

# New Jersey Court of Errors and Appeals.

HILDRETH GRANITE COMPANY,  
Complainant,

*vs.*

EDWARD P. O'NEILL *et al.*,  
Defendants.

On Bill, &c.

Three Consoli-  
dated Causes.

On Appeal of  
Maher & Mc-  
Nichols.

## BRIEF OF APPELLANT.

### Statement.

A concise statement of this case presenting the questions involved and the manner in which they are raised is contained in the State of Case (p. 1 & 2).

This is an appeal from the decree of the Court of Chancery, entered in the three consolidated causes, and decreeing that the Hildreth Granite Company is entitled to the fund in the hands of the Board of Chosen Freeholders of the County of Hudson. There were three bills of complaint filed by three different lien claimants, under the Municipal Lien Act, Comp. Stat., 3315. The three complainants furnished labor and materials used in the performance of a contract for a public improvement, made by the Board of Chosen Freeholders of the County of Hudson with Edward P. O'Neill.

One bill was filed by the Hildreth Granite Company to recover the sum of fourteen thousand

six hundred nineteen dollars and sixty-three (\$14,619.63) cents.

One bill was filed by Patrick J. Maher and John McNichols, partners trading as Maher & McNichols, appellants, to recover eighty-two hundred eighteen dollars and seventy-two (\$8,218.72) cents, with interest.

One bill was filed by the Edison Portland Cement Company to recover seventeen hundred nineteen dollars and three (\$1719.03) cents, with interest.

The decree upholds the lien of the Hildreth Granite Company and decrees that the appellants and the Edison Portland Cement Company have no lien on the fund.

No appeal has been filed by the Edison Portland Cement Company.

There was no question raised on the hearing as to the amounts claimed to be due to each claimant. The Board of Chosen Freeholders of the County of Hudson admitted that it had the sum of money claimed to be due and tendered its willingness to pay same in accordance with such decree as the Court might make.

#### **Grounds of Appeal.**

The decree adjudges that the complainant, the Hildreth Granite Company, is entitled to priority of payment to the full amount of its lien and to the full amount of the fund in the hands of the Board of Chosen Freeholders of Hudson County to the exclusion of the appellants. The appellants contend that the decree is erroneous and that the Hildreth Granite Company is not entitled to a lien on the said fund for the following reasons:

First: Because the Hildreth Granite Company did not file its notice and claim in accordance with the requirements of the statute.

Second: Because the Hildreth Granite Company is a foreign corporation and did not as a foreign corporation procure a license under the New Jersey Law to transact business within this State; and therefore it could not perfect any lien on its contract with O'Neill, under which the materials were furnished, the said contract having been made in this State and the said Hildreth Granite Company having been transacting business in this State in the contemplation of the statute.

A further ground of appeal is that the appellants contend that their notice and lien claim were filed within the time limited by the statute.

Therefore the questions to be determined on this appeal are:

1. Whether the Hildreth Granite Company filed its notice and lien in accordance with the requirements of the statute.

2. Whether the Hildreth Granite Company, a foreign corporation, without procuring a license in this State, as a foreign corporation, could perfect any lien on the fund under its contract with Edward P. O'Neill, viz.:

- (A) Whether the Hildreth Granite Company, a foreign corporation, was transacting business in this State.

- (B) Whether the contract upon which the Hildreth Granite Company based its claim and brought its action was made in this State and whether the Hildreth Granite Company, a foreign corporation, had a right to lien.

3. Whether the notice and lien of the appellants were filed within the time limited by the statute.

These questions are set forth in the Statement in the record, pages 1 and 2.

In this brief, I will designate the Hildreth Granite Company as "the respondent."

## BRIEF OF THE ARGUMENT.

### I.

**Respondent did not file its notice and lien in accordance with the requirements of the statute.**

The respondent's right to lien is based upon what is commonly known as the "Municipal Lien Act" (P. L. 1892, p. 369), and the supplements and amendments thereto (Comp. Stat., 3315).

The action is purely statutory. The statute must be strictly complied with.

Section 2 of the Act provides as follows (*italics mine*):

"At any time before the whole work to be performed by the contractor for any such city, town, township or other municipality is completed, or accepted, by said city, town, township or other municipality, and within fifteen days after the same is so completed, or accepted, any claimant may file with the *chairman or head* of the department, council, *board*, bureau or commission having charge of said work, notice of its claim, etc."

The contention of the appellant is that the notice and claim of the Hildreth Granite Company was not filed with "the chairman or head of the

department, council board, bureau or commission having charge of said work." The board having charge of the work was the Board of Chosen Freeholders of the County of Hudson. The chairman or head of the board was the director of the board of freeholders. See page 140.

The testimony is to the effect that the notice and claim of the Hildreth Company was left with the assistant clerk of the board of freeholders. See testimony of John P. Noonan, page 10.

On page 10, line 33, Noonan testifies as follows:

"Q. Do you know whether there was received by the director of the Board of Chosen Freeholders of the County of Hudson, on November 5th, 1914, a notice of lien claim by or for the Hildreth Granite Company? A. I do not know that one was filed with the director of the Board, but I do know that one was filed with the clerk of the Board on November 6th, 1916.

"Q. In the office of the Board, with the clerk of the board? A. Filed with me, I docketed it."

There is no conflict in the testimony in respect to how the notice of the Hildreth's Granite Company was filed. So far as the testimony shows the director of the Board never saw the notice and claim of the Hildreth Granite Company.

The statute does not provide that the notice and claim may be filed with the Board, nor does it provide that it may be filed with the Clerk of the Board, or the Assistant Clerk. It specifies the particular officer. Under the statute it must be filed with the chairman of the board.

There have been several cases arising under this statute. Most of these cases were based on technical grounds and it has been consistently

held in this State that the statute must be strictly complied with; that otherwise no lien is acquired.

I have been unable to find any case in this State where the precise question raised in this case has been determined.

One failing to comply with the statute securing the pay of laborers and materialmen on municipal improvements, and requiring the filing of notices and claims, by failing to file a notice, is not entitled to the benefit of the statute. *Cope v. C. B. Walton Co.*, 67 N. J. Eq., 512.

A leading case in this respect is the case of the *National Fire Proofing Company v. Daly*, 76 N. J. Eq., 35; affirmed by this Court on the opinion below, 77 N. J. Eq., 583.

The questions raised in that case and the careful consideration of them by Vice-Chancellor Stevenson show that before a lien can be obtained, the statute must be strictly complied with.

One of the claims received no consideration, because the affidavit of verification did not fully verify the claim; one of the claims was not allowed because it was held that technically no action had been commenced by the claimant within the ninety days provided by the statute (p. 44).

On page 46, the Vice-Chancellor says there is no question about the provisions of the Act in respect to the necessity of commencing the action within the ninety days, as it is clearly expressed.

It certainly is as clearly expressed that the filing of the notice must be with the *chairman or head* of the department, board, etc.

On page 47, the Vice-Chancellor quotes, with approval, the opinion of Vice Chancellor Grey in *Somers Brick Co. v. Souders*, 70 N. J. Eq., 390, as follows:

"The statute creates a right of action which heretofore had not existed. It prescribes certain conditions and limitations and declares that if they be not observed, the right given only by the statute shall not arise or shall be defeated."

On page 47, he says: "How strictly the Courts held themselves bound to deal with these statutory liens is exemplified by *Daley v. Lumber Co.*, 70 N. J. Eq., 343.

In the case of *Hazard v. Board, etc.*, 75 Atl., 237, the Court said that the language which applies here is entirely clear.

The Vice-Chancellor says on page 238, "The requirements of the Second Section of the Act are that two notices or claims of lien shall be filed; one with the chairman of the board having charge of the work, and the other with the financial officer of the municipality. The language of the Act is entirely clear in this respect."

It was held in that case that the filing with the treasurer of the municipality was not sufficient, but that it should have been filed with the financial officer of the school district.

Further, on page 240, the Court says:

"The statute requires a notice of the pendency of the action to be filed with the financial officer of the school district. This is a special and distinct statutory requirement. The service of a subpoena on the district, or the acknowledgment of service by its solicitor, apprises the district of the suit, but does not necessarily apprise the financial officer, who is charged with the duty of keeping a lien docket, of the pendency of the suit."

In the case of *Camden Iron Works v. Camden*, 67 N. J. Eq., 723, this Court held that where it

appears upon the face of the claim, or by proof that a claim is untrue or excessive, the Court must be satisfied that the erroneous part of the claim was made in good faith, or the lien will fail.

In the case of Hazard *et al.* v. Phoenix Woodwork Co. *et al.*, 78 N. J. Eq., 568, this Court held that unless the proceedings, required by the statute, for fastening a claim upon the fund are taken, the claim will be disallowed.

## II.

**The Hildreth Granite Company cannot perfect its lien for materials furnished under the O'Neill contract.**

The Hildreth Granite Company is a foreign corporation. The contention of the appellants is that the contract between O'Neill and the Hildreth Granite Company was made in New Jersey. That the Hildreth Granite Company was transacting business within the State of New Jersey without having filed the copy of its charter, etc., required by the corporation act. Section 98 of the General Corporation Act, Comp. Stat., 1658, provides that until a foreign corporation, transacting business in this State, shall have obtained a certificate from the Secretary of State, provided for by Section 97 of the Act, it shall not maintain any action in this State upon any contract made by it in this State.

The testimony of O'Neill is to the effect that the signature of the Hildreth Granite Company was on the contracts at the time his signature was affixed. (P. 90, also p. 43.)

The testimony of Hopkins is to the effect that

at the time the signature of O'Neill was placed on the contracts, they had been signed by the Hildreth Granite Company. That they laid in the office about a week; that Mr. O'Neill had not decided whether he would sign or not. (P. 128, l. 30.)

### III.

**The notice and lien of the appellants was filed within the time limited by the statute.**

Section two of the Municipal Lien Act, Comp. Stat., 3317, provides that the notice shall be filed "at any time before the whole work, to be performed by the contractor, for any such city, town, township, or other municipality, is completed or accepted by said city, town, township or other municipality, and within fifteen days after the same is so completed or accepted."

There was no question raised as to the date of the completion and the date of the acceptance. It was admitted that the work was completed on October 31st, and was accepted on December 7th, page 36, line 5.

The notices of the appellants were filed on November 25th. Page 23, line 37; page 31, line 15. The filing marks on the original notices show they were filed on November 25th. Pages 148-149.

The situation therefore is that the notices were filed more than fifteen days after the actual completion of the work but prior to the acceptance of the work.

The Court following the decision of Vice-Chancellor Grey, in *Somers Brick Co. v. Souders et al.*, 70 N. J. Eq., 388, determined that because the

notice and lien claim of appellants were not filed within fifteen days after the work had been physically completed, the statute had not been complied with and the claim would fail, although the notice and claim were filed before the date of acceptance.

In the case of *Somers Brick Co. v. Souders et al.*, Vice-Chancellor Grey, on page 393, says:

“In my view, but two periods are offered by the statute during which the lien claim notices may be filed. First, before the whole work is completed; second, within fifteen days after it is either completed or is accepted, whichever date may come first. The arrival of the one is intended to exclude the other. It is not to be supposed that after the city has finally accepted the work, a period for the filing of liens against the contract price may continue to run until fifteen days after the work shall, at a date no matter how remote, finally be completed, or that after all the work has been completed, a lien period may continue until the city shall have formally accepted it.”

This case was appealed to this Court but this point was not passed upon by this Court. No appeal was taken by John M. Frere, whose claim was under consideration by the Vice-Chancellor, when determining this point. (76 N. J. Eq., 759.)

In speaking of this claim this Court says on page 761:

“The claims of the latter (Frere), however, were excluded by the Vice-Chancellor because of non-conformity with the statute and there is no appeal on their behalf.”

It is respectfully submitted that this construction of the statute is erroneous. The statutory

language is plain. Section 2 of the Act reads as follows:

“At any time before the whole work to be performed by the contractor for any such city, town, township, or other municipality, is completed or accepted by said city, town, township or other municipality, and within fifteen days after the same is so completed, or accepted,” any claimant may file lien, etc.

The Act does not say *either* completed or accepted. No clearer language could be employed to express the intent. The claim may be filed before the work is completed; it may be filed within fifteen days after it is completed; it may be filed before the work is accepted; it may be filed within fifteen days after the work is accepted.

The reason for the distinction and the provision that the time shall run from the date of acceptance is very clear. A materialman, who has furnished material, may have never been on the work. He has nothing before him to show when the work is physically completed, but by keeping in touch with the board having charge of the work, he can readily ascertain when the work is accepted and know that he has fifteen days from that time within which to file his claim. The acceptance is a matter of public record. It is almost an absurdity to say that the work might be accepted first before it is completed. It can hardly be conceived that a municipal board would accept work before the work had been completed.

The Legislature in the statute, however, showed its intention of protecting a materialman from fraud or connivance whereby the board might possibly, in order to save the contractor, accept the work before it was fully completed and pay

the contractor and thus prevent a materialman who thereafter actually furnished materials for the completion of the work from having a lien. Under the construction of the Vice-Chancellor the materialman would have no lien whatever.

I think that the statutory language is clear, that two specific periods are provided. Appellant's notices and claims were filed prior to the date of the acceptance of the work and within the time provided by the statute.

It is respectfully submitted that the decree of the Court of Chancery should be reversed.

Nov. Term, 1916.

ZIEGENER & LANE,  
Solicitors for Appellants.

HARRY LANE,  
Of Counsel.

New Jersey Court of Errors and Appeals.

Between

HILDRETH GRANITE COMPANY,

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*Complainant-Appellee,*

*and*

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, et al.,

Appeal from Chancery by Maher & McNichols.

*Defendants- (Maher & McNichols, Appellant).*

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**POINTS FOR HILDRETH GRANITE COMPANY, APPELLEE.**

**Statement.**

This is a proceeding under the Municipal Lien Act.

The claim of the Hildreth Granite Company is for \$14,619.63.

The balance in the hands of the Freeholders is \$11,659.74. 30

If the Hildreth Granite Company is entitled to be paid, it will not be paid in full, and there will be no payment to Maher & McNichols.

Decree Pro Confesso was taken against O'Neill, contractor.

The Board of Freeholders filed an answer submitting to the jurisdiction and offering to pay the balance in their hands to whomever should be entitled to receive it. 40

No question is raised as to the sufficiency of the papers in form, nor as to the amount due the Hildreth Granite Company. No question is raised that the Hildreth Granite Company did not comply with all statutory requirements in filing notice and claim with the Director of the Board and the Financial Officer of the County nor with respect to giving, filing and approval of bond, nor with respect to filing of notice of pendency of action,  
 10 except the question whether the notice and claim of that Company was "filed" with the Director of the Board of Freeholders in accordance with the statute, and the question based on the Company being a foreign corporation.

The parties concede that the Director is "the head of the Board" and the officer with whom notice and claim should be filed.

The statute does not direct that notice and claim shall be *served*, or *delivered to*, or *left with* the  
 20 Director. The provision is that it shall be "filed" with the Director.

The statute is as follows:

"At any time before the whole work to be performed by the contractor for any such city, town, township or other municipality is completed or accepted by said city, town, township or other municipality and within fifteen days after the same is so completed or accepted, any claimant may file with the  
 30 chairman or head of the department, council, board, bureau or commission having charge of said work, and with the financial officer of said city, town, township or other municipality, notices," &c.

Comp. Stats., p. 3317, Sec. 37.

The notice and claim of Maher & McNichols was filed with the Director of the Board in the same way as was the notice and claim of the Hildreth Granite Company.

### **Brief of the Argument.**

We contend:

1. The notice of the Hildreth Granite Company was filed in accordance with the statute.
2. The decisions under the similar New York Municipal Lien Statute show that the Hildreth Granite Company notice was properly filed.
3. The notice of Maher & McNichols and the notice of the Edison Portland Cement Company were filed out of time. 10
4. The Hildreth Granite Company has not been transacting business in New Jersey.
5. The contract of the Hildreth Granite Company with O'Neill was not made in New Jersey; it was made in Boston, Mass.
6. Moreover, the Hildreth Granite Company was doing an interstate business. 20
7. Maher & McNichols cannot raise the foreign corporation question against the Hildreth Granite Company.

#### 1.

#### **The notice of the Hildreth Granite Company was filed in accordance with the statute.**

The notice and claim of the Hildreth Granite Company was "filed with" the Director of the Board of Freeholders. 30

The Director had no duty with the paper, except through the Clerk of the Board to have a record made of the time of the reception of the paper which would give notice to the County, in order that the County's interest might be safeguarded. This was done.

The Director was not physically at the office of the Board of Freeholders at the time the Hildreth Granite Company notice was delivered to the 40

Clerk of the Board for him. The Clerk stated to the person bringing the Hildreth notice for the Director to the Clerk's office that the Clerk represented the Director with respect to the notice in question and stated that he would file the same with the public records; and the paper was filed and docketed in the Lien Book in accordance with the custom.

10 In delivering the paper to official custody, as it was delivered, the statute was complied with and the purpose of the statute was carried out.

The manifest purpose of the statute is to insure adequate notice of the claim.

*Hazard v. Board*, 78 N. J. Eq., 568.

The notice was properly filed under this test.

20 The Director of the Board is himself a Freeholder. He could not be a director without being a freeholder. The statute provides that the Board "shall elect from their own number a director who shall be the presiding officer of the said board and shall appoint standing committees thereof".

Comp. Stat. "Chosen Freeholders", p. 530, §194.

30 There is no provision in the statute that the director shall have an office of his own; so that the office of the Clerk of the Board, the office of the Board, must also be held to be the office of the Director. A director has no right to set up an office of his own at any place and to thus create an official office. If he has any such right he has not done so. The director in question has no official office away from the office of the Board of which he is director.

40 The Director was at the Court House nearly every day. He substantially designated the office of the Clerk, the office of the Board, as the office of him, the director.

The duties of the Director referred to in the statute, namely, the presiding at meetings, and the appointing of standing committees surely are duties to be performed in the office or meeting room of the Board itself.

The proof is that the Board has a meeting room in the County Court House, which room is used alone for the holding of meetings. Immediately adjoining this meeting room is the office of the Clerk of the Board. Except for presiding at meetings and appointing committees, which duties the Director should perform in the meeting room of the Board, the only other place appropriate for the doing of any official act to be done by the Director is the office of the Clerk of the Board, the office of the Board. 10

A notice and claim is filed with the director as a designated or selected freeholder. The records and files of the freeholders, that is, the records and files of the Board, of which the freeholders are members, are kept in the office of the Clerk of the Board, the office of the Board. 20

With respect to the filing of notices, the Clerk of the Board could and should act for the Director in the absence of the Director.

The Clerk's custody is the Director's custody. The Board, and not the Director, would act on a notice; and if the Board wanted to act on a notice, the expectation would be that the notice would be found in the files of the office of the Clerk of the Board, that is, in the files of the Board. 30

The Clerk of the Board testified that whenever a paper was delivered to a director personally, while the director was away from the Court House, for filing, such paper was always brought by the Director to the office of the Clerk of the Board for filing in the office of the Clerk, the office of the Board. 40

Some of the testimony bearing on these points is as follows:

See the testimony of John P. Noonan, Assistant Clerk of the Board of Freeholders:

Page 10:

"A. The custom is to file these liens in the office, then they are sent to our counsel who takes the matter up.

10 "Q. Who represents the director of the Board in his absence, with respect to the reception of legal papers of any kind? A. Either Mr. O'Mara or myself." (Mr. O'Mara is the Clerk of the Board.)

Page 17:

20 "Q. In the absence of the Director of the Board of Chosen Freeholders, I mean his physical absence, from the office, or room of the Board of Chosen Freeholders, in the County Court House, who is there representing him? A. Either Mr. O'Mara, the clerk, or myself.

"Q. What accommodations for office room has the Director of the Board of Chosen Freeholders in the County Court House in connection with the Board of Chosen Freeholders; my question has relation to the time this notice which you identified was left with the Clerk for the Director. A. He has no special office; he has free access to all the offices in the freeholders' room.

30 "Q. There is, is there not, a room in the Court House called the freeholders' room where the Board of Chosen Freeholders meet when in session as freeholders? A. Yes, sir, we have such a room.

"Q. And there is besides that, is there not, a clerk's office occupied by the Clerk of the Board of Chosen Freeholders and his assistant, yourself, and the appropriate clerks and subordinates? A. Yes, sir.

40 "Q. And has the Director of the Board of Chosen Freeholders—I mean, did he have at the time in question, when this notice was left with you—any accommodation other than

those I have mentioned, for occupying any place or office in the Court House? A. No. No other accommodations, only those that you have mentioned.

Page 19:

"Q. What office, if any, did the Board of Chosen Freeholders of the County of Hudson have in the County Court House at the time this notice was filed, in the way you have indicated, other than the Clerk's office of the Board of Chosen Freeholders? A. As a rule that was the office he always did his business in outside of the regular sessions of the Board, the Clerk's office. 10

"Q. At that time were all papers, legal papers, so-called, for the Director left, in his physical absence from that place, with the Clerk of the Board? A. That office or the office that I occupy.

Page 20:

"Q. And the office you occupy is in the room adjoining the clerk's office? A. Yes, sir. 20

"Q. It is part of the Clerk's office, is it not? A. Yes, sir.

"Q. Part of the same suite? A. Yes, sir."

Page 26:

"Q. But you simply followed the usual course or practice? A. The general custom."

Page 27:

"Q. Did you follow the usual course of practice? A. In this case, as in the others, yes." 30

See testimony of Francis V. Many, who delivered the Notice and Claim of the Hildreth Granite Company to the Clerk for Mr. Witt, the director.

Page 36:

"Q. Where was he (Mr. Noonan) when you left the notice with him? A. In the office of the Clerk of the Board of Freeholders.

"Q. The Clerk of the Board of Freeholders in the Court House? A. Yes, sir. 40

"Q. Did you, at that time, make any in-

quiries with respect to the whereabouts of the Director of the Board? A. I did."

Page 37:

"Q. Of whom? A. Mr. Noonan.

"Q. Was Mr. Noonan in charge of the Clerk's office at that time? A. He was, Mr. O'Mara was not there; I asked for Mr. O'Mara and he was not there, and Mr. Noonan was there; he was the assistant clerk.

10 "Q. Please state of whom you inquired with respect to the whereabouts at that time of the Director of the Board. A. I inquired of Mr. Noonan; he said Mr. Witt was not there; I wanted to know where he could be found; he could not tell."

By the Vice-Chancellor:

"Q. Who was the head of the Freeholders at that time or Chairman or whatever the office is?

20 "Q. Who was it? A. Mr. Witt.

"Q. Go on Mr. Many, and tell us what else was said, if anything, in that connection? A. I told him what I was there for; he said any papers for Mr. Witt he would take as Mr. Witt's representative, that papers served that way—he would receive them for Mr. Witt."

30 The filing of a paper includes the placing of the paper in proper order on the files of the office where the files are kept. Where else could a Freeholders' Office files be kept than in the office of the Board of which he is a member?

The files of the office of the Board must be held to be the files of the office of the Freeholders making up the Board. Otherwise Freeholders might have individual files at their homes, and on the termination of their terms of office public papers would not be found on the public files.

40 A notice is not filed with a director for his own personal use. It is filed as notice to the Board of Freeholders. It is delivered to the Director because it is to be made a permanent record; and

until it is made a permanent record it is not filed. Manifestly a notice cannot be made a permanent record until it is placed on or with the official files.

Papers are filed with a County Clerk or with a Surrogate by leaving the same with a Clerk in the office, which means that the papers thus come to the custody of the Clerk or the Surrogate. Only by getting to the official office can such papers be filed.

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There is no provision in the statute stating what the director is to do with a notice when he receives one. We find, however, as just stated, that directors have always understood that such papers are to be brought to the office of the Board, being the office of the Clerk of the Board, and that is what happened with the Notice of the Edison Portland Cement Company which was delivered to the Director away from the Court House, where the office of the Board is located.

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If the office of the Clerk of the Board is the proper place for filing, then the custody of the Clerk is the custody of the Director, and the Director would not need to be served personally to comply with the provisions of the statute to the effect that a notice should be "filed with" the director, any more than would the Clerk of the Board need to be served personally under a provision of a statute that a paper should be filed with the Board or with a clerk of the board.

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The lien book produced by the Clerk of the Board shows no difference in the treatment of the notices that were served by the several complainants. This book has an entry for the Edison Portland Cement Company notice. This notice of the Edison Portland Cement Company left with the Clerk is found entered in the Lien Book, and the Notice of that Company left with the Director in his plumbing shop, two miles away from the

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Court House, was brought by the Director to the Clerk of the Board and by the Clerk was entered in the same lien book and thus the "filing" was in regular course.

There is a distinction between the "filing" and the "service" of a paper.

60 Cal. 280, *Boyd v. Burrell*.

Judge Gaynor, *in re Norton*, 25 Misc. Rep. 53

10 N. Y. Sup. 924, decided as follows:

"In order to be 'filed' with the clerk a paper must be delivered to him in his office where the law requires him to keep his books and files and to receive and file papers. That this is the rule whether the words of the statute in respect of filing be 'in the office of the clerk' or 'with the clerk' is beyond doubt (*Hathaway v. Howell*, 54 N. Y. 97). It does not seem that anyone could think of 'filing' a paper on the street, for instance."

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We do not find any cases holding that a paper is "filed" merely by its being delivered to a proper officer on the street, at his house, or away from the office of the official.

And no paper can be said to be filed unless it is placed in the proper office, unless it is delivered to the place where the files with which it is to be placed actually are kept.

30 A paper that carries notice or affects private rights is filed only when deposited with the proper official in his office.

This means, at least, a proper presentation to the officer at the proper place.

In 57 Cal. 501, it was said filing a paper consists in leaving it at the proper office and leaving it to deposit with the papers in such office. Hence where an attorney, after office hours, hunted up a deputy clerk and gave him a paper for filing but the clerk did not place the paper on file until

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the next day, the delivery to the clerk did not constitute filing.

134 Cal. 178;  
66 Pac. 223.

Delivering an instrument to the proper official in a place other than the place where it is required to be filed is not sufficient even though the official endorses it as properly filed.

53 Pac. 796.

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In order to be filed with a clerk a paper must be delivered to him in his office where the law requires him to keep his books and files, and to receive and file papers.

This is the rule where the words of the statute with respect to filing are "in the office of the clerk", or "with the clerk".

53 N. Y. Sup. 294.

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A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file.

Bouvier Law Dict. under "File".

In matters of practice the word "filing" is very commonly used to express the duties of bringing to the proper office, as the case may be, writs, pleadings, affidavits and other such matters for safe custody or enrolment.

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*Hunter v. Caldwell*, 10 Q. B. 69, 81.

The filing of a paper is the delivery of it to the officer at his office, to be kept by him as a paper on file and the file mark of the officer is evidence of filing, but it is not the essential element of the act.

*Masterson v. So. Ry. Co.*, 82 N. E. 1021.

Filing a paper, in modern usage, consists in

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placing it in the custody of the proper official by the party charged with the duty and the making of the proper endorsement by the officer.

2 S. Dak. 525.

In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of per-  
**10** manent preservation of the thing so delivered and received, that it may become part of the public record. It is not synonymous with deposited.

67 Hun, 560.

“Filing” comprehends a placing of the paper in the custody of the official *and* a depositing by that official of the paper in the place where his official records and papers are usually kept.

**20** *O'Brien v. Schneider*, 129 N. W. 1002; 88 Neb. 479.

The proof in this case is that notices of the claims of liens delivered to directors were always kept in the office of the clerk of the board.

A document may be said to be filed with an officer within the meaning of the statute which required certain instruments and documents to be filed, &c., when it is placed in his official custody *and* is deposited in the place where his official re-  
**30** cords and papers are usually kept.

120 Mass. 130;

2 Ind. 91;

60 Tex. 487;

98 Mo. 590.

Filing means placing the paper in the office or case where it belongs.

21 Ark. 578.

**40** The word carries with it the idea of permanent

preservation of the paper in order that it may become a part of a public record.

126 N. W. 389.

The Edison Portland Cement Company did quite some hunting before they found Keilt, the Director. Keilt is a plumber, and, apparently, he was off repairing pipes, or something of that sort. Suppose a director should have a plumbing business in New York, where he spent nearly all of his time; or suppose he was a man who did not report at his home very often. Suppose he had a disagreement with his family and was living in New York City for a few months. Suppose he was interested in the matter in which the notice was given and wanted to receive certain notices of claims given by his friends and did not want to receive notices of claims given by creditors with whom he was unfriendly? How could a notice be served on him personally?

We contend that, as the Maher & McNichols Notice was filed out of time (See Point 3) they have no standing to raise any question with respect to the Notice of the Hildreth Granite Company not being "filed with" the Director; since a decree pro confesso was taken against the contractor O'Neill, and the answer of the Board of Freeholders raises no questions against the manner in which the notice of the Hildreth Granite Company was filed with the Director.

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## 2.

**The decisions under the similar New York Municipal Lien Statute show that the Hildreth Granite Company notice was properly filed.**

The New York Statute is generally similar to the New Jersey Statute. It has a provision that  
 10 the claimant "may file a notice of lien with the head of the department or bureau having charge of such construction, and with the Comptroller of the state, or with the financial officer of the municipal corporation, or other officer, or person charged with the custody and disbursement of the state or corporate funds applicable to the contract and under which the claim is made.

The opinion in *Bell v. New York*, 105 N. Y., 139 is by Justice Peckham and is concurred in by the  
 20 full court.

"It is further urged, in amplification of the argument upon the part of the city, that there was in this case no head of a city department or bureau in which to file a notice of claim under the second section of the act in question, because the board of education or the trustees of public schools of the twelfth ward formed no such department or bureau of the city government within the cases above cited. But having so construed the first  
 30 section of the act as to include a case of this kind, and holding that a contract such as this was a contract substantially and for the purpose of the act, with an incorporated city, there is no difficulty in holding that for the same purpose the board of education was the department or bureau having charge of the work and the comptroller of the city was the financial officer thereof, and that a filing of the notice of lien with the clerk of the board and with the comptroller was a fulfillment  
 40 of the provision of that section of the act."

While the opinion in the case of *Mechanics &*

*Traders Bank v. Winant*, 123 N. Y., 271, is not directly in point, it is helpful as showing that the inquiry really is whether in the attempt to file the notice of lien, notice is given to the proper board or department and all other parties who may be interested.

The opinion, in part, is as follows:

“I should consider it quite immaterial that the notice was given to the one rather than to the other officer; provided it is brought home to those charged with the payment. So far as the city is concerned, it is only a matter of knowledge from notice. For convenience of knowledge, with respect to its officers, as well as for all parties interested in the performance by and the payment to the contractor, the head of the department executing the work is mentioned as the officer to whom notices shall be given. The comptroller is the financial officer of the city, to whom the commissioner of public works, under the contract, was to certify as to payments for the work, and it is not easy to see why the city is not as much chargeable with notices of claims against its contractor filed in the one as in the other office. The provision in the contract designating the officer with whom notices of claims may be lodged, is one intended for the benefit and security of those employed under the contractor (citing cases).”

### 3.

30

#### **The notice of Maher and McNichols and the notice of the Edison Portland Cement Company were filed out of time.**

The improvement was completed October 31, 1914. The Hildreth Granite Company notice was filed with the Director and with the Financial Officer November 6th, 1914, within 15 days after completion.

The Maher & McNichols notice was filed November 25, 1914.

40

The Edison Portland Cement Company notice was filed January 26, 1915.

