.P. 715. See also what Brett J. said in the case of Bottoms v. The Mayor and Corporation of York, reported in Hudson on Building Contracts, Vol. II, p. 220.

If there is in the contract a clause by which the employer disclaims responsibility for the accuracy of the statements and information with which he supplies the contractor, and as to which the contractor is to satisfy himself, this will not confer exemption on the employer for statements fraudulently or recklessly made by the employer or by the engineer and whatever be the form of the contract, if there is an allegation of fraud made, the party making it is entitled to have the question tried by jury : Pearson v. Dublin Corporation [1907] A.C. 351.

The engineer, moreover, has not authority where there are omissions, to order those omissions as extras ; even if there is a power to order extras, if they are works reasonably necessary to carry the contract to completion : Sharp v. San Paulo Rly. Co. (1875) 8 Ch. Appeals 597. Nor has the engineer authority, if his plans are impracticable, to

order as extras work which is necessary in order to make them practicable : Tharsis Sulphur & Copper Co. v. McElroy (1878) 3 App : Cases 1040.

Even if authority has been given to the engineer to furnish further plans and other detailed and working drawings during the progress of the work, this does not entitle him to make variations which are totally subversive of the original scheme ; he can only give more detailed drawings of the plans already in use : Rex v. Peto (1826) 1 Young & Jarvis 37. Without the express consent of the employer the engineer has no authority whatever to alter the contract in any way or to vary the work as provided for in the plans and specifications : Cooper v. Langdon (1841) 9 M. & W. 60.

If the contract does give certain powers, the case of Rex v. Peto already quoted shows that these must be exercised strictly. Therefore where a contract provides for stipulated work at a lump sum and such work is not done, but its equivalent or even better work is effected, no claim for such substituted work can be sustained : Forman v. The "Liddesdale" [1900] A.C. 190. And if there is a provision that there is to be no alteration or deviation from the agreed specification or claim made for extras without the written sanction of the engineer, work so ordered must be within the scope of the engineer's authority to order. For example : A having contracted with B to use cement mortar in building the walls of a house which he was erecting for B, it was held that B's architect had not authority without B's consent to sanction the use of milled lime instead of cement mortar : Steel v. Young [1907] S.C. 360.

Generally speaking unless he is expressly authorised so to do the engineer has no authority to invite tenders, and until he is instructed to do so he is merely a skilled draughtsman and as such only entitled to charge for the specific work he does ; he is not an agent of the employer : see Spratt v. Dornford, Hudson Vol. II. p. 7. The question of whether an engineer is authorised to employ a quantity surveyor is more difficult, but on the whole it would seem that the engineer *qua* engineer, has no authority to do so, though doubtless very little evidence would be sufficient to raise an implied authority, as for example if the employer instructed the engineer to obtain tenders for the work. An authority in the engineer may be implied by custom or from circumstances or by the necessities of the case. In Antisell v. Doyle, [1899], 2 I. R. 275, the defendant desiring to build certain houses employed an architect to make out plans. The architect having done so instructed the plaintiff, a quantity surveyor, to take out quantities and when these were completed the architect invited tenders all of which exceeded the limits of the defendant's proposed expenditure. No tender was accepted. It did not appear that the defendant had authorised the application for tenders. The plaintiff sued for the amount of his charges for taking out the quantities and relied on the alleged custom in the building trade, throwing on the employer the liability for the surveyor's fees where no tender is accepted or for other reasons the work is not proceeded with. The jury found at the trial that the employment of the quantity surveyor was neither within the scope of the architect's authority nor sanctioned by the defendant and that there is no

custom authorising such employment without the consent of the employer. It was held that the defendant was entitled to judgment and, by the majority of the judges, that the custom relied on was not one of which the Court must take notice ; that even if the alleged custom was reasonable as to which *quare*, the verdict against the custom could not be interfered with. On the other hand it would seem from Young v. Smith, (1880), Hudson Vol. II. p. 57, that the custom of the engineer to employ a quantity surveyor has been recognised in the English courts. If the engineer has not implied authority to employ a quantity surveyor he certainly has not any implied authority to take out the quantities himself though it is sometimes done.

An engineer has no implied authority moreover to enter into a formal contract with a contractor even though he has been expressly instructed to obtain tenders and there is a contractor who has tendered at or near the required price : see Hamer v. Sharp, (1874), L. R. 19 Eq. 108. If a contract however is entered into, the contractor will be entitled to recover the price of any work done at the engineer's orders even though it exceeds the employer's limit ; unless of course the contractor had previously been informed by the employer or the engineer of that limit, but the employer will be able to recover from the engineer damages for any loss he may sustain owing to the latter having allowed the contractor to exceed the limit privately given to the engineer by his employer: Kimberley v. Dick, (1871), L. R. 13 Eq. 1. When once the contract is made, the engineer, if employed for that purpose, has authority to superintend the execution of the works on behalf of the employer. His business is then "to be an over-

looker of the owner, to see that the work is accurately performed": Rex v. Peto, (1826), 1 Y. & J. per Alexander, C. B. at p. 59. The contractor must obey all reasonable directions or instructions given to him by the engineer, and if he has expressly contracted to carry out the works in accordance with such directions and instructions he must obey them even if they are unreasonable, as there is no warranty or implied contract on the part of the employer, that the engineer will only give such directions as are reasonable: Jones v. St. John's College, Oxford, (1870), L.R. 6. Q.B. 115. The engineer has no implied authority to dismiss the contractor. This must depend on the terms of the engineering contract and if the engineer is to exert such authority it must be expressly conferred upon him by the employer.

As already pointed out an engineer has not any general authority to waive, or vary, any of the terms or conditions of the contract or to alter the work as laid down in the drawings and specification. The case of Cooper v. Langdon, (1841), 9 M. & W. 60, is conclusive on this point. Alderson, B. at p. 67 said: "The defendant undertook to do the work according to the drawings. He has not done so but he says he deviated from them by the authority of the architect of the plaintiff. He does not aver that he did them according to the plans and specifications and no authority is shown on the part of the architect to bind the plaintiff by any deviation from the drawings."

The engineer has no sort of power to bind the employer by representations varying the contract, so it is useless for a contractor to plead that he varied the contract or made alterations in the design

or materials owing to the engineer's statements or promises that the terms of the written contract would be varied or waived altogether. This is especially the case when the employer is a corporation. The written contract together with the plans and specification should as a rule be taken as defining the powers and authority of the engineer who is superintending the works, and therefore anything he does or proposes to allow to be done outside those powers should be looked upon with a certain amount of suspicion or at any rate cautiousness and treated by the contractor as being in excess of his real powers and authority. The question of the engineer's powers with regard to certificates will be considered later on.

A word or two must now be said as to the legal position of the various parties. So long as the engineer keeps strictly within his expressed or implied authority as the employer's agent he incurs no personal liability to the contractor, for he does not warrant his client's solvency or that he will commit no breach of the building contract, or even that he will act in a reasonable manner.

The engineer in these circumstances enjoys all the immunity of an ordinary agent: see Wilson v. Bury (1880), 5 Q.B.D. 518. If however the engineer does exceed his authority, whether that authority is general or special, the employer is then under no liability towards the contractor for the unauthorised work unless he subsequently accepts the work or adopts what the engineer has done or unless the employer is to be bound by the engineer's final certificate. In the case of Sharpe v. San Paulo Railway (1873) L.R. 8 Ch. 597 to which I have already alluded, it was held that the contractors

could not on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the amount specified in the contract. The question as to what amounts to a sufficient ratification by the employer of an unauthorised act on the part of the agent depends to a large extent upon whether the employer is an individual or a corporation.

If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and so knowing allows the stranger to expend money in that belief, it seems that a Court of Equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal: Ramsden v. Dyson & Thornton (1865) L.R. 1 H.L. 129.

If the engineer exceeds his authority he is also liable to be sued by the contractor for breach of warranty of authority whether he bonâ fide believed he had sufficient authority or not, and indeed if the engineer fraudulently asserted that he had authority, when in fact he had not, he would also be liable to an action in tort for deceit. The measure of damages for breach of an express or implied warranty of authority is the loss sustained either as a natural and probable consequence or such as both parties might reasonably expect to result as a probable consequence of the breach of warranty: Mitchell v. Kahl (1862) 2 F. & F. 709. In Randell v. Trimen (1856) 18 C. B. 786 the defendant, an architect, falsely and fraudulently represented to the plaintiff that he was authorised by the employer to order, and did order certain quantities of stone for the building of a church to be charged to the employer. The plaintiff,

relying on the representation of the defendant supplied the stone, whereas in fact the defendant had no authority to order it, and, the employer refusing to pay for it, the plaintiff brought an action against him for the price and failed. Because of the false representation and assumption of authority on the part of the defendant, the plaintiff was held entitled to recover from him by way of damages not only the price of the stone supplied but also the costs which he had paid in the unsuccessful action against the employer. If the owner does not adopt or ratify the unauthorised order of the engineer he can sue the contractor for not performing the contract according to its original terms, and it is no answer for the contractor to set up the defence that he deviated from the plans or made omissions by the authority of the engineer.

LECTURE II.

Delivered 25th October, 1910.

Mr. GEO. T. BULLOCK,

Past-Chairman of the Junior Institution of Engineers, in the Chair.

THE various functions of an engineer and the duties which he has to perform when he has been engaged to design and supervise the erection of any works, have been admirably and concisely summarised by Mr. Hudson on p. 31 of his book on Building Contracts, and I now propose to consider those duties in detail and to deal briefly with the legal position of the engineer in regard to them. An engineer under an engineering contract usually acts, it would seem, in several distinct capacities. He is, first of all, merely a designer or draughtsman; then, when he has received instructions to get tenders and have the work executed, he becomes an agent for the employer, and from time to time during the progress of the works he assumes the role of quasi-arbitrator between the employer and the contractor, and finally he may have to act in a fully judicial capacity under the terms of the contract appointing him arbitrator between the parties in the event of a dispute. An engineer's duties and liabilities are personal to himself, and therefore, following the ordinary rules applicable to the relationship of principal and agent, he cannot entirely delegate them or transfer them to

some one else without the express or implied authority of the employer. The rule of law in regard to this is expressed in the maxim "delegatus non potest delegare" which is founded on the confidential character of the contract of agency. The general rule of law is, that whenever authority is coupled with a discretion or confidence it must be executed by the agent in person. This does not of course prevent the engineer from making use of the skill and labour of assistants or clerks; for although an agent cannot delegate his authority there are many acts which he must necessarily do through the agency of other persons and which, notwithstanding, are valid when done (Rossiter v. The Trafalgar Life Assurance Association (1859) 27 Beav. 377) because there is always an implied authority from the principal that his agent may employ a sub-agent where such employment is justified by the usage of the particular profession, or where the authority conferred is of such a character as to necessitate its execution wholly or in part by means of a deputy, and where the acts done are purely ministerial and do not involve confidence or discretion. Lord Justice Thesiger in the course of his judgment in the case of de Bussche v. Alt, said "the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case the reason of the thing requires that the rule should be relaxed": see (1877), 8 Ch. D. at p. 310). See also Harris v. Fiat Motors Limited, decided in 1906 and reported 22 T.L.R. 556 and per Williams J. in Hemming v. Hale (1859) 7 C.B.N.S. at p. 498. In the case of The Burial Board of St. Margaret's, Rochester v. Thompson (1871)

L.R. 6 C.P. 445, one of the questions for decision was whether the sexton was entitled to appoint another person to dig graves and ring the bell, and in giving judgement Willes J. summed up the law as to delegation of duties in these words "If a person is appointed to some function, or selected for some employment, to which peculiar personal skill is essential—as a painter engaged to paint a portrait—he cannot hand it over to some one else to perform ; but where the thing to be done is one which any reasonably competent person can do equally well, or where any discretion to be exercised is in respect of a merely ministerial act, a deputy may be appointed" (p. 457). This statement of the law applies to engineers equally with sextons so that it follows that an engineer may to a certain extent employ deputies providing that he does not abdicate his functions as engineer or neglect the duties of his position or cease to exercise his judgment and discretion. Where therefore an architect certified in the following form "I hereby certify that A.B. is entitled to recover the sum of £585 to balance account of works, as certified by the measuring surveyor to be the final amount due thereon," it was held by Grove J. that the certificate was good on the ground that there was "nothing to shew that the architect had deputed his judicial position as architect to another person or had acted upon the judgment of another person and not exercised his own judgment:" see Clemence v. Clarke decided in 1880 and reported in Hudson Vol. II, p. 41. Of course, if an engineer does delegate some of his work to another, even in circumstances where such delegation is reasonable and permissible he will be just as liable to the employer for any defects or errors as if he had done

the work himself, and as Abbott C. J. said in Moneypenny v. Hartland & Others, 1 Car. & P. at p.354, "if he went upon the information of others which now turns out to be false or insufficient he must take the consequences."

Here let me say also that an engineer is not entitled to put implicit faith in a resident engineer or a clerk of works appointed by the employer. In a case reported in The Times, 31 October, 1893, Lee v. Bateman, an architect brought an action for his fees, and the employer counterclaimed for negligence by reason of the architect not having had a number of damaged beams removed from the house in which he had carried out certain alterations. The clerk of works appointed by the employer had thought that new beams were not required. Cave, J. directed the jury that the question of whether new beams were required was one for the architect to decide and that the responsibility rested upon him if he adopted the view of the clerk of the works without himself making a proper inspection.

With regard to the duration of an engineer's duties as quasi-arbitrator or certifier under an engineering contract it may be said that his duties generally speaking continue until he has fulfilled his duties under the terms of the contract, whether the contractor has forfeited his rights or not; so that where payments under a contract are to be made so soon as an engineer shall give a certificate, and such certificate is honestly and bonâ-fide withheld, no action can be maintained by the contractor for the amounts alleged to be due to him, as it is the engineer's duty to exercise his discretion and he

is in fact acting as quasi-arbitrator : see Botterill v. The Ware Board of Guardians, (1886) 2 T. L. R. 621.

If the engineering contract contains a provision that disputes shall be rererred to the engineer, neither the employer nor the contractor can refuse to submit to his jurisdiction as arbitrator ; because by the terms of the Arbitration Act, 1889, such an agreement is really a submission to arbitration and therefore irrevocable unless of course there is also in the contract power reserved to the employer to appoint another engineer or a statement that the engineer appointed is only the engineer for the time being. If the engineer is specifically nominated arbitrator by name then neither the employer nor the contractor can possibly refuse to appoint him arbitrator and submit to his ruling : Pollock C. B. in Mills v. Bayley,(1863) 2 H. & C. at p. 41. said "where there is a reference to a particular individual to ascertain the quantity of work done and the amount due as, for instance, where the parties to a building contract stipulate that an architect shall certify whether the work has been done and the price to be paid for it, neither party can revoke his authority." If again, there is a covenant in the engineering contract whereby the parties agree to abide by the engineer's decision, whether as to price or otherwise, such an agreement is equally irrevocable unless there is, as already mentioned a power reserved to the employer to appoint another engineer : Bos & Another v. Helsham & Another (1866) L R 2 Ex p. 72. What has been said with regard to the irrevocability of the engineer's authority and power to act applies only so far as his duties as certifier or quasi-arbitrator are concerned ; for in so far as he is merely an agent, his employment may be put an end to at any moment,

even without notice, though as previously pointed out if there were no just cause for his dismissal, the engineer would, it goes without saying, have his action for damages, though he could not get specific performance of the agreement to employ him.

It has already been said that anyone who holds himself out as an engineer, is bound to bring to the exercise of his profession a reasonable degree of care and skill and if he does not exercise his calling with proper skill he breaks his contract, and is liable to dismissal, with the consequent forfeiture wholly or partly of his right to be paid ; but more than that he renders himself liable to the employer in damages for any loss the latter sustains and it would seem to be settled that the amount of damages obtainable is not limited to the sum to which the engineer would be entitled on a proper discharge of his duties. For this reason it would perhaps be advisable that there should be a provision in the engineer's agreement of service expressly limiting his possible liability to a certain fixed sum. In the case of Saunders v. The Broadstairs Local Board tried in 1890 and reported in Hudson Vol. II p. 159, an engineer brought an action against the Local Board for £270, commission on work costing £5,000. The Local Board denied liability and counter-claimed for negligence on the part of the engineer in superintending the work. The Official Referee found negligence and fixed the damages at £4,691. The Divisional Court in upholding this decision held that the engineer was liable in damages for his neglect and that his liability was not limited to the amount of his professional charges.

Whenever an engineer is negligent the employer can either set up the negligence as a defence

to an action by the engineer for his remuneration or he can put in a counterclaim for damages as in the case just referred to, though from the rule laid down by Best C.J. in Moneypenny v. Hartland, 2 C. & P. at p. 380 it would appear that, supposing negligence or want of skill to be made out, unless that negligence or want of skill has been to an extent that has rendered the work useless the employer must first pay the engineer and then seek his remedy in a cross action. Of course, if the employer pleases, he can institute an entirely separate action for damages. The question as to whether the engineer has exercised reasonable skill and care is always one of fact, and the criterion to be applied in each case was given by Tindal C.J. in the case of Chapman & Another v. Walton (1833) 10 Bingham at p. 63 where he says "The action is brought for the want of reasonable and proper care, skill and judgment shewn by the defendant under certain circumstances in the exercise of his employment as a policy broker. The point therefore to be determined is . . . . whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill and judgment. This is a question of fact, the decision of which appears to us to rest upon this further enquiry, viz. whether other persons exercising the same profession or calling and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it, and it appears to us, that it is not only an unobjectionable mode, but

the most satisfactory mode of determining this question, to shew by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty would be entitled to a verdict in his favour. And there is no hardship upon the plaintiffs by this course of proceeding, for they might have called members of the same profession or trade to give opposite evidence, if the facts would have warranted it; and the jury would then have decided upon such conflicting testimony according to the relative skill or experience of the witnesses on either side or according to the strength of the reasons which were advanced by the witnesses in support of their respective opinions." Although this judgment was given in a case relating to a policy broker the principle laid down will apply by a parity of reasoning to engineers.

There are a number of cases in which various acts have been held to indicate incompetence or negligence, that is to say, as proving that there has been a want of the required skill and care. The fundamental rule is that a professional man must act in accordance with the recognised canons of the science or art which he professes to have : see Slater v. Baker & Stapleton, (1767) 2 Wilson (K. B.) 359 quoted ante (page 7). The engineer is first of all under a strict duty to inspect the site of the proposed buildings, to examine the under-

lying soil and foundation, and also the adjoining buildings ; and, as already pointed out, if he does not do so himself but relies on the information supplied by another he will still be liable : Columbus Co. v. Clowes, (1903), 1 K.B. 244, where Wright, J., said "I think it was practically admitted that it was his (the architect's) duty to have surveyed the site and measured it." In the case of Moneypenny v. Hartland and others, (1826), 2 C. & P. 378, where an engineer was employed by a committee to erect a bridge and form a road, and to make an estimate of the expense of the works, it was held that he was bound to ascertain for himself by experiments the nature of the soil, and if he made a low estimate and thereby induced persons to subscribe for the execution of the work who would otherwise have declined it, and it turned out afterwards that such estimate was incorrect either from negligence or want of skill, and that the work could not be done but at a much greater expense, he was not entitled to receive anything for his trouble in making such estimate.

The engineer is clearly liable to the employer if he prepares improper plans, sections, and details, and also if he specifies useless or superfluous work, or if he omits proper and necessary work, and even the approval of the plans by the employer will not absolve the engineer from his liability in cases where the employer is personally not of sufficient skill to give a satisfactory decision. It would seem, however, from the old case of Taylor v. Higgins, (1822), 1 L.J. (O.S.) K.B. 19, that although the maps and plans of an engineer are incorrect, yet he may still be entitled to a remuneration for journeys made respecting them. The engineer must supply the contractor with proper drawings and all the necessary plans, and the

specification, together with the proper details and instructions for the execution of the works, and if he does not supply the contractor with the proper drawings and so forth, in due time he will be certainly liable to the employer if, through his default, the contractor rightfully refuses to go on with the contract or gets damages from the employer for the delay.

An engineer is under a general duty to know the law as it affects his profession, and is bound to act in accordance therewith. This means that he must comply with all the local by-laws and regulations as to buildings, he must give all proper notices to the Public Authorities and to the owners of adjoining property. This being so, it is imperative that an engineer should keep himself thoroughly posted in the various judicial decisions which from time to time are given upon the meaning of Building Acts and so forth. In Lee v. Walker, (1872), L.R. 7 C.P., at p. 126, Grove, J., said "I think we may fairly hold it to be part of the duty of one who holds himself out as one skilled in that branch of professional knowledge to become acquainted with a decision which had so important a bearing upon the practice . . . . . I cannot say that ignorance of that change in the practice was not some evidence of negligence." The practice here referred to was that with regard to the obtaining of patents, but there is no doubt that the same principles apply to any other profession, and it is therefore clearly incumbent upon every engineer to keep himself abreast of the times in the matter of legal decisions affecting the practice of his profession, as otherwise he might contravene some local by-law or regulation and thereby render himself liable to his employer for any ensuing loss. See

also James v. Masters, (1893), 1 Q.B. 355, where the facts were as follows: By one of the by-laws of the Merthyr Tydfil Sanitary Authority every person intending to erect a building was required to give to the sanitary authority notice in writing of such intention, and at the same time to deliver or send to the clerk or surveyor complete plans and sections of every floor of the intended building shewing the position, form, and dimensions of the several parts of the building. Another by-law empowered the sanitary authority to remove, alter, or pull down work done in contravention of any by-law relating to new buildings; but there was no by-law directed against persons building contrary to deposited plans. The respondent gave notice to the sanitary authority of his intention to build a house, and sent in plans which were approved. During the progress of the building he made substantial deviations from the plans, and alterations which chiefly consisted in diminishing the height of certain of the floors, but such alterations did not contravene any of the by-laws, there being no by-law regulating the height of rooms in new buildings. The respondent was summoned on a charge of erecting a building without sending in complete plans and sections of every floor as required by the by-laws. The justices had dismissed the summons but it was held on the appeal that as the erection of the building was no longer proceeding in accordance with the deposited plans, the respondent was bound to send in fresh plans in accordance with the change in his intention, and having omitted to do so was liable to be convicted.

