

New Jersey Court of Errors and Appeals.

AMERICAN SURETY COMPANY OF
NEW YORK, a corporation,
Plaintiff-Appellee,

v.

MARY L. MASON, Administra-
trix of James Conway, de-
ceased,
Defendant-Appellant.

On Appeal from
the Supreme
Court.

BRIEF FOR DEFENDANT- APPELLANT.

This is an appeal from a judgment entered in the Supreme Court upon a verdict directed by the Honorable Frederic Adams at the Essex Circuit. Owing to the amount involved, the case is of much seriousness. The action was originally instituted by the plaintiff against James Conway, as the sole defendant, and during Mr. Conway's lifetime came on for trial before the Essex Circuit and was left by the Court to the decision of the jury who rendered a verdict for the defendant. This verdict was set aside by the Supreme Court upon a rule to show cause. Pending the consideration of the matter by the Supreme Court, Mr. Conway died, and the action has been duly revived against the present defendant, as the administratrix of his estate. Pursuant to the judgment of the Supreme Court upon

the rule to show cause, the case was again brought on for trial at the Essex Circuit, and it was agreed by the parties (see Stipulation, p. 214) that the record upon the former trial with its offers, objections and rulings should be considered as the record upon the new trial. This record, having been thus submitted, the Court, upon the application of the plaintiff, feeling bound by the decision of the Supreme Court upon the rule to show cause, directed a verdict in favor of the plaintiff for the full amount of its claim. The judgment entered is for the sum of 56,133.75 dollars.

The facts are as follows: The action was brought by the plaintiff, as surety company, to recover from James Conway, who was the sole defendant, upon an alleged agreement of indemnity (Exhibit P12) signed by Mr. Conway and two others. The recovery sought was the amount which the plaintiff had been required to pay upon three bonds given by it to the Town of Wakefield, Mass., upon behalf of a contracting firm known as Minahan & Costa, a firm with which Mr. Conway had nothing at all to do. The agreement in suit was claimed to indemnify the plaintiff upon these bonds. The amount sought to be recovered was the sum thus paid, together with interest thereon, and an item of \$3,300. for premiums from the date of the issuance of the bonds on behalf of Minahan & Costa until the date of the payment thereon from the surety company to the Town of Wakefield. The plaintiff, at the opening of the case, in addition sought recovery for an item of \$1.10 expended by it in obtaining copies of the bonds (p. 38), which item, however, the plaintiff later magnanimously waived (p. 147, line 14). The bonds upon which the plaintiff was held liable to the Town of Wakefield were those upon which it was bound for Minahan & Costa. The plaintiff never went on any bond for Mr. Conway, nor for the Conway Contracting Company in which Mr. Conway was interested, and the default which resulted in the judgment in Massachusetts against the Amer-

ican Surety Company was that of Minahan & Costa and not of the Conway Contracting Company.

The defendant admitted signing the agreement upon which suit was brought, but alleged and sought to prove, as a defense thereto, that it never had become an agreement binding upon the defendant by reason of the failure of the plaintiff to perform a condition precedent to any liability upon the part of the defendant thereunder. Under adverse rulings of the Court below this defense was shut out.

The tenth paragraph of the agreement in suit (p. 22) is as follows:

"That this agreement shall cover all obligations heretofore or hereafter issued for us or either of us, or heretofore issued for the firm of Minahan & Costa, and the principals do hereby stipulate that the surety may release, and it is hereby requested to release Antonio Costa and L. T. Fell from all liability or responsibility to it by reason of any such obligations."

The Court below, in directing a verdict against the defendant, did so, deeming itself bound by the opinion of the Supreme Court upon the rule to show cause, inasmuch as the Supreme Court held that, assuming that this clause of the agreement just referred to imposed an obligation upon the part of surety company to release Costa and Fell from liability on the original agreement of indemnity, that it was not necessary to show a formal release of Fell and Costa, but that it was enough if the agreement in suit had been accepted by the plaintiff, since the acceptance of the new agreement in itself worked a release of Costa and Fell since it operated as a substitution of new indemnitors in the place of the original ones.

Various objections were made by the defendant during the course of the trial and noted as exceptions, which are specifically referred to as grounds of appeal in the notice of appeal filed by the defendant. Many of the grounds of appeal refer to the

same legal principle under different aspects and the present appeal presents substantially five matters for the consideration of this Court, in respect of which the defendant contends that prejudicial error was committed by the Court below. These are as follows:

I.—The rejection, by the Court below, of all evidence as to an oral understanding between the plaintiff, the defendant and the other parties executing the agreement in suit, which said oral agreement accompanied the execution thereof, and the fulfillment of which constituted a condition precedent to the taking effect of the agreement in suit.

II.—The erroneous admission, in evidence, of an alleged copy of the supposed release executed by the American Surety Company to Fell and Costa.

III.—The refusal of the Court below to grant the defendant's motion for a nonsuit.

IV.—The refusal of the Court below to direct a verdict for the defendant.

V.—The direction, by the Court below, of a verdict for the plaintiff.

I.

The Court below should have admitted evidence of the oral agreement, the compliance with which constituted a condition precedent to any liability upon the part of the defendant under the agreement in suit.

As already pointed out, the liability against which it is contended the defendant indemnified the surety company was one which the surety company had

incurred on behalf of Minahan & Costa, a contracting firm in which Mr. Conway was in no manner interested. While the agreement of indemnity also refers to other bonds which the surety company had executed or should execute for the parties signing it, as an actual fact, the surety company had not executed any such bonds for Mr. Conway nor did it ever execute any for him. Recovery is sought solely because of its liability on the bonds executed for Minahan & Costa. The agreement of indemnity is upon the usual forms of the surety company and contains no undertaking, on its part, to do anything of any possible service or benefit to Mr. Conway. The defendant therefore sought to prove the facts which surrounded the execution of the agreement in suit and from which it was contended that the agreement in suit, while actually signed by the defendant, had been signed upon the express condition that before the defendant would become bound thereon, and it should be considered as a valid and subsisting agreement, the Conway Contracting Company should receive an assignment of the contract which Minahan & Costa had with the Town of Wakefield, Mass., and that the surety company should do all upon its part necessary to effectuate this assignment and to place the Conway Contracting Company in all respects in the position which Minahan & Costa had occupied as contractors with the Town of Wakefield and that it was agreed that until this had been done, the agreement in suit should not be considered in effect and Mr. Conway should not be deemed bound thereby.

The defendant further offered to prove the fact that after this conditional signing of the agreement, Minahan & Costa assigned their contract to the Conway Contracting Company and that notice of the assignment was given to the Town of Wakefield and its consent thereto asked. That the Town of Wakefield signified that it would consent, provided the surety company issued a bond to it covering the Conway Contracting Company, and that the surety

company refused to execute such a bond, and as a consequence the assignment of the contract was never recognized by the Town of Wakefield, and the agreement of the parties never consummated, so that the condition precedent to any liability upon the part of Mr. Conway on the agreement in suit never was fulfilled. This defense is referred to in number fourteen (p. 27c) of the specification of defenses, and was sought to be made by various questions asked upon cross-examination of the witnesses Mason and Clark and upon the direct-examination of Mr. Conway. The specific questions and offers made appear in grounds of appeal numbers 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26. It is very clear that this evidence should have been admitted, and that the Court below erroneously excluded it. The Court below had some doubt upon the admissibility of this evidence, but finally felt constrained to exclude it upon the authority of *Naumberg v. Young*, 15 Vr., 331. In so ruling however, we submit that the Court overlooked the fact that he was dealing with one of the exceptions which are expressly noted by Justice Depue in his opinion in that case. Thus Justice Depue said (see p. 336):

“Another class of cases in which oral testimony of an agreement by the parties is held to be competent are those in which the evidence is offered to show that the written agreement was made to take effect upon a condition which was not performed.”

The rule of inviolability of written instruments to attack by parol is admitted. Evidence of a condition precedent, however, does not attack the instrument itself, but shows that it never became a binding agreement. Such evidence, therefore, constitutes a well-settled exception to the general rule.

This exception is thus stated by Stephen in his *digest of the Law of Evidence* (N. J. Ed.), page 426, as follows:

“The existence of any separate oral agreement constituting a condition precedent to

the attaching of any obligation under any such contract, grant or disposition of property”

may be shown.

The following cases are cited by Stephen as illustrations of the rule:

(f) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree orally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.

(g) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is orally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent and the fact that he does not consent.”

In 17 Cyc., 694, the rule is thus stated:

“The objection to parol evidence does not apply where it is offered not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument, and in order to determine the validity of the writing, the true character of the transaction may always be shown. So also evidence which is offered, not for the purpose of varying or contradicting the terms of a written instrument, but to show that it was never intended to be operative between the parties, and never in fact had any legal existence as a contract or grant is admissible.”

A leading case is *Burke v. Dulaney*, 153 U. S., 228. It was there held by the Supreme Court, speaking through Mr. Justice Harlan, after a thorough consideration of the authorities, that it was admissible in an action by the payee of a negotiable promissory note against the maker to show a parol agreement between the parties made at the time of the

making of the note that it should not become operative as a note until the maker could examine the property for which it was to be given and determine whether he would purchase it. The Court, after recognizing the general rule of evidence as to the contradiction of written instruments by oral testimony, stated that the case before it did not involve that rule, and continued:

“And the evidence offered by the appellant, and excluded by the Court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations.”

The same rule has been repeatedly recognized in this State. Reference may be made to the very careful opinion of Vice-Chancellor Pitney in *O'Brien v. Paterson Brewing & Malting Co.*, 3 Robb., 117. In this case it was held that evidence could be introduced in a suit to restrain the enforcement of a note and mortgage given to the defendant, a brewing company, as part of the transfer of a saloon business to the complainant, to establish a parol agreement at the time such securities were executed, that defendant company would not enforce them so long

as complainant purchased his beer of it. The Vice-Chancellor stated that the rule of evidence as to the contradiction of written instruments was as effective in equity as at law, but that the evidence proposed did not violate the rule. Many cases are discussed and the Vice-Chancellor quotes with approval the conclusion of the American annotator to the Leading Cases in Equity to the effect

“That the recent course of English decisions tends to qualify and restrict, rather than enlarge, the operation of the rule that a written contract cannot be varied or controlled by a contemporaneous oral stipulation.”

And he continued, referring to the case of *Wallis v. Littell*, 11 C. B. (N. S.), 369:

“In that case the suit was brought to enforce a written contract by a farmer, who held as a tenant of a landlord, to convey his whole tenant right and possession to the plaintiff at a fixed sum. The contract was complete in all its parts. The defendant refused to fulfill on the ground that there was a verbal agreement, made at the time of entering into the written contract, that it was not to be binding unless the landlord consented to it, and this defense was held good and prevailed at law.

To have held otherwise would have added another example to the many which the reports show of the injustice of the universal application of the rule now in question.

In answer to this injustice, judges have said that people must not rely on oral promises, but have everything put in writing. But the answer to that suggestion is that people do in practice rely on oral promises, and equity and fair dealing require that they should be protected therein.”

See also

Sloss Sheffield Steel & Iron Co. v. Aetna Life Ins. Co., 4 Buch., 635.

Black v. Schreve, 2 Beas. (C. of Er. & App.), 455.

Boulevard Globe & Lamp Co. v. Kern Gas Light Co., 38 Vr., 279.

Upon the argument before Judge Adams, counsel for the plaintiff sought to distinguish the authorities which we have here cited, and which were cited before the Court below, upon the ground that the agreement in suit was sealed and that the rule we referred to applied only to instruments which are not sealed, and this apparently influenced the Court below in his ruling and as justification for this distinction, which will no doubt be urged in this court also, reference was made to the opinion of Justice Dixon writing for this court in *New Jersey Rubber Co. vs. Com. Union Ins. Co.*, 35 Vr., 508. We submit that this distinction is not well taken. Obviously there is no reason on principle why there should be any difference between writings which are sealed and those which are not sealed. The statute of frauds relates to writings and it is just as much doing away with the binding and conclusive effect of a writing if one is allowed to show a condition precedent in the case of an instrument not under seal, as in the case of an instrument under seal. Nor is the New Jersey Rubber Company case authority for the distinction. It is, on the contrary, an authority for the admissibility of evidence of this character. The instrument there involved was a policy of insurance which apparently was not sealed. The Court held that effect could be given to an oral agreement made coincidentally with the issuing of the policy which constituted a condition precedent to its taking effect. As to such a stipulation Justice Dixon said:

“Such a stipulation did not vary or add to the terms of the written policy. It merely prevented that document from becoming a contract between the parties until the stipulation was complied with or abrogated.”

Justice Dixon then referred to the leading case of *Pym v. Campbell*, 6 El. & B., 370, and *Wallis v. Littell*, 11 C. B. (N. S.), 369, and said that with respect to writings not under seal, they liken the

delivery by one party to the other on such a condition precedent to the delivery of a deed to a third person in escrow, and he quoted also the language of Judge Folger in *Benton v. Martin*, 52 N. Y., 570, where he said:

“Instruments not under seal may be delivered to one to whom upon their face they are made payable, * * * upon conditions, the observance of which is essential to their validity.”

Justice Dixon did not assume to say, and it was not necessary to the decision that he should say, that the rule was not applicable to instruments under seal and a reference to the cases shows that the presence of a seal does not affect the matter at all, and that the cases apply this rule equally to instruments under seal as well as to instruments not under seal, with the possible exception, in some jurisdictions, with respect to deeds or other instruments affecting real estate. Thus in the leading case of *Pym v. Campbell*, *supra*, no significance was attached by the Court to the fact that the instrument was not under seal, but the opinion proceeded upon broad grounds independent of whether the instrument was sealed or not. Of the three judges who wrote opinions, only one made a reference, by way of illustration, to a paper under seal, and he was obviously referring to a deed of real estate. Thus Justice Erle said:

“The production of a paper purporting to be an agreement by a party with his signature attached affords a strong presumption that it is his written agreement, and if, in fact, he did sign the paper *animo contrahendi*, the terms contained in it are conclusive and cannot be varied by parol evidence; but in the present case the defense begins one step earlier; the parties made and expressly stated to each other that for convenience they would then sign the memorandum of terms, yet they were not to sign it as an agreement until Abernathie was consulted. * * * The dis-

inction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In the very same volume of reports the same judges applied the rule to a lease which bore a seal.
See

Gudgen v. Besset, 6 El. & B., 986,

where Lord Chief Justice Campbell said:

"I think that, looking at all the facts here, it must have been the intention of both parties that the instrument should not operate as a lease till the money was paid, and that neither party intended that the interest in the term should vest till then. The formality of delivering the instrument to a third person as an escrow was not essential when it was intended to operate as such."

To the same effect see

Johnson v. Baker, 4 Barn. & Ald., p. 440,

which related to a composition deed which was apparently an instrument under seal.

In *State v. Wallis*, 20 S. W. (Ark.), 811, it was held competent to be shown, by parol evidence, that the parties who signed a bond, did so on the condition that other persons named therein as sureties would also sign it. The Court said:

"Proof that such of the defendants as subscribed the bond did so upon the condition that other persons named in it as sureties would sign it was competent. It was not designed to vary the terms of a written instrument, but to show that there never was a complete execution of such instrument. For this purpose it was competent."

See also *Hurlbut v. Dusenbery*, 57 Pac. (Col.), 860.

A thorough review of the authorities is found in the opinion of Judge Peckham concurred in by all the other judges, in *Blewitt v. Boorum*, 142 N. Y., 357. That was an action brought against the de-

fendant for damages sustained by the plaintiff by reason of the violation of a certain contract *under seal* entered into with relation to a certain patented article. The defendants admitted the execution of the contract, but alleged that it had been executed upon the parol condition that it was not to operate as a contract until the plaintiff acquired the interest of a third person in the patent spoken of in the agreement, and it was alleged that the plaintiff had never performed the agreement. The trial Court received this evidence and the question at issue was whether such evidence had been properly received. The Court said (p. 359):

“The case of *Reynolds v. Robinson* (110 N. Y., 654), holds that a writing which is in form a complete contract, and which has been delivered, may be proved to have been delivered upon a parol condition that it was not to become a binding contract until the happening of some event in the future, and that such event had not occurred. The cases cited in the brief opinion fully bear out the statement.

The plaintiff here contends that the authority of that case must be confined to contracts which are not under seal, and, as the contract here was a sealed one, the case has no application.

Of course the mere presence or absence of a seal upon a writing would seem to be a matter of the smallest importance upon the question now under consideration. The same reasons would apply with equal force for receiving or rejecting the contemporaneous parol understanding where the writing was sealed, as where the seal was absent. It is a question in each case as to whether there has or has not been an executed and completed agreement or act.”

The Court then referred to the old English cases which seemed to prohibit such evidence as to all writings, whether under seal or not, and said that they were

“not founded upon the presence of a seal to the writing, but the rule was adopted because

when the words were contrary to the act (of delivery), the words were regarded as of no effect, for it was not what was said, but what was done that was in such case to be regarded."

The old rule, however, has since been disregarded, as the Court continued:

"A different view was subsequently taken of this act of delivery. The courts said it was not a contradiction of the terms or legal effect of the writing, but it was proof simply that no contract had in fact been entered into."

The Court then continued (p. 362):

"As a result of the examination of the English authorities I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal may be shown to have been under an agreement that it was not to operate as such until the happening of some future event."

The Court then referred with approval to *Lovett v. Adams*, 3 Wend., 380, where it was said by Chief Justice Savage:

"That if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act of the obligee, or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then there is no contract, this being a bond under seal."

The Court referred to the old rule in New York, which prohibited such evidence as to deeds respect-

ing lands, and said that whether or not it was founded in reason, the Court would not now disturb that rule, but that such evidence was undoubtedly admissible as to any instrument not conveying or relating to the conveyance of real estate, and which did not require a seal for its validity.

A dictum to the contrary in *Cocks v. Barker*, 49 N. Y., 107, was expressly disapproved.

In the recent case of *Strebel v. Grosberg*, 95 N. E. (N. Y.), 692, the New York Court of Appeals again, by unanimous vote, approved of *Blewitt v. Boorum* and held that a general release signed, sealed and delivered may be shown by parol to have been delivered to take effect on a contingency which has never happened. Judge Haight, speaking for the Court, said:

“We incline to the view that oral evidence may be given for the purpose of showing whether the delivery of the instrument was intended to be absolute or conditional.”

In some states this rule has even been extended to deeds of real estate.

See *Curry v. Colburn*, 74 N. W. (Wis.), 778.

The agreement in suit while under a seal, did not require a seal for its validity, and the seal may be regarded as mere surplusage. But whether it required a seal or not, the authorities, we submit, are very clear that the presence of the seal did not in any way prevent the operation of the rule that the existence of a condition precedent may be shown by parol. Nor would the presence of a seal necessarily mean the presence of a consideration which the defendant could not attack or explain.

That other, further and additional consideration may be shown by parol, even in the case of a sealed instrument, is now undoubted. The Evidence Act specifically refers to this (Evidence Act, Sections 15 and 66) and indeed even before the present provi-

sions of that act, the true consideration of even sealed instruments could be shown.

See *Herbert v. Scofield*, 1 Stock., 492.

See also

Silver v. Potter, 3 Dick., 539.

Henry v. Zurflieh, 53 Atl., 243.

The true consideration of an agreement may always be shown by parol.

Toomey v. Crowley, 137 Mass., 184.

Under our Evidence Act want or failure of consideration of sealed instruments may now be shown. For a discussion of the effect of the statute, see

Aller v. Aller, 11 Vr., 446, and
Stephen's Digest of Law of Evidence
(N. J. Edition, p., 426).

See *Whiting v. Ringwood*, 13 Ky. Law Reporter, 687.

The defense thus proffered by the defendant was a substantial one affecting the merits of the case and should have been admitted. The effectiveness of such a defense if properly established is recognized by this Court in *Wallace Muller & Co. vs. Leber & Meyer*, 40 Vr., 312. The agreement which is the subject of this suit expresses nothing to be done upon the part of the surety company. There is not a reason in the world why Mr. Conway should have signed this agreement of indemnity and have voluntarily taken upon himself this great liability, except upon condition of some benefit to himself. This benefit was to be the assignment of the Wakefield contract which it was incumbent upon the surety company to assist in procuring. Without the assignment of this contract, there was no gain to Mr. Conway and no reason why he should assume the liability to the surety company. What was more natural then than that he should sign the agreement of indemnity upon the condition precedent above referred to and certainly whether that

is natural or not, the defendant should at least have been given an opportunity to introduce the evidence with reference to what happened at the time of the signing of the agreement and which the defendant claimed constituted the parol condition precedent to the taking effect thereof.

II.

The Court improperly admitted in evidence the alleged copy of the alleged release to Messrs. Fell and Costa without proper proof of the execution and delivery of the original or proper search having been made for the original itself.

The necessity of the proof of the release at all will be discussed hereafter. We shall assume, for the purpose of our discussion under this head, that a release of Messrs. Fell and Costa was necessary to be shown, and upon that assumption we submit that the Court below improperly admitted, in evidence, the supposed copy of this alleged release (Exhibit P.13). The Court admitted the copy, ruling that, in his opinion, a proper attempt to procure the original had been made.

The alleged release was from the American Surety Company to Messrs. Fell and Costa. The only direct evidence as to its execution and delivery was that of the witness Jarvis W. Mason. He testified that it was executed by the officers, and was handed by him in his office in New York to Messrs. Minahan, Conway and Hanna, or some one of them (p.82, line 30), at the same time when, as he testified, these gentlemen signed the agreement in suit at his office (p.92). There was no evidence whatever as to the delivery of this alleged release to either Mr. Fell or Mr. Costa, the

parties to be benefitted thereby, and upon this ground, with others, the defendant moved for a nonsuit. The plaintiff contended, however, and the Court held that it was sufficient to show a delivery to Messrs. Conway, Minahan and Hanna, inasmuch as, according to the agreement in suit, they were the parties who had requested the release, and the surety company, after its delivery to them, would be estopped thereby. Assuming, therefore, that the Court's view was correct in this respect, there were at least five parties under that view who had an interest in the alleged release and with whom search therefor should have been made, and the nature of the search indicated to the Court before it was proper to permit a copy thereof to be used, because of inability to procure the original. Mr. Conway admitted that he had never seen the release or heard of it (p.154, line 30). It may be assumed, therefore, that search with him would have been unavailing. The plaintiff did show inquiry among the personal representatives of Mr. Fell (now deceased). The executors of his estate were produced, and the only one of them who was shown to have any papers whatever, Miss G. R. Fell, made search for the release among her papers on the morning of the trial (p. 49, line 23). This examination was restricted to a tin box in which unimportant papers of Mr. Fell were kept (pp. 48 and 52). Mr. Fell had been in business in New York, but no search whatever was made in his former office or with people who had been employed by him there (p. 52). The executors had indeed destroyed some papers belonging to Mr. Fell some years ago, but they were not of any consequence (pp. 45 to 52), and it is impossible to believe that so intelligent persons as these executors are would have destroyed a paper of the obvious importance to Mr. Fell of a release like that in question, particularly when it was known that there was a possible liability upon the indemnity bond executed by him. No one of the executors had ever seen or heard of the release

(p. 62, line 20, p. 64). Plainly even the search among Fell's representatives was not sufficient. The only effort made to ascertain whether Costa had the release was the service of a subpoena upon him. He did not appear in court in response to the subpoena, and the Court indicating his willingness to have Costa produced under a bench warrant (p. 85), counsel for the plaintiff asked for a bench warrant, and it was served upon Costa. The response was a doctor's certificate to the effect that Mr. Costa was not fit for court duty, but it did not appear that he could not have been examined at his home, the Court concluding from the certificate that Mr. Costa was not unfit to testify at his home (p. 98, line 31), as we may assume also from the fact that the witness, Mr. Conover, had seen and spoken to him at his home the day before the trial. Counsel for the plaintiff, however, being confident that he had done all that was necessary to be done, took the responsibility of not making further effort to get or examine Mr. Costa (p. 100, line 15), the defendant at all times insisting that there had been no proper search so as to justify the introduction of the copy (p. 95), and the copy being received in evidence expressly against this objection (p. 96).

Under the Court's ruling that delivery to Conway, Minahan and Hanna was sufficient it became further necessary, in order to permit the use of the copy, to show search among all the parties to whom, as the Court ruled, the delivery was sufficient. There was not the slightest pretense of an effort to find the original release with the representatives of either Mr. Minahan or Mr. Hanna.

We therefore most earnestly submit that there never was any competent evidence whatever of the alleged release. The authorities are very plain and leave no doubt whatever that the effort to find the release—this document of such great importance in this case—was far short of that which should have been made.

We call special attention to *Johnson vs. Arnwine*, 13 Vr., 451, the leading case on this subject.

Longstreth vs. Korb, 35 Vr., 112, and
Durbrow vs. Hackensack Meadows Co.,
48 Vr., 89,

and in addition, the following authorities may be referred to.

Koler vs. Schilling, 41 Vr., 585.
Simpson vs. Dale, 3 Wall., 460.
Hatch vs. Carpenter, 9 Gray, 271.
Kearny vs. The Mayor of N. Y., 92
N. Y., 617.

III.

The defendant's motion for a nonsuit should have been granted.

A motion for a nonsuit (see p. 147) was made upon three grounds, first, that it appeared that the plaintiff was a corporation of the State of New York, that it did not appear that it had been admitted to do business in the State of Massachusetts where the transaction giving rise to the liability in question occurred, and second, that no delivery of the release had been shown, and third, that there was no proper evidence of the release since the copy was not properly admitted. As to the third point, obviously the nonsuit should have been granted if we are correct in the matters urged in the foregoing section of our brief. As to the second ground of the motion for a nonsuit, its propriety also depended upon the necessity of a release being shown, which will also be discussed hereafter. The evidence failed to show any delivery of the release to either Fell or Costa who were to be affected thereby. As to the first ground of nonsuit, it appeared that the American Surety Company is a corporation of the State of

New York. It appeared also that the transaction in question, so far as it involved any liability for which the defendant could be claimed to have been indemnitor, was a Massachusetts transaction. Mr. Clemmons, a member of the Massachusetts Bar, testified that under the law of Massachusetts, foreign corporations had to comply with certain prerequisites before being permitted to do business there (p. 44). There was no proof whatever that the plaintiff had ever been admitted to do business in Massachusetts and hence under the condition of the record it did not appear that the transactions of the surety company carried on in Massachusetts had been legal acts.

IV.

The Court should have directed a verdict for the defendant.

The motion for the direction of a verdict was based upon the same grounds as the motion for a nonsuit; and upon the additional ground that there was no evidence that the officers, who it was said executed the original release, a document that admittedly was a special paper, and out of the ordinary course of events, were legally authorized to execute it, or that the paper produced as a copy, was, in fact, a true true copy of the alleged original (see p. 202). The propriety of this motion, so far as it affected the release again depends upon the issue whether it was necessary for the release to be shown, and this we shall discuss under the next head of our brief,—if the point made upon the motion for a nonsuit was well taken, then of course it would follow that the motion for the direction of a verdict should have been granted.

V.

The Court below improperly directed a verdict for the plaintiff.

Feeling bound by the opinion of the Supreme Court upon the rule to show cause, the Court below granted the plaintiff's motion for the direction of a verdict. Inasmuch as the opinion of the Supreme Court will, no doubt, be referred to, we may, at the outset, point out some inaccuracies of fact in that opinion. Thus it is said that Minahan & Costa assigned their contracts to the Conway Contracting Company and that after the assignment of the contracts, the indemnity bond in suit was signed. As already shown, the facts as to the assignment were not permitted to go into evidence. As appears from the offer of proof, however (see p. 177), the assignment of the contract to the Conway Contracting Company was not made until June 27th, 1901, the day after the agreement in suit was signed, which was on June 26th, 1901, thus bearing out the defendant's contention as to the condition precedent. So also it is stated in the opinion that the Conway Contracting Company failed to carry out the contracts with the Town of Wakefield. This also is incorrect, since the Conway Contracting Company were never recognized as the assignee of the contracts by the Town of Wakefield, and the default, which was the cause of the action against the surety company by the Town of Wakefield, as appears from the exemplified copy of the record of that proceeding put in evidence, and the opinion of the Supreme Court of Massachusetts, was the default of Minahan & Costa. Also it is stated, in the opinion, without foundation in the record, that Mr. Conway was represented at the trial in Massachusetts by counsel of his own selection. The evidence produced below does not justify this conclusion.

The Supreme Court held first, that assuming the

proof of the delivery of the release to have been necessary, the Court would feel constrained to hold that the verdict was contrary to the evidence. This, of course, would be upon the assumption, since the matter came up on a rule to show cause obtained by the plaintiff, that the copy of the release had been properly received in evidence upon a sufficient showing of search for the original. And that part of the Supreme Court's opinion would merely necessitate the submission of this issue of fact anew to another jury. There can be no question whatever that upon this issue, there was a conflict of fact such as would require the submission thereof to a jury. This is apparent from a review of the facts which we shall make very briefly.

The only direct testimony on behalf of the plaintiff as to the making and execution of this release and its delivery was that of Mr. Mason. The direct testimony on behalf of the defendant was that of the defendant himself, Mr. Conway. Before considering their evidence, we may contrast them. Mr. Mason is an extremely busy man. Formerly Assistant General Solicitor of the plaintiff, he is now one of its vice-presidents, a lawyer and a certified public accountant (p. 80, line 22). The matters to which he testified were of ordinary occurrence to him. This was but one of innumerable other transactions of this character in which he has engaged, and the transaction occurred more than eleven years before.

The defendant, a man advanced in years, had been a contractor all of his life. He had had little experience with matters of this kind. He was risking his entire fortune. It was so unusual a transaction as to stamp itself indelibly upon his memory. Granting that these two witnesses were of equal honesty, there is every probability that Mr. Conway's memory was accurate and equal probability that Mr. Mason's memory was inaccurate.

Examining then the direct testimony of these witnesses we have Mr. Mason testifying that the agree-

ment in suit, and the alleged release (Exhibits P12 and P13) were executed upon the same day at his office in the offices of the American Surety Company on Broadway, New York City, and that both instruments were delivered simultaneously (p. 91, line 12). He testified that the signatures upon the agreement in suit were put there "in my presence" (p. 81, line 23), and the release was delivered by him to Messrs. Minahan, Conway or Hanna or some one of them, he did not remember which. He recalled the appearance of neither Minahan nor Hanna, although he had seen Minahan oftener than Conway (p. 90, line 12). He thought that he had seen Conway before, and in his (Mason's) office in New York (p. 88, line 8). While he at first assumed to identify Mr. Conway in court, he later admitted that he had talked to somebody about it (p. 91, line 3). He was assured that Exhibit P12, the agreement in suit, was signed by all of the parties at the same time as he could be "of anything that happened so long ago" (p. 116, line 15). This was his direct testimony. In considering it, we should consider that Mr. Mason would have us believe that the sole inducement to Messrs. Conway and Hanna in assuming the great liability which he said they assumed, was the "getting out" of Fell and Costa therefrom and that Fell and Costa would not get out unless Conway and Hanna were accepted in their place (pp. 124 to 126) and it is worthy of note also that he remembered comparing the notarial certificate on the copy of the release (p. 131, line 30).

The direct testimony of Mr. Conway is unequivocally opposed to that of Mr. Mason. He admitted that he signed the agreement in suit but he signed it at No. 800 Broad Street, Newark, N. J., at the office of the American Surety Company, and in the presence of its agent (p. 154, line 9). Messrs. Minahan and Hanna, both of whom are now dead, signed at the same time and place (p. 154, line 15); that he had never seen Mr. Mason until the day of the trial and did not sign in his office (p. 154, line 19); that he never saw Tierney (p. 154, line 26), and that

no release to Messrs. Fell and Costa was exhibited to nor taken away by himself, Minahan or Hanna at the time he signed (p. 154, line 30); that he never saw the release or a copy of it, or knew that there was such a document. He testified further that at the time he signed this agreement in suit, a statement of his property was taken down by Mr. Clark and written out by Mr. Clark. That he did not go to the office of the Surety Company in New York until December, 1901, long after the making of the agreement in suit after work had closed at Wakefield. That he had never been there previously and never signed any document in New York (p. 157, line 11). He remembered the transaction because of the effect it made upon him to be asked particularly as to what property he had (p. 159, line 3). Upon cross-examination it developed that the statement of property had been signed by Mr. Conway although he had previously thought he did not sign it, and that it bore date the 24th day of June and not the 26th, but aside from these matters, which are immaterial, Mr. Conway's testimony was not shaken upon cross-examination and he testified positively, as above set forth.

If there was nothing further in the case, it is plain that it was a clear problem for the jury to determine which of the two witnesses to give credence, and a verdict in favor of either could not have been objected to. Upon rebuttal plaintiff's counsel sought to support Mr. Mason's testimony. For this purpose they called Messrs. Clark and Tierney. They did not call Mr. Bishop, the notary before whom the alleged release was acknowledged, as appears from the supposed copy thereof, although he was in court and had been a witness in another phase of the case, nor did they call Mr. Mason's stenographer who he said prepared the agreement in suit (p. 116, line 7).

Mr. Clark's testimony is of no weight whatever. He admitted that the statement of property had been taken down by him in his handwriting,

thus bearing out Mr. Conway's story, and in this connection we may point out that Mr. Mason in his direct testimony said that he had himself negotiated the entire transaction and made no mention whatever as to the statement in writing of Mr. Conway's property, although he had been asked whether there were any other writings there when this matter was consummated at his office (p. 82, line 17). Mr. Clark had no recollection whatever of the occurrence except as he recognized his handwriting. On direct-examination he said that the agreement of indemnity could not have been signed in his office, but on cross-examination it appeared clearly that he had no recollection of the circumstance, and that he relied entirely for his statement upon the fact that Tierney's name as a New York Notary appeared thereon (p. 191, line 13). The only effect therefore of Mr. Clark's testimony is to lend corroboration to Mr. Conway's that he conducted the negotiation through the Newark office. Unless the transaction was closed in Newark, there is no explanation why the statement of Mr. Conway's property was taken there. When the previous indemnity of Fell, Costa and Minahan was taken, Mr. Mason, as he testified himself, made the investigation as to the standing of the indemnitors. Mr. Clark admitted that documents were frequently signed in his office without his being there. Upon its direct case the plaintiff made no mention whatever of the Newark office having had any part in the transaction.

The remaining prop of Mr. Mason was Frank I. Tierney, the Notary before whom the agreement in suit is supposed to have been acknowledged. For an estimate of his testimony we suggest the reading of his direct and cross-examination. Matters which we may advert to are his statement that he remembered the matter by the names of Minahan and Conway, although the only part he took in it was to take their acknowledgments, and he

took a great many acknowledgments. So also he assumed to identify Mr. Conway, although he had previously been coached as to his identity, and he had not the faintest recollection how Minahan and Hanna looked. The plaintiff relies upon the circumstance that this New York acknowledgment is on the document and Tierney's statement that he never made acknowledgments not true in fact. He had no real recollection upon the subject. The office of the American Surety Company is a large and busy office, and without imputing to Mr. Tierney actual dishonesty, we may readily believe that acknowledgments may well have been taken by him in an irregular way. Mr. Bishop, another employee of the Surety Company who appeared on the stand, admitted to having taken acknowledgments irregularly without having the parties before him (pp. 72 and 73). A significant thing is that the word "New York" in the acknowledgment was first written in the blank space above the acknowledgment in question reserved also for taking acknowledgments. Asked why he was so sure that he had never taken an irregular acknowledgment, Mr. Tierney remarked that he was always straight "on that question," because he knew the penalty of not being so (p. 200, line 3).

In support of Mr. Conway's testimony, there are many significant circumstances. As adverted to above, the rebuttal case corroborated Mr. Conway's testimony that the statement of his property was taken in Newark, though the direct case was silent upon this subject.

Mr. Mason, as he himself testified, was familiar with the entire transaction. According to his testimony he knew that the agreement of indemnity in suit had been given and according to his evidence also, he believed that it was an effective instrument by reason of the performance of the consideration in the delivery of the release (P13). Therefore he must have known, if his testimony is correct, that Messrs. Minahan, Conway and Hanna were firmly bound to

the American Surety Company, yet when the American Surety Company was later asked to execute another bond in relation to the work at Wakefield in which they should directly assume responsibility for the Conway Construction Company instead of Minahan & Costa, he wrote a letter enclosing another agreement of indemnity, the execution of which he requested (Exhibit D3, p. 251) (see p. 92). This letter was dated October 11th, 1901, many months after the date of the agreement in suit.

It was admitted also that there was an office in the City of Newark, where matters of this kind could be consummated. Likewise as showing the view of the Surety Company that the release had not yet become effective, and that Mr. Costa was still subject to liability on account of his original agreement of indemnity to the Surety Company, we may refer to Exhibits D1, D2, D4 and D5, which are premium notices addressed to Minahan & Costa (though under P13 Costa would have been absolutely discharged), requesting payment of premiums due, and these notices are dated April 10th, 1902, and March 10th, 1903, a considerable period, of course, after the alleged release was said to have become effective.

And very significant indeed is the action of the Surety Company in retaining in its possession the agreement of indemnity of April 10th, 1901, upon which Messrs. Fell, Minahan and Costa were responsible, and from which Exhibit P13 was supposed to have released Fell and Costa. This agreement of indemnity remained in the possession of the Surety Company and was produced by the plaintiff upon the present trial (p. 56, line 39). The inquiry immediately suggests itself why this agreement of indemnity was not surrendered to Messrs. Fell and Costa or to Messrs. Conway, Minahan and Hanna in their behalf. If Messrs. Fell and Costa had been released, there was no longer any liability upon their part. There is no answer in the fact that Mr. Minahan was upon the old agreement since he signed

the new one also, which, in all respects, covered all possible liability under the old agreement. Assuredly if the release had been executed and delivered in the manner testified to by Mr. Mason, its delivery would have been accompanied by the surrender of this now void and inoperative agreement of indemnity. Mr. Fell, as a business man, would have required the surrender of this agreement, and Mr. Mason himself, a lawyer, and a man used to transactions of this character, would have understood that the agreement was properly to be surrendered, and that it was improper for the Surety Company any longer to retain it in its possession. The agreement of indemnity was not surrendered nor was it cancelled, but it remained in the possession of the Surety Company to all intents and purposes an apparent subsisting agreement. Mr. Mason was fully aware of the existence of this previous agreement of indemnity at the time Mr. Conway and the others signed the agreement in suit (p. 114, line 32). The retention of this old agreement is wholly inconsistent with the claim that there was no longer any liability thereunder by reason of the delivery of the release (Exhibit P13).

The decision of the Supreme Court, however, was placed upon another point, and it was this ground which moved the Court below to direct a verdict for the plaintiff. This was that the acceptance of the agreement in suit by the Surety Company in itself worked a release of Costa and Fell, and that proof of the execution and delivery of a formal release was unnecessary; in other words, that Fell and Costa were released *ipso facto* by the acceptance of the agreement in suit. Even under the restricted view which the Court below took, it was necessary to find some consideration for the agreement in suit, which the Court below found in the release of Fell and Costa. Without this there would have been no semblance of consideration under the proof admitted for the act of the defendant.

The plaintiff itself admitted that the release of

Fell and Costa was a consideration of the agreement in suit, and that the performance of this consideration was a condition precedent to any liability upon the part of the defendant. This is the plaintiff's own theory of its case. Thus in count one of the declaration it is averred (p. 11):

"In consideration that the said plaintiff would release the said Antonio Costa and the said Lawrence T. Fell from all liability or responsibility to the said plaintiff as indemnitors as aforesaid * * * and the said plaintiff further avers * * * it did release the said Antonio Costa and the said Lawrence T. Fell from all liability or responsibility to the said plaintiff as indemnitors."

And in the second count (p. 14), which relates to the premiums alleged to be due, it is again averred that the defendant promised

"In consideration that the plaintiff at the special instance and request of the said defendant and said Daniel F. Minahan and said William Hanna would release certain other indemnitors of it the said plaintiff."

It seems very plain then that at all events the release of Fell and Costa was necessary.

The suggestion that proof of the execution and delivery of the release was not necessary was first made by the Supreme Court on the argument of the rule to show cause before that Court. It was a matter which was not present upon the trial of the cause and, as we have pointed out, was inconsistent with the plaintiff's theory of its case. The plaintiff averred and sought to prove the execution and delivery of the release in question. There was not a suggestion of a possible release by estoppel or *in pais* made at the trial.

Nor is the conclusion of the Supreme Court well founded in point of law. The parties to the agreement in suit, if we are to consider that the release of Fell and Costa was the consideration thereof,

were entitled not to an estoppel, the effect of which might vary with the view different juries might happen to take of the evidence, but to a formal binding release, whose effect could not be contradicted nor disputed. Nor indeed, even viewing the record in its present condition, are the elements present which could result in a release by estoppel. The surety company, if estopped at all, would have to be estopped as to Fell and Costa. It is elementary that among the essentials of an estoppel *in pais* is that the party invoking the estoppel must have changed his position in reliance upon the acts which it is maintained result in the estoppel.

See 16 Cyc., p. 722.

There is not the slightest pretense of proof that either Fell or Costa in any way relied upon anything done by the surety company. It does not even appear that they knew of anything that took place in connection with the entire matter. In order to justify the release of an indemnitor on the ground of an estoppel operating against the indemnitee, the evidence must be clear and convincing.

Thus in *Ætna National Bank vs. Hollister*, 10 Atl. (Conn.), 550, where many of the elements of estoppel were present, it was held that the indemnitor was not released by estoppel where it did not appear that he had been misled to his injury by anything done by the indemnitee. We are in the present case dealing with a corporation. Knowledge of what occurred, if we except the phase of the case relating to the release (Exhibit P13), is brought home to the corporation no higher than to the Assistant General Solicitor, Mr. Mason. He did not pretend that he himself was able to bind the corporation in reference to this transaction. Assuming then (which does not at all appear) that Mr. Mason had so acted as to justify an estoppel against him individually, can it be said that this corporation could be estopped by the act of its assistant solicitor

with no knowledge of the situation brought home to the executive officers or the board of directors? We have nothing brought home to any officer or officers of the plaintiff who could assume to bind it. A corporation must act in matters of this character under its seal, and the signatures of its proper officers. *Corporate acts must be shown.* There is nothing of this character in the case.

At all events, even if the correctness of the point of view of the Supreme Court as a matter of law be admitted, it is quite plain that the issue whether the surety company had so accepted the new agreement of indemnity as to release *ipso facto* the signers of the old is a question of fact, and since it was not clear, as a matter of fact, whether the surety company had accepted the new agreement, the matter should have been left to the jury, and the direction of a verdict upon this ground was unjustifiable. Much appeared in the case which indicated that the surety company had not relinquished its right under the old bond, but, on the contrary, still considered it and relied upon it as a binding obligation, and there was enough of this character to require the submission of the matter to the jury. Thus we have the premium notices sent to Minahan & Costa for premiums which accrued after the signing of the agreement in suit. Under the original indemnity agreement, there was the liability to pay premiums as they accrued. There was a similar liability, under the agreement in suit. When, therefore, the time for signing the first premium bill came around, it was necessary for the surety company to make their election. Costa was on the original indemnity agreement and was not upon the new agreement. If he had been released, therefore, he had no further connection whatever either with the contract nor the premiums accruing thereon, nevertheless he, with Minahan, received bills for the premiums, which action upon the part of the surety company was wholly inconsistent

with the election of the surety company to hold some one other than Costa.

In addition, there is the very significant fact that the surety company retained in its possession the agreement of indemnity of April 10th, 1901, upon which Messrs. Fell, Minahan and Costa were responsible, and from which, Exhibit P13, was supposed to have released Fell & Costa. This agreement apparently never went out of the possession of the surety company and was produced by the plaintiff upon the present trial (p. 56, line 39). As already pointed out, the inquiry immediately suggests itself why this agreement was not surrendered to Messrs. Fell and Costa or to Messrs. Conway, Minahan & Hanna in their behalf. If Fell and Costa had been released there was no longer any liability upon their part. There is no answer in the fact that Minahan was upon the old agreement since he signed the new one also, which in all respects covered all possible liability under the old agreement. If the old agreement had been given up by the surety company, then it was proper and essential, for the protection of Fell and Costa, that the old agreement should have been surrendered to them, or at least have been destroyed. As pointed out, Mr. Mason, who acted for the surety company, was a lawyer and certainly understood this, and Mr. Fell, as a practical business man of wide experience, would have understood it also. The fact that the old bond was retained is of the greatest weight upon this issue whether the arrangement between all the parties was so far consummated as to have resulted in the release of Fell and Costa.

Very important, also, in this connection, would have been the evidence as to the condition precedent which was offered and rejected. It is plain that under the theory of the Supreme Court the release of the old indemnitors could only have followed the acceptance, by the surety company, of the new indemnitors. If, therefore, the new agreement was signed upon the condition that it should only take

effect upon the assignment of the Wakefield contract having been consummated, then this evidence was material and relevant on the question of acceptance of the new agreement by the surety company, since the purpose of the evidence offered and rejected was to show that there could be no acceptance of the new indemnity agreement until the whole arrangement had been consummated; and, until the whole arrangement had been consummated, the release of Fell and Costa would not have been proper. The fact that Mr. Mason retained this old agreement at the time when the new one was signed, indicates that he did not deem it proper, at that time, to surrender it; and for what reason could it have been improper other than that something still remained to be done after the signing which had not been done, and because of this fact, Mr. Mason did not consider that Fell and Costa should be released and the agreement surrendered to them as partial evidence thereof.

The question is somewhat analogous to the situation which obtains where the doctrine of novation is invoked. This Court, in a recent decision, has held that where the question is, whether a new contract was made so as to result in the discharge of an old contract, where the facts are in dispute, is a question for the jury (*Morecroft v. Allen*, 49 Vr., 729). Thus it was said in that case:

“The maxim of procedure is ‘*novatio non præsumitur*’ and, therefore, whether such an agreement was actually entered into between the parties, so as to bring this case within the doctrine referred to, is a question of fact for the jury, where the facts are in dispute; and hence, in this instance, the question was properly submitted to the jury whether or not a debt has been novated is ordinarily a question of fact and depends entirely upon the intention of the parties. Where there is no doubt as to the terms of the agreement it is a question of law. But if the terms of the agreement are equivocal or uncertain, then it

becomes a question of fact for the jury under suitable instructions."

The discharge of an old obligation by the acceptance of a new cannot be presumed. It must be established by clear and positive proof that there was such an intention upon the part of the creditor.

See 29 Cyc., 1139, note 63, citing *Latiolais v. Louisiana Citizens Bank*, 33 La. Ann., 1444.

Fidelity, &c., Co. v. Engleby, 37 S. E. (Va.), 957, where it was held that in default of sufficient evidence to the contrary, it will be presumed that the creditor retained the old debt or at the same time that he accepted the new one.

We may add that the entire evidence in the case which we have discussed under another head taken together with the matters which we have here specifically mentioned, indicate most clearly that it was a question of fact, also, whether the new bond had been accepted even on the narrow issue indicated in the opinion of the Supreme Court. There was error, therefore, in taking the case away from the jury.

The judgment in the case at bar is a very large one obtained by a surety company in that business for reward and gain against a defendant who, under the restricted evidence admitted in the case, was a voluntary indemnitor. Contracts of this character are always subject to the strictest construction and it is invariably held that the person sought to be charged is entitled to every just defense against the claims of the party claiming to have been indemnified.

We respectfully and most earnestly submit that the lines have been drawn too tightly about the defendant in this case and that he was improperly prevented from showing a full and meritorious defense which was wholly competent, and that even

upon the issue as made up in the Court below the defendant was improperly deprived of the right to have a jury pass upon the disputed question of fact. Upon the entire record, therefore, we submit that harmful error has been done to the appellant and that the proceedings below should be reversed.

ARTHUR F. EGNER,
ROBERT H. McCARTER,
Counsel for Appellant.

June Term, 1914.

New Jersey Court of Errors and Appeals

AMERICAN SURETY COMPANY OF
NEW YORK, a corporation,

Plaintiff-Appellee,

vs.

MARY L. MASON, Administratrix of
James Conway, deceased,

Defendant-Appellant.

*On Appeal
from
Supreme
Court.*

Brief for Plaintiff-Appellee.

It may be of service if we supplement the statement of facts contained in the brief for the defendant-appellant, by printing the opinion of the Supreme Court on plaintiff's rule to show cause, and by giving a digest of certain of the exhibits. The Supreme Court opinion contains a review of the facts as well as the discussion of one or more of the questions of law presented in this appeal.

OPINION OF THE SUPREME COURT.

New Jersey Supreme Court,

February Term, 1913.

AMERICAN SURETY COMPANY	}	<i>Plaintiff's</i>
OF NEW YORK,		
<i>vs.</i>		
JAMES CONWAY.		

Rule to
Show
Cause.

Argued before Gummere, Chief Justice, and Justices Bergen and Kalisch.

For the rule, Pitney, Hardin & Skinner.

Contra, Robert H. McCarter, and Arthur F. Egner.

Per Curiam.

The firm of Minahan & Costa entered into a series of contracts with the Town of Wakefield, Massachusetts, for the building of certain sections of the sewerage system of that town. The plaintiff company guaranteed to the town the performance of these contracts by the firm and was itself secured against loss by a bond of indemnity made by Minahan, Costa and Lawrence T. Fell. Minahan & Costa assigned their contracts to the Conway Contracting Company, the stockholders of which corporation were the defendant Conway, his daughter, Minahan, one of the original contractors, and William Hanna. After the assignment of the contracts a second indemnity bond was given to the surety company executed by Minahan, Conway and Hanna. This latter bond provided, among other things that "this agreement shall cover all obligations heretofore or hereafter issued for us or either of

us or heretofore issued for the firm of Minahan & Costa, and the principals do hereby stipulate that the surety may release, and it is hereby requested to release Antonio Costa and L. T. Fell from all liability or responsibility to it by reason of any such obligations." The Conway Contracting Company having failed to carry out the contracts with the Town of Wakefield in accordance with the provisions thereof, that municipality brought suit against the plaintiff company upon its guarantee and the company thereupon notified the defendant Conway, and also Minahan and Hanna of the pendency of that suit. Conway attended at the trial thereof, was represented there by counsel of his own selection and testified as a witness. The trial resulted in a verdict in favor of the town and judgment was entered thereon. The plaintiff company then paid the judgment with costs and interest amounting to the sum of \$45,439.11 and after calling upon Conway for payment and his refusal to comply brought suit against him upon the indemnity bond executed by him, Minahan and Hanna. The bond in suit is a joint and several one, and it is conceded that the plaintiff company was entitled to bring suit against Conway alone. The defense set up was that the consideration for the bond was the promise of the plaintiff company to release Costa and Lawrence T. Fell as indemnitors on the original bond given to the surety company and that this promise had never been performed by the company. The court charged the jury that the right of the plaintiff to recover against the defendant depended upon whether or not it had duly executed and delivered a written release of those two original indemnitors; that if it had their verdict should be for the plaintiff, but if not, then their verdict should

be for the defendant. The jury on this instruction found for the defendant.

The plaintiff offered evidence to prove the execution of a written release to Costa and Fell and its delivery to either Minahan, Conway or Hanna at the time these gentlemen signed the bond in suit. Conway testified that no such release had in fact been delivered. Our examination of the proofs sent up with the rule satisfies us that the finding of the jury that no release had been delivered was against the preponderance of the evidence, and, if we considered the crucial point in the case to have been execution and delivery of the release, *vel non*, we should feel compelled to set aside the verdict as contrary to the evidence. But in our opinion it was quite immaterial whether or not a formal release in writing was executed and delivered. It will be observed that there was no express agreement by the surety company to release either Costa or Fell from liability on the original bond of indemnity. The company did not execute the substituted bond but merely accepted it. The provision in the writing is in terms a consent to and a request for a release made by the obligors to the obligee and we think it very doubtful whether the mere acceptance of the defendants' obligation with this consent and request in it constitute an agreement to comply with the request. But assuming that it did, then in our judgment the acceptance of the bond by the plaintiff in itself worked a release of Costa and Fell without any other action on its part, for it operated as a substitution of new indemnitors in the place of the original ones; and consequently, upon the facts recited, the plaintiff's right of recovery against the defendant was complete.

The rule to show cause will be made absolute.

DIGEST OF EXHIBITS.

P. 1 (Case, page 217). This is a bond given to the Town of Wakefield, Massachusetts by the firm of Minahan & Costa, of Orange, New Jersey, as principals, the American Surety Company of New York, as surety, conditioned for the performance by Minahan & Costa of a contract for building Section 1 of the Wakefield sewerage system.

P. 2 and P. 3 (Case, page 222). These are bonds similar in all respects to P. 1, except as to the amount and that they refer to Sections 2 and 3 of the Wakefield sewerage system.

P. 11 (Case, page 228). This is a general contract of indemnity given by Minahan & Costa, D. F. Minahan, Antonio Costa and L. T. Fell to the American Surety Company. It is in common form, is a general undertaking to indemnify the surety company for any payment it may have to make by reason of its having gone or thereafter going as surety upon any bond for the indemnitors.

P. 12 (Case, page 233, and pages 18 to 22). This is a similar general contract of indemnity given by D. F. Minahan, James Conway and William Hanna to the plaintiff company, with a special clause that shall cover not only obligations issued for any of the indemnitors, but shall cover as well those theretofore issued for the firm of Minahan & Costa, and requesting the plaintiff company to release Antonio Costa and L. T. Fell from any similar prior indemnity agreement.

P. 10 (Case, page 227). This is an exemplified copy of the Massachusetts judgment obtained by the Town of Wakefield against the American Surety Company in suit founded on the three

bonds above mentioned, Exhibits P. 1, P. 2 and P. 3.

P. 4, P. 5, P. 7 and P. 8 (Case, pages 222 to 226, both inclusive). These are checks and vouchers in payment of the judgment (P. 10), with costs and sheriff's fees. The total amount paid was \$45,458.47.

P. 15A (Case, page 236). This is notice to the defendant Conway, of service of process in the suit of the Town of Wakefield on the above mentioned bonds, calling on Conway to take part in the defense.

P. 16 and P. 17 (Case, pages 239 and 240). This is notice from the plaintiff company to the defendant Conway, that the Supreme Court had decided the appeal taken from the judgment obtained by the town, calling on Conway to put the company in funds to pay the judgment.

