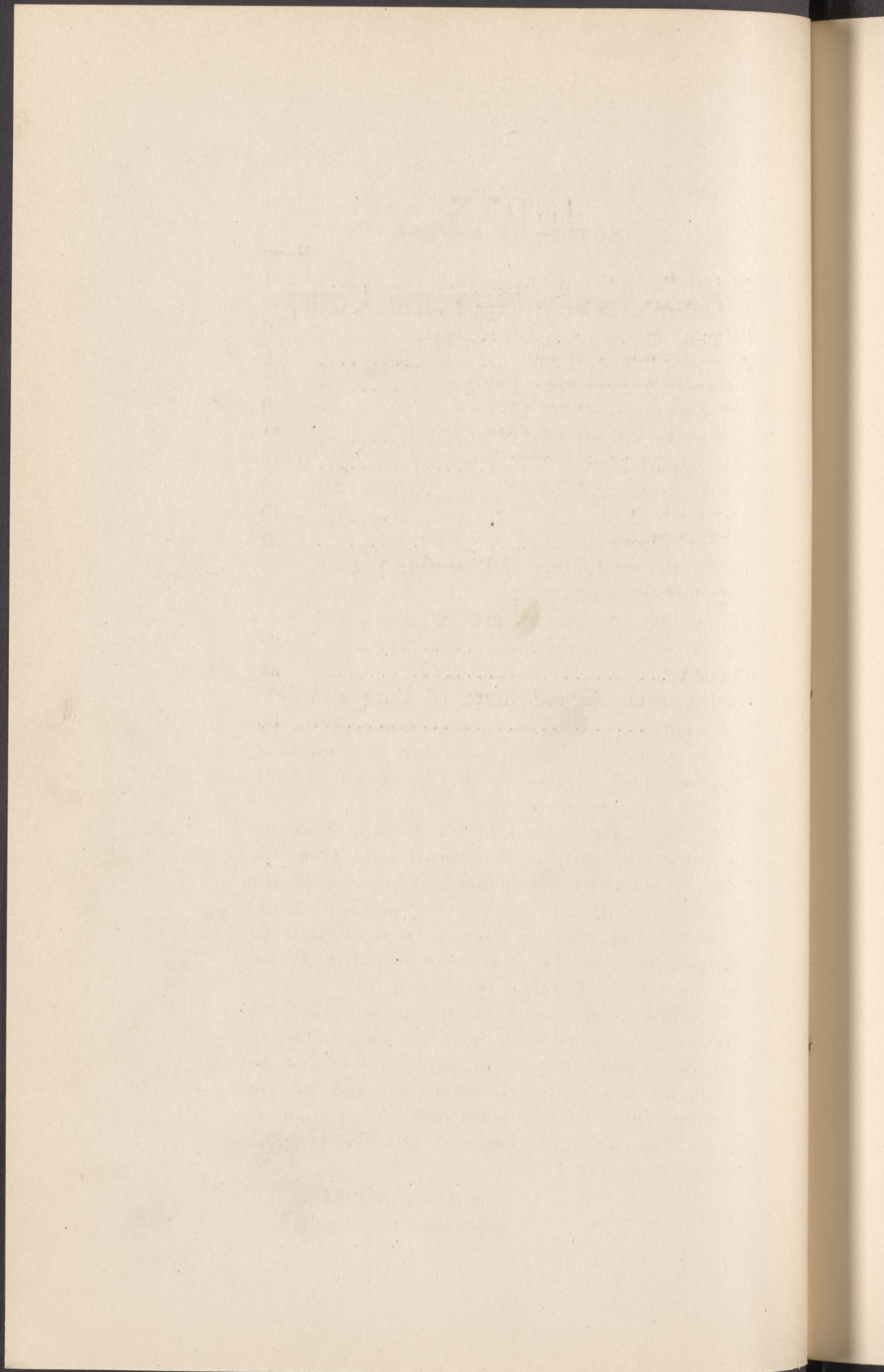
INDEX

	Page
Plaintiff's Notice of Appeal	1
Defendant's Notice of Appeal	2
Stipulation	3
Agreed State of Facts	4
Surety Corporation Bond	7
Letter of April 10, 1923	9
Letter of April 18, 1923	11
Letter of May 2, 1924	12
Statement of Account	14
Exhibit P. 1	15
Final Decree	21
Stipulation re Letters of December 1, 1921, and December 12, 1921	24
Stipulation re Acceptance of Work by County of Morris	27
Opinon	28
Findings on Agreed State of Case and Postea	33



NOTICE OF APPEAL.

New Jersey Supreme Court

ESSEX COUNTY.

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

10

To MESSRS. MCCARTER & ENGLISH,
Attorneys of Defendant.

20

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court erred in its decision that the plaintiff was entitled to interest only from the date upon which the defendant learned of the contractor's default, whereas the plaintiff should have been entitled to interest from the date or dates upon which the contractor was first obliged to pay for the material furnished.

30

2. The Court erred in its decision that the letter of April 10, 1923, was the first notice to the defendant sufficient to apprise it of the default of the Oakridge Company and of the amount that the defendant was called upon to pay. The defendant received such notice on or about December 1, 1921.

40

RIKER & RIKER,
Attorneys of Appellant.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

10

To MESSRS. RIKER & RIKER,
Attorneys of Plaintiff.

20

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

The Court erred in its decision that the plaintiff was entitled to interest from the 10th day of April, 1923, whereas, in fact, the Court should have held that the plaintiff was entitled to no interest until it was in a position to enforce its claim against the defendant by an action at law, that is to say, after the acceptance of the work and after the expiration of sixty days after service of a statement of its claim upon the defendant, pursuant to the provisions of the statute under which the defendant's bond was given.

30

McCARTER & ENGLISH,
Attorneys of Appellant.

40

Stipulation.

Service of the within Notice of Appeal is hereby acknowledged this 25th day of September, 1925.

RIKER & RIKER,
Attorneys of Plaintiff.

10

STIPULATION.

NEW JERSEY SUPREME COURT.

Essex County.

Warren Brothers Company, *Plaintiff*, vs. Hartford Accident and Indemnity Company, *Defendant*.	*Action at Law.* *Stipulation.*

20

It is hereby stipulated and agreed by and between Riker & Riker, attorneys for the plaintiff, and McCarter & English, attorneys for the defendant, that the above matter be submitted to Honorable Nelson Y. Dungan on an agreed state of facts for a decision.

30

It is also agreed that the right of appeal from said decision is reserved to both parties.

RIKER & RIKER,
Attorneys of Plaintiff.

McCARTER & ENGLISH,
Attorneys of Defendant.

40

AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff,* vs. HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law.* *Agreed State of Facts.*

10

1. On or about the thirty-first day of May, 1921, the County of Morris, a municipal corporation, entered into a contract in writing with the Oak Ridge Company, a New Jersey corporation, for the construction of a pavement on that portion of State Highway Route No. 12, section 2, extending from Denville to Cobb's Corner, Parsippany, in the County of Morris, in accordance with plans and specifications and contract duly executed between the said parties and on file in the office of the Board of Chosen Freeholders of said county, said work being a public improvement.

20

30

2. On or about the first day of June, 1921, the said Oak Ridge Company, as principal, and the defendant, as surety, entered into a bond with the County of Morris in the sum of $268,-007.59 in accordance with the provisions of Chapter 75 of the Laws of New Jersey for the year 1918. A copy of said bond is attached hereto.

40

3. Plaintiff at various times between the sixth day of October, 1921, and the first of October, 1922, furnished to, hauled and laid for said Oak Ridge Company 37,732 square yards of Warren-ite-Bitulithic pavement at the rate of $2.35 per square yard in accordance with a certain contract entered into between the plaintiff and the said Oak Ridge Company, the total amount of said contract being $88,674.90.

10

4. All of the said materials was actually used and the said labor was actually performed in the execution of said contract between said County of Morris and Oak Ridge Company for said public improvement as stated above.

5. On or about January 21, 1922, the said Oak Ridge Company was indebted to plaintiff on overdue estimates in the sum of $63,959.95 and as the County of Morris had considerable funds in its hands due said Oak Ridge Company plaintiff started suit in the Court of Chancery under the so-called Municipal Lien Act of 1918 referred to above; that subsequently the pleadings were amended to cover the additional $24,-714.95 which said Oak Ridge Company owed this plaintiff.