The engineer must further inform himself as to the existence or otherwise of private rights, as, for

example, rights of way, light, and air or other easements in connection with the land to be built upon, in order if necessary to take them into consideration in the planning and construction of the proposed works. He must also respect the rights of owners of adjoining property in regard to party walls. These depend chiefly on local acts and by-laws. This duty of the engineer is of the highest importance because the employer will be liable to his neighbour for any infringement of their rights : see Hughes v. Percival, (1833), 8 App. Cases 443. The engineer should also make enquiries as to the tenure of the land on which he proposes to erect works, and ascertain whether there are any restrictive covenants attaching thereto. From what has been said it will be seen that engineers must have at any rate a working knowledge of the laws relating to their profession. They are not expected "to supply minute and accurate knowledge of the law" but they are properly required to know the general rules applicable to the planning and construction of works and buildings and all that appertains thereto : see per Jervis, C.J., in Jenkins v. Betham, (1875), 15 C.B., at p. 189.

An engineer, when employed for that purpose, must properly supervise the works he is constructing and inspect the materials used and the work done at frequent intervals, so that he may be able to say in due course whether the work has been properly carried out in accordance with the terms of the engineering contract or not. In a Scotch case, Jameson v. Simon, heard in 1899 and reported in 36 Scottish Law Reporter, p. 883, it was held that an architect who undertakes the supervision of building operations is liable in damages to his employer for

defective work done by a contractor, where due supervision on his part would have detected and prevented the defect. The Judges in the course of the case made some general observations upon the duty of supervision incumbent upon an architect employed upon ordinary terms, and among other things the Lord Ordinary said at p. 886 (and his remarks apply equally well to engineers) "He (the architect) was bound to supervise, and in doing so he was, I think, bound to use reasonable care and skill, the burden being upon him to show that with respect to any disconformity or default it was such as could not be discovered by reasonable care and skill. I cannot assent to the suggestion that an architect, undertaking and being handsomely paid for supervision, the limit of his duty is to pay occasional visits at longer or shorter intervals to the work, and paying those visits to assume that all is right which he does not observe to be wrong." It may well be that when the engineer stipulates for and obtains the assistance of a clerk of works his implied undertaking is less stringent. He may in that case be entitled to accept the reports of the clerk of works as correct, and of course in no case can the engineer be bound to that minute supervision which is only possible to a person continually on the ground. But speaking generally, his obligation is, so far as is reasonably possible, to see that the work is duly and properly executed, and whether he has failed in that duty in any particular case is a question of circumstances, and a question not for his professional brethren but for the Court.

If an engineer makes an estimate of the probable cost of an undertaking, and his estimate is less than the actual cost of the work, he will be liable in

damages to the employer, provided that the increase in cost is sufficient to show want of proper skill and care, and not only will he be liable in damages but he will also be unable to recover his fees. The deviation from the estimate must be a substantial one, however, for if it is merely a trifling one the engineer will still be able to recover. Best, C.J., in Moneypenny & Hartland, (1826), 2 Car & P., at p. 381 said "If a surveyor delivers in an estimate greatly below the sum at which a work can be done and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover ; and this doctrine is precisely applicable to public works." In another similar case Bayley, J., used these words "The plaintiff claims as much as his services are worth ; and if he led his employers into a great expense by his want of care, his services would be worth nothing" (1 Car & P., p. 335) ; and Abbott, C.J., at p. 356 said "I think it of the greatest importance to the public that gentlemen in the situation of the plaintiff should know that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover anything." In the case of Nelson v. Spooner, (1861), 2 F. & F. 618, which was an action by some architects whose plans, after having been accepted, were rejected on the ground that the work could not be done for the amount of their estimates, it was decided by Cockburn, C.J., that it is for a jury to say whether it is an express or implied condition of the contract that the estimates shall be reasonably near the actual cost. See also Moffatt v. Laurie, 24 L.J. C.P. 56. Where an engineer is instructed or authorised to obtain tenders, it would seem, according to the decisions in various cases, that

he is entitled on submitting some which are unsuitable to get others, provided, however, he does so within a reasonable time, as otherwise he might be held liable for any loss accruing to the employer owing to the loss of time. An engineer would, it is submitted, also be liable if he negligently takes out quantities, or even if the employer suffered loss owing to the insolvency of a contractor recommended by the engineer, as to whose stability the engineer had not made reasonable enquiries. In the case of Hayes v. Tindall, (1860), 2 F. & F. 444, Blackburn, J., left it to the jury to say whether the nature of a house agent's business was such that he was not bound to make inquiries as to the solvency of a tenant he was introducing, or whether it was such as did impose that duty. If so, then he told them the agent was bound to use care to discharge such duty. The duty of an engineer towards his employer is no doubt of an analogous character, and he must make reasonable enquiries as to the fitness and solvency of the contractor he introduces to his client.

As already said, an engineer would be liable to his employer for negligence in not properly supervising the work under a building contract which he was employed to supervise by the building owner (see in this connection Rogers v. James, (1891), T.L.R. 67), but more than that, he will also be liable if he carelessly or unskilfully measures the work done: see Saunders v. Broadstairs Local Board, (1890), Hudson, Vol. II., p. 159.

Now although, as has been shewn, an engineer is, generally speaking, liable to his employer for negligence, that is for not displaying a proper and reasonable care and skill, he is nevertheless not liable for want of skill, ignorance of law, or even

negligence when he is acting in a quasi-judicial capacity as arbitrator or even as certifier between the parties. He is only liable when he is acting as a person of professed skill. It is, however, often very difficult, if not impossible, to determine whether he is acting in the one capacity or the other. In Chambers v. Goldthorpe, (1901), 1 K.B. 624, a building contract provided that the certificate of the architect employed by the building owner, showing the final balance due or payable to the contractor, was to be conclusive evidence of the works having been duly completed and that the contractor was entitled to receive payment of the final balance. It was held by the Court of Appeal that the architect, in giving his final certificate, was placed in the position of an arbitrator as between the building owner and the contractor, and was not liable for negligence in the exercise of those functions. The Master of the Rolls in his judgment at p. 633 said "The question raised is whether, in ascertaining and certifying the amount payable by the defendant to the contractor, the plaintiff was in the position of an *arbitrator* between the building owner and the contractor, or merely in the position of an *agent* for the building owner. If he were merely in the latter position he would clearly be liable for negligence; but if he were in the position of an arbitrator, then, beyond all doubt, the building owner could not sue him for negligence, for in that case he would only be liable to an action on the ground of fraud or collusion." The ascertainment of the amount to be paid to a contractor is not a matter of mere arithmetic, not a merely ministerial or clerkly duty, to use the words of Lord Coleridge in Stevenson v. Watson, (1879), 4 C.P.D. 148, but one

involving the exercise of professional knowledge, skill and judgment. It is not necessary that there should be an actual dispute between the parties in order to put an engineer into the position of quasi-arbitrator, for as A.L. Smith, M.R., pointed out, why should not there be an arbitration to settle matters as to which, even if there was no actual dispute, there would probably be a dispute unless they were so settled.

In the well known case of the Tharsis Sulphur & Copper Co. v. Loftus, (1872), L.R. 8 C.P. 1 there was no more a dispute than in the case of Chambers v. Goldthorpe. In the Tharsis Sulphur Co. v. Loftus a ship, having incurred a general average loss, an average adjustment had to be made. There was apparently no actual dispute as to the proportions of the loss to be borne by the parties interested respectively, but those amounts had to be settled, just as in Chambers v. Goldthorpe it was necessary on the completion of the works to ascertain what was payable by the building owner to the builder, and the matter was therefore put into the hands of an average adjuster. It was held that the average adjuster could not be sued for negligence, on the general principle that a person so employed is in the position of an arbitrator and cannot be sued in respect of the manner in which he has exercised his functions, unless, of course, he be guilty of fraud or collusion. The case of Pappa v. Rose, (1871), L.R. 7 C.P. 32, 325 also decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions, for the purpose of deciding the matter in dispute, that an arbitrator in the strict sense of the

term would have to exercise, nevertheless is not liable to an action for a want of skill. Brett, J., in his judgment in the Tharsis Sulphur Co. v. Loftus, referring to Pappa v. Rose, said "It appears to me that the reasoning employed in that case is equally applicable to an action for want of care and that if an arbitrator in the strict sense of the word is not liable for want of care it follows that a person who has undertaken to decide a dispute between two parties is also not liable." The principle of law which forbids an action for want of skill or care against an arbitrator or quasi-arbitrator is just as applicable to a skilled or professional arbitrator as to one that is unskilled and non-professional, and the fact of its being his business makes no difference. The principle of law applicable is, that when two men employ a third to settle a dispute they are bound by what he decides. The parties are supposed to have satisfied themselves as to the third person's skill and care, and they are not allowed to say after his decision has been given that he had acted negligently or with want of skill: per Mathew Restell v. Nye, (1900), 16 T.L.R. 154. The real duty of an engineer when acting as quasi-arbitrator was explained by Lord Collins (then Collins, L.J.) in Chambers v. Goldthorpe, where he said "The question whether he (the architect) was in that position appears to me to depend upon whether, to use the words of Channell J. in the Divisional Court, he was placed in a position in which he was bound to exercise his judgment impartially as between the two parties to the building contract. It was argued that he was not placed in that position, but was to act only as agent for the building owner, and that as such agent he owed no duty to the builder to act carefully and impartially. The question is whether

that view, or the view that he was bound to exercise his judgment impartially between the parties, is the right view of his position. . . . . What then is the position of an architect who, under a contract such as that here in question, has to give a certificate which is to be final and binding not only on his employer but also on the other party to the contract? Can he address himself to his duty in the matter of giving that certificate free from any obligation towards that other party, or is he placed in a position in which it is his duty to exercise his judgment impartially as between the parties to the contract? It appears to me that he is placed in the last-mentioned position." Lord Justice Romer delivered a dissentient judgment in Chambers v. Goldthorpe, and said he thought it would be lamentable that in cases of this kind an employer who pays an architect for supervising work and who has sustained damage by his negligence in the performance of the duties for which he is paid should have no remedy against him, but of course the opinions of the majority of the court prevail, and the law is now settled as stated above. If an employer makes the decision of his engineer binding as between himself and the contractor he cannot protect himself by an agreement (not disclosed to the contractor) with the engineer by which the latter, in spite of his position as quasi-arbitrator, renders himself liable to the employer for negligence. The reason for this is, that any contract out of the ordinary course between the employer and the engineer, if not revealed to the contractor, would be a fraud on him. As Lord Romilly, M.R., said in Kimberly v. Dick, (1871), L.R. 13 Eq. at p. 19 "It is impossible that the builder can be bound by an undertaking that he would abide by the decision of the architect on all such occasions inasmuch

as that undertaking has been entered into by the builder at a time when he was ignorant of the contract between the architect and the employer, and when he supposed that the decision of the architect would be impartial, unbiased, and not one in which he had himself a strong pecuniary interest." If the building contract provides that the decision of the engineer is to be final, the decisions of the latter cannot be questioned and this is to the advantage of an employer provided of course, he has selected a competent and trustworthy engineer. If, however, the engineer's decision is not expressed to be final, or if there is an appeal to an independent arbitrator, the matter can be re-opened and the employer could recover for bad work or materials notwithstanding the engineer's approval.

In the recent case of Robins v. Goddard, (1904), 74 L.J. K.B. 167 a building agreement provided that the contractor should be entitled under certificates to be issued by the architect to payment by the employer by instalments, but that "no certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement." It further provided that, save as to certain specially excepted matters, any dispute or difference arising between the employer and the contractor as to the construction of the contract or as to any matter or thing arising thereunder should be referred to arbitration, and that the arbitrator should have power to open up, view, and revise any certificate, opinion, decision, requisition or notice (save as to specially excepted matters), and to determine all matters submitted to him as if no such certificate,

opinion, etc. had been given. It was held that this certificate was not conclusive as to the rights of the parties, and that the employer was entitled to set up a counterclaim for damages in respect of alleged defective work and the supply of improper materials under the contract. Collins, M.R., said, "If something which purports to be conclusive is itself made subject to another adjudication it loses that finality which would make it a condition precedent to the right to sue, and therefore it leaves open the remedy at Common Law."

What has been said hitherto has largely had reference to the relationship of the engineer to his employer and his liability for negligence or neglect of duty toward him, but a word must now be added as to the engineer's liability to the contractor. It has already been pointed out that an engineer in no way impliedly warrants the practicability of his plans: Thorn v. The Corporation of London, (1874) 1 Appeal cases 120. See also Jackson v. The Eastbourne Local Board, Hudson, Vol. II, p. 67. Nor does he give an implied warranty to the contractor of the correctness and sufficiency of the bill of quantities or of his estimates and calculations. In Le Lievre v. Gould, (1893) 1 Q.B. 491 the facts were as follows: Mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates, given by a surveyor, that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part.

It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates and they could not maintain an action against him by reason of negligence. An engineer, so far as he acts within the authority of the employer, is not in any way liable to the contractor because there is no privity of contract between them. If the engineer only acts in pursuance of his authority as agent no liability will attach to him as regards the contractor even though he may act wrongly, improperly or negligently. As Lord Esher said in the case just referred to (Le Lievre v. Gould) "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." An engineer has no sort of contractual relationship to the contractor; his contractual obligation with its concomitant duty and liability is entirely towards the employer and there is therefore, apart from fraud, no legal basis upon which to found a responsibility on the part of the engineer to the contractor. In the case of Ambrose v. The Guardians of the Dunmow Union, (1846), 9 Beavan 508, a builder had entered into a contract to build a Union workhouse on specified terms, but became bankrupt before it was completed, and it was finished by the Guardians. The assignees of the builder sued the Guardians to have an account taken of what had been done, and joined the architects of the Guardians as defendants also. The suit was dismissed with costs and the then Master of the Rolls in his judgment (p. 515) expressed the strong

opinion that there was not the least excuse for joining the architects as defendants, and suggested that it had been improperly done in order to prevent them giving evidence on behalf of the other defendants, the Guardians of the Union. In a case quoted in Hudson, Vol. II, p. 130, Priestly v. Stone, a builder brought an action against a quantity surveyor for negligence in taking out quantities. The quantity surveyor had been engaged by the employer's architect, though his fees were included in the tender. It was held that the quantity surveyor was under no liability to the builder, although he knew the purpose for which the quantities were to be used.

Of course, if the engineer is guilty of fraud he is liable not only to his employer but also to the contractor. Lord Esher, M.R., in the case of De Morgan, Snell & Co., & The Rio de Janeiro Flour Mills, Hudson, Vol. II, p. 198 said "Unless the architect had done what he did fraudulently they (i.e., the contractors) could not sue the architect." An engineer would also be liable to an action if he fraudulently refuses to certify whether or not he is acting in collusion with the employer. In Scott v. The Liverpool Corporation, (1856), 25 L.J. Ch. 227 where an action was brought alleging that the withholding of the certificate by the engineer was a fraud on the plaintiffs, although in the contract in the case there was a stipulation which purported directly and positively to exclude the jurisdiction of any court with reference to the conduct of the engineer, however fraudulent or improper, it was nevertheless held that the engineer was properly joined as a party. Stuart, V.-C., said that "such a stipulation was an express contract that the engineer should not be liable to any proceeding against him

at law or in equity, by reason of any conduct on his part which in ordinary circumstances would render him liable to a suit by the other contracting parties." But because such a stipulation could not but be highly improper the learned Vice-Chancellor treated it as having no operation. In Batterbury v. Vyse, (1863), 32 L.J. Ex. 177 the declaration, or statement of claim as it would now be called, after setting out a contract by which the plaintiff agreed with the defendant to do work to the satisfaction of the architect and to receive payment upon the certificate of the architect, no payment to be considered due unless upon production of the architect's certificate, averred performance by the plaintiff of all things necessary to entitle him to the certificate and that he had completed the work to the satisfaction of the architect, and alleged as a breach that the architect unfairly and improperly neglected to certify, and so neglected in collusion with the defendant and by his procurement, by means of which the plaintiff had been unable to obtain payment of a balance due to him ; it was held that the words " collusion " and " procurement " imported fraud and that the declaration disclosed a good cause of action. Again, in Ludbrook v. Barrett, (1877), 46 L.J. C.P. 798 a contractor brought an action against an architect for refusing in collusion with the employer to certify satisfaction, and for falsely pretending that he was dissatisfied ; it was held that there was a good cause of action and that the architect was not only liable for costs but also for damages on the ground that the statement of claim showed a duty on the part of the defendant, and a breach of such duty, and a fraudulent collusion with another person to abstain from doing that which was a lawful act to do, dam-

age resulting to the plaintiff from the defendant so abstaining from doing such act. As to what will be considered sufficient to constitute fraud on the part of an engineer : see per Lord Cottenham, L.C. in Macintosh v. Great Western Railway, (1850), 19 J., Ch. at p. 375 : " this is clearly a case in which the plaintiffs (the contractors) cannot obtain what they are entitled to at law and their inability to do so has arisen from the acts of the defendants or their agent (the engineer) and whether such acts arose originally from any fraudulent motive or not, I think, that to use them for the purpose of defeating the plaintiffs' remedy would constitute a fraud which this Court will not permit the defendants to avail themselves of." See also per James, L.J., in the Panama & Pacific Co. v. India Rubber &c. Co., (1876) L.R. 10 Ch. at p. 526. If a breach of duty on the part of the engineer, so far as he is an agent, gives the employer a right of action against him, the employer can recover damages for any loss sustained by him through the engineer's breach of duty, and also of course all profits made by the engineer fraudulently : see Parker v. McKenna, (1874), L.R., 10 Ch. 96. If the engineer has acted in collusion with the contractor the employer can not only refuse to pay, and defend any action brought against him by the contractor, but he can also take proceedings against the engineer for any loss sustained by reason of the engineer's improper actions. If the engineer fraudulently withholds a certificate he is liable also to the contractor who can if he pleases sue him alone (Ludbrooke v. Barrett, ubi supra), but in all cases fraud must be proved, mere want of care and skill never being sufficient. There must be *mala fides* or recklessness amounting to *mala fides* : see Sharpe

v. San Paulo Railway Co., (1873), 8 App. Cases 597 and also Priestley v. Stone, reported in Hudson Vol. II. p. 130 (ante p. 47). Lastly it may be said that an engineer will be held liable if personal injury is caused to any one owing to acts done by the contractor under the direction of the engineer, or if the contractor commits a trespass by the instructions of the engineer the latter will be personally liable: Monks v. Dillon, 10 L.R., Ir. 349. Further under the provisions of the Public Health Act, 1875, an engineer employed by a local authority would render himself liable to a penal action if he was improperly interested in any bargain or contract made with the local authority: see Whiteley v. Barley, (1888), 21 Q.B.D., 154. And although there is no reported case in England upon the point it is submitted that an engineer might be held criminally liable, even for manslaughter, if owing to his carelessness or incompetency any person were killed, as for example by the falling of a building the construction of which had been negligently planned and supervised.

LECTURE III.

DELIVERED NOVEMBER 9th, 1910.

MR. DIOGO A. SYMONS,

M.INST.C.E., PRESIDENT OF THE SOCIETY OF ENGINEERS (INCORPORATED), IN THE CHAIR.

WHEN the employer has finally approved of the designs or plans submitted by the engineer, and definitely made up his mind to proceed with the work, the next step is to get in touch with one or more contractors and ascertain at what price the work can be carried through and the necessary materials supplied. For this purpose it is usual to invite tenders either from a selected contractor or contractors or from contractors in general by means of public advertisement. In all cases it is generally the rule to announce that the employer does not bind himself to accept the lowest or any tender, though such a precaution is really quite unnecessary, as an invitation for tenders is merely an offer to negotiate ; it is, in fact, an offer to receive offers which may or may not be accepted, and does not in any sense imply a promise to accept any tender at all. In Spencer v. Harding, (1870), L.R. 5 C.P. 561, the facts were as follows : the defendants sent out a circular in these terms " We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A, amounting to, &c., and which will be sold at a discount in one lot ; payment to be made in cash. The tenders will be

received and opened at our offices, &c." It was held that this did not amount to a contract or promise to sell to the person who made the highest tender. Willes, J., in his judgment at p. 563 said "If the circular had gone on 'and we undertake to sell to the highest bidder . . . .' there would have been a good contract, but the question is whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are willing to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here, there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt." This last sentence really sums up the whole law upon this point, and it was in effect reproduced in the words used by Bowen, L.J., in the famous smoke-ball case Carlile v. The Carbolic Smoke Ball Co., (1893), 1 Q.B. at p. 268, where, referring to the facts in that case, he said "It is not like cases in which you offer to negotiate or you issue advertisements that you have got a stock of books to sell or houses to let, in which case there is no offer to be bound by any contract. Such offers are offers to negotiate—offers to receive offers —offers to chaffer, as I think some learned Judge in one of the cases has said." There is one case where it seems at first sight that the Court has recognised the validity of the custom for the architect or

engineer to accept the lowest of the tenders sent in in response to the invitation to tender, namely, Pauling v. Pontifex, (1852) 1 W.R. 64, where it was held on appeal to the Queen's Bench that the County Court Judge was right on the evidence before him in concluding that, according to the custom in the trade, the plaintiff's (a builder), being the lowest tender, had been accepted, though the defendant's surveyor had no absolute authority to accept the lowest. On close examination, however, it will be seen that this case cannot be taken as a precedent, because the decision was really based on the actual circumstances of the particular case and the conduct of the parties. The County Court Judge had found as a fact that the conduct of the defendants at the time the tenders were opened amounted to an acceptance of the plaintiff's tender. In cases where the employer does bind himself to accept the lowest tender, the meaning of this term might have to be considered, as to which see The South Hetton Coal Co. v. Haswell, Shottan etc. Coal Co., (1898), 1 Ch. 465 ; where the owner of certain coal mines proposed to receive sealed tenders from two parties who were competing for the purchase of them and undertook to accept the highest net money tender. One of the competitors offered such a sum as would exceed by £200 the amount offered by the other. It was held that a tender in this form did not answer the description of the highest net money tender, and an order was made striking out the statement of claim for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action. From the decision in this case it follows that a tender to execute works for £200 lower than any other tender would not be considered the lowest tender

for the purpose of compelling the person inviting tenders to accept it.

Because an invitation for tenders is merely an offer to do business a person inviting tenders may revoke his invitation, and the expenses of making a tender cannot be recovered if the invitation is withdrawn : see Harris v. Nickerson, (1873) L.R. 8. Q.B. 286, which was a case of an auctioneer withdrawing goods after announcing that they would be sold by auction. Blackburn, J., at p. 288 said "Unless every declaration of intention to do a thing creates a binding contract with those who act upon it . . . . we cannot hold the defendant liable." On the other hand a tender may always be withdrawn at any time before acceptance, even though the person making the offer promises to keep the offer open for a given time: Bristol & Cardiff Co. v. Maggs, (1890), 44 Ch.D. 616, unless there is consideration for the promise not to withdraw the offer before the specified time. In Routledge v. Grant, (1828), 4 Bingham 653, Best, C.J., at p. 161, referring to authorities quoted in the argument, said "These cases have established the principle, on which I decide, namely that, till both parties are agreed either has a right to be off." If, however, the tender be made under seal it would seem that it cannot be withdrawn. A tender made by a contractor and an acceptance by the employer or by the engineer as his agent will constitute in law a binding contract when the acceptance is unqualified and no fresh terms are contemplated, and, indeed, a tender and acceptance may amount to a contract although the acceptance refers to a formal contract to be drawn up afterwards, for in Lewis v. Brass, (1878), 3 Q.B.D. 667 it was decided that an intimation in the written acceptance of a tender for a

contract that a contract will be afterwards prepared does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned if the intention of the parties was thereby to enter into an agreement and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. Cotton, L.J., said at p. 672 "The acceptance of an offer accompanied by the expression of a wish for a more formal instrument is sufficient to enable a Court of Justice to hold that a final agreement has been arrived at."