These exhibits tell a clear story. The defendant does not deny that the plaintiff company became surety on the Minahan & Costa bond to the Town of Wakefield, that Minahan and others agreed to indemnify the plaintiff company against any liability incurred by thus going on the bond, that subsequently the defendant Conway agreed in writing and under seal to indemnify the plaintiff company against this same liability, that the Town of Wakefield brought suit and obtained judgment enforcing this liability, that the plaintiff company paid a large sum of money in satisfaction of this obligation.

In the first trial the defense set up was that plaintiff company had never kept its promise to release Costa and Fell, two of the original indemnitors. The Supreme Court held that the finding of the jury that no release had been delivered, was against the weight of evidence but that this was immaterial as there was no need of any formal release in writing, that the acceptance of the new indemnity agreement (called in

the Supreme Court opinion "the substituted bond"), operated as a substitution of new indemnitors in place of the original ones and worked a release of Costa and Fell. The defendant is now seeking to persuade this court that the defendant ought to escape from its clear obligation because the court below erred in not permitting the defendant to give evidence of an oral understanding that the written indemnity agreement should not be effective until something had been done by the plaintiff company; that the trial judge improperly admitted copy of a written release said to have been given to Costa and Fell (though in the view of the Supreme Court no such written release was necessary), and that there were issues of fact that should have gone to the jury.

We will discuss the points made in brief for defendant appellant in their order.

DEFENDANT'S FIRST POINT, THAT THE TRIAL JUDGE SHOULD HAVE ADMITTED EVIDENCE OF AN ORAL AGREEMENT, COMPLIANCE WITH WHICH CONSTITUTED A CONDITION PRECEDENT TO ANY LIABILITY ON THE PART OF THE DEFENDANT UNDER HIS INDEMNITY AGREEMENT (p.12).

Defendant's brief under this point cites and discusses many cases which have held that parol evidence may be resorted to to prove that a written instrument was signed upon some condition as to its going into effect not stated in the instrument. Before we consider these cases and this legal proposition, we ask the court to inquire whether the defendant's offer of parol evidence that was excluded at the trial, was an offer of this kind, that is, an offer to prove a condition precedent to the liability of Conway under the indemnity agreement. Then to consider whether such offer was within the issue presented by the pleadings.

First then, what was the defendant's offer? Defendant-appellant's brief says that the specific questions and offers appear in grounds of appeal Nos. 6 to 9 and 16 to 26, both inclusive. Most of these cover the trial judge's ruling, sustaining objections and excluding certain letters or documents, but the defendant's offer is stated in its fullest form at page 157, lines 20 to 30. Defendant sought to prove that when he signed and delivered the indemnity agreement, a statement was made by him that he only signed this bond upon the condition that the plaintiff company would consent to the assignment of these Wakefield contracts to the Conway Contracting Company and become responsible for it in the same way that they were then responsible for Minahan & Costa, and that without any further expense for the current year of work, that the representative of the surety company had agreed to this. Later, defendant offered to prove (Case, page 176), the assignment of the Wakefield contracts from Minahan & Costa to Thomas A. Davis, trustee, dated June 15th, 1901, subsequent assignment by him as trustee to Conway Contracting Company on June 27th, 1901, and that after that assignment was made the surety company refused to go on a new bond for the Conway Contracting Company, whereupon the Town of Wakefield refused to permit the Conway Contracting Company to continue and drove them from the job. See defendant's grounds of appeal, Nos. 6 to 9 and 16 to 26, both inclusive, and for questions and offers see case, pages 120, 122, 127, 157, 171, 176, 178, 180, 181, 182, 184 and 185. In other words, the defendant Conway, being sued upon a certain instrument under seal (P. 12, page 18), not disputing the fact that he signed and delivered the instrument to the representative of the plaintiff company, seeks to prove that when he delivered the indemnity agreement he said he wanted it understood that he signed it on condition "that you will help me to

be substituted for Minahan & Costa in the contracts with the Town of Wakefield, by consenting to the assignment of the Wakefield contracts to the Conway Contracting Company and going on a new bond for the Conway Contracting Company to the Town of Wakefield," that the surety company's representative replied, "it is so agreed," and Mr. Conway then delivered the bond. We submit that there is nothing in this that implies that the indemnity agreement was not really delivered or that its delivery was not to be effective until some future time or event. The oral agreement with the surety company that he seeks to prove is not a condition precedent to the liability upon the part of Conway. It is a further and additional consideration for Conway's promise to the company. In other words, he was offering parol testimony to show a consideration other than or additional to that contained in the written instrument and then sought to show failure of this part of the consideration.

As was natural, the controversy under this offer at the trial developed with the first question that presented the point. This would be found at page 120. The question was:

"Q And furthermore, is it not true that at the same time you expressed a willingness to become responsible for the completion of the contracts by the Conway Contracting Company, if Mr. Conway and these other two gentlemen, namely Messrs. Minahan and Hanna, indemnified your company in lieu of Mr. Fell and Mr. Costa."

The record does not show what counsel for the defendant said in support of the admissibility of this question, but the objection made by plaintiff's counsel shows that the question was looked upon as an attempt to prove a further consideration, "the true consideration" for the agreement of indemnity. It was objected that such proof was not admissible by parol, *Naumberg vs. Young* was cited. The trial judge relied upon it and excluded the testimony.

Nowhere in the record does it appear that defendant presented his offer of testimony as coming within the principle set forth in his point, that is, as being proof by parol that the delivery of the agreement of indemnity was on condition *that it should not be regarded as delivery* until the plaintiff company had done something when the time for it should arrive, and if the point was presented to the learned trial judge, it may well be assumed that it was to some extent confused with the idea of proving the true consideration for the indemnity agreement. Defendant's brief, now before this court, speaks of the learned judge "as having *overlooked* the fact that he was dealing with one of the exceptions," noted in *Naumberg vs. Young*, and the concluding part of the argument under defendant's first point, commencing at the bottom of page 15, cites statute laws and cases on the proposition that "further and additional consideration may be shown by parol, even in the case of a sealed instrument."

We submit then that the proper interpretation of the offer that was made at the trial is, that it was an offer to prove by parol, additional consideration as being the true consideration for the indemnity agreement and failure of this consideration, and not an offer to prove a parol agreement, that the delivery of the instrument should be ineffective until the plaintiff company had done something.

But whatever may be the court's conclusion on this point, the defendant's offer was outside of the issues presented by his pleading. The defendant gave notice of special matter, accompanying the plea of general issue. There is absolutely nothing in this notice that justifies an offer to prove an oral agreement constituting a condition precedent to the defendant's liability (see case, page 24). True, paragraph 8 speaks of conditions precedent to the liability of the defendant but limits the reference "to

the contingencies named in the alleged bond of indemnity as conditions precedent." No attempt is made to include the contention that there was some contingency outside of the indemnity agreement that was a condition precedent to the defendant's liability. When we turn to the particular paragraph of this notice that attempts to set up the substance of defendant's offer; namely, the agreement on the part of the company to become surety for the Conway Contracting Company, that it refused to do so, we find it stated in terms of failure of consideration. Paragraph No. 3 is the one. It says that the *true consideration* of the indemnity agreement was the agreement to become surety for the Conway Contracting Company, that the plaintiff company refused to do this, and frustrated thereby the object of the defendant, and that the consideration of said agreement of indemnity wholly failed. Defendant will no doubt contend that in his specification of defenses, numbers 14 and 15, he has sufficiently covered the point he is now making. We submit that under *McGlade vs. Home Insurance Co.*, 71 N. J. L., 40, the defendant was not entitled to raise the point of failure of performance of conditions precedent. We quote from the opinion of Mr. Justice Garrison:

"It is urged, however, that the trial court erred in the refusal to non-suit the plaintiff for failure to prove the giving of notice of loss required by the policy. The plaintiff had averred the performance of conditions precedent generally under section 118 of the Practice Act (Pamph. L. 1903), so that the ruling of the trial judge followed the cases of Supreme Assembly *vs. McDonald*, 30 Vroom, 248; *Ottawa Tribe vs. Munter*, 31 Id. 459; *Dimick vs. Metropolitan Life Insurance Co.*, 38 *Id.*, 367; *Vail vs. Pennsylvania Fire Insurance Co.*, 38 *Id.*, 422.

The defendant sought to avoid the force of these decisions by showing that in response to a demand for a specification of defenses, under section 104 of the Practice Act, it had specified the failure of the plaintiff to give the proofs of loss required by the policy. This practice provision has, however, no bearing upon the question under consideration, which is a statutory regulation touching a matter of record and requires that a condition precedent, the performance of which is to be contested by a party, shall be specified in his *pleading*—that is to say, shall be made a part of the record. The response to a demand under section 104 does not become and cannot be treated as a part of the record; it is a mere notice, and is so denominated by the statute, which permits it to be filed as such. *Pamph. L.* 1903, p. 568.

There is no error in the ruling of the trial court.

The defendant will contend that if this objection be well taken leave should be given to him to amend his pleadings so as to include the defense in question. We most vigorously oppose this suggestion. If the learned trial judge ruled correctly in excluding the testimony, we are at liberty to suggest any argument in support of that ruling, whether or not the same reason was urged at the trial. We may fortify the objections presented at the trial by any other objections that may occur to us. On the other hand, if the defendant failed to plead in such manner as to entitle him to make the offer of proof that he did, he ought not now to be permitted to cure the defect. Defendant now says, "The point was in my specification of defenses; let that be enough. Or, if it is not enough, let me amend my pleadings." The *McGlade* case held that it was not enough. In the case of *Dimick vs. Metropolitan Life Insurance Co.*, 67

N. J. L., 367, the same objection was made to the defendant's pleading (and by the way, counsel for defendant in the case at bar represented the defendant in the Dimick case). The court there permitted the defendant to amend his pleading so as to specify the condition precedent performance of which it wished to contest; but it justified this course on the two grounds that the defendant had been perhaps misled by a declaration on the subject of pleading made in *Deweese vs. Manhattan Fire Insurance Co.*, and that he had applied at the trial for leave to amend. It was argued that even if the plea failed to specify the condition, performance of which the defendant intended to contest, still, if the evidence showed that such condition had not been performed the non-performance must be given effect. But the court refused to assent to that view. In the case at bar neither of these grounds is present. The defendant has not been misled by anything in any other case; the rule that the specification of defences is not part of the pleading is well settled; the defendant made no application at the trial for amendment of his pleading, and entered into a stipulation to go to trial the second time on the former record without thus applying for any amendment.

Conceding, however, for the purpose of argument, that the court shall find that the offer of testimony was an offer to prove an oral agreement that was a condition precedent rather than an offer to prove some further and additional consideration, and assuming that this court shall decide that the defendant was entitled to make its offer notwithstanding the condition of his pleading, we turn to a discussion of defendant's first point.

The rule that parol testimony will not be admitted to alter, vary or contradict a written instrument is thoroughly grounded in our law. Defendant's counsel contend that the case at bar falls within one of

the exceptions to this rule "expressly noted" by Justice Depue in his opinion in *Naumberg vs. Young*. This, we submit, involves a misconception of what Justice Depue said in that case. He said that there was a class of cases in which oral testimony is received to show that a written agreement was meant to take effect upon a condition which was not performed, but it is not correct to say that he treats it as an exception to the rule that forbids the altering of written instrument by parol testimony. On the contrary, he points out:

"In cases of this class the oral testimony is received, not with a view to add an additional term to the written agreement in defeasance of it, but for the purpose of showing that the latter did not become an agreement at all."

This distinction is recognized in many other cases. It appears in the abstracts from Stephens' Digest of the Law of Evidence, and from the Cyclopedia of Law and Procedure cited in defendant's brief, pages 6 and 7. It appears in the extract from *Burke vs. Delaney* on page 8 of defendant's brief. The opinion in *Burke vs. Delaney* quotes all three of the judges who decided *Pym vs. Campbell*, and each of them made this distinction and were careful to say that they were not making an exception to the rule, that they were not sanctioning the admission of parol testimony that would alter a written instrument; that the written instrument, after proof of the parol agreement, would remain in its terms precisely what the parties had intended, without alteration. So in *O'Brien vs. Paterson Brewing & Malting Co.*, cited in defendant's brief, Vice-Chancellor Pitney pointed out that the evidence there sought to be offered did not tend to vary the terms of the written instrument, but only to show that it never had any binding effect upon the plaintiff in equity. *Black vs. Shreve*, cited in defendant's brief, was a case

in this court that emphasizes this distinction. In that case a bond was circulated among the stockholders of a company for signature. Many of them (but not all) signed. Each as he signed, handed it back to the agent who was procuring their signatures, with the understanding it should not be effective unless or until signed by certain other persons. The court held that this testimony did not tend to alter the instrument, was not a violation of the rule that prohibits parol testimony to that end, but that it showed that the paper was not delivered in the legal sense. So in *The Globe & Lamp Co. vs. Kearny Lamp & Gas Light Co.* case, cited on defendant's brief, this court decided that oral testimony was admissible because it threw light upon the question of the existence of the contract rather than tending to alter, vary or contradict the terms of the contract itself. This scrupulous regard for the rule that bars parol testimony that would alter a written instrument, seems to have been somewhat lost sight of in some of the cases. When in *Pym vs. Campbell* the offer was made to prove by parol that the agreement, though signed, was not to be effective till approved by A, and the court allowed this proof, the effect or existence of the instrument was contingent upon some act or event outside of the control of the parties to the instrument. If, however, the offer were to prove by parol that there was some promise by one of the parties to the instrument to do something other than the agreement recites, the performance of which was a condition precedent, etc., this at once enters the field of danger; it becomes then an attempt to alter the written contract by showing that the promise of one of the parties to the contract was something different from that set forth in it. It is an attempt to alter the instrument by showing some further or additional consideration than that named in it, and is a vio-

lation of the rule. In other words, the court might justify the admission of parol testimony to prove that the instrument was not to become effective, as they did in *Pym vs. Campbell* and the many other cases referred to, because it did not involve any alteration of the instrument. But as soon as the parol proof did involve an alteration of the instrument it should be rejected, even though the same end might be in view; namely, to show that the instrument was not to be in effect.

Many times have courts and text writers pointed out the distinction between a recital of the consideration received, intended merely as a written acknowledgment, and the statement of the consideration which is itself an operative part of a contractual act, as where in the same writing the parties set out their mutual promises as considerations for each other. In the first case parol evidence is received, but in the second case, where the consideration is contractual, it is no longer open to contradiction or alteration by parol evidence. *Wigmore on Evidence*, Section 2433, 6 Amer. & Eng. Encyc. of Law, 766, 767, 775; 17 Cyc. page 661; 8 *Decennial Digest*, Section 419; *Sayre vs. Burdick*, 49 Minn., 367; 50 N. W., 245; *Lefkovitz vs. First National Bank of Gadsden* (1907), 152 Ala., 521, 44 Southern, 613; *Kchoe vs. Southern Paving Construction Company* (1909); 7 Ga. App., 266, 66 S. E., 547; *Wellmaker vs. Wheatley*, 123 Ga., 201, 51 S. E., 436; *Kramer vs. Gardner*, 104 Minn., 370, 116 N. W., 925-927; *Tate vs. Wabash R. R. Co.* (1908), 131 Mo. App., 107, 110 S. W., 622; *Sutherlin vs. Blumer* (1907), 50 Oregon, 398, 93 Pac., 135, 139; *Indianapolis Union R. R. Co. vs. Houlihan*, 157 Ind., 497, 60 N. E., 943.

Whatever be the interpretation put upon the principle laid down in *Pym vs. Campbell*, it is to be remembered that in that case it was pointed out that the parol evidence would not be admissible if the writ-

ing were under seal. Crompton, J., says on this point:

"When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed; that is technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop."

The early English cases are cited in *Pattle vs. Hornbrook* (1897), 1 Ch., 30; 66 L. J. Ch. (N. S.), 144:

"The plaintiff signed an agreement to take a lease of a house from the defendant. The defendant subsequently signed it, but without intending to bind himself till he should be satisfied of the plaintiff's responsibility, and ultimately not being so satisfied, let the house to another person. *The signed document had not been delivered to the plaintiff.* Held—that the defendant might show that no contract had been arrived at between the plaintiff and himself."

A discussion of this point will be found in a case decided in this court, namely, *New Jersey Rubber Company vs. Commercial Union Assurance Company*, 64 Law, 580. This was a suit upon a written contract, a policy of insurance. Mr. Justice Dixon, in the opinion delivered for this court, quotes the rule stated by Mr. Justice Stephen in his digest of the Law of Evidence that is also quoted by defendant's counsel on page 6 of his brief, and refers to *Pym vs. Campbell*, *Wallis vs. Littell* and *Davis vs. Jones*, 17 C. B., 625. He says, speaking of these cases:

"With respect to writings not under seal, they liken the delivery by one party to the other on such a condition precedent to the delivery of a deed to a third person in escrow" (page 584).

He also quotes the language of Mr. Justice Folger, expressing the opinion of the New York Court of Appeals, in *Benton vs. Martin*, 52 N. Y., 570-4:

"Instruments not under seal may be delivered to one to whom, upon their face, they are made payable, or who, by their terms, is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity."

Benton vs. Martin, the New York case cited, thus emphasizes the point that the exception which permits proof by parol of a condition precedent with reference to an instrument that has been delivered, applies only to instruments not under seal.

In order to overcome the effect of *Benton vs. Martin*, counsel for the defendant cite *Blewitt vs. Boorum*, 142 N. Y., 357; 37 N. E., 119. This case was decided by the New York Court of Appeals in 1894. Mr. Justice Dixon wrote the opinion for this court in *New Jersey Rubber Co. vs. Com. Union Assur. Co.*, *supra*, in 1900. It seems to us significant that the opinion in the earlier New York case was cited as containing the correct statement of the law for this State.

In our view the New York judge who wrote the opinion in *Blewitt vs. Boorum* misapprehended the effect of *Pym vs. Campbell* and the other English cases.

Gudgen vs. Besset, 6 El. & B., 986, turns upon a question of pleading merely. If the suit was upon a sealed instrument the declaration should have been in covenant, whereas, if no lease had been delivered to the tenant, an action for use and occupation would lie. The latter form of action was held to be proper on the ground that there had been no absolute delivery of the lease. It is to be noted that delivery of the lease to the defendant by the plaintiff, and not

delivery to the plaintiff by the defendant, would have been requisite to establish that the action should have been in covenant; and that there was in fact no real delivery to the defendant at all. Thus the arguments of counsel on both sides show that the lease was retained by the plaintiff as security for the payment of fifty pounds, and counsel for the plaintiff further say (at the top of page 989)—“but it is clear that he (the plaintiff) never parted with the possession of the parchment, and that Patullo never expected to get it.” A reading of the opinions of the various judges shows that the facts attending the execution were made the test as to an absolute delivery.

In the present case it is not questioned by anyone that the sealed agreement of indemnity executed by James Conway was physically delivered to the surety company and remained in its possession.

Not only in New Jersey, but in numerous other jurisdictions, *Pym vs. Campbell* is treated as stating the correct principal of law upon the point here in issue. We need refer to only two authorities to show that the New York courts are practically alone in holding that a sealed instrument may be delivered directly to the party to be benefited thereby, but nevertheless in escrow.

In 17 Cyc., page 644, the learned author of the article on “Evidence,” writing on the sub-topic “Parol or extrinsic Evidence affecting Writings” says at page 644:

“Particular Instruments—(1) Sealed Instruments Generally. It is well established as a general rule that an instrument under seal cannot be delivered to the grantee or obligee upon a parol condition which may prevent the taking effect of the instrument according to its tenor, although in New York it has been held that this applies only to instruments which are required to

be under seal, and not to instruments effective without a seal."

Blewitt vs. Boorum is the only case cited.

On the other hand, *Naumberg vs. Young*, and *Pym vs. Campbell, supra*, are cited on page 643 in foot note 46; and in the same foot note *Benton vs. Martin, supra*, is cited as stating the doctrine applicable to the conditional delivery of instruments *not under seal*.

Professor Wigmore in Vol. IV of his Work on Evidence, section 2410 says:

"Sealed instruments—otherwise known as deeds—were the chief legal documents, in the earlier history of our legal system, and for a long time the only ones whose contents were undisputable. Other writings thus came down to us without the tradition of delivery as a formal and arbitrary mark of the finality of the act. It has therefore long been well understood, for *other writings*, that the finality of the writing as a legal act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition, and, in particular, that this is so whether the writing (or escrow) is provisionally handed to the grantee himself or to any one else. The case of *Pym vs. Campbell* in England, is commonly taken as the leading case. In the United States the doctrine is not only completely accepted but has even been applied to sealed instruments other than deeds of land in jurisdictions still bound by precedent to the older rule for deeds."

For the final proposition of the text only two cases are cited; *Blewitt vs. Boorum, supra*, and *State vs. Wallis*, 57 Ark., 64, 73; 20 S. W., 811.

State vs. Wallis, we believe, is the only additional case quoted by counsel for the defendant for the

proposition he seeks to uphold, and this does not support his point for it only illustrates the familiar class of cases holding that where a bond is signed upon the condition that other persons *named in it* as sureties will also sign, no person is bound unless and until all have subscribed.

That Arkansas is strongly inclined against any breach of the parol evidence rule on the pretext in question whether the instrument be sealed or unsealed, see the recent case of *Cox vs. Smith*, 138 S. W. 978 at the bottom of 980 (Ark. 1911), where the court passing upon an unsealed contract says:

"Where the written contract is complete in its terms, it is incompetent to ingraft thereon any condition by parol testimony. *Collins vs. Southern Brick Co.*, *supra*; *Lower vs. Hickman*, 80 Ark., 505; 97 S. W. 681; *John vs. Hughes*, 83 Ark., 105, 103, S. W., 184.

"As is said in the case of *Barry-Wehmiller Mach Co. vs. Thompson*, 83 Ark., 283, 104 S. W., 137: 'Antecedent propositions, correspondence, prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject-matter of such antecedent negotiations, when it is free of ambiguity and complete.' "

See also *Findley vs. Means*, 71 Ark., 289; 73 S. W., 101, where it was attempted to introduce parol evidence to prove that a contract in writing was delivered to take effect on the performance of certain conditions.

The court said:

"The court committed no error in refusing to admit the testimony. It has been repeatedly held by this court that a deed, bond, note or other instrument of writing delivered to the grantee or obligee to take effect when certain conditions are performed, becomes operative and binding from the time of the delivery, though the conditions

never be performed," citing earlier Arkansas cases.

A case similar to *State vs. Wallis, supra*, in our own reports is *Black vs. Shreve*, 13 N. J. Eq., 455, decided by this court in 1860. In this case it was held that a sealed instrument entrusted to a party with authority to deliver it to the grantee in case certain conditions are complied with will not become a deed if delivered without compliance with such conditions; and that parol evidence to defeat such an instrument is admissible to show that when the defendants, or some of them, signed the instrument, it was stated by them to the agent procuring their signatures that it should be binding on them only in the event of its execution by certain other persons.

Mr. Justice Whelpley says at page 457:

"The respondents rest their case upon a single point—that the covenant of the defendants, upon which their liability depends, was never, in the legal sense of the word, delivered to the complainants, and that, for that reason, it never had any legal vitality, though signed by them.

"Until an instrument under seal is delivered by those who sealed it, or with their consent, it has no legal operation as a deed; delivery is essential for that purpose. It must go into the hands of the grantees or covenantees, by the consent of the grantors or covenantors; possession acquired by force or finding, or in any other mode than by the full consent of the party to be found, is ineffectual.

"In the absence of all evidence to the contrary, mere possession of a complete instrument, by the grantee, is sufficient evidence of a lawful delivery.

"Mere tradition of a sealed instrument, even to the party in whose favor it is drawn, does not,

necessarily, in all cases, make it a deed. A deed complete in form, signed and sealed, may be handed to the party for inspection. If he should refuse to return it, and claim that the mere tradition of the paper so executed was a legal delivery, he could not hold it. The answer would be that the tradition, although to the party, was not a delivery of the paper, as a deed. It was not a final parting with the custody of the paper. A taking, under such circumstances, would be a tortious taking. Trover would lie for the paper. It would be a mere lending of the paper, not a delivery. So, if the party to be bound suffer the paper to go into the hands of a third person, with authority to deliver it in case certain conditions are complied with, a transfer of the paper without compliance with the conditions, is no delivery for want of authority in the agent to do the act. It is the duty of the party thus accepting a tradition of the instrument, to see to it that the agent, in the act of transfer, is authorized to do it, unless he be the party's general agent. *If the instrument be once delivered to the party who, on its face, is entitled to it, it becomes eo instanti a deed.* No agreement, in conflict with the plain tenor of the deed, is permitted to be proved—to show that its operation, as a deed, is to depend upon the performance of some condition subsequent."

Ordinary vs. Thatcher, 41 N. J. L. (12 Vroom), 403, is a decision by our Supreme Court, the opinion being by Chief Justice Beasley. The sealed instrument there in question was a guardian's bond in the usual form to the Ordinary, and the question was whether it could be delivered in escrow to the surrogate of the county. The court held that the surrogate was the deputy of the Ordinary for the purpose of receipt of the bond; that delivery to him

was therefore delivery of the instrument to the obligee. It therefore refused to entertain the defense that the delivery had been in escrow or on condition, stating this as one of the settled rules of the common law recognized generally both in English and American courts. The opinion disapproves the distinction sought to be made in the New York case of *People vs. Bostwick*, to the effect that the rule that a deed cannot be delivered as an escrow to a party who takes an interest in it has application only to the case of a deed of conveyance. Says the opinion:

“For the purpose of this part of the inquiry I assume that these sureties delivered this instrument to the surrogate intending to deliver it, as they say, as an escrow, and using words expressive of such purpose, and from this premise I have concluded that the bond, by force of an imperative rule of law, passed to the obligee detached from all extraneous condition. The bond cannot, notwithstanding such express conditions, be treated as an escrow in the hands of such obligee.”

The opinion remarks that this rule is not by any means a technical one:

“To the contrary, I regard it as a wise regulation founded in public utility and conducing greatly to the security of persons desirous of executing contracts in a definite and assured form” (p. 410). * * * If a condition could be annexed to the delivery of a deed when made to the obligee himself, the very essence of the transaction would be left to depend upon the memory and truth of the bystander. I cannot but think that there is manifest wisdom in the old rule that the law will regard, in such transactions, not what is said, but what is done.”

This opinion is of great interest further in its statement of the distinction that we have endeavored to make in our first objection that the offer of the defendant was not, after all, an offer to prove a condition precedent to the liability. The distinction is made clear between the execution of an instrument under the circumstances that one of the parties promised at the time that something further shall be done, and under circumstances making the performance of this promise a condition precedent to the instrument going into effect. See page 414, and quotations from *Evans vs. Gibbs*, 6 Humphrey, 405, and the quotation from *Cumberlege vs. Lawson*, 40 E. L. & Eq., 228, in which the defendant pleaded that he executed the indenture *on the faith* that B (one of the sureties) should join therein, and never did execute it. The court speaks of the

“Radical distinction which exists between an understanding cotemporaneous with the delivery of a deed that something further is to be done as a part of the transaction, and an understanding that the doing of such thing is to be a pre-requisite to the legal existence of the instrument” (p. 415).

The same distinction was made by Chancellor Williamson in the case of *Black vs. Lamb*, 1 Beasley (12 Eq.), p. 118, where he says:

“There is a manifest difference where the testimony is offered for the purpose of showing that the writing was not to be delivered until a condition precedent was performed, and that it was delivered with an agreement that the condition was to be performed.”

Seitz Brewing Company vs. Ayres, 60 Eq., 190. Vice-Chancellor Reed held that a sealed instrument having been delivered with nothing in it to indicate the existence of a condition upon its taking effect,

parol evidence to prove the existence would not be admitted. Citing *Ordinary vs. Thatcher*.

In *Atlantic City vs. Atlantic Steel Pier Company*, 62 Eq., 139, a deed had been delivered by the grantor to the agent of the grantee and proof was admitted that the said agent then said:

"If we don't get everyone to sign it, then it would not be worth anything."

Says the opinion:

"The defense, it is perceived, rests not upon any condition inserted in the deed, but upon a verbal statement said to have been made previous to their execution." * * * The defense raised if it has any substance must stand upon the notion that the delivery of the deed to Judge Endicott was in escrow. Now, if Judge Endicott was the agent of the grantee, the deed was absolutely delivered."

"Again, the conversation between Judge Endicott and Mr. Jackson, as detailed, seems to raise merely an expectation or promise that something in the future would be done."

Citing *Ordinary vs. Thatcher*.

In *Lake vs. Weaver*, 76 Eq., 280, we have a decision by this court, in the course of which the opinion of Chief Justice Beasley, in *Ordinary vs. Thatcher* was emphatically approved. And it is stated:

"The rule everywhere is that the delivery of a deed to its grantee cannot be in escrow, but is, regardless of such purpose, a good delivery of the deed."

Defendant's brief contains extended quotations from *Blewitt vs. Boorum*, and as one reads them one would think that the English rule had been quite abandoned, but the learned judge that wrote the opinion was not willing to commit the Court of Appeals of New York to these propositions, and adds cautiously, at page 121:

"In this case it is not necessary to now go further than to hold the rule inapplicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, the seal being in such case, and for this purpose, regarded as surplusage, and the instrument should be held to come within the rule laid down in *Reynolds vs. Robinson*, 110 N. Y., 654, 18 N. E., 127, already cited."

In other words, instead of complete demolition of the early rule that is implied in parts of the opinion, we find the court contenting itself with the statement that the rule has been modified when in its application to instruments not affecting real estate and not required to be under seal. All this on the assumption that if an instrument is not required to be under seal, a seal is surplusage. This ignores the fact that when a seal is attached to the instrument, even though it be not required to give it validity, it is a manifestation of the intent of the party to give solemnity and effect to the execution of the instrument, and it is the more proper in such case that the party should not be afterwards permitted to attempt to prove by parol evidence that he did not intend to give it effect. The argument of Mr. Justice Peckham in the portions of his opinion cited in defendant's brief depends largely upon his interpretation of the case of *Gudgen vs. Besset*. The court will notice that the lease under consideration in *Gudgen vs. Besset* was sealed and was certainly an instrument affecting real estate. Apparently the learned judge of the New York court was unwilling to go to the logical length of his own interpretation of *Gudgen vs. Besset*.

In *Aller vs. Aller*, 40 N. J. L., 446, at page 450, Mr. Justice Scudder speaking for the Supreme Court, said that it was not intended by the legislature to

abolish all distinction between simple contracts and specialties. He continues:

"It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced."

Without conceding that the contract in suit was in any sense voluntary on the part of James Conway, we submit that on account of its executory character on both sides the sealing of it gave it added force, making it impossible for either party to recede from it even before performance by the other. This effect of the seal, we think, is strongly indicated in the quotation from the opinion of Mr. Justice Scudder, *supra*. That parol evidence cannot be introduced to establish a contingency upon which a sealed executory instrument is to take effect, see also *Ryan vs. Cooke*, 172 Ill., 302; 50 N. E., 213, particularly page 216.

Numerous cases in other states support the general proposition that where a sealed instrument has been delivered to the party to be benefited thereby, parol evidence is inadmissible to show the existence of conditions precedent. The defendant concedes that this is a correct proposition as applied to deeds of real estate. The cases will be found digested in 20 Cent. Dig., "Evidence," Section 1929, and in 8 Dec. Dig., "Evidence," Sections 420 and 444.

Curry vs. Colburn, 74 N. W., 778 (Wis. 1898) is cited in the brief for the defendant as indicating that the rule has been relaxed in the case of deeds. Here, however, the deed was not dated or acknowledged, was handed to the grantee for examination merely. There was in no sense a legal delivery of the deed and the case falls into that class where fraud or mistake in obtaining physical possession of the instrument is permitted to be shown.

The following cases may be cited upholding the rule as to sealed instruments other than deeds for lands.

Foley vs. Cowgill, 5 Blackf. 18; 32 Am. Dec. 49 (Ind. 1838).

The court says:

"A deed may be delivered to a stranger to take effect upon a condition to be subsequently performed; but if it be delivered to the obligee upon such contingency the condition is a nullity, and the delivery absolute," citing the early English authorities.

Corcoran vs. Dougherty, 4 Cranch C. C., 205; Fed. Cas. No. 3227.

Head note 1 is as follows:

"It is competent for the defendant in an action upon a special contract in writing, not under seal to present a parol condition not stated in the written contract."

Westeman vs. Krumweide, 30 Minn., 313; 15 N. W., 255.

Skaaraas vs. Finnegan, 16 N. W., 456 (Minn.).
Following *Westeman vs. Krumweide*, *supra*.

State vs. Lewis, 73 N. C., 138; 21 Am. Rep., 461.
This was a suit on a guardian's bond and the defense set up was a conditional delivery.

The court says:

"But an absolute delivery as a deed by a party executing it is incompatible with a delivery on condition, and supersedes as to him any previous notice of incompleteness. It estops the party from any defense inconsistent with it."

Fulton vs. Hood, 34 Penna. St., 365; 75 Am. Dec., 664.

Ward vs. Lewis, 4 Pick. (Mass.), 518. The assignment by an insolvent debtor in trust for his creditors by an indenture of three parts was signed and sealed

and purported to have been delivered by the debtor, the trustees and some of the creditors. It was held that parol evidence was inadmissible to show that the delivery was conditional.

The court says at page 519:

"We are therefore satisfied, that the deed of indenture was delivered by the debtors to the assignees and to the creditors. It could not have been delivered as an escrow, because it was delivered to the parties; an escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. Upon delivery it became an absolute deed, and went into immediate operation as to all who had executed it. If it had been the intention of the parties to make a conditional assignment, to take effect only upon the signature of the whole or a major part of the creditors, that condition ought to have been inserted in the instrument itself. But to permit parties to a deed purporting to be absolute, to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief."

Newman vs. Baker, 10 App. D. C. 187. (District of Columbia, 1897.)

Held, that parol evidence is inadmissible to show that it was orally agreed between the parties to an executory sealed instrument, before delivery, that it should not take effect unless within one year from its date one of the parties should do certain acts not set forth in the instrument itself.

Ryan vs. Cooke, 172 Ill., 302; 50 N. E., 213 (1898).

This was a suit upon a sealed contract in reference to the manufacture and sale of certain patented articles. The attempt was made to introduce parol testimony to show that the contract was not to become operative, except upon a certain contingency. This testimony was held to be inadmissible.

The court says on page 215:

"Neither a deed nor any other sealed instrument can be delivered to the grantee or the obligee himself, as an escrow, to take effect upon a condition not appearing on the face of such deed or other instrument. Such deed or other instrument becomes absolute, at law, unless the delivery is made to a stranger," citing Illinois cases.

"Undoubtedly, the delivery of a written contract is necessary to give it binding effect, and delivery is a question of intent; and the character of the delivery, whether absolute or conditional, may be established by parol. *Jordan vs. Davis*, 108 Ill., 336. *But, while it may be shown that a deed or contract is not to be delivered until a condition is performed, yet it cannot be shown by parol that actual delivery was made under an agreement that a condition should be performed, and that the deed or contract should not be operative unless it was performed. In the one case the purpose of the proof is to show want of a legal delivery, but in the other case the effect of the proof is to contradict an instrument absolute on its face by showing, contrary to its terms, that it is not absolute, but only conditional.* Devl. Deeds, Sections 295, 315; *Ward vs. Lewis*, 4 Pick., 518.

* * * * *

"It is said, however, that a different rule prevails in regard to instruments under seal from that which applies to instruments not under

seal, and that the contract in the present case, although having sales attached to it, is not necessarily such a contract as is required by the law to be under seal."

The court then discusses Illinois cases on the subject of escrow and concludes that the rule is no different, although the contract would be one which would be valid if not under seal.

Lefkovitz vs. First National Bank, 44 So., 613 (Ala., 1907).

Headnote 5 is as follows:

"In an action on a guaranty of the payment of debts made by defendant and others, defendant could not show he signed the contract under an agreement that, if one of the parties to the contract failed to ratify a signature by his agent, the contract should not bind defendant, since that would be varying the terms of the written agreement."

The court says:

"It is settled law in this state that there can be no delivery in escrow to the obligee, himself."

We submit that the effect of the above cases is sufficient to discredit *Blewitt vs. Boorum*, *supra*, upon which the counsel for the defendant relies.

The proposition that parol evidence will not be admitted to show that a sealed instrument delivered to the party of the second part was not intended to be effective until some condition precedent had been performed does not depend upon any principle peculiar to deeds for real estate as distinguished from other sealed instruments. It is based upon inherent distinction between instruments not under seal and all sealed instruments. A contract not under seal may be either verbal or in writing. For the validity of a contract not under seal, whether it be by words or in writing, delivery is not essential. The test is—the

meeting of the minds, and that may have occurred without delivery. But, with a sealed instrument delivery is essential. With this conception of the sealed instrument and of the solemnity attached to the affixing of a seal, it is easy to understand why the courts should be unwilling to permit the party of the first part in a sealed instrument, who has delivered it to the party of the second part, to be heard to say that the sealing and delivery were not to be effective.

We would also point out that to permit the defendant to prove what it offered would be directly to alter the written instrument in question, the agreement of indemnity, and not simply to make it inoperative until a condition precedent had been met. The defendant offered to prove that the agreement was not to be operative until the surety company should consent to the assignment of the Wakefield contracts to the Conway Contracting Company and become responsible for it in the same way that they were then responsible for Minahan & Costa, who held the Wakefield contracts (page 157); that the surety company was to assist in procuring the acceptance by the Town of Wakefield of the Conway Contracting Company in place of the firm of Minahan & Costa, and was then to become surety for Conway Contracting Company on a new bond to the Town of Wakefield (pages 176-177; page 182, lines 25 to 40; page 183, lines 1 to 10; see also page 156, lines 1 to 10). The attempt was to show that Minahan & Costa's obligation to the Town of Wakefield, by reason of its contracts and its bonds were to be terminated and a contract relation established between the Conway Contracting Company and the Town of Wakefield, and a new bond given. We submit that proof of this kind would tend to alter the agreement of indemnity itself, with respect to the tenth clause, which was an undertaking to be answerable for the bonds of Minahan & Costa thereto-

fore issued. If Conway did not mean to be answerable on the indemnity agreement until Minahan & Costa had been eliminated from the Wakefield business and the Conway Contracting Company substituted for them, both as contractor in a contract and obligor on a bond, then why should Mr. Conway be entering into an agreement to be answerable for the bonds of Minahan & Costa to the Town of Wakefield in connection with said contracts. Conway in effect says, "I agreed in writing that I would be answerable for all of Minahan & Costa's obligations, but I want to show a parol agreement that this was on condition that some of Minahan & Costa's obligations be got out of the way." This would permit him to vary the written instrument by parol.

DEFENDANT-APPELLANT'S SECOND POINT
THAT THE COURT IMPROPERLY ADMITTED
IN EVIDENCE A COPY OF RELEASE.

We answer:

1. As it was not necessary for the plaintiff to prove the execution and delivery of the release to Fell and Costa (see opinion of Supreme Court), it makes no difference whether the court properly or improperly admitted the copy.

2. The decision as to sufficiency of search for the original was a matter within the discretion of the trial judge, and his decision will not be disturbed by this court.

The record shows that plaintiff's counsel had not completed his proof of endeavor to obtain or trace the original when the trial judge ruled that the proof of search was sufficient and the copy would be admitted. Thereupon, further proof along that line was dropped. It should be remembered that of the three men to whom the plaintiff's proofs showed that the release had been delivered, Messrs. Conway, Minahan

and Hanna, Minahan and Hanna were both dead, Conway denied having the release. Anyway as the release was in form a release of Feli and Costa and was to go to them it would be natural to look for the original in their custody.

3. The defendant did not make the insufficiency of proof of search for original the ground of objection at the trial. At page 95 the objection was made in terms that show that while defendant's counsel was not admitting that we had proven search for the original so as to open the door to proof of a copy, he was basing his objection upon another ground.

DEFENDANT'S THIRD POINT THAT THERE SHOULD HAVE BEEN A NON-SUIT BECAUSE THERE WAS INSUFFICIENT PROOF THAT THE PLAINTIFF COMPANY WAS ADMITTED TO DO BUSINESS IN THE STATE OF MASSACHUSETTS.

As to this we say :

1. The point is not covered in the notice of special matter that accompanied the plea, nor in the specification of defenses (see pages 24 to 28).

2. Even though it should appear that the plaintiff company was not authorized to do business in Massachusetts that could be no defense to a suit on the undertaking to indemnify the surety company against all obligations issued by the American Surety Company for the firm of Minahan & Costa prior to June 26th, 1901. (See tenth clause of the indemnity agreement on which suit is brought, page 22 of Case.) The bond given to the Town of Wakefield, Massachusetts was one of these bonds and it was therefore covered by this indemnity agreement. In other words, the indemnitors did not agree to indemnify the plaintiff company on all bonds that it might issue covering transactions in states where it was permitted to do business, but on "all bonds."

3. The fact that the Town of Wakefield accepted the plaintiff company as surety on the bond of Minahan & Costa, and the fact that this bond was good enough to support a judgment against the surety company on which they had to pay over \$45,000 was sufficient, in the absence of contradiction, to take the case to the jury on the question whether the plaintiff company was authorized to do business in Massachusetts.

4. The case shows that the bonds given to the Town of Wakefield were in contemplation of the defendant when he signed the agreement of indemnity. He is therefore estopped to set up the objection that the bond given by the surety company in Massachusetts had not been proven to be a legal act.

DEFENDANT'S FOURTH POINT. THAT THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT.

This was based upon the same grounds as the motion for a non-suit, and these have been considered in the discussion of defendant's third point. An additional ground urged, was that there was no evidence that the officers who had executed the original release were legally authorized to do so, or that the paper produced as a copy was in fact a true copy. This ground requires no consideration if this court shall sustain the view taken by the Supreme Court, that it was unnecessary to prove the execution or delivery of any instrument of release. The point that the officers executing the paper were not shown to be legally authorized, is answered by the fact that the instrument was under seal, and the presence of a seal raises a presumption of authority. See 10 Cyc., 1018, and numerous cases cited. It is apparent further that the surety company having accepted the agreement of indemnity, and their officers having executed and delivered the release would be estopped to deny the au-

thority of these officers. That the copy was shown to be a true copy is found in the testimony of Mr. Mason at page 82, where he stated that this paper was the office copy, retained by the plaintiff company. It was produced by Mr. Mason, the officer of the company under whose direction it was prepared (page 82, line 25), and at page 128 Mr. Mason said, "It was a carbon copy of the original." (See page 128, line 10, to bottom of the page, and pages 129-130.) The point that we did not sufficiently prove it to be a true copy was not made at the trial and is not one of the grounds of appeal (see pages 94, 95, 149).

DEFENDANT'S FIFTH POINT. THAT THE COURT BELOW IMPROPERLY DIRECTED A VERDICT FOR THE PLAINTIFF.

Defendant's brief attempts to point out inaccuracies in the statements of fact contained in the Supreme Court opinion. One of these so-called inaccuracies is the statement that Minahan and Costa assigned their contracts to the Conway Contracting Company, etc., and that after the assignment of the contracts the indemnity bond in suit was signed. Reference is then made to offer of proof at page 177, but if we turn to that offer we will find that it included an offer to prove the assignment of the Wakefield contracts from Minahan and Costa to Thomas A. Davis, trustee, dated June 15th, 1901, which was prior to the date of the indemnity agreement (p. 12), that date being June 26th, 1901. That the Conway Contracting Company could act under an assignment from Minahan and Costa without the consent of the Town of Wakefield, and that they did act and were actually engaged in the prosecution of work under the contract for six months after June, 1901, is shown by the answer of Mr. Conway at the top of page 157, where he speaks of being "laid off by the Town of Wake-

field," and says that was in the month of December, 1901. Again, on page 171, he says, "We were stopped on the work in Wakefield," and his preceding answers on page 170 show that this was in December, 1901.

Mr. Mason told that he learned that the Conway Contracting Company was to take an assignment of the Minahan and Costa contracts (page 117). He expressed for the company willingness that such assignment should be made (page 119, lines 1 to 10, and the answer to the question). On page 164, we have Mr. Conway telling of a visit to the office of the representative of the Surety Company,

"for that job to be transferred to us—that job to be transferred from Minahan and Costa to the firm, the Conway Contracting Company, and Mr. Clark said that will be all right."

Exhibit D. 3, found at page 251, is a letter introduced by the defendant showing that the Surety Company had executed and forwarded to the Conway Contracting Company its consent to the assignment of the Minahan and Costa contracts. All through the case, these and other bits of testimony show that there was an assignment to the Conway Contracting Company, under which the Conway Contracting Company went on the work and proceeded about six months, and if it be the fact that this assignment was never formally consented to by the Town of Wakefield, that does not do away with the fact of the assignment.

Another so-called inaccuracy is that the Supreme Court opinion says that the Conway Contracting Company failed to carry out the contracts. That this is so is shown by the above cited answers of Mr. Conway.

Then defendant's brief argues that the Supreme Court opinion was inaccurate in stating that the Conway Contracting Company failed to carry out the

contracts with the Town of Wakefield, basing it on the fact that it was never recognized by the Town of Wakefield as the assignee of this contract. This is a *non-sequitur*, for it is manifest that the Conway Contracting Company may have gone on with work on the contracts, though not recognized as assignee. It could do this as the representative of Minahan and Costa, the contractors, in their place, and that they did so appears from Mr. Conway's answers above cited.

Defendant's brief endeavors to support its contention on this point by reference to the opinion of the supreme court of Massachusetts, and in the oral argument before said court, defendant's counsel made extended references to the Massachusetts court's opinion in spite of the fact that a copy of this opinion was one of the documents offered by the defendant at the trial, and excluded by the court (pages 184 and 185). We submit that while this court may be referred to the reported decision of the Massachusetts court, for ascertainment of that court's statement of law, the reported case can not be treated as part of the evidence in this case to establish the fact that it was based upon the assignment by Minahan and Costa to the Conway Contracting Company as a breach of the contract with the Town of Wakefield.

It is also said that the Supreme Court opinion states without foundation in the record that Mr. Conway was represented at the trial in Massachusetts by counsel of his own selection. We are at a loss to see how this statement can be made in view of the fact that Mr. Clemens testified that he and Pelletier were the attorneys of record for the surety company, the defendant in the Massachusetts suit, that Mr. Conway was present and testified, and that in the course of his testimony he was asked what he had done with a certain notice and replied, "I gave it to my counsel." Then he added, "to our counsel." He was then asked,

"Who is your counsel," and pointing to Mr. Lee who was conducting the examination he said, "our counsel." (See pages 143 to 145.)

Defendant's brief then reviews what it calls a conflict of testimony between Mr. Mason and Mr. Conway as to the making and execution of the release and its delivery. Again we remark that this is unimportant if this court accepts the view of the Supreme Court that no written acceptance of release was necessary. But there was no real conflict between Mr. Mason and Mr. Conway on this point. We produced the office carbon copy of the original release made in the office of the plaintiff company and retained by them. Mr. Mason, the vice-president of the plaintiff company, under whose direction the release had been prepared, said it was a copy, and that the release had been executed and delivered. Mr. Conway at first denied that there had been any release (page 154), that is, he said he had never seen it; that the agreement of indemnity (page 12) had not been executed at the New York office of the Surety Company as Mr. Mason had testified, but had been executed in Newark before Mr. Clark, the New Jersey representative of the plaintiff company. Cross examination brought out the statement that Mr. Conway had signed but one paper on the occasion of his visits to Mr. Clark's office, and that the agreement of indemnity (p. 12) was that paper (pages 160-161). We then produced a paper that he did sign in Mr. Clark's office. It was a statement of his real estate, in the handwriting of Mr. Clark. Mr. Conway admitted that he signed it in Mr. Clark's office (page 168, line 30). This bore date June 24th, 1901, two days earlier than the date of the agreement of indemnity. As Mr. Conway was clear that he had signed but one paper on his visit to Mr. Clark's office, and also remembered that Mr. Clark got from him some statement of his real estate on

that occasion, it was evident that his story of going to Mr. Clark's office and there signing an indemnity agreement, had really referred to a visit there to sign a statement of his real estate, and that his recollection of his visit had been by him misapplied to the execution of the indemnity agreement.

Defendant's brief then makes the point that the plaintiff did not call Mr. Bishop, the notary before whom the alleged release was acknowledged. It is apparent that the existence and execution of such a release was not contradicted by anything in the defendant's proofs. The defendant's contention at the trial was that such a release was never delivered. For us to produce Bishop to swear he had once taken acknowledgment of such a paper, would not tend to prove that it had been, or would we expect Mr. Bishop to recollect it, having been taken ten years ago, and in the course of routine.

The testimony of Mr. Tierney is criticized. That is, the court is told "for an estimate of his testimony, we suggest the reading of his direct and cross examination." This criticism by insinuation we think will be sufficiently answered by reading the testimony as suggested. It is said that Mr. Tierney assumed to identify Mr. Conway, "although he had previously been coached as to his identity." This statement is without any foundation. Mr. Tierney said that Mr. Mason called his attention to Conway as they came into court, and asked him if he had even seen him before, and Tierney said "and having seen him I say I have" (page 198, line 30). This does not justify the statement that Mr. Tierney had been "coached."

Then defendant argues that Tierney may never have taken the acknowledgment to the agreement of indemnity (page 12) because Mr. Bishop, another employee of the surety company had admitted having taken acknowledgments irregularly, without having the parties before him. It is argued that Tierney

may be presumed to have done things the same way. There is nothing to justify this presumption.

Then it is argued (defendant's brief, page 28) that there is great significance in the fact that the plaintiff company sent premium notices addressed to Minahan and Costa, requesting payment of premiums, although knowing that Costa would have been absolutely discharged, and that these notices bore date a considerable period after the said release was to become effective, and that the plaintiff company retained in its possession the original agreement of indemnity upon which Messrs. Fell, Minahan and Costa were responsible, and from which (page 13) it was supposed to have released Fell and Costa.

And defendant asks why was this agreement not surrendered to Messrs. Fell and Costa, or Messrs. Conway, Minahan and Hanna. In the oral argument counsel spoke of these premium notices as having been sent to Costa. There is no proof of this. They were in fact addressed to the firm of Minahan and Costa, and in this connection we point out that in the original agreement of indemnity (P. 11, page 228) the firm of Minahan and Costa was named as a party additional to the individuals, D. F. Minahan and Antonio Costa, and that it was executed by and in the name of the firm as well as by the individuals Minahan and Costa. So too the original bond of the Town of Wakefield was executed in the firm name of Minahan and Costa, besides being executed by Minahan and Costa as individuals. (Exhibits P. 1, P. 2, P. 3, pages 217 to 222, both inclusive.) It seems quite natural that in the business practices of the plaintiff company, bills may have continued to have been sent out to the firm of Minahan and Costa, notwithstanding Costa, an individual party to the indemnity agreement had been released, on going out of the firm.

As to the surrender of the bond, why should it be assumed that it would be surrendered, or why should

any assumption against the substituted indemnity agreement be made from the fact that it was not surrendered? For all that it appears it may be that the original indemnity agreement was to remain in effect against Minahan, one of the individual parties to it not released, or against the firm of Minahan and Costa, as a firm; or it may have remained in hands of the company because no one interested took the trouble to ask for it.

Then we come to the main contention of the defendant under this fifth point, that the Supreme Court was in error in its view that the acceptance of the agreement in suit by the plaintiff company in itself worked a release of Costa and Fell, and that proof of the execution of a formal release was unnecessary. It is stated (defendant's brief, page 30) that the suggestion that proof of execution and delivery of the release was not necessary was first made by the Supreme Court on the argument of the rule to show cause; that this point was not presented upon the trial of the cause, and is inconsistent with the plaintiff's theory of the case. That this is not a correct statement will be seen upon an examination of the record. At page 147 we find the motion for non-suit, and one ground urged was that the alleged release was not shown to have reached Fell and Costa, or to have come to their knowledge. This, of course, afforded an opportunity to urge upon the court the counterview that it was not necessary for the plaintiff to show either of these facts, and that anything to operate as a release would be sufficient, whether it would be the delivery of the instrument or by the conduct of the surety company estopping it from any attempt towards the old agreement against Fell and Costa. The record simply states "counsel argued" (page 148, line 28).

On page 151 you will find counsel for the plaintiff urging that if the contention of the defendant was

that no release was delivered to the persons named in the instrument, there is nothing in that to go to the jury, and the court was asked to direct a verdict.

At page 152 we find the learned trial judge saying:

"* * * all that was necessary for the plaintiff to prove, to use an expression used by counsel in the course of the trial, was the delivery of the paper to the persons who asked for it. * * *"

Again we find the judge remarking that if the release was executed and delivered to Conway as Mason had described,

"It would be effectual as between the parties to this case, it seems to me, by the operation of the doctrine of estoppel, to remove Fell and Costa from the position of liability."

This certainly would indicate that the point of release by estoppel resulting by the acts and conduct of the parties had been presented.

At this point we would reply to the suggestion made by Mr. Justice Garrison in the oral argument that the acceptance of the agreement of indemnity (P. 12) by the plaintiff company might have operated as an estoppel against that company in any attempt to hold Costa or Fell, but while this estoppel might be set against the plaintiff company, it could not be set up in its favor. We would point out that the estoppel is not being set up in favor of the plaintiff company; that the inquiry was solely as to whether there was consideration for the agreement of indemnity (P. 12). This is an inquiry made by the court. When the plaintiff company produces and sues upon the agreement of indemnity, the court inquires whether there was a consideration for it. If it finds that the acceptance of the substituted indemnity agreement worked a release of Costa and Fell, it then determines that the consideration for the indemnity agreement (P. 12) expressed in it has been proven. This is a conclusion to which the plaintiff company is entitled

without regard to the fact that the estoppel thus found to exist is not being asserted against the company in an attempt by it to enforce the original agreement of indemnity.

