

INDEX

13

	PAGE
Bill of Complaint	1
Amendment to Complaint	28
Answer	31
Replication	36
Testimony	37
COMPLAINANT'S TESTIMONY:	
Lawrence A. Duble—Direct	39
Cross	54
Re-direct	56
Re-cross	58
Cornelius W. Greaney—Direct	60
Cross	62
Re-direct	65
George Austin Smiley, Jr.—Direct	66
Cross	69
Recalled—Direct	129
Joseph Desorte—Direct	71
Recalled—Direct	78
Recalled—Cross	79
F. B. Kerns—Direct	72
Cross	74
Re-direct	77
Re-cross	77
Motion to Dismiss	82

	PAGE
DEFENDANT'S TESTIMONY:	
F. B. Kerns—Direct	83
Cross	104
Recalled—Direct	125
Recalled—Cross	127
Walter O. Colflesh—Direct	115
Cross	117
Bart P. Costello—Direct	122
Cross	124
Conclusions	134
Supplemental Conclusions	137
Final Decree	140
Notice of Appeal	142
Petition of Appeal	144
<i>Exhibit C-1 (Continuation Certificates)</i> —	<i>147</i>
<i>Exhibit C-2 (Letter)</i> —	<i>152</i>
<i>Exhibit D-1 (Letter)</i> —	<i>154</i>
<i>Exhibit D-2 (Letter)</i> —	<i>155</i>
<i>Exhibit D-3 (Index Card)</i> —	<i>157</i>
<i>Exhibit D-4 (Letter)</i> —	<i>158</i>

BILL OF COMPLAINT.

(Filed 4-2-34.)

IN CHANCERY OF NEW JERSEY.
102-151

*To the Honorable Luther A. Campbell, Chancellor
of the State of New Jersey:*

The complainant, Township of Waterford, a 10
municipal corporation, County of Camden, respect-
fully shows that:

FIRST CAUSE OF ACTION.

1. Cornelius W. Greaney, of Atco, in the Town-
ship of Waterford, County of Camden, State of New
Jersey, was the tax collector of the said Township
of Waterford, from January 1, 1916, to December
16, 1932. 20

2. That as such tax collector, he failed to pay to
complainant certain fees, taxes, interest or penalties
on taxes, costs, and other perquisites which he re-
ceived as such tax collector.

3. The said Cornelius W. Greaney did omit from
tax search certificates, certain taxes, assessments,
and other municipal liens and charges which were
levied or assessed against the premises described 30
in the applications for the said searches, and which
were liens thereon at the respective dates of the
said certificates, and that the persons to whom said
certificates were issued, in reliance thereon, acquired
for a valuable consideration an interest in the lands

Bill of Complaint

described in the aforesaid certificates, and thereupon held said interest free from said municipal liens not shown on said certificates. The said omissions were the result of the wilfull, careless, and negligent manner in which the said Cornelius W. Greaney issued the said certificates.

- 10 4. That on or about the first day of January, 1916, the defendant, Maryland Casualty Company, of Baltimore, Maryland, upon consideration of fees or premiums, duly paid by the complainant to the said defendant, executed as surety, a bond to the complainant in the sum of three thousand (\$3,000.00) dollars, and subsequently by endorsement increased to the sum of five thousand (\$5,000.00) dollars, conditioned for the faithful performance and discharge by the said Cornelius W. Greaney of his duties.
- 20 The said defendant upon receipt of yearly premiums duly paid to it by the complainant renewed or extended the said bond from year to year until the first day of January, 1927, with penalty increased as aforesaid containing all its conditions and obligations.
- 30 5. That on or about the fifth day of February, 1934, the complainant commenced a suit in the New Jersey Supreme Court against the said defendant and others, said suit being based upon the said alleged defalcations and the other breaches of duty as in and by the said complaint therein filed will more fully appear, a copy of which is attached hereto and marked Exhibit "A."

6. Subsequently an amendment to the complaint

Bill of Complaint

was filed, a copy of which is attached hereto and marked Exhibit "B."

7. The said defalcations were fraudulently concealed by the said Cornelius W. Greaney and were impossible of ascertainment until the completion of an audit on or about the twenty-eighth day of August, 1933. The defendant has filed its answers 10 to the said complaint and to the amendment to the complaint and therein specially pleads the statute of limitations, copies of which answers are attached hereto and marked Exhibits "C" and "D" respectively.

8. The said errors or omissions in the said tax searches were fraudulently concealed by the said Cornelius W. Greaney and were impossible of ascertainment until audit thereof was completed on or 20 about the twenty-eighth day of August, 1933. The said Cornelius W. Greaney negligently, carelessly, and wilfully failed to keep adequate records or copies of the said tax searches, and by reason thereof discovery of said omissions was impossible of ascertainment except by the aforesaid audit or examination, and the said defendant has by its answers to the said complaint and to the amendment to the complaint specially pleaded the statute of limitations. 30

9. On or about the eighth day of April, 1933, complainant informed defendant that it was of the opinion that defalcations had been made by the said Cornelius W. Greaney of certain moneys duly coming into his hands as tax collector, and that omis-

Bill of Complaint

sions appeared on many tax search certificates duly issued by said tax collector, and furnished the said defendant with a partial list of said defalcations and invited said defendant to make an investigation thereof. At said time the defendant suggested that complainant proceed with an audit, and upon completion thereof defendant would proceed to investigate and make settlement of the amounts found to be due complainant. Relying upon said statements of the defendant, complainant refrained from instituting legal proceedings at that time and for a long time thereafter to give defendant an opportunity for an independent investigation and to make settlement of said claims.

10. By reason of said acts and statements of the defendant a considerable time elapsed, which, if the defendant is permitted to plead the statute of limitations, may defeat complainant in recovering a substantial amount due to it.

SECOND CAUSE OF ACTION.

1. Said complainant in its bill of complaint alleged that the said bond and the renewals or extensions thereof, were mislaid or lost, and demanded of the said defendant that it file a copy thereof prior to the filing of its answer, or annex copy thereof to its answer, which the said defendant has failed or neglected to do.

2. The said defendant is in possession of a copy of said bond, of the renewals, extensions thereof, and the endorsements thereon.

Bill of Complaint

5

Complainant is without adequate remedy in the courts of law and therefore prays that:

I.

The defendant, Maryland Casualty Company, answer this bill of complaint and each statement therein made.

10

II.

That the defendant, Maryland Casualty Company, be enjoined and restrained forever from interposing, pleading, or urging the defense of the statute of limitations in the action at law now pending between the complainant and the defendant.

III.

20

That the defendant be enjoined to furnish a true and accurate copy of the said bond and the renewals or extensions thereof and the endorsements thereon.

IV.

That a writ of subpoena may issue out of this court, commanding said defendant to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

30

AARON HEINE,
*Solicitor for and of Counsel
with Complainant.*

Bill of Complaint

EXHIBIT "A."

COPY

Camden County

10 THE STATE OF NEW JERSEY to COR-
NELIUS W. GREANEY and MARYLAND
CASUALTY COMPANY of Baltimore, Mary-
land, a corporation of Maryland.

You are hereby summoned to an-
swer the annexed complaint of TOWN-
(SEAL) SHIP OF WATERFORD, in an action
at law in the New Jersey Supreme
Court. And take notice that unless
you file your answer to said complaint with the Clerk
20 of the New Jersey Supreme Court, at Trenton,
within twenty days after service upon you of this
writ and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you.

Witness, THOMAS J. BROGAN, Chief Justice of
the New Jersey Supreme Court, at Trenton, this
23rd day of January, nineteen hundred and thirty-
four.

FRED L. BLOODGOOD

30

Clerk

AARON HEINE

Attorney

*Bill of Complaint*NEW JERSEY SUPREME COURT
CAMDEN COUNTY

Township of Waterford, a municipal corporation, Plaintiff, vs. Cornelius W. Greaney, and Maryland Casualty Com- pany, of Baltimore, Maryland, a corporation of Maryland, Defendants.	}	Action at Law Complaint	10
---	---	----------------------------	----

The plaintiff, Township of Waterford, of the
 County of Camden, State of New Jersey, a munic-
 ipal corporation says that:

20

FIRST COUNT

1. The defendant, Cornelius W. Greaney, of the
 Township of Waterford, County of Camden, was
 the Tax Collector of the Township of Waterford
 aforesaid, from January first, 1916 to December 30
 twenty-second, 1932.

2. That as Tax Collector, he collected certain
 fees, taxes, interest or penalties on taxes, allow-
 ances, costs and other perquisites, which by law
 he received as such Tax Collector, totaling the sum

Bill of Complaint

of \$1,138.68, an itemized list of which is in the possession of the defendants, and are hereby referred to as though fully incorporated herein, and which if demand is made therefor, will be produced by plaintiff.

3. That it was the duty of the said defendant to
10 make a full itemized statement and return, verified by oath, to the Treasurer of the said Township of all such taxes, interest or penalties on taxes, fees, allowances, costs and other perquisites.

4. That said defendant has neglected or refused to make such account and pay over said moneys to the Treasurer of the said Township as required by law.

20 Plaintiff demands judgment on this count in the sum of \$1,138.68, together with interest thereon from the time said moneys were paid to said defendant.

SECOND COUNT

1. Paragraph 1 of the First Count is made paragraph 1 herein.

30 2. It was the duty of the defendant, Cornelius W. Greaney, within five days after he ceased to hold his said office, to deliver to Thomas A. Fanelli, who was designated by the said plaintiff to receive the same, all moneys, papers, books, memoranda, accounts or any data of any nature whatever pertaining to the office.

3. Said defendant has neglected or refused within the time limited by law after he ceased to hold his said office, to deliver to said Thomas A. Fanelli, the following: the cash book for the year 1926 and the papers, books, memoranda, accounts and any and all data of any nature whatsoever from which information relating to receipts of moneys by the said tax collector, and belonging to the plaintiff for said 10 year 1926, could be ascertained and which pertain to his office, although repeated demands have been made upon him to do so according to the statute in such case made and provided.

4. That by reason of the neglect or refusal of the said defendant to deliver as aforesaid, said plaintiff has and will be put to great expense in ascertaining the information contained therein and in the duplication thereof. 20

5. That by reason of the failure or neglect by the defendant to deliver as aforesaid, said defendant is subject to a penalty of \$50.00 for each day of refusal or neglect to deliver as aforesaid.

Plaintiff demands judgment on this account, in the sum of \$5,000.

THIRD COUNT

30

1. Paragraph 1 of the First Count is hereby made Paragraph 1 herein.

2. That part of the duties of the said Tax Collector was to issue to any person or persons so

requiring it, a certificate, certifying what taxes, assessments or other municipal liens or charges, if any, were levied or assessed against the property described in the application and were liens thereon at the date of the certificate and which should have included all unpaid instalments of any assessments theretofore levied and in force, whether due or not.

10

3. That the said defendant, Cornelius W. Greaney, did issue certificates purporting to certify what taxes, assessments or other municipal liens or charges described in the said applications and which said certificates purported to show all of the unpaid installments of any assessments theretofore levied and in force, whether due or not, a list of which is in the possession of the defendants and to which reference is hereby made as though fully incorporated herein, and which if demand is made therefor
20 plaintiff is willing to produce.

4. That the said defendant did omit from said certificates certain taxes, assessments and other municipal liens or charges which were levied or assessed against the properties described in the aforementioned applications and which were liens thereon at the respective dates of the said certificates, among which said respective certificates in
30 certain instances also omitted to state the unpaid installments of any assessments theretofore levied and in force, whether due or not.

5. Certain persons, in reliance on said tax searches or tax search certificates acquired, for a valuable

Bill of Complaint

consideration, an interest in the lands described in the aforesaid tax certificates, and thereupon held such respective interests free from said omitted municipal liens held by the said Township of Waterford and not shown on said tax searches or tax search certificates.

6. By reason of said omissions, said plaintiff, in accordance with the Statute in such case made and provided, has and will suffer damages in the sum of \$858.10 exclusive of interest and penalties. 10

Plaintiff demands judgment on this count, in the sum of \$858.10, together with interest or such penalties as are allowable by statute thereon.

FOURTH COUNT

20

1. Paragraphs 1, 2, 3 and 4 of the First Count are hereby made Paragraphs 1, 2, 3 and 4 herein, and Paragraphs 2, 3, 4 and 5 of the Third Count are made Paragraphs 5, 6, 7 and 8 herein.

2. By reason of the said conduct of the said defendant, Cornelius W. Greaney, it became necessary to engage necessary persons to investigate and ascertain the payments of whatever nature and by whomsoever made to the said defendant, as tax collector, as aforesaid, and not paid by him to the said plaintiff, and to engage necessary persons to ascertain the omissions in the aforesaid tax searches, and to whom the said searches were issued and the persons relying thereon and the interest of the said 30

Bill of Complaint

person in the lands described in the said tax search, and the amount of the loss that has and will be sustained by the said plaintiff; all of which was necessary and proper and reasonably worth the sum of \$2,500.00.

Plaintiff demands judgment on this count, in the
10 sum of \$2,500.

FIFTH COUNT

1. Paragraph 1 of the First Count is hereby made Paragraph 1 herein.

2. That on or about the first day of January, 1916, the defendant, Cornelius W. Greaney, as principal, and Maryland Casualty Company, of Baltimore,
20 Maryland, a corporation of Maryland and licensed to do business in the State of New Jersey, as surety, executed a bond to the plaintiff, in the sum of \$3,000., and subsequently by endorsement increased to the sum of \$5,000., conditioned for the faithful performance and discharge by the said Cornelius W. Greaney of all his duties, a copy of which bond is in the possession of the defendant, Maryland Casualty Company of Baltimore, Maryland, and demand is hereby made of the said defendant, to file or annex
30 a copy thereof with all endorsements and renewals thereof to the answer at or prior to the filing thereof by it, which bond is made a part hereof.

3. The said bond, with the penalty thereof increased as aforesaid with all its conditions and obli-

gations, was renewed or extended from year to year thereafter and remained in full force and effect until December 31st, 1926.

4. Plaintiff repeats the allegations contained in the First, Second, Third and Fourth Counts.

Plaintiff demands judgment on this count, in the sum of \$5,000. 10

AARON HEINE

Attorney for Plaintiff.

EXHIBIT "B."

COPY

NEW JERSEY SUPREME COURT
CAMDEN COUNTY

20

Township of Waterford, a
municipal corporation,
Plaintiff,

vs.

Cornelius W. Greaney, and
Maryland Casualty Com-
pany, of Baltimore,
Maryland, a corporation
of Maryland,
Defendants.

Action at Law
Amendment to
Complaint.

30

The plaintiff, Township of Waterford, of the County of Camden and State of New Jersey, a municipal corporation, amends its complaint by adding additional Counts, as follows:

Bill of Complaint

SIXTH COUNT

1. It repeats Paragraph 1 of the First Count.

2. That as Tax Collector, he collected certain fees, taxes, interest or penalties on taxes, allowances, costs and other perquisites, which by law he received
10 as such Tax Collector, to wit: in addition to the sum set out in the First Count of the within suit, from M. Bombaro, on or about the first day of August, 1925, for taxes and interest, the sum of \$62.92, and paid over to the said plaintiff, the sum of \$55.57, and retained the sum of \$7.35.

3. Paragraphs 3 and 4 of the First Count are hereby made Paragraph 3 of this count.

20 4. Paragraphs 1, 2, 3 and 4 of the Fifth Count are hereby made Paragraph 4 herein.

Plaintiff demands damages against the defendants on this Count, in the sum of \$7.35, together with interest thereon from the time the said money was paid to the defendant.

SEVENTH COUNT

30 1. Paragraph 1 of the First Count is hereby made Paragraph 1 herein.

2. That part of the duties of the said Tax Collector was to issue to any person or persons so requiring it, a certificate, certifying what taxes, as-

sessments or other municipal liens or charges, if any, were levied or assessed against the property described in the application and were liens thereon at the date of the certificate and which should have included all unpaid instalments of any assessments theretofore levied and in force, whether due or not.

3. That the said defendant, Cornelius W. Greaney, 10
did issue certificates purporting to certify what taxes, assessments or other municipal liens or charges described in the said applications and which said certificates purported to show all of the unpaid instalments of any assessments theretofore levied and in force, whether due or not, a list of which is in the possession of the defendants and to which reference is hereby made as though fully incorporated herein, and which if demand is made therefor, plaintiff is willing to produce. 20

4. That the said defendant did, negligently, carelessly and/or wilfully omit from said certificates certain taxes, assessments and other municipal liens or charges which were levied or assessed against the properties described in the aforementioned applications and which were liens thereon at the respective dates of the said certificates, among which said respective certificates in certain instances also omitted to state the unpaid instalments of any assessments theretofore levied and in force, whether due or not. 30

5. Certain persons, in reliance on said tax searches, or tax search certificates, acquired for a

Bill of Complaint

valuable consideration, an interest in the lands described in the aforesaid tax certificates, and thereupon held such respective interests free from said omitted liens held by the said Township of Waterford and not shown on said tax searches or tax search certificates.

- 10 6. By reason of said negligent, careless and/or wilful omissions, said plaintiff, in accordance with the Statute in such case made and provided, has and will suffer damages in the sum of \$858.10, exclusive of interest and penalties.

Plaintiff demands judgment on this count, in the sum of \$858.10, together with interest or such penalties as are allowable by statute thereon.

AARON HEINE

20

Attorney for Plaintiff.

30

Bill of Complaint

17

EXHIBIT "C."

COPY

NEW JERSEY SUPREME COURT
CAMDEN COUNTY

10

Township of Waterford, a municipal corp.,	}	Action at Law Answer of Defendant Maryland Casualty Company	20
Plaintiff			
vs.			
Cornelius W. Greaney, and Maryland Casualty Co. of Baltimore, Md., a corp. of Maryland,			
Defendants			

The defendant, Maryland Casualty Company, a corporation of the State of Maryland, authorized to transact business in the State of New Jersey, answering the complaint in the above entitled cause says that:

30

IN ANSWER TO THE FIRST COUNT

This defendant makes the following answers to the first count for the reason that this count is repeated as a part of the fifth count.

Bill of Complaint

1. It has not sufficient information or knowledge to form a belief as to the allegations in paragraph one and neither admits nor denies but leaves the plaintiff to its proof.

2. It denies paragraph two.

10 3. It denies paragraph three.

4. It denies paragraph four.

This defendant makes no answer to the unnumbered paragraph following paragraph four as this count is not directed or the demand made against this defendant but the allegations contained therein are merely incorporated in the fifth count.

20 IN ANSWER TO THE SECOND COUNT

This defendant makes the following answers to the second count for the reason that this count is repeated as a part of the fifth count.

1. It makes the same answer to paragraph one of the second count as the answer to paragraph one of the first count, which is made a part of the second count.

30

2. It denies paragraph two, and alleges and states that at the time of the occurrences set forth therein this defendant was not under any contract of suretyship with one Cornelius W. Greaney or on behalf of the plaintiff.

3. It denies paragraph three and refers to the further statement made in the answer to paragraph two of this count.

4. It denies paragraph four.

5. It denies paragraph five.

10

This defendant makes no answer to the unnumbered paragraph following paragraph five as this count is not directed or the demand made against this defendant, but the allegations contained therein are merely incorporated in the fifth count.

IN ANSWER TO THE THIRD COUNT

This defendant makes the following answers to the third count for the reason that this count is repeated as a part of the fifth count. 20

1. It makes the same answer to paragraph one of the third count as the answer to paragraph one of the first count, which is made a part of the third count.

2. It denies each and every allegation contained in paragraph two.

30

3. It denies paragraph three.

4. It denies paragraph four.

5. It denies paragraph five.

Bill of Complaint

6. It denies paragraph six, and specifically denies that the plaintiff has lost or will lose any money by reason of the fact alleged thereon.

This defendant makes no answer to the unnumbered paragraph following paragraph six as this count is not directed or the demand made against
10 this defendant, but the allegations contained therein are merely incorporated in the fifth count.

IN ANSWER TO THE FOURTH COUNT

This defendant makes the following answer to the fourth count for the reason that this count is repeated as part of the fifth count.

1. It makes the same answer to paragraph one
20 of the fourth count as to paragraphs one, two, three and four of the first count and paragraphs two, three, four and five of the third count, which are made a part of the fourth count.

2. It denies paragraph two.

This defendant makes no answer to the unnumbered paragraph following paragraph two, as this count is not directed or the demand made against
30 this defendant, but the allegations contained therein are merely incorporated in the fifth count.

Bill of Complaint

IN ANSWER TO THE FIFTH COUNT

1. It makes the same answer to paragraph one of the fifth count as to paragraph one of the first count, which is made a part of the fifth count.

2. This defendant in answer to paragraph two admits that during a certain period subsequent to January 1st, 1916 it executed as surety an application of one Cornelius W. Greaney and/or by or on behalf of the plaintiff, Township of Waterford, a certain bond, but denies the condition of the bond as set forth in paragraph two of this count and alleges and states that the original executed bond is in the possession and under the control of the plaintiff, and the defendant hereby demands that the plaintiff produce a certified copy of the aforesaid bond on or before the time of trial. 10 20

3. It denies paragraph three.

4. It repeats the answers to the first, second, third and fourth counts as the answer to paragraph four of the fifth count, for the reason that the allegations in these counts are made a part of the fifth count.

The defendant denies liability to the plaintiff in any sum whatsoever. 30

FIRST SPECIAL DEFENSE TO FIFTH COUNT

The aforesaid bond was entered into as a result of an application made by the said Cornelius W.

Greaney and/or the Township of Waterford aforesaid, which said application failed to state or disclose that part of the alleged duties of the said Greaney as Tax Collector would be the duties described in the Second Count of the complaint herein.

SECOND SPECIAL DEFENSE TO FIFTH
COUNT

The contract of suretyship expressed in the aforesaid contracts are in each case to be construed and limited by the application for said bonds, and as so construed and limited no liability was assumed by this defendant for loss to the plaintiff as a result of the alleged failure of the said Greaney to properly perform the services described in the Second Count.

THIRD SPECIAL DEFENSE TO FIFTH COUNT

The defendant alleges and states that the prosecution of this suit was not commenced on any bond or on any continuation certificate on any bond which this defendant executed as surety during the years from January 1st, 1916 to December 31st, 1924 inclusive within nine years after the dates of the said bonds effective during this interval and that this suit does not operate in any wise against or in any manner effect the said sureties named in said bonds.

It is alleged and claimed that the matters and happenings set forth in this complaint and embodied in the fifth count occurred during the period from

Bill of Complaint

January 1st, 1916 to December 31st, 1924, which would bar the right of the plaintiff to recover against this defendant.

CECIL W. ROTZELL

Attorney for Defendant, Maryland Casualty Company.

10

EXHIBIT "D."

COPY

NEW JERSEY SUPREME COURT
CAMDEN COUNTY

20

Township of Waterford, a
municipal corporation,
Plaintiff

vs.

Cornelius W. Greaney, and
Maryland Casualty Company, of Baltimore,
Maryland, a corp. of
Maryland,

Defendants

Action at Law
Answer to Amendment to Complaint.

30

The defendant, Maryland Casualty Company, a corporation of the State of Maryland, authorized to

Bill of Complaint

transact business in the State of New Jersey, answering the amendment to the complaint in the above entitled cause, makes this as a supplemental answer to the answer heretofore filed to the original complaint.

IN ANSWER TO THE SIXTH COUNT

10

1. This defendant makes the same answer to paragraph one of the sixth count as the answer to paragraph one of the first count in the original answer of the defendant, Maryland Casualty Company.

2. It denies paragraph two.

3. It makes the same answer to paragraph three of the sixth count as the answers to paragraphs
20 three and four of the first count contained in the original answer of the Maryland Casualty Company.

4. It makes the same answer to paragraph four of the sixth count as the answers to paragraphs one, two, three and four of the fifth count in the original answer filed on behalf of this defendant, Maryland Casualty Company.

This defendant denies liability to the plaintiff in
30 any sum whatsoever.

FIRST DEFENSE

The aforesaid bond was entered into as a result of an application made by the said Cornelius W.

Bill of Complaint

Greaney and/or the Township of Waterford aforesaid, which said application failed to state or disclose that part of the alleged duties of the said Greaney as Tax Collector would be the duties described in the Second Count of the complaint herein.

SECOND DEFENSE

10

The contract of suretyship expressed in the aforesaid contracts are in each case to be construed and limited by the application for said bonds, and as so construed and limited no liability was assumed by this defendant for loss to the plaintiff as a result of the alleged failure of the said Greaney to properly perform the services described in the Second Count.

THIRD DEFENSE

20

The defendant alleges and states that the prosecution of this suit was not commenced on any bond or on any continuation certificate on any bond which this defendant executed as surety during the years from January 1st, 1916 to December 31st, 1934 inclusive within nine years after the dates of the said bonds effective during this interval and that this suit does not operate in any wise against or in any manner effect the said sureties named in said bond. 30

IN ANSWER TO THE SEVENTH COUNT

1. It makes the same answer to paragraph one of the seventh count as the answer to paragraph

Bill of Complaint

one of the first count contained in the original answer of the defendant, Maryland Casualty Company.

2. It denies paragraph two.

3. It denies paragraph three.

10

4. It denies paragraph four.

5. It denies paragraph five.

6. It denies paragraph six.

This defendant denies liability to the plaintiff under the seventh count in any sum whatsoever.

20

FIRST DEFENSE

The aforesaid bond was entered into as a result of an application made by the said Cornelius W. Greaney and/or the Township of Waterford aforesaid, which said application failed to state or disclose that part of the alleged duties of the said Greaney as Tax Collector would be the duties described in the Second Count of the complaint herein.

30

SECOND DEFENSE

The contract of suretyship expressed in the aforesaid contracts are in each case to be construed and limited by the application for said bonds, and as so construed and limited no liability was assumed by

Bill of Complaint

this defendant for loss to the plaintiff as a result of the alleged failure of the said Greaney to properly perform the services described in the Second Count.

THIRD DEFENSE

The defendant alleges and states that the prosecution of this suit was not commenced on any bond or on any continuation certificate on any bond which this defendant executed as surety during the years from January 1st, 1916 to December 31st, 1934 inclusive within nine years after the dates of the said bonds effective during this interval and that this suit does not operate in any wise against or in any manner effect the said sureties named in said bonds. 10

CECIL W. ROTZELL 20
Attorney for Defendant, Maryland Casualty Company

AMENDMENT TO COMPLAINT.

IN CHANCERY OF NEW JERSEY.

102/151

10

Between

TOWNSHIP OF WATER-
FORD, a municipal cor-
poration,*Complainant,*

and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

20

*Defendant.*On Bill, &c.
Amendment to
Complaint.

