E. A. Gleeson, for the appellant.
W. L. Scott, for the defendants, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the appellant was a contractor, and agreed to "do the excavating of all materials, excepting rock, under the entire factory building of the owners (in) Ottawa and remove same from the premises, disposing of same as he may see fit." The price was to be "$1 per cubic yard for all material removed by the said contractor."

During the work, the appellant encountered large boulders and removed them. His claim in this action was for payment of the cost thereof, upon the ground that the contract did not include them.

The County Court Judge dismissed the action because he concluded that boulders were not "rock" as that word is used in the contract. He properly discarded evidence given as to the practice and custom in Ottawa or under contracts which specifically classify material. None of that evidence was admissible—it did not profess in any way to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.

The word "rock" must, in the circumstances of the case, be considered as having its usual meaning. "Rock" was not to be excavated—and this word, according to the dictionaries, includes both stratified and loose rock. See the Imperial Dictionary (1859); Murray's Dictionary (1910); the Century Dictionary (1914); the Encyclopædia Britannica.

There is no judicial authority as to the meaning of the word save in Drhew v. Altoona City (1888), 121 Penn. St. 401, in which the Supreme Court of Pennsylvania in appeal decided that "rock" excavation included "all the divers qualities of what was properly called rock, encountered in the progress of the work" (p. 421).

The same rule should be applied in this case: rock, either in stratified or boulder form, was not included in the written contract, and might be recovered for, in the circumstances in evidence. Enough evidence was given to enable the Court to conclude that the boulders charged for were of sufficient size to distinguish them from stones or small boulders such as were buried.

The case cited also refers to a limitation upon the functions of an architect, i.e., he cannot make a new contract for the parties, and they are not bound by his classification or certificate unless they have expressly agreed to accept it as final.

The appeal should be allowed, and the appellant should recover $395 with costs throughout.

Appeal allowed.