In considering the Supreme Court opinion and this whole question of whether or not the plaintiff company did release Costa and Fell, the inquiry is all from the point of ascertaining whether there was a consideration for the agreement in suit, so that the action may be supported. We say it makes no difference in the case of a sealed instrument, such as this, whether the promise on the part of the plaintiff company had been performed or not, but we also contend that in fact it had been. It may be that this court will take the view expressed in the Supreme Court opinion that when the plaintiff company accepted the agreement of indemnity, as undisputedly it did, there was then worked a release of Costa and Fell by the estoppel arising out of that acceptance. The defendant urges that the fact of retention by the plaintiff company of the original agreement of indemnity, with the sending of premium notices to the old firm of Minahan & Costa were sufficient to make the acceptance of the indemnity agreement and the consequent release by estoppel a jury question, but whatever uncertainty or doubt there may be about the fact of the acceptance by the plaintiff company as indicated by the sending of these premium notices, must all be resolved in favor of a final and binding acceptance in the demands shown to have been made by the plaintiff company upon the parties to the substituted indemnity agreement, calling on them to defend the suit in Massachusetts and calling on them to pay the judgment, together with the subsequent commencement of this action. It should also be remembered that a release of Costa and Fell need not have been in affirmative form, that the negative of holding Costa and Fell was equivalent to the affirmative of releas-

ing them, or in other words, that if, as the result of acceptance of this substitutional indemnity agreement, at the time of its delivery, as the Supreme Court's thought, or in any of the later acts or conduct of the plaintiff company, the plaintiff company was thereby made unable to enforce the old agreement of indemnity against Costa and Fell. This was the same as release.

In conclusion we submit that the defendant entered into the agreement in suit was undisputed. It was shown to have a consideration expressed in the instrument, that was sufficient. All the testimony, the rejection of which is the subject of the defendant's principal complaint, was testimony that would tend to establish another additional consideration for the instrument, not expressed in the written instrument, and therefore properly excluded as tending to alter the instrument; that that offer should not be regarded as an offer to prove a condition precedent making the delivery of the instrument in suit ineffective until the condition was complied with; that if so regarded it was outside of the defendant's pleadings, and was therefore inadmissible, and that if outside of the defendant's pleading, no amendment should now be permitted to cure that defect. And further, that even if it were within the defendant's pleading it was inadmissible, because of the fact that the instrument in suit was under seal, and that it is not permitted to prove that a sealed instrument has been delivered to a party named therein in escrow, or on a condition precedent to its becoming effective. And finally, we urge that no harmful error was done to the appellant, and that the judgment below should be sustained.

ALFRED F. SKINNER,

CORWIN HOWELL,

Counsel for Plaintiff-Appellee.

June Term, 1914.

New Jersey Court of Errors and Appeals.

AMERICAN SURETY COMPANY OF
NEW YORK, a Corporation,
Plaintiff-Appellee,

v.

MARY L. MASON, Administra-
trix of JAMES CONWAY, De-
ceased.

Defendant-Appellant.

On Bill from Su-
preme Court.

REPLY BRIEF FOR DEFENDANT- APPELLANT.

The answer of the appellee to the first point made in our brief is three-fold. First,—that the matter was not presented to the Court below; second,—that if the matter was presented to the Court below, it could not properly be considered because of the state of the record; and third,—assuming that it was properly presented and in the case, that nevertheless the rule we contend for does not apply to sealed instruments.

The appellant's contention that the matter was not presented to the Court below is most disingenuous. The very point now discussed before this Court was urged by the appellant in the Court below with the greatest insistency. The record does not, of course, show the arguments of counsel, and nothing appears there as to the exact grounds urged.

The matter, however, was so doubtful in the mind of the trial Judge, that he did not render his decision thereon until after a recess (see p. 120). Very many of the cases which are cited in the brief of the appellant before this Court were brought to the attention of Judge Adams and the plaintiff then endeavored to distinguish them upon the very ground which he now urges, namely, that the rule had no applicability to sealed instruments; and counsel for the plaintiff himself, among other authorities, cited before the Court below, the decision of this Court in *New Jersey Rubber Co. v. Commercial Union Insurance Co.*, 35 Vr., 580, as an authority for this distinction. Numerous offers of proof were made and questions asked, and it was only after it appeared clearly that the Court below had firmly made up his mind as to the legal principle to be applied that no further offers of proof in this respect were made. With thus these very cases presented to the Court, and in view of the repeated offers made presenting this matter from its various aspects, it is, as we have stated, most disingenuous now to claim that it was not presented to the trial Court.

Nor ought the appellee's insistent that this defense was not properly in the record to move this Court. The plea of the defendant as to the first count of the declaration was *non est factum*, to which plea a notice of special matter was annexed. The defense offered is fairly covered by numbers 3, 14, 15, 17 and 18 of the notice of special matter and it is also clearly referred to in number 14 of the specification of defenses. With the record thus, it cannot fairly be argued that the matter was not brought to the attention of the Court below, or that it was not in the record.

McGlade v. Home Insurance Co., 71 N. J. L., 40, does not affect this cause.

The discussion there related to the effect of Section 118 of the Practice Act, and that section refers plainly to conditions precedent contained within the contract upon which suit is brought. This dis-

tion is obvious. This section of the Practice Act was never meant to apply to collateral matters or defenses outside of the contract such as conditions precedent which prevented the instrument from ever becoming a contract.

In *New Jersey Rubber Co. v. Commercial Union Insurance Co.*, *supra*, Mr. Justice Dixon recognized the distinction between defenses resting upon terms of the agreement in suit and others resting upon collateral matters. Thus he there said:

“Two defenses were interposed, one resting on the terms of the policy, the other resting on an agreement made before the policy was issued.”

Furthermore, the objection now made was not raised by the plaintiff before the trial Court, but the propriety of the offer of the evidence as to the condition precedent was considered upon the merits. If the plaintiff intended to assert that the issue was not covered by the pleadings, it was the duty of the plaintiff to make that insistment at the time of the trial. This was not done, however, and the merits of the offer were fully argued. If the point had been made in the Court below and been considered well taken, there would have been power in that court to permit an amendment to the defendant. Thus it was provided by Section 104 of the Practice Act then in force:

“The Court may, at or before the trial of the action, upon terms, permit the notices herein mentioned to be filed or amended.”

If, therefore, there was a defect in the notice attached to the pleas in this cause, which we deny, then reference thereto should have been made at the trial, where the Court could have permitted the filing of a new notice or amendment of the notice already filed. It is too late now to raise this objection, and this Court may, if it considers the objec-

tion well taken, nevertheless consider the record as if the requisite amendment had been made. That an amendment could readily have been obtained at the trial is plain, since there can be no possible suggestion of surprise. The plaintiff concedes that the offer was covered by number 14 of the specification of defenses, and the plaintiff was, in fact, prepared at the trial to argue, and it then argued fully the propriety of the admission of evidence as to the condition precedent.

We come then to the merits of the admissibility of this testimony. As pointed out in our brief, in the consideration of this matter, we start, as to writings not under seal, with the unchallenged decision of this Court in the case of *N. J. Rubber Co. v. Commercial Union Ins. Co.*, *su ra* (assuming that the instrument there involved was not sealed, which doesn't appear from the report), to the effect that such evidence is admissible. The only question then is whether the rule recognized in that case is inapplicable to the case at bar because of the fact that the agreement of indemnity in suit, while not necessarily possessing a seal for its validity, did happen to have seals thereon. The appellee argues that the presence of a seal leads to a necessary distinction. We submit that the discussion in the brief of the appellee does not weaken the effect of the well-considered authorities which we have cited in our brief. They do not support the distinction which the appellee contends for.

Findley v. Means, 73 S. W. (Ark.), 101, did not involve a sealed instrument. The rule therefore laid down in that case is contrary to the admitted weight of authority and is directly contrary to *N. J. Rubber Co. v. Commercial Union Ins. Co.*, 35 Vr., 580.

Corcoran v. Dougherty, 4 Cranch, C. C., 205, did not involve a contract under seal. It is an authority for the admissibility of evidence as to a condition

precedent affecting a written contract not under seal. Nothing is said in the opinion as to any distinction as to sealed instruments. They are not even mentioned in the opinion.

In *State v. Lewis*, 73 N. C., 138, 21 Am. Reps., 461, the precise point here in question was not raised. It does not appear from the report whether the instrument in question, which was a guardian's bond, was sealed or not sealed, nor was the question of the admissibility of evidence as to a condition precedent discussed. The effort was to show by parol, as a defense to an action on the bond, that the defendant had been induced to sign it by a promise that another person would also sign it, which promise he always believed was fulfilled and which had not been fulfilled. The decision went upon the ground that the person claiming the benefit of the bond had not been a party to the alleged fraud and had accepted the bond as a valid instrument and that of the two innocent parties, the defendant, inasmuch as he allowed the bond to go out without any question appearing upon its face, must be held bound thereby. Thus the Court said:

"By his negligence the defendant enabled Speight to become possessed of the indicia of a guardian and to obtain into his possession the property of the relator which he wastes and then dies insolvent. No impropriety is imputed to the defendant; but no principle of equity is better established than that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

Lefkovits v. First National Bank, 44 South. (Ala.), 613, did not involve a sealed instrument, and as the Court distinctly pointed out in its opinion, the evidence proposed was not purported to establish a condition precedent. Thus the Court said:

"The condition sought to be set up in the third pleading is in the nature of a condition

subsequent rather than a condition precedent."

If this case is to be considered an authority for the proposition that evidence of a condition precedent may not be admitted as to a writing not under seal, then it also is contrary to *N. J. Rubber Co. v. Commercial Union Ins. Co.*, *supra*.

Ryan v. Cooke, 50 N. E. (Ill.), 213, to which a lengthy reference is made by the appellee, is also not in point. It appears quite clearly from the statement of facts in that case that the evidence offered did not relate to a condition precedent which prevented the contract in suit ever becoming a contract. Thus as appears from the statement of pleadings the defendant filed a plea stating

"That on August 26th, 1889, and after the signing, sealing and delivering of said contract the defendants and plaintiffs made another contract whereby it was agreed that such written contract would only become binding upon the defendants in the event of the defendants obtaining from the City of Chicago a certain contract for which they were negotiating with said City, * * * and that the contract referred to as having been made subsequent to the written contract was a verbal one; and it was further averred that the defendants in pursuance of said verbal contract, endeavored to procure from said City of Chicago a contract * * * and * * * failed to obtain such contract from the city by means whereof the written contract referred to in the declaration became null and void."

From this statement of the pleadings it is apparent that the case was tried on the theory that the original contract had been finally delivered as a binding agreement and the effort was to prove a later oral contract, the non-performance of which, it was alleged, made the written contract void. This was clearly a procedure forbidden by the rule respecting the contradiction of written instruments.

That this was all the Court had in mind appears very clearly from a reading of its opinion and with respect to the rule which the Court laid down it was said,

“The rule is made to apply to instruments not under seal as well as to instruments under seal.”

and again it was said by the Court:

“Where an agreement is under seal, it is not competent, either at common law or under the law of this state, to modify or change it by proof of a subsequent parol understanding or agreement.”

In *Ward v. Lewis*, 4 Pick., 518, the significance of a seal or no seal was not involved. The case was decided on general circumstances of estoppel and fair dealing. It is not an authority in point. Nor was the question of a seal or of a condition precedent raised in the case of *Fulton v. Hood*, 34 Pa. State, 365. It was a plain case of an effort to introduce evidence contradicting and varying the express provisions of a written agreement. There was no pretense of delivery depending upon the fulfillment of a condition precedent. There is nothing in the discussion by Mr. Justice Whelpley in *Black v. Shreve*, 13 N. J. Eq., 455, which is contrary to our contention. Thus he is very careful to say in that case:

“No agreement in conflict with the plain denial of the deed is permitted to be proved
* * * to show that its operation as a deed is to depend upon the performance of some condition subsequent.”

. Nor is there anything of this character in *Aller v. Aller*, 40 N. J. L., 446. All that case held was that the statutes with reference to evidence relating to sealed instruments were not intended to take away from the binding effect of a voluntary executory contract under seal.

Westman v. Krumwiede, 30 Minn., 313; 15 N. W., 255, did not involve a sealed instrument. It is merely an authority for the admissibility of such evidence as to instruments not sealed.

Reference is made to *Wigmore on Evidence*, but counsel for the appellee fail to point out that it is the conclusion of that author, after a thorough review of the authorities, that such evidence is admissible and that there is no reason upon principle why there should be any distinction between sealed and unsealed instruments (*Wigmore on Evidence*, Sections 2408 and 2410).

Nor are the New Jersey decisions cited by the appellee authorities which require the making of the distinction contended for in the case at bar.

Much reliance is placed upon the case of *Ordinary v. Thatcher*, 12 Vr., 403, in which the opinion of the Supreme Court was written by Chief Justice Beasley. The case is quite like *State v. Lewis*, *supra*. The instrument there in question was a guardian's bond given in the usual form to the Ordinary. Many years after the bond had been given, and after it had appeared that the guardian for whom the bond had been given had wasted the estate and that there was a loss, there was an effort made by the sureties to show that they had delivered the bond to the Surrogate in escrow. The facts in that case obviously were not at all similar to those in the case at bar, and clearly the decision there was proper. The Chief Justice found, moreover, from the evidence that the delivery of the instrument had not been conditional, though the expectation that some other person would sign the bond may well have been in the minds of the sureties at the time of their signature and the delivery of the bond. But he pointed out the distinction between a condition which operates to prevent a final delivery and a final delivery made with the expectation that something will be done thereafter. Thus he said

“Now this testimony, as I construe it, shows this and nothing more, that both these

sureties who signed this bond believed that it would be signed by the third surety and they had the promise of the principal obligor that he would procure the signature of such third surety, but such belief founded on such promise does not manifest or constitute a conditional delivery of the instrument. Neither of these sureties intimated by word or act that in case of the failure of the other party to sign the bond was to be inefficacious with respect to himself."

In *Ordinary v. Thatcher* the plainest principles of estoppel and fair dealing required the result which was there reached. There was not in that case squarely presented the issue, whether *as between two contracting parties*, it may not be shown that an instrument which one asserts is a contract was signed upon the express condition precedent that it should not become a subsisting instrument until some certain other event had happened, even though the alleged contract be under seal. The question at issue in the case at bar is decidedly different from the situation discussed by the Chief Justice in *Ordinary v. Thatcher*. That he had this distinction clearly in mind between a condition which prevented a completed delivery and the mere expectation of something to be done by the other party is plain from his own language as well as from his approval of the language of Chancellor Williamson in the case of *Black v. Lamb*, 1 Beas., 118, where the Chancellor held that evidence had been properly admitted as to a sealed composition agreement of a parol condition with respect to the circumstances under which that agreement was to be finally delivered.

Furthermore, the Chief Justice first found that the delivery to the Surrogate was actually a delivery to the Ordinary, the person to whom the bond ran. There is no such circumstance of actual delivery present in the case at bar. Mr. Conway testified that he left the instrument after he signed it with

Mr. Clark, who was a mere resident agent of the company in Newark. According to Mr. Mason the agreement was left with him. Mr. Mason at that time was only an Assistant General Solicitor of the plaintiff. Counsel for the appellee in their brief refer to Mr. Mason as a Vice-President of the plaintiff. This reference is misleading. While Mr. Mason was a Vice-President at the time of the trial some ten years after the occurrence in question, he was not a vice-president of the Company at the time of the signing of the agreement in suit, but was at that time only, as shown, an Assistant General Solicitor, whose office was in a different building from the head offices of the company. Even if, therefore, the bond were handed to him, it need not necessarily be considered as then in the possession of the plaintiff, since it did not come into the hands of any of its officers or any one who could have been considered in the legal sense as the corporation for the purpose of the receipt of the bond. The situation was similar to that which obtains where papers are left with a lawyer, even though he may be the lawyer of a party entitled to a benefit thereunder. So that, even on the narrow question of delivery, we have not the paper traced into the hands of the party entitled to a benefit thereunder as in the Thatcher case. Even if one considers the question, therefore, from the narrow point of view of the doctrine of escrow, there is no reason why Mr. Mason, being only Assistant General Solicitor of the plaintiff—a lawyer—could not have been considered as sufficiently distinct from the plaintiff corporation to permit of the agreement having been left with him without it being understood thereby to have been put into the possession of the plaintiff. *A fortiori* is this so if Mr. Conway's evidence that the agreement was left with Mr. Clark be accepted.

Brewing Co. v. Ayres, 60 N. J. Eq., 190, and *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq., 139, both cases in the Court of Chancery,

are entirely distinguishable upon their facts. Reference is also made to the opinion of this Court in *Lake v. Weaver*, 6 Buch., 208. The point now argued, however, was not there at issue and the discussion which is found in that case relates to deeds of real estate. Thus the Court said:

“The stability of all titles to lands rests at bottom upon this rule.”

We therefore most respectfully submit that the only authorities which have directly and thoroughly considered the very question here at issue are in accord with the appellant's contention and that no ground exists, upon reason or authority, for a distinction as to instruments of the character of that involved in the case at bar because of the presence or absence of a seal. With this issue for the first time clearly and unequivocally presented to this Court, we submit that in view of the modern enactments with reference to the uses and functions of a seal and the present tendency of the courts in their dealings with sealed instruments that this Court should follow the rule advanced in the well-considered authorities of which *Blewitt v. Boorum*, 142 N. Y., 157, is an example, and equally apply the rule which is recognized in *New Jersey Rubber Co. v. Commercial Union Ins. Co.*, also to instruments which, while not requiring a seal for their validity, and while not, in any manner, altered in effect by the presence of a seal, nevertheless do happen to have a seal.

The effort of the appellee is to insinuate that the appellant was endeavoring really to vary a written instrument by parol and to change the provisions of the agreement in suit. This, we submit, was not the effort at the trial and would not have been the result if the evidence were admitted. The offer related clearly to something to be done which was understood to precede the agreement of indemnity

having any effect whatever as to any of its terms, in fact, becoming an agreement at all. We have already adverted in our brief to the likelihood of this having been the arrangement, since on no other theory was there any reason why Mr. Conway should have undertaken this liability. To exclude this evidence now merely because this instrument which needs no seal, has a seal, would result, we submit, in suppressing the truth, and making effective a supposed agreement which under the real intentions of the parties never became an agreement at all.

The appellee in his discussion of the second and fourth points of our brief, says that the point of the insufficiency of the search for the original copy of the release was not made before the Court below. We submit that the record shows directly the contrary (see pp. 94, 95, 96 and 97). In fact, a strenuous argument was made on this point, and the Court, in deciding to admit the copy in evidence said (p. 96) that its admissibility depended upon two questions, one of which was "whether the search for the lost paper was sufficient."

In the appellee's discussion of the fifth point there is a statement, after a reference to some of the evidence, that all through the case there are bits of testimony which show that there was an assignment of the Wakefield contract to the Conway Contracting Company under which the Conway Contracting Company went on the work. As already shown, the Court below ruled that the facts as to the assignment of the contract were immaterial and he excluded them. But from what did go into the case, it is very clear, and in fact is conceded, that after the signing of the agreement in suit efforts were made to perfect the transfer of the Wakefield contract from Minahan & Costa to the Conway Contracting Company and all the steps which were taken to that end merely substantiate the defendant's

contention of what the true fact was. It is also undisputed that with all that was done the surety company failed to do the final act necessary to the completion of the assignment, namely, become bound to the Town of Wakefield on behalf of the Conway Contracting Company as it had been bound for Minahan & Costa. So the assignment was never recognized by the Town of Wakefield and, of course, without recognition from the Town of Wakefield the effect of everything else which had been done failed. As the opinion of the Supreme Court of Massachusetts shows, the action there was decided upon the very ground that the assignment had never been recognized by the Town of Wakefield, so that it never became effective. The most that can be said, therefore, of all these items of evidence, is that they substantiate the defendant's view of the case and go to show that steps actually were taken to effect the accomplishment of that act which the defendant contends was a condition precedent to the taking effect of the agreement in suit.

With reference to the point which we make as to the sending of the premium bills to Minahan & Costa, an effort is made to minimize the importance of this fact by the suggestion that Minahan & Costa as a firm were still bound. This fails of effect, however, because the original agreement of indemnity upon which Costa and the firm of Minahan & Costa were bound, contained the agreement to pay premiums. Minahan & Costa individually, and as members of their firm, were bound, therefore, under this original agreement to pay these premiums. It was this agreement from which Costa was to be released, and if he was released therefrom the release carried with it freedom from any further obligation with respect to the premiums, and if he was released individually he was released also as a member of his firm. If the plaintiff's contention as to the release was correct, then the only parties thereafter who were responsible for the premiums were Minahan,

Hanna and Conway, and it was improper to send bills therefor to Costa, either individually or as a member of any firm. The old indemnity agreement was, in fact, gone, if the release had been effectuated, *since all the parties who were to remain bound were upon the new agreement of indemnity*, which in all respects was to supplant the old.

The remaining portions of the appellant's brief require no further answer than we submit is already contained in our main brief and is to be found in the record itself. We may, however, in closing, point out that the appellant's brief contains no answer to our contention that even granted the decision of the Supreme Court was unexceptionable in point of law, that nevertheless on the question of the acceptance of the new agreement of indemnity there was such an issue of fact as required the submission of that issue to the jury under proper instructions.

Respectfully submitted,

ARTHUR F. EGNER,

ROBERT H. McCARTER,

Of Counsel for Defendant-Appellant.

June Term, 1914.

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Plaintiff's:

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New Jersey Court of Errors and Appeals

NEW JERSEY SUPREME COURT

Notice of Appeal

(Filed, June 5, 1914)

AMERICAN SURETY COMPANY OF
NEW YORK, a corporation,
Plaintiff-Appellee,

vs.

MARY L. MASON, administratrix
of James Conway, deceased,
Defendant-Appellant.

20

On appeal from
Supreme Court.

TAKE NOTICE, that the above named defendant
appeals to the Court of Errors & Appeals from
the whole of the judgment entered in this cause
on the seventh day of May, nineteen hundred and
fourteen, on the following grounds: 30

1. Because the said judgment was for the plain-
tiff, whereas the judgment should have been for
the defendant.

2. Because the Circuit Court judge before
whom the said cause was tried erroneously ad-
mitted in evidence, over the objection of the de-
fendant, an exemplified copy of the record of a
judgment in the Superior Court of the County of
Suffolk, State of Massachusetts. 40

Notice of Appeal

3. Because the said Circuit Court judge, over the objection of the defendant, erroneously admitted in evidence a certain agreement of indemnity (p. 11), dated April 10, 1901.

4. Because the said Circuit Court judge, erroneously admitted in evidence a certain alleged copy of a release (Exhibit P-13), without sufficient proof as to the search for the original thereof, or proof of the delivery thereof.

5. Because the said Circuit Court judge admitted in evidence, over the objection of the defendant, certain bonds which were marked as Exhibits P-1, P-2 and P-3.

6. Because the said Circuit Court judge erroneously refused to permit the witness Jarvis W. Mason, upon cross-examination, to answer the following question propounded by the defendant;

20 “Q. And furthermore, is it not true that at the same time you expressed a willingness to become responsible for the completion of the contracts by the Conway Contracting Company if Mr. Conway and these two other gentlemen, namely, Messrs. Minahan and Hanna, indemnified your company, in lieu of Mr. Fell and Mr. Costa?”

7. Because the said Circuit Court judge erroneously refused to permit the witness Mason to answer the following question propounded by the defendant (p. 114):

30 “Q. Mr. Mason, before the gentlemen left your office that day, and before they signed the paper, was it not agreed to by you, on behalf of the American Surety Company, that you would become surety
40 for the proposed assignee of the contract

Notice of Appeal

1970 if the indemnity agreement sued on were
-68 signed and delivered to you?"

8. Because the said Circuit Court judge erroneously refused to permit the witness Mason to answer the following question propounded by the defendant:

-102 "Q. And was it not also expressly stated
-101 on that occasion that the paper was signed 10
by those that did sign it on the condition
-68 that when the time arrived the surety com-
-95 pany would become surety without further
-28 expense for the current year to the pro-
posed assignee of the contract, in lieu of
-903 their former surety-ship for Minahan and
W Costa?"

9. Because the said Circuit Court judge erroneously refused to permit the witness Mason to answer the following question propounded by the 20 defendant:

-10 "Q. Did you expect that they would de-
-90 liver the paper to Fell or Costa?"

10. Because the said Circuit Court judge erroneously refused to permit the witness Mason to answer the following question propounded by the defendant:

-79 "Q. Well, you expected them to show
-1026 that release to Fell and Costa, did you
-1026 not?" 30

11. Because the said Circuit Court judge erroneously permitted the plaintiff's Counsel to ask the witness Mason the following question against the objection of the defendant:

-70 "Q. You were asked yesterday after
-791 identifying Mr. Conway whether you had
-791 talked with Judge Skinner in the Court
-1027 Room. Was anything said about the iden-
tification of Mr. Conway in that talk?" 40

Notice of Appeal

12. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask the witness Mason the following question against the objection of the defendant:

"Q. Was Mr. Conway pointed out to you before that by anybody?"

10 13. Because the said Circuit Court judge erroneously admitted in evidence, over the objection of the defendant a certain check which was marked as Exhibit P-7.

14. Because the said Circuit Court judge erroneously admitted in evidence, over the objection of the defendant, a certain receipt which was marked Exhibit P-8.

15. Because the said Circuit Court judge erroneously denied the motion made by the defendant for a non-suit at the close of the plaintiff's
20 case.

16. Because the said Circuit Court judge erroneously refused to permit the defendant to proceed with an offer of proof as follows:

30 "I now offer to prove by this witness the fact that at the interview which he just described a statement was made by him that he only signed this bond upon the condition that the American Surety Company would consent to the assignment of these Wakefield contracts to the Conway Contracting Company, and become responsible for it in the same way that they were now responsible for Minahan & Costa, and that without any further expense for the current year of work, and that Mr. Clark said that he would agree to that."

17. Because the said Circuit Court judge erroneously refused to permit the witness James
40

Notice of Appeal

Conway to answer the following question propounded by the defendant, namely,

“Q. I notice this paper that bears your signature and the signature of Mr. Hanna reads, ‘Application is hereby made to the American Surety Company of New York for the execution of bonds of the suretyship, for us as principal or upon our request under a general contract of indemnity. James Conway and William Hanna. Contracting partnership, and so forth, without undertaking to read it all. Did the American Surety Company ever go on your bond?’” 10

18. Because the said Circuit Court judge erroneously refused to permit the defendant to offer proof in accordance with the following offer:

“Q. I offer to prove the assignment of this contract for the Wakefield work from Minahan, Costa and Fell, to Thomas A. Davis, trustee—that is, Judge Davis by assignment dated the 15th of June, 1901; a subsequent assignment by him, Davis, trustee, to Conway Contracting Company, on the 27th of June, 1901; and to be followed by proof of the fact that after that assignment was made, by the correspondence that was identified yesterday by Mr. Mason, an effort was made to procure from the American Surety Company their bonds for the Conway Contracting Company, which had received the assignment, and refused by the American Surety Company, whereupon the Town of Wakefield rejected the presence of the Conway Contracting Company upon the work, refused to permit 40 30

Notice of Appeal

them to continue and drove them from the job."

19. Because the said Circuit Court judge erroneously refused to permit the defendant to offer proof in accordance with the following offer:

10 "Q. We now have here the policies of insurance; first, the fire insurance policy upon the plant up there, issued in the name of Minahan & Costa, on the 18th day of May, 1901, by the Philadelphia Underwriters Policy Company, with the assignment thereof to Conway Contracting Company, dated the 5th of August, 1901; also liability policy for casualty to the employees engaged on the work, issued on the 21st of May, 1901, by the Maryland Casualty Company to Minahan & Costa, and on the 7th of November, 1901, assigned to the Conway Contracting Company. I assume that under your Honor's ruling, they will be also excluded; but they go to indicate the extent to which this assignment to the Conway Contracting Company was endeavored to be perfected."

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20. Because the said Circuit Court judge erroneously refused to permit the defendant to offer in evidence certain letters written between 30 the witness Maynard E. S. Clemons and plaintiff.

21. Because the said Circuit Court judge erroneously refused to permit the defendant to offer in evidence a certain resolution of the sewer commissioners of Wakefield Mass., discharging the Conway Contracting Company from the job.

21. Because the said Circuit Court judge erroneously refused to permit the witness Clemons to answer the following question propounded by 40 the defendant:

Notice of Appeal

901 120 "Q. Was any bond ever received by the
Town of Wakefield from the American
-19 Surety Company, covering the contract of
-30 the Conway Contracting Company on this
-10 Wakefield Sewerage job?"

23. Because the said Circuit Court judge erroneously refused to permit the witness Clemons to answer the following question propounded by 10
the defendant.

-11 "Q. Did the American Surety Company
-12 ever give to you or to the Town of Wake-
-13 field any bonds covering the work that the
-14 Conway Contracting Company might do
-15 upon the Wakefield sewers?"

24. Because the said Circuit Court judge erroneously refused to permit the defendant to offer in evidence a duly authenticated copy of an opinion by Mr. Justice Rugg of the Supreme Ju- 20
dicial Court of Massachusetts, in a certain cause of the Town of Wakefield, Mass. against the plaintiff.

25. Because the said Circuit Court judge erroneously refused to permit the witness Clemons to answer the following question propounded by the defendant:

01 120 "Q. Did the Town of Wakefield ever
-12 formally recognize and consent to the as-
-13 signments that have been produced and 30
-14 marked for identification here?"

26. Because the said Circuit Court judge erroneously refused to permit the witness Clemons to answer the following question propounded by the defendant:

-19 03 "Q. If they did not, why not?"

27. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask 40

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the witness Tierney, against the objection of the defendant, the following question:

“Q. Mr. Tierney, although you have no recollection of the occurrence of the taking of this acknowledgment on June 26, 1901, can you, nevertheless, state whether or not those gentlemen appeared before you?”

- 10 28. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask the witness Tierney, against the objection of the defendant, the following question;

“Q. And on what do you base your statement?”

29. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask the witness Tierney, against the objection of the defendant, the following question:

- 20 “Q. Well, how does the fact that you took the acknowledgment convey to you the fact that those gentlemen appeared before you?”

30. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask the witness Tierney, against the objection of the defendant, the following question:

“Q. Well, what does that mean to you?”

- 30 31. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask the witness Tierney, against the objection of the defendant, the following question:

“Q. What was your course of business or practice as to the taking of acknowledgments at that time with reference to having the parties before you whose acknowledgments you were taking?”

- 40 32. Because the said Circuit Court judge erroneously permitted the plaintiff's counsel to ask

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the witness Tierney, against the objection of the defendant, the following question:

"Q. Will you please tell us, Mr. Tierney, what the custom was?"

33. Because the said Circuit Court judge erroneously refused to direct a verdict for the defendant for the reasons stated, upon the motion for the said direction of a verdict. 10

34. Because the said Circuit Court judge erroneously granted the plaintiff's motion for the direction of a verdict in favor of the plaintiff.

35. Because the said Circuit Court judge erroneously refused to permit the case to go to the jury.

36. Because the judgment below is in divers other respects illegal, unjust and improper.

Dated, June 2d, 1914.

McCARTER & ENGLISH, 20
Attorneys of Defendant-Appellant.

To:

Messrs. Pitney, Hardin & Skinner,
Attorneys of Plaintiff-Appellee.

Declaration

(Filed, Sept. 29, 1941) 30

New Jersey Supreme Court of the seventh day of September, one thousand nine hundred and eleven.

Essex County, ss:

James Conway, the defendant in this suit, was summoned to answer American Surety Company of New York, a corporation, the plaintiff therein, in an action upon contract, and thereupon the 40

Declaration

plaintiff, by Pitney, Hardin & Skinner, its attorneys, complains:

- For that whereas, heretofore, to wit, on the tenth day of April in the year one thousand nine hundred and one, at the City of New York, in the State of New York to wit, at Newark in said County of Essex, one Daniel F. Minahan and one
- 10 Antonio Costa, partners composing the firm of Minahan & Costa, as principals, and the said plaintiff as surety at the special instance and request of the said principals and one Lawrence T. Fell, did execute three certain writings under seal, or bonds, to the Town of Wakefield in the State of Massachusetts, conditioned for the proper performance of certain contracts for building sections 1, 2 and 3 respectively of the Wakefield Sewerage System in Wakefield; and
- 20 whereas the aforesaid Daniel F. Minahan, Antonio Costa and Lawrence T. Fell, in consideration that the plaintiff would execute as surety the three bonds or writings aforesaid, did by a certain other writing under seal on the day last aforesaid and at the place aforesaid, agree to indemnify the said plaintiff for any loss which it, the said plaintiff, might sustain by reason of its liability upon said three bonds; and whereas thereafter, to wit, on the twenty-sixth day of
- 30 June, one thousand nine hundred and one, at the City of New York in the State of New York, to wit, at Newark in said County of Essex, the said defendant did request the plaintiff to release the said Antonio Costa and the said Lawrence T. Fell from all liability or responsibility to the plaintiff by reason of the agreement of indemnity last above mentioned. And the plaintiff avers that on
- 40 the day and year last aforesaid at he place afore-

Declaration

said, the said defendant together with the said Daniel F. Minahan, and one William Hanna in consideration that the said plaintiff would release the said Antonio Costa and the said Lawrence T. Fell from all liability or responsibility to the said plaintiff as indemnitors as aforesaid, did by a certain other writing under seal then and there made, jointly and severally undertake and agree 10 to indemnify and save the plaintiff harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever by reason of any obligation theretofore or thereafter entered into by the said Daniel F. Minahan and William Hanna, and the said defendant, or by some one or more of them or by the firm of Minahan & Costa as principals, and the said plaintiff as surety, and to place the said plaintiff in funds to meet every such claim, de- 20 mand, liability, cost, charge, expense, suit, order or adjudication against it by reason of any obligation theretofore or thereafter entered into by the said Daniel F. Minahan and William Hanna and the said defendant or by some one or more of them or by the firm of Minahan & Costa as principals, and the said plaintiff as surety (which said last mentioned writing with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the day and year 30 last aforesaid, a true copy of which said writing is attached hereto and hereby made a part hereof); and the plaintiff further avers that at the special instance and request of the said defendant as aforesaid, it did release the said Antonio Costa and the said Lawrence T. Fell from all liability or responsibility to the said plaintiff as indemnitors by reason of the obligation afore- 40

Declaration

said, and that it, the said plaintiff, did accept in lieu of the said agreement of indemnity executed by the said Daniel F. Minahan, Antonio Costa and Lawrence T. Fell as aforesaid, the agreement of indemnity last above mentioned, executed on the twenty-sixth day of June, one thousand nine hundred and one as aforesaid, by the said Daniel F. Minahan, William Hanna and the said defendant; yet the said defendant not regarding his said promise and undertaking contained in the agreement of indemnity aforesaid, a copy of which is annexed hereto, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf did not, nor would indemnify or save harmless the said plaintiff from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication or place the said plaintiff in funds to meet every such claim, demand, liability, cost, charge, expense, suit, order, or adjudication against it by reason of the three bonds or obligations above mentioned entered into by the said Daniel F. Minahan and the said Antonio Costa as principals and the said plaintiff as surety, but wholly neglected and refused so to do; by means and in consequence whereof the said plaintiff as surety upon said three bonds afterwards, to wit, on the eighth day of June, one thousand nine hundred and eleven, at Boston in the State of Massachusetts, to wit, at Newark in said County of Essex, was called upon and forced and obliged to pay, and did then and there pay to the said Town of Wakefield, the obligee named in said three bonds, a large sum of money, to wit, the sum of thirty-three thousand dollars (\$33,000), being the total of the penalties in said three bonds specified,

Declaration

together with certain interest thereon, and the costs of a certain action or actions before then brought in the Superior Court, holden at Boston for and within the County of Suffolk in the State of Massachusetts, and carried by exceptions to the Supreme Judicial Court of the State of Massachusetts, on the said three bonds or obligations by the said Town of Wakefield against the said plaintiff, and together with certain charges for poundage on executions issued upon judgments obtained by the said Town of Wakefield in said actions, in the whole amounting to a large sum of money, to wit, the sum of one hundred thousand dollars (\$100,000); and the said plaintiff avers that it has duly kept and performed and fully complied with all the terms and conditions of the said agreement of indemnity on its part to be kept, performed and fulfilled, and all conditions precedent have been performed, and all events have happened, and all things exist, and all periods of time have elapsed to entitle the plaintiff to a performance by the defendant of his said agreement to indemnify the said plaintiff and to entitle the plaintiff to maintain an action for the breach by the said defendant of his said agreement to indemnify the said plaintiff; whereof the said defendant, afterwards, to wit, on the day and year last aforesaid had notice; yet the said defendant further disregarding the terms and conditions of the said agreement of indemnity and his said promise and undertaking hath not (although he was afterwards, to wit, on the day and year last aforesaid at Newark in said County of Essex, requested by the said plaintiff so to do), as yet paid the said sum of one hundred thousand dollars (\$100,000), or any part thereof to the said plain-

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Declaration

tiff, but so to do hath wholly refused and still doth refuse, to wit, at Newark in said County of Essex, to the damage of the said plaintiff one hundred thousand dollars (\$100,000).

And whereas also heretofore, to wit, on the twenty-sixth day of June in the year one thousand nine hundred and one, at the City of New York
10 in the State of New York, to wit, at Newark in said County of Essex, by a certain other writing under seal then and there made (which said writing with the seal of the said defendant the said plaintiff now brings here into Court, the date whereof is the day and year aforesaid, a true copy of which said writing is attracted hereto and made a part hereof), the aforesaid defendant and one Daniel F. Minahan and one William Hanna, in consideration that the plaintiff at the special
20 instance and request of the said defendant and said Daniel F. Minahan and said William Hanna would release certain other indemnitors of it, the said plaintiff, did jointly and severally undertake and agree to indemnify the plaintiff for any loss which it, the said plaintiff, might sustain by reason of its liability upon three certain contract bonds theretofore executed by it, to wit, on the tenth day of April in the year one thousand nine hundred and one, at the City of New York in the
30 State of New York, to wit, at Newark in said County of Essex; and the said defendant and the said Daniel F. Minahan and the said William Hanna in and by the said agreement of indemnity did, among other things, jointly and severally undertake and agree to pay to the plaintiff, on the anniversary of the date of the execution of each of said contract bonds, in advance, an annual
40 premium or charge of one per cent of the amount

Declaration

of every such contract bond, until the said defendant or the said Daniel F. Minahan or the said William Hanna should deliver to said plaintiff competent written evidence upon said bonds as by any and all responsibility upon said bonds as by said agreement, a copy of which is attached hereto as aforesaid, will more fully appear; and the plaintiff avers that said annual premium or charge of one per cent of the amount of said three contract bonds is in the case of the first of said bonds the sum of one hundred and five dollars, in the case of the second of said bonds the sum of one hundred and twenty-five dollars, and in the case of the third of said bonds the sum of one hundred dollars, making a total yearly premium due upon said three bonds of three hundred and thirty dollars; and although it, the said plaintiff, did duly execute as surety the three contract bonds as aforesaid, at the time and place aforesaid (whereof the said defendant afterwards, to wit, on the twenty-sixth day of June in the year, one thousand nine hundred and one had notice), and hath always from the time of the making of said agreement of indemnity hitherto well and truly performed, fulfilled and kept all things therein mentioned and contained on its part and behalf to be performed, fulfilled and kept according to the tenor and effect, true intent and meaning thereof, and although no notice has been served on or delivered to the said plaintiff of its discharge from its responsibility upon said three bonds as aforesaid, the said plaintiff in fact saith that neither the said defendant nor any other person or persons, did at any time pay to the said plaintiff the said premium of three hundred and thirty dollars due to the said plaintiff on the first anniversary of the date of said three bonds, to

Declaration

wit, on the tenth day of April in the year one thousand nine hundred and two, and that neither the said defendant nor any other person or persons has at any time paid to the said plaintiff the premiums or charges for said three bonds amounting to three hundred and thirty dollars annually and due on the respective subsequent anniversaries of the date of said bonds up to the present
 10 time; and on the contrary thereof the said annual premiums or charges with interest upon the same, together making the sum of seven thousand dollars, became and were and still are in arrear and unpaid to the said plaintiff contrary to the form and effect of the said agreement of indemnity, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of seven thousand dollars
 20 above demanded; yet neither the said defendant although often requested so to do, nor any other person, has paid the said sum of seven thousand dollars above demanded, or any part thereof, to the said plaintiff, but has hitherto wholly neglected and refused and still does neglect and refuse so to do, to the damage of the said plaintiff, seven thousand dollars (\$7,000).

And whereas also the said defendant heretofore, to wit, on the twenty-seventh day of August,
 30 in the year, one thousand nine hundred and eleven, at the City of New York in the State of New York, to wit, at Newark in said County of Essex, was indebted to the said plaintiff in the further sum of seven thousand dollars for certain premiums before that time and then due and payable from the said defendant to the said plaintiff upon for and in re-
 40 spect to the said plaintiff's having before then at

Declaration

the special instance and request of the said defendant executed three certain other bonds as surety, and being so indebted, he, the said defendant, in consideration thereof afterwards to wit on the day and year last aforesaid at the place aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said last mentioned sum of money, when he, the said defendant, should thereunto be afterwards requested; yet the said defendant hath not, although often requested so to do, paid said sum of seven thousand dollars (\$7,000) or any part thereof to the said plaintiff but has hitherto wholly neglected and refused and still does neglect and refuse so to do, to the damage of the said plaintiff seven thousand dollars (\$7,000). 10.

And whereas, also the said defendant heretofore, to wit, on the day and year last aforesaid at Newark in said County of Essex, was indebted to the plaintiff in the sum of one hundred thousand dollars (\$100,000), upon an account stated between the plaintiff and the defendant, the same to be paid by the defendant when he should be thereunto after requested; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money loaned by the plaintiff to the defendant at his request; and in the like sum of money for interest for the forbearance by the plaintiff at the defendant's request of money due and owing from the defendant to the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at his request; and being so indebted the defendant in consideration thereof did then and there promise the plaintiff to pay to it, the said plaintiff, the 20 30 40

Exhibit Attached to Declaration

said several sums of money on request; yet the defendant has disregarded his said several promises and has not paid the said several sums of money, or any of them, or any part thereof, although often requested so to do, but to do so hath hitherto wholly refused and still doth refuse to the damage of the said plaintiff one hundred thousand dollars (\$100,000), and therefore it brings its suit, etc.

PITNEY, HARDIN & SKINNER

Attorneys of Plaintiff.

Exhibit Attached to Declaration

Form C. 390-5,000-6-1900.

Contract No.
 Limit of Liability, \$75,000.
 Premium Rate....%

AMERICAN SURETY COMPANY OF NEW
 YORK

 Capital, \$2,500,000

General Contract of Indemnity

WHEREAS, D. F. Minahan, James Conway and Wm. Hanna, or some one or more of us, hereinafter called the principals have required and may hereafter require suretyship upon certain obli-

Exhibit Attached to Declaration

tions, known as "Sureties Consents," "Sureties Guarantees," "Sureties Agreements," "Guarantees on Bids," "Bidders Bonds," and "Contract Bonds," or otherwise, and have applied and will apply to the AMERICAN SURETY COMPANY OF NEW YORK hereinafter called the Surety to execute such instruments, as surety.

THEREFORE, we do hereby jointly and severally 10
undertake and agree:

FIRST: That the principals, commencing on the date of the execution of each such obligation and thereafter on the anniversary thereof, will pay the Surety in advance, a premium or charge of five dollars (\$5) for each such "Sureties consent," "Sureties guarantee," "Sureties Agreement," "Guarantee on Bids," "Bidders Bond," or similar obligation, and otherwise in advance an annual premium or charge of one per cent of 20
the amount of every such "Contract Bond," "Sureties Consent," "Sureties Guarantee," "Sureties Agreement," "Guarantee on Bids," "Bidders Bond," or similar obligation which shall operate as a bond or obligation for the performance of the contract therein referred to. Such premiums to be paid in each instance, until the Surety shall be discharged and released from any and all responsibility upon such obligations and until the principals shall deliver to said Surety, 30
at its office in the city of New York, competent written evidence of such discharge, that the amount to be paid said Surety for executing any one of such obligations shall not, however, for any one year, or fraction thereof, be less than \$10, when such obligation shall be or shall operate as a bond or obligation for the performance of the contract therein referred to. 40

Exhibit Attached to Declaration

SECOND: That the principals will perform all the conditions of each of said obligations on the part of the principals to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever and will place the

10 Surety in funds to meet every such claim, demand, liability, cost, charge, expense, suit, order or adjudication against it by reason of any such obligation before it shall be required to pay thereunder.

THIRD: That upon the making of any demand, or the giving of any notice, or the institution of any proceeding, preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of any such obligation,

20 the principals will immediately notify the Surety thereof in writing at its said office.

FOURTH: That in the event of the principals requesting the Surety to prosecute or defend or appear or take part in any suit, action, proceeding, appeal, or writ of error, the principals will, on making such request place the Surety in possession of funds or collateral security, approved by the Surety, sufficient to defray any costs, charges and expenses which the Surety may incur in so

30 doing, and to discharge any liability, order, judgment or adjudication which may result in consequence of the Surety so doing, or of its suretyship upon any such obligation.

FIFTH: That the principals will, on request of the Surety, procure the discharge of the Surety from any and all such obligation and all liability by reason thereof.

40 SIXTH: That the Surety shall, at its option have

Exhibit Attached to Declaration

and may exercise in the name of the principals or otherwise, any and all rights and remedies which the principals have or may have in connection with any of the matters arising out of or connected with any of the matters out of which any such suretyship obligation arises; and the Surety shall have, at any time, the right to be discharged from liability for further default of the principals on any of such obligations, and to require the principals to account and give new sureties. 10

SEVENTH: That the voucher or other evidence of payment by the Surety in discharge of any liability for which the Surety is or may be liable by reason of any such obligation shall be *prima facie* evidence of such payment and the propriety thereof, and of the principals liability therefor to the Surety.

EIGHTH: That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, in any way abridge, defer or limit its right to be subrogated to any right or remedy, or limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, and it shall have every right and remedy which an individual Surety acting without compensation would have. 30

NINTH: That the Surety also looks to and relies upon the property of the principals and the income and earnings thereof, and shall at all times have the right to rely upon, look to and follow and recover out of the property which the principals now have or may hereafter have, and the income and earnings thereof, for anything due or to become due the Surety, under this agreement; such 40

Exhibit Attached to Declaration

suretyship in each instance being by the Surety entered into for the special benefit of the principals and the special benefit and protection of the property of the principals, their income and earnings.

TENTH: That this agreement shall cover all obligations heretofore or hereafter issued for us or
 10 either of us or heretofore issued for the firm of Minahan and Costa, and the principals do hereby stipulate that the Surety may release, and it is hereby requested to release Antonio Costa and L. T. Fell from all liability or responsibility to it by reason of any such obligations.

IN WITNESS WHEREOF, we have caused these present to be signed and sealed this 26th day of June, 1901.

20 DANIEL F. MINAHAN (Seal)
 JAMES CONWAY (Seal)
 WILLIAM HANNA (Seal)

Fifty-cent stamp cancelled.

State of New York, }
 County of New York. } ss:

30 On this 26th day of June, 1901, before me personally came Daniel F. Minahan, James Conway, William Hanna, to me known and known to me to be the persons described in and who executed the foregoing instrument and they thereupon severally acknowledged to me that they executed the same.

(Seal)

FRANK I. TIERNEY,
 Notary Public, New York County.

Pleas*(Filed, Oct. 27, 1911)***NEW JERSEY SUPREME COURT**

AMERICAN SURETY COMPANY	}	On contract.	10
OF NEW YORK,			
vs.			
JAMES CONWAY.			

And the said defendant, by McCarter & English, his attorneys, as to the first count of the said declaration, comes and defends the wrong and injury when etc., and says that the said supposed writing obligatory is not his deed, and of this he puts himself upon the country.

And the said defendant, as to the second third and fourth counts of the said declaration, comes and defends the wrong and injury when, etc., and says that he does not owe the sums of money above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country.

McCARTER & ENGLISH,
Attorneys of Defendant. 30

State of New Jersey, } ss:
County of Essex.

James Conway, being duly sworn upon his oath, says, he is the defendant in the above entitled action and pleas named; that the foregoing pleas are not interposed for the purpose of delay, but

Notice of Special Matter

that he verily believes he has a just and legal defence to said action on the merits of the case.

JAMES CONWAY.

Sworn to and subscribed before me,
this 26th day of October, 1911.

Nellie B. Crawford,
(Seal) Notary Public of New Jersey.

10

Notice of Special Matter

The defendant, pursuant to the statute in such case made and provided, hereby annexes to the pleas filed herewith a notice of special matter, which, if pleaded, would have been a bar to the foregoing action, and at the trial of the issues
20 joined herein will give evidence in support thereof, namely:

1. There was no consideration for the said alleged signing of said paper writing by the defendant.

2. The consideration for said alleged bond or paper writing wholly failed.

3. The true consideration of said bond of indemnity or paper writing upon which this action is based, was the agreement on the part of the
30 plaintiff to be and become surety for the Conway Contracting Company in the execution and performance by it of a certain contract or contracts with the Town of Wakefield, in the Commonwealth of Massachusetts, for the construction of Sections 1, 2 and 3 of the Wakefield System of Sewerage; that the said plaintiff, after the making by the defendant of the alleged agreement of
40 indemnity, refused to become surety as aforesaid,

Notice of Special Matter

and refused to execute the necessary papers for that purpose, and the object of the defendant in executing the said alleged agreement of indemnity was thereby frustrated, and the consideration therefor wholly failed.

4. The said plaintiff has not paid out any money on account of its said alleged liability referred to in said first count of said declaration. 10

5. The said plaintiff was not compelled to pay out to the Town of Wakefield, or any other person, the sum of money in said first count mentioned or any other sum as a basis for the plaintiff's right to commence this suit.

6. If any moneys were paid by the plaintiff herein to the Town of Wakefield on account of its alleged liability to said Town under its alleged agreement therewith, said payments were improperly made, and no real liability therefor existed, and hence no ground of action exists against the defendant herein on said alleged agreement of indemnity. 20

7. No liability exists on the part of the defendant to pay the plaintiff any money.

8. The contingencies named in the alleged bond of indemnity as conditions precedent to the liability of the defendant to the plaintiff herein, have never arisen, nor have events happened, nor do the things exist, nor has the time elapsed to entitle the plaintiff to a performance by the defendant of said alleged agreement to indemnify, or to maintain the said first count of said declaration. 30

9. It is not true that the plaintiff released Antonio Costa and Lawrence T. Fell from all liability or responsibility to the plaintiff as indemnitors of plaintiff by reason of the alleged obliga- 40

Notice of Special Matter

tion here in suit, or as a consideration therefor, or that the plaintiff did accept, in lieu of the agreement of indemnity of said Antonio Costa and said Lawrence T. Fell the alleged agreement in the first count of said declaration.

10. There was no breach of the surety bond or bonds, agreement or agreements entered into by
10 the plaintiff with the Town of Wakefield, whereby the plaintiff became in law liable to pay the plaintiff any money.

11. The plaintiff, as surety for the performance of said contracts for the construction of Sections 1, 2 and 3 of the Wakefield System of Sewerage, was, by said Town of Wakefield, discharged and released from liability as said surety before its alleged payment to said Town of the moneys named in the first count of said declaration, as said plaintiff well knew, and said release and discharge operated to release and discharge the defendant's supposed liability to plaintiff on said alleged agreement of indemnity referred to in the first count of the declaration herein.
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12. Said alleged agreement of indemnity was and is void, and of no legal effect whatever.

13. Said alleged agreement of indemnity was not properly stamped as required by the War Revenue Law of the United States, in operation
30 and effect at the time of the alleged execution thereof.

14. Said alleged agreement of indemnity was never completely executed and delivered by the parties, styled the principals therein, and before such completion the principal and said plaintiffs differed and failed to agree as to the amount of premium to be paid by said principals for the obligation to be assumed by the plaintiff under said
40 agreement.

Notice of Special Matter

15. The said alleged agreement was based upon the assumption and condition that D. F. Minahan, James Conway and William Hanna, or some one or more of them, required, or would require suretyship upon certain obligations known as "Sureties Consents," "Sureties Guarantees," "Sureties Agreements," "Guarantees on Bids," "Bidding Bonds" and "Contract Bonds," and re- 10
quired, or would require the plaintiff to execute such bonds or agreements, and that the plaintiff would have to execute, and would, in fact, execute some or all of said agreements above described; whereas in fact no such requirement existed, upon did plaintiff ever execute or become liable upon any such agreement or any agreement whatever after the alleged making of the agreement referred to in the first count of said declaration, and no liability exists on account of the principals in 20
said alleged agreement named to the plaintiff to indemnify or save it harmless.

16. The payments made, if any, by the plaintiff herein to the Town of Wakefield, and forming the basis of the first count of said declaration, were made upon bonds, contracts or agreements made by said plaintiff before the making of the said alleged agreement in the first count declared on, and in connection with the firm of Minahan & Costa, and not for or in connection with D. F. 30
Minahan, James Conway and William Hanna, or either of them; and the obligation, if any, which the defendant by said alleged agreement assumed with regard thereto was unilateral, without consideration, and void.

17. No obligation was assumed by the defendant in the said alleged agreement with regard to losses or payments suffered or made by the plain- 40

Specification of Defenses

tiff by reason of contracts or obligations previously incurred by it with, or for, or in regard to the firm of Minahan & Costa.

18. The defendant never agreed to pay, or in any way became liable or obliged to pay the plaintiff any sums of money in the second, third, or fourth counts of said declaration claimed.

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McCARTER & ENGLISH,
Attorneys of Defendant.

Specification of Defenses

NEW JERSEY SUPREME COURT

20	AMERICAN SURETY COMPANY OF NEW YORK, v. JAMES CONWAY.	}	On Contract.
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*To Messrs. Pitney, Hardin & Skinner, attorneys
for the plaintiff:*

Gentlemen:

30 The defendant gives notice that at the trial of the issues in the above entitled cause, he will set up the following defenses:

1. That the writings obligatory of the defendant in the first and second counts of the declaration mentioned and the promises in the third and fourth counts alleged to have been made by him were wholly without consideration.

2. The consideration for the said writings obligatory and promises has wholly failed.

40 3. The true consideration of said bond of in-

Specification of Defenses

demnity or paper writing, upon which this action is based was the agreement on the part of the plaintiff to be and become surety for the Conway Contracting Company in the execution and performance by it of a certain contract or contracts with the Town of Wakefield in the Commonwealth of Massachusetts for the construction of Sections one, two and three of the Wakefield System of Sewerage. That the said plaintiff after the making by the defendant of the alleged agreement for indemnity refused to become surety as aforesaid, and refused to execute the necessary papers for that purpose and the object of the defendant in executing the said alleged agreement of indemnity was thereby frustrated and the consideration therefor wholly failed. 10

4. The said plaintiff has not paid out any money on account of its said alleged liability referred to in said first count of the said declaration. 20

5. The plaintiff has not at any time hitherto been in any wise damnified by reasons or means of any matter, cause or thing in the said writing obligatory mentioned.