30 The complainant, Township of Waterford, of the
County of Camden and State of New Jersey, a
municipal corporation, amends its bill of complaint,
by omitting paragraphs 1 and 9 of the first cause of
action, and substituting therefor, the following
paragraphs:

1. Cornelius W. Greaney, of Atco, in the Town-
ship of Waterford, County of Camden and State of
New Jersey, was the tax collector of said Township

Amendment to Complaint

of Waterford, from January first, 1916, to December seventeenth, 1932. Said Greaney was elected in November, 1915, for a term of three years, taking office on the first day of January, 1916, and served as tax collector for said period. In November, 1918, he was subsequently elected tax collector for the term of three years, taking office on the first day of January next ensuing, and served as tax collector 10 for the said period. In November, 1921, he was subsequently elected tax collector of the said Township of Waterford, for the term of three years, taking office on the first day of January next ensuing, and served as tax collector for said period. In November, 1924, he was subsequently elected tax collector for the said Township of Waterford, for the term of three years, taking office on the first day of January next ensuing, and served as tax collector for 20 said period. In November, 1927, he was subsequently elected as tax collector of said Township of Waterford, for the term of three years, taking office on the first day of January next ensuing, and served as tax collector for said period. In November, 1930, he was subsequently elected as tax collector of said Township of Waterford for the term of three years, taking office on the first day of January next ensuing, and served as tax collector until December seventeenth, 1932.

30

9. On or about the eighth day of April, 1933, complainant informed defendant, that it was of the opinion that defalcations had been made by the said Cornelius W. Greaney of certain moneys duly coming into his hands as tax collector, and that omis-

Amendment to Complaint

sions appeared on many tax search certificates duly issued by said tax collector, and furnished the said defendant with a partial list of said defalcations and invited said defendant to make an investigation thereof. Defendant requested the complainant to proceed with its audit and upon completion thereof, to give defendant a copy thereof, which the said defendant would proceed to verify and if found to be correct, would pay the amount due to the complainant, and that in the meantime, no suit be instituted against the said defendant. Relying upon said statements of the defendant, complainant refrained from instituting legal proceedings at that time and for a long time thereafter to give defendant an opportunity for an independent investigation and to make settlement of said claims.

20

AARON HEINE,
Solicitor for Complainant.

ANSWER.

(Filed May 21, 1934.)

IN CHANCERY OF NEW JERSEY.

102/151

10

Between

TOWNSHIP OF WATER-
FORD, a municipal cor-
poration,

Complainant,

and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

Defendant.

On Bill, &c.
Answer.

20

The Maryland Casualty Company, a corporation of the State of Maryland, authorized to transact business in the State of New Jersey, answering the bill of complaint in the above-entitled cause, says that:

IN ANSWER TO THE FIRST CAUSE OF ACTION.

30

1. This defendant has not sufficient information or knowledge to form a belief as to the allegations in paragraph one as amended and neither admits nor denies but leaves the plaintiff to its proof.

2. It denies paragraph two.

3. It denies paragraph three.

4. In answer to paragraph four, this defendant admits that during a certain period subsequent to January first, 1916, it executed a surety on application of one Cornelius W. Greaney and/or by or on behalf of the complainant, Township of Waterford, a certain bond, but denies the conditions of the bond as set forth in paragraph four of this count and alleges and states that the said bond was executed only by this defendant for the faithful performance of the said Cornelius W. Greaney as collector of taxes and in no other capacity.

This defendant further states that the last year when the aforesaid bond was renewed was January first, 1926.

5. In answer to paragraph five, the defendant admits the commencement of the suit as set forth in the summons and complaint marked Exhibit A.

6. In answer to paragraph six, the defendant admits Exhibit B to be an exact copy of the amendment to the complaint in the suit filed in the New Jersey Supreme Court.

7. The defendant denies the first sentence in paragraph seven. In answer to the second and last sentence in paragraph seven, the defendant admits the answers marked Exhibits C and D attached to and made a part of the complaint.

Answer

8. The defendant denies each and every allegation in paragraph eight.

9. The defendant denies each and every allegation in paragraph nine as amended.

10. The defendant denies paragraph ten.

10

SPECIAL DEFENSE TO THE FIRST CAUSE OF ACTION.

This defendant specifically denies that it ever made any statement or representation or that any statement or representation authorized by this defendant were made by a lawfully authorized agent waiving in any way the statute of limitations or any of the provisions of the special statute of limitations as set forth in the third special defense to the fifth count in the answer and the third defense to the sixth and seventh counts in the answer to the amended complaint in the action pending in the New Jersey Supreme Court. 20

This defendant further alleges and states that no representations of any kind were made at its request or upon its authorization by any one to the complainant or to any authorized representative of the complainant in any way affecting the alleged defalcations of the said Cornelius W. Greaney or the Township of Waterford at any time. 30

SECOND SPECIAL DEFENSE TO THE FIRST COUNT.

The defendant hereby sets up and pleads as a separate defense paragraph five of the Act respect-

ing limitation of actions in which, among other things, it is provided "That any prosecution to be had or commenced on any bond heretofore given or hereafter to be given by any sheriff and his securities for faithful performance of the office of sheriff, or by any city, county or township collector and the securities of such collector for the faithful perform-

10 ance of the duties of said office of collector shall in no wise operate against or in any manner affect the said securities named and bound in said bond, unless such prosecution shall be commenced within nine years after the date of the said bond and not after;

* * *"

This defendant alleges and states that the complainant by the bill of complaint specifically sets forth the eighth day of April, 1933, as the first date

20 that the complainant informed the defendant of any defalcations, which is more than nine years after the date of the bond executed January first, 1924, as a renewal of the original bond and that the special defense in the action in the New Jersey Supreme Court is, therefore, in accordance with the provisions of the Act respecting limitation of actions which would bar the complainant of any right to restrain this defendant from pleading the defense as set up in the aforesaid action.

30 IN ANSWER TO THE SECOND CAUSE OF ACTION.

1. This defendant specifically denies the allegations set forth in paragraph one of the second cause of action and hereby alleges and states that there was no allegation in the complaint in the action at

Answer

law to the effect that the bond and renewals were mislaid or lost but that a simple demand was made upon the defendant to file or annex a copy of said bond and renewals.

2. The defendant denies having possession of a copy of the aforesaid bond or any of the renewals or extensions thereof or any of the endorsements thereon, the same having apparently been lost or destroyed and the defendant, therefore, is unable at this time to comply with the request made by the complainant. 10

SPECIAL DEFENSE TO THE SECOND CAUSE OF ACTION.

The defendant alleges and states that the complainant has a full and adequate remedy at law under the allegations set forth in the second count, the bonds being executed in duplicate each of these bonds becomes an original document and demand can be made under the Practice Act in the courts of law for the production of the executed copy of the bond, renewals and extensions thereof, and on the failure of the defendant to produce in the courts of law the evidence demanded secondary evidence can be introduced by the complainant in the proceeding in the courts of law. The defendant, therefore, denies that the complainant has any equitable rights under the second cause of action as there is a full and adequate remedy at law. 20 30

CECIL W. ROTZELL,
Attorney for Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

102/151

10

Between

TOWNSHIP OF WATER-
FORD, a municipal cor-
poration,*Complainant,*

and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

20

*Defendant.*On Bill, &c.
Replication.The complainant joins issue on the answer of the
defendant.

AARON HEINE,

Solicitor for Complainant.

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.
102/151

Between

TOWNSHIP OF WATER-
FORD, a municipal cor-
poration,

Complainant,

and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

Defendant.

On Bill, etc.
Final Hearing.

10

20

DAVIS, V. C.

January 28th, 1935. 30

APPEARANCES:

AARON HEINE, Esq., for complainant.

CECIL W. ROTZELL, Esq., for defendant.

(Mr. Heine opened the case to the Court for the complainant.)

(Mr. Rotzell opened the case to the Court for the defendant.)

10

The Court: I suggest that you go ahead and present your proof and then you can file briefs, because I will not have time to listen to argument, and if I care to have argument after briefs are submitted I will give you ample opportunity. The time for the hearing of this case has been shortened considerably and I want to get all the testimony in this afternoon, and I imagine counsel want to do the same thing, and I suggest that you go ahead
20 with your testimony.

Mr. Heine: I think we can stipulate a lot of preliminary facts, such as that Mr. Greaney was the tax collector.

Mr. Rotzell: I don't think there is any doubt about that.

Mr. Heine: From January 3rd, 1916, down to
30 December 17th, 1932.

Mr. Rotzell: If the Court please, I can only stipulate, in answer to that stipulation, the only thing I can agree on is the fact an annual bond was written on Mr. Greaney from 1916 to 1926 by

Lawrence A. Duble—Direct

the company I represent. I don't know how he was elected, or anything else.

The Court: It is a simple matter of proof. You can't stipulate it because you haven't any knowledge.

Mr. Rotzell: No, I don't have the knowledge of how he was elected. 10

LAWRENCE A. DUBLE, SWORN.

By Mr. Heine:

Q. Mr. Duble, you are the clerk of Waterford Township? 20

A. I am.

Q. How long have you been the clerk?

A. January 1st, 1917.

Q. Down to date?

A. Down to date.

Q. When you became the clerk of Waterford Township who was its tax collector?

A. Mr. Greaney, Cornelius W. Greaney.

Q. How long did he continue as tax collector?

A. To a time in December, 1932, I don't know the date. 30

Q. Did he occupy that position by election?

A. By election, three year terms.

Q. By the people of the Township?

A. That is right.

The Court: When did his term begin?

The Witness: His term began January 1st, 1916.

The Court: And continued until when, to January 1st, 1932?

10 The Witness: No, December, I don't know the date, in December, 1932.

Mr. Heine: December 17th, if the Court please, 1932.

The Court: That was when he resigned?

Mr. Heine: Yes, sir.

20 Q. In addition to his duties as tax collector, did he perform any other duties?

Mr. Rotzell: Now, if the Court please, I object to this question unless we have an absolute qualification from the minutes of the Township of Waterford. In other words, we only bonded this man as tax collector and I think it is immaterial, as far as we are concerned, what other duties he performed, because our bond only relates to the office of tax
30 collector, and that is admitted in the pleadings by the complainant.

Mr. Heine: We don't know what this bond provides, in the first place, so I can't start with the promise the bond bonds him only as tax collector.

The Court: What are you trying to prove?

Mr. Heine: That he issued tax searches as well as collecting money for taxes.

Mr. Rotzell: If the Court please, that is the material point I am raising. In other words, it has already been admitted by counsel in the pleadings in this case, which I am willing to offer in evidence, if that is necessary, in my case, that Mr. Greaney was bonded as tax collector by our company. Now, I am willing to refer to some cases relating to that, if your Honor wants to hear them at this time. 10

The Court: I will allow the question to be answered, and if it is found to be immaterial it will be disregarded.

Mr. Rotzell: Your Honor will grant me an exception? 20

The Court: I am only admitting it conditionally.

The Witness: Part of the time he was search clerk, and collector and treasurer.

Q. Did he, to your knowledge, issue tax searches?

A. Yes.

Q. And receive fees from the people to whom he furnished tax searches? 30

A. That was my understanding.

Q. Was there at any time a resolution or ordinance passed appointing him tax search clerk and fixing his salary as such?

A. There was a resolution to that effect.

Q. Prior to and subsequent to that time, did he act as tax search clerk?

Mr. Rotzell: If the Court please, I object to that.

The Court: Prior and subsequent to what?

10

Mr. Heine: Prior to the actual appointment by the Township officials by resolution or ordinance, I want to know whether or not he acted.

Mr. Rotzell: I feel we should know the date the resolution was passed. I think that information should be in evidence.

The Court: Refer to the minutes or the resolution.
20

The Witness: I would have to look it up, but Mr. Heine has the date.

The Court: Have you the date?

Mr. Heine: You say I have the date?

The Witness: You have the date he was appointed.
30

The Court: Search clerk, is that it?

Mr. Heine: Search clerk, yes. I don't seem to locate it.

Lawrence A. Duple--Direct

Mr. Rotzell: If he looks at the minutes of April, 1926, I think that would help him.

The Witness: The minutes of April 22nd, 1926, Mr. Cornelius W. Greaney was appointed as tax search officer of Waterford Township.

Q. Do you know whether or not that was the first 10 resolution?

The Court: Is that finished, have you read the whole resolution?

The Witness: No.

The Court: Read the whole resolution.

The Witness: And the price set for the search 20 was \$2, as called for in the laws.

Q. Was his compensation fixed as such?

A. Not at that time.

Q. Do you know when it was fixed?

A. No.

Q. Do you know whether prior to April 22nd— was that April 22nd, 1926?

A. That is right.

Q. He did issue tax searches and receive the fees 30 for doing so?

Mr. Rotzell: If the Court please, I object to that on the ground that the Act with relation to tax search clerk specifically provides, and we have

copies of those Acts here, with reference to the question of the duties of tax collector, Volume 4, Compiled Statutes, 5182, it provides there, "Whenever any collector of taxes, treasurer or other public officer of any city, town, borough, township or other municipality of this State is authorized or empowered by statute or by resolution or ordinance
10 of the Common Council or Township Committee, to make searches"—that is the Act which gives him the qualifying power. In other words, by statute, resolution, or by ordinance, that is the power to act as tax search clerk. It even specifies in the Tax Sale Revision Act that a municipality can, by resolution—that is another Act which deals with the same thing, "The governing body of each municipality shall, from time to time, by resolution, designate some bonded official of such municipality to
20 make examinations of its records as to unpaid municipal liens and to certify the result thereof."

The Court: When was that passed?

Mr. Rotzell: The Law of 1918, Chapter 237.

The Court: Read it again.

Mr. Rotzell: "The governing body of each
30 municipality shall, from time to time, by resolution, designate some bonded official of such municipality to make examinations of its records as to unpaid municipal liens and to certify the result thereof. The official so designated, and each new incumbent of said office shall thereafter be vested

with the power to make official certificates of searches for municipal liens until a new official has been designated for such purpose, and no other official than the one so designated shall make any such official certificate." The other Act is practically the same, in connection with the omissions made in searches, it deals with the omissions, and states it must be by resolution. Our contention is 10 this—in the first place, our contention is we only bonded Mr. Greaney as the collector of taxes, and that is admitted by the complainant in their pleadings, and it is also admitted in the action in the court of law. Our second contention is, regardless of whether or not your Honor might decide that being a bonded official his bond would extend to tax searches, nevertheless this first resolution of which the Township has any record, according to what the clerk has said, was on April 22nd, 1926, after the 20 date of the last bond which was effective as far as the Maryland Casualty Company is concerned, and your Honor knows on the question of our suretyship it cannot be extended beyond the terms of the contract at a subsequent date.

The Court: You are asking questions prior to the date?

Mr. Heine: That is right. If the Court please, 30 with reference to the statement that the bond was issued only indemnifying against Mr. Greaney's duties as tax collector, and he says that appears from our pleadings, I call your Honor's attention to the language of the bill, which does not purport

to say anything of the sort. We say in paragraph 4 of the bill, "There is no limitation it was conditioned solely for the performance of his duties as tax collector," so if there is any merit or substance to Mr. Rotzell's remarks, which I am not conceding for the moment, he can't draw any comfort from my pleadings, and we are not, not having the bond
10 in evidence at this time, bound by any such stipulation that Mr. Rotzell wishes to make with respect to the limitation of this bond. With respect to the other proposition, that we can't introduce any testimony with respect to Mr. Greaney's duties prior to a resolution of the Township Committee, may I point out to the Court that Mr. Rotzell is attempting to have this Court, in a suit in which the issue is not squarely presented, to pass upon the validity of tax searches made by Mr. Greaney at a time
20 when he was acting *de facto* and *in de jure*. In other words, he wants the Court to determine at this time, when interested parties do not have the opportunity of presenting their objections, and it can very readily be seen what their objections may be if they permitted Mr. Greaney, with full knowledge of the Township Committee to issue tax searches, and collect fees, which he accounted to the Township for, and on which they had a right to rely, it would seem to me the Township would be
30 bound by their own conduct, they would be estopped by their own conduct from denying the right of Mr. Greaney to issue these tax searches, and denying the right of these innocent parties to rely on these tax searches. It seems to me the Court cannot say that Mr. Greaney, having held himself out, by permission

of the Township Committee, as the proper party to issue the searches, did not have any authority to do so. He did have the authority of the Township Committee, and that at the present stage is not denied, and he received the emoluments therefrom.

The Court: You haven't any evidence yet to 10
show he had the authority to issue the searches.

Mr. Heine: I am laying the foundation for it.

Mr. Rotzell: If the Court please, answering the second objection first, in other words, regardless of how it may bind the Township, you cannot bind us. You cannot increase the obligation of a surety after the bond is written, and that would be increasing the bond of this surety. While the complaint does 20
not specifically say this bond was issued as tax collector, it goes all the way through the complaint, the first and second paragraphs, and it only designates him as tax collector, and it is our contention so far as the question of the resolution is concerned the law specifically says that is the only way they can designate it. There are some places they don't use the tax collector, they use an outside party, and some places they use the treasurer, and if it is legally done it must be done by resolution. What 30
he did before is not binding on us, what he did before he was legally authorized to do anything like that is not binding on us, even though your Honor says our bond included tax search clerk, or treasurer, or whatnot, but I say it was only written as

tax collector, and anything that happened as tax search clerk is immaterial.

The Court: If there are certain duties imposed upon the tax collector at the time the bond was written, outside of the actual collection of taxes, you would possibly be responsible.

10

Mr. Rotzell: The bonds were the duties imposed by law.

The Court: You said anything he did outside of tax collector.

Mr. Rotzell: Our contention is the resolution is the way to determine it, and if he is doing a duty not imposed upon him by law he is exceeding his
20 duty.

The Court: I suppose that is what Mr. Heine is trying to prove.

Mr. Heine: I think the cases of this State, as well as the other States, support the position that where a surety issues a bond covering an official for certain duties and later, by statute or ordinance, additional duties are imposed on that official, the
30 bond not only covers the duties for which the bond was originally written but also the additional duties that were imposed and assumed by him.

The Court: You are going beyond that. You have already in the testimony a resolution of April

Lawrence A. Duple—Direct

22nd, 1926, imposing the duty of making searches.
Is there any resolution prior to that time?

The Witness: Not to my knowledge, no.

The Court: That answers that question. Where
is that duty imposed on him by statute, Mr. Heine,
where is there any obligation on his part to make 10
searches?

Mr. Heine: I will produce by competent testi-
mony that with the knowledge and consent of the
Township Committee of Waterford Township he
did, in fact, issue tax searches and receive the
emoluments arising therefrom.

The Court: Without authority?

20

Mr. Heine: Without the force of a statute, but
with the consent of the Township Committee. If
the Township Committee had the authority to do so
the surety company at this time cannot say all these
tax searches at this time are invalid. That is what,
in effect, they are asking this Court to do, they
are attaching collaterally the issuance of these tax
searches.

The Court: The relief you are asking is to re- 30
strain the defendant from pleading the statute of
limitations.

Mr. Heine: Yes.

The Court: And as I understand it, that ques-

tion is brought about by reason of some alleged arrangement by the representative of the bonding company and the Township Committee.

Mr. Heine: The main portion of our case is not this arrangement that took place in 1933, but the fact—and that is what I wanted to elaborate on
10 when your Honor stopped me—that we couldn't discover these defalcations because of certain concealing entries made by the tax collector on the books of the Township, so we could not ascertain or discover that these defalcations, in fact, took place, and by virtue of that fact we say this tax collector, and his surety, cannot now, by reason of a fraud of the tax collector in making self-concealing entries, take advantage of the statute of limitations. In other words, it would be the same thing as put-
20 ting into the hands of this tax collector the instrumentality with which you can defeat being held responsible for the defalcation if he were to be permitted to take advantage of the statute of limitations, because he made certain concealing entries in the books of the Township whereby they could not ascertain the defalcation taking place he could escape the penalty of having made the defalcations. There are cases in this State, as well as in other States, that say in such a position a man cannot
30 take advantage of his wrong, and that is what, in effect, it would be doing, he set up his own wrong doings as the measure which defeats this Township from collecting a loss, and that is the reason we are in the Chancery Court, we can't set up that defense in the law court. If your Honor is interested in hearing the cases I will read them.

The Court: No, I will hear the testimony and you can present the matter on briefs.

Mr. Heine: May I point out to your Honor at this time we are only asking the Court to pass on whether or not the statute of limitations should be set up by this defendant or not. The question as to whether or not we have the right to collect for 10 tax omissions made by him at a time when he did not have the authority to issue them is a matter which the law court should determine.

Mr. Rotzell: Then it is immaterial in this court entirely on that reason also. I don't know whether your Honor wants me to answer it, this is practically another opening, and I have an answer to the additional opening, but I think your Honor would rather hear the testimony and bring that out 20 later.

The Court: I will hear the testimony and you may file your briefs.

Q. The question is did Mr. Greaney issue tax searches prior to April 22nd, 1926?

A. Yes.

Mr. Rotzell: I object to that.

30

The Court: I will let him answer. Your objection may be noted and it will be taken conditionally. If your contention is correct it won't make any difference whether he did or did not, if he hadn't

any authority. He can answer the question and it will be disregarded if it is immaterial.

The Witness: It was my understanding —

The Court: Not your understanding, it is a question of whether you know or whether you do not.
10 It is a question of knowledge, not what your understanding is.

The Witness: Well, I don't know.

Mr. Heine: We have Mr. Greaney in court and we can get it direct from him.

Q. Were you familiar with Mr. Greaney's duties outside the collection of taxes prior to the passage
20 of the Act that was read—what is the date of that?

Mr. Rotzell: April 22nd, 1926.

Mr. Heine: No, the Act.

The Court: 1918.

Q. The 1918 Act.

30 Mr. Rotzell: Your Honor will allow me an objection as being immaterial.

The Court: This will be answered yes or no.

The Witness: No.

Lawrence A. Duple—Direct

Q. You are not familiar with them?

A. No.

Q. Can you look through your records and state whether or not any premiums were paid to the Maryland Casualty Company, or to its agents, for a bond on Mr. Greaney?

The Court: Is that disputed, the question of 10
whether premiums were paid?

Mr. Rotzell: I would like him to answer, for the purpose of cross-examination.

Q. Can you give us the premiums that were paid on the bond?

A. I can look them up.

The Court: Haven't you a memorandum of that? 20
They ought to have been looked up.

Mr. Heine: I didn't think that would be in dispute. They admitted in their answer the bond was issued.

Mr. Rotzell: I will admit that for the purpose of saving time, but I did want to cross-examine on that question.

The Court: He apparently doesn't know any- 30
thing about it. Do you have any knowledge outside of the records?

The Witness: No.

The Court: All right.

Mr. Heine: Take the witness.

Cross-examination.

By Mr. Rotzell:

10

Q. As the Township Clerk during that period, Mr. Duble, you kept the records of all the proceedings of the Township Committee, didn't you?

A. Yes, sir.

Q. And your proceedings covered the period from January 1st, 1917, up to the time you relinquished office, or up to today, if you are still Township Clerk?

A. Yes, sir.

20

Q. And during that time you have no knowledge of any other resolution excepting the one of April 22nd, 1926, that was passed by the Township Committee?

A. That is the only one.

Q. How often did you order the tax collector's records audited?

A. Well, one time it was two years by the State, two years at one time, and after that the State required it yearly, and after that it was done yearly.

30

Q. When was the time the record was audited two years, do you recall?

A. No, I don't know the date.

Q. That is since you were Township Clerk?

A. Yes, sir.

Q. Would you say that was before 1927?

A. Yes, sir.

Q. How long have you been having the records audited yearly?

A. Since 1918.

Q. Since 1918?

A. Yes.

Q. At one time you had them audited every two years, is that right? 10

A. No, that is not right.

Q. Did you as Township Clerk direct audit of the records of the tax collector by letter?

A. No. Direct the audit?

Q. Direct the audit as Township Clerk?

A. I don't believe I understand the question.

Q. Did you write any letter to any auditors directing the audit of the tax collector's records?

A. Yes, all the records of the Township.

Q. That included the records of the tax collector? 20

A. Yes.

Q. I think you said that Mr. Greaney was also Township treasurer?

A. Part of the time, yes.

Q. Do you recall when he was Township treasurer, during what years?

A. No.

Q. Was it during the latter part of his term or the early part?

A. The early part. 30

Q. He was bonded as Township treasurer by a separate bond, and kept separate records, isn't that right?

A. I don't know.

Q. You don't know about that?

A. No.

Q. Do you know how long he acted as Township Treasurer?

A. No.

Mr. Rotzell: That is all.

10 Mr. Heine: Do you have any objection to these being offered?

Mr. Rotzell: I will consent to their admission.

By Mr. Heine:

Q. Mr. Duple, were these continuation certificates of the Greaney bond in your possession?

A. They were.

20 Q. Do you have any others besides those?

A. Of this company?

Q. Yes.

A. No, I do not.

Mr. Heine: I have shown them to Mr. Rotzell and he will admit their entry.

(Said papers offered in evidence and marked Exhibit C1.)

30

Q. Do you remember who was tax search clerk when you went into office?

Mr. Rotzell: Objected to on the same ground, immaterial as far as this defendant is concerned.

Lawrence A. Duple—Re-direct

The Court: He said he didn't know, he has answered that already.

Mr. Heine: I am not so sure about that. May I have him answer that again?

The Court: Do you know who was tax search clerk, legally authorized? 10

Mr. Heine: I didn't qualify it like that.

The Court: Do you know?

The Witness: I know who made the searches.

The Court: That is all you know about it, you don't —

The Witness: I didn't know who it should have been. 20

Q. Who did do it?

A. Mr. Greaney.

Q. He did it from when to when?

A. From the time he went in until the date of the resolution. The Township Committee did that on the authority of the statute, and he received the fees for it.

Q. He received the fees? 30

A. Yes.

By Mr. Rotzell:

Q. Mr. Duple, look at these Exhibits, marked C1 for the complainant, will you tell me during those years, 1921, 1924, 1925 and 1926, whether Mr. Greaney was treasurer during those years?

A. I can't without looking it up.

10

Mr. Heine: It seems to me it is immaterial whether he was treasurer or not.

Mr. Rotzell: I don't know, if the Court please, I felt the question of whether or not he made tax sales was immaterial to this issue, but I feel we should show —

20

Mr. Heine: We didn't say anything about tax sales, tax searches.

Mr. Rotzell: I thought that was immaterial, but I think we are entitled to answer that by cross-examination of this witness.

The Court: Go ahead.

The Witness: In 1921 he was not the treasurer.

30

Q. Not the treasurer of that year. What about 1924, 1925 and 1926?

A. 1924 he was not the treasurer.

Q. 1925?

A. He was not in 1925.

Q. What about 1926?

Lawrence A. Duble—Re-cross

A. He wasn't in 1926.

Q. And the continuation certificates themselves are continuing his bond as tax collector, aren't they?

Mr. Heine: Objected to, if the Court please.

Mr. Rotzell: They will speak for themselves, if the Court please, and I will withdraw it. 10

Mr. Heine: The question is withdrawn, Mr. Duble.

The Court: Anything further from this witness?

Mr. Rotzell: No further cross-examination.

The Court: You are excused.

20

Mr. Burkhardt: I would like to have the privilege of informing Mr. Greaney that he does not have to answer any questions which may tend to incriminate him, because there is a criminal indictment against him now. I don't suppose Mr. Heine or Mr. Rotzell will ask any questions that are objectionable, but I would like to have it noted.

Mr. Rotzell: I am willing to agree to that, I 30 recognize the significance of Mr. Burkhardt's position.

CORNELIUS W. GREANEY, SWORN.

By Mr. Heine:

Q. Mr. Greaney, did you issue tax searches prior to April 22nd, 1926?

10

Mr. Rotzell: Your Honor will record my objection to that question as being immaterial?

The Court: It may be noted.

