2594

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,		IN THE CIRCUIT COURT OF
Plaintiff		BALDWIN COUNTY, ALABAMA,
vs		
THE TOWN OF DAPHNE, a Municipal Corporation,		AT LAW
Defendant		

Comes the defendant in the above styled cause and answering complainant's complaint and each count thereof separately and severally says:

1. That the matters alleged therein are untrue.

2. That the defendant has paid the demands sued on.

3. That the account sued on grew out of a contract by and between the plaintiff and defendant entered into on May 9, 1953, wherein and whereby the said plaintiff agreed and undertook to drill, construct and install the said well and pump according to the plans and specifications of J. B. Converse & Co., Inc., engineers, at the agreed price of $14,002.16, and to complete the same on or before June 23, 1953, and that the plaintiff breached the said contract in this that he did not complete the said contract on said date.

4. That the plaintiff ought not to further prosecute this suit because the account sued on grew out of a contract between the plaintiff and defendant wherein and whereby plaintiff contracted and agreed with defendant to construct a municipal well and pump for a water system for the defendant; that said contract was entered into on the 9th day of May, 1953 and that in and by the said contract the plaintiff agreed to complete the said well within 45 days or to have the same so nearly complete that the same would produce 250 gallons of water per minute suitable for human consumption within such 45 days, though the defendant fully complied with the said contract the plaintiff breached the same in this, that he did not have the said well complete nor had he made sufficient progress within the said 45 days in the drilling

of said well and installation of said pump so that the same would produce 250 gallons of water per minute suitable for human consumption, and further in and by said contract the plaintiff agreed that in the event he did not complete the said well and pump, drilling and installation, or had not made sufficient progress on the same within 45 days to produce 250 gallons of water per minute suitable for human consumption he would pay to the defendant $45.00 a day for each day of delay thereafter, and he did not complete the said well or make progress as provided in the said contract and the number of days delay therein amounted to 169 days, which at $45.00 per day is the amount of $7,605.00 and defendant has paid to the plaintiff all of the construction money specified in said contract, namely, $14,002.16, except the said sum of $7,605.00, the amount sued for.

5. That the account sued on grew out of a contract by and between the plaintiff and defendant entered into on May 9, 1953 wherein and whereby the said plaintiff agreed and undertook to drill, construct and install a municipal well and pump for the defendant and that in and by said contract the plaintiff agreed to drill, construct and install the said well and pump according to the plans and specifications of J. B. Converse & Co., Inc., engineers, within 45 days after date of said contract at the agreed price of $14,002.16, if sufficiently completed so as to provide 250 gallons of water, suitable for human consumption, within such 45 days, but if within 45 days of the date of such contract sufficient progress had not been made in the drilling of such well and installation of such pump to provide 250 gallons of water per minute, suitable for human consumption, the price would be reduced in an amount of $45.00 per day for each day thereafter, and that though the defendant fully complied with said contract the plaintiff breached the said contract in this, that he did not make sufficient progress in the completion of the said contract within the said 45 days to produce the flow of water provided in said contract until 169 days after the date provided therefor; so that under the terms of the said contract the agreed

price to be paid by the defendant to the plaintiff was reduced in the sum of $7,605.00 to $6,397.16 and the defendant has paid the plaintiff said sum and is not indebted to him in any amount.

6. Comes the defendant in the above styled cause and further answering plaintiff's complaint and each count thereof separately and severally says:

That at and before the commencement of this suit the plaintiff was indebted to the defendant in the sum of $7,605.00 for breach of contract in this, that the account sued on grew out of a contract by and between the plaintiff and defendant entered into on May 9, 1953, wherein and whereby the said plaintiff agreed and undertook to drill, construct and install a municipal well and pump for the defendant and that in and by said contract the plaintiff agreed to drill, construct and install the said well and pump according to the plans and specifications of J. B. Converse & Co., Inc., engineers, at the agreed price of $14,002.16, and to complete the same on or before June 23, 1953, and though defendant fully kept and performed all agreements made therein by it the plaintiff breached the said contract in this, that he did not complete the said contract on or before the said date, and the plaintiff in and by said contract contracted and agreed to pay to the defendant the sum of $45.00 for each day of delay after June 23, 1953, in the completion of the drilling, construction and installation of the said well and pump and that the drilling, construction and installation of the said well and pump was not completed until 169 days after the date provided aforesaid for completion thereof, all of which the defendant offers to set off against the demand of the plaintiff and prays judgment for the excess.