6. The said plaintiff was not compelled to pay out to the Town of Wakefield or any other person the sum of money in the said declaration mentioned or any other sum as a basis for the plaintiff's right to commence this suit. 30

7. If any moneys were paid by the plaintiff herein to the Town of Wakefield on account of its alleged liability to said Town, under its alleged agreement therewith, said payments were improperly made and no real liability therefore existed and hence no ground of action exists against the defendant herein, on said alleged agreement of indemnity. 40

Specification of Defenses

8. If the plaintiff has been damnified for or by reason or means or on account of any cause matter or thing in said writing obligatory mentioned, the plaintiff has been so damnified by his own wrong and by and through his own means and default.

9. No liability exists on the part of the defendant to pay the plaintiff money.

10. The defendant owes the plaintiff nothing.

11. The contingencies named in the alleged bond of indemnity as conditions precedent to the liability of the defendant to the plaintiff herein have never arisen, nor have the events happened nor do the things exist nor has the time elapsed to entitle the plaintiff to a performance by the defendant of said alleged agreement to indemnify or to maintain the said first count of the said declaration.

12. It is not true that the plaintiff released Antonio Costa and Lawrence T. Fell from all liability or responsibility to the plaintiff as indemnitors of the plaintiff by reason of the alleged obligation here in suit or as a consideration thereof or that the plaintiff did accept in lieu of the agreement of indemnity of said Antonio Costa and said Lawrence T. Fell, the alleged agreement in the first count of said declaration.

13. There was no breach of the surety's bond or bonds, agreement or agreements entered into by the plaintiff with the Town of Wakefield whereby the defendant became in law liable to pay the plaintiff any money.

14. That as a condition precedent to any liability of the defendant on the writings obligatory and promises in the declaration mentioned, the plaintiff was to be and become surety for the Conway Contracting Company in the execution and

Specification of Defenses

performance by it of a certain contract or contracts with the Town of Wakefield, in the Commonwealth of Massachusetts for the construction of Sections one, two and three of the Wakefield System of Sewerage. That the plaintiff after the making by the defendant of the alleged agreement of indemnity refused to execute the papers necessary to become its surety as aforesaid and still so refuses, wherefore the defendant has not become under any liability to the plaintiff by reason of the said writings obligatory or promises either to indemnify the plaintiff, to pay it any premiums, or otherwise. 10

15. The plaintiff as surety for the performance of said contracts for the construction of Sections one, two and three of the Wakefield System of Sewerage was by the said Town of Wakefield discharged and released from liability as such surety, before its alleged said payment to said Town of the moneys named in the first count of the declaration as said plaintiff well knew and such release and discharge operated to release and discharge the defendant's supposed liability to the plaintiff on said alleged agreement of indemnity referred to in the first count of the declaration herein. 20

16. Said alleged agreement of indemnity was and is void and of no real effect whatever.

17. Said alleged agreement of indemnity was not properly stamped as required by the War Revenue Law of the United States in operation and effect at the time of the execution thereof. 30

18. Said alleged agreement of indemnity was never completely executed and delivered by the parties styled the principals therein and before the completion of the suit, the plaintiff and said principals deferred and failed to agree as to the amount of premium to be paid by said principals 40

Specification of Defenses

for the obligation to be assumed by the plaintiff under said agreement.

19. The said alleged agreement was based upon the assumption and condition that D. F. Minahan, James Conway and William Hanna, or some one or more of them, required or would require suretyship upon certain obligations known as "Sureties Consents," "Sureties Guarantee," "Sureties Agreements," "Guarantees on Bids," "Bidding bonds" and "Contract Bonds," and required or would require the plaintiff to execute such bonds or agreements, and that the plaintiff would have to execute and would in fact execute some or all of said agreements above described, whereas, in fact, no such requirement existed, nor did the plaintiff ever execute or become liable upon any agreement whatever, after
20 the alleged making of the agreement referred to in the first count of said declaration and no liability exists on the part of the principals in said alleged agreement named to the plaintiff to indemnify or save it harmless.

20. The payments made, if any, by the plaintiff herein to the Town of Wakefield and forming the basis of the first count of the said declaration were made upon bonds, contracts or agreements made by the said plaintiff before the making of the
30 said alleged agreement in the said first count declared on and in connection with the firm of Minahan & Costa and not for or in connection with D. F. Minahan, James Conway and William Hanna or either of them; and the obligation, if any, which the defendant by said alleged agreement assumed with regard thereto, was unilateral without consideration and void.

21. No obligation was assumed by the defend-
40 ant in the said alleged agreement with regard to

Additional Specification of Defenses

losses or payments suffered or made by the said plaintiff by reason of contracts or obligations previously incurred by it with regard to the firm of Minahan & Costa.

22. The defendant never agreed to pay or in any way become liable or obliged to pay the plaintiff any sums of money in the second, third or fourth counts of said declaration claimed.

10

McCARTER & ENGLISH,
Attorneys of Defendant.

Additional Specification of Defenses

NEW JERSEY SUPREME COURT

AMERICAN SURETY COMPANY OF
NEW YORK,

v.

JAMES CONWAY.

20

On Contract.

*To Messrs. Pitney, Hardin & Skinner, attorneys
of plaintiff:*

Gentlemen:

Defendant hereby gives notice that at the trial of the issue in the above entitled cause he will set up the following defenses in addition to the defenses already specified herein.

30

23. The said alleged agreement of indemnity is of no effect whatever because the agreement of the defendant involved therein is unilateral and no obligation ever existed upon the part of the plaintiff to perform the consideration of the said agreement of indemnity.

40

Testimony

24. The alleged agreement between the plaintiff and the defendant was wholly unilateral.

25. No valid and enforceable agreement of any character ever existed between the plaintiff and defendant.

McCARTER & ENGLISH,
Attorneys of Defendant.

10

Testimony

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Monday, November 18, 1912.

20

AMERICAN SURETY COMPANY of
NEW YORK,

vs.

JAMES CONWAY.

} On Contract.

Before HON. FREDERIC ADAMS J., and a jury.

30

For plaintiff appear Pitney, Hardin & Skinner,
by Alfred F. Skinner and Corwin How-
ell.

For defendant appear McCarter & English, by
Robert H. McCarter and Arthur F. Eg-
ner.

Mr. Skinner opens for plaintiff.

Maynard E. S. Clemons—Direct

MAYNARD E. S. CLEMONS, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Mr. Clemons, what is your occupation or profession? A. Attorney-at-law.

Q. And where do you practice? A. Boston and Wakefield—Boston, Massachusetts. 10

Q. How long have you been a member of the Massachusetts bar? A. Sixteen years.

Q. Did you ever have any official connection with the Town of Wakefield? A. I have been town counsel, as we call it, for eleven years, and am now, of the Town of Wakefield.

Q. And were you town counsel in the years 1901 and 1902? A. I was.

Q. And since that time? A. I have been.

Q. Continuously? A. Yes. 20

Q. Have you recently had any connection with a suit brought by the Town of Wakefield against the American Surety Company in Massachusetts? A. I was counsel—brought the suit and acted as counsel to its close, which was last year, I think.

Q. And you were the attorney of the plaintiff, the Town of Wakefield? A. I was.

Q. Have any papers come into your possession connected with that suit, and have you still those papers? A. I have all the original papers which 30 the Town of Wakefield or myself, as its counsel, have had during that suit.

Q. Now, will you just tell us briefly the nature of the suit? A. The suit was brought on three bonds. The bonds were given by Minahan and—

Mr. McCarter: I think the record should be produced, your honor.

Question withdrawn.

Maynard E. S. Clemons—Direct

Q. In connection with the suit that you have named did any bonds come into your possession?

A. I had the bonds prior to the suit being brought, and have had them, and do have them now.

Q. Have you them with you? A. I have them.

Q. Will you produce them, please?

10 Witness: May I say that both counsel, as I understand, your honor, have agreed that these papers will not be impounded in this Court, but may be substituted by copy.

Mr. McCarter: That is understood; that is quite right.

A. These are the three original contracts, and that at the end of each one of the contracts is found the original bond (producing papers).

Q. Are they fastened together? A. They are.

20 Q. Are these contracts, or bonds, numbered in any way by which we can designate them? A. They are entitled "Section 1," "Section 2," "Section 3."

Q. Well, I am showing you now one of these papers, the one that you have just produced to me, and it bears on the outside "84,757," that number, whatever that may be, and I call your attention to a signature at the end of this paper, and ask you whose signature that is (paper
30 shown to witness)? A. "Maynard E. S. Clemons." That is my signature.

Q. Did you witness the other signatures to that instrument? A. I did as to the principal; that is, Daniel F. Minahan, Minahan & Costa, Antonio Costa.

Q. These three signatures above here, whose are they (indicating)? A. Daniel F. Minahan
40 and Antonio Costa, who signed the bond.

Maynard E. S. Clemons—Direct

Q. When did that paper come into your possession with reference to the time that you witnessed those signatures and put your signature there?

The Court: Does your question relate to the contract or the bond?

Mr. Skinner: The bond, sir. I have not questioned him as to anything but that. 10

A. The 10th day of April, 1901.

Q. Well, I say, when did it come into your possession with reference to the time when you witnessed those signatures, before or after? A. Oh, prior to that, and I am not certain as to the date, which I have given as the 10th day of April, 1901, as being the exact date, because the bond—it may have been filled out—I think it was—at a prior time.

Q. Where were those signatures attached? A. 20
In the office of the Board of Sewer Commissioners, at Wakefield, Massachusetts.

Q. And after they were attached what became of the paper? A. They have been kept in the custody of the town treasurer or myself ever since.

Q. At the time that those signatures were attached was there anything on the bond of signature by the American Surety Company? A. Those were on the bonds prior to the signing by Minahan and Costa. 30

Q. Who brought the bond to the office of the Sewer Commissioner do you know—who produced it there? A. I can not say positively.

Q. You have other papers there, I see. I take up the one that is designated "84,758" on the outside, and call your attention to a signature there, and ask you if that is yours (shown to witness)? A. "Maynard E. S. Clemons," my signature. 40

Maynard E. S. Clemons—Direct

Q. Under what circumstances did you put it there? A. Exactly as I have testified with reference to the bond accompanying the contract on section 1.

Q. That is the bond we designated 84,757? A. Yes.

Q. Then you put your signature there as the witness to the signatures by these other parties?
10 A. I did.

Q. Minahan and Costa; that is, "Daniel F. Minahan, Minahan & Costa," the firm, and "Antonio Costa"? A. Yes.

Q. At the same time? A. Yes.

Q. And was or was not the signature of the American Surety Company on the bond when you witnessed the signatures of these others? A. It was.

20 Mr. McCarter: I object to that, if that is intended as proof of the American Surety Company's signature.

Mr. Skinner: I have proof other than that.

Mr. McCarter: Well, the writing there on the page was there at that time?

Mr. Skinner: Yes.

Witness: Yes, it was.

Q. I also now call your attention to another
30 paper, marked on the outside "84,759," and call your attention further to the signature at the end, and ask you if that is yours (shown to witness)?
A. That is mine—"Maynard E. S. Clemons."

Q. And did you put your signature there under the same circumstances as you have related as to the others too? A. I did.

Q. As the subscribing witness to the signatures of Daniel F. Minahan, Minahan & Costa and Antonio Costa? A. I did.
40

Maynard E. S. Clemons—Direct

Q. And those signatures were all affixed to all these papers in your presence at that time? A. It was.

Q. And was or was not the writing here, purporting to be the signature of the American Surety Company, on the bond at the time you did that (indicating)? A. It was.

Q. And have all three of these papers remained in your possession since that time, or in the possession of the commissioners? A. In the possession of the Town of Wakefield; sometimes in its treasurer's, and sometimes in my possession.

Q. And in your possession in connection with the suit you have mentioned? A. Yes.

Q. These papers that have been thus marked or designated by the numbers I have named, each of them has a contract and specifications accompanying it, has it not, with the bond attached? A. It contains the contract and the bond and a notice to contractors and a proposal.

Q. And it is all in printed form, is it not? A. Yes.

Q. With the bond as a part of the printed paper? A. Printed form, filled up in many instances in writing, yes.

Q. The papers that I have been calling your attention to particularly and asking you with reference to your signatures, in the case of No. 84,757, occupy pages 48, 49 and 50, do they not—the paper to which those signatures were attached—that is, the bond? A. Yes; what pages did you say?

Q. 48, 49 and 50. A. It does.

Q. That is, in the No. 84,757? A. Yes.

Q. And in the paper marked 84,758, the paper

Maynard E. S. Clemons—Direct

that you call the bond occupies pages 48, 49 and 50, does it not? A. Yes, that is correct.

Q. This paper that we have designated as 84,759, the bond occupies the pages numbered 46, 47 and 48, does it not? A. That is correct.

Q. And attached to it are certain papers purporting to be a certificate of acknowledgment, or 10 proof? A. Yes.

Mr. Skinner: I am prepared to prove the corporate seal of the American Surety Company. I thought possibly that counsel might not require it, and that I might now offer this in evidence while Mr. Clemons was on the stand. Otherwise I would have to withdraw him and call the other witness.

20 Mr. McCarter: I have no objection to your offering them in evidence, subject to such further proof as may be necessary in order to make them fully in. Under our arrangement, they are to be marked and handed to Mr. Clemons, and we can use copies. Under our arrangement, I have no objection to their being marked, subject to further proof. There is no possible objection to that, judge.

30 Mr. Skinner: Then I offer the bonds that are on the pages that I have just specifically designated, as I understand it, subject to my presenting further proof of the execution of them by the American Surety Company.

Mr. McCarter: Yes, that is the idea.

Mr. Skinner: But without objection as to the papers themselves.

Mr. McCarter: Oh, no.

Maynard E. S. Clemons—Direct

The Court: This is an offer merely of the bond?

Mr. Skinner: Yes.

The Court: Not of the contracts?

Mr. Skinner: Yes, sir; they are so connected that we can not offer them separately; but I have no use for the contracts.

The Court: Let them be marked in the order of their numbers, P-1, P-2, and P-3. 10

Mr. Skinner: Can we have the exhibit marks go on the copies themselves instead of on the originals?

Mr. McCarter: I am satisfied.

Mr. Skinner: We will not have them marked until Mr. Clemons has compared them with the originals.

Q. In the year 1911, was any payment made by the American Surety Company to you for the 20 Town of Wakefield?

Objected to as immaterial.

Mr. Skinner: I understand that I am skipping a good deal in the order of proof, but I do not understand that there is any objection on that ground. I do that because Mr. Clemons is the witness as to both, and I wanted to make it one examination. I only propose to have them marked for identification. 30

Mr. McCarter: All right.

Witness: Shall I answer the question?

Mr. Skinner: Yes.

A. Yes.

Q. I show you these papers purporting to be checks, two of the date of June 6, 1911, and ask if you received them (papers shown to witness)?

A. One of them we did not receive, except in- 40

Maynard E. S. Clemons—Direct

directly; one of them received in hand, and was turned over—I received it and turned it over to the town treasurer of the Town of Wakefield.

Q. In what amount? A. Which check is numbered 7186, for the sum of \$45,202.71.

By the Court: Q. That is the one you did receive? A. That is the one we did receive. The
10 other one I received in this way. It represented—

Mr. McCarter: Well, I think you had better tell us how you received it.

Witness: Well, I received it from the American Surety Company, and it was turned over by me to the sheriff. It was poundage for the sheriff of Suffolk County for the execution.

By Mr. Skinner: Q. Well, we are not familiar with those terms. What do you mean by the word
20 “poundage”? A. The sheriff is entitled to a certain percentage for collecting on the execution, and this represented the amount of his fee.

Q. And that check is for the amount of \$236.40? A. \$236.40.

By the Court: Q. The sheriff of what county? A. The sheriff of Suffolk County.

Q. Massachusetts? A. Massachusetts.

By Mr. Skinner: Q. Then I show you another check, to your order, dated October 16, 1911, for
30 \$1.10 and ask you if that was received by you and under what circumstances (shown to witness)? A. It was received by me.

Q. Do you recall the circumstances? A. No, I do not.

The three checks identified by witness are marked respectively P-4, P-5 and P-6 for identification.

Maynard E. S. Clemons—Direct

Q. Now, I show you a paper marked "Voucher No. 139,709," dated June 8, 1911, and call your attention to a signature at the end here and ask you whose it is (shown to witness)? A. My signature—"Maynard E. S. Clemons, Attorney."

Q. For whom? A. For the inhabitants of the Town of Wakefield.

Q. Under what circumstances was that signature attached to this paper? A. It was the voucher which accompanied the delivery of the two checks of that same date.

Q. What did you do with that after you had signed it—what became of it? A. I returned it to Mr. Philbrick.

Q. Is Mr. Philbrick the attorney in the Boston office of the American Surety Company? A. The manager of the Boston office. I am not positive; that is my motion of what was done with it; I am not positive to whom I handed it.

By the Court: Q. You say you gave that to Mr. Philbrick? A. Mr. Philbrick, the manager of the Boston office of the American Surety Company.

The paper identified by witness is marked P-7, for identification.

By Mr. Skinner: Q. I show you another paper, marked "Voucher No. 139,710," dated June 8, 1911, and ask you if you saw that at any time, or if you saw it, when it was with reference to your own attaching of signature to this P-7 for identification that I have just been showing to you (shown to witness)? A. After I saw Mr. Peter P. Fee, the deputy sheriff, sign a voucher for \$236.84 at the time I signed the other voucher.

Q. And is that Mr. Fee's signature? A. That is Mr. Fee's signature, yes.

Q. And where was this done? A. This was

Maynard E. S. Clemons—Direct

done in the office of the American Surety Company.

Q. What city? A. State Street, Boston.

Q. And did you see what became of the paper?

A. I think they were left probably where they were signed, in that office. Mr. Philbrick was on the other side, representing the Surety Company, right there, and they were left in his possession.

Q. And was this the office of Mr. Philbrick in which this was left? A. Yes, sir.

The paper identified by witness is marked P-8 for identification.

Q. I show you another paper, marked "Voucher No. 143,274," dated October blank, 1911, and call your attention to the signature. Whose is it (paper shown to witness)? A. My signature—"Maynard E. S. Clemons."

20 Q. I ask you to refer to that paper, use it as a memorandum to refresh your memory, and see if it recalls anything as to the \$1.10 check that you did not recognize? A. Yes, I know what the \$1.10 check was now.

Q. What was it? A. It was repayment to me \$1.10 which I had expended in obtaining copies of these bonds for the American Surety Company.

Q. Where did you obtain the copies? A. Why, I had the originals and had a stenographer make
30 them.

The paper identified by witness is marked P-9 for identification.

Q. Now, turning to the copies of bonds which I have put in your hands, can you tell whether or not those are the copies that you supplied to Mr. Philbrick (shown to witness)? A. I can't tell. They look like them, but I can't say; there is
40 nothing on them to identify them.

Maynard E. S. Clemons—Direct

Q. Mr. Clemons, you have spoken of a suit by the Town of Wakefield against the American Surety Company, I think. What, if any, connection was there between the checks that have just been shown to you and that suit? A. Those checks were the payments upon execution which issued on a judgment obtained upon that suit.

Mr. Skinner: I find that one of these 10
vouchers that I had marked for identification, the \$1.10 voucher, is a duplicate. I wish to have the identification mark on the original, which I also have here, and ask that it be changed.

The paper produced by counsel is marked P-9 for identification.

Witness: My signature is on both of them, is it?

Mr. Skinner: Oh, yes.

20

Witness: Yes.

Q. So that they are both originals? A. Yes, sir.

Mr. Skinner: One is marked "original" and the other "duplicate." They are both marked with the same mark.

I offer in evidence an exemplified copy of the record of a judgment in the Superior Court of the County of Suffolk, State of Massachusetts.

30

Objected to on the ground that the paper referred to is not properly exemplified, and on the further ground that it contains matters that are not properly part of the so-called record.

The Court: (After argument.) I feel no difficulty on the subject. I recall, somewhat indistinctly, an opinion by Chief Jus- 40

Maynard E. S. Clemons—Direct

10 tice Beasley, I think, in which he was treating of certificates, and after saying that something very elaborate might be no certificate at all, he said that "Copy, B. F. D. Clerk," was a good certificate. Therefore I take it that it is fair to treat this document which is at the end of the record, the certificate of the clerk, as being certified by him to be a copy of the original, which it itself purports to be. And I should not suspect a Massachusetts record because it did not conform to New Jersey practice as to what it contains. Therefore I will receive it.

Defendant's counsel pray an exception, and the same is allowed.

20 Mr. McCarter: We also object to it on the ground that there is no relevancy shown yet to the record being admitted as against Mr. Conway, even assuming that the proof of its being a copy of the record be ample, as your honor has ruled. For that reason we also object.

30 The Court: (After further argument.) This is a suit by the Town of Wakefield against the American Surety Company. I understood that Mr. McCarter's objection was that the connection was not yet established between Mr. Conway and the record. So that you had better have this marked for identification.

Marked P-10 for identification.

40 Mr. Skinner: I have tried to depart from the order of proof, or skip over to other things that I wanted to question Mr. Clemons about. So far as applied to docu-

Maynard E. S. Clemons—Cross

ments, I could do it; that was easy, because the paper could be marked for identification. There are other questions of fact that I will have to recall Mr. Clemons for. At this stage that is all I have to ask Mr. Clemons, and I turn him over for cross-examination. I will have to reserve the right to recall him. 10

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Clemons, were these three bonds signed by Minahan and Costa and the firm of Minahan & Costa in your office? A. No, sir.

Q. Where? A. The office of the Sewer Commissioners, at the town hall, in the Town of Wakefield.

Q. And the other writing and other signatures, whatever they are or represent, were on the document at the time they signed? A. Yes. You are referring now to the bond? 20

Q. Yes. A. To the several bonds, the three bonds?

Q. Yes. A. Yes.

The Court: We are not talking about anything else.

Q. What is the fact with regard to my question? A. What is that?

Q. The other writing, purporting to be certain 30 signatures, were they or were they not on the bonds at the time that you witnessed the signatures of Messrs. Minahan and Costa? A. They were on the bonds, yes.

Q. You represented the Town of Wakefield in this matter? A. I did.

Q. And in having these signatures that you witnessed placed thereon you acted for the town? A. I did.

Maynard E. S. Clemons—Cross

Q. And throughout all the proceedings down to the receipt of those checks you acted for the town?

A. I did, in these matters.

Q. And the Board of Sewer Commissioners were an agency of the town, and you acted for them as well?

Objected to as not cross-examination.

10 The Court: (After argument.) The question is whether the commissioners referred to in the bond are an agency of the town—whether they are town officers, in other words.

Mr. McCarter: Part of the town government.

A. Yes, but I do not think their names—

Q. Just answer the question, please? A. Par-
don me.

20 The Court: Your question does not contain a statement that the commissioners are referred to in the bonds.

Mr. McCarter: Yes, sir.

The Court: That may be in the witness's mind.

Witness: I do not think they are referred to in the bonds.

Q. What is the fact about it? A. I do not see their names.

30 Q. Just kindly answer my question. Were they at that time a branch of the city government, engaged in the construction of this system of sewers?

A. Oh, yes.

Q. And if they were a separate body, or institution, you were their attorney as well? A. I was their attorney, yes.

40 Q. When did you first become acquainted with Minahan and Costa, whose signatures you wit-

Maynard E. S. Clemons—Cross

nessed? A. Within a few days prior to the date of the execution of these bonds.

Q. Who introduced you to them? A. Some one of the commissioners.

Q. Now, there has been identified here a check for \$1.10. I understand you to say that you are now able to recall the fact that some time in October, 1901, the bonds being dated in the previous April, you procured copies of the bonds to be made? A. Oh, no, you have not stated the dates at all correctly. 10

Q. The bonds are dated April 10th, are they not? A. 1901.

Q. Yes. A. That \$1.10 was paid in 1911.

Q. Yes, 1911. Well, then, in October, 1911, you procured a copy of these bonds to be made, and charged to somebody— A. What date?

Q. October, 1911. A. 1911, yes. 20

Q. October 16, 1911, you procured a copy of those bonds to be made? A. Yes, sir.

Q. Did not your own typewriter do it? A. Oh, no.

Q. You paid \$1.10? A. Yes, sir.

Q. And who requested you to make them? A. I think Mr. Philbrick.

Q. Is he the attorney-at-law of the American Surety Company in Boston? A. I can't say; he is manager of their Boston office. 30

Q. Is he a lawyer? A. Yes, a member of the bar there.

Q. And is he not their attorney there? A. I can't say, Mr. McCarter.

Q. Don't you know that Mr. Philbrick is the recognized attorney, the legal representative of the American Surety Company in Boston? A. No, I think their letterheads give some other person 40

Maynard E. S. Clemons—Cross

as counsel for that company and state that he is the manager.

Q. I mean at that time was he not? A. No, I think not, and I don't know but what it is a fact; he might have been.

Q. Was it your idea to have the American Surety Company act as bondsmen for these contracts? A. That arrangement had all been made before I was town counsel.

Q. You had nothing to do with that? A. I had nothing to do with that.

Q. I presume the law requires the Surety Company before it can do business in Massachusetts to file certain papers and comply with certain provisions, does it not? A. It does, yes.

Q. Now, at the time that these checks, one for \$45,202.71 and the other for \$236.40, were passed, I understood that you were in Mr. Philbrick's office? A. Yes, that is correct.

Q. And did he hand you the checks? A. No, the deputy sheriff was there, and he handed the checks to the deputy sheriff.

By the Court: Q. Mr. Philbrick handed the checks? A. Mr. Philbrick handed the checks to the deputy, yes.

By Mr. McCarter: Q. The separate checks? A. Yes.

Q. For the separate amounts? A. Yes.

Q. And what did you do with the so-called vouchers that you signed at the time that they were signed by you or after? A. This was in his office, and all I can say is that they were signed on the table in his office, and I think, left there.

Q. Left there? A. Yes, that is all I can say.

Q. Did you issue execution immediately? A. It had been issued; the deputy sheriff had the execution at that time.

Lawrence T. Fell—Direct

Q. Did you issue execution immediately upon the judgment? A. As soon as we could legally get execution the clerk issued it—the clerk of the courts.

Q. At your direction? A. Yes.

The Court: The understanding is that the witness may be re-called?

Mr. Skinner: Yes, sir. Now, if your Hon- 10
or please, I would like to depart from the order of proof, for the accommodation of three witnesses who are here, Mr. Fell and his sister and another.

Mr. McCarter: No possible objection to that, Judge.

LAWRENCE T. FELL sworn in behalf of 20
plaintiff:

Direct-examination by Mr. Skinner:

Q. Mr. Fell, where do you reside? A. Orange.

Q. And what was your father's name? A. Lawrence T. Fell.

Q. And when did he die? A. April, 1901.

Q. April, 1901? A. No, 1903.

Q. 1903? A. Yes.

Q. Are you one of the executors of his estate? 30
A. I am.

Q. Have you looked among his papers and made any search lately, at my request? A. At the request of Mr. Skinner, the papers that he wanted I didn't have, and referred to my sister, who had whatever papers there are in the estate.

Q. Well there was such a request made? A.
Yes.

Lawrence T. Fell—Cross

Q. And you had no papers to look among, because they were all in the possession of one of your sisters? A. Yes, sir.

By the Court: Q. Which sister, Mr. Fell? A. Miss Genevieve R. Fell.

CROSS-EXAMINATION by Mr. McCarter:

10 Q. Well, you are one of the executors? A. Yes, sir.

Q. Did none of your father's papers come into your possession, Mr. Fell? They did originally, Mr. McCarter, but a few years ago what was left that we were keeping I turned over to my sister, and they were put in a box that she has. We haven't settled the estate yet.

Q. Is she an executrix? A. Yes, sir.

By the Court: Q. Is your sister an executrix? A.
20 Yes, sir.

By Mr. McCarter: Q. Well, did you physically turn them over, or did she take them, or how was that transaction effected? A. I don't recollect, Mr. McCarter. We were working in harmony in the estate. There is no question about—

Q. No. What I want to get at is that you did nothing in turning the papers over to her, that she— A. She is running things. We cleaned up the papers that were in the safe deposit vault, and
30 whatever papers we thought she ought to keep she has got. We turned everything into cash, and what we kept she has got.

Q. Where was the box? A. The Second National Bank.

Q. Were you down there when she took them from the box? A. Yes, sir.

Q. Were all the papers of the estate in the box?
40 A. That we had; yes, sir.

Lawrence T. Fell—Cross

Q. Every document connected with the estate?
A. Yes, sir.

Q. Your father had no bills or papers or **mar-**
ters or things that were not in the box? A. Well,
whatever bills or papers that father had we paid
in the first three months after his death.

Q. You do not mean to say that all your father's
documents and papers were down there in the Sec- 10
ond National Bank safe deposit? A. I mean a
couple of years ago, when we cleaned up.

Q. Every document that he had? A. Yes, sir.

Q. That he left? A. Yes, sir. Before that, of
course, we cleaned up a lot of stuff, years ago,
but I am talking about here a couple of years ago.

Q. He had a lot of bills and documents and pa-
pers and things, of course, as every business man
had? He was a business man, was he not? A.
Yes, sir. 20

Q. How large a box was this in the safety de-
posit? A. An ordinary box, about that long (in-
dicating). You know what they are.

Q. This, I suppose, had nothing but securities
in it, did it? A. We didn't have many of those.

Q. What was in there? A. Nothing in partic-
ular, outside of a few receipts and notes that he
had,

Q. Who had the other papers that were not in
that box? A. We didn't have any papers that 30
were worth anything.

Q. I did not ask you that. Nobody had them?
A. They were destroyed, whatever we thought
was not necessary.

Q. And when was that? A. Two or three years
ago.

Q. Did you personally destroy them? A. Yes,
sir; all together. 40

Lawrence T. Fell—Re-direct

Q. Every paper that was connected with your father's estate you destroyed? A. Yes, sir; we didn't think it was necessary to keep them.

Q. You had in this box notes that your father had paid? A. No, we had in that box notes that had never been paid to him.

Q. Did you have receipts in there? A. Well, I
10 can't recollect any receipts, Mr. McCarter.

Q. How old was your father when he died? A. In his fifty-eighth year.

Q. And do I understand you now to say that you will swear that every document that was not put in that strong box in the Second National Bank was absolutely destroyed in your presence, that belonged to his estate? A. As near as I can recollect; yes, sir.

Q. Where were they kept up to that time? A.
20 Why, the documents that we didn't think were real valuable we kept in a tin box at my sister's house.

Q. And when were they destroyed? A. Why, I should judge, two or three years ago, when my sister moved from that place.

Q. And were all the documents that belonged to your father's estate in that tin box that were not in the strong box? A. Yes, sir.

30 RE-DIRECT-EXAMINATION by Mr. Skinner:

Q. What can you say about the number of papers that were destroyed, many or few? A. Well, judge, I couldn't say particularly.

Q. Well, I do not say just how many, but were there a few or— A. Well I shouldn't think there was over probably a package of a hundred pieces of paper, something like that—different things.

40 Q. Could you tell us what the papers were that

Genevieve R. Fell—Direct

were destroyed? Would you be able from your memory to describe them? A. No, I couldn't.

RE-CROSS-EXAMINATION by Mr. McCarter:

Q. Did you know Minahan? A. Yes, sir.

Q. Did you know that your father was a surety for Minahan on this Wakefield bond? A. No, sir. 10

GENEVIEVE R. FELL, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Miss Fell, you are the daughter, are you not, of Lawrence T. Fell, who died in 1903? A. Yes.

Q. And the sister of Mr. Fell, who was just on the witness stand? A. Yes. 20

Q. Have you made any search among the papers of your father's estate? A. Yes.

Q. Have you done that recently, at anybody's request? A. Why, I did it this morning.

Q. And did you find any release—any paper, a release from the American Surety Company to your father and Mr. Costa? A. No, sir.

Q. Have you had your father's papers recently? A. Yes, sir. 30

Q. How long have you had them? A. Well, for the last three or four years.

Q. And was there some time some years ago when other papers of his were destroyed that you thought were not important? A. What is that?

Q. Do you remember any papers of his being destroyed? A. Not up to three or four years ago.

Q. Well, back of that were there any? A. Not that I know of. 40

Genevieve R. Fell—Direct

Q. You do recall any papers being destroyed, eh? A. No, sir.

Q. Where did your father live at the time of his death? A. 159 Main street, Orange.

Q. And did you live with him at the time of his death? A. Yes, sir.

Q. And did you at any time later move away
10 from there? A. Yes, sir.

Q. Well, was anything done with the papers that he had left at or about the time of your removal? A. No, sir.

Q. You have some papers now, have you? A. Yes, sir.

Q. And where are they now, where are they kept? A. 139 Central avenue, where I live, in a tin box, a safety box.

Q. Have you any papers of your father's in any
20 safe deposit now? A. No.

Q. And these papers that are in the tin box which you have now, are they all the papers that your father left, or were there others? A. Well, there were others three or four years ago.

Q. What became of them? A. Why, we cleaned up the safe deposit, and we destroyed the papers that we thought would be of no use to us about three or four years ago.

Q. When was it that these papers were de-
30 stroyed—some papers? A. When was it?

Q. Yes. A. About three or four years ago.

Q. And where was it? A. The Second National Bank of Orange.

Q. And when was that with reference to your moving away from your father's house? A. When was it?

Q. Yes. Was it before you moved or after you
40 moved? A. Well, it may have been right around

Genevieve R. Fell—Cross

the same time, because I moved exactly three years ago.

CROSS-EXAMINATION by Mr. McCarter:

Q. Well, now, Miss Fell, who were the executors of your father's will? A. My brother and my sister, Mrs. Fungler, and myself.

Q. What is your sister's name? A. Fungler. 10

Q. You lived with your father down to the time of his death? A. Yes.

Q. Had he any business at that time? A. Why, yes.

Q. What was his business? A. Why, he was in Wall street.

Q. Did he go in and out from Orange to New York every day? A. Yes, sir.

Q. And after his death the papers that you collected and put in the safe deposit vault in the Second National Bank of Orange consisted of what, what kind of papers were they? A. Why, some deeds to property and some insurance papers and a great many old notes. 20

Q. How soon after his death was that box in the Second National Bank secured, pretty promptly? A. Well, yes, I think so, very promptly.

Q. Now, there were other papers that were not put in the vault, I suppose, at his house? A. Yes, sir. 30

Q. Where were they kept? A. They were kept where they were kept before my father died, in a tin box he had, and they consisted of insurance papers and deeds and old notes.

Q. They were not disturbed? A. No, they were not disturbed; we kept them.

Q. Well, you had got this box in the meantime at the Second National Bank, had you? A. Yes. 40

Genevieve R. Fell—Cross

Q. When did you get it? A. He had picked it out. The boxes were not rented up to the time he died.

Q. Who made the separation of the papers between the tin box at the house and the safe deposit vault at the Bank? A. There wasn't any separation made; the papers that were originally
10 in the tin box we left there.

Q. And the other papers were put into the vault, where were they at the time of your father's death? A. Well, they were in New York.

Q. In New York? A. Yes.

Q. How did they get out to Orange? A. My brother brought them out.

Q. Larry, Junior? A. Yes.

Q. He went to New York and brought out some papers? A. Yes.

20 Q. And the papers that he brought out from New York were put in the safe deposit? A. Yes.

Q. Just in bulk, without any sorting or anything? A. Yes, just in bulk.

Q. Now, as I understand you, you gave up that vault box about two or three years ago; is that true? A. Yes, sir.

Q. And what became of the contents of the vault box? A. Why, the papers that we wanted for use, like insurance papers and deeds, were put in the
30 tin box with the others, and the papers that were no use to us, old notes and things, we destroyed.

Q. And the examination that you made this morning was in the tin box? A. Yes, sir.

Q. That is all you did this morning? A. That is all.

Q. Did your father have a partner on Wall street? A. Why, no, no, sir.

Q. Did he have an office in Wall street? A. Yes.

40 Q. Was he alone in the occupancy of the office,

Mary C. Funger—Cross

or did he have a clerk or somebody? A. Why, he had clerks.

Q. Clerks? A. Yes, sir.

By Mr. Skinner: Q. Could you tell from memory, Miss Fell, what the papers were that were destroyed? A. No, I couldn't.

10

MARY C. FUNGER, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Mrs. Funger, you are a daughter of Lawrence T. Fell, are you not? A. Yes, sir.

Q. Who died in 1903? A. Yes, sir.

Q. One of the executrices of his estate? A. Yes.

Q. Who has had the papers of your father's estate—who has had charge of them? A. My sister has had charge of them. 20

Q. Have you had any? A. No, not at all.

CROSS-EXAMINATION by Mr. McCarter:

Q. Have you ever done anything as executrix, Mrs. Funger? A. Only to sanction whatever my sister or brother did.

Q. Were you ever present when any documents were destroyed? A. Yes, just prior to my sister's moving away from Main street, I was witness to some papers of no value at all being destroyed. 30

Q. Do you know what the papers were, or did you hear them say what they were? A. Well, I have heard of them, but, of course, I don't just remember. They were not of very much consequence.

By Mr. Skinner: Q. Can you recall from memory what they were? A. No, I can't. 40

Earl F. Watson—Direct

EARL F. WATSON, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Mr. Watson, where do you live? A. Dumont, New Jersey.

Q. Are you connected with the American Surety Company? A. I am.

Q. In what capacity? A. Attorney in the court and contract department.

Q. To what office of the Company are you attached? A. The home office.

Q. In New York City? A. Yes.

Q. How long have you been with them? A. Oh, I went there originally in 1895, I believe.

Q. Were you there in the month of April, 1901? A. I was.

20 Q. Do you remember any business transacted by that company with the firm of Minahan & Costa? A. I do.

Q. Did you have anything to do with it originally? A. I did.

Q. What? A. I took the application for the bond, as we call it, and obtained the execution of the document indemnifying us for executing the bond, or the bonds. There were three of them.

Q. Obtained the execution of it by whom? A. By 30 Mr. Minahan and by Mr. Costa and by an indemnitor, Mr. Lawrence T. Fell.

Q. I show you a paper bearing date April 10, 1901, with certain signatures attached, and ask you if you have seen that before (paper shown to witness)? A. I have; they were signed in my presence.

Q. And where and when? A. At the office of the American Surety Company, 100 Broadway, on 40 the 10th day of April, 1901.

Earl F. Watson—Direct

Q. There is an imprint of some seal there attached. Do you know when that was put on there?

A. Oh, I didn't see that put on; that is some notary's seal.

Q. I call your attention to the fact that there is indorsed on this paper something purporting to be a certificate of acknowledgment as to Minahan and Costa, and ask you to refresh your recollection by that, and tell us whether it does refresh your recollection as to the date when Minahan and Costa were in your office and saw the other—

Mr. McCarter: I object to that. I do not think the witness can refer to a paper that he did not prepare and refresh his recollection to something that is not a memorandum made by the witness, or, so far as he knows, made at the time.

Question withdrawn.

Q. I call your attention, Mr. Watson, to an indorsement on the paper that I have been showing you, purporting to be a certificate of acknowledgment, and ask you if you know the signature that is there attached? A. There are two signatures.

Q. Do you know both of the signatures there?

A. I do not know the first one, W. E. Ogilvie, as to the acknowledgment by Mr. Fell; I do know the signature as to the acknowledgments by Messrs. Minahan & Costa, by Walter J. Moore, a notary public.

Mr. McCarter: I move that that be stricken out, your Honor. I can not see how that has any materiality—the fact that he knows the signature of the notary before whom the two obligors signed the bond. It is wholly immaterial and irrelevant, and I ask that it be stricken out.

Earl F. Watson—Direct

Mr. Skinner: I will consent to the striking out of the answer until such time as perhaps, on further questioning, it may be made more apparent what its materiality is

The Court: Then the question goes out, too?

Mr. Skinner: Yes, sir.

10 Q. Mr. Watson, what was done with this paper after the affixing of the signatures that you have described?

Mr. McCarter: Do I understand that the witness has sworn that he saw the bond signed by the obligors?

Mr. Skinner: I think he has.

The Court: He said, "It was signed in my presence, at the office of the American Surety Company."

20 Mr. McCarter: By all three?

The Court: That is all he said, that it was signed.

Mr. McCarter: I did not understand that he saw Mr. Fell sign it. I may be mistaken, but I did not so understand his evidence.

(By direction of the Court, the stenographer reads from the record as follows:

30 "Q. I show you a paper bearing date April 10th, 1901, with certain signatures attached, and ask you if you have seen that paper (shown to witness)? A. I have; they were signed in my presence.")

(Last question read.)

Mr. Skinner: What became of the paper?

A. Well, for the last—it was made part of our records and put with our bonds.

40 Q. In whose possession has it been? A. The American Surety Company.

Earl F. Watson—Direct

Q. Do you recall whether or not the paper was acknowledged by the parties to it?

Mr. McCarter: One moment.

The Court: Answer the question yes or no.

Mr. Skinner: I mean whether there was such acknowledgment in your presence or under your eye?

Mr. McCarter: I think the question should be answered yes or no, as the Court said. 10

A. Yes.

Q. That is, you remember whether or not it was?

A. Well, I—

Q. I am asking you now whether you remember whether or not this paper was acknowledged in your presence? A. I don't remember.

Q. Do you remember whether or not at the time you signed, as you have described, there was upon it any certificate? 20

Objected to.

A. I don't remember.

The Court: That is a mere physical fact, is it not?

Mr. McCarter: He says he does not remember, so that we will not pursue it.

The Court: He says he does not remember.

Mr. Skinner: I offer this in evidence. 30

Mr. McCarter: May I cross-examine the witness on a few matters before the document is marked?

The Court: You may do so; you may cross-examine on the offer.

By Mr. McCarter: Q. Referring, Mr. Watson, to this document. I presume you see a great many signed, do you not? A. I do. 40

Earl F. Watson—Direct

Q. Practically most of your time is spent— A. Pardon me. I say I do. I do not at present, but I did at that time.

Q. In those days? A. Yes, sir.

Q. A great many? A. Yes, sir.

Q. How many a day, do you suppose? A. Oh, possibly ten, in those days.

10 Q. Do you remember this specific incident? A. I do.

Q. Was Mr. Fell present? A. Not at the time Messrs. Minahan & Costa first signed.

Q. So they did not all sign, did they? A. Well, he signed a few moments later. Mr. Minahan and Mr. Costa came in to get the bond and signed that application in the name of Minahan & Costa, and also by Mr. Costa.

20 Q. Had you ever met Minahan and Costa before? A. Never.

Q. How did you know it was they? A. Well, they so represented themselves.

Q. They told you so? A. Yes, sir.

Q. Nobody introduced you to them? A. I don't recall that anybody did.

Q. The same gentleman that signed the firm name of Minahan & Costa signed the name "Daniel F. Minahan"? A. Yes, sir.

Q. And was Costa there? A. Costa was there.

30 Q. At the same time? A. Yes, sir.

Q. Some gentleman that called himself Fell— A. Mr. Lawrence T. Fell; yes, sir.

Q. Did you know him personally? A. No, sir.

Q. Ever hear of him before? A. No.

Q. Ever see him since? A. Not that I recall.

Q. Who introduced him to you? A. Mr. Minahan.

40 Q. Mr. Minahan? A. Yes.

Earl F. Watson—Direct

Q. Well, did he bring him in? A. I say Mr. Minahan brought Mr. Fell in.

Q. Do you remember that distinctly, too? A. On that same day. Yes, sir.

Q. Now, your attention is called to the fact that there are some blank acknowledgments on the next day. If that was the same day, how do you account for the fact that one acknowledgment bears date the 10th and the other the 11th? A. Mr. Minahan said that Mr. Fell was a friend of his— 10

Q. I object to your saying what was said. I ask you how you account for the fact that, if Minahan and Costa, as you say, came in on one day and Mr. Fell came in a few minutes later, and both papers appear to be acknowledged, why they were acknowledged on separate dates? A. Because Mr. Moore, who took the acknowledgment of Minahan and Costa, took it on the 10th day of April. Mr. Fell came in and signed it—came in at the request of Mr. Minahan. Mr. Fell was engaged on that day on the Stock Exchange, in New York, you see, and there were some very lively times there, I should judge a panic— 20

Q. Do not talk so glibly. I want an answer to my question.

Mr. Skinner: I object to your interrupting the witness.

Q. I ask you, if Mr. Minahan and Mr. Costa and Mr. Fell were all in your office on the same day, within a few minutes of one another, how you account for the fact that one of them acknowledged the paper on the next day? A. Mr. Minahan got Mr. Fell to come from the Stock Exchange and Mr. Fell explained that he was a friend of Mr. Minahan's and would sign that agreement. The reason I recall it is that Mr. Fell was shaking like this (illustrating) under the strain of the Stock Ex- 40

Earl F. Watson—Direct

change, and that is what makes me recall this document as I do. He signed it there. The acknowledgment was typewritten on there. That of Messrs. Minahan & Costa, the firm and individually, is taken before William H. Moore, who was at that time in my office and was a notary. Mr. Ogilvie I do not know. Mr. Fell was anxious to
10 get back to the Stock Exchange and rushed away. The fact is that we require them to be acknowledged as soon as we can. I presume Mr. Fell went before another notary. That is the reason it was taken the next day.

Q. So that Mr. Fell hadn't time to turn around to Mr. Moore, who sat in your office, and say, "I acknowledge this?" A. Mr. Moore had taken the acknowledgment of Messrs. Minahan and Costa
20 when they signed, and then Mr. Fell coming in later, Mr. Moore might have been out on another case.

Q. Well, was he out? A. I don't recall.

Q. You do not recall anything about that, do you? A. No.

Q. So that you can not give any rational explanation for the fact that the acknowledgment of Fell bears date the 11th of April? A. Other than that, we would have had that acknowledgment taken, and if he did not sign it that day, we would have
30 had him sign it the next day.

Q. You have already said that you never saw Fell again? A. I don't recall; I didn't go down there.

Q. If you witnessed these signatures, why did you not attest it? A. It was not customary at that time for us to witness the signatures. We do it now frequently, but we didn't then.

Q. You do now frequently? A. Yes, we do. I
40 never do.

Lawrence T. Fell—Direct

Q. If Mr. Moore took the acknowledgment, why did he not attest it? A. It was not customary at that time.

Objected to.

Q. What did Mr. Fell look like? A. I don't recall, except the fact that he was so nervous.

Q. What color hair did he have? A. I don't recall.

10

Q. How tall was he? A. I don't recall.

Q. Did he have a bald head, like Judge Skinner, or was he handsome, like me? A. Is that a leading question?

Q. What did he look like? Can't you tell us at all? A. I don't recall.

Q. You would not have known him if you had met him on the street? A. No, I wouldn't.

Q. Would you have known Minahan? A. Yes, I think I would.

20

Q. Would you have known Costa? A. No, I can tell you how I would know Minahan.

Q. No. The only reason you remember the Fell incident is because he was trembling some on account of some Stock Exchange transaction? A. Yes.

LAWRENCE T. Fell re-called in behalf of 30 plaintiff:

Direct-examination by Mr. Skinner:

Q. Are you familiar with your father's signature? A. I was; yes, sir.

Q. Would you know it if you saw it? A. I think I would, yes.

Q. Have you ever seen this paper, showing you 40

Lawrence T. Fell—Re-direct

paper dated April 10, 1901, the one that has just been shown to Mr. Watson (shown to witness)?

A. Not to my knowledge; no, sir.

Q. You have not been asked to identify the signature, then, for the purposes of this case? A. No, sir.

Q. Look at the signature that is there and tell us whether that is your father's signature? A. I would say yes, sir.

Mr. McCarter: Now, I want to ask a further question on cross-examination.

CROSS-EXAMINATION by Mr. McCarter:

Q. Did you ever come across in your father's papers a release, or document purporting to be a release, of him from the liability that is said to have arisen from this document that has just been shown you? A. No, sir.

Q. Did you ever hear of any such document? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Skinner:

Q. You were asked whether you ever heard of such a paper. I ask you, Mr. Fell, if you have any recollection of your father's having spoken of it?

A. Nothing at all, Judge, about any release or anything. I remember the time very well when the year is mentioned, but I don't remember anything about this case at all.

Q. Do you remember your father saying anything about a liability that he was under to the American Surety Company? A. No, sir.

Q. Or anything about his having got rid of it or being through with it? A. No, sir.

Q. Do you remember his saying anything about

Lawrence T. Fell—Re-direct

possibly not a liability to the American Surety Company, but a liability that he was under by association with Minahan and Costa? A. No liability, sir.

Q. Well, do you remember his speaking of any relations that he had with them? A. Why, I know he must have had some relations—

I A. Objected to as immaterial.

10

The Court: (After argument.) I thought your question was whether he had ever heard his father say anything about terminating the relation with these gentlemen. It proves to be whether he said anything about the relations.

Question withdrawn.

Q. Did your father ever speak to you about any association with Minahan & Costa as to any contract work in Massachusetts?

20

Objected to as immaterial.

The Court: (After argument.) It seems to me that all that was opened by the question that was asked on cross-examination is whether the witness ever heard his father say anything about the termination of such a relation, not its existence.

Question withdrawn.

Q. Did you ever hear your father say anything about the termination of any association that he had with Minahan & Costa in a job at Massachusetts? A. Yes.

30

Q. What did he say?

Objected to as not re-direct-examination.

The Court: (After argument.) Inasmuch as in correct business such transactions are almost necessarily evidenced by documents, there is perhaps a sort of implication of law and fact that supports your question, 40

Genevieve R. Fell—Cross

I will allow the witness to answer it.

Mr. McCarter: This is a statement by the senior Mr. Fell in our absence—mere talk.

Mr. Skinner: I would not feel that it was competent if the door had not been opened by Mr. McCarter's question.

10 Defendant's counsel pray an exception, and the same is allowed.

Question read.

A. Why, as I recall it—at that time I was associated with my father in business, and he was leaving the office—he left it several times to go to Massachusetts; what it was on I didn't know, but he went up there. One day he came in the office; the date I don't remember, but he said he was finished with Massachusetts and he could spend more
20 time in his office.

Q. Can you tell us about when that was? A. I couldn't honestly answer that, Judge, only for the fact that your papers say it was in 1901, so that I presume it was.

GENEVIEVE R. FELL re-called for further cross-examination by Mr. McCarter:

30

Q. Did you ever come across in your father's papers after his death a release of any liability on his part as surety or indemnitor to the American Surety Company? A. No, sir.

Q. Did you ever hear of any such document? A. No, sir.

William H. Bishop—Direct

MARY C. FUNGER re-called for further cross-examination by Mr. McCarter:

Q. Did you ever come across any such document? A. No, sir.

Q. Did you ever hear of any such document? A. I never heard of it.

10

At 12.30 o'clock p. m., the court takes a recess until 2 o'clock, p. m.

After recess.

WILLIAM H. BISHOP sworn in behalf of plaintiff:

20

Direct-examination by Mr. Skinner:

Q. Mr. Bishop, what is your business? A. With the American Surety Company of New York.

Q. In what part of that company's business? A. Clerk, home office agents.

Q. Were you in the employ of the company in April, 1901? A. I was, sir.

Q. I show you a paper which has already been marked, I think, P-1, and show you a signature at the end here, and ask you whose that is (shown to witness)? A. That is my signature, sir.

Q. Do you know this seal that is here attached? A. Yes, sir.

Q. What is it? A. The corporate seal of the American Surety Company of New York.

Q. Under what circumstances did you attach your signature there? A. As subscribing witness to the signature of David B. Sickles, as vice-president of the American Surety Company of New York.

40

William H. Bishop—Cross

Q. When was the corporate seal attached here with reference to your putting your name on as witness? A. Why, that was put on at the time the bond was executed, probably a few moments after Col. Sickles signed the instrument as vice-president and the secretary, Mr. Sweeney, signed.

Q. When was that done with reference to your signing it? A. Why, I signed—I subscribed as witness after I fixed all the papers up and turned them over for delivery to the proper party in the office.

Q. That is not what I asked you. When did you sign with reference to the affixing of the corporate seal and the signing by Sickles and Sweeney? Did you sign before or after that? A. After, sir.

Mr. Skinner: I offer this.

Mr. McCarter: I would like to cross-examine.

Mr. Skinner: I believe it was received in evidence already, subject to further proof as to the corporate seal, so that I do not have to renew my offer.

CROSS-EXAMINATION by Mr. McCarter:

Q. Do you remember the incident? A. Well, I can't exactly say I remember the incident; I remember that we have executed a bond for that party, but—

Q. I ask you again, do you remember the occurrence? A. Of signing?

Q. Yes, this particular? A. Oh, yes, I remember that particular bond; yes, sir.

Q. Well, why did you say just now that you could not remember? A. Why, I remember signing the Costa & Minahan bond, but I can't tell you what time of day I signed it, sir.

William H. Bishop—Cross

Q. Well, I did not ask you that. What is your occupation in that business? A. I am clerk.

Q. I know, but what business do you do? A. Why, at that time I was looking after the preparation of bonds and getting them executed by the officers of the company.

Q. Your business was just to see that bonds were executed, was it not? A. Yes, sir. 10

Q. Did you have anything to do with drafting the agreements? A. Oh, no, sir.

Q. After they had all been drafted you took them up to the officers of the company and got them executed; is that right? A. Yes, sir.

Q. And then you would sign your name? A. Yes, sir.

Q. Now, you would have as many as ten or fifteen or twenty a day, would you not? A. Possibly.

Q. Well, probably? A. Probably we would; yes, 20 sir.

Q. Do you remember every one? A. I try to remember every one.

Q. This is away back in 1901, eleven years ago? A. Yes, sir.

Q. What other bonds did you execute that day besides that one? A. That day?

Q. Yes. I can't remember.

Q. And yet you do remember that one? A. I do remember that one, yes. 30

Q. How does that happen, that you remember that and can't remember another single one that day? A. Because the name is familiar to me, sir.

Q. Yes, you have heard of this suit? A. I have heard of the name of Costa & Minahan.

Q. Had you heard of it before? A. Before when?

Q. Before the time you say you performed this act? A. Before 1901? 40

William H. Bishop—Cross

Q. Yes. A. No, sir.

Q. They were strangers to you, were they not?

A. Yes, sir.

Q. Now, I want to get at the machinery. Do you recall seeing the vice-president, Mr. Sickles, sign that document? A. The vice-president sign it?

