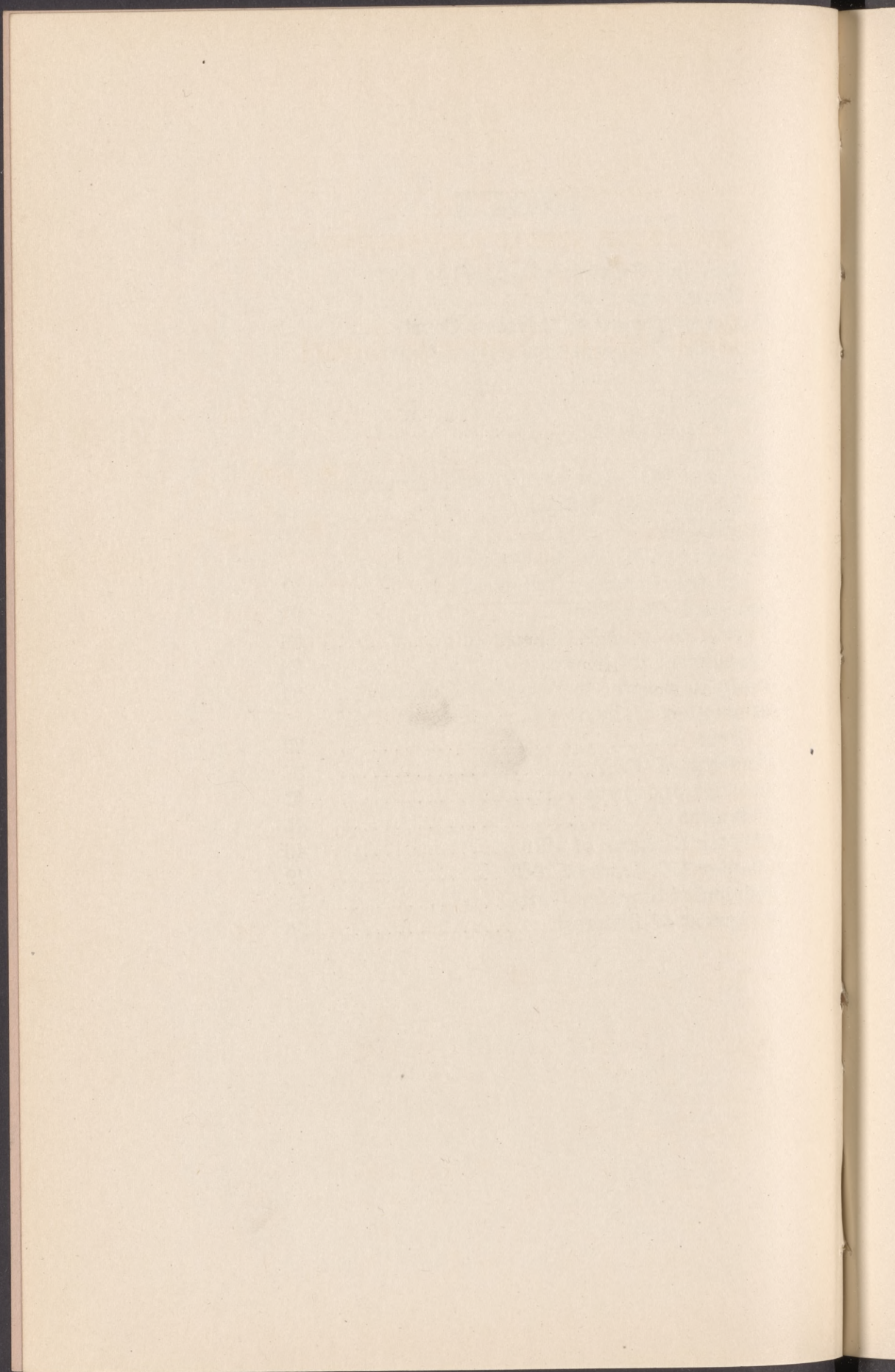


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Notice of Appeal and Grounds.

NOTICE OF APPEAL AND GROUNDS.

Filed November 17, 1925.

New Jersey Supreme Court

FRANKLIN LUMBER COMPANY, <i>Plaintiff,</i>	} <i>On Appeal from the Essex Circuit.</i>	10
<i>vs.</i>		
GLOBE INDEMNITY COMPANY, <i>Defendant.</i>	} <i>Notice of Appeal and Grounds.</i>	

To William B. Harley, Esq., attorney of defendant:

20

SIR:

TAKE NOTICE that the plaintiff, Franklin Lumber Company, appeals from the whole of the judgment entered in the above-entitled cause from the New Jersey Supreme Court to the Court of Errors and Appeals in the last resort in all causes, upon the ground that the Supreme Court erred in reversing the judgment of the Essex County Circuit Court, instead of affirming the said judgment of said Essex County Circuit Court.

30

Dated, November 12, 1925.

Respectfully,

HARRY A. AUGENBLICK,
Attorney for and of Counsel
with Plaintiff-Appellant.

Service acknowledged.

W. B. HARLEY,
Attorney of Defendant.

40

Notice of Appeal to Supreme Court.

NOTICE OF APPEAL.

Filed November 5, 1924.

ESSEX COUNTY CIRCUIT COURT.

10	FRANKLIN LUMBER COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Notice of Appeal.</i>
	GLOBE INDEMNITY COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>		

To Harry A. Augenblick, attorney for plaintiff:

20 TAKE NOTICE that the defendant Globe Indem-
 nity Company appeals from the whole of the
 judgment entered in this cause.

Dated November 5, 1924.

Respectfully yours,

W. B. HARLEY,
 Attorney of Defendant.

30 Service acknowledged November 5, 1924.

HARRY A. AUGENBLICK,
 Attorney of Plaintiff.

Grounds of Appeal to Supreme Court.

GROUNDS OF APPEAL.

Filed November 6, 1924.

NEW JERSEY SUPREME COURT.

FRANKLIN LUMBER COMPANY, a corporation,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>				
GLOBE INDEMNITY COMPANY, a corporation,	}	<i>Defendant.</i>	<i>Grounds of Appeal.</i>	

The defendant sets forth the following grounds of appeal: 20

1. The Trial Judge erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on the following ground urged in the support thereof:

(a) There was no evidence showing that the plaintiff had furnished the defendant with a statement of the amount due the plaintiff, within eighty (80) days after the acceptance of the building, work or improvement referred to in plaintiff's complaint, in accordance with the provisions of Chapter 75 of the Laws of 1918. 30

W. B. HARLEY,
Attorney of Defendant.

Service acknowledged November 5, 1924.

HARRY A. AUGENBLICK,
Attorney of Plaintiff-Respondent. 40

Summons.

SUMMONS.

Filed August 27, 1923.

COUNTY OF ESSEX, ss.

THE STATE OF NEW JERSEY.

10 To Globe Indemnity Company, a corporation:

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of the FRANKLIN LUMBER COMPANY, a corporation, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of Essex County at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, WORRALL F. MOUNTAIN, Esquire, Essex County Circuit Court Judge, at Newark, this 23rd day of August, Nineteen Hundred and Twenty-three.

JOHN H. SCOTT,
Clerk.

30 HARRY A. AUGENBLICK,
Attorney.

40

Complaint.

NOTICE TO THE WITHIN-NAMED DEFENDANT:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service and in default of the filing of such affidavit and answer, judgment will be entered against you. 10

HARRY A. AUGENBLICK,
Attorney for Plaintiff.

COMPLAINT.

20

Filed August 27, 1923.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a
corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a
corporation,

Defendant.

*Action
at Law.*

Complaint.

30

Plaintiff Franklin Lumber Company, a corporation, organized and existing under the laws of the State of New Jersey, says:

1. That on the 13th day of June, 1922, the Board of Education of Cranford, New Jersey, 40

Complaint.

10 which was vested with the power and privilege to enter into contracts for school construction in said municipality, entered into a written contract with Dillon & Wiley, Inc., a corporation, for the construction and the supply of all materials and performance of all the work shown on the drawings and described in the specifications, entitled
20 "Sherman School at Cranford, N. J.," designated as Job No. 196, including the labor and material to be furnished to fulfill the requirements for the general work, including wing containing the model kitchen and dining room and class rooms Nos. 7 and 14, specified as alternate, prepared by Hollingsworth & Bragdon, architects, 17 West 45th street, New York, a copy of which contract is on file with the Board of Education of the Town of Cranford and expressly referred to herein.

2. The said Franklin Lumber Company, a corporation, the plaintiff herein, did on the 23rd day of September, 1922, agree to furnish lumber material in connection with the contract for the construction of the aforesaid Sherman School, which materials are more particularly itemized in the annexed bill of particulars, made part hereof and expressly referred to.

30 3. That the plaintiff, pursuant to said agreement between itself and the said Dillon & Wiley, Inc., as aforesaid, has supplied materials consisting of various kinds of lumber, in accordance with said bill of particulars attached hereto, for which the said Dillon & Wiley promised and agreed to pay the sum of \$3,257.62, and on account of which material and lumber the said Dillon & Wiley paid the sum of \$1,152.64, leaving a balance, after deducting all proper credits and
40

Complaint.

set-offs, in the sum of \$2,104.98, due from the said Dillon & Wiley to Franklin Lumber Company.

4. That the plaintiff has frequently demanded payment of the said sum due it from the said Dillon & Wiley, Inc., as aforesaid, but the said Dillon & Wiley, Inc., have failed to pay the same or any part thereof. 10

5. That on the 14th day of June, 1922, the said Dillon & Wiley, Inc., executed and filed a bond with the Board of Education of the Town of Cranford, in which bond the defendant, Globe Indemnity Company, a corporation, was the surety, a copy of which bond is hereto annexed, made part hereof and expressly referred to.

6. That the said Dillon & Wiley, Inc., under the terms of said contract, commenced the construction and erection of said Sherman School and proceeded with the construction and erection of said school in accordance with the terms of its contract, but through various causes, unknown to the plaintiff, the said Dillon & Wiley, Inc., have not completed the said work and have completely abandoned the same. 20

7. That in accordance with the statute in such case made and provided (Chapter 75, P. L. 1918), the plaintiff, on the 20th day of June, 1923, furnished the defendant, Globe Indemnity Company, the surety on said bond, with a statement of the amount due the plaintiff, together with an itemized copy of the account, a copy of which notice is hereto annexed, made part hereof and expressly referred to. 30

Complaint.

8. The defendant, Globe Indemnity Company, of New York, has not paid the said sum of \$2,104.98 to the plaintiff, or any part thereof.

Plaintiff demands as damages the sum of \$2,104.98, together with interest and costs of suit.

10 HARRY A. AUGENBLICK,
Attorney for Plaintiff.

GLOBE INDEMNITY COMPANY,
Washington Place, Newark, N. J.

SIRS:

20 Take Notice that we have on the _____ day of June, 1923, filed a notice of lien under the Mechanics' Lien Law (Revision of 1918) with the Secretary of the Board of Education of the Town of Cranford for material that entered into the erection and construction of the Sherman School in the Town of Cranford, designated as Job #196, including the material furnished to fulfill the requirements for the general work, including wing containing the model kitchen and dining room and class rooms No. 7 and No. 14, specified as alternate, prepared by Hollingsworth & Bragdon, architects, 17 West 45th street, New York City, for the sum of \$2,104.98, besides lawful interest, a copy of which notice, including a copy of the bill of particulars showing the amount due to the undersigned, and the credits the general contractors, Dillon & Wiley, Inc., have received, is annexed hereto and made part hereof.

30

40 And you are hereby notified of this fact, because you are the surety on the bond executed by Dillon & Wiley, Inc., dated the 14th day of June, 1922, and now on file with the Secretary

Complaint.

of the Board of Education of the Town of Cranford.