7. That at and before the commencement of this suit the plaintiff was indebted to the defendant in the sum of $9,161.85 for breach of contract in this that the account sued on grew out of a contract by and between the plaintiff and defendant entered into on May 9, 1953, wherein and whereby the said plaintiff agreed and undertook to drill, construct and install a municipal well and pump

for the defendant and that in and by said contract the plaintiff agreed to drill, construct and install the said well and pump according to the plans and specifications of J. B. Converse & Co., Inc., engineers, at the agreed price of $14,002.16, and to complete the same on or before June 23, 1953, and further agreed that within 20 days after the work order was given him he would have made sufficient progress in the drilling of the well so that the same on test would produce 250 gallons of water per minute suitable for human consumption and work order was given more than 20 days prior to June 8, 1953; at the time of entering into the aforesaid contract, by the defendant with the plaintiff, the defendant had entered into contract with its fiscal agent Hendrix & Mayes, Inc., for a sale of $115,000.00 of bonds at par, the same to draw interest at the rate of 4½ per cent, the said bonds to be delivered within 45 days from April 24, 1953, and in which said contract it was stipulated that unless plaintiff should have made sufficient progress in the drilling of the said well so that the same upon test made on or before 20 days from May 9, 1953, it would flow 250 gallons of water a minute suitable for human consumption, the said Hendrix & Mayes, Inc., would be relieved from the contract to purchase the said bonds at the aforesaid price; and though defendant fully and completely kept and performed all agreements made by it therein the plaintiff breached the said contract in that within the said 20 days he had not made sufficient progress in drilling so that the same would produce 250 gallons of water per minute suitable for human consumption, and therein and thereby the said Hendrix & Mayes, Inc., were relieved from the said contract; that the said plaintiff had not made sufficient progress in the drilling of the said well so that the same would produce 250 gallons of water per minute suitable for human consumption within the said time provided in said contract; that because the plaintiff breached the said contract as aforesaid the defendant was not able to deliver its

bonds in the sum of $115,000.00 and lost its sale therefor and was unable to sell the said bonds until plaintiff had so compiled with the said contract, and when plaintiff had so complied with the said contract sufficient to enable defendant to sell the said bonds the defendant was able to sell the said bonds only at a price of two per cent less than its contract forfeited by the defendant because of plaintiff's delay, so that defendant because of plaintiff's delay in the progress and completion of his contract was damaged in the sum of $2,875.00 in the sale of said bonds, and the defendant was required to pay an additional sum of $3,751.87 of interest on the same and further because of the plaintiff's default under the terms of said contract defendant became liable to and had to pay to its engineer J. B. Converse & Co., Inc. for additional services, the sum of $2,535.00, in this that in and by the said contract the said plaintiff agreed to complete the said well within 45 days from the date thereof and the plaintiff did not complete the same until 169 days after the date thereof and the defendant had employed J. B. Converse & Co., Inc., as engineers on the said project and under their contract with them it was provided that the defendant should pay to them additional amounts for service for each day of delay in the completion of the said contract, and in his breach of the said contract aforesaid and as a direct and proximate result of such breach the defendant was damaged in the sum of $9,161.87 as aforesaid, which said sum the defendant offers to set off against the demand of the plaintiff and claims judgment for the excess.

8. That the plaintiff ought not to further prosecute this suit because the account sued on grew out of a contract entered into by and between the plaintiff and defendant on to-wit, the 9th day of May, 1953, wherein and whereby the plaintiff contracted and agreed with the defendant to drill a well and install a pump as a part of a water works system for the defendant for and at a price therein stated, namely, $14,002.16; that in and by the said