Q. Yes. A. Do I recall seeing him sign that?

10 Q. Yes. A. Yes, sir; I recall seeing him sign that.

Q. You do? A. Yes, sir.

Q. He probably signed a dozen more at your request that day, did he not? A. Yes, sir.

Q. Do you recall each one? A. Well, it was my habit to take them personally to get him to sign; that goes with my duties.

Q. I understand that. I ask you whether you remember the fact of Mr. Sickles putting that
20 particular name on that document? A. Well—

Q. Well, you do not, do you? A. No.

Q. If you did not see your name there as a witness you would not know whether he had signed it or not, would you? A. If I didn't see my name as a witness?

Q. Why do you have to repeat every question I put to you? You see your name as witness there, do you? A. Yes, sir.

Q. "William H. Bishop"? A. Yes, sir.

30 Q. Now, I ask you, if you did not see your name, "William H. Bishop," there, whether you would be able to remember whether you saw Mr. Sickles sign that particular one, after eleven years, when you say you were signing as many as a dozen a day? A. It is kind of hard for me to answer.

Q. You would not remember, would you? A.
40 It is doubtful whether I would.

William H. Bishop—Cross

Q. Certainly, that is perfectly natural. You did not attach the seal, did you? A. No, that I couldn't swear to, sir.

Q. Who keeps the seal, the secretary? A. Why, it is kept on the table.

Q. Well, the secretary's table, in the secretary's department? A. No, we keep a seal in the numbering division.

10

Q. Is there one seal of this company or are there many seals? A. Well, I know two seals right on the table right next to my desk.

Q. In your department? A. Yes, sir.

Q. And that is what department? A. That was in the court and contract department at that time.

Q. And who was head of that department at that time? A. I was assistant; I was under Mr. Watson's jurisdiction.

Q. That is the gentleman who was here this morning? A. Yes, sir.

Q. So that there are two so-called seals of the company in Mr. Watson's department? A. Yes, sir.

Q. Now, where are there any more seals? A. I couldn't tell you that, sir.

Q. Well, you know the secretary, Mr. Sweeny, has a seal, do you not? A. That I couldn't tell you.

Q. You never knew whether the secretary of the company had a seal? A. I don't know whether he had an individual seal, sir; I couldn't tell you that.

Q. What was the use of having two seals in your department? A. To facilitate the execution of the bonds.

Q. Because you had so many to sign that you wanted to be able to use both at once? A. Oh, no, sir.

40

William H. Bishop—Cross

Q. What? A. Probably I would sign—

Q. I do not ask you probably; I ask you the fact. A. I don't know why there were two seals.

Q. Did you ever compare the seals? A. I have compared them many a time on paper; yes, sir.

Q. Is Mr. Sickles still vice-president of the company? A. No, sir.

Q. Is he dead or alive? A. I believe he is alive, sir.

Q. Where is Mr. Sweeney, the secretary of the company, who signed at that time? A. He is dead, sir.

Q. He is dead? A. Yes, sir.

Q. Did you see him sign it? A. I take it around—

Q. Did you see Mr. Sweeney sign it (paper shown to witness)? A. I know his signature, sir. I can't swear that I saw him sign it.

Q. What is there about it that enables you to swear you saw Sickles sign it? A. Because I was in the habit of taking it to Col. Sickles myself.

Q. Simply because it was your habit to do so, then? A. Yes, sir.

Q. Sometimes these documents that had to be signed, a dozen or so at a time, would be taken up to the officer by somebody else, would they not?

A. In some cases they would, yes, sir.

Q. What was the mechanism of doing this thing? Would you get these things all ready and take them up in a bunch? A. Sometimes they would be taken in a bunch.

Q. Would they have to go to another floor or the same floor where you were located? A. In some cases they would have to go to another floor.

Q. The officers were not all on your floor, were they? A. Not all.

William H. Bishop—Cross

Q. Mr. Sickles himself was on another floor?

A. Well, I can't tell at that time whether he was or not.

Q. And for aught that you now remember, is it not a fact that a bunch of these papers might have been taken up by some clerk other than yourself, and their signatures gotten, just as on other occasions that was done by you? A. I was 10
in the habit of going—

Q. Answer my question. A. That I couldn't tell you.

Q. That might be true? A. It might be.

Q. That somebody else might have taken them up and gotten their signatures? A. It might be.

Q. And then it would be completed? A. Yes, sir.

Q. Just as it is there? A. Yes, sir.

Q. And you can not say who affixed this seal? 20

A. No, sir; I can not.

Q. And were the other signatures that are on the same page, Mr. Clemon's and those, there then or not, or do you not remember that? A. I don't remember, sir.

Q. Had you ever seen Minahan and Costa at that time? A. Not to my knowledge.

Q. Then, as I understand your present position, you have no personal recollection of the incident itself? A. No, sir. 30

Q. Was Mr. Moore a notary in your department, too, at that time? A. He was a notary for the company, sir; I couldn't tell whether he was in our department or not.

Q. Who gave you, if you know, the document to be executed? A. Well, that I couldn't tell you, sir.

Q. And all that you know about it is that it was your habit at the end of a day to take a lot of pa- 40

William H. Bishop—Cross

pers that you prepared up to the officers and have them sign them, and then you usually, if you took them up, put your name there and— A. Well, not at the end of the day.

Q. Well, whatever time it was. A. Yes, different periods during the day.

Q. What thing did you have to do in connection
10 with the document except to play the errand boy and take it upstairs? A. Well, I had to see that it was properly executed by the officers.

Q. Well, you took the acknowledgment some times, did you not? A. In some cases I did, sir.

Q. And you did not always see the officer when you took the acknowledgment? You have been known to put your acknowledgment on when you did not see the officer, have you not? A. Well, I know their signatures.

20 Q. In other words, when you took their acknowledgment, you took the acknowledgment without seeing them? A. Yes, sir.

Q. So that if this document bears your signature, it does not necessarily follow that you saw Mr. Sickles sign, does it? A. Well, I know his signature.

Q. Well, I know, but the mere fact that you took Mr. Sickles' acknowledgment here does not involve that you saw Mr. Sickles sign, that an errand boy might have taken it up and you filled
30 out the acknowledgment; that is true, is it not? A. That is true; yes, sir.

Mr. Skinner: I renew the offer.

Mr. McCarter: We object to the admission of this document, first, because of the fact that its execution is not proven to have been authorized by the board of directors; second, that there is no proper identification of the seal; third, there is no

William H. Bishop—Cross

proper proof of the signatures, and, fourth, the contract for the bond that is now offered is not accompanied by the contract to which it refers and which is part of it. For those reasons we make the objection.

Mr. Skinner: (After argument.) I am perfectly willing to make the offer include the whole paper, including the contract referred to in the bond as annexed, or attached, and I make that offer. 10

The Court: (After further argument.) The Court has not read the paper, and only knows what the evidence tells about the case. I have heard of a bond and I have heard that it is attached to a contract. What the statue of this resolution is, I am quite ignorant of. 20

By Mr. McCarter: Perhaps I might be permitted, in view of the suggestion of the Court, to ask the witness a question with regard to the document.

Q. You have recognized this document as bearing your signature, Mr. Bishop? A. Yes, sir.

Q. Attached to it is a printed blank bearing Mr. Sweeney's signature? A. Yes, sir.

Q. Was part of the mechanism in getting up the signatures the affixing of that document—was that part of the duty done in your department, too—this blue paper (indicating)? A. Yes, sir. 30

Q. And this document that you affixed at the time, or that was done under your direction in the office in your department, quotes from the by-laws and reads: "Resolved that the president and vice-president be and they hereby are and each one of them is authorized and empowered to execute and deliver and attach the seal of the com- 40

William H. Bishop—Re-direct

pany to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts, other than insurance policies, and executing and guaranteeing guaranty bonds and undertakings; however, to be attested by the secretary, one of the assistant secretaries or one of the attorneys."

10 That is right, is it not? A. Yes, sir.

Q. That resolution, you are aware, was in existence at the time you affixed this seal to the papers, was it not? A. This paper we always attach to a bond.

Q. And you attached that there at that time? A. Yes, sir.

Q. Or someone in your department? A. Yes, sir.

Q. And you have a whole stack of them all
20 ready to attach, have you not? A. In blank.

Q. In blank? A. Yes, sir.

Q. All ready to attach? A. In blank, and we fix them up.

Objection renewed.

Mr. Skinner: (After argument.) I do not recall whether I asked Mr. Bishop about the signature of the secretary here. I think he has testified, in answer to Mr. McCarter, that the signature is his. I would
30 like to ask him this further question.

RE-DIRECT-EXAMINATION by Mr. Skinner:

Q. Mr. Bishop, do you know that signature, "G. M. Sweeney"? A. I do, sir.

Q. And whose handwriting is it? A. Mr. Sweeney's own handwriting. I have seen him sign it
40 many a time.

William H. Bishop—Re-direct

Q. Was he at the time of this date, April 10, 1901, the secretary of the company? A. Yes, sir.

Q. And is now dead? A. He is, sir.

(Counsel argue further.)

Q. Do you know that signature (shown to witness)? A. Yes, sir.

Q. David D. Sickles? A. David D. Sickles.

The Court: He identified Mr. Sickles' 10
signature.

Q. I mean do you know the handwriting, do you know the signature? A. Yes, sir.

Q. How do you know? A. Why, I have seen him sign it many, many times.

Q. And is that his signature? A. Yes, sir.

The Court: (After further argument.)

It is objected that no authority is shown in Mr. Sickles to execute the bond; that there is no proper identification of the seal, and 20
that the bond is not a complete document.

I think that the identification of the seal as the seal of the company is sufficient.

Now, as to proof of Mr. Sickles' authority to execute the bond and to affix the seal. I reserve any decision as to the broad claim made on behalf of the plaintiff that the seal itself would prove the validity of the whole paper, without any signatures. Looking at the paper as it is, the 30
subject is to be treated in a common sense way. When it is said that the vice-president must affix the seal, it does not mean that he must do it manually himself; it means that it must be done by his authority. The authority may be implied, of course, especially in the case of a large company, doing a great deal of business. 40

William H. Bishop—Re-direct

10 The signature of Mr. Sickles is identified. He signed this paper, and it is admitted that he was vice-president. A seal, which, in my opinion, is identified as the seal of the company, is found affixed to the paper. It seems to me the most natural presumption that the seal was affixed by authority of the vice-president. One of the steps in the execution of a paper is to affix the seal. His own signature was another step. Whether the authority of Mr. Sickles to sign and whether his authority to affix the seal requires proof of the resolution is another question. We have the genuine seal and we have the genuine signature. It may be fairly presumed, I think, that the seal was affixed by the authority of the head officer who signed in that connection. But it appearing that there was a resolution, or it being suggested that there was a resolution, which gave express authority to certain officers to do certain things, it seems to me that a good deal is to be said in support of the idea that that resolution, if there was one, ought to be proved, unless the seal itself dispenses with the proof of it, which I am not prepared to say.

20
30 I take the same view of the third point that has been expressed: that while on a motion to non-suit, it might be necessary that the Court should find in the evidence proof both of the contract and of the bond itself, it does not necessarily follow on this motion that the bond can not be proved unless the contract is proved at the same time. That further leads me to think that

40

William H. Bishop—Re-direct

proof of the resolution is necessary to support the offer of the bond.

(After further argument.) Unless you can satisfy me that the seal is all sufficient, I should sustain this objection, on the ground that the authority of the vice-president is not proved.

Mr. Skinner: May I suggest this, sir? 10
There are three of these bonds, and I have only been questioning as to one. I may go on with this witness and make proof of the other two up to the same point, and have the same point made as to each one, and that the ruling on the actual admission of the bond may be delayed until tomorrow?

Mr. McCarter: I have no doubt that we can agree, if Mr. Bishop says so, that his testimony with regard to the other two 20 documents will be the same as it was with regard to that. Perhaps we can save time on that. I have no doubt that could be stipulated.

(After conference between counsel.) It is stipulated between counsel that the testimony already given on direct and cross-examination as to the first bond shall apply to the other two.

By Mr. Skinner: Q. Mr. Bishop, I show you this 30 signature on the blue piece of paper that Mr. McCarter referred to, and ask you whose signature that is (shown to witness)? A. G. M. Sweeney's, secretary.

Q. Secretary of the company? A. Yes, sir.

Q. And this other signature above it, also on the blue part, "William H. Bishop," whose is that? A. My signature, sir.

Maynard E. S. Clemons—Direct

MAYNARD E. S. CLEMONS, re-called in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Mr. Clemons, I call your attention to the papers that have just been under examination, three bonds, and that were shown to you on your former testimony, marked "84,757," "84,758" and "84,759." Taking first 84,757, I call your attention to signatures on page 47, and ask you if you saw any of them attached (shown to witness)?
A. I did.

Q. Which ones? A. I saw the signature of William H. Lee, George M. Thomson, William B. Daniel, Minahan & Costa, Daniel F. Minahan and Antonio Costa.

Q. That is all there are, is it not? A. Yes, sir.
20 Q. And when and where was that done? A. That was done at the office of the Board of Sewer Commissioners of the Town of Wakefield at the same time that the bond which follows was executed.

Q. Who were William H. Lee, Thomson and Daniel? A. They constituted the Board of Sewer Commissioners of the Town of Wakefield.

Mr. Skinner: I offer that entire paper now, made up of this instrument just identified and proven with the bond attached—the contract and the bond together.
30

Objected to.

Mr. Skinner: I withdraw the renewal of the offer because there is still the objection to the Surety Company's execution.

Let it be stipulated on the record that it is agreed between counsel that Mr. Clemon's proof as to the ones marked 84,753
40

Maynard E. S. Clemons—Cross

and 84,759 would be the same in this particular as that just given in this particular with regard to the one marked 84,757—proof of the signatures of the sewer commissioners and the other parties to the contracts accompanying the other two bonds.

CROSS-EXAMINATION by Mr. McCarter:

Q. Have you any way of fixing the day that those signatures took place? A. I have.

Q. Can you tell us when? A. They were April 12, 1901.

Mr. Skinner: I offer in evidence the agreement of indemnity so called, April 10, 1901, already proven, but not marked. I think it was not offered. It is dated April 10, 1901. That is the one as to which Mr. Watson testified. Then I had Mr. Fell back on the stand to identify his father's signature.

Mr. McCarter: This is the document, your Honor, that purports to bear the signature of Minahan & Costa, D. F. Minahan, Antonio Costa and L. T. Fell. It is the document that the clerk, Mr. Watson, I think his name was, testified about. He said that he did not know Minahan and he did not know Costa, except as they came in. Somebody came in and called himself Costa and called himself Minahan, and signed it. And he said that the same thing was true with regard to Mr. Fell's signature. It later appeared that Mr. Fell's son identified his father's signature; but there has been no identification of the other signatures. Therefore the document is not

Jarvis W. Mason—Direct

proven There is no attestation by anybody, and there is no identification of the signatures, so that I think the document is not authenticated. It is up to the plaintiff to strictly prove his case.

10 The Court: (After argument.) I think there is a *prima facie* case as to the signatures of the parties named. You offer the agreement and I receive it.

Defendant's counsel pray an exception, and the same is allowed.

Paper marked Exhibit P-11.

Mr. Skinner: I ask that these three bonds that have already been considered and testified as to, and the contracts with them, the printed books, be marked for identification.

20 Marked respectively P-1, P-2, and P-3 for identification.

JARVIS W. MASON, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Mr. Mason, where do you reside? A. Mt.
30 Vernon, New York.

Q. And what is your occupation? A. I am one of the vice-presidents of the American Surety Company of New York and manager of its credit department.

Q. Have you any profession? A. I am a lawyer and a certified public accountant.

Q. How long have you been connected with the American Surety Company? A. Since the 1st of
40 March, 1892.

Jarvis W. Mason—Direct

Q. How long have you been one of its vice-presidents? A. I can't tell you exactly; some seven or eight years.

Q. In the year 1901 did you have any business dealings or negotiations with Daniel F. Minahan, James Conway and William Hanna, or with any of them? A. I did, with all of them.

Q. Without telling us what the negotiations 10 were or the result of them, Mr. Mason, tell us where they were carried on? A. In my office, in the American Surety Company's office, 100 Broadway, New York.

Q. Were all of these three gentlemen present there at your office? A. They were.

Q. Was there any writing or were there any writings made in the course or at the end of these negotiations? A. There were.

Q. I show you a paper bearing date June 26, 20 1901, and ask you whether that was one of the writings you have mentioned (paper shown to witness)? A. It was.

Q. I call your attention to the signatures that are thereto attached, and ask if you know anything about their being put there? A. They were put there in my presence, and in the presence of Mr. Tierney.

Q. And who was Mr. Tierney? A. A clerk in my office and a notary public. 30

Q. By whom were those signatures placed there? A. By Mr. Minahan and Mr. Conway and Mr. Hanna, each signing his own name.

Q. Do you see either of the gentlemen that you have mentioned in Court? A. I think I see Mr. Conway, but I can't be positive.

Q. Which do you think is Mr. Conway? A. I think the gentleman on the second bench, near the center aisle. 40

Jarvis W. Mason—Direct

Q. Can you indicate his location with reference to anybody else? A. He is leaning—if my recollection is correct, he is the man leaning on the seat. He just pointed to himself.

Q. The gentleman who just pointed to himself? A. Yes.

Q. Is that gentleman Mr. James Conway? A. 10 That is my recollection; I may be wrong. It is a long time ago.

Mr. Skinner: Can that be stipulated? Is that the fact?

Mr. McCarter: The gentleman there who pointed to himself is Mr. Conway.

Q. You spoke of there being writings at that time. What other writing was there than the one I have just shown you? A. A release of Mr. Cos- 20 ta and another gentleman, whose name has slipped me just now, executed by the American Surety Company of New York.

The paper shown to witness is marked P-12 for identification.

Q. Did you see the release that you have spoken of? A. I did.

Q. Well, to what extent did you see it? A. I either drew it myself or directed it to be drawn and then directed that it be executed by the proper officers, and when it was returned to me I 30 delivered it to these three gentlemen, or some one of them.

Q. "These three," meaning whom? A. Mr. Minahan, Mr. Conway or Mr. Hanna.

Q. I show you this paper and ask you what that is (paper shown to witness)? A. That is the of- 40 fice copy, which we retained, of the original then delivered.

Mr. Skinner: I offer it in evidence, to-

J. Howard Conover—Direct

together with the one that was marked P-12 for identification. We will call this last one P-13 for identification.

Paper marked P-13 for identification.

Mr. Skinner: Before having the Court pass upon the offer or before having any cross-examination on it, I would like to have permission to withdraw Mr. Mason and to offer the Court further proof as to the attempt to procure the presence of another witness, who, I think, is not present.

The Court: You may do so.

Mr. Skinner: Is Mr. Antonio Costa here?

(No response.)

20

J. HOWARD CONOVER, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

Q. Where do you live? A. Orange, New Jersey.

Q. And what is your occupation? A. Attorney-at-law, in the employ of Pitney, Hardin & Skinner.

Q. Did you recently make any effort to see or find Mr. Antonio Costa? A. On Friday night I served Mr. Costa with a subpoena *duces tecum* and gave him a fee of \$1.10.

Q. Have you that subpoena or a copy of it? A. I have the original subpoena here, and served upon him a true copy of it (producing paper).

Q. Where did you find Mr. Costa? A. In his residence, on Henry Street, Orange, New Jersey.

40

J. Howard Conover—Direct

Q. Was anything said by him as to whether or not he would appear in answer to the subpoena?

10 Mr. McCarter: I think that can not be shown. I am sure I do not know what the object of the testimony is; but conversation between some witness and this young gentleman can not be competent against us. We have nothing to do with Mr. Costa, and I do not think that conversations between Mr. Conover and Mr. Costa are competent.

The Court: This evidence might be laid before the Court as ground for a bench warrant, but it seems to me it stands now in a different light in the trial of the case.

20 Mr. Skinner: The purpose I had in this testimony is this. I feel that if we want to use a copy of a given paper, that we should make reasonable effort to procure the production of the original, and that we should prove to the Court that we have made that effort. Now, we want to use, and have just had before the Court, what we endeavored to establish as a copy of the release given to Fell and Costa. We have had Fell's executors on the stand to testify to search among his papers and the original release not being found. Costa is living, we understand, and we subpoenaed him to come here. Now, it occurs to me that we are not dependent upon Mr. Costa; we have not anything to do with him. Mr. McCarter says they have not. Certainly we have not. In case Mr. Costa does not come, then I have a right to show what I have done to get him here, and failing his appearance, to use the paper. If Mr. Cos-

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40

J. Howard Conover—Direct

ta in being served has said anything with reference to his willingness or unwillingness to come, that would be one of the circumstances, to be followed with others, to show the Court whether or not he was willfully absent or, possibly, compelled to be absent.

The Court: Well, he was served with a 10 subpoena *duces tecum*?

Mr. Skinner: Yes, sir.

The Court: That subpoena would prove what it was that he was directed to produce. He was bound to obey the process of the Court. If he has not obeyed, he is acting in his own wrong, on the face of it.

Mr. Skinner: Possibly, I might show circumstances to show whether he was evading the process or whether it was an 20 unavoidable absence, without assuming that it was the contempt that would call for a bench warrant.

The Court: If you want Mr. Costa produced, I will bring him here, if I can lay my hands on him.

Mr. Carter: Your Honor thinks that question ought not to be answered?

The Court: Yes, I think so. It goes into a conversation. 30

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

Q. Mr. Conover, since then have you been to Mr. Costa's house? A. I went to Mr. Costa's house this morning, and his wife—

Q. No. A. Yes, I went to his house this morning.

J. Howard Conover—Cross

Q. And did you inquire for Mr. Costa? A. I did.

Q. Did you see him? A. No.

Q. Whom did you see? A. Mrs. Costa.

Q. Were you told anything by Mrs. Costa as to where her husband was?

Objected to as incompetent.

10

The Court: It seems to me that is beyond the rule; it seems to me it is incompetent; that is, it is not incompetent for the witness to answer yes or no, but that would not get you forward any.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

CROSS-EXAMINATION by Mr. McCarter:

20 Q. Mr. Conover, had you ever seen Mr. Costa before Friday? A. Many times.

Q. You knew him? A. Yes, sir.

Q. Where was it you saw him on Friday? A. At his residence, on Henry Street.

Q. Do you remember the number? A. I think it is 108.

Q. What nationality is Mr. Costa? A. I should judge an Italian.

30 Mr. Skinner: I should like to have this subpoena *duces tecum* that Mr. Conover has produced, marked.

The paper is marked Exhibit P-14.

Mr. Skinner: In connection with this offer of the subpoena *duces tecum*, I want the Court to know the contents of it. It is sufficient for me to state, without reading it at all, I think, that it states that "You bring with you and produce at the time and place aforesaid a certain release exe-

40

Jarvis W. Mason—Cross

I A. cuted by the American Surety Company of New York to you and one Lawrence T. Fell, now deceased, which release is dated the 26th day of June, 1901, together with of as any letters, and so forth, in any way connected with the matters in controversy.”

Mr. Skinner: I now renew the offer of of the ageement of indemnity—I think it was 10 P-12—and the office copy of the release, P-13.

JARVIS W. MASON, re-called in behalf of plaintiff:

Cross-examination by Mr. McCarter:

Q. Mr. Mason, you have been vice-president 20 since when? A. I can't tell you exactly; some six or seven years. I have been in the—do you mean the—

Q. You have been in the employ of the company — A. Since March 1, 1892.

Q. In 1901 you were assistant general solicitor? A. I was.

Q. And where was your office as assisting general solicitor? A. At 100 Broadway.

Q. In the building? A. Yes, or in the Scher- 30 merhorn building. The two were operated together; the doors open between the two.

Q. The question is where it was? A. I am trying to tell you. Mine was in the Schermerhorn building, next door.

Q. Next door to the tall building on the corner of Broadway and Cedar Street; is that it? A. Yes.

Jarvis W. Mason—Cross

Q. The executive offices were in the corner building, were they not? A. They were.

Q. And you were then in the law department? A. Yes, sir.

Q. Your chief was Mr. Willcox? A. Yes.

Q. Now, had you ever seen Mr. Conway except on this one visit? A. I think I saw him on one
10 previous visit.

Q. In your office? A. In my office.

Q. Are you sure of that? A. I will not tell you I am sure, but I have a pretty fair recollection of his having come in and talked the matter over once before.

Q. Well, was that negotiation, whatever it was, that resulted in the signing of a document, with you personally on behalf of the company? A. It was.

20 Q. And you closed the deal? A. I did.

Q. As assistant general solicitor? A. Yes.

Q. Did you consult with your chief, Mr. Willcox? A. I may have done so.

Q. I did not ask you what you might have done. A. I can't tell you whether I did or not.

Q. Did you consult with the president of the company? A. I can not tell you whether I did or not.

30 Q. Well, you told us a moment ago that you closed it yourself? A. I did.

Q. And after the negotiation ceased, the paper was drawn either by you or somebody else, and, you said, signed then and there? A. It was.

Q. Then I ask you now if you consulted with any of your superior officers? A. And I can tell you now I don't know whether I did or not; I may have done so and may not have done so.

40 Q. Then you wish this jury to understand that

Jarvis W. Mason—Cross

you signed some document letting up on Mr. Fell and Mr. Costa without necessarily consulting a single soul with that company, and you were then only its assistant general solicitor? A. No, I did not sign it; I advised the officers to sign it.

Q. You did, then, consult with the officers? A. I advised them to sign it. I may not have seen them; I may have done it by putting my initials 10 on the document itself.

Q. Have you any recollection about it at all? A. I have a recollection distinctly of the transaction; what particular form my advice took or just whom I advised with, I can not recall.

Q. You know you advised with somebody, although you do not know whom you advised with? A. I know I spoke to the officers who signed or put my initials on the paper, which is accepted as equivalent. I want to ask if you are referring 20 to the document executed by the American Surety Company, not that one?

Q. That is very, very funny. I am referring to the document that was signed by Mr. Conway and which you have identified as having been signed by him. A. That document was never signed by any officer of the company, so far as I know of.

Q. And did you accept this without conferring with any officer of the company? A. Very likely I did. 30

Q. Well, did you? A. I can not tell you.

Q. Do you find any signature or initial, or what not, on that document indicating that you, as general assistant solicitor, went to anybody? A. I did not.

Q. Who drew that? A. It was done under my direction.

Q. Who drew it? A. I can tell you again, it was 40

Jarvis W. Mason—Cross

done under my direction; I can not tell you what particular clerk drew it up.

The Court: What paper is that, Mr. McCarter?

Mr. McCarter: P-12 for identification.

This is the document in suit, which is being offered.

10 Q. Can you recall the appearance of Mr. Minahan and Mr. Hanna? A. I can't describe them.

Q. You saw them, I suppose, as frequently as you saw Mr. Conway? A. I saw Mr. Minahan very much oftener. Whether I saw Mr. Hanna on more than one occasion, I don't know.

Q. Had Mr. Minahan seen you about this matter before, or about other matters? A. He had seen me about matters arising out of this contract with the Village of Wakefield, or whatever the
20 name of that village is.

Q. Who composed the tenth clause in this document? A. I did.

Q. Did you write it out? A. No, dictated it.

Q. Now, you say that this took place in New York? A. In New York, yes.

Q. You saw Mr. Conway this morning, did you not, here? A. I think I did.

Q. Looked at him? A. Yes.

Q. Identified him or had him pointed out to you?
30 A. He was not pointed out to me.

Q. You looked for and saw Mr. Conway in this room before recess? A. I saw a gentleman sitting here—

Q. Answer my question, please. You looked for and saw Mr. Conway before recess sitting in the courtroom? A. I didn't look for him, but I saw a man here who I thought was Mr. Conway.

Jarvis W. Mason—Cross

Q. Did you talk to anybody about it? A. No.

Q. Not to a soul? A. I told Judge Skinner—

Q. You did talk to somebody about it, did you not? A. I did.

Q. Which document was prepared first, Exhibit P-12 or this so-called release that you speak of? A. I can't tell you. They were both drawn before either was executed.

10

Q. Were they both executed at the same time? A. On the same day, or practically so; they were delivered simultaneously.

Q. Now, please look at this document dated April 10, 1902, addressed to Minahan & Costa, and see if you recognize that and can tell what it is (paper shown to witness)? A. That is on the bill-head of the American Surety Company of New York, and purports to be a bill against Minahan & Costa for premiums accruing on these bonds on April 10, 1902, amounting to \$230.

20

Q. It is dated April 10 1902? A. Yes.

Q. That is how long after the date of this alleged interview? A. Well, if you let me see that document, I will tell you. (Paper shown to witness.) About ten months, or a year and ten months. That is 1902, is it not? I do not see very clearly. Was that 1901?

Q. 1901. A. About ten months.

The paper shown to witness is marked 30
and D-1 for identification.

Q. I now show you this document, dated March 10, 1903, and ask you what that is (paper shown to witness)? A. That is on the blank of the American Surety Company of New York, and purports to be notice that a premium will accrue on the bonds of which we have been testifying on the 10th day of April next, and it is dated April 10, 1903.

40

Jarvis W. Mason—Cross

Q. A premium will accrue from whom? A. The paper is addressed "Minahan & Costa."

The paper shown to witness is marked D-2 for identification.

Q. I show you a letter on the letterhead of the American Surety Company, purporting to be dated October 11, 1901 and purporting to be
10 signed by J. W. Mason, I think it is, assistant solicitor, together with a proposed bond of indemnity (shown to witness). Please look at them and see if you wrote that letter and signed that document with the letter attached to it? A. I did; that is my signature.

Marked D-3 for identification.

Q. Now, Mr. Mason, which one of the three gentlemen, namely, Messrs. Minahan, Hanna or
20 Conway, took this paper that you say was a release? A. Oh, I can't attempt to recollect.

Q. Well, did they all three carry it? A. It was delivered to some one of them in the presence of all three; which one I do not know.

Q. You do not know, then, who had it or who took it away? A. No.

Q. I imagine you have had during all your life a great many transactions where bonds were given as indemnity? A. Yes many.

Q. Your company always in going on these
30 bonds exacts indemnities, does it not? A. That is the rule; it is not the exclusive practice.

Q. So that, looking at the thing purely, now, from the standpoint of large, humdrum detail in business, there is nothing unusual about the execution of a bond of indemnity in connection with a surety contract that your company goes on? A. No, but there is something unusual about exchanging one for another.
40

Jarvis W. Mason—Cross

Q. These contracts are not always—these indemnity contracts and surety contracts are not always fixed up at the home office, are they? A. No.

Q. You then had and now have an office in New-ark? A. Yes.

Q. In charge of an agent? A. Yes.

Q. You then had and now have an office in Bos- 10
ton, in charge of an agent? A. Yes.

Q. And in all these offices—I only use them as specimens because they are apt to this case—there are officers and bonds and documents all ready for execution so that a contract of suretyship or a bond of indemnity could be closed at the office of your company in any one of these cities with an authorized agent there? A. We have authorized agents in all those places who can draw such contracts and draw such bonds and can execute bonds 20
on behalf of the company.

Q. And obtain indemnity? A. And obtain indemnity.

Q. Did you have anything to do with the negotiation of the original bonds with Messrs. Minahan and Costa? A. I have no recollection of it, and there is no probability that I did.

Q. Who did do that? A. I presume Mr. Watson did; he was the man who should have done it.

Q. What Mr. Watson? A. That has testified 30
here as a witness to-day.

Q. What makes you presume that? A. Because he was at that time the attorney in charge of the contract branch of the business.

Q. Well, you presume that from the fact that he testified this morning to having— A. Why, I have known Mr. Watson, for, I should think, twenty years, or nearly so.

Argument

Q. If you had not heard him testify this morning, you would not know but what that bond was executed in Newark, would you? A. I would know it was not from the names of the officers thereon.

10 Mr. Skinner: May I ask the Court for a bench warrant for Antonio Costa, to be served to-morrow morning before half-past nine?

The Court: Yes, you may have a warrant.

Mr. McCarter: That is all the cross-examination of Mr. Mason.

20 I object to the introduction of this copy that is offered, P-13. This purports to be a copy of the so-called alleged release that is said to have been given, forming the basis for the bond in suit. There is no proof of the delivery of this release—assuming this to be a copy and the original not to be found—to Mr. Fell or Mr. Costa. All that is shown up to date is the fact that a paper, of which this is a copy was given by this gentleman to either Mr. Hanna, Mr. Minahan or Mr. Conway, or some or all of them, and carried away by one of them. Now, proof, therefore, of a copy coming from the office of the surety company, the plaintiff, is premature until the original is shown to have been given to the person to whom it belonged; and while I think that I have no objection that I can make to the introduction of P-12, which is the agreement in suit, I do object to the other document.

30 Mr. Skinner: I ask first that P-12 be marked as an exhibit, then.

40 Marked Exhibit P-12.

Argument

Mr. Skinner: I understand that the objection that is made is, assuming that we have made sufficient search for the original and sufficient endeavor to procure it we have not shown delivery to the parties named in the release as the ones to whom the release was to run. I take it, therefore, that it is not the subject of objection that we have not made sufficient attempt to procure the original. 10

Mr. McCarter: I said assuming—I do not think there has been any proper foundation for the introduction of a copy, assuming that the original had been traced to Mr. Fell; but it has not. I object because the paper is not properly admissible even assuming that you had proven, which I do not admit at all, the loss of the original and 20 opened the door to the proof of a copy. You have not taken the alleged original to Fell or Costa yet. You put the original in the hands of three other men, none of whom represented or was Mr. Fell, and to say that a copy was given to Minahan or Conway or Hanna, and therefore, because Fell's representatives have searched for it, that you can now introduce a copy is too much. 30

Mr. Skinner: I did not expect to ask Mr. McCarter to admit that we had made sufficient search, but I wanted to understand what the ground of objection was, and I understand that it is that we have not shown delivery to Mr. Fell or Mr. Costa, and therefore we ought not to be permitted to prove the copy that we now offer. That seems to at least not include any objection that it has 40

Argument

not been sufficiently shown that the original has been sought for and not produced.

10 Now as to the objection that we are now considering, I call the Court's attention to the fact that P-12, which is in evidence, contains the request to release Antonio Costa and L. T. Fell from all liability or responsibility to it by reason of any such obligation, and I call the Court's attention to the fact that the request is not made by Mr. Fell or by Mr. Costa, but is made by the parties who signed this paper, Daniel F. Minahan, James Conway and William Hanna, and the proof that we have presented is that the people who requested the execution of such a release are the ones who got it. Now, it
20 seems to me that is sufficient for the purposes of proof at least, regardless of whether it got to Mr. Fell or not. I simply want to show that Conway, Minahan and Hanna conducted negotiations which resulted in two things, one of which was a bond which contained a request to give a release to Fell and Costa and the release to the people who requested it.

30 The Court: The question is as to the reception of a copy of the alleged release as evidence of the release. That depends upon two questions, or at least, two questions have been discussed; whether the search for the lost paper was sufficient, and, secondly, whether the testimony is sufficient, though not proving delivery to any persons except these three gentlemen who asked for it. I think the search was sufficient, and I think
40 the proof sustains the reception of the re-

Argument

release without any further proof of delivery.

I therefore receive it.

Defendant's counsel pray an exception,
and the same is allowed.

Paper marked Exhibit P-13.

Mr. Skinner: I asked for a bench warrant to compel the appearance of Mr. Costa.

The Court: I granted it; I will sign it. 10

Mr. Skinner: I was endeavoring to go as far as I could in the procuring of his presence here as a part of the effort on our part to produce the paper. The Court has admitted this release without having Mr. Costa in court. That makes it unnecessary for me to have him by bench warrant, and I withdraw the application for the bench warrant.

The Court: That is a matter for you to 20 decide.

Adjourned until to-morrow, Tuesday,
November 19, 1912, at ten o'clock a. m.

SECOND DAY.

Tuesday November 19, 1912. 30

Met pursuant to adjournment.

Present, counsel as before stated.

The Court: Let me say a word, lest I should be misunderstood. When I stated yesterday that I had not personally ex- 40

Argument

10 amined the documentary exhibits on behalf of the plaintiff, I did not mean to suggest that counsel had not made me aware of the character of those exhibits; on the contrary, I felt that counsel had done their full duty in that regard and that I was sufficiently informed as to the legal nature of those instruments, although, since I had to take notes of the testimony, I had not found time to myself inspect the exhibits.

20 Shortly prior to the adjournment of Court one of the counsel for plaintiff asked for the issuance of a bench warrant to bring Mr. Costa to Court. That was rather at the suggestion of the Court, I think. Then, following a ruling of the Court, he withdrew his request. Subsequent to the adjournment of Court I was requested to issue a bench warrant, and did so, and the officer who had the process has brought back to me a communication from Dr. Bradshaw, of the City of Orange. It is a certificate. Medical men appear to think themselves exempt from the duty that rests on everybody else to make affidavits. It is as follows: "November 18, 30 1912. This is to certify that Antonio Costa is a patient under my care for trouble with the kidneys. He is unfit for Court duty." By which the officer understood and I understand that he perhaps was not incompetent to testify at his house, but that he was unfit to go to Court. Now, I am not informed as to the purpose of counsel in asking for the issuance of the bench warrant. If it was the desire of counsel to introduce 40 further testimony on the question of the

Argument

Had search for the missing release, it would be necessary, in order to conform to regularity of procedure, that the question as to the admissibility of what is said to be a copy of the missing paper should be regarded as an open one; in other words, if there is to be any more testimony from Mr. Costa or any body else bearing on the question of the sufficiency of the search, that entails the admissibility of a copy. Then the Court would have to retrace its steps and consider that question an open one; in other words, recall the ruling on that subject, and consider that paper, not as an exhibit, but as a paper merely marked for identification.

Mr. Skinner: If your Honor please, may I reply to one expression of your Honor's stating that you were not informed as to the purpose of counsel in asking for the bench warrant? 20

The Court: Yes. I did not see counsel. The request came to me through the clerk.

Mr. Skinner: I think your Honor probably refers to the second request.

The Court: I did.

Mr. Skinner: I can state that it was nothing but an exhibition of indecision on the part of counsel for the plaintiff. I had first asked for the bench warrant, and then having, with other proof of search that I had made, succeeded in obtaining the admission of the copy, the Court having ruled that the search for the original was sufficient, I felt that it was unnecessary for me to bring Mr. Costa here, and I stated so to the Court, and your Honor will remember that 30 40

Henry Tofts—Direct

you replied stating that you would leave that with me.

The Court: I understand all that.

10 Mr. Skinner: And after that I, in what I call a spirit of indecision, said, "Well, I will have Mr. Costa here, or do all that can be done to get him here," and so repeated my request for the bench warrant. That was the way that came about.

The Court: Now what do you want to do? Do you want to get Mr. Costa here and reopen that branch of the case?

Mr. Skinner: I have no desire to reopen that branch of the case. I am content to take the Court's ruling that the search proven had been sufficient and the admission of the copy.

20 The Court: Then you may proceed.

Mr. Skinner: If your Honor please, I will ask the indulgence of Court and counsel to interrupt the order of proof again. I have here the assistant secretary of the company with books of minutes, for some formal proof. He is very much needed at a meeting of his company in New York.

Mr. McCarter: No possible objection.

30 The Court: With the consent of counsel, the witness may be called.

HENRY TOFTS, sworn in behalf of plaintiff:

Direct-examination by Mr. Skinner:

40 Q. Mr. Tofts, are you connected with the American Surety Company? A. I am.

Henry Tofts—Direct

Q. In what capacity? A. I am assistant secretary at present, also secretary of the board of trustees and executive committee.

Q. As secretary of the board of trustees and executive committee, do you have anything to do with the minutes of the meetings of those bodies?

A. I attend the meetings and I write the minutes and I have the custody of the records.

10

Q. Have you with you the minute book that has thus been in your custody? A. I have.

Q. How long have you been filling this position?

A. Oh, five or six years, about.

Q. Have you with you the minute book of the board of directors of the American Surety Company? A. I have.

Q. Which is it? A. Both of these (producing two books).

Q. There are two? A. Yes.

20

Q. Neither of them is the minute book of the meetings of the executive committee? A. No, sir.

Q. Have these books been in your custody? A. They have been in my custody, and previous to my being assistant secretary to the board of trustees I had custody of these books.

Q. For how long? A. Since 1891.

Q. And in 1893 did you have anything to do with the keeping of the minutes of the board of directors? A. Yes, sir; I wrote them in the book.

30

By the Court: Q. What was then your official position? A. I was just a clerk then, sir.

Q. A clerk? A. Yes, your Honor.

By Mr. Skinner: Q. A clerk to what? A. Just an ordinary clerk.

Q. Were you assigned to any particular office or officer in your clerical duties? A. I was assigned to writing the minutes in the books for the then secretary to the board of trustees.

40

Henry Tofts—Direct

Q. Who was that secretary then? A. David B. Sickles.

Q. Will you turn, please, to the minute book, or books, that you have there, and see if you can find a resolution in the minutes of a meeting held on the 12th day of April, 1893? A. (Turning to book.) I have it here sir.

10 Q. You have it here? A. Yes, sir.

Q. It is found at page what of the book? A. 443.

Q. And what is that? A. That is a resolution made—

Q. What is the record? A. It is a record of the meeting, the regular quarterly meeting, of the board of trustees of the American Surety Company of New York, held April 12, 1893, 12 o'clock, noon.

20 Q. How many pages does it occupy? A. One and a quarter.

Mr. Skinner: I offer this.

Mr. McCarter: I suggest that you just have him read it.

Q. Just read that resolution that you find there, Mr. Tofts will you?

A. (Reading.) "The following resolution was unanimously adopted. Resolved, that the president and vice-president be and they hereby are and
30 each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts, other than insurance policies, and executing and guaranteeing guaranty bonds and undertakings required or permitted in all actions or proceedings by law al-
40 lowed, such guaranty bonds and undertakings,

Henry Tofts—Direct

however, to be attested in every instance by the secretary, one of the assistant secretaries or one of the attorneys."

Q. Will you turn, please, to the minutes of any meetings of the board of directors or trustees in the month of January, 1893? A. 1893 or 1901?

Q. 1901. A. Yes, sir (turning to book).

Q. It is found on page what? A. It starts on 10 page 405 of that book.

Q. The same book? A. The other book.

Q. This is the second one of the two books that you have produced? A. This is book No. 2.

Q. The other one being No. 1? A. Yes, sir.

Q. What do you find at page 405? A. The commencement of the entry of the minutes of the regular quarterly meeting of the board of trustees of the American Surety Company, held January 10, 1901. 20

By the Court: Q. That is the meeting of the trustees, is it? A. Yes, your Honor.

By Mr. Skinner: Q. Now that is a pretty long minute, is it not, Mr. Tofts? A. Yes, sir; it occupies—

Q. Well, forty or fifty pages, anyway, does it not? A. It occupies from page 405 to 473.

By the Court: Q. That is in longhand? A. It is typewritten, your Honor.

of bet Mr. Skinner: Do not answer this ques- 30
-motion until I see whether it is objected to, be-
-to cause I am going to make it leading.

Q. Generally it tells of the result of an election, does it not? You may answer. A. Yes.

Q. Can you turn to any portion of it that relates to the election of David B. Sickles, as vice-president— A. Yes, sir.

Q. —and of G. M. Sweeney as secretary of the American Surety Company? A. Yes, sir. 40

Henry Tofts—Direct

Q. Will you do so, please? A. (Reading.)
 “The secretary read the report of the nominating committee, as follows”——

Q. You are reading from the book are you? A.
 Yes, sir.

Q. At page——? A. Page 407.

Q. Go on. A. “To the board of trustees of the
 10 American Surety Company of New York. Gentle-
 men: The committee appointed by the executive
 committee of this company at their meeting, held
 Wednesday, December 12, 1900, for the purpose of
 nominating officers of the company, members of
 the executive committee and a committee on ac-
 counts for the ensuing year, beg leave to report as
 follows. We nominate for”——

Q. Then follows, does it not, a designation of
 the respective offices with an enumeration of the
 20 nominations under each heading? A. Yes, sir.

Q. Where do you find anything about Mr.
 Sickles? A. On page 409, “Vice-presidents:
 David B. Sickles,” among some others.

Q. And where do you find anything as to Mr.
 Sweeney as secretary? A. On the same page,
 “George M. Sweeney, secretary.”

Q. What you have just read from is, as I under-
 stand you, a statement of a nomination? A. It is.

Q. Is there anything showing an election? A.
 30 That is the nomination submitted to the board of
 trustees, and it was followed in this way——

Q. On what page? A. Page 463. —“On mo-
 tion of Mr. John J. McCook, the secretary was
 authorized to cast one ballot on behalf of the trus-
 tees present, and the aforementioned officers, men-
 40 mittee, were declared to have been unanimously

Henry Tofts—Cross

elected to their respective offices for the ensuing year."

Q. And Messrs. Sickles and Sweeney were among the aforementioned officers there referred to? A. Yes, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Tofts I understood you to refer to the directors and also the trustees. Are they a distinct body? A. The executive committee and the trustees, sir. The executive committee is a committee appointed—

The Court: You misunderstood the question.

Q. Are the directors and the trustees the same thing? A. They are the same thing.

Q. They are the same thing? A. Yes, sir.

Q. Now, at the meeting of 1901, to which you just referred, what position did you hold? A. I was a clerk at that time.

Q. You did not typewrite those minutes, did you? A. No, they were typewritten at my direction.

Q. Did you keep the minutes of 1901? A. They were in my custody all the time; yes, sir.

Q. Did you keep the minutes of the meeting of 1901? A. I don't understand your question.

Q. Did you write the minutes of the meeting? A. No, sir; I did not.

Q. Who wrote them? A. The stenographer wrote them, or the typewriter wrote them.

Q. The only thing that you know about the minutes of the meeting of 1901 is the fact that they are in that minute book? A. No, sir; I know that they are the original minutes. These books have been in my care. The minutes were written

Henry Tofts—Cross

in these books at my direction, and the books have been in my custody from that time since.

Q. Listen to the question and see if my suggestion is not right, after all?

(Question read.)

A. Well, I know that these are the minutes, because—

10 Q. You did not write them, did you? A. No, but I checked them, sir.

Q. And you are not secretary? A. No, sir, but I checked them, sir.

Q. With what? A. With a draft.

Q. That you did not prepare? A. No.

Q. You were not secretary? A. No.

Q. And you did not write the minutes? A. No, but I had them written in the book and then took them to the secretary, and the secretary signed
20 them.

Q. But he did not keep them, did he? He did not write the minutes? A. No, no.

Q. The minutes of 1901 contain the names of gentlemen all over the country? A. Yes, sir.

Q. It contains, for instance, on page 409, the names of four vice-presidents, of whom Mr. Sickles is one? A. Yes, sir.

Q. Were they located at the home office? A. Yes, sir.

30 Q. Three assistant secretaries, of whom you were one? A. Yes, sir.

Q. At the home office? A. Yes, sir.

Q. "Assistant to solicitor, Jarvis W. Mason." That is the Mr. Mason who was here yesterday, and he is here this morning? A. Yes, sir.

Q. Four attorneys? A. Yes, sir.

Q. Solicitor Mr. Wilcox? A. Yes, sir.

Henry Tofts—Cross

Q. Then so-called resident vice-presidents at probably one hundred and fifty cities or places throughout the country? A. I do not think quite as many as that. You see, these are double; some of these are vice-presidents and the others are resident assistant secretaries.

Q. Well, we will stick to the vice-presidents. I have counted over seventy now. A. Yes, sir. 10

Q. There seems to be a hundred or more. A. Whatever there is in the book.

Q. And those resident vice-presidents are vice-presidents, under the practice of the company, within the resolution that you have just read? A. Yes, sir.

Q. So that there are probably seals of this company in the possession of every one of these so-called resident vice-presidents? A. In the possession of the assistant secretaries. 20

Q. Does this company do business throughout the entire country? A. Yes, sir. There may be one state, or there may be some states, in which they do not do business, but I am not quite sure about that. I would like to make a correction there. I think I said, in answer to your question, that I was a clerk at this time, in 1901. I was assistant secretary, I see by the book.

By Mr. Skinner: Q. At which time do you now speak of? A. At the time, 1901. 30

By Mr. McCarter: Q. In 1901 who were the resident vice-presidents? Did you have a resident vice-president at Newark? A. Yes, sir.

Q. New Jersey? A. Yes, sir.

Q. And resident vice-presidents at Newark, Ohio? A. Yes, sir.

Q. And had an assistant secretary at Newark, New Jersey? A. Yes, sir. 40

Henry Tofts—Cross

Q. Who was it? A. John F. Clark and Jay Ten Eyck.

Q. Now, look at Boston, please? A. Assistant secretary?

Q. No, for vice-presidents first, and then assistant secretary. A. The vice-presidents at Boston elected at that meeting were Charles D. Burridge,
 10 Phineas Pierce, Samuel N. Aldrich, Ransom D. Fuller, W. H. Hand and the assistant secretaries were Wallace H. Hand and E. F. Philbrick.

By Mr. Skinner: Q. Won't you tell us who were the resident vice-presidents at Newark? A. Thomas W. Crooks, Frederick Frelinghuysen and John R. Hardin.

Mr. Skinner: I think now perhaps would be the proper time for me to renew my offer of the bonds. We have just had the proof
 20 supplied that I was endeavoring to obtain over the adjournment—this resolution by the board of directors. I offer P-1, P-2 and P-3.

Defendant's counsel renew their objection to the offer.

The Court: (After argument.) It seems to me quite immaterial in what order the signing and sealing was done. They were all parts of one transaction. The signature
 30 of the vice-president is proven, as I understand it, and the genuineness of the seal is proven, and there is every presumption—every natural inference—I think, in favor of the regularity of the proceeding in all its parts.

Defendant's counsel pray an exception, and the same is allowed.

Mr. Skinner: I would like to have the
 40

Henry Tofts—Cross

benefit of the recollection of Court and counsel on this matter. I think the contracts were offered, but were they offered with the bond, making one exhibit of the whole book?

Mr. McCarter: I do not know whether they were or not, but they can be. I think you had better make one exhibit of the whole thing.

10

Mr. Skinner: Then I ask that the bonds and contracts, all comprised in a printed book of about fifty pages, which we have been using throughout, and which were produced by Mr. Clemons, be marked in evidence, P-1, P-2 and P-3, P-1 being the one marked 84,757, P-2, the one marked 84,758, P-3, the one marked 84,759.

Marked respectively Exhibit P-1, Exhibit P-2 and Exhibit P-3.

20

Mr. Skinner: I understand from Mr. Clemons that the bonds are all copied at length, and the contract as well, in the record of which I have produced an exemplified copy, with the exception of what we call the blue shee attached to each bond.

Mr. McCarter: I am satisfied. We have got a copy.

Mr. Skinner: I wanted to have it understood that we were not only going to supply the defendant with a copy, but we were to have a copy to go to the jury, so that these originals need not be retained to go to the jury. I think counsel for the defendant has been supplied with a copy, but the one for jury use has not been supplied. I also was informed that there is a copy in the record. My suggestion was that we should agree to

30
40

Jarvis W. Mason—Direct

use the copy contained in the exemplified record, and let this go to the jury as the copies of the bonds, the originals being returned to Mr. Clemons.

Mr. McCarter: That seems to have everything there.

The Court: Including the contracts?

10

Mr. Skinner: Yes, sir.

The Court: Then that would make it unnecessary to make the second copy.

JARVIS W. MASON resumes the stand in behalf of plaintiff.

20

Mr. Skinner: I call for the production of a letter to James Conway from the surety company, signed "Henry C. Wilcox, Solicitor, by" somebody, "Assistant Solicitor," I think by Mr. Mason, of the date of March 27, 1903, notice to produce having been given.

Paper produced by defendant's counsel.

DIRECT-EXAMINATION by Mr. Skinner:

30 Q. I show you, Mr. Mason, the letter just produced by the defendant, of the date of March 27, 1903, and ask you if you had anything to do with the sending of that? A. I dictated it and signed it and caused it to be mailed.

Mr. Skinner: I offer that in evidence.

Paper marked Exhibit P. 15-a.

(Plaintiff's counsel reads Exhibit P. 15-a.)

40

Mr. Skinner: The letter refers to an inclosure—"a copy of process inclosed." Will that be produced also?

Jarvis W. Mason—Direct

Mr. Egner. We do not seem to have it. I do not think it was demanded.

Mr. Howell. Yes, it was. I beg your pardon! "Together with any inclosures."

Mr. Egner: Well, we do not seem to have it.

Q. Mr. Mason, I show you what seems to be four printed pages (shown to witness). Will you 10
tell us what that is? A. The first page is a formal notice from the Insurance Commissioner of Massachusetts, addressed to the American Surety Company, advising them that on March 23, 1903, certain process had been served on him as the agent of the American Surety Company.

Q. On the suit of whom?

Mr. McCarter: I object to all this. It does not appear that that was brought to our attention. 20

The Court: This will speak for itself, will it not?

Q. Did that paper that you have in your hands have any relation to the paper spoken of in this letter of March 27th as inclosed? A. The copies that were inclosed in that letter of March 27th were certainly the last two pages and probably all four.

By Mr. McCarter: Q. Why did you not say so in your letter then? A. I did. 30

Q. You say a copy of the summons? A. I did.

Q. You did, eh? A. Yes.

Mr. McCarter: All right.

Witness: "I hand you a copy of process in the case of the Town of Wakefield against this company, served upon the insurance commissioner," and the process was the last two pages. 40

Jarvis W. Mason—Cross

Mr. Skinner: I offer the last two pages of these four that Mr. Mason has just identified.

Mr. McCarter: All right.

Marked Exhibit P-15-b.

10 Mr. McCarter: Mr. Mason, may I ask you not to speak to your counsel when you are on the stand?

By Mr. Skinner: Q. Will you repeat what you have just said to me, Mr. Mason? A. I asked you to let me see this letter and also the first page of that bunch of four pages which you showed me a moment ago.

Q. I hand you the letter, Exhibit P-15-a, and the first page that you asked for (handed to witness). A. Thank you.

20 Q. Mr. Mason, had the premiums on the bonds that have been shown here been paid to the American Surety Company?

Mr. McCarter: Which bonds do you refer to?

Mr. Skinner: P-1, P-2 and P-3.

A. The premiums for the first year were paid, but not any subsequent premiums.

CROSS-EXAMINATION by Mr. McCarter:

30 Q. What did those premiums amount to per annum? A. From recollection, \$330.

Q. I show you a document dated March 10, 1903, addressed to Minahan & Costa, and ask you what that is (paper shown to witness)? A. That is a notice that a premium will fall due on April 10, 1903, on bond No. 84,758, which is one of these bonds.