The Witness: Was I given tax searches?

Q. Did you issue them?

A. That I couldn't tell you.

20

Q. You can't tell whether you issued tax searches prior to April 22nd, 1926?

A. I may, but I am under oath, and I am not going to say that I did positive, I may and I may not.

Q. Did you issue any subsequent to April 22nd, 1926?

A. Afterwards? Oh, yes, when I was appointed I issued them.

Q. Why are you uncertain as to prior to the date just mentioned?

30

A. I have no explanation, because I don't know what makes me uncertain. The same as anybody else, a man becomes that way.

Q. What makes you certain you issued them after April 22nd, 1926?

A. Because I got paid for it.

Cornelius W. Greaney—Direct

Q. Did you receive payment prior to that date?

A. Not from the Township.

Q. Did you get payments from individuals?

Mr. Rotzell: If the Court please, I think that is entirely objectionable, because, certainly, we are not bound by what this man may have done privately with other individuals.

10

Mr. Heine: We are not talking about him in his private capacity, purely in his official capacity.

The Court: He says he doesn't know whether he issued any. If he doesn't know whether he issued any he can't tell whether he was paid anything.

Mr. Heine: If the Court please, with respect to this witness it must be remembered that because of the proceedings outstanding against him there is very little likelihood he would be inclined to assist the Township in this case.

20

The Witness: I don't see why I would do that. I don't want you to stand up there and throw any insults on me. I am a citizen the same as you are.

The Court: Let me hear what the question is.

30

(Question repeated.)

The Court: Without he can testify he issued some he certainly can't testify he collected money.

Mr. Heine: Here is a period from 1917 down to

1926, a period of nine years, and this witness gets up and says he can't remember whether he issued a tax search or not. This is not one isolated case, there are hundreds of cases involved in this suit.

The Court: If he can say he issued them, all right, but he says he can't tell.

10

Mr. Heine: I could have produced the title company and produced the records they have where his signature is appended. I didn't think I would be forced to that when the amount of tax omission was not in issue.

Mr. Rotzell: That is why I don't think this line of questioning is admissible.

20 Mr. Heine: I didn't want to clutter up the record with such a narrow issue. We can produce it, if necessary.

The Court: All right, proceed with your examination.

Mr. Heine: Witness excused.

Cross-examination.

30

By Mr. Rotzell:

Q. Mr. Greaney, from the time you were first collector of taxes in Waterford, you signed applications for bonds, didn't you?

Cornelius W. Greaney—Cross

Mr. Heine: Objected to as not being cross-examination.

The Court: Wait until he finishes.

Q. You signed bonds, applications for bonds, at the time you were tax collector, from the time you first became tax collector up to the time you were no longer tax collector? 10

The Court: Bonds for what, applications for surety bonds?

Mr. Rotzell: This is the question. In other words, this is the basic question which will be cross-examination on the first question which was asked by Mr. Heine. He asked whether he issued tax searches, and I am going to show what kind of an application for a bond he signed, and I think that is material on cross-examination on Mr. Heine's first question. 20

The Court: Have you got the application he signed?

Mr. Rotzell: No, we do not, those records have been destroyed entirely. They are asking for records we don't have, and I think we have a right to go into all of that with this witness, and I think this is cross-examination on Mr. Heine's first question. 30

The Court: I don't think so. I think if you want

to prove the contents of the application—is that what you are trying to do?

Mr. Rotzell: If the Court please, to protect myself in the matter, I have called upon Mr. Heine—although I feel this is cross-examination, and I thought I could probably bring it out on cross-examination of this witness—this is my witness also, and I have already made a demand on Mr. Heine to produce his executed copy of the application.

The Court: I will permit him to be examined as your witness out of turn. You can make him your own witness.

The Witness: Yes. That is, the investigation on the bond?

20

Q. I mean the surety bonds, the surety bonds of the Township of Waterford?

A. Yes.

Q. Did you ever sign a bond, an application for a bond, to the Maryland Casualty Company as tax search clerk?

Mr. Heine: Objected to.

30 The Witness: I think I had to get the bonding company to go on the bond.

Q. When did you sign that bond, that application as tax search clerk?

A. Not as tax search clerk.

Q. You did not?

A. No. No, I only signed for them to go my security.

Q. In what capacity?

A. What?

Q. In what capacity or what position, to go your security under what position?

A. As tax collector.

10

Q. And in no other capacity?

A. What?

Q. And in no other capacity?

A. No.

Mr. Rotzell: That is all.

By Mr. Heine:

Q. How do you remember that, Mr. Greaney?

20

A. Because I remember it.

Q. Do you remember what else was on the application?

A. No, because Mr. Duble told me I was making application for a bond and it was all right for me to sign it, which was right.

Q. You can remember that?

A. Yes, sir.

Q. You can't remember whether or not in a period of nine years preceding you ever issued a tax search or not or received any emolument for doing so, is that correct? 30

The Court: He probably won't understand the word "emolument."

Q. Received for issuing tax searches. You can remember the fact you signed the application for a bond as tax collector, and yet you can't remember whether or not for a period of nine years preceding April 22nd, 1926, you ever issued a tax search and received the fees for doing so?

10 A. I had been tax collector for seventeen years, you see, and I can't remember everything transacted in that office. If I am supposed to you had better get about a dozen clerks.

Q. Did you ever issue a tax search prior to April 22nd, 1926?

A. Did they ever?

Q. Did you?

A. Well, I don't know. You ought to know that, you have been going over the books.

20 Mr. Heine: That is all.

Mr. Rotzell: That is all, Mr. Greaney.

The Court: That is all.

GEORGE AUSTIN SMILEY, JR., SWORN.

30 By Mr. Heine:

Q. Mr. Smiley, what is your business?

A. Auditing.

Q. With whom are you connected?

A. Charles S. Rocke and Company.

George Austin Smiley, Jr.—Direct

Q. How long have you been an auditor?

A. Since February 1st, 1928.

Q. Did you, at the request of the Township of Waterford, make an audit of the books of the tax collector in 1932?

A. I did.

Q. Do you know who was then tax collector?

A. Cornelius W. Greaney.

10

Q. And for what period did you examine the books?

A. The calendar year, January 1st—this was for 1932.

Q. No, for what entire period did you examine the books of Mr. Greaney?

A. In the year 1932, we audited for the year 1931, the calendar year January 1st to December 31st.

Q. Did you make any subsequent audits of his books?

20

A. No, sir.

Q. Did you cover a period from 1921 down to 1932?

A. I did not, no, my predecessor —

Q. Didn't you make an examination of the tax receipts for the citizens of Waterford Township in 1932 and of 1933 respecting tax payments?

A. I did.

Q. Isn't that what you call an audit?

A. I thought you were referring to the subsequent records. The actual cash examination for the shortage amounts were examined in 1933.

30

Q. In 1933 you did that?

A. That is right.

Q. For what period did that examination cover?

A. From 1916 up until 1932, if I recall the correct dates.

Q. Did you, in the course of your audit, see any tax receipts?

A. I did.

Q. Did you compare the tax receipts with the books of Mr. Greaney?

10 A. I did.

Q. Did you find in any instance where the tax receipts differed from the books of Mr. Greaney?

A. To this extent, the amounts were not entered in the tax collector's cash receipt book.

Q. Could you have from an examination of Mr. Greaney's books as tax collector discovered that there was a shortage of his accounts?

A. Not without complete confirmation of the account.

20 Q. By complete confirmation of the account, what do you mean?

A. The actual sending out of confirmation notices by auditors in the field and direct communication with the taxpayer who would present to the auditor the receipted bill asked for.

The Court: Why do we have to go into all this evidence? It seems to me your relief, if you have any, is based upon the proposition of some arrangement having been made between the representative
30 of the bonding company and the Township Committee, as I understand it.

Mr. Heine: I will read your Honor the bill.

The Court: No, I have read it.

George Austin Smiley, Jr.—Cross

Mr. Heine: That is the unimportant part of our bill, paragraph 7 is our most important.

The Court: Fraudulently concealed?

Mr. Heine: Yes, sir, that covers the bulk of the defalcations. This alleged conversation is only for a small period of time when the statute might have run, but it is the fraudulent concealment that covers the bulk of this. 10

The Court: All right.

Mr. Heine: Take the witness.

Cross-examination.

By Mr. Rotzell:

20

Q. How long had Rocke and Company been auditing the books of Waterford Township?

A. About nine years, I believe.

Q. About nine years including this past year?

A. I believe so, yes.

Q. That would date back until about 1925 or 1924?

A. I have always heard Mr. Welker say nine or ten years, but that is beyond my period of employment.

30

Q. You don't know anything that happened prior to that time at all?

A. No, sir.

Q. Do you know whether or not there is a tax duplicate of the Township of Waterford on file in any office in Waterford?

A. Yes, there is.

Q. Where is that kept?

A. That is kept, usually, by the tax collector. At present those books are under the care of the new tax collector.

Q. For the purpose of making this audit, you took charge of the books of the tax collector during those
10 years, didn't you?

A. That is correct, yes, of the year under audit. There is a summary of the delinquent years outstanding, which is summarized in the form of a delinquent tax register, and that register, along with the current tax duplicates, would be the books required for that particular year's audit.

Mr. Rotzell: That is all.

20 Mr. Heine: That is all for the time.

Mr. Heine: I offer in evidence a letter on the stationery of Maryland Casualty Company, signed by William Penn Lewis, Jr., its attorney, and I would like to read the major portion. "We are in receipt of your letter of the 7th" ——

30 The Court: What is the date?

Mr. Heine: April 18th, 1933, "—and we have now been able to locate this bond"—the bond and its number is given at the head of the letter.

Mr. Rotzell: Read the balance.

Joseph Desorte—Direct

Mr. Heine: It is in there, I am pointing out the purpose of that letter.

(Said paper offered in evidence and marked Exhibit C2.)

JOSEPH DESORTE, sworn.

10

By Mr. Heine:

Q. Mr. Desorte, you are the Chairman of the Township Committee of Waterford Township?

A. That is right.

Q. And have been a member of the Township Committee since when?

A. January 1st, 1932.

Q. Did you, in pursuance of certain information, have a conference with Mr. Kerns of the Maryland Casualty Company respecting alleged defalcations of Cornelius W. Greaney?

20

A. I did.

Q. Do you remember the approximate date of the first conversation?

A. I think it was April 8th, 1933.

Q. And where was that held?

A. At Mr. Heine's office.

Q. At my office?

30

A. That is right.

Q. Will you state in your own language what was said at that conversation?

Mr. Rotzell: Now, if the Court please, for the purpose of the record, I would like to object to this

line of testimony on the ground there is no evidence that Mr. Kerns has any authority to bind the Maryland Casualty Company.

The Court: There isn't any proof as to who Mr. Kerns is.

- 10 Mr. Heine: I can prove it. I didn't think there would be that type of technical objection. Step aside.
-

F. B. KERNS, SWORN.

By Mr. Heine:

Q. For whom do you work?

- 20 A. Maryland Casualty Company.

Q. Did you call at my office with reference to a claim by the Township of Waterford against W. Cornelius Greaney by virtue of a bond written by the Maryland Casualty Company?

A. I did.

Q. How did you come to my office?

A. Well, I don't know whether it was by you calling our office or by me getting in communication with you, one or the other.

- 30 Q. Did you receive instructions from your superiors to call at my office?

A. I did.

Q. And what is your official title for that company?

A. Bonding representative.

Q. Don't you style yourself an adjuster?

A. Yes.

Q. And you are an adjuster as well?

A. That is correct.

Q. With power to adjust claims?

A. No, sir.

Q. What does "adjust" mean?

A. I will leave that up to you.

10

Q. Do you sign yourself "Adjuster"?

A. That is correct.

Q. And have signed yourself as adjuster in connection with this case?

A. I wouldn't be surprised.

Q. Did you or didn't you?

A. If my name appears on any letters as an adjuster.

Q. Did you or didn't you?

20

The Court: If you have any letters, let me see them. We are interested in finding out what his authority is.

Q. (Counsel shows witness letters.)

A. That is correct.

Q. You did sign yourself as adjuster?

A. Yes.

Q. Did you receive a copy of audits made by Rocke and Company respecting the alleged defalcations and tax omissions?

30

A. Yes.

Q. Did you go to Waterford Township to investigate and check the audit?

A. Yes.

Q. Were you present at a conversation held sometime in April, 1933, at which Mr. Colflesh, representing the Fidelity Casualty, and Mr. Costello, representing the American Casualty, were present?

A. Yes, sir.

Q. At that time the claims were discussed?

A. If I remember correctly, shortly after the
10 claim was reported to our branch office by the home office.

Q. And the claims were then and there discussed with the respective representatives?

A. No actual proof of loss, or claim, had been filed with us.

Q. I asked whether at that time the claims were not discussed?

A. Well, yes.

Q. They were?

20 A. Yes.

Cross-examination.

By Mr. Rotzell:

Q. Mr. Kerns, what was the discussion at that time?

Mr. Heine: I object, if the Court please.

30

Mr. Rotzell: If the Court please, I think this is proper cross-examination. He has made him his witness and has said the claims were discussed, and I am asking what the discussion was.

Mr. Heine: That is the point, I haven't asked

him what the discussion was. You are trying to produce from this witness testimony which is in my case. I can prove that.

Mr. Rotzell: He has made him his witness, and I am entitled to cross-examination.

Mr. Heine: Only for the purpose of proving his 10 duties with the Maryland Casualty.

Mr. Rotzell: I think on that question I will re-frame it.

Q. You say that you have no power to adjust claims?

Mr. Heine: I object to that, if the Court please.

Mr. Rotzell: I haven't finished the question yet. 20

Q. You have no power to adjust claims?

A. No, I have not.

Mr. Heine: I object.

The Court: I haven't heard the question yet. He started to answer before you finished. Ask the question fully and don't reply until Mr. Heine has an 30 opportunity to object.

Q. What is the procedure in connection with the adjustment of a claim of this character?

A. As soon as the loss is recorded —

The Court: Do you object to that?

Mr. Heine: No, sir.

The Witness: As soon as any loss is recorded an investigator or adjuster will go out and investigate it and report to the home office and they will advise
10 what disposition is to be made.

Q. During the discussion that was referred to, did you agree in any way to adjust this claim?

Mr. Heine: I object to that, if the Court please.

Mr. Rotzell: If the Court please, he has brought out the question—not only the question of his powers as an adjuster, but he also brought out the
20 fact there was a discussion, Mr. Heine brought out that question himself, that there was a discussion in his office, and I think I am entitled to cross-examine as to his discussion.

The Court: All right, he may answer.

(Question repeated.)

The Witness: If I remember correctly that was
30 the first meeting we had in your office, around April 18th?

Mr. Heine: I don't know.

The Court: You will have to answer it, you can't ask counsel about it.

F. B. Kerns—Re-direct—Re-cross

The Witness: Never at any time did I promise or agree to pay or settle the claim.

Mr. Rotzell: That is all.

By Mr. Heine:

Q. Do you mean to say, Mr. Kerns, you never 10
made an offer of settlement in this case?

A. Yes.

Q. You do retract your statement to that extent, don't you—do you retract it to that extent, you never offered to adjust this case, yet you say you did make an offer of settlement?

A. You say we agreed at some time to pay the claim.

Mr. Heine: I have never said that as far as you 20
are concerned, Mr. Kerns.

Mr. Rotzell: If the Court please, I will withdraw the objection. I think there is an objection to that, but I will withdraw it. The question is still pending.

Mr. Heine: Yes, but I think the two answers are purely argument of the witness, and I will withdraw the question.

30

By Mr. Rotzell:

Q. Did you at any time make any offer to settle this claim before any audit was made of the accounts, or any investigation?

A. No, I did not.

Mr. Rotzell: That is all.

Mr. Heine: That is all.

JOSEPH DESORTE, resumed.

10

Mr. Heine: (To the stenographer:) May I have the last question asked of Mr. Desorte?

(Question repeated.)

The Witness: At the meeting at Mr. Heine's office Mr. Kerns said that they wanted time to make a survey in Waterford Township, of the different accounts.

20

By Mr. Heine:

Q. Was there anything further said?

A. I recall him saying they were willing to settle for the defalcation.

Q. Was there anything said at that time with reference to an opportunity to be given them to check the figures we had submitted to them?

A. That is right.

30

Q. They did say that?

A. Yes.

Q. And that upon the checking of the figures —

Mr. Rotzell: If the Court please, this is certainly leading to the highest extent.

The Court: You can ask him to relate the conversation, you can't put the words in his mouth. He is your witness. Let him relate the conversation with relation to the matter.

Q. What was said with relation to their action upon checking the figures in the audit that was submitted?

10

A. They offered to pay the defalcation.

Q. Was the audit given to them at that time?

A. The complete audit?

Q. A partial audit?

A. Yes.

Q. Were you present when the completed audit was given to them?

A. Yes.

Q. Do you know of your own knowledge whether or not they did appear in Waterford Township to check the audit?

A. Through the collector's say-so, that is all.

Mr. Rotzell: I move that that be stricken out.

The Court: The answer will be stricken.

Mr. Heine: That is all.

Cross-examination.

30

By Mr. Rotzell:

Q. Mr. Desorte, what day were you in Mr. Heine's office?

A. You mean the first conference we had?

Q. Yes.

A. I think it was April 8th.

Q. April 8th, what year?

A. 1933.

Q. Was Mr. Kerns there at that time?

A. Yes.

Q. Was Mr. Colflesh and Mr. Costello there at that
10 time?

A. Which is which?

Q. Suppose you stand up, Mr. Costello, and Mr.
Colflesh.

A. Mr. Kerns was there, and this man here was
there.

Q. Mr. Costello?

A. Yes.

The Court: April 8th, 1933?

20

Mr. Rotzell: April 8th, 1933, yes, your Honor.

Q. Now, at that time you had not any audit made
at all at that time, had you?

A. A partial audit was made.

Q. A partial audit made?

A. Yes, sir.

Q. Isn't it a fact that Mr. Kerns, as far as he was
concerned, made the statement he would like to have
30 the audit submitted so he could investigate it and
look over the situation at Waterford, isn't that what
he said?

A. Repeat that again.

Q. Isn't it a fact that Mr. Kerns said he would
like to have a copy of the audit so he could investi-
gate it and go over the situation down at Waterford?

A. He did have a copy of the partial audit at that time.

Q. That is the day he received it?

A. I don't know when he received it, but he had a copy of the partial audit that day.

Q. That was the first time you were in Mr. Heine's office when Mr. Kerns was there?

A. That is right.

10

Q. At that time he wanted to investigate the situation, didn't he?

A. That is right.

Q. When was the next time you were in Mr. Heine's office when you say Mr. Kerns received the final audit?

A. I don't recall the date.

Q. Now, referring to the date of April 8th, 1933, could you say how long after that it was when he received the final audit?

20

A. No, I couldn't.

Q. Was it before the end of the year 1933?

A. I don't recall the date.

Q. It wasn't within a short period of time after that date, was it? After that date it wasn't within a week or two or anything like that?

A. It was longer than that.

Q. Now, after this second time when Mr. Kerns received the final audit, or the balance of the audit, or whatever it was, did you see him again?

30

A. I saw Mr. Kerns three or four times. I can't tell you when it was. I saw him three or four times in Mr. Heine's office.

Q. Do you recall bringing at least one or more of the minute books to Mr. Heine's office when Mr.

Motion to Dismiss

Kerns, Mr. Costello and Mr. Colflesh, the two gentlemen I have pointed out, were in his office?

A. Did I bring the book up?

Q. Yes.

A. I did.

Q. That was sometime after these two dates, wasn't it?

10 A. I don't recall.

Q. Well, was that the last time you saw Mr. Kerns?

A. When I brought the minute book?

Q. Yes.

A. I couldn't answer.

Q. That was pretty late in the year 1933 that happened, wasn't it?

A. I don't recall the date.

20 Mr. Rotzell: I think that's all.

Mr. Heine: That is all. Complainant rests.

COMPLAINANT RESTS.

Mr. Rotzell: For the purpose of the record at this time, your Honor, I would like to make a motion to dismiss. I think I know what your Honor's decision will be, but I would like to make a motion to dismiss
30 on the ground, first there has been —

Mr. Heine: May I interrupt for a moment? It seems to me I should, in fairness to counsel, state that in Chancery if an application made to dismiss a bill, and that is denied, I think the complainant then

has the right to apply for relief under its bill without allowing the defendant any opportunity to submit any additional proof.

The Court: I was waiting to hear what he said.

Mr. Rotzell: I was making my application on the ground there was no proof of any promise, or any waiver, or anything which would implicate the Maryland Casualty Company, the defendant, in this suit, as far as the allegations of the complainant are concerned. In other words, they allege there was a waiver, they have alleged in their bill, I would say, an estoppel to plead the statute of limitations, and I feel they have not submitted sufficient proof but I will, however, go on with my proof on that point, if your Honor desires. 10

The Court: In other words, you are not pressing your motion, you prefer to put in your proof first? 20

Mr. Rotzell: Yes.

F. B. KERNS, recalled.

The Court: I might say, as far as the second count is concerned, there is no proof in connection with that, that is, the furnishing of the bond. I don't see any proof, except the letter. 30

Mr. Heine: We can elaborate on that, but we don't have the bond. We can ask a formal question of the clerk, if necessary.

The Court: Mr. Rotzell indicated they haven't a copy of it, either.

Mr. Rotzell: Yes, and for the purpose of producing secondary evidence I have made a demand for the original bond, and the continuation certificates, and so on.

10

The Court: I don't suppose it is disputed the Township can't find the bond.

Mr. Rotzell: Except these continuation certificates. We have no records on this at all, our records have been destroyed.

Mr. Heine: I will ask Mr. Duple to rise and state it.

20

The Court: You are not raising the question?

Mr. Rotzell: No, Mr. Heine has stated they don't have it, except the continuation certificates.

The Court: You are willing to take their statement, that is, all they have are the continuation certificates?

30 Mr. Rotzell: Yes.

By Mr. Rotzell:

Q. Mr. Kerns, the file in connection with this bond is under whose supervision in your office in Philadelphia?

A. Under my supervision.

Q. And when did you first receive any communication from the Township of Waterford, or anyone on behalf of the Township of Waterford regarding this bond?

A. Mr. Heine wrote our home office under date of April 1st.

Q. Do you have that letter, do you have the original letter from Mr. Heine's office? 10

A. Yes, it is right here.

Mr. Rotzell: I offer this letter in evidence, if the Court please.

(Said paper offered in evidence and marked Exhibit D1.)

Q. When did you next hear from Mr. Heine, or from anyone on behalf of the Township of Waterford? 20

A. As I said, this letter which was just offered in evidence was sent to our home office, then our branch office, Philadelphia office, received a report notifying us that the loss had been reported. We received advice under date of April 18th, 1933, from our home office, that the claim had been reported.

Q. Do you have a subsequent letter before that date which was sent to the home office during the month of April? 30

A. That was sent to the home office by whom?

Q. By Mr. Heine, or someone on behalf of the Township of Waterford?

A. Yes, sir, I believe I do, April 7th, Mr. Heine, to our Baltimore office.

Q. The first letter you received from Mr. Heine, did that have any bond or bond number in it?

A. No, it has not.

Q. And referring to the second letter dated April 7th, will you tell us whether that contained any reference to the bond?

A. Yes, it contains a bond number.

10

Mr. Rotzell: I offer the second letter in evidence.

(Said paper offered in evidence and marked Exhibit D2.)

Q. Now, do you have in your file any correspondence with Mr. Heine from the home office?

A. Yes.

20 Q. Do you have a copy of a letter which was written to Mr. Heine from the home office of the Maryland Casualty Company around April 18th?

A. Yes, I have a copy of that letter.

Q. And on that date did you receive a report from the home office regarding this case?

Mr. Heine: I object to that, if the Court please.

Mr. Rotzell: I think it will be proven this is evidential.

30

Mr. Heine: Certainly the question is not proper. There is a reference to a letter, and then a statement by counsel without the witness responding in any way.

Mr. Rotzell: This letter was already in evidence.

The Court: What is the question?

(Question repeated.)

The Court: You said a report?

Mr. Rotzell: A report from the home office.

The Court: What is the objection?

10

Mr. Heine: I don't see where we are bound by the report.

The Court: He is asking whether he received a report. I think he can answer whether he received a report.

The Witness: I did.

20

Q. Do you have in your possession any record which was referred to in that report of this bond?

A. Yes, I do, a card indicating that —

Mr. Heine: I don't know that there is any question pending.

Q. What is that card?

A. A notice, or a record that this bond was executed by the company.

30

Q. And can you say whether or not the Maryland Casualty Company has been able to locate any other record of that bond or any of its continuation certificates?

Mr. Heine: I object to that, if the Court please.

Mr. Rotzell: To do it, I suppose, strictly in order, I will ask for the production of the original bond, the continuation certificates and the duplicate and original applications for the bond.

10 Mr. Heine: We don't have them.

Mr. Rotzell: I will submit to the Court a notice to produce, and I desire to offer secondary evidence of the bond at this time. They are asking us for the original bond and I made that notice for the express purpose of being able to answer whatever allegation they may make regarding the production of this bond, and this is our answer to the demand for the production of the bond. I feel after this card is
20 introduced it will explain our situation, as a matter of record, why we can't produce the original bond and the continuation certificates. I think under the existing circumstances I have taken every precaution so it can be introduced into evidence.

The Court: The complaint alleges they are in possession, and yet you haven't made any proof.

Mr. Heine: We have that letter, the letter from
30 their attorney.

Mr. Rotzell: We expect to show that letter was an inadvertence. If I might explain further, based on those two letters, the first letter was written and, undoubtedly, from the tenor of the letter, as your Honor can see, they couldn't locate a record of the is-

suance of this bond, and they asked for further information, and Mr. Heine produced the bond number, and at that time, according to the letter of April 18th, the home office was able to locate a record of this bond, and I think they used the words "We have now located the bond" or something like that, which was a mere inadvertence, as we hope to prove, they located the card, and they hoped to turn up the original papers. This card which I intend to prove is the only record we have been able to locate of the bond and continuation certificates, and we have done everything we could to comply with the notice of complainant. 10

The Court: What is your objection?

Mr. Heine: Mr. Kerns is not the person properly qualified to state whether they have looked through all their records. Maybe through the records handed to him he couldn't find them, but he hasn't searched every record of the Maryland Casualty Company or their agents, he hasn't inquired of their agents whether they have it or not. 20

The Court: Who wrote that letter, Mr. Lewis, an attorney?

Mr. Rotzell: That was written from the home office in Baltimore, and at the same time this card record was sent to Mr. Kerns with the only record they could produce. 30

The Court: At the same time the letter was written?

Mr. Rotzell: At the same time the report was made to Mr. Kerns, and that is the first report, and the only record they have found was the card record.

The Court: Is Mr. Lewis here?

10 Mr. Rotzell: No, but we have his letter in evidence, and I think we can explain that by the card record.

The Court: Where are the records kept, Baltimore?

Mr. Rotzell: Records of this age are kept in Baltimore, and at the request of the Philadelphia office they have made a complete search to locate the papers, and that card explains what happened to the
20 papers. It is our answer, it is our reason.

The Court: Are you trying to offer the card in evidence?

Mr. Rotzell: I intend to offer it as secondary evidence.