contract it was provided that the plaintiff should within 45 days after the date of the said contract complete the drilling of said well and installation of said pump and that if the said well and pump, drilling and installation, was not completed the contract price thereof would be reduced in an amount of $45.00 a day for each day of delay, and the plaintiff did not complete the said well and installation of the said pump until 169 days after the date provided therefor in the said contract; and the said contract further provided that J. B. Converse & Co., Inc., engineers, to prevent misunderstandings, disputes and litigation, should decide any and all questions which should arise, including the rate of progress of the works, the fulfillment of the contract, the amount, quantity, character, classification and quality of the several kinds of works performed and material furnished, which were to be paid for under the contract and that their decision and estimate should be conclusive and binding on both parties thereto and that such decision and estimate of the engineer in case any question should arise should be a condition preceeded to the right of the contractor to receive any moneys due him under the said contract and that his findings in such matter should be final and binding on both parties and the said J. B. Converse & Co., Inc., upon the completion of the said contract, did determine and find and certify to the defendant in this cause that the said defendant owed to the plaintiff the sum of $6,397.16 and the defendant has paid to the plaintiff the said sum so ascertained, found and certified by the said engineer and the defendant in all things has fully complied with the said contract, and is not indebted to the plaintiff.

Beebe & Swearingen
By W. C. Beebe
Attorneys for defendant

Filed April 20, 1925

No 7570

A W Williams

vs

Town of Daphne

Answer

Filed April 20, 1955

BEEBE & SWEARINGEN
LAWYERS
BAY MINETTE, ALABAMA

STATE OF ALABAMA)
)
BALDWIN COUNTY)

IN THE CIRCUIT COURT - AT LAW

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon The Town of Daphne, a Municipal Corporation, to appear within thirty days from the service of this Writ in the Circuit Court to be held for said County at the place of holding same, then and there to answer the Complaint of A. W. Williams, Individually and doing business as A. W. Williams Inspection Company.

Witness my hand this 21st day of ~~February~~ March, 1955.

Clerk.

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff,

vs.

THE TOWN OF DAPHNE, A Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW.

COUNT ONE:

The Plaintiff claims of the Defendant Seven Thousand Six Hundred Five Dollars ($7,605.00) due from it for work and labor done for the Defendant by the Plaintiff during the period of time from May 4, 1953, to December 8, 1953, at its request, which sum of money, with the interest thereon, is still unpaid.

COUNT TWO:

The Plaintiff claims of the Defendant Seven Thousand Six Hundred Five Dollars ($7,605.00) due from it by account on the 9th day of December, 1953, which sum of money, with the interest thereon, is still unpaid.

Executed March 22, 1955

AUSTILL & AUSTILL

and

CHASON & STONE

By: _____
Attorneys for Plaintiff.

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M 2570

Received 21 day of Mar 1955
and on 22 day of March 1955
I served a copy of the within
on Mayor of Town of Daphne
Arthur Mane
By service on

TAYLOR WILKINS, Sheriff
By Ellwight Steadley D. S.

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff,

vs.

THE TOWN OF DAPHNE, A Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

SUMMONS AND COMPLAINT

FILED

MAR 21 1955

ALICE J. DUCK, Clerk

LAW OFFICES

CHASON & STONE

BAY MINETTE, ALABAMA

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,	I	IN THE CIRCUIT COURT OF
	I	BALDWIN COUNTY, ALABAMA,
Plaintiff	I	
	I	AT LAW
vs.	I	
THE TOWN OF DAPHNE, a Municipal Corporation,	I	
	I	
Defendant	I	

DEMURRER TO PLEAS

Comes now the Plaintiff in the above styled cause and demurrs to the pleas numbered three, four, five, six, seven and eight heretofore filed by the Defendant and to each of said pleas separately and severally and assigns the following separate and several grounds in support thereof.

1. That said pleas are immaterial.

2. That said pleas do not constitute a defense to the complaint.

3. For aught that appears from the allegations of plea three, the alleged failure to complete the contract on or before June 23, 1953, was not a material breach of said contract.

4. The allegations of plea four do not constitute a defence to this cause of action.

5. The allegations of plea four are vague and uncertain in that it does not appear from said allegations of what the delay alleged therein consists.

6. The allegations of plea four fail to allege in what the delay consists.

7. For aught that appears from the allegations of said plea, the Defendant has not been damaged by the alleged delay.

8. The allegations of plea six are vague, indefinite, and uncertain.

9. The allegations of plea six fail to state a cause of action against the plaintiff.

10. The allegations of plea six fail to allege wherein the Plaintiff is indebted to the Defendant.

11. For aught that appears from the allegations of plea six, the Defendant was not damaged by the alleged delay.

12. The allegations of plea seven fail to state a cause of action against the Plaintiff.

13. The allegations of plea seven are vague, indefinite, and uncertain.

14. It affirmatively appears from the allegations of plea seven that the Defendant is attempting to hold the Plaintiff liable for the breach of a contract to which he was not a party.