Yours very truly,

FRANKLIN LUMBER COMPANY,

By

President. 10

Secretary.

To the Secretary of the Board of Education of the Town of Cranford, New Jersey:

TAKE NOTICE that the Franklin Lumber Company, a corporation, organized and existing under the laws of the State of New Jersey, and having its principal place of business in the Town of Irvington, County of Essex and State of New Jersey, hereby claims a lien in accordance with the Municipal Lien Law (Revision of 1918), and you are hereby further notified that Dillon & Wiley, Inc., is justly indebted to the Franklin Lumber Company, a corporation, the claimant herein, in the sum of \$2,104.98, besides interest, for lumber material furnished and delivered to the said Dillon & Wiley, Inc., that entered into the construction of the Sherman School, at Cranford, N. J., designated as Job No. 196, at the request of said Dillon & Wiley, Inc.; that the said lumber material was furnished to the said Dillon & Wiley, Inc., the general contractors on the Sherman School, with whom the Town of Cranford, a municipal corporation, by its Mayor and Town Clerk, entered into a written contract for the construction of the aforesaid Sherman School; that the said lumber material was furnished, supplied and delivered to the said school

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Complaint.

and actually used in the construction and erection of said school.

That said Franklin Lumber Company, by its servants and agents, has demanded from the said Dillon & Wiley, Inc., the said sum of \$2,104.98, the amount of moneys due on the Sherman School job, and the said Dillon & Wiley, Inc., have refused to pay the same, or any part thereof, although they have acknowledged that the amount is correct and is due and owing to the said Franklin Lumber Company.

You are hereby required to retain the amount of moneys so due and claimed by the said Franklin Lumber Company out of the moneys now due and to become due and owing by the Town of Cranford to the said Dillon & Wiley, Inc., in accordance with the foregoing act.

Annexed hereto and made part hereof is a bill of particulars of the account of said Dillon & Wiley, Inc., on the books of the Franklin Lumber Company, for the Sherman School job, for materials furnished and delivered to the said Dillon & Wiley, Inc., and used by them in the erection and construction of the Sherman School, in accordance with the aforesaid contract.

30

FRANKLIN LUMBER COMPANY,

By

President.

Attest:

Secretary.

40

Complaint.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

FRANK A. WILLETTE, being duly sworn according to law, on his oath deposes and says: That he is the president of the Franklin Lumber Company, the claimant, who filed the foregoing notice of lien; that he has read the foregoing notice of lien claim, and everything therein contained is true; that the sum of \$2,104.98 is justly due and owing to the said Franklin Lumber Company, claimant, from the said Dillon & Wiley, Inc., and that the said Dillon & Wiley, Inc., is entitled to no other deductions, credits or set-offs except as stated in the bill of particulars annexed to the said notice of lien, and that all of the materials were furnished and delivered to the said Dillon & Wiley, Inc., and used in the construction of the Sherman School, in the Town of Cranford, a municipal corporation.

Subscribed and sworn to before me
 this 11th day of June, A. D. 1923.

30

40

Complaint.

	Date	Ticket No.	Items	Debits
	1922			
	Sep. 23	52056	Sherman School, Cranford	149.60
		25 52078	"	280.00
		25 52074	"	135.36
		25 52073	"	147.90
10	Oct. 5	52602	"	232.99
		14 53016	"	132.50
		24 53490	"	216.44
	Nov. 4	54125	"	147.80
		8 54247	"	161.02
		11 54406	"	181.64
		17 54627	"	135.00
		29 55077	"	235.59
		29 55102	"	84.00
	Dec. 12	55503	"	225.05
20		20 55782	"	215.69
		23 55948	"	16.00
		27 55981	"	58.40
	1923			
	Jan. 30	56957	"	161.37
	Feb. 9	57272	"	167.78
		9 57280	"	173.49
				<hr/>
				\$3,257.62

30

CREDITS.

	1922			
	Nov. 11	Cash	\$493.00
	Nov. 13	"	602.09
	1923			
	May 5	Cash	57.55
				<hr/>
				1,152.64
				<hr/>
40		Balance	\$2,104.98

Complaint.

COPY OF BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, Dillon & Wiley, Inc., of 103 Park avenue, New York, Principal, and Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and duly authorized to do business in the State of New Jersey, surety, are held and firmly bound unto the Board of Education of Cranford, N. J., in the sum of One Hundred Sixty-five Thousand Three Hundred Fifty-six and 00/100 (\$165,356.00) Dollars, lawful money of the United States of America, to be paid to the said Board of Education of Cranford, N. J., or to its certain attorney, successors or assigns, to which payment well and truly to be made, we do hereby bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. 10
20

Sealed with our seals and dated this 14th day of June, A. D., nineteen hundred and twenty-two.

The condition of the above obligation is such, That Whereas the above-named Principal did on the 13th day of June, 1922, enter into a contract with the Board of Education of Cranford, New Jersey, to provide all the materials and to perform all the work shown on the drawings and described in the specifications entitled Sherman School at Cranford, New Jersey, designated as Job #196, including the labor and material to be furnished to fulfill the requirements for the general work, including Wing containing the Model Kitchen and Dining Room and Class Rooms #7 and #14 specified as "Alternate" prepared by Hollingsworth & Bragdon, Architects, #17 West 45th Street, New York, which 30
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Complaint.

said contract is made a part of this bond the same as though set forth herein;

10 Now, if the said Dillon & Wiley, Inc., shall well and faithfully do and perform the things agreed by it to be done and performed according to the terms of said contract, or any changes or modifications therein made as therein provided, and shall pay all lawful claims of sub-contractors, material-men and laborers for labor performed and materials furnished in carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material-men or labor having a just claim as well as for the obligee herein, then this obligation shall be void, otherwise the same shall remain in full force and effect, it being expressly understood and agreed 20 that the liability of the Surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

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

30 (SEAL)

Dillon & Wiley, Inc.
 James H. Wiley, Pres.
 Globe Indemnity Company
 By Fred C. Williams,
 Resident Vice-Pres.
 Attest: Frances Drake,
 Resident Asst. Secretary
 Ret #7509

Countersigned at Newark, N. J.
 By M. H. Craig,
 40 Resident Agent.

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed September 1, 1923.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff,</i> <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Affidavit of Merits.</i>	10
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STATE OF NEW JERSEY, COUNTY OF ESSEX.	}	<i>ss.</i>	20
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W. J. McCAFFREY, being duly sworn according to law, on his oath says, that he is Vice-President of the Globe Indemnity Company, the defendant in the above-stated action, and that this affiant believes that the said defendant has a just and legal defense to the said action on the merits of the case.

W. J. McCAFFREY.

Subscribed and sworn before me this first day of September, 1923.	30
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W. B. HARLEY,
 A Master in Chancery
 of New Jersey.

40

*Answer.***ANSWER.**

Filed September 5, 1923.

ESSEX COUNTY CIRCUIT COURT.

10	FRANKLIN LUMBER COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> GLOBE INDEMNITY COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law. Answer.</i>
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20 The defendant, the Globe Indemnity Company, a corporation duly created and existing by virtue of the laws of the State of New York and authorized to transact business in the State of New Jersey, having its principal place of business in New Jersey, at Washington Park and Halsey street, Newark, for answer to the within complaint says, that:

FIRST DEFENSE.

- 30 1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.
2. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 2.
3. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3.

40

Answer.

4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 4.

5. It admits the allegations of paragraph 5.

6. It admits the allegations of paragraph 6.

7. It admits that a certain statement was furnished the defendant as alleged in paragraph 7, but denies the legal sufficiency thereof. 10

8. It admits the allegations of paragraph 8.

SECOND DEFENSE.

The bond referred to in plaintiff's complaint was issued under and by virtue of Chapter 75 of the Laws of 1918 which Act provides among other things in paragraph 3 as follows:

"Any person, firm or corporation to whom any money shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. * * *"

20
30

The material and labor alleged to have been furnished by the plaintiff has not been accepted by the duly authorized board or officer of the Board of Education of Cranford, New Jersey, and in accordance with the terms of paragraph 3, Chapter 75 of the Laws of 1918, the plaintiff 40

Notice of Motion to Strike Out Answer, etc.

**NOTICE OF MOTION TO STRIKE OUT
ANSWER AND FOR SUMMARY
JUDGMENT.**

Filed September 10, 1923.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a
corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a
corporation,

Defendant.

10

Notice.

PLEASE TAKE NOTICE that on Saturday, the
fifteenth day of September, 1923, I shall appear
before Hon. Nelson Y. Dungan, one of the
Judges of the Essex County Circuit Court, at
the Essex County Court House, Newark, N. J.,
at ten o'clock in the forenoon of that day, or as
soon thereafter as counsel can be heard, and
shall move to strike out the answer filed in this
cause, and ask for a summary judgment, on the
ground that the said answer is sham, false, and
frivolous, and discloses no defense to the com-
plaint.

20

30

Yours, Etc.,

HARRY A. AUGENBLICK,
Attorney of Plaintiff.

Dated September 10, 1923.

To W. B. HARLEY, Esq.,
Attorney of Defendant.

40

Stipulation.

STIPULATION.

Filed September 24, 1923.

ESSEX COUNTY CIRCUIT COURT.

10	FRANKLIN LUMBER SUPPLY COM- PANY,	<i>Plaintiff,</i>	}	<i>Action</i>
	<i>vs.</i>			<i>at Law.</i>
	GLOBE INDEMNITY COMPANY,	<i>Defendant.</i>		<i>Stipulation.</i>

IT IS HEREBY STIPULATED by and between
 Harry A. Augenblick, attorney for plaintiff, and
 20 William B. Harley, attorney for defendant, that
 the motion to strike out the answer and for
 summary judgment be argued before Chief
 Justice William S. Gummere, instead of before
 Nelson Y. Dungan, as indicated by notice of mo-
 tion to strike out, said argument to be pre-
 sented to the Court on Saturday, September 15,
 1923, at ten o'clock in the forenoon or as soon
 thereafter as counsel can be heard.

30 HARRY A. AUGENBLICK,
 Attorney for Plaintiff.

W. B. HARLEY,
 Attorney for Defendant.

Dated, September 24, 1923.

Opinion on Motion to Strike Out Answer.

**OPINION ON MOTION TO STRIKE OUT
ANSWER AND FOR SUMMARY
JUDGMENT.**

Filed.

ESSEX COUNTY CIRCUIT COURT.

10

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff,</i> <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant.</i>	}	<i>On Motion to Strike Out Answer of Defendant, Globe Indemnity Company.</i>
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20

Harry A. Augenblick, for plaintiff.

William B. Harley, for defendant.

Gummere, *C. J.* The bond which is the subject matter of the above suit is in the form provided by Chapter 75 of the Laws of 1918, the purpose of which is to protect persons furnishing labor or materials for the construction, etc., of public works. Although the obligee named in the bond is the Board of Education of Cranford, the right to sue upon it is not confined to the Board alone, but, by the express terms of the statute, is extended to sub-contractors, laborers and material-men doing work upon or furnishing material to be used in the building. But, by force of section 3 of the act, the right of this latter class to sue upon the bond does not become complete by the mere default in payment by the person who is primarily liable to him or them. In order to render the surety liable to a laborer or ma-

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Opinion on Motion to Strike Out Answer.

terial-man, there must be (1) an acceptance by the Board—either express or implied—of the work done upon or material furnished for the building; and (2) the furnishing to the surety by the laborer or material-man, *after such acceptance*, of a statement showing the amount due.

10 The obvious purpose of this limitation provided in the act, as it seems to me, is to protect the surety against liability to laborers or material-men where the work done or the material furnished has been rejected by the Board.