"In my view but two periods are offered by the statute during which the lien claim notices may be filed: first, before the whole work is complete; second, within 15 days after it is either completed or accepted whichever date may come first.

10 "The arrival of the one is intended to exclude the other. It is not to be supposed that if the city has finally accepted the work a period for the filing of liens against the contract price may continue to run until 15 days after the work shall, at a date, no matter how remote, finally be completed, or that if all the work has been completed, a like period may continue until the city shall have formally accepted it."

Vice-Chancellor Grey, in *Somers Brick Co. v. Souder* 70 Eq. 388.

20 This case went to the Court of Errors and Appeals and the decree was modified, but the Vice-Chancellor's decision on the point in question was assumed as correct and was not disturbed.

(See *Somers Brick Co. v. Souder*, 70 Atl., p. 158, 1908, 71 Eq. 759.)

30 The proceeding is statutory, as appellant points out. Why should not the words of the statute be given their plain meaning? They are not ambiguous.

However, as the Hildreth Granite Company's notice was filed first, that company's lien has priority over the lien of Maher & McNichols. That being so, the decision in the case of *Somers Brick Co. v. Souder* does not need to be invoked, nor can any benefit come to Maher & McNichols from attacking it.

## 4.

**The Hildreth Granite Company has not  
been transacting business in New Jersey.**

If the company had been doing business in New Jersey, as the contract with O'Neill was made in Boston, still the contract is enforceable.

The statute is as follows:

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“Until such corporation so transacting business in this State shall have obtained said certificate of the Secretary of State, it shall not maintain any action in this State upon any contract made by it in this State.”  
Comp. Stat. p. 1658, §98.

It will thus be seen that the prohibition is against a corporation “transacting business in this state” where action is brought on a contract made in this state.

20

In the case in hand, there is no proof that the Hildreth Company was “transacting business in this state” and the proof clearly was that the contract with O'Neill was not made in this state.

Even if the Hildreth Company had transacted business in this State which, however, the evidence does not show is the fact, still the company could maintain an action on the contract made with O'Neill since that contract was made without the State.

30

See the case of *Faxon Co. v. Lovett*, 60 Law, 128.

It does not appear in the Faxon—Lovett case whether the foreign corporation had been transacting business in the State, although the contract in question was made outside of New Jersey.

The decision of Dixon, Justice, in *Faxon v. Lovett*, is clear:

40

“By expressly prohibiting the maintenance of suits on contracts made in this state it impliedly permits suits on contracts made elsewhere \* \* \*. We interpret the law to permit foreign corporations, without complying with its provisions, to maintain suits in this State on contracts made anywhere before the passage of the act and on contracts made outside of the State since the passage of the act.”

10 The statute does not affect the validity of the contract. The statute merely suspends the remedy.

Clark & Marshall on “Corporations” p. 2720.

See the case of *Low v. Davey*, 83 N. J. L., p. 542.

20 “Error is also assigned upon the refusal of the trial court to admit proof of a sale to one Collins upon a similar contract. This reasoning was correct, and if defendant’s contract was made in Chicago, it was not a contract made in this state, and it was of no consequence that a similar contract was made with Collins, and in neither case was the company transacting business in this state within the terms of the statute invoked.”

## 5

30 **The contract of the Hildreth Granite Company with O’Neill was not made in New Jersey; it was made in Boston, Mass.**

The testimony of Mr. Hildreth and of Mr. Harlow and the examination of Hopkins and O’Neill shows this.

40 Mr. Hildreth and Mr. Harlow testified that the contract was signed by O’Neill before it was sent to the New York Office of the company; that the contract, in triplicate, was sent from the New York office to the Boston office for execution by the company and in order that the corporate seal

of the company might be affixed. The correspondence in evidence proves this.

The letter of May 6th, 1914 from the New York office of the company to O'Neill states that the New York office has received from O'Neill the "signed contracts". The testimony of Hopkins & O'Neill is that the contracts were sent in the early part of May to the Hildreth Granite Company. This testimony, in connection with the letter of May 6th and the other correspondence manifests the situation clearly. O'Neill, by his agent Hopkins, his bookkeeper, executed the three copies of the contract, whereupon they were sent to the New York office of the company. The New York office of the company acknowledged the receipt of the contracts as signed by O'Neill on May 6th, 1914. Mr. O'Neill testified that he did not know whether the corporate seal of the company was on the contract when the contracts were sent to the New York office of the company. The testimony of Mr. Hildreth and Mr. Harlow is that the corporate seal has always been kept in Boston. Mr. Hildreth's testimony clearly is that he executed the contracts in triplicate for the company on May 15th, 1914. The dates of the contracts written in the typewritten blanks are in Mr. Hildreth's handwriting. The dates are May 15th, 1914, and Mr. Hildreth's testimony is that May 15th, 1914 was the date of the execution by him for the company of the three copies of the contract, and that at that time he affixed the corporate seal of the company and then sent two of the contracts to the New York office of the company so that O'Neill might receive one of the copies thus executed by the company. Mr. Hildreth sent two copies of the contract to New York, retaining one copy. All three copies were executed in the same way and bear the same date.

There is letter dated May 6th, 1914, being

letter from the New York office of the company to the Boston office (Exhibit C. No. 6). This letter is as follows:

“Kearny work, (Edw. P. O’Neill).

“Please find enclosed herewith Edw. P. O’Neill’s signed contract for the above work.

10 “We have reduced the price on these blocks from \$1.96 to \$1.94 as per Mr. H. M. Potter’s understanding with Mr. O’Neill. He states that he told you of this, so you will no doubt attach your signature and return them as soon as possible.

“Regarding his credit, would say that Mr. Potter being in Jersey City to-day and having all necessary information regarding this gentleman, will have to forward same to you to-morrow, as the writer understands he has looked this party up.”

20 This letter clearly shows that O’Neill executed the contracts on or prior to May 6th and that at that time the contracts had not been executed by the Hildreth Granite Company.

On May 7th, 1914, the Boston office sent a letter signed by Mr. Hildreth to the New York office (Ex. C. No. 9) as follows:

“Kearney Work:

30 “We are in receipt this morning of contract as signed by Edw. P. O’Neill. We note this contract is the old form, without the clause relating to assignments, etc. We do not know when you got Mr. O’Neill’s signature to this, but if it has just been secured, there is no reason why you could not have given him the latest form.

“We hope that Mr. O’Neill’s references will be satisfactory to us. The only thing we have at the present time is the information of the Messrs. Potter. We shall expect in to-morrow’s mail a detailed account.”

40 On May 7th the treasurer of the company wrote from the Boston office to the New York office (Exhibit C-10) as follows:

“KEARNEY WORK.

“We have received contract for our signature with the E. P. O’Neill firm for Jersey City, and in looking up their rating in our book of credits, I find a few lines meaning nothing so far as a statement of their condition is concerned.

“This does seem to me to be in keeping with the usual slackness that has prevailed in our New York office.

“This contract has been in prospect for some time and the standing and financial condition of this party long ago should have been thoroughly looked up and sent to us. I understand that someone in the New York office made a slight investigation; has the results, but never has sent it over to this office. This is a fine illustration of the way business has been done in the New York office. 10

“I wish to say that I want this looked up immediately and such information sent to the Boston office. If you have not gone into the matter thoroughly, take it up and iron it out now! I enclose copy of all we have in our office in regard to this party.” 20

Mr. Harlow’s testimony is that he was instructed to investigate O’Neill’s financial condition; that he came to Jersey City and did so; that, thereafter, he made his report to his company. As a result of his report on May 15, 1914, the Boston office sent a letter signed by Mr. Hildreth to the New York office, returning two copies of the contract duly signed. This letter (Ex. C, No. 7) is as follows: 30

“KEARNEY WORK.

“We have your favor of the 14th instant, and while we are not just exactly satisfied with Mr. O’Neill’s financial condition, we have decided to accept his order and are returning herewith two copies of contract duly signed. It would seem to us that Mr. O’Neill 40

intends to be honest, but if he is in bad financially, it behooves us to watch every movement he makes.

“Deliver these contracts in person and tell Mr. O’Neill frankly that the Boston office must insist upon payment according to contract and that in accepting the contract we shall expect him to keep the contract in his name and not assign it or any monies due from same.

10 “If he is honest, we have nothing to fear from him, but if he is in any way tricky, we must look out.

“Ascertain when he proposes to begin his work and we will make arrangement for shipment.”

The weak testimony of Mr. O’Neill and Mr. Hopkins cannot stand as against the facts manifested by the testimony of Mr. Hildreth and Mr. Harlow and the correspondence just referred to.

20 Mr. Harlow testified that he received the two copies of the contract executed by Mr. Hildreth, from the Boston office of the company, and that he sent one of the copies to Mr. O’Neill and he retained the other.

If the testimony can possibly be held to show that the contract of the company with O’Neill was executed in New Jersey, still there is no proof that the company was transacting business in New Jersey, except with relation to the O’Neill  
30 contract itself.

The decided cases are clear that the making of a single contract would not be “transacting business in New Jersey.”

See case of

*Slaytor-Jennings Co. v. Specialty Paper  
Box Co.*, 69 N. J. Law, p. 214;  
*Faxon v. Lovett Co.*, 31 Vr., 128;  
*Delaware & Hudson Canal Co. v. Mahlen-*

*brock*, 34 Vr., 281;  
*Low v. Davies*, 83 N. J. L., 540.

Mr. Hildreth testified that all the business of the company in connection with supplying granite blocks for use in New Jersey was done by means of contracts made at Boston, that is, contracts executed at first by the purchaser and executed afterwards by the company at Boston; that such contracts had affixed to them the corporate seal of the company after the prospective purchaser had executed the contracts. He testified also that some smaller orders were executed by means of letters or orders received at Boston and there accepted, and there would become contracts. 10

Under the decisions, there is no proof that the company was "transacting business in New Jersey."

Soliciting business in the state is not doing business within the state. 20

*Hoagland v. Segur Case*, 38 N. J. L., 230;  
*Cooper Mfg. Co. v. Ferguson*, 113 U. S. Rep., 727.

The company had no office, nor any place of business in New Jersey. It is true that it had salesmen who lived in New Jersey, but those salesmen were attached to the New York office of the company. The home office of the company was in Boston. There is no proof that the salesmen had any right to make a contract in New Jersey binding on the company. If the solicitation of an agent led to business, orders were accepted at the home office of the company in Boston and there would become contracts on execution for the company by Mr. Hildreth. 30

## 6.

**Moreover, the Hildreth Granite Company was doing an interstate business.**

The company had no factory or plant in New Jersey. It did not ship large blocks to New Jersey to be cut into smaller blocks. It did not keep a supply of blocks in New Jersey and sell  
 10 from such supply. Its sole business was selling and transporting from quarries finished granite blocks. Such blocks upon their reception were ready for use by purchasers.

See

*Cooper v. Ferguson*, 113 U. S., 727.

A sale of bricks to be delivered by a foreign corporation within the state and sent from another state is an act of interstate commerce which  
 20 cannot be affected by state statutes prescribing conditions of doing business by a foreign corporation.

*Cooke v. Rome Brick Co.*, 98 Ala., 409.

See the case of *MacMillen Co. v. Stewart*, 69 Law, p. 212, citing and upholding the doctrine of the case of *Faxon v. Lovett*.

This case was affirmed in the Court of Errors, 69 Law, p. 676:

30 "Sales of goods to a corporation situated without a state, to a resident of the state, even though made through traveling salesmen or agents sent into the state, to be shipped to him into the state, belong to the operations of interstate commerce, and are consequently not subject to a prohibition of the state constitution or statute against foreign corporations doing business within  
 40 the state without having an agent or place of business therein, or otherwise subject to prohibition or regulation by the state."

19 Cyc., p. 1230:

"Statutes of the kind under consideration

have no application to the case where a corporation sends into the restricting state its traveling agent who solicits orders for its goods and forwards them, subject to approval, to the home office, the orders being afterward filled by shipments to the customer. Such an application of the statute would be inadmissible in so far as the state statutes are concerned, because, so applied, it would have the effect of imposing a restraint upon commerce between the states or with foreign countries.”

10

19 Cyc., p. 1272:

“Nor are they allowed to restrict the ordinary operations of commerce, although conducted by corporations, across the boundary lines of the states of the Union or between the states and a foreign country; because, to give them this effect, would bring them into conflict with the settled interpretation put upon the commerce clause of the federal constitution. Therefore, a foreign corporation may advertise its goods, take orders for them, make contracts of sale, and ship its goods to customers within a state having such a statutory restraint or prohibition without complying with such statute.”

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19 Cyc., p. 1275:

“Such statutes are not generally allowed to operate so as to impose any restraint upon the making and taking of contracts the *situs* of which is outside the state enacting the statute; and this for two reasons; (1) to allow them to have such an operation would give them an extra territorial effect beyond the limits of the principle of interstate comity; and (2) it would also, in most cases, interfere with the operations of interstate commerce.”

30

19 Cyc., p. 1276:

“The most familiar illustration of the preceding doctrine arises in the case where

40

goods are sold by a foreign corporation in the state of its own domicile, or in some state other than the state having the restrictive statute, and are shipped into the restricting state and there delivered to its customer, whether the sale be made by correspondence, or through local agents or traveling salesmen. Here the transaction is valid, although the foreign corporation has not complied with the prohibitory statute."

10 19 Cyc., p. 1277:

## 7.

**Maher & McNichols cannot raise the foreign corporation question against the Hildreth Granite Company.**

If it should be held that the contract of the company with O'Neill was not made at Boston, but was made in New Jersey and was not a single  
20 transaction, and that the company was "transacting business in New Jersey," because of its dealings with customers outside of its dealing with O'Neill, still Maher & McNichols have no status to raise the foreign corporation question against the Hildreth Granite Company.

A decree pro confesso was taken against O'Neill.

The Board of Chosen Freeholders have not raised the foreign corporation question.

30 Maher & McNichols, under the authority of *Somers Brick Co. v. Souder*, have no lien.

The Hildreth Granite Company's bill of complaint was filed before the notice of lien of Maher & McNichols was filed with the Clerk of the Board of Freeholders. So that it was not necessary for the Hildreth Granite Company to make Maher & McNichols a party defendant.

40 Maher & McNichols filed their own bill of complaint and made the Hildreth Granite Company a party defendant therein.

If Maher & McNichols have no right to lien, as was decided by the vice-chancellor, their bill being dismissed, they would have no standing to raise any questions against the Hildreth Granite Company.

And, in addition to this, it must be said that the bill of complaint of Maher & McNichols sets up the judgment obtained by the Hildreth Granite Company against O'Neill in the New Jersey Supreme Court. The answer of the Hildreth Granite Company admits the obtaining of this judgment. It, therefore, appears that the claim of the Hildreth Granite Company has been adjudicated, so far as O'Neill is concerned, by a judgment entered in the Supreme Court. In the action leading up to that judgment, O'Neill did not raise the foreign corporation question. As neither O'Neill, with whom the contract was made, nor the Board of Chosen Freeholders, in whose hands the fund is, have raised this foreign corporation question, Maher & McNichols cannot raise it.

Maher & McNichols cannot raise this question first, for the reason hereinbefore stated, namely, because their notice of lien was filed out of time, and their bill was dismissed; and, second, because the contract between the Hildreth Granite Company and O'Neill was, and is, a valid contract.

The statute only suspends the remedy, and the remedy only would be suspended in case an appropriate pleading raising the statute, was filed by someone who had a right to raise the question.

The objection that the statute has not been complied with must be raised by plea or it is waived, for the statute affects the capacity to sue and not the cause of action.

Moreover, the contract between O'Neill and the Hildreth Granite Company was fully executed.

Ibid., p. 2723.

The essential thing in the present inquiry is whether the county has received and had the use of the granite blocks mentioned in the contract. The proof is that the blocks were so received and used by the county.

- 10** This foreign corporation question cannot be raised by Maher & McNichols collaterally. O'Neill alone could challenge on this ground the right of the Hildreth Granite Company to sue. O'Neill adopted the contract. The blocks were supplied and the contract has been executed.

Moreover, the proceeding is one in rem, and the statute does not apply.

- 20** The Hildreth Granite Company is not suing on its contract. It is foreclosing a lien and, so far as the fund is concerned, the lien is good if it rests on an enforceable contract against O'Neill under which merchandise was supplied to and used by the county.

- 30** The only questions are: Did the Hildreth Company have a contract with O'Neill? Were the granite blocks supplied to and used by the county? Did the Hildreth Granite Company comply with the lien statute in giving notice of its lien or claim?

As the Maher & McNichols notice and the Edison Portland Cement Company notice were filed out of time, neither has a lien; neither has a right to enforce a lien; neither is affected by a judgment enforcing the Hildreth Granite Company lien: therefore, neither is entitled to contest the validity of the Hildreth Granite Company lien.

See 27 Cyc., 345:

“The doctrine that a contract entered into by a foreign corporation without having complied with the statute prescribing conditions precedent to its right to do business in a state is void or voidable, and cannot be enforced by the corporation, does not affect the rights of either party under a contract which has been fully executed or prevent the corporation from maintaining or defending actions to protect such rights.”

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19 Cyc., 1302.

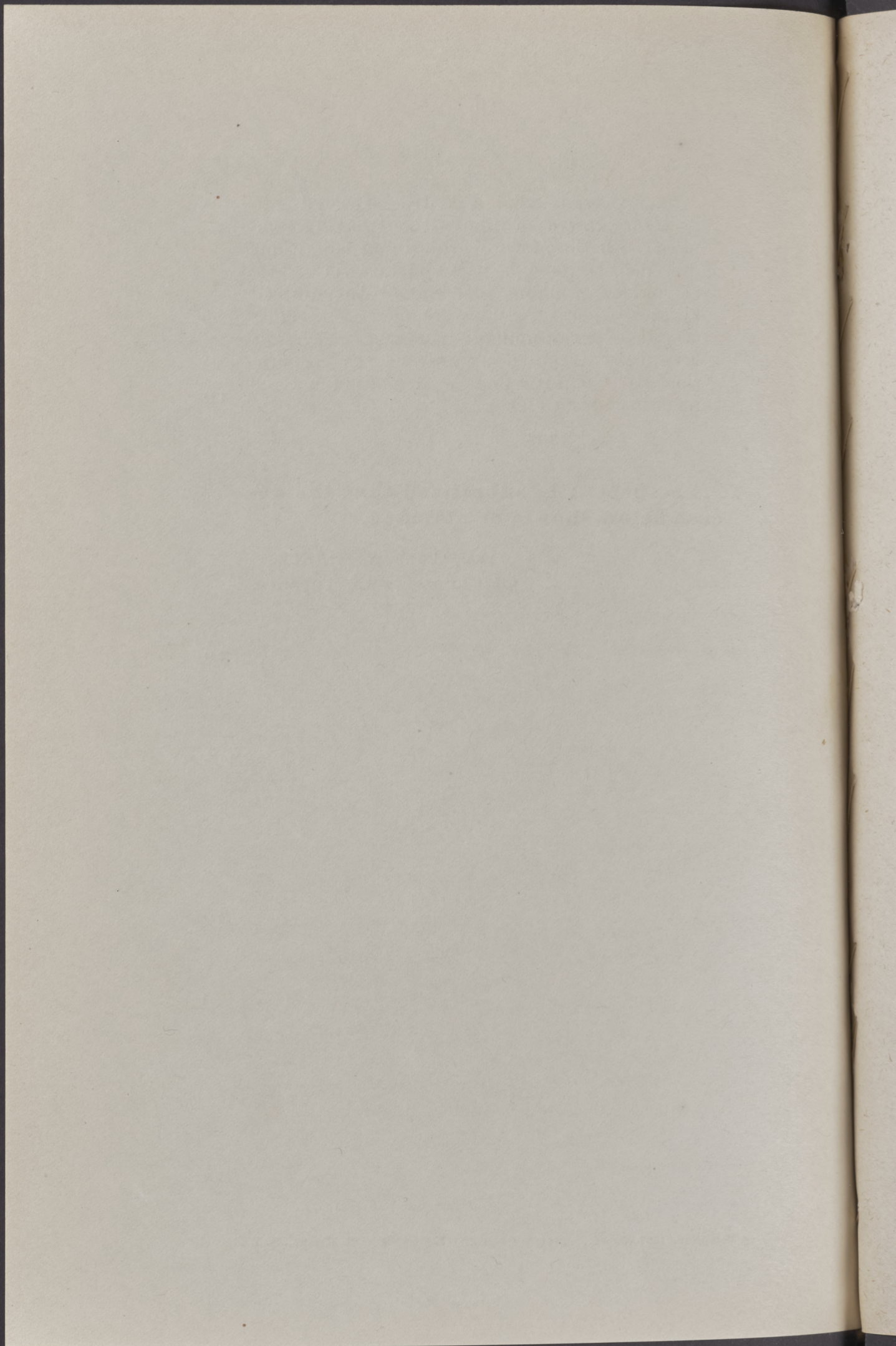
**It is respectfully submitted that the decree below should be affirmed.**

MARSHALL VAN WINKLE,  
Of Counsel with Appellee.

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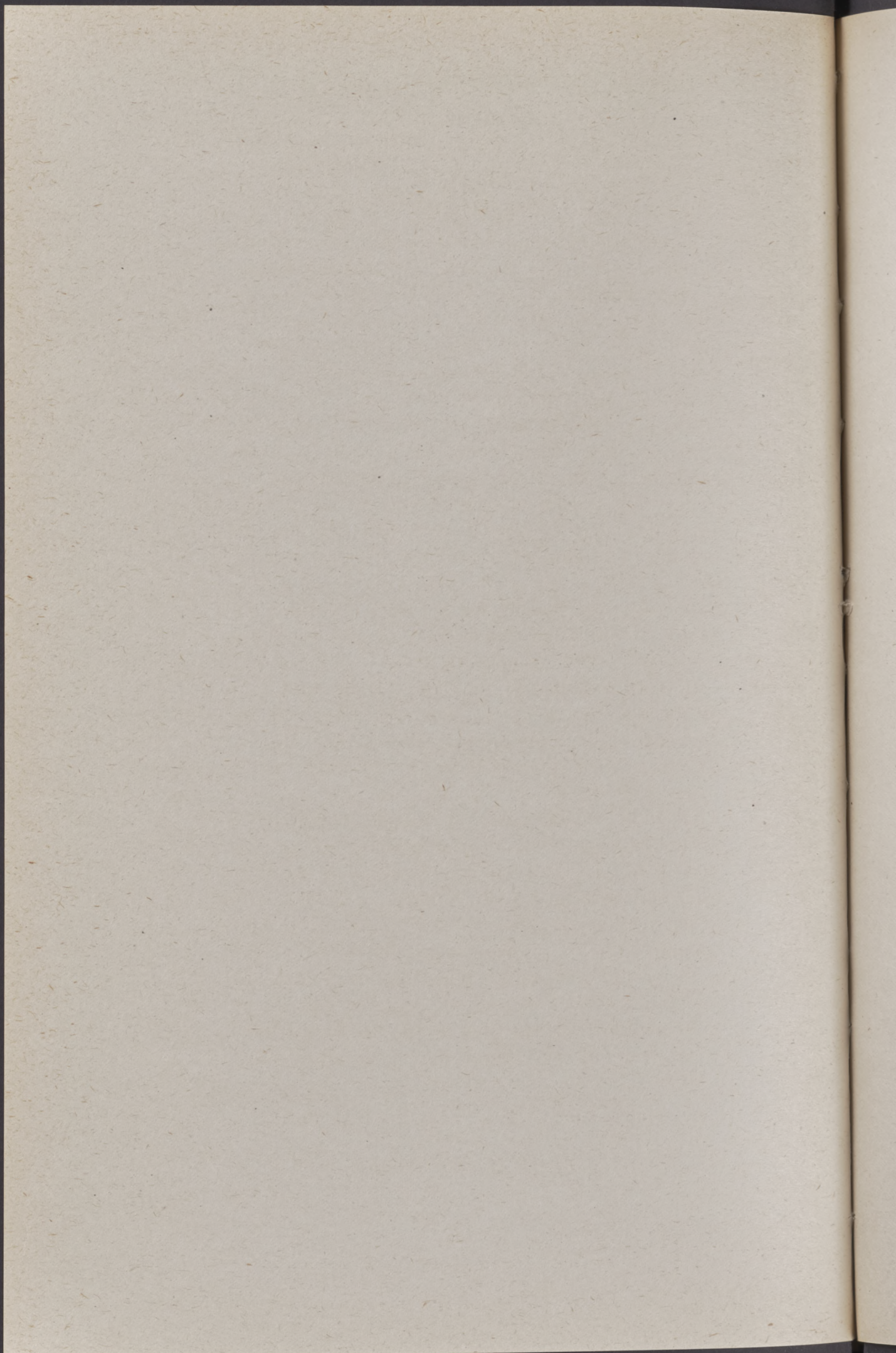
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### Statement.

Three bills of complaint were filed to establish liens under an act to secure the pay of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work on public improvements, in cities, towns, townships and other municipalities in this State (P. L., 1892, page 369), and the Amendments and Supplements thereto. (Comp. Stat., 3315), against the balance of \$11,659.74 in the hands of the Board of Chosen Freeholders of the County of Hudson due and owing to the defendant, Edward P. O'Neill, on a contract for the improving of a county road of the County of Hudson. 10

One bill was filed by the Hildreth Granite Company, a corporation of the State of Maine, for the recovery of the sum of \$14,619.63. 20

One bill was filed by Patrick J. Maher and John McNichols, partners trading as Maher & McNichols (appellants) to recover the sum of \$8,218.72, with interest from the 29th day of October, A. D. 1914. 30

One bill was filed by the Edison Portland Cement Company, a corporation of the State of New Jersey, to recover the sum of \$1,719.03, with interest from the 15th day of January, 1915.

There is no question as to the amount claimed to be due to each claimant being due.

Proper answers and replications were duly filed and the questions in issue duly raised and set up.

Formal answer was filed by the Board of Chosen Freeholders of the County of Hudson admitting it 40

had the sum of money claimed to be due to the said Edward P. O'Neill in its possession and tendering its willingness to pay said balance in accordance with such decree as the Court of Chancery might make.

No answer was filed in either case by Edward P. O'Neill and decrees pro confesso were duly taken against him in each case.

10

An order consolidating the three suits was duly entered and the three suits were duly set down for final hearing on January 11, 1916, and tried together.

This appeal was taken from the decree of the Court of Chancery by Patrick J. Maher and John McNichols, partners, trading as Maher & McNichols (appellants).

20

No appeal has been taken by the Edison Portland Cement Company.

The only questions to be determined on this appeal are:

First. Whether the Hildreth Granite Company filed its notice and claim in accordance with the requirements of the statute.

30

Second. Whether the Hildreth Granite Company, a foreign corporation, without procuring a license as a foreign corporation could perfect any lien on this fund under its contract with Edward P. O'Neill, viz. (A) Whether the Hildreth Granite Company, a foreign corporation, was transacting business in this State and (B) whether the contract upon which it brought its action was made in this State and whether the Hildreth Granite Company a foreign corporation had a right to lien.

40

Third. Whether the notice and claim of Patrick J. Maher and John McNichols, partners trading as Maher & McNichols (appellants) were filed within the time limited by the statute.

**Notice of Appeal.**

To

Marshall VanWinkle, Esq.,  
 Solr. for Hildreth Granite Co.,  
 a body corporate.  
 Hartshorne, Insley & Leake, Esqs.,  
 Solrs. for Edison Portland Cement Co.  
 John A. Dennin, Esq.,  
 Solr. for Board of Chosen Freeholders of Hud  
 son County.

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Sirs:

Patrick J. Maher and John McNichols, partners  
 trading as "Maher & McNichols," hereby appeal  
 from the final decree made herein, by his Honor,  
 the Chancellor, on the 29th day of March, A. D.  
 nineteen hundred and sixteen, and from each and  
 every part of such final decree to the New Jersey  
 Court of Errors and Appeals in the last resort in  
 all causes.

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Dated March 30th, 1916.

ZIEGENER & LANE,  
 Solicitors for Patrick Maher  
 and John McNichols, partners,  
 trading as "Maher & McNichols.

Harry Lane,  
 Of Counsel.

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I conceive that there is good cause for appeal  
 in the above stated cause.

HARRY LANE,  
 Of Counsel with Patrick Maher  
 and John McNichols, partners, etc.

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**Petition of Appeal.**

To the Honorable the Court of Errors and Appeals  
in the last resort in all causes:

10 The Petition of Patrick J. Maher and John Mc-  
Nichols partners trading as Maher & McNichols,  
the appellants in the above entitled cause, respect-  
fully show that your petitioners find themselves  
aggrieved by the final decree made in the Court of  
Chancery by His Honor, Edwin Robert Walker,  
Chancellor of the State of New Jersey upon the  
29th day of March, A. D. 1916, wherein the parties  
were as set forth in the foregoing title, in this re-  
spect, to wit:

20 That said decree adjudged and decreed that the  
said Hildreth Granite Company is entitled to have  
and receive from the said Board of Chosen Free-  
holders of the County of Hudson the sum of \$11,-  
659.74 now in the hands of the said Board of Chos-  
en Freeholders of the County of Hudson, being the  
balance due from the said Board of Chosen Free-  
holders of the County of Hudson, upon a contract  
made by and between the said Board and the said  
Edward P. O'Neill, for the improvement of Passaic  
Avenue, in the Town of Kearny; that the complain-  
ant, the Hildreth Granite Company, is entitled to  
30 priority of payment to the full amount of said \$11,-  
659.74 over the said Patrick J. Maher and John Mc-  
Nichols, partners trading as Maher & McNichols  
and the said Edison Portland Cement Company,  
and the said Board of Chosen Freeholders is here-  
by ordered to pay said sum to the Hildreth Granite  
Company, or to its solicitor; and in this respect,  
to wit, that the said decree adjudged and decreed  
that the bill of complaint of Patrick J. Maher  
and John McNichols, trading as Maher & Mc-  
Nichols, be, and the same is hereby dismissed with  
40 costs to the Hildreth Granite Company in the suit

of Patrick J. Maher *et al.*, against Edward P. O'Neill *et al.*, up to and including the filing of answers.

And your petitioners humbly appeal from the said decree and from each and every part thereof upon the ground that the same is erroneous for that the Court should have adjudged and determined that the said Hildreth Granite Company had no lien on the funds mentioned in said suits and in said decree; and that its alleged lien was illegal and of no force or effect; that the provisions of the statute for perfecting of a lien were not complied with by the said Hildreth Granite Company; that notices of said lien were not filed with proper officers of the County of Hudson in accordance with the provisions of the statute and that no notice of said lien was filed with the "chairman or the head of the department, council, board, bureau or commission having charge of said work" in accordance with the provisions of the statute, to wit, Par. 37, Comp. Stat. of New Jersey, 1910, page 3317; and that the court should have adjudged and determined the claim of the said Hildreth Granite Company as founded upon a certain contract made and to be performed in the State of New Jersey; that the said County had at other times entered into the said contract, transacted business in this State; that it was a foreign corporation, and that it has not complied with the laws of the State of New Jersey by filing its certificate in this State as required by law in order that it could do business in this State, and that it has never been authorized to transact business in this State; and that it could not recover or maintain its suit on said contract in this State; and that the Court should have adjudged and decreed that the lien of your petitioners against the said funds set forth in the pleadings in said suits was a valid and effective lien and

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that your petitioners were entitled to a priority over the lien of the said Hildreth Granite Company and the other parties to said suits and to be first paid out of said funds in the hands of the Board of Chosen Freeholders of the County of Hudson as aforesaid the amount of their said claim.