In Allen v. Yoxall, (1844), 1 Car. & K. 315, A, a railway contractor, met B and several others in order to receive tenders with reference to certain work. A then read a specification with reference to the work in question, after which B and the others handed in their tenders. B's tender was signed with his name, but there was no evidence that it was in his handwriting; it was held, notwithstanding, that such tender, taken with the specification, sufficiently proved the contract.

It would, perhaps, always be advisable that an engineer should not accept a tender on behalf of his employer absolutely, but only on condition that the contractor signs a contract in a specified form and also, where it is considered necessary, finds approved sureties for the due performance of the contract and proper execution of the work. It should be noted that an acceptance by a corporation so required to contract must be under seal: see Young v. Royal Leamington Spa Corporation, (1883), 8 App. Cases 517.

In another case a contractor sent in a tender to a railway company for the execution of part of some

works either with a double or single line of rails. He was informed, in writing, by the engineer of the company that his tender was accepted, and that intimation was confirmed by the directors upon his attendance at one of their board meetings, but no document accepting the tender was executed by the company in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterwards abandoned, and the contractor then filed a bill, i.e., brought an action, seeking to have a binding contract executed by the company, or to recover from them the loss which he had sustained in preparing for the works. It was held that he had no claim to relief in equity upon the general merits of the case: Jackson v. The North Wales Railway Co., (1848), 1 Hall & Twells 69.

In the case of the Kingston-upon-Hull Governors v. Petch, (1854) 10 Ex. 611; the Guardians of the Poor issued an advertisement stating that they would receive tenders for the supply of the workhouse with meat for three months; that sealed tenders were to be forwarded, and that all contractors would have to sign a written contract after acceptance of the tender. A butcher wrote accepting the terms of the advertisement. His proposal was accepted and he was informed that he was appointed butcher, upon which he immediately declined the appointment. It was held that the transaction amounted merely to a proposal for a contract and that there was no binding agreement till a written agreement had been signed. An acceptance of a tender should, of course, be stamped in order that it may be sued upon: Coker v. Young, (1860), 2 F. & F. 98, 101. As already said, when once a tender has been definitely accepted there is a binding

contract and the contractor cannot withdraw : see Byrne v. Van Tienhoven, (1880), 5 C.P.D. 344, which is a leading case upon this point. In the case of the Guardians of the Dartford Union v. Trickett, (1889), 54 Law Times 754, the Guardians required and advertised for granite spalls for workhouse purposes to be delivered by a particular day. The defendants sent in a tender which was accepted. The usual form of contract used by the plaintiffs was sent to the defendants. Two days later the defendants sent back the contract signed by them agreeing to deliver the quantity by the day fixed, but adding the words "weather and other circumstances permitting." Four days later the plaintiffs wrote to the defendants acknowledging the receipt of the signed contract, but pointing out that they (the plaintiffs) had erased the words "other circumstances." On the same day the defendants wrote to the plaintiffs that they had put the order in hand. Four days later the plaintiffs affixed their common seal to the contract. The defendants did not execute any part of their contract by the day specified, alleging that want of ships and stress of weather had prevented them from so doing. After a month's delay the plaintiffs were obliged to purchase the granite spalls at a higher price than that tendered by the defendants, and brought the action for damages for a breach of the agreement. It was held that as the defendants had assented to the alteration in the contract made by the plaintiffs there was mutuality between the parties at the time the seal was affixed, and that consequently the plaintiffs were entitled to succeed in their action. Pollock, B., quoting a dictum of Parke, B., in the South Yorkshire Railway Company v. Great Northern Railway Company, (1853) 9 Exch. 55, said at p. 757 that "In truth and

fact the affixing of a seal by a corporation is for all contracting purposes the same thing as the signature of an ordinary individual." Therefore it comes to this: that a corporation may forward their contract after affixing the corporation's seal, and then, if that contract is signed by the other side, or having been signed and an alteration having been made is assented to by the other side, that contract is good. From this decision and also that of a Scotch case it will be seen that the contractor must be careful in the preparation of his tender, for he will not be allowed to withdraw or even to rectify omissions if he has made a mistake in his estimate. The Scotch case just referred to is that of the Seaton Brick Co. v. Mitchell, (1900), 2 F. (5th series) 550. There, Mitchell, a contractor, by letter offered to execute certain carpentry work according to specifications for the lump sum of £859, and the offer was accepted. He afterwards found that his son, who made the offer for him, had in his private calculation gone over the schedule of measurements and quantities and marked down the prices of each item, but that in making the summation of the whole items he had accidently omitted a number of items with the result that the offer was £326 less than it should have been. He accordingly refused to execute the work, and the Seaton Brick Company thereupon had the work done by the contractor who had made the next lowest tender, namely, for £1,085, and then they brought this action for the difference between Mitchell's tender and the price they had had to pay. Mitchell pleaded that in consequence of his son's error he was entitled to resile, i.e., to rescind the contract, but it was held that the defender was not entitled to resile and that he was liable in

damages for his breach of contract. Lord Moncreiff said at p. 555 "When the defender's offer was made and accepted the proprietor's architect had nothing before him to indicate that any mistake had been made on the part of the offeror. Now I understand the law to be that a party who enters into a contract under a mistake must be held to it unless the mistake was induced by the other party or was brought under the other party's notice before acceptance." See also in this connection Kimberley v. Dick, (1872) L.R. 13 Eq. 1.

From the decisions in these cases it is clear that an engineer who, on behalf of his employer, has once accepted a tender without notice that there is any sort of mistake with regard to the figures and estimates contained in it, can, if he chooses, hold a contractor to his tender even though it subsequently turns out that the contractor had in fact made some error in his calculations and thereby made an offer which he would not otherwise have made. Further, it would seem that an offer is no less binding because it is in the form of an estimate and headed with the word "estimate." In the case of Croshaw v. Pritchard, (1899), 16 Times L.R. 45 the facts were as follows: the plaintiff's architect wrote a letter inviting a tender, and a contractor replied "Estimate :— Our estimate to carry out the sundry alterations to the above premises according to the drawings and specification amounts to the sum of £1,230." On the next day the plaintiff wrote that he accepted the contractor's "offer to execute for the sum of £1,230" the work in question. At a later date the defendants wrote that they had made an error in their figures, and that under the circumstances they must withdraw their estimate. The plaintiff had the work done by another builder at a price higher than that

given by the defendant and then brought this action to recover the difference in price as damages for breach of contract. The question was whether there was a complete contract binding on the defendants. Their contention was that the word "estimate" was advisedly used by them in order to avoid a final and binding agreement, and evidence was given by several builders to show that this distinction is always observed in the trade. It was held, however, by Bigham, J., that the defendant's letter headed "estimate" was an offer to do the work at the price named and the learned Judge said "It had been suggested that there was some custom or well-known understanding that a letter in this form was not to be treated as an offer. There was no such custom and if there was, it was contrary to law." The defendants had to abide by the consequences of their mistake and judgment was given for the plaintiff with costs.

Contractors may sometimes enter into agreements among themselves as to tendering for works, and it has been held that a contract not to tender is not void, but valid and enforceable. In Jones v. North, (1875), 19 Eq. 426, tenders for the supply of stone having been invited by a Corporation, it was agreed between A, B, C and D, quarry owners, that B should not tender, that C and D should tender above A's price, that A should purchase certain quantities of stone from B, C and D at a fixed price, and that B, C and D should not supply the Corporation with stone during 1875. The stone was purchased as agreed by A, but B, in breach of the agreement, sent in a tender which was accepted; it was held that the agreement was not void and that B could be restrained by A from supplying the

Corporation during 1875. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can (per Bacon, V.-C., at p. 430), though it might well be that some such contracts would be held void as being in restraint of trade and therefore opposed to public policy. There is little doubt, however, that agreements between contractors merely not to tender or not to bid against one another would be held valid. In Metcalf v. Bouck, (1871) 25 L.T. 539, an agreement was made between A and B not to tender in competition with each other for certain gas-tar, and A, in answer to an advertisement, sent in a mere nominal tender in consequence of which B obtained the contract. On the expiration of the contract fresh advertisements were issued and a tender by B was rejected, whereupon A, without communicating with B, sent in a tender on his own account ; it was held that the agreement between them was still pending and A was liable to B for the breach of it. Again in Carew's Estate, in re, (1858), 26 Beavan at p. 189, the Master of the Rolls, Sir John Romilly, said "I am not aware of any case or of any principle which establishes that such an agreement is inequitable." If a contractor, however, should obtain an acceptance of a tender by offering a bribe or commission to the intending employer's engineer, the employer can, if he chooses, repudiate the contract, or if the work has been begun he can not only recover from the engineer the amount of the bribe he has received but he may also recover from the engineer and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract,

without allowing any deduction in respect of what he has recovered from the engineer under the former head, and it is immaterial whether the principal sues the engineer or the third person first; see The Mayor, etc. of Salford v. Lever, (1891), 1 Q.B. 168. So, too, in the Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha & Telegraph Works Company, (1875), L.R. 10 Chancery Appeals 515; The Telegraph Works Co. agreed with the Telegraph Cable Company to lay a cable, the cable to be paid for by a sum payable when the cable was begun and by twelve instalments payable on certificates by the Cable Company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the Works Company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the Works Company when they received the instalments from the Cable Company; it was held that under the circumstances the agreement between the engineer and the Works Company was a fraud which entitled the Cable Company to have their contract rescinded, and to receive back the money which they had paid under that contract. James, L.J., at p. 526 said that "any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal . . . . the defrauded principal, if he comes in time is entitled at his option to have the contract rescinded or, if he elects not to have it rescinded to have such other adequate relief as the Court may think right to give him." Lord Esher in the Salford case remarked that commissions sometimes cover a multitude of sins and that there the commission received was meant to cover a fraud. The

taking of secret commissions as an inducement or reward for doing or forbearing to do any act in relation to a principal's affairs or business or for shewing favour or disfavour to any person in relation to a principal's affairs or business is now by the Prevention of Corruption Act 1906, made an indictable misdemeanour, and if the tender is for a contract with a public body the engineer of that body and the contractor who had accepted and given the bribe would be liable also to criminal proceedings for a corrupt practice under the Public Bodies Corrupt Practices Act, 1889. A principal, however, cannot follow money received by his agent as trust money, for the relation between the parties is only that of debtor and creditor, not that of trustee and cestui que trust : see Lister v. Stubbs, (1890), 45 Ch. Div. 1 ; Powell v. Jones, (1905), 1 K.B. 11. In any case the claim of a principal in respect of a bribe received by his agent is barred by the Statute of Limitations in equity as well as in law after the expiration of six years from the time when the principal became aware of the bribery. If an employer in inviting tenders is guilty of misrepresentation, which is material and induced the tender, he will be liable so long as the contract remains unperformed to an action for its rescission.

In a case tried in the Exchequer in 1839, Selway v. Fogg, A engaged to convey away certain rubbish for B at a specified sum under a fraudulent representation by B as to the quantity of the rubbish which was to be conveyed. It was held, in the action, which was for the value of the work actually done, that A could recover only according to the terms of the special contract ; when he discovered the fraud he might have repudiated the contract and

sued B for deceit. See also Ormes v. Beadel, (1861), 30 L.J. Ch. 1. Whenever the representation by the party inviting tenders is fraudulent he is liable to an action for damages for deceit. He is also considered to be liable for any fraud committed by the engineer by his authority or privity in regard to the inducing of the contract. See Kimberley v. Dick, (1872), L.R. 13 Eq. 1, to which reference has already been made.

A word or two must now be said as to the construction and interpretation of tenders. The invitation for tenders and the tender itself must be taken together as constituting an agreement contained in several different documents. And where the invitation and tenders form a completed contract either party can object to the introduction of any fresh term : see per Bramwell, L.J., in Lewis v. Brass, (1877), 3 Q.B.D. at p. 671. If the agreement refers to the drawings and specification they are accordingly incorporated in the contract, and if the specification has a term fixing the time for completion it was held in Wimshurst v. Deely, (1845), 2 C.B. 253 that under such circumstances that time was of the essence of the contract, and the work must be done within the time named. If the specification, on the other hand, leaves a blank as to the time within which the work is to be completed, then the work has to be done in a reasonable time: Croshaw v. Pritchard, (1899), 16 T.L.R. 45 and see also Alcoy & Gandia Rly. & Harbour Co., Ltd. v. Greenhill, (1898), 79 L.T. 257. A proposal to receive tenders for certain things to be sold specifying no limitation or qualification, and an acceptance also specifying no limitation or qualification, will be construed as a contract for the whole ; and so where the commissioners of Her

Majesty's Works advertised that offers would be received for the old Portland stone of Westminster Bridge, and a firm of contractors made an offer for the stone of a particular quality, which was accepted, it was held that this was a contract for the purchase of all the stone of that quality, otherwise the contract is merely idle and illusory : per Romilly, M.R., in Thorn v. The Commissioners of Her Majesty's Works and Public Buildings, (1863), 32 Beavan 490. In another case, this time against the Admiralty, a tender was accepted from the contractor for the supply of about 2,000,000 tons, or such quantity as might be required, of refuse stone for the construction of a breakwater. After a small quantity had been delivered the Admiralty gave notice that they had entered into a contract with another contractor for the completion of the breakwater, and no more stone would be required from the suppliants ; it was held that the contract meant that the Admiralty would accept approximately 2,000,000 tons of stone, or such quantity, either a little more or a little less, as might be required for the construction of the breakwater, and that therefore the suppliants were entitled to damages for breach of the contract. Stewards & Co. (Ltd.) v. The Queen, (1900), 17 T.L.R. 111.

A binding contract may be constituted by two or more documents even if they mention that a more formal contract is contemplated, provided that the formal document contemplated is one which is to put into more correct form a completed agreement, and not to alter that agreement by adding terms to it.

An engineering contract for the construction of works and the like may be made informally, and need not be in writing unless it is not to be performed within the space of one year from the making of it.

Such a contract does not fall within the provisions of section 4 of the Statute of Frauds (29 Car. 2, c. 3) as relating to land, nor does it come within section 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). A contract to build is not in law a contract for the sale of goods, even as regards the materials. The contract with the contractor is a contract for work and labour, and such a contract has been held not to come within section 17 of the Statute of Frauds, of which section 4 of the Sale of Goods Act, 1893, is a reproduction. In Lee v. Griffin, (1861), 1 B. & S. 272, Blackburn, J., said at p. 277 "If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labour but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In the case of Clark v. Bulmer, (1843), 11 M. & W. 243, it was held that a contract to build an engine of 100 horse power to be delivered and fixed in a certain colliery within a given time was not a contract for the sale of goods, and that the proper action was one for work, labour and materials, or for erecting and constructing the engine. Parke, B., at p. 250 said "The question here is whether it is proper to describe this as a debt for a main engine or goods sold and delivered. We think not. The engine was not contracted for to be delivered as an engine in its complete state and afterwards affixed to the freehold—there was no sale of it as an entire chattel and delivery in that character and therefore it could not be treated as an engine sold and delivered." From this it is apparent that a contract for the sale of an engine or other appliances in a complete state would be a contract within section 4 of the

Sale of Goods Act, and, therefore, unenforceable in the absence of compliance with the provisions of that section which are as follows: "A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery. In cases coming within the provisions of this section the note or memorandum must not only be signed by the person to be sued but it must also contain the names or sufficient descriptions of both parties, the subject matter of the bargain, and the consideration that is to be paid. These particulars, however, need not be contained in one document, but may be gathered from a number of documents connected together.

A contract for building need not be in writing inasmuch as the contractor has no rights in the land on which he is erecting the works: Camden v. Battenburg, (1859), 28 L.J. C.P. 187, 335, and see also per Bramwell, L.J., in the New River Company v. The Midland Railway Co., (1877), 36 L.T. N.S. at p. 540. Nevertheless, a contract for the sale of

the building materials of a house with a condition that all materials were to be taken down and cleared off the ground within two months "after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease" was held to be a contract for the sale of an interest in or concerning land within section 4 of the Statute of Frauds. A binding contract may be established by the mere conduct of the parties even if the agreement made out in writing as a draft has never been formally executed by them, though in Wood v. Silcock, (1884) 50 L.T. 251, it was held by Bacon, V.-C., that the Court will not decree specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement. The real ground of that decision, however, was that the parties had intended subsequently to execute a more complete and formal contract. The most usual case where writing is required, is when the contract is not to be performed within a year from the making of it. In cases not coming within the Statute of Frauds or the Sale of Goods Act, neither writing nor signature, or, indeed, any particular formality is required unless the contract is made with a corporation which, by its charter or by statute, can only contract in writing or under seal. In cases not falling within the two Acts of Parliament just mentioned the signature of the party tendering and verbal acceptance of the specification have been held sufficient to show a complete contract: Allen v. Yoxall, (1844), 1 Carrington & Kirwan 315. So also in Russell v. Trickett, (1865), 13 L.T. 280, where the mere fact that a specification was not signed as required by the statute regulating the Local Authority

was held not sufficient to avoid the contract which was itself under seal. Generally speaking, a party may sue though he has not himself executed the contract: see Morgan v. Pike, (1854), 14 C.B. 473, and by suing he affirms the contract. Even if the plaintiff be a corporation this makes no difference: see per Jervis, C.J., in Northampton Gas Light Co. v. Parnell, (1855), 24 L.J. C.P. at p. 63, where he said "Morgan v. Pike shews that in the case of a private person his non-execution is no objection to his right to sue upon the deed a party who has executed" and at p. 64 "I do not think the fact of their (i.e., the plaintiffs) being a corporation makes any difference, nor that a sufficient reason has been given why any rule different from that which prevails in the case of any other plaintiff should prevail in their case." The rule of construction which applies in these circumstances is "fortius contra proferentem verba accipiuntur." In the case of Pattinson v. Luckley, (1875), L.R. 10 Ex. 330, the plaintiff was employed by the defendant to erect buildings on the defendant's land upon written conditions, which, after being signed, were kept on the defendant's behalf by his architect. One of the conditions made the architect's certificate a condition precedent to the right to payment. The plaintiff, having been paid for all the works for which the architect had certified, sued upon a quantum meruit in respect of works for which no certificate had been given. The defendant in answer set up the conditions, on which appeared an erasure in a material part. The jury having found that the erasure was made by the architect after the plaintiff had signed, the plaintiff contended that the document was void, and that he might sue on a quantum meruit. It was held that, notwith-

standing the erasure, the conditions were either still the governing document, or at least must be looked at to see what were the real terms of the contract, and that the plaintiff could recover. If a contract is by deed, and the deed were so mutilated as not to be binding, even in that case Bramwell, B., doubted whether a plaintiff would lose the benefit of the contract being by deed and so lose his right of action after the expiration of six years.

The determination of what are the terms of a verbal contract is always a matter for the jury: Bowes v. Shand, (1877), 2 App. cases 455; and, indeed, where a contract is contained only partly in writing and partly in oral evidence it becomes a question of fact which may be submitted to a jury upon the whole matter what are the terms of the contract: Moore v. Garwood, (1849), 4 Ex. 681. The construction of a contract entirely in writing, however, as of all written instruments, belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances, if any, have been ascertained as facts, and it is the duty of the jury to take the construction from the Court: per cur. in Neilson v. Harford, (1841) 8 M. & W. p, 823. See also Lyle v. Richards, (1866) L.R. 1 H. & 222.

Printed forms are often used for engineering contracts, because the greater part of the language of them is invariable and uniform and has acquired by use a known and definite meaning, so that it can be applied on all similar occasions by merely adding the particulars in writing; and it is generally true that there is no difference in the importance of words merely because they are printed or written: see

Leake on Contracts, 5th edition, Chapter IV. The words superadded in writing are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions: per Lord Ellenborough, C.J., in Robertson v. French, (1803), 4 East at p. 136; and see Glynn v. Margetson, (1893), A.C. 351, where Lord Herschell, L.C., said "Where general words are used in a printed form which are obviously intended to apply so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent." The rule of construction which applies to all other instruments applies equally to engineering contracts, namely, that they are to be construed according to their sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense unless they have generally in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to the contract, be understood

in some other special and peculiar sense : per Lord Ellenborough quoted by Lord Halsbury, L.C., in Glynn v. Margetson at p. 358. It is, indeed, the leading rule of construction that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistence, but no further : in per Lord Wensleydale in Grey v. Pearson, (1857) 6 H.L.C. 61 ; and see per Lord Blackburn in the Caledonian Railway v. North British Railway,(1881) 6 App. Cases 131; and also Blore v. Giulini, (1903), 1 K.B. 356. Although words are always presumptively to be understood in their plain, ordinary, and popular meaning, as Lord Ellenborough said, technical words are, nevertheless, to be understood in their proper technical meaning, and therefore engineering or building terms used in engineering contracts are to be understood in their ordinary technical meaning: Mallan v. May, (1844), 13 M.&W. 517, and the meaning of such technical language, as intended and understood by the parties, is a question for the jury : Hutchinson v. Bowker, (1839), 5 M. & W. 535. If words are obviously left in the printed form by negligence, and are inconsistent with the words entered in writing, they may be rejected : Western Assurance v. Poole, (1903), 1 K.B. 378. One must look at the whole of the contract, and, having ascertained its main purpose, it may be necessary to reject, not only words, but, indeed, whole provisions if they are inconsistent with what one assumes to be the main purpose of the contract : see per Lord Halsbury, L.C. in Glynn v. Margetson at p. 357. Words deleted

and initialled form no part of a contract, and cannot be read for the purpose of construing it : Inglis v. Buttery, (1878) 3 App. Cases 552. Where a written contract has been lost, and secondary evidence is given of its contents, it is still the province of the Court and not of a jury to decide upon the evidence of its contents : Berwick v. Horsfall, (1858) 4 C.B. N.S. 450; also, where a contract is contained in several letters or writings connected together the construction on the whole is for the Court : Key v. Cotesworth, (1852), 7 Ex. 595. All documents referred to in the contract, such as the plans, specifications and so forth, and identified, must be construed together : see Rex v. Peto, (1826), 1 Y. & J. 37 at p. 54.