I conclude, therefore, that the motion to strike out the answer should be denied.

20

30

40

Amended Complaint.

AMENDED COMPLAINT.

Filed January 17, 1924.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff,</i> <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant.</i>	}	10 <i>Action at Law.</i> <i>Amended Complaint.</i>
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Plaintiff, Franklin Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, says: 20

1. That on the 13th day of June, 1922, the Board of Education of Cranford, New Jersey, which was vested with the power and privilege to enter into contracts for school construction in said municipality, entered into a written contract with Dillon and Wiley, Inc., a corporation, for the construction and the supply of all materials and performance of all the work shown on the drawings and described in the specifications entitled "Sherman School at Cranford, N. J.," designated as Job #196, including the labor and material to be furnished to fulfill the requirements for the general work, including wing containing the model kitchen and dining room and class rooms #7 and 14, specified as alternate, prepared by Hollingsworth and Bragdon, architects, 17 W. 45th street, New York, a copy of which contract is on file with the Board of Edu- 30 40

Amended Complaint.

cation of the Town of Cranford and expressly referred to herein.

10 2. The said Franklin Lumber Company, a corporation, the plaintiff herein, did on the 23rd day of September, 1922, agree to furnish lumber material in connection with the contract for the construction of the aforesaid Sherman School, which materials are more particularly itemized in the annexed bill of particulars, made a part hereof and expressly referred to.

20 3. That the plaintiff, pursuant to said agreement between itself and the said Dillon and Wiley, Inc., as aforesaid, has supplied materials consisting of various kinds of lumber, in accordance with said bill of particulars attached hereto, for which the said Dillon and Wiley promised and agreed to pay the sum of \$3,257.62 and on account of which material and lumber the said Dillon and Wiley paid the sum of \$1,152.64, leaving a balance, after deducting all proper credits and set-offs, in the sum of \$2,104.98 due from the said Dillon and Wiley to Franklin Lumber Company.

30 4. That after the plaintiff had supplied the various kinds of lumber in accordance with the bill of particulars attached hereto and said materials were delivered to the premises, the Board of Education of the Town of Cranford accepted the said material more particularly specified in the bill of particulars attached hereto and used the same in the construction and erection of the building.

40 5. That the plaintiff has frequently demanded payment of the said sum due it from the said Dillon and Wiley, Inc., as aforesaid, but the said

Amended Complaint.

Dillon and Wiley, Inc., have failed to pay the same, or any part thereof.

6. That on the 14th day of June, 1922, the said Dillon and Wiley, Inc., executed and filed a bond with the Board of Education of the Town of Cranford, in which bond the defendant, Globe Indemnity Company, a corporation, was the surety, a copy of which bond is hereto annexed, made part hereof, and expressly referred to. 10

7. That the said Dillon and Wiley, Inc., under the terms of said contract, commenced the construction and erection of said Sherman School, and proceeded with the construction and erection of said school in accordance with the terms of its contract, but through various causes, unknown to the plaintiff, the said Dillon and Wiley, Inc., have not completed the said work and have completely abandoned the same. 20

8. That in accordance with the statute in such case made and provided (Chapter 75, P. L. 1918) the plaintiff on the 20th day of June, 1923, furnished the defendant, Globe Indemnity Company, the surety on said bond, with a statement of the amount due the plaintiff, together with an itemized copy of the account, a copy of which notice is hereto annexed, made part hereof and expressly referred to. 30

9. The defendant, Globe Indemnity Company of New York, has not paid the said sum of \$2,104.98 to the plaintiff or any part thereof.

Plaintiff demands as damages the sum of \$2,104.98 together with interest and costs of suit.

HARRY AUGENBLICK,
Attorney for Plaintiff.

Answer to Amended Complaint.

ANSWER TO AMENDED COMPLAINT.

Filed January 24, 1924.

ESSEX COUNTY CIRCUIT COURT.

10	FRANKLIN LUMBER COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Answer to Amended Complaint.</i>
	GLOBE INDEMNITY COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>		

20 The defendant, the Globe Indemnity Company, a corporation duly created and existing by virtue of the laws of the State of New York and authorized to transact business in the State of New Jersey, having its principal place of business in Newark, New Jersey, at Washington Park and Halsey street, for answer to the within amended complaint, says that:

30 1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

 2. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 2.

 3. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3.

 4. It denies the allegations of paragraph 4.

40

Answer to Amended Complaint.

5. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 5.

6. It admits the allegations of paragraph 6.

7. It admits the allegations of paragraph 7.

8. It admits that a certain statement was furnished the defendant as alleged in paragraph 8, but denies the legal sufficiency thereof. 10

9. It admits the allegations of paragraph 9.

FIRST SEPARATE DEFENSE.

The bond referred to in plaintiff's complaint was issued under and by virtue of Chapter 75 of the Laws of 1918, which act provides among other things in paragraph 3 as follows: 20

“Any person, firm or corporation to whom any money shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement * * *.” 30

The material and labor alleged to have been furnished by the plaintiff has not been accepted in accordance with Paragraph 3 of Chapter 75 of Laws of 1918, by the duly authorized board or officer of the Board of Education of Cranford, 40

Answer to Amended Complaint.

New Jersey, and in accordance with the terms of Paragraph 3, Chapter 75 of the Laws of 1918, the plaintiff is precluded from furnishing a statement or proceeding to suit until the time limited by the aforesaid Act, *i. e.*, within eighty (80) days after the acceptance thereof by the duly authorized board or officer of said municipality.

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W. B. HARLEY,
Attorney for Defendant.

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Amendment to Answer.

AMENDMENT TO ANSWER.

Filed October 17, 1924.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff,</i> <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Amendment to Answer to Amended Complaint.</i>	10
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FIRST SEPARATE DEFENSE.

The bond referred to in plaintiff's complaint was issued under and by virtue of Chapter 75 of the Laws of 1918, which act provides among other things in paragraph 3 as follows:

"Any person, firm or corporation to whom any money shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement * * *."

The building or work of improvement referred to in plaintiff's complaint was accepted by the

Amendment to Answer.

10 Board of Education of Cranford, New Jersey,
on May 2, 1924. The plaintiff has not furnished
the surety, the defendant herein, with a state-
ment of the amount due the plaintiff within
eighty (80) days after the acceptance of the
building referred to in plaintiff's complaint by
the authorized board or officers, in accordance
with Chapter 75 of the Laws of 1918.

The plaintiff has, therefore, not complied with
the terms of Chapter 75 of the Laws of 1918,
and there can be no recovery in this action.

W. B. HARLEY,
Attorney for Defendant.

Consent given to filing amendment to answer.

20 HARRY A. AUGENBLICK,
Attorney of Plaintiff.

Reply to Answer to Amended Complaint.

**REPLY TO ANSWER TO AMENDED
COMPLAINT.**

Filed February 1, 1924.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation,) <i>Plaintiff,</i>) <i>Defendant.</i>	} <i>Action at Law.</i> } <i>Reply to Answer to Amended Complaint.</i>	10
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Plaintiff replying to defendant's answer to the
 amended complaint, says: 20

1. It denies the separate defense set up in
 said answer and says that the work and material
 was accepted by the governing body of the Town
 of Cranford in accordance with Chapter 75 of
 the Laws of 1918, paragraph 3.

HARRY A. AUGENBLICK,
 Attorney for Plaintiff.

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*Stipulation of Facts and Opinion of Trial Court.***STIPULATION OF FACTS AND OPINION
OF TRIAL COURT.**

Filed October 17, 1924.

ESSEX COUNTY CIRCUIT COURT.

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FRANKLIN LUMBER COMPANY,

vs.

GLOBE INDEMNITY COMPANY.

*Action
at Law.*

Before Hon. Nelson Y. Dungan, *J.*, without a jury.

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For the plaintiff appears Harry A. Augenblick.

For the defendant appears William B. Harley.

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Mr. Augenblick: It is stipulated and agreed by and between the parties hereto that all the facts stated in the plaintiff's complaint are true, except that portion of paragraph 4 which says that the Board of Education of the Town of Cranford accepted the said material more particularly specified in the bill of particulars attached hereto, and used the same in the construction and erection of this building. Instead of that we wish to add that the material of the Franklin Lumber Company was satisfactory and in accordance with the specifications and went into the building from September 23, 1922, to February 9, 1923, and was not rejected by the engineers or architects of the Board of Education at any time.

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Another paragraph to be added is that a few weeks after the adjudication in bankruptcy of Dillon & Wiley, a new contractor, one D. J. Flynn,

Stipulation of Facts and Opinion of Trial Court.

started on the completion of the building, and the final payment was made and the building was completed in accordance with the plans and specifications on May 2, 1924; and also that, although we did file a municipal mechanics' lien against the premises in conjunction with the city on the bond, there were no funds from the municipality to pay this lien. 10

Mr. Harley: I cannot stipulate that. It is immaterial in this suit. We are amending the answer also by stipulation. I have it in writing.

The Court: The stipulation will be marked as filed in open court.

DECISION.

DUNGAN, J. (orally):

The facts in this case are agreed to be those stated by the plaintiff in its complaint, with the exception of paragraph 4, which is amended in accordance with the statements made upon the record, and with one or two additional statements which were placed upon the record, from all of which it is stated by counsel that the single disputed question of law to be decided by the Court upon those facts is whether or not this suit was prematurely brought. 20 30

The attention of the Court is called to a decision by a Justice of the Supreme Court rendered in the Circuit Court during the vacation season, in which he refused to strike out the answer and enter judgment for want of an answer upon the legal situation presented by the pleadings in this case. In that decision it was held that in order to render the surety liable to a laborer or material-man there must be (1) an acceptance, either express or implied, of the work done upon or 40

Stipulation of Facts and Opinion of Trial Court.

material furnished for the building; and (2) the furnishing of the surety by the laborer and material-man, after such acceptance, of a statement showing the amount due. It is suggested that at this time this Court might overcome the effect of that decision by finding as a fact that there had been an acceptance of the materials for which this suit is brought before the time the notice required by the third section of the statute was served. There can be no question under the agreed facts but that the building is now completed and the materials accepted, but the building had not been completed and accepted at the time this notice was filed, the facts agreeing that the building was completed on the 2nd day of May, 1924. I do not read the section as requiring as a condition precedent that the building must have been accepted, but that the work done or materials furnished must have been accepted, and I am unable to find as a fact in this case that there was any acceptance by the municipality of the materials for which this suit was brought before it accepted the building; so this case cannot be decided in favor of the plaintiff by a finding of fact that the materials were accepted prior to the acceptance of the building, which was after the plaintiff had served its notice. The question, therefore, narrows down to the one embraced in the second point in the decision above mentioned, which is that the notice must have been served after the acceptance of the labor and materials. If this were a decision of the Supreme Court or of the Court of Errors and Appeals, this Court would be obliged to adopt it, regardless of views of the judge of the Circuit Court; but this decision was rendered in this Court; and, while it is with the greatest diffidence that I disagree with

Stipulation of Facts and Opinion of Trial Court.

it, and decide differently, yet if, upon a consideration of all the facts, I find my mind unconvinced, I ought not to follow it. The act under which this bond is given is not an act for the protection of the municipality; it is "An act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public work"; and it is suggested that the provision of the statute which requires the filing of the notice within eighty days after the acceptance of the work or material, is for the benefit of the municipality for the purpose of enabling it to establish a prior lien upon the funds or, rather, to establish its priority of claim upon the bond. The Hurd Act and the decisions under the Hurd Act are cited as authority for that claim; and while it is true that the Hurd Act has a title much the same as our act, and is "An Act for the protection of persons furnishing materials and labor for the construction of public work," that act contains these words: "Subject, however, to the priority of the claim and judgment of the United States," indicating a reason for the six months' limitation in that act, and shows that the limitation in that act is for the purpose of protecting the United States. There is nothing in our act to indicate that it was the intention of the Legislature that there should be any priority of claim by the municipality upon the bond, but, as has been suggested, this act was passed, and the bond given under its provisions, for the protection of material-men and laborers. I think it would be very difficult for any material-man or any laborer to know when, either expressly or impliedly, the municipality had accepted certain work and certain material. How would the laborer or material-man

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Stipulation of Facts and Opinion of Trial Court.

know that his labor and material had been accepted unless there was an express acceptance of it given to him on behalf of the municipality? He could not know it, and if there had been, expressly or impliedly, an acceptance of that labor and material from the general contractor more than eighty days before he served his notice, and he did not know it, he would be barred by this limitation of eighty days from asserting his claim upon the bond, and my sincere conviction has been, and still is, that this period of eighty days is a limitation of time beyond which this notice may not be served, and that a service of notice prior to the acceptance of the building or of the labor and material by the municipality by the material-man or laborer does not bar the material-man or laborer from maintaining his suit.