10 Your petitioners pray that the said decree of the Chancellor may be reversed, set aside and for nothing holden and that the record may be remitted to the Court of Chancery with the direction to enter a decree, directing the payment to your petitioners of the full amount of their claim as set forth in the pleadings in said suits, and a decree in accordance with the prayer of the bill of complaint of your petitioners; and that your petitioners may have such further and other relief in the matter as to your Honors shall seem meet.

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ZIEGENER & LANE,  
Solrs. for Patrick J. Maher  
and John M. McNichols,  
Partners as Maher & McNichols,  
Appellant.

HARRY LANE,  
Of Counsel.

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IN CHANCERY OF NEW JERSEY.

Between

HILDREDTH GRANITE COMPANY,  
*et al.*,  
Complainants,

and

EDWARD P. O'NEILL, and the  
BOARD OF CHOSEN FREEHOLD-  
ERS OF THE COUNTY OF HUD-  
SON,  
Defendants.

On Bills, etc.

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(Three cases  
consolidated.)

Chancery Chambers, Jersey City, N. J.,

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Tuesday, January 11th, 1916.

Before Honorable EUGENE STEVENSON, Vice-Chan-  
cellor.

Mr. MARSHALL VAN WINKLE, and Mr.  
JAMES E. BENNET (N. Y. Bar), for  
the Hildredth Granite Company.

Messrs. ZIEGENER and LANE (By Mr.  
HARRY LANE) for Maher and Mc-  
NICHOLS.

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Messrs. HARTSHORNE, INSLEY and LEAKE  
(By Mr. CHARLES YOUNG) for the Port-  
land Cement Co.

Mr. JOHN A. DENMAN, for the County of  
Hudson.

JOHN P. NOONAN, sworn for the complain-  
ant.

Direct examination by Mr. Van Winkle:

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Q. What is your employment? A. Assistant  
Clerk of the Board of Freeholders.

Q. Of the Board of Chosen Freeholders of the County of Hudson? A. Yes, sir.

Q. You have been such for a good many years? A. Yes, sir.

10 Q. You have been subpoenaed to produce certain papers, and I think all of the papers in connection with the contract made by Edward P. O'Neill with the Board of Chosen Freeholders of the County of Hudson for the improvement of Passaic Avenue in the Town of Kearny? A. Yes, sir.

Q. Will you please let me see what papers you produce in answer to that subpoena? A. I have the contract.

20 Mr. Van Winkle: Is there any question about this contract between O'Neill and the Board of Chosen Freeholders being entered into as set forth in the bill of complaint?

Mr. Lane: There is no objection.

Mr. Van Winkle: I offer in evidence the contract which is referred to; award of contract approved October 14th, 1913.

Marked Exhibit C, No. 1, Jan. 11th, 1916,  
H. W. K.

30 Q. At the time of the making of that contract, and in November, 1914, who was the chairman or head of the Board of Chosen Freeholders of the County of Hudson? A. Director Witt.

Q. Without giving the name—the Director of the Board? A. Yes, sir.

Q. At that time did the Board have a clerk? A. Yes, sir.

Q. Who was he? A. Walter O'Mara.

40 Q. At the time referred to who was the financial officer of the Board of Chosen Freeholders of the County of Hudson, or the financial officer of the County of Hudson? A. Frederick Rider.

Q. His title would be what? A. County Collector.

Q. Did you keep the lien book in connection with the reception and filing of liens against the County of Hudson, or funds in his hands? A. Yes, sir.

Q. Have you got that book with you? A. No, sir, when I received those liens I docketed them and sent them to our counsel?

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Mr. Lane: We are perfectly willing to admit that all these lien claims, notices and certain bonds were served.

Mr. Van Winkle: Will you admit that the allegations in the bill of complaint of the Hildredth Granite Company with respect to the filing of notices and lien claims and the time of filing and the persons upon whom they were filed are correct?

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Mr. Lane: No, I will admit that the lien claims produced were filed.

Mr. Van Winkle: Will you admit that the notice and lien claim by the Hildredth Granite Company as set forth in the bill of complaint, was filed at the time stated in the bill with the Director of the Board of Chosen Freeholders and also that such notice was filed with the financial officer, the County Collector, at the date given in the bill, and bond given and notice of pendency of action in accordance with the statute?

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Mr. Lane: If the papers are produced I will admit their service upon the different officers that Mr. Van Winkle states, provided he admits the same with reference to our notice, and so forth.

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Mr. Van Winkle: I am glad to be able to do that. That is, the fact of the filing

of notices and the dates of filing of notices and the statement in the bill of complaint of the Hildredth Granite Company as to who these notices were filed with and the giving of notice of the pendency of action by the Hildredth Granite Company are admitted.

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The Vice Chancellor: Is the same admission made with reference to the Portland Cement Co.?

Mr. Young: In view of the fact, that I did not prepare this pleading and in as much as it does make an allegation of various defects, a general allegation perhaps, I do not see how I am in a position to admit that.

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The Vice-Chancellor: I think you had better proceed and prove the case in the usual way.

Mr. Lane: As I understand testimony by this witness given in this case applies to all the cases.

The Vice-Chancellor: By the order of consolidation, the evidence in each case is evidence in all.

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Q. Do you know whether there was received by the Director of the Board of Chosen Freeholders of the County of Hudson on Nov. 5th, 1914, a notice of lien claim by or for the Hildreth Granite Co.? A. I do not know that one was filed with the director of the Board, but I do know that one was filed in the office of the Board on November 6th, 1914.

Q. In the office of the Board, with the Clerk of the Board? A. Filed with me, I docketed it.

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Q. In the absence of the Director of the Board? A. The custom is to file all these liens in the office then they are sent to our counsel who takes the matter up.

Q. Who represents the director of the Board in his absence, with respect to the reception of legal papers of any kind? A. Either Mr. O'Mara or myself.

Q. In the absence of the Director of the Board on November 6th you say that notice of lien claim was received there? A. Yes, sir.

Q. Have you the hour marked there? A. No, I have not got the time. 10

Q. But your books would show the hour? A. It would not show the time.

Q. You say the notice that was then filed was given to the counsel of the Board? A. Mailed to the counsel, yes.

Q. This notice you produced is one that has been served on the County Collector? A. I have not produced that.

Q. Well, it was produced through Mr. Dennin, the counsel of the Board; it has just been produced? A. Yes, sir. 20

Q. I want to know, I am not finding fault, but you see we are being held to strict proof; I want to know where the original notice of lien claim, of the Hildreth Granite Company, filed as you say with the Director of Chosen Freeholders on November 6th, is? A. It must be in the possession of the counsel of the Board. 30

Q. I show you now a paper purporting to be the paper which you have just referred to, is that the paper you referred to? A. Yes, sir.

The Vice-Chancellor: You are showing the witness a paper produced by the counsel for the County Mr. Dennin—the counsel for the Board of Freeholders?

Mr. Van Winkle: Mr. Dennin has produced this paper I am now showing. 40

The Witness: That is the original.

Q. You find on the back your own initials? A. Yes, sir.

Q. And you find your stamp on there showing the reception by the Board of Chosen Freeholders on November 6th, 1914. A. On November 6th, 1914.

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Mr. Van Winkle: I offer this paper in evidence.

Mr. Lane: I object on the ground first that it does not appear to be either directed to or filed with the Chairman or head of the department, Council, Board, Bureau or Commissioners having charge of the said work.

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Mr. Van Winkle: The statute directs it should be filed "with", it does not say to whom it should be directed.

Mr. Lane: Furthermore, that there is no proof this notice has been filed or served with—

Mr. Van Winkle: I have not finished.

Mr. Lane: Do you wish to offer it in evidence or not?

Mr. Van Winkle: As far as he is concerned.

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Mr. Lane: There is no proof of its having been filed with or on the chairman of the department, council Board or Commissioners having charge of the said work.

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The Vice-Chancellor: The paper will be admitted in evidence. It cannot establish a lien of course until the further proof is made, in fact no lien can be established for the amount of this claim, until a great many things have been proved; but the paper will be received in evidence.

Mr. Young: Before your Honor rules will you allow me to make an objection?

The Vice-Chancellor: I will hear you.

Mr. Young: I desire to further object on the ground that it is produced by a person in whose custody it was not at the time of its production.

This was in the custody of Mr. Dennin and it seems to me it should be produced by the Clerk of the Board.

The Vice-Chancellor: Suppose it is not? 10

Mr. Young: I simply make the objection.

The Vice-Chancellor: The paper may be in the hands of a dozen different individuals, but if it is produced here: it may be put in evidence.

Notice of lien claim of Hildredth Granite Company received in evidence and marked Exhibit C, No. 2, Jan. 11th, 1916, H. W. K. 20

Q. I show you a paper purporting to be a notice of pendency of action to be filed with the financial officer of the defendant, the Board of Chosen Freeholders of the County of Hudson, entitled in the case of the Hildredth Granite Company, in the Court of Chancery, as complainant, against Edward P. O'Neill and the Board of Chosen Freeholders of the County of Hudson, and I ask you if that paper was received and filed in your office, and if so when? 30

A. Yes, sir; on November 23rd, 1914.

Q. When I say "your office" I mean the office of the Board of Chosen Freeholders of the County of Hudson? A. Yes.

Mr. Van Winkle: That is offered in evidence.

Mr. Lane: I object to the offer of the paper in evidence on the ground that the proof is not that it has been filed with the Chief Financial Officer of the County. 40

Mr. Van Winkle: This is a copy.

Mr. Lane: Then I object to it on the ground that it is a copy.

The Vice Chancellor: Are you offering the copy?

10 Mr. Van Winkle: I am offering the paper filed with the clerk of the defendant, the Board of Chosen Freeholders of the County of Hudson. We are going, later on to prove the original was filed with the financial officer of the county.

The Vice Chancellor: The statute requires this notice to be filed with whom?

Mr. Van Winkle: With the financial officer. I am merely producing all the papers, although this may have no probative force.

20 The Vice Chancellor (after discussion): Objection is made and I shall have to sustain the objection.

Q. Have you a record in your office, that is the office of the Board of Chosen Freeholders, showing when, the date, this contract was completed, the work under the O'Neill contract. A. We have not got the date of the completion of the work, we have the last payment made on the work.

30 Q. Does the certificate show anything in that regard, the time of the completion?

Mr. Van Winkle: If the Court please, the county engineer has telephoned to me that he is detained in the court room as a prospective witness and cannot be excused, he has tried to be excused; the assistant is here and will help us as well as he can.

40 Is there any question, gentlemen, about the time of completion? How about you Mr. Young?

Mr. Young: We have no objection.

Mr. Van Winkle: What about you, Mr. Lane, cannot we agree that the work was completed on October 31st, 1914, I have the county engineer's letter here.

Mr. Lane: We cannot agree on that, excepting at the same time we can agree on the acceptance.

Mr. Young: We will consent as to the date of completion.

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Mr. Van Winkle: It is consented I understand, that the work under this contract, between O'Neill and the Board of Chosen Freeholders was completed on October 31st, 1914.

Mr. Lane: I will not consent to that unless they also consent to the date of acceptance. I have already made that statement. It was accepted December 7th, 1914. I don't care what later date you may make it.

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Q. Is that the correct date, December 7th? A. I cannot say as to the acceptance I have nothing to show that date.

Mr. Van Winkle: We will agree that the work was accepted on December 7th, 1914. Is that all right Mr. Young?

Mr. Young: Yes, that is all right.

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Mr. Van Winkle: Now, the amount of the contract and the amount of payments made to O'Neill and the amount in the hands of the Board of Chosen Freeholders when our notice was served and the question about retained percentage, is that all admitted?

Mr. Lane: All admitted.

Mr. Van Winkle: All admitted as charged in the bill of complaint. In order that your Honor may have those figures, the full contract price was \$54,906.06, of this amount

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\$43,246.32, had been passed by the Board of Freeholders, on or prior to November 13th, 1914, leaving a balance of \$11,659.74, at the time the Hildreth Granite Company notice was served of which \$2,745.30, would not be due until one year from that time, being five per cent. retained.

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The Vice Chancellor: The retained percentage would be five per cent.?

Mr. Van Winkle: Yes, sir.

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The Vice Chancellor: I did not inquire but I suppose the contract is in the usual form calling for certificates to be made by the county engineer, and payments to be made on certificates, and the certificate being based on the amount of work done up to date, and in payment for which the warrant of the Board would be given in that amount less five per cent. retained.

Mr. Van Winkle: Yes, sir.

The Vice Chancellor: Retained until the completion of the work and its acceptance by the Board of Freeholders.

Mr. Dennin: Yes, and one year thereafter.

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Mr. Van Winkle: That time has expired and we all admit that I believe.

The Vice Chancellor: What is the amount of the Hildredth Granite Company's claim?

Mr. Van Winkle: About \$14,000.

Mr. Lane: The second claim is about \$8,000 and the third one about \$1,700.

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The Vice Chancellor: Is there any question really between you as to the priority of those claims; I do not ask as to the validity of them, but as to priority; if they are all liens, is there any question about

the Hildredth Granite Company's claim coming first?

Mr. Lane: If they show they complied with the statute, there is no question that they come first.

Q. You produced certain claims and assignments in connection with this work on file with the Clerk of the Board of Chosen Freeholders? 10  
A. Yes, sir.

Mr. Van Winkle: I will offer them in evidence if you wish. You may need to see them later.

Mr. Lane: This does not cover the Hildredth Company at all.

Mr. Van Winkle: Nothing special about the Hildredth.

Mr. Lane: If they are the only ones I don't object. 20

The Vice Chancellor: Why put them in? It seems to be admitted there is over \$11,000 due, the only question is who has got the lien; so far no other question is suggested; if the first lien goes out, there is enough money for both of the others and I understand if the first lien goes in there is nothing for either of the others. 30

Q. In the absence of the Director of the Board of Chosen Freeholders, I mean his physical absence, from the office, or room of the Board of Chosen Freeholders, in the County Court House, who is there representing him?

Mr. Lane: I object to that on the ground that it is irrelevant, under the statute which provides for certain specific parties; it is immaterial who is present in a certain 40

office, and I object to it on the further ground that it is incompetent.

The Vice Chancellor: I will take it.

A. Either Mr. O'Mara, the clerk or myself.

10 Q. What accommodations for office room has the Director of the Board of Chosen Freeholders in the County Court House in connection with the Board of Chosen Freeholders; my question has relation to the time this notice which you identified was left with the clerk for the Director.

Mr. Lane: I object to that on the same ground as I made the preceding objection on and on the ground that it is immaterial, incompetent and irrelevant.

The Vice Chancellor: I will allow it.

20 A. He has no special office; he has free access to all the offices in the freeholders' room.

Q. There is, is there not, a room in the Court House called the freeholder's room where the Board of Chosen Freeholders meet when in session as freeholders? A. Yes, sir, we have such a room.

30 Q. And there is besides that, is there not, a clerk's office occupied by the Clerk of the Board of Chosen Freeholders and his assistant, yourself, and the appropriate clerks and subordinates? A. Yes, sir.

Q. And has the Director of the Board of Chosen Freeholders—I mean did he have at the time in question, when this notice was left with you, any accommodations other than those I have mentioned, for occupying any place or office in the Court House? A. No other accommodations, only those that you have mentioned.

40 Q. Is it not true that when the Director of the Board was at the Court House on public business, outside of the time when he was

attending a session of the Board as a freeholder, that he would put in use, occupy, or make his office in, the office of the Clerk of the Board?

Mr. Lane: I object to that on the ground that it is entirely leading.

The Vice Chancellor: Reconstruct your question, Mr. Van Winkle.

Q. What office if any did the Board of Chosen Freeholders of the County of Hudson have in the county court house at the time this notice was filed, in the way you have indicated, other than the Clerk's office of the Board of Chosen Freeholders?

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Mr. Lane: I object to that on the ground it is immaterial because the statute does not provide anything with reference to any office of the Director of the Board of Chosen Freeholders, also as incompetent, immaterial and irrelevant.

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The Vice Chancellor: I will allow it.

A. As a rule that was the office he always did his business in outside of the regular sessions of the Board, the Clerk's office.

Q. At that time were all papers, legal papers, so called, for the Director left, in his physical absence from that place, with the Clerk of the Board?

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Mr. Lane: I object to that question on the same ground as I objected to the preceding question, that there is no provision in the statute for the leaving of any notice with anybody, and as immaterial, irrelevant and incompetent.

Mr. Young has requested that any objections made by me may be considered as also

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made by him without his making separate objections.

The Vice Chancellor: The question is allowed.

A. That office or the office that I occupy.

Q. And the office you occupy is in the room adjoining the clerk's office? A. Yes, sir.

10 Q. It is part of the Clerk's office is it not? A. Yes, sir.

Q. Part of the same suite? A. Yes, sir.

Q. Who stamped this notice on the back, showing its reception? A. I did.

Cross examination, by Mr. Young:

Q. You say that you are the assistant clerk of the Board of Freeholders? A. Yes, sir.

20 Q. Do you know whether the Chairman of the Board, whom you say was Mr. Witt at that time— A. Yes, sir.

Q. —was present when the notice of lien claim was filed in your office? A. I could not say as to that.

Q. The notice was handed to you? A. Yes.

Q. And then you stamped on it the date of its receipt? A. And entered it in the docket.

30 Q. Entered it in the lien docket, is that correct? A. Yes, sir.

Q. Why did you not produce the lien book here? A. Because the original, the copies of these papers were filed with the County Clerk and I did not have the original lien that I received, I didn't think it was necessary to bring the docket book.

Q. The lien book stays in your possession does it not? A. In my possession, yes.

40 Q. But you did not think it was necessary to produce it you say? A. No, sir, it was not called for in the subpoena as I understood.

Q. Does not the lien book show the dates of the receipts of these various papers? A. Yes, sir; it is on the back also of the paper.

Q. Mr. O'Mara was the Clerk of the Board at that time? A. Yes, sir.

Q. Was he present when this service was made upon you? A. I could not say as to that.

Q. What time of the day was the service made? A. I didn't put the time down.

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Q. Cannot you approximate the time? A. I cannot recall; a great many of those papers come in.

Q. You have time stamps in your office, have you not? A. No.

Q. Which you use for the marking of these papers as they are received? A. No, no time stamps, I write the time if necessary.

Q. Is it not the custom to write the name of the officer receiving the paper, on the paper itself, when it receives the stamp? A. I put my initials on there over the stamp.

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Q. Are your initials on that paper which you have in your hand? A. Yes, sir, J. P. N.

Q. I am referring now particularly to the notice of lien claim, you testified that was served upon you. A. Yes.

Q. That was served upon you was it? A. Yes, sir; as I recollect; if you will show it to me I will tell you right away.

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Q. (Exhibit C, No. 2 shown witness.) I show you Ex. C, No. 2 and ask you if that is the notice of lien claim that was filed and served upon you? A. Yes, sir.

Q. When was that served upon you. A. November 6th, 1914.

Q. What became of that paper after it was served upon you? A. Mailed to our counsel.

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Q. Does that also bear your initials? A. Yes, sir.

Q. Did the director or chairman of the Board see that paper at all, as far as you know? A. I do not know.

Q. Did you hand it to him? A. No, sir, I sent it to our counsel.

Q. You sent it direct to Mr. Noonan, your county counsel? A. Mr. Murphy I think was counsel at that time.

10 Q. The bond that was filed by the Hildreth Co. was that filed upon you too? A. No, sir.

Q. Do you know anything about the bond after service? A. I understand it was filed with the county collector.

Q. Who informed you that it was filed with the county collector? A. Mr. Finn, I believe, the deputy collector.

20 Q. You do not know of your own knowledge? A. No, sir.

Mr. Young: Then I move to strike out the answer on the ground that it is hearsay.

The Vice Chancellor: You brought it out yourself did you not?

Mr. Young: It is not proper proof, I can only question him on what he has been asked about.

30 The Vice Chancellor: No, it is not proper proof, what this witness heard about the filing of the paper. It is immaterial whether it remains on the record or not. You may proceed.

By Mr. Lane:

Q. You are simply the assistant clerk of the Board of Chosen Freeholders, are you not? A. 40 Yes, sir.

Q. At the time you received this notice you say you turned it over to the county counsel? A.

Mailed it to him, I think that is what I did at that time.

Q. So far as you know the director never saw that notice? A. I don't know that he did.

Mr. Lane: I presume that the proper thing to do would be to go into this matter of their claim and if their claim is all right we will not have to take any time on our claim. 10

The Vice Chancellor: That is very true; all the evidence is evidence in each case.

Mr. Lane: He is not a witness produced by me however, as yet, I can only cross examine him on what he has been asked about.

The Vice Chancellor: Certainly, unless it is consented that you may. Very often where there is a witness in the situation of this gentleman who has to prove papers in three different claims upon trial, as a matter of convenience his whole story is taken in regard to each set of papers while he is on the stand. If counsel cannot agree on that course, the witness must be retained for use in the other causes. 20

Q. Have you any record of any papers received on the claim of Maher and McNichols? A. I think I did receive such a paper. 30

Q. I show you what purports to be a notice and claim of Patrick J. Maher and John McNichols, partners and so forth, and ask you if you received that notice and if so when? A. Yes, sir, I received the notice on November 25th, 1914.

Q. Is that notice initialed by you as set forth in the prior claim you were speaking of? A. Yes, sir. 40

Q. Was that entered by you in the lien claim docket? A. Yes, sir.

10 Mr. Lane: I offer in evidence this paper which is a notice of lien claim of Patrick J. Maher and John McNichols, partners and so forth, against Patrick J. O'Neill and the Chosen Freeholders, filed on November 25th, 1914, concerning which the witness has testified.

Mr. Van Winkle: It does not say "filed," it is endorsed "received Nov. 25th, 1914."

Notice and Lien claim of Maher and McNichols received in evidence and marked Exhibit No. 1, Maher and McNichols, Jan. 11th, 1916, H. W. K.

20 Q. I show you a notice of pendency of action by Maher and McNichols against Edward P. O'Neill and the Board of Chosen Freeholders endorsed "Received Jan. 13th, 1915," and ask you when that was received by you and how you know it was. A. January 13th, 1915, I know it because I put my initials over the stamp.

Notice of Pendency of Action by Maher and McNichols offered in evidence.

30 Mr. Van Winkle: I object to that as incompetent, immaterial and irrelevant. No notice of pendency of suit needs to be served on the Board of Chosen Freeholders, it is gratuitous and superfluous.

Objection sustained.

40 Q. Have you any other papers in relation to the Mahr and McNichols claim or the claim of the Hildreth Granite Company except what you have just testified to? A. I do not know of any.

Q. You did not receive any of the bonds in this case did you? A. No, sir.

By Mr. Van Winkle:

Q. Do you know whether or not the attorney of the Board of Chosen Freeholders of the County of Hudson had any official papers or files in the office of the Clerk of the Board at the time you received the notice of Hildreth Granite Company, which you have identified? A. I don't know.

Q. Did he have any desk there where he kept any files or records, as far as you know? A. I don't think he had any desk to keep files and records, they were kept for him by— 10

Mr. Lane: I object to any further answer; that requires an answer yes or no.

Q. Do you say they were kept for him, by whom?

Mr. Lane: Objected to as immaterial and irrelevant. 20

The Vice Chancellor: I will receive it.

Q. They were kept for him by whom? A. By Mr. O'Mara or by myself or some of the other clerks; who had the particular matter in charge.

Q. So that whatever paper was left for the director at that time in his absence was left with you or Mr. O'Mara?

Mr. Lane: Objected to as leading and on the further ground that it is immaterial, incompetent and irrelevant. 30

The Vice Chancellor: It is certainly leading.

Q. What was the custom and practice with respect to the papers, legal papers, left to be filed or left for the director of the Board, at the time this notice was received by you?

Mr. Lane: I object to that on the ground that it is immaterial, irrelevant, and incompetent, that is is not called for by the 40

provision of the statute or any other authority, it is just the mere sayso of this man and it makes no difference what the custom was.

The Vice Chancellor: I will take this as I have taken the other testimony that has been objected to, subject to objection and deal with the legal force of it later.

10

A. I do not know that any papers were left with the director at that particular time, if they were they were taken charge of by either Mr. O'Mara or myself.

Q. Don't you remember telling the gentleman who brought this notice of the Hildreth Granite Company to the office of the Clerk of the Board of Chosen Freeholders that Mr. Witt, the director was not there at the time?

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Mr. Lane: I object to that on the ground that it is leading, immaterial and irrelevant and seems to be for the purpose of contradicting his own witness.

The Vice Chancellor: Is it not leading?

Mr. Van Winkle: I think it is.

Q. Do you remember having any conversation with Mr. Mañy at the time he brought this Hildreth Granite Company notice to the office where you received it, with respect to whether Mr. Witt, the director was then present, was present in the office or in the Court House? A. I cannot recall.

30

Q. You do not remember anything special do you about those facts, or about the other notices in this matter? A. No, sir.

Q. But you simply followed, the usual course or practice? A. The general custom.

40

Mr. Lane: I object to that on the ground that it is entirely leading.

Q. Did you follow the usual course of practice?

Mr. Lane: That is objected to as immaterial, irrelevant and incompetent under the statute.

The Vice-Chancellor: I will take it subject to the objection.

A. In this case, as in the others, yes.

Q. How often did the Board of Chosen Freeholders meet in session at the time this notice was served, or around that time, how frequently?

10

Mr. Lane: I object to that on the ground it is immaterial.

The Vice-Chancellor: I will take it.

A. We have meetings, regular meetings, once a month, it may require to have a special meeting in the middle of the month, when it does we meet then.

20

Q. What special work did Mr. Witt do with respect to the Board? A. Presided at the meetings.

Q. That is all he did substantially, preside at the meeting of the Board?

Mr. Lane: I object to that.

A. At the sessions, you mean?

Q. Yes.

Mr. Lane: I object to that as immaterial and irrelevant.

30

The Vice-Chancellor: I will hear your argument at the end of the case; a great deal of this does not seem to be of any value.

Mr. Lane: Will your Honor permit me to make a general objection along that line. I do not want to be interrupting all the time.

The Vice-Chancellor: Certainly. It is perfectly plain that no notice can be established here that is not a legal notice; if a

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lien has been filed contrary to the statute, it is not a lien and at the end of the case I will hear the argument of counsel. Here is a question whether anything but personal service on the head officer of the Board is sufficient to establish a lien; we can take a great deal of testimony as to the custom of the office and after all we come back to the question whether anything but personal service on the head officer of the municipality is sufficient to establish a lien.

By Mr. Young:

20

Q. Who was the Chairman, head officer or Director of the freeholders, if that is all the same person, of the County of Hudson, on January 26th, 1915? A. I have not got the records here to show that now, I think it was George W. Capron.

Q. Was it not Bernard Kulpt? A. On January 26th, 1915?

Q. Yes. A. Yes, sir, I think it was Bernard Kulpt.

Q. Do you know who the County Collector was at that date? A. What date?

Q. January 26th, 1915. A. Bernard Kulpt, if I recall.

30

Q. The County Collector I refer to and the financial officer if that is the same thing. A. Frederick Rider.

Q. Who was the Clerk of the Board of Freeholders on that date? A. Walter O'Mara.

Q. On March 27th, 1915, who was the County Collector or financial officer of the County? A. Frederick Rider.

40

JOHN J. FINN, sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. What is your employment? A. Clerk to the County Collector.

Mr. Van Winkle: There is no question about this man testifying for the County Collector.

10

Mr. Lane: If I want him to testify for me the same way it is all right.

Q. I show you a certain paper marked on the back "Received November 25th, 1914, Frederick Rider, County Collector" and entitled "Hildreth Granite Company v. Edward P. O'Neill. Notice of claim." Can you say whether or not that paper comes from the office of the County Collector or from the County Collector? A. It does; it is from the County Collector's office.

20

Q. Do you know the County Collector's handwriting? A. Yes, sir, that is his handwriting.

Q. That signature is his handwriting? A. Yes, sir.

Q. Referring to the endorsement that I spoke of? A. "Frederick Rider, County Collector" on the notice of claim.

Q. Looking at that claim can you say when that was received by the County Collector? A. November 5th, 1914.

30

Q. Filed with the County Collector on that date? A. Yes, sir.

Q. Is there anything here to indicate what time of the day it was filed? A. No, sir.

Mr. Van Winkle: I offer the notice of claim of Hildreth Granite Company, referred to by the witness, in evidence.

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Marked Exhibit C, No. 3, January 11th, 1916, H. W. K.

10 Q. I show you a paper being a bond by the Hildreth Granite Company, and the American Surety Company of New York as surety, to the Board of Chosen Freeholders of the County of Hudson in the penal sum of \$3,500, dated November 5th, 1914, having on the back "Received November 5th, 1915. Frederick Rider, County Clerk" and I ask you if that bond was filed with the County Clerk November 5th, 1914? A. It was.

Q. Is that the handwriting of the County Collector "Frederick Rider"? A. It is.

Mr. Van Winkle: Is there any question about the bond being in a sufficient sum?

Mr. Young: I have no question about it.

Mr. Van Winkle: There is no question about it?

20 Mr. Lane: No.

Mr. Van Winkle: It is agreed the bond is in sufficient penalty and the amount was fixed by the County Collector in excess of twenty per cent. of the claim.

Mr. Lane: And there will be the same agreement as to all the bonds.

Mr. Van Winkle: Oh, yes.

30 Bond of Hildreth Granite Company in evidence and marked Exhibit C, No. 4, January 11th, 1916, H. W. K.

40 Q. I show you what purports to be a notice of pendency of action to be filed with the financial officer of the defendant, the Board of Chosen Freeholders of the County of Hudson in the case of the Hildreth Granite Company, claimant, against Edward P. O'Neill, and the Board of Chosen Freeholders of the County of Hudson, in Chancery of New Jersey, and ask you if that paper was filed with Frederick Rider, the County Collector, and if so when? A. November 23rd, 1914.

Q. Do you find on the back thereof, an endorsement in the handwriting of the County Collector showing the filing of the paper with him at that time? A. Yes, sir.

Notice of pendency of action of the Hildreth Granite Company offered in evidence and marked Exhibit C, No. 5, January 11th, 1916, H. W. K.

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By Mr. Lane:

Q. Have you similar papers in the Maher and McNichols case? A. I have.

Q. I show you a notice of claims of Maher and McNichols, partners, etc., marked "Received November 25th, 1914," endorsed "Frederick Rider, County Collector" was that claim received in the office of the County Collector on that date and is that his endorsement? A. It is and it was received November 25th, 1914.

20

Mr. Lane: I offer in evidence claim of Maher and McNichols, marked Exhibit No. 3, Maher and McNichols, January 11th, 1916, H. W. K.

Q. I show you a bond given by Maher and McNichols, partners, etc., to the Board of Chosen Freeholders, in the sum of two thousand dollars, endorsed "Received November 27th, 1914, Frederick Rider, County Collector" and I ask you if that bond was filed at that time and approved by the County Collector, if that is his handwriting? A. It was and that is his handwriting.

30

Mr. Lane: I understand that it is agreed that it can be offered the same as your bond Mr. Van Winkle.

40

Mr. Van Winkle: Yes.

Bond of Maher and McNichols offered in

evidence and marked Exhibit No. 4, Maher and McNichols, January 11th, 1916, H. W. K.

10 Q. I show you a notice of pendency of action in the matter of Maher and McNichols partners, etc. v. O'Neill and the Board of Chosen Freeholders, on which service is admitted on January 13th, 1915, by Frederick Rider, County Collector and ask you if that is his handwriting and if that was filed in the County Clerk's Office? A. It was and that is his handwriting.