Once a contract has been reduced to writing the Court will not consider any previous negotiations or extensive declarations : Lewis v. Nicholson, (1852), 18 Q.B. 503. Parole evidence is not admissible, except to shew that a new or supplemental contract has been entered into : see Bush v. The Trustees of Port and Town of Whitehaven, (1888) Hudson, Vol. II., p. 118 and Taylor on Evidence (9th ed.), pp. 742-746 : or to give a different meaning to words in the contract which may bear a special sense by the custom of the trade or locality, or to explain a latent antiquity though never a patent one : Beacon Fire and Life Ass. Co. v. Gibb, (1862), 1 Moore P.C.C. (N.S.) 573. In Symonds v. Lloyd, (1859), 6 C.B. N.S. 891, the plaintiffs contracted in writing to build for the defendant the front and back walls of a house "for the sum of 3/- per superficial yard of work 9 inches thick, and finding all materials, deducting all lights." The lower part of the walls to the height of 11 feet were of stone two feet thick, the remainder of brick 14 inches thick ; it was held that evidence of the

usage of builders at the place to reduce brickwork for the purpose of measurement to nine inches, but not to reduce stonework unless exceeding two feet in thickness, was admissible, and that the proper construction of the contract was that it provided only for the price of the brickwork, leaving the stone work to be paid for on a quantum meruit. Again, where a written contract provided that a railway engineer should receive extra commission "on the estimate of £35,000 in the event of my being able to reduce the total cost of the work below £30,000" it was held that evidence was rightly admitted to shew to what items of cost the estimate related: Bank of New Zealand v. Simpson, (1900), A.C. 182, where Lord Davey at p. 187 said "Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about" and at p. 189 "Of course, if the words in question have a fixed meaning not susceptible of explanation, parole evidence is not admissible to shew that the parties meant something different from what they have said."

As a general proposition it may be laid down that whichever party is the plaintiff, and is complaining of a breach of contract, he is bound to shew as a matter of law that he has performed all that was incident to his part of the concurrent obligations. He must be able to aver that he was always ready and willing to perform his obligation. "The party who brings an action must shew that he was ready and willing to do his part of concurrent acts; otherwise he cannot succeed": see per Halsbury, L.C., in Forrest & Son v. Aramayo, (1900), 83 L.T. at p. 338, where the plaintiffs agreed to construct and deliver, f.o.b., at the port of London for the defend-

ants a steam launch by a fixed date. The launch was not in fact ready to be delivered until three months after the agreed date, but the defendants did not during that time notify the plaintiffs that there was any vessel at the port of London on board of which they required the launch to be delivered, and it was held that, as the defendants were not ready and willing to take delivery before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery.

The duty of a contractor is to commence the work without undue delay, to use proper care and diligence in carrying it through in accordance with orders given, and to complete within a reasonable time if no definite time for completion is specified. In the words of Le Blanc, J., in Basten v. Butter, (1806), 7 East at p. 484, if a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to shew that he had put together such a quantity of brick and timber in the shape of a house, if it could be shewn that it fell down the next day ; but he ought to be prepared to shew that he had done the stipulated work according to his contract. It is always open to a defendant to prove that work done has been executed in such a manner as to be of no value at all to him, or not to be of the value claimed. Where a contract provides that no final or other certificate shall relieve the contractor from any fraud or wilful deviation from his contract, but that he shall remain liable for a certain number of years for such acts, the employer cannot recover damages for such deviations unless he prove something in the nature of deliberate scamping. Trivial

deviations, or deviations which might have been prevented had the employer or his engineer exercised proper supervision, will not be sufficient to make the contractor liable : see London School Board v. Johnson, tried in 1891 before Denman, J., and quoted in Emden's Building Contracts, 4th Edition, p. 665. In some cases there may be an implied contract on the part of the employer to do certain things before the contractor commences work, and when this is the case the employer will be liable to the contractor for any damage he may sustain owing to the employer's failure to do what he ought to have done, at the proper time : see Lawson v. The Wallasey Local Board, (1882), 52 L.J., Q.B. 302, quoted in Lecture I, ante. Of course it goes without saying that, when the contractor has completed the works contracted for, the employer must fulfil his obligations and make all due payments and so forth, subject however to any special conditions if such exist.

LECTURE IV.

Delivered 21st November, 1910.

Mr. B. E. DUNBAR KILBURN,

Vice-Chairman of the Junior Institution of Engineers, in the Chair.

In the preceding lecture it was pointed out that as a general rule no special formalities are necessary for the formation of a valid engineering contract ; one of the exceptions to the rule being a contract which is not to be performed within the space of a year from the making of it. Another great class of exceptions is found in the case of contracts with public bodies of various kinds, including not only what are properly termed government contracts but also generally speaking contracts with corporations aggregate of all descriptions. Something must first be said as to so-called "Government contracts" which really means contracts in which the contractor is paid out of funds provided by Parliament. Some of these as Mr. Hudson points out in his book on Building Contracts, are made actually with the Crown, others with public bodies created and sometimes incorporated by Act of Parliament and by it provided with the necessary funds. The Crown enters into contracts through its proper agents acting within the scope of their authority, and it enforces such contracts through the Attorney-General who takes all the necessary proceedings to enforce a contract against the subject.

The latter can sue the Crown only by means of a Petition of Right. The procedure on Petition of Right is regulated by the Petitions of Right Act 1860, 23 24 Vict. c 34, the object of which Act as appears from the preamble was to assimilate the proceedings relating to petitions of right "as nearly as may be to the course of practice and procedure now in force in actions . . . between subject and subject," and it is subsequently provided in sec. 7 that the practice and course of procedure in such actions shall extend to petitions of right, so far as applicable. In Tomline v. The Queen (1879) 4 Ex. Div. 252 the Court of Appeal decided that in a Petition of Right, the Crown is entitled as against the suppliant to an order for the discovery of documents, though from Thomas v. The Queen (1874) 10 Q.B. 44 it would seem on the other hand that the suppliant has no power to obtain discovery as against the Crown. A Petition of Right may be either written or printed and must be addressed to the Sovereign in the form prescribed in the Schedule to the Act. A Petition of Right is not a pleading in the ordinary acceptation of the term but it is framed in the most general terms like an article in a newspaper: see per Willes J. in Tobin v. The Queen (1864) 32 L.J.C.P. at p. 224. The Petition concludes in the usual way with a prayer for relief either special or general: see Rustanjee v. The Queen (1876) 1 Q.B.D. 487; James v. The Queen (1874) L.R. 17 Ex. 502. The petition is signed by suppliant, his counsel, or solicitor, and is then left at the Home Office for the fiat of the Crown "that right be done." The granting of the fiat is an act of grace (per Erle C.J. in Tobin v. The Queen (1863) 14 C.B.N.S. at p. 521) and is essential; for in default

of it no steps can be taken : Irwin v. Grey (1863) 3 F. & F. 635. The statute of limitations does not apply to Petitions of Right. The judgment for or against the suppliant is in the form prescribed : Petitions of Right Act, 1860 S.9. See Clode on Petitions of Right pp. 157 et seq.

The different Departments of State exercise their powers either by virtue of the inherent constitutional powers of the Crown or under special statutory powers. An agent for the Crown, so long as he contracts as such, cannot be sued either personally or in his official capacity : Macbeth v. Haldemand, &c., (1786) 1 T.R. 180, but if he contracts without authority or expressly so as to render himself personally liable, he may be sued. A Petition of Right cannot be brought against the Crown for tort in respect of the negligence of its servants nor for a claim based on an allegation of fraud importing to the Crown the fraudulent misconduct of its servants.

When an engineer is retained on behalf of the Crown his engagement, like that of any other servant of the Crown, is liable to be determined at any moment because all such appointments are in theory held solely at the pleasure of the King. The case of Dunn v. The Queen (1896) 1 Q.B. 116 expressly decides that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. This is so, even if the engagement was for a definite period (ibid) and the rule applies not only to employment at home, but also to employment in the Colonies (Shenton v. Smith (1895) A.C. 229,) except in cases where it is expressly modified by law as for example by certain provisions of

the New South Wales Civil Service Act of 1884 : see Gould v. Stuart (1896) A.C. 575. From what has already been said, it will be seen however that the rule with regard to contracts for works is different, for as Lord Watson said in the case of the Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co. (1886) 11 App. Cases p. 613, it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown and it is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. Many public works are now carried out under special Acts of Parliament which make the head of the Department under which they are executed the proper person to sue and be sued. In such cases the contract is not with the Crown nor with the head of the Department as agent for the Crown ; consequently in these circumstances an engineer could recover his fees or obtain damages for wrongful termination of his employment just as if his engagement was with a private individual : see in re Wood's Estate, ex-parte Her Majesty's Commissioners of Works and Buildings, (1886), 31 Ch. D. 607.

A corporation has full power to contract but from earliest times it has been settled law that the corporate will can only be signified by the corporate seal and so we get the rule that a corporation will only be bound by a contract which is executed under seal, (6 Vin Abr. 267). The seal must be affixed by the persons who have authority to do so (D'Arcy v. The Tamar Kit Hill and Callington Railway Co., (1866), 36 L.J. Ex. 37.) and with the

intent that the instrument should operate at once (The Mayor, Constables and Company of Merchants of the Staple of England v. The Governor and Company of the Bank of England, (1887), 21 Q.B. D., 160). The need for the seal was explained by Lord Abinger, C.B. in his judgment in the case of The Mayor etc. of Ludlow v. Charlton, (1840), 10 L.J. Exch. at p. 79. "The seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows he is bound by what is due under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively establishing the sense of the whole body corporate, is a necessary inherent in the very nature of a corporation ; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members . . . . . might be productive of great inconvenience." The general rule therefore is that contracts with municipal corporations must be under seal in all cases where the contract is executory, i.e., one which is either wholly unperformed or in which there remains something to be done on both sides. In these cases the sealing of the contract is essential to its validity and so it would be idle to say there is no magic in a wafer : see per Lord Bramwell in Young v. The Mayor and Corporation of Royal Leamington Spa, (1883), 8 App. Cases p. 528. The necessity for the seal is of course for the protection of the ratepayers or shareholders and others as the case may be who must act through

the agency of a representative body. The importance of the seal is that the fixing of it requires the observance of certain solemnities and formalities which evidence a certain amount of reflection and deliberation. As Lord Bramwell pointed out in the case just referred to, it continually happens that carelessness and indifference on the one side and the greed of gain on the other, cause a disregard of these safeguards and improvident engagements are entered into. In some cases, as in that particular one the decision of the Court may be hard on the plaintiffs, who perhaps do not know the law, but they and others have to be taught it, which can only be done by its enforcement. On the other hand however the absence of a contract under seal, when a contract under seal is necessary, may be set up as a defence against a corporation by the other party to the contract, so that if an engineer or a builder has entered into a contract with a corporation which was not sealed the corporation could not sue the engineer or the builder in respect of it : see The Wandsworth Board v. Heaver (1885) 2 T.L.R. 130. There are certain exceptions to the general rule that a corporation can only contract under seal and these are almost as ancient as the rule itself. As long ago as the reign of the Merry Monarch it was laid down that a corporation might employ one in ordinary services without a deed as for example a butler or a porter and the like (Horn v. Ivy, 21 Car II. 1 Ventr 47) and so it comes about that in these latter days it is not necessary for a corporation to give a contract under seal to its office boys or charwomen. It may in fact be stated as a general proposition that no matter of trifling importance or daily necessary occurrence requires the form of a deed. The supply of

coals to a corporation or a work-house and the hiring of all inferior servants furnish instances of such matters. In Nicholson v. The Guardians of the Bradfield Union (1866) L.R. 1 Q.B. 620 the plaintiff supplied coals from time to time to the defendants, the guardians of a poor law Union, for the use of their workhouse, under articles of agreement between the plaintiff and the defendants, executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals and in an action for goods sold and delivered it was held that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal. In the same way where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract: see Wells v. The Mayor and Corporation of Kingston on Hull (1875) L.R. 10 C.P. 402. Lord Coleridge C.J, while expressing the opinion that a municipal corporation when engaged in any trading transaction has not the same immunity as a corporation created under an Act of Parliament for the very purpose of trading said, referring to the authorities cited before him, "the principle laid down is that whenever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed. Hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing

the common seal are established exceptions." Trading corporations may always through their agents enter into simple contracts relating to the objects for which they were created ; as Bovill C.J. said in the course of his judgment in the South of Ireland Colliery Co. v. Waddle in 1868, "a company can only carry on business by agents, managers and others ; and if contracts made by these persons are contracts which relate to the objects and purposes of the company and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument." See L.R. 3 C.P. at p. 469. A corporation is not bound in an action to set up as a defence the absence of a contract under seal. In the case of The Queen v. Prest the corporation of Halifax had paid their Town Clerk a sum of money for extra services for which there had been no retainer under seal. It was held that at least after payment, it was no objection there was no retainer under seal for the extra services. Lord Campbell, C.J. said "I think, as to a part of these charges, that, as the business was done fairly and bonâ-fide for the benefit of the ratepayers, and the sums have been bonâ-fide paid to the Town Clerk, the question as to the form of the retainer is not material, and we have no authority to interfere and order the sums to be refunded : (1850, 16 Q.B. at p. 43). It was formerly thought that corporations having a titular head such as a mayor or a dean could contract by that head himself entering into agreements without having a contract by deed and

there are a number of old cases which give support to such a doctrine one of them dating from the 16th year of the reign of Henry VII. There is no doubt however that modern decisions have entirely overruled such contention which was quite inconsistent with the decision of the Exchequer Chamber in Bowen v. Morris, decided in 1810 and reported in 2 Taunton 374. Reference has already been made to the common law exceptions to the rule that a corporation can only contract under seal and it was also pointed out that the seal only applies to executory contracts; for in the case of contracts entered into with a corporation which are executed before action brought, and under which the defendant has received the whole benefit of the consideration for which he bargained, it is no answer to an action by the corporation that the corporation itself was not originally bound by the contract, by reason of its not having been made under their common seal, and even if the contract were executory only on the part of the corporation it would seem that their sueing upon it would amount to an admission on record by them that such contract was duly entered into on their part so as to be obligatory on themselves and that such admission on the record would estop them from setting up as an objection in a cross-action that the contract was not sealed with the common seal. See The Wardens and Commonalty of the Fishmongers' Company v. Robertson, (1843), 6 Scott N. R. 56. Again in Doe Pennington v. Tanière, (1848), 12 Q.B. 998 it was held that though to enforce an executory contract against a corporation it might be necessary to shew that it was by deed, yet where the Corporation have acted as upon an executed contract, it is to be presumed against them that everything has been

done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that in general a corporation can only contract by deed : it is merely raising a presumption against them, from their acts, that they contracted in such a manner as to be binding upon them whether by deed or otherwise : see per Lord Denman, C. J. at page 1013. So also in Beverley v. The Lincoln Gas Light and Coke Co., (1837) 6 A. & E. 829 it was held that an action is maintainable against a Corporation aggregate on an executed parol contract. In another case official assignee in bankruptcy (or as we should now call him the Official Receiver), verbally agreed with a corporation, who were mortgagees of the insolvent debtor, to release to them the equity of redemption in consideration of their not proving their debt which exceeded the value of the mortgaged property and it was held that after the assignee had released the equity of redemption, the corporation were precluded from proving the debt, notwithstanding that the agreement was not under seal, and therefore, that the consideration for the release had not failed : The Melbourne Banking Corporation v. Brougham, (1897) 4 App. Cases 156. From what has been said it will be seen that the exceptions that have been made at Common Law to the general rule that corporations cannot validly contract except under seal. are really more of importance to contractors than to engineers. As was pointed out in Church v. The Imperial Gas Co., (1837), 6 A. & E. 849 they are all based on the principle that where " convenience amounting to necessity requires it, corporations may bind themselves by contracts made by parol, that is, say either

verbally or in writing not under seal. What is convenience amounting to necessity depends really on the kind of corporation concerned and the circumstances of each particular case. The case of Wells v. The Mayor, etc., of Kingston-upon-Hull, (1875) L.R. 10 C.P. 402 already mentioned above and also the case of The South of Ireland Colliery Company v. Waddle, (1868), 38 L.J.,C.P. 338 may be cited in this connection. Of course if the corporation is created for the purpose of trade the doctrine is then carried to its greatest extent : see Henderson v. The Australian Royal Mail Steam Navigation Co., (1855), 5 Ellis & Blackburn, 409. In addition to the Common Law exceptions to the general rule that a corporation can only contract under seal, various modifications of the rule have in recent years been made by Act of Parliament and these may be described as statutory exceptions. The Public Health Act, 1875, 38 & 39, Vict. c 55, creates a kind of intermediate class of cases because by that Act contracts entered into by urban authorities where the amount involved does not exceed £50 need not be under seal, but in all contracts where the amounts exceeds £50 the seal is essential. By Section 7 of the Act all urban authorities not then incorporated were thereby incorporated and those already corporations remained so. Sub-section 1. of Section 174 of the Act enacts that "every contract made by an urban authority whereof the value or amounts exceeds £50 shall be in writing and sealed with the common seal of such authority." A similar provision applies to Ireland by virtue of the Public Health (Ireland) Act, 1878. The provision of the Act is obligatory and not merely directory, and applies even though the contract is an executed one

of which the urban authority have had the full benefit and enjoyment and which has been affected by their agent duly appointed under their common seal. Lord Blackburn said in the House of Lords in the course of his judgment in the case of Young v. The Mayor, etc., of Royal Leamington Spa, (1883), 8 App cases at p. 522, "the act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed. In Hunt v. The Wimbledon Local Board (1878), 4 C.P.D. 48, the defendants, an Urban Authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in it was found that the plaintiff's plans were on too extensive a scale, and the intended offices were not erected. There was no ratification under seal of the act of the defendants' surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the building, for which they were designed, and that the cost of the plans was £94. It was held that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for section 174 was imperative and not directory, and applied to every contract for a sum exceeding £50 entered into by an Urban Authority. Lindley, J., when giving judgment at the original trial (3 C.P.D., p. 215) said "It appears to me that I should be depriving the ratepayers of the protection intended to be afforded them by the Statutes with which I have to deal, if I held the defendants liable to pay for work done

under a contract required by those Acts to be under seal, and not in that form." See also the judgment of Bramwell, L.J., in the Court of Appeal (4 C.P.D., p. 51). In the case of Routledge v. The Local Board of Health for Farnham, (1861), 2 Foster & Finlason 406, the Local Board employed the plaintiff, an engineer, about certain works, and made a contract to pay him £500 during two years, he undertaking to do his best to complete the works within that period ; and it was held that they were not liable for refusing to allow him to carry on the works beyond that time, even though the delay was caused by their fault or default, they paying him the whole £500, and that they were not liable for any extra work not contracted for by deed. This case was decided before the Public Health Act, 1875, but it would appear to be, nevertheless, an authority for the proposition that an order for extra work is a new contract, and, as such, must be under seal in cases where a seal is required. The general rule with regard to extras on corporation contracts would seem to be that, where a contract for the original work would be invalid unless made by deed, all orders for extra work will be invalid unless they are also given under seal, unless the original contract under seal provides expressly that the engineer shall be entitled to order extras in some other manner, in which case orders for extras made in conformity with the provisions of the contract will form part of the original contract under seal : see Ranger v. The Great Western Railway Company, (1854), 5 H. L.C. 72. No doubt, in the case of contracts with Local Authorities, where the work done does not exceed £50, sealing would not be necessary in any case. While dealing with the subject of extras it

may incidentally also be stated that, where the contract for work would be valid though not made by deed, if it is, in fact, made by deed, orders for extras may still be given verbally or in writing. All orders for extras are in reality new contracts unless there are special provisions in the original contract applying to the circumstances, in which case they may be made in any way which the law would hold binding, even if the original contract does not exist at all. There are a great number of authorities dealing with the question of necessity or otherwise for the seal in the case of contracts with corporations, and it would, perhaps, be useful to cite one or two of the better known cases upon this point. In a case decided in the year 1885 and reported in 2 T.L.R. 130, The Wandsworth District Board v. Heaver, the plaintiffs sought by means of a correspondence which had passed between them and the defendant to set up a contract. They alleged, in fact, that the defendant, a builder, had agreed to contribute a share towards the purchase of a strip of land which the plaintiffs were to acquire for street widening ; it was held that the correspondence between the parties did not amount to a contract, and that even if it did, as it was not under seal it could not be enforced. It would seem that the seal may be affixed at any time provided there is consideration for affixing it, as for example, a promise to go and complete the contract. In Melliss v. The Shirley Local Board, (1885), 14 Q.B.D. 911, the defendants, an Urban Authority, by contract not under seal employed the plaintiffs, Melliss and Pim, as engineers to perform certain work. The plaintiffs performed part of the work, exceeding in value £50, and then required the defendants to affix their seal to the contract. This the

defendants did, believing that it was for the benefit of the ratepayers of the district that the contract should be completed ; it was held by the Queen's Bench Division that as part of the work was unperformed when the seal was affixed, and there was consideration for affixing it in the plaintiffs' promise to complete the work, it was competent for the defendants to constitute the contract a good contract under seal within section 174 in respect of the work already done, and, therefore, the plaintiffs were entitled to maintain their action for the value of that work. The case was overruled on appeal to the Court of Appeal on another point, namely, that one of the parties interested in the contract was an officer or servant of the Board, and therefore the contract was void under section 193 of the Act, but no doubt the sealing of the contract after the work was begun, seeing that consideration for it was given, made the contract quite valid so far as that point is concerned. In a previous lecture reference was made to the case of the Dartford Union v. Trickett, (1889), 54 L.T. 754, where the Guardians had invited tenders for granite, and Trickett made a tender which was accepted, whereupon the Guardians sent the usual form of tender to him, and he returned it, having added the words "weather and other circumstances permitting," and then sent the contract back signed. The Guardians subsequently wrote to Trickett and informed him they had erased the words "and other circumstances," and then he commenced the work. The Guardians subsequently affixed their seal to the contract, and it was held that, as Trickett had assented to the alteration made in the contract, there was mutuality between the parties when the seal was fixed. It was also held that

because the contracts of corporations are like those of private individuals, where a contract under seal of a corporation is sent to the other party to be signed, or where the contract signed by the other party is altered by the corporation and the alteration is assented to by the other party and the seal is subsequently affixed, the contract is good and valid. This case, therefore, would appear to be an authority for saying that the seal of a Local Authority may always be fixed, even after an alteration in the contract has been made, provided, of course, that the alteration is assented to by the other side.