That view necessarily results in a finding in favor of the plaintiff in this case.

An exception to this finding of the Court will be noted.

Mr. Harley: Your Honor will consider that I made a motion for the direction of a verdict?

The Court: Yes. The motion will be overruled.

Exception noted as ground of appeal.

*Findings of Fact.***FINDINGS OF FACT.**

Filed October 18, 1924.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> GLOBE INDEMNITY COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Findings of Fact.</i>	10
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This case was tried before Judge Nelson Y. Dungan, without a jury, by consent of both of the parties thereto, in the Essex County Circuit Court, on October 17, 1924. 20

After hearing the admitted facts and the counsel for plaintiff and for defendant, the Court finds the following:

First. That on the 13th day of June, 1922, the Board of Education of Cranford, New Jersey, which was vested with the power and privilege to enter into contracts for school construction 30 in said municipality, entered into a written contract with Dillon & Wiley, Inc., a corporation, for the construction and the supply of all materials and performance of all the work shown on the drawings and described in the specifications, entitled "Sherman School at Cranford, N. J.," designated as Job #196, including the labor and material to be furnished to fulfill the requirements for the general work, including wing containing the model kitchen and dining room and 40

Findings of Fact.

class rooms #7 and 14, specified as alternate, prepared by Hollingsworth & Bragdon, architects, 17 West 45th street, New York, a copy of which contract is on file with the Board of Education of the Town of Cranford and expressly referred to herein.

- 10 Second. That the said Franklin Lumber Company, a corporation, the plaintiff herein, did on the 23rd day of September, 1922, agree to furnish lumber material in connection with the contract for the construction of the aforesaid Sherman School.

20 Third. That the plaintiff, pursuant to said agreement between itself and the said Dillon & Wiley, Inc., as aforesaid, has supplied materials consisting of various kinds of lumber, for which the said Dillon & Wiley promised and agreed to pay the sum of \$3,257.62, and on account of which material and lumber the said Dillon & Wiley paid the sum of \$1,152.64, leaving a balance, after deducting all proper credits and set-offs, in the sum of \$2,104.98, due from the said Dillon & Wiley to Franklin Lumber Company.

30 Fourth. That the plaintiff has frequently demanded payment of the said sum due it from the said Dillon & Wiley, Inc., as aforesaid, but the said Dillon & Wiley, Inc., have failed to pay the same, or any part thereof.

40 Fifth. That on the 14th day of June, 1922, the said Dillon & Wiley, Inc., executed and filed a bond with the Board of Education of the Town of Cranford, in which bond the defendant, Globe Indemnity Company, a corporation, was the surety, a copy of which bond is annexed to the complaint in this cause.

Findings of Fact.

Sixth. That the said Dillon & Wiley, Inc., under the terms of said contract, commenced the construction and erection of said Sherman School and proceeded with the construction and erection of said school in accordance with the terms of its contract, but through various causes, unknown to the plaintiff, the said Dillon & Wiley, Inc., have not completed the said work and have completely abandoned the same. 10

Seventh. That in accordance with the statute in such case made and provided (Chapter 75, P. L. 1918), the plaintiff, on the 20th day of June, 1923, furnished the defendant, Globe Indemnity Company, the surety on said bond, with a statement of the amount due the plaintiff, together with an itemized copy of the account.

Eighth. That the material of the Franklin Lumber Company was satisfactory and in accordance with the specifications, and went into the building from September 23, 1922, to February 9, 1923, and was not rejected by the architect of the Board of Education, who supervised the construction and erection of said building. 20

Ninth. That a few weeks after the adjudication in bankruptcy, a new contractor, one D. J. Flynn, started on the completion of the building, and the final payment was made and the building was completed in accordance with the plans and specifications on May 2, 1924. 30

Tenth. That the school in which the material of the Franklin Lumber Company was furnished was not accepted by the Board of Education of the Town of Cranford until May 2, 1924.

Eleventh. That the statement as required by Section 3, Chapter 75, of the P. L. of 1918, was 40

Findings of Fact.

furnished defendant within eighty days after the acceptance of the materials by the Board of Education of the Town of Cranford, within the meaning of that statute.

10 Twelfth. The Court finds for the plaintiff and against the defendant for the sum of \$2,104.98, together with interest from February 9, 1923, amounting to \$87.70, making a total of \$2,192.68.

NELSON Y. DUNGAN,
Judge.

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Rule for Judgment.

RULE FOR JUDGMENT.

Filed November 5, 1924.

ESSEX COUNTY CIRCUIT COURT.

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff,</i> <i>vs.</i> GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Rule for Judgment for Plaintiff.</i>	10
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This case was tried before Judge Nelson Y. Dungan, without a jury, at the Essex Circuit, on October 17, 1924. 20

The case having been heard and submitted, the Court rendered the following findings of fact:

FIRST. That on the thirteenth day of June, 1922, the Board of Education of Cranford, New Jersey, which was vested with the power and privilege to enter into contracts for school construction in said municipality, entered into a written contract with Dillon and Wiley, Inc., a corporation, for the construction and the supply of all materials and performance of all the work shown on the drawings and described in the specifications entitled "Sherman School at Cranford, New Jersey," designated as Job #196, including the labor and material to be furnished to fulfill the requirements for the general work, including wing containing the model kitchen and 30 40

Rule for Judgment.

dining room and class rooms #7 and 14, specified as alternate, prepared by Hollingsworth and Bragdon, architects, No. 17 West Fifty-fifth street, New York, a copy of which contract is on file with the Board of Education of the Town of Cranford and expressly referred to herein.

10 SECOND. That the said Franklin Lumber Company, a corporation, the plaintiff herein, did on the twenty-third day of September, 1922, agree to furnish lumber material in connection with the contract for the construction of the aforesaid Sherman School.

20 THIRD. That the plaintiff, pursuant to said agreement between itself and the said Dillon and Wiley, Inc., as aforesaid, has supplied materials consisting of various kinds of lumber, for which the said Dillon and Wiley promised and agreed to pay the sum of Three Thousand Two Hundred Fifty-seven Dollars and Sixty-two Cents (\$3,257.62), and on account of which material and lumber the said Dillon and Wiley paid the sum of One Thousand One Hundred Fifty-two Dollars and Sixty-four Cents (\$1,152.64), leaving a balance, after deducting all proper credits and set-offs, in the sum of Two Thousand One
30 Hundred Four Dollars and Ninety-eight Cents (\$2,104.98), due from the said Dillon and Wiley to Franklin Lumber Company.

FOURTH. That the plaintiff has frequently demanded payment of the said sum due it from the said Dillon and Wiley, Inc., as aforesaid, but the said Dillon and Wiley, Inc., as aforesaid, have failed to pay the same or any part thereof.

40 FIFTH. That on the fourteenth day of June, 1922, the said Dillon and Wiley, Inc., executed

Rule for Judgment.

and filed a bond with the Board of Education of the Town of Cranford, in which bond the defendant, Globe Indemnity Company, a corporation, was surety, a copy of which bond is annexed to the complaint in this cause.

SIXTH. That the said Dillon and Wiley, Inc., under the terms of said contract, commenced the construction and erection of said Sherman School and proceeded with the construction and erection of said school in accordance with the terms of its contract, but through various causes, unknown to the plaintiff, the said Dillon and Wiley, Inc., have not completed the said work and have completely abandoned the same. 10

SEVENTH. That in accordance with the statute in such case made and provided (Chapter 75, P. L. 1918) the plaintiff on the twentieth day of June, 1923, furnished the defendant, Globe Indemnity Company, the surety on said bond, with a statement of the amount due the plaintiff, together with an itemized copy of the account. 20

EIGHTH. That the material of the Franklin Lumber Company was satisfactory and in accordance with the specifications, and went into the building from September 23, 1922, to February 9, 1923, and was not rejected by the engineers or architect of the Board of Education, who supervised the construction and erection of said building. 30

NINTH. That a few weeks after the adjudication in bankruptcy, a new contractor, one D. J. Flynn, started on the completion of the building and the final payment was made and the building was completed in accordance with the plans and specifications, on May 2, 1924. 40

Rule for Judgment.

TENTH. That the school in which the material of the Franklin Lumber Company was furnished was not accepted by the Board of Education of the Town of Cranford until May 2, 1924.

10 ELEVENTH. That the statement as required by Section 3, Chapter 75 of the P. L. of 1918, was furnished defendant within eighty days after the acceptance of the materials by the Board of Education of the Town of Cranford, within the meaning of that statute.

20 TWELFTH. Whereupon, it is adjudged that the plaintiff recover of the defendant the sum of Two Thousand One Hundred Four Dollars and Ninety-eight Cents (\$2,104.98) and costs, and interest in the sum of Eighty-seven Dollars and Seventy Cents (\$87.70), making in the whole the sum of Two Thousand One Hundred Ninety-two Dollars and Sixty-eight Cents (\$2,192.68), besides costs to be taxed.

Rule actually entered this 5th day of November, 1924, on motion of

HARRY A. AUGENBLICK,
Attorney of Plaintiff.

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Judgment.

JUDGMENT.

Filed October 18, 1924.

ESSEX COUNTY CIRCUIT COURT.

34713	}	<i>Action at Law.</i>	10
FRANKLIN LUMBER Co., a corporation, <i>Plaintiff.</i>		<i>By the Court. Judgment Entered November 5, 1924.</i>	

Damage	\$2,104.98	
Interest	87.70	
Costs	53.36	20
Total		\$2,246.04

Harry A. Augenblick, attorney for plaintiff.

Judgment by the Court in the above-entitled action at law was rendered on the eighteenth day of October, A. D., Nineteen hundred and Twenty-four, in favor of the said plaintiff, Franklin Lumber Company, a corporation, and against the said defendant, Globe Indemnity Company, a corporation, for the sum of two thousand one hundred and four dollars and ninety-eight cents, damages and the sum of eighty-seven dollars and seventy cents interest from January ninth, 1923, and the sum of fifty-three dollars and thirty-six cents costs of suit. 30

Judgment entered and signed October 18, 1924.

WILLIAM S. GUMMERE,
Judge.

Book 99 Circuit Court
Judgments, page 276. 40

Chapter 75, Laws of 1918.

CHAPTER 75.

An Act to Protect Persons Performing Labor or Furnishing Materials for the Construction, Alteration or Repair of Public Works.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

Contractors to furnish sureties for performing work and protecting material men.

1. When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district thereof, it shall be the duty of the board, officer or agent, contracting on behalf of the State or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district, to require the usual bond, as provided for in the statute, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, or improvements.

Bond required.

2. Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer or agent acting on behalf of the State, or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district aforesaid, in an amount equal to at least one hundred per cen-

Chapter 75, Laws of 1918.

tum (100%) of the contract price, and conditioned for the payment by the contractor, and by all sub-contractors, of all indebtedness which may accrue to any person, firm or corporation, on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such building, works or improvement. Such bond shall be deposited with, and held by, such board, officer or agent for the use of any party interested therein.

Amount.

Conditions.

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

Sureties Notified.

Bringing action.

4. The bond hereinbefore provided for shall be substantially the following form, and recovery of any claimant thereunder shall be subject to the conditions and provisions of this act to the same extent as if such conditions and provisions were fully incorporated in said bond form.

Form of bond; conditions of recovery.

Chapter 75, Laws of 1918.

Know all men by these presents, that we, the undersigned.....as principal and.....as sureties, are hereby held and firmly bound untoin the penal sum of.....dollars for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves,
 10 our heirs, executors, administrators, successors and assigns.

Signed this.....day of.....19....

The condition of the above obligation is such that whereas, the above-named principal did on the.....day of.....19...., enter into a contract with....., which said contract is made a part of this the bond the same as though set forth herein;

20 Now, if the said.....shall well and faithfully do and perform the things agreed byto be done and performed according to the terms of said contract, and shall pay all lawful claims of sub-contractors, material-men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material-man or laborer having
 30 a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of said contract or in or to
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Chapter 110, Laws of 1920.

the plans or specifications therefor shall in any wise affect the obligation of said surety on its bond.

5. This act shall take effect immediately.

Approved, February 16, 1918.

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CHAPTER 110, LAWS of 1920, p. 243.

An Act to amend an act entitled "An act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works," approved February sixteenth, one thousand nine hundred and eighteen.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey: 20

1. Section two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

2. Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer or agent acting on behalf of the State or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district aforesaid, in an amount not more than one hundred per centum (100%) of the contract price and conditioned for the payment by the contractor, and by all subcontractors, of all indebtedness which may accrue to any person, firm or corporation, on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such building, works or improvement. 30 40

Chapter 110, Laws of 1920.

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

2. This act shall take effect immediately.

Approved April 7, 1920.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed October 22, 1925.

NEW JERSEY SUPREME COURT.

No. 16. January Term, 1925.

FRANKLIN LUMBER Co.,

vs.

GLOBE INDEMNITY Co.

*Appeal from
Essex
Circuit
Court.*

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Argued before Gummere, Chief Justice, and Justices Parker and Katzenbach.

For the appellant, William B. Harley.

For the respondent, Harry A. Augenblick.

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The opinion of the Court was delivered by GUMMERE, C. J.

The present action was instituted by the plaintiff against the defendant upon a bond given by Dillon & Wiley, Inc., to the Board of Education of the Town of Cranford, and on which the defendant company was surety. The case was tried before the court, without a jury, and resulted in a judgment in favor of the plaintiff. The defendant appeals.

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The following facts were found by the Trial Court: In June, 1922, the Board of Education of the Town of Cranford entered into a written contract with Dillon & Wiley, Inc., for the construction of a school house and the supplying of all the materials for and the performance of all the work required in such construction. Upon the same day, pursuant to the provisions of the

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Opinion of Supreme Court.

contract, and in accordance with the requirements of an act of the Legislature entitled, "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works," being Chapter 75 of the Laws of 1918, the bond in suit was delivered by the contractors to the Board. Its condition is that Dillon & Wiley, Inc., will faithfully perform all the provisions of its contract; and also pay all lawful claims of subcontractors, materialmen and laborers for labor performed and material furnished in the carrying out of the contract. The bond recites that this latter undertaking is for the benefit of all parties furnishing materials used in or doing work upon the building. The present plaintiff furnished to the contractors a considerable quantity of the lumber used in the building of the school house, and default having been made by the latter in the payment of the moneys due for that material, the plaintiff, on the 20th of June, 1923, served upon the defendant surety company a statement of the amount due to it for the materials furnished, together with an itemized copy of its account; and the defendant having failed to pay the amount so due, the present suit was instituted, a summons having been issued on the 27th of August, 1923. All of the material furnished by the plaintiff used in the erection of the building was in accordance with the specifications annexed to the contract, and was satisfactory to the Board, no part of it having been rejected by the architect or any other representative of the Board. The notice above referred to was not served by the plaintiff upon the defendant corporation until all the material furnished to the contractors had been used in the construction of

Opinion of Supreme Court.

the building, but some ten months prior to its completion and acceptance by the Board.

The right of the plaintiff to maintain the present action depends upon the true construction of the statute above referred to, in compliance with the provisions of which the bond was given. That statute provides that bonds of this character shall not only guarantee to the public board or body the faithful performance of the contract, but shall also contain an additional obligation for the payment by the contractor for all labor performed or material furnished in the construction of a public building or the making of a public improvement. The statute then provides (section 3) that "Any person to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person. No suit shall be brought against said sureties on said bond until the expiration of sixty days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person may bring an action in his own name upon such bond, said action to be commenced within one year from the date of the acceptance of said building, work or improvement."

The contention before us of counsel for the plaintiff, and the view entertained by the trial court was that the right of action given to a materialman or laborer by this statutory provision becomes complete when the material fur-

Opinion of Supreme Court.

nished complies with the specifications annexed to the contract, is actually used in the construction of the building or the making of the improvement, with the implied approval of the public board or body and notice is given to the surety within eighty days thereafter of default in payment by the contractor. In other words, that the clause "within eighty days after the acceptance thereof" refers to the acceptance of the material used in the building or on the improvement, and not the acceptance of the completed building or improvement. In our opinion, this view of the construction of the statute is unsound. It will be observed that the latter part of the section above quoted permits the person furnishing material or labor to sue the surety at the expiration of sixty days after service of notice of nonpayment by the contractor and, according to the theory of the plaintiff, before it is known whether the contractor has faithfully performed his contract with the public board or body, and if he has not, what, if any, has been the loss sustained by such board or body through such failure of performance. The primary purpose of the bond, as we understand the statute, is the protection of the public board or body; and the protection of laborers and materialmen is "an additional obligation" assumed by the surety on the bond. The construction put upon the statute by the plaintiff, and adopted by the trial court, subordinates the right of the public agency to be protected against loss, by default of the contractor, to the right of materialmen and laborers to the same protection; allowing the latter first to exhaust the security to the extent necessary to satisfy their respective claims, and leaving the former to reimbursement by the

Opinion of Supreme Court.

surety only to the extent to which its liability has not already been extinguished, although such existing liability may not amount to fifty per cent. of the loss sustained by the public agency. As we read the act the words "after the acceptance thereof" contained in the third section thereof refer to the building or improvement which is the subject matter of the contract, and not to the materials used therein or the work done thereon. It does not disclose a purpose upon the part of the legislature to give preference to the claims of materialmen or laborers over the claims of the public agency, by compelling the surety to pay the claims of the former without regard to the rights of the latter; but, on the contrary, protects those rights by requiring that no step shall be taken by materialmen or laborers, looking to the enforcement against the surety of their claims against the contractor, until after the building or improvement has been accepted by such public agency. Upon this construction of the statute notice of default by the contractor in the payment of such debts, in order to constitute a basis for a suit against the surety cannot be legally served prior to such acceptance.

For the reasons indicated, we conclude that the service by the plaintiff upon the defendant of notice of the default in payment by the contractor, and the institution of the present suit before the school house had been accepted by the Board of Education, were, each of them, premature, and that consequently, the judgment under review must be reversed.

Judgment of Reversal.

JUDGMENT OF REVERSAL.

Entered November 10, 1925.

NEW JERSEY SUPREME COURT.

10	FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff-Respondent,</i>	}	<i>On Appeal to the Supreme Court.</i>
	<i>vs.</i>		
	GLOBE INDEMNITY COMPANY, <i>Defendant-Appellant.</i>		<i>Judgment of Reversal.</i>

20 This cause having been duly argued at the
January, 1925, Term of this Court by William
B. Harley, of counsel for the defendant-appel-
lant, and Harry A. Augenblick, of counsel for the
plaintiff-respondent, and the Court having con-
sidered the same and finding error in the record
of proceedings in the Essex County Circuit
Court;

30 It is thereupon ORDERED and ADJUDGED that
the judgment of the Essex County Circuit Court
removed by the appeal to this Court be reversed
with costs; and that the record be remitted to
the Essex County Circuit Court to be proceeded
with in accordance with this judgment and the
practice of said court.

WM. S. GUMMERE,
C. J.

Entered November 10, 1925,

On motion of

40 W. B. HARLEY,
Attorney of Defendant-Appellant.

New Jersey Court of Errors and Appeals

FRANKLIN LUMBER COMPANY, a corporation, <i>Plaintiff-Appellant,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
GLOBE INDEMNITY COMPANY, a corporation, <i>Defendant-Respondent.</i>		

*On Appeal
from
Supreme
Court.*

BRIEF OF APPELLANT.

Statement of Facts.

This appeal arises out of an action commenced by the plaintiff against the defendant in the Essex County Circuit Court on the statutory form of bond prescribed by Chapter 75 of the Laws of 1918 (pp. 45, 46, 47, 48 and 49) entitled "**An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works.**"

The facts in this case are all admitted, and are as follows:

On the 13th day of June, 1922, the Board of Education of the Town of Cranford, N. J., which was vested with the power and privilege to enter into contracts for school construction in the said municipality, entered into a written contract with Dillon & Wiley, Inc., contractors, for the construction and the supply of all materials and the performance of all the work, shown on the drawings and described in the specifications entitled "Sherman School at Cranford, N. J.," including the labor and material to be furnished to fulfill the requirements for the general work,

which contract is on file with the Board of Education of the Town of Cranford.

That on the 14th of June, 1922, the said Dillon & Wiley, Inc., executed and filed a bond with the Board of Education of the Town of Cranford, in which bond the defendant, Globe Indemnity Company, a corporation, was the surety, a copy of which bond is printed in the State of Case.

The Franklin Lumber Company, a corporation, the plaintiff herein, on the 23rd day of September, 1922, agreed to furnish the lumber material in connection with the contract for the construction of said Sherman School.

The Franklin Lumber Company, pursuant to the said agreement, between itself and the said Dillon & Wiley, Inc., supplied materials consisting of various kinds of lumber, for which the firm of Dillon & Wiley, Inc., promised and agreed to pay the Franklin Lumber Company the sum of \$3,257.62, and on account of which the said firm of Dillon & Wiley, Inc., paid the sum of \$1,152.64, leaving a balance, after deducting all proper credits and set-offs, in the sum of \$2,104.98, that remains due and owing from the said general contractors, Dillon & Wiley, Inc., to the Franklin Lumber Company.

The Franklin Lumber Company frequently demanded payment of this balance from Dillon & Wiley, Inc., but Dillon & Wiley, Inc., failed to pay the same or any part thereof.

The materials of the Franklin Lumber Company were supplied to the school in accordance with the specifications and went into the building during the period from September 23, 1922, to February 9, 1923, and were entirely satisfactory and were never rejected by the architect of the

Board of Education, who supervised the construction and erection of this building.

The said firm of Dillon & Wiley, Inc., under the terms of its contract with the Town of Cranford, commenced the construction and erection of this school and proceeded with the same, but through various causes unknown to the Franklin Lumber Company, the said Dillon & Wiley, Inc., did not complete the building, but completely abandoned the same at the time that they went into bankruptcy, the early part of July, 1923. That a few weeks after the adjudication in bankruptcy, a new contractor, one D. J. Flynn, started on the completion of this building and the final payment was made and the building was completed in accordance with the plans and specifications on May 2, 1924.