30 The Court: All right, you can proceed with whatever testimony you have. What is the particular question? Mr. Kerns was the adjuster in charge of this matter, and made the investigation, is that correct?

Mr. Rotzell: Yes, sir.

By the Court:

Q. Did you make an effort to locate a copy of the bond?

A. One day when I was in Baltimore, after the claim was reported, we checked there, and also checked at our branch office. We always keep a duplicate copy.

10

Q. You checked when you were in your home office at Baltimore?

A. I didn't do the actual checking.

Q. Under your supervision, it was checked in your presence?

A. Yes, sir, along with Mr. Penn Lewis.

Q. What about the records in Philadelphia?

A. I checked those.

Q. So you were present at the office in Baltimore when they were checked, and also in Philadelphia? 20

A. That is correct.

Mr. Heine: May I be permitted to ask this witness a few questions?

The Court: Yes.

By Mr. Heine:

Q. What efforts were made—what did you do in checking for the record? 30

A. We have a card index—first of all, if we have the bond number —

Q. What did you do?

Mr. Rotzell: He is telling you.

Mr. Heine: He said "if".

Mr. Rotzell: He said "first of all, if we have the bond number."

The Witness: If we have the bond number it is a simple matter to find your card, and after you find
10 your card you can then refer to your file where the bond should be located. If you don't have a card, or the name of the principal and obligee, it is quite a difficult task.

Q. What did you do in this particular case?

A. We first looked in our Philadelphia office for a card, and we couldn't find it, and when we couldn't find the file the home office was able to find the card record that such a bond existed.

20 Q. What else did you do?

A. That is as far as we could go.

Q. Did you look through all your files to see if it had been misplaced?

A. After our home office was finally successful in locating the card, the card was marked "Cancelled and destroyed." The bond was terminated on December 31st, 1926, and if no claims are reported the file is closed after four or five years.

30 Q. You made a statement to the Court in response to the Court's inquiry that under your supervision a check was made for this bond and you couldn't locate it, and I am asking what investigation you made of the files in Baltimore for this bond?

Mr. Rotzell: I think he answered that question.

F. B. Kerns—Direct

He said he looked at the card record and the card recorded what had been done.

Mr. Heine: I didn't get that impression from the witness' answer.

The Court: He said he made his investigation in the Philadelphia office and down in Baltimore, and he located a record of the bond, and I think that may be offered in evidence. Is it an original record? 10

The Witness: Yes.

The Court: Offer that in evidence, and then proceed.

(Said paper offered in evidence and marked Exhibit D3.) 20

Q. Were the entries on here made under your supervision?

A. Oh, no.

Q. Do you know when they were made?

A. I can't answer that.

Mr. Heine: Here are statements, self-serving, if the Court please, without any testimony as to when they were put on, whether they were made after the receipt of our letter or not. It seems to me if this card is to have any evidential value it should have been made at a time when this matter was not at issue before this Court, and we should have direct proof on that question. We have a letter from their 30

counsel, a man who is supposed to know what he is talking about, in unequivocal language stating he had the bond. Now, we don't have him in court, we have Mr. Kerns, who is an adjuster who produces a card from the files in Baltimore over whose custody he doesn't have control, contradicting their counsel's own letter on which we had a right to rely.

10

Mr. Rotzell: I think if that letter is read with the other two—in other words, when they found a record of the bond that was an indication they had all the records they needed, and when they looked it up they found the card showed the records had been destroyed.

Mr. Heine: If the Court please, that card does not indicate anything of the sort, because if they had looked at the card and the card said the bond had been destroyed I don't see how in the face of that statement it could be presumed the bond was in existence. Here is the very document on which they rely and what ground is there for their belief the bond is in existence when the very document says it is not in existence? Counsel would know from reading the card, if those entries were made on there at the time, that the bond was not in existence, and why should he write that the bond was in existence?

30

The Court: Here is your letter of April 1st, and you call attention to the matter, then on April 7th in response to a letter from the attorney, or from somebody in the Maryland Casualty Company, you advise them the number of the bond, and this letter

F. B. Kerns—Direct

of April 18th says "We are in receipt of your letter and we have now been able to locate this bond and have referred the matter to our Philadelphia claim division suggesting they have their representative get in touch with you at once." I think it is quite obvious on receipt of your letter, with the number of the bond, they located something. Now, Mr. Kerns is trying to explain what was located, 10 and he says what was located was this card. When was it you made your further search for the bond, when was the search made for the bond, when were you down there?

The Witness: During August, 1933.

Mr. Heine: In other words, four months after you knew the bond was destroyed you made a search for the bond? 20

The Witness: I didn't go down to Baltimore specifically for that purpose, but while I was there, knowing the importance of this, a search was made. However, we had been advised by the home office previously they had not been able to locate the papers.

The Court: The situation we have here is Mr. Lewis writing this letter and not being here to tes- 30 tify.

The Witness: May I say something, if the Court please, off the record?

The Court: Of what nature?

The Witness: We have letters there from Mr. William Penn Lewis over his signature.

The Court: You can't prove it in that way.

Mr. Rotzell: Shall I proceed with the direct examination?

10

The Court: I want to get this information.

By the Court:

Q. You had a search made in the Philadelphia office, is that right?

A. Yes.

Q. And in the Baltimore office?

A. Yes, sir.

20 Q. And while you were there a search was made for the files?

A. Yes, sir.

Q. Were you able to locate them?

A. No, sir.

Q. What was the nature of the search?

A. Looking through files for that year.

Q. Was there any other effort made other than looking through the files of that year?

A. There is no other way you can do it.

30 Q. Were you able to locate the bond number without having the information contained in Mr. Heine's letter? Did you have the bond number prior to that time?

A. We couldn't at the Philadelphia office, no.

The Court: Go ahead.

By Mr. Rotzell:

Q. Now, Mr. Kerns, did you later receive a communication, or did you write a letter to Mr. Heine in connection with this case sometime during the month of May, 1933?

A. May, 1933? Yes, I did.

Q. What date was that letter?

10

A. May 8th.

Q. That is one of the letters, I believe, I asked to be produced. Will you examine that, is that the letter you wrote on that date?

A. That is right.

Q. Now, can you tell me whether or not you had any conference with Mr. Kerns before that letter was written?

A. Mr. Heine?

Q. Mr. Heine, in his office?

20

A. Yes, I did.

Q. At that conference was this gentleman who testified on the stand present, Mr. Desorte?

A. Yes, I am most certain he was.

Q. Did you at that time receive a partial audit of the account at that conference before this letter was written?

A. Yes.

Mr. Rotzell: I will offer this letter, if the Court please. 30

(Said paper offered in evidence and marked Exhibit D4.)

Q. Mr. Kerns, during the investigation that you

made personally, and from any information you obtained, were you at any time able to locate any application for the bond in this case?

A. No.

Q. Referring to the exhibits that have been offered on the part of complainant, C1, will you look those over?

10 A. Yes.

Q. At the time those continuation certificates were executed, and at the time of the execution of the original bond, are you personally acquainted with the form of application that was used to obtain bonds of this character?

A. Yes.

Q. I show you a form and ask you what that is?

A. That is an application for a public official bond.

20 Q. And can you say whether or not that was the form in use during the time this bond was in effect?

A. Yes, it was the form of application used.

Mr. Rotzell: I would like to offer it in evidence at this time, if the Court please.

Mr. Heine: I object to it unless it is shown this individual was connected with the company in 1915 and has personal knowledge of it.

30 The Court: How long have you been connected with the company?

The Witness: Nine years.

Mr. Heine: Here is a bond written in 1915.

The Court: If you are trying to make secondary proof ——

Mr. Rotzell: I will withdraw it.

Q. Mr. Kerns, after this letter of May 8th, did you have any further conference with Mr. Heine, and if so, can you refer to your file and tell us, approximately, on what dates those conferences were held? 10

A. Sometime during September I am most certain we had a meeting in Mr. Heine's office.

Q. At the first meeting before the letter of May 8th was written, and at the time Mr. Desorte was there, who else was there besides yourself, Mr. Desorte and Mr. Heine?

A. Mr. Colflesh of the Fidelity Casualty and Mr. Costello of the American Surety. 20

Q. At the time you received the final audit referred to by Mr. Desorte, can you tell us what date that was, approximately?

A. I believe that was September 7th.

Q. September 7th?

A. Yes.

Q. At that first meeting referred to when you received the partial audit, did you or didn't you make any statement regarding a settlement or any adjustment of this particular claim? 30

Mr. Heine: I object to that, if the Court please, that is a pure conclusion of the witness, as to what his statement conveyed to these people.

Mr. Rotzell: I asked if he made any statement.

Mr. Heine: I think he should relate the conversation, not his idea of what he said.

Mr. Rotzell: The complainant on its case opened up with a statement this man made with regard to a settlement, it was kind of ragged, but it was a statement he made a promise to settle the case.

10

The Court: He can answer yes or no, that is the question.

The Witness: No, I did not.

Q. What conversation was held between you and Mr. Heine at that first conference when you received the partial audit?

A. Nothing more than ——

20

Mr. Heine: I object to that, I think the witness ought to state exactly ——

Q. Tell us, as near as you can, the exact words, as near as you recall them now.

A. You realize that is a very difficult thing to do.

The Court: When was this time, the date of this alleged conversation?

30

The Witness: Is this the first meeting?

Q. Yes, the first conversation prior to May 8th.

A. Mr. Costello, Mr. Colflesh, Mr. Desorte and Mr. Heine were there, and each representative of

the various surety companies was given a partial audit, and we were given to understand it wasn't final, and something was said about how soon the auditors would be entirely through and the claim would be filed.

Q. Do you recall who asked that question—was there a question asked? You said you would be advised. Who asked that question, do you recall? 10

A. One of us, one of the three men. Something else was said, and at that same meeting Mr. Heine was also told by me we couldn't locate our bond.

Q. Now, after this letter of May 8th was written, which is in evidence, do you recall the next conference in September, or August, or September?

A. I believe that was September 11th.

Q. What, if anything, was said then by you to Mr. Heine?

A. The same men were present. I don't remember whether Mr. Desorte was present, but I know the other two surety men were present, and I am most certain that was the day—it was, in fact, the day the audit was turned over to us. 20

Q. Before had you received a copy of the partial audit?

A. Yes, Mr. Heine gave us a copy of the partial audit and it was understood we were to investigate and check over the claim, make whatever investigation we felt was necessary to determine whether it was in order for payment and then we were supposed to advise Mr. Heine. 30

Q. Prior to that time had you been able to complete your investigation to determine anything in connection with the status of the claim?

A. I did very little checking on the first audit.

Q. Did you at that time make any definite promise that you would pay any portion or what portion you would pay of these delinquencies?

Mr. Heine: I object to that, if the Court please, I think there ought to be a definite statement of this
10 conversation.

The Court: Testify to what he said.

Mr. Rotzell: Mr. Desorte said at the last meeting when they received the final audit there was some statement made to the effect they would pay the delinquencies. I think they are the words he used, I am practically using his words.

20 Mr. Heine: Instead of the last meeting it was the first meeting.

Mr. Rotzell: No, he said the last meeting, he said they would pay the delinquencies, or something to that effect. I will reframe it.

Q. Mr. Kerns, at the meeting when you received the final audit, do you recall whether or not Mr. Desorte was there?

30 A. Yes, he was.

Q. Did you at that time make any statement to the effect that you would pay all the delinquencies, the Maryland Casualty Company?

A. No, after receiving the audit —

Q. I just want an answer. I guess you did answer the question.

A. I did not.

Q. Did you in any of your conferences you had with Mr. Heine have any discussion with him about the statute of limitations in this case?

A. Yes.

Q. Do you recall how many times that conversation took place, or that was discussed?

A. Well, on or about September 11th we got the 10
audit, and it was quite a task, we had other work, we
couldn't get on it immediately, and after we had
completed our investigation we had a meeting in
Mr. Heine's office. Mr. Desorte was there, and we
asked for the minute book, which was there, and
Mr. Colflesh and Mr. Costello were present at that
time, and we got into the actual discussion of our
liability, and I brought out the fact that a large
portion of the claim was eliminated because of the
statute of limitations, and I cited the Act, and he 20
got a book down —

Q. Who did?

A. Mr. Heine, and referred to the Act and did
not agree with me.

Q. Have you since that date at any time had any
conference with Mr. Heine?

A. That was the last conference.

Q. Have you talked to Mr. Heine over the phone
since that date?

A. No, that was the last time I talked with him, 30
either over the phone or personally.

The Court: When was this?

The Witness: The early part of December, 1933.

Mr. Heine: The early part of December?

The Witness: I think that is about right, yes.

Q. 1933?

A. Yes.

10 The Court: When was suit brought in this case?

Mr. Heine: January, 1934.

Mr. Rotzell: I would like at this time to ask for the production of the letter addressed to Mr. Heine dated March 16th, 1934.

Mr. Heine: From the Maryland?

20 Mr. Rotzell: From myself.

Mr. Heine: 1934?

Mr. Rotzell: March 16th, 1934.

Mr. Heine: Are you going to attempt to offer that letter?

Cross-examination.

30

By Mr. Heine:

Q. Mr. Kerns, who was present the first time we all got together?

A. In the first instance?

Q. Yes.

A. I believe both the other surety representatives were there, and I believe Mr. Desorte was there, and yourself.

Q. Was Mr. Welker there?

A. I don't remember his being there.

Q. The accountant?

A. I don't remember his being there.

10

Q. How many audits or reports from the accountant did you get?

A. We got a partial audit, and later on —

Q. How many later on?

A. I don't know whether one or two.

Q. Two, as a matter of fact, weren't there?

A. I don't know, there may have been two.

Q. Wasn't one given to you in May and one in September?

A. That was the partial audit in May.

20

Q. And one partial audit in April, still, wasn't there?

A. Well, now, the first time I came to your office I received a partial audit.

Q. Didn't you get another one sometime in May?

A. I don't recall that. I can recall in May I received the partial audit, and I acknowledged receipt of it, and in September I received the final audit, and I acknowledged receipt of it. That is the reason I say I did not receive any in the meantime.

30

Q. Mr. Kearns, at the first meeting wasn't there some discussion with respect to the institution of suit?

A. No, I don't remember anything about suits.

Q. Nothing said at that time about not bringing

suit so as to give you people an opportunity to investigate the claim?

A. I don't remember anything about that being said.

Q. At that time wasn't there an offer extended by the Township Committee to furnish you the services of Mr. Fineli, the Township Clerk, to go around
10 with you to the various inhabitants of Waterford Township to aid you in checking this audit?

Mr. Rotzell: I don't think that is material. It is not proper cross-examination on anything I brought out on direct examination. I don't see how it is material.

The Court: When was that?

20 Mr. Heine: April, 1933.

Mr. Rotzell: In other words, how would that be material to this issue in any way? If the Court please, I can't see—it is certainly not based on anything in the direct examination, and I don't see how it can be material to this issue.

Mr. Heine: This is cross-examination, and I am trying to test the memory of this witness.

30 Mr. Rotzell: I guess anything is admissible on that basis. If it is merely to test his credibility I will withdraw my objection.

The Witness: I don't remember whether any-

thing was said in regard to Mr. Fineli assisting us in checking the list, but I do know Mr. Fineli did go around with us.

Q. How did you happen to go to Mr. Fineli?

A. He was the present collector, he had the tax records.

Q. Did you tell him you were seeking his assistance on behalf of the bonding company, or was he doing it at the suggestion of the Township Committee? 10

Mr. Rotzell: If the Court please, I object to that, I think that is going beyond the scope of the direct examination.

The Court: I think it is.

20

Mr. Heine: I am trying to show the conversation, which he denies, took place and, in fact, must have taken place, because of the subsequent conduct of the parties.

The Court: Supposing he did get the collector to go around with him, what effect does it have? Naturally, if there were a claim filed against the bonding company and the matter was referred to an adjuster, the adjuster would probably take advantage of anything he could to determine whether it was a proper claim, and to determine the extent of their liability, and so on. I don't see that that is helpful at all in this testimony. 30

Mr. Heine: We are trying to show a course of

conduct between the parties which did away with any idea of instituting suit immediately, and that conduct on the part of the Township was such as tended to give the bonding company every opportunity to check the claim and avoid the institution of suit, and all of this is built up on a course of conduct.

10

The Court: In the first place, what you are trying to show is there was an agreement made between the Township Committee, that is what you are alleging, and a representative of this bonding company, by which they were not to plead the statute of limitations.

Mr. Heine: That is right.

20 The Court: (After further argument.) All right go ahead with your proof.

Q. How did you happen to go to Mr. Fineli?

The Court: Is this for the purpose of bringing on the other collector, laying a foundation for the contradiction of this witness on that point?

Mr. Heine: Yes, sir.

30

Mr. Rotzell: I don't think it is material.

The Court: The objection will be sustained. If there is to be a contradiction it should be on a material point, and I don't think that is a material point.

Mr. Heine: I am testing this man's recollection as to a conversation which he has categorically denied, and which Mr. Desorte testified was had.

The Witness: Answer it?

The Court: No, sir.

10

Q. Mr. Kerns, what was said at that time, if anything, with respect to the institution of suit, or the present amount of the claim of Waterford Township to your bonding company?

Mr. Rotzell: I ask that the time be fixed.

Q. At the first conference?

A. I don't recall anything being said at all about institution of a suit against the Maryland Casualty Company. 20

Q. Do you say nothing was said at that time about the institution of suit?

A. I don't remember anything being said.

Q. Your answer is nothing was said at that time?

A. I don't remember anything about anything being said about suit being instituted against the Maryland Casualty Company.

Q. Will you state what, if anything, was said respecting the period with respect to the time audits were being completed as pleading the statute for that time, not in the waiver of the statute of limitations in its entirety prior to your conferences, but for the period between the first time of the conference and completion of the final audit? 30

Mr. Rotzell: I object to that as not being material, and not proper cross-examination. We are not pleading the statute of limitations that would affect that period, we are pleading the statute that affects a prior period.

The Court: From April to December; wasn't it
10 December when the Township was notified the Maryland Casualty Company wouldn't pay the claim?

The Witness: During the early part of December was the last conference we had with Mr. Heine, and at that time I raised the statute of limitations.

The Court: That was in December?

The Witness: Yes.
20

The Court: This period was somewhere from the first of April to December. It certainly ought to be determined whether during that period the statute was running.

Mr. Rotzell: I might call your Honor's attention to the fact that even in the letter of May our rights were reserved.

30 Mr. Heine: I think it was in April you reserved your rights.

The Court: May 8th.

Mr. Rotzell: Our contention is and our defense

in the law court relates to a time which even this period does not affect, because it is a time prior to nine years before that.

Mr. Heine: We contend 1933 would bring us to 1924.

The Court: According to the proof, Mr. Kern's 10
testimony —

Mr. Heine: We couldn't have started in April, 1933.

The Court: How could you be affected between April and December?

Mr. Heine: Because we could have started in 1933. 20

The Court: What effect would it have? There wouldn't be any change until the end of that year. If it was good in April it was good at the end of the year, because the bond started the first of January.

Mr. Heine: We didn't start our suit until 1934, just a few days after.

The Court: You could have started in December, 1933, there was nothing to stop you, you had your audit at that time and had notice from the insurance company, or casualty company, whatever it was. 30

The Witness: Mr. Desorte was there, and the other two surety representatives, and that was the early part of December, 1933, and I explained what items my company felt should be eliminated, and cited the statute of limitations.

The Court: That was final as far as you were
10 concerned?

The Witness: Yes.

The Court: You could have commenced your suit in December then, and that is the time you should have commenced it. Suppose you hadn't commenced suit for a year?

Mr. Heine: I think we acted with sufficient dili-
20 gence when we started our suit in less than a month after we had an opportunity to submit it to the Township Committee and get them to accept or reject their offer. A month's time is not an unreasonable delay, in view of the conduct of the parties.

The Court: I haven't been able to find in the testimony there was any such agreement.

Mr. Heine: I am cross-examining on that. Mr.
30 Desorte testified in April, 1933, there was a statement by Mr. Kerns the statute would not operate while we were investigating and negotiating.

Mr. Rotzell: There is nothing to that effect.

Mr. Heine: That is my interpretation, and I think the record shows that.

The Court: Go ahead with the examination.

Q. Mr. Kerns, was there anything said with respect to the statute continuing to operate during the period of the investigation and the negotiation for settlement?

A. Mr. Heine, I don't remember that the statute of limitations was ever mentioned until in your office 10 we had the conference in December, 1933.

Q. You mentioned it in your letters?

A. I might have, but we didn't discuss it at your office.

Q. From the first time you corresponded with me respecting your claim, the statute of limitations was constantly brought up?

A. I don't remember a thing being said about it.

The Court: If you have any letters showing it, 20 produce them.

Mr. Rotzell: The only letter we have is the letter of May 8th, and that has been offered in evidence.

The Court: Which one?

Mr. Rotzell: The letter of May 8th.

The Witness: And another one in September, 30 September 11th, Mr. Heine must have that.

The Court: They have reserved it in May.

Mr. Heine: That is as to the rights they had

prior to the time we first notified them there was a loss. Now, after that time —

The Court: It doesn't say that.

Mr. Heine: That is what the conversation was.

10 The Court: This letter doesn't say so.

Mr. Heine: That is the letter they wrote, but not what we agreed to as the agreement between the parties.

The Court: In other words, they write one thing and say something else?

Mr. Heine: Yes. They said in the conversation
20 everything will stop as of April when we negotiate it, and then continue with a statement like that, that they reserve their full rights.

The Court: Mr. Kerns denies that proceeding.

Mr. Heine: His testimony has clearly gone from my mind due to the long argument. That is all.

Mr. Rotzell: That is all.

30

WALTER O. COLFLESH, SWORN.

By Mr. Rotzell:

Q. Mr. Colflesh, by whom are you employed?

A. The Fidelity and Casualty Company of New York. 10

Q. What is your capacity, what is your occupation with that company?

A. Assistant claim examiner.

Q. Were you involved in the investigation of the Waterford Township claim?

A. I was.

Q. Your company was on one of the subsequent bonds of the tax collector?

A. That is right.

Q. Were you present in April when Mr. Kerns 20 and Mr. Costello were present in Mr. Heine's office with Mr. Desorte?

A. I was.

Q. Will you tell us what was said by Mr. Kerns in your presence respecting the liability of the Maryland Casualty Company on this bond?

A. I don't recall that there was anything said by Mr. Kerns as to the liability. In the first place, we only had a partial audit, and there was nothing that any of us could say as to the liability. 30

Q. Did Mr. Heine explain to you that was a partial audit at that time?

A. He did.

Q. And you don't recall any statement being made by Mr. Kerns in your presence assuming any liability at that time under the Maryland bond?

A. No.

Q. Were you there during the month of September when another conference was held and Mr. Kerns was there and Mr. Desorte was there, I believe, in Mr. Heine's office?

A. Yes.

10 Q. Will you tell us what was said, if anything, regarding the liability of the Maryland Casualty Company?

A. Nothing said regarding the liability. We then received two additional copies of audits.

Q. Was there anything said about making any further investigation by Mr. Kerns?

A. I think it was at that time we all agreed to make an investigation by checking up in the Township of Waterford.

20 Q. Was there anything said at that time about the statute of limitations, in your presence, as far as the Maryland Casualty Company was concerned?

A. I don't think there was at that time.

Q. Were you present at the December conference when Mr. Kerns was there?

A. Yes, sir.

Q. Can you tell us what, if anything, was said at that time by Mr. Kerns?

30 A. Mr. Kerns told Mr. Heine at that time that they wouldn't be responsible for the items that were eliminated by the statute of limitations.

The Court: When was that?

The Witness: December, 1933.

Q. You don't recall any other conference after

Walter O. Colflesh—Cross

that at which you were present, or Mr. Kerns was present?

A. No, I think that was the final.

Mr. Rotzell: Cross-examine.

Cross-examination.

By Mr. Heine:

10

Q. When did you get the second partial report, Mr. Colflesh?

A. If I remember correctly we got the second and third in the early part of September, possibly around the 8th or 10th.

Q. You heard Mr. Kerns testify he got his in May, 1933?

A. The second one?

20

Q. Yes.

A. I am pretty sure we got the second and third in your office in the early part of September.

Q. Have you got your files with you?

A. Yes, sir, they are down on the bench there. Do you want me to get them?

Q. Yes.

A. On September 7th I received the second and third reports.

30

The Court: September?

The Witness: September 7th, 1933.

Q. Do you have a letter from me dated June 1st, 1933?

A. That is right, I have a copy of that letter.

Q. Read it.

A. Dated June 1st, 1933, addressed to the "Fidelity and Casualty Company of New York, 122 South Fourth Street, Philadelphia, Pa. Attention of Mr. Walter O. Colflesh, Esq., In Re: Township of Waterford—C. W. Greaney bond. I beg to advise you the auditors have now completed their examination of receipts not accounted for by Mr. Greaney, tax collector, during the years 1921 to 1926 inclusive, all of which is embodied in a written report by the auditors and of which you may have a copy. I shall expect to hear from you within five days as to whether or not the claim will be paid. Very truly yours, Aaron Heine."

Q. When did you receive that letter?

A. Received on June 2nd, 1933.

20 Q. Do you mean to say in June, 1933, you did not have a copy of the report of the auditors?

A. Not according to this memorandum dated June 5th, here. Shall I read this?

Q. Your memorandum?

A. Yes.

Q. I don't know what is in it. I am asking between the date of that letter, June 1st, to September sometime, you did not receive a copy of that report?

30 A. On my memorandum, June 5th, I advised my home office we requested Mr. Heine to cooperate with us by getting the proof of loss to us at the earliest possible moment.

Q. We were offering it to you in the form of an auditors' report, weren't we?

A. Partially, yes.

Q. Does that letter say partially? That letter says they have now completed their examination and you could have a copy of it and I expected to hear from you within five days.

A. You said of which you may have a copy.

Q. That is right. Did you call for a copy?

A. Yes.

Q. What?

10

A. Right.

Q. And you didn't get it?

A. Not a complete copy, no.

Q. Did you call for that second report?

A. Did I what?

Q. Did you call for the second report following the receipt of that letter?

A. Yes.

Mr. Rotzell: If the Court please, I don't know 20
how far we are going in an examination of this kind. These audits related to this other company, they were not audits relating to the Maryland Casualty Company.

Mr. Heine: I have the exact letters sent to each one of the three bonding companies, I have a copy of the letters, and the Maryland denied they got theirs in May.

30

Mr. Rotzell: No, we admitted we got the best copy in September, and we have the audit which is dated August 28th, which couldn't have been mailed to us in June.

The Witness: I have your letter.

The Court: That letter says it was completed and that they might have a copy. Can't you tell when you got your copy? It was testified in September.

The Witness: Here is the letter.

- 10 Mr. Heine: If the Court please, there seems to have crept in a lot of confusion in this case.

The Court: I don't think there is very much confusion. I think there has been a lot of matters entirely outside the issue here, because the issue is practically only two matters, and one is whether this Court should restrain the defendant from undertaking to plead the statute of limitations in the law court because of fraudulent representation, not
20 actual fraud, but equitable fraud.

Mr. Heine: We contend there was actual fraud because the records of the tax books were deliberate misstatements of the amount collected, that is what we refer to as fraudulent concealment.

