INDEX

REBUTTAL

PLAINTIFF'S EXHIBITS

Notice of Appeal

(Filed March 7, 1931)

New Jersey Supreme Court

American Well Works, a corporation, *Plaintiff*, *v.* Royal Indemnity Company, a corporation, *Defendant.*	Action at Law

To Fleming & Handford, Esqs., Attorneys of Plaintiff.

Sirs:

Take notice that the defendant appeals to the Court of Errors and Appeals of New Jersey, from the whole of the judgment entered in this cause.

Dated—February 28th, 1931.

Respectfully yours,

COLLINS & CORBIN,
Attorneys of Defendant.

Served March 3, 1931.

Complaint

(Filed Sept. 7, 1929)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

AMERICAN WELL WORKS,
a corporation,
Plaintiff,

v.

ROYAL INDEMNITY COMPANY,
a corporation,
Defendant.

Action at Law

Plaintiff, a corporation of the State of Illinois with its principal office and place of business in the City of Aurora in said State, says:

FIRST COUNT

1. It sues for the price of goods sold and delivered to the defendant upon a certain book account of which a copy is attached hereto and made a part hereof, marked "Schedule A," and the whole of which is due and unpaid.

Plaintiff demands as damages the amount due thereof being $3,165.00 with interest from September 6th, 1923, on the first count.

SECOND COUNT

1. Plaintiff, being engaged in the manufacture and sale of pumps, pumping machinery and appliances, did on or about September 6th, 1923, sell and deliver to the defendant certain goods set forth and enumerated in "Schedule A" at-

tached hereto and made a part hereof under an agreement between the parties that the plaintiff should charge the defendant a reasonable price for the goods so sold.

2. The amount due on the account on September 6th, 1923, charged in conformity with said agreement was and still is the sum of $3,165.00.

3. Defendant has not paid the same.

Plaintiff demands as damages $3,165.00 with interest from September 6th, 1923, on the Second Count.

THIRD COUNT

1. Plaintiff is engaged in the manufacture and sale of pumps, machinery and appliances.

2. On and prior to September 6th, 1923, the plaintiff had agreed with one John R. Proctor to furnish certain machinery for the said Proctor, to be used on a municipal job for the Borough of Sayreville, N. J.

3. On or about September 6th, 1923, the said Proctor became financially embarrassed and abandoned the work.

4. The plaintiff thereupon cancelled the said order.

5. The defendant, Royal Indemnity Company, a corporation, had entered into a bond on behalf of the said Proctor to protect the Borough of Sayreville in the completion of the said work.

6. The plaintiff was then approached by one

L. W. Carle who represented that he was agent for the defendant Royal Indemnity Company.

7. The said Carle was financially irresponsible, was not, in fact, a contractor and had never been engaged in the contracting business on his own account.

8. The defendant Royal Indemnity Company authorized the said Carle to agree in behalf of the defendant that if the plaintiff would furnish the said pumps for the sum of $3,165.00 for the said job at Sayreville, New Jersey, the defendant would pay for the same.

9. The plaintiff would not have