Q. On the regular notice from your company?

40 A. Yes, sir.

Jarvis W. Mason—Cross

The paper shown to witness is marked D-4 for identification.

Q. I show you another one, dated the same date, addressed to Minahan & Costa, and ask you what that is (shown to witness)? A. That is a similar notice, except that it states the premium to be \$100 and on bond No. 84,759.

The paper shown to witness is marked 10
D-5 for identification.

Q. So that these two that I have just shown you and the one that was shown you yesterday marked 'D-2,' are notices of the fact that the premiums on these three bonds should be paid? A. They are notices——

Q. Answer that yes or no, please. A. They are not; they are notices of the fact that the premiums will become due on that day.

Q. Well, if you wish to put it that way, all right. 20
And the request is to send check, is it not? A. Yes, sir.

Q. Now, you are familiar with this suit, I suppose? A. In a general way.

Q. And you know that among the claims that are put in against the defendant, Mr. Conway, are these \$330 premiums down to date, do you not? A. I do not know that.

Q. You do not know that? A. I do not know that, but I assume they are. 30

Q. So that your company is not only endeavoring to make Mr. Conway pay the loss that you say was due to the conduct of Minahan and Costa previous to the time of his entering upon this work or giving this indemnity, but you are also trying to the present, are you not? A. I can not answer that question, because I do not know.

Q. You assume that that is it? A. If you want my assumption, I will tell it to you. I assume that 40

Jarvis W. Mason—Cross

we are suing for the amount which we paid out, including expenses, plus whatever unpaid premiums exist on the bond, whether before or after he signed the indemnity.

Q. Down to date? A. Down to the date when we paid the loss on the bond.

Q. 1911? A. Whenever that was.

10 Q. And that includes \$1.10 for a copy of some papers that Mr. Clemons got for your Mr. Philbrick? A. I have no doubt of it; I do not know.

Q. What particular department did you, as vice-president, have charge of? A. Then or now?

Q. In 1901? A. I was the assistant general solicitor, and I had charge of what are called the general credits; that is, when a man wanted more than one bond from the company without furnishing collateral, I advised as to how much credit he
20 should have.

Q. Since you became vice-president—? A. I have had charge of that department and still continue as assistant general solicitor, although not active in the legal department, and in addition to that I have advised the president on very many things.

Q. Have you any particular duty in connection with the court and contract department? A. I am
30 manager of the credit department, whose functions are so interlaced with the court and contract department that it is difficult to separate them.

Q. Now, previous to this time when you say that the indemnity was signed in your presence, in your office, by Mr. Conway and Mr. Minahan and Mr. Hanna, did you know that the company held the indemnity of Mr. Fell? A. Yes.

Q. Did you know Fell? A. I never saw him,
40 so far as I can recollect.

Jarvis W. Mason—Cross

Q. Did you know anything about his responsibility? A. I had occasion to look it up, and was satisfied it was sufficient for this purpose.

Q. That happened before he was accepted as a surety? A. I have no doubt it was.

Q. I did not ask you what your doubt was; I asked you your recollection? A. My recollection is that it was.

Q. Did you attend to that matter yourself? A. I attended to the matter of looking up his sufficiency, but nothing else connected with the business. 10

Q. So that you had something to do with the original indemnity given by Fell? A. To the extent of ascertaining whether he was sufficiently responsible.

Q. And that was before you accepted him as indemnitor? A. I have no doubt it was.

Q. Now, I understand you to say that you only saw Mr. Conway once? A. No, I said that I thought I only saw him once, but I might have seen him once before. 20

Q. At any rate, upon this day which if the papers correctly dated, is the 26th of June, 1901, you say Conway and Hanna and Minahan came in to you and that some negotiations took place, which resulted in the preparation, while they waited, of the indemnity agreement in suit and the signature to it by the parties? A. No. 30

Q. Did you not say that yesterday? A. No.

Q. Well, did they go out and come back? A. Mr. Minahan called——

Q. Won't you answer my question?

The Court: Did they go out and come back?

Witness: I do not know.

Q. Was the paper ready for execution before Conway came in? A. It was. 40

Jarvis W. Mason—Cross

Q. So that it was not prepared after Conway got there? A. It was not.

Q. How long had it been prepared? A. I can't remember.

Q. Who prepared it? A. I dictated the tenth clause, and the paper was prepared under my direction by my stenographer.

10 Q. Whose name was——? A. Miss Brinkerhoff, probably, although there were three or four and it might have been any other one.

Q. Did all the parties sign together? A. They did.

Q. You are sure of that? A. As sure as I can be of anything that happened so long ago. They were all present, and I have no doubt they signed together, because my recollection is that they never had the papers away with them.

20 Q. Well, as a matter of fact, Mr. Mason, you do not now recall the fact of the three gentlemen signing the bond do you? A. I do recall the fact of the three gentlemen being in my office, at the table, and acknowledging it before Mr. Tierney in my presence, and I have a recollection as distinct as can be of anything that happened so long ago of their actually, physically signing it there.

Q. Who is Tierney? A. He is a lawyer practicing in New York; he was at that time a clerk in
30 my office and a notary public of the State of New York.

Q. Which one of these gentlemen had you seen before this day, the 26th of June? A. Mr. Minahan, a number of times.

Q. Had he negotiated the arrangement which resulted in what transpired that day with you? A. Had I negotiated with Mr. Minahan? I had.

Q. Did he tell you or did you learn during those
40 negotiations that Mr. Conway was to take an as-

Jarvis W. Mason—Cross

signment of the Minahan and Costa contract? A. I learned that the Conway Contracting Company, if I have the name right, was to take an assignment.

Mr. Skinner: I would like to interpose an objection to the question. I find it difficult to frame the objection, because of the skill with which the question is framed. I expect 10 to interpose objections to anything of testimony as to anything of the negotiation, or the bargain, or the contract, or whatever it was, because whatever was done was embodied in a writing or in two writings, and the testimony of that character would be in violation of the rule laid down by the Courts of this state. This question is, "Did you learn anything in that negotiation of an assignment?" It simply calls on the witness 20 to state whether he got any information then. I question, although I admit my doubt, too, whether that is not overstepping the line. I think perhaps the best way for me to do is to admit my doubt as to whether it does overstep the line, and not press the objection. I will withdraw it.

Objection withdrawn.

Q. And you knew that Mr. James Conway was connected with the Conway Contracting Company, 30 to which you have just referred? A. He said he was.

Mr. Skinner: Pardon me. I ask that you only answer the question. The question is whether you knew.

Witness: I did not.

Q. Had you heard from Mr. Minahan, who, you say, conducted these negotiations, that a Mr. James Conway was connected with the Conway 40

Jarvis W. Mason—Cross

Contracting Company, who, you understood, wanted to take an assignment of the Minahan and Costa contract? A. I don't remember.

Mr. Skinner: One moment. I presume when counsel asks, "Had you heard?" he means, "Had you heard prior to this meeting?"

10 Mr. McCarter: Yes.

Q. You say you do not remember? A. I do not remember.

Q. So that at the time you say James Conway came in there—at the time he came in, you can not now say whether you knew whether he had anything to do with the Conway Contracting Company, that you heard was going to take an assignment of this contract, or not? A. No, I did not know.

20 Q. Had you heard of him individually at all before that? A. Before he called?

Q. Yes. A. I had.

Q. How did you happen to hear of him, if you did not hear that he was connected with the Conway Contracting Company? A. Mr. Minahan—

Mr. Skinner: How did you happen to hear by what source of information? Not what you heard.

Witness: Mr. Minahan referred to him.

30 Q. You can remember that; your memory serves you that far? A. Surely.

Q. Assuming that the day was the 26th of June, as I assume it was, how long before then had you first heard of the proposition of the Conway Contracting Company's taking over this Wakefield sewer contract? A. I can not answer that question.

40 Q. Well, about how long? A. I can not tell you whether I had heard of the Conway Contracting

Jarvis W. Mason—Cross

Company taking it over before or at that interview, one or the other.

Q. And you stated, did you not, at that time that you were quite willing that that assignment should take place, and would not object, so far as the surety company was concerned, or words to that effect?

Mr. Skinner: I object on the ground that I have already indicated, and on the further ground that that is not cross-examination; that this witness has not in his direct-examination testified to anything of the conversation. He simply said that he was in his office, and three gentlemen were there, and that there was some conversation and negotiations that ended in certain papers, which he identified and proved. That at this time does not make him a witness to be cross-examined as to the conversation that he has not narrated. 10 20

The Court: (After argument.) Counsel seem to agree pretty well, and I agree with both of them; that it, I should have not sustained the objection if it had been insisted upon that this was not cross-examination. I am in the habit of ruling and I often have occasion to rule, that the memory of a witness must be tested in respect to things that are relevant and not as to things that are irrelevant. You may answer the question. 30

(Question read.)

Mr. Skinner: I renew my objection, sir, on the ground that such cross-examination is irrelevant; it is the testing of the memory of the witness on a matter that is irrelevant.

The Court: I will let it stand.

Jarvis W. Mason—Cross

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. I made no objection and had none.

Q. And furthermore, is it not true that at the same time you expressed a willingness to become
10 responsible for the completion of the contracts by the Conway Contracting Company if Mr. Conway and these two other gentlemen, namely Messrs. Minahan and Hanna, indemnified your company, in lieu of Mr. Fell and Mr. Costa?

Mr. Skinner: I object. Now, if your honor will refer to the specification of defenses interposed in this case, you will see that included therein is a specification as to what was the consideration; that the true
20 consideration of the agreement of indemnity sued upon was the agreement to give a new bond for the Conway Contracting Company, or possibly Mr. Conway. I think it is the first specification of defenses. (Counsel reads from the specification of defenses.) Now, as to that specification of defenses and anything at all of evidence supporting it, I urge my objection. Of course, the principal case I have in mind, is
30 Naumberg vs. Young, 15 Vroom, 331.

Counsel argue.

At one o'clock. p. m., the Court takes a recess of one hour.

After recess.

The Court: (After further argument.)
It would be idle for me, if it were possible
40 for me to do so at this time, to attempt to

Jarvis W. Mason—Cross

reconcile this mass of cases. I shall only state my conclusion.

I think the case of Naumberg vs. Young governs this case. The expression of the Supreme Court, in 15 Vroom, at the foot of page 341 and on the next page, is this: "I think it may be considered as settled upon principle, as well as by the weight of authority, that where the written contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and that oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction, with respect to which the parties are contracting, as to be part and parcel of the transaction itself, without the adjustment of which the parties can not be considered as having finished their negotiations and finally concluded a contract."

This contract contains mutual covenants, and seems to be complete in itself, and the subject which the question is designed to develop is so closely connected, it seems to me, with the subject-matter that forms the contract itself as to bring it within the citation which I have just read. I therefore think that the inquiry that is proposed is one that the Court is forbidden to entertain, and so sustain the objection to the question.

Defendant's counsel pray an exception, and the same is allowed.

Jarvis W. Mason—Cross

JARVIS W. MASON resumes the stand in behalf of plaintiff:

Cross-examination (continued) by Mr. Carter:

Q. Mr. Mason, before the gentlemen left your office that day, and before they signed the paper, was it not agreed to by you, on behalf of the American Surety Company, that you would become surety for the proposed assignee of the contract if the indemnity agreement sued on were signed and delivered to you?

Objected to on the same grounds.

The Court: That objection is sustained, with the same ruling.

Defendant's counsel pray an exception, and the same is allowed.

Q. And was it not also expressly stated on that occasion that the paper was signed by those that did sign it on the condition that when the time arrived the surety company would become surety without further expense for the current year to the proposed assignee of the contract, in lieu of their former suretyship for Minahan and Costa?

Objected to on the same grounds.

The Court: I sustain this objection for the reasons above stated.

Defendant's counsel pray for an exception, and the same is allowed.

Q. I understand you did not see Mr. Fell at all?

A. I have no recollection of ever having seen him.

Q. Did you expect that they would deliver the paper to Fell or Costa?

Mr. Skinner: I object to that question, as to what Mr. Mason expected. That carries with it, and must be based on, something of conclusion as to things that had passed there. It is only an indirect way of trying

Jarvis W. Mason—Cross

to get in what the Court has ruled should be kept out.

The Court: The expectations of the witness on this subject seem to me to be irrelevant. I overrule the question.

Defendant's counsel pray an exception, and the same is allowed.

Q. Did they say they would give it to Mr. Fell or Mr. Costa? 10

Mr. Skinner: One moment.

A. They did not.

Mr. Skinner: One moment.

(Question read.)

Mr. Skinner: I make no objection.

Witness: They did not, so far as I remember.

Q. Did you tell them to? A. I said nothing about it.

Q. You had been informed that Mr. Fell was the party that was anxious to be released, had you not? A. Not any more than Mr. Costa. 20

Q. And Mr. Costa, too? A. I had been informed that the contract could not be—

Q. Answer the question. Had you been informed that Mr. Fell and Mr. Costa were the parties that were anxious to be relieved? A. I had not.

Mr. Skinner: You mean prior to this occasion, do you not, Mr. McCarter? 30

Mr. McCarter: I certainly do not mean after it.

Witness: I had not.

Q. You had not? A. I had not.

Q. Neither one of them? A. No.

Q. You have told us, I think, that the instrument was all prepared before these gentlemen came in? A. Before they came in on the day it was executed, yes. 40

Jarvis W. Mason—Cross

Q. Then how did you happen to have the clause in it about releasing Fell? A. Because Mr. Minahan had said to me that he desired to bring others in, and he could not do it without getting Mr. Fell and Mr. Costa released, and proposed to me that he would produce these gentlemen as indemnitors in lieu of Mr. Fell and Mr. Costa; and then I inquired into their responsibility, and being satisfied, assented.

Mr. McCarter: I did not ask you that. I move that that be stricken out.

The Court: Strike it out.

Q. You knew that some business transaction was to take place between Fell and Minahan, did you not? A. Yes.

Q. And did you not know, therefore, that the consummation of the release of Fell depended upon the completion of the business arrangement?

Mr. Skinner: I want it to be clear that the question is directed to some knowledge of Mr. Mason's prior to the conversation and interview that we have been inquiring about.

Mr. McCarter: I am talking about the time that that thing occurred.

Mr. Skinner: Mr. McCarter is talking of Mr. Mason's knowledge as of that time; but is it clear that he is inquiring of knowledge obtained in the course of the conversation?

Mr. McCarter: I do not care when it was obtained.

Mr. Skinner: Then I object.

Mr. McCarter: I want to know whether or not he did not know at the time that that release was handed over and this alleged indemnity was signed and left with him,

Jarvis W. Mason—Cross

that before the release was to become completely effective some business arrangements were to be transacted between Fell and Costa and the others.

Mr. Skinner: Then I object to that on the same ground.

The Court: That seems to be covered by the ruling. I may be wrong about it. 10

Mr. McCarter: Counsel and the Court both seem to overlook the fact that this paper was never proven to have been delivered to Fell, and I have a right to show that it left this gentleman's hands—of course he hears all this now—that it left this gentleman's hands in a conditional way. The delivery of a paper has some effect, I suppose, even in a court of law. Here is a document that is handed to Minahan that affects Fell and Costa. Isn't it proper to show that this gentleman knew that, before the paper became effective, Fell and Minahan and Costa were to have some business between one another, and that, if they did not have it, the release would not be effective? 20

Mr. Skinner: That is objectionable, under the ruling that your Honor made, and also in another point of view. It is utterly irrelevant. It can make no difference in the case, and could not have any bearing on the issue, whether or not there was an understanding on Mr. Mason's part that the paper was to be delivered to Mr. Fell and was not to become effective until it was. As between the American Surety Company and Conway it was effective, regardless of its ever having gone to Fell. The surety 40

Jarvis W. Mason—Cross

10 company gave what they were to give to the man to whom they were to give it and who requested it, and who was the only man whose relations with them are now under inquiry. What difference can it make whether it was understood that it was going to be delivered to Fell or not, or what difference can it make whether it was understood that it was not to be effective until it was delivered to Fell? The surety company gave it to Conway, who requested it and made the transaction complete between them and Conway.

The Court: (After further argument.) You may answer the question.

Plaintiff's counsel pray an exception to this ruling of the Court.

20 Exception allowed.
(Question read.)

A. I had no such knowledge.

Q. You stated that Mr. Minahan told you that he could not get these other gentlemen in without getting Mr. Fell and Mr. Costa released? A. That is what he said.

Q. Did he not tell you that he had to pay Mr. Fell something?

30 Mr. Skinner: Is that question directed to this particular interview or some time prior to it?

Mr. McCarter: Before the paper was handed over.

Mr. Skinner: But at this interview? I do not want to object to it if it is prior to that interview—some other conversation.

The Court: You may answer the question.

40 A. He did not.

Jarvis W. Mason—Cross

Q. Did you ever see the assignment that was made? A. I did not.

Q. Well, you knew at the time that Fell and Costa had not agreed to get out, as you have called it, did you not?

Objected to.

(Question read.)

Objection withdrawn.

A. I knew nothing except what Minahan said.

Q. And what was that? A. He said that they would get out if we accepted the others.

Q. Well, you expected them to show that release to Fell and Costa, did you not?

Mr. Skinner: I object. It is a statement again of what Mr. Mason expected.

The Court: I think that question has substantially been ruled on. I sustain the objection.

Mr. McCarter: Lest there be any misunderstanding I think it is necessary to state that I think the *quo animo* with which a paper is handed by A to B is very important.

Q. Did any of these gentlemen ask you for the paper after it was signed?

Mr. Skinner: Will you be good enough to state which paper you refer to?

Mr. McCarter: The release.

The Court: You may answer the question.

A. I don't remember. It was delivered as a matter of course.

Mr. McCarter: I move that the last part of the answer be stricken out.

The Court: Strike it out.

Mr. McCarter: If you will be kind enough to answer my questions alone, we will get along a great deal better, Mr. Mason.

Jarvis W. Mason—Cross

Q. Who prepared this release?

Mr. Skinner: That has already been answered.

Q. Who prepared the release? A. Either I did or I directed it to be done.

Q. Well, which was it? A. I can't remember which.

10 Q. How, then, do you know that this is a copy? A. Because it is a carbon copy of the release which I directed should be signed after it was drawn.

Q. Well, did you prepare it? A. I have already said I either prepared it or directed it to be done.

Mr. McCarter: Let me see the original document, please?

(Plaintiff's counsel hands paper to defendant's counsel.)
20

Q. Before that document was taken away by one of these three gentlemen, did you compare this document with it (paper shown to witness)? A. They are manifold copies.

Q. (Question repeated.) A. I did.

Q. You did? A. Yes, sir.

Q. Read it over? A. I didn't say that; I said I compared it.

Q. What do you mean by "compared"? A. I mean exactly this: this was a manifold copy, and I looked at the signatures that were stamped and changes from the manifold.
30

Q. This was a manifold in every particular, was it? A. Yes.

Q. Well, you have stated positively that this was a manifold in every particular? A. Yes.

Q. In every particular? A. It is, except the acknowledgment, which is on a printed paper.

40 Q. Everything else is manifold? A. Yes, sir.

Jarvis W. Mason—Cross

Q. You will stand by that, will you? A. Yes, sir.

Q. And that is the reason you know it is a copy? A. Yes, sir.

Q. Well, look at it and see. The date is not manifold, is it? A. Oh, no, not the date.

Q. And the signatures are not manifold? A. I said they weren't. I said that I compared it to see that the signatures were there. 10

Q. Did you say a moment ago that the entire agreement was manifold? A. I said that in the light of what I had already said to you.

Q. Well, is the date manifold? A. It is not; the day is not; the month and year is.

Q. Now, I ask you again, when did you compare this paper with the original that you say you delivered to these gentlemen? A. Either before they came in at this time or while they were there. 20

Q. Or after they left? A. It was not.

Q. You can not remember when you compared it, can you? A. I know how that paper was prepared; I know it was a manifold made at the time, and certain blanks in it were filled, and it is as apparent to you, as well as to me, and I will leave it to his Honor, if he wants to look at it.

The Court: The question is merely at what time you compared it? 30

Witness: I can't tell whether—

Q. Now, did you have this release already executed before these gentlemen came in? A. I think I did.

Q. Already executed? A. I think I did.

Q. Are you sure of that? A. I am not sure.

Q. Then you were so anxious to have this go through that you had it already executed before these gentlemen came in, you think? A. I had no 40

Jarvis W. Mason—Cross

anxiety one way or the other, but I think it was compared and executed.

Q. If this is a manifold copy, where is the initial that you say was on the original, by which, as you say, the person that executed it was justified in executing it? A. The initials are not on the copy and it is not any part of the copy.

10 Q. What else is not on this is on the original, and yet you say it is an exact copy? A. It is as far as it is a document.

Q. Whose typewriting are the words. "H. D. Lyman" and "G. M. Sweeney?" A. They are not typewriting; they are rubber stamped.

Q. Who manipulates the rubber stamps? A. Any office boy who is connected with that particular office where papers are prepared for execution and copied or completed.

20 Q. Will you say that that rubber stamping was on there before that document came down to you—before the original came down completed? A. Yes.

Q. You remember that? A. I know that it is always done.

Q. Always so? A. Yes.

Q. Well, if this copy was made in the place, wherever the original was executed, how long had it been prepared before the time these gentlemen came there? A. I can't tell you.

30 Q. Why can't you? A. Because, I have just told you, I don't know whether it was prepared just before or not. It was prepared between an interview in regard to what should be done and the actual meeting when the papers were delivered.

Q. Well, do you judge from the fact that the date is manuscript that it was not prepared on the 26th of June? A. It was not completed and executed until the 26th of June.

40

Jarvis W. Mason—Cross

Q. Did you expect the gentlemen on the 26th of June? A. I have no doubt I had an appointment with them.

Q. Then if it was prepared that day and you had an appointment with them, the date would probably have been filled in, too, would it not? A. Not necessarily. The paper might have been drawn any day before and executed on that day. 10

Q. Now, did you prepare the attached certificate of the notary with the original? A. Sufficiently to see that—

Q. Did you compare it? A. I have got to answer your question not yes or no, but exactly.

Q. I ask you if you compared the certificate of the notary on the back with the original? A. I am telling you that I compared it sufficiently to see that the signatures were in.

Q. Do you remember doing that? A. Yes, sir. 20

Q. You do? A. Yes, it is a matter of course.

Q. Then you say you did it because it is a matter of course? A. Surely.

Q. I asked you a moment ago if you remembered doing it? A. I do after seeing that paper.

Q. You now recall that you did do that comparing? A. Having seen that paper, I know I did it; that refreshes my recollection.

Q. I ask you if you now recall the fact that you compared the notarial certificate? A. And I am 30 telling you, having seen that certificate, I recall the fact that it was compared.

Q. Where did you compare it? A. In my room.

Q. Who was with you? I don't remember; probably—

Q. On this day? A. In all probability on this day. It must have been then, because it was after execution.

Q. I am asking you what your recollection is? 40

Jarvis W. Mason—Cross

A. I am telling you it was after execution, and therefore it was on that day.

Q. You remember it distinctly? A. My recollection is refreshed about that.

Q. What is there about that that refreshes your recollection that you compared it? A. The fact that I see the paper.

10 Q. And I ask you what there is about that paper that enables you, out of the thousands of papers passing through your hands in the eleven years, to tell you that you now remember that you compared that certificate? A. Because out of the thousands of papers that have passed through my hands in the past few years, where I have delivered them, I have compared them, without variation.

20 Q. So that, notwithstanding the fact that you are a vice-president and an assistant solicitor and certified accountant and a lawyer, you spend your time in comparing notarial certificates, do you?

A. With respect to looking after the half dozen signatures, yes.

Q. And it is because of your universal practice that you now say that? A. Yes, sir.

Q. And therefore you told an untruth, or you were inaccurate, when you said you remembered it, eh? A. I did not.

30 Q. Do you say that you remember comparing the certificate? A. I won't tell you another thing than what I have told you, because it is the fact.

Q. What is the fact? What did you start to call me then? A. Nothing, sir. I didn't refer to you. I said, "because it is the fact."

Q. Do you now say under oath, as a lawyer, as a certified public accountant and vice-president of the company, that you personally compared and
40 you remember personally comparing that notarial

Jarvis W. Mason—Cross

certificate with the original? A. I state, my memory being refreshed by that paper, I do.

Q. Suppose I tell you that Mr. Conway was never there, sir?

Mr. Skinner. I object. I suggest that counsel has no right to expect the witness to answer an incomplete question. Surely, "Suppose I tell you that Mr. Conway was never there," is no question, either complete or incomplete. It is merely some more of the invective and— 10

The Court: Well, grammatically it is incomplete, and yet I suppose the witness understood what the question asked for. It asked for his recollection on that subject.

To the Witness: You may answer the question, if you understand it.

A. I should say you were mistaken. 20

Q. You have already told us that you have not the slightest recollection of what Mr. Minahan or Mr. Hanna looked like, I think. A. I couldn't describe them.

Q. You had seen Minahan two or three times?

A. I had seen him several times.

Q. How many times had you seen Hanna? A. I have no recollection of having seen him but the once.

Q. How long were they in your office that day? 30

A. Oh, I don't know.

Q. You can't remember that either, can you?

A. I don't remember how long they were there.

Q. And you can not remember whether these documents were completed before they came in or after they came there, can you? A. Not now, no.

Q. And you can not remember which one took 40

Jarvis W. Mason—Cross

it away—so important a document as the release?

A. No.

Q. And you can not remember who took the document to be signed, if it was taken from your office to be signed, or you can't remember whether it was signed, in fact, before these gentlemen arrived there, can you? A. I don't remember.

10 Q. In fact, you do not remember anything about the instrument except the fact that these three gentlemen arrived there, and took away this document then and there, and that you remember very distinctly? A. Oh, I remember much more.

Mr. McCarter: Well, I have not been able to find out much that you did remember, and I have been trying to find out.

Judge Skinner, it is agreed, I believe, that these copies may be used—these letters that are here.

20

Mr. Skinner: I think that was covered by the stipulation.

Q. I show you what purports to be and is admitted to be a copy of a letter, signed, "Henry C. Wilcox, Solicitor, by J. W. Mason, Assistant Solicitor," addressed to "Maynard E. Clemons, Esq." Do you remember writing that letter (paper shown to witness)?

Objected to.

30

Mr. McCarter: He can say whether he wrote it, at least.

Mr. Skinner: I object to his being asked anything that is so utterly irrelevant to the case. This has no more relevancy, nor has it anything more to do with the transaction, than if it was in an entirely different case. It is dated in September, 1901—months after this. It does not need to be identified or stated that it is a letter, because it is

40

Jarvis W. Mason—Cross

stipulated that these copies may be used in evidence without the production of the original. What connection has it with the direct-examination?

The Court: Do you object to it because it is not cross-examination, then?

Mr. Skinner: Yes, sir.

The Court: Is it cross-examination? 10

Mr. McCarter: I think it is, sir. He has said that he could remember nothing that was said under the circumstances, as far as the cross-examination was permitted to go, and I think this bears out what was said. I think this letter shows that he is performing what had before been assented to.

Mr. Skinner: Then it is attempted by this to show that this witness has stated something of the negotiation that took place in his office, culminating in these papers. Then it is clearly within the ruling that your Honor has already made. It is an attempt to get in, by reference to some later statement, what they tried to get in by reference to statements made at that time. The Court has excluded that. 20

The Court: You may answer the question.

Plaintiff's counsel pray an exception to this ruling of the Court. 30

Exception allowed.

Question read.

A. I have no recollection of the letter, but I have no doubt I signed it. It was prepared by Mr. Watson.

Q. How do you know that? A. From the initials "E. F. W." at the top of it.

Mr. McCarter: I have a copy of it here; 40

Jarvis W. Mason—Cross

I would like to have it marked for identification.

Paper marked D-6 for identification.

Q. I show you a letter dated September 11, 1901—(it is misprinted; it is September 11, 1909, in this book, shown on page 34)—purporting to be addressed to Maynard E. Clemons, and signed,
10 “Henry C. Willcox, Solicitor, by” blank (shown to witness). Please look at it and see if you remember sending that letter?

Objected to as not cross-examination.

A. I did not write or sign it.

Mr. Skinner: One moment. I objected to it.

The Court: It stands on very much the same footing as the last letter. I will receive it.

20 Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

Q. I show you what appears to be a carbon copy of the same letter, with an accompanying inclosure (shown to witness). I ask you to look at it and see if you can tell us whose signature appears to be attached to that?

Mr. Skinner: The same objection.

A. Mr. Watson dictated it.

30 The Court: Do you refer to the letter?

Mr. McCarter: Yes, and the inclosure as well.

The Court: You may answer the question.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

Witness: Mr. Watson dictated it, and there is
40 nothing to show who signed it. I did not.

Jarvis W. Mason—Cross

Q. Well, is not Mr. Willcox's name there? A. Mr. Willcox is stamped there by whoever may have signed it.

Q. Do you remember the fact of the letter?

Mr. Skinner: I object on the same grounds not cross-examination and within the former ruling of the Court.

The Court: I will allow it.

Plaintiff's counsel pray an exception to this ruling of the Court. 10

Exception allowed.

A. I have no recollection of it.

Q. Who signed the inclosure? A. The inclosure purports to have been signed by David B. Sickles, vice-president, and Henry Tofts, assistant secretary.

Q. Mr. Tofts is the gentleman who was here this morning? A. Yes, sir. 20

Q. Did you ever see that paper—the original or a copy of that—before? A. Yes.

Mr. McCarter: I would like to have the letter of September 11th and inclosure marked for identification.

Marked D-7 for identification.

Q. I refer you now to page 37, and ask you if you remember sending the letter that is there printed, purporting to have been signed by Mr. Willcox, per J. W. Mason (shown to witness)? 30

Objected to on the same grounds.

The Court: I will allow it.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. I have no recollection other than the letter. I have no doubt I signed the original.

Paper marked for identification.

Mr. McCarter: Now, we will call upon 40

Jarvis W. Mason—Cross

you to produce a letter from the Conway Contracting Company, William Hanna, president, to the American Surety Company, dated September 26, 1901, on the foot of a letter of Mr. Daniel, the secretary of the sewer commission.

10

Mr. Skinner: While we are looking for this, may I state that Mr. McCarter is using typewritten copies of some of these letters, and we agreed that copies should be used as they appear in a certain printed book entitled "Defendant's Exceptions"? I simply want it to be understood that they are used subject to examination, if we should find that there is any incompleteness about them.

20

Mr. McCarter: No question about that.

Mr. Skinner: I have the letter, and I am perfectly willing to produce it at the proper time. I suggest to the Court that this is not the proper time, on the cross examination of this witness, and the production is made, with the objection to its use.

The Court: What question do you want to ask about it?

Mr. McCarter: Simply if he saw it.

30

The Court: You may ask that question.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

Q. I show you a letter produced by your company on our call, on the back of another letter, but signed "Conway Contracting Company, William Hanna, President," addressed to the American Surety Company, dated September 26, 1901, and ask you if you saw that letter at or about the time it was received (paper shown to witness)?

Jarvis W. Mason—Cross

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. There is no evidence that I saw it, but I am of the impression that I did.

Pape rmarked D-9 for identification.

10

Mr. McCarter: I am now going to show the witness the letter found on page 39 of the bill of exceptions, marked there "Exhibit No. 11," dated September 28, 1901, addressed to the Board of Sewer Commissioners, William B. Daniel, Esq., Secretary," and signed, "American Surety Company, blank, "Attorney."

Q. I ask you to look at it, noting that it is initialed "E. F. W." at the top and ask you to tell us, if you can, who wrote it, and whether you saw it at or about the time it was written. (paper shown to witness)?

20

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. The letter was dictated by Mr. Watson; I saw it a long time since; when I first saw it I don't remember.

30

Paper marked D-10 for identification.

Mr. McCarter: We call for the production of a letter signed "William Hanna, President," to the American Surety Company, dated October 4, 1901.

Mr. Skinner: Letter produced (producing paper).

Q. I now ask the witness to look at this letter,

Jarvis W. Mason—Cross

dated October 4, 1901, addressed to the American Surety Company, and produced by it for us on this call, and tell us whether or not he saw that letter about the time it was received (paper shown to witness)?

Objected to on the same grounds.

Objection overruled.

10 Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. I have no recollection. Doubtless I did see it.

Paper marked D-11 for identification.

Q. Please look at the letter which I now show you, and tell us if it was signed and written by you, and whether it was a reply to the letter which you have just identified (paper shown to wit-
20 ness)?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. The letter was written by me; that is my signature. It was not an immediate reply to that letter; it refers to another letter, to which it probably was a reply.

30 Mr. McCarter: I misread the word "replying;" it is "referring to" the letter of October 11th.

Paper marked D-12 for identification.

Q. What is the business of the American Surety Company?

Objected to as not cross-examination.

Objection withdrawn.

40 The Court: You may tell us.

Jarvis W. Mason—Re-direct

A. Executing or guaranteeing bonds or obligations.

Q. For a consideration? A. For a consideration.

Q. The amount of the consideration depends upon the extent of the liability? A. No, not only.

Q. Well, there is some relation, is there not?

A. There is some relation, yes.

10

Q. Who fixes the relation between the amount of the compensation that you get and the amount of the bond? In other words, this bond in suit, or the bond which you gave for Minahan & Costa, had an annual fee of \$330, or so much a thousand dollars? A. That was so much a thousand dollars, whatever that was.

Q. Now, is that a matter of actuarial ascertainment?

Objected to as immaterial and irrelevant. 20

Objection overruled.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

A. The rate table is published by direction of the president, and all concerned have printed copies to refer to.

Q. All what? A. All officers or employees of the company.

Q. It is a New York company, is it not? A. Yes, 30
incorporated under the laws of the State of New York.

RE-DIRECT-EXAMINATION by Mr. Skinner:

Q. Mr. Mason, how long had you known Mr. Minahan before the meeting at your office that you have spoken of? A. I met him when I was a boy once or twice.

40

Jarvis W. Mason—Re-cross

Q. And between that time and the time that he came into your office have you met him? A. Why I had met him, but I hadn't met him to speak to.

Q. You were asked yesterday, after identifying Mr. Conway, whether you had talked with Judge Skinner in the court room. Was anything said about the identification of Mr. Conway in that talk?

Objected to.

Objection overruled.

Defendant's counsel pray an exception, and the same is allowed.

A. I pointed out Mr. Conway and asked you whether it was not Mr. Conway.

Q. Was Mr. Conway pointed out to you before that by anybody?

Objected to.

Objection overruled.

Defendant's counsel pray an exception, and the same is allowed.

A. He was not.

RE-CROSS-EXAMINATION by Mr. Carter:

Q. Was Mr. Conway alone at the time your attention was first directed to him?

Mr. Skinner: I object to the form of the question, implying that his attention was first directed to him, when he has just distinctly stated that it was not.

Mr. McCarter: I did not mean that somebody called his attention to him, but when he first noticed him.

The Court: When he first noticed him.

A. My recollection is that there were one, if not two, people sitting on the same bench. Whether they were with him or not, I do not know. They were strangers to me.

Maynard E. S. Clemons—Direct

Q. Was his son here sitting there at the same time? A. No, he was not; his son was sitting at the table with you.

MAYNARD E. S. CLEMONS, re-called in behalf of plaintiff:

10

Direct-examination by Mr. Skinner:

Q. Mr. Clemons, I call your attention to Exhibit P-10—

Mr. Skinner: That paper, by the way, by mistake, I think, is marked "P-10 for identification." It has been admitted. It is the exemplified record, as to which there was debate yesterday, and your Honor ruled on it.

20

Paper marked Exhibit P-10.

Q. I call your attention to page 10 of this exemplified copy, following copies of the contract bonds, and to the entry there of appearance for the defendant, Eliphalet F. Philbrick. I now ask you who conducted the trial of the case on the part of the defendant, what attorney? A. The firm of Leahy & Pelletier, Mr. John P. Leahy of that firm being the active attorney in the case.

Q. During the course of the trial did Mr. James Conway, the defendant in this suit, the gentleman who is sitting here (indicating), testify? A. He did.

30

Q. And you appeared throughout the trial as the attorney for the plaintiff? A. The Town of Wakefield, the plaintiff, yes.

Q. Did you hear Mr. Conway testify? A. I did.

Maynard E. S. Clemons—Direct

Q. In the course of his testimony did he make any reference to Leahy & Pelletier?

10 Mr. McCarter: I object. My thought is, as I understand the rule, that statements made by witnesses under oath in the course of a trial are so dependent as to what they are in reply to, and all that sort of things, that they are not considered admissions in a way that would bind them, any more than the fact that a man testified on the stand and nobody objected to it. It is a Court proceeding, and it is germane to that, and that alone. I think I see what counsel is driving at, and it does not seem to me that that is the way to prove it, that is all.

20 The Court: I do not, of course, know what the answer to the question will be; but, generally speaking, may not a party be interrogated on the other side as to what he said on the stand for the purpose of showing admissions? He may be asked what he said out of Court and he may be asked what he said in Court, may be not?

(After further discussion, the question is read.)

The Court: Can you answer that yes, or no?

A. Yes, he did.

30 Q. Do you remember his being interrogated with reference to some notice, as to what had been done with it? A. I do.

Q. And do you remember the reply that he gave to that question, as to what had been done with the notice, or "What did you do with the notice"?

A. I do remember the reply in substance.

40 Q. Will you give it? A. "I gave it to my counsel—to our counsel."

Maynard E. S. Clemons—Direct

Q. Was he then asked, "Who is your counsel?"
Was he asked that? A. Something in substance
as I remember, to that effect. I can not give the
exact words.

Q. And to that question of that substance what
reply did he make? A. He pointed to Mr. Leahy,
or something like that, and said, "Our counsel."

Q. Was Mr. Leahy present in the court room at
the time? A. Oh, he was conducting the examin- 10
ation part of the time.

Cross-examination waived.

Mr. Skinner: I call for the production of
a letter May 26, 1911. There were either
four letters, to each of the four parties,
Minahan, Hanna, Conway, or the Conway
Contracting Company, and William Hanna,
or one addressed to all four, and I want it
in either form that it was. If it was in the 20
separate form, I would like to have it in that
form. Another one of June 1st.

Mr. Egner: Signed by whom?

Mr. Skinner: Henry C. Willcox, general
solicitor.

(Defendant's counsel produce paper.)

Mr. Skinner: Now June 1st.

(Defendant's counsel produce paper.)

Mr. McCarter: We admit that we got
both of these letters. 30

Mr. Skinner: I offer these in evidence.
One is dated May 26, 1911. I think it will
be sufficient to state the substance of it. It
is to these parties, including James Con-
way, notice that the Supreme Court has de-
cided the suit in favor of the Town of Wake-
field, and that the company will undoubt-
edly be called upon to pay the judgment;
that the amount is not yet known, but it will 40

Maynard E. S. Clemons—Direct

be over \$40,000 and asking that Conway and the others put the company in funds to meet that demand.

Marked Exhibit P-16.

10 Mr. Skinner: The letter of June 1st gives later advice, or information, on the same point, and tells them that the judgments aggregate over \$45,000 the exact amount has not been furnished, and if not paid before Monday, the company is informed, execution will issue. "Please put the company in funds to pay these judgments at once."

Paper marked Exhibit P-17.

20 Mr. Skinner: I now renew the offer of certain exhibits that were offered and then laid over until there had been further proof—objection being made that Mr. Conway had not yet been connected with the case. P-4, P-5 and P-6 for identification were the three checks. I offer now P-4 and P-5 and withdraw the offer of P-6, the check for \$1.10.

Marked respectively Exhibit P-4 and Exhibit P-5.

30 Mr. Skinner: Then I offer P-7 for identification, which is the receipt for forty-five thousand and some odd dollars.

Mr. McCarter: That we object to as immaterial and irrelevant. We had nothing to do with it.

The Court: I will receive it.

Defendant's counsel pray an exception, and the same is allowed.

Marked Exhibit P-7.

40 Mr. Skinner: I also offer the exhibit

Motion for Nonsuit

that was before marked P-8 for identification. It is the receipt for \$236 and some cents.

Objected to as immaterial and irrelevant.

Objection overruled.

Defendant's counsel pray an exception, and the same is allowed.

10

Marked Exhibit P-8.

Mr. Skinner: And in the same spirit that I expressed with reference to the exhibit, the check for \$1.10 I also withdraw the offer of the receipted bill for \$1.10 which was P-9 for identification.

Plaintiff rests.

Mr. McCarter: May it please your Honor 20
I move to nonsuit the plaintiff, upon the
ground that it appears in evidence that the
American Surety Company is a corpora-
tion of the State of New York, and that the
transaction in question, so far as it involved
any liability for which we were indemnitor
was a Massachusetts transaction, per-
formed through the medium of a Massa-
chusetts agent, and that there is no proof
that the company had performed the legal 30
prerequisites that Mr. Clemons swore ex-
isted before such a company could be per-
mitted to transact business in Massachu-
setts.

Secondly I move to nonsuit on the ground
that there is no proof that the alleged re-
lease ever came to or was known to exist
by either of the releases, that it was, there- 40

Motion for Nonsuit

fore, a completed release, or that it ever came to the persons who were to benefit by it, or has knowledge of its existence ever come to them.

10 Thirdly, upon the ground that, assuming the contention last made is incorrect, there is no evidence to justify the Court in per-
mitting the copy of the alleged release to be introduced without further proof of search-
ing for the original than has been adduced; that the only proof that has been adduced
with regard to search for the original was
by proof from the estate of Mr. Fell the very
person to whom it has never been proven to
have been delivered, but that no effect has
been made by evidence from the Hanna es-
tate, the Minahan estate of Mr. Conway
20 himself, to one of whom, by the evidence,
the paper was delivered, that they have
looked or examined for the original, and
yet now, without any further accounting for
the loss or absence of the original an al-
leged copy is used.

On those three grounds I move to non-
suit the plaintiff.

Counsel argue.

30 Mr. Skinner: I ask permission to call
upon Mr. Conway to produce the original
of the release. I am not sure whether I
did call for the production of the original
myself or not. He might have it.

The Court: I myself see no objection to
opening the case for that purpose.

Mr. Skinner: I call for the production
of the paper.

40 Mr. McCarter: I confess that I do not
either, and that being so, I will say, if my

Motion for Nonsuit

statement may be taken—you can call Mr. Conway if you want to—that Mr. Conway, if called, would say that he never saw and never had the release. If that is sufficient, you have that.

Mr. Skinner: That is not only sufficient but in excess of what I would like to have, at least, as Mr. McCarter knows, and it is sufficient, in response to the call, to say that he has not got it.

Plaintiff rests.

Mr. McCarter: Now I again renew my motion, on the last ground particularly.

Here are Mr. Costa and Mr. Hanna's estate and Mr. Minahan's estate. By the way, Hanna and Minahan are dead, and so is Fell, and yet they produce Fell's daughter and his other married daughter, who never heard of the thing, and young Larry Fell, who never heard of the thing, and got them to search their boxes and their conscience, and there is this man Costa, whom they could examine *de bene esse*, if he is sick and they do not say a word about him or Minahan or Hanna, both of whom, or one of whom, got the paper, and both of whom were present when the paper was delivered. I can not see how, under any ordinary principles of law, the copy under such circumstances, can be admitted on proof that Mr. Fell has not got the paper and that Mr. Conway has not got the paper, Mr. Fell being dead, when, according to counsel's own story, it was necessary that Fell should get it.

Motion for Nonsuit

10 The Court: (After further argument.)
I will open the case on this point, if counsel
desires me to do so. It is now past the time
of adjournment, and I will give him until
10 o'clock tomorrow morning to make any
proof that he may be advised to make on
that point. I suppose it is within my dis-
cretion to do that. I express no opinion
about the matter.

Adjourned until tomorrow, Wednesday,
November 20, 1912, at 10 o'clock, a. m.

THIRD DAY

20

Wednesday, November 20, 1912.

Met pursuant to adjournment.
Present counsel as before stated.

Counsel argue.

30

Mr. Skinner: I have already stated to
your honor that I feel it would be improper
for me to ask to have the case opened on a
matter on which the Court has already
ruled.

Mr. McCarter: Then I understand that
the case is closed?

Mr. Skinner: Yes.

Mr. McCarter: Then I make my motion
for a nonsuit, for the reasons urged.

The Court: The motion to nonsuit is de-
nied.

40

Defendant's counsel pray an exception,
and the same is allowed.

Motion for Direction of Verdict

Mr. McCarter opens for defendant.

Mr. Skinner: If your honor please, I move that the Court direct a verdict for the plaintiff upon the opening of counsel for the defendant. There has not been a thing stated in Mr. McCarter's opening of his client's case that should be submitted to the consideration of the jury as a defense to this action. It amounts to the expression of regret that they can not prove things that the Court has ruled out, and the statement that Mr. Conway signed this agreement, but did not sign it in the place that somebody had said, but, nevertheless, that he signed it, and that the release that was said to have been delivered never was delivered. Now, I submit, that there was nothing delivered—no release delivered—to the persons named in the instrument. If that is the contention of the defense, it seems to me, there is nothing in that that should go to the jury. 10 20

The Court: The language of the agreement, Section 10, is that "The principals do hereby stipulate that the surety company may release, and it is hereby requested to release, Antonio Costa and L. T. Fell from the liability or responsibility to it by reason of any such obligations." Of course, the bond might have been drawn in stronger form; it might have had a whereas clause, distinctly making the execution and delivery of the release a condition precedent to any liability of the obligor. It does not do that; and yet I can not consider the bond apart from the evidence of Mr. Mason, who makes the case, 40 30

Motion for Direction of Verdict

10 that the release was executed and delivered under certain circumstances; that both papers, the bond and the release, were prepared before either of them was executed; that they were present at the same time and were executed practically as part of one transaction. So that the effect of the case made by the testimony seems to me to link these papers together so that the plaintiff must satisfy the jury that the release was executed and delivered as Mr. Mason has stated. I think the case has narrowed down to that.

20 It seems to me that, as between these parties, these persons on the one side and the surety company on the other side, all that was necessary for the plaintiff to prove, to use an expression used by counsel in the course of the trial, was the delivery of the paper to the persons who asked for it, or one of them. If it was a release, it never reached Fell or Costa. Nevertheless, as between these parties, if a release was given in the way in which Mr. Mason describes, it would certainly raise an effectual estoppel against the company from ever asserting any liability on the part of either Costa or Fell. One of the witnesses said that he 30 wanted to get Costa and Fell out, or, rather that he wanted to get some friends of his in, and in order to do that it was necessary to get Costa and Fell out. There was some reason for his desire to do that. Now, the release, if it was executed and delivered as part of this transaction which I have described, would be effectual as between the parties to this case, it seems to me, by the 40

James Conway—Direct

operation of the doctrine of estoppel, to remove Fell and Costa from the position of liability.

I do not really have to look at that now but, I thought I would indicate what my idea was on that subject. So I come back to what I first said: That, for reasons which I have given, I deny the motion that 10 is made by counsel for the plaintiff.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

JAMES CONWAY, defendant, sworn in his own behalf:

20

Direct-examination by Mr. McCarter:

Q. Mr. Conway, how old are you? A. I am about seventy-two, sir.

Q. Where do you live? A. In the City of Newark, sir.

Q. How long have you lived here? A. About sixty-one years.

Q. What has been your business?

A. I was a currier by trade first and a contractor afterwards.

30

Q. How long have you done the contracting business? A. About forty-five years.

Q. Right here in this vicinity? A. This vicinity and elsewhere.

Q. I beg your pardon. A. This vicinity and somewhere else.

Q. I show you a document marked in this case Exhibit P-12, and ask you to look at it carefully 40

James Conway—Direct

and familiarize yourself with it (shown to witness).

(Witness examines paper.)

Q. You are familiar with it? A. I signed that bond.

Q. You signed that paper? A. Yes, sir.

10 Q. Where did you sign it? A. I signed it in the City of Newark, No. 800 Broad Street, with the agent of the American Surety Company, I think, Mr. Clark.

Q. Who else was present? A. Mr. Hanna and Mr. Minahan.

Q. Did they sign at the same time? A. Yes, sir.

20 Q. Was not Mr. Mason, who testified yesterday and whom I do not see in the room now, present at the time you signed that document? A. I never saw the man, to my knowledge, on my oath, till I saw him in this Court yesterday.

Q. Did you sign that document at the office of the American Surety Company, in Mr. Mason's office, on the corner of Broadway and Cedar Street in the City of New York? A. No, sir.

Q. Did you ever see a young man by the name of Tierney, whose name is on the back of that document, a notary public? A. No, sir; no, sir; I never saw him.

30 Q. Was there any release by the surety company of Fell and Costa present and exhibited to you and taken away by either you, Minahan or Hanna at the time that you signed this document? A. No, sir.

Q. Did you ever see any release by the American Surety Company to those gentlemen? A. No, sir.

40 Q. Never saw it? A. Never saw it, sir.

James Conway—Direct

Q. I show you what is said to be a copy of the document (paper shown to witness). Look at it and see now if, after looking at what is said to be a copy, you will say that you saw a copy or the original of which that is a copy before? A. I never saw any paper or copy like that before.

Q. You have not seen the original or copy before? A. No, sir.

10

Q. Now, Mr. Conway, Messrs. Hanna and Minahan are both dead, are they? A. Yes, sir.

Q. The Conway Contracting Company was composed by whom? A. Mr. Conway, Mr. Hanna and my daughter and Mr. Minahan.

Q. The majority of the stock was owned by you and Hanna? A. Yes, sir.

Q. What transpired down there in the office in the Globe building, 800 Broad Street, the day you were there with regard to any inquiries as to your property by Mr. Clark? What transpired? What inquiries did he make about your responsibility? A. When he commenced to fill the bond he made inquiries about real estate that I have owned here and there, and with Mr. Hanna, and when he was making—testing Mr. Hanna about his estate, when I put in the question—I says, “Pretty strict, all right.” He said, “All right; it is a matter of form; it has to be done,” Mr. Clark says. I says, “All right.”

30

By the Court: Q. Who is Mr. Clark? A. Mr. Clark is the agent of the American Surety Company, your honor.

By Mr. McCarter: Q. In Newark? A. Newark.

Mr. McCarter: That is already in evidence, your honor.

Q. Did you tell him what property you had? A. I did, sir.

40

James Conway—Direct

Q. Now, go on. A. I told him what property I had, and he said, "All right"; and Mr. Hanna and Mr. Minahan told him that the bond was to be made out in our name, to the Conway Contracting Company, and the job in the Town of Wakefield was to be transferred to us—

10 Mr. McCarter: One moment. I do not want to take any advantage. I put my inquiry, or at least I intended to limit it within the Court's rulings. I am not trying to slip in anything—

Mr. Skinner: I understand.

Mr. McCarter: —and I think the witness is endeavoring unconsciously to do that. I do not think he understands the situation. I do not want to get in anything that the Court has ruled out; in other words, I want to loyally adhere to the ruling.

20 Mr. Skinner: The answer should be stricken out.

Mr. McCarter: I think it should, if it touches on that.

Q. You were asked about your property? A. Yes, sir.

Q. Did he write it down? A. He did, sir.

Q. And after some more conversation, about which his honor has ruled you can not testify, until
30 I make a further offer—did you leave Mr. Clark after same further conversation? A. Not until the bond was signed.

Q. You mean after you signed the bond? A. Yes, sir.

Q. You left the bond there? A. Yes, sir.

Q. In Clark's possession? A. Yes.

Q. Now, when, if at all, were you in the office
40 of the American Surety Company in New York?

James Conway—Direct

A. After we were laid off by the Town of Wakefield I and Mr. Hanna went to the New York office.

Q. About when was that, the month of December? A. It was about in December, the latter part of December.

Q. 1901? A. 1901.

Q. Previous to that time had you ever been to that office? A. Never, sir.

Q. Did you ever sign any document in the City of New York? A. Never, sir, never.

Mr. McCarter: Now, may it please your honor, lest there should be any misunderstanding, I desire to make an offer as to what I wish to prove by this witness, and then your honor can pass upon the offer.

The Court: You may do so.

Mr. McCarter: I now offer to prove by this witness the fact that at the interview which he just described a statement was made by him that he only signed this bond upon the condition that the American Surety Company would consent to the assignment of these Wakefield contracts to the Conway Contracting Company, and become responsible for it in the same way that they were now responsible for Minahan & Costa, and that without any further expense for the current year of work, and that Mr. Clark said that he would agree to that.

The Court: The offer seems to me to be an offer of proof as to a new feature, and the effect of it, if granted, would be inconsistent, according to my view of the authorities, with the class of decisions of which Naumberg vs. Young is an example, and

James Conway—Cross

10 which established the law in this state that a contract once reduced to writing by the parties and duly executed was held to be the complete expression of their will. The result of this line of authorities is to exclude proof of other matters, which may have been the subject of consideration before the time of the execution of a written contract, but which the parties saw fit not to put in it. For that reason I deny the offer.

Defendant's counsel prays an exception, and the same is allowed.

20 Mr. Skinner: Your honor has either inferred from my present manner or my past argument that I would, of course, object to this. I think that my objection is not entered on the record, however.

The Court: Yes. You object to the offer?

Mr. Skinner: Yes, sir.

CROSS-EXAMINATION by Mr. Skinner:

Q. Mr. Conway, all this was on that day? Look at the paper. A. I think on the 26th day of June, 1901, that was contracted between Mr. Clark and us.

30 Q. I show you the paper, Exhibit P-12 and call your attention to the date, which, you will see, is June 26, 1901 (paper shown to witness). A. That is right.

Q. Now, have you any recollection of the day other than as appears by that paper—other than as you are told of it by what you see there? A. I was positively sure before that, sir.

40 Q. You were sure of it? A. The 26th of June;

James Conway—Cross

that is when I signed that paper for Mr. Clark in Newark.

Q. What makes you sure of that day other than that you see it on the paper? A. By asking the question, what real estate I owned and where it was located. That was in my mind very strong.

Q. You remember distinctly those questions? A. Yes, sir.

Q. But how does that enable you to remember distinctly that it was the 26th of June? A. Because I know that, because I went down. When you ask me further I will tell you.

Q. Well, I ask you further to tell me why you say it was the 26th day of June? A. I give you the answer, that I went down, and he asked me what I owned here and there, and a memorandum he made, and I kept it in my brain ever since.