(Last question and answer repeated.)

Q. When did you get it?

- 30 A. From my recollection we got it in September, the final report.

Q. You did get the final report in September, and there was another May report prior to that, wasn't there?

A. At the time I called at your office on Saturday morning before June 5th, I don't know the date.

Walter O. Colflesh—Cross

Q. Mr. Colflesh, you were present in December when the three bonding company representatives were there?

A. That is right.

Q. And at that time the purpose was to discuss the settlement of these cases?

A. That is right.

Q. At that time your company offered to pay only 10 the tax defalcations —

Mr. Rotzell: Objected to, if the Court please.

Mr. Heine: Wait a minute, this is all in connection with the same conversation.

Q. The American Surety offered the same thing, and the Maryland Casualty offered the same thing, isn't that correct?

20

A. The Maryland Casualty didn't offer the same, because they were standing on the statute of limitations.

Q. Wasn't that in fact solely with respect to the tax omissions and as their basis for offering a settlement merely for defalcations?

A. No, they were standing on the statute of limitations as to both tax defalcations and tax search items.

Q. You are sure of that?

30

A. Sure, that has always been my understanding of it.

Mr. Heine: That is all.

BART P. COSTELLO, SWORN.

By Mr. Rotzell:

Q. Mr. Costello, what is your occupation and by whom are you employed?

10 A. Inspector of claims.

Q. In that capacity —

The Court: What company?

The Witness: American Surety Company of New York.

Q. In that capacity were you in conference at any time on the Waterford Township proposition relating to Cornelius Greaney?

20

A. I recall being in conference three times at which the other two adjusters were present, and one alone. I was there by myself at one time with Mr. Heine.

Q. As to the first of those three times, can you tell me approximately when it was?

A. No, I could not, I am frank to say I don't have my file, and I couldn't tell you. The first time I called I called alone, neither of the other men were

30 there.

Q. Take the second time, the first time Mr. Kerns and Mr. Colflesh were present in Mr. Heine's office, was there anything stated by Mr. Kerns at that time with relation to the liability of the Maryland Casualty Company on the bond?

Bart P. Costello—Direct

A. I don't recall him having said anything.

Q. Do you recall whether any promise was made by him at that time?

A. No, I do not.

Q. Do you recall the second time you were together, when that was?

A. No, I know it was sometime between that, but when it was—I don't have my file.

10

Q. Were all these conferences in 1933?

A. I couldn't tell you that.

Q. The second time the three of you were together in Mr. Heine's office do you recall any statement made at that time by Mr. Kerns as to the liability of the Maryland Casualty Company on the bond?

A. No, I don't recall him having made any statements as to liability.

Q. Was there any promise made by him at that time?

A. I can't recall, no.

Q. The last time you three were in conference together, do you recall what statements were made at that time by Mr. Kerns?

A. I know—I can't say his words, and I don't know that I could say the full meaning of his words, but I know he brought into prominence there the question of the statute of limitations. Just what bearing it had on the case I don't know, but I know that was brought up in conference. I wasn't interested because it didn't touch us, but I know he did speak of it.

30

The Court: That was the last conference?

The Witness: Yes. I didn't know it was going to be the last, but it happened to be the last.

Q. At that time was there any promise made by Mr. Kerns on behalf of the Maryland Casualty Company?

A. I don't think so. I don't recall any one's statement—pardon me, I recall this, I think we all three agreed, I think, I feel sure we all agreed we would take care of our own liabilities regarding the defalcations in taxes. By that I mean I felt satisfied that my company would take care of the defaults, you know what I mean, the taxes, and I believe the other men had the same thought, although I didn't know what reservation Mr. Kerns might have said or did say regarding the limitation. I know he expressed a reference to take care of his company's liability as far as it was liable, that is as far as I can say on their case.

Cross-examination.

By Mr. Heine:

Q. You weren't present the first time that Mr. Kerns and Mr. Costello were present?

A. I went myself, if they were ahead of me I wasn't there.

Mr. Heine: I think that is all.

Mr. Rotzell: That is all. That is our case.

DEFENDANT RESTS.

The Court: Anything further, Mr. Heine?

Mr. Heine: I would like to call Mr. Smiley for the purpose of elaborating on these fraudulent —

Mr. Rotzell: Before closing could I just recall Mr. Kerns for two questions?

10

The Court: All right.

F. B. KERNS, recalled.

By Mr. Rotzell:

Q. Mr. Kerns, do you have any communication from Mr. Heine referring to or enclosing copies of 20 any of these audits?

A. Under date of September 8th, 1933, Mr. Heine wrote a letter to the Maryland Casualty Company, to my attention, the body of the letter is as follows: "I enclose herewith proof of loss, in the above matter. Please acknowledge receipt."

The Court: What was the date of that?

The Witness: September 8th, 1933.

30

Q. Do you recall whether you received anything with the proof of loss at that time?

A. How that happened—we were in Mr. Heine's office a day or so before the 8th, got the two audits,

and then I requested Mr. Heine to enclose his proof of loss, which he did, and I acknowledged it on the 11th of September.

Q. I show you that book and ask you the date of that and when you got that one?

A. This is the third report, I believe the third was the last.

10 Q. What was the date?

A. August 28th, 1933.

Q. And you got that on what day?

A. Mr. Heine communicated with my company and requested that we get in communication with the other representatives of the surety companies.

Q. What day did you get this?

A. This request was received on the 22nd day of August, 1933, and this was Mr. Heine's request. Reading from a copy of a letter that was addressed
20 to the other sureties: "At the request of Mr. Aaron Heine, attorney representing the Township of Waterford, it is desired that a conference be held at his office, 5 Hudson Street, Camden, New Jersey, under date of September 7th, 1933, at ten A. M., to go into the matter of Mr. Greaney, tax collector." We all attended that meeting and it was on the 7th day of September we received the second and third reports and it was on that day I requested Mr.
30 Heine to execute a proof of loss, which he did, and forwarded it to my company on the 8th of September, I just read that letter before, and it was on the 11th of September I wrote Mr. Heine this letter.

Mr. Rotzell: I don't think we need that. I have already gone into the letter of September 11th.

Cross-examination.

By Mr. Heine:

Q. Will you say you did not get a report following my letter of June 1st in which I asked you to call for a report?

A. Mr. Heine, it is my recollection in the early 10
part of May or April, whenever it was, I got the
partial audit, then we did not receive any more
until September 7th, and on that date we received
the second and third.

Q. Didn't you get a letter from me dated June
1st asking you to call at my office for a report?

A. Yes, I have such a letter in here.

Q. Did you call and get the report?

A. If you requested me to be in your office in that
letter, I was there. 20

Q. Dated June 1st, addressed to the Maryland,
care of your attention?

A. I am trying to find ——

Q. "I beg to advise you the auditors have now
completed their report and examination of receipts
not accounted for by Greaney, tax collector, during
the years 1921 to 1926 inclusive, all of which is
embodied in a written report by the auditors and
of which you may have a copy. I shall expect to
hear from you within five days as to whether or 30
not the claim will be paid."

A. Yes, I have that letter.

Q. And did you call for the report?

A. I would say yes.

Q. So you had two reports by June 1st, didn't
you?

A. How is that?

Q. You had two reports?

A. All together are there three?

Q. Three.

A. The partial, and then the second and third.

Q. The second and third.

A. No, I would still say we got the second and
10 third audit on the 7th of September.

Q. Despite the fact you had knowledge, or were acquainted with the fact I had these reports ready for you?

Mr. Rotzell: I object to this because it is unquestionably in evidence that the report was dated August 28th, and could not have been in his possession.

20 Mr. Heine: Speaking of the first and second. The second is dated May 29th.

The Court: What difference does it make?

Mr. Heine: Except there is a denial in an important situation.

The Court: It couldn't affect your rights whether the report was delivered in June or September.

30 Mr. Heine: There is no denial of that letter.

The Court: So you couldn't possibly be affected.

Mr. Heine: Despite those letters negotiations

George Austin Smiley, Jr.—Direct

were had in my office as late as December, with the idea of settlement.

The Court: All right.

Mr. Heine: And at that time, in December, there was an offer of settlement.

The Court: There wasn't any offer, you were proceeding to suit. 10

Mr. Heine: Because we did not accept the offer, but there were continual efforts of settlement down to December, and when the last offer came in we decided not to accept it, and the negotiations having failed suit was instituted, but at no time was there any statement there would be no settlement and there would be no use negotiating. 20

The Court: Any further proof?

Mr. Rotzell: That is our case.

GEORGE AUSTIN SMILEY, JR., recalled.

By Mr. Heine: 30

Q. Will you state briefly the nature of the defalcations that took place?

Mr. Rotzell: If the Court please, that is part

of the original case, it is not rebuttal, and I also object because it is immaterial for the reason the defalcations have nothing to do with this action in the Court of Chancery to restrain the proceedings in the court of law as far as that defense is concerned.

10 The Court (After argument): I will listen to his testimony. I will let it in conditionally, but I think this testimony ought to have been produced in the main case. You had the witness here and I don't know why you didn't call him. If I had passed on the case on the motion to dismiss, the case would have been through, and I ought to have passed on that phase of it anyway, I didn't think you had enough proof.

20 Q. The question was: State briefly the nature of the defalcation.

A. The actual defalcation was the failure of the tax collector to record in the cashbook the actual receipt of taxes, which we were unable to determine until we were authorized by the governing body of the municipality to completely confirm the outstanding accounts.

30 Q. Were they, in the main, not the exception, in the main did they consist of the checking of the taxes, or of the interest on delinquent taxes?

Mr. Rotzell: That is objected to on the same ground. I don't know whether I need to object to each one of the questions or not.

The Court: It seems to me if we are going into

George Austin Smiley, Jr.—Direct

this sort of proof you will have to produce all the books and do it in the regular way. This witness has merely expressed opinion evidence of what happened.

(After argument.)

Q. Are there rules and regulations laid down for the making of an audit? 10

A. Positively.

Q. By whom are the rules laid down?

A. The State auditor.

Q. Did you comply with the rules and regulations in making the audit?

A. Yes, sir.

Q. Following those rules and regulations, could you have discovered the defalcations were taking place? 20

A. No.

Mr. Rotzell: That is objected to, if the Court please.

The Court: I think it is objectionable. He can testify to what he did, but he can't testify to rules and regulations.

Q. Mr. Smiley, I show you copies of reports and ask if they are reports which have relation to the defalcations as affecting the Maryland Casualty Company? 30

A. Yes.

Mr. Heine: You have copies of these?

Mr. Rotzell: Yes, I don't see that there is any objection to these.

Mr. Heine: I offer them.

(Said papers offered in evidence and marked Exhibits C3, C4, and C5.)

10

Q. How did you discover the defalcations?

A. We were authorized by the Township to completely circularize the outstanding delinquent taxes, after an effort had been made on their part to notify the delinquents and try to make arrangements for those delinquents to pay the outstanding taxes.

Q. Did you interview the individual taxpayers?

A. Yes, sir.

Q. And check their tax receipts with the collector's tax book?

20

A. We did.

Q. Did you find the defalcations in that way?

A. We did.

Q. And not from an inspection of the tax book?

A. Yes.

Mr. Rotzell: I object to this entire line of questioning. I know I should have objected to each question, but I didn't like to do that.

30

The Court: It is hearsay testimony. Were they marked paid on the duplicate?

The Witness: No, they were outstanding on the tax duplicate.

The Court: How could this testimony be material without each individual was interviewed?

Mr. Heine: If we were trying to bind them to the total amount we would have to prove it differently, but what we are trying to prove now is whether the statute is operative.

The Court: The testimony will be admitted conditionally, go ahead.

10

Mr. Heine: That is our case.

Mr. Rotzell: No questions.

Mr. Heine: Your Honor states it went in conditionally. Does that mean you do not give me the opportunity of opening my case to introduce the testimony?

20

The Court: I will let the case be opened to introduce the testimony. Have you any rebuttal to this testimony?

Mr. Rotzell: No, I think it is immaterial to this issue.

Mr. Heine: I suppose the matter will not be determined this afternoon, and I would like the opportunity of filing a brief on the subject.

30

The Court: Counsel may file briefs, the complainant first, and he will serve a copy on the defendant,

and if I find it necessary to have a transcript of the testimony, or any part of it, I will have to get the stenographer to furnish it to me, and the expense will be charged half to the complainant and half to the defendant.

10

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

102-151

20	Between TOWNSHIP OF WATERFORD, a municipal corpora- tion, <i>Complainant,</i> and MARYLAND CASUALTY COMPANY, of Balti- more, Maryland, a cor- poration of Maryland, <i>Defendant.</i>	}	On Bill, etc. On Final Hearing. Conclusions.
----	---	---	--

30

Aaron Heine, Esq., for complainant.
 Cecil W. Rotzell, Esq., for defendant.

DAVIS, V. C.:

The relief sought by the bill is set forth in the conclusions filed on defendant's motion to strike, making it unnecessary to restate those matters here.

The cause came on for final hearing and the testimony disclosed that Cornelius W. Greaney was

Conclusions

the former collector of taxes for the complainant, that he was elected for a term of three years, commencing January 1, 1916, and continued in office by virtue of re-elections every three years until December 17, 1932. During part of this time he was also treasurer of the Township and acted as tax search clerk. However, no resolution appointing him as tax search clerk was passed until April 22, 1926, and Mr. Greaney, the collector, testified that he could not say whether he issued any tax searches prior to that time; no proof was presented showing the issuance of tax search certificates by him, except what inference may be drawn from the testimony of the auditor who made an examination of the books in order to ascertain whether or not there was a shortage in the accounts of the tax collector by reason of not finding entries for fees alleged to have been paid for tax searches. In April of 1933, the attention of the defendant was called to defalcations by the tax collector, but there is no testimony which supports complainant's charges that there was a promise on the part of defendant to make good such defalcations. Several months elapsed between the time when the matter of defalcations was under discussion by the attorneys representing the defendant and the complainant and the time when suit was actually instituted, but I am unable to determine that the defendant promised to pay or settle the claims arising out of the alleged defalcations of the collector or in any way misled complainant into delaying its suit on the bond. Therefore there is no justification for this Court to interfere with the plea of the statute of limitations filed by the defendant in the suit at law.

The second cause of action relates to the furnishing by the defendant of a copy of the collector's bond executed by him with the defendant herein as surety, the complainants alleging that such bond cannot be found and calling upon the defendant to furnish a copy of the duplicate bond. Notwithstanding the fact that there was some correspondence
10 between the complainant's attorney and the representatives of the defendant, in which it appeared that a letter was written by William Penn Lewis, a representative of the company, acknowledging a letter from the complainant's solicitor, wherein Mr. Lewis said that the company had located the bond, the basis of the letter apparently was information contained on a card record kept by complainant in its Baltimore office. The testimony produced at the
20 hearing convinces me that the card record was the only record that the defendant could locate after a diligent search, and the fact is noted on the card that the bond had been destroyed. A diligent search was made in the Philadelphia office and also in the Baltimore office in an endeavor to locate some other information regarding the bond, but without avail. I am satisfied that the defendant has used every reasonable effort to procure a copy, and since no proofs were offered in an effort to establish the terms and conditions of the bond, complainant is
30 not entitled to any relief on its second cause of action.

The bill of complaint will be dismissed.

Determined: March 5th, 1935.

SUPPLEMENTAL CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

102-151

Between

TOWNSHIP OF WATERFORD,
a municipal corpora-
tion,

Complainant,
and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

Defendant.

On Bill, etc.
On Final Hearing.
Supplemental Con-
clusions.

10

20

Aaron Heine, Esq., for complainant.

Cecil W. Rotzell, Esq., for defendant.

DAVIS, V. C.:

30.

Since the filing of conclusions on final hearing in this cause, and before entry of decree, the complainant has petitioned for re-argument on certain matters, which re-argument has been had. The bill, in addition to the matters referred to in the con-

clusions already filed, charges that defalcations of the Township collector, Greaney, were fraudulently concealed by him, and because of such fraudulent concealment, his surety, the defendant herein, is estopped from pleading the statute of limitations as a defense to the action at law. The testimony of such alleged concealment is insufficient, in my
10 opinion, to legally establish the fact that there was such a concealment by the collector as could not have been discovered by the complainant by a proper audit of his accounts; therefore, the defendant is not estopped from pleading the statute because of the alleged fraudulent concealment. If legal proof had been submitted so that I could have reached the conclusion that the collector had fraudulently concealed the alleged defalcations, still, the defendant, as surety on his bond, would be entitled to
20 its plea under the statute up to and including the year 1924, by virtue of the statute which provides "that any prosecution to be had or commenced upon any bond heretofore given or hereafter to be given * * * by any city, county or township collector and the securities of such collector for the faithful performance of the duties of the office of said collector, shall in no wise operate against or in any manner affect the said securities named and bound in said bond unless such prosecution shall be commenced
30 within nine years after the date of said bond and not after; * * * ." 3 CS 3165, par. 5. The fact that the sureties on the bond are referred to as "securities" makes no difference in the application of the statute, because its terms undoubtedly refer to sureties on the bond and are not to be understood

Supplemental Conclusions

as referring to the "instrument" embodying the contract in its limited sense of representing "securities" which may have been pledged, as suggested by counsel of the complainant. This statute is undoubtedly enacted for the protection of the sureties and affords no protection to the Township collector by reason of his defalcations. If a surety could be held because of fraudulent concealment by the collector, for more than the nine years' period provided in the statute, then there would be no limitation whatever, and the words of the statute that "*the prosecution upon the bond shall in no wise operate against or in any manner affect the securities named,*" would have no force to accomplish the purpose for which it was intended; that is, to limit actions against sureties. In order that this Court should enjoin the filing of a statutory plea in a law court, the proof should be such as to leave no doubt of the propriety of such action, in view of the plain language of the statute.

A decree dismissing the bill will be advised.

Determined: March 20th, 1935.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

102-151

10

Between

TOWNSHIP OF WATERFORD,
a municipal corpora-
tion,*Complainant,*

and

MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,

20

*Defendant.*On Bill, &c.
Final Decree.

This matter coming on to be heard in the presence of Aaron Heine, solicitor of the complainant, and Cecil W. Rotzell, solicitor of the defendant, and the Court having examined the pleadings and having
 30 taken proofs orally and in open court, and heard and considered the arguments of counsel therein;

And it appearing to the satisfaction of the Court that there is no justification for this Court to interfere with the plea of the statute of limitations filed by the Maryland Casualty Company in the suit at

law, as prayed for in the first cause of action, and that the complainant is not entitled to any relief on its second cause of action prayed for by it in its bill of complaint filed therein;

It is, on this 25 day of March, 1935, ordered, adjudged and decreed that the bill of complaint filed in the above-entitled cause be and the same is hereby dismissed.

10

It is further ordered, adjudged and decreed that the said complainant, Township of Waterford, pay to the defendant the costs of this suit to be taxed.

Respectfully advised,

F. B. DAVIS,
V. C.

20

30

NOTICE OF APPEAL.

(Filed April 25, 1935.)

IN CHANCERY OF NEW JERSEY.

10

102-151

Between

TOWNSHIP OF WATERFORD,
a municipal corpora-
tion,*Complainant,*

and

20 MARYLAND CASUALTY
COMPANY, of Balti-
more, Maryland, a cor-
poration of Maryland,*Defendant.*On Bill, &c.
Notice of Appeal.

30 The complainant, Township of Waterford, a mu-
nicipal corporation, hereby appeals from a final
decree made in the above-entitled cause on the twenty-fifth day of March, 1935, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated:

AARON HEINE,
*Solicitor for and of Counsel
with Complainant.*

Notice of Appeal

143

I conceive there is good cause for appeal in the above-entitled cause.

AARON HEINE,
Of Counsel with Complainant.

[ENDORSED]

10

Service of a copy of the within Notice of Appeal is hereby acknowledged this 22d day of April, 1935.

Cecil W. Rotzell,
Solicitor for Defendant.

20

30

PETITION OF APPEAL.

(Filed April 25, 1935.)

10 NEW JERSEY COURT OF ERRORS AND
APPEALS.

	TOWNSHIP OF WATERFORD, a municipal corporation, Complainant-Appellant,	} On Appeal from the Court of Chancery. Petition of Appeal.
	v.	
	MARYLAND CASUALTY COM- PANY, of Baltimore,	
20	Maryland, a corporation of Maryland, Defendant-Appellee.	

*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

30 The petition of the Township of Waterford, a
municipal corporation, complainant-appellant in the
above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final de-
cree made in the Court of Chancery by his Honor,
Luther A. Campbell, Chancellor of the State of New

Petition of Appeal

Jersey, bearing date March twenty-fifth, 1935, in a certain cause in said Court of Chancery wherein the said Township of Waterford was complainant and the said Maryland Casualty Company, of Baltimore, Maryland, a corporation of Maryland, was defendant, in this respect, to wit, that the said decree adjudges that the bill of complaint filed in the above-entitled cause, be and the same is hereby dismissed and that the complainant, Township of Waterford, pay to the defendant the costs of said suit to be taxed. 10

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Court shall seem proper.

AARON HEINE, 20
*Solicitor for and of Counsel
 with Appellant.*

[ENDORSED]

Service of a copy of the within Petition of Appeal is hereby acknowledged this 22d day of April, 1935. 30

Cecil W. Rotzell,
 Solicitor for Defendant-Appellee.

6

30

30

EXHIBIT C1.

(The following two lines written in lead pencil:)

1921

5003

Continuation Certificate

10

MARYLAND CASUALTY COMPANY
OF BALTIMORE

(Seal of Maryland Casualty Company)

Bond #26643 P O & D.
BALTIMORE, MARYLAND

IN CONSIDERATION of the sum of FIFTEEN 20
Dollars, this bond, subject to all its covenants and
conditions, is hereby continued in force until noon
on the 1st. day of January, 191 22.

IT IS EXPRESSLY UNDERSTOOD AND
AGREED that the total liability of the Maryland
Casualty Company, under its original bond and any
renewals or continuation certificates attached there-
to, including this one, is not cumulative and shall
not under any circumstances or in any event exceed 30
the sum of \$3,000.00.

ATTACHED to and forming part of the bond, in
the amount of THREE THOUSAND Dollars here-
tofore issued from the 1st. day of January 1916. on

Complainant's Exhibits

behalf of CORNELUS W. GREANEY, ATCO,
N. J. TAX COLLECTOR. and in favor of TWP.
COMMITTEE OF WATERFORD TWP.

WITNESS the signatures of the President and
Assistant Secretary this 15th. day of November,
1920.

10 MARYLAND CASUALTY COMPANY,
By Jno. T. Stone
President.

BR W. T. Harper
(Seal) Assistant Secretary
Countersigned at Camden, New Jersey this 3rd
day of January, A. D., 1921.

Ruth Baird
New Jersey Agent

20 (The following line written in lead pencil:)
1926

Continuation Certificate

MARYLAND CASUALTY COMPANY
OF BALTIMORE

(Seal of Maryland Casualty Company)

30 BALTIMORE
Bond No. 26643 P. O.

IN CONSIDERATION of the sum of TWENTY
FIVE Dollars, this bond, subject to all its covenants
and conditions, is hereby continued in force until
noon on the 1st. day of January, 1927.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the total liability of the Maryland Casualty Company, under its original bond and any renewals or continuation certificates attached thereto, including this one, is not cumulative and shall not under any circumstances or in any event exceed the sum of \$5,000.00.

10

ATTACHED to and forming part of the bond, in the amount of FIVE THOUSAND Dollars heretofore issued from the 1st. day of January, 192 16 on behalf of CORNELIUS W. GREANEY. ATCO. N. J. TAX COLLECTOR. and in favor of TWP. COMMITTE OF WATERFORD. TWP.

WITNESS the signatures of the President and Secretary this 2nd. day of Nov., 1925.

MARYLAND CASUALTY COMPANY, 20

By F. Highlands Burns,
President

Jno A. Hartman
(Seal) Secretary

Countersigned at Camden, N. J. this 22nd day of December, A. D., 1925.

New Jersey Agent.

(The following line written in ink:)

BA

30

(The following line written in lead pencil:)

1924

Continuation Certificate

MARYLAND CASUALTY COMPANY
OF BALTIMORE

(Seal of Maryland Casualty Company)

BALTIMORE

Bond No. 26643 P. O.

10

IN CONSIDERATION of the sum of TWENTY FIVE Dollars, this bond, subject to all its covenants and conditions, is hereby continued in force until noon on the 1st. day of January, 1925.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the total liability of the Maryland Casualty Company, under its original bond and any renewals or continuation certificates attached thereto, including this one, is not cumulative and shall not under any circumstances or in any event exceed the sum of \$5,000.00.

20
30

ATTACHED to and forming part of the bond, in the amount of FIVE THOUSAND Dollars heretofore issued from the 1st. day of January 192 16. on behalf of CORNELUS W. GREANEY. ATCO, N. J. TAX COLLECTOR. and in favor of TWP. COMMITTEE OF WATERFORD TWP.

WITNESS the signatures of the President and Assistant Secretary this 30th. day of October, 1923.

MARYLAND CASUALTY COMPANY,

By F. Highlands Burns

President

BR W. T. Harper

(Seal) Assistant Secretary

Countersigned at Camden, N. J. this 22nd day
of December, A. D., 1923.

Carl J. Allendorf

New Jersey Agent.

Continuation Certificate

10

MARYLAND CASUALTY COMPANY
OF BALTIMORE

(Seal of Maryland Casualty Company)

BALTIMORE

Bond No. 26643 P. O.

IN CONSIDERATION of the sum of TWENTY
FIVE Dollars, this bond, subject to all its covenants
and conditions, is hereby continued in force until
noon on the 1st. day of January, 1926.

20

IT IS EXPRESSLY UNDERSTOOD AND
AGREED that the total liability of the Maryland
Casualty Company, under its original bond and any
renewals or continuation certificates attached there-
to, including this one, is not cumulative and shall
not under any circumstances or in any event exceed
the sum of \$5,000.00.

30

ATTACHED to and forming part of the bond, in
the amount of FIVE THOUSAND Dollars hereto-

Complainant's Exhibits

fore issued from the 1st. day of January 192 16
on behalf of CORNELIUS W. GREANEY, ATCO.
N. J. TAX COLLECTOR. and in favor of TWP.
COMMITTEE OF WATERFORD. TWP.

WITNESS the signatures of the President and
Assistant Secretary this 10th. day of Nov., 1924.

10 MARYLAND CASUALTY COMPANY,
By F. Highlands Burns
President

BR W. T. Harper
(Seal) Assistant Secretary
Countersigned at Atco this 1st day of December,
A. D., 1924.

New Jersey Agent

EXHIBIT C2.

20

Incorporated 1898

MARYLAND CASUALTY COMPANY

F. Highlands Burns, President

Home Office,—Baltimore

Cable Address "Marcasco"

Please Address Reply to Writer
and Quote Caption

30

Bonding Claim Division

George W. Dexter,

George F. Cushwa,

Associate Managers

April 18, 1933

26643—P. O.—Township of Waterford,

Camden County, New Jersey—C. W. Greaney,
Tax Collector

Mr. Aaron Heine, Atty.
5 Hudson Street
Camden, N. J.
Dear Sir:

We are in receipt of your letter of the 7th, and we have now been able to locate this bond, and have 10 referred the matter to our Philadelphia Claim Division, requesting that they have a representative get in touch with you at once.