That in accordance with the statute in such cases made and provided—Chapter 75, P. L. 1918—the plaintiff, on the 20th day of June, 1923, more than four months after its materials went into the building, furnished the defendant, Globe Indemnity Company, the surety on the bond, with a statement of the amount due the Franklin Lumber Company, together with an itemized copy of the account.

That on May 2, 1924, the **school** in which the materials of the Franklin Lumber Company was furnished, was by formal resolution accepted by the Board of Education of the Town of Cranford.

The plaintiff instituted the suit herein on the 23rd day of August, 1923. The defendant filed an answer and set up the defense that the action of the plaintiff was premature; in that the building which included the material of the Franklin Lumber Company had not yet been ac-

cepted by the duly authorized Board or Officers of the Town of Cranford. The plaintiff made a motion to strike out the answer of the defendant and asked for a summary judgment in accordance with the Practice. The motion was argued before the Honorable Chief Justice Gummere, who was then sitting for Judge Dungan, as a Circuit Court Judge. As a result of the said argument, Justice Gummere refused to strike out the answer of the defendant and refused to enter a summary judgment, and the Chief Justice rendered a written opinion (see p. 20, State of the Case).

The plaintiff, on reading the opinion of the Chief Justice, wherein he intimated that before there can be a recovery on this bond, there must be an acceptance by the Board, either expressed or implied, **of the work done** or **material** furnished for the building (not the building as a whole), filed an amended complaint in which the plaintiff set up that the material of the Franklin Lumber Company was accepted by the Town of Cranford.

An answer was filed to the amended complaint and a reply to the said answer, and the cause was regularly set down for hearing.

The case was reached for trial on October 17, 1924, and was tried before Judge Dungan in the Essex County Circuit Court, sitting without a jury on an agreed statement of facts, as will be found in the State of Case.

The single disputed question of law in this case is whether or not the suit was prematurely brought by the Franklin Lumber Company.

ARGUMENT.

Point I.

The eighty-day provision in the act is to be regarded as a statute of limitation; that is, a limit beyond which the statement might not be furnished.

That portion of Chapter 75 of the Laws of 1918 more particularly involved in the consideration of this case is paragraph three, page 204, which was enacted by the legislature in the following language:

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

The contention of the plaintiff is, that a materialman, laborer, or subcontractor, under this act, has the right to furnish the sureties on the bond a statement of the amount due at any time **within** eighty (80) days after the acceptance of the work by the duly authorized board or officers. The words “**within eighty days after acceptance**” mean that the time limited for filing a

statement is eighty days after acceptance, but such statement may be filed at any time before acceptance. These words fix the limit **beyond which** the statement cannot be furnished, but they do not fix the first point of time when such a statement can be furnished. This is very clearly borne out by the following cases adjudicating the words "**within * * * days after.**"

In *Blion v. Durand*, 117 Pacific 798, the facts were as follows:

A statute provided that a new trial may be granted by a Justice provided the motion for such a new trial is made "**within ten (10) days after the entry of judgment.**" The case was tried and the Justice rendered a verdict. After the verdict was rendered, but before the judgment was entered, a motion for a new trial was made. The prosecutor contended that the motion was premature, claiming that the motion could only be made after judgment was entered, but the Court held:

"That the words '**within ten (10) days after**' fix only the limit beyond which the motion might not be made; that is, it could not be made after the expiration of ten (10) days from the entry of the judgment, but it did not fix the first point of time in which it could be made, and consequently the motion was not premature and could be made before the entry of judgment."

The limit that this statute imposed was that if you decided to make the motion after the entry of the judgment, you must make such a motion not later than ten days after the entry of the judgment; but the statute does not preclude one

from making the motion before the entry of the judgment. The Court said:

“We have been referred to a number of cases where it was held that the words ‘**within ten days after**’ fix only the limit beyond which the notice may not be given or the motion made and did not fix the first point of time at which it may be given or made.”

In the case of *Atherton v. Corlis*, 101 Mass., page 40, the statute provided that a widow may waive the provisions in her husband’s will, provided such waiver is made at any time within six months after the probate of the will. The widow in this case waived the provisions for her benefit in her husband’s will immediately after her husband’s death and before the probate of the will, and the question arose “Was such a waiver premature, because it was made before the probate of the will?” The Court held:

“This waiver was sufficient under the statute which allows the waiver to be made at ‘**anytime within six months after the probate of the will.**’ ”

The statute was construed to mean that if the waiver was to be made after the probate of the will, it must be made **not later than** six months after such probate, but it did not limit the time it could be made prior to probate and it did not mean that before there could be a waiver there must be a probate.

In *Wittkowsky’s Land*, 55 S. E. 617, the statute provided that any person aggrieved by the taking of land for a highway may within six months after the road is completed apply for a jury to assess the damages. The owner of the land applied for a jury before the road was completed and the jury awarded two thousand dollars damages. The Trustees of the Township moved to dismiss

the proceedings on the ground that they were premature. The Trustees contended that the application for a jury must be made after the road is completed, but the Court held otherwise, and said as follows:

“We think **within six months after the road is completed** means simply that the proceeding to assess damages shall begin **within, that is, not later than** six months after completion. It was error, therefore, to dismiss the proceedings.”

From all these cases which are analogous to ours, the words **within eighty days after the acceptance by the Board** simply mean that the acceptance by the Board is the limit of time eighty days beyond which it would be too late to furnish the surety with a statement, but it does not mean that the statement must be furnished **after** the acceptance. It can be furnished at any time before acceptance, but if it is furnished after acceptance, the limit of time is eighty days from such acceptance.

In our case there was a formal acceptance by the Board on May 2, 1924. The statement was furnished the surety company by the Franklin Lumber Company on June 20, 1923. This was within eighty days after acceptance and in accordance with the construction and meaning of the statute as construed by the cases cited below.

Point II.

The obligations of the sureties under this bond to the municipality and the subcontractors, materialmen and laborers are separate and distinct and neither one is preferred before the other.

The act under which this bond is given is not an act for the protection of the municipality. On

the contrary, it is entitled "**An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works.**"

The defendant contends that the provisions of the statute which requires the furnishing of the statement within eighty days after the acceptance of the work or material is for the benefit of the municipality, for the purpose of enabling it to establish a prior lien upon the funds, or rather to establish its priority of claim under the bond.

We think this contention is unsound. There is nothing in the act or the bond to indicate that it was the intention of the legislature that there should be any priority of claim by the municipality upon the bond. This act was passed and the bond given under its provisions for the protection of the persons performing labor or furnishing material for the construction, alteration or repair of public works.

Paragraph one of Chapter 75 of the Laws of 1918 reads as follows:

"When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract at the expense of the State or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district thereof, it shall be the duty of the board, officer or agent, contracting on behalf of the State or any county, city, town, township, village, borough, municipality governed by a board of commissioners, or improvement commission, or school district, to require the usual bond, as provided for in the statute, with good and sufficient sureties, **with an additional obligation for the payment by the contractor, and all subcontractors, for all labor performed or materials**

furnished in the construction, erection, alteration or repair of such building, works or improvements."

The words contained in the aforesaid paragraph "**usual bond**" refer to Section 89 of "An Act Relating To Regulating and Providing for the Government of Cities" (P. L. 1902, p. 284, and the supplements thereto, P. L. 1908, p. 356) (C. S. 1231, Sec. 2235), which says as follows:

"All bonds made to such city for supplies or work for any purpose whatever, unless otherwise provided in this act, shall be addressed to the city clerk and be opened by him at a regular or special meeting of city council, duly called to consider the same, and the said city council shall, after opening said bids as required by law, if such expenditures shall be deemed necessary by such city council, award the contract thereon to the lowest responsible bidder. The successful bidder shall promptly, within the time mentioned in the advertisement soliciting such bid, execute a formal contract to be approved as to its form, terms and conditions by the corporation counsel, which contract shall be signed, on behalf of the city, by the mayor and attested by the city clerk, and such bidder shall also execute and deliver to the city clerk of such city a **good and sufficient bond, to be approved by the corporation counsel, in double the amount of the contract price for which the award is made * * ***"

The Act of 1918 is an act solely for the protection of laborers and materialmen, who furnish labor and supply material for the erection, construction, alteration or repair of public buildings, works or improvements. The bond on page 205, P. L. 1918, says:

"Now, if the said * * * shall well and faithfully do and perform the things agreed by * * * to be done and performed according to the terms of said contract, and

shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim, as well as for the obligee herein * * *."

The municipality itself is primarily protected by a bond in double the amount of the contract price for which award is made under the 1902 and 1908 statutes. In conjunction with this, Chapter 75 of the Laws of 1918, imposes an additional obligation on the municipality to require a bond for the protection of the materialmen.

The argument, therefore, of counsel for the defendant, insisting that the obligation to the municipality under the 1918 statute is preferred to the obligation to the materialmen, is, we think, without foundation. The municipality is primarily protected by the 1902 acts and the supplements thereto (P. L. 1908, p. 356) and the subcontractors, laborers, materialmen and the municipality are jointly protected by the Act of 1918.

It is strongly urged by the defendant that if the municipality has no priority, the creditors such as subcontractors, materialmen and laborers can exhaust the amount of the bond and leave the municipality out in the cold. The answer to this argument is, however, that the municipality, even though it were left out in the cold by the subcontractors, materialmen and laborers, will nevertheless be protected by the bond required to be filed under the Laws of 1902, page 284, and the supplements thereto (P. L. 1908, p. 356), where the bond required is double the amount of the contract price. The 1920 amendment (P. L. 1920, p. 243) permits municipalities to require a

bond "in an amount not more than one hundred per cent. of the contract price." This provision in itself is an indication that the legislature intended that this bond (Chapter 75, P. L. 1918) be primarily and above all other things, a protection for subcontractors, materialmen and laborers and not primarily for the municipality. It could never mean municipality first and laborers, materialmen and subcontractors second. Where the bond can not be more than one hundred per cent. of the contract price, the protection of the municipality, let alone subcontractors, materialmen and laborers, would be wholly inadequate. The only adequate protection for the municipality in these public works is a bond in double the amount of the contract price as required by the 1902 and 1908 statutes, and an adequate protection of subcontractors, materialmen and laborers is a bond equal to, or not more than one hundred per cent. of the contract price, and sometimes even less, as the 1920 amendment permits.

The **Hurd Act** and the decisions under the Hurd Act are cited by the defendant as authority for the claim that the provisions of the statute which requires the furnishing of the statement within eighty days after the acceptance of the work or the material, is to enable the municipality to establish a prior lien upon the funds, or rather, to establish its priority of claim upon the bond. While it is true that the Hurd Act has a title very much the same as our act, yet the Hurd Act contains the following words:

"Subject, however, to the priority of the claim and judgment of the United States."

In the case of *United States v. National Surety Company*, 92 Fed. 549, the Court said:

“The two agreements which the bond contains—the one for the benefit for the Government and the other for the benefit of third parties, are as distinct as if they were contained in separate agreements; the Government’s name being used as an obligee in the latter agreement merely as a matter of convenience.”

The obligee in our particular bond is the municipality and it is used as the obligee for the third persons, namely, laborers, materialmen and subcontractors, merely as a matter of convenience; but the distinction between the Hurd Act and Chapter 75 of the Laws of 1918, is that the Hurd Act, by express statute, makes the claim of the United States prior, paramount and superior to the claim of subcontractors, materialmen and laborers. The words “Subject, however, to the priority and claim of judgment of the United States” indicates a reason for the six months’ limitation in the Hurd Act and clearly shows that the limitation in that act is for the purpose of protecting the United States. There is nothing in Chapter 75 of the Laws of 1918 to indicate that it was the intention of the legislature that there should be any priority of claim by the municipality on the bond, but that this bond is given under its provisions for the protection of materialmen and laborers.