20

6. Plaintiff has received on account of said amount the following payments:

30

Nov. 8, 1922, from the Co. of Morris..	$57,938.41
Apr. 24, 1924, from the Co. of Morris..	21,125.73
June 10, 1924, from the defendant.....	9,610.76
Making a total of..................	$88,674.90

7. On April 10, 1923, plaintiff, through its attorneys, wrote the defendant and defendant received a letter of which a copy is attached hereto.

40

Agreed State of Facts.

8. On April 18, 1923, plaintiff, through its attorneys, wrote to the defendant and defendant received a further letter of which a copy is also attached hereto.

9. On May 2, 1924, plaintiff mailed a notice to the defendant of which a copy is annexed
10 hereto. Defendant received said notice.

10. On June 10, 1924, defendant paid plaintiff the sum of $9,610.76, being the balance of the principal due the plaintiff, but did not include the interest, which plaintiff alleged was due to it.

11. This stipulation shall not operate to prevent either party from introducing such further evidence as the Court may deem admissible.

The only question to be determined by the
20 Court in this case is whether or not plaintiff is entitled to interest and, if so, from what date.

Plaintiff claims interest from the dates the contractor was obliged to pay for the material furnished while defendant contends that it is only chargeable with interest from sixty days after it received the notice referred to in paragraph 11.

30 RIKER & RIKER,
Attorneys for Plaintiff.
McCARTER & ENGLISH,
Attorneys for Defendant.

40

SURETY CORPORATION BOND.

Know All Men by These Presents, that we, The Oak Ridge Company, principal, and Hartford Accident & Indemnity Company, a corporation, organized and existing under the laws of the State of Connecticut, with an office and place of business at 110 William street, New York City, and duly authorized to do business in the State of New Jersey, surety are held and firmly bound unto the County of Morris, New Jersey, in the sum of TWO HUNDRED SIXTY-EIGHT THOUSAND AND SEVEN AND 59/100 ($268,007.59) dollars, lawful money of the United States of America to be paid to the said County of Morris, N. J., or to its certain attorney, successors or assigns, to which payment well and truly to be made we do hereby bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of June, A. D. nineteen hundred and twenty-one.

The Condition of the Above Obligation Is Such, that whereas the above-named principal did on the 31st day of May, 1921, enter into a contract with the Board of Chosen Freeholders of the said County of Morris, N. J.

Now, if the said The Oak Ridge Company shall well and faithfully do and perform the things agreed by it to be done and performed according to the terms of said contract, or any changes or modifications therein made as therein provided, and shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in carrying forward, performing or completing of said contract; we agreeing and assenting that this under-

taking shall be for the benefit of any material, man or laborer having a just claim, as well as for the obligee herein, and shall indemnify and save harmless the party of the first part mentioned in the contract aforesaid, its officers, agents and servants, and each and every one of
10 them, against and from all suits and costs of every kind and description, and from all damages to which the said party of the first part in said contract mentioned, or any of its officers, agents or servants may be put by reason of injury to the person or property of others resulting from the performance of said work, or through the negligence of the said party of the second part to said contract, or through any improper or defective machinery, implements or appliances used by the said party of the second
20 part in the aforesaid work, or through any act or omission on the part of the said party of the second part, or his agents, employees or servants; then this obligation shall be void, otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein
30 stated.

The said surety hereby stipulated and agrees that no modification or omissions, or additions in or to the terms of the said contract or in or to the plans or specifications therefor, shall in anywise affect the obligations of said surety on its bond.

THE OAK RIDGE COMPANY,

By H. J. Hapgood,
President.

40

HARTFORD ACCIDENT & INDEMNITY COMPANY,

By F. J. Menig,
Res. Vice President.

ATTEST: C. A. WOLF,

Res. Asst. Secretary.

10

Signed, sealed and countersigned—

GEO. W. TODD.

delivered in the presence of

G. W. BISHOP
M. P. HOPKINS

Apr. 10, 1923.

20

Hartford Accident and Indemnity Co.,
110 William St.,
New York City.

Warren Bros. Co. v. *Oak Ridge Co.*

Gentlemen:

We beg to advise on behalf of our client, Warren Bros. Co. that the Oak Ridge Co., has defaulted on its payments on its contract for the laying of Warranite-Bitulithic surface on Pinebrook Road, Morristown, N. J., known as State Route No. 12, Section 2; that on December 6, 1921 a notice of lien claim was filed with the County of Morris against the moneys held by said County belonging to the said Oak Ridge Co. Subsequently an action in the Court of Chancery of this State was instituted on behalf of our client to enforce said lien claim resulting in a final decree of the *County* of Chancery dated October 31, 1922 stating that at that time our

30

40

client was entitled to the sum of $90,919.87 on account of this claim; that at the time of said decree it was found that said County of Morris had in its possession belonging to Oak Ridge Co., the sum of $97,263.61 of which sum $27,-852.45 was retained for work which the said Highway Commission had not as yet approved. The Morris County Crush Stone Co., also had a claim against the above named defendant and the decree of the court ordered that the amount in the hands of the County of Morris be shared pro rata between the two lien claimants. As a result Warren Bros., received on account of its claim the sum of $57,938.41. We understand from the county authorities that in order to secure the balance of the moneys retained, it will be necessary to secure a bond guaranteeing the work in accordance with the terms of its contract with the Oak Ridge Co. We are anxious to have this matter cleared up and would like to know if you have done anything towards putting up the bond.

You are hereby notified that there is a balance due our client, Warren Bros. Co. on this claim the sum of $32,981.46 with interest from October 31, 1922 and in accordance with the terms of the bond entered into between your company and the Oak Ridge Co. with the County of Morris dated June 1, 1921, we look to you for the payment of the balance due.

Awaiting the favor of an early reply in the matter, we are,

Very truly yours,

TEF/MMH

April 18th, 1923.

Hartford Accident & Indemnity Co.,
110 William Street,
New York City.

Warren Brothers v. *Oak Ridge Company.*

Gentlemen: 10

On April 10th last we wrote you concerning the default of the Oak Ridge Company in connection with its contract for the laying of Warrenite Bitulithic surface on Pine Brook Road, Morristown, N. J., known as State Route No. 12 section 2, and requested that you advise us as to what position your Company intends to take in the matter. As we stated in our letter there is a balance due from Morris County amounting to $27,852.45, the largest portion of which will be 20 paid to us as soon as the maintenance bond is furnished by the contractor. The sooner this money is paid to us the better it will be for your company as the interest on the amount due will amount to quite an item if the matter is not cleared up within a short time.

Perhaps your failure to answer our letter of the 10th is due to an oversight and we trust that upon receipt of this communication, you will furnish us with the information desired. 30

Yours very truly,

TEF: B

40

New York, May 2d, 1924.

Hartford Accident & Indemnity Company,
110 William Street,
New York City, N. Y.

Gentlemen:

10 We hereby notify you that the Oakridge Company of Mountain Lakes, N. J. contractors on the Pine Brook Road, known as State Highway Route 12, Section 2, in the County of Morris, New Jersey, entered into a contract with us on June 3, 1921 for supplying Warranite-Bitulithic surface mixture and for hauling and laying the same on the above referred to State Highway, at the price of $2.05 per sq. yd. for the mixture at the plant, and a price of $.30 per sq. yd. for hauling and laying the same.

20 We further notify you that the Oakridge Company has failed to pay us for materials and labor supplied in accordance with this contract. We therefore, acting under Chapter 75, Laws of 1918, Statutes of New Jersey, notify you that said Oakridge Company is in default in the following amounts of principal and interest, in accordance with contract as above referred to:

30 WARRENITE-BITULITHIC PAVEMENT furnished and laid on Pine Brook Road, Morris County, N. J., State Highway Route 12, Section 2, as follows:

Oct. 26, 1921—13,126 sq. yds. War-Bit. @ $2.35 per sq. yd.		$30,846.10
Oct. 31, 1921— 4,918 " " " " " 2.35 " " "		11,557.50
Nov. 9, 1921— 9,173 " " " " " 2.35 " " "		21,556.55
Sept. 30, 1922—10,517 " " " " " 2.35 " " "		24,714.95
Total		$88,674.90
LESS		
Nov. 8, 1922—Paid on Account	$57,938.41	
April 24, 1924— " " "	21,125.73	79,064.14
Balance		$9,610.76

40

Interest as follows:

On $30,846.10—Oct.	26, 1921 to Nov.	8, 1922—378 days	@ 6%	1,916.68
" 11,557.30— "	31, 1921 " "	8, 1922—373 "	@ 6%	708.64
" 21,556.55—Nov.	9, 1921 " "	8, 1922—364 "	@ 6%	1,289.85
" 24,714.95—Sep.	30, 1922 " "	8, 1922— 39 "	@ 6%	158.44
" 30,736.49—Nov.	8, 1922 " April	24, 1924—533 "	@ 6%	2,693.02
				6,766.63

Total with interest until paid................$16,377.39

10

Your company gave the bond covering the construction work and guaranteeing that all persons supplying labor and materials on said work would be protected as to their payments. We, therefore, notify you of the above situation and advise you that we will hold your company liable for the amount due us as above.