Of course, it is understood that any investigation that we make is under a full reservation of rights, and without admitting liability, particularly so in view of the great length of time that has elapsed since this bond was in effect.

Yours truly,

Wm. Penn Lewis, Jr., 20

Wm. Penn Lewis, Jr.,

Attorney

14

CC to Philadelphia Claim Division

(The following two lines in lead pencil:)

4-19-33 Frank B. Kearns

received Copy of Audit

Casualty Insurance and Surety Bonds

EXHIBIT D1.

(Stamped:)
RECEIVEDApr 3 1933
Bonding Claim

10

AARON HEINE
Counselloer at Law
Camden, New Jersey
548 Federal Street
#5 Hudson StreetApril first,
1933.

(In pencil:)

No record

20

T E

P O

Maryland Casualty Company,
Baltimore, Md.
Gentlemen:

I represent the Township of Waterford, Camden County, New Jersey, to whom you issued a bond against any default of its Tax Collector, C. W. Greaney.

A recent audit has revealed defalcations by Mr. Greaney, and criminal proceedings by the Prosecutor of the Pleas of Camden County have been instituted by reason thereof.

30

It is suggested that you kindly communicate with me, so that we may lay the full facts before you, and the loss of the Township established, so that recovery can be had under the bond.

Very truly yours,

Aaron Heine

AH:L

Copy

No other P. O. Bond —

EXHIBIT D2.

10

(Stamped:)
RECEIVED
Apr 8 1933
Bonding Claim

AARON HEINE
Counsellor at Law
Camden, New Jersey
548 Federal Street
#5 Hudson Street

20

April seventh,
1933.

Maryland Casualty Company,
Baltimore, Md.

Attention: Wm. Penn Lewis, Jr.,
Attorney

Dear Sir: In re: Your special file 2100.
Township of Waterford,
Camden County, New Jersey.
(C. W. Greaney, Tax Collector) 30

In response to your letter of April fourth, beg to advise that the original bond issued was issued from January first, 1916, under bond #26643, and was continued from year to year by continuation certificate, until January first, 1927.

Defendant's Exhibits

I trust that this gives you the information requested.

Very truly yours,
Aaron Heine

AH:L
Copy

(Written across bond no.:)
P. O.

10

—————
(On back:)

(Stamped:)
RECEIVED
Apr 8 1933
Bonding Claim

20

April 18, 1933

26643—P. O.—

Township Committee of Waterford Township
Carnelus W. Greaney, Tax Collector of the
Township i

Mr. Aaron Heine, Atty.
5 Hudson Street
Camden, New Jersey

30

EXHIBIT D3.

(In pencil:)
Watch
Principal Application
Cornelus W. Greaney No. 26643 10
Address
Atco New Jersey.
Assured
Township Committee of Waterford Township.
Address
.....
Date of Class
Application
Jan. 1st 1916 P. O.
(Typewritten across face:) 20
3-18-33
Skeleton file made for use of Claim Dept.
(Stamped:)
CANCELLED 1-1-27
FILE DESTROYED MAR 17 1932

EXHIBIT D4.

(In pencil:)

580

Incorporated 1898

10 MARYLAND CASUALTY COMPANY

F. Highlands Burns, President

Cable Address "Marcasco"

Please Address Reply to Writer

and Quote Caption

WILBUR F. WHITTLE

Manager

J. FRANK WYNKOOP

O. O. OWINGS

Asst. Managers

20

HOME OFFICE — BALTIMORE
PHILADELPHIA CLAIM DIVISION

322 Walnut Street

PHILADELPHIA, PA.

May 8, 1933.

33-71-Bond-26643-P.O.

Twp. Committee of Waterford Township

Cornelus W. Greaney

Aaron Heine, Esq.,

5 Hudson Street,

30 Camden, New Jersey.

Dear Sir:

In further reference to the above case, we submit the enclosed Proof of Loss under full reservation of all rights and defenses we may have to the claim, including those arising out of the failure of the

Defendant's Exhibits

Township of Waterford, to file claim within any limitation applying to a contract of this nature.

Upon receipt of the Proof of Loss, properly executed, the matter will be given our further consideration.

Very truly yours,

W. F. Whittle, Mgr.,

By; F B Kerns

10

F. B. Kerns

Adjuster.

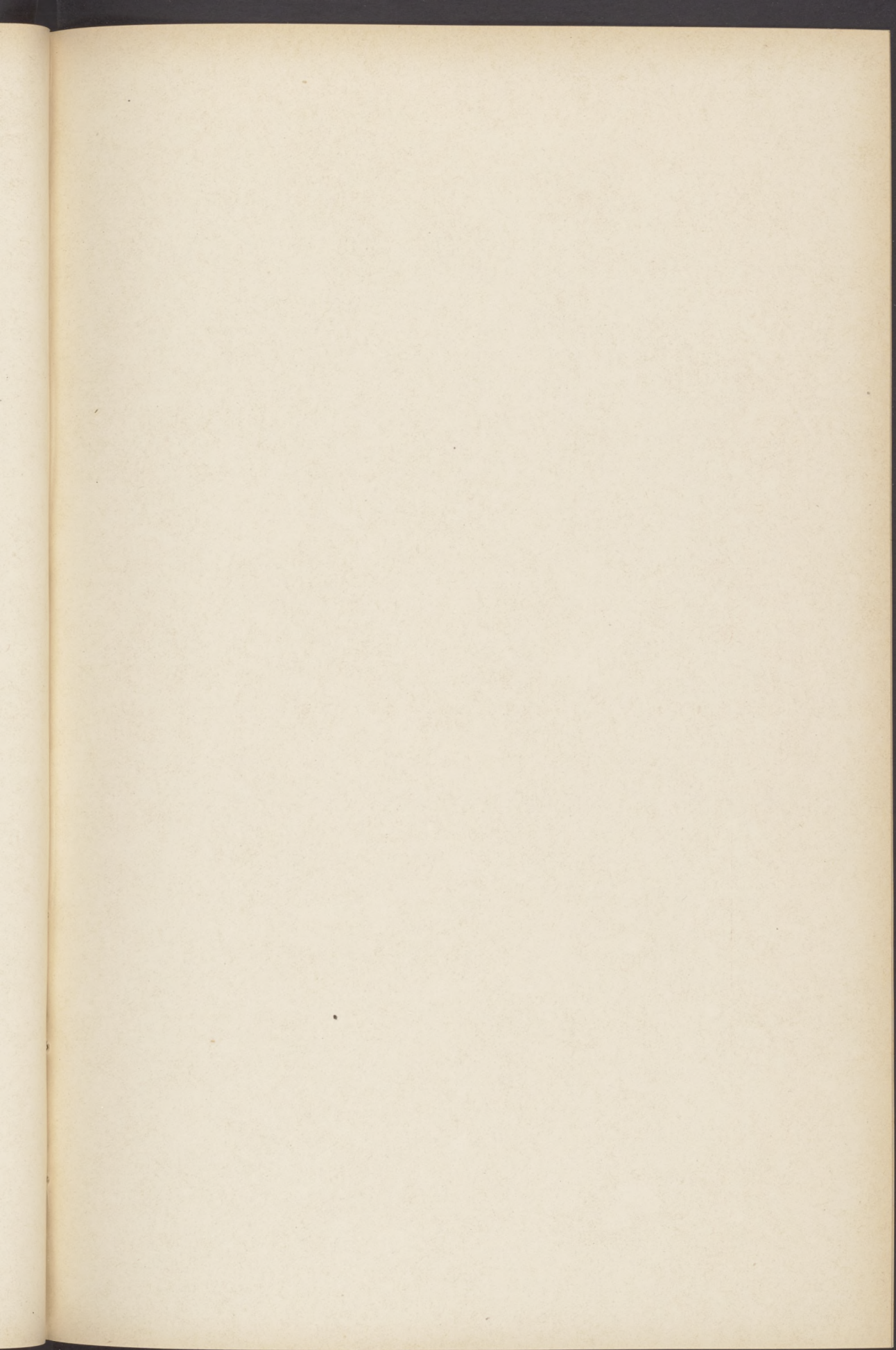
FBK'MB

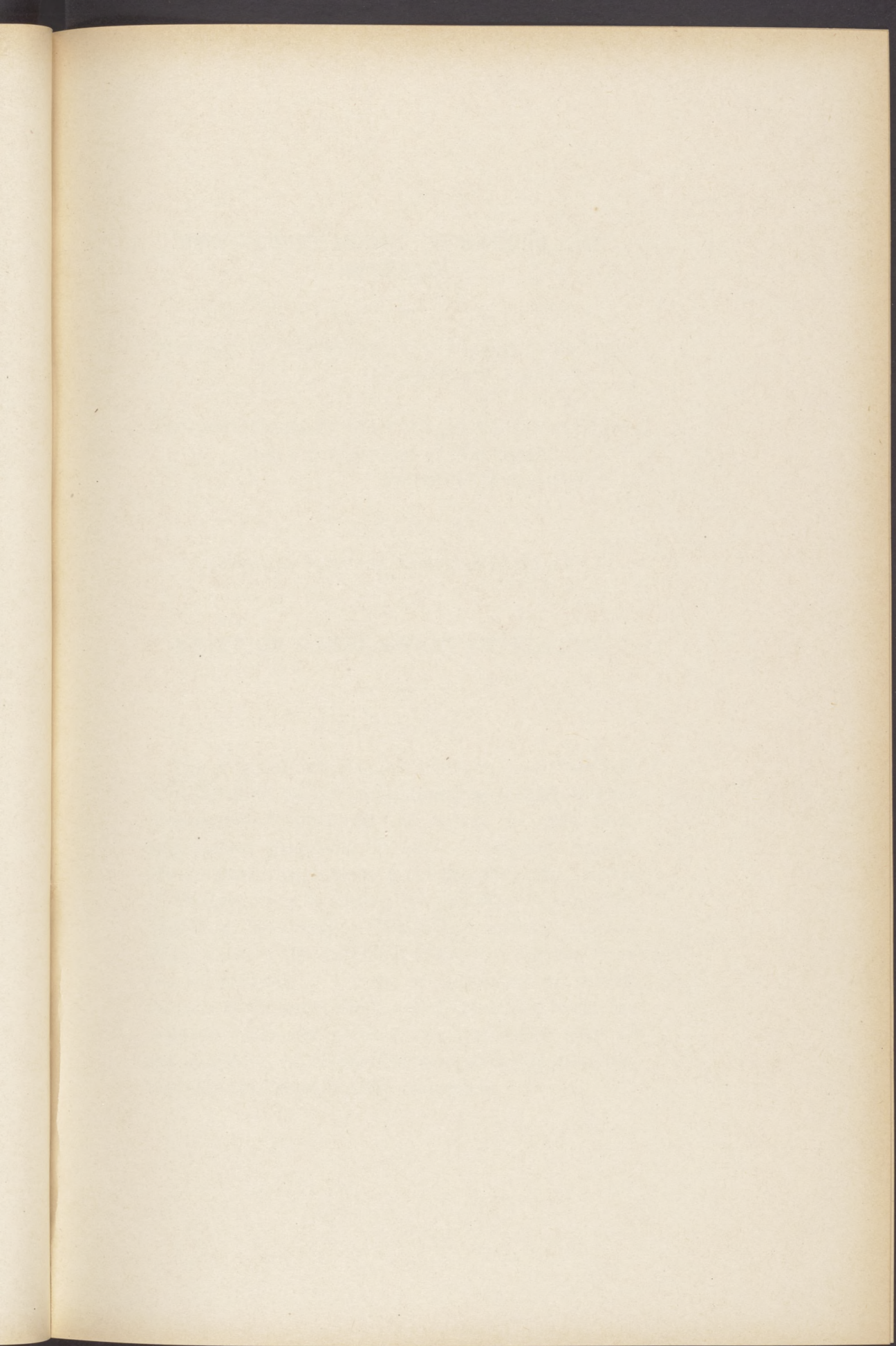
Enc.

Casualty Insurance and Surety Bonds

20

30





**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

TOWNSHIP OF WATERFORD, a municipal corporation,
Complainant-Appellant,

v.

MARYLAND CASUALTY COMPANY, of Baltimore, Mary-
land, a corporation of Maryland,
Defendant-Respondent.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF COMPLAINANT-APPELLANT.

STATEMENT.

This cause of action came before the Court by way of a bill filed by the complainant-appellant, hereinafter called "appellant," to enjoin the defendant-respondent, Maryland Casualty Company, hereinafter called respondent, from pleading the statute of limitations in a suit at law pending between the appellant, Township of Waterford, and the respondent, wherein the appellant sought to recover from the respondent on a bond of indemnity or surety, because of the peculations and defalcations of the tax collector, who also acted as the tax search clerk of the appellant, which peculations and defalcations the tax collector fraudulently concealed.

Brief of Complainant-Appellant

As a separate and second cause of action, the appellant sought to compel the respondent to produce a copy of the bond in question and the certificates of continuation which had been lost or mislaid by the Township. Appellant, at the time of filing the suit at law, had annexed a demand for the production of a copy of the lost instruments but respondent failed and refused to do so. Whereupon appellant appealed to the Court of Chancery for relief.

After hearing the proofs and arguments, the Court of Chancery dismissed the bill.

FACTS.

(Parenthetical references are to the State of Case; italics throughout mine.)

Appellant's uncontradicted proofs disclosed that one, Cornelius W. Greaney, was tax collector of the Township of Waterford, from January 1st, 1916, to December 17th, 1932 (p. 40). Upon entering on his duties, he furnished an official's bond for one year and it was continued by yearly continuation certificates. (Exhibit "C1".) The bond and some of the certificates were lost or mislaid by appellant. After Greaney resigned from office, the Township officials caused a special audit of his accounts to be conducted to ascertain the extent of alleged defalcations and embezzlements. The regular auditors of the appellant, Charles S. Rockey and Company, by one of their employees, George Austin Smiley, Jr., con-

Brief of Complainant-Appellant

ducted said audit. It disclosed that the tax collector was guilty of peculations, defalcations and embezzlements of moneys belonging to the Township, and then fraudulently concealing the peculations, defalcations and embezzlements by failing to enter upon his records, the moneys received, or entering a lesser sum (p. 130). Smiley testified that his company was authorized by the Township to completely circularize the outstanding delinquent taxes, which meant the actual sending out of confirmation notices by the auditors in the field and direct communication with the taxpayers. He interviewed the individual taxpayers and thereby found the discrepancies. When making former audits, the accountants had complied with the rules and regulations laid down for the making of audits by the State Auditor and that following those rules and regulations, they could not have discovered the defalcations and peculations which had taken place. The defalcations and embezzlements could only have been discovered by the individual canvas of the taxpayers above referred to (pp. 66, 67, 68, 130, 131 and 132).

As to the second cause of action, the facts showed that appellant had lost or mislaid the original bond and certain of the certificates of continuation which continued the liability of the respondent on said bond. When the audit was completed, appellant notified respondent of the breach of the bond, advised it that it had lost or mislaid the bond, but, however, submitted to it its proof of loss. Immediately after the proof of loss was submitted to the company, respondent advised the solicitor for appel-

Brief of Complainant-Appellant

lant that it could not locate the bond, but that subsequent thereto and after a search having been made, respondent's attorney, one, William Penn. Lewis, from the home office in Baltimore, wrote to the solicitor for the appellant, Exhibit "C2" (p. 71), by letter, dated April 18, 1933, *inter alia*, as follows: "We are in receipt of your letter and *we now have been able to locate this bond* and have referred the matter to our Philadelphia Claim Division, suggesting that they have their representative get in touch with you at once" (p. 95).

Respondent attempted to negate the plain import of the letter through one, F. B. Kerns, an employee, who testified that he made a search for the file containing the bond and the certificates of continuation and was unable to locate it. Mr. Lewis, the attorney who wrote the above mentioned letter, was not produced and his absence was unexplained.

Kerns offered a card, Exhibit "D3," which was supposed to be an index card of the bond upon which was stamped "File Destroyed Mar. 17, 1932."

GROUND'S FOR APPEAL.

1. The Court of Chancery erred in not finding that the tax collector had fraudulently concealed his peculations, embezzlements and defalcations from the appellant and that the surety on his bond should, therefore, be enjoined from pleading the statute of limitations as a defense to a pending suit at law on the bond, to recover for the said peculations, embezzlements and defalcations.

2. The Court of Chancery erred in not finding that the appellant had carried the burden of proof and in not compelling the respondent to produce a copy of the bond and certificates of continuation, or in the event they were not produced should have proceeded to ascertain and determine the terms of the missing bond and continuation certificates.

ARGUMENT.

The first cause of action resolves itself down to a single question:

If the principal on a bond given for the faithful performance of the principal's duties can be estopped from pleading the statute of limitations by reason of his fraudulent concealments, can the surety on his bond be enjoined similarly even though it was not a party to the fraud?

The Courts of this State have, from the earliest days, laid down the sound fundamental principle in equity that, ^{enjoining the pleading of the statute of limitations when there was} a fraudulent concealment by a debtor of a right of action is not ingrafting an exception on the statute of limitations. It has always been held that such a person has never come within the statute, since its protection was never designed for such as he. In *Board of Chosen Freeholders of the County of Somerset v. Veghte*, 44 L. 509, the Court said:

"It has not been contested, on the argument, that, under the circumstances here disclosed,

appropriate and adequate relief may be afforded plaintiff by an application to the Court of Chancery, which, under our system of jurisprudence, retains general equity powers.

That such relief may there be granted is a conclusion warranted by a long course of decision and precedent, eliciting no objection either from counsel, courts or commentators on this branch of the law."

Thereafter is cited a long list of cases in support of this well-grounded principle, and then:

"Whether this jurisdiction of courts of equity is to be vindicated on the ground that the statute of limitations does not bind those courts, or on the more reasonable ground (*Hovenden v. Lord Annesley*; *Gibbs v. Guild*) that there exists in them an inherent power to prevent one from exercising even his legal rights—whether existing at common law or created by statute—when, by his fraudulent conduct, he has made it inequitable that he should be permitted to exercise those rights; and whether the relief in those courts would be by way of injunction, to prevent reliance on the bar of the statute (*Doughty v. Doughty*, 2 Stockton 347), or by way of acquiring jurisdiction for the purpose of relieving from the fraud, and retaining it to administer all the relief the injured party is entitled to (*Blair v. Bromley*), are questions unnecessary to discuss. It is sufficient that it seems conceded and plainly appears that, under the circumstances of this case, the plaintiff is not left without adequate remedy."

In *Holloway v. Appleget*, 55 E. 583, 40 A. 27 (E. & A.), the case of *Board v. Veghte*, *supra*, was cited with approval, the Court saying:

"That the equitable relief here invoked has been granted mostly in cases where the act out of which the cause of action arose was a fraudulent act, in its nature self-concealing, such as embezzlements or thefts carried out by the falsifications of accounts or vouchers. But it seems clear that a court of equity will interfere, although the cause of action may not have arisen out of a technically fraudulent act, if the defendant has employed any means to mislead the plaintiff, or to hide from him the fact that a cause of action has arisen."

In *Freeman v. Conover*, 95 L. 89, 112 A. 324 (E. & A.), the Court, in discussing *Board v. Veghte*, *supra*, said:

"In the Veghte case the grounds upon which the doctrine of equitable estoppel rests were clearly present. His fraudulent act in concealing the fact that the plaintiff had a cause of action against him was the inducing causes of its failure to institute its action within the statutory period. The situation, in its legal aspect, did not differ from what it would have been if Veghte had stated to the board in express terms that his accounts were straight, and that he did not owe the county a dollar, and the board had accepted that statement as true. The doctrine equally applies whether the fraud of the defendant consists of an act of concealment, or an actual misrepresentation of a fact."

Weinstein v. Blanchard, 9 N. J. Mis. 113, 152 A. 787; affirmed 109 L. 332, 162 A. 601:

"Under our system of jurisprudence the Court of Chancery has inherent power to prevent a

party from pleading the statute of limitations in an action at law if by the defendant's fraudulent conduct it would be inequitable for him to plead the statutory bar."

In a most recent case, the Court of Errors and Appeals, in *Partrick, et ux., v. Groves*, 115 E. 208; 169 A. 701, in an illuminating opinion by Justice Heher, thoroughly discusses, with a citation of many authorities, the entire question of enjoining the pleading of the statute of limitations by one who has by deception or by the violation of his duties toward the plaintiff caused him to subject his claim to the statutory bar. The subject was so fully discussed in this case that the Court is respectfully referred to this case as the final word in this State on this subject.

THE DISTINCTION BETWEEN CASES
WHERE THE STATUTE OF LIMITATIONS
HAS ONCE COMMENCED TO RUN AND
CASES WHERE BECAUSE OF FRAUDU-
LENT CONCEALMENT, THE STATUTE
DOES NOT COMMENCE TO RUN UNTIL
AFTER THE DISCOVERY OF THE FRAUD.

There are many cases in this State which undoubtedly hold, and justly so, that where the statute of limitations has once set in that it will run uninterruptedly, unless stayed by the exceptions contained in the statute, and it may be argued by the respondent with seemingly sound logic that the period ex-

Brief of Complainant-Appellant

pressed in the statute of limitations within which suits on a bond are to be brought, having run, that the plaintiff cannot ask relief from the Court of Chancery against the statute. The weakness of this argument is apparent when the reasoning of the Courts enjoining the pleading of the statute in cases where there is a fraudulent concealment, is scrutinized. In those cases, where the principal debtor, by his own fraudulent act, prevents his creditor from ascertaining the fraud, and lulls him into a false sense of security, the Courts have said that there the statute has never commenced to run and that for such fraudulent debtor the statute was not designed, since by his own conduct, he has obtained the running of the statute to enable him to defeat the action. In short, where a debtor does nothing to conceal his fraud and does not lull his creditor by fraudulent act or deception, then the statute having commenced to run, will run uninterruptedly; but where at the commencement of a fraudulent act, the debtor by deception or fraudulent concealment, prevents the creditor from ascertaining that he has been wronged, then the Court of Chancery will not permit him to set up the statute of limitations as a bar to recovery against him.

The case of *Freeman, et al., v. Conover, supra*, settled the law in this State that the Court of Chancery is the only tribunal which has the power to bar the statute of limitations as a defense in a suit at law, where it is alleged that it was defendant's fraudulent act or misrepresentation, inducing plaintiff to delay instituting suit.

Former Chief Justice Gummere, speaking for this Court said:

“But, although the fraudulent act or representation of the defendant which induces delay in the bringing of his suit by the plaintiff is no bar to the plea of the statute in an action at law, appropriate and adequate relief under such circumstances may be afforded the plaintiff by an application to the Court of Chancery. Under our system of jurisprudence there exists in that court an inherent power to prevent one from exercising even his rights—whether existing at common law or created by statute—when by his fraudulent conduct he had made it inequitable that he should be permitted to exercise those rights.”

In *Partrick, et ux. v. Groves, supra*, Justice Heher, speaking for the Court of Errors and Appeals, construed the word “fraud” as used in these cases. On this point, he said:

“While the doctrine of estoppel *in pais* rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; whether the author of a proximate cause may justly repudiate its natural and reasonably anticipated effect, fraud, in the sense of a court of equity, properly including all acts, omissions, and concealments which involve a breach of

Brief of Complainant-Appellant

legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

“Equity will interfere although the cause of action may not have arisen out of a technically fraudulent act, if the defendant has employed any means to mislead the plaintiff, or to hide from him the fact that a cause of action has arisen, whether the act was a fraudulent one or in its nature, self-concealing, such as embezzlement or thefts carried out by the falsification of accounts or vouchers.” *Holloway v. Appleget, supra. Partrick v. Groves, supra.*

That the Tax Collector did, in fact, fraudulently conceal or keep the Township in ignorance of his peculations, defalcations and embezzlements, was not disputed or denied. There was no contradiction of the testimony of appellant's witnesses that the tax collector's books did not properly show the actual sums collected by him and that his books did not agree with the tax search certificates issued by him, and that these defalcations and embezzlements were impossible of ascertainment except by an individual canvas of each taxpayer to ascertain the truth of the collector's books. It cannot be urged that the accountants or the township should not have relied upon the entries appearing on his books but should have made an individual canvas of all the tax receipts issued to taxpayers each year, in order to ascertain whether the entries on his books were correct. They had a right to rely upon the accuracy of his books. It having been later disclosed that

the books contained untrue entries of fact, in their nature, self-concealing, under the doctrine of *Holloway v. Appleget, supra*, it was immaterial whether the untrue entries were intentionally false, as in equity they would be so considered. The collector would thus be enjoined from pleading the statute of limitations.

We now turn to the question whether the surety, free of fraud, may nevertheless take advantage of his principal's fraud and plead the statute in bar of the claim.

The rule is more amply stated in *Griffith v. State*, 20 Pac. (2nd) 289, companion case to *Griffith and Maryland Casualty Co. v. State*, 20 Pac. (2nd) 295. There the Court, in enjoining the surety from pleading the statute of limitations by reason of the fraudulent concealment of the defendant assessor, upon facts analogous to the case at bar, said:

"The assessor was charged with the duty in the first instance of keeping his books, collecting this money, and turning it over to the county treasurer, or other proper authority. If he knew the books were incorrect, and that he had collected money which he had not turned over, and did not tell the county commissioners, he was guilty of actual concealment and fraud. If he kept the books in such a manner that he did not know whether the money which he had collected belonged to him or to the county, and as a matter of fact he had received money which was not his and which he should have turned over to the county, but converted the same to his own use, this was a breach of his duty and was, as to the county, a fraud."

Brief of Complainant-Appellant

Respondent does not seriously dispute the rule above stated, but questions its application against it, the surety, free of participation in the fraudulent acts. Appellant charges that the surety may be held responsible for its principal's acts, if the principal can be estopped from pleading the statute of limitations by reason of fraudulent or self-concealing acts, even if the surety on his bond, was not a party to it.

"The sureties stand in no better position than their principal. The measure of his responsibility is the measure of theirs." *Patterson's Appeal*, 48 Pa. St. 342.

"The statute (statute of limitations) in this case is pleaded by the sureties, and they have not been guilty of any fraud; but they, without doubt, we think, are bound by the fraudulent conduct of their principal. The liability of the surety is dependent upon the liability of the principal. The ordinary rule is that, if the principal is bound, so is the surety." *Bradford v. McCormick*, (Iowa) 32 N. W. 94.

"Where a public officer or an agent or officer of a corporation converts or misappropriates money intrusted to him and fraudulently conceals the defalcation, the equitable or statutory rule applies and the statute runs only from the discovery of the defalcation or of the breach of conditions of this bond. In such cases the sureties cannot invoke the protection of the statute on the ground that they were innocent of the fraud." 37 C. J. 939, paragraphs 307-308, and the cases therein cited.

"A surety's liability is measured by that of his principal and where, owing to the concealed fraud of the latter, the statute has not commenced to run, the surety will not be permitted to invoke the protection of the statute on the ground that he was innocent of the fraud. Therefore, where, because of fraud of a principal in the concealing and misappropriation of money, the statute does not run against him, it does not run against the sureties on his bond. The reason in such cases seem to be that the sureties guarantee the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that in equity and good conscience they should not be exempt from liability for his misconduct and peculations, when by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means of relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skillfully and fraudulently concealed peculations, and would be an inducement to fraud." 17 R. C. L. 866, paragraph 223, and the cases therein cited.