Point III.

The purpose of the bond required by Chapter 75 of the Laws of 1918 is an absolute protection, insurance and guarantee to subcontractors, materialmen or laborers furnishing materials or performing labor on public works.

If this were not so, what would have been the purpose of the legislature in passing Chapter 75 of the Laws of 1918? Surely it was not passed for the further protection of the municipality. The municipality is already protected by the 1902 and 1908 acts and by the bond required under those acts. If, as the defendant contends, the 1918 act is for the benefit of the municipality first and the subcontractors, laborers and materialmen afterwards, the municipality would always be in a position to completely defeat the claims of the laborers, materialmen and subcontractors by exacting first in a proper case the full amount of the bond and leaving nothing for materialmen and laborers, and the title of the act, to wit, "**An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works**" would mean absolutely nothing, and the act would not stand for what the title indicates it does stand.

The bond being primarily for material people, laborers and subcontractors, can we, by any stretch of the imagination, say that the acceptance by the municipality is a condition precedent to a right of recovery by materialmen, laborers and subcontractors on this bond? If this were so, it would follow that if the work were *never accepted* by the municipality, the laborer, materialmen or subcontractors would forever be defeated of their claim, and the act

and the bond would be absolutely no protection to them.

The legislature never intended that the protection, guarantee and insurance intended for the materialmen, subcontractors and laborers should be contingent or dependent in anywise on the acts of the municipality.

Justice Gummere, sitting as Circuit Court Judge, in the opinion rendered by him in deciding the motion in this case, felt that the work or material must be expressly or impliedly accepted by the municipality in order to render the surety liable. By the words "work or material" he no doubt means the particular work furnished by the labor-claimant and the particular material furnished by the material-claimant. He does not mean an acceptance of the entire work or contract as a whole. His reason is that the purpose of this limitation is to protect the surety against liability to laborers or materialmen where the work done or the material furnished has been rejected by the Board. We contend that the provision is not for this purpose, even though it were a limitation, for the act provides further, Chapter 75, Laws of 1918, paragraph 3: "that no action can be brought against such surety until sixty (60) days have expired from the time the statement is furnished the surety." This obviously is a period allowed to the surety to examine the claim for work or material, its character, etc., and if found defective, can always be offset by the surety against the claim of the laborer or materialman, and it is not necessary, in order to give the surety this protection to have the formal approval or acceptance of the municipality.

Point IV.

There was an implied acceptance of the material by the Board of Education of the Town of Cranford.

Assuming, for the purpose of argument, that the act can be construed to mean that there must be an acceptance of the material by the municipality, either expressly or impliedly, before a recovery can be had on this bond. The facts in this particular case show that there was an implied acceptance of the material by the Board of Education of the Town of Cranford. The admitted facts (State of Case, p. 38, par. 8) say: that the material of the Franklin Lumber Company was satisfactory and in accordance with the specifications and went into the building from September 23, 1922, to February 9, 1923, and was not rejected by the architect of the Board of Education, who supervised the construction and erection of said building.

The material of the Franklin Lumber Company went into this building from September 23, 1922, to February 9, 1923, and still remains there, and was, no doubt, examined by the architect of the Board of Education, who supervised the construction and erection of this building, and it was never rejected. The action of the Board of Education in not rejecting the material after a reasonable time had elapsed from the time it went into the building, and while the construction was supervised by the architect of the Board, constitutes in law an implied acceptance. The material was all in this school on June 14, 1923, when the statement was furnished the surety. It had already been in from February 9, 1923. At that time it was in the building over four months and had never been rejected. Did not that in

itself constitute in law an implied acceptance of this material by the Board of Education of the Town of Cranford?

Point V.

If the legislature intended that the acceptance of the work, labor or material by the municipality was a condition precedent to a right of recovery on this bond, the legislature would have provided that subcontractors, materialmen and laborers should receive notice of such acceptance.

As the act stands now there is no provision for notifying materialmen, laborers or subcontractors that either the work as a whole or the particular labor or material furnished was expressly or impliedly accepted by the municipality. As the act stands now it would be very difficult for any materialman or laborer to know when, either expressly or impliedly, the municipality had accepted certain work or certain material.

How would a laborer or materialman know that his labor and material had been accepted unless there was an express acceptance of it given to him on behalf of the municipality? He could not know it and if there had been an express or implied acceptance of that labor or that material from the general contractor more than eighty days before the statement was furnished and he did not know it, he would be barred by this limitation of eighty days, from asserting his claim upon the bond, and this clearly shows that this period of eighty days is a limitation of time beyond which the statement cannot be furnished, and that the furnishing of a statement prior to the acceptance of the building or of the labor or the material, by the materialman or laborer does bar the materialman or laborer from instituting his suit.

Point VI.

Forfeitures of insurance policies or bonds are not favored in the law, and should be liberally construed to uphold the contract.

Justice Fort in *John W. Hampton, et als., v. Trustees, et als.*, 65 N. J. L., page 265, said:

“Forfeitures of this class are not favored in the law. The rule as to them in our state is settled. Our courts say:

“‘It has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract; and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy.’ *Carson v. Jersey City Insurance Company*, 14 Vroom 300; *Snyder v. Insurance Company*, 30 Vroom 544.

“The court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it.”

Insurance companies exact large fees from contractors for the responsibility that they assume under the bond required by Chapter 75 of the Laws of 1918. Materialmen, contractors and laborers in doing work or supplying material for public works, look to and depend upon these bonds for the payment of their bills. They look to the sureties on these bonds to indemnify them in the event the general contractor defaults or abandons the work. The question in this case, therefore, which confronts this Court is of great importance to materialmen, laborers and contractors who supply material or perform labor on public works.

Point VII.

It is, therefore, in view of the above-stated facts in this case, and in view of the rules of law applicable to same, respectfully submitted, that the judgment of the Supreme Court should be reversed and the judgment of the Essex County Circuit Court should be affirmed.

Respectfully submitted,

HARRY A. AUGENBLICK,
Attorney for and of Counsel with
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

FRANKLIN LUMBER COMPANY, a
corporation,

Plaintiff-Appellant,

vs.

GLOBE INDEMNITY COMPANY, a
corporation,

Defendant-Respondent.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF RESPONDENT.

Statement of Facts.

This appeal arises out of an action commenced by the plaintiff-appellant against the defendant-respondent in the Essex County Circuit Court on the statutory form of bond, prescribed by Chapter 75 of the Laws of 1918 (pp. 46-47-48-49). The defendant issued its bond, with Dillon and Wiley, Inc., contractors, principal, and the Board of Education of Cranford, New Jersey, as obligee, in the sum of One Hundred Sixty-five Thousand Three Hundred Fifty-six Dollars (\$165,356). This bond being the statutory form contained a condition that the bond was for the benefit of any materialmen or laborers having a just claim, as well as for the obligee herein. The bond issued was to cover a contract for the construction of a high school at Cranford, New Jersey.

The plaintiff furnished to the contractors, Dillon and Wiley, Inc., the principal on the bond, certain items of lumber for use in the aforesaid school between September 23, 1922, and February 9, 1923 (p. 39), part of which material was paid for but leaving a net balance unpaid of Two

Thousand One Hundred Four Dollars and Ninety-eight Cents (\$2,104.98). The school building had not been completed by the contractors when they went into bankruptcy and abandoned the contract. Thereafter the contract was relet to another contractor and the building was completed and accepted on May 2, 1924 (p. 33).

The plaintiff instituted the suit herein on the twenty-third day of August, 1923 (p. 4), nearly nine months before the school was completed and accepted, endeavoring by said suit to collect from the Globe Indemnity Company the amount of its unpaid material bills. The defendant filed an answer (p. 16), and set up the defense that the action of the plaintiff was premature in that the building which included the labor and material had not as yet been accepted by the duly authorized board or officer, as provided for in Chapter 75 of the Laws of 1918. The plaintiff made a motion to strike out the answer of the defendant and for summary judgment, in accordance with the Practice Act (p. 19), which motion was argued before the Honorable Chief Justice Gummere, who was sitting for Judge Dungan, and hearing Circuit Court motions in the absence of Judge Dungan. As the result of said argument, the Court refused to strike out the answer of the defendant and give summary judgment, at which time a written opinion was filed in this cause. (See page 21, State of Case.) The plaintiff then filed an amended complaint (p. 23) to which an answer was filed (pp. 26-30) and a reply (p. 31), and the cause regularly set down for hearing.

The case was reached for trial on October 17, 1924, and was tried before Judge Dungan, in the Essex County Circuit Court, sitting without a jury on an agreed statement of facts, resulting

in a verdict and judgment for the plaintiff (pp. 37-40) which judgment was reversed by the Supreme Court for the reasons stated in the opinion by Chief Justice Gummere (pp. 51-55).

The notice required by Chapter 75 of the Laws of 1918 to be filed with the surety was filed by the plaintiff on June 20, 1923, nearly one year before the building was completed, *and no statement was filed with the surety subsequent to the completion and acceptance of the building by the Board of Education of the Town of Cranford, New Jersey.*

The question presented by this appeal is, therefore, whether Chapter 75 of the Laws of 1918, requires that materialmen or subcontractors must wait until the public work or improvement is accepted by the duly authorized board or officer before they may proceed against the surety, or, whether they may proceed against the surety within eighty days after his material is furnished, notwithstanding the public work or improvement has not as yet been accepted.

ARGUMENT.

POINT I.

The judgment of the Supreme Court should be affirmed because there was no evidence that the plaintiff furnished the surety with a statement of the amount due within eighty (80) days after the acceptance of the building, work or improvement by the duly authorized board or officer of the Town of Cranford.

That portion of Chapter 75 of the Laws of 1918 more particularly involved in the consideration of this case is Paragraph 3, Chapter 75,

Laws of 1918, p. 204, which was enacted by the Legislature in the following language:

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

The contention of the plaintiff is that a materialman or subcontractor has the right to proceed against the surety under the above Act before the building, work or improvement has been accepted by the municipality. The only theory on which the plaintiff can support its contention must be the language of the Act of 1918. Paragraph 3, quoted above, provides that a materialman shall furnish the sureties on said bond a statement, *et cetera*, “within eighty (80) days after the acceptance thereof by the duly authorized board or officer * * *.” This language certainly does not imply that a materialman has the right to proceed after the delivery of the material but before the acceptance of the building, work or improvement by the municipality or the duly authorized board or officer, and there is nothing in the Act which would authorize a materialman to proceed for the collection of his bill

after delivery and before the acceptance by the municipality of the building, work or improvement as aforesaid.

Particular attention is called to Paragraph 1 of Chapter 75 of the Laws of 1918, lines twelve and thirteen, which paragraph provides that a municipality is to require the usual bond as provided for in the statute "with an additional obligation for payment by the contractor and by all subcontractors * * *."

The usual bond required prior to the Act of 1918 was a bond which was solely for the benefit of the municipality and as an illustration of that requirement, reference is made to P. L. 1891, p. 259; Comp. Stat., Vol. 1, p. 973, p. 1392; and Chap. 179, Laws of 1908, p. 356, Sec. 89. There are many acts covering the letting of contracts in municipalities, all of which require what is known as a "performance bond"—that is, a bond conditioned upon the faithful performance by the contractor of the contract with the municipality.

The argument of the appellant that the municipality is primarily protected by a bond in double the amount of the contract price under the 1902 and 1908 statutes arises from an erroneous view of Chapter 75 of the Laws of 1918. This act, which is under review in this case, *does not require an additional bond*, but the same bond as theretofore, or as the statute reads "to require the usual bond, * * * *with an additional obligation, etc.*" Only one bond is required by the statute and only one bond was in existence on this particular contract. Only one bond is required by municipalities today, and that is the bond required by Chapter 75 of the Laws of 1918, the form of which was outlined by the legislature at the time of the enactment of this statute.