While dealing with the subject of alterations reference should perhaps be made to the case of Williams v. The Barmouth Urban Council, (1897) 77 L.T. 383, where it was held that if an Urban Authority enters into a contract in writing, sealed with the common seal of such Authority pursuant to sections 173 & 174 of the Public Health Act, 1875, with a contractor for the construction by him, for example, of sewerage works, and the contract contains the usual power for the engineer who has the control and supervision of the works to vary, alter, or enlarge or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the Urban Authority.

The provisions of section 174 of the Public Health Act, 1875, apply only to contracts where the amount does not exceed £50 at the time they are made, and so we get a case which is of great importance to engineers who are engaged by Local Authorities, to advise, say, on improvements, at a given fee per day. This is the case of Eaton v. Basker, (1880), 7 Q.B.D. 529, where the facts were

as follows. Scarlet fever having broken out at Grantham, the Urban Sanitary Authority appointed a committee under section 200 of the Public Health Act. A medical man agreed verbally with the committee, on behalf of the Sanitary Authority, to attend the patients, who were housed in tents, at the rate of 5s. 3d. per tent per day, and attended until the amount due was nearly £100. It was held, affirming the judgment of Stephen, J., that the committeemen were not liable to pay the medical man, but (reversing the judgment of Stephen, J.) that although more than £50 became due it was not a contract "whereof the value or amount exceeds £50" within the meaning of the Public Health Act, 1875, section 174, because, at the time of entering into it, the parties had not ascertained that it would exceed £50, and that therefore the Urban Sanitary Authority were liable to the medical man. Lord Justice Bramwell in the course of his judgment, having read section 174, said "The legislature has not used the words 'shall exceed' or 'may exceed' it has used the present tense ; the words 'at the time of making it' must be read into the enactment." It will easily be seen what an important decision this is for engineers when engaged at so much per day without any reference to the time the work is likely to occupy. See also Melliss v. Shirley, ubi supra, on this point. It is to be noticed that the section provides that it is the contract itself which is to be under seal ; it is not sufficient, therefore, that the terms of the contract are set forth in a petition or some other instrument which has not the seal of the Local Board upon it. In the Tunbridge Wells Improvement Commission v. Southborough Local Board, (1888) 60 L.T. 172, a petition was presented by the plaintiffs and

defendants to the Local Government Board, stating an agreement whereby the plaintiffs were to transfer to the defendants certain land forming part of the plaintiffs' district, on condition that the defendants should adopt a certain road and dedicate it as a public highway. The agreement referred to was not under seal, but the petition was sealed with the common seal of the plaintiffs and of the defendants. The cost of completing the road was estimated at over £50. On action for specific performance of the agreement, it was held that under section 174 of the Public Health Act the agreement must be under seal, and that the petition, though under seal, was not a deed, and therefore was not a contract under seal within the section. An Urban Authority is not bound, in an action for work done for them, to set up the absence of a sealed contract: per Hawkins, J., in The Bournemouth Commissioners v. Watts, (1884), 14 Q.B.D. 87. An agreement to compromise a suit is not a contract within the Public Health Act, 1875, necessary for carrying the Act into execution (section 173), so as to require to be sealed with the common seal of the Local Board under section 174, and therefore such agreement, though not under seal, is capable of being enforced by the Board: Attorney-General v. Gaskill, (1882), L.J. Ch. 163. See also Williams v. Barmouth Urban Council, already quoted, where it was held that an agreement between an Urban Authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the Urban Authority, is not a contract within section 173 of the Public Health Act, 1875, necessary for carrying that Act into execution so as to require to be sealed with the common seal of the Urban Authority under

section 174, and therefore such agreement, though not under seal, is also capable of being enforced against the Urban Authority. It should be observed that the provision in sub-section 2 of section 174 of the Public Health Act, 1875, that every contract made by an Urban Authority "whereof the value or amount exceeds £50" shall specify some pecuniary penalty to be fixed in case the terms of the contract are not duly performed, is obligatory and not merely directory, and, therefore, if such penalty is not specified an action on the contract against the Urban Authority cannot be maintained: see The British Insulated Wire Co. v. Prescot Urban District Council, (1895), 2 Q.B. 463, affirmed ibid, 538.

The section just referred to reads as follows: "Every such contract shall specify the work, materials, matters and things to be furnished, had or done, the price to be paid and the time or times within which the contract is to be performed and shall specify the pecuniary penalty to be paid, in case the terms of the contract are not duly performed." Although the section is mandatory it would appear from the case just quoted that the Local Government Board might sanction payment under the contract and the execution of a fresh contract with a proper penalty clause; for when the appeal came on for hearing it was stated that the Local Government Board would sanction the payment of the arrears due under the contract which the Divisional Court had held to be invalid, and that it had been arranged that a new contract, containing a penalty clause, should be entered into in place of the invalid contract, and upon these terms the Court dismissed the appeal without delivering any judgments: see (1895), 2 Q.B. p. 538. Section 174 does not apply to the appoint-

ment of permanent officers of the Urban Authority. Their appointment is made under section 189 and it need not be under seal ; so in Smith v. Hirst (1871), 23 L.T. 665, it was held that the appointments of clerk and surveyor to the Board need not be under their hands and seal, and that a resolution of the Board directing their officers to take certain steps need not be under the hands and seal of the Board. From this case it may be inferred that the appointment of an engineer as a permanent official to a Local Authority would be quite valid and binding if it were done by means of a resolution appearing in the minute book of the Board. There are one or two further points to be mentioned in connection with section 174. Sub-section 3 provides that the Urban Authority shall obtain from their surveyor a previous estimate in writing of the cost and of the most advantageous manner of contracting, but this sub-section appears to be merely directory and not mandatory, and therefore the obtaining of the estimate and so on is not a condition precedent to entering into a valid contract. When a Local Authority has entered into a binding contract there is an implied undertaking on its part to collect and get in the necessary funds to pay the contractor, and it is no defence that there is a want of funds : see Lewis v. The Rochester Corporation, (1860), 9 C.B. N.S. 401 ; and Worthington v. Ludlow, (1862), 31 L.J. Q.B. 131. This was a case under section 69 of the Public Health Act, 11 & 12 Vict., c. 63, which provided that the Local Board of Health may, by notice in writing to the owners of premises adjoining streets which are not highways, require them to do certain works in the same streets, and if the notice is not complied with the Local

Board may, if they think fit, execute the work, and the expenses are to be paid by the owners. The Local Board of Health for a district near Manchester, having thought fit to execute such works, made a contract with the plaintiff to do the actual work for them. The Local Board had, unintentionally, given bad notices, and therefore were unable to collect the money from the owners. The plaintiff, having done the work contracted for, brought an action against the Local Board for the amount due to him by the contract, and it was held that he was entitled to recover, as an undertaking must be implied upon the part of the Local Board that they were in a position to collect the money from the owners and pay it over to him : see also Bush v. Martin, (1863), 2 H. & C. 311. Lastly, in connection with section 174, it must be stated that, by sub-section 4, before any contract of the value or amount of £100 or upwards is entered into by an Urban Authority at least ten days notice must be given, stating the nature and purpose of the proposed contract and inviting tenders for the execution of the works ; and the Urban Authority must also take sufficient security for the due performance of the contract. Where an engineer is engaged as a permanent officer of a Local Authority it will be necessary for him to bear in mind section 193 of the Public Health Act, for that section expressly prohibits an officer of a Local Authority from being concerned or interested in any contract made with such Local Authority from taking any fee other than his salary or allowances, under a penalty of £50, recoverable by any person : and any member of the Board who is interested in such a contract would vacate his seat. The engineer, as officer of the Local Authority, would not only be subject to a penalty but also

could not sue either on the contract itself or on any sub-contract. For example, in the case already quoted, Melliss & Pim v. The Shirley Local Board, (1885), 10 Q.B.D. 446, the Court of Appeal held that the plaintiffs could not recover because one of them, Pim, was an officer of the Board; and in Whiteley v. Barley, (1888), 21 Q.B.D. 154, the Local Authority at Ramsgate had employed their surveyor, Barley, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay: and it was held that the surveyor was liable to the penalty imposed by section 193 of the Public Health Act, 1875.

It appears that the word allowance in the section does not include an allowance in money (The Queen v. The Mayor etc. of Ramsgate, (1889), 23 Q.B.D. 66, which was a case arising out of Barley's case just referred to), but it does include extra payments for extra work, and is not limited to allowances in respect of lodgings, coal, lights, and other like matters: see Edwards v. Salman, (1889), 23 Q.B.D. 531, which arose shortly after the Ramsgate cases above mentioned.

Being interested (in the technical sense, of course) in any bargain or contract entered into with a Parish or District Council or Board of Guardians, or with any Vestry, District Board or Local Board in London, is also a ground of disqualification for being elected or acting on any such body. Public Authorities are protected from vexatious proceedings by the Public Authorities Protection Act, 1893, which provides that actions against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority,

shall not lie or be instituted unless commenced within six months after the act complained of; but these provisions do not protect Local Authorities against actions for the price of goods sold and delivered (Milford Dock Co. v. Milford Haven Urban District Council, (1901), 65 J.P. 483), nor for damages for breach of contract (Clarke v. Lewisham Corporation, (1902), 19 T.L.R.), nor to cases turning on the construction of a contract and the effect of acts done under contracts (National Telephone Co. v. Kingston-upon-Hull Corporation, (1903), 89 L.T. 291). See also Sharpington v. Fulham Guardians, (1904), 2 Ch. 449. In that case the Guardians of Fulham entered into a contract with Sharpington, a builder, for certain works required by them for the purpose of carrying out their public duties. The works were completed on May 3, 1901, and paid for in September of that year. Sharpington then claimed an additional sum by way of damages for loss alleged to have been caused by negligence and frequent changes of plans on the part of the defendants. The contract contained an arbitration clause, and the plaintiff's claim was referred to arbitration in November, 1902. The defendants took two preliminary objections: (1) that the claim was for neglect or default in the execution of the defendants' public duty, and proceedings had not been commenced within six months as required by the Public Authorities Protection Act, 1893; and (2) that the amount claimed became due, if at all, on or before May 3, 1901, and, by the Poor Law (Payment of Debts) Act, 1889, could only be paid within the half year commencing March 30, 1901, or within three months afterwards. The action was brought for the determination of these two points of law, and

it was held : (1) that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing the statutory or public duty, and the Public Authorities Protection Act did not apply ; (2) that the sum (if any) owing to the plaintiff did not become due within the meaning of the Poor Law (Payment of Debts) Act, 1859, until the amount was ascertained by arbitration according to the contract. From this case it will be seen that the Act does not protect Authorities when sued by a contractor for damages for breach of contract and balance of work done.

Something must now be said as to the contracts of Rural District Councils and such like bodies. The members of Rural District Councils also act as Boards of Guardians, which are Corporations under the Poor Law Acts. As Highway and Sanitary Authorities they contract in accordance with the provisions of the Highway Acts and the Public Health Act, while the contracts of Guardians are governed by the Poor Law Acts. County Councils are made Corporations under the Local Government Act, 1888. The law with regard to all these bodies is that, as a rule and for general purposes, being corporations they can only contract under seal : Austin v. The Guardians of Bethnal Green, (1874), L.R. 9 C.P. 91. Lord Denman, C.J., in the course of his judgment in Church v. The Imperial Gas Light and Coke Company, (1838), 6 A. & E. 861 said : "The general rule of law is that a corporation contracts under its common seal ; as a general rule it is only in that way that a corporation can express its will and do any act." That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which

furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact unit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed. This view of the law was adopted by Rolfe, B., in the Mayor of Ludlow v. Charlton, (1840), 6 M. & W. at p. 822. There are a great number of cases on this point, and it is only by reference to these that the application of the rule and the exceptions can be clearly ascertained. Lord Blackburn, in Young v. The Leamington Corporation, (1883), 88 App. Cases at p. 522, said: "The cases on this subject are very numerous and conflicting and they require review and authoritative exposition by a Court of Appeal." The following are some of the cases in which Guardians and Highway Authorities have had to contract under seal: in regard to an order to make a survey of the rateable property in a parish (Paine v. The Strand Union, (1845), 8 Q.B. 326); as to extras ordered over and above a contract under seal (Lamfrell v. Billericay Union, (1849), 3 Ex. 283); and as to the appointment of a medical officer (Dyte v. The Guardians of St. Pancras, (1872), 27 L.T. N.S. 342). In the case of an order for iron gates for a workhouse (Sanders v. St. Neots Union (1846) 8 Q.B. 810), and in the case of a contract for the erection of water-closets in a workhouse (Clarke v. The Cuckfield Union, (1852), 21 L.J. Q.B. 349) Guardians have been held liable, even though the contract was not under seal. Lastly, it

may be said, that Boards of Guardians, Rural District Councils and other public bodies not governed by the Public Health Act, as well as all non-trading Corporations, are liable where there is an executed consideration, even though the contract is not under seal. See Lawford v. The Billericay Rural Council, (1903), 1 K.B. 772, where it was decided that where the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect these purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied. The decisions in Clarke v. The Cuckfield Union, (1852), 21 L.J. Q.B. 349, and Nicholson v. The Bradfield Union, (1866), L.R. 1 Q.B. 620, were approved. With regard to companies it may be said that they have an inherent right to contract, but only in regard to such objects as come within the scope of their Memorandum of Association. A contract not within the objects for which the company is incorporated is said to be *ultra vires*; see The Ashbury Railway Carriage and Iron Coy., Ltd. v. Riche, (1875), L.R. 7 H.L. 653.

LECTURE V.

Delivered 16th January, 1911.

JOHN KENNEDY,

Vice-President, Society of Engineers (Incorporated) in the Chair.

IF there is no condition in an engineering contract, requiring the approval of some person of the materials used or of the work executed, there is no obligation upon a contractor to satisfy the employer or his engineer. All he has to do is to use reasonably good materials, and to carry out the work in a way which would satisfy a reasonably minded person. If this is done the employer will be bound to pay the price stipulated for, even though he may not in fact approve either of the materials used or the work done. Generally speaking, however, it is made a term of the contract that the approval of the employer or of the engineer shall be a condition precedent to payment. Even where a contract does provide that the work is to be done to the employer's satisfaction and approval, the Courts will nevertheless hesitate to make that approval a condition precedent to payment, except on very good ground. In Dallman v. King, (1837), 4 Bing. N.C. p. 105, there was an agreement that a lessee should spend £200 in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, the lessee to be allowed to retain the sum out of the first year's rent of the

premises. It was held in that case that the lessor's approval was not a condition precedent to the lessee's retaining the rent. The reason for the attitude of the Courts upon this point is, that they are naturally reluctant to allow a man to assume the position of judge in his own cause. On the other hand, however, it is equally clear that where from the tenor of the agreement it appears that, however unreasonable and oppressive a stipulation may be, the one party intended to insist upon and the other party to submit to it, a Court of Justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. It frequently happens in the competition which notoriously exists in the engineering and building trades, that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and excessive. From the stringency of such terms escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning. But the duty of a Court in such cases is to ascertain and give effect to the intention of the parties, as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not. See per Cockburn, C.J., in Stadhard v. Lee, (1863), 3 Best & Smith at p. 372. Of course, a stipulation or condition that work is to be done to the satisfaction of an employer or his engineer should always, where the language of the contract admits of it, receive a reasonable construction, as it is to be intended that the party in whose favour

such a clause is inserted meant to secure only what was reasonable and just. This is really the ground of the decision in Dallman v. King, to which reference has just been made. As a general rule, therefore, whenever payment by the employer is made conditional upon his approval of the work, he cannot withhold his approval in an arbitrary or capricious manner unless the terms of the bargain are quite clear and unambiguous, in which case the satisfaction or approval may be quite arbitrary, provided, of course, the right is exercised by the employer in a bona fide way, and not merely for the purpose of defeating the contract; and if a contract does provide that work is to be done to the satisfaction of the employer, he must be afforded an opportunity of making a proper inspection. See Andrews v. Belfield, (1857), 2 C.B. N.S. 779. In this case A had applied to B, a carriage maker, to build for him a carriage of a particular description, and stipulated that the order should be executed in a manner which should meet his approval, not only on the score of workmanship, but also that of convenience and taste. The carriage was built and forwarded to A who found many faults in it and rejected it, and it was held that, the order having been given and accepted on the express condition that the carriage should meet the approval of A "on the score of convenience and taste," the latter was entitled (acting bona fide and not from mere caprice) to reject it. Williams, J., at p. 790 of the report, says: "I cannot arrive at any other conclusion than that the plaintiff . . . was content to take upon himself the risk of producing a vehicle which should satisfy the nice and fastidious taste of the defendant, and that the latter should have the privilege of rejecting it if it did not please him." In this sort

of cases the order given is really a conditional one, and the principle is equally sound as applied to the building and construction of houses and works generally. The question of taste may, perhaps, be of more importance to architects than to engineers, seeing that engineering works are more often of a character which does not admit of much scope from the artistic point of view, being designed more for utility than beauty. One is, for example, not accustomed to associate the idea of artistic effect with a sewerage scheme. At the same time, however, if an employer makes it a condition of his approval that the work to be done shall meet his views on the score of convenience, or even of taste, he is entitled to reject the work if it does not please him, provided always he bases his refusal to pay on some bona fide reason and does not act merely from a desire to avoid payment. The Courts will always the more carefully scrutinize a condition of this kind, when it is a question of placing works upon land which entails a vesting of the ownership in them in the owner of the land, irrespective of payment.

Where there is a contract to pay what the employer thinks fit, there is an implied obligation to pay something, that is to say, whatever is a reasonable sum in the circumstances: see Bryant v. Flight, (1839), 5 M. & W. 114. In all cases where it is expressed to be a condition precedent to the right to payment that the employer shall approve or be satisfied with the work, the contractor will, it would seem, be entitled to be paid if he has done the work in a manner with which the employer ought in reason to have been satisfied: Parsons v. Sexton, (1897), 4 C.B. 899; Braunstein v. The Accidental Death Insurance Company, (1861), 1 Best & Smith

782. The question of what is reasonable of course depends largely upon the position of the employer, and the nature of the work to be done. In some cases it may be stipulated that there shall be a limited right of disapproval, as, for example, in the case of Parsons v. Sexton quoted above; and in Ripley v. Jordan, (1860), 2 L.T. (N.S.) 154, where it was held that the proper construction of an agreement to make a machine "for cutting glue pieces according to drawing, etc., strong and sound workmanship, to the approval of A" is that the approval of A is to be as to the strength and workmanship of the machine, not as to its efficiency for cutting glue pieces. Finally, upon this question of the employer's approval it should be said that, even when the disapproval of the employer need not be reasonable it must at any rate be real, honest, and in good faith. It must never be merely caprice, unless it relates to question of taste as in the carriage case quoted above. If it be in any way fraudulent, or the result of mere caprice or dishonourable intention, the contractor will still be entitled to his money, inasmuch as no person can take advantage of his own wrong-doing or set up as a defence the non-performance of a condition when he himself has prevented its performance. Reference should be made in this connection to the well known case of Roberts v. The Bury Commissioners, (1870), L.R. 5 C.P. 310.

Generally speaking, because the employer is not usually an expert himself, it is customary in engineering contracts to provide that the work to be done shall be carried out to the satisfaction and approval of some third person, i.e., some one who is not a party to the contract between the employer and the contractor; and as it is

immaterial whether the third person is the agent of the employer (see Grafton v. The Eastern Counties Rly. Co., (1853), 8 Ex. 699) it is the practice to make it a condition of payment that the employer's engineer shall give his certificate of approval; and the mere fact that a stipulation that certain questions shall be decided by an engineer appointed by an employer is tantamount in some cases to a stipulation that they shall be decided by the employer himself, does not in any way detract from the virtue of such stipulation: see per Lord Brougham, L.C., in Ranger v. The Great Western Rly., (1854), 5 H.L.C. at p. 117. In that case a contract between the Railway Company and the building contractor stipulated that payments should from time to time, during the progress of the works, be made by the Company to the contractor; such payments to be made on certificates granted by the "principal engineer of the Company or his assistant resident engineer." In case of dispute between the contractor and the assistant resident engineer the decision of the principal engineer of the Company was to be final, but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the Company, it was discovered by the former that the principal engineer was a shareholder in the Company. On a bill to have accounts taken, one of the grounds was this fact, then just discovered. It was held that (no fraudulent concealment being alleged) it formed no ground for relief, and that, by contract, the contractor had bound himself to submit to the judgement of a particular individual whose

position as principal engineer made him interested for the Company.

The approval of the engineer or other person whose approval is necessary (e.g., a clerk of works as in Jones v. St. John's College, Oxford, (1870), L.R. 6 Q.B. 115, or a resident engineer) is usually given by means of a certificate, and is generally referred to as such. These certificates are of two kinds, namely : progress certificates and final certificates. Progress certificates are those which are given from time to time, as the work proceeds, to control and specify the payments to be made by the employer to the contractor by way of instalments. A definition of them was given by Lord Cairns in the case of the Tharsis Sulphur and Copper Coy. v. M'Elroy (1878) 3, App. Cases 1040. The Lord Chancellor there said at p. 1045 : "The certificates I look upon as simply a statement of a matter of fact, namely, what was the weight and what was the contract price of the materials actually delivered from time to time upon the ground." The payments made under these certificates are altogether provisional, and subject to adjustment or to re-adjustment at the end of the contract. The progress certificates will also, of course, include statements as to the value of the labour expended on the materials.

Final certificates are those which are given by the engineer at the end of the contract, stating that all the work has been completed to his satisfaction and that the balance of the contract price is accordingly due and payable to the contractor. Whenever it is clear upon a proper construction of the engineering contract that the certificate of the engineer is a condition precedent to payment of the

contractor, the contractor cannot, save in certain exceptional circumstances, recover without such certificate : see Morgan v. Birnie, (1833), 9 Bingham 672. That was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and workmanlike manner, and with good, sound and well-seasoned materials, and be completed to the reasonable satisfaction of the defendant's architect. The architect checked the builder's charges and sent them to the defendant. It was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. Tindal, C. J., at p. 676 said: "It appears to me that the effect of a certificate would be altogether different, applying to the manner in which the work had been done ; while the checking the accounts applies only to the propriety of the charges." See also Milnes v. Field, (1850), 5 Ex. 829. There a building agreement between the plaintiff and the defendant contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant that the works were performed according to the specification. It was held that the want of a certificate was a good defence, under the general issue, to an account for the instalments.