15. For aught that appears from the allegations of plea seven, the fiscal agent of the Defendant did not exercise the alleged right to be relieved from its said contract.

16. The allegations of plea seven fail to allege when the said bonds were sold.

17. For aught that appears in the allegations of plea seven, the bonds would have sold for the same discount and at the same rate of interest submitted after May 29, 1953.

18. For aught that appears from the allegations of plea seven, there was no promise in writing by the Plaintiff to pay the alleged debt of the Defendant to J. B. Converse and Company.

19. It affirmatively appears from the allegations of plea seven that the Defendant is attempting to hold the Plaintiff liable for the debt of another and said plea fails to allege that the Plaintiff promised in writing to pay said debt.

20. The allegations of plea eight are vague and uncertain.

21. For aught that appears from the allegations of plea eight, no question has arisen between the Plaintiff and the Defendant which, under the contract, should have been submitted to J. B. Converse and Company, Inc.

22. The allegations of plea eight do not constitute a defence to this cause of action.

Respectfully submitted,

Filed Jan. 22, 1955 By: Marlowe J. Stone

2570

DEMURRER TO PLEAS

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff

vs

THE TOWN OF DAPHNE, a Municipal Corporation,

Defendant.

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IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

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LAW OFFICES
CHASON & STONE
BAY MINETTE, ALABAMA

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff,

vs.

THE TOWN OF DAPHNE, a Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW.

Comes now the Plaintiff in the above styled cause, by his attorneys, and moves this Honorable Court to transfer said cause from the Law side of the Circuit Court of Baldwin County, Alabama, to the Equity side of said Court and as grounds for said motion says as follows:

That this suit was filed by the Plaintiff for breach of a contract entered into by and between the Plaintiff and the Defendant on May 9, 1953, in and by the terms of which the Plaintiff agreed to construct and erect a water well for the Defendant by a specified date from the date of the original contract. That although the Plaintiff completed his said contract, he did not complete the same within the specified time and the Defendant has now claimed a forfeiture in its favor in the amount of Seven Thousand Six Hundred and Five Dollars ($7,605.00) as evidenced by the pleas heretofore filed in this cause by the Defendant, and the Plaintiff further alleges that by the filing of said pleas the Defendant has raised an equitable question, the defense of which depends upon the assertation of his equitable right by the Plaintiff, and the Plaintiff does hereby assert his equitable right to have the penalty above referred to in the matter of a forfeiture on account of the non-performance by him of a condition or covenant contained in said contract construed strictly against the interest of the Defendant, who is claiming the benefit of said penalty of forfeiture, under the equitable doctrine or principal that equity abhors a penalty or forfeiture.

Respectfully submitted,

CHASON & STONE

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By: Malcolm G. Stone Jr.

STATE OF ALABAMA

BLADWIN COUNTY

Before me, G Mac Humphries, a Notary Public, in and for said County in said State, personally appeared Norborne C. Stone, who is known to me and who, after being by me first duly and legally sworn, did depose and say under oath as follows:

That he is one of the attorneys of record for the Plaintiff in that certain cause now pending in the Circuit Court of Baldwin County, Alabama, at Law, wherein A. W. Williams, individually and doing business as A. W. Williams Inspection Company, is the Plaintiff and the Town of Daphne, a Municipal Corporation, is the Defendant, and that his name is signed to the foregoing motion as such, and that the facts alleged therein are true.

Norborne C. Stone

Norborne C. Stone

Sworn to and subscribed before
me this 16th day of January,
1956.

Notary Public, Baldwin County, Ala.

Filed Jan. 16, 1956

25-70

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff,

vs.

THE TOWN OF DAPHNE, a Municipal Corporation,

Defendant.

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IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW.

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MOTION TO TRANSFER TO EQUITY

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LAW OFFICES
CHASON & STONE
BAY MINETTE, ALABAMA

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,	IN THE CIRCUIT COURT OF
Plaintiff,	BALDWIN COUNTY, ALABAMA
vs.	
THE TOWN OF DAPHNE, a Municipal Corporation,	AT LAW.
Defendants.	