Notice of pendency of action by Maher and McNichols offered in evidence and marked Exhibit No. 5, Maher and McNichols, January 11th, 1916, H. W. K.

20 By Mr. Young:

Q. Have you similar papers in the case of Edison Portland Cement Company? A. I have, yes, sir.

Q. I show what purports to be a notice of lien claim of Edison Portland Cement Company and ask you if that was served upon Mr. Rider and if so, when? A. Yes, sir, January 26th, 1915.

30 Q. I show you also a bond on behalf of the same company and ask you whether that was served upon Mr. Rider the County Collector? A. Yes, sir, January 26th, 1915.

Q. Do you know whether those papers were served at one and the same time? A. They were served at the same time.

Q. I show you also a notice of pendency of action on behalf of the said company and ask you if that was served on the County Collector? A. March 27th, 1915, it was served.

40 Notice of lien claim, bond and notice of pendency of action, of Edison Portland Cement Company offered in evidence and

marked respectively, Exhibits Nos. 1, 2 and 3, Portland Cement Company, January 11th, 1916, H. W. K.

Q. I refer you to the bond and ask you whether that is for more or less than twenty per cent. of the amount claimed by the Edison Company?

Mr. Van Winkle: There is no question about your bond as far as I am concerned. 10

Mr. Lane: And none as far as I am concerned.

Mr. Van Winkle: We agreed that the bonds were sufficient and were properly filed.

A. It is for twenty per cent.

The Vice Chancellor: I understood you to say your claim was for seventeen hundred dollars? 20

Mr. Young: Yes, \$1700 and over.

Q. On those dates who was the financial officer or county collector? A. Frederick Rider.

The Vice Chancellor: As I understand it the work was completed in November and accepted in December; your claim was filed January 26th, which was a good deal more than fifteen days after the acceptance or completion of the work. My recollection is that the time for filing these liens is within fifteen days after the acceptance of the work. 30

Mr. Van Winkle: There is a case which decides that the claim must be filed within fifteen days after completion or acceptance whichever event occurs first. 40

The Vice Chancellor: However that may be, the order of events as stated is, that the

work was finished October 31st, and accepted December 7, and that gives, according to my understanding of the act, fifteen days from December 7th, within which to file liens.

10 Mr. Van Winkle: The fifteen days computed from the time of the completion if the completion comes before the acceptance.

Mr. Young: The statute says within fifteen days after the same is completed or accepted.

The Vice Chancellor: How are you in this controversy, Mr. Young?

20 Mr. Young: If the work was completed or accepted more than fifteen days before the filing of our claim I believe we are out, but I would like to recall Mr. Noonan.

The Vice Chancellor: We will proceed regularly but I don't want you to be deprived.

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JOHN P. NOONAN, recalled.

Examined by Mr. Young:

30 Q. On the 26th day of January, 1915, you were the assistant clerk of the Board of Chosen Freeholders? A. Yes, sir.

Q. And you are the assistant clerk at this date? A. Yes.

Q. Have you produced any paper with respect to the claim of the Edison Portland Cement Company showing the lien of that company? A. Only what were handed to me here today by Mr. Dennin.

40 Q. I show you what purports to be a notice of lien of the Edison Portland Cement Company in connection with the work on Passiac Avenue,

Kearny, and ask you if that was filed in your office? A. Yes, sir.

Q. With whom was that filed? A. With me.

Q. Might that not have been filed with the chairman or head officer of the Board of Chosen Freeholders? A. I don't think so.

Notice of lien claim of Edison Portland Cement Company marked "Received January 26th, 1915" offered in evidence, and marked Exhibit No. 4, Edison Portland Cement Company, January 11th, 1916, H. W. K. 10

Q. Do you also produce another notice of lien claim which was filed in your office? A. This paper does not bear any stamp, I don't think it was ever received by me in the office?

20

Paper last referred to by witness marked for identification Exhibit No. 6, Edison Portland Cement Company.

Q. Do you know of your own knowledge when the Passaic Avenue work was accepted by the county? A. I do not know, sir.

Q. Would your records show when that work was accepted? A. They may.

Q. Have you in Court any record which will show the time of the acceptance of that work? A. No, sir, only the last payment. 30

Q. What is the date of the last payment? A. This is not the acceptance, but the last payment made by the Board, of the money due for the work.

By Mr. Van Winkle:

Q. Is there any relation at all between this paper you are looking at and the question of acceptance? A. No, sir. 40

Mr. Van Winkle: Then I object to counsel using any material of that sort.

Mr. Young: I will withdraw the question.

The Vice Chancellor: It has been stipulated by all of the counsel that the work was finished on October 31st, and accepted on December 7th, 1914, that is the way the record stands.

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FRANCIS V. MANY, sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. What is your occupation? A. Lawyer.

Q. You have been attorney in this State for how long? A. Thirty or thirty-five years.

20

Q. And you have been associated with Mr. Van Winkle for how long? A. Over fourteen years.

Q. Did you have to do with the serving of notices for the Hildreth Granite Company in connection with their claim against the County of Hudson? A. I did.

Q. I show you Exhibit C, No. 2, of January 11th, 1916, and ask you if you had anything at all to do with serving or filing that notice? A. Yes, I did.

30

Q. With whom did you leave that notice? A. I left it with John P. Noonan in the Freeholder's office.

Q. Do you mean John P. Noonan who testified in this case today? A. Yes, sir.

Q. Where was he when you left the notice with him? A. In the office of the Clerk of the Board of Freeholders.

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Q. The Clerk of the Board of Freeholders in the Court House? A. Yes, sir.

Q. Did you, at that time, make any inquires

with respect to the whereabouts of the Director of the Board? A. I did.

Q. Of whom? A. Mr. Noonan.

Q. Was Mr. Noonan in charge of the clerk's office at that time? A. He was, Mr. O'Mara was not there; I asked for Mr. O'Mara and he was not there and Mr. Noonan was there, he was the assistant clerk.

10

Q. Please state of whom you inquired with respect to the whereabouts at that time of the Director of the Board?

Mr. Lane: I object to that on the ground that it is immaterial, irrelevant incompetent and not in compliance with the statute.

The Vice Chancellor: I will take it.

A. I inquired of Mr. Noonan; he said Mr. Witt was not there; I wanted to know where he could be found; he could not tell.

20

By the Vice Chancellor:

Q. Who was the head of the Freeholders at that time or Chairman or whatever the office is?

Mr. Van Winkle: Mr. Noonan has testified it was Mr. Witt.

Q. Who was it? A. Mr. Witt.

30

Further direct examination:

Q. Go on Mr. Many, and tell us what else was said, if anything in that connection? A. I told him what I was there for; he said any papers for Mr. Witt he would take as Mr. Witt's representative, that papers served that way—he would receive them for Mr. Witt.

Q. At the time you thus left that paper with Mr. Noonan, you knew the requirements of the

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statute with respect to the service or filing or leaving of papers in connection with municipal liens.

Mr. Lane: Objected to as immaterial, irrelevant and incompetent.

The Vice-Chancellor: I will take it.

A. Yes.

10 Cross examination by Mr. Lane:

Q. How long were you with Mr. Noonan? A. Possibly ten or fifteen minutes.

Q. Who else was there besides you and Mr. Noonan? A. There were a number of other clerks around.

Q. You knew that Mr. Noonan was the assistant clerk, did you not? A. Yes.

20 Q. And you knew who was the Director, did you? A. I could not say that I knew then; I inquired of Mr. Noonan to find out.

Q. You knew after he told you? A. Yes, sir.

Q. Did you make any other efforts to find the Director or the chief or head of the department, the County Board, than what you have stated? A. No.

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30 CHARLES W. HARLOW, sworn for the complainant.

Direct examination by Mr. Van Winkle:

Q. What is your business? A. New York salesman of the Hildreth Granite Company.

Q. You have been such how long? A. Two years.

Q. And have been with the company how long? A. Four years.

40 Q. Did you have anything to do with the making of a contract between Edward P. O'Neill one

of the defendants in his case, and the Hildreth Granite Company? A. The making of the contract?

Q. Anything to do with the making of the contract, anything to do leading up to the making of the contract? A. Yes, sir.

Q. What did you do? A. I looked up—

Mr. Lane: I object on the ground it is immaterial. 10

The Vice-Chancellor: I will take it.

The Witness: I looked up Mr. O'Neill's credit.

Q. Did you have any conversations with Mr. O'Neill about the supplying of granite to Passaic Avenue in Kearny in connection with his contract with the County of Hudson? A. Yes, sir.

Q. Did you get to a point where a contract was talked about? A. It had already been reached when I talked to Mr. O'Neill. 20

Q. What had been reached? A. As I understood it, Mr. O'Neill had decided to give us the work.

Q. The Hildreth Granite Company sells granite paving blocks? A. Yes, sir.

Q. I show you what purports to be a contract dated the 15th of May, 1914, between Edward P. O'Neill and the Hildreth Granite Company and ask you whether you ever saw that paper before? A. Yes, sir. 30

Q. When did you first see this paper? A. When Mr. O'Neill sent them to our office on the 6th day of May.

Q. You say "them" I ask you about "it"; was there more than one? A. There were three copies.

Q. A contract in triplicate? A. Yes, sir. 40

Q. Where was your office to which you refer to which he sent these three copies of this paper? A. 290 Broadway.

Q. New York City? A. Yes, sir.

Q. I call your attention to the signature "Edward P. O'Neill" and the seal opposite that signature on this paper, and I ask you if you know when that name was signed there with reference to the time when you state these papers were received at your New York office?

10 Mr. Lane: Objected to as immaterial, irrelevant and incompetent.

The Vice-Chancellor: I will receive it.

A. I do not know when Mr. O'Neill affixed his signature, but he sent them to our office for our signature on the 6th day of May.

Q. On the 6th day of May, my question is, when these papers came to your office, did you find this signature on these contracts? A. Yes, sir.

20 Q. At that time where was the home office of the Hildreth Granite Company? A. 31 State Street, Boston.

Q. Who was the general manager of the Hildreth Granite Company at that time? A. H. B. Hildreth.

Q. Where was his home office? A. Boston, 31 State Street.

30 Q. Was the corporate seal of the Hildreth Granite Company ever in New York? A. No, sir.

Q. Do you know the handwriting of Edward P. O'Neill? A. I do not.

Q. Did you ever see him write? A. I have seen him write.

Q. Do you know the handwriting of Mr. Hopkins, his bookkeeper? A. No, sir.

40 Q. Having received that contract, that agreement in triplicate, this being one of the copies, what did you next do? A. I forwarded them to Boston.

Q. By that do you mean the three copies? A. The three copies.

Q. Was each one signed in the way you specified? A. Yes, sir.

Q. Did you send a letter to Boston with those papers? A. I did.

Q. Have you got the original letter you sent or that was sent? A. (Producing a paper.) There is the original letter.

10

Q. This name at the bottom, C. W. Harlow, Jr., in pen and ink, is that your writing? A. Yes, sir.

Q. Was that written on May 6th, the day it is dated, 1914? A. Yes, sir; the same day that we received the contract from Mr. O'Neill.

Mr. Van Winkle: I offer that letter in evidence.

Mr. Lane: I object to it on the ground that it is immaterial, irrelevant and incompetent and not binding on the parties to this suit.

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The Vice Chancellor: What is the object?

Mr. Van Winkle: The allegation is that the contract in question was made in the State of New Jersey; I want to show that Mr. O'Neill signed this contract in triplicate first and the agreements were sent to Boston and there the contract was made, the agreement accepted, the seal affixed and the general manager signed—and there is another letter showing the contract came back; it is important from our standpoint to show this in view of the defense.

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The Vice Chancellor: I will take it. I understand the witness testified he wrote that letter and enclosed these agreements.

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Mr. Van Winkle: Yes, sir.

The Vice Chancellor: I will take it.  
Agreement between Hildreth Granite Co.,  
and O'Neill, received in evidence and marked  
Exhibit C, No. 6. January 11th, 1916, H.  
W. K.

10 Q. With that letter, what did you enclose you  
say "Enclosed herewith are Edward P. O'Neill's  
signed contracts"? A. I sent three copies signed  
by Mr. O'Neill.

Q. And they went forwarded as far as you know  
to Boston, by mail with this letter? A. Yes, sir.

Q. Did you afterwards receive them, or any of  
them back from Boston with the corporate seal  
of the Granite Co. on them and Mr. Hildreth's  
name as general manager, signed to them or any  
of them? A. Yes, sir; I received two copies back.

20 Q. How long after you had sent the three agree-  
ments, or the agreements in triplicate to Boston,  
did you receive the agreements back? A. I re-  
ceived them in New York on the 16th day of May.

Q. Was any one of them retained in Boston? A.  
One was retained for the Boston files, the original.

Q. And another went where? A. One was kept  
in the New York office and one went to Mr. O'Neill.

30 The Vice Chancellor: How did it go to  
Mr. O'Neill.

Witness: It was sent by mail, your Hon-  
or.

Q. Referring to the coming back of the two  
agreements from Boston, have you an original let-  
ter from the Boston office of the Hildreth Gran-  
ite Company to you or your office returning these  
contracts?

40 Mr. Lane: I object to that on the ground  
that it is immaterial.

The Vice Chancellor: I will allow it.

Mr. Young: I also make the same objection, and object to it as not binding on the Edison Portland Cement Co.

A. I have.

Q. You produce a letter signed "H. B. Hildreth, general manager" dated from Boston, May 15th, 1914, on the letterhead of the Hildreth Granite Company, is that the letter which you received with these agreements? A. That is the letter I received in the New York office. 10

Q. At about what date? A. On the 16th day of May.

Q. On the next day? A. Yes, sir.

Letter of the Hildreth Granite Company offered in evidence, and marked Exhibit C, No. 7, Jan. 11th, 1916, H. W. K. 20

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EDWARD P. O'NEILL, sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. I have here what purports to be a copy of a letter dated May 6th, 1914, addressed to Edward P. O'Neill, 576 Newark Avenue; was that your address at that time? A. Yes, sir. 30

Q. Jersey City, N. J.? A. Yes, sir.

Q. "Dear Sir: We beg to acknowledge receipt of contract signed by you; we have made the change agreed to sometime ago. Yours very truly, HILDRETH GRANITE COMPANY, By———." Did you receive that letter about that day or the next day? A. I think I did receive a letter of that description.

Q. Who has your papers now? A. The receiver in bankruptcy. 40

By the Vice Chancellor:

Q. Do you recollect signing these contracts and

mailing them to the New York office of the Hildreth Granite Company? A. My Bookkeeper signed the contracts.

Q. Do you recollect the fact of their being signed and mailed? A. Yes, sir.

Q. They went by mail, did they? A. Yes, sir.

Q. Afterwards did you get one of them back?  
10 A. No, sir.

Q. You never got one back? A. No, sir, we kept our copy in the office.

Q. Did you send all three? A. Yes, sir.

Q. And sent all three to New York? A. No, the contract was signed by the company and brought over to my office.

Q. Were they signed by the company before they were signed by you? A. Yes, sir.

20 Mr. Van Winkle: I offer this copy of the letter in evidence.

The Vice Chancellor: Is there any objection.

No objection was stated by counsel.

Letter of May 6th, 1914, addressed to Edward P. O'Neill, received in evidence and marked Exhibit C, No. 8, January 11th, 1916, H. W. K.

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CHARLES W. HARLOW, resumes the stand.

Further direct examination by Mr. Van Winkle:

Q. I show you a letter dated May 7th, 1914, on the letterhead of the Hildreth Granite Company, addressed to the New York office and signed "H. B. Hildreth, general manager," and ask you if you know whether that letter was received by  
40 the New York office on or about May 7th? A. Received on the 8th day of May.

Q. That is the original letter? A. That is the original letter, signed by Mr. Hildreth.

Letter of Hildreth Granite Company dated May 7th, 1914, offered in evidence.

Mr. Young: I object on the ground that is not binding on the Edison Portland Cement Company.

The Vice Chancellor: I will take it for what it is worth. 10

Marked Exhibit C, No. 9, January 11th, 1916, H. W. K.

Q. This letter speaks of a contract in the old form? A. Yes, sir.

Q. What can you say as to whether this contract that is here on the table in front of you is in the old form or not? A. That contract is in the old form. 20

Q. Does this letter of May 7th, 1914, have relation to that contract in the old form, being the same paper here in front of you? A. Yes, sir.

Q. That is the contract referred to in this letter? A. Yes, sir.

By the Vice Chancellor:

Q. Do I understand that you were agent in New York? A. Yes, sir. 30

Q. Are there any other representatives of the company there? A. Not now, sir.

Q. Was there at that time? A. At that time there was.

Q. Who else? A. Two gentlemen by the name of Potter.

Q. What were their positions? A. Salesmen also.

Q. Was there any authority there to close a contract like this for the company? A. No, sir. 40

Q. Where had that business to be done? A. In the Boston office.

Q. Was it, as a matter of fact, all done in the Boston office? A. There was never any exceptions taken.

Further direct examination:

10 Q. Do you know of Mr. Hildreth, the general manager ever putting the seal of the corporation and his name to a contract except at Boston? A. Never.

Mr. Van Winkle: I offer this contract in evidence now.

Mr. Lane: I would like to cross examine him in relation to the contract.

20 Mr. Van Winkle: Then I will go on with a little more of the correspondence.

Q. I show you a letter dated May 7th, 1914, on the letterhead of the Hildreth Granite Company addressed to Hildreth Granite Company, 290 Broadway, New York City, signed "Hildreth Granite Company, by Thomas Lahey, Treasurer" dated at Boston; do you know whether or not that letter was received at about that date? A. It was received on the 8th day of May, 1914.

30 Q. By the Hildreth Granite Company's New York office? A. Yes, sir.

Q. And relates to this work, or contract, in question. A. In relation to Mr. O'Neill's credit.

Mr. Van Winkle: I offer this letter in evidence.

Mr. Young: I object on the ground that it is not binding on the Edison Portland Company or the other defendants.

40 Mr. Van Winkle: It bears on the signing of the contract.

The Vice Chancellor: I confess, for the

moment, I cannot see that the paper is of any force whatever, but I will take it.

Letter of Hildreth Granite Company, dated May 7th, 1914, addressed to the Hildreth Granite Company, 290 Broadway, New York City, received in evidence and marked Exhibit C, No. 10, January 11th, 1916, H. W. K.

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Cross examination by Mr. Lane:

Q. Were you ever over in Mr. O'Neill's office in Jersey City? A. Yes, sir.

Q. Prior to the time that this contract was executed? A. By the Boston office do you mean?

Q. Were you ever over in Jersey City in Mr. O'Neill's office, prior to the time this contract was signed by anybody? A. No, sir.

Q. Who else was in the office of the Hildreth Granite Company in New York besides yourself? A. Two gentlemen by the name of Potter.

20

Q. Who was in charge of the office you or Potter? A. I was.

Q. Did you see O'Neill sign this contract? A. No, sir.

Q. Did you see the Hildreth Granite Company or any of their officials sign the contract? A. No, sir.

30

Q. You had done business with O'Neill before had you not? A. No, sir.

Q. In Jersey City? A. No, sir.

Q. Have you done other business since then with him? A. No, sir.

Q. Are you still connected with the Hildreth Granite Co? A. Yes, sir.

Q. How long had you been connected with them at the time this contract was signed? A. About two years.

40

Q. You say that you had charge of the matters

leading up to the signing of the contract? A. Why no, the contract was signed when I came over to New York to look up Mr. O'Neill's credit?

Q. Where were you when you came to New York to look up his credit, where did you come from? A. Boston.

10 Q. Were you in the Boston office at that time or the New York office? A. I was in the New York office at the time I received Mr. O'Neill's contract.

Q. Were you stationed in the New York office or the Boston office? A. The Boston office.

Q. Then you did not know anything about the matters leading up to the signing of the contract? A. Not by Mr. O'Neill.

20 Q. This contract was solicited by Potter? A. Yes, sir.

Q. Before that time had you ever been a salesman in New York? A. No, sir.

Q. Or New Jersey? A. No, sir.

Q. Is Mr. Potter here? A. No, sir.

Q. Either one of them? A. No, sir.

Q. Are they still connected with the company? A. No, sir.

30 Q. Do you say that you received this letter in which they returned the contract to you and told you to see that it was personally delivered to Mr. O'Neill? A. I received that from the Boston office on the 16th day of May.

Q. What day was that? A. The 16th day of May.

At this point a recess was taken

By Mr. Van Winkle:

40 Q. Referring to the contract which was executed by O'Neill and the Hildreth Granite Com-

pany; did you have any conversations with him respecting the execution of that contract by him or by the company with relation to the time when he signed the contract? A. With regard to that I would say when I was sent over here it was to look up Mr. O'Neill's credit before Boston affixed its signature; by appointment Mr. Potter and myself met Mr. O'Neill.

10

Q. Where did you meet him? A. At Connell's.

Q. Is that saloon on the hill? A. Yes, sir, on Summit Avenue; we talked over the matter, and there were several questions that came up at that time, which necessitated my looking up further and also necessitated a trip to Newark, and that was straightened out that night before I left Mr. O'Neill, and on leaving him he asked me if he would get the contract back and whether I had decided to ship him the granite blocks and I told him I would make further investigations at the court house the next day and no doubt we would give him the blocks because I was satisfied with Mr. O'Neill's standing and general character.

20

Q. Was there any talk about when he had to sign the contract, what time? A. No, there was nothing said at that time about when he had to sign the contract?

30

Q. Was there anything said at that time by him or by you to him with respect to when the company would sign the contract? A. Only as to when he would get his copy of the contract back, and whether we had decided to ship the granite blocks to him under the contract.

Q. Can you give us the conversation or the substance of it; you say he wanted to know if he would get his contract back; was there anything said at that time as to whether he at that time had already signed the contract? A. We

40

had the contracts then in our possession and that is why they had not been returned before; you see there were nine days between the time we made that contract and the time of delivering them back and the reason they were held up was owing to the fact that we had not investigated Mr. O'Neill's credit.

10 Q. Are you entirely clear with respect to your recollection that the conversation took place after you had the contract signed by O'Neill? A. Yes.

Q. No doubt in your mind about that? A. No doubt at all, sir.

Mr. Van Winkle: I can prove by this witness also the fact that our blocks went into this work.

Mr. Lane: Go ahead on that one point.

20 Q. Did you have any knowledge of the performance of this agreement that has been offered in evidence, with O'Neill with respect to what work he did at this time on Passaic Avenue? A. Yes, sir.

Q. Did you go out there while he was doing the work? A. Yes, sir.

Q. How often? A. Some weeks two or three times.

30 Q. For what purpose? A. To see how the work was progressing, and I used to also go there when a boat had gotten to see if the stevedore had taken care of it, after notifying him from our office to go there, to start unloading the boat.

Q. You are referring to boats that would bring the blocks of the Hildreth Granite Company to the job? A. Yes, sir.

40 Q. The granite blocks came from the Hildreth Company's plant I suppose to the Passaic River?

A. To the Passaic River, yes, sir.

Q. And somewhere near the job they were un-

loaded? A. Right near the job, alongside the job.

Q. And you say this was one of the purposes of your going there? A. Yes, sir.

Mr. Lane: I object to any further leading questions on this point; it is very leading.

The Vice Chancellor: Yes, it is. 10

Q. Who were the stevedores taking the blocks there? A. The Passaic River Lighterage Company.

Q. What are the names of the men connected with it? A. Mr. Bowers is the man I had all my dealings with, he is the man we notified whenever a boat would get into the harbor so that he could attend to it. 20

By the Vice Chancellor:

Q. Where was the quarry from which the granite blocks were quarried? A. Some came from New Hampshire and some from Vermont.

Q. How were they shipped? A. By cars to the water front, either in New London or Boston.

Q. Then what? A. Transferred from the cars into the boat.

Q. What kind of a boat? A. A barge, a coal barge. 30

Q. And the barge hauled by a tug down to New York? A. Yes, sir.

Q. Where was that barge hauled to? A. That barge was hauled by an ocean tug right down to a point they used to call Red Hook, then we would notify the New York Towing Company and also the stevedores that the barge was in the harbor and to be at the dock at a certain time, so that they could make their arrangements to get their lighter to that point. 40

Q. And they would run it up to the Passaic River? A. Yes, sir.

By Mr. Van Winkle:

Q. In what way were the blocks transferred after being unloaded, to the place where the work was being done? A. By teams.

10 Q. By teams? A. Horses and wagons, I believe.

Q. Going to the job as you say you did, how long would you stay there at those different times and what would you see being done? A. Doing various parts of the work; sometimes they would be concreting, putting in the concrete base, at other times they would be laying the blocks and at other times they would be grouting over.

20 Q. The contract provides that the Hildreth Granite Company should supply sufficient granite paving blocks for the completion of the amount of the work specified in the contract of O'Neill with the chosen freeholders. Was such quantity or amount of paving blocks supplied?

Mr. Lane: I object to that on the ground that the witness is not competent to answer the question.

30 The Vice Chancellor: I will take it. You may cross examine the witness as to the source of his knowledge, later.

A. There were sufficient blocks to complete this work, there were sufficient blocks shipped to have completed the work but at the end of the job we found that we needed, we were some two thousand blocks short, and we took them from a job we were constructing on Ogden Street, just across the river from Mr. O'Neill's work, they were taken from Ogden Street down to finish the work.

40 Q. Are you able then to say that all the granite

blocks of the Hildreth Granite Company that came by barge to the Passaic River front were used in the completion of this paving job?

Mr. Lane: I object on the same ground, that he is incompetent to testify to that.

The Vice Chancellor: I will take it.

A. To the best of my knowledge and belief they were used in the work; of course I did not stay on the job continually and follow each team until it dumped its load on to the work but the stevedore put them in the wagon and supposedly they went to the job which was right alongside the river front. 10

Mr. Lane: I move to strike out the latter part of that answer that supposedly something happened. 20

The Vice Chancellor: Yes, we will disregard that.

Q. What is the way, or what is a way in which it can be ascertained with respect to the quantity of blocks that went into that job—by surface measurements? A. By surface measurements, yes, sir.

Q. Explain that, please. A. Our contract reads that our payments shall be made by engineer's measurements, as paid to the contractor, and by the specifications of the block we make our shipments accordingly, that is, the size of the blocks being a certain measurement, we know from past shipments that they usually run so many to the square yard and make our shipments accordingly. 30

Q. The pay you were to receive was at the rate of one dollar and ninety cents per square yard? 40

Mr. Lane: I object to that. If there is any contract it speaks for itself.

Mr. Van Winkle: It is a contract which will be put in evidence.

The Vice Chancellor: The contract states the price.

10 Q. Did you ever have any conversation with Mr. O'Neill with respect to how much or how many square yards of granite blocks he had received and whether he had received granite blocks sufficient to complete that contract? A. We always got our measurement from the County Engineer.

Q. Did you have any conversation this morning with Mr. O'Neill with respect to that? A. This morning?

20 Q. Yes. A. Why, there was something said about that and he made the remark—

Mr. Lane: I object to what he said; it is not responsive to the question. The question was did he have any such conversation.

Witness: Yes.

30 The Court: That is an objection which cannot come from you; if the answer is not responsive, the objection can only come from examining counsel. Proceed.

Witness: Yes, I had a few words with Mr. O'Neill, with regard to it.

Q. Please tell us what he said in regard to it.

Mr. Lane: I now make the objection that it is immaterial, irrelevant and incompetent.

40 The Vice Chancellor: How can it be material?

Mr. Van Winkle: In proving the quan-

tity of blocks actually used in the work; the admission of a man on the work who is a party to the case.

The Vice Chancellor: How can a statement made this morning by Mr. O'Neill have any probative effect on this case now on trial.

Mr. Van Winkle: I will put him on the stand himself, I will withdraw that question. 10

Q. Do you know whether or not any other granite bocks than the blocks of the Hildreth Granite Company were used in the completion of this work? A. I am quite certain there was not.

Q. Did you use the blocks of any one else? A. No, sir. 20

By the Vice Chancellor:

Q. Do you know how many blocks were shipped from the quarries of the company to this job?

A. Yes, I know how many were shipped, your Honor.

Q. How many? A. (Witness refers to a memorandum.)

Mr. Lane: I object to the witness using a memorandum unless he states what it is. 30

The Vice Chancellor: You can cross examine him about it later.

Witness: 402,836 by boat and approximately 2,500 taken from the other job.

Q. Making a total of what? A. 405,336.

By Mr. Van Winkle: 40

Q. At \$1.94 per square yard, amounting to what? A. We have never taken that amount into

consideration as against engineer's measurements, because that is the basis of settlement.

Q. So you did not figure your bill based on what you knew yourself you had furnished, but you based them on what the engineer returned and applied the prices to his returns? A. Yes, sir.

10 Q. Where did you see the returns of the engineer? A. At the County Engineer office.

Q. You went there for the purpose of making your bill? A. Yes, sir.

20 Q. I show you the bill or account of the Hildreth Granite Company, being part of and annexed to this notice of claim of lien, Exhibit C, No. 2, and ask if that is an account, or a copy of an account which you got up in the way you have described, from your visits from the County Engineer's office? A. Yes, sir.

Mr. Lane: I object to that as immaterial, irrelevant and incompetent, and if there is any such account the original records of such an account should be produced.

Mr. Van Winkle: We expect the man here; I think he is not here yet.

30 The Vice Chancellor: This is not offered in evidence yet.

Mr. Lane: I object on the ground that he is not qualified to answer.

The Vice Chancellor: I will let it stand; the paper is not offered in evidence.

40 Q. Can you tell what amounts were received from Mr. O'Neill by the Hildreth Granite Company on account of the claim of the company against him? A. We have received one check from Mr. O'Neill from this account of \$11,500, a check dated about one week ahead.

Q. Did it go through all right? A. Yes, sir.

Q. In calculating the amount due from Mr. O'Neill did the Hildreth Granite Company give credit for the freight paid? A. Yes, sir.

Mr. Lane: I object to that on the same ground, as immaterial, irrelevant and incompetent and on the ground that this witness has not shown any knowledge on which he could base any such testimony. 10

The Vice Chancellor: I will allow it.

Q. Who paid the freight? A. Mr. O'Neill paid the freight on all barges but the last one.

Q. Credit then were given to him on the amounts due to the company, for the amount of freight paid by him? A. Those were the terms of the contract.

Q. What was the total of credits for freight given by the company to Mr. O'Neill on his account? A. \$13,174.75, both in cash and freight paid. 20

Q. On the proposition that \$27,794.38 was the amount due from O'Neill to the Granite Company, deducting from that \$13,174.75, covering freight and his check that you have mentioned, that leaves a balance of four thousand six hundred and nineteen dollars and sixty-three cents. 30

Mr. Lane: I object to that as entirely leading and the testimony of counsel; we can figure that ourselves.

The Vice Chancellor: It hardly seems worth while to take such testimony, and it hardly seems worth while to object to it. The claim is proved and the credits stated and you do not need to have any testimony in regard to that. 40

Cross examination by Mr. Lane:

Q. You say you did not come into this matter until after the contract had been signed by Mr. O'Neill and then you came for the purpose of looking up his credit? A. That is true.

Q. On what day were you put on this matter?  
A. I have not a distinct recollection of the exact date; it was on the 8th or 9th of May I should say.

Q. Where were you when you were put on this matter? A. Where was I?

Q. Yes. A. I was over here on the 2nd of May and went back to Boston and came back again.

Q. When did you go back to Boston? A. I have not got my book I have got it over in the New York office though, I have all those dates.