The functions of an engineer in ascertaining the amount due to a contractor are not merely ministerial, and though the result is one of figures, there must be an exercise of professional knowledge, skill and judgement. He, therefore, to some extent

occupies the position of an arbitrator (as pointed out in a previous lecture) against whom, no fraud or collusion being alleged, an action will not lie. See Stevenson v. Watson, (1879), 4 C.P.D. 148. where Denman, J., in the course of his judgment, said: "to hold that an architect was a kind of appraiser or valuer to look at certain work, cast up certain figures and do rather clerkly than judicial work, or the work of an arbitrator, which requires the exercise of skill and judgment would be to ignore the experience of every member of the Bar and Bench who has had to do with building contracts, and as very many of us have had great experience of them we ought to take it into consideration" (p. 161). Of course Mr. Justice Denman's remarks apply with equal force to the position of engineers when granting certificates.

Although the giving of a certificate must be based upon an exercise of skill and judgement, it is not necessary that in all cases the engineer shall have made all the measurements and calculations himself; it will be sufficient if he overlooks the work of others, and gives his certificate upon the information supplied to him, providing of course he does use a reasonable discretion in the matter. Accordingly an engineer's certificate as to a contractor's right to payment will be conclusive, even if, on the face of it, it is founded upon measurements made by another person on his behalf, provided that it is not shown that the engineer has acted corruptly or abdicated his duty: see Clemence v. Clarke, (1879), reported in Roscoe's Digest of Building Cases. It is not necessary, unless it is so provided in the contract, for the contractor to give any notice to the employer before applying to the engineer for the certificate.

The legal effect of a certificate, must now be dealt with and, as already pointed out, it may be premised that the ordinary common form clause in a contract that the engineer of the employer is to certify as to the progress of the work, or a clause providing that the certificate of the engineer is to be conclusive as to work done and the mode of doing it, is not a submission to arbitration : see per Hannen, J., in Wordsworth v. Smith, (1871), L.R. 6 Q.B. p. 337. Consequently it cannot be made a rule of Court. See also Lawson v. The Wallasey Local Board, (1883), 52 L.J. Q.B.

Nor is the certificate itself an award. Lord Justice James, in Sharpe v. San Paulo Railway Coy., (1873), 8 Ch. Appeals at p. 609, said : " It is not pretended that Mr. Brunlees (the engineer) did not come to a conclusion to the best of his belief and according to the best of his judgment. He was to determine the sums to be paid and was not like an arbitrator dealing with evidence, or like a judge dealing with a law suit. The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances. That was the agreement between the parties : the contractors relied upon Mr. Brunlees, and the Railway Company relied upon Mr. Brunlees. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties, and just to all parties. I myself should be very loath to interfere with any such stipulation upon any ground except default or breach of duty on the part

of the engineer." This case, therefore, is also an authority for the proposition, as will be shown hereafter, that in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties.

A certificate, moreover, does not become an award because a contract says that the contractor shall pay upon certain defaults "*whatever the engineer* '*adjudges*' to be due." See The Northampton Gas Light Company v. Parnell and another, (1855), 24 L.J. C.P. 60, where Jervis, C.J., said : "As to the other point, whether Eunson's (the engineer) adjudication is anything more than a mere appraisement: I think it is not. He takes no judicial appointment; he is not to determine whether or no the covenants have been broken." Mr. Justice Maull, in the same case, said : "As to the second point, whether this is a reference to arbitration, I think it would be extremely inconvenient to distinguish this from the ordinary case of a certificate given by an engineer as to the amount of work done. The duty of the engineer in this case is only to decide the proper sum to be paid by the defendant in case he makes default in the execution of the contract; he is not to determine whether the covenants are subsisting, or whether they have been broken, or to what extent they have been broken, but only to ascertain an amount of an uncertain and not necessarily a disputed matter" (p. 65). This case is also an authority for saying that a clause providing for a certificate will be binding, even though the employer has not executed the contract, for the execution of the contract deed by the plaintiffs was not a condition precedent to the commencement and

completion of the works by the contractor : see per Jervis, C.J., p. 64 ; and also Morgan v. Pike, 14 C. B. Rep. 473. A clause of this character does not come within the provisions of the Arbitration Act, 1889, section 27, which requires that a submission to arbitration shall be by written agreement. Notwithstanding the general rule as to certificates not being awards however, under certain conditions an engineer's certificate will be treated as an award to this extent : that an action for negligence cannot be sought against the engineer by the employer on the ground that he was negligent in granting the certificate. As pointed out in a previous lecture under the decision in Chambers v. Goldthorpe, (1901), 1 Q.B. 624, the engineer in such cases occupies the position of a quasi-arbitrator, and consequently he cannot be called to account in a Court of Law : see also Restell v. Nye, (1900), 70 L.J. K.B. 482, and 16 T.L.R. 154, per Mathew, J. In the case of re an Arbitration between Hohenzollern Actien Gesellschaft and the City of London Contract Corporation, (1886), 54 L.T. 596 a contract for the sale of locomotives provided for payment of the price upon the certificate of the engineer that the locomotives were in perfect working order at Croydon, and by a subsequent clause that "all disputes are to be settled by arbitration." The locomotives were delivered at Croydon, but the engineer refused to certify or to give his reasons for not certifying. The vendors thereupon proceeded under the arbitration clause, the purchasers taking part under protest. An award was given in favour of the vendors. The purchasers then moved to set aside the award on the ground that there was no jurisdiction to make it, and the

vendors moved to enforce it. Judgment was given in the Queen's Bench Division in favour of the vendors, and from that judgment the purchasers appealed. It was held that a dispute had arisen within the arbitration clause, and that whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction, the Court would enforce the award. Lindley, L.J., on p. 597 said: "I think that the arbitrator has not exceeded his jurisdiction. The fact is that without such an arbitration clause as this, these agreements are very often extremely onerous. The engineer may refuse his certificate for any or no reason. That may be one reason why this clause was inserted." Certificates may, by the terms of the contract, be expressly or impliedly conditions precedent to payment, but sometimes on the true construction of the contract the obtaining of a certificate is not really a condition precedent, so that the contractor can recover without it. If in fact the certificate is a condition precedent, the price payable under the contract, though it becomes due when the works are actually completed, is not recoverable until the engineer has given his certificate. Certificates can be made conditions precedent either by express words in the contract or by implication, and it may be broadly stated that, in the absence of an express stipulation, certificates are only conditions precedent in cases where the engineer is required to exercise his judgement and skill in making out his certificate, or has to perform other functions of a quasi-judicial nature, as, for instance, in valuing materials and workmanship or approving the same. Wherever works are to be executed to the satisfaction of the engineer it is clearly intended that a plaintiff should obtain a certificate: see per Jervis, C.J., in Glenn v.

Leith, (1853), 1 Com. Law Reports at p. 574. In that case the claim was founded upon a building contract by which the works were to be executed to the satisfaction of the architect; additions or alterations not to be executed without his order, and the value to be ascertained by him; the money to be paid on completion of the work. It was averred that the architect required additions to the work, which were executed by the plaintiff, and that all things had happened to entitle him to have the values and amounts ascertained, but that the architect did not ascertain the same and that the balance of the whole account was unpaid. The defence was that all things necessary to entitle the plaintiff to have the values and documents ascertained had not happened, because the certificate of the architect that the works had been completed to his satisfaction had not been obtained. It was held: (1) that the satisfaction of the architect was a condition precedent to entitle the plaintiff to have the amounts and values of the extra worked ascertained, and (2) that the declaration, i.e., the statement of claim, was bad for not alleging that the certificate of satisfaction had been obtained, unless the general averment was sufficient for that purpose; and if it were, that the defence raised was a good answer to the action. In some cases not only has the granting of a certificate been made a condition precedent to payment, but also the presenting of it to the employer; as in Scott v. The Liverpool Corporation, (1858), 3 De. G. & J. 334, where the contract upon which action was brought contained a provision that no sums should be considered due or owing to the contractor "unless the said engineer shall certify the amount thereof and that the said contractor is reasonably entitled to

such instalment or balance respectively, nor unless such certificate shall have been presented to the Town Clerk of the said borough." In cases of this description, until the certificate is actually given there is no debt payable, though there may be a debt due. In some cases, again, a condition is inserted in the contract that the final certificate shall precede by a certain time, the date on which payment of the final balance is to be made. This was so in Coleman v. Gittins, (1884), 1 T.L.R. 8. Here, the final balance of a building contract was not to be paid until the architect had given his final certificate. The architect had by letter expressed his satisfaction with the work, but the final certificate was not given till more than a year afterwards. Another clause of the contract provided that only 80 per cent was to be paid as the work proceeded, and the balance in two months after the architect should have expressed his satisfaction with the completion of the work. The action was commenced within two months of the delivery of the final certificate. It was held that the intention of the parties was to be expressed by the architect's final certificate, and that as the action had commenced before the expiration of two months from the delivery of the final certificate, the defendant was entitled to judgment; but that as the defence was technical, and devoid of merits, judgment would be entered without costs. From this case it appears that merely to set up that the stipulated time has not elapsed after the granting of a certificate before the demand of payment, is a defence of a slender character, and one on which it would not be very safe to rely. The word certificate in itself contains no magic (see per Grove, J., in The Dunaberg and Witepsk Railway Company Limited v. Hopkins,

Gilkes and Coy., Limited, (1877), 36 L.T. N.S. p. 737), and even if that particular word is inserted in the contract, that does not necessarily make the obtaining of such a certificate a condition precedent to payment. On the other hand, even if the engineer's certificate is not expressly mentioned in the contract, the obtaining of it may still be an implied condition precedent to payment, e.g.: in the case just referred to. So also Westwood v. The Secretary of State for India, (1863), 7 L.T. (N.S.) 763. There a contract contained a clause that the engineer for the time being should have power to make such additions to or deductions from the work as he might think proper, and to make such alterations and deviations as he might judge expedient during the progress of the work, and if by reason thereof he should consider it necessary ; to extend the time for the completion of the work ; or otherwise the time of completion should be deemed to be not extended, and that the value of all such additions, deductions, alterations and deviations should be ascertained aud added to or deducted from the amount of the contract price. That in the event of the contractors failing to complete their work within the specified time, they should pay the sum of £5 as liquidated damages for each day between the day specified for completion and the day when the work should be completed and ready for delivery ; and, further, that if any doubt, dispute or difference should arise concerning the work, or relating to the quantity or quality of the materials employed, or as to any additions, alterations, deductions or deviations made to, in or from the said work, the same should from time to time be referred to and decided by the engineer, whose decision should be final and binding on both parties. The defendant,

by directing extra work, rendered impossible the performance of the contract by the plaintiff within the stipulated time. In the action which was brought to recover the amount of certain extra works, it was held that the ascertainment of the value of the extra work was a condition precedent to the right of the plaintiffs to maintain their action; and, further, that the defendant, having by his own act rendered the performance of the contract impossible within the stipulated time, was not entitled to set off the penalties. Although there had been no extension of the time for completion by the engineer, Crompton, J., at p. 738 said: "It seems to me that we must give the words in the 11th clause such a construction that the ascertainment of the value amounts to a condition precedent. Any other construction would be to reject the words 'to be ascertained and deducted'." On the other hand, however, it sometimes happens that in the construction of the contract the obtaining of a certificate is not a condition precedent, so that the contractor can recover payment without it, as, for example, when the giving of the certificate is merely a ministerial act, or where the covenant to pay is independent of the covenant to do the work, or where the certificate is not required for the particular work for which a certificate has been given or is not intended to be conclusive (Hudson's Building Contracts, Vol. I., p. 371). In the case of Morgan v. Birnie, (1833), 9 Bing. 672, already referred to ante, it was held by Tindal, C.J., that the mere checking of accounts did not amount to the giving of a certificate. See also Morgan v. La Riviere, (1875), L.R. 7 H.L. 423, 436. Certificates are never conditions precedent where it is obvious from the contract that it was not intended

that the certificate was to be conclusive, as, for example, where there are clauses in the contract giving the employer or the contractor power to go behind the engineer's certificate and enquire into and dispute as to the matters dealt with in it, as for instance in the case of Ranger v. The Great Western Railway, (1854), 5 H.L.C. 72. There the railway company had made the engineer, during the progress of the works, the absolute judge of the mode in which the contractor was carrying out his obligations, and of how much of the price under the contract had from time to time become payable, and his decision was to be final ; yet, after all the works were finished, the contractor was to be allowed to call in a further referee on his own account, as to any question of amount due beyond what was certified by the engineer, and the House of Lords held that he was entitled to an account. Again, in Robins v. Goddard, (1905), 1 K.B. 294, the building contract was in the form approved by the Royal Institute of British Architects, and there was not only a clause as to the architect's certificate, but also an arbitration clause. The point raised in this case is such an important one that it would perhaps be as well to set out the facts in full. They were as follows :—In a building contract an architect was nominated who was given a general control over the works, which were to be carried out in accordance with his directions and to his satisfaction. By a clause in the contract he was empowered to order the removal of improper materials and the re-execution of work not done in accordance with the drawings and the specifications. By another clause, any defects which might appear within twelve months from the completion of the works, arising in the opinion of the architect from

materials or workmanship not in accordance with the drawings and specification, were, upon the written direction of the architect, to be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. A further clause, after providing for payment of the contractor under certificates issued by the architect, declared that, "no certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by the contract." The final clause provided that, in case any dispute or difference should arise as to the construction of the contract, or any matter or thing arising therefrom except certain specified things, notice thereof should forthwith be given, and such dispute or difference should be referred to arbitration ; and the arbitrator should have power to open up, review, and revise any certificate, opinion, decision, requisition or notice, save in regard to the matters expressly excepted, and to determine all matters in dispute of which notice should have been given. The action was brought by the contractor against the employer to recover sums due on certificates issued by the architect, and the defendant set up by way of defence and counterclaim that the work done and the materials supplied were defective and unsuitable, and not in accordance with the terms of the contract. At the trial before Farwell, J., ([1904], 2 Ch. 261), the certificates were held to be conclusive, and judgment given for the plaintiff ; but on the appeal it was held that the arbitration clause destroyed the finality of the certificates, and that consequently the defendant was entitled to set up the defence and counterclaim to the action. It was

further held by Stirling, L.J., that the provision that no certificate should be considered conclusive evidence as to the sufficiency of work or materials to which it referred, was general, and that the clause could not be read as applying only to the liability of the contractor to make good defects. Collins, M.R., at p. 301 said : " If something which purports to be conclusive is made subject to revision it loses its quality of finality." If the arbitration clause, however, excludes the matters left to the engineer's final decision, then no arbitration can take place in respect of them : see Meadows v. Kenworthy, (1897), reported in Hudson, Vol. II., p. 292. So too, if the engineer has merely to act as the agent of the employer, without being required to act in any judicial or quasi judicial capacity, then his certificate is not a condition precedent : see Great Northern Railway Coy. v. Harrison, (1852), 10 Ex. 376. Nor is a certificate conclusive if the covenant to pay be an independent one, as, for example, in the London Gas Light Co. v. The Chelsea Vestry, (1860), 2 L.T. (N.S.) 217. The certificate is, moreover, not a condition precedent beyond the matters to which it is intended to apply, that is to say, it is not a condition precedent save in so far as it expressly provided or impliedly made so : see Lawson v. The Wallasey Local Board, (1881), 48 L.T. 507. Progress certificates are only intermediate certificates to enable the contractor to obtain instalments on account during the course of the operations. They only contain approximately the value of the materials supplied or the work done. See Pashey v. The Birmingham Corporation, (1856), 18 C.B. 2. They are accordinly liable to adjustment and alteration, and are not in any sense conclusive as to

the final payment when the work is finished (see per Lord Blackburn in The Tharsis Sulphur & Copper Co. v. McElroy cited ante), but once they have been signed by the engineer, it would seem from a dictum of Lawrence, J., that they cannot afterwards be withdrawn : Davey v. The Gravesend Corporation, (1903), 67 J.P. 127. It is not necessary that all certificates should be in writing : they may be given orally unless the contract especially provides that they shall be given in writing : see per Hill, J., in Coker v. Young, (1860), 2 F. & F. at p. 101 ; and Roberts v. Watkins, (1863), 14 C.B. N.S. 592. The certificate must be given by the persons appointed in the contract, so that if the certificate of two engineers is provided for, a certificate by one only would not be sufficient : Lamprell v. The Billericay Union, (1849), 3 Ex. 282, 304. It would seem that an engineer would not become disqualified from giving his certificate because his interests had become similar to those of the employer, e.g., in Hill v. The South Staffordshire Railway, (1865), 11 Jur. N. S. 192, it was held that, where payments to a contractor are to be certified for by the engineer of a railway company, he is not disqualified from doing so even on account of his having become lessee of the railway at a rent depending on the amount so certified for. But, on the other hand, where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for his work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount, although he refused to guarantee that amount, the Court did not consider that the decision of the architect made under such a bias as

binding, but gave directions so as to ascertain under the authority of the Court how much remained justly due to the builder : Kemp v. Rose, (1858), 1 Giff 258. Incidentally, this case also decides that the Court will not readily act on parole evidence to fill up a blank in a written contract where the object of the evidence is to inflict a penalty or forfeiture. The conclusiveness of a final certificate is admirably dealt with by Mr. Hudson in his book on Building Contracts, Vol. 1, p. 393, and from the authorities which he there collects it would appear that, in order that an engineer's final certificate may be conclusive and binding, certain definite conditions must exist. First of all, the engineer must be empowered to certify as to the particular matters dealt with by his certificate, and also have authority given him to bind both parties : Roberts v. The Bury Commissioners, (1870), L.R. 5 C.P. Secondly, the contract under which the engineer's power to certify is given must show, by its whole tenor, that it is clearly intended by the parties that the certificate should be binding : accordingly, any sort of provision which would enable either party to go behind and question or dispute the engineer's decision, would do away with the conclusiveness and finality of the engineer's certificate : in re Hoherzollern Actien Gesellschaft and The City of London Contract Corporation, (1886), 54 L.T. 596 ; and Robins v. Goddard, quoted ante. Further, the certificate must be as to a matter requiring judgement and skill, and not be merely a ministerial act as agent of the employer: Morgan v. La Riviere, (1875), L.R. 7 H.L. 423. It must also be honest—for if it is fraudulent it is void—but at the same time it need not be skilfully, accurately or even carefully made: Steven-

son v. Watson, (1879), 4 C.P.D. 148 ; Clemence v. Clarke, (1879), Hudson, Vol. II., p. 41. It must be given during the existence of the engineer's power and authority; and it must be given without interference or unfair influence; and also it must be given, if so required by the contract, after the ascertainment of the facts upon which the power to give a particular certificate arises, as in the case of the Northampton Gas Light Co. v. Parnell, (1855), 15 C.B. 630. It must be given before a dispute has arisen in cases where there is to be in the alternative an arbitration in case of disputes (see Lloyd v. Milward, (1895), Hudson, Vol. II., p. 288); and, lastly, it must purport to be final: see Brunsdon v. Staines Local Board, (1884), 1 Cababe & Ellis 272. In order, therefore, to bind a contractor to the certificate or decision of an engineer appointed by the party for whom the work is done, there must be, generally speaking, very conclusive language in the contract. In Richards v. May, (1883), 52 L.J. Q.B. B. 272, where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the employer: it was held that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive. In an action, too, for a balance due under a building contract, with a plea of set off for penalties incurred by reason of delay, and a replication of hindrance and exoneration on the part of the defendant, evidence of such hindrance and exoneration was admitted, but a certificate of the

defendant's architect that the balance was due was held by Crowder, J., to be conclusive : Arnold v. Walker, (1859), 1 F. & F. 671. In the British Thomson Houston Co. v. West Bros. case, which was tried in 1903, and is reported in Vol. 19 of the Times Law Reports, p. 493, the building contract contained a penalty clause for delay and also a provision that the architect might, under certain circumstances, extend the time for the completion of the work, but no express power to deal with the penalties was given to him. The architects gave the following final certificate : "We hereby certify the sum of..... to be due to.....in settlement of contract for erection of power stations." In an action by the building owner to recover penalties for delay it was held by Phillimore J., that, as the contract only gave the architect power to deal with penalties if circumstances arose justifying an extension, and as his certificate did not show on the face of it circumstances giving him such jurisdiction, the certificate was not conclusive evidence that he had considered and dealt with the question, and that therefore there must be an issue of fact to ascertain whether he had done so or not. There is also an Irish case which bears upon this point : Richardson v. Mehan, (1879), 4 L.R., Ir. 486. Finally it may be said that where, by the contract, an engineer's certificate is intended to be binding, ignorance or incompetence of the engineer will not avoid the certificate. So, if a man employs an engineer or an architect who does not know his business, and who certifies that he is satisfied when he ought not to be satisfied, he must take the consequences, and be bound by his mistake : see per Willes, J., in Goodyear v. The Corporation of Weymouth, (1865), 35 L.J.C.P. 12. The engineer's

certificate, therefore, where it is by the contract intended to be final, cannot be set aside save in certain exceptional circumstances. But though a certificate cannot be called in question for mere negligence or mere mistake or idleness on the part of the engineer, it can be impeached for fraud or collusion : see per Lindley, L.J., in Clemence v. Clarke, ubi supra. In the case of the South Eastern Railway Company v. Walton, (1861), 2 F. & F. 457, it was decided that an action was maintainable by a railway against a contractor for not doing brickwork of the specified thickness, although certified to have been so done by the company engineers in collusion with a sub-contractor ; but the fraud or neglect of the engineer is material to be considered in regard to the question of damage, though not affecting the right of action against the contractor. If an engineer has fraudulently refused to certify in collusion with and by the procurement of the employer, the contractor can still maintain his action, and recover against the employer : see Batterbury v. Vyse, (1863), 2 H. & C. 42, where the declaration alleged that the plaintiff agreed to do certain specified works for the defendant upon the terms and conditions (amongst others) that the works were to be executed to the satisfaction of the defendant and his architect, "but no payment was to be considered due unless upon the production of the architect's certificate." The declaration averred performance of all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the architect, and alleged as a breach that the architect unfairly and improperly neglected to certify, and "so neglected in collusion with the defendant and by his procurement," whereby the plaintiff was unable to obtain payment. It

was held that the declaration disclosed a good cause of action, inasmuch as it imputed fraud in withholding the certificate.