This cause, coming on to be heard, is submitted for decree upon the plaintiff's demurrers to the defendant's motion to transfer to Equity as amended March 3, 1956, and the same being considered by the Court the Court is of the opinion that the demurrers are well taken and should be sustained;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said demurrers of the defendant to the plaintiff's motion to transfer to Equity be and they are hereby sustained.

Done this June 19, 1956.

/s/ Hubert M. Hall
Judge

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,	IN THE CIRCUIT COURT OF
Plaintiff	
vs	BALDWIN COUNTY, ALABAMA,
THE TOWN OF DAPHNE, a municipal corporation,	
Defendant	AT LAW.

Comes the defendant in the above styled cause and demurring to plaintiff's motion to transfer this cause to the equity side of Court and as grounds of demurrer says:

1. That the said motion sets up no facts authorizing the transfer of the said cause.

2. Said motion does not contain equity.

3. That the allegation of the motion of the agreement on the part of the plaintiff to pay $45.00 a day for several days delay beyong 45 days is a penalty, is a conclusion of the pleader.

4. That the said motion does not allege facts showing an equitable right on the part of the plaintiff.

5. That the allegation of the said motion does not show that the plaintiff has any equitable right against the enforcement of the collection of the amount agreed by him to be paid for delay in the performance of his contract.

6. That the said motion sets up no facts showing the defendant in this cause is not entitled to enforce the payment of the amount agreed to be paid for delay in the completion of his contract.

7. Said motion sets up no facts constituting an excuse legal or equitable for the plaintiff's failure to complete the contract within the time specified.

8. That the allegation in the said motion that the plaintiff was prevented from completing the contract within the time specified in his contract was due to his encountering sand in the water struck in the drilling does not set up an equitable defense to defendant's right to collect the amount agreed upon.

9. That the said motion does not show that the plaintiff used due diligence in the prosecution of his contract.

10. Said motion does not show that the plaintiff used proper and sufficient tools, equipment and machinery in his drilling of the said well.

11. Said motion does not show that the plaintiff used due skill in the drilling of the said well.

12. For ought that appears from the facts alleged in the said motion, the plaintiff was not equiped with proper machinery for the drilling of the well contracted to be dug and that he used due skill and diligence in such operation.

13. For ought that appears in said motion the defendant was damaged as set out in its pleas.

14. Said motion does not allege that the defendant was not damaged by reason of the delay of the plaintiff in the completion of his contract.

15. Said motion does not allege that the amount due under the contract has not been fully, completely and finally determined as provided therein.

16. Said motion does not allege that J. B. Converse, & Co., Eng., engineers on the said job has not settled and determined the dispute existing between the plaintiff and defendant as to the amount to be paid by the defendant to the plaintiff under the said contract.

17. Said motion sets up no facts constituting an equitable defense in whole or in part to the matters alleged in defendants pleas filed in this cause.

18. For ought that appears from the facts alleged in said motion the plaintiff assumes the risk of sand condition that he found, set out in his motion.

19. For it does not appear from the facts stated in said motion that the plaintiff did not assume the risk of the sand condition set out in his motion as the cause of his delay.

20. For it does not appear from the facts alleged in his motion that due diligence and skill in the drilling of the well with the proper equipment would have obviated the delay in the completion of the contract.

Filed March 19, 1927

Beebe & Swearingen

By W. C. Beebe

Attorneys for defendant

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,	(	IN THE CIRCUIT COURT OF
Plaintiff,	(	
vs	(	BALDWIN COUNTY, ALABAMA,
THE TOWN OF DAPHNE, a Municipal Corporation,	(	
Defendant	(	AT LAW

Comes the defendant in the above styled cause and demurs to the motion of the plaintiff to transfer the said cause to the equity side of the said Court filed January 16, 1956 and as grounds therefor says:

1. That the said motion sets up no facts constituting an equitable defense.

2. That the said motion does not allege any facts showing an equitable claim against the defendant.

3. That the said motion does not contain equity.

4. That the allegation therein made that the defendant has raised an equitable question, the defense of which depends upon the ascertation of his equitable right by the plaintiff, is but a conclusion of the pleader.