This communication serves as a notice as contemplated by Section 3 of Chapter 75 of the Laws of 1918, Statutes of New Jersey. Will you kindly, therefore, send us your check for the balance due as above indicated at your very earliest possible convenience.

20

In this connection we would advise you that we have been compelled to wait for this money for a very long period of time, and that we could not file this formal notification with you until after final payment was made by the County, and that said final payment was held up by the failure on the part of your company, as surety, to finish the contract in accordance with plans and specifications after the default of the Oakridge Company. We, therefore, believe that we are entitled to prompt settlement of this claim.

30

Very truly yours,

WARREN BROTHERS COMPANY,

(signed) Job H. Lippincott,
District Manager.

40

Agreed State of Facts.

Warrenite-Bitulithic Pavement
WARREN BROTHERS COMPANY
DISTRICT OFFICE
50 CHURCH STREET
Hudson Terminal Building

New York, N. Y., June 10, 1924.

Hartford Accident & Indemnity Company,
110 William Street,
10 New York City, N. Y.

WARRENIT-BITULITHIC PAVEMENT furnished and laid on Pine Brook Road, Morris County, N. J., State Highway Route No. 12, Section 2, as follows:

Oct. 26, 1921	—13,126	sq. yds. War-Bit. @ $2.35 per sq. yd.	....	$30,846.10
" 31, 1921	— 4,916	" " " " " 2.35 " " "	......	11,557.30
Nov. 9, 1921	— 9,173	" " " " " 2.35 " " "	......	21,556.55
Sep. 30, 1922	—10,517	" " " " " 2.35 " " "	......	24,714.95
	37,732			
		Total	....	$88,674.90

Less Payments on account:

20 Nov. 8, 1922	....	$57,938.41
April 24, 1924	....	21,125.73
June 10, 1924	....	9,610.76
		88,674.90

Interest on overdue estimates as follows:

On $30,846.10—Oct. 26/21	to Nov. 8/22,	378 days	@	6%	......	$1,916.68
" 11,557.30—Oct. 31/21	" Nov. 8/22,	373 "	"	6%	......	708.64
" 21,556.55—Nov. 9/21	" Nov. 8/22,	364 "	"	6%	......	1,289.85
" 24,714.95—Sept. 30/22	" Nov. 8/22,	39 "	"	6%	......	158.44
" 30,736.49—Nov. 8/22	" April 24/24,	533 "	"	6%	......	2,693.02
" 9,610.76—April 24/24	" June 10/24,	47 "	"	6%	......	74.25
				Total	....	$6,840.88

30 CERTIFIED CORRECT

JOB. H. LIPPINCOTT
District Manager.

Sworn and subscribed before me this 8th day of July, 1924.

Regina Magnussen.
Notary Public Queens County No. 698.
(L. S.) Certificate filed in New York County No. 12.

40

Exhibit P. 1.

Exhibit P. 1.

This Agreement made and entered into this third day of June, 1921, between WARREN BROTHERS COMPANY of Boston, Massachusetts, party of the first part, and OAKRIDGE COMPANY of Mountain Lakes, New Jersey, party of the second part; 10

Witnesseth, That, Whereas, the party of the first part did on May 11th 1921, file with the Board of Chosen Freeholders of the County of Morris, New Jersey, an offer, a copy of which is attached hereto and made a part hereof as fully as if written herein, and as the party of the second part has been awarded by the Board of Chosen Freeholders of the County of Morris, a contract for laying WARRENITE-BITULITHIC PAVEMENT on that portion of 20 STATE HIGHWAY ROUTE NO. 12, Section 2, extending from Denville to Cobb's Corner, Parsippany, County of Morris, State of New Jersey.

Now, Therefore, in consideration of the sum of One Dollar by each to the other in hand paid, receipt whereof is hereby acknowledge, the party of the first part agrees to furnish to the party of the second part everything contained in the offer above referred to, at the price stated 30 therein, TWO DOLLARS AND FIVE CENTS ($2.05) per square yard, and further agrees to haul and lay the same for THIRTY CENTS ($30¢) per square yard, a total of TWO DOLLARS AND THIRTY-FIVE CENTS ($2.35) per square yard, to be laid as per plans and specifications of said Route 12, Section 2.

The party of the second part agrees to prepare the foundation in a thoroughly substantial manner and to a true grade and line, so that the 40 party of the first part will not be obliged to lay

more or less than the contract requirement of two inches (2″) after compression of WARREN-ITE-BITULITHIC material on any part of the foundation, and after an expiration of about fifteen days' notice from the party of the first part, will prepare ready for the laying of the
10 surface at least 1000 square yards of continuous foundation each working day, stormy weather excepted.

The party of the first part guarantees that the material agreed to be supplied as above will be suitable, durable and properly mixed, and if, at any time during the maintenance period, said mixture shall show any disintegration or decay due to faulty materials or mixture, and necessitating repairs to the pavement, the party of
20 the first part will make such repairs without expense to the party of the second part.

It Is Further Agreed that the party of the second part shall make payments to the party of the first part of all moneys due under this agreement in cash at the same time and rate as the party of the second part receives its money from the Board of Chosen Freeholders of the County of Morris, for said WARRANITE BITU-LITHIC, provided that in no case shall payments
30 be delayed beyond two (2) months after delivery of the mixture.

If at any time during the progress of the work the above provisions as to payments are not fulfilled by the party of the second part, then the entire contract price for all work done by the party of the first part shall immediately be and become due and payable with interest.

The party of the second part further agrees
40 that no assignment will be made to any third

Exhibit P. 1.

party, without the consent in writing of the party of the first part.

In Witness Whereof, the parties hereto have caused this agreement to be entered into and their respective names and seals to be hereto attached the day and year first above written.

WARREN BROTHERS COMPANY, 10
by—E. Sutcliffe, Treasurer and
Herbert M. Warren, Secretary.

OAKRIDGE COMPANY,
by—H. J. Hapgood, President and
M. Kelly, Secretary.

THE WARRENITE BITULITHIC PAVEMENT 20

(Patented by)

WARREN BROTHERS COMPANY
Boston, Massachusetts.

Boston, May 11, 1921.

To Hon. Board of Chosen Freeholders,
County of Morris,
Morristown, New Jersey. 30

Gentlemen:

Inasmuch as it is deemed advisable by the proper authorities that bids be received for the improvement of That portion of State Highway Route No. 12, Section 2, extending from Denville to Cobb's Corner, Parsippany in the County of Morris, State of New Jersey, with Warrenite-Bitulithic Pavement; and inasmuch as the construction of said pavement requires the use of certain patents; and inasmuch as competitive 40

Exhibit P. 1.

bidding in the letting of contracts for street improvements is deemed advisable, in order to provide for such competitive bidding and at the same time secure the adoption of WARRENITE-BITULITHIC PAVEMENT as the kind of pavement to be constructed in the above-named street or streets;
10 the undersigned, Warren Brothers Company, as owner of such patents being numbered 959, 976-1, 115, 259 and 1,183,507, hereby proposes and agrees, for the consideration hereinafter named, with the County of Morris or with any bidder, to whom a contract may be awarded to pave the above-named street or streets with WARRENITE-BITULITHIC PAVEMENT, and who shall enter into a contract with such surety or sureties as may be required by said County of Morris to furnish, for the performing of any such contract,
20 the following materials ready for use and service, with the right to use any or all the patents, trademarks, or trade names now owned or which may hereafter be owned by Warren Brothers Company, necessary to lay said pavement, at the terms, prices, and conditions as shown herein:

1. MATERIALS—The necessary roadway mixtures for the wearing surface, having a thickness of two (2) inches after compression, pre-
30 pared under the patents of Warren Brothers Company, and delivered hot in the wagons of the City or Contractor at the WARRENITE-BITULITHIC mixing plant located within an average of Two (2) miles of the work to be performed.