The contractor in these circumstances may also maintain an action against the engineer for damages upon the ground of fraud : Ludbrook v. Barrett, (1877), 46 L.J. C.P. 798. There, the plaintiff, who had contracted to do certain repairs at the house of A. B. to the satisfaction of the architect of A. B., sued such architect for refusing to certify that the repairs had been done to his satisfaction, and in his statement of claim the plaintiff averred that the defendant, with a view to earning his commission, induced the plaintiff to make a tender for the repairs, and that the defendant accepted such tender and agreed with the plaintiff that, as soon as the work was done in a sound and workmanlike manner, he would certify his satisfaction so as to enable the plaintiff to recover the price thereof from A. B. The statement afterwards averred the due execution of the work by the plaintiff, and alleged that though the defendant admitted to the plaintiff he was satisfied with the work, yet he in collusion with A. B. and in fraud of the plaintiff, refused to certify that he was satisfied, and falsely pretended that he was dissatisfied, by reason of which and through such wrongful acts the plaintiff was unable to recover the price of the work from A. B. It was held that the statement of claim disclosed a good cause of action, because there was a breach of duty on the part of the defendant, and a fraudulent collusion with another person to abstain from doing that which was a lawful act to do, and a damage resulting to the plaintiff from the defendants so abstaining to do such act. Until this case it does not appear that such an

action as this had ever been brought, but Grove J., saw no reason why such an action should not lie ; and no doubt this decision is good law, even though it does not necessarily follow that in circumstances such as these a contractor will sustain any substantial damage from an engineer's neglect or refusal to certify, since he would always have a remedy against the employer, as in the case of Batterbury v. Vyse cited above. The Courts of Equity would always interfere where in the case of building contracts there was collusion between the employer and the engineer or architect : Bliss v. Smith, (1863), 34 Beav. 508. The employer, however, is not liable for the wrongful neglect or refusal of his engineer to certify, unless such neglect or refusal is brought about by him colluding with the engineer in some way or other : see Clarke and others v. Watson and another, (1865), 18 C.B. N.S. 278. In a case where the engineer improperly refused to certify for some reason of his own or through some neglect, but without any collusion with the employer, it would seem from the remarks of Willes, J., at p. 285, that the proper course would be for the contractor to call upon the employer to appoint some other engineer who would be less recalcitrant, and do his duty. It is even possible for the engineer's certificate to be binding in cases of fraud; for the parties may, if they so choose, agree that a certificate shall not be set aside on the ground of fraud. For instance : in the case of Tullis v. Jackson, [1892], 3 Ch. 44, there was an agreement between the parties to a building contract that the valuations, certificates, orders and awards of the architect should be final and binding, and should not be set aside or attempted to be set aside on any ground or for any reason or

for any pretence, suggestion, charge or insinuation of fraud, collusion or confederacy. It was held that, in the absence of fraud by either party, when such a contract is made it is valid and not void as being against public policy. It is, therefore, quite competent for the parties to agree that the question of fraud on the part of the engineer or arbitrator shall not be raised by by either of them. Those who frame clauses in building contracts which even some years ago were stringent, have by degrees kept on making them more and more stringent by reason of the consequences that follow from opening a certificate and the enormous cost and litigation that arises, where the work is a large work like a railway or a large public building, from any Court of Justice endeavouring to take the account—an account of thousands and thousands of items, on every one of which skilful advisers may raise some issue—whether the amount should stand for the sum charged, or for a less sum or for some greater sum. A litigation of that kind it is almost impossible to bring to a conclusion in a Court of Justice, where the parties are entitled to be heard and to insist on every possible objection. Hence, as Mr. Justice Chitty said, ([1892], 2 Ch. p. 444), it does appear that those who deal in matters of this kind are wise in making the clauses of a contract as stringent as possible. It is, of course, for the contractor, when he enters into a contract of this kind, to consider whether he will accept it or not. There is no doubt that contractors do accept clauses which to the lawyer look terrific; but they do it as business men—they do it for better or worse—and they think on the whole it is very unlikely that any engineer selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the

subject. To put a concrete illustration : Suppose a gentleman, who is going to have a house built for him, enters into a complex agreement with the contractor in the performance of which innumerable questions may arise, says : "Will you agree with me (for if you will, I will agree with you) that nothing on earth shall upset the certificate that is given?" "Why" said Mr. Justice Chitty, "is that unfair or against public policy?" It was because he saw no reason why grown men should not be allowed to contract in these terms—that neither of them would ever raise a charge of fraud against the other under the contract—that the learned judge held the clause in question not void but valid. Where by the contract an award of the engineer is to be final, and is fairly and impartially made, the Court will not relieve against it, however severe it may be in its effects ; Ormes v. Beadel, (1860), 2 Giff. 166 : but where a contractor, under pressure occasioned by the refusal of the architect to pay what was justly due under the contract, was induced by the architect to enter into a disadvantageous agreement, the Court set it aside, though by the terms of the original contract the decision of the architect was made final (ibid). Although, if the terms of an engineer's contract are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not ; yet where the language admits of it, it should always be presumed that the parties meant only what was reasonable : see Foster and Dicksee v. The Corporation of Hastings, (1903), 87 L.T. 736. In concluding this question, reference should be made to the recent case of Kellett v. The Stockport Corporation, tried before Walton J., in 1906, and reported in 70 J.P. 154. In that case a

contract to do work for the Local Authority stipulated that payment for work done should only be made on the production of a certificate from the engineer appointed under the contract, who was to fix the price of all extra work done under the contract but not included in the specification. The engineer under the contract was "J.M. of the firm of J. M. & Sons, or other the engineers of the Corporation." While extra work was being done, but before a price had been agreed upon ; the engineer named in the contract died, and a member of his firm was appointed to carry out his duties under the contract. The contractor contended that the engineer so appointed had no jurisdiction to fix the price of the extra work. He also alleged that the condition in the contract as to engineer's certificates had been waived by the defendants by an oral agreement with himself. It was held (1) that such oral variation of a contract under seal would be bad, as any variation of such a contract must itself be under seal and (2) that the duly appointed successor to the engineer named in the contract had jurisdiction to determine the price to be paid for work which was begun before his appointment.

LECTURE VI.

Delivered January 30th, 1911.

E. DUNBAR KILBURN,

Vice-Chairman of the Junior Institution of Engineers, in the Chair.

GENERALLY speaking, the work comprised in an engineering contract must be completed at or within the time named in the contract; but the contractor has up to the last moment of the day fixed for completion to finish the work: see Startup and another v. Macdonald, (1843), 6 Man. & G. 593. If no time is fixed for completion, then the work must be done within a reasonable time, having regard to all the circumstances: see per Rolfe, B., 6 Man. & G. at p. 611; and Fisher v. Ford, (1840), 4 Jur. 1034. As a rule, however, engineering contracts do contain a provision for the due performance of the contract within a given time. At Common Law, mere delay in performance beyond the stipulated time would be sufficient to constitute a breach of contract, and prevent the party in default from further asserting his rights. A Court of Equity would, however, relieve against the legal consequences in spite of the delay, upon equitable terms; so that, in Equity, time was never considered to be "of the essence of the contract": and now, under the Judicature Act, 1873, which may be said to have fused the principles of Law and Equity, the same kind of

relief may be granted in all Courts. If, however, the parties so choose, time may still be made of the essence of a contract by special conditions in the contract; as, for example, in Hudson v. Temple, (1861), 29 Beav. 536, where the then Master of the Rolls, Sir John Romilly, said (p. 542): "It is true that ordinarily in Equity time is not of the essence of the contract although the time for the completion of the contract be specified, but there are various cases in which it is and it may be made so by express stipulation." In engineering contracts time is not considered to be of the essence of the contract merely from the nature of the contract itself, but of course it can always be made so by express provision to that effect: see Lucas v. Godwin, (1837), 3 Bing. N.C. 737. Even if time was not originally made of the essence of the contract it may be made so subsequently; but when time is not originally made of the essence of a contract, one of the parties is not entitled afterwards by notice to make it so unless there has been some default or unreasonable delay by the other party: see per Fry, J., in Green v. Sevin, (1879), 13 Ch. p. 600. The nature of the contract itself may by implication in some cases make time of the essence of the contract, as, for example, where a lease for building is subject to forfeiture of the building if not finished within a given time: see per Jessel, M.R., in Barclay v. Messenger, (1874), 43 L.J.Ch. at p. 455. If there has only been a slight delay in the completion of a contract the contractor will not be debarred from recovering payment, provided that the contract is in other respects substantially carried out. Any damage resulting to the employer owing to the delay in such circumstances will be a

matter for compensation only, it will not altogether prevent the contractor from getting payment. For instance, in Lucas v. Godwin, (1837), 3 Bing. N.C. 737, the plaintiff had contracted to build cottages by the 10th of October but they were not finished till the 15th. The defendant having accepted the cottages, however, it was held by Tindal, C.J., that the plaintiff might recover the value of his work on a declaration for work and labour and materials. At p. 743 the learned Judge says: "As the work was to be done and the payment to be made at a time which had expired before this action was commenced I think the plaintiff was entitled to sue on the general counts. In all such cases a plaintiff is entitled to do so unless there be something express and explicit in the contract to shew a condition which goes to the whole right of action. I see none such here. If it be said that the condition that the work shall be done in a proper and workmanlike manner, is of that nature, that is a condition which is implied in every contract of the same kind and if it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would put an end to the contract and deprive a plaintiff of any claim for payment: but under such circumstances, it has always been held that where the contract has been executed a jury may say what the plaintiff really deserves to have." The reason for the decision in this case is, that it never could have been the understanding of the parties that, if the house were not done by the precise day, the plaintiff would have no remuneration at all. At all events, whenever so unreasonable an engagement is entered into, the parties must express their meaning with a precision which cannot be mistaken.

The completion by 10th October was not a condition precedent; it did not go to the essence of the contract, and any inconvenience occasioned by the deviation could be compensated for in an action for damages. On the other hand, where it was part of a condition precedent to the claim of a sum of £80 in addition to the purchase money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April, it was held that a delay of four days, though occasioned by bad weather which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim: Maryon v. Carter, (1830), 4 Car. and Payne 295. This case, therefore, is also an authority for saying that bad weather is no excuse for delay; and if a contractor has covenanted to execute works by a certain time, mere severity of weather will not relieve him from his liability, on account of the general rule which was laid down in the ancient case of Paradine v. Jane, Aleyn, 26, that wherever a party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances; and if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage. But where the act to be done is one in which both parties

to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect either expressed by the parties or to be collected from what they have expressed, the damage arising from some unforeseen impediment, is to be cast by law on the one party more than the other ; and consequently what is implied by law in such a case is, not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part : see per Blackburn, J., in Ford v. Cotesworth, (1868), L.R. 4 Q.B. at p. 134. It may be taken, therefore, that it is quite firmly established both by decided cases and on principle that, where a party has either expressly or impliedly undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages ; even though the performance was rendered impracticable by some unforeseen cause over which he had no control. If, however, delay occurs without fault on either side, and neither had undertaken by contract, express or impliedly, that there should be no delay, then the loss must remain where it falls. But if the contractor contracts, either expressly or impliedly, that there shall be no delay, then he is obliged to finish the work by the day named or pay compensation to the employer for not so doing.

In contracts for the sale of goods, if, on the true construction of the contract, they are to be delivered by a certain time, time is of the essence of the contract (Sale of Goods Act, 1893, 56 & 57 Vict. c. 71 s. 10); for example in the case of Wimshurst v. Deeley, (1845), 2 C.B. 253, where B engaged to supply an engine and boilers for a steam vessel of A "in con-

formity to the drawings and specification furnished by C; the engine to be got up under the superintendence of C and, when approved by him at the works, to be delivered by B into the East India Docks when B's liability ceases." One of the terms contained in the specification was, that the engine, &c., should be completed within two months. It was held that time was of the essence of the contract, and that B was liable to an action at the suit of A for not delivering the engine and boilers within the two months. Time is not of the essence of the contract where, by the terms of the contract, a possible postponement of the completion of the contract is contemplated; nor is time to be considered of the essence of the contract where there is a provision for payment of liquidated damages in the event of delay, nor where a bonus is to be given in case of expedition. In the case of Lamprell v. The Billericay Union, cited ante, Rolfe, B., at p. 308, said: "The only point raised on these pleas was that the works were not completed before the end of December, 1840, instead of the 24th June, 1840. But looking to the whole of the deed we are of opinion that the time of the completion was not an essential part of the contract: first because there is an express provision made for a weekly sum to be paid for every week during which the work should be delayed after the 24th June, 1840; and secondly because the deed clearly meant to exempt the plaintiff from the obligation as to the time for completion in case he should be prevented by fire or other circumstances satisfactory to the architects and here in fact it is expressly found by the arbitrator, that the delay was necessarily occasioned by the extra work." With regard to the interpretation of particular words as to

time, it may be said that "month" in contracts generally means lunar month, except in mercantile transactions in the City of London: Turner v. Barlow, (1863), 3 F. & F. 946. "Directly" means not "within a reasonable time," but "speedily," or at least "as soon as practicable": Duncan v. Topham, (1849,) 8 C.B. 225. "As soon as possible" means within a reasonable time: Attwood v. Emery, (1856), 1 C.B. N.S. 110. As to "forthwith" and "immediately," see Roberts v. Brett, (1865), 11 H.L. Cases 337; and Toms v. Wilson (1862), 4 B. & S. 442.

It is now important to consider the question of penalties and liquidated damages. It is usual to make provision for the proper enforcement of an engineering contract, by fixing a sum of money to be paid by the contractor if he breaks all or any of the covenants contained in the contract. But whether the definite sum thus fixed can be recovered or not depends upon the question of whether it is, in the eyes of the law, a penalty, or is liquidated damages. Wherever the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a penalty or as liquidated damages. The difference in in effect is this: The amount recoverable in case of a penalty is, not the sum named, but the damage actually incurred; the amount recoverable as liquidated damages is the sum named as such. In construing these terms a Judge will not accept the phraseology of the parties. They may call the sum specified "liquidated damages," but if the Judge finds it to be a penalty he will treat it as such: see Winter v. Trimmer, (1762), 1 W.Bl. 395 and Harrison v. Wright, (1811), 13 East 343, where Lord Ellen-

borough, at p. 347, said, referring to the case of Winter v. Trimmer: "There the question immediately was whether the plaintiff could recover more than the penalty and it was ruled that he might." So also in Lowe v. Pears, (1768), 2 Burr. at p. 2228, Lord Mansfield said: "There is a difference between covenants in general and covenants secured by a penalty. In the latter case the obligee has his election. He may either bring an action of debt for the penalty and recover the penalty, or if he does not choose to go for the penalty he may proceed upon the covenant and recover more or less than the penalty. Courts of Equity always made a distinction, however, in that they relieved against a penalty upon a compensation, i.e., upon payment of a sum sufficient to compensate for the damage actually suffered; but where the covenant is to pay a particular liquidated (i.e., an ascertained) sum, a Court of Equity cannot make a new covenant for a man, nor is there any room for compensation or relief." From the cases which have just been cited it would seem that, where the sum named in the contract is considered to be a penalty and not liquidated damages, it is conclusive on neither party, and the amount of damages actually suffered must be proved, and they may be greater or less than the penalty itself. Liquidated damages of course bind both parties. From the case of Wilbeam v. Ashton, (1807), 1, Campbell's Nisi Prius Reports, p. 77, it would appear that the legal construction of an agreement to pay a penalty is this: "Beyond the penalty you shall not go, within it you are to give the party any compensation which he can prove himself entitled to" (per Lord Ellenborough.) In Randall v. Everest, (1827), 2 Car. and P. 577, it was held by

Abbott, C.J., that whatever may be the terms of an agreement with regard to the sum to be paid on the non-performance of it, the party suing, if the agreement is not under seal, is entitled only to such damages as a jury under all the circumstances may think fit to award. It is probable that the distinction between a penalty and liquidated damages is seldom or never present to the minds of those who enter into agreements, and the Courts in recent times have often expressed a wish that the simple plan had been invariably adopted of allowing people to enter into any agreement they liked, only keeping them to it. The first relaxation of such a system commenced with the Courts of Equity. They drew a distinction between the primary intention of a contract, and the machinery contained in the contract by which that intention was to be carried out. If the primary object was to secure the doing or refraining from a particular act, they considered that the party to be benefited should be satisfied if they compelled or forbade the act in question, or, where this was impossible, if they awarded him reasonable compensation. They disregarded the penalties or forfeitures which the parties themselves had agreed to. In other words, they substituted their own machinery for that which was provided by the parties. But where the primary intention was, that if some particular act was not done, then some other act should be substituted for it, they held that the alternative act was not machinery but the essence of the contract, against which no relief could be given : see Mayne on Damages, Eighth Edition, p. 172. The question of whether or not a sum specified in the contract is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided

by the Judge upon a consideration of the whole instrument : per Wilde, C.J., in Sainter v. Ferguson, (1849), 7 C.B. p. 727. There, the agreement did not prohibit the defendant doing several distinct and independent acts, each of which might be incapable of exact estimation, nor did it involve any of the circumstances that in any of the cases induced the Court to hold the sum to be a penalty only. The whole object of the plaintiff was to protect himself from a rival ; and as it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement, it was not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid, and so the sum fixed in the contract was held, not to be a penalty, but liquidated damages. A contractor is not at liberty to pay the sum stipulated for and then break the covenant ; and, notwithstanding payment, an injunction may in certain cases be granted against such contractor if he is in default, or the employer can re-enter as for forfeiture (Hudson on Building Contracts, Vol. I, p. 518). The provisions of engineering contracts as to the recovery of liquidated damages vary considerably. In some, a certificate by the engineer is a condition precedent to the right of recovery ; in others, the architect has no control whatever over the liquidated damages. In computing time in the case of liquidated damages for delay, "days" mean consecutive days, and so would include Sundays and Holidays ; for if the parties wish to exclude any days from the computation, they must be expressed : per Lord Abinger, C.B., in Brown v. Johnson, (1842), 10 M. & W. p. 334. The law on the question of penalty or liquidated damages may now be considered after a great number of

decisions, not, perhaps, all of them strictly reconcilable with each other, to be, however, satisfactorily settled, and the hinge on which the decision in every particular case turns is the intention of the parties to be collected from the language they have used. The mere use of the term "penalty" or the term "liquidated damages" does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion: if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty and not in the way of liquidated damages: see Dimech v. Corbett, (1858), Moores Privy Council Cases, at p. 221. It is always quite immaterial whether the money intended to be made payable is called by the parties themselves a penalty or liquidated damages: Sparrow v. Paris, (1862), 7 H. & N. 594; and, consequently, though a sum to be paid for default in performing an agreement is described as a "penalty," it may really be liquidated damages: see Bonsall v. Byrne, (1867), 1 N.R. 1 C.L. 573; and Sainter v. Ferguson, ubi supra. The same proposition was also laid down by Lord Brougham in the case of Ranger v. The Great Western Railway, to which reference has already been made; and Littledale, J., in Davies v. Penton, (1827), 6 B. & C. at p. 224, said: "Before the 8 & 9 Will III. the whole penalty might be recovered at law and the party against whom it was recovered

was driven to seek relief in a Court of Equity." That Statute only contains the word "penalty." Since the Statute, parties in framing agreements have frequently changed that word for "liquidated damages," but the mere alteration of the term cannot alter the nature of the thing, and if the Court see, upon the whole agreement that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the Statute : see also Rendell v. Schell, (1858), 4 C.B. N.S. 97. Where however, a sum is spoken of by the parties themselves as a penalty, according to the view taken by A. L. Smith, L.J., in Willson v. Love, (1896), 1 Q.B. at p. 632, a strong case is required to show that it is, nevertheless, liquidated damages. This case is also a further authority for the proposition that, where a contract contains a condition for payment of a sum of money to secure the performance of several stipulations of varying degrees of importance, such sum is, prima facie, a penalty and not liquidated damages. Though it is the function of the Court to determine what the intention of the parties in each case really was, the following guiding rules are stated by Sir William Anson in his well-known treatise on Contracts :—(1.) If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, this sum may be recovered as liquidated damages : Law v. The Redditch Local Board, (1892), 1 Q.B. 127. (2). If a contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages : Astley v. Weldon, (1801), 2 B. & P. 346. (3). If a contract contains a number of

terms, some of certain and some of uncertain value, and a fixed sum is to be paid for the breach of any of them, this is probably a penalty: Kemble v. Farren, (1829), 6 Bing. p. 147. The clauses in engineering contracts providing for the payment of a fixed sum weekly or per diem for delay fall under the first of these rules, and consequently, generally speaking, would come under the decision in Law v. The Redditch Local Board (cited above). In that case the contract made with the Urban Authority for the construction of certain sewerage works provided that the works were to be completed in all respects and cleared of all implements, tackle, etc., on or before 30th April, 1889, and that in default of such completion the contractor should forfeit and pay to the Urban Authority the sum of £100, and £5 for every seven days during which the works should be incomplete after the said time, and that the sums so forfeited might be recovered by the Urban Authority from the contractor as and for liquidated damages; and it was held that, as there was only one event—the non-completion of the works by the specified date—upon the happening of which the sums of £100 and £5 per week were to become payable, those sums must be considered as liquidated damages and not as penalties. Lord Esher M.R., at p. 131, said: "there seems to me to be only one event on which the liability to pay the sums mentioned depends, viz.:—non-completion of the works by the time specified. Then the contract goes on to say that the sums so forfeited may be recovered 'as and for liquidated damages.' I do not think much reliance ought to be placed on those words, for even if the sums were called penalties the same consideration might be applicable, but I do not think that

they ought to be left out of account altogether. It seems to me that they go somewhat to shew that the parties intended that these sums should be liquidated damages, and not penalties." From these remarks of Lord Esher it will readily be seen that engineers will be wise to insist in all cases in which they are concerned that the phrase "liquidated damages" is used rather than "penalties," as being some criterion of the true intention of the parties, which, however, must be made quite clear in other ways as well. In spite of the apparent topsy-turvy meaning of the two expressions it is obvious that liquidated damages are likely to be more advantageous to the employer than penalties. The case of Law v. The Redditch Local Board will well repay a careful perusal, as in the judgments the many and somewhat conflicting authorities are clearly discussed and commented upon by the Court of Appeal. In the recent case of The Commissioner of Works, representing the Government of the Cape of Good Hope v. Hills, (1906), 22 T.L.R. 589, it was laid down that the criterion of whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages, and, as such, not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. This case had been preceded by that of the Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda, (1905), A.C. 6, where the appellants had contracted for the construction of four torpedo boats for the Spanish Government, each of which was to

be completed at a given date. In the event of non-completion they were to pay £500 in respect of each ship for every week's delay. There was considerable delay, and it was held on the appeal that the sums stipulated for were liquidated damages, payable in full, and not a penalty. Lord Davey, at p. 16 of the report, remarks that where under a contract a sum is made payable for the breach of a stipulation, and the amount is proportioned to the extent of the breach, such sum must, prima facie, be regarded as liquidated damages, and not as a penalty. In re White & Arthur, (1901), 84, L.T. 594, was another case where, although the word "penalties" was used, as the amounts accrued owing to the default of the contractor, they were in fact "liquidated damages." The contract was one for electric lighting installation, and it provided that the work should be "completed in all respects on or before the 26th November, 1898, subject to a penalty of £15 a day, and the plant by the 10th December, subject to a penalty of £3 per day for every day the work remains unfinished to the satisfaction of the authorities and engineers. On the other hand, in Bradley v. Walsh, (1903), 88 L.T. 737, by an agreement W. agreed to purchase a public-house of B., and the fittings, and to take the stock to a certain amount and pay for the same, and B. agreed to assign the licenses and pay certain rates and taxes and give possession, and not carry on the business of a licensed victualler within one mile, W. further agreeing to pay the purchase money and produce references. It was further provided "that if either of the said parties should neglect to perform or refuse to comply with any part of this agreement" the party refusing or neglecting should pay the other

£25 as liquidated damages. In Crux v. Aldred, (1866), 14 W.R. 656, however, the plaintiff, a builder, contracted to do certain repairs and alterations to a house, to be completed in a specified time "subject to a penalty of £20 per week that any of the works remained unfinished." Here, it was held that the sum of £20 per week was in the nature of liquidated damages, and could be deducted by the defendant without proving the loss he had actually sustained by reason of the delay. As already stated, engineering contracts usually contain stipulations for the payment by the contractor to the employer of a fixed sum or sums by way of liquidated damages for delay in completing the work, and in these cases the liquidated damages which are stipulated for each day or week of delay in completing the works, must begin to run from a fixed date (see Kemp v. Rose, quoted ante); and consequently, if there is no date named in the contract, or if, for example, where the engineer has given an extension of time under the powers conferred upon him by the contract, there is no date from which the liquidated damages can run, the employer then loses all right to recover liquidated damages at all: Westwood v. The Secretary of State for India, (1863), 11 W.R. 261. See also Dodd v. Churton, (1897), 1 Q.B. 562, where, in a contract for the execution of specified works, it was provided that the works should be completed by a certain day, and in default of such completion the contractor should be liable to pay liquidated damages; and there was also a provision that other work might be ordered by way of addition to the contract, and additional work was ordered, which necessarily delayed the completion of the works.