Prior to 1918 there was no method by which materialmen and subcontractors could protect themselves in the furnishing of materials and labor to general contractors on municipal work as far as taking advantage of the bond was concerned. There was in effect the Act of 1892, p. 369, which is an act providing for liens for labor and materials in public improvements. This Act gave a lien for the

“value of the labor or materials, or either, upon the monies in control of the said city, town, township, or other municipality, due or to grow due, under said contract with the said city, town, township or other municipality, to the full value of said claim or demand, and these liens may be filed and become an absolute lien to the full and par value of such work or materials to the extent of the amount due, or to grow due, under said contract, in favor of every person or persons who shall be employed or furnish materials to the person or persons with whom the said contract with the said city, town, township or other municipality, was made, or the subcontractor of said person or persons, their assigns or legal representatives; *provided that liens may be filed only by such laborers, mechanics, merchants or traders as shall have performed any labor or furnished any material toward the performance or completion of any such contract directly for, or to, the person or persons with whom the said contract with said city or municipality is made, or the subcontractor of said person or persons, their assigns or representatives; and no liens shall or may be filed on behalf of any laborer, mechanic, merchant or trader, for labor performed or material furnished to any other person than the said contractor with the said municipality, or a subcontractor on any such contract, notwithstanding such materials have actually been used in the performance of the said contract;*

Provided, further, that no city, town, township, or other municipality shall be required to pay a greater amount than the contract price or value of the work or materials furnished when no specific contract is made for the performance of said work by the contractor."

It will be noted this Act also excludes from its benefits laborers, mechanics, merchants or traders who performed labor or furnished material to any other person than the said contractor or sub-contractor in such contract. This Act was repealed by Chapter 280 of the Laws of 1918, which is the same year that Chapter 75, the Act in question was enacted. Chapter 280 of the Laws of 1918, p. 1041, does not contain the limitations provided for in the Act of 1892, but permits any person who was laborer, merchant, mechanic or trader, or subcontractor, to file a lien and it is interesting to note that by paragraph 2 this lien may be filed

"at any time before the whole work to be performed by the subcontractor for the municipality is either completed or accepted by resolution of the municipality or within sixty days thereafter any claimant may file with the chairman or head officer, or with the secretary or clerk * * * a notice of claim verified by oath or affirmation * * *."

The balance of the Act provides a method for enforcing the lien and simplifies the procedure materially. Particular attention is called to the fact that under this Act the lien must be filed at any time *before* the whole work is completed or accepted or *within sixty days thereafter*. We believe in view of the fact that Chapter 75 was enacted by the same Legislature that this illustrates the legislative intent in enacting Chapter 75 of the Laws of 1918, because by a reference to that Act, under the construction for which we

contend, a lien may not be filed against the surety until within eighty (80) days after the acceptance by the duly authorized board or officer thereof. These two acts would seem, therefore, to harmonize, leaving the laborer and materialman a method of collecting the amount due him before the work is completed, under Chapter 280 of the Laws of 1918, and a method of collecting for work done or material furnished after the acceptance of the building, work or improvement under the provisions of Chapter 75 of the Laws of 1918.

In this connection particular attention is called to the case of *West Shore Railroad v. State Board of Taxes*, 92 N. J. L. 332 at 335; affirmed by the Court of Errors and Appeals in 92 N. J. L. 648:

“The inquiry, therefore, obviously resolves itself into one of legislative intent, and to divine the legislative purpose we must consider not only the act *sub judice*, imposing the tax, but all kindred legislation; for the rule of construction is fundamental that when divers laws are made relating to one subject-matter, the whole must be considered as constituting one system, and mutually connected one with another. *N. J. Insurance Co. v. Meeker*, 37 N. J. L. 282, 304.”

“Where there are different statutes in *pari materia*, though enacted at different times, and not referring to each other, they are to be taken and construed together as one system, and as explanatory of each other.” *In re Book's Will*, 107 Atl. Rep. 435.

An examination of Chapter 75 of the Laws of 1918 will disclose that the bond provided for therein has two purposes or benefits. One for the benefit of the municipality, and the one for the benefit of third parties not mentioned in the bond, but referred to therein as materialmen and

subcontractors. That being the case, the bond referred to in Chapter 75, *supra*, is primarily for the protection of the municipality and, secondarily, for the protection of materialmen and subcontractors. It is for that very purpose that the Legislature has required in paragraph 3 the filing of notices by materialmen and subcontractors, within eighty (80) days after the acceptance of the building, work or improvement for, if materialmen could proceed against the bond before the work had been completed, the entire protection afforded by the bond to the municipality would be diminished and the municipality left without adequate protection.

An examination of the form of bond required under Chapter 75 of the Laws of 1918, indicates the bond to be what is known as a "performance bond" as well as a bond to protect materialmen and subcontractors, etc. It will be noted by reference to the statutory form of bond that the liability of the surety shall in no event exceed the penal amount of the obligation stated therein. The prime requisite of the bond is to guarantee the municipality the performance of the contract, in accordance with the terms of the contract and in accordance with the plans and specifications. If, however, the contention of the plaintiff is correct the provision of the bond guaranteeing the performance of the contract may be entirely eliminated by the action of the subcontractors, materialmen, laborers, etc., in enforcing their liens under Chapter 75 of the Laws of 1918 before performance has been secured, rather than having subcontractors, materialmen, and laborers proceed under Chapter 280 of the Laws of 1918.

A further reason for an interpretation of Chapter 75 of the Laws of 1918 in accordance

with the contention of the defendant is the reason given by Chief Justice Gummere in his opinion on the Motion to Strike Out the Answer of the defendant and for summary judgment (pp. 21-22) wherein, it is stated:

“The obvious purpose of this limitation provided in the Act, as it seems to me, is to protect the surety against liability to laborers and materialmen where work done or material furnished has been rejected by the Board.”

Many instances could be cited where materials furnished and incorporated in a building during the course of its construction, but before the building or improvement has been accepted by the municipality, develop defects, which cause the municipality to refuse to accept the work until the defects have been remedied. If the contention of the plaintiff is permitted to prevail, in many instances the surety will be compelled to pay for labor and material and then, if the work is rejected, the surety (in case the principal is bankrupt as in this case) would be compelled to do the work over again under its guarantee of performance and thus be called upon to pay twice for the same work.

Chapter 75 of the Laws of 1918, while differing in language, was enacted for the accomplishment of the same purpose as the so-called “Hurd Act” (28 U. S. Stat. L. 278, Fed. Stats. Anno. 2nd Ed., Vol. 8, p. 374.), which is an act adopted by the Federal Congress covering the construction of Federal buildings. The Hurd Act, *supra*, was construed by the U. S. Supreme Court, October Term, 1915, opinion by Justice Hughes:

“It was evidently the purpose of the Act of 1905 to remedy the defect in the Act of 1894 by assuring to the United States ade-

quate opportunity to enforce its demand against the contractor's surety and priority with respect to such demand.

Mankin v. Ludowici-Celadon Company (215 U. S. 533); *U. S. v. Robinson*, 214 Fed. Rep. 38, 39 and 40."

See also Brandt on Suretyship and Guaranty, third edition, Vol. 2, p. 1330, p. 758 and foot notes. See also the *City of Lancaster v. Trescolm* (Pa.), 53 Atl. 508 at 509. Here the Court said:

"Suppose that by reason of the failure of the contractor, the damages sustained by the city itself equalled or almost equalled the amount of the bond, and that, the contractor having also failed to pay his labor and materials, the aggregate amount of both claims more than equalled the amount of the bond. Could it be claimed for a moment that laborers and materialmen could recover on the bond to the detriment of the city itself? Or, in case such laborers and materialmen, as their claims became due sued on the bond for their own benefit *could they thus have exhausted it to the peril of the city in case of default by the contractor in fulfilling the terms of his contract.*" Under no circumstances could the surety be called upon for more than the amount of his bond, and, under such conditions, who would be entitled to reap the benefit of it?"

Chapter 75 of the Laws of 1918 expressly provides:

"It being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

It can be seen, therefore, that the legislative intent by the language used in paragraphs one and three is clear—that the bond is primarily for the protection of the municipality and,

secondarily, for the protection of subcontractors and materialmen. The legislative intent can be gleaned from the language of the statute itself, particularly paragraph one, and by reason of the choice of language used in paragraph three, and more particularly, from the interpretation placed on the so-called "Hurd Act" *supra*, which has for its purpose the same principles as those embodied in Chapter 75 of the Laws of 1918.

Particular attention is called at this time to paragraph two of Chapter 75 of the Laws of 1918, which provides that bond shall be required "in an amount equal to, at least, one hundred per centum (100%) of the contract price * * *." This portion of Chapter 75 of the Laws of 1918 was amended by Chapter 110 of the Laws of 1920, p. 243. (See pp. 49 and 50, State of Case.) It will be noted that the amendment permits municipalities to require a bond "in an amount not more than one hundred per centum (100%) of the contract price * * *." Under the original act, Chapter 75, the bond must be in an amount equal to one hundred per centum (100%) of the contract price, but by force of the amendment of 1920 (Chapter 110) the municipality may require a bond in an amount less than one hundred per centum (100%).

The amendment referred to above is important in the construction of the legislative intent when we consider one practical illustration.

We may presuppose a case where a municipality is building a school and has for its protection, in accordance with the prior acts and Chapter 75 of the Laws of 1918 and its amendment, a bond for \$20,000, but that before the school is half finished the materialmen and laborers have claims aggregating \$20,000. If, un-

der these circumstances, the materialmen and subcontractors were permitted at that time to sue on the bond and recover \$20,000, the municipality will be left with a partly finished school and no bond to look to for the protection of the municipality. In the meantime, it would be possible that the municipality had paid under authorization of architect's certificates, a substantial portion of the \$20,000 to the contractor, but that the contractor had not used those payments for the reimbursement of his subcontractors and materialmen. By no stretch of imagination can we concede that it was the intention of the Legislature by Chapter 75 of the Laws of 1918 and its amendment, Chapter 110 of the Laws of 1920, to deprive the municipality of the protection afforded theretofore, which prior requirement is referred to in Chapter 75 of the Laws of 1918 as follows:

“To require the usual bond as provided for in the statute with an additional obligation for the payment by the contractor and by all subcontractors for all labor performed, etc.”

The contention of plaintiff that the bond involved herein should be construed most strongly against the defendant proceeds from a conclusion that this bond was constructed by the surety. This is not so, the bond having been framed by the Legislature and the parties to this litigation having no voice in the choice of its language.

“The liability of the surety on the bond must be strictly construed and cannot be extended by implication beyond the precise terms of the undertaking; the contract of suretyship being *strictissimi juris*.” *Skillman v. U. S. F & G Company*, Vol. III, No. 44, *New Jersey Advance Reports*; 130 *Atl. Rep.* 564.

The interpretation placed upon Chapter 75 of the Laws of 1918 by the decision of the Supreme Court in this case is eminently just. Such a construction does not deprive laborers or materialmen from collecting amounts due to them, but merely postpones the time when they may collect until the municipality has had the contract performed in accordance with the plans and specifications, and in addition such an interpretation has the extreme advantage of being definite, thus assuring to all parties an absolute knowledge of their rights. The construction contended for by the plaintiff would result in increased litigation under this statute because of disputes which must necessarily arise as to at what time material is impliedly accepted. In addition to this, as pointed out heretofore, the laborers and materialmen may collect amounts due them from retained percentages in the hands of the municipality under Chapter 280 of the Laws of 1918.

POINT II.

It is, therefore, in view of the above-stated facts in this case and in view of the rules of law applicable to same respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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