2. ADVICE—An expert, who will give advice as to the building of such pavement, will be furnished to the County or Contractor at the expense of Warren Brothers Company.

3. SERVICE—Daily examinations of the mix-
40 tures as delivered on the street will be made at

Exhibit P. 1.

the Laboratory of Warren Brothers Company; said samples to be sent, prepaid, to the Laboratory of Warren Brothers Company, Potter Street, East Cambridge, Mass., or 289 East Salmond Street Portland Ore., by the County or Contractor.

4. PERIOD OF CONTRACT—This offer is open for acceptance at any time within four (4) months from this date, or at any time thereafter until withdrawn, or an amended proposition is filed with the proper authorities covering the same or similar specifications for wearing surface mixture.

10

5. PRICE—The price at which said materials and service are offered to any and all contractors who make a bid on WARRENITE-BITULITHIC PAVEMENT, for said street or streets, is TWO DOLLARS AND FIVE CENTS ($2.05) per square yard of finished pavement, at which price it is also agreed to furnish the materials f. o. b. Denville, New Jersey, in barrels for reheating and the service for making all repairs, if any which may be necessary for the wearing surface during the life of said patents.

20

It is understood that if on account of war conditions or by reason of fire, flood, the common enemy or for any other cause beyond the control of Warren Brothers Company, it is unable after the exercise of reasonable diligence, to secure the shipment of materials or procure the necessary labor for doing the work, that a length of time will be granted to Warren Brothers Company in which to comply with this offer, corresponding to the length of time during which it was unable, for any of the above causes, to proceed with its undertaking.

30

40

Exhibit P. 1.

The acceptance of bids by your City and the letting of a contract for the same shall be deemed by Warren Brothers Company to be an acceptance of the proposal by the County and by the Contractor to whom such contract shall be awarded, and are all that shall be necessary to
10 bind Warren Brothers Company to this agreement.

WARREN BROTHERS COMPANY,

by—R. W. Turner,
Vice President.

and—Herbert M. Warren,
Secretary.

20

30

40

Exhibit P. 1.

IN CHANCERY OF NEW JERSEY.

Between WARREN BROTHERS COMPANY, a Massachusetts corporation, *Complainant,* *and* COUNTY OF MORRIS, a municipal corporation, and OAK RIDGE COMPANY, a corporation, *Defendants.*	*On Bill, &c.* *Final Decree.*

10

The above-entitled cause coming on to be heard in the presence of Riker & Riker, solicitors for and of counsel with the complainant, and Charles A. Rathbun, solicitor for and of counsel with the defendant, County of Morris, and King & Vogt, solicitors for and of counsel with the defendant, Oak Ridge Company, and C. Stanley Smith, solicitor for Morris County Crushed Stone Company, a creditor of defendant, Oak Ridge Company, who secured leave of court since the starting of this suit to be made a party defendant as an intervening creditor, and leave to withdraw the answers filed in this cause by the defendants, County of Morris and Oak Ridge Company, having been made, and said permission having been granted and a stipulation signed by the solicitors of all of the parties hereto, having been filed setting forth that the defendant, County of Morris, has in its hands the sum of $97,263.61 belonging to defendant Oak Ridge Company, and further stating that said defend-

20

30

40

ant, Oak Ridge Company, is justly indebted to complainant, Warren Brothers Company, in the sum of $90,919.87, and to the defendant, Morris County Crushed Stone Company, an intervening creditor, in the sum of $18,004.74 Dollars, and the Chancellor having duly considered all of the
10 facts in the case,

It is on this 31st day of October, 1922, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor by virtue of the power and authority of this court, does hereby Order, Adjudge and Decree that the complainant, Warren Brothers Company, is entitled to the sum of $90,919.87 on its claim as filed.

It is Further Ordered, Adjudged and De-
20 creed that the defendant, Morris County Crushed Stone Company is entitled to the sum of $18,-004.74 on its claim as filed.

It is Further Ordered that the defendant, County of Morris, pay forthwith to the complainant, Warren Brothers Company, and to the defendant, Morris County Crushed Stone Company, the sum of $97,263.61 pro rata in accordance with Section 10, Chapter 280, Laws of 1918.

It is Further Ordered that the lien claims
30 filed by the complainant, Warren Brothers Company, and by the defendant, Morris County Crushed Stone Company, be continued against any moneys becoming due in the future to the said Oak Ridge Company on account of the contract between said Oak Ridge Company and County of Morris referred to in the original bill of complaint filed in this cause.

It is Further Ordered that the defendant, Oak Ridge Company, do forthwith pay to the
40 complainant, Warren Brothers Company, and to

the defendant, Morris County Crushed Stone Company, their costs of suit to be taxed, and that they have execution therefor according to the rules and practice of this court.

Respectfully advised,

ALONZO CHURCH,
V.-C.

10

We consent to the entry of the above decree.

CHARLES A. RATHBUN,
Solicitor for and of Counsel with Defendant, County of Morris.

KING & VOGT,
Solicitors for and of Counsel with Defendant, Oak Ridge Company.

20

C. STANLEY SMITH,
Solicitors for and of Counsel with Defendant, Morris County Crushed Stone Company.

30

40

STIPULATION.

NEW JERSEY SUPREME COURT.

Essex County.

10

Warren Brothers Company, a Massachusetts corporation, *Plaintiff*, *vs.* Hartford Accident and Indemnity Company, a Connecticut corporation, *Defendant.*	*Action at Law.* *Stipulation.*

20

The Court having directed that the letters attached hereto be admitted as evidence in the above case, it is hereby stipulated and agreed by and between the attorneys for the respective parties that said letters be attached to the agreed State of the Case filed in this cause.

RIKER & RIKER,
Attorneys for Plaintiff.

McCARTER & ENGLISH,
Attorneys for Defendant.

30

40

Stipulation.

New York, December 1st, 1921.

Hartford Accident & Indemnity Company,
110 William Street,
New York City.

Gentlemen:

As surety on the bond given by the Oak Ridge Company of Mountain Lakes, N. J. to the County of Morris, for the due performance of its contract with the County of Morris, covering Route 12, Section 2, extending from Denville to Cobb's Corners, Parsippany, in the County of Morris, we notify you that the following amounts are due to us for materials furnished to Oak Ridge Company for use in the performance of said contract, shown by the Schedules hereto annexed:

$27,761.49
10,401.57
19,400.90

We notify you because of the provision in the said bond on which you are surety, which provides for the payment of "all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborer having a just claim, as well as for the obligee herein."

Very respectfully yours,

WARREN BROTHERS COMPANY,
by (Signed) Job H. Lippincott.

10 20 30 40

Stipulation.

HARTFORD
ACCIDENT AND INDEMNITY COMPANY
Hartford, Connecticut.

New York December 12, 1921.

Warren Brothers Company,
10 50 Church Street,
New York City.

Gentlemen:

Attention of Mr. J. H. Lippincott.

Re: Bond No. 165338—The Oak Ridge Company.

We acknowledge receipt of your letter of December 1st advising us certain amounts are due you for materials furnished to the Oak Ridge Company.

20 Yours truly,

C. S. Riley.

CSR GVW

30

40

STIPULATION.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff*, *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law. Stipulation.*

10

In addition to the facts already stipulated in this cause, it is further stipulated and agreed that the work required to be done under the contract entered into between the Oakridge Company and the County of Morris on May 31st, 1921, pursuant to which the bond, upon which the plaintiff's suit was brought, was given, was accepted by the County of Morris on April 24th, 1924.

20

RIKER & RIKER,
Attorneys of Plaintiff.

30

McCARTER & ENGLISH,
Attorneys of Defendant.

40

OPINION.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff*, *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law.* *Opinion.*

20 As recited by the agreed state of facts "on or about the 31st day of May, 1921, the County of Morris, a municipal corporation, entered into a contract in writing with the Oak Ridge Company, a New Jersey corporation, for the construction of a pavement on that portion of State Highway Route No. 12, Section 2, extending from Denville to Cobb's Corner, Parsippany, in the County of Morris, in accordance with plans and specifications and contract duly executed between
30 the said parties and on file in the office of the Board of Chosen Freeholders of said county, said work being a public improvement." Pursuant to Chapter 75 of the Laws of New Jersey of 1918, and on June 1, 1921, the said Oak Ridge Company, as principal, and the defendant, as surety, entered into a bond with the County of Morris in the sum of $268,007.59 conditioned upon the faithful performance by the Oak Ridge Company of its contract and the payment by it of
40 all lawful claims of sub-contractors, materialmen

and laborers for labor performed and materials furnished in carrying forward, performing or completing it. By the terms of the bond the defendant agreed that it should be for the benefit of any material man or laborer having a just claim.