It was held that the contractor was exonerated from liability to pay the liquidated damages. It would, of course, be different if by the terms of the contract the contractor agreed that, whatever additional work might be ordered, he would nevertheless still complete the works within the time originally agreed upon. The reason for the rule is, that otherwise a most unreasonable burden would be imposed on the contractor. Jones v. St. John's College, (1870), L.R. 6 Q.B. 115, is an example of a case where there was an agreement by which the contractor agreed that if any extra work was ordered, then whatever that work might be, he would undertake nevertheless to complete the works within the time originally specified by the contract; and it was thereupon held that if the contractor was foolish enough to make such an agreement he was bound by it, and must take the consequences. If, however, no such agreement has been entered into by the contractor, it is a well-ascertained rule of law that, where the failure of a contractor to complete the work by the specified day has been brought about by the act of the other party to the contract, he is exonerated from the performance of the contract by that date, which has been thus rendered impossible. This principle is applicable, not to engineering and building contracts only, but to all contracts. If a man agrees to do something by a particular day, or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time. It is in order to meet a contingency such as that in Dodd v. Churton, that a provision is generally inserted in engineering contracts that the engineer may grant an

extension of time for the completion of the works in case of delay from various causes such as strikes, lockouts, alterations and additions, and so forth, and that, in case of such extension of time being granted, the contractor shall complete within the extended time. Where there is power to extend the time, and delays have occurred, the power of extension must always be exercised by the person named in the contract, and within the time specified for the exercise of such power. In the case of Wells v. The Army and Navy Co-operative Society, (1902), 86 L.T. 764, by a building contract, certain matters causing delay and "other causes beyond the contractor's control" were to be submitted to the Board of Directors of the owners of the building, who were to "adjudicate thereon and make due allowance, therefore, if necessary, and their decision shall be final." It was held that the exclusive jurisdiction of the Board did not extend to delay caused by the interference of the building owners or their architect with the conduct of the works, and by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time ; and so, such interference and defaults being made out, the building owners could not recover penalties. Where the engineer has been given power over the question of liquidated damages, his exercise of discretion cannot be challenged, except for fraud or misconduct : see The London Tramways Co. v. Bailey, (1877), 3 Q.B.D. 217. And if the engineer has power to grant an extension of time and to take into account the question of penalties, and then gives his final certificate without considering the question of penalties, the employer's rights against the contractor in respect of penalties will be

lost. For instance : In Arnold v. Walker, (1889), 1 F. & F. 671, in an action tried at Hereford before Crowder J., for the balance due under a building contract not under seal, with a plea of set-off for penalties incurred by reason of delay, and a replication of hindrance and exoneration on the part of the defendant, evidence of such hindrance and exoneration was admitted, but the certificate of the defendant's architect that the balance was due was held conclusive, and a verdict for the plaintiff was directed. The learned Judge was of opinion that the certificate included the question of penalties. Much more might be said on the question of the engineer's position in regard to the extension of time, and the employer's position with regard to the release or waiver of conditions as to penalties, but space does not permit. A word or two, however, must be said as to the general law with regard to the recovery of penalties or liquidated damages. In some cases the engineer's certificate will be a condition precedent to the employer's right to sue for, deduct or set off liquidated damages for delay, but this is not the case unless it is expressly made so. As previously indicated, the party entitled under a deed containing covenants, or under a simple agreement to build, with a penalty attached may either bring an action of debt for the penalty, or may proceed as for breach of the covenant or agreement and recover full damages, as the penalty is auxiliary to the performance of the contract : see per Mansfield, C.J., in Lowe v. Peers, ubi supra ; and also Bird v. Randall, (1762), 1 W.Bl. 387. In the case of liquidated damages the employer can sue for the exact sum stipulated for, and this will prevent him from suing for any other damages for breach of the

contract : see the remarks of Brett, J., in the case of Nevitt, ex parte, (1881), 16 Ch.D. at p. 529. Reference should also be made to the case of Munro v. The Ennis and Athenry Ry., (1867), 15 W.R. 255, which, though an Irish case, would seem to lay down a proposition of law which is equally applicable to English contracts. There, a contractor engaged by the terms of his contract to have a line open by the 1st of October. At the end of the specifications annexed to the contract were the words : "the time for the completion of the contract is to be the 1st October, 1864, under a penalty of £50 per week at discretion of the company's engineer." It was held that this was a discretion to impose, and not merely to remit, and that therefore on behalf of the contractor there was no liability which could be the subject of set-off by the company in an action by the contractor, until the engineer had actually imposed the penalty. In the case of penalties contained in contracts with Urban District Councils, section 174 subs. (2) of the Public Health Act, 1875, is important. It provides that every such contract shall specify the work, etc., to be done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify the pecuniary penalty to be paid in case the terms of the contract are not duly performed. The provisions of this section would appear to be imperative, but apparently the Local Government Board will, in a proper case, authorise a new substituted contract containing a penalty, to be entered into : see The British Insulated Wire Co. v. The Prescot Urban District Council, (1895), which is reported in the 11th Vol. of the Times L.R., p. 595. Mr. Hudson points out at p. 593 of his book that

it is not clear from this case whether the provisions of this section would be satisfied by an ordinary "liquidated damages" clause, or whether a "pecuniary penalty" strictly so-called must be inserted, but apparently a pecuniary penalty is necessary. While upon the subject of penalties and liquidated damages, it may further be said that engineering contracts, besides providing as it were a punishment for the contractor if he fails to carry out his obligations within a fixed period, sometimes hold out an inducement to him for the punctual or even early completion of the contract by the provision of extra payments in the event of the contractor completing the work before the stipulated time. Examples of such a provision are to be found in the case of Ranger v. The Great Western Railway Co. already quoted, and also in Macintosh v. The Midland Counties Railway, (1845), 14 M. & W. at p. 551. The conditions providing for an expedition payment may vary considerably. If the contractor is given his choice of completing the work or not by a certain day, and in the event of his doing so is to be paid a fixed sum, this is generally called a bonus ; but if the contractor is bound to complete by a certain date, in consideration of an addition to his contract price, this additional payment may become part of the contract. If the contractor is under an obligation to complete his contract by a certain time and does not do so, he is still entitled to his contract price (Dodd v. Churton, ubi supra)—unless time is of the essence of the contract—whether the contract is to complete in a short time or not, for completion to time is not a condition precedent to payment (Lucas v. Godwin, ubi supra). The employer, however, can counter-

claim for damages: see Hudson, Vol. I., p. 544. To entitle the contractor to claim the expedition payment he must complete by the time fixed, or prove that he was prevented from doing so by the employer or his engineer: see Bywaters v. Carwick, (1906), Emden's Building Contracts, 4th Edition, p. 660; and Leslie & Co. v. The Managers of the Metropolitan Asylums District, (1904), 68 J.P. 86. There, by a contract made between the contractor and the employers, the contractor undertook to erect and complete the "works" of a hospital, including chimney stacks and heating apparatus, in two years for £210,688, with penalties for delay. The stacks and heating apparatus were to be provided by specialists or sub-contractors. The employers reserved to themselves the option to employ those specialists. Certain specialists for the work of the chimney stacks and heating apparatus were appointed by the architect under the contract, and he made terms with them as to the works they were to execute and the prices they were to charge. These prices were subsequently paid by the contractors out of the whole sum paid to them under the contract. The architect sent the contractors orders to give to the specialists, and the builders made no objection and gave them to the specialists. In the execution of these works there was delay on the part of the specialists whereby, as the contractors alleged, they suffered damage. It was held that the contractors and not the employers contracted with the specialists. There was nothing in the contract inconsistent with such sub-contracts. The contractors, therefore, had no right of action against the employers for the delay of the specialists: see per Collins, L.J., at p. 87.

In concluding this little series of lectures, it would seem appropriate to say something with regard to arbitration and awards, since it often happens that the last duties of an engineer in connection with a piece of work is to act in a judicial capacity as an arbitrator, to settle a dispute between the employer and the contractor. It need hardly be said that, in the ordinary course of events, an employer or a contractor who feels himself aggrieved by the doings of the other party to the contract must seek his remedy in a Court of Law, unless, of course, as has already been explained, the certificate of the engineer is a condition precedent to payment of the contractor by the employer, in which case the contractor cannot proceed against the employer until the certificate has been given. In the same way, the employer would be equally bound, because both he and the contractor have agreed to submit to the ruling of the engineer. These are, however, quite naturally, obvious and strong objections to this latter method of settling disputes; because, after all, the engineer is the agent of the employer, and if he has any bias at all it would more likely be in favour of the employer. And again, it is the engineer who supervises the contractor's work, and consequently a contractor very naturally objects to the engineer giving a decision in what, to all intents and purposes, is his own cause; and, however impartial the engineer may strive to be, it is easily understood that the contractor is inclined to view his decisions with a certain degree of suspicion. For these reasons it is usual to insert in the engineering contract a clause providing for arbitration, thus affording the contractor—or, for that matter, the employer also—an opportunity of appealing

from the decision of the engineer in the case to some other arbitrator or arbitrators whose decision is made final and binding on the parties, thus avoiding litigation in the ordinary Courts of Law. Arbitrations in England are now governed by the Arbitration Act, 1889. This Act applies only to England, however, and so arbitrations in Ireland are still governed by the provisions of earlier Acts. The Law of Arbitrations in Scotland, has been approximated to that of England by the Arbitration (Scotland) Act, 1894. It is very important to distinguish between arbitrations on the one hand, and valuations on the order, in order to determine whether the provisions of the Arbitration Act are applicable to any particular agreement, and also whether the arbitrator must proceed judicially. The distinction was well defined by Lord Esher, M.R., in the case of Dawdy and Hartcup, in *re* (1885), 53 L.T. p. 801, where he said that the word "arbitration" in S. 17 of the Common Law Procedure Act, 1854, must be taken to mean a judicial proceeding in which the arbitrator is bound to hear the parties and hear evidence if evidence is produced, and to give a judicial decision. It has been held, therefore, that if a person is appointed to value he is not an arbitrator, for he is not acting judicially when he values but is merely using his own skill and his knowledge as to that which he values ; and the same is the case where each party appoints a valuer. It was not agreed in that case that the valuers were to determine on evidence, and therefore on the construction of the agreement, the Master of the Rolls thought that they were only valuers and not arbitrators within the meaning of the Statute. See also Collins v. Collins, (1858), 26 Beav. 306 ; Bos v. Helsham, (1866), 15 L.T. N.S. 481.

Also per Lord Chelmsford, L.C., in Scott v. The Liverpool Corporation, (1858), 28 L.J. Ch. 230. Where the contract provides for the determination of the claim and liabilities of the contractors by the judgment of some particular person this would be incorrectly called a provision for submission to arbitration. Where, therefore, the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award: Wadsworth v. Smith, (1871), L.R. 6. Q.B. p. 337, per Blackburn, J. The words used by the Master of the Rolls in *re* Dawdy and Hartcup would apply equally well to the word "arbitration": see *re* Hammond and Waterton, (1890), 62 L.T. 808. The same rules also apply for ascertaining whether umpires are arbitrators or valuers. The real criterion in all these cases, in the absence of any provision for judicial enquiry, is whether the umpire is to decide upon the facts submitted to him or whether he has himself to value in substitution for the valuers *in re* Carus-Wilson and Greene, (1886), 18 Q.B.D. 7. In the former case he is an arbitrator; in the latter case he is a valuer. The whole question really turns upon the intention of the parties, and consequently a valuer would not become an arbitrator merely because he subsequently decided to hear evidence; and it does not matter whether the engineer is called an arbitrator if the parties obviously only intended him to act as valuer. A valuer cannot be removed from his office under the provisions of the Arbitration Act, as an arbitrator can, nor can the Court appoint a new valuer in place of one who has died or refused to act: see Vickers

v. Vickers, (1867), L.R. 4 Eq. 529. The decision of a mere valuer cannot be enforced as the award of an arbitrator; nor can he be directed by the Court to proceed in any particular manner, as, for example, to state a case. At Common Law the Court had no power to remove an arbitrator, but now, by Section 11 of the Arbitration Act, power has been conferred on the Court to remove an arbitrator where he has misconducted himself; though merely to make an error as to the limit of his jurisdiction is not misconduct so as to enable the Court to remove the arbitrator: Schofield v. Allen, (1904), 48 Sol. J. 176. As an arbitrator is in a quasi-judicial position he ought not to have any personal interest in the subject matter of the arbitration. For instance, in the case of the Edinburgh Magistrates v. Lownie, (1903), 5 F. 711, by a clause of reference—in a contract entered into by the Town Council of the Burgh for the mason work of a building,—the parties agreed to refer disputes which might arise under the contract to an arbiter named therein. The arbiter named was afterwards appointed Dean of Guild, and became ex officio a member of the Town Council. It was held: First, that he was thereby disqualified from acting as arbiter, and Secondly, that this disqualification might be pleaded by the Town Council, and Thirdly, that it was not removed by his ceasing to hold the office of Dean of Guild. This case would therefore seem to be an authority for saying that, once an arbitrator has become disqualified to act because he is likely to be biased on one side or the other, his disqualification is not removed simply because the reasons for possible bias no longer exist. In another case, an agreement

contained a clause providing that all disputes arising in respect of it should be referred to the arbitration of a certain barrister. In the course of the arbitration a charge of misconduct was made against a firm of solicitors or their authorised representative, who were clients of the barrister; and it was held, on motion to restrain the continuance of the proceedings before the named arbitrator, that there being no charge of incompetence or unfitness or bias against the arbitrator, the motion could not succeed: Bright v. The River Plate Construction Coy., [1900], 2 Ch. 835. There are a great number of cases dealing with this question of an arbitrator's disqualification, and perhaps it would be useful to quote one or two examples. An arbitrator is, for instance, not disqualified from ascertaining the manner and cost of making a sewer which will improve the arbitrator's own land (Johnson v. Cheape, (1817), 3 Dow. 247); nor because he is owed money or paid money by one of the parties in the ordinary course of business, such as a debt due from the employer to the engineer (Morgan v. Morgan, (1833), 2 L.J. Ex. 56); and it will be remembered that in Ranger v. The Great Western Rly., (1854), 5 H.C. Cas. 22, quoted ante, it was held that the engineer was not disqualified from acting as arbitrator under a railway or building contract from the personal interest natural to his position—not even by holding shares in the Company. Further, the acceptance of entertainment or hospitality from a party, though an improper act, will not invalidate an award unless it appears that there was an intention to influence the arbitrator, or that he was in fact thereby influenced (in *re* Hopper, (1867), L.R. 2 Q.B. 367); and a reference

to the engineer of one party will be quite valid, although it makes him in substance a judge in his own cause, unless there is sufficient reason to suspect that he will act unfairly : Eckersley v. The Mersey Docks, etc., Board, [1894], 2 Q.B. 667. Lord Esher, M.R., in the course of his judgment in that case (p. 671) said : "It (the case put forward by the plaintiffs) is an attempt to apply the doctrine which is applied to judges not merely of the superior Courts but to all judges that not only must they be not biased but that even though it be demonstrated that they would not be biased they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biased. Is that a rule which can be applied to such contracts as this where, as between the contractor and his principal, both parties agree that the chief servant of one of them shall be the arbitrator ? If it was not for the agreement of the parties—if the rule applicable to judges were to be applied—it is obvious that it would be impossible to say that the engineer under whose superintendence the work has to be done could act as arbitrator, because some persons would suspect him of being biased in favour of the parties whose servant he was. But that cannot be the case here because both parties have agreed that the engineer though he might be so suspected shall be the arbitrator. A stronger case must therefore be shewn. It must in my opinion, be shewn, if not that he would be biassed, that at least there is a probability that he would be biased." This principle was really laid down in the previous case of Jackson v. The Barry Railway Co., (1893), 1 Ch. 238. In spite of what has been said, however, an

engineer who has to act as arbitrator should not have any very strong views as to the merits of one side or the other. The case just mentioned, and also that of Halliday v. Hamilton's Trustees, (1903), 5 F. 800, decided in the Court of Session in Scotland, would seem to indicate that the engineer in all circumstances certainly ought to go, into the arbitration with an open mind, and that if he has expressed any definitive views on the merits that might be a disqualification.

Of course, if they so choose, the parties to the arbitration may waive any objections there might be to the proposed arbitrator, and that either expressly and impliedly by their conduct. For example :—if one of the parties knows of an objection to the arbitrator and yet takes part in the arbitration proceedings, he will be held to have impliedly waived the objection (Clout v. The Metropolitan and District Railway Companies, (1882), 46 L.T.N.S. 141) : unless, of course, he expressly protests against the arbitrator going on with the arbitration, as, for instance, in Davies v. Price, (1864), 34 L.J.Q.B. 8, where it was held that if a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence upon it, and the party still under protest continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter. It may now be taken as good law that a party to an arbitration will be held to have impliedly waived any objection

there might be on the ground of interest and bias on the part of the proposed arbitrator if such party were aware of it at the time he entered into the agreement to submit a present or any future dispute to such arbitrator's decision. Questions as to implied waivers most frequently occurred in cases where the parties to a building or engineering contract had appointed the architect or engineer as arbitrator in the event of a dispute between the employer and the contractor, for difficulties frequently arose owing to the fact that the dispute in these classes of cases was really a dispute between the contractor and the architect or engineer, and the latter had therefore often expressed a more or less decided opinion upon the merits of the case. It therefore seemed somewhat hard to compel the contractor to submit to the ruling of the engineer in a case of that kind, and in the older cases the Courts were inclined to accept the contractor's contention that the engineer would probably be biased and not impartial, but this practice has now been altered to a large degree and the law now stands as laid down in the leading cases to which reference has been made, namely. : Jackson v. The Barry Railway Company ; and Eckersley v. The Mersey Docks and Harbour Board. As to the matters which are to be referred to arbitration, very clear and precise terms should always be used, as there is a tendency among arbitrators to assume that they can adjudicate upon any matter that is placed before them. It is therefore always necessary that the contract should state very definitely what the real intention of the parties is upon this point, so that there should be no doubt as to whether any particular question is a fit subject for reference or not. An agreement to determine

disputes by arbitration is called a submission. It may be verbal, but if it is, it will not come within the Act of 1889, which applies to written submissions only. As the engineering contract is, however, almost always in writing, it follows that the submission will generally be in writing also. Even if the agreement is not in writing it is still an agreement, and if an award is made upon it, the award can then be enforced : see Wood v. Griffith, (1818), 1 Swanston 43. A submission under the Arbitration Act, 1889, unless a contrary intention is expressed in it, is irrevocable except by leave of the Court or a Judge, and has the same effect in all respects as if it had been made an order of Court. A submission may be enforced in various ways. An action may be brought against the party refusing to proceed with the arbitration, and damages may be claimed : see Brunsden v. The Staines Local Board, (1884), 1 Cab. & El. 272. Only nominal damages, however, can be recovered, unless in the original contract refusal to arbitrate was made to involve the payment of a fixed sum as liquidated damages. A submission will not be enforced by a decree for specific performance nor by injunction ; but the Court can compel the parties to carry out the arbitration by allowing the arbitrator to proceed to hear one party only, and giving effect to his award when made ; or the Court may stay proceedings brought to determine matters which come within the scope of the arbitration, but the application must be made before the party bringing the action takes any step in the proceedings : see Ives & Barker v. Willans, [1894], 1 Ch. at p. 71 ; Chappell v. North, [1891], 2 Q.B. 252. If, however, fraud is charged, a stay of proceedings is

generally refused if there is sufficient ground for not referring the matter in accordance with the agreement. But at any rate a prima facie case of fraud must be made out. It is, however, competent for the parties if they so choose to provide that arbitration shall take place even if fraud is charged : see Tullis v. Jacson, [1892], 3 Ch. 441. In making an award no special or technical terms are necessary (Eardley v. Steer, (1835), 4 Dow. 423), but if the submission itself contains directions as to the form which the award is to take these must be complied with. If this is not the case the award may be made evenverbally (Oates v. Brunil, (1706), 2 Salk. 75), but in any event it must be definite and clear in its terms (Lock v. Vulliams, (1833), 5 B. & Ad. 600) ; and it must follow the submission (Hide v. Petit, (1670), 1 Ch. Ca. 185). It need not contain any recitals ; they are mere surplusage (Harlow v. Read, (1845), 3 D. & L. 203) ; even a mis-recital in an award does not vitiate it (Watkins v. Phillpots, (1825), 1 McClel. & Y. 393). But the award must be final, and in construing an award it is the duty of the Court to favour that construction which renders the award certain and final : Wood v. Griffith, (1818), 1 Swans 52.

INDEX.


BEDS. TIMES
PUBLISHING CO. LTD
PRINTERS · BEDFORD