Q. You did not come here until the 2nd day of May you say? A. I think it was then, on this matter.

Q. Were you there on the 6th day of May? A. I certainly was.

Q. How do you know that? A. My correspondence tells me that.

Q. What particular correspondence? A. The letter is here.

Q. You say that you came over and met Mr. O'Neill in Connells in reference to this contract? A. Yes.

Q. That is the time they had some controversy with him about some figures or something or another? A. No, I don't believe it was, I believe it was all straightened out before in reference to the prices; I never had any talk with Mr. O'Neill with reference to that personally.

Q. As a matter of fact was there not a prior contract to this in which there were some interlineations and then, afterwards, this contract was drawn up? A. No, sir. I believe the changes

were made in that contract, as I recollect; I do not know.

Q. Will you point out the changes that you referred to, to me? A. This was made up by our New York office before I—there, it has been erased there (indicating).

Q. Do you say that it was erased before it was signed by O'Neill, or afterwards? A. I could not say; I did not see Mr. O'Neill sign that contract.

10

Q. Was this erased before the time you saw it on May 5th or after that? A. I could not tell that either, I don't know.

Q. You do not know that this is O'Neill's signature do you? A. No, sir.

Mr. Lane: I was pointing to the signature on the contract.

20

Q. You say that the seal of this corporation has never been in the State of New York; you have not the custody of that seal have you? A. No, sir.

Q. And you don't know anything about where it goes, do you? A. I only know its home is in Boston and it never goes out of the Boston office.

Q. How do you know that? A. Well that is the usual custom of the corporation I believe.

30

Q. Does not Mr. H. B. Hildreth ever come down to the New York office? A. Yes, sir.

Q. And he comes over to Jersey once in a while? Yes, sir.

Q. You don't know whether that contract was executed by him when he was down here on one of his visits or not do you? A. Yes, sir.

Q. How do you know that? A. My correspondence tells me that.

40

Q. Is that the only thing you base your knowledge on? A. That seems to satisfy me.

Q. Can you recollect whether it was before or after you sent this contract to Boston that you saw O'Neill over in Connell's? A. It was after that.

10 Q. After you sent it to Boston? A. After the contracts were sent to Boston.

Q. And after they came back? A. No, I saw O'Neill before they came back.

Q. You say that you got some blocks from some other job at that time, did you not? A. Yes, sir.

Q. And the other job was right in Jersey City here? A. Right alongside of Mr. O'Neill's job, on the other side of the river.

20 Q. The blocks your company furnished this concern? A. Yes, sir.

Q. Do you know any other people that you were doing business with at that time, in Jersey City? A. I can't recollect now.

Q. Were you on a job for James H. McMullin? A. On what street?

Q. The job he was contractor on, of Newark? A. I can't tell you that.

30 Q. Did you ever hear him? A. Yes, sir, we supplied him blocks.

Q. In Jersey? A. Yes, sir.

Q. Robert Fangiovana? A. Yes, we furnished him blocks.

Q. In Newark? A. Newark and Jersey City.

Q. And Alexander Mihinie? A. Yes, sir, we furnished him blocks.

40 Q. As a matter of fact you have done considerable work in Jersey have you not? A. Yes, sir.

Q. You say that you personally went over and got on this job? A. Yes, sir.

Q. And saw the material and so forth? A. Yes, sir.

Q. How long were you here on the matter? A. I took up my residence here in May.

Q. In Jersey? A. New York.

Q. And you have stayed here ever since? A. Yes, I have.

Q. What were your duties? A. I was manager of the New York office and also credit man as well as salesman.

10

Q. As a matter of fact, how often were you on this job? A. Why I was over and on the job twice and sometimes three times a week.

Q. You mean on the particular job or at some place over at Passaic River? A. On that particular job, I had nothing else in that section at that time?

20

Q. Did you have any other contracts on at that time out there? A. Yes, sir.

By Mr. Van Winkle:

Q. Jobs out there he said? A. Yes, sir.

Q. You had other jobs out there? A. Yes, sir.

Further cross examination:

Q. Did you personally examine these granite blocks? A. Yes, sir, I used to go to every boat, always go to the boat and see what the blocks looked like.

30

Q. You do not recollect from your own memory how many boats you saw there? A. Why, I could tell you right now; there were five boats; my memory would not perhaps tell me that, but by records show me that.

Q. Records you made at the time or records you got from the company? A. The records I made at the time; I always have to check with the records I got from the company.

40

Q. Everytime they sent the blocks you would go out there and check them up? A. Exactly.

Q. Would you count the blocks or have them counted? A. No, sir.

Q. How would you check them? A. The checking would be done by the stevedore; he made out his bill by the thousand blocks.

10 Q. So that of your own knowledge you do not know anything about it except what the stevedore told you? A. From my own knowledge, for I know the record I used to get from Boston used to check with the record that stevedore took off the boat.

Q. As a matter of fact during all this time your company was soliciting business throughout Jersey was it not? A. Soliciting business throughout Jersey?

20 Q. Yes? A. Why—with regard to that I might answer it this way, if there is no objection, and that is if a man sent us an invitation to quote some figures, we of course sent them to him.

Q. Didn't you go out and see O'Neill on this job, were you ever asked to come there by O'Neill? A. No, sir, I did not see O'Neill until May, 1914, when we had already got his signed contract.

30 Q. You did not see these contracts at all after they came from Boston did you? A. I received two of those contracts from Boston and one of them we kept in our New York office, the other being sent to Mr. O'Neill.

Q. And you did not send them yourself through the mail? A. I have not got any sure recollection that I did.

40 Q. Do you recollect receiving a letter from the company, suggesting that the contract, at the time the contract was delivered to him—that you yourself personally go to see him? A. I do.

Q. Did you do it? A. I did not personally, it

may have been done by one of the other salesmen or it may have been sent to him.

Q. Do you recollect whether when this contract came back to you in your New York office and, as you say, was signed by O'Neill that after it got over to your office you made these changes, or these changes were made, of the prices? A. I believe those changes were made by Mr. Potter in Mr. O'Neill's office if I am not mistaken; I am not sure, but I believe they were made by the parties, but I am emphatic in stating they were not made by me.

10

Q. You do not know whether they were made at the time you saw the contract and sent it to Boston? A. I could not say for sure.

Q. Did you send it, you, yourself, to Boston? A. I did.

20

Q. Do you mean to say you cannot state whether this change was made in the price at the time you sent it to Boston or not? A. I believe my letters will show that if you have got the correspondence there.

Q. Can you explain that letter written on the 6th to O'Neill in which you state that you have received, or the Hildreth Granite Company states that it has received, the contract signed by him, and then goes on and says, "We have made the change as agreed"? A. "We have made the change as agreed sometime ago". I could give you my opinion of it; it was not written by me.

30

Q. Did you know anything about it? A. I did not.

Q. Do you say these contracts came into your office? A. I do.

Q. Were sent over to you by O'Neill? A. Yes.

40

Q. What did you do with them while they were in your New York office? A. What did we do?

Q. What did you do with them before they were sent to the Boston office? A. The probabilities are that the change was made then, although it was not made by me, and then I sent them to Boston.

10 Q. You say the change was made after you received the contract signed by O'Neill? A. Actually that is what it says in this letter. "We have made the change as agreed sometime ago."

Q. And you say O'Neill signed that when it read the old figure and after you got the contract you changed it reducing it to another figure? A. It looks that way on the face of it.

Q. Have you any personal knowledge about that? A. I have no distinct recollection.

By the Vice Chancellor:

20 Q. I understood you to say a little while ago your theory was that the change was made by Mr. Potter in O'Neill's office? A. That is the understanding I had at that time, but this letter refreshes my memory to the extent that it states here that Potter did make the change as promised to him at that time.

30 Q. Do you interpret that letter as referring to changes made by Mr. Potter in Mr. O'Neill's office? A. I do not now, although I believed the change was made in his office before the contract was returned to us; it seems by that letter the change was made in our office.

Q. How does it show that? A. "We beg to acknowledge receipt of contract as signed by you."

40 Q. To whom is this letter addressed? A. Mr. O'Neill. "We beg to acknowledge receipt of contract as signed by you. We have made the change as agreed sometime ago." That would lead me to believe that the change was made in our office.

Q. That would lead you to believe the agreement for the change was made sometime ago, and the change was actually made in your office? A. Exactly, that is what I mean to say, your Honor.

Q. At that time, when you wrote the letter, where were the contracts? A. When I wrote the letter to Boston?

Q. No, the letter to O'Neill? A. This letter was an acknowledgment of contract signed by him. 10

Q. Do you know who wrote that letter? A. Mr. H. M. Potter, one of our salesmen at that time.

Further cross examination:

Q. Where does Mr. Potter live at the present time? A. I believe he lives in Montclair somewhere. 20

Q. In the State of New Jersey? A. I think so.

Q. At the time that you met in Connell's with Mr. O'Neill did you have any conversation with him as to the prices? A. No, sir, not to my recollection.

Q. Was the price mentioned at all? A. Not to my recollection.

Q. Did you have any conversation with him with relation to when the contract would be signed? A. Only as I said before, I told Mr. O'Neill I was there to look up his credit and before we signed that contract with him why we would have to be satisfied as to his standing and so forth. 30

Q. As a matter of fact, were not these letters from the Hildreth Company of New York signed by Potter? A. Not if my signature is on them?

Q. Did Potter have anything to do with these contracts after they came into your office? A. After they came into the office? 40

Q. Yes, in New York? A. I do not believe so, except that he might have made that change, because with regard to the change I have not the slightest recollection of making it myself.

Q. Have you any recollection of any conversation with O'Neill in reference to the change? A. No, sir.

10 Q. Do you recollect whether you ever saw this agreement again until after you had begun to do some work for O'Neill? A. I don't get you on that.

Q. Whether you ever saw it after you sent it to Boston? A. Whether I had ever seen it?

Q. Yes, after you sent it at that time? A. I saw it when the two copies were returned to my office.

20 Q. Which copy is that that you have produced here? A. I do not know which that is, there are three of them; they were all alike.

Q. Have you got the three? A. Mr. O'Neill has one and our New York office has one and our Boston office has one.

Q. Where did you get that one from? A. That belongs to Mr. Van Winkle I believe.

30 Q. You have already testified I believe that you did not see any of these signatures affixed to the contract? A. Exactly.

Q. Do you recollect receiving this letter of May 15th, from the Hildreth Company? A. Yes, sir.

Q. Which has been marked Exhibit C, No. 7? A. Yes, sir.

Q. Did you get that letter? A. It was sent to our office and I used to open the New York mail.

40 Q. Do you recollect that letter? A. Yes, sir.

Q. What did you do with reference to that

letter did you see O'Neill. A. Let me read it over. I went to see Mr. O'Neill, yes.

Q. Where did you see him? A. I saw Mr. O'Neill in his office and we drove in his car over to the job, over the turnpike.

Q. That was after you got this letter of May 15th, 1914, Exhibit C, No. 7? A. Yes, sir.

Q. Do you recollect how long it was after you got that letter before you saw O'Neill? A. I cannot recollect just how long after that it was.

10

Q. You went to O'Neill's office with it first you say? A. I went to O'Neill's office with what.

Q. Did you go to O'Neill's office first? A. Yes, sir, I did; that is the place of business where I naturally would make the appointment.

Q. You received this letter with the two contracts in it, were there two copies enclosed in that letter? A. Yes, sir.

20

Q. And you took a copy over to O'Neill did you? A. I did not.

Q. What did you do, just take the letter over to him? A. I did not take the letter over to him, no, sir.

Q. What did you say to him with reference to that letter? A. After that letter, I went over to see him to tell him just the terms of this letter that we expected him to live up to the terms of this contract and he promised that he certainly would do so.

30

Q. Do you mean to say that after receiving this letter with the contracts you went over to see O'Neill in reference to it and did not take the copies of the contract with you? A. I did not. I would remember that part of it if I had.

Q. Had O'Neill received this copy of the contract or not at the time you were over there, do you know? A. I do not know.

40

Q. Nothing was said about it at all? A. No, sir.

Q. As a matter of fact didn't you take that contract over there and refuse to hand it over to him until he had agreed to just what that letter states? A. I did not.

10 Q. You say that you know that this is the old form of contract; how do you know that? A. Well, our new form of contract has a clause in it which states that the contractor shall make no assignment.

Q. You did not require him to sign any such new contract? A. No, those contracts were sent to him I understand in the latter part of 1913, and at that time we had not made up the new form of contract.

20 Q. When was that sent? A. I think copies of this contract was sent to him the latter part of 1913.

Q. And he held them until May? A. Yes, sir.

Q. Now, can you recollect when it was that he signed the contract, was it on the 15th of May? A. No, that is the date we signed; that (indicating) is in Mr. Hildreth's handwriting.

Q. The 15th, day of May? A. Yes, sir.

30 Cross examination by Mr. Young:

Q. At the time of the signing of this contract by your company were you then the manager of the New York office or were you then in Boston? A. I was the manager of the New York office at that time.

40 Q. When did you become the manager of that office? A. I do not recollect the exact date now, I know it was sometime around the first of May.

Q. It was the same month? A. Yes, sir, about that time.

Q. You had been managing the New York office but a week or so? A. Evidently, if it was in the first part of May, and the contract was signed the 15th, I was there two weeks.

Q. And the local end of the signing of the contract, was done by you or under your control? A. What's that.

Q. The signing of the contract at this end was under your control? A. There was no signing of the contract by us at this end.

10

Q. I mean by Mr. O'Neill? A. No, because the contracts were in Mr. O'Neill's hands before I came over here.

Q. Had the contract been signed by Mr. O'Neill while you were still connected with the Boston office? A. I believe that is what brought me over here; if I recollect it right I came over to look up Mr. O'Neill's credit.

20

Q. When was the first time that this contract came to your knowledge at all, this O'Neill contract? A. I do not recollect the exact date, just when it was it came to my attention. I know that this work was in the air—I might explain it this way, the work was in the air and I was sent over to New York to look up other matters besides this, on various lines of credit.

Q. When you say the work was in the air, what does that mean? A. We had not got the contract from O'Neill at that time, the work was in the air for of course we were not sure that—

30

Q. Had there been some talk between your company and O'Neill that the contract might be secured by you? A. Yes, sir.

Q. This contract was with whom? A. With O'Neill by the Potters—

Q. Were you at that time connected with the New York office? A. Yes, sir, salesman there.

40

Q. How long had that been so? A. Since 1911 or 1912, 1911 I think it was.

Q. So that it was through the Potter's efforts this contract was finally obtained from O'Neill, by your company? A. I believe so.

Q. When was the contract finally completed, finally made and signed? A. On the 15th day of May.

10 Q. 1914? A. Yes, sir, 1914.

Q. Were the Potters under your control? A. At that time, yes, sir.

Q. Don't you know now that you instructed one of the Potters to come to Mr. O'Neill's office for that contract? A. I have not any recollection of that fact. You mean the signed contract?

Q. The contract signed by your company but not yet signed by Mr. O'Neill? A. Oh, I didn't get that all, because that could not be the case, we never sign contracts until we get the signature of the contractor.

Q. These changes you have testified to in the contract, were they made before or after the signing of the contract by the parties? A. They were made after Mr. O'Neill's signature was attached as the copy as the letter sent to Mr. O'Neill shows.

30 Q. Would you say they were also made after the company signed? A. They were not made after the company signed because the letter to the Boston office also explains or shows the change in the prices as originally quoted.

Q. There were three contracts executed altogether were there not? A. Yes, sir.

Q. And you say that two of those contracts after they were signed by the Boston office were returned to your New York office? A. Yes, sir.

40 Q. What became of those two contracts? A.

One was kept by our New York office and the other was either sent or carried to Mr. O'Neill.

Q. Your duties in the Boston office were what?

A. Were clerk mostly, and inspector at the quarries, and juvenile salesman.

Q. Did your duties in the Boston office confine you to that office the greater part of the time? A. Yes, sir.

10

Q. Most of your time was spent in the office at Boston? A. A greater part of the time, was, yes, sir.

Q. You have no charge however, of the books of the Hildreth Company in Boston have you? A. No, sir.

Q. And the only knowledge that you have about the amount of blocks shipped to Mr. O'Neill was information imparted to you by the stevedore and the county engineer? A. By the Boston office, first, checked up by the stevedore, as to the amount of blocks shipped, that would give me a check on the final estimate of the county engineer.

20

Q. Have you the returns of the county engineer with you? A. I believe they show on that statement Mr. Van Winkle has.

Q. What statement do you refer to? A. A part of it was read.

30

Mr. Van Winkle: He is referring to the account in connection with the notice of lien claim.

Q. I am referring particularly to the engineer's reports; were they made in writing? A. By the engineer do you mean, to us?

Q. Yes. A. No, sir, we got them from his record.

40

Q. From his record? A. Yes, sir.

Q. Made by whom? A. The measurement was

gotten by the county engineer who had his assistant measure up the work.

Q. You have mentioned that your concern has done other work in Jersey? A. Yes, sir.

10 Q. Can you state some other contracts that were made here or where your company did other work in New Jersey? A. I cannot off hand without looking at my records, I don't know what it has to do with this case.

Q. Did your company do work for a man named Coughlin on Montgomery Street, work? A. Yes, sir.

Q. Was there a contract covering that work? A. Yes, sir.

Q. Made with your company? A. Yes, sir.

By the Vice Chancellor:

20 Q. Made where? A. The same place as this contract.

Q. In Boston? A. Yes, sir.

Further cross examination by Mr. Young:

Q. Were there other contracts with other contractors? A. Yes, sir.

30 Q. There was work that you did with Mr. O'Neill that you did on another job, was there not? A. I believe a curbing job, a little amount of curb was shipped him; I don't believe, in fact I know, there was no contract made for that, we just sent it on a written order.

Q. Was that after or during the Passaic Avenue job? A. I believe it was during the construction of that work.

Q. You refer to the Concord Street job in Jersey City? A. Yes, sir.

40 Q. Did you not solicit that work from Mr. O'Neill, you or someone from your company? A. We did not solicit that, he just said he needed so much curb and sent up an order for it.

Q. Where was that order sent? A. To the New York office and forwarded to the Boston office.

The Vice Chancellor: Accepted there in Boston.

Witness: Accepted in the Boston office.

Q. Does that account appear in your Boston office. A. Yes, I believe it does.

Q. You have not that book with you? A. No, sir. 10

Q. Do you keep books in the New York office? A. No, just statements of account, that is all.

Q. Did you bring the statement of amounts with you? A. No, sir, there was no occasion for it because Mr. Van Winkle had all the figures and I did not think it was necessary.

Q. What have you to show, other than your mere word, that these goods were delivered to Mr. O'Neill? A. I have the bills of lading. 20

Q. You have those in Court, here? A. No, sir.

Q. Is his account present in Court? A. What is that?

Q. You have nothing present in Court in writing which shows that? A. No, I believe Mr. O'Neill knows the blocks were shipped by us and would acknowledge that fact.

Q. You do not recall when you sent the contract up to Boston after it was returned to you by O'Neill? A. I believe the correspondence states it is on the same day it was received from Mr. O'Neill, namely, on the 6th day of May. 30

Q. That is the same day you sent the contract to Boston? A. Yes, sir.

Q. When the contract was returned to you with instructions to deliver it to Mr. O'Neill, was it not with the understanding or was it not your instructions not to deliver that contract unless Mr. O'Neill agreed—unless it was agreed by Mr. O'Neill 40

that the contract was to be kept in his own name and not to be assigned to any one nor was he to make any assignment of the moneys coming due under the contract.

10 Mr. Van Winkle: I do not see the competency of the testimony and unless counsel can point out something making it competent, I object.

The Vice Chancellor: I do not see the competency or relevancy of any thing that has been put in this case for the past hour; there may have been something but it has passed my observation. However I will let that stand.

20 Q. What is your answer? A. I would like to have the question repeated.

(Question read by stenographer.)

The Vice Chancellor: What is the relevancy?

Mr. Young: Only this, that unless all the terms were agreed to, including the delivery of the contract itself, it is not a contract, as soon as everything is complied with, then it is complete.

30 The Vice Chancellor: Your point is this contract was never delivered until this day.

Mr. Young: That the instructions from the parent company to this man formed part of this contract and that there was no acceptance of that contract until those terms were complied with.

40 The Vice Chancellor: I would like to see the letter that accompanied the contract.

Mr. Young: It is a letter of May 14th, 1915, in which they say (Mr. Young read the letter referred to).

Witness: All they expected Mr. O'Neill to do was to live up to the terms of his contract as agreed with us, both in writing —by my company and by Mr. O'Neill in writing.

Mr. Van Winkle: I have in evidence the contract which he has been examined on.

Mr. Lane: I object to it on the ground that it has not been properly proved to be a contract, the signatures have not been proven, and on the further ground that it is immaterial, irrelevant and incompetent. It appears from the testimony so far, that it was an alleged contract entered into in the State of New Jersey by a foreign corporation in violation of law.

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The Vice Chancellor: I will accept the instrument subject to objections.

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THOMAS WASSER, sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. What is your profession? A. I am a civil engineer.

Q. What is your official position? A. I am county engineer of Hudson County.

30

Q. As county engineer of Hudson County, did you have to do with the supervision and measurement of the work done in the improvement of Passaic Avenue in the Town of Kearny, by Edward P. O'Neill for the county? A. The work was under my charge.

Q. Did you have an assistant there with you? A. Yes, sir.

Q. Who was your assistant? A. The field engineer in charge was Mr. Lewis Scott.

40

Q. Is he an engineer? A. Yes, sir.

Q. Who is the man that made for you and under your supervision, a measurement of the square yards of granite block that went into that improvement? A. Mr. Scott.

Q. After he had measured those blocks did he submit his measurements to you? A. Yes, sir.

10 Q. What did you do as county engineer with those measurements afterwards? A. I notified the commissioner of public roads at Trenton that the work was completed.

Q. Basing your report on the measurements made by Mr. Scott? A. Yes, sir.

Q. Have you with you a copy of your report to the man you spoke of—the official you spoke of? A. I have.

Q. Please produce it. The original I suppose it is? A. Yes, sir (producing paper).

20 Q. What was the date of the completion of the work?

Mr. Lane: I object to that, I understand that has been stipulated and agreed to.

Mr. Van Winkle: For Mr. Young's sake I wanted to give him an opportunity of contesting it if he wanted to.

30 Q. What was the total measurement in square yards of the granite paving on that work. A. 14,342 square yards.

Mr. Young: If your Honor please I desire on behalf of our clients and perhaps on behalf of Mr. Lane's clients, to object on the ground that he is testifying from some record not made by him.

40 The Vice Chancellor: I cannot tell; he answers the question directly. You may on cross examination find where he derived the information.

Mr. Young: He says these are Mr. Scott's entries.

The Vice Chancellor: Of course, Mr. Van Winkle, there is no use bringing out testimony which is hearsay.

Mr. Van Winkle: I want to show the measurements reported by him and show where he got the information.

10

The Vice Chancellor: From his statement it would appear that Mr. Scott is the witness to prove the number of square yards.

Q. Did you make a certificate with respect to the number of square yards? A. Yes, sir.

Q. When did you file that? A. January 8th, 1915.

Q. Is this a copy of your certificate? A. That is a copy of the certificate sent to Colonel Stevens.

20

Q. I am desirous of getting information as to what your certificate contained, how many square yards you certified to, no matter where you got your information. A. 14,342 square yards of granite paving, in addition to other items of work.

Q. Did you certify that amount to the freeholders and also to Colonel Stevens? A. I do not believe I certified that to the freeholders, for the reason that the last estimate which I certified to them calls for thirteen thousand and the final measurements had not been made and I was informed that litigation was likely to occur.

30

Q. First was the estimate and then came this certificate? A. The progress payments.

Q. Your certificate certifies that 14,342 yards of granite paving went into this work? A. Yes, sir.

40

Cross examination by Mr. Lane:

Q. And it also certifies that 2,873 cubic yards of concrete base went into that pavement? A. Yes, sir.

10 Q. And it also certifies that there were 7,298 lineal feet of 5 x 15" blue stone curbing set in concrete, is that it? A. I don't know; of course, I don't know the sub-contractors there, Mr. Scott can tell about that.

Mr. Young: These figures you certified to the state road commissioner you say?

Witness: Yes, sir.

By Mr. Young:

20 Q. You got these figures from some one else, did you? A. That is based on figures submitted to me by Mr. Scott of my department from his actual measurements.

Q. You have no knowledge, of course, as to the measurements? A. No.

30 Mr. Young: I move to strike out his testimony as to the amount certified by him to the state road commissioner on the ground that he has no knowledge of the measurements and the figures were obtained by him from someone else.

40 The Vice Chancellor: I will let the testimony stand. No objection was made at the time. The witness stated, at the very start he did not make the measurements, but Mr. Scott made them and then he testified he made certain certificates. What the force of that testimony may be in the future I do not know; no objection was made as to the testimony he gave in regard to those figures. The testimony may stand although it may prove to be of no force.

Q. Do you know of your own knowledge when the work of the Passaic Avenue job was completed? A. On October 31st, 1914, it was reported to me completed; I saw the work was completed, and I wrote Colonel Stevens asking him to make the final inspection of it.

Q. Do you also know of your own knowledge when the work was actually accepted by the county? A. Yes, sir; I accepted it, with Colonel Stevens, on December 9th; I met him and went over the work, Colonel Stevens. The state pays a portion of this work.

10

Q. Is it the County Engineer or the Board of Freeholders which accepts? A. Well, it was the County Engineer and the State Road Commissioner accepting the road.

Q. Did the Board of Freeholders at any time accept this work as completed? A. I cannot tell you off-hand, now.

20

Q. Did you make a report to the Board of Freeholders that the work was completed? A. I had reported to the Board of Freeholders that the work was completed.

Q. Do you attend the meetings of the Board of Freeholders of Hudson County? A. Some meetings I do and some I do not.

Q. Did you attend a meeting of the Board of Freeholders at which the work on Passaic Avenue was accepted by the county. A. I may or may not have done so, but I send communications to the Board, and they act on my communications.

30

Q. When did you send a communication to the board with respect to the acceptance of this work? A. I do not recall that I did, I told you that as the work progressed I was notified that there was litigation over it and there was no final estimate put in by the contractor and I

40

notified the commissioner that the work was completed, as it really stood.

By the Vice Chancellor:

10 Q. I didn't quite understand your last statement. You said that you had heard during the progress of the work, presumably near the end of it, that there was litigation and that no final report was made. A. No, no final estimate was submitted to the Board of Freeholders.

Q. Have you made that final estimate? A. No, sir, except to the Commissioner of Public Roads, in order that they could send the money from Trenton to the County Collector of Hudson and have it to be disposed of when the final order would be presented to the Court.

20 Q. When was that final estimate made by you? A. January 18th, 1915.

30 Q. Then down to that time you, as County Engineer, had no authoritative ascertainment of the total amount due? A. I may answer that in this way, the work as originally laid out is estimated, the quantity, the work as it progresses is measured up; there were six progress reports made on which payments were made; that did not complete the work and then we go out and measure it—the men did, went out and measured it, the entire work, and deducted the former payments from it. I think six payments had been made, and there was a notice served on me that—  
40 I cannot recall just by whom, it had possibly been served on the Board of Freeholders, that there were to be no more payments on this Passaic Avenue work as the matter was now in Court. The result was that in order to get the money from Trenton to the county I made up a final measurement; I notified them that the work was completed, and we fixed a day and Colonel Stevens joined me and accepted the work.

Q. That was on December 9th? A. Yes, sir. And then I filed a certificate January 18th, with the Commissioner on which he sent the money, a portion of the money, to the County Collector.

Q. Down to January 18th, had you made any estimate of the entire amount due, from which of course the six progress payments would be deducted? A. Oh, in October it was all measured up.

10

Q. It was all measured up then? A. Yes, sir.

Q. Who did that? A. Mr. Scott measured that, in October.

Q. This paper which you made out and sent to Trenton, on January the 18th, was that merely— A. A copy of the report.

Q. A statement of the results? A. Yes, sir.

Q. Which had been secured— A. In October.

Q. Measurements that had been made then? A. Yes, sir.

20

By Mr. Young:

Q. Then on what date would you say the work was accepted by the County of Hudson?

Mr. Van Winkle: I object to the question in that form.

(Question withdrawn.)

30

Q. Do you know whether the Board of Freeholders would accept an improvement such as the Passaic Avenue improvement except on a final statement or report from you as county engineer? A. No.

Q. Now then, tell us whether you did or not make that final report to the Freeholders in connection with the Passaic Avenue job so as to have them accept that work? A. I endeavored to explain that.

40

Q. You can answer that question yes or no,

whether you did make a report advising the acceptance? A. I cannot answer it yes or no.

Q. All right give us your explanation. A. I did not know this work was going into litigation and it is customary when the contractor presents his final bill that I O. K. it and call for its acceptance; that final bill was never presented in this case and I could not do that.

10

Q. So that as a matter of fact, you did not make any final report on this job? A. I cannot say that I did to the Board of Freeholders, I am not positive of it.

Q. You do not know whether you did or not make a final report? A. No, it might have been in the form of a letter to them that the work was completed.

20

Q. Would you not go further and say that the work was completed— A. If it had been I might.

Q. What would you say then? A. Recommend a day to go out and inspect it.

Q. In this case did you recommend a day to inspect it? A. No, I don't believe I did. I notified them that it was completed.

30

Q. Has the matter been finally determined in the Board of Freeholders? A. I don't know, there has been nothing further done. I was informed by the assistant clerk that there were to be no further estimates on this work. Now, that is where I stop.

Q. You mean what? A. Estimates of progress, progress reports on it, progress payments.

40

Q. Reports made by the county engineer. A. My department makes an estimate of the work done, the contractor presents a bill, we compare them, if they compare, I certify to it for payment; it never reached a point of the final bill being presented.

Q. So, that being the case, there could be no

acceptance of the Passaic Avenue work? A. Well, I—the State Road Commissioner accepted it.

By Mr. Van Winkle:

Q. What is that? A. The State Road Commissioner accepted it.

Q. When did he accept it? A. November 9th.

Mr. Van Winkle: This is a long contract and I take the opportunity of calling attention to the provision providing for payment. 10

(Mr. Van Winkle read from the contract in evidence the provision concerning acceptance by the State Road Commissioner.)

Q. On December the 9th, he accepted it? A. December 9th. 20

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LEWIS S. SCOTT, sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. What is your business? A. Civil Engineer.

Q. Are you assistant to Mr. Wasser, the County Engineer? A. Yes, sir.

Q. Were you such assistant at the time Passaic Avenue was being paved in Kearny? A. Yes, sir. 30

Q. Are you the man that measured the work as it progressed and furnished Mr. Wasser the material for his estimate and report? A. Yes, sir.

Q. Mr. Wasser has stated that he received certain measurements from you with respect to the granite paving used on that work and he gave the figures 14,342 square yards of granite pavement; did you measure the granite pavement used 40

in the completion of that work? A. Yes, sir, I measured it, the final work.

Q. What can you say with respect to the number of square yards of granite paving used in the completion of that work? A. 14,342 square yards of granite pavement to finish up the work.

10 Q. Did you make actual measurements? A. Yes, sir, I was right there in the field work.

Q. Accurate measurements? A. Yes, sir.

Q. And they show that result? A. Yes, sir.

Q. When you got that result did you report to Mr. Wasser? A. Yes, sir.

Q. I suppose before that time you reported partial measurements? A. As the work progressed I always reported to Mr. Wasser.