The plaintiff was a sub-contractor. Between October 6, 1921, and October 1, 1922, it furnished to, hauled and laid for the Oak Ridge Company 37,732 square yards of Warrenite-Bithulithic pavement at the rate of $2.35 per square yard. The total amount of this contract was $88,674.90. It is admitted that this amount was liquidated as follows: 10

Nov. 8, 1922, from Morris County ...	$57,938.41
Apr. 24, 1924, from Morris County ..	21,125.73
June 10, 1924, from the defendant ...	9,610.76
	$88,674.90

20

Before the above payments were made and on January 21, 1922, the Oak Ridge Company, being then indebted to the plaintiff on overdue estimates amounting to $63,959.95, and the County of Morris then having considerable funds in its hands due the Oak Ridge Company, started suit in the Court of Chancery under the so-called Municipal Lien Act of 1918. The defendant admits that as early as December 12, 1921, it had notice of a claim of $57,563.96 by the plaintiff for materials furnished. On April 10, 1923, it had a further notice that $32,981.46 with interest was due the plaintiff from the Oak Ridge Company. On April 18, 1923, it was notified that the claim was $27,852.45 and on May 2, 1924, the statutory statement of the amount due was submitted by the plaintiff to the defendant in accordance with Section 3 of Chapter 75 30 40

of the Laws of 1918. Thereafter on June 10, 1924, the defendant paid the principal of the amount ($9,610.76) claimed to be due, but refused to pay any interest.

It is obvious at once that under the admitted facts, if the plaintiff had brought an action against the Oak Ridge Company it could have recovered judgment against that company and included in that judgment would have been a certain interest charge. The amount of its claim was liquidated. If this was enforceable against the Oak Ridge Company, why is it not now enforceable against the defendant? The plaintiff, proceeding under the Laws of 1918, has merely turned from the Oak Ridge Company to the surety with the same claim. It would not have been wise to have proceeded against the Oak Ridge Company. In the absence of the benefit conferred upon the plaintiff by the legislative enactment of 1918, a judgment against the Oak Ridge Company would have had no value except to collect as much from Morris County as it could legally obtain from the monies in the hands of the freeholders of that county and due to the Oak Ridge Company on the contract. The plaintiff relied for protection on Chapter 75, of the Laws of 1918, which the Legislature entitled, "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works." Under that act and its amendments it seems to me that any just claim the plaintiff had against the Oak Ridge Company it could urge against the defendant, with this qualification, that the defendant, a surety, would not be liable for interest until it had notice of the default of the contractor, for it is the rule that whenever a debtor knows what he is to pay and when he is to pay it, he shall

be charged with interest if he neglects to pay it. Any other construction of this statute, passed for the benefit of the materialman, would defeat its intention. A materialman is a business man. His business is subject to the uses of money and credit. If perchance he uses credit to finance such a contract, he pays for the use of that credit. If he does not use credit, he is entitled to interest for the deprivation of his money. It is a distinct loss to him to have to assume that burden long after the materials are furnished and while he is waiting for the acceptance of the whole work by the public authorities and a proper opportunity, under the statute, to submit a statement of the amount due him. The materialman can and should include in that amount, such interest charges as have accumulated from the time the surety knew of the contractor's default.

10

20

The question then arises: When did the surety have notice of the default of the Oak Ridge Company and the amount that it, the defendant, was called upon to pay. In view of all the circumstances, the letter of December 1, 1921, followed by suit in equity resulting in a final decree was insufficient. The letter of April 10, 1923, was sufficient to apprise the defendant that the plaintiff looked to it for payment of $32,981.46 with interest from October 31, 1922. In that letter the plaintiff frankly narrated its efforts to collect its indebtedness against the Oak Ridge Company. It is hard to imagine what additional notice of the amount due, the defendant required. Interest will be allowed from that date.

30

40

New Jersey State Library

The principal then due was $30,736.49. The following calculations exhibit the interest charges.

Apr. 11, 1923. Principal due	$30,736.49
Int. on this sum to Apr. 24, 1924, 1 yr. & 13 days	1,910.76
	32,647.25
Apr. 24, 1924, Morris County paid ...	21,125.73
	$11,521.52
Int. on this sum to June 10, 1924, 1 mo. & 16 days	88.33
	$11,609.85
June 10, 1924, defendant paid	9,610.76
	$ 1,999.09
Int. on this sum to Aug. 1, 1925, 1 yr. 1 mo. & 21 days	136.94
	$2,136.03

Judgment will be entered for $2,136.03.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

FINDINGS ON AGREED STATE OF CASE AND POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff,* vs. HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant.*	*Action at Law.* *Findings on Agreed State of Case and Postea.*

10

20

This case was tried before Judge Worrall F. Mountain without a jury at the Essex Circuit upon June 24, 1925.

After hearing the agreed State of the Case, and counsel for the plaintiff, and counsel for the defendant, the Court finds:

It appears that this case is submitted upon a signed statement of facts agreed upon by the parties and filed with the Clerk of the Court. For the reasons given in an opinion filed herein, judgment in this case is given for the plaintiff and against the defendant in the sum of $2,136.03.

30

The damages of the plaintiff are assessed at $2,136.03.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

40

NEW JERSEY SUPREME COURT.

STATEMENT.

WARREN BROTHERS CO., *vs.* HARTFORD ACCIDENT & INDEMNITY COMPANY.	*Action at Law.*

Judg't entered .... Oct. 3, 1925.