Q. Have you kept it in anything but your brain? A. Nothing that I know of.

Q. You have nothing to depend upon but your memory? A. My memory, sir.

Q. And does not the date of this paper, the 26th of June, help you to conclude in your memory that it was the 26th of June that you were at Mr. Clark's? A. It might, sir, but, as the same time, I know I signed it then, but I recollect it before he showed me the bond.

Q. Well, on this occasion that you signed the indemnity bond you gave Mr. Clark a statement of your property? A. Yes, sir; he asked me for it.

Q. Did you do that at any other time? A. Not as I know of, to Mr. Clark or anybody else either.

Q. I mean to Mr. Clark? A. No, sir.

Q. So that the only time that you gave Mr. Clark any statement of your property was the

James Conway—Cross

day and the time that you signed this indemnity bond? A. That is all I know.

Q. Whom did you say were present, all three of you? A. Mr. Minahan and Mr. Hanna.

Q. And yourself? A. And myself.

Q. While you were in Mr. Clark's office you signed a paper? A. I did, sir.

10 Q. And this paper, P-12 was that the paper you signed? A. Let me see it. I know my signature.

Q. I do not question that you know your signature, but was that the paper that you signed in Mr. Clark's office (paper shown to witness)? A. Yes, sir; that is the one I signed in Mr. Clark's office; I think so. I don't think; I am positively sure.

Q. Why do you say, "I think so"? A. I don't
20 think so; I am positively sure about it.

The Court: Not quite so fast.

Witness: Your honor, that is the paper I signed.

Q. Well, did you not sign two papers? A. No, sir.

Q. Well, are you positive of that? A. Signed the bond.

Q. What bond, this one (shown to witness)?
A. Yes, sir.

30 Q. This paper P-12, isn't that the one (shown to witness)? A. That is the one I signed, yes.

Q. And did you sign any other? A. No, sir.

Q. At that time? A. No, sir.

Q. Or in Mr. Clark's office at any time? A. Oh, I might a year before that time.

Q. How long before? A. He might give me bonds to bid on work.

40 Q. Well, you mean in connection with something

James Conway—Cross

other than this Wakefield job? A. Other works, yes.

Q. Did you sign any other paper in Clark's office at this time, June 26th, or at any other time, connected with the Wakefield job? A. Not only that.

Q. Only this? A. Only that.

Q. Why, Mr. Conway, did Mr. Clark write out a statement of your real estate as you gave your answers to this question? A. Yes. 10

Q. And did you not sign it? A. I did not, sir.

Q. You did not? A. I did not.

Q. But you remember his writing it out? A. He wrote it out. I said that; I said he wrote it out.

Q. And you remember it, do you? A. Yes, I didn't sign it.

Q. I say you remember his writing out your answers to his questions? A. He asked me what real estate I owned, and he was taking a memorandum of it; that is all I know; and I think I signed nothing for him but that bond. 20

Q. You say, "I think"? A. I don't think; I am positive I signed nothing for him but that paper.

Q. Are you just as positive that you were there on the 26th day of June as you are that you only signed one paper? A. I am; yes, sir. 30

Q. Now, did you ever see Frank I. Tierney? A. No, sir.

Q. Did you in Mr. Clark's office or at any other place have anybody take your acknowledgment of the paper that you signed, the indemnity bond, this paper, P-12 (shown to witness)? A. This same paper?

Q. Yes, that same paper. I call your attention to the acknowledgment on the back. 40

James Conway—Cross

A. I have not, sir. I haven't saw any man but Mr. Clark, that I know.

(Question read.)

By the Court: Q. Did you at Mr. Clark's office or at any other place have any one take your acknowledgment to that bond? A. No, sir.

By Mr. Skinner: Q. Do you understand what is meant by taking your acknowledgment? Do you know what that means? A. Will you ask me that again?

Q. What do you understand is meant by the phrase "taking your acknowledgment"? A. That is an acknowledgment of what I was going to fulfill by the contract.

Q. Well, when some officer of the law, a commissioner, notary, or other officer, asks you if you are the person who executed this paper and if you acknowledge it as your own, isn't that taking your acknowledgment? A. If he asked me?

Q. Yes, if he asks you if you acknowledge that the paper signed by you has been executed by you and is your act, don't you understand that that is taking your acknowledgment? A. If I don't understand the question, have I a right to ask you a question, what you ask me?

Q. Yes. A. You asked me if I would be responsible, is that so?

30 Q. No. I want to make it clear. I want to know whether you understand what is meant by taking your acknowledgment. You say that your acknowledgment was not taken. What do you mean by taking your acknowledgment? A. Taking my acknowledgment, whatever I said there, that was so and so, that is all.

Q. Well, do you mean going before some officer and telling him that that is your paper and that
40

James Conway—Cross

you signed it and that you acknowledge it as your own? A. No, sir; I do not.

Q. You do not what? A. I didn't go before any officer.

Q. I did not ask you that, but isn't that what you mean by taking an acknowledgment? A. Yes, sir.

Q. And that you did not do? A. No, sir. 10

Q. Nor did Minahan? A. No, sir.

Q. Neither did Hanna? A. Neither did Hanna. The Court: In his presence.

Q. I mean under your observation? A. That is right.

Q. Now, Minahan and Hanna signed in Clark's office, too, did they? A. Yes, sir.

Q. At the same time that you did? A. The same time.

Q. And did they sign any other paper than this 20 P-12 this bond? A. I haven't saw them sign any paper.

Q. Now, you say, Mr. Conway, I believe, that you never saw this release, or a release of which this Exhibit P-13 is said to be a copy—you never saw the original of that? A. I never saw a release of any kind, sir.

Q. Well, how do you remember that? A. Because I know I never got one.

Q. How do you know you never got one? A. 30 Because I am positive.

Q. What makes you positive? A. Because I should know if I got a release, or a paper of that kind; I should know it. I have handled papers many years, forty-five years.

Q. You remember, do you not, that you asked the surety company to give such a release? A. I remember that Mr. Hanna and I went in, with Mr. Minahan, to Mr. Clark's office, for that job to be 40

James Conway—Cross

transferred to us—that job to be transferred from Mr. Minahan and Costa to the firm, the Conway Contracting Company, and Mr. Clark said, “That will be all right”—

10 Q. Now, wait a minute. I only asked you whether you did not ask the surety company to release Fell and Costa, and I call your attention to the clause numbered 10 in this so-called indemnity bond?

Mr. McCarter: Do you ask him if he asked it by word of mouth, or whether he saw the clause?

Mr. Skinner: I ask him if he does not know that by this clause in this paper he had requested the release.

20 Mr. McCarter: I object to that. He is asking the witness to construe the paper. The paper speaks for itself. If he asks as to a verbal request, that is another thing.

Question withdrawn.

Q. Did you not know at the time that you signed this paper that it contained this tenth clause, which I now ask you to read (paper shown to witness)? A. I haven't read that down there in the office, sir.

Q. I ask you to answer the question.

30 The Court: That is not the question.
(Question read.)

A. I did not, sir.

Q. Mr. Conway, I show you a paper, comprising about eight pages partly printed and partly written, and call your attention to the signature at the end and ask you if that is your signature (paper shown to witness)? A. I believe it is, sir.

40 Q. You haven't any doubt of it, have you? A. I wouldn't doubt it at all.

James Conway—Cross

The Court: I do not hear what you say.

Witness: That is my signature.

Q. And the other signature there, is that the handwriting of William Hanna? Do you know his handwriting? A. I couldn't say.

Q. Do you remember when and under what circumstances you put your signature to that paper? Look at the paper before you answer the question. 10
A. I don't know, sir.

Q. Look at the paper. A. (Witness examines paper.) I am not a great scholar, but I want you to read it.

Q. Well, it is eight pages. I won't read it all, but just enough to give you an idea. A. All right.

Q. (Reading.) "Application is hereby made to the American Surety Company of New York for the execution of bonds of suretyship, for us as principals or upon our request under a general 20 contract of indemnity." Then follows printed blanks: "State name of firm," and the words in writing, "James Conway, William Hanna." Then, "State nature of its business: Contracting. State names and residences of partners in full: William Hanna; residence, Sherman Avenue, East Newark. James Conway; residence, 491 Central Avenue, Newark." At the foot: "This application is for the purpose of inducing 30 the American Surety Company of New York to accept us as indemnitors on bonds of David F. Minahan of Orange, N. J." Then follow two printed pages in legal blank form not filled out. Then the fourth page is a printed blank for the statement of assets. Some of these blanks have been filled up. The blank that calls for the statement of real estate as per Schedule A-1 has the figures "40,700"; the blank that calls for the statement of cash on hand and in bank has the figures in 40

James Conway—Cross

- writing "1000"; and the blank that calls for the statement of stocks and bonds as per Schedule B-1 has the figures "15,000." Then, apparently inserted in the pages of this printed blank, follow four sheets of letter paper with the superscription of the American Surety Company, with the names of the officers at the top, and the words
- 10 in handwriting "James Conway"; then the heading, "Schedule A-1," and underneath that is a list of real estate: "Cabinet Street, one block, Bergen to Camden Street, store, etc., and tenements, Newark, \$27,000; corner Lafayette and Madison, Newark, \$5,000; 21 Arlington Street, Newark, \$2,500; two lots, First Street, near Ogden, Newark, \$1,200; corner Eleventh Avenue and Sixth Street, Newark, \$5,000; Central Avenue and Warren Street," blank, and then the total
- 20 of "40,700" in handwriting. Then on the next sheet of letter paper, "Schedule B-1," and the heading upon the top, "James Conway." Then comes, "Conway Contracting Company, paid up stock, \$5,000; mortgages, \$10,000"; and the footing of "\$15,000" in handwriting. Then comes another sheet of letter paper, with the heading, "William Hanna," in handwriting, and "Schedule A-2." It is a list of real estate, I take it, purporting to be real estate owned by him.
- 30 Schedule B-2, William Hanna," personal property owned by him, stock in the—

Mr. McCarter: Well, now, you are arguing about that. Tell us what the paper says, not what you say about it.

Mr. Skinner: I will reframe that, then.

Q. Then follows the letter sheet headed "William Hanna, Schedule A-2," and then, "Nos. 1 to 8 Sherman Avenue, East Newark, N. J., no more"

40 gage; value \$16,000; 38 to 40 Central Avenue,

James Conway—Cross

Newark, N. J., value, \$5,000; mortgage \$2,000; Sheridan Avenue, Kearney, N. J., dwelling and machine shop; value, \$3,500; mortgage, \$1,200; two lots, Maple Street, Kearny, N. J., \$1,000"; and the footing of "\$26,700." Another sheet, headed "William Hanna, Schedule B-2. Conway Contracting Company, 49 shares, \$4,900; 25 shares People's Building & Loan Association, Harrison, N. J., \$300; mortgages, \$3,000"; and the footing "\$8,200." Then comes the next page of the printed blank, the heading "Liabilities," and the word written across, "Nothing." Then the statement opposite the printed blank for "Surplus" of "56,700," and the total of "56,700." On the other side of that printed sheet—that is, the next page is a printed blank—there is a statement headed "Assets," and a blue pencil mark, "Mr. Hanna," and the statement of assets filed out, 20
 "Real estate as per Schedule A-2, \$26,700; cash on hand and in bank \$1,000; stocks, bonds and so forth, \$2,000"; and "Interest in other businesses as follows: Conway Contracting Company \$4,900." I have not read every word on that page, but the substantial part of it. Then there is the total footing, "Total assets, \$34,600." Then on the next printed page, part of the printed blank headed "Liabilities," is a statement of liabilities: "Debts secured by lien on real estate as 30
 per Schedule A-2 \$3,200." Then there are some other printed blank headings that are not filled out, but left blank. Then "Total liabilities, \$3,200; surplus, \$31,400; total, \$34,600." And then follows this, which is in the printed blank up to the point that I will indicate; "The undersigned, the members of the foregoing firm, hereby certify that each statement hereinbefore contained is true, and that this statement is made for the 40

James Conway—Cross

purpose of inducing the American Surety Company of New York, to execute certain bonds or undertakings on behalf of"; and then the printed words "the said" are ruled out, elided, and written in in handwriting are the words, "David F. Minahan"; and then follow the words "firm without meaning collateral security to the full amount thereof. Dated," printed, and then in
10 handwriting, "June 24, 1901"; and then the signature of "William Hanna"—purporting to be William Hanna's signature and your own, that you have just identified. On the back of that printed page are some more printed blanks, that do not seem to be filled out at all. Do you recall that? A. I tell you now, and the Court there is nothing in that paper that—I can swear there is nothing regarding that paper that I know, only
20 the statement that I made to Mr. Clark, and that is all I agreed to in that paper; that is all I agreed to then.

Q. I ask you if you recall signing that paper?

A. I signed that paper; that is the statement of my property to Mr. Clark.

Q. But you said before that you did not sign a paper—that he made out a memorandum, but you did not sign it? Do you recall now signing it?

A. I recall signing in Mr. Clark's office what was
30 necessary to sign for them bonds to become collateral to the Town of Wakefield.

Q. Do you recall now signing that paper? Answer my question, please. Does it come to your memory? A. I must have signed it.

Q. I understand, of course, you see your signature, and you recognize that you must have signed it, but do you recall signing it? Does your memory bring back the fact that you signed that pa-
40 per? A. It does; I must have signed it.

James Conway—Cross

Q. No. You did not remember it before. Now, that you have seen the paper, your memory has been refreshed by it possibly. Do you remember it? Now, not do you feel sure that you did it, but do you remember doing it? A. I must have done it.

Q. But you have no recollection of it, have you? A. Well, that I couldn't say, but I must have done it; I see my name there; but I didn't do anything, only sign what he asked me to sign there on the property; that is all what he asked me to sign, the property I owned; that is all I signed. The rest of the paper I know nothing about. 10

Q. Now, seeing your signature there, then, makes you sure that you must have signed it; that is right, is it not? A. I signed the paper. I signed papers before for Mr. Clark for bonds.

The Court: Do not wander from the question; 20 it takes time. Just pay attention to the question and answer it, and stop.

Q. (Question read.) A. Yes.

Q. Now, seeing the date there, June 24, 1901, does that recall to you anything of having been at Mr. Clark's office on that day? A. That I don't know. I must have been there, if I signed that paper.

Q. What? A. I must have been there, but I can't really say now. I am not responsible for 30 anything on that paper, to my knowledge, on my oath, only what property I signed with Mr. Clark on the conditions that the bonds—

The Court: No.

Q. At any rate, Mr. Conway, now that you see the paper and the signature and that date, you will not say that you did not sign that paper on the day named there, June 24, 1901, will you? A. 40

James Conway—Cross

Well, I couldn't say whether it was the 24th or 26th, but I signed one on the 26th; sure I did.

Q. Are you positive that you did not sign this on the 24th? A. I couldn't say whether I did.

Q. Now, I think you said a few minutes ago that you recall having signed the memorandum of your property that Mr. Clark made up? A. Yes,

10 sir.

Q. You did not do that more than once, either, did you, with reference to these Minahan bonds?

A. No, not to my knowledge, sir, no, sir.

Mr. Skinner: I would like to have this paper that has just been shown to Mr. Conway marked for identification.

Marked P-18 for identification.

Q. You told of going to Mr. Mason's office, in New York—

20 Mr. McCarter: No, not Mr. Mason's office; the American Surety Company.

Q. —the American Surety Company's office, in New York, in December, 1901. Was that the only time you were there? A. The only time I was in the American Surety Company office in New York to my knowledge, positively, is once.

Q. Were you not on some other occasion in Mr. Mason's office, as distinguished from the surety company's office? A. I never saw Mr. Mason till
30 I saw him here—that gentleman there (indicating)—till I saw him here yesterday.

Q. Well, when you say you were not in the American Surety Company's office but that once, you mean, do you not, that you were not in the building in which their office is? A. I was in the building, I and Mr. Hanna.

Q. But you were never in that building except that once? A. I was never in the building but
40 that once; I had no occasion to go there.

James Conway—Re-direct

Q. That is what you mean? A. Yes, sir; I had no occasion to go there.

Q. Well, is it because you had no occasion to go there that you say that, or because you remember?

A. I should remember it, when we were stopped on the work in Wakefield, and we went over to the American Surety Company—Mr. Hanna.

Q. You remember that you did not go there any other time? A. No, sir; I haven't; I swear that I have not.

RE-DIRECT-EXAMINATION by Mr. McCarter:

Q. Mr. Conway, I notice that this paper that bears your signature and the signature of Mr. Hanna reads, "Application is hereby made to the American Surety Company of New York for the execution of bonds of the suretyship, for us as principals or upon our request under a general contract of indemnity. James Conway and William Hanna. Contracting partnership," and so forth, without undertaking to read it all. Did the American Surety Company ever go on your bond?

Mr. Skinner: One moment.

A. It did go on—

Mr. McCarter: One moment.

Mr. Skinner: I object to the question as being immaterial and irrelevant to the issues in the case, as they have been identified by the rulings of the Court. Your honor will understand that that paper is not in evidence; it has been simply marked for identification; and I have called his attention to it and the statement of his real estate, and then in connection with that called his attention to the date, and put the question about his statement that he was in Clark's

James Conway—Re-cross

10 office on the 26th, and then gave a statement of his real estate; that is all. Now, as to the facts of anything that may be referred to in the statement, I take it that that is entirely foreign to this issue. It is certainly not presented by my cross-examination. I only asked him as to the fact of his having signed, and called his attention to the contents and date for the purpose of refreshing his memory. He asked that that be done, and it was no more than fair.

20 The Court: I am thinking what effect would be given to it in this case if the company had gone on his bond. My thought is that it is foreign to the case that we are trying. This is what I have in my mind. Suppose it were so that this company had gone on Mr. Conway's bond, what effect would be given to it in this case?

(After argument.) I do not think the difficulty is removed Mr. McCarter. I sustain the objection.

Defendant's counsel pray an exception, and the same is allowed.

Q. This building of the American Surety Company where you were, as you think, in December, accompanied by—Who was with you? A. Mr.
30 William Hanna.

Q. Was that that tall building on the corner that you went into at that time? A. Yes, sir; that big building.

Q. And that is the only time you were ever in that building? A. The only time.

RE-CROSS-EXAMINATION by Mr. Skinner:

40 Q. Now, Mr. McCarter has described that build-

James Conway—Re-cross

ing to you, Mr. Conway, as the tall building on the corner. Perhaps you can go on and complete the description, and tell us what corner it was on, can you? A. Well, I could tell you on the corner of Broad Street; I couldn't tell you really Broad Street, but I know the office of the American Insurance Company, that is all.

Mr. Skinner: Broadway, you mean? 10

Witness. I couldn't tell you the street now, but I know I got there.

Q. You could not tell whether it was high or low, could you? A. It was a very tall building.

By the Court: Q. Did you say Broad Street? A. Broadway.

Mr. Skinner: Broadway.

Mr. McCarter: I will admit that it is one of the tallest buildings in the world.

Witness: Yes, sir. 20

Q. And it is on a corner? A. Yes, sir.

Q. But you do not remember which corner? A. Well, I couldn't really tell you now.

Q. Do you remember which side of Broadway? A. Well, I think it was on the left-hand side coming down or the right-hand side going up.

Q. As you went towards the Battery, which side was it on? A. Well, I think it was on the left-hand. Is that correct?

Mr. McCarter: That is correct. 30

Q. Now, will you tell us where Mr. Mason's office was in that building? A. I didn't know Mr. Mason's office and I didn't know himself.

Q. What office did you go in? A. Well, in fact, we called for a man that had some—

Q. What office did you go in, that is all? A. We were in the American Surety office. Whatever it was in that department, I didn't know. Mr. 40

James Conway—Re-cross

Hanna went in and made some inquiries. That is all I know about it.

By the Court: Q. Mr. Conway, I did not catch your statement as to where Mr. Clark's office was. I understood you to say that you signed the bond in Mr. Clark's office. Where was that? A. It was in the City of Newark, in the old Globe building, the old Mechanic's Bank.

Q. That is what I want to know. A. On the corner of Broad and Mechanic.

The Court: That is all.

Witness: That is the only place where I contracted that business.

Mr. McCarter: I now offer in evidence Exhibits D-2, D-4 and D-5 for identification, D-1 for identification, D-3 for identification and the document accompanying it.

Mr. Skinner: I object to the exhibits that are marked D-1 for identification, D-2 for identification, D-4 for identification and D-5 for identification, on the ground that they are immaterial. Your Honor will see that they are bills, or duns, for premiums—bills, or statements, of premiums to come due, addressed to Minahan & Costa.

Mr. McCarter: The significance is the date. You leave that out. It is long after you say you released Costa.

Mr. Skinner: I object to them as irrelevant and immaterial, because there is nothing in the proof to show that there was a release that was in form, or substance either, for that matter, a release of the firm of Minahan & Costa; in other words, Minahan & Costa were upon the original bonds, according to the proofs, on which

James Conway—Re-cross

those premiums would become due; they were the principals liable to the surety company, in the first instance, for the premium. Whatever might have been the relation between the surety company and certain indemnitors, who had indemnified or agreed to indemnify the company, the premiums of Minahan & Costa would still remain due, of course, and they would remain bound for the payment of the premiums. 10

The Court: These considerations perhaps go more to the weight than to the admissibility of the papers. I suppose they are offered as the basis for an inference—

Mr. McCarter: Surely.

The Court: —for whatever it may be worth, as to whether Mr. Costa had been released. 20

Mr. McCarter: That is it, sir.

The Court: I will receive them for that purpose.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

Mr. Skinner: I object to the one that is marked D-3 for identification. It is a letter of October 11th and a document, or printed blank, filled out in typewriting, unsigned, which is said to have accompanied the letter. I object to that as being irrelevant, and I call particular attention to the fact of its irrelevancy, in view of the rulings of the Court, and as being a part, or relating to the part that has already been excluded by the Court. It is in line with the other offers that have been made and ruled out. 40

James Conway—Re-cross

The Court: This is considerably subsequent to the date of the bond of indemnity.

10 Mr. McCarter: Yes, sir. The object of the offer is to indicate that at the date of the letter and of the proposed bond of indemnity an effort is made to get Mr. Conway to become an indemnitor, when, according to their statement, he was already that, that the jury may infer from the request and the proposed paper that they sent him to sign, that he should indemnify them, how useless it was if they already had him.

Mr. Skinner: Well, if it was disputed that they had him, that might be relevant; but in view of the fact that it is admitted, that they had him, what is the relevancy of it? What is the value of it?

20 Mr. McCarter: The value of it is as indicating to the jury that that is not true, as Mr. Conway has himself said.

The Court: I will receive the paper.

Plaintiff's counsel pray an exception to this ruling of the Court.

Exception allowed.

30 The papers offered by defendant's counsel are marked respectively Exhibit D-1, Exhibit D-2, Exhibit D-3, Exhibit D-4 and Exhibit D-5.

Mr. McCarter: I am now going to make some offers, which, I assume, under your Honor's rulings, would be excluded, but I want to have my offers before the Court.

40 I offer to prove the assignment of this contract for the Wakefield work from Minahan Costa and Fell, to Thomas A. Davis, trustee—that is, Judge Davis—by assignment dated the 15th of June, 1901; a subse-

James Conway—Re-cross

quent assignment by him, Davis, trustee, to Conway Contracting Company, on the 27th of June, 1901; and to be followed by proof of the fact that after that assignment was made, by the correspondence that was identified yesterday by Mr. Mason, an effort was made to procure from the American Surety Company their bonds for the Conway Contracting Company, which had received the assignment, and refused by the American Surety Company, whereupon the Town of Wakefield rejected the presence of the Conway Contracting Company upon the work, refused to permit them to continue and drove them from the job. 10

The Court: For reasons already stated, I think that this offer should be overruled; I think the testimony ought not to be received. 20

Mr. Skinner: My objection will be noted?

The Court: Yes.

Defendant's counsel pray an exception, and the same is allowed.

Mr. Skinner: I am asked by Mr. McCarter to consent to the use of copies of the assignments that he has just mentioned, to the extent of their being marked for identification, in order that they may be identified as the papers that have been offered and rejected, and if Mr. McCarter says that they are copies— 30

Mr. McCarter: We are prepared to prove that they are, but if Judge Skinner has the originals, I will be glad to have them marked. That will be sure. We have hunted for those originals, but could not find them. 40

James Conway—Re-cross

Mr. Skinner: The originals may be marked, if we agree that they go back to Mr. Clemons. The copies may be used, and we will agree that they are correct copies. They are marked for identification only, of course.

10 Mr. McCarter: The assignment from Minahan, Costa and Fell to Davis, trustee is dated the 15th of June, 1901, and the assignment from Davis, trustee to the Conway Contracting Company is dated the 27th of June, 1901.

Marked respectively D-13 and D-14 for identification.

20 Mr. Skinner: The copies, or what purport to be copies, are accepted by me as copies, subject to their correction respectively, if necessary.

30 Mr. McCarter: We now have here the policies of insurance; first, the fire insurance policy upon the plant up there, issued in the name of Minahan & Costa, on the 18th day of May, 1901, by the Philadelphia Underwriters Policy Company, with the assignment thereof to Conway Contracting Company, dated the 5th of August, 1901; also liability policy for casualty to the employees engaged on the work, issued on the 21st of May, 1901, by the Maryland Casualty Company to Minehan & Costa, and on the 7th of November, 1911, assigned to the Conway Contracting Company. I assume that, under your Honor's ruling, they will be also excluded; but they go to indicate the extent to which this assignment to the Conway Contracting Company was endeavored to be perfected.

40

Maynard E. S. Clemons—Direct

Mr. Skinner: I would like my objection noted to the immateriality and irrelevancy, as well as on the other grounds.

The Court: The offer is overruled.

Defendant's counsel pray an exception, and the same is allowed.

Marked respectively D-15 and D-16 for identification.

10

MAYNARD E. S. CLEMONS, re-called in behalf of defendant:

Direct-examination by Mr. McCarter:

Q. It already appears that you were the legal representative of the Town of Wakefield and of the sewer commission, Mr. Clemons? A. Yes, 20 sir.

Q. There have already been marked for identification letters contained in the bill of exceptions in the suit in which you said you participated as counsel for the town—certain letters purporting to be written by you to the American Surety Company and some letters written by the American Surety Company to you? A. Yes.

Mr. McCarter: I do not want you to answer this question until we have the ruling 30 of his Honor about it.

Q. I now ask you whether, on behalf of the town, you wrote such letters as I have referred to, without taking the time to refer them to you again—for the town to the American Surety Company?

Mr. McCarter: This is to show, I will say to your Honor, the fact that, not only was the assignment completed, as has been 40

Maynard E. S. Clemons—Direct

10 proven, or offered to be proven, by the assignments that are in evidence, but that after that was done the correspondence that has been marked, looking to a request for the American Surety Company to go upon and give bonds for the Conway Contracting Company, was made, and finally refused, and that thereafter the town, or Mr. Clemons in conjunction with the town authorities put off the Conway Contracting Company from the job and commenced the suit that has been the basis of this action.

The Court: I may assume that the letters show that?

Mr. McCarter: Yes, sir; they show that. I am trying to make this as short as possible.

20 The Court: They tend to show that?

Mr. McCarter: Yes, sir.

The Court: As that which they tend to show seems to me to be a matter not relevant to the issue that we are trying, I deny the offer of the testimony.

Defendant's counsel pray an exception and the same is allowed.

30 Mr. McCarter: The letters Judge Skinner is familiar with. They have already been marked for identification, part of them.

The Court: Can you refer to them?

40 Mr. McCarter: The letters that have already been marked are the letters from Mason, assistant solicitor, to Clemons, dated September 4, 1901, and marked D-6 for identification. The next is D-7 for identification, a letter signed "Willcox, Solicitor, by" blank, to Clemons, dated September 11, 1901, with enclosure attached, signed

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"American Surety Company, by Sickles, Vice-President," and "Tofts, Assistant Secretary." The next one is a letter dated September 13, 1903, marked D-8 for identification, signed by Willcox, solicitor, by Mason, assistant solicitor, to Mr. Clemons. The next one is D-9 for identification, signed by the Board of Sewer Commissioners, to the Conway Contracting Company, and on the back of it a letter to the American Surety Company, and produced by them, from William Hanna, president, the whole thing being marked D-9 for identification. The next one is D-10 for identification, being a letter on the letterhead of the American Surety Company signed blank "Attorney," the initials "E. F. W." at the top, which Mr. Mason said he had no doubt was written, therefore, by Mr. Watson, dated September 28, 1901, and addressed to the "Board of Sewer Commissioners, Daniel, Secretary." The next is D-11 for identification, being addressed to the American Surety Company, signed by "William Hanna, President," dated October 4, 1901. The next is D-12 for identification, being a letter dated September 10, 1901, signed "Henry C. Willcox, Solicitor, by J. W. Mason, Assistant Solicitor," addressed to the Conway Contracting Company, at Greenwich, Massachusetts. Now, those are all the letters that have thus far been marked for identification, that I am aware of.

Q. Have you before you a record of a resolution passed by the sewer commissioners, or the

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authorities in Wakefield, discharging the Conway Contracting Company from the job?

Mr. Skinner: One moment.

Mr. McCarter: I should say discharging Minahan & Costa from the job.

Mr. Skinner: I object.

10 Mr. McCarter: That is along the same line—the object being now to show that later a resolution was passed putting them off.

The Court: The question seems to ask for an answer as to a matter that is outside of the issue, and it seems to me to be an immaterial matter.

20 Mr. McCarter: It also tends along the same line, your Honor. It is offered for no other purpose than to indicate just what I have said.

The Court: The question is objected to as relating to an irrelevant matter, as I understand. I sustain the objection.

Defendant's counsel pray an exception, and the same is allowed.

Q. Was any bond ever received by the Town of Wakefield from the American Surety Company covering the work of the Conway Contracting Company on this Wakefield sewerage job?

30 Mr. Skinner: I object to the question on two grounds: that it calls for a conclusion of law and that it is irrelevant and immaterial.

The Court: I make the same ruling on the latter ground.

Defendant's counsel pray an exception, and the same is allowed.

40 Q. Did the American Surety Company ever give

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to you or to the Town of Wakefield any bonds covering the work that the Conway Contracting Company might do upon the Wakefield sewers?

Objected to on the same grounds.

Same ruling.

Defendant's counsel pray an exception, and the same is allowed.

Mr. McCarter: Now, I have further letters that I would like to have marked for identification, which I do not think I need describe farther than to say Judge Skinner has seen them. 10

Mr. Skinner: I only want to be sure of one thing. Are they not all in this printed book?

Mr. Egner: I am quite sure they are in it. I will find them for you.

Mr. McCarter: August 21, 1901, from Clemons to the American Surety Company. 20

Mr. Egner: That is right; that is here. Marked D-17 for identification.

Mr. McCarter: September 10, 1901, from Clemons to the American Surety Company.

Marked D-18 for identification.

Mr. McCarter: September 12, 1901, Clemons to the American Surety Company.

Marked D-19 for identification.

Mr. McCarter: October 4, 1901, Clemons to the American Surety Company. 30

Marked D-20 for identification.

Mr. McCarter: January 9, 1902, Daniel, Secretary, to Minahan & Costa, contractors, 169 Main Street, Orange, New Jersey.

Mr. Skinner: That is not in here.

Marked D-21 for identification.

Mr. McCarter: Letter of March 11, 1902, from Daniel, Secretary of the Board of 40

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Sewer Commissioners, to Leahy & Pelletier, Attorneys at Law, 38 School Street, Boston, Mass.

Marked D-22 for identification.

Q. Please look at this document, which purports to be a copy of the opinion of Mr. Justice Rugg, of the Supreme Judicial Court of Massachusetts (paper shown to witness). I suppose you
10 are familiar with that decision? A. I am familiar with that decision.

Q. See if you recognize it and can tell us if that is a copy? A. Well, I haven't time to compare it.

Q. Well, in a general way? A. It seems to be, yes.

Q. It is reported in the Northeastern Reporter?
A. 209 Massachusetts. I saw it in your library.

20

Mr. McCarter: I offer that.

Mr. Skinner: I object.

30

Mr. McCarter: I will say that the purpose of this offer is to show the basis of the decision incorporated in the record which has been offered in evidence. This is the affirmance of the decision, and indicates that the sole ground of liability for which this action is brought was the fact that Minahan & Costa had assigned the contract for the Wakefield sewers to the Conway Contracting Company without their consent.

40

Mr. Skinner: I have not the time to examine it with care either, although I am under the impression that Mr. McCarter's statement of its contents is incorrect—that that was not the sole ground of decision. But I object to it as being irrelevant and immaterial, even though it does contain what he says it contains. What difference

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does it make what the reason was that the judge gave for the judgment. The only connection it could have would be an attempt to get in evidence of some other term or some other condition of this agreement; in other words, showing that there was a violation of an agreement that the Court has held, if it was made, was supplemental to this written agreement and the 10
parol proof of it to be excluded, under the rule in Naumberg vs. Young.

The Court: (after argument) It seems to me entirely unimportant in this case.

Defendant's counsel pray an exception, and the same is allowed.

Paper marked D-22 for identification.

Q. Did the Town of Wakefield ever formally recognize and consent to the assignments that 20
have been produced and marked for identification here?

Objected to as immaterial and irrelevant to the issue.

Objection sustained.

Defendant's counsel pray an exception, and the same is allowed.

Q. If there did not, why not?

Objected to on the same grounds.

Objection sustained. 30

Defendant's counsel pray an exception, and the same is allowed.

Q. You have the official minutes here of the Board of Sewer Commissioners? A. I have.

Q. And they kept records of their transactions?
A. They did.

Cross-examination waived.

Defendant rests. 40

John F. Clark—Direct

JOHN F. CLARK, sworn in behalf of plaintiff in rebuttal:

Direct-examination by Mr. Skinner:

Q. Mr. Clark, what is your occupation? A. Manager of the American Surety Company in the City of Newark.

10 Q. And in 1901, in the month of June, did you fill that position? A. I did.

Q. I show you a paper marked "Exhibit P-12," entitled "General Contract of Indemnity," signed by Daniel F. Minahan, James Conway and William Hanna, dated June 26, 1901, acknowledged, or bearing a certificate of acknowledgment, before a notary in New York County on that day, and ask you to look at that first and see what it is (paper shown to witness). A. All right.

20 Q. You have read it—you have seen it? A. I recognize the character of the document.

Q. Was that paper signed in your office, in Newark—that is, the office of the American Surety Company, in Newark—on the 26th day of June, 1901? A. It was not.

Q. Or any other day? A. It was not.

Q. Mr. Conway says that he and Mr. Minahan and Mr. Hanna came to your office on that day and signed that paper. Were either of those gentlemen in your office on that day, or, rather, did
30 either of them on that day, sign that paper in your office? A. They could not have done so. I have never seen the document before.

Q. I show you a paper that has been marked "P-18 for identification," bearing date June 24, 1901, and purporting to be signed by William Hanna and James Conway, and call your atten-
40 tion to the handwriting in which that paper is

John F. Clark—Cross

made out (paper shown to witness). Just look through it, will you—the handwriting other than the signatures? A. (Witness examines paper.) I recognize the handwriting.

Q. Whose is it? A. My own.

Q. Now, asking you to look at that paper, particularly the signatures and the date attached there, I ask you if you have any recollection of William Hanna or James Conway being at your office on the 24th day of June and signing that paper? A. I have. 10

Q. Do you refresh your memory by anything at all? A. This is in my handwriting, the entire agreement, and the date is there in my own handwriting.

Q. And do you know or recall anything about the transaction other than as now suggested to you by the fact of its being in your handwriting and the date that is there? A. I wish you would repeat the question. 20

Q. Do you recall anything about the transaction of their signing other than as is suggested by the fact that it is in your handwriting and that the date is June 24th? Have you any independent memory of it, not suggested by those facts? A. I do not recall anything.

CROSS-EXAMINATION by Mr. McCarter: 30

Q. So that, Mr. Clark, if that manuscript on the inside of those blanks, P-18, that you have before you, had been in typewriting, and there was nothing to indicate from the character of the handwriting on it that you personally had anything to do with it, you would have been quite as sure that you had never seen that paper as you were that you had never seen the bond of indemnity before, 40

John F. Clark—Cross

would you not? A. Hardly, Mr. McCarter, because I—

Q. I did not ask you why; I ask you if that was not the fact? A. All right, go ahead.

Q. What is the fact about it? A. The fact is that—

Mr. McCarter: Now, answer the question.
(Question read.)

10 Q. Do you understand the question? A. Yes, sir.

Q. If there was no identifying mark, if it did not bear the impress of Clark, if it was all type-writing and print, I ask you if you would be any less sure that you had never seen that before than you are that you never seen the other document before? A. Well, I think I would need some additional evidence to support my memory.

20 Q. Now, you have been resident agent, or whatever your title is, of the American Surety Company for how long? A. Probably sixteen years.

Q. Sixteen years? A. About.

Q. And your business is taking applications and issuing bonds in this vicinity? A. Yes.

Q. Over how large a territory? A. The northern part of the State, extending down to Trenton, Burlington County, Ocean County.

30 Q. How many bonds are issued through your agency in that way, preceded by applications of one kind or another, in the course of a year? I do not care to go into the company's business—you do a large business, of course—but I simply want to know generally what the humdrum of it is? A. Well, it varies in amount.

Q. I suppose there is some average. It gets bigger, I guess, every year, but is it one or two a
40 year? A. Oh, four or five hundred.

John F. Clark—Cross

Q. Four or five hundred a year? A. Yes.

Q. So that it is two or three a day sometimes, sometimes ten a day, is it not? A. Yes.

Q. During the busy season, when work is active, you will get as many as twenty a day sometimes? A. Exceptional cases.

Q. Now, of course, you do not pretend to remember each incident, do you? A. I have certain 10 rules to observe—

Q. Yes. I am not talking about rules; I am talking about your memory. I say you do not pretend to remember each incident, do you? A. I couldn't over the 16 years; it is impossible.

Q. For instance, you remember that I have been good natured enough once in a while to bring people into your office, but who they were or whether the papers were signed there or signed in New York you could not tell, could you? A. I 20 could tell you whether a document was signed in my office or not.

Q. Are documents sometimes signed there when you are not there? A. Yes, sir.

Q. Do you have some rule about that thing that you are speaking of? A. We do.

Q. And is it the failure to observe some rule on this document that enables you to say that that was not signed in Newark?

to show Mr. Skinner: Which document? 30

I show Mr. McCarter: The bond.

Witness: The bond.

Mr. McCarter: Yes.

Witness: I have not seen the bond. I don't know which paper you refer to, this one or that one (indicating)?

show Mr. Skinner: He has been shown two papers. 40

John F. Clark—Cross

Mr. McCarter: The question is perfectly plain. There is only one document that he says was not signed in Newark.

Q. I ask you if it arises from the failure to observe this rule on that document that enables you to say that it was not signed in Newark? A. Surely.

10 Q. You can not say from anything else than from the fact that something fails to appear thereon that leads you to infer that it was not signed there; is that it? A. It was physically impossible to have signed that document in Newark,

Q. Physically impossible? A. Yes.

Q. You observe the notary's signature on the back, do you not? A. Yes.

Q. And do you know that notary was not in your office? A. Yes.

20 Q. Is that the physical impossibility? A. I know that no notary—

Q. Is that your physical impossibility? A. Exactly.

Q. So that if there was no notarial statement on there at all, looking at the document itself, leaving out the notarial signature, you could not say, could you, Mr. Clark, where it was signed? A. I can't swear where it was signed.

30 Q. And if there were no notarial certificate by this young clerk, Tierney, on the back of that document, for aught that you know, that paper was signed wherever it was signed, and you could not say where it was signed; that is right, is it not? A. Well, I do not think, under our rules, it could be signed in my office; I do not think it is possible.

40 Q. You think that a notary never would put his signature to a document when he had not seen the

Frank I. Tierney—Direct

party sign it, do you? A. Well, I know it could not be done in my office.

Q. But it might be done in New York?

Objected to.

Q. Suppose you were told that Bishop already had sworn that he did it when he never saw the people, would you think it might be done in this case, too?

10

Objected to.

The Court: I think we have two questions that are objected to.

Q. As I understand it, then, it is the fact that Mr. Tierney's name appears on the back of this document as a notary public in New York that you rely on as indicating that that document was not signed in your office; is that right? A. That is evidence enough.

Q. And you rely on that fact? A. Yes.

20

FRANK I. TIERNEY, sworn in behalf of plaintiff in rebuttal:

Direct-examination by Mr. Skinner:

Q. Where do you live, Mr. Tierney? A. 307 East Seventeenth Street, New York City.

Q. And what is your occupation? A. Lawyer. 30

Q. How long have you been practicing? A. I have been practicing for the last 13 years—12 or 13.

Q. At what bar? A. Well, from the Supreme Courts of the United States down to the New York County Courts.

Q. Were you at any time a notary public of New York County? A. I was, during my employment 40

Frank I. Tierney—Direct

in the legal department of the American Surety Company.

Q. When was that? A. I think during the year 1901 and part of the year 1900; I am not quite sure.

10 Q. In the month of June, and on June 26, 1901, were you connected with the legal department of the American Surety Company? A. Yes, I think I was.

Q. I show you a paper which has been marked "Exhibit P-12," and call your attention to a certificate of acknowledgment on the back and the signature, and ask you whose signature that is (paper shown to witness)? A. That is my signature.

20 Q. And the handwriting in the body of the certificate, other than the signature, whose handwriting is that? A. Yes, that is in my handwriting, I am quite sure.

Q. Look at the paper itself, as well as the certificate of acknowledgment, and tell me whether you have any recollection of the circumstances or of the occurrence itself—the signing of that certificate of acknowledgment by him? A. (Witness examines paper.) I merely recollect the matter, the title being familiar to me—Minahan, Conway.

30 Q. Have you any recollection of the act of taking the acknowledgment or of the signing of that certificate? A. No, I have no present recollection, except that it is there, refreshing me.

Q. Where was that certificate of acknowledgment taken, Mr. Tierney? A. Why, it was taken where the venue in the acknowledgment states, New York County, and I presume in the office of the American Surety Company.

40 Mr. McCarter: Well, I object to the an-

Frank I. Tierney—Cross

swer, and move that it be stricken out.
"Presume."

Q. When you say you presume in the office of the American Surety Company, have you any recollection of it at all, or do you state that as a matter of inference from anything? A. I state it as a matter of inference from the acknowledgment itself; I have no present recollection of it. 10

The Court: I did not rule on your objection.

Mr. McCarter: I asked that the answer be stricken out.

The Court: I think the witness is fairly entitled to explain what he meant.

Mr. McCarter: All right, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Tierney, may I ask what year you were admitted to the Supreme Court of the United States? A. The spring of this year. 20

Q. How many cases have you argued there? A. I haven't argued any cases; I was admitted for the purpose of presenting an application for certiorari in a case in which Mr. Shann and I were counsel together.

Q. So that at the time, in 1901, you were not a member of the Supreme Court of the United States? A. Oh, no, I was a very young man, 24 or 25; I don't know whether I was admitted to the bar then. 30

Q. Were you admitted in 1901? A. Yes, sir; I was a member of the bar in June, 1901; I was admitted in 1901.

Q. How old were you in 1901? A. I guess about 24 or 25.

Q. Well, when you were performing the functions of notary public you sometimes took ac- 40

Frank I. Tierney—Cross

knowledge, I suppose, in different parts of New York County? A. No, I think that—my recollection is that I never took any acknowledgments outside of the office of the American Surety Company; possibly in some other part of the building, outside of their offices, I may have.

Q. Well, now, in what part of the building did
10 you take this acknowledgment? You can not tell, can you? A. I can't tell, except that I presume.

Q. I do not ask you what you presume; I ask you what part of the building you took this acknowledgment in, if you did take it? A. Why, I think it was in the legal department; it was on the fourth floor.

Q. What makes you think that? You used to go up to the executive department and take acknowledgments, did you not? A. Oh, no, I very
20 seldom went up there to take them.

Q. Well, you did do it? A. No.

Q. You went to other parts of the building, did you not? A. No, the other parts of the building that I referred to were parts of the building entirely disconnected with the offices of the American Surety Company.

Q. I say you used to take acknowledgments in other parts of the building— A. For the American Surety Company?

30 Q. I did not say anything about that; I ask you if you did not take acknowledgments in other parts of the building than in the legal department, as you call it? A. Oh, yes, I guess I did.

Q. Well, you know you did, do you not? A. That is the best answer that I can make. My recollection is that I may have a few times.

Q. You took a great many in the course of your experience? A. Yes, a great many.

40 Q. A great many? A. Yes.

Frank I. Tierney—Re-direct

Q. Now, I understand you to frankly say that you have no personal recollection of that action at all? A. Oh, no, I wouldn't state any present recollection.

Q. And if you did not see it there as written, you would not remember the incident at all? A. No, I wouldn't think about it.

Q. And all you know now is that it is there? 10
A. And that is my signature and my seal, which I had in my possession at the time.

Q. Is that word "New York" in your writing?
A. Yes, I think all of that is in my writing.

Q. How do you account for the "New York" written above there, too? A. Well, I don't know. I think that is in my handwriting, too.

Q. That is in your handwriting, too, is it not?
A. I think so.

Q. You can not tell us why you started up there 20 and then went down below? A. No, I can't give any explanation about that at all, except that I might have started to make the acknowledgment there and then, made the acknowledgment later, on the lower line.

RE-DIRECT-EXAMINATION by Mr. Skinner:

Q. Mr. Tierney, although you have no recollection of the occurrence, the taking of this acknowledgment on June 26, 1901, can you nevertheless 30 state whether or not those gentlemen appeared before you?

A. I don't know. Objected to as repetition and as not re-direct-examination.

The Court: I think the witness should be allowed to answer the question.

Frank I. Tierney—Re-direct

Defendant's counsel pray an exception,
and the same is allowed.

(Question read.)

A. They certainly did.

Q. And on what do you base your statement?

Same objection.

Same ruling.

10 Defendant's counsel pray an exception,
and the same is allowed.

A. On the fact that I took the acknowledgment.

Q. Well, how does the fact that you took the acknowledgment convey to you the fact that those gentlemen appeared before you?

Same objection.

Same ruling.

Defendant's counsel pray an exception,
and the same is allowed.

20 A. Because I knew it was absolutely necessary, because the acknowledgment states that they did personally appear before me.

Q. Well, what does that mean to you?

Objected to. Objection overruled.

Defendant's counsel pray an exception,
and the same is allowed.

A. It means that I would not take an acknowledgment without those men personally appearing before me, as a notary public and as a lawyer,
30 knowing what a notary public's obligations are.

Q. What was your course of business or practice as to taking of acknowledgments at that time with reference to having the parties before you whose acknowledgments you were taking?

Objected to as not re-direct-examination
and as immaterial.

Objection overruled.

Defendant's counsel pray an exception,
40 and the same is allowed.

Frank I. Tierney—Re-cross

A. If the parties had business with Mr. Mason, Mr. Mason would come and severally introduce the parties to me. I sat right alongside of Mr. Mason; he had a desk some five or six feet from me; and he would call me over and introduce me to the parties and tell me to take their acknowledgments. Then I would, in turn, ask them, or see them sign the document, or if they had signed it, I would ask them if that was their signature 10 always. That was my invariable rule.

RE-CROSS-EXAMINATION by Mr. McCarter:

Q. Did you see these gentlemen sign it? A. As I look upon that man there (indicating) now, his face is quite familiar.

Mr. McCarter: I did not ask you that question. I move that it be stricken out. 20

The Court: Strike it out.

Witness: Yes, I saw them sign it, if my name is on that document.

By the Court: Q. What gentleman do you refer to? A. I refer to the man sitting back with the lady (indicating).

Mr. McCarter: I object to the witness interpolating that he was the man. I asked him if he saw the gentlemen sign the document and he answered something about 30

Mr. Conway. If the Court asks questions, I suppose I am bound to have them answered, whether they are competent or not.

The Court: If I am in error, I will strike it out.

(The stenographer reads the last two questions and answers.)

Frank I. Tierney—Re-cross

The Court: Strike out the question by the Court:

By Mr. McCarter: Q. Now, Mr. Tierney, have you ever seen those gentlemen since that day? A. No, I have not.

Q. What did Mr. Hanna look like? A. I don't know; I haven't the faintest recollection.

10 Q. What did Mr. Minahan look like? A. I haven't the faintest recollection.

Q. Tall or short? A. I haven't the faintest recollection.

Q. Old or young? A. I don't know.

Q. How can that be, if you took the acknowledgment of this document, and all that, that you can not remember anything about it? A. It is the most natural thing in the world, twelve or thirteen years ago, that I should have no present recollection how they looked.

20 Q. And yet, having been casually introduced to this gentleman twelve or thirteen years ago, you remember him? A. I didn't say that. I will tell you how I remember him. Mr. Mason casually called my attention to him as I came into Court, and asked me if I had ever seen him before.

Q. So you have been talking to Mr. Mason? A. Mr. Mason or Mr. Watson asked me if I had seen him before, and having seen him, I say I have.

30 Q. When did you first talk to Mr. Mason about this business? A. On the telephone this morning. He called me from the Trial Term, Part 10, Judge Giegerich's Court.

Q. You were trying a case this morning? A. A case that I have been trying for three weeks, it was just ended.

40 Q. So that a request was made to you this

Frank I. Tierney—Re-cross

morning to come over the telephone, was it? A. Yes, sir. They send me word before that—

Q. I thought you said this morning was the first time? A. Yes, sir; by Mr. Mason.

Q. Was any request made for you to come yesterday? A. No.

Q. Or the day before? A. No, sir; but there was two weeks ago, and I couldn't come. A man 10 came over from Mason's office.

Q. A man came two weeks ago. Why were you coming two weeks ago? A. I was asked to be in readiness to come, and asked if I could come the next day, and I said I couldn't, if they wanted me they would have to wait for two or three weeks.

Q. How many acknowledgments were taken in the course of a day in the legal department of the American Surety Company? A. Some days there weren't any and other days there might be fifty. 20

Q. Were they always filled out when there were fifty— A. Well, if I took them, they were.

Q. One moment. Were they always filled out, if there were fifty, at the time they were taken, or later sometimes? A. Well, as to that I don't know.

Q. You do not know? A. No.

Q. Did you hear Mr. Bishop testify in this case that when he went up to the executive department he would take a whole batch and have them 30 signed, and fill them up later, or sometimes, if he knew the signatures, he would fill them up without seeing the parties at all? Did you hear him testify to that?

A. *Witness* Objected to as irrelevant.

2 weeks (Question read.)

A. No, I didn't hear Bishop. I don't know what Bishop did; I know what I did. 40

Frank I. Tierney—Re-cross

Q. Your conduct was different from Mr. Bishop's? A. My conduct was always straight on that question; you can bank on that. I was a lawyer, and I knew the penalty for any foolish practice.

Q. How long have you been a lawyer? A. I have been a lawyer since July, 1900.

10 Q. And what work did you perform besides taking acknowledgments? A. I was the managing clerk in the legal department.

Q. What work did you perform besides taking acknowledgments? A. Argued motions and helped prepare cases and dictated letters in connection with bonds. I had plenty of work, I know that.

Q. Did you have anything to do with the preparation of that document? A. I had nothing to
20 do with that.

Q. Did you ever read it before? A. Oh, I may have read it.

Q. Well, did you? A. I haven't any present recollection.

Q. It is on one of the regular blanks, is it not, in use at that time? A. (Witness examines paper.) Well, yes, I guess that was the regular form in use at that time, although I do not think it had been in use very long. They used to have a
30 long blue paper.

Q. You were shown this document in the Courtroom this morning before you took the stand, were you not? A. Just the minute I came in here—

Q. Oh, answer my question. You were shown this document, sitting out here in the Courtroom, after you came in the Courtroom this morning?

40 A. The minute I came in I was shown it.

Frank I. Tierney—Re-cross

Q. By whom? A. By this gentleman over here (indicating).

Mr. Skinner: Mr. Howell.

Mr. McCarter: Mr. Howell.

Q. Did he call your attention to the signatures on the back of it? A. He asked me if that was my handwriting.

Q. And did he tell you anything at all more than 10 that? A. Not another word. It was not Mr. Mason; it was he that asked me if I knew the man in the corner. I had never seen the man in the corner before.

Q. Then you did not talk to Mr. Mason? A. Yes, I gave him the courtesy of the day coming in, that is all.

Q. Then Mr. Mason and you and he talked about that? A. Mr. Mason said nothing to me about the case at all.

Q. Well, why did you say he did, then? A. He 20 asked me if I identified the man. I am mistaken if I said that.

Q. Well, why did you say that, then? A. Well, I am very sorry if I said it.

By the Court: Q. How is this seal made? A. That was a steel instrument that was furnished by the company to me when I was appointed a notary public, a steel seal. I impressed it here; I put this in and impressed it, pressed the seal 30 on it which bears my name, "Frank I. Tierney."

Q. How large an affair is it? A. Why, it always stood on my desk. About, say, pretty near a foot in height, and rather bulky at the bottom, and it had an opening on the bottom there where this could be inserted, and then you push the handle down, and it would impress itself.

Q. Was it worked by a lever arrangement or direct? A. Pressure on this lever, by the handle. 40

Motion for Direction of Verdict

Q. And what does it weigh, if you remember?

A. I should say—well, I don't know. I am a very poor judge of weight.

Q. Well, if you do not know, you need not guess. A. I don't know. It was pretty heavy, anyway.

Q. This is nothing put on or affixed, but something impressed? A. Something impressed.

Q. Do you remember when it was put on with reference to the writing? A. Not except as I might say what my custom was.

Further DIRECT-EXAMINATION by Mr. Skinner:

Q. Will you tell us, please, Mr. Tierney, what the custom was?

Objected to.

20 The Court: Well, I think the course of business in an office is not improper to testify to, if there is a fixed course of business.

Defendant's counsel pray an exception, and the same is allowed.

A. I generally affix the seal when I put my signature on.

Plaintiff rests.

30

At 1:10 o'clock p. m., the Court takes a recess of one hour.

After recess.

Mr. McCarter: May it please your Honor, I renew my motion; that is, I ask now for the direction of a verdict in favor of

40

Motion for Direction of Verdict

the defendant, upon the grounds that I urged upon the application for a non-suit, and upon the additional ground that there is no evidence that the officers who, it is said, executed the original release, a document that was admittedly a special paper and out of the ordinary course of events, were legally authorized to execute it, or 10 that the paper that is produced as a copy is, in fact, a true copy of the alleged original.

Counsel argue.

Mr. Skinner: If your Honor please, I also request the direction of a verdict in favor of the plaintiff.