20 Q. Did you bring with you your measurements and memoranda? A. I have a card here for making up my final report.

Q. That card is made from memoranda made at the time? A. It was made at the time on the work. It is a card showing the amount of material derived from measurements at the completion of the work.

Q. When you made the measurements did you put the result right on the card? A. No, sir, I put it on my field notes.

30 Q. Where are your field notes? A. They are up in the office.

Mr. Van Winkle: Is there any further contest over the amount of granite blocks that went into the work?

Mr. Young: I think we have a perfect right to be shown.

40 Q. Where is your card? A. I have the card here. We cannot let that go out of the office without the permission of Mr. Wasser.

Q. You made the measurements and made your

memorandums and you are sure of that result being correct? A. Yes, sir.

Mr. Young: I object to that line of question as being entirely leading.

The Vice Chancellor: That was entirely leading.

Cross examination by Mr. Lane:

Q. I ask you if you also made this estimate of 7,298 lineal feet of five by sixteen blue stone curbing? A. Yes, sir.

10

Q. And 2,873 cubic yards of concrete base? A. Yes, sir.

Q. You did that in the same way as you have testified you did, in reply to Mr. Van Winkle, in reference to the square yards of granite? A. The amount of material on that particular job.

20

By Mr. Young:

Q. You are not testifying from your own knowledge, as to the quantity of granite pavement? A. I am not?

Q. Yes. A. Yes, I am.

Q. Are you not testifying from some notes you made? A. Well, you have to make notes to know the amount of material so that you can figure up the quantity, the same as lawyers have to make notes on paper as the case progresses; I have to do the same thing.

30

Q. Without the use of that card, would you be able to tell us what quantity of granite pavement went into the Passaic Avenue job? A. Well, I am on so much work all the time that if I did not make records of the particular jobs I am on from year to year, I would not be able to tell, unless I had records of them.

40

Q. The card you have there, is that a copy of notes you made at the time of the measurements?

A. That is the final result of my figuring of the measurements made on that work.

Q. You did, however, make records from which you made that resume if I may call it that? A. Yes, sir, I have to make a record in order to know the amount of measurements, the lineal feet, so as to figure out and get the final results.

10 Mr. Young: If your Honor please, I desire to object to the testimony of Mr. Scott on the ground that he is testifying from records not made at the time of the making of the measurements; it is really a copy of the records made at that time.

20 The Vice Chancellor: I will let the testimony stand. It may be, if this matter is contested, the failure of the witness to produce the original field notes where he put down the measurements as he made them on the ground, will be a matter of very great importance affecting the force of the testimony.

By Mr. Van Winkle:

Q. Have you got your field books? A. I have not got them here.

30 Q. Have you got them some place? A. I am pretty sure they are in the court house.

Q. Can you produce them if necessary? A. I believe I can.

Q. You can produce them? A. I believe so.

Mr. Van Winkle: I am through with the witness reserving the right to recall him to make this matter plain.

EDWARD P. O'NEILL, recalled for the complainants.

Direct examination by Mr. Van Winkle:

Q. Did any other granite paving block go into the completion of the Passaic Avenue, Kearny, contract that you had with the Freeholders than the granite blocks of the Hildreth Granite Co.?  
A. No, sir.

10

Q. Have you any knowledge or recollection of how many blocks went in or how many square yards?  
A. No.

Q. Did you measure, yourself, at all?  
A. After the job was completed we went over it and found the engineer's measurements were correct.

Q. You confirmed that by measurements as well as you could?  
A. Yes, sir.

Q. And found his measurements to be correct?  
A. Yes, sir.

20

Q. How long a space was paved with this improvement?  
A. About a mile and a quarter.

Q. How wide was the street?  
A. Thirty-six feet, about thirty-six feet.

Q. Was all that surface paved with these granite blocks?  
A. Yes, sir.

Cross examination by Mr. Lane:

30

Q. Was all the cement that was furnished on that job and the sand and stone and curbing furnished by Maher and McNichols?  
A. Not all the cement.

Q. By whom was any other cement furnished?  
A. The Edison Portland Cement Company.

Q. Was all the cement with the exception of what was furnished by the Edison Portland Cement Company furnished by Maher and McNichols?  
A. Yes, sir.

40

Q. Was all the other stuff, the sand, stone and

curbing furnished by Maher and McNichols? A. Yes, sir.

10 Q. Are you familiar with the account of Maher and McNichols with you with reference to the sand and cement and stone and curbing, and material furnished by Maher and McNichols in reference to this job? A. I was at the time they presented the bill, I checked it up and found it correct.

Q. You did, at that time, find the bill correct? A. Yes, sir.

Q. Can you state as to how much was due from you to them? A. Somewhere around eight thousand dollars.

20 Q. Can you state whether this bill of \$8,218.72 is a correct statement of the amount of material that was furnished by Maher and McNichols, material, labor and so forth on this job (handing witness a paper)? A. It is.

By Mr. Van Winkle:

Q. Can you say whether the account of the Hildreth Granite Company annexed to the notice of claim, an exhibit in this case, is a correct statement of their account against you and shows the proper amount of credits? A. It is.

30 The Vice-Chancellor: Do I understand that all material for which these two bills which have been shown to you were made out, actually went into this job.

The Witness: Yes, sir.

By Mr. Young:

40 Q. In addition to the material furnished by the Hildreth Granite Company and Maher and McNichols, did the Edison Portland Cement Company furnish any material to you? A. They did.

Q. Can you tell us the amount of material that they furnished you? A. Well, I really forget now,

but I remember checking the Edison people's cement bill, and I found it correct to the amount of \$1,700.

The Vice-Chancellor: Did all of that material go into this job?

The Witness: There was some of that material I don't think went into that job.

Q. Can you tell us what part of that material went into that job? A. The biggest part of that, about two thousand barrels of cement.

Q. Do you know where the other material went to? A. Yes, on Concord Street, Jersey City.

The Vice-Chancellor: Was that a paving job?

The Witness: Yes, sir.

Q. Did any of the material that was furnished by the Hildreth Company or by the Maher and McNichols Company, go into any other job than the Passaic Avenue job? A. No, sir.

Q. I show you a contract purporting to be made by the Edison Portland Cement Company and Edward P. O'Neill and ask you if that bears the signature of Edward P. O'Neill? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Mr. Young: I offer in evidence the contract between Edison Portland Cement Company and Edward P. O'Neill.

Marked Exhibit No. 7, Portland Cement Company, Jan. 11th, 1916, H. W. K.

By Mr. Lane:

Q. Did you sign this contract with the Hildreth Granite Company, Exhibit C, No. 11? A. No, my foreman signed it, or rather, my bookkeeper.

Q. What is his name? A. Hopkins.

Q. At the time that it was signed by him can

you state whether or not the signature of the Hildreth Granite Company was on there? A. Those signatures were.

Q. Where was the contract at the time it was signed? A. In my office on my desk.

Q. In Jersey City? A. Yes, sir.

10 Q. Who was present besides Mr. Hopkins? A. There was noboddy present, only Mr. Hopkins and I.

Q. How did you get the contract? A. It was brought to us by Mr. Potter.

Q. Did he go away and leave it there? A. He left it there.

20 Q. At the time that this contract was signed by Mr. Hopkins, had that change been made, a dollar ninety-four, or not, or do you remember? A. There was talk about changing something in regard to the price per square yard on the granite blocks at that time between Potter and I.

Q. Did you sign the contract before you had that corrected or not—I mean did you have Hopkins sign the contract before you had that corrected? A. It was signed before there was any change.

Q. Signed before there was any change? A. Yes, sir.

30 Q. Do you mean the one dollar and ninety-four cents was put in there after it was signed by Hopkins and the Hildreth Granite Company? A. Well, to the best of my knowledge the price was one ninety-six and they lowered the price to one ninety-four; I am not sure about that. There was that change in the price anyway of the square yard of two cents.

40 By the Vice-Chancellor:

Q. Do you say Mr. Potter was present when

these papers were signed? A. No, he was not; he brought them to the office and left them there.

Q. How many? A. Three of them.

Q. Then you say your bookkeeper signed them? A. Yes, sir.

Q. All three of them? A. Yes, sir.

Q. What was done with them then? A. They laid in the office for a week I suppose, and I ordered him to send them back. 10

Q. Are you sure that at that time they were signed by the Hildreth Granite Company? A. Yes, sir.

Q. All three, signed by the Hildreth Granite Company remained in your possession for a week?

A. No, they remained in the office for a week before I signed them, or had any man sign them.

Q. But signed by the Hildreth Granite Company? A. Yes, sir. 20

Q. He then signed them, and then what was done with them? A. We kept them in the office for about a week before I agreed to sign it and then I told my bookkeeper "You sign and send those things back."

Q. Then they were signed? A. Yes, sir.

Q. And you sent all three of them? A. No, sir, I sent two back and kept one.

Q. You sent two back? A. Yes, sir. 30

Q. Did that close the matter? A. As far as I am concerned, yes.

Q. Did you receive any communications in regard to it from the New York office afterwards?

A. I cannot remember that.

Q. Are you quite sure that contract was signed by the Hildreth Granite Company at that time?

A. I am sure of it, yes sir, I am sure of it. 40

By Mr. Lane:

Q. How did you come to get in touch with the

Hildreth Granite Company did they come to you or did you go to them? A. They came to me.

Q. In reference to getting the contract do you mean? A. Yes, sir.

Q. Who came? A. Mr. Potter.

Q. Did you see Mr. Harlow, at all? A. Not at the time the contract was let, no sir.

10 Q. Did you have a meeting with him up in Connell's? A. That was long after I got the contract.

Q. What was that in relation to? A. In relation to my credit.

Q. At that time had they sent you any blocks yet or not? A. No, sir.

Q. Under that contract? A. No, sir.

20 Q. Had you at that time requested them to send blocks? A. No, sir.

Q. How did it happen he came up there? A. He came there to see me, looking my credit up at the Court House.

Redirect examination by Mr. Van Winkle:

Q. This change in the contract was from one-ninety-six to one-ninety-four a square yard? A. I think so, as far as I am concerned.

Q. A change in your favor? A. Yes, sir.

30 Q. You wanted the change made? A. Well, no, Potter agreed to that change? Q. Did you not want it? A. Well, I did not request it.

Q. So then the contract was signed with your knowledge that it was to be, if it had not then been, reduced so that the price would be one-ninety-four; you expected the contract to be changed to one-ninety-four? A. Yes, sir, and one-ninety if they would do it.

40 Q. One-ninety-four you agreed to? A. Yes, as long as it was lower than one-ninety-six, I didn't care what they did with it.

Q. Anything lower than one-ninety-six, Potter had the right to change the contract to, put in the lower price, and it would suit you and be your contract? A. Yes, sir.

Q. How did your bookkeeper sign your contract and put your seal here and you did not sign it yourself? A. He had very often done that, he had the power to do that, he acted as my agent in the matter and often times signed.

10

Q. He signed the contract as your agent? A. Yes, sir.

Q. It became your contract without any question? A. Yes, sir.

Q. I call your attention to the fact that your handwriting and his handwriting seem to be very much alike? A. They are alike.

Q. Can he sign your name so that a third party may think it is yours, does he write it as closely as that to yours? A. Very closely.

20

Q. And that is true, that he can write your name— A. As well as I can myself.

Q. Well, I didn't say "As well" but just like it. A. Well, he can.

Q. Then the only reason he signed was that you asked him to as a matter of ease and convenience? A. Yes.

30

Q. Can you fix the date when you signed the contract? A. No, I cannot.

Q. Can you approximate the date, get anywhere near it? A. It was sometime in May.

Q. And this letter which you said you thought you got, this letter in evidence dated May 6th, 1914, from the Hildreth Granite Company which says, "We beg to acknowledge receipts of contract as signed by you"—do you think you signed the contracts before May 6th, 1914? A. Well, I would not be sure of that.

40

Q. I call your attention to the fact that the con-

tract itself is dated May 15th, 1914, which would indicate, we think, that after you signed the contracts they went to Boston and there the date was put on and the Hildreth Company signed them and returned them—I call your attention to that date; can you say who put that date in; it is written in ink. A. In handwriting.

10 Q. It is not your handwriting? A. No, sir.

Q. Nor your bookkeeper's? A. I could not say.

Q. You know how he writes? A. Well, I would not swear to that.

Q. It is not yours? A. It is not mine, no, sir.

Q. Don't you find, in looking over the contract now and searching your recollection that this contract must have been sent by you to the Hildreth Granite Company prior to May 6th, 1914, and then was signed in Boston, on the date it bears date the 15th of May, 1914; if it does not indicate that to you can you explain the situation? A. Well, I cannot tell when it was signed or when Hopkins signed it.

Q. Leaving Hopkins aside entirely and calling your attention to this letter which substantially says you had sent the contract on or before May 6th to the Hildreth Granite Company, and I show you the date in the contract is a subsequent date, and I ask you if you can explain— A. I cannot explain that date, that 15th, no.

Q. Does it now change your recollection to a certain extent? Does it not indicate to you that the contract was subsequently signed in Boston on the 15th? A. No, it does not.

Q. But you have no way of dealing accurately with the situation, your recollection is only general, is it not? A. General.

40 Q. No diaries, no records? A. No diaries.

By the Vice-Chancellor:

Q. Can you tell from recollection whether the date of the contract was blank when you had your bookkeeper sign it? A. I couldn't tell you.

Q. Would you not be likely to remember such a fact? A. Well, no, I don't.

Q. If you had your bookkeeper sign and seal a contract which had been signed and sealed by the other parties, and yet the date of it was left blank, would you not be likely to recollect it? A. Well, I didn't, the date didn't bother me much, it was what was in the contract, the price of the blocks and so forth. 10

By Mr. Van Winkle:

Q. Do you recollect talking over this feature of the case with your attorneys or anybody interested and making statements with regard to where the contracts were signed by the Hildredth Granite Company and when? A. With my attorney? No, sir. 20

By the Vice-Chancellor:

Q. Where is Mr. Hopkins? A. He is here.

Q. In Court? A. Yes, sir.

By Mr. Lane:

Q. You are in bankruptcy now are you not? A. Yes, sir. 30

Q. And a Trustee has been appointed for your affairs? A. Yes, sir.

Q. Who is he? A. The Receiver is Mr. Lippincot.

By Mr. Van Winkle:

Q. You will pardon this question but I feel I must ask it under my instructions. Were you not for a considerable period, including the period 40

when this contract was signed, drinking very heavily? A. No, I was not.

Q. I do not like to ask the question, but I am instructed to do it; were you on a spree extending over several weeks? A. After this contract was signed.

Q. How long after? A. Two or three weeks.

10 Q. You will pardon me for asking that question? A. I surely do.

Q. Before the time you went on that spree were you not drinking very heavily? A. No, sir, I was not.

Q. Were you transacting your business in Connell's? A. No, sir, I met this man at the tube station, that is the reason we went into that hotel.

20 Q. Didn't you drink very extensively after this trouble came on you? A. It had no bearing on this case.

Q. Excepting your power to recollect distinctly? A. It was away after this matter happened altogether that I was drinking.

Q. That was the cause of all the business complications you had? A. I suppose it had a lot to do with it.

30 Q. That is all, Mr. O'Neill. I am sorry to ask you that, pardon me. A. That is all right.

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H. B. HILDRETH sworn for the complainants.

Direct examination by Mr. Van Winkle:

Q. Where do you live? A. In Westford, Massachusetts.

Q. What is your business? A. Granite business.

40 Q. With what company? A. The Hildreth Granite Company.

Q. A corporation of what State? A. Of the State of Maine.

Q. What is your official position with that company? A. General manager.

Q. How long have you been such general manager? A. Since its organization in 1910.

Q. Where is the home office of that corporation? A. 31 State Street, Boston.

Q. Where has the corporate seal been since the organization of that company? A. At our Boston office.

10

Q. Has it ever been in New York City? A. No, sir.

Q. I show you Exhibit C, No. 11, the contract between Edward P. O'Neill and the Hildreth Granite Company and ask you if you signed that contract for the Hildreth Granite Company? A. I did.

Q. I call your attention to the words "Hildreth Granite Company by H. B. Hildreth, General Manager," did you write any part of that? A. All of it.

20

Q. I call your attention to the seal; is that the corporate seal of the Hildreth Granite Company? A. Yes, sir.

Q. Where was that seal affixed to this paper? A. In the Boston office.

Q. Can you say when, what date, as nearly as you can? A. On the 15th day of May, 1914.

30

Q. I call your attention to the words written in ink at the top of the first page of this agreement "15th May, fourteen" and ask you in whose handwriting that is? A. My own.

Q. I ask you when you put those words, that writing, there? A. At the time I signed the contract.

Q. I ask you what date that was? A. May 15th, 1914.

40

Q. At the time you signed this exhibit that I

now show you, were there other copies of the contract executed? A. Yes, sir.

Q. How many? A. Two besides that one.

Q. Have you one or more of the other copies? A. There is one in the Boston office, or I have it in my pocket here.

10 Q. Will you please produce it? A. (Witness produces paper.)

Q. Was the agreement signed in triplicate? A. Yes, sir.

Mr. Van Winkle: The witness produces a carbon copy apparently, of Exhibit C, No. 11.

20 Q. On this carbon copy which is produced by you, or triplicate original agreement, I find at the top of the first page the figures and words "15th May, fourteen," in whose handwriting are those words and figures? A. Mine.

Q. When did you write those words there? A. At the time I signed the contract and affixed the seal.

Q. When was that? A. May 15th, 1914.

Copy of contract produced by this witness marked for identification C, No. 12.

30 Q. What became of the other copy, the third copy? A. The third copy?

Q. Yes. A. There were two copies forwarded to the New York office and I kept the third copy in Boston myself.

Mr. Van Winkle: Mr. O'Neill, have you got with you the copy of the agreement sent to you?

40 It was stated Mr. O'Neill had left the court room.

Q. What can you say with respect to Edward P. O'Neill's execution of this agreement, that is with

respect to whether he executed this agreement before or after the Hildreth Granite Company? A. Before, for the simple reason that we never execute a contract until after the party with whom we are dealing has put his signature on, and it has been the universal custom since the incorporation of the company.

Q. In this particular instance, do you remember it being done in that way? A. Only from custom, absolutely; and from our correspondence absolutely. 10

Q. Proceed with your correspondence, let me see what you mean by that, have you any letter? A. (Witness produces a letter.)

By the Vice Chancellor:

Q. Mr. Hildreth, I call your attention to the second page of these two contracts, Exhibits No. 11 and No. 12, and to the price per square yard, of one dollar and ninety-four cents? A. Yes, sir. 20

Q. Was there an alteration made after the type-writing was done? A. That alteration was made at this end of the business. It was not done at the Boston office.

Q. Then when you signed these papers they did not read exactly as they do now? A. Yes, sir.

Q. They did? A. Yes, sir. 30

Q. One dollar and ninety-four cents? A. Yes, sir; the correspondence will corroborate that, I think.

Further direct examination.

Q. I show you a letter which I think has been marked in evidence—no it has not—a letter on the letter head of the Hildreth Granite Company dated New York November 14th, 1913, addressed to Mr. H. B. Hildreth, General Manager, Hildreth Granite Company, Boston, Massachusetts, signed by Henry M. Potter, Jr., an original letter appar- 40

ently, and ask you if you produce that from your records in Boston? A. I do.

Q. I ask you if you received that letter from the New York office? A. I did.

Mr. Van Winkle: I offer that letter in evidence.

10 Mr. Young: We object to that offer on the ground that that letter is not binding on the defendants.

The Vice Chancellor: The letter will be received.

Letter to H. B. Hildreth, General Manager and so forth, dated November 14th, 1913, received in evidence and marked Exhibit C, No. 13, January 11th, 1916. H. W. K.

20 Q. Have you any letter, Mr. Hildreth, original letter, with respect to the agreements as signed by Mr. O'Neill being sent from the New York office to the home office in Boston? A. Yes, sir, one dated May 6th, 1914.

Q. That is Exhibit C, No. 16. Did you receive that letter at, or shortly after, its date; this letter of May 6th? A. Yes, sir. The date it was received was stamped upon it.

30 Q. May 7th, 1914? A. Yes, sir.

Q. Who put that on there? A. I put that on there; that is my custom.

Q. Can you say whether or not the agreements, the three copies signed by Mr. O'Neill as specified in this letter were forwarded to and received by you with this letter from New York? A. Yes, sir, they were; and I acknowledged them in a letter of the following date.

40 Q. Show us your acknowledgment of that letter. A. Witness refers to Ex. C, N. 9.

Q. This letter says "We are in receipt this morn-

ing of contracts as signed by Edward P. O'Neill"; what if anything did you do with reference to the contracts you then received? A. Kept them there while we were investigating the credit end of the contract.

Q. Who made the investigation of the credit end of the contract? A. It was done at the New York end, principally by Mr. Harlow.

10

Q. You knew he was doing it? A. Yes, sir.

Q. Did the fact that you did not have full knowledge as to Mr. O'Neill's financial standing or credit or his prospects have any relation to the holding up of the contracts for some time? A. Yes, sir.

Q. Can you say how long the contracts as then signed by O'Neill but not signed by your company were held at Boston? A. From May 7th to May 15th.

20

Q. What information induced you, on May 15th, to write in the dates of the contracts and execute them for the company, put the company's seal on and send them back to New York. A. Information we had from New York, and a consultation I had with the Treasurer Mr. Lahey; we decided to take the contract.

Q. Have you the letter or copy of the letter with which you sent back the contracts to New York? A. Yes, sir.

30

Q. Or two of them, as you have stated? A. Yes, sir.

Q. On May 15th, the day the contracts were dated, you wrote that letter? A. Yes, sir.

Q. To the Granite Company, in New York? A. Yes, sir.

Q. (Reading): "We have your favor of the 14th inst.," the letter states "While we are not entirely satisfied with Mr. O'Neill's financial condition, we have decided to accept his orders and are returning

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herewith two copies of the contract duly signed." Are you entirely clear those contract were not executed by your company until May 15th, the date of this letter, when you returned them? A. Yes, sir.

Q. Has it ever been your custom to execute contracts in triplicate and send them to a prospective customer waiting on him to sign the same? A. We never did that.

10

Q. You refer in this letter of May 14th, 1915, to the acceptance of O'Neill's order; did that have reference to his contract signed by him as his order? A. Yes, sir.

20

Q. In this letter you say further, "Deliver these contracts in person and tell Mr. O'Neill frankly that the Boston office must insist upon payments according to contract, and in accepting the contract we shall expect him to keep the contract in his name and not assign it or any moneys due on the same;" do you remember that? A. Only from my memory being refreshed from reading the letter.

Q. Are you entirely clear the contracts went back with this letter, those referred to in this letter? A. Yes, sir.

30

Mr. Van Winkle: I offer in evidence the letter of May 15th.

Mr. Lane: Where is the original letter?

Mr. Van Winkle: We cannot find it.

Mr. Lane: Why, you have the original in evidence here somewhere.

Mr. Van Winkle: Oh, very well, I am obliged to you for the suggestion.

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Adjourned until Friday, January 14th, 1916, at ten o'clock A. M. at Chancery Chambers, Jersey City, N. J.

Chancery Chambers, Jersey City,

January 14th, 1916.

Hearing resumed pursuant to adjournment.

THOMAS J. WASSER recalled.

Examined by Mr. Van Winkle:

Q. Do you wish to add to or correct your testimony in any particular? A. I wish to correct my testimony. After leaving Court the last day I returned to the office and consulted the calculation book and field notes and I found that while I stated it was 14,342 yards of granite block pavement, included in that is forty-nine and one-half yards of wood block, and the reason I want to correct that is that the linoleum works have a factory located on both sides of the avenue connected by two narrow gauge tracks, and when we came to the paving of the tracks we found the rails were not of sufficient depth to put granite blocks between them and the contractor and I agreed we would substitute wood blocks on account of insufficient depth and accept granite block prices as the price for the wood blocks as we have no unit to fix the other value. So forty-nine and one-half square feet should be deducted from the amount I stated.

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Q. So that the correct figures are the amount that you gave the other day— A. Less forty-nine and one-half yards.

By the Vice-Chancellor:

Q. While you are on the stand, referring to your testimony the other day, I understand that in 1914 when these notices were served you had an office in the Court House? A. Yes, sir.

40

Q. Was it near the office of the Clerk of the

Board of Chosen Freeholders? A. In the next office, the next room.

By Mr. Young:

10 Q. Do you know of your own knowledge when this work was completed by Mr. O'Neill as contractor? A. Oh, yes, I know it was on the last day of October, because I made an examination of it that day, October 31st and I came in and immediately wrote a letter to Colonel Stevens to have it accepted. The reason I did that was because if possible I wanted to have it done before the next meeting of the board. They did not have the opportunity—I suppose they had other work—they did not take the opportunity and finally I understand they sent some of their engineers over the work, and afterwards the Colonel agreed to come up and have a final inspection of it, Colonel Stevens, and I accompanied him on Wednesday, 20 December 9th, over the road.

Q. Have you any personal knowledge of when the work was accepted by the County? A. As I stated the other day I looked through my papers, but there is no communication stating when the work was accepted by the County.

30 Q. You do not know of any personally? A. No, I say there was no communication sent to them and I would have had to send the communication, and in all my work that communication is never sent until the final bill is presented by the contractor and in this case my attention was called to the condition before the final bill could be sent, so, therefore, it was never sent. To my knowledge it has never been sent as yet.

40 By Mr. Van Winkle:

Q. Do you understand the retained percentage is now due? A. According to the procedure, it is

one year after completion, and while it says one year after completion, that means practically one year after the acceptance the money will be due from the State and it is now due.

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H. B. HILDRETH, recalled.

Cross examination by Mr. Lane:

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Q. You say you are the general manager of the Hildreth Granite Company? A. Yes, sir.

Q. Are you a member of the Board of Directors? A. No, sir.

Q. How long have you been general manager? A. Since the organization of the company.

By the Vice-Chancellor:

Q. When was that? A. In 1910, February.

20

Q. Did the company take over the business of a firm? A. No, sir.

Q. Did the company immediately start in quarrying granite? A. No, sir; we are a mercantile corporation, buying and selling, we own quarries.

Q. Where do you ship your granite from, different quarries? A. Yes, sir.

Q. Where located? A. New Hampshire, Vermont and Massachusetts.

Q. Any other States? A. No, sir. We have a small lot of stuff in the State of Maine that we bought, but never has been shipped.

30

Q. Have you any quarries in, or do you ship any granite from, New Jersey? A. No, sir.

Q. Do you have any business in New Jersey, excepting the delivery of goods that are purchased in New Jersey? A. No, sir.

Q. Do you maintain any office in New Jersey? A. No, sir.

40

Q. Do you have any salesmen resident in New Jersey and employed there? A. No, sir, if I un-

derstand, you mean whose headquarters are in New Jersey?

Q. Yes. A. No, sir, I would qualify that by the fact that one salesman resides in New Jersey, but the business is done in New York.

Further cross examination:

10 Q. As a matter of fact, at the time this contract was entered into, you had a Mr. Potter whose particular duty it was to look after the New Jersey territory, was it not? A. No, sir.

Q. What territory did you look after? A. Wherever there was business for him to look after with New York City as the central office.

By the Vice-Chancellor:

20 Q. In what state were you doing business in 1914? A. You mean—

Q. In what states were you shipping granite and other material, whatever it is? A. I should say all of the New England States, New York, New Jersey and Pennsylvania.

30 Q. Was it your general method of business to enter into contracts for the supply of granite or whatever you sold? A. If the job was anything of any material size, we had a formal contract; we accepted of course, small orders by letters and filled the order.

Q. Where were any orders accepted? A. In Boston.

Q. Anywhere else? A. No, sir.

Q. Where were your contracts made? A. In Boston.

Q. Anywhere else? A. No, sir.

40 Q. When you supplied granite blocks in New Jersey, Pennsylvania or New Hampshire, or wherever was the contract made and accepted and signed in Boston? A. Yes, sir.

Further cross examination by Mr. Lane:

Q. Did Mr. Potter have anything to do in 1914 outside of the New Jersey territory? A. Yes, sir.

Q. Did he take care of all the contracts which you entered into in reference to shipping goods to New Jersey? A. No, sir.

Q. Who else took charge of that? A. There were two Mr. Potters and Mr. Harlow. 10

Q. Prior to entering into this contract in question here, Mr. Harlow was only in New England, was he not? A. Mr. Harlow was in New York at the time this contract was made.

Q. Did the two Potters live in New Jersey? A. Yes, sir, I believe they did; I could not swear to it.

Q. How many jobs, at this time, did you have in New Jersey? A. I don't know. 20

Q. Have you looked it up? A. No, sir.

Q. —since this suit was started? A. No, sir.

Q. Is whatever authority you have conferred on you by resolution of the Board of Directors? A. No, sir, not wholly.

Q. Is there any resolution of the Board of Directors in reference to conferring any authority on you; yes or no? A. I could not say anything more than I was to perform the duties usually performed by a general manager, making contracts, and so forth. 30

Mr. Lane: I move to strike that answer out as not responsive.

The Vice-Chancellor: You cannot exact an answer of yes or no to that sort of question.

Q. Did anybody else ever sign any contracts for your concern? A. No, sir. 40

Q. What did you mean when you sent this

contract to the New York office and stated to them to exact certain conditions before they delivered in reference to what Mr. O'Neill would do. A. Will you tell me the contents of the letter, please, or let me produce it.

10 Q. (Handing witness letter of May 15th.) A. I meant just what I said that I expected them to have a talk with Mr. O'Neill and impress upon him that we looked to him to fulfill his contract, and we expected to do the same ourselves.

Mr. Van Winkle: I am informed the third contract signed in triplicate is in the possession of counsel for the Receiver, Mr. Young's firm, and he has been asked to produce it. Do you produce it?

20 Mr. Young: Yes, I produce that (producing a paper).

Mr. Van Winkle: We also served a subpoena *duces tecum* and made a demand for the letter of May 16th, 1914, which should be among the papers of Mr. O'Neill. Have you that paper?

30 Mr. Young: We received a telephone message in regard to the subpoena and I have looked all over these papers and that letter is not amongst them.

Mr. Van Winkle: Do you raise any question about the receipt of that letter; do you admit he got it at that time?

Mr. Young: I do not see how I can.

Mr. Van Winkle: What search have you made among the papers in your office?

40 Mr. Young: The papers we received from Mr. Lippincott were kept in two folders and I have gone through each folder very carefully, paper by paper and examined each. There is some other correspondence there and I will look through that.

Cross examination by Mr. Young:

Q. Your concern did naturally solicit business in New Jersey did it not? A. Why in a general way the same as we would everywhere?

Q. What would you do to lead up to the making of a contract, whether made in Boston or Jersey, or anywhere, what steps would be taken before the contract absolutely would be given, what would lead up to the contract itself—steps taken by your company or agent. A. Meeting the contractor personally, finally getting him to say that he would get the order, and then the contract would be prepared in triplicate and given to him for his signature and then they would be sent over to Boston they would be signed in Boston and two of them sent back here and the third one kept in the Boston office. 10

Q. Before seeing the contractor would you first wait until you received a letter from him or go there of your own volition and solicit business? A. We met them anywhere, at the letting, on the street or any place wherever anything of that sort was talked about. 20

Q. I suppose you mean as soon as you ascertain a man had a contract for public work you would go and make an effort to get that contract? A. Not necessarily, we might go and see him long before the job was let; we might hear something was to be done in any town or city and we would talk with the contractors then, and ask them when the job was let if they were successful they would use our figure in making the bid, in every common every day conversation as every solicitor does in the interest of his work. 30

Q. You often did that in New Jersey? A. Certainly the same as in any other state. 40

By Mr. Van Winkle:

Q. I show you a triplicate copy of the executed

contract dated May 15th, 1914, purporting to be signed by H. B. Hildreth general manager, Hildreth Granite Company, is that your signature there? A. Yes, sir.