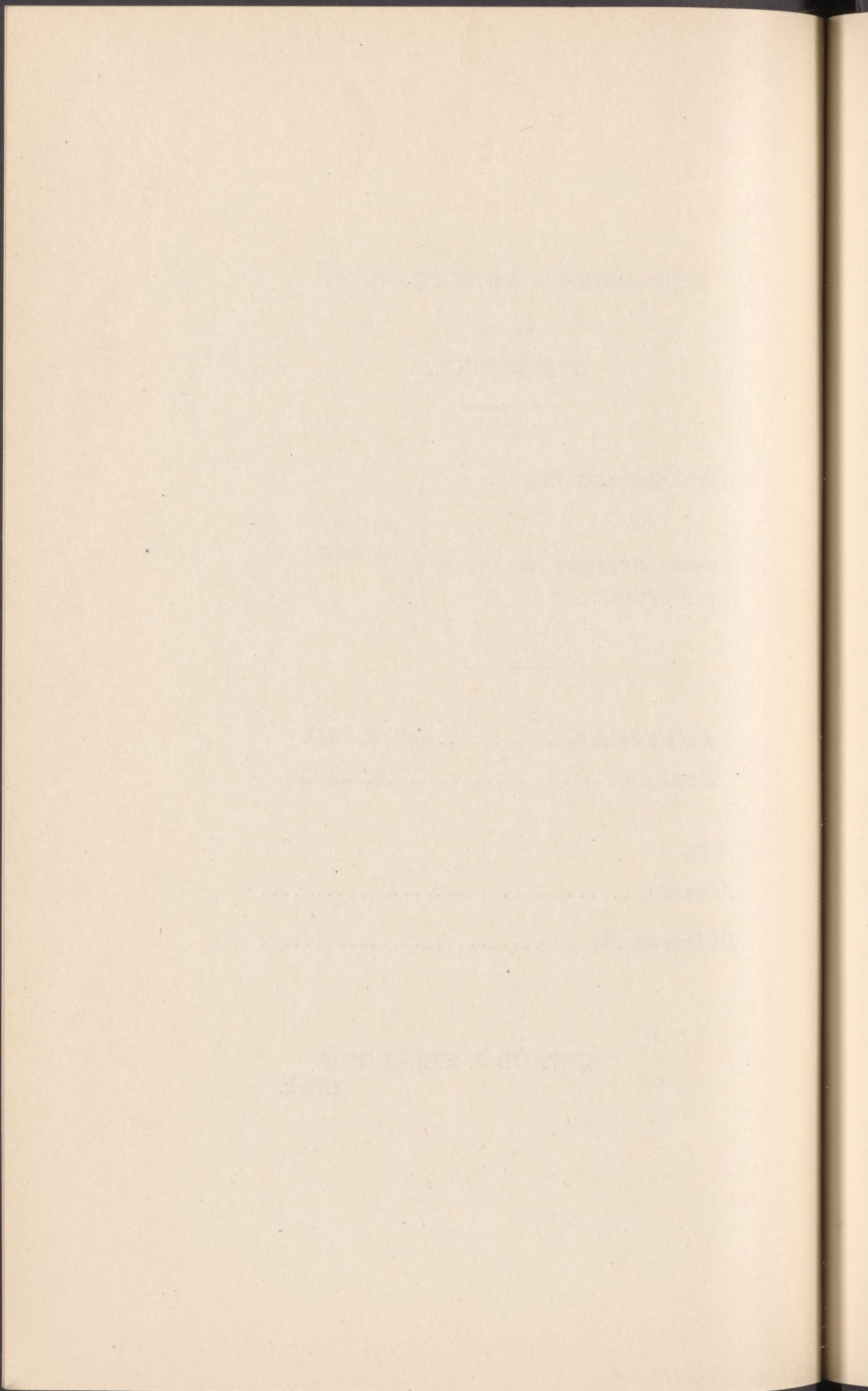
Damages $2136.03

COSTS

Attorney ....

Disbursements ....

EDWARD J. KELLEHER
Clerk.



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff-Appellant,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant-Respondent.*	*Action at Law.* **Brief for Defendant-Respondent.**
WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff-Respondent,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant-Appellant.*	*Action at Law.* **Brief for Defendant-Appellant.**

The sole question involved in this cause is as to the liability of the defendant below to pay interest to the plaintiff below upon sums due to the plaintiff for materials furnished to the Oakridge Company in the prosecution of certain work for the County of Morris.

The defendant was surety upon the bond of the Oakridge Company and has already discharged in full, by the payment of $9,610.76, its liability to the plaintiff for the principal amount due to it for materials furnished under said contract.

The bond was given pursuant to the provisions of Chapter 75 of the Laws of 1918, which, by its title, is "An Act to protect persons performing

labor or furnishing materials for the construction, alteration, or repair of public works." The bond, which was written under date of June 1, 1921, was *conditioned for the performance of the contract between the Oakridge Company and the County of Morris,* and also for the payment of "all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in carrying forward, performing, or completing of said contract." The Oakridge Company defaulted in the performance of its contract and failed to make payment of large sums due to Warren Brothers Company.

The following facts are important:

The agreement under which the plaintiff furnished the materials in question to the Oakridge Company was made on June 3, 1921, and the bond upon which the defendant became surety bore date June 1, 1921.

On December 1, 1921, the plaintiff wrote to the defendant advising it that certain amounts were due to the plaintiff for materials furnished to the Oakridge Company under this contract. This letter does not, as asserted in plaintiff's brief (page 7), state that the contractor had defaulted in the payment of this sum; nor is there any statement in the letter that a demand is made upon the defendant for the payment of these moneys because of the failure of the Oakridge Company to pay them. The letter on its face was intended merely to advise the surety of the amount due for materials which had been furnished up to that time, and bore no suggestion that the information was being given for any other purpose. (See page 25.)

On April 10, 1923, the plaintiff wrote to the defendant alleging a balance due of $32,981.46,

together with interest thereon from October 31, 1922.

The work was finally completed and accepted by the County of Morris on April 24, 1924. (Page 27.)

Upon the completion of the work the plaintiff received a further payment out of the sums in the hands of the County of Morris. Thereafter and under date of May 2, 1924, the plaintiff mailed to the defendant a notice, under the statute, claiming a balance due of $9,610.76, together with interest items running from October 26, 1921, to April 24, 1924, and aggregating the sum of $6,766.63.

On June 10, 1924, the defendant paid to the plaintiff the sum of $9,610.76, the amount claimed to be due to the plaintiff without interest.

Under the above facts the plaintiff claims that it is entitled to the same amount of interest from the defendant as surety that it could have collected from the Oakridge Company—that is to say interest from the time when the various items of its claim against the Oakridge Company became due and payable.

Upon the other hand, the contention of the defendant and the basis of its appeal is that the defendant as surety did not become liable for interest until after an enforceable demand had arisen against it, that is to say, until the expiration of sixty days after a statement of the plaintiff's claim had been given to the defendant, pursuant to the provisions of the statute.

Plaintiff's contention on the subject of interest is untenable.

The basis of plaintiff's contention is that inasmuch as the bond is conditioned for the payment of "all lawful claims of subcontractors, materialmen and laborers for labor performed," etc., we must ascertain what the lawful claim of the subcontractor or materialman is as against the contractor. This, it is said, includes interest from the date when payment should have been made, and, therefore, interest is a part of the "lawful claim." We submit that the fundamental fallacy of this argument is that it overlooks the difference in obligation between the contractor and the surety. The contractor is bound by reason of a contract which requires it to make payments at certain specified times. The surety is bound not upon that contract, but upon a bond which becomes obligatory upon its part only in the event that the contractor fails to perform the contract. The surety does not do the work and is not, in the first instance, liable for the payment of the moneys which may become due to the subcontractors and materialmen. The work must be done and the payments made by the contractor. It is no part of the duty of the surety company to keep in touch with the work and to exercise vigilance to see that the contractor is living up to the obligations of his contracts with his subcontractors and materialmen. This being so, the surety cannot in any event be charged with interest, as in the case of default, until notice has been given to it of the claims of the subcontractors or materialmen. The Federal authorities under the Heard Act so hold. Neither the Heard Act, nor our own statute makes any specific reference to the subject of interest.

As this Court pointed out in *Skillman* v. *United States Fidelity & Guaranty Company*, 130 Atl. 564, the liability of a surety upon a bond of this character must be strictly construed and cannot be extended by implication beyond the precise terms of the undertaking, the contract of suretyship being *strictissimi juris.*

In *London & Lancashire Indemnity Co.* v. *Smoot,* 287 Fed. 952, the Court said:

> "In the case at bar the statute does not mention interest, and the bond makes no provision for its payment. Its condition is that Pawling & Co. shall well and truly perform its contract, and shall promptly make payments to all persons supplying it with labor and materials in the prosecution of the work provided for therein, following substantially the language of the statute. In the statute it is provided that the surety on a bond may pay into court the penalty named therein and be relieved from all further liability.
>
> "The bond imposes no further obligation upon the surety as regards materialmen than the language already referred to. We do not think it became the duty of the surety to ascertain whether or not the contractor was paying for material and labor as it was furnished from time to time, but that the statute and the bond contemplated that, when thereunto requested, the surety should see to it that such claims were paid, and that until such request or demand was made the right to recover interest of the surety did not attach."

And in *United States* v. *Quinn,* 122 Fed. 65, the Court said:

> "A surety whose undertaking obligates him contingently for unliquidated damages is not considered as in default until notice or demand, and interest does not begin to run upon the amount until then. The rule

is thus stated in 1 American Leading Cases 507:

" 'It is *not* (sic) to be understood that, in general interest as against the surety, begins to run on the penalty, and on the debt if less than the penalty, only from the time of a demand upon the surety, or notice to him to pay, or by suit, or something equivalent to demand or notice.' "

It is not necessary to cite other authorities, nor to refer to the cases laying down this general rule with reference to the obligation of sureties.

The surety does not become in default so as to justify the imposition of an interest charge upon it until sixty days after the service of a statement of claim as required by the statute.

As already indicated, the work required to be done under the contract between the Oakridge Company and the County of Morris was not accepted by the County of Morris until April 24, 1924. The only notice of claim after the acceptance of the work, and the only notice which by its terms purports to be given pursuant to the statute, is the notice of May 2, 1924 (see p. 12).

It is true that under date of April 10, 1923, the plaintiff wrote a letter advising of the termination of the lien claim suit and requesting the defendant to put up another bond covering the maintenance on the work. While the letter says that Warren Brothers Company will look to the surety for payment, the letter clearly contemplates the receipt of further moneys by Warren Brothers Company from the County of Morris, that company then being engaged in exhausting its rights under a lien claim filed by it. Furthermore, if this letter be viewed as an attempted compliance with the provisions of the statute, it

was premature, since the work had not yet been accepted by the county.