5. That said plea does not raise an equitable question the defense of which depends upon the ascertion of an equitable right of the plaintiff.

6. That the said motion does not set up any facts showing an equitable right by the plaintiff against the defendant.

7. That the allegation in said motion that the plea of the defendant seeks to impose a penalty for non-performance of contract is but a conclusion of the pleader.

8. That the said motion alleges no facts showing that the defendant's plea seeks to impose a penalty against the plaintiff for non-performance of contract.

9. That the said motion does not allege sufficient facts to apprise the defendant of what equitable rights the plaintiff seeks to enforce.

Filed Jan. 25, 1956
Alice D. Luck, Clerk.

Beebe & Swearingen

By W. V. Beebe

25-70

A. W. Williams, Individually and doing business as A. W. Williams Inspection Company,

Plaintiff,

vs

The Town of Daphne, a municipal Corporation,

Defendant

Demurrers

A. W. WILLIAMS, Individually and doing business as A. W. Williams Inspection Company,	)	
Plaintiff,	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
	)	AT LAW.
THE TOWN OF DAPHNE, a Municipal Corporation,	)	
Defendant.	)	

MOTION TO TRANSFER TO EQUITY

Comes now the Plaintiff in the above styled cause, by his attorneys, and moves this Honorable Court to transfer said cause from the Law Side of the Circuit Court of Baldwin County, Alabama, to the Equity side of said Court and as grounds for said motion says as follows:

That the cause of action upon which the Plaintiff instituted this suit arose out of a contract entered into by and between the Plaintiff and the Defendant on May 9, 1953, in and by the terms of which the Plaintiff agreed to construct a municipal water well and to install a pump for the operation of said well as a part of the water system of the Defendant corporation. That in and by the terms of said contract the Defendant agreed to pay to the Plaintiff, for the construction and installation aforesaid, the sum of Fourteen Thousand Two and 16/100 Dollars ($14,002.16) upon the completion of the work to be performed under said contract and in such manner that the said well and pump would produce two hundred fifty (250) gallons of water per minute suitable for human consumption. That said contract further provided that said construction and installation would be completed in the manner specified within a period of forty-five (45) days from the date of said contract, or by, to-wit: June 23, 1953, and that in the event said installation was not completed within said specified time that the Plaintiff would be required to pay to the Defendant a sum equal to Forty-five Dollars ($45.00) per day for each day beyond a period of forty-five (45) days from the date of said contract that the said construction and installation were not completed according to the plans and specifications contained

therein and capable of production as hereinabove set forth as a penalty for the failure to complete said contract within said specified time. And the Plaintiff further alleges that he did not, in fact, complete said construction and installation according to the plans and specifications contained in said contract within forty-five (45) days from the date of said contract for and on account of difficulties which he encountered in the drilling of said well with the structure of the sub-surface soil and on account of the presence of sand in the water produced from said well in quantities which rendered it unfit for human consumption, but that he did pursue said work diligently and in a workmanlike manner; that for and on account of the delay occasioned for reasons hereinabove alleged the Plaintiff has, by the terms of said contract, incurred liability for the penalty therein provided for and hereinabove set forth, and has subjected himself to loss in the nature of a forfeiture under said contract. That the inclusion of the provision in said contract for said penalty was as security for the performance of said contract by the Plaintiff and the Plaintiff has fully performed said contract except that he did not complete his performance thereof until a period of one hundred sixty-nine (169) days after the expiration of the original forty-five (45) day period and he thereby, under a strict legal construction of said contract, subjected himself to a penalty in the amount of Seven Thousand Six Hundred Five and No/100 Dollars ($7,605.00), but the Plaintiff alleges that if the Defendant is permitted to avail itself of said provision of said contract that an injustice will be done to the Plaintiff in that the Defendant did not, and has not, suffered damages in the amount of said penalty and to permit the Defendant to reduce the amount of its liability under said contract by an amount equal to the total amount due under said penalty provision would be to require the Plaintiff to suffer a loss greatly disproportionate to the injury or damage sustained by the Defendant on account of the delay in the completion of the performance of said contract by the Plaintiff. The Plaintiff further alleges that the Defendant, in and by pleas numbered "4", "5" and "6" heretofore filed in this cause, has claimed the benefit of said penalty provision of