Q. The figures and the words "15th, May fourteen" is that your handwriting? A. Yes, sir.

10 Q. When did you write that? A. On the 15th day of May.

Q. Where? A. In the Boston office.

Triplicate copy of contract of May 15th, 1914, marked for identification, C, No. 14.

20 Q. Calling your attention to the letter Exhibit C, No. 13, which is addressed to the Hildreth Granite Company, Boston, from the New York office of the company inclosing draft of contract which the New York office was going to submit to Mr. O'Neill for signature, have you found that draft? A. Yes, sir.

Q. Will you please produce it? A. Witness produces a paper.

Q. You produce a paper which has no date and is not executed? A. Yes, sir.

30 Q. A draft of a contract between Edward P. O'Neill and the Hildreth Granite Company in connection with the Passaic Avenue contract? A. Yes, sir.

Draft of contract between O'Neill and Hildreth Granite Company marked C, 15, for identification.

Q. The contract price in there is \$1.96 per square yard—in the draft? A. Yes, sir.

40 Mr. Lane: Was that a question or a statement that you made on the record, that the contract price was \$1.96?

Mr. Van Winkle: We will offer the paper in evidence and it will manifest itself.

By Mr. Lane:

Q. Where did you get this from?

Exhibit C, 15, for identification.

A. The Boston office.

Q. Did you make this up? A. No, sir.

Q. Who made it up? A. It was made up in the New York office.

10

Q. And it was sent on to the Boston office? A. Yes, sir.

Q. Where were these other contracts the ones that were executed made up? A. In the New York office.

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LEWIS S. SCOTT, recalled.

Direct examination by Mr. Van Winkle:

20

Q. You said that you would look up, and produce here this morning if you could find them your field books showing the measurements in connection with the granite block on this job? A. Yes, sir; I have got everything that was in the office that I could find.

Q. You gave us the other day the total number of square yards of block actually used in that improvement, Mr. Wasser this morning made some correction in his figures, he made a reduction made necessary by the fact that wooden blocks were put in in connection with the railway of the Linoleum Company? A. Yes, sir.

30

Q. Please turn to your books and give us the calculations which you made based on your own measurements—were these entries made at the time? A. Well, when I got back in the office I—

Q. Right away? A. Well, perhaps, maybe the next day or so.

40

Mr. Lane: I understand these pages contain a memorandum as to our claim as well

as the others inasmuch as he put in there what he measured in regard to cement and so forth.

Q. Now, the Granite Company first? A. The Granite paving—I have a total here of—

10 Q. How many square yards or square feet? A. 14,292.54 square yards of granite block, and the wooden block was 49½ making a total of 14,342.04; we did not allow for the .04 we called it 14,342.

Q. Your field book then shows the entry of 14,292 square yards of granite? A. Yes, sir.

Q. And you made the entry in this field book how soon after you made the actual measurements on the ground? A. When did I make the entry?

20 Q. Yes. A. Well, probably after I got through measuring and got into the office and made the cancellation.

Q. The field book is all in pencil? A. Yes, sir.

Q. This is your book of first entry? A. That is all my own writing.

Mr. Van Winkle: I offer the book in evidence to the extent of this answer.

It was agreed the book need not be marked nor left in court.

30 The Vice Chancellor: I understood there was no question as to the amount, why ask all these questions?

40 The only question anyone raised in regard to the amount of these bills was in reference to a specific claim. One witness claimed that a portion of the material furnished, the cement I think it was, went into another improvement. That is the only question as to the amount. I do not understand the good faith of the claim was attacked by anybody, it is only a question of

what amount the lien would stand for if it was a lien. Is that correct?

Mr. Young: Yes, Mr. O'Neill testified some of the material shipped by our client went to another job. I presume I should find out just what went into this job.

By Mr. Young:

Q. Will you turn to the entries including the cement work? 10

The Vice Chancellor: Is the witness able to state how much of the material which you furnished went into the job?

It seems cement was also furnished by other claimants, Mr. Lane's clients, Maher and McNichols, part of their claim was for cement.

Mr. Lane: Yes, the major part is cement. 20

The only question that came up in the case in reference to the Edison Portland Cement Company was that Mr. O'Neill went on the stand and said that all of Maher and McNichol's stuff went in and all of the Hildreth company and there was some question of about two thousand pounds of the Edison Portland Cement that went into the other job. This man cannot tell which of the Edison Cement Company's material went into the job. 30

The Vice-Chancellor: No, that is my suggestion; he can only testify from his measurements how much went in. It is true you might reach the amount that went in from the Edison Company if you took the total amount this engineer can testify to and deduct the amount furnished by Maher and McNichols of course the amount that was left would be the amount fur- 40

nished by the Edison people that went in there.

Pursue your own course of proof. I think that is all there is in this case about amounts. All that I know of.

10 Q. Can you tell us what quantity of cement did go into the Passaic Avenue job? A. The way I have got it here is just simply the amount of concrete that went into the work.

Q. Then you could not tell us how much cement formed part of that concrete? A. Well, I was not all the time on the job, I was there at different times and measured up the amount, that is the figures given to me and I made the calculations of the exact amount of concrete.

20 Mr. Young: I will prove this by the contractor himself.

Mr. Van Winkle: I think that is all the proof in connection with the Hildreth Granite Company's claim.

I will offer in evidence the several papers marked for identification.

Mr. Lane: I object to the offer of the contract on the ground that no contract has been proved.

30 Mr. Van Winkle: There is one contract in; the other is the one that came from the custody of the attorneys for the Receiver.

Mr. Lane: I understood there was an offer and it was held pending the cross examination.

The Vice-Chancellor: What do you refer to?

40 Mr. Lane: I am referring to the alleged contract between O'Neill and the Hildreth Granite Company; at the time it was of-

ferred in evidence it was withheld pending examination with reference to it.

The Vice-Chancellor: That contract was in triplicate.

Mr. Lane: Yes.

The Vice-Chancellor: The three copies have been produced before the Court and marked I think.

Mr. Lane: Marked for identification. 10

The Vice-Chancellor: Are they offered?

Mr. Van Winkle: The marking indicates and my recollection is, that one was offered and received in evidence, Exhibit C11; one is marked for identification and the one produced this morning is also produced for identification.

The Vice-Chancellor: Do you offer them all? 20

Mr. Van Winkle: Yes, sir.

The Vice-Chancellor: Is there any objection?

Mr. Lane: I object to them on the ground that they have not been proved to be contracts; that the testimony is that the signature of O'Neill is not his signature; I object, secondly, on the ground that the proof shows it is an illegal contract because entered into in the State of New Jersey by a corporation which has no power to enter into such a contract; and on the third ground that they are immaterial, irrelevant and incompetent. 30

The Vice-Chancellor: They will be received in evidence.

Mr. Van Winkle: Then, if your Honor please, the present offer includes the offering in evidence of the paper marked C15 for identification. 40

Mr. Lane: I object to that as irrelevant, incompetent and immaterial.

The Vice-Chancellor: It will be admitted.

10 Mr. Van Winkle: I think all the letters were actually marked in evidence. I have been looking over them and if there are any you have objections to you might look at them now.

I think they are all in evidence, if not I offer in evidence now those marked for identification.

That is the claim of the Hildreth Granite Company.

20 The Vice-Chancellor: Is the Clerk of the Board of Chosen Freeholders here to-day? I would like to ask him a question or two which I should have asked him when he was on the stand, but which slipped my mind.

Mr. Van Winkle: We will send for him.

The Vice-Chancellor: The other side can proceed. We will take up yours first, Mr. Lane.

30 Mr. Lane: It seems to me this would be the time to move to dismiss the claim of the Hildreth Granite Company.

The Vice-Chancellor: You cannot do that, because the cases are consolidated. You would move yourself out of court.

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PATRICK J. MAHER, sworn.

Direct examination by Mr. Lane:

40 Q. Are you a member of the firm of Maher and McNichols? A. Yes, sir.

Q. Engaged in what kind of business? A. General contracting.

Q. Where is your office? A. Passaic Avenue, Kearny.

Q. Hudson County? A. Yes, sir.

Q. I show you a bill and statement and ask if you prepared that bill and statement for work furnished, materials and so forth and whatever is stated on there, furnished Mr. O'Neill in this Passaic Avenue job, and whether or not you submitted that bill to Mr. O'Neill and the bill was found to be correct? A. Yes, I did. 10

The Vice-Chancellor: I think that was all proved, Mr. Lane. If any attack is made on this claim as to the amount of it or any question is raised as to the material that went into the job, I will allow you to introduce proof afterwards. The proof so far is perfectly plain. Mr. O'Neill is very positive all that material went in there. 20

Q. It appears that there were 6,941 feet of new curb of which the price was eighty cents a foot; does that include the setting and cutting and other labor performed on that curb? A. No.

Q. I mean that price of \$80c.? A. Yes, it includes everything.

Q. What did you do with reference to that curb, of course you furnished it, the new curb? A. Yes, sir. 30

Q. What else did you do in reference to that? A. I hired men to cut it, and hired men to set it, mix the concrete and so forth.

Q. What was the cost of that labor per foot? A. Well, the recutting of curb is twelve cents a foot.

Q. What else? A. The setting of the curb and digging the trench was fifteen cents a foot. 40

Q. How much for unloading and hauling the curbing? A. Seven cents a foot.

Q. Making a total of 34c. a foot for labor? A. Yes, sir.

Q. You have never been paid the amount of this bill? A. No.

10 Mr. Van Winkle: So far as the Hildreth Granite Company is concerned our only point against the Maher and McNichol claim is that it was filed more than fifteen days after completion. We do not question the amount and so forth.

Mr. Lane: I suppose if anything should crop up that they did I could rest now and furnish additional proof later.

20 The Vice-Chancellor: Yes. There is only one question I could consider and that is as to Mr. Young's claim as to the amount. The amount of his claim is proved by Mr. O'Neill but certain portions of the material went into another job, and no question is raised about the good faith of the claimants in serving notice for the whole amount. I suppose Mr. Young was somewhat surprised when that little bit of evidence came out.

30 Mr. Young: Yes, I was. But we have a witness here to testify to the material that went into the Passaic Avenue job which came from us.

THOMAS O'NEIL, sworn.

Direct examination by Mr. Young:

Q. Were you the foreman of Edward P. O'Neill in connection with the Passaic Avenue job in Kearny? A. Yes, sir.

40 Q. Was the work done under your supervision? A. Yes, sir.

Q. Were you present when the work was done?  
A. Yes, sir.

Q. Do you know the Edison Portland Cement Co.? A. Yes, sir.

Q. Do you know whether any material was received from that concern in connection with the Passaic Avenue job? A. Yes, sir.

Q. I show you a statement made by the Edison Portland Cement Company directed to Mr. Edward P. O'Neill and call your attention to various items there and wish you would tell us what items on that statement went into the Passaic Avenue job? A. I could not tell you how much. 10

Q. Where did the cement from the Edison Company come from? A. From the Edison people. I unloaded the cars, that is all I have done.

Q. Do you know on what railroad it was shipped? A. On the Erie. 20

Q. And it came to Kearny? A. Yes, sir.

Q. Or is it the Arlington Station? A. Well, the Arlington station. It is in Kearny.

Q. And the material that came from the Edison Co. to Kearny you say you were there when it was unloaded? A. Yes, I unloaded it.

Q. Do you know whether that material was used in the Passaic Avenue job? A. Yes, sir.

Q. Have you any idea as to the quantity? A. That came on to Passaic Avenue. 30

Q. Yes. A. I don't know. I should imagine twenty cars or twenty-five cars.

Q. The Edison Company did send in some cement which you received from Hoboken? A. No, I didn't receive any from Hoboken.

Q. If any cement was bought by O'Neill and shipped from the Hoboken Warehouse, that was not used in connection with the Passaic Avenue job. A. No, not on Passaic Avenue. 40

Mr. Van Winkle: Do I understand there was some cement that went from Hoboken and was not used in Passaic Avenue.

10 Mr. Young: Yes, I will admit to save time that the sand or cement charged for on this statement and marked as delivered from the Hoboken place was not used in connection with the Passaic Avenue job, making a difference of \$333.

By the Vice Chancellor:

Q. Did I understand that all the material which came in cars to the Arlington Station went into this Passaic Avenue job? A. Yes, sir.

Q. Was there any other cement which went into that job that came there at Kearny? A. From Maher and McNichols.

20 Q. That came to Kearny also? A. Yes, sir.

Q. So if you took out of this bill before you the cement that came from Hoboken, and sand or other material that came from Hoboken what is left represents cement that went into this Passaic Avenue job does it? A. Yes, sir.

30 Statement of Edison Portland Cement Company identified by this witness offered in evidence and marked Exhibit No. 8, Edison Portland Cement Company, January 14th, 1916, H. W. K.

Mr. Van Winkle: We do not contest that the item shown on Exhibit No. 8, amounting to \$333 are correct.

Mr. Young: This statement shows a total of \$1,719.03.

40 If some of these items are credited on this account \$333 should be deducted from the lien claim against the Passaic Avenue job, leaving a balance of \$1,400 approximately due on that job.

Mr. Van Winkle: All right what do you say to that Mr. Lane?

Mr. Lane: That is agreeable to me.

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ALBERT P. MARGOLIES, sworn.

Direct examination by Mr. Young:

Q. You are an attorney in this City? A. Yes, 10  
sir.

Q. Connected with the office of Hartshorne, Insley and Leake of Jersey City? A. Yes, sir.

Q. Were you connected with that office on January 26th, 1915? A. Yes, sir.

Q. And also March 27th, 1915? A. Yes, sir.

Q. Have you been connected with that office continuously since January 25th, 1916? A. Yes, sir.

Q. I show you what purports to be a notice of lien claim marked Exhibit No. 4, Edison Portland Cement Company and ask you if you made service of that notice and upon whom if you recall? 20

Mr. Van Winkle: I object to the form of that question; I have no objection to his stating with whom he left it, but the question calls for a conclusion.

Q. With whom did you leave the notice? A. I 30  
left such a notice with the clerk, Mr. O'Mara, personally, at 10:16 if I remember correctly on January 26th, 1915.

The Vice Chancellor: January 26th?

The Witness: Yes, sir, and and the same copy with Frederick Rider.

Q. You mean a similar copy? A. Yes, sir, with 40  
Frederick Rider and with the collector personally, I think it was 10:20 January 26th, and also at the same time I left the bond.

Mr. Van Winkle: There is no question about the bond.

10 Q. Did you not also? A. I also served Mr. Kulpt Director of the Board of Chosen Freeholders at his office on Washington Street at nine o'clock, personally on January 27th, and at ten-thirty the same day I served John Magner, supervisor, personally.

Q. I show you a notice of pendency of action and ask you if you made service of that and upon whom? A. I made service of this notice of pendency of action personally upon Mr. Rider County Collector March 27th, 1915.

20 The Vice Chancellor: The notice which the witness testified to a moment ago as having been served on March 26th, is marked what?

30 Mr. Young: Exhibit No. 4, Edison Portland Cement Company, the notice the witness testified to as serving on Mr. Kulpt is marked No. 6, for the Edison Portland Cement Company. The other notice which the witness testified to, which is marked "Notice of pendency of action," and is dated March 27th, 1915, which he testified to having served upon Mr. Rider the County Collector is marked Exhibit No. 3, Edison Portland Cement Company.

Q. I show you what purports to be another copy of a lien claim of the Edison Portland Cement Company and ask you if you made service of that and if so upon whom? A. Service of this copy was made on the county collector Mr. Rider on January 26th.

40 Mr. Young: That paper is marked Exhibit No. 1 Edison Portland Cement Company.

Q. I show you what purports to be a bond of the

Edison Portland Cement Company and ask you if you made service of that paper or filed it with anyone and if so whom? A. Service of this bond was made upon county collector Mr. Rider personally on January 26th, 1916.

Mr. Young: This paper is marked Exhibit No. 2 Edison Portland Cement Co.

By the Vice Chancellor:

10

Q. Was the new director of the board in office January 26th, 1914? A. No, this was 1915. Mr. Kulpt was in office.

Q. Mr. Witt was the director up to the first of the year was he? A. Yes, sir.

Mr. Young: I desire to offer the paper which has been marked for identification No. 6, in evidence.

20

The Vice Chancellor: It will be received in evidence.

Cross examination by Mr. Van Winkle:

Q. From what office or from whose custody did you get this paper marked for identification No. 6 being the notice which you say you served on Mr. Kulpt the director; it seems to have no filing mark of any kind on it? A. That I do not know.

30

Q. The statute in question under which this notice was served directs that a notice be filed with the person or official upon whom service is to be made; how did you serve this with director Kulpt in what way; I find no file mark on it. A. I was hunting for him for a couple of days to make service upon him of that copy which you have there and I finally met him in his office at nine o'clock.

Q. Where was his office? A. Two hundred and forty something Washington Street.

40

Q. Worth Street, New York City is it not? A. No, Washington Street, Jersey City.

Q. What is his business? A. Plumber.

Q. So you served this notice on Mr. Kulpt in his plumbing office in the lower part of Jersey City about two miles away from the office of the Board of Directors in the County Court House? A. No, sir; I didn't say I served him in the County Court House.

10

Q. (Last question read to witness.) A. Yes.

By the Vice Chancellor:

Q. Is that paper which Mr. Van Winklé has in his hand the identical paper which you left with Mr. Kulpt? A. No, sir.

Q. Or is it a copy? A. A copy of this, a similar copy, it is not the identical paper.

20

Q. Where did this paper come from do you know? A. No, Mr. Young had this paper, I do not know.

Mr. Young: The witness is wrong when he says that is not the paper; that is the identical paper.

Witness: I do not know whether it is the identical paper or not.

30

Mr. Van Winkle: Then I would like it to appear on the record that Mr. Young's statement now is on behalf of his client that this paper No. 6 for identification, which bears no file mark was produced in court by John Denman county attorney who also produced in court a notice of Maher and Mc-Nichols and a notice of the Hildreth Granite Company.

40

The Vice Chancellor: I believe that all appears on the record. I tried on Tuesday last to make the record complete and show where these papers come and I think that the origin of each paper is indicated on the

record. Those which Mr. Dennin produced I think can be identified from the record.

By Mr. Van Winkle:

Q. Did you ask the director of the board to put a filing mark on this paper No. 6 for identification which you say you then left with him? A. No, sir.

Q. Did you tell him to take it to the court house or did he say he would take it to the court house? A. He said he would.

10

Q. He said he would take it to the Clerk of the Board? A. I don't know that he said that, he said he would take it up to the court house, and take care of it.

By the Vice-Chancellor:

Q. How many copies of this notice did you serve altogether? A. I served four.

20

Q. On whom? A. One on the Clerk Walter O'Mara.

Q. The Clerk of what? A. The Clerk of the Board of Chosen Freeholders; I served one on Mr. Kulpt the Director of the Board of Freeholders; I served one on Frederick Rider, County Collector and one on John Magner the supervisor.

Q. And in each case you left a copy with these officers, did you? A. Yes, sir, I did.

30

Q. Did you have a copy which you returned to the office to Mr. Young? A. Yes, sir.

By Mr. Van Winkle:

Q. Did you say that you spent a couple of days hunting for Mr. Kulpt, the Director? A. Two days, yes, sir.

Q. You could not find him readily? A. No, sir, I could not.

40

Q. Did you first go to the Board of Chosen

Freeholders' office in the court house and inquire for him there? A. Yes, sir, I did.

Q. Did you see the Clerk of the Board there?  
A. At the time I inquired?

Q. Yes. A. No, he was not in either.

10 Q. But there is a clerk there? A. Well, I don't know whether there was, some gentleman told me he was not in, I went in the office of the Board of Freeholders.

Q. When did you find out that Mr. Kulpt was the Director of the Board? A. From the court house.

20 Q. You went then to the office of the Board of Chosen Freeholders in the court house intending to serve Mr. Kulpt there if he was the Director, or whoever the Director was? A. No, we first found out the proper names of the officers of the freeholders before we drew up the papers so as to know on whom to serve them.

Q. You went to the court house then to serve Mr. Kulpt and could not find him there? A. I could not find him there.

Q. Having found him in his plumbing shop two miles away from the court house— A. Well, if I may interrupt—

30 Q. Surely. A. I was told he could be found at his plumbing office at nine o'clock in the morning before he came to the court house and I tried to get him and he was not in and I tried the next morning and he was in.

Q. So that, instead of waiting for him to come to the court house you chose to serve him at his plumbing establishment? A. No not at all, because I was told he was out on a job and would not be back that day.

40

Mr. Young: I offer in evidence an affidavit of service by Mr. Margolies.

Mr. Van Winkle: He has testified to that.

Mr. Young: Very well.

The Vice-Chancellor: Is that the case?

Mr. Young: We might produce one further witness corroborating Mr. O'Neill as to the making of the contract and for that purpose I would like to call Mr. Hopkins who was in his office as bookkeeper and, I think, made his signature. 10

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MICHAEL F. HOPKINS, sworn.

Examined by Mr. Young:

Q. Were you associated with Mr. Edward P. O'Neill? A. Yes, sir.

Q. In the contracting business? A. Yes, sir. 20

Q. What was your position with Mr. O'Neill? A. Bookkeeper, general clerk and so forth.

Q. Did you have charge of the office? A. Yes, sir.

Q. Where was that located? A. 576 Newark Avenue.

Q. Do you know the Hildreth Granite Company? A. I know of them.

Q. (Referring to Exhibit C, No. 11.) I show you what purports to be a contract entered into between Edward P. O'Neill and the Hildreth Granite Company and ask you if you recognize the signature purporting to be that of Edward P. O'Neill? A. I signed that. 30

Q. You signed that? A. Yes, sir, I signed Edward P. O'Neill.

Q. I also call your attention to a duplicate of that contract purporting to be signed similarly and ask you whose signature that is. A. That is mine. 40

Q. Is the name "Edward P. O'Neill" signed by you? A. Yes, sir.

Q. And does the same testimony apply to the third copy? A. Yes, sir.

Q. That is signed by you also? A. Yes, sir.

10 Q. When was the first time you saw those contracts before they were signed? A. I don't remember the date, but it was in the early part of May.

Q. May, 1914, do you mean? A. Yes, sir, May, 1914.

Q. Were they at your office in Jersey City, you saw them there? A. Yes, sir.

Q. That was the first time? A. Yes, sir.

Q. At that time were there any signatures on that contract? A. Yes, sir.

20 Q. Whose signatures? A. The Hildreth Granite Company; here is the signature on them.

Q. The Hildreth Granite Company? A. Yes, sir.

Q. By H. B. Hildreth General Manager? A. Yes, sir.

Q. You say those signatures were there when you saw the contract the first time? A. Yes, sir.

30 Q. Did the contract also bear the corporate seal of the company if you recall? A. I don't remember, I never took notice.

Q. At that time had you signed these contracts for Mr. O'Neill; prior to the time that you saw the signature of the Hildreth Granite Company had you signed Mr. O'Neill's name to them? A. They laid in the office about a week; Mr. O'Neill had not decided whether he would sign or not.

40 Q. Do you mean the contract came to you with the signature of the Hildreth Granite Company upon them? A. Yes, sir.

Q. And remained in your office one week? A. Yes, sir.

Q. After that you signed O'Neill's name to them? A. Yes, sir.

Q. Then what did you do with the contracts?  
A. After I had signed it?

Q. Yes. A. I kept one and mailed two to their New York office.

Q. How did the contracts come to your office, by mail or how? A. They were delivered personally, by Mr. Potter. 10

Q. Which one of the Potters? A. I don't know his first name, he was a junior, I think his name was Henry.

Q. Was he connected with the Hildreth Granite Co.? A. Yes, sir.

By the Vice-Chancellor:

Q. Which one of the three papers which you have examined was the one you retained? A. I could not tell you that. This is probably it. 20

Q. Counsel has shown you something, what is it counsel has shown you? A. Mr. O'Neill has wrote on there "Mike send this to Elks and pay tickets," that is the only one we had.

Q. Why do you say that? A. Because Mr. O'Neill must have carried that around in his pocket and given it to me.

Q. Is that a memorandum that Mr. O'Neill made on there? A. Yes, sir. 30

Q. A private memorandum? A. Yes, sir.

Q. So you think because you discover a private memorandum in his handwriting that shows that the instrument on which the memorandum was made was the one you retained is that right? A. Yes, sir.

Mr. Young: If the Court please, I could amplify that by my own testimony. 40

Cross examination by Mr. Van Winkle:

Q. Is there anything in this pencil memorandum about paying something to the Elks that gives you any date or time reference at all? A. No, sir.

10 Q. Why could not that pencil memorandum have been made after Mr. O'Neill received this contract from the Hildreth Granite Company no matter who signed it first, after it was signed by both parties; is there any thing to contradict that? A. There is not anything.

Q. Could not that memorandum have been made a month or two before Mr. O'Neill went into bankruptcy, recently, in 1915? A. It could.

By the Vice-Chancellor:

20 Q. I understood you to say that this transaction occurred some time in the first part of May? A. Yes, sir.

Q. That is, the signing of the contract? A. Yes, sir.

Q. I observe that the contracts originally had the year 1913 appearing in them? Just look at the top of the contract do you observe that? A. Yes, sir.

Q. And it is changed to 1914? A. Yes, sir.

30 Q. Do you know whether you had the draft of the contract in your possession in 1913, for any purpose? A. I do not think we had it in 1913.

Q. You think not? A. No, sir.

Q. Do you know anything about when that alteration was made from 1913 to 1914? A. No, sir.

Q. Was that change made when the contracts were brought to your office? A. I did not take notice; this is the first I noticed it now.

40 Q. When you signed it do you know whether the alteration had been made? A. No, sir.

Q. What is that? A. I do not know whether it had or not.

Q. Do you know whether it was dated when you signed it or not? A. The contract?

Q. Yes. A. I don't think it was.

Q. Do you know, have you any recollection about it? A. Well, I could not swear to it.

Q. Are you certain that the contract bore the signature of the Hildreth Granite Company? A. Yes, sir.

Q. What makes you positive of that if you do not know whether it was dated or not? A. Well, I see the signature there and I looked at it and Mr. Potter told me he had it signed.

10

Q. How do you account for the fact that you signed it in the early part of May, and it bears date the 15th of May? A. It was brought in the office in the early part of May, and laid on the desk, I don't know that I signed it then.

20

Q. You said a moment ago you signed it in the early part of May. A. Well, probably the 10th or 12th of May, I think.

By Mr. Van Winkle:

Q. You are just guessing now? A. Well, I am not positive.

Q. Have you any records or letters or memorandum of any kind that will aid you in being accurate or exact in this matter? A. Well, all the letters, Mr. Lippincot has all them.

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Q. Speaking of letters, here is a copy of a letter in evidence C, No. 8, dated May 6th, 1914, the early part of May, addressed to Edward P. O'Neill "We beg to acknowledge receipt of contracts as signed by you; we made the changes agreed on sometime ago." Does not that refresh your memory some-what? A. That must be right if it is a correct copy?

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Q. Is it not true that your recollection of this matter is not very strong? A. Not on the date?

Q. When you say that "it" hung around the office and was lying on the desk for a while you mean one copy of this contract? A. No, three copies.

Q. Three copies were hanging around the desk were they? A. Yes, sir.

Q. And all three signed by the Hildreth Granite Company? A. Yes, sir.

10 Q. You are not sure the seal was on? A. No, sir.

Q. How did you come to write O'Neill's name there instead of his doing it himself? A. He told me to.

Q. You look alike and you write alike; you are related are you not? A. No, sir.

20 Q. The change referred to in this letter P. 8 was a change, was it not from one dollar and ninety-six cents to one dollar and ninety-four cents, a yard? A. I don't know anything about what prices they made, that was between Mr. O'Neill and the Hildreth people.

30 Q. Calling your attention to Exhibit C, 15, being draft of contract of blank date, 1913, unexecuted, which is a paper on which the price appears as \$1.96 a square yard delivered f. o. b., and so forth, I ask you to look at that carefully and see if that is the contract that you had hanging around the office or a copy of that? A. It was those, I think because they had those covers on.

Q. To your recollection as far as you have a recollection, in the early part of May you signed them for O'Neill and they went to the New York office of the company? A. Yes, sir.

Q. And at that time the contracts, your best recollection is, were undated? A. Yes, sir.

Redirect examination by Mr. Young:

40 Q. Do you know whether the papers of Mr. O'Neill were turned over to the Receiver in Bankruptcy Mr. Lippincott? A. Yes, sir, they were.

Q. Do you know if that copy of the contract was turned over to him? A. I think so; he told me to get every paper in his business and give it to Mr. Lippincott.

Q. And you gave him this instrument? A. Yes, sir.

Q. Before this contract was entered into by Mr. O'Neill and the Hildreth Granite Company did the Hildreth Company solicit this particular business from Mr. O'Neill, did they send a man there? A. Yes, sir.

10

Q. Who was it solicited the work? A. Mr. Potter.

Q. The same gentleman who brought the contracts over there afterwards? A. Yes, sir.

Q. How long before the contract was made was the solicitation made? A. He came over to the office nearly every day.

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Q. Did he do that in response to a letter Mr. O'Neill sent him? A. No, he used to come around to see Mr. O'Neill.

Q. He came to Mr. O'Neill's office? A. Yes, sir.

Q. Did he say he knew about the contract Mr. O'Neill had gotten from the county for this paving job? A. Oh, yes, he knew about it.

Q. Tell us in a brief way just what he said on this first occasion. A. Mr. Potter and Mr. O'Neill you mean? A. Yes.

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Mr. Van Winkle: I object to any negotiations leading up to the contract, we are standing on the contract at the time it was signed if it bears on that it may be competent.

Mr. Young: Very well, that is all we have.

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JOHN P. NOONAN, recalled.

By the Vice Chancellor:

Q. I think you stated that you had been Clerk of the Board of Freeholders of Hudson County for a number of years? A. Yes, sir.

Q. For how long a period? A. For about thirty-three years; but in a clerical capacity?

10 Q. You referred to a lien docket or book that is kept there; have you that book with you? A. Yes, sir.

Q. Here? A. Yes, sir.

Q. Is that it before you? A. Yes, sir.

Q. That seems to be a new volume; how long has that been running? A. The first entry in this book is May 4th, 1914.

20 Q. What is that book entitled on the outside? A. "Law Register."

Q. Is there any other title inside? A. No, sir; merely a blank form.

Q. What is entered in that book? A. Liens, summons, anything pertaining to legal matters affecting the interest of the counties.

Q. Was there a similar book which ran up to the date when this was opened? A. Yes, sir.

30 Q. How many of these law registers are there, how far back do they go? A. That is the second one, I could not tell you how far back the other one went, I did not bring it with me.

Q. A number of years? A. Yes, sir.

Q. For some years past, has it been the custom to enter all these municipal lien notices in that law register? A. Yes, sir; all that I received and I think I received them all.

40 Q. What has been the custom where the notice had been left with the Director of the Board? A. He would hand them to me maybe without looking at them, merely hand them to me to take care of.