The Supreme Court, by Chief Justice Gummere, in the recent case of *Franklin Lumber Company* v. *Globe Indemnity Company,* 130 Atl. 608, held that under this statute the claimant for labor or materials may not furnish the statement and make the demand required by the statute until after the acceptance of the work contracted for, since the primary purpose of the bond is to protect the Public Board, and only secondarily is it designed to protect materialmen. Otherwise they would be enabled to exhaust the bond before the Public Board could be protected.

The Court said:

> "Upon this construction of the statute, notice of default by the contractor in the payment of such debts, in order to constitute a basis for a suit against the surety, cannot be legally served prior to such acceptance."

Under paragraph 3 of the act (Laws of 1918, p. 204), it is provided that the person to whom any money shall be due "within eighty days after the acceptance thereof (the public work) by the duly authorized board or officer *shall* furnish the surety on said bond a statement of the amount due to any such person, firm or corporation," and the same paragraph further provides that no suit shall be brought against the surety until the expiration of sixty days after the furnishing of said statement and "if said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond." By paragraph 4 of the act, the entire statute is read into the bond to the same extent as if the conditions and provisions

thereof were fully incorporated into the bond form. In view of the above, we submit that the right of any claimant under the bond, or to found any claim upon the bond, depends upon a compliance with the statute. Without it he not only has no cause of action against the surety, but has not a demand or claim upon which interest would run. The giving of the statement is made mandatory and it is provided that it shall be given "within eighty days after the acceptance" of the work. The act then gives sixty days apparently for the investigation of the matter and checking off by the surety company and then says, "if said indebtedness shall not be paid in full at the expiration of said sixty days" the action may be brought. Nothing is said about interest and it is quite clear that the statute did not intend to create any obligation on the part of the surety to pay until the expiration of sixty days after the furnishing of the statement. The interest here claimed is not interest payable under an agreement of the surety company to pay interest, or to guarantee the payment of interest under an agreement to that end, but is interest claimed on account of a default, or, in other words, as a penalty for failure to pay some other sum. It is not within the purview of the statute, nor is it fair or equitable to impose an interest penalty upon a surety prior to the time when the surety may pay with due regard to the paramount rights of the public body or may be required to pay by legal action.

The Court below adopted the view that the plaintiff was entitled to interest from the time of the first demand made by it upon the defendant, notwithstanding the fact that such demand was made prior to the acceptance of the work

covered by the contract. This demand for payment the Court found in the letter of April 10, 1923. Even upon that view the amount for which judgment was entered was erroneous since the calculations on page 32 of the printed book show that the Court in crediting amounts paid on account from time to time credited such amounts as against principal and interest, thereby in effect compounding interest as against the surety company.

As already shown, however, no interest is properly chargeable against the surety company, for the reason that notice under the statute was not given until May 2, 1924, and the principal amount of the plaintiff's claim was paid to it by the surety company on June 10, 1924, less than sixty days after the service of the notice, and prior to the time when an action could have been brought against the defendant.

The case at bar strongly illustrates the propriety of requiring a subcontractor to give notice under the statute before he can insist that he is entitled to interest as against the surety.

The total amount due for all of the material furnished by Warren Brothers Company to the Oakridge Company was some $88,000. The figures show (see p. 5, l. 30) that Warren Brothers Company did not collect a cent from the Oakridge Company, but freely and with apparent recklessness continued to extend credit to the Oakridge Company until all of the material had been furnished.

And this is so notwithstanding the fact that under the terms of the contract between Warren Brothers Company and the Oakridge Company, the latter was required to pay the former on account of material furnished by it "at the same

time and rate as the party of the second part receives its money from the Board of Chosen Freeholders of the County of Morris,'' etc. (p. 16, l. 21).

Common fairness would seem to require persons dealing with contractors to use due diligence to collect in the ordinary course from the contractor, and not to rely entirely upon the bond with no notice to the surety company of the contractor's failure to comply with the terms of his contract as to payment. To establish the view that the materialman may recklessly extend credit without notice of the situation to the surety and further penalize the surety by additional interest charges because of such extension of credit, would be neither equitable nor in accord with sound business practice.

It is respectfully submitted that the learned Court below erred in imposing any interest charge against the defendant, and that the judgment below should be reversed.

ARTHUR F. EGNER,
Counsel for Hartford Accident and
Indemnity Company,
Defendant below and Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff-Appellant,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant-Respondent.*	*Action at Law.* **Brief for Plaintiff-Appellant.**
WARREN BROTHERS COMPANY, a Massachusetts corporation, *Plaintiff-Respondent,* *vs.* HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, *Defendant-Appellant.*	*Action at Law.* **Brief for Plaintiff-Respondent.**

FACTS.

As set forth in the agreed state of facts this case arose out of the refusal of the defendant-respondent, hereinafter called the respondent, to pay the plaintiff-appellant, hereinafter called the appellant, an item of interest which said appellant claims to be due from the respondent on account of a certain contract entered into between the appellant and a company known as "Oak Ridge Company".

This matter was submitted by the respective parties on an agreed state of facts to the Supreme Court, Essex County Circuit, and was heard and determined by Honorable Worrall F.

Mountain without a jury. A judgment was entered in favor of the plaintiff below for $2,136.03 from which judgment both parties appeal to this Court.

POINT I.

A charge for interest is a lawful claim and properly included in a statement from a materialman to a surety under Chapter 75, P. L. 1918.

The sole question involved in this cause is whether or not the respondent is legally bound to pay interest to the appellant upon sums due to said appellant for materials furnished to the Oak Ridge Company in the prosecution of work for the County of Morris.

In accordance with Chapter 75 of the Laws of 1918, the said Oak Ridge Company, as principal, and the defendant, as surety, entered into a bond with the County of Morris in the sum of $268,-007.59. Said act is entitled "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works." Section 2 as amended by Chapter 110 of the Laws of 1920 provides as follows:

> "Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer or agent acting on behalf of the state or any county, city, town, township, village, borough, municipality governed by a board of commissioners or improvement commission or school district aforesaid in an amount not more than one hundred percentum of the contract price and *conditioned for the payment by the contractor and by all subcontractors of all indebtedness which may accrue to any person, firm or corporation on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such building, works or improvement.*

> "Such bond shall be deposited with, and held by, such board, officer or agent for the use of any party interested therein."

Section 3 of Chapter 75 of the Laws of 1918 provides as follows:

> "Any person, firm, or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, said action to be commenced within one year from the date of the acceptance of said building work or improvement."

Unfortunately, there have been no cases decided by the courts of this State or the courts of any State which can be pointed to as being directly in point. This is probably due to the fact that the statute in question is of recent origin and the question of interest has never been litigated. However, it is our contention that the language used in the statute is so plain that it is hardly necessary to go beyond said statute in order to come to the conclusion that the plaintiff is entitled to the amount of interest claimed.

The respondent contends that it cannot be charged with interest in the case of a default by the contractor until notice has been given to it of the claims of the subcontractors or materialmen. On the other hand appellant states that it

is entitled to interest from the dates the contractor was obliged to pay for the materials furnished, and that the surety is not entitled to notice.

The mere reading of Section 2 of the Laws of 1920 referred to above in conjunction with Section 3 of Chapter 75 of the Laws of 1918 clearly indicates that the contention of the respondent in this case is unsound. In the middle of paragraph 2 it says that said bond shall be conditioned for the payment by the contractor and by all subcontractors of all indebtedness which may accrue to any person, firm, etc. Section 3 says that any person, firm or corporation etc., shall within eighty days after the acceptance thereof by the duly authorized board, etc., furnish the sureties on said bond a statement of the *amount due* to any such person, firm or corporation.

It seems to me that this case resolves itself into a determination by this Court of what is meant by the phrases *"all indebtedness"* and *"amount due"*. Certainly, when a contractor fails to pay for material when said payment becomes due, interest would begin to run against the debt even though nothing was said in the contract between the contractor and the materialman. In this case there is a specific provision in the contract between said parties that, if payments are delayed beyond two months after delivery of the materials, the entire contract price for all work done shall immediately become due and payable with interest.

On this point it is respectfully submitted that, if the plaintiff is not entitled to interest as claimed, the bond written by the defendant is not sufficient to answer the full purpose and design of the statute mentioned above, which statute in effect intended that the materialmen and laborers

etc., should be indemnified against all loss, because certainly it cannot be said that the loss of the use of the money is not an element of damage. The following cases support this contention:

Jersey City v. *Flynn,* 74 N. J. Eq. 104;
Ruchman v. *Bergholz,* 38 N. J. Law 531.

