

reached, Mr. Henderson left, and until the trial did not learn what settlement had been arrived at between Price and the plaintiff. Following these measurements Price refused to admit that he was liable to the plaintiff for any stone beyond the forty feet which he claimed was all he had bought or received. He then signed an order written by the plaintiff, in which he asked the town to "please pay to W. Fisher the sum of forty-eight dollars and charge to my account." Upon receipt of this order the town tendered the plaintiff with a cheque for \$48, which the plaintiff refused to accept, for the reason, as he alleges, that it was offered to him upon condition that he would accept it in full of his claim. This \$48 has never been paid to the plaintiff; nor as far as I can find from the evidence has the town paid it to Price. When this order was given by Price he had been paid by the town for the full 637 feet of curbing he had agreed to furnish them, but the town owed him for some other stone supplied by him under a contract separate and distinct from that for the curbing. The plaintiff's evidence is, that from the time the stone was taken, continuously down to the trial, he always regarded the town as the party primarily liable to him for the curbing taken, except that I take the effect of his evidence to be, that subsequent to the taking of the stone he had agreed with Price to look to him for the forty feet of curbing for which the order was given. That \$1.20 per foot is a fair and reasonable price for the stone is not disputed.

The learned Judge, although he finds the town took and used 174 feet of curbing belonging to the plaintiff, comes to the conclusion that the plaintiff cannot recover because he subsequently demanded payment from Price. He says: "On the 10th September, 1906, Mr. Fisher in his own handwriting sits down and writes, 'Albert Price to W. Fisher, Debtor, To 190 feet of curbing at \$1.20 per foot, \$228.' He cannot expect that he can look to Price for his pay, and to the town at the same time; he must choose one or other of them. If he has elected to give the credit to Albert Price he cannot turn around and look to the town." In this view of the learned Judge I am unable to agree. When the town took this stone it was unquestionably the property of the plaintiff. It is not even suggested that when the stone was taken, the plaintiff had sold it either to the town or to Price, or had given any authority to the defendants or any person to take it. There was nothing at the time which