Although this question has never been decided by any Court in this State, the precise point involved in the case *sub judice* was decided by the Supreme Court of Delaware, in *Lieberman v. First National Bank of Wilmington*, 45 A. 901. The Court, in an illuminating opinion and in what is undoubtedly one of the leading cases on this point in the United States, exhaustively considering all of the

Brief of Complainant-Appellant

cases and discussing the question from all angles, concluded:

"The liability of the principal is that of the surety, and hence, where the running of the statute of limitations has been suspended by the concealed fraud of the principal, the surety cannot invoke the aid of the statute on the ground of his innocence of the fraud."

"The surety guaranteed the honesty and faithfulness of the principal, and promised to make good his defaults, and there is no good reason why the surety should be relieved of liability for the dishonesty of the principal when by reason of the same dishonesty the liability was covered up. We think the liability of the surety depends upon the liability of the principal. There is no distinction between their liabilities in cases of concealed fraud, and the statute does not begin to run in favor of either until the fraud is discovered." McMullen v. Winfield Building and Loan Association, 67 Pac. 892.

"As the concealment at bar would operate against the principal, it operates also against the surety to postpone the running of the statute." Heap v. Heap, 258 Mich. 250—242 N. W. 252.

The statute of limitations applying to sureties on a tax collector's bond is found in 4 C. S., page 5578, par. 17. It is true that it is positive in its language. But so are all statutes of limitations in this State. Even as in other similar statutes, there is no exception to the statute because of fraudulent or concealed acts, so there are none in the statute in ques-

tion. But equity has not been deterred in this and in other States from estopping the pleading of the statute because of that fact. In the case of *Griffith v. State, supra*, the Court not only settled the liability of the surety where its principal had fraudulently concealed the facts, but also settled the question respecting the barring of the pleading of the statute of limitations, where no statutory relief had been enacted. The Court said:

"It is generally held that, where a trustee has fraudulently concealed the facts from which a cause of action to recover money received by him in his official capacity arises, the statute of limitations does not begin to run until the discovery by the plaintiff of the facts, which gave him a right of action, and *that the same rule applies to his bondsman.*"

"Where a trust relation exists, if fraud enters into the transaction giving rise to the cause of action even though the cause of action is not based upon such fraud, the statute is tolled until the fraud is discovered.

It would indeed been a grievous wrong if a public officer by the very concealment of his defalcation for a year could plead that the statute of limitations had run against a recovery."

"In examining the California and Idaho cases which do indeed hold that, in actions on liabilities created by the statute, the running of the statute of limitations commences with the actual defalcation, regardless of the time of discovery. These decisions, it is evident from reading the cases, are based upon the theory that, since there is a specific exception in the statute apply-

Brief of Complainant-Appellant

ing to actions based upon fraud to the effect that the statute does not run till the discovery of the fraud, it must be assumed the Legislature did not intend the exception to apply to any form of action."

Hence, the California and Idaho cases were tried upon the theory that since the delay was due to fraudulent concealment, which was not one of the statutory exceptions, the California and Idaho courts determined that the Legislature did not intend to create an exception to include fraudulent concealments. But in this State, as in Arizona, there is no exception to the statute. In Arizona the Court reasoned that since the Legislature has not tied its hands by specific exceptions, it would bar the statute in proper cases. The reasoning behind the decision rests upon sound and long standing rules of equity and reason and were there applied by the courts to bar the surety. It should be adopted by the courts in this State. This reasoning is a sounder and more equitable rule than advanced by the respondent, which would bar relief after the statutory period had run. It must be borne in mind that the surety would benefit by the very acts against which it had covenanted, and as has been repeatedly stated in the cases cited that the fraud of the principal is the fraud of the surety and operates against the surety to postpone the running of the statute.

I have exhaustively searched the cases in this State and must frankly admit that there is not one case either for or against the subject which deals

with the question as to the liability of the surety where its principal has fraudulently concealed a cause of action and for that reason, the cases which are cited in this brief are from neighboring States.

It must also be borne in mind that although I have searched the cases of all the States, in not one single State where the point has been raised and decided has a conclusion been reached contrary to the one urged here. It is true that California and Idaho hold that a concealed fraud will not bar the pleading of the statute of limitations, but that, as pointed out in the case of *Griffith, et al. v. State, supra*, was because the Legislature had seen fit to enact into law against what fraud the statute would be barred.

As has been amply stated by the courts of this State, equity will find a way to relieve even though the path be difficult. As was stated by Cardozo, J., in *Graf v. Hope Building Corp.*, 245 N. Y. 1—171 N. E. 884, to A. L. R. 984, and adopted by the Court of Chancery in this State in *Fifth Ave. Bank of N. Y. v. Compson*, 113 E. 152, 166 A. 86, and in *Young v. Weber*, 117 E. 242, 175 A. 273:

“If the hardship be strong enough and equity will find a way.”

The testimony of the Township standing uncontradicted and undisputed was that embezzlements and defalcations took place by the collector and that these were impossible of ascertainment except by canvassing the entire community and checking their tax receipts with the tax collector's books, a stupendous task and at considerable expense to the Town-

Brief of Complainant-Appellant

ship. It can be readily seen that if a municipality would periodically have to check and visit the taxpayers and ascertain from the taxpayers the amount paid by them and compare those amounts with the tax collector's return, that the cost of administering government would be prohibitive. The adoption of such a rule would do violence to the relationship of trust owed by officials to a municipality, since it is equally well settled that the municipality had a right to presume that its officials would discharge their duties with fidelity.

AS TO THE SECOND CAUSE OF ACTION.

This has to do with the demand by the appellant for the production by respondent of a copy of the bond and certain of the continuation certificates which have been mislaid by appellant. It was uncontradictedly admitted that the bond and certificates were lost or mislaid and were no longer in the possession of the appellant.

The appellant introduced a letter from William Penn Lewis, an attorney for the respondent, that he had located the bond (pp. 89, 95). It is significant to note that respondent did not produce Mr. Lewis at the final hearing, nor call upon him to explain or deny the contents of his letter, nor was his absence explained, but this was attempted by the solicitor for respondent in a gratuitous assertion that what Mr. Lewis wrote was by inadvertence (pp. 88, 89, 90). Mr. Kerns, an adjuster and bonding representative (p. 73), testified that he had not

been able to locate the bond or any of the continuation certificates, or even the file and believed them to be destroyed (pp. 87 to 98). Yet he does not carry this assertion far enough. He does not testify that he examined all of the records of the company in an effort to locate the bond, and although it may be true that this may be quite a task, at the same time, respondent cannot escape the responsibility for the production of the instruments prayed for, upon the bald statement of one witness, that the copy of the bond and the said certificates were not in his company's possession. This witness cannot qualify as being the one in charge of the records or as one who has made the search. He did little, if anything, beyond looking at a card index to ascertain whether respondent was in possession of the records or that the file to which the card related was in existence.

All that the Court had before it by way of defense was the testimony of Kerns, and it was not, in the opinion of the appellant, sufficient to move the Court to excuse the respondent from being ordered to produce the missing instruments. The witness was clearly incompetent to excuse discovery. On the other hand, appellant's evidence remained unanswered. The attorney for the Maryland Casualty Co. had, by letter, stated that he had the bond. He was not produced although he was still in respondent's employ. He was not called to deny that he had the bond at the time he wrote the letter or that the bond has since been destroyed or lost. Nor could he have denied that he had the bond in his

Brief of Complainant-Appellant

possession at the time he wrote the letter, upon the theory that he believed he had the bond because of the index card, Exhibit "D3." The notation upon the card upon which respondent relies to prove that the bond in question was destroyed was obviously there when it was examined by Mr. Lewis. Solicitor for appellant wrote to the company on April seventh, 1933; Lewis answered by letter dated April 18, 1933. There was a notation on the card that the file in question was destroyed March 17, 1932. The notation was, therefore, upon the card when he looked at it and was in such large print that it could not have been overlooked by Mr. Lewis. Nor can we ignore the plain meaning of his letter; he states in unequivocal language that he had located the bond and we do not see how that language can be twisted into meaning that he had located the record of the bond. We have the right to assume that when a man of his profession states in plain language that he had located the bond, he meant exactly that. On the other hand, if it be argued that the notation that the bond was destroyed was added to the card after he wrote the letter, those statements should have come from the lips of Mr. Lewis and the persons who placed the notation thereon.

The bill of complaint filed by appellant stated in plain language that the bond was lost or mislaid; that it had received the letter in question that respondent had located the bond; stated that the bond was necessary in a pending action at law, and asked for its discovery.

Although the answer of the respondent denied possession of the bond, it did not deny the letter set out at length in the bill of complaint, it did not set up any facts to explain away the plain language of the letter, but set up as a special defense, that it was under no legal obligation to produce it. Only at the final hearing did respondent urge that the letter was written by inadvertence and which theory of the case the learned Court below adopted.

But if the Court below properly determined that respondent should not be required to produce that which it allegedly did not have in its possession, because of the relief prayed for, "that the defendant be enjoined to furnish a true and accurate copy of the said bond and the renewals or extensions thereof and endorsements thereon," the Court should have required respondents to furnish the copy. The Court had sufficient information in the record to reconstruct the bond. The Court should have required respondent to execute a bond. Upon its failure to do so, the Court should have established the contents thereof, it being in possession of all the necessary information, much of which appeared in the continuation certificates, Exhibit "C1"; the continuation certificates showing the names of the parties, the principals, the amount, the dates, and the statute determined the language of the condition. P. L. 1899, page 378, 4 C. S., page 5578, par. 17, provides:

"The collector of taxes shall hold his office for the term of three years; he shall before he enters upon the duties of his office, and within

Brief of Complainant-Appellant

thirty days after notice given of his election or appointment to such office, give bond to the township, in such sum and with such surety or sureties, corporate or otherwise, as the township committee shall approve, *conditioned for the faithful performance of the duties of his office* * * *."

The Court having judicial knowledge of the statute and there being a strong presumption that the Township officials acted according to law, and that the Township officials took at least a bond which was conditioned in the terms of the statute, it had all the evidence before it requisite to have given appellant the relief that it prayed for, either by way of discovery or by way of establishing lost instruments.

In *The Mayor, etc., adv., State, Batten, et al., pros.*, 32 L. 453, 458, the Court lays down the principle that there is a strong presumption that township officials act in accordance with law.

•

CONCLUSION.

For the reasons herein stated, the order of the Court of Chancery should be reversed, and the respondent should be barred from pleading the statute of limitations to the pending action at law and the respondent should be ordered to produce the bond or a copy thereof and the continuation certificates, or copies thereof, or in default thereof, respondent should re-execute a bond in the amounts shown in

Brief of Complainant-Appellant

the continuation certificates and conditioned in the language of the statute.

Respectfully submitted,

Norman Heine
~~AARON HEINE,~~

*Solicitor for and of Coun-
sel with Complainant-
Appellant.*

*D. T. Stackhouse
of Counsel*

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

TOWNSHIP OF WATERFORD, a municipal
corporation,
Complainant-Appellant,
v.

MARYLAND CASUALTY COMPANY, of Baltimore,
Maryland, a corporation of Maryland,
Defendant-Respondent.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF DEFENDANT-RESPONDENT.

STATEMENT.

This proceeding in the Court of Chancery arose by reason of a suit that was brought in the Supreme Court of New Jersey by summons, dated January 23, 1934 (Case, page 6), for the purpose of enjoining the defendant-respondent, which was a co-defendant named in the suit in the Supreme Court, from pleading the statute of limitations embodied in the third special defense to the fifth count in the answer (Case, page 22) and the third defense to the sixth and seventh counts of the answer to the amended complaint. (Case, pages 25 and 27.) The bill in a second count demanded the production of bonds and certificates of continuation from the defendant.

Brief of Defendant-Respondent

The proceedings before the Court of Chancery and heard by Honorable Francis B. Davis, Vice-Chancellor, consisted of a number of hearings and the filing of several briefs due to various motions which were made and due to the fact that after the testimony was heard before Vice-Chancellor Davis and his conclusions upon the filing of briefs on behalf of both the complainant and the defendant were rendered on March 4, 1935 (Case, pages 134 to 136, inclusive), dismissing the bill and an application for a rehearing the matter was again argued and the argument supplemented by memoranda, the supplemental conclusions were rendered by Vice-Chancellor Davis (Case, pages 137 to 139), in both conclusions, the bill was dismissed and on the twenty-fifth day of March, 1935, a final decree (Case, page 140) was advised by Vice-Chancellor Davis dismissing the bill.

FACTS AND DISCUSSION.

The facts in this case may be briefly divided into three separate and distinct divisions.

A. THE FACTS APPEARING IN THE TESTIMONY WITH RESPECT TO FRAUD OF THE TAX COLLECTOR.

B. FACTS APPEARING IN THE TESTIMONY WITH RESPECT TO ANY ATTEMPT ON THE PART OF THE DEFENDANT-RESPONDENT TO FRAUDULENTLY INDUCE THE TOWNSHIP OF WATERFORD TO WITHHOLD ANY FILING OF A SUIT WITHIN THE RUNNING OF THE STATUTE OF LIMITATIONS.

C. FACTS WITH RESPECT TO THE PRODUCTION OF BONDS AND CONTINUATION CERTIFICATES.

These various facts will be referred to and discussed in the order stated.

A. THE FACTS APPEARING IN THE TESTIMONY WITH RESPECT TO FRAUD OF THE TAX COLLECTOR.

The testimony shows that Cornelius W. Greaney, the tax collector involved in this case, began his

Brief of Defendant-Respondent

term of office on January 1, 1916, and this term continued until December 17, 1932. (Case, page 40.) The continuation certificates of the bond produced by the complainant-appellant and offered in evidence as one Exhibit C1 (Case, pages 147 to 152), show in each case that the continuation certificate issued November 15, 1920, was on behalf of Cornelius W. Greaney as a New Jersey tax collector. The same appears in the continuation certificate of December 22, 1925, the one of December 22, 1933, and the one of November 10, 1924. It is quite evident from the testimony, and is not disputed, that the bonds which were issued were in the capacity as tax collector and no other capacity. This testimony appears on page 58, and again the following appears on pages 64 and 65:

“Q. When did you sign that bond, that application as tax search clerk?

A. Not as tax search clerk.

Q. You did not?

A. No. No, I only signed for them to go my security.

Q. In what capacity?

A. What?

Q. In what capacity or what position, to go your security under what position?

A. As tax collector.

Q. And in no other capacity?

A. What?

Q. And in no other capacity?

A. No.”

There is no doubt from the testimony of Lawrence A. Duble, the clerk of Waterford Township

Brief of Defendant-Respondent

(Case, page 43), that Cornelius W. Greaney was never authorized in the proper fashion to act even as tax search officer of Waterford Township until a resolution was passed on April 22, 1926, for that purpose and this is borne out by the further testimony of Mr. Duble when interrogated by the Court in the testimony on page 57. The testimony of Mr. Cornelius W. Greaney himself when called as a witness by the complainant-appellant also shows that he cannot recall issuing tax searches prior to April 22, 1926, but that he does remember issuing them after he was appointed for that purpose. (Case, page 60.) The question of tax searches does not enter into this section of the argument except in that it corroborates the other evidence that whatever bond and continuation certificates on the bond were issued were in the capacity of tax collector as appears on the continuation certificates themselves.

The complainant-appellant in the brief submitted, on page 3, goes a little further in defining the evidence as indicating defalcations and embezzlements than the evidence itself. It might be well to review the testimony on this point. On the direct case of the complainant-appellant before the Chancery Court the only evidence from which it could be at all possible to construe that there was anything wrong with the tax collector's accounts was the following statement (Case, page 68):

“Q. Did you compare the tax receipts with the books of Mr. Greaney?

A. I did.

Q. Did you find in any instance where the

Brief of Defendant-Respondent

tax receipts differed from the books of Mr. Greaney?

A. To this extent, the amounts were not entered in the tax collector's cash receipt book.

Q. Could you have from an examination of Mr. Greaney's books as tax collector discovered that there was a shortage of his accounts?

A. Not without complete confirmation of the account.

Q. By complete confirmation of the account, what do you mean?

A. The actual sending out of confirmation notices by auditors in the field and direct communication with the taxpayer who would present to the auditor the receipted bill asked for."

There was no further testimony on the direct case of the complainant on this point. After the defendant-respondent had completed the defense in this case the complainant-appellant recalled Mr. Smiley to the stand and although objection was made as appears in the record, over objection testimony was allowed of a nature which was not rebuttal but was really a part of the main case of the complainant-appellant. It is our contention that this testimony should properly be excluded from any consideration for that reason. However, if we disregard the objection, by even looking at the testimony as it stands, the only things from which any error whatever in the tax collector's records could be construed are the statements on page 130, as follows:

"Q. The question was: State briefly the nature of the defalcation.

A. The actual defalcation was the failure of the tax collector to record in the cashbook the

actual receipt of taxes, which we were unable to determine until we were authorized by the governing body of the municipality to completely confirm the outstanding accounts."

And the following statements, Case, page 132:

"Q. How did you discover the defalcations?

A. We were authorized by the Township to completely circularize the outstanding delinquent taxes, after an effort had been made on their part to notify the delinquents and try to make arrangements for those delinquents to pay the outstanding taxes.

Q. Did you interview the individual taxpayers?

A. Yes, sir.

Q. And check their tax receipts with the collector's tax book?

A. We did.

Q. Did you find the defalcations in that way?

A. We did.

Q. And not from an inspection of the tax book?

A. Yes."

At the most this testimony is an indication of mistake rather than any positive and substantial proof of fraud even on the part of the tax collector himself.

B. FACTS APPEARING IN THE TESTIMONY WITH RESPECT TO ANY ATTEMPT ON THE PART OF THE DEFENDANT-RESPONDENT TO FRAUDULENTLY INDUCE THE TOWNSHIP OF WATERFORD TO WITHHOLD ANY FILING OF A SUIT WITHIN THE RUNNING OF THE STATUTE OF LIMITATIONS.

At the time of the hearing before Vice-Chancellor Davis great stress was laid upon the fact alleged in the complaint itself, paragraph 9, page 3, that the defendant-respondent was guilty of fraudulent acts or acts in the nature of promises of settlement sufficient to lull the complainant into a position of security and to prevent the complainant-appellant from starting the proceedings in the law court within time to escape the bar of the statute of limitations. The complainant-appellant called Mr. Kerns, who was an employe of the defendant-respondent, and although he went by the title of adjuster it was explained (Case, page 73) that he had no power delegated to him by the Maryland Casualty Company to adjust any claims, which the Court will probably take judicial notice of as being a matter of common knowledge with adjusters of all insurance companies; namely, that they must submit any propositions of settlement for approval before they can work out the settlement itself and cannot on their own motion agree on a settlement on behalf of the company. This testimony was enforced by the further statements of Mr. Kerns on cross-examina-

tion. (Case, pages 75 and 76.) The testimony of Mr. Kerns further was (Case, page 77) that he never made any offers to settle the case on behalf of the Maryland Casualty Company. This is borne out by an exhibit offered in evidence during the testimony of Mr. Kerns when he was called by the defendant-respondent (Case, page 97) and is set forth among the exhibits (Case, page 158) showing that as early as May 8, 1933, when a proof of loss was submitted it was with full reservation of rights and defenses to any claim arising out of failure to file such claim within the limitations applying to a contract of this nature.

The testimony also indicates it was a long time after the first audit was delivered, around April 8, 1933, before the final audit or a copy thereof was surrendered to the Maryland Casualty Company and the other bonding companies involved. (Case, page 81.) In addition to Mr. Kerns' testimony (Case, pages 99 to 105, inclusive), setting forth that at no time during the negotiations in the office of Mr. Heine, solicitor for the Township of Waterford, was any promise made or held out as to settlement or anything done by Mr. Kerns to in any way lull the complainant-appellant into a feeling of security, this testimony is directly corroborated by the disinterested witnesses produced on behalf of the defendant-respondent, who were present at these various conferences. Mr. Walter A. Colflesh was a representative of the Fidelity and Casualty Company and testified (Case, pages 115 and 116) that nothing was said as to liability at the first confer-

ence and that at no time during any of the conferences was any promise of settlement made and he expressly stated that at the December conference he recalled Mr. Kerns stating that their company would not be responsible for the items that were eliminated by the statute of limitations. This disinterested testimony was corroborated by Bart P. Costello, another witness called on behalf of the defendant-respondent, who testified (Case, pages 122 and 123) that he was present at the various conferences in Mr. Heine's office when Mr. Kerns was present and he never recalled at any time any statement made as to the liability of the Maryland Casualty Company on this bond nor any promise made by him at any time. He likewise recalled something being said by Mr. Kerns about the statute of limitations in one of these conferences. As a matter of fact, it is evident from the statement of Mr. Heine (Case, page 29), appearing as a part of the record, that while there were discussions, that no settlement was agreed upon even for purposes of submission to the Maryland Casualty Company at any time of these conferences.

C. FACTS WITH RESPECT TO THE PRODUCTION OF BOND AND CONTINUATION CERTIFICATES.

It is well to remember in considering the testimony regarding the production of the bond and continuation certificates demanded in the second count of the bill of complaint that after the bond and the

Brief of Defendant-Respondent

continuation certificates were issued the originals were never in the possession of the defendant-respondent. The most that the defendant would have under any circumstances would be unexecuted copies of these documents. The originals were naturally in the custody of the complainant-appellant.

The Exhibit C2 offered on behalf of the complainant-appellant (Case, page 71) and printed in the State of the Case (Case, page 152) cannot be read separate and apart from the first letter of Mr. Heine offered in evidence on behalf of the defendant-respondent as Exhibit D1 (Case, page 85) and printed in the State of the Case (Case, page 154), and also the second letter written by Mr. Heine, dated April 7th, and offered in evidence on behalf of the defendant-respondent as Exhibit D2 (Case, page 86) and printed in the State of the Case on page 155. It will be noted upon reading first Exhibit D1, dated April 1st, that when Mr. Heine, counsel for the Township of Waterford, wrote to the Maryland Casualty Company at their Baltimore office, he not only failed to quote any bond number but did not even show in the body of the letter during what years the bond was in effect. As a result of this letter and as shown in the letter of April 7th, Exhibit D2, a response was apparently immediately directed to Mr. Heine under date of April 4th and this letter of April 4th from the Maryland Casualty Company at Baltimore was answered by Mr. Heine in his letter dated April 7th, Exhibit D2 (Case, page 155), and in this letter it is to be noted that he quoted for the first time the bond number, 26643,

Brief of Defendant-Respondent

and the date of issue, January 1, 1916. Now, there is much made of the fact that the Maryland Casualty Company in a letter dated April 18th, stated that they were now able to locate the bond. It is just as unreasonable to apply these words in a strict sense as Mr. Heine attempts to do in his brief as it is to consider that the party writing the letter could not have meant the word bond because the original bond was never, after being delivered to the Township of Waterford, in their possession. In other words, if the records had not been destroyed the only thing which the Maryland Casualty Company would have had under the circumstances would be a copy of this bond with the bond application and copies of the continuation certificates. It seems to me that this letter is nothing more than an acknowledgment of the letter of April 7th to Mr. Heine, indicating that now that he had supplied the information they had located some record of having issued this bond and accordingly had requested a representative from their Philadelphia office to contact with Mr. Heine.

There was certainly nothing perfunctory about the manner in which the search was made for this bond. The testimony shows (Case, page 87) that the only thing that could be located was a card record of the bond in the Baltimore office, which was offered in evidence during the testimony of Mr. Kerns on behalf of the defendant-respondent (Case, page 93) and is printed as Exhibit D3. (Case, page 157.) This card taken from the card index system shows that the file was destroyed March 17, 1932,

Brief of Defendant-Respondent

and that the bond had been cancelled January 1, 1927. Even after locating this card a thorough search was made of the Philadelphia office records by Mr. Kerns and made by other parties at Baltimore (Case, pages 91, 92 and 93), and Mr. Kerns also supervised a search after making a special trip to the Baltimore office, going through the files in an effort to locate copies of the bond and continuation certificates. (Case, page 96.)

LAW AND ARGUMENT.

There are five main subjects to be considered from the standpoint of the law and the order of argument will be changed somewhat as compared to the last portion of this brief.

The following subjects are of importance as referring to the facts presented in this case before the Chancery Court:

1. THE SUBJECT OF FRAUD AS DISCUSSED IN THE CASES IN THIS STATE.

2. THE SUBJECT OF FRAUD AS PRACTISED BY A PARTY LULLING HIS OPPONENT INTO A SENSE OF SECURITY TO THE RUNNING OF THE STATUTE OF LIMITATIONS.

3. THE DIFFERENTIATION OF CASES IN FOREIGN JURISDICTIONS.

4. THE SPECIAL PROVISION OF THE STATUTE UNDER CONSIDERATION IN THIS CASE.

5. THE QUESTION OF THE PRODUCTION OF DOCUMENTS.

The discussion of the sub-divisions will be taken up separately in each case.

1. THE SUBJECT OF FRAUD AS DISCUSSED IN THE CASES IN THIS STATE.

In the brief on behalf of the complainant-appellant, on page 9, a reference is made to cases where the principal debtor by his own fraudulent act prevents his creditor from ascertaining the fraud and lulls him into a sense of security. These cases involve questions where the defendant himself is the perpetrator of the fraudulent acts and then conceals his fraud a sufficient length of time until the statute of limitations has expired and later attempts to take advantage of the statute to evade legal responsibility for the results of his own fraud. There is no doubt that the law is well settled by various decisions of our Courts of Chancery that a man cannot take advantage of his own wrong. This is clearly upon the old equitable principle that "he that comes into equity must come with clean hands."

In considering this question of fraud on the part of the original debtor it is our contention that the complainant-appellant has not sustained the burden

Brief of Defendant-Respondent

of proof even of evidence of fraudulent conduct on the part of Cornelius W. Greaney, the tax collector. The evidence in this respect has been previously discussed and shows that on the direct case and even including the testimony admitted over objection as rebuttal evidence after the defendant-respondent's case had been closed would not be sufficient to establish fraud. The Vice-Chancellor in his conclusions (Case, page 138) decided as a matter of fact that there was not sufficient evidence to establish the alleged fraudulent concealment even though as he pointed out later in his conclusions that this would not alter the situation at any rate.

The Court of Chancery in *Kaufhold v. Cader Construction Co.*, 109 N. J. Equity 1, used the following language:

“The complainants have the burden of proving their allegations of fraud. ‘Fraud is a fact that will never be presumed, but must always be CLEARLY AND CONVINCINGLY PROVED.’ *Pahy v. Pahy*, 107 N. J. Eq. 538.”