The statute in question is somewhat similar to the Federal Statute known as the "Heard Law". In construing that act, the United States Supreme Court in the case of *Illinois Surety Company* v. *Davis,* 244 U. S. 376, says:

> "First, the purpose of the act is to provide security for the payment of all persons who provide labor or materials on public work. This was done by giving a claim under the bond in lieu of the lien against lands and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally in order to effectuate the purpose of Congress as declared in the act. In every case which has come before this court where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond where recovery was allowed, if the suit was brought within the period prescribed by the act technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

Counsel for respondent claims that interest does not begin to run until sixty days after said respondent receives notice of the default. This claim is in accordance with the provision of the statute which says that no suit shall be begun against the surety within sixty days after said surety receives notice of the default. It is our contention that this point is also without merit as we think it plainly obvious that this provision merely amounts to a suspension of the right to

sue and does not in any way affect the question of interest. This point was clearly expounded in *Stitzer* v. *U. S.*, 182 Fed. 513, where the Court said:

> "The lapse in six months was a condition precedent to the plaintiff's right to sue. In other words, a conditional cause of action only was conferred. Such cause of action was created by the statute and must be instituted pursuant to the terms and conditions of the statute and not otherwise."

The respondent says that it did not receive notice of appellant's claim as required by the statute until May 2, 1924. This is true due to the fact that under Section 3 of Chapter 75, Laws of 1918, such statutory notice could not be given until eighty (80) days after the work had been completed and accepted by the municipal authorities. It can be readily seen that this provision absolutely precluded the appellant from giving said statutory notice prior to that time. This rule was recently laid down by the Supreme Court in the case of *Franklin Lumber Company* v. *Globe Indemnity Company*, Vol. 4 N. J. Advanced Reports, p. 16, in which case the Court adopts the following syllabus:

> "Although a person who has furnished materials to be used by a contractor in the construction of a public work is protected by the bond given by the contractor to the public agency, pursuant to chapter 75 of the laws of 1918, his right to notify the surety of the default in payment by the contractor, in case default exists as a preliminary to bringing suit against the former for the recovery of the debt due to him, and also his right to bring such suit, are each of them postponed until the completion of such work and its acceptance by the public agency."

It is admitted by counsel for respondent on the question of notice that as early as December 1,

1921, the said respondent received a letter from the appellant stating that the contractor had then defaulted in his payments. (See State of Case, p. 25.)

It is further admitted in the agreed state of facts that on April 10, 1923, said respondent received a letter from counsel for the appellant further advising it that the contractor had defaulted and that in accordance with the provisions of the Municipal Lien Act of 1918, appellant had instituted suit in the Court of Chancery of this State and that a final decree was entered which stated that said contractor was indebted to the appellant in the sum of $90,919.87; that the County of Morris had in its possession belonging to the contractor the sum of $97,263.61 of which sum $2,785.45 was retained for work which the State Highway Commission had not yet approved. Said letter further notified the respondent of the balance due appellant at that time and requested said respondent to pay the claim of the appellant and become subrogated to the rights of said appellant against the money in the hands of the County of Morris. (See State of Case, p. 9, l. 20.)

On April 18, 1923, a further letter was written to the respondent by counsel for the appellant again calling its attention to the facts and again calling its attention to the condition of the claim against the contractor and further urging said respondent to make payment to prevent the running of interest. (See State of Case, p. 11, l. 10.) This letter was also ignored by the respondent. It appears perfectly plain that every opportunity was given the respondent to pay the claim of appellant and thereby prevent the interest charges from accumulating.

Attention of the Court is also directed to the wording of the bond which was entered into between the Oak Ridge Company and the respondent with the County of Morris. The form of this bond appears on page 205 of Chapter 75, Laws of 1918, and reads as follows:

> Now, if the said shall well and faithfully do and perform the things agreed by to be done and performed according to the terms of said contract and shall pay all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in the carrying forward, performing or completing of said contract we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim as well as for the obligee herein, etc.

This certainly can only be construed to include the item of interest. We contend that the amount of the decree in the Court of Chancery is conclusive and that by its terms the appellant had a lawful claim for the amount set forth therein.

In the Court below Judge Mountain made the following observations:

> "It is obvious at once that under the admitted facts, if the plaintiff had brought an action against the Oak Ridge Company it could have recovered judgment against that company and included in that judgment would have been a certain interest charge. The amount of its claim was liquidated. If this was enforceable against the Oak Ridge Company, why is it not now enforceable against the defendant? The plaintiff, proceeding under the Laws of 1918, has merely turned from the Oak Ridge Company to the surety with the same claim. It would not have been wise to have proceeded against the Oak Ridge Company. In the absence of the benefit conferred upon the plaintiff by the legislative enactment of 1918, a judgment

against the Oak Ridge Company would have had no value except to collect as much from Morris County as it could legally obtain from the monies in the hands of the freeholders of that county and due to the Oak Ridge Company on the contract. The plaintiff relied for protection on Chapter 75 of the Laws of 1918, which the Legislature entitled, 'An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works.' Under that act and its amendments it seems to me that any just claim the plaintiff had against the Oak Ridge Company it could urge against the defendant, with this qualification, that the defendant, a surety, would not be liable for interest until it had notice of the default of the contractor, for it is the rule that whenever a debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay it. Any other construction of this statute, passed for the benefit of the materialman, would defeat its intention. A materialman is a business man. His business is subject to the uses of money and credit. If perchance he uses credit to finance such a contract, he pays for the use of that credit. If he does not use credit, he is entitled to interest for the deprivation of his money. It is a distinct loss to him to have to assume that burden long after the materials are furnished and while he is waiting for the acceptance of the whole work by the public authorities and a proper opportunity under the statute, to submit a statement of the amount due him. The materialman can and should include in that amount, such interest charges as have accumulated from the time the surety knew of the contractor's default."

It is my contention that the above views submitted by the learned Judge below correctly interprets the statute under consideration and the obligations contracted for by the surety. It seems

to me that it would have been logical for the Court to have stopped at that point and allowed interest as claimed by the appellant. The views expressed by the learned Judge in the last paragraph of his opinion on page 31, State of the Case, have been nullified by the Supreme Court in the case of *Franklin Lumber Company* v. *Globe Indemnity Company,* cited herein.

It seems to me that the position taken by counsel for the respondent in this case is hardly tenable. It must be admitted that under the decision of the Court referred to above no legal notice of the amount due from the contractor to the materialmen could have been served upon the respondent until within eighty (80) days after the acceptance of the work by the governing body. Certainly it cannot be said that the Legislature intended to discharge said surety company from any liability for interest. If that were so, the so-called Municipal Lien Act, Chapter 280, P. L. 1918, would be superfluous. In paragraph 10 on page 1046 of this act the following provision appears:

> "The Court of Chancery shall determine the validity of the lien of the complainants and defendants and of all other liens which may be filed within the time prescribed by this act and the amount due from the municipality to the contractor under the contract and from the contractor or sub-contractor to the respective claimants and shall make a decree directing the municipality out of the moneys due from it to the contractor to pay over to the several claimants the sums found due to them respectively with interest and costs upon claims adjudged to be just and valid under this act for work done or materials furnished in the execution of the contract or contracts with the municipality."

It is my contention that the above section must be considered by the Court in connection with construing Chapter 75 of the Laws of 1918, and, in view of the fact that the statute quoted above was enacted after Chapter 75, P. L. 1918, it is conclusive on the question at issue. In this case the Court of Chancery has by its final decree passed on the validity of the claim of the appellant and notice of the amount of said decree was forwarded to the respondent on two or three occasions but said notices were disregarded by the respondent.

Conclusion.

In this case if the appellant is not entitled to interest the act in question fails of its purpose. It does not protect persons performing labor or furnishing materials as stated in its title. It is respectfully urged that the lower Court erred in allowing interest on the various amounts from April 11, 1923, instead of from October 26, 1921, in accordance with the statement appearing on page 14 of the State of Case. It is further urged that said appellant is entitled to accrued interest on the sum of $6,840.88 from June 10, 1924, to date.

Respectfully submitted,

RIKER & RIKER,
Attorneys for Plaintiff-Appellant.

THOMAS E. FITZSIMMONS,
On Brief.