The proof that there is before the Court relates, as I take it, under the rulings that have been made, to the very narrow issue 20 as to whether or not a transaction took place as Mr. Mason describes it.

The Court: That is a question of fact, is it not?

Mr. Skinner: It is, practically. I only wish to say that this is practically undisputed; that when the defense was put in on that point, it was confined to Mr. Conway and Mr. Conway at first denied that he had executed this particular paper 30 on which suit was brought in New York, or before Mr. Mason, and ascribed it to another time and place; but Mr. Conway in his cross-examination tied this occurrence in Newark that he was speaking of to the execution of or being asked for some statement of real estate, and said that there was no other paper signed in Newark but that one. That 40

Motion for Direction of Verdict

10 was his clear cut testimony. That was P-12, the agreement of indemnity. At any rate, it was done at the time of the taking of his statement. We produced the statement of his real estate, and he admitted his signature. It seems to me that made it quite clear that the story that he had been giving was a story of recollection of going to Mr. Clark's office, that had been misapplied to the giving of the indemnity and really related to the other paper, of June 24th—leaving the case without contradiction.

20 The Court: I think it is a question of fact, and I shall deny both motions—my view being that it resolves itself into a question of fact as to whether the bond and the release were executed, or whether they came into existence, under the circumstances detailed by witnesses on behalf of the plaintiff; and if yea, the plaintiff prevails, and if nay, the defendant prevails.

Defendant's counsel pray an exception to the refusal of the Court to direct a verdict for defendant, and the same is allowed.

30 Plaintiff's counsel pray an exception to the refusal of the Court to direct a verdict for the plaintiff.

Exception allowed; sealed accordingly.

Circuit Court Judge.

40 James Conway the defendant having departed this life pending the cause Mary L. Mason was appointed as the Administratrix of his estate and the cause duly reviewed against her as such Administratrix.

Discussion

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Monday, May 4, 1914.

AMERICAN SURETY COMPANY OF
NEW YORK, a corporation,

vs.

MARY L. MASON, Administratrix
of James Conway, deceased.

10

Before HON. FREDERICK ADAMS, J., and a Jury.

For plaintiff appear Messrs. Pitney, Hardin &
Skinner, by Corwin Howell, Esq.

For defendant appear Messrs. McCarter &
English, by Arthur F. Egner, Esq.

20

A jury is called and sworn.

Mr. Howell: I remind your Honor that
this case was tried before you once before.
The case was submitted on the narrow is-
sue, Was there or was there not a written
release delivered? The Supreme Court on
a rule to show cause has held that on this
narrow issue the verdict rendered was
against the weight of the testimony—the
jury having rendered a verdict for the de-
fendant but the Supreme Court in its opin-
ion also held that this delivering of a re-
lease was not the point upon which the case
turned, and that in the absence of the de-
livery of such a release, nevertheless, the
plaintiff was entitled to recover.

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Discussion

Now, counsel for both sides have agreed that the testimony, if this case were retried, would be the same as in the former trial, and that the view taken by the Supreme Court leads logically to the result that a verdict should be directed for the plaintiff in this case.

10 Mr. Egner: We have not quite agreed to that. We have made a stipulation. Why not read the stipulation?

The Court: Read the stipulation into the record.

20 Mr. Howell: Defendant's counsel wish to review this result in the Court of Errors and Appeals, and to that end we have entered on a point program, to hasten it as much as possible, and this stipulation has been signed and filed. The general substance of it is that the testimony taken on the former trial shall be deemed and taken to be the testimony taken on this trial, and the various motions, objections, orders and rulings in respect thereto made upon the first trial are to be treated as if made again. I have a copy of the stipulation here, which, it seems to me, I should not
30 take up the time of the Court to read, unless the Court wants to hear it. I thought I would give it to the stenographer.

The Court: If you will hand it to the stenographer, he can copy it into the record.

40 Mr. Howell: The testimony will be found in the printed case used on the argument of the rule on pages 20 to 193, and that is the part of this book that is covered by the

Discussion

stipulation. So that the matter is before the Court as if the taking of testimony had proceeded up to the point of closing the testimony on both sides.

The Court: Was there any motion to nonsuit?

Mr. Howell: Yes, sir.

Mr. Egner: That motion is to be deemed to have been repeated on this trial. 10

The Court: What became of the motion?

Mr. Howell: The motion was denied.

There was also a motion by the defendant for the direction of a verdict on the same grounds and other grounds. I assume that the defendant proposes to repeat that motion before your Honor today; but, assuming your Honor does not feel that anything has happened that would cause you to reverse these rulings— 20

The Court: Both those rulings would be the same?

Mr. Egner: Yes, sir.

Mr. Howell: Yes, sir.

The Court: So that you go on smoothly until you get down to the close of the testimony?

Mr. Howell: Yes, sir.

The Court: Then we will assume that the testimony, beginning on page 20 and ending on page 193, has all been received in the presence of the Court and jury. 30

Mr. Egner: Yes, sir; with the same rulings and objections made.

Mr. Howell: Yes, sir. Your Honor has a copy of the opinion of the Supreme Court, and unless your Honor takes a different view, Mr. Egner agrees that the 40

Discussion

situation would lead logically to the result of a direction of a verdict for the plaintiff.

Mr. Egner: No, I do not think we ought to have anything on the record other than the stipulation, and having stipulated that we proceed smoothly to page 193, I think counsel can make his motion without anything further.

10

The Court: Make your motion.

Mr. Howell: I think, then, at this point that the record should show our motion for the direction of a verdict, the grounds of it and the defendant's objection. I accordingly move your Honor to direct the jury to find a verdict in favor of the plaintiff for the sum of \$56,463.75. I have already furnished counsel on the other side with a statement showing how this sum was computed. It represents the amount paid by the surety company to the Town of Wakefield, with interest on that sum up to April 8th last. We do not want to carry it beyond that—that being a period of three years less two months. Then it also includes unpaid premiums for ten years, without any interest.

20

Now, the grounds of this motion, your Honor, are as follows. The testimony in this cause, we say, shows beyond question that the defendant, James Conway, agreed to reimburse the plaintiff for any sum that it might be called upon to pay to the Town of Wakefield by reason of having become surety on the bond given to that town by the firm of Minihan & Costa; that the surety company was called upon to pay, by judgment obtained by the Town of

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Discussion

Wakefield, and did pay the sum of \$45,439.

11. I think that this was paid on or about June 8, 1911. The fact of the contract liability entered into by the American Surety Company and this payment are undisputed. The only contention is whether the defendant was obligated to reimburse the plaintiff company, and on that point alone, 10 as I understand it, the defendant contends that, while James Conway signed an agreement to reimburse the surety company, that agreement never became operative. The defense contended at the former trial and has contended at this trial that it was not effective, this so-called agreement of indemnity, until and unless a release of certain prior indemnitors was delivered by the surety company. On that 20 point we think that the evidence proves beyond question, according to the testimony of the plaintiff's witness, Mr. Mason, that such a release was delivered. But we further contend that it was not necessary for the plaintiff to show the delivery of such a release, and we say that, under the terms of the indemnity agreement signed by Conway, and in the circum- 30 stances of this case, the delivery of an express release to the prior indemnitors was not a condition precedent to any liability upon Conway; that the acceptance of the new indemnitors, including Conway, was an implied release of the prior indemnitors, and that such acceptance has been established beyond any question, not only by the institution of this suit, but by the acts 40

Discussion

of the surety company prior thereto showing the acceptance.

On these grounds we move for a direction of a verdict in favor of the plaintiff for the amount I stated.

The Court: Do you wish to be heard, Mr. Egner?

10 Mr. Egner: We wish to make a motion for the direction of a verdict for the defendant upon the grounds that were the basis of our motion for a nonsuit, which are represented on pages 140 and 141 of the record, and upon the additional ground that there is no evidence that the officers who, it is said, executed the original release, a document that was admitted, to be
20 a special paper and out of the ordinary course of events, were legally authorized to execute it, or that the paper produced as a copy is in fact a true copy of the alleged original. If your Honor does not feel that you can direct a verdict in our favor on the grounds that we have stated, then we think that the case ought to go to the jury.

30 First of all, we contended, and your Honor has ruled against us, that there had not been sufficient search shown for the original of this alleged release—the copy offered in evidence being a mere office copy, and no proof having been shown of a search among the people who would be likely to have it. However, your Honor will recall that there was a conflict in the evidence as to whether this release had ever been delivered, the testimony of Mr.
40 Mason, for the plaintiff, being that the pa-

Discussion

per had been delivered in New York at the
 time the bond in suit was signed and the
 testimony of Mr. Conway being that he had
 never signed any papers in New York;
 that he had signed a bond in New York,
 and that there had never been any such re-
 lease delivered. The Supreme Court has
 said that they felt that the verdict was 10
 against the weight of the evidence on the
 first point. I think, however, that that
 would not mean that that issue would not
 have again to be submitted to the jury, in-
 asmuch as it is an issue of fact.
 On the other point on which the Supreme
 Court founded its opinion, namely, that the
 surety company had evinced an acceptance
 of this new bond, and that in itself is 20
 enough, I think the Supreme Court has
 overlooked in that conclusion some of the
 facts which were shown and which clearly
 make it a question of fact as to
 whether they did accept this new bond.
 I need not call your Honor's atten-
 tion to the fact that after the time
 of their alleged acceptance of this new bond
 they sent bills for the premium to Minihan
 & Costa, of whom Costa was on the original 30
 bond, but not on the subsequent bond, and
 the action of sending bills for premiums to
 Costa was wholly inconsistent with any in-
 tention to release him. And there are
 other things in the case, the general at-
 mosphere of the case, tending to show that
 they still held onto this old bond. For in-
 stance, they had the old indemnity agree-
 ment; they had never surrendered it; they 40

Discussion

kept it in their possession, whereas, if they intended to release it, they would have turned it over to the parties entitled thereto.

10 So that we have these two facts: First of all, the custody of this agreement in the possession of plaintiff—this old agreement which the Supreme Court said they had *ipso facto* released—and we have, further, the positive action of sending the premium bills to Costa—an action wholly inconsistent with the intention to release Costa on this old bond. So that on that issue also we have a question of fact certainly. This acceptance *in pais* is a question of fact as to whether they did accept it. It seems to me it is question of fact to be determined
20 by the jury, under the proper instructions of your Honor.

I think therefore, even if our motion for the direction of a verdict does not prevail, that, even under the opinion of the Supreme Court, in view of these matters of fact, the case ought to go to the jury.

30 As to the amount of the plaintiff's claim, there is included in that an item of \$3,300 for premiums. In the bond there is a provision that the idemnitor shall pay premiums each year in advance until the surety is discharged from liability. The proof is that the bond bore date in April, 1901, so that the premiums became due in April of each year. The payments which finally discharged the surety were made in June, 1911. So they are claiming an entire
40 year's premium, from April, 1911, to April,

Discussion

1912, contending, I suppose, that it is due in advance and due for the entire period.

Mr. Howell: We will waive that one year's premium, your Honor; we will deduct \$330 from our total.

The Court: The Court has before it cross motions: a motion by counsel for the plaintiff to direct a verdict for the plaintiff and a motion by counsel for the defendant to direct a verdict for the defendant. 10

The case has been once tried, and is tried again on the same facts and on the same testimony, the purpose being to put the case in shape for speedy and convenient review by the Court of Errors and Appeals. It is always convenient for a trial judge in a Supreme Court case to know exactly what the opinion of the Supreme Court will be if the case goes up. The Court has that advantage in this case. 20

I therefore direct a verdict in favor of the plaintiff against the defendant for the amount which counsel will state again.

Mr. Howell: \$56,133.75.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Verdict accordingly.

30

The following is a copy of the stipulation entered into by counsel:

Stipulation**NEW JERSEY SUPREME COURT**

AMERICAN SURETY COMPANY, a
corporation,

vs.

10 JAMES CONWAY.

On contract.

20

“The rule to show cause why a verdict obtained on behalf of the defendant in the above entitled cause having been heard before the Supreme Court, and the said rule to show cause having been made absolute, and the said defendant James Conway having departed this life, pending the argument of the said rule to show cause, and the attorneys of the parties in this cause desiring to simplify and expedite the further proceedings therein:

“It is on this fourth day of April, nineteen hundred and fourteen, hereby STIPULATED by and between the attorneys of the respective parties as follows:

30

“An administrator of the estate of James Conway deceased having been appointed the above entitled cause shall be reviewed as against such representative, and said cause shall be put on the list of causes to be tried at the April term, nineteen hundred and fourteen, at the Essex Circuit, as if regularly noticed for trial, notice of trial being hereby waived, and shall be brought on for trial at the said April term of said Court at such early day as

40

Stipulation

the judge of said Court may assign therefor.

"The record of the former trial in this cause shall be used as the record upon such new trial in all respects as if the witnesses were sworn and testified and the testimony therein introduced anew, and the various motions, objections, orders and rulings in respect thereto made upon said first trial were again made, and counsel for both parties may make, before said Circuit Court, such motions or request for the direction of a verdict, or the submission of the case to the jury as they may be advised, and upon the entry of judgment, any appeal to be taken therefrom to the Court of Errors and Appeals shall be prosecuted promptly so that said appeal shall be placed upon the list of the June term, nineteen hundred and fourteen of said Court of Errors and Appeals. 10 20

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

McCARTER & ENGLISH,
Attorneys of Defendant."

Afterwards, to wit, at a Circuit Court holden at Newark, in and for the County of Essex, on the fourth day of May, in the year of our Lord One Thousand Nine Hundred and Fourteen, before his Honor, Frederic Adams, a Circuit Court Judge, to whom the said cause had been referred for trial by Honorable William S. Gummere, the Chief Justice of the Supreme Court, presiding on said Circuit, according to the statute in such case made and provided, comes as well the said plaintiff as the said defendant by their respective attorneys within mentioned, and the jurors of the jury, 30 40

Order

whereof mention is within made, being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, upon their oath say they find for the plaintiff and assess the damages of the said plaintiff against the defendant over and above the costs and charges by the said plaintiff
 10 about its suit in this behalf expended, at the sum of fifty-six thousand one hundred thirty-three dollars and seventy-five cents (\$56,133.75), and for those costs and charges.

FREDERIC ADAMS,
 Circuit Court Judge.

 Order

20

NEW JERSEY SUPREME COURT

AMERICAN SURETY COMPANY OF
 NEW YORK,

vs.

MARY L. MASON Administratrix
 of James Conway, deceased.

On contract.
 On Postea.

30

56,133.75

296.73

56,430.48

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of fifty-six thousand one hun-

Exhibit P-1

dred and thirty-three dollars and seventy-five cents besides costs to be taxed.

Entered May 7, 1914,

On motion of Pitney, Hardin & Skinner, Attys.

A true copy.

WM. C. GEBHARDT, 10
Clerk.

PLAINTIFF'S EXHIBITS

Exhibit P-1

Know all men by these presents, that we Minahan and Costa, of Orange, N. J., as principals, 20 and the American Surety Company of New York, of 100 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto the Town of Wakefield, Mass., in the sum of Ten Thousand, Five Hundred Dollars (\$10,500.00) to be paid the said Town of Wakefield, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

The conditions of this obligation is such, that if 30 the above bounden Minahan and Costa, their heirs executors, administrators or assigns, shall in all things stand to and abide by, and well and truly keep and perform, the covenants, conditions and agreements in the foregoing contract for building Section 1 of the Wakefield Sewerage System in Wakefield on his or their part to be kept and performed, at the time and in the manner therein specified, and shall indemnify and save harmless 40

Exhibit P-1

the Town of Wakefield, its officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this tenth day of April in the year nineteen hundred and one.

10 (Signed) DANIEL F. MINAHAN, (SEAL)
MINAHAN & COSTA (SEAL)
ANTONIO COSTA, (SEAL)

(Seal of American Surety Company of New York.)

(Signed) AMERICAN SURETY COMPANY
OF NEW YORK.

DAVID B. SICKELS, *Vice-President*.
G. M. SWEENEY, *Secretary*.

Signed and sealed in the presence of

20 (Signed) MAYNARD E. S. CLEMONS,
as to principals.

WM. H. BISHOP,
HARRY C. JONES,

as to surety.

(U. S. Internal Revenue Stamps
cancelled, amounting to one
dollar two and one-half cents.)

STATE AND COUNTY OF NEW YORK, ss.

30 On this 10th day of April, 1901, before me personally appeared David B. Sickels, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he is the Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of
40 said Corporation; that the seal affixed to said in-

Exhibit P-1

strument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with G. M. Sweney and knew him to be the Secretary of said corporation; that the signature of said G. M. Sweney subscribed to the said instrument, is in the genuine handwriting of the said G. M. Sweney, and was thereto subscribed by the like order of said Board of Directors; and in the presence of him the said David B. Sickels, Vice-President. 10

WM. H. BISHOP,
Notary Public.

(Seal)

New York County. 20

At a regular quarterly meeting of the Board of Directors of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the President and Vice-Presidents be, and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries, or one of the attorneys." 30

to 1893 918

ni 1893 918

Exhibit P-1

COUNTY OF NEW YORK, ss.

I, G. M. Sweney, Secretary of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company, at the City of New York, this 10th day of April, 1901.

G. M. SWENEY,
(Seal.) Secretary.

(Incorporated April 14, 1884.)

20 AMERICAN SURETY COMPANY
OF NEW YORK

General Offices, 100 Broadway

FINANCIAL STATEMENT, MAR. 30, 1901

RESOURCES

	Real Estate and Improvements.....	\$3,054,567.16
	Stocks and Bonds.....	1,515,584.00
30	Bills Receivable	701,667.99
	Cash in Banks and Offices.....	145,328.56
	Premiums in Course of Collection.....	234,423.26
	Accrued Interest and Rents.....	36,076.13
		\$5,687,647.10

LIABILITIES

	Capital Stock.....	\$2,500,000.00
	Surplus	1,000,000.00
	Undivided Profits.....	1,093,306.39
	Premium Reserve Requirement.....	592,012.00
	Claims in Process of Adjustment.....	289,725.63
	Bills and Accounts Payable.....	212,603.08
40		\$5,687,647.10

Exhibit P-1

State of New York, {
 County of New York. } ss:

G. M. SWENEY, being duly sworn, says: That he is Secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to Section 4 of said Act of Congress; that said American Surety Company of New York is worth more than \$2,500,00 over and above all its debts and liabilities and such exemptions as may be allowed by law. 10 20

G. W. SWENEY.

Subscribed and sworn to before me this

10th day of April, 1901.

Wm. H. Bishof,

30

Notary Public,

New York County.

(Seal)

Exhibit P-2

Exhibit P-2 is a bond in all respects similar to Exhibit P-1, except that same is numbered 84758, is in the sum of twelve thousand five hundred dollars, refers to Section 3 instead of Section 1 of the Wakefield Sewerage System, and has cancelled U. S. Revenue Stamps amounting to one dollar twelve and one-half cents.

Exhibit P-3

Exhibit P-3 is a bond in all respects similar to Exhibit P-1, except that same is numbered 84759, is in the sum of ten thousand dollars, refers to Section 2 of the Wakefield Sewerage System, and has cancelled U. S. Revenue Stamps amounting to one dollar.

Exhibit P-4

No. 7186

New York, June 6, 1911

30 THE TRUST COMPANY OF AMERICA

Pay to the order of Inhabitants of the Town of Wakefield, Massachusetts, Forty-five thousand two hundred two & 71/100—Dollars.

AMERICAN SURETY COMPANY OF
NEW YORK

\$45,202 71/100 \$45,202 71/100 by H. B. Zevely
Vice-president.

Exhibit P-5

Across the face of the check same is countersigned Wm. A. Brandt, Treasurer.

Written thereon is the following: Accepted payable at the Hanover National Bank, of New York, June 6, 1911, through New York Clearing House, The Trust Company of America. T. M. Warfield, Tre.

The check is endorsed: Inhabitants of the 10
Town of Wakefield, Massachusetts, by Albert W. Flint, Treasurer. Endorsement guaranteed Wakefield National Bank. F. A. Winship, Cashier. Pay to the order of the Wakefield National Bank,, Town of Wakefield, by Albert W. Flint, Treasurer. Pay to the order of Chase National Bank, Town of Wakefield, by Albert W. Flint, guaranteed, Wakefield National Bank, Wakefield, Mass. F. A. Winship, Cashier. Received payment through New York Clearing House, June 20
9, 1911. Chase National Bank, New York, No. 74.

Exhibit P-5

No. 7178

New York, June 6, 1911.

THE TRUST COMPANY OF AMERICA

30
10 Pay to the order of Sheriff of Suffolk County,
Massachusetts, Two hundred thirty-six & 40/100
—Dollars.

AMERICAN SURETY COMPANY
OF NEW YORK

\$236 40/100

by H. B. Zevely,
Vice-president.

Not over Two hundred sixty \$260\$

40

Exhibit P-7

Across the face of the check same is countersigned, Wm. A. Brandt, Treasurer.

Written thereon is the following: Accepted payable at the National City Bank of New York, June 6, 1911 through New York Clearing House, The Trust Company of America. T. M. Warfield, Tre.

- 10 The check is endorsed: Fred. H. Seavey, Sheriff of Suffolk County, Massachusetts. John F. Kelly, Treasurer of Suffolk Deputies. Prior endorsements guaranteed. Pay to the order of any National Bank or Trust Co. June 10, 1911, The New England Trust Co., Boston. Pay the National City Bank of New York, or order, The Merchants National Bank of Boston, A. P. Weeks Cashier. Received payment through New York Clearing House. Prior endorsements guaranteed June 12, 1911, The National City Bank, A. Kavanagh, Cashier. Mail teller paid June 12, 1911, The National City Bank of New York.

Exhibit P-7

Accounting Department.

Voucher No. 139709

30

**AMERICAN SURETY COMPANY
OF NEW YORK**

100 Broadway, New York City.

To Inhabitants of the Town of Wakefield,
Massachusetts, Dr.

c/o Mr. E. F. Philbrick,
Boston, Mass.

1911

Exhibit P-7

June 6, C&C No. 1193 Bond Nos. 8457-8-9
Minahan & Costa to Town of Wakefield, Mass.

In full for all liability of American Surety Company of New York for judgment, interest and costs in litigation arising on 18.92
above described bonds. 45202.71

45221.63 10
45221.63

PLEASE RECEIPT AND RETURN THIS
VOUCHER BY THE NEXT MAIL

Registered G. R. C.

Approved C. E. C.

	Account	Amount	
Audited D. R. S.	Claims	45202.71	20
		45202.71	

Received June 8th, 1911, from the AMERICAN SURETY COMPANY OF NEW YORK, the sum of Forty-five thousand two hundred two & 71/100..... Dollars, and eighteen & 92/100 Dollars in full of above account, collected on execution by deputy sheriff.

M. E. S. CLEMONS, 30
Attorney for Inhabitants of
\$45202.71 Town of Wakefield.

Exhibit P-8

Accounting Department.

Voucher No. 139710

**AMERICAN SURETY COMPANY
OF NEW YORK**

100 Broadway, New York City.

To Sheriff of Suffolk County, Massachusetts,

10 Dr.
Boston, Mass.

1911

June 6 C&C No. 1193 Bond Nos. 84757-8-9
Minahan & Costa to Town of Wakefield, Mass.

In full for all liability for
poundage on executions in case of
Town of Wakefield vs. American .44
Surety Company of New York. 236.40

20 236.84
236.84

PLEASE RECEIPT AND RETURN THIS
VOUCHER BY THE NEXT MAIL.

	Account	Amount
30	Audited D. R. S. Claims	236.40
	Registered G. R. C.	
	Approved C. E. C.	
		236.40

Received June 8th, 1911, from the AMERICAN
SURETY COMPANY OF NEW YORK, the sum of two
hundred thirty-six & 40/100.....Dollars,
and forty-four cents in full of above account.

PETER F. FEE,
Deputy Sheriff.

40 \$236.40

Exhibit P-10

Exemplified copy of the record of the Superior Court for the County of Suffolk in the State of Massachusetts, and also of the Supreme Judicial Court of the State of Massachusetts, in the case of Town of Wakefield against American Surety Company of New York, showing that judgments were entered in said Superior Court, in favor of 10 the plaintiff, on the third day of December, 1908, upon the three counts of the declaration in said suit, each of said counts being upon one of the bonds, Exhibits P-1, P-2 and P-3 in the present suit.

The exemplified copy of said records further shows that certain exceptions were taken to the rulings and opinion of the said Superior Court on behalf of the defendant to the said Supreme Judicial Court of Massachusetts; that on May 19, 20 1911, it was ordered by said Supreme Judicial Court, that said exceptions be overruled, that thereupon it was ordered that the three several judgments be entered as of December 3, 1908, and that judgments were entered accordingly as of the 3d day of December, 1908, in said Superior Court, and executions awarded, in favor of the plaintiff, upon the three counts of the declaration in said suit as follows:

On the First Count. Damages \$8,966.05. Costs 30
\$144.91. Total \$9,110.96, with interest there-
on from December 3, 1908.

On the Second Count. Damages \$13,415. Costs
—none. With interest on said damages from
December 3, 1908.

On the Third Count: Damages \$16,768.75. Costs
—none. With interest on said damages from
December 3, 1908.

Exhibit P-11

The exemplified copy of said records further shows that an execution issued on each of said judgments on the 8th day of June, 1911, and was returned into Court fully satisfied on June 15, 1911.

10

Exhibit P-11

Contract No.

Limit of Liability \$75000. No.

Premium Rate.....%

AMERICAN SURETY COMPANY
OF NEW YORK.

20

Capital, \$2,500,000.

GENERAL CONTRACT OF INDEMNITY.

WHEREAS, we Minahan & Costa, D. F. Minahan and Antonio Costa and L. T. Fell, all of Orange, N. J., hereinafter called the principals
30 have required and may hereafter require suretyship upon certain obligations known as "Sureties Consents," "Sureties Guarantees," "Sureties Agreements," "Guarantees on Bids," "Bidders Bonds," and "Contract Bonds," or otherwise, and have applied and will apply to the AMERICAN SURETY COMPANY OF NEW YORK hereinafter called the Surety to execute such instruments as Surety:

THEREFORE, we do hereby jointly and severally
40 undertake and agree:

Exhibit P-11

FIRST: That the principals, commencing on the date of the execution of each such obligation and thereafter on the anniversary thereof, will pay the Surety in advance, a premium or charge of Five Dollars (\$5) for each such "Sureties Consent," "Sureties Guarantee," "Sureties Agreement," "Guarantee on Bids," "Bidders Bond," or similar obligation, and likewise in advance an annual premium or charge of one per cent of the amount of every such "Contract bond," "Sureties Consent," "Sureties Guarantee," "Sureties Agreement," "Guarantee on Bids," "Bidders Bond," or similar obligation which shall operate as a bond or obligation for the performance of the contract therein referred to. Such premiums to be paid in each instance, until the Surety shall be discharged and released from any and all responsibility upon such obligations and until the principals shall deliver to said Surety, at its office in the City of New York, competent written evidence of such discharge; that the amount to be paid said Surety for executing any one of such obligations shall not, however, for any one year, or fraction thereof, be less than \$10 when such obligation shall be or shall operate as a bond or obligation for the performance of the contract therein referred to. 10 20

SECOND: That the principals will perform all the conditions of each of said obligations on the part of the principals to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, expense, suit, order 30 40

Exhibit P-11

or adjudication against it by reason of any such obligation before it shall be required to pay thereunder.

THIRD: That upon the making of any demand, or the giving of any notice, or the institution of any proceeding, preliminary to determining or fixing any liability which the Surety may be
10 called upon to discharge by reason of any such obligation, the principals will immediately notify the Surety thereof in writing at its said office.

FOURTH: That in the event of the principals requesting the Surety to prosecute or defend or appear or take part in any suit, action, proceeding, appeal, or writ of error, the principals will, on making such request, place the Surety in possession of funds or collateral security, approved by the Surety, sufficient to defray any costs,
20 charges and expenses which the Surety may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result in consequence of the Surety so doing, or of its suretyship upon any such obligation.

FIFTH: That the principals will, on request of the Surety, procure the discharge of the Surety from any and all such obligations and all liability by reason thereof.

SIXTH: That the Surety shall, at its option
30 have and may exercise in the name of the principals or otherwise, any and all rights and remedies which the principals have or may have in connection with any of the matters arising out of or connected with any of the matters out of which any such suretyship obligation arises; and the Surety shall have, at any time, the right to be discharged from liability for further default of
40 the principals on any of such obligations, and to

Exhibit P-11

require the principals to account and give new sureties.

SEVENTH: That the voucher or other evidence of payment by the Surety in discharge of any liability for which the Surety is or may be liable by reason of any such obligation shall be *prima facie* evidence of such payment and the propriety thereof, and of the principals liability therefor to the Surety. 10

EIGHTH: That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, in any way abridge, refer or limit its right to be subrogated to any right or remedy, or limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, and it shall have every right and remedy which an individual Surety acting without compensation would have. 20

NINTH: That the Surety also looks to and relies upon the property of the principals and the income and earnings thereof, and shall at all times have the right to rely upon, look to and follow and recover out of the property which the principals now have or may hereafter have, and the income and earnings thereof, for anything due or to become due the Surety, under this agreement; such suretyship in each instance being by the Surety entered into for the special benefit of the principals and the special benefit and protection of the property of the principals, their income and earnings. 30

Exhibit P-11

IN WITNESS WHEREOF, we have caused these presents to be signed and sealed this 10th day of April 1901.

MINAHAN & COSTA (SEAL)
 D. F. MINAHAN (SEAL)
 ANTONIO COSTA (SEAL)
 L. T. FELL (SEAL)

10

State of New York, }
 County of New York. } ss:

On this 11th day of April, 1901, before me personally came Lawrence T. Fell, to me known and known to me to be the person described in and who executed the foregoing instrument and he thereupon acknowledged to me that he executed the same.

20 (Notary's Seal) W. E. OGILVIE,
 Notary Public Queens County.
 Certificate filed in N. Y. County.

State of New York, }
 County of New York. } ss:

30 On this tenth day of April, 1901, before me, personally came D. F. Minahan and Antonio Costa, to me known, and known to me to be the persons described in and who executed the foregoing instrument, and they thereupon severally acknowledged to me that they executed the same, both individually and as and for the act and deed of the firm of Minahan & Costa.

(Notary's Seal) WALTER J. MOORE,
 Notary Public,
 New York County.

40 U. S. Internal Revenue Stamps cancelled, in the sum of fifty cents.

Exhibit P-12

Copy of same is annexed to declaration and is printed with the declaration. See pages 18 to 22.

Exhibit P-13

KNOW ALL MEN BY THESE PRESENTS:

10

That for valuable considerations, the AMERICAN SURETY COMPANY OF NEW YORK has released and by these presents does hereby release L. T. FELL and ANTONIO COSTA, and each of them, from all claims of every nature whatsoever which the said Surety Company ever had, now has, or hereafter may, can or shall have by reason of any claim from the beginning of the world to the date hereof, arising out of or connected with the suretyship of said Surety Company upon each and all of the three following bonds, to wit:

20

One: Bond No. 84757, in the sum of \$10,500, dated April 10, 1901, in which Minahan and Costa are principals; said Surety Company, surety, and the Town of Winfield, Massachusetts, obligee;

Two: Bond No. 84758, in the sum of \$12,500, dated April 10, 1901—the parties being the same;

30

Three: Bond No. 84759, in the sum of \$10,000, dated April 10, 1901—the parties being the same:

IN WITNESS WHEREOF, the American Surety Company of New York has caused its corporate seal to be hereunto affixed and these presents to be signed by its proper officers, this 26th day of June, 1901.

40

Exhibit P-13

AMERICAN SURETY COMPANY OF NEW YORK,
YORK,

by

H. D. LYMAN, President.

(L. S.)

G. M. SWEENEY, Secretary.

10

State, City and County of New York, ss:

On this 26th day of June, 1901, before me personally appeared H. D. Lyman, President of the AMERICAN SURETY COMPANY OF NEW YORK, to me known, who being by me sworn, did depose and say that he resided in the City of New York; that he is the President of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and which executed the above instrument; that he

20 knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said H. D. Lyman, further said that he was acquainted with G. M. Sweeney, and knew him to be one of the attorneys of said

30 corporation, that the signature of said G. M. Sweeney, subscribed to the said instrument, is in the genuine handwriting of the said G. M. Sweeney, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said H. D. Lyman, president.

(Signed) WM. H. BISHOP,
Notary Public, New York County.

Exhibit P-14

427—Subpoena—*Duces Tecum*.

Essex County, ss:

The State of New Jersey to Antonio Costa,
(L. S.) GREETING:

WE COMMAND YOU, that laying aside all and singular businesses and excuses, you be and appear in your proper person, before New Jersey Supreme Court, to be held at Court House, Newark, in and for the County of Essex, on Monday, the 18th day of November, 1912, at 10 o'clock in the forenoon of the same day, to testify all and singular what you know in a certain cause now depending and undetermined in our said Supreme Court, between American Surety Company of New York, plaintiff, and James Conway, defendant, of a plea of contract on the part of the plaintiff, and also that you bring with you and produce at the same time and place aforesaid, a certain release executed by American Surety Company of New York, to you and one Lawrence T. Fell, now deceased, which release is dated the Twenty-sixth day of June, Nineteen Hundred and One, together with any other letters, writings, papers or documents in any way connected with the matters in controversy in the above mentioned suit, and this you are in no wise to omit, under the penalty of One Hundred Dollars. 10 20 30

WITNESS, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton, the Fourteenth day of November, One Thousand Nine Hundred and Twelve.

JOS. P. TUMULTY,

Clerk.

PITNEY, HARDIN & SKINNER,

Attorneys. 40

Exhibit P-15a

March 27, 1903.

J. W. M.

84757-8-9: Minahan & Costa to the Township of
Wakefield.James Conway, Esq.,
491 Central Avenue,
Newark, N. J.

10

Dear Sir:

Herewith enclosed I hand you copy of process
in the case of Town of Wakefield, Mass., against
this company, served upon the Insurance Com-
missioner of the Commonwealth of Massachusetts
on behalf of this company on March 25, 1903.
Please take notice of the peniency of this action,
the answer in which must be made on or before
May 4, 1903. Kindly advise us before that date

20

of your wishes in the matter and of any defence
there may be to the cause of action therein set
forth, and if you wish come in and take part in
the defence thereof and in all proceedings and the
trial of the action, as you will be bound by any
judgment which may be recovered therein.

Kindly acknowledge receipt, and oblige.

Yours very truly,

HENRY C. WILLCOX,

Solicitor.

30

By J. W. MASON,

L.B.

Assistant Solicitor.

Exhibit P-15b

(Copy)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss:

To the American Surety Company of New
 York, a corporation duly established 10
 (L. S.) under the laws of the Stat of New
 York and having an usual place of
 business in Boston in said County of
 Suffolk, GREETING:

We command you that you appear at our Su-
 perior Court to be holden at Boston within and
 for our County of Suffolk aforesaid, on the first
 Monday of May next; then and there to answer
 unto the town of Wakefield, a municipal corpora- 20
 tion duly established by, within the County of
 Middlesex in said Commonwealth of Massachu-
 setts in an action of contract which action the
 said plaintiff has commenced against you to be
 heard and tried at our said Court; and your
 goods or estate are attached to the value of forty
 thousand Dollars, for security to satisfy the judg-
 ment which the said plaintiff may recover upon
 the aforesaid trial. Fail not of appearance at
 your peril.

WITNESS, ALBERT MASON, Esquire, at Boston, 30
 the twenty fourth day of March in the year of
 our Lord one thousand nine hundred and three.

(Signed) JOS. A. WILLARD,
 Clerk.

From the office of M. E. S. Clemons,
 15 Court Square, Boston.

Exhibit P-15b

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

To the Sheriffs of our Several Counties,
(L. S.) or their Deputies, GREETING:

- WE COMMAND you to attach the goods or estate
of the American Surety Company of New York,
10 a corporation duly established under the laws
of the State of New York and having an usual
place of business in Boston in said County of
Suffolk to the value of forty thousand dallars;
and summon the said defendant (if it may be
found in your precinct), to appear before our
Justices of our Superior Court, to be holden at
Boston, within and for our said County of Suffolk
on the first Monday of May next; then and there
in our said Court to answer unto the Town of
20 Wakefield, a municipal corporation duly estab-
lished by law, within the County of Middlesex in
said Commonwealth of Massachusetts.

In an action of contract.

To the damage of the said plaintiff (as it says)
the sum of forty thousand dollars, which shall
then and there be made to appear, with other due
damages. And have you there this writ, with
your doings therein.

- WITNESS, Albert Mason, Esquire, at Boston,
30 the twenty-fourth day of March in the year of
our Lord one thousand nine hundred and three.

JOS. A. WILLARD,

A true copy.

Attest:

ROBERT E. MAGUIRE,

Deputy Sheriff.

Exhibit P-16

C. R. B.

May 26, 1911.

L. D. No. 15: The Township of Wakefield *vs.*
 Amercian Surety Company of New York.

B-84757: \$10,500: Minahan & Costa -to- Town of Wakefield.	4/10/01	
B-84758: \$12,500: " " " " " " "	4/10/01	
B-84759: \$10,000: " " " " " " "	4/10/01	10

E. F. Minahan, Esq., 81 High St., Orange, N. J.
 James Conway, Esq., 491 Central Ave., Newark,
 N. J.

Conway Construction Co., 491 Central Ave.,
 Newark, N. J.

William Hanna, Esq., Sherman Ave., E. Newark,
 N. J.

Dear Sirs:

20

I have just been advised that the Supreme Court
 of the State of Massachusetts has decided the
 above-entitled action in favor of the Town of
 Wakefield. Demand will undoubtedly be made
 upon this Company for payment of the judgment,
 the amount of which I do not know, but the same
 together with interest and costs will be some-
 thing over \$40,000. Please put this Company in
 funds to meet the demand when it is made, or if
 the same is not to be paid please advise me the
 reasons therefor. This is a matter which should
 have your immediate attention.

30

Yours very truly,

HENRY C. WILLCOX,

General Solicitor.

CBE.

Exhibit P-17

C. R. B. June 1, 1911.

L. D. No. 15: The Township of Wakefield *vs.*
American Surety Company of New York.

B-84757: \$10,500: Minahan & Costa -to- Town of Wakefield.	4/10/01
B-84758: \$12,500: " " " " " " "	4/10/01
B-84759: \$10,000: " " " " " " "	4/10/01

10

E. F. Minahan, Esq., 81 High St., Orange, N. J.
James Conway, Esq., 491 Central Ave. Newark,
N. J.
Conway Construction Co., 491 Central Ave.,
Newark, N. J.
William Hanna, Esq., Sherman Ave., East New-
ark, N. J.

Gentlemen:

- 20 A few days ago I advised you that I had heard
that the Supreme Court of the State of Massa-
chusetts had decided the above-entitled action in
favor of the Town of Wakefield. I am now in
receipt of further advices, to the effect that judg-
ments of affirmance have been entered. Three
judgments, one on each count, were entered, in-
stead of one judgment covering all. These three
judgments, one on each count, were entered, in-
The exact sum has not been furnished me. 1
30 understand that if the same are not paid on or
before next Monday execution will issue. Please
put this Company in funds to pay these judg-
ments at once.

Very truly yours,
HENRY C. WILLCOX,
General Solicitor.

CBE.

Capital \$2,500,000

10

State..... Agency.....
 A. No.....
 Contract No.....
 Amount \$.....
 Premium %

Application is hereby made to the American
Surety Company of New York for the execution
of bonds of suretyship for us as principals or
upon our request under a general contract of in-
demnify.

1. State name of firm James Conway
William Hanna
2. State nature of your business—Contractings
3. State location of its principal office
4. State other states, territories and countries
in which it transacts business 30
5. State names and residences of partners in
full:
William Hanna
Residence Sherman Ave. E. Newark.
Residence
James Conway
Residence 491 Central Ave.
Residence Newark 40

Exhibit P-18

6. At what office of the American Surety Company of New York will application be made for bonds?

10 7. Has the said firm or any firm or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors or become bankrupt, or in any other way been discharged from payment of its or his debts otherwise than by payment thereof in full? If so, state details thereof in full in confidential letter to be annexed.

This application is for the purpose of inducing the American Surety Co. of N. Y. to accept us as Indemnitors on Bonds of Dan'l F. Minahan of Orange, N. J.

20

ASSETS.

Mr. Conway.

Real Estate as per Schedule A-1.
 (Schedule A-1 should be prepared and annexed and should describe in detail each piece of real estate owned. State its cost price, its present value, and the nature and amount of encumbrances thereon. The amount should be here entered at its present value without deduction for encumbrances, the amount of such encumbrances being included in the statement of liabilities contra.)

30 Cash on hand and in bank 40700
 Stocks, bonds and similar securities 1000
 as per Schedule B-1.

40 (Schedule B-1 should be prepared and

Exhibit P-18

annexed showing in detail the stocks, bonds and securities owned.)	15000
Notes and accounts not otherwise in- cluded herein secured by lien on real estate.	
Notes and accounts not otherwise in- cluded herein secured by collateral.	
Notes and accounts unsecured not otherwise included herein.	10
Interest in foregoing business.	
Interest in other businesses as follows:	

Total Assets.....	56700.00
-------------------	----------

 LIABILITIES.

Debts secured by lien on real estate as per Schedule A-1.	20
Debts, including notes, secured by col- lateral.	
Debts due the United States.	
Debts due any state, county or munic- ipality.	NOTHING
Debts due to laborers or employees.	
Debts, including notes, unsecured and not yet due.	
Debts, including notes, unsecured and past due.	30
Total Liabilities	
Surplus	56700
Total	56700

Exhibit P-18

ASSETS.

Mr. Hanna.

- Real Estate as per Schedule A-2
 (Schedule A-2 should be prepared and annexed and should describe in detail each piece of real estate owned. State its cost price, its present value, and the nature and amount of encumbrances thereon. The amount should be here entered at its present value without deduction for encumbrances, the amount of such encumbrances being included in the statement of liabilities contra.) 26700
- Cash on hand and in bank. 1000
- 20 Stocks, bonds and similar securities as per Schedule B-2.
 (Schedule B-2 should be prepared and annexed, showing in detail the stocks, bonds and securities held.)
- Notes and accounts not otherwise included herein secured by lien on real estate. 2000
- Notes and accounts not otherwise included herein secured by collateral.
- 30 Notes and accounts unsecured not otherwise included herein.
- Interest in foregoing business.
- Interest in other businesses as follows:
- Conway Contracting Co. 4900

 Total Assets..... 34600

Exhibit P-18

 LIABILITIES.

Debts secured by lien on real estate as per Schedule A-2.	3200	
Debts, including notes, secured by col- lateral.		
Debts due the United States.		10
Debts due any state, county or munic- ipality.		
Debts due to laborers or employees.		
Debts, including notes, unsecured and not yet due.		
Debts, including notes unsecured and past due.		
Total Liabilities.....	3200	
Surplus	31400	20
Total	34600	

The undersigned, the members of the forego-
ing firm, hereby certify that each statement here-
inbefore contained is true, and that this state-
ment is made for the purpose of inducing the
American Surety Company of New York, to exe-
cute certain bonds or undertakings on behalf of
Daniel F. Minahan firm without demanding col- 30
lateral security to the full amount thereof.
Dated, June 24, 1901.

WILLIAM HANNA
JAMES CONWAY

Exhibit P-18

*Schedule A-1*AMERICAN SURETY COMPANY
OF NEW YORK

H. D. LYMAN, President

LOCAL BOARD

10

Thomas W. Crooks, Res. Vice-Prest.,
 Frederick Frelinghuysen,
 Benjamin Atha,
 George R. Gray,
 John R. Hardin.

Jay Ten Eyck, Counsel,
 John F. Clark, Agent & Res. Asst. Sec.,
 Telephone 415. 804 Broad Street,
 Newark, N. J.

20

JAMES CONWAY,

Cabinet St.

1 Block Bergen to Camden St.
 Store etc. & Tenements, Newark..\$27,000.
 Cor. Lafayette & Madison, Newark 5,000
 21 Arlington St., Newark..... 2,500.
 2 Lots First St. near Ogden, Newark 1,200.
 Cor. 11th Ave & 6th St., Newark 5,000.
 Central Ave., Warren St.

30

40,700

*Schedule B-1*AMERICAN SURETY COMPANY
OF NEW YORK

H. D. LYMAN, President

40

Exhibit P-18

LOCAL BOARD

Thomas W. Crooks, Res. Vice-Prest.,
 Frederick Frelinghuysen,
 Benjamin Atha,
 George R. Gray,
 John R. Hardin.

Jay Ten Eyck, Counsel,
 John F. Clark, Agent & Res. Asst. Sec., 10
 Telephone 415. 804 Broad Street,
 Newark, N. J.
 JAMES CONWAY,

Conway Contracting Co.
 Mortgages

Paid up worth
 5000
 10000
 \$15000

20

*Schedule A-2*AMERICAN SURETY COMPANY
OF NEW YORK

H. D. LYMAN, President

LOCAL BOARD

30

Thomas W. Crooks, Res. Vice-Prest.,
 Frederick Frelinghuysen,
 Benjamin Atha,
 George R. Gray,
 John R. Hardin.

Jay Ten Eyck, Counsel,
 John F. Clark, Agent & Res. Asst. Sec.,
 Telephone 415. 804 Broad Street,
 Newark, N. J.

WILLIAM HANNA, 40

Exhibit P-18

	No. 1-8 Sherman Ave., E. Newark, N. J.	
	No mortgage—value	16,000
	38-40 Central Ave., E. Newark, N. J.	
	Mortgage 2000—value	5,000.
	Sheridan Ave., Kearney, N. J.	
	Dwelling & machine Shop, value	3,500.
	Mortgage	1,200.
10	2 Lots Maple St., Kearney, N. J.	1,000.
		26,700.

*Schedule B-2*AMERICAN SURETY COMPANY
OF NEW YORK

20

H. D. LYMAN, President

LOCAL BOARD

Thomas W. Crooks, Res. Vice-Prest.,
 Frederick Frelinghuysen,
 Benjamin Atha,
 George R. Gray,
 John R. Hardin.

30

Jay Ten Eyck, Counsel,
 John F. Clark, Agent & Res. Asst. Sec.,
 Telephone 415. 804 Broad Street,
 Newark, N. J.

WILLIAM HANNA,

Conway Contracting Co., 49 shares	4,900
25 shares Peoples Building & Loan	
Ass'n, Harrison, N. J.	300
Mortgages	3,000
	8,200

40

DEFENDANT'S EXHIBITS

Exhibit D-1

ACCOUNTING DEPARTMENT

No. 100 Broadway.

New York, April 10, 1902. 10

Minahan & Costa,
Orange, N. J.

TO THE AMERICAN SURETY COMPANY OF
NEW YORK, Dr.

For premium on Court and Contract Bonds as follows:

Bond No.	When Due.	Title.	Premium	Total.	
84757	Apr. 10/02	To Town of Wakefield, Mass., Bldg. Section 1 of Wakefield Sewerage System Bd. Sewer Commrs.	\$105 00		
84758	Apr. 10/02	To Town of Wakefield, Mass., Bldg. Section 3 Wakefield Sewerage System, Bd. Sewer Commrs.	125 00		
84759	Apr. 10/02	To Town of Wakefield, Mass., Bldg. Section 2, Wakefield Sewerage System, Bd. Sewer Commrs.	100 00		30
				\$330 00	
				W. C. L.	

Exhibit D-2

Court and Contract Department,

AMERICAN SURETY COMPANY
OF NEW YORK,

100 Broadway,

10

New York, Mch. 10th, 1903.

To Town of Wakefield, Mass.,
Bldg., Section 1 of Wakefield
Sewerage System, Bd. of Sewer
Commrs.

Minahan & Costa,
81 High St., Orange, N. J.

20 Court and Contract.

In accordance with the terms of the Contract of indemnity between yourself and the Company, the premium on Bond No. 84757 issued on your behalf, in the above entitled matter for the year beginning on the 10th day of Apr. next, will then be due.

30 Please remit with this notice the amount of Premium \$105.00 by Check, P. O. or Express money order to Treasurer's Dep't., 100 Broadway, New York.

Make checks payable to order of AMERICAN SURETY COMPANY OF NEW YORK.

Very respectfully,

H. D. LYMAN,
President.

Exhibit D-3AMERICAN SURETY COMPANY
OF NEW YORK.

100 Broadway,

New York, Oct. 11, 1901.

10

H. D. Lyman, President.

Official letters should be addressed
to the Company and Departments,
and in replying to this letter, please
quote any initials or number given.
Legal Department.

J. W. M.

Conway Contracting Company,
Greenwood, Mass.

20

Gentlemen:

Referring to your letter of the 4th instant, and
to Mr. Clement's letter of the same date, I have
already forwarded consent to the assignment of
the contracts to the Conway Contracting Com-
pany. If, however, you deem it best to have a
new bond I have no objection, providing you send
me the enclosed agreement of indemnity, executed
and duly acknowledged by the Conway Contract- 30
ing Company, D. F. Minahan, James Conway and
William Hanna.

Yours very truly,
HENRY C. WILLCOX,
Solicitor.

By J. W. Mason,
Assistant Solicitor.

Enclosure.

A. S. L.

40

Exhibit D-3

CONWAY CONTRACTING COMPANY
TO
AMERICAN SURETY COMPANY
OF NEW YORK
AGREEMENT.

Amounts, \$10,500, \$12,500 & \$10,000.

10 Premium, \$330.00.

Dated 10th day of Oct., 1901.

THE AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, having at our request, become surety for CONWAY CONTRACTING COMPANY, of Newark, New Jersey, in the sums of Ten Thousand Five Hundred Dollars, Twelve Thousand Five Hundred Dollars and Ten Thousand Dollars, respectively, by those three certain contract bonds for the building of sections Num-
20 bers One (1) Two (2) and Three (3) of the Wakefield Sewerage system in Wakefield, Massachusetts, for the Town of Wakefield, Mass., a copy of which is, or is to be hereto annexed and made a part hereof,

THEREFORE, in consideration thereof we do hereby jointly and severally undertake and agree:

1. That we will immediately pay the Surety at its office, No. 100 Broadway, New York City, \$330 and \$330 on the 10th day of October in each year
30 hereafter being a premium charge of \$105, \$125 and \$100 on each of the three above mentioned bonds respectively, and until we shall serve upon the Surety at said office competent written legal evidence of its discharge from such suretyship and all liability by reason thereof.

2. That we will at all times indemnify and save the Surety harmless from and against every
40 claim, demand, liability, cost, charge, expence,

Exhibit D-3

suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every claim, demand, liability cost, charge expense, suit, order, judgment or adjudication against it by reason of such suretyship and before it shall be required to pay the same.

3. That upon the making of any demand, or the giving of any notice or the institution of any proceeding preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of such suretyship we will immediately notify the Surety thereof in writing at its said office. 10

4. That in the event of our requesting the Surety to prosecute or defend or take part in any suit, action, proceeding, appeal, or writ of error we will, on making such request, place the Surety in possession of funds or securities approved by it, sufficient to defray any costs, charges and expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said Suretyship. 20

5. That upon default on our part to faithfully perform any of the provisions hereof, we will, on request of the Surety, procure the discharge of the Surety from said Suretyship and all liability by reason thereof. 30

6. That the Surety shall, at its option, have and may exercise in our own name or otherwise, any and all rights and privileges which we have or may have in the premises.

7. That the voucher or other evidence of any payment made by the Surety by reason of such Suretyship, shall be *prima facie* evidence of such payment and the propriety thereof, and of our liability therefor to the Surety. 40

Exhibit D-3

8. That the Surety also looks to and relies upon our property and the income and earnings thereof, and shall also at all times have the right to rely upon, look to and follow and recover out of the property which we now have or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement; such suretyship having been by the Surety entered into for our special benefit and the special benefit and protection of our property, its income and earnings.

9. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, in any way abridge, defer or limit its right to be subrogated to any right or remedy, or limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce.

10.

IN WITNESS WHEREOF, we have hereunto set our respective hands and seals this tenth day of October, 1901.

CONWAY CONTRACTING COMPANY.

By

30

President.

Attest:

Secretary.

In the presence of:

.....(Seal)

.....(Seal)

.....(Seal)

40

Exhibit D-3

State of
County of } ss:

On this.....day of October, 1901, before me personally appeared D. F. MINAHAN to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon duly acknowledged to me that he executed the same.

10

State of
County of } ss:

On the.....day of October, in the year 1901, before me personally came..... to me known, who being by me duly sworn, did depose and say; that he resided in.....; that he is the.....President of the Conway Contracting Co. the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

20

State of
County of } ss:

On this.....day of October, 1901, before me personally appeared JAMES CONWAY, to me known and known to me to be the person described in and who executed the foregoing instrument and he therupon duly acknowledged to me that he executed the same.

30

(Seal)

(Seal)

(Seal)

SS :

10

Court and Contract Department

20

New York, Mch. 10th, 1903.

30 Minahan & Costa,
81 High St., Orange, N. J.

Court and Contract.

In accordance with the terms of the Contract of indemnity between yourself and this Company, the premium on Bond No. 84758 issued on your behalf, in the above entitled matter for the year be-

Exhibit D-5

ginning on the 10th day of Apr. next, will then be due.

Please remit with this notice the amount of Premium \$125.00 by Check, P. O. or Express money order to Treasurer's Dep't., 100 Broadway, New York.

Make checks payable to order of AMERICAN SURETY COMPANY OF NEW YORK.

10

Very respectfully,

H. D. LYMAN,
President.

Exhibit D-5

Court and Contract Department

20

AMERICAN SURETY COMPANY
OF NEW YORK,

100 Broadway,

New York, Mch. 10th, 1903.

To Town of Wakefield, Mass.,
Bldg., Section 2, Wakefield Sew-
erage System, sewer commrs.

30

Minahan & Costa,
81 High St., Orange, N. J.

Court and Contract.

In accordance with the terms of the Contract of indemnity between yourself and this Company, 40

Exhibit D-5

the premium on Bond No. 84759 issued on your behalf, in the above entitled matter for the year beginning on the 10th day of Apr. next, will then be due.

Please remit with this notice the amount of Premium \$100.00 by Check, P. O. or Express money order to Treasurer's Dep't., 100 Broadway, New

10 York.

Make checks payable to order of AMERICAN SURETY COMPANY OF NEW YORK.

Very respectfully,

H. D. LYMAN,
President.