In the case of *Somerset v. Veghte*, 44 N. J. L. 509, which was first reported in the Court of Chancery in 42 N. J. Equity, page 39, the Chancellor, on page 41, used the following language:

“The complainants’ counsel insist that the plea is not good because it sets up the statute of limitations as a bar to a claim that the defendant fraudulently concealed the fact that he had done so up to a period within six years before the time of filing the bill. The plea of the statute is a good plea in equity as well as at

law. Where the complainants' claim is based upon a fraud which the defendant has concealed until sufficient time has run to enable him to set up the statute, the statutory period will not, in equity, be considered to have commenced until the fraud is discovered or until it would have been discovered had reasonable diligence been exercised. *Todd v. Rafferty*, 3 Stew. Eq. 254; *Story Eq. Jur.* 1521. It is not so at law. *Somerset Freeholders v. Veghte*, 15 Vr. 509. Direct trusts, as between trustee and *cestui que* trust, are not reached by the statute. But the case in hand is not one of those to which the statute is not applicable. The alleged fraud was in the embezzlement by the defendant, while acting as cashier of the complainants, of their money entrusted to his hands. The claim against him arising therefrom is one cognizable at law. If so, the statute applies to it in equity. *Kane v. Bloodgood*, 7 Johns, Ch. 90; Aug. on Lim. 178."

In this case it was shown that where the statute of limitations applied with all its force in a court of law, unless there was some special equity the Court of Chancery would not uphold the contention of the complainants that the plea of the statute of limitations was not good, and from the portion of the opinion quoted above it will be seen that this was entirely due to the fact that there was an adequate remedy at law and if the statute was applicable in the law courts it would apply in the Court of Chancery. In the brief of complainant-appellant, on page 7, reference is made to the case of *Freeman, et al., v. Conover*, 95 N. J. L. 89; 112 Atl. 324. In this case the following was used as the

Brief of Defendant-Respondent

language of the decision of the Court in this situation:

“The question for determination was whether the fraudulent concealment for a period of more than six years after the cause of action had accrued was a bar to the defendant’s right to plead the statute. In discussing the question the Court cites with approval the following statement of Chief Justice Hornblower in *Thorpe v. Corwin*, 20 Id. 311: ‘The statute of limitations *makes the lapse of time a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course uninterrupted by any subsequent events; and when the period prescribed by the statute has elapsed, the bar is complete, and its force can neither be strengthened nor impaired by anything that has happened in the meantime.* * * * *The statute leaves nothing for presumption. Time alone settles the rights of the parties by the giant force of the statute.*’ The opinion then points out that the statute of limitations contains various express exceptions from the operation of its provisions, and declares that when the legislature itself has expressly provided what facts shall take a given case out of a statute, *courts of law are not permitted to engraft upon it other exceptions not contained therein, however inequitable the enforcement of the statute, without such exceptions, may be.*

It is to be noted that the Court, after saying that the force of the statute could not be impaired by anything that has happened after once it began to run, and that courts of law could not read into it exceptions other than those expressed by the legislature in the statute

itself, declared that the doctrine of estoppel had been applied to prevent a resort to the defense of the statute of limitations even at law, and referred to the case of *Quick v. Corliss*, 39 N. J. L. 11, in support of this declaration.

The Court said: 'The general rule is that no contract or agreement can modify a law, but the exception is, that where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but where the enactment is to secure general objects of policy or morals, *no consent will render a non-compliance with the statute effective.* This statute, limiting the time within which actions shall be brought, is *for the benefit and repose of individuals and not to secure general objects of policy or morals.* Its protection may, therefore, be waived by those who assent in legal form, and when acted on such waiver becomes an estoppel to plead the statute.'" (Italics ours.)

The case of *Patrick v. Groves*, 115 N. J. Equity 208, is a recent decision but can easily be distinguished from the case at issue by reason of the fact that here the party committing the fraud, who happened to be an attorney, not only was personally guilty of fraud but used fraudulent attempts to prevent any proceedings on the part of the plaintiffs upon whom the fraud was committed. In fact, a quotation from this case will be referred to in the second division of argument in this portion of the brief. On page 11 of counsel's brief the words "embezzlements, peculations and defalcations" were used and a statement made that they were not

Brief of Defendant-Respondent

disputed or denied. There is also a statement made that the books did not agree with tax search certificates, none of which were in evidence, and, in fact, these statements appearing through the brief are clearly beyond the testimony of the case as previously outlined.

It is to be noted that on page 13 of the complainant's brief there is a citation from 37 *Corpus Juris*, page 939. In this case counsel has taken the last portion of paragraph 307 and omitted the first portion of paragraph 308, and then quoted the last portion of this paragraph. The quotation of these two paragraphs should appear in full and I have in quoting them italicized the particular section which was omitted and which is applicable to the situation that we are now confronted with:

“(307) (b) Fraudulent Conversion; Defalcations by Officers and Agents—aa. In General. In many decisions the equitable or statutory rule is held applicable to cases of fraudulent conversion of money or other property where the conversion has been concealed and the guilty party occupies a fiduciary relation toward the party defrauded; although it has been held otherwise where the gravamen of the action was not fraud but merely a wrongful conversion or a breach of contract, or where plaintiff was guilty of negligence in failing to discover the fact of the conversion, or according to some authorities, where defendant did not by an affirmative act conceal the fraud. Thus it has been held that, where a public officer or an agent or officer of a corporation converts or misappropriates money intrusted to him and fraudulently conceals the defalcation, the equi-

table or statutory rule applies and the statute runs only from the discovery of the defalcation or of the breach of condition of his bond.

(308) bb. Liability of Sureties on Bond. The rule just stated has been applied to actions against principal and sureties on the bond of a defaulting agent or officer—*unless limitation is prescribed by another section of the statute admitting of no exception*—and to suits in equity by the sureties to enjoin the defrauded party from proceeding to collect from them the amount of the defalcation. In such cases the sureties cannot invoke the protection of the statute on the ground that they were innocent of the fraud; and if the statute is suspended as to the principal it is suspended as to the sureties also.” (Italics ours.)

All the cases cited in the first portion of the brief for the complainant-appellant refer to actions where the party actually committing the fraud endeavors to set up the statute of limitations as a bar to a right of recovery. There is no doubt that the correct principle of law is enunciated in these cases; namely, that by virtue of the fraudulent conduct the party who is setting up the statute can by a court of equity be restrained under the principle as stated before, that a man should not be permitted to take advantage of his own wrong.

It is our contention in this first section of the argument that we are not dealing with a defendant-respondent in this case who was guilty of any fraud, but we are dealing merely with the surety.

There is no evidence whatever that the surety was in any way implicated in fraud even had the

Brief of Defendant-Respondent

Court below found as a fact that Cornelius W. Greaney, the principal under these bonds, was guilty of fraud, which fact, however, was not found by the chancery court.

2. THE SUBJECT OF FRAUD AS PRACTISED BY A PARTY LULLING HIS OPPONENT INTO A SENSE OF SECURITY TO THE RUNNING OF THE STATUTE OF LIMITATIONS.

The second portion of this argument deals primarily with the findings as set forth in Section B of the Facts and Discussion. This, in other words, relates to the situation where a party who is not guilty of any fraud but against whom there may be a substantive right at law, acts fraudulently to restrain the party holding such a substantive right from proceeding during the running of the period under the statute of limitations. This is clearly set forth in the opinion of *Patrick v. Groves, supra*, where the Court on page 210 used the following language:

“Appellant’s fraudulent conduct caused respondents to subject their claim to the bar of the statute of limitations, and equity will not permit him to hold the advantage thus obtained. This is a firmly established rule. In *Howard v. West Jersey, &c., Railroad Co.*, 102 N. J. Eq. 517, 520; affirmed, 104 N. J. Eq. 201, Vice-Chancellor Leaming, in applying the apposite rule, said: ‘It must be recognized that the statute of limitations is for the benefit of individ-

uals and not to secure general objects of policy; hence, it may be waived by express contract or by necessary implication, or its benefits may be lost by conduct invoking the established principles of estoppel in pais. *Freeman v. Conover*, 95 N. J. Law 89.'''

A reference to the case of *Howard v. West Jersey, &c., Railroad Co.*, 102 N. J. Eq. 517; 141 Atl. 755, affirmed in 144 Atl. 919, will show that this was a case where during the running of the statute the defendant by its actions lulled the complainant into a sense of security until after the two year statute of limitations had run and then refused to consider settlement which had been previously discussed on the grounds that the case was outlawed. This case also followed the case of *Lamb v. Martin*, 43 N. J. Equity 34, which laid down the same principle.

It is to be noted that counsel does not argue this point very strenuously in the brief. In the first place, the defense pleaded in the action which was commenced by summons dated January 23, 1934, in the Supreme Court (page 6) merely sets up that the suit was not commenced on the bonds executed as surety during the years from January 1, 1916 to December 31, 1924, inclusive, within nine years after the dates of said bonds (page 22), and the same situation applies to the defenses in the answer to the amended complaint which were called in question. The evidence clearly indicates that there was nothing done in this case until the writing of the letter of April 1, 1933, by Mr. Heine, which, as can be seen, is more than nine years after the date of

Brief of Defendant-Respondent

the bond for the year of 1924, which according to the continuation certificate, part of Exhibit C1 which appears on page 150, was actually dated the 30th day of October, 1923, and countersigned on the 22nd day of December, A. D. 1923. Even accepting the effective date of this continuation certificate as January 1, 1924, the first evidence whatever of negotiations of any kind were nine years and three months later; namely, the letter written in April, 1933.

It is further clearly indicated in the original conclusions at the bottom of page 135, that the Chancery Court decided as a matter of fact "that the defendant did not promise to pay or settle the claims arising out of alleged defalcations of the collector or in any way misled the complainant into delaying its suit on the bond." As heretofore outlined there seems to be ample evidence to support this finding of fact both on the testimony of witnesses and from the written testimony of the letters produced in evidence in this case.

3. THE DIFFERENTIATION OF CASES IN FOREIGN JURISDICTIONS.

Counsel for the complainant-appellant has commented on the fact that there are no cases in the State of New Jersey interpreting this particular section of the statute of limitations upon which the defendant-respondent relies, but he has stepped out of the boundary lines of this State and quoted several other cases from other jurisdictions. Although

it is regretted that it is necessary to go at length into the decisions of other States, I feel that a consideration particularly of those cited is necessary.

In the case of *Griffith & Fidelity & Deposit Co. of Maryland v. State*, 20 Pac. (Ariz.) 289, cited by the complainant-appellant on page 12 of his brief, the Court used the following language on page 291:

“Defendants by their demurrer on that point claim that the causes of action set forth in the complaint were barred by the provisions of sub-division 3, paragraph 709, RS. A. 1913 (Civil Code). This sub-division reads as follows:

‘709. There shall be commenced and prosecuted within one *year after the cause of action shall have accrued*, and not afterward, all actions or suits, in court, of the following description:

(3) An action upon a liability created by statute other than a penalty or forfeiture.’

It is generally held that, where a trustee has fraudulently concealed the facts from which a *cause of action* to recover money received by him in his official capacity arises, the statute of limitations does not begin to run until the *discovery by the plaintiff of the facts which gave him a right of action*, and that the same rule applies to his bondsman.” (Italics ours.)

In this case and in a number of cases which will hereafter be considered it is to be noted that under the provision of the Civil Code, sub-division 3, paragraph 709, the particular statute of limitations pleaded and relied on both by the principal and the surety, uses the words “AFTER THE CAUSE OF ACTION SHALL HAVE ACCRUED.” This fa-

miliar wording will appear through all these cases which have been cited by the complainant-appellant. The decision further refers to the fact that the discovery by the plaintiff of the facts which gave him a right of action fitted right in with the words of the statute of limitations. There is no doubt that the courts in a number of States where there is a statute requiring the filing of a suit within a period of years after the cause of action accrues has been construed in cases of fraudulent conduct which was concealed to date only from the time when the fraud was discovered by the other party. This under the terms of such an act would be a proper decision.

The case of *Patterson's Appeal*, 48 Penna. State 342, cited by the complainant-appellant on page 13 of the brief, has no reference whatever to the statute of limitations, but merely covers the general principle of law that a surety is in no better position than the principal. This related to a case where a surety had bought up some outstanding claims of principal who had disappeared and then tried to enforce these claims against an estate, but it appeared that before the principal disappeared he had assigned certain of these claims to another party for a valuable consideration and surety here took the claim subject to the outstanding equities. This would not have any bearing on the case at issue.

In the case of *Bradford v. McCormick, et als.*, 32 N. W. (Iowa) 94, cited by complainant-appellant in his brief, covers another special section under the code of the State of Iowa. The Court used the following language in this decision:

“It is insisted by counsel for the appellee that a right of action accrued upon the payment of the money to the justice, and, as more than three years had elapsed when the action was commenced, it is therefore barred under section 2525 of the Code. Counsel for the plaintiff concede the action is barred under that section, unless it appears that the justice fraudulently concealed from the plaintiff the fact that the money had been received.”

In order to determine the wording of this section 2529 of the code it was necessary to search through other cases and in the case of *Hintrager v. Richter*, 41 N. W. (Iowa) 55, the following language appears, quoting and including the provisions of this section of the code of Iowa, as follows:

“ * * * and that action therefor was barred in three years from that time, under section 2529 of the Code, which provides that an action against ‘a public officer, growing out of a liability incurred by the doing of an act in an official capacity, or by the omission of an official duty,’ shall be brought within three years *after the cause of action accrues.*” (Italics ours.)

It will be noted that the same as the Arizona decision of *Griffith, et al. v. State*, this particular statute again quotes the clause as fixing the time in the following fashion: “after the cause of action accrues.” It is therefore apparent that this decision of the Court was on the same fundamental basis as the case previously cited.

The complainant again cites the case of *McMul-*

Brief of Defendant-Respondent

len, et al. v. Winfield Bldg. & Loan Assn., 64 Kan. 298; 67 Pac. 892. In this decision the Court used the following language:

“It is next contended that the action was barred by the statute of limitations. A default may be said to have occurred in the beginning of 1886, and the action was not brought until February, 1892, more than six years after the default. *It was based on the written bond*, and therefore falls within the five year limitation. The question then arises, was the action brought *within five years after the cause of action accrued?*” (Italics ours.)

(Later clause:)

“Did this fraudulent concealment interfere with the statute of limitations? Did the *cause of action accrue* when the fraud was committed, or not until the fraudulent conduct and defaults were discovered?” (Italics ours.)

In this decision itself the same or similar provision of the statute is quoted; namely, “within five years after the cause of action accrued,” and the decision further shows definitely that the very basis of the opinion was taking into consideration the fact that the cause of action accrued when the fraudulent conduct was discovered rather than when the fraud was committed, but it is shown like in other decisions previously referred to that this statute has the same earmarks as being effective from the date that the cause of action accrued.

In the case of *Heap v. Heap*, 285 Mich. 250; 242 N. W. 252, cited on page 15 of the brief of the com-

plainant-appellant, the Court used the following language:

“Defendant Fidelity & Deposit Company pleaded the statute of limitations Comp. Laws 1929, paragraph 13976, which requires action on the bond of an administrator to be brought within four years after his discharge.” (This statute applies to both principal and surety on the bond and they were both made parties to this suit.)

Further the Court said:

“ * * * it nevertheless appears that the *cause of action* was fraudulently concealed from Mrs. Heap, and that she brought suit within two years after discovering the fraud. Comp. Laws 1929, para. 13983.” (Italics ours.)

This refers again to paragraph 13983 of the code of Michigan, relating to the statute of limitations, and after a search a case was discovered of *Barker v. Kraft*, 232 N. W. 839, where, on page 841, this particular section is quoted as follows:

“Section 13983 reads as follows: ‘If any person who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within two (2) years after the person who is entitled to *bring the same shall discover that he had such cause of action*, although such action would be otherwise barred by the provisions of this chapter.’” (Italics ours.)

Brief of Defendant-Respondent

It is to be noted that this particular section is quoted in connection with the other facts in the opinion and is a separate clause relating to actions fraudulently concealed to the effect that they may be brought within two years after the fraudulent concealment is discovered. In other words, in this case the law has been clearly and definitely laid down in a special provision of the statute of limitations itself.

To follow along the complainant's line of reasoning by quoting from other States, the case of *State, ex rel. Barringer v. A. W. Hawkins and J. H. Todd*, 103 Mo. App. 251; 77 S. W. 98, is a case where the sureties set up the statute of limitations on a bond of a notary, but the section which they relied on was section 8836 of the Revised Statutes of Missouri, 1899, which provision was "three years after the cause of action accrued." It was held here as in similar cases that this should date from the time when the fraudulent act was discovered.

The Court in this case distinguished from another statute (Section 1710, Revised Statutes 1879) which provided that action should be "commenced within three years after the commission of the offense, and not after." In this decision the Court commented on this particular statute and differentiated it from the statute applicable to notaries in this fashion:

"That statute (Section 1710) *left no room for construction*, since it fixed upon the time by naming a specific and definite period, while this statute used an expression 'cause of action accrued,' which leaves something to be determined more than a mere calculation of time." (Italics ours.)

Brief of Defendant-Respondent

This latter statute is somewhat similar to the wording of our statute and even in the State of Missouri it was held that such a statute left no room for construction.

In the case of *Skagit City v. American Bonding Co.*, 59 Wash. 1; 109 Pac. 197, there were two subdivisions of the statute of limitations which were referred to, the latter one of which being subdivision four and provided that in all cases originating in fraudulent acts the causes of action only accrue when the fraud is discovered, but this again is a special statutory provision which is not applicable in this State.

Insofar as the California and Idaho cases referred to on page 17 of the complainant-appellant's brief are concerned and also discussed in the opinion in *Griffith v. State*, *supra*, namely, the cases of *Peterson v. Title Guaranty & Surety Co.*, 34 Cal. App. 103; 169 Pac. 239; *Norton v. Title Guaranty & Surety Co.*, 176 Cal. 212, 168 Pac. 16; *Hellwig v. Title Guaranty & Surety Co.*, 39 Cal. App. 422, 179 Pac. 222, and others, are concerned, a reading of the California cases would naturally indicate that the decisions of these particular courts do not seem to carry forth the spirit contained in the decisions of other States.

The last case which was cited in another State by complainant-appellant was the case of *Lieberman v. First National Bank*, 8 Del. Chanc. 229; 40 Atl. 382, but the Court here, as shown in the following quotation, deals with two separate statutes, one a two year statute after the accrual of the cause of action,

Brief of Defendant-Respondent

and the other a six-year statute from the date of the bond. It is easy to see in referring to the following quotation from this decision that the six year statute is inapplicable, and is the only statute which compares with the one with which we are dealing. The Court used this language in this case:

“Section 11. No action shall be brought upon any bond given to the president, directors and company of any bank, or to any corporation, by any officer of such bank or corporation, with condition for his good behavior or for the faithful discharge of the duties of his station, or touching the execution of his office, against either the principal or sureties, *after the expiration of two years from the accruing of the cause of such action.* And no action shall be brought, and no proceedings shall be had upon any such bond, or upon any judgment thereon against either the principal or sureties, for any cause of action accruing after the expiration of six years from the date of such bond. The defalcations under each of the bonds accrued within *six years* from the date of the bond, and therefore the second clause is clearly inapplicable, and we are only concerned with the first clause, which provides that no action shall be brought against either principal or sureties after the expiration of two years from the cause of such action.” (Italics ours.)

It is our contention that if we take all the cases that have been referred to and other cases which have been purposely cited in other States, that there is something in the statute of limitations which either specifically refers to cases arising out of

fraudulent acts or deals with a period of years in limitation after the accrual of the cause of action. We, therefore, feel that these courts have justly decided in these cases that the cause of action would not accrue until the fraudulent conduct was discovered, and it is to be noted in each of these cases the surety and the principal both rely upon the same provisions of the statute.

In the case at point, however, the surety does not rely on such a statute but as will be outlined in the next section of this brief, relies on a statute which more closely follows the second provision referred to in the case of *State, ex rel., Barringer v. Hawkins, et al., supra*, and deals with a period of time after the date of the bond which leaves no room for construction.

4. THE SPECIAL PROVISION OF THE STATUTE UNDER CONSIDERATION IN THIS CASE.

The statute upon which the defendant-respondent relies is Section 5 of the Statute of Limitations as set forth in Volume 3, Compiled Statutes of 1910, page 3165, which reads as follows:

“5. Actions on bonds of sheriffs, collectors or constables.—That any prosecution to be had or commenced upon any bond heretofore given or hereafter to be given by any sheriff and his securities for the faithful performance of the office of sheriff, *or by any city, county or township collector and the securities of such collector*

for the faithful performance of the duties of said office of collector, shall in no wise operate against or in any manner affect the said securities named and bound in said bond, unless such prosecution shall be commenced within nine years after the date of the said bond and not after; and any prosecution to be had or commenced upon any bond heretofore given or hereafter to be given by any constable and his securities for the true and faithful performance of all duties enjoined on him as constable, shall in no wise operate against or in any manner affect the said securities named and bound in said bond, unless such prosecution shall be commenced within four years after the date of the said bond and not after. (Rev. 1877, p. 594, as amended P. L. 1883, p. 33.)"

It might be well to outline the history of this particular Act, although in tracing it from its origin at no time do the pamphlet laws contain any view of the legislators in passing this particular Act. The history, however, shows that it is a progressive Act. The first statute of this character which was passed in 1859 embodied in P. L. 1859, page 80, holds that where a bond is given

"by any insolvent debtor or a person arrested upon final process in a civil action shall in no wise operate against or in any manner affect the sureties named in such bond, unless such prosecution shall be within sixteen years after the date of said bond."

In 1860 an Act was passed, P. L. 1860, page 691, providing that any action upon bond given by a

Justice of the Peace and his securities "shall in no wise operate against, or in any manner affect the said securities named and bound in said bond, their heirs, executors or administrators, unless such prosecution shall be commenced within ten years after the date of said bond, and not after." This was the first Act apparently which added the words "and not after," seeming to intensify the provisions of the Act itself.

In the revision of 1877, page 594, Section 5, the section of the Act now in effect was included and referred only to the bonds of sheriffs and constables. Later, in P. L. 1883, page 33, this revision of 1877 was amended so far as paragraph 5 was concerned, to include city, county and township collectors, and the Act now reads the same as it did after the amendment of 1883. There is no real interpretation in any of the cases on this Act. In the case of *Knowlton v. Reed*, 6 Holstead (11 N. J. L. 320), the Court used this language, referring to another question at issue and not the one we are confronted with here:

"The limitation is fairly within the words. In every respect, comprehends the respect of time."

It will be noted that the wording of this Act is entirely different from the cases cited in foreign jurisdictions, which were referred to above. There is nothing in this Act to the effect that the statute of limitations runs from the time the cause of action accrues. It is an Act peculiarly applicable only to sheriffs', constables' and collectors' bonds and refers

Brief of Defendant-Respondent

only to the liability of the surety and not to the principal. This also is a feature which did not appear in the cases cited in foreign jurisdictions in the complainant-appellant's brief.

Counsel on page 15 of his brief has referred to the positiveness of this statute, and claimed that it is the same as other statutes of limitations in this State. The attention of the Court is called to the fact that Section 1, providing a six-year limitation in various actions, Volume 3, Compiled Statutes, page 3162, uses the very words that have been interpreted in other States, "after the cause of action shall have accrued." Section 2 again uses the same words in the latter part of the section, page 3164. Section 3, in the last line, uses the same words and Section 6, covering a sixteen-year limitation, in the middle of the statute, uses the same language, "after the cause of such action shall have accrued, and not after." This is the only section in the entire group of Acts under the heading of limitation of actions where the wording is peculiar and different from other sections of the same Act and from statutes of limitations which have been taken under consideration in other States, and the very wording of the Act itself, "* * * unless such prosecution shall be commenced within nine years after the date of the said bond and not after; * * *" is definite and apparently would admit of no other construction. It is for this reason we contend that there has been no decision in any way construing this particular Act.

It is our contention under these circumstances, therefore, that the conclusions of the Vice-Chancel-

lor as set forth on page 138, line 18 to the bottom of the page, constitute a proper finding of the law applicable to this particular case and that the facts distinctly show that the cause of action was not started within nine years after the date of the bond, which was pled in the action of the Supreme Court; namely, the bonds effective from January 1, 1916, to December 31, 1924, inclusive, and that inasmuch as such action did not affect the sureties this defense is a proper one to be pleaded in the court of law and would not be affected by anything under the cases which was done by the principal so far as the question of fraud may be concerned, even if there should have been any finding of fact that there was evidence of fraud presented before the Court of Chancery.

5. THE QUESTION OF THE PRODUCTION OF DOCUMENTS.

It is to be noted that the second cause of action in the bill of complaint (Case, pages 4 and 5) demands that the defendant furnish a true and accurate copy of the bond and the renewals or extensions thereof. The evidence presented in the Court of Chancery showed that the defendant exercised diligence in endeavoring to locate this bond but could only find the card record of the bond. The findings of the Court of Chancery as set forth in the conclusions (Case, page 136) indicated that the Vice-Chancellor found this as a question of fact from the evidence.

Brief of Defendant-Respondent

As a matter of fact, there is no doubt that on this particular cause of action the complainant-appellant has a full and adequate remedy in the courts of law. The mechanics used in introducing the only card record that we could locate of the bond in question, Exhibit D3, page 157, consisted of the method used in our courts of serving a notice to produce, which was served on the attorney for the complainant-appellant, asking him to produce the original bond and the copy of the bond application as well as the continuation certificates. On his failure to present these original documents the card record was introduced as secondary evidence. The same thing could be done in the action at law; namely, to request the defendant in the court of law to produce the original office copies of this bond and continuation certificates and in case of failure to produce them, the Township of Waterford, in the action at law, can introduce secondary evidence of the terms and conditions of these bonds.

The counsel for the complainant-appellant sets forth the fact that there is a presumption that township officials act in accordance with law. We have, however, here, an actual fact that the Township of Waterford apparently not only lost the original bond and all but four of the continuation certificates which were documents that should have been preserved with their records, but furthermore, in failing to act in accordance with the law they claim to have permitted one who occupied the position of tax collector to make tax searches prior to the time that any resolution authorizing him to

make these searches had been passed. (Case, page 43.) This is an indication that the Township itself, therefore, apparently has not taken the care and precaution to protect their records and to properly qualify their officials in the exercise of their duties.

At any rate, our contention is under this section that the defendant-respondent not only made every effort to locate the copies of the papers requested, but that the complainant-appellant has a full and adequate remedy in the courts of law and that the Chancery Court in deciding that the defendant had used every reasonable effort to produce these copies and that no proofs were offered in an effort to establish the terms and conditions of the bonds, it became a question of fact upon which the decision was based, that the complainant-appellant was not entitled to any relief on the second cause of action.

CONCLUSION.

It is our contention, based on the evidence, first, that the evidence of fraud was not sufficient, but could only be inferred or presumed, and that the finding of fact of the Chancellor that the evidence of fraud was insufficient is correct and proper so far as it relates to the principal, Cornelius W. Greaney; second, that even though there may have been some indication of fraud on the part of the principal, that such fraud in this State would not be chargeable to the surety by reason of the definite terms of Section 5 of the Statute of Limitations, heretofore quoted; and, third, that there was no evidence of

Brief of Defendant-Respondent

any waiver or any fraudulent attempt to lull the complainant-appellant into a position of security and prevent them from starting a suit within any period that was later barred by the statute of limitations, and fourth, that the complainant-appellant has a full and adequate remedy at law as to the second cause of action.

We, therefore, respectfully submit that the decision of the Court of Chancery should be affirmed, for the reasons herein stated.

CECIL W. ROTZELL,
*Solicitor for and of Counsel
with Defendant-Respondent.*