Q. Are the notices with which we are dealing in this case, the notice of Hildreth and Company and of Maher and McNichols and of the Edison Portland Cement Company entered in that book? A. Yes, sir.

Q. Was there any other office connected with the Board of Freeholders where these notices of Municipal Liens were entered or filed? A. Yes, sir, with the County Collector.

10

Q. No, I say was there any other office besides this, connected with the Board of Freeholders? A. No, sir, this is the only office.

Q. You said, I think, that Mr. Witt was the Director of the Board in December, 1914? A. Yes, sir.

Q. Who became Director in January, 1915? A. He was succeeded by George W. Capron.

20

Q. How about Mr. Kulpt? A. He is the Director now, he succeeded Mr. Capron.

Q. When did he go in? A. He went in a year this month, in January, 1915.

Q. Mr. Witt then was the Director in December, 1914? A. Yes, sir.

Q. And then he was succeeded by Mr. Kulpt in January, 1915? A. No. Mr. Witt was the first Director and he was succeeded by Mr. Capron; Mr. Witt had one year to serve from January, 1913, to January, 1914, he went out of office then and he was succeeded by George W. Capron who had a two year term and the last year of his term he was Director of the Board, until 1915, January, 1915, when I think as near as I can recollect now, without looking at the record, Mr. Kulpt was elected Director?

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Q. And went in when? A. January, 1915.

Q. In November and December, 1914, you say that Mr. Capron was the Director, you think? A. 1914?

40

Q. Yes, during November and December. A. Yes, sir.

Q. Are you quite sure of that? A. Yes, sir; quite sure; Mr. Witt was there from 1913, until January, 1914, Mr. Capron was there from 1914, until January, 1915, and Mr. Kulpt is now there, since 1915, and is acting Director now.

10 Q. Where was Mr. Capron's office in November and December, 1915, or did he have any as Director of the Board? A. Only when he came to the Board. There is a suite of offices there that the Director goes to every time he comes to the Court House and translates county business.

Q. I understand there is a large room where the Board is in the habit of meeting? A. Yes, sir, we have a regular meeting room.

20 Q. And a desk or raised dias on which there was a place for the Director to sit when he presided, is that right? A. Yes, sir.

Q. Was any other business done in that big room excepting that which was transacted by the Board when in session? A. No, sir, just as soon as they got through with the sessions they adjourned to the other offices.

30 Q. Do you know where Mr. Capron left or kept any papers which he had as Director? A. No, sir, I do not, I think all the papers that he had in connection with county matters, he left them with me.

Q. What was his business? A. He is in the hotel business.

Q. Whereabouts? A. In Harrison.

Q. That is over by the Passaic River near Newark, is it not? A. Yes, sir, just this side of it.

By Mr. Van Winkle:

40 Q. I notice in this lien book which you have produced are two notices with respect to the Edison Portland Cement Company why did you enter the

notice twice in this book? A. This is the second one that came in.

Q. Did one of these two notices come to you from Director Kulpt? A. I could not say as to that, maybe it did; as I said, if papers of that character were handed to the Director he would hand them to me.

Q. That was the course of practice? A. Yes, sir.

Q. You do find in the book those two notices; what does that indicate about the situation? A. It would look as if one was given to the Director and one was given to me.

Q. Was that the only official record made of the notices that came to you from the Director? A. That is the only one.

Q. In this lien book? A. Yes, sir.

By Mr. Lane:

Q. You are not the financial officer of the County or Board? A. No, sir.

Q. That is the County Collector? A. The County Collector is the financial officer.

Q. Were these entries in this book made by you? A. Yes, sir.

Q. Has Mr. Wasser the County Engineer a separate office in the Court House? A. Yes, sir.

Q. You had nothing to do with this improvement, as Clerk of the Board, that is done through his office is it not? A. The payment of claims and the issuing of warrants.

Q. Except the payment of claims? A. Ordered by the Board?

Q. Yes, except the payment of claims; he is the man to look after the work. A. He looks after the work.

Q. As a matter of fact is it not the custom for the Director of the Board of Freeholders to come to the Court House every morning. A. No, sir.

Q. Does not Mr. Kulpt come every morning, about? A. Not every morning, no, sir.

Q. How often does he come there? A. When he is required to.

Q. How often? A. He might be there two or three times a week and he might be there every morning some weeks, and maybe not quite so often other weeks.

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By Mr. Young:

Q. Does not Mr. O'Mara the clerk come into the office at any time? A. Yes, sir.

Q. Does he ever receive service of papers like these? A. Sometimes he does.

Q. Do you know Mr. Margolies? A. I have seen him before.

Q. Do you recollect that he served you with a notice of the lien claim of the Edison Portland Cement Company? A. Well, I cannot say that he served it on me, it was served on me, but I cannot recall whether he is the man who served it; there are so many of these papers served by so many people.

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Q. Do you swear positively that the notice of lien claim of the Edison Company, was served on you? A. Yes, sir; it was handed to me or I would not have it in that book.

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Q. Handed to you by whom? A. I cannot say by whom now.

Q. And you say it was not handed to you by some other clerk? A. That might happen.

Q. You have charge of the lien book as assistant clerk? A. Yes, sir.

Q. And any notice served on Mr. O'Mara he would hand over to you. A. Yes, sir.

40

Q. And you would initial the notice? A. Yes, sir.

Q. And put it in the book? A. Yes, sir.

Q. Could not that have been done with the Edison Company, notice? A. It might.

Mr. Lane: If your Honor please, before closing my case, I want to make a motion to amend the lien claim of Maher and McNichols if necessary to permit the question of labor which Mr. Maher has sworn to being brought in so that it will be a material and a labor claim. I understand they are both put in the same claim, and Mr. Maher has testified as to the actual labor performed and I am therefore making that motion. My claim now reads for 6,941 feet of new curb at \$1.80 a foot. That was the contract price for the curb including labor, and our contention is that so far as labor is concerned we ought to be in a little better position for actual labor.

The Vice Chancellor: What power has the Court to amend this notice—you either got a lien or you did not. As I understand your case it rests upon a contract for so many yards of curb. The Court of Errors and Appeals has held that a notice for the value of material supports a lien for plumbing work installed or to use the term employed in the opinion of Justice Pitney, it is the price of material *in situ* and I don't know why that rule does not apply to this municipal lien act and if you have a contract for the furnishing of granite blocks laid, or a contract for furnishing curb including the setting, it is a contract for furnishing material in place, *in situ*, and you get your lien by serving notice of your lien stating that it is for material furnished, and naming a price—and that is your case, is it not.

Mr. Lane: Yes, sir.

The Vice Chancellor: That is the way I shall rule unless counsel correct me by citing authorities that lead to another conclusion.

Is the case closed?

Mr. Van Winkle: Yes, sir.

Mr. Young: We close.

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Mr. Lane: Yes, sir.

The Vice Chancellor: As to the Hildreth Granite Company, the first question, as has been suggested by Mr. Van Winkle, is whether the lien was affected by the lodging of this paper with the Clerk of the Board of Freeholders, whether that was a filing of the notice with the Director. I understand that no question is raised in this case by any counsel as to the proper party with whom the paper must be filed in order to comply with the statute; it has not been suggested—

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Mr. Lane: It has not been suggested but in my argument it may be that I shall suggest that the chief engineer or the County Engineer was the man who had charge of it.

The Vice Chancellor: Some testimony, I will say gentlemen might have been taken if it had not appeared that counsel were in accord as to who the proper officers were. The question frequently comes up as to who the head officer, or the financial officer, is; I understood, perhaps erroneously, that counsel were in accord as to who the proper parties were with whom these notices should be filed and that they were the Director of the Board of Freeholders and the County Collector and my recollection is that in other cases coming from Hudson County it has been stated that those were the two officers here. Recollecting that fact I made no inquiry, I did not ask the witness on the stand about the functions of these different officers. Whom do

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you contend, Mr. Lane, should have been the party with whom the notice should have been filed?

Mr. Lane: I asked the witness as to whether the County Engineer was the man who had charge of the work and I contended there is a question as to which is the man. I might frankly state to your Honor that I got that from a question which your Honor asked one of the witnesses this morning as to whether or not the chief engineer had an office of his own and that was what put me on the track of it, so that I think the question should be raised.

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The Vice Chancellor: I will hear argument on that point. The next, and the only other question that I recall as to the Hildreth Granite Company, is the question whether that company was doing business in the State of New Jersey at the time this contract was made. If it was then, of course, it is amenable to the penalties which our law imposes on foreign corporations doing business in New Jersey without a license, because I understand, it is conceded, the Hildreth Company has not filed a copy of its charter and obtained a license to do business in this State. If it was doing business within the State of New Jersey but this particular contract was made outside of the State, then the question counsel may examine is whether our statute barred the Hildreth Company from recovering on that particular contract. If the Hildreth Company was not doing business in the State of New Jersey then it is not amenable to the penalty under our law even if this particular contract was made in New Jersey, as I recall the decisions—a single transaction in the State of New Jersey does not render a foreign corporation liable. I do not know of any other question that appertains to the claim of the Hildreth Granite Company, which has been suggested by the evidence.

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As to the next claim, that of Maher & McNichols I

understand that there is no question whatever—  
Yes, there is some question in regard to the sufficiency of notice and its filing with Mr. Noonan the Assistant Clerk of the Board of Freeholders. A notice I understand was left with him and entered in the law register precisely as the notice of the Hildreth Company was, so that same question comes up in regard to the claim of Maher & Mc-Nichols. If there is any other claim about that counsel may state it.

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Mr. Van Winkle: Yes, there is this situation: the date of completion was October 31st, and their notice I understand was not filed, if it was filed at all, within fifteen days after the time of completion.

The Vice Chancellor: The notice as I understand was served early in December?

20

Mr. Lane: On November 25th.

The Vice Chancellor: Then you must be prepared to argue that question, whether in view of the fact the work was completed October 31st, service on November 25th was good, the work having been accepted after that time.

Some discussion then ensued on this point.

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The Vice Chancellor: As to the claim of the Edison Cement Company, the amount having been fixed, I understand the only question is whether the notice was served within the time provided by the act.

Mr. Van Winkle: Your Honor will understand that in regard to Mr. Young's claim the question arises as to the demand itself, and the discrepancies.

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The Vice Chancellor: The cases generally refer to slight errors, but I think now it is established that men are not punished for more mistakes, if they are acting in good faith. The actual amount then would be ascertained by the Court and the lien would stand for the actual amount.

Adjourned for Argument.

**Exhibit C, No. 1.**

Contract in regular form, entered into between the Board of Chosen Freeholders, of Hudson County, and Edward P. O'Neill, dated October 22nd, 1913, for the improvement of Passaic Avenue, of County of Hudson, between Newark and Hudson Streets, and in the town of Kearney, and extending to Bergen Avenue, in the said township of Kearney, a distance of three thousand five hundred and fifty-eight feet (3,558); for the sum of fifty-three thousand, eight hundred and eighty-nine dollars, and thirty-seven cents (\$53,889.37); under the said contract, it was provided that monthly payments should be paid by the said Board of Freeholders, of Hudson County, to the said Edward P. O'Neill, for work performed, and the amount not to exceed 80% of the total cost of the work then completed to date, upon presentation by him of the proper certificate of the Engineer, and Inspector; and that upon the completion and presentation of the final estimate by the Engineer and Inspector, and the written acceptance of the work by the State Commissioner of Public Roads, 15% will be paid by the said Board of Chosen Freeholders of the County of Hudson; that the remainder of 5% should be retained by the said Board of Chosen Freeholders, for a period of one year, as further security for the faithful performance of the completion and maintenance of the said road, should be paid, upon certificate of the Engineer, approved in writing by the State Commissioner of Public Roads.

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**Exhibit C, No. 2.—Hildreth Granite Co.**

Notice and Lien Claim of the Hildreth Granite Company, a corporation, in proper form for the sum of \$14,619.63 with interest from the day of A. D. 1914.

Endorsed as follows:

10      "Received Nov. 6, 1914, Board of Freeholders  
J. P. N."

**Exhibit C, No. 3.**

Notice and Lien claim of the Hildreth Granite Company, a corporation, in proper form, for the sum of \$14,619.63 with interest from the day of A. D. 1914.

20      Endorsed as follows:

"Hildreth Granite Company,

vs.

Edward P. O'Neill

Notice of Claim

30      Marshall Van Winkle, Atty  
1 Exchange Place,  
Jersey City, N. J.

Received Nov. 5, 1914.

Frederick Rider,  
County Collector."

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**Exhibit C, No. 4.**

Bond in proper amount, and proper form under the statute to cover the claim of the Hildreth Granite Company, a corporation,

Endorsed as follows:

“The Hildreth Granite Company

to

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The Board of Chosen Freeholders  
of the County of Hudson.

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BOND

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Received Nov. 5, 1914.

Frederic Rider,  
County Collector.”

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**Exhibit C, No. 5.**

Notice of pendency of action, by Hildreth Granite Company, a corporation, in proper form, and in accordance with the statute;

Endorsed as follows:

“In Chancery of New Jersey

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Between

Hildreth Granite Company, body corporate,  
Complainant,

and

Edward P. O'Neill and the Board of Chosen Freeholders of the County of Hudson,

Defendants.

On Bill.

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Notice of Pendency of Action to be filed with

the Financial Officer of the Defendant The Board  
of Chosen Freeholders of the County of Hudson.

Marshall Van Winkle,  
Sol'r of Complt.,  
1 Exchange Place,  
Jersey City, N. J.

10 Received Nov. 23, 1914.  
Frederick Rider,  
County Collector."

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**Exhibits C, 6, 11, 12,**

are as follows:

20 "This agreement made this 15th day of May,  
Nineteen hundred and fourteen by and between  
EDWARD P. O'NEILL, of the City of Jersey City,  
County of Hudson, State of New Jersey, hereinafter  
known as the party of the first part, and the  
HILDRETH GRANITE COMPANY a corporation  
organized and existing under the Laws of the State  
of Maine with an office in the City of Boston,  
County of Suffolk, State of Massachusetts, herein-  
after known as the party of the SECOND part,  
WITNESSETH:"

30 This agreement recites that O'Neill has been  
awarded a contract for the paving, &c., of Passaic  
Ave. and the Hildreth Granite Co. is willing to sell  
them paving blocks to be used for such paving.  
O'Neill agrees to pay a certain price for such pav-  
ing blocks.

The agreement provides that the blocks shall be  
delivered alongside dock to be furnished by O'Neill  
in Passaic River at Newark, New Jersey.

40 Under this contract the amount mentioned in the  
notice of lien claim of the Hildreth Granite Co. be-  
came due from O'Neill.

“FOURTH:—This agreement is made in triplicate one of which being accomplished the others to stand void.”

“IN WITNESS WHEREOF, the party of the first part has hereto affixed its name and seal and the party of the second part by its General Manager has duly affixed its name and corporate seal the day and year above written.

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In the presence of

EDWARD P. O'NEILL  
HILDRETH GRANITE CO.

[SEAL.]

By H. V. Hildreth,  
Gen. Mgr.”

The date and the month and the year in the agreement are written in ink and the rest of the agreement is typewritten. The words in ink are as follows:

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15th  
May  
fourteen

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**Exhibits C, 7, 8, 9, 10, 13.**

The letters produced by the Hildreth Granite Co. are as dated and as copied in the testimony and in the brief of counsel of the Hildreth Granite Co.

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It is agreed that such copies are true copies of these Exhibits.

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**Exhibit No. 1.—(Maher & McNichols.)**

Notice and Lien Claim of Patrick J. Maher, and John McNichols, partners trading as "Maher & McNichols," in proper form, for the sum of \$8218.72, with interest from the 29th day of October, A. D. 1914.

Endorsed as follows:

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"Patrick J. Maher and  
John McNichols, partners, etc.,

vs.

Edward P. O'Neill,

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Notice and Claim

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Ziegner & Lane,  
Attorneys for Claimants,  
75 Montgomery St.,  
Jersey City, N. J.

Received,  
November 25, 1914.  
Board of Freeholders,  
J. P. N."

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(There was no Exhibit No. 2 on the part of  
Maher & McNichols.)

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**Exhibit No. 3.—(Maher & McNichols.)**

Notice and Lien Claim of Patrick J. Maher and John McNichols, partners, trading as "Maher & McNichols," in proper form, for the sum of \$8218.72, with interest from the 29th day of October, A. D. 1914.

Endorsed as follows :

"Patrick J. Maher and  
John McNichols, partners, etc.,

10

vs.

Edward P. O'Neill,

—————  
Notice and Claim  
—————

Ziegner & Lane,  
Attorneys for Claimants,  
75 Montgomery St.,  
Jersey City, N. J.

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Received November 25, 1914.  
Frederic Rider,  
County Collector."

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**Exhibit No. 4.—(Maher and McNichols.)**

Bond, in proper amount and proper form, under the statute, to cover the claim of Maher & McNichols, endorsed as follows:

“Patrick J. Maher and  
John McNichols, partners  
trading as “Maher & McNichols,”

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to

The Board of Chosen Freeholders  
of the County of Hudson.

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Bond

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Received November 25, 1914.

Frederic Rider,  
County Collector.”

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**Exhibit No. 5.—(Maher and McNichols.)**

Notice of pendency of action by Patrick J. Maher and John McNichols, partners trading as "Maher & McNichols", in proper form, and in accordance with the statute.

Endorsed as follows :

"In Chancery of New Jersey 10

Between

Patrick J. Maher and  
John McNichols, partners  
trading as Maher & McNichols,  
Complainants,

and

Edward P. O'Neill, 20  
The Board of Chosen Freeholders  
of the  
County of Hudson *et al.*,  
Defendants.

On Bill, etc.,  
Notice of Pendency of Action, etc.,

Ziegner & Lane, 30  
Solicitors of Complainants,  
75 Montgomery St.,  
Jersey City, N. J.

Service of within, is hereby acknowledged, on  
the 13th day of January, A. D. 1915.

Frederic Rider,  
County Collector."

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### Conclusions.

Consolidated suits for the enforcement of liens under the Municipal Lien Act.

Heard on consolidated bills, answers and proofs taken in open Court.

10                   Mr. MARSHALL VAN WINKLE for Com-  
                          plainant Hildredth Granite Company.  
                          Mr. LANE and Mr. YOUNG for other Lien  
                          Claimants.

STEVENSON, V. C. (Orally) :

20                   My conclusion is that the complainant, the Hil-  
                          dredth Granite Company, is entitled to a lien on  
                          the fund and that the other two complainants,  
                          whose names I do not now recall, have no lien on  
                          the fund, because, following the decision, which I  
                          think is binding on this Court, of Vice Chancellor,  
                          Grey, in the Somers Brick Company case, the no-  
                          tices were not filed by these two other claimants  
                          within the time limited by the statute.

30                   I find as a matter of fact and of law that the  
                          complainant, the Hildredth Granite Company, filed  
                          its notice in accordance with the requirements of  
                          the statute. The act provides that the notice shall  
                          be filed with two public officials and one of these  
                          public officials is the head of the department hav-  
                          ing the work in charge. Counsel all conceded, as  
                          I understood them, that the head officer of the  
                          municipality, for the purposes of acquiring liens  
                          in this case, was the Director of the Board of Free-  
                          holders, and that the act requires that one of the  
                          notices shall be filed with him. This statute ap-  
                          plies to a large number of municipalities, small  
                          boroughs included, and the head officer may have  
40                   a regular office or he may not. He may have his of-  
                          fice in his own house, his residence; I suppose that  
                          is true in the case of many small boroughs; but

there is no reason, it seems to me, why the head officer may not establish an office and announce that all notices to be filed with him are to left there, and that in effect is what has been done in Hudson County. It has been the established custom to file these notices with the Director of the Board by leaving them in the office of the Clerk of the Board where a book is kept in which every notice is entered. If one of these notices is left with the Director at his place of business, which in this case was a couple of miles perhaps from the office of the Clerk of the Board, he takes the paper to the clerk's office and delivers it to the clerk or his assistant and it is entered in this same register.

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The attorney for the Hildredth Granite Company following the custom which had been established in Hudson County, filed his notice with the Director of the Board of Freeholders by leaving it with the Clerk of the Board at his regular office where these notices are registered. The attorney for one of the other claimants not only complied with this custom but out of abundant caution delivered a similar notice to the Director of the Board at his place of business a mile or more away from the clerk's office, and thereupon the Director of the Board brought the notice and delivered it to the clerk, and it was duly entered in the register so that the notice which is the basis of the lien of this defendant was registered twice in the same book. We could hardly have a more positive recognition by the Director of the Board of Freeholders, who was in office at the time this notice was served, of the custom of filing such notices with him by delivering them to the clerk of the Board in his office.

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In determining whether a notice has been served or filed in accordance with the terms of this statute, the exact language of the act should at all times be kept in mind as well as the great variety of

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municipalities and heads of departments, councils, boards, bureaus and commissions and financial officers to which its provisions must be applied. After the proper "chairman" or "head" and also the proper "financial officer" have been ascertained with as much certainty as possible among the wide variety of chairmen, heads and financial officers to be found among our great variety of municipalities, the mandate of the statute to the lienor is merely that he "file with" the proper chairman or head officer and the proper financial officer, the notice which the statute describes. What is meant by filing a paper with a public official plainly must depend upon circumstances. The statute does not prescribe any method by which the chairman or the financial officer shall perform the manifest duty which is cast upon him of receiving the notice and placing it somewhere on file. The statute, in my judgment, left the Director of the Board of Freeholders of Hudson County entirely free to establish an office and authorize a clerk occupying such office from day to day to receive these lien notices on behalf of the Director, and place them on file in his office. Can it be seriously argued that the Director of the Board should keep these notices on his person and thereby defeat one of the manifest objects of the statute? Where an officer like a County Clerk or the Clerk of the Court has a legally established office where he transacts his official business, a direction that a paper be "filed with" such clerk of course means that the paper must be filed or placed on file in the public office of the clerk. Where, however, as in this case, the head officer of the Board having the public improvement in charge, has no office, and there is no room other than the public assembly room where the meetings of the Board are held, which bears any special relation to his official character, it seems to me that

it is entirely within the right of the Director to establish and to recognize the custom of having these lien notices filed with him by leaving them with the Clerk of the Board, who as a part of his official work, registers them in a convenient volume accessible to the public.

In view of the established custom in Hudson County the legality of which, so far as I can learn, has never before been challenged, and which the Director of the Board of Freeholdres in this case in the most unmistakable manner has recognized and sanctioned, my conclusion is that the notice of the Hildreth Granite Company was lawfully filed with the Director of the Board of Freeholders when it was delivered by an agent of the Hildreth Granite Company to the Clerk of the Board, and was by the Clerk received, filed and registered. That the notice was also effectively filed with the financial officer of the municipality has not been disputed and has been duly proved.

The other important attempted defense to the lien claim of the Hildreth Granite Company is based upon the charge that that company cannot maintain an action in New Jersey because it was a foreign corporation transacting business in the State of New Jersey without the license which our law requires. Counsel for the Hildreth Granite Company argues with great force that these rival claimants cannot raise this particular objection, and if my finding is correct to the effect that neither of these rival claimants has perfected or can now perfect any lien on this fund, there certainly is difficulty in establishing their right to make an objection which the parties interested have waived. I shall, however, briefly consider the merits of the objection to the lien of the Hildreth Granite Company based upon the fact that the company is a foreign corporation and had no license. The stat-

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ute provides not that contracts made by these foreign corporations who transgress the law by neglecting to take out a license, shall be void; the statute provides that a foreign corporation transacting business in this State shall not maintain any action upon any contract made by it in this State, until it has procured such license. It is a suspension of the right to sue in the Courts of this State which the statute creates. That the Hildreth Granite Company is a foreign corporation and that it had no license to transact business in New Jersey is conceded. The two questions to be determined are whether this foreign corporation was transacting business in this State, and whether the contract upon which it brings its action was made in this State.

In this case I find as a matter of fact that the Hildreth Granite Company was not transacting business in the State of New Jersey within the meaning of our statute. Whether in case it had been transacting business in the State of New Jersey, our statute would hold good against the Federal legislation, is a question I do not have to entertain. I find as a matter of fact that the complainant, the Hildreth Granite Company was not transacting business in New Jersey within the meaning of our statute. Its office is in Boston. It is a Maine corporation which sends drummers throughout the State of New Jersey and other States, but all contracts are made in and from the Boston office.

Further, I find as a matter of fact that the contract in this case, with which we have to deal, was not made in New Jersey, but was made in Boston. All the probabilities are in favor of that view, and the testimony of the officials of the company is direct and positive, while the correspondence in ref-

erence to these contracts corroborates that view. I think that Mr. O'Neill was mistaken in the testimony which he gave; he might readily at this late day forget and be confused about exactly what was done in his office. I do not think that he meant to testify falsely, but I think he was mistaken, and I find as a fact, that the contract was not made in the office of Mr. O'Neill, but it became effective in Boston, when it was approved by the Boston office.

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If, therefore, the correct view is that the Hildreth Granite Company was transacting business in New Jersey, nevertheless, it is not prevented by our statute from maintaining an action in this State on this particular contract with Mr. O'Neill. Both propositions—that the corporation was transacting business in New Jersey and that the contract sued on was made in New Jersey—must be established by the proofs or the defense falls. Neither proposition in my judgment is established.

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There was some other point that I intended to mention but I have forgotten what it was. Perhaps counsel can suggest it.

However, these points, if correct as I have stated them, are of course dispositive of this case, and the result is that the complainant will take the amount of its claim which will consume the entire fund.

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## Final Decree.

## IN CHANCERY OF NEW JERSEY.

10	Between HILDRETH GRANITE COMPANY, body corporate, Complainant, and EDWARD P. O'NEILL <i>et al.</i> , Defendants.	On Bill, &c. On Order of Consolidation.
20	Between PATRICK J. MAHER and JOHN McNICHOLS, partners, etc., Complainants, and EDWARD P. O'NEILL <i>et al.</i> , Defendants.	On Bill, &c.
30	Between EDISON PORTLAND CEMENT COM- PANY, body corporate, Complainant, and EDWARD P. O'NEILL <i>et al.</i> , Defendants.	On Bill, &c.

40 The three above entitled causes having been consolidated, and coming on to be heard at the Chancery Chambers in the City of Jersey City, on the Bills, Answers, Replications and proofs, in the presence of Marshall Van Winkle, of counsel with the Complainant, the Hildreth Granite Company, Harry Lane, of counsel with Patrick J. Maher and John McNichols, partners trading as Maher & McNichols, Charles Young, of counsel with the Edison Portland Cement Company, and John A. Dennin,

of counsel with the Defendant The Board of Chosen Freeholders of the County of Hudson, and the Bill of Complaint of the said The Hildreth Granite Company having been taken as confessed against the Defendant Edward P. O'Neill; and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered said pleadings, proofs and arguments; and it appearing to the Court that the work to be done by the said Edward P. O'Neill under the contract between him and the said The Board of Chosen Freeholders of the County of Hudson, for the improvement of Passaic Avenue, in the Town of Kearny was completed on October 31, 1914, and that the contract was completed on that date and that said work was completed before it was accepted; and that the amount of the claim of the Complainant, the Hildreth Granite Company is \$14,619.63; that the granite blocks supplied by the said Hildreth Granite Company to the said contract were used in the completion of the said contract and the completion of the work under the said contract; that the Notice of Claim of Lien of the said Complainant, the Hildreth Granite Company was duly filed on the sixth day of November, 1914; that action was commenced by the said Complainant, The Hildreth Granite Company within the time required by law; that the said The Hildreth Granite Company duly complied with the statute; that the said Complainant. The Hildreth Granite Company is entitled to priority over the said Patrick J. Maher and John McNichols, partners trading as Maher & McNichols, and Edison Portland Cement Company and to priority in payment to the full amount of the moneys in the hands of the said The Board of Chosen Freeholders of the County of Hudson.

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10 And it further appearing that the Notice of Claim of Lien of Patrick J. Maher and John McNichols, partners trading as Maher & McNichols, was not filed within fifteen days from the completion of the said contract and the work to be done by the said Edward P. O'Neill under the said contract between the said Edward P. O'Neill and the said Board of Chosen Freeholders of the County of Hudson; but was filed prior to the date of the acceptance of said work to be performed under said contract, and that the said notice of lien was in due form and otherwise properly filed in compliance with the statute,

20 And it appearing further that the Notice of Claim of Lien of the said Edison Portland Cement Company was not filed within fifteen days from the completion of the work to be done by the said Edward P. O'Neill under the said contract and the said contract between the said Edward P. O'Neill and the said Board of Chosen Freeholders of the County of Hudson.

30 And it further appearing that there is in the hands of the said, the Board of Chosen Freeholders of the County of Hudson, the sum of \$11,659.74, being the balance due from the said Board of Chosen Freeholders of the County of Hudson upon the said contract entered into between the said Board of Chosen Freeholders of the County of Hudson and the said Edward P. O'Neill, for the improvement of Passaic Avenue, in the Town of Kearny, and that the percentage retained by the said Board of Chosen Freeholders in accordance with the said contract is now due and is part of the said fund of \$11,659.74.

40 And it appearing that the Complainant, The Hildreth Granite Company, is entitled to the relief sought and prayed for by it in its Bill of Complaint, and to have the whole sum so in the hands

of the said Board of Chosen Freeholders of the County of Hudson paid to it.

And it appearing that the Edison Portland Cement Company is not entitled to the relief sought and prayed for in its Bill of Complaint.

And it appearing that Patrick J. Maher and John McNichols, partners trading as Maher & McNichols, are not entitled to the relief sought and prayed for in their Bill of Complaint.

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And it appearing from the Answers filed by the said Board of Chosen Freeholders of the County of Hudson and the statement in open Court of the counsel for the said Board of Chosen Freeholders of the County of Hudson, that the said Board of Chosen Freeholders of the County of Hudson are ready and willing to pay said balance of \$11,659.74 to such of the parties as is entitled to receive the same,

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It is, on this 28th day of March, One thousand nine hundred and sixteen by the 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, doth hereby Order, Adjudge and Decree that the said Hildreth Granite Company is entitled to have and receive from the said Board of Chosen Freeholders of the County of Hudson the sum of \$11,659.74 now in the hands of the said Board of Chosen Freeholders of the County of Hudson, being the balance due from the said Board of Chosen Freeholders of the County of Hudson, upon the contract made by and between the said Board and the said Edward P. O'Neill for the improvement of Passaic Avenue, in the Town of Kearny; that the Complainant the Hildreth Granite Company is entitled to priority of payment to the full amount of said \$11,659.74 over the said Patrick J. Maher

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and John McNichols, partners trading as Maher & McNichols, and the said Edison Portland Cement Company; and the said Board of Chosen Freeholders of the County of Hudson is hereby ordered and directed to pay said sum to the Hildreth Granite Company or to its solicitor.

10 And it is further ordered, adjudged and decreed that the Bill of Complaint of Patrick J. Maher and John McNichols, partners trading as Maher & McNichols be, and the same is hereby dismissed with costs to the Hildreth Granite Company in the suit of Patrick J. Maher *et al.*, against Edward P. O'Neill up to and including filing of answers;

20 And it is further ordered, adjudged and decreed that the Bill of Complaint of the Edison Portland Cement Company be, and the same is hereby dismissed with costs to the said Hildreth Granite Company; such costs to be taxed in the suit of Edison Portland Cement Company against Edward P. O'Neill *et al.*, to and including filing of answers.

E. R. WALKER,  
C.

Respectfully advised,

30 EUGENE STEVENSON,  
V. C.

A true copy.

ROBERT H. McADAMS,  
Clerk.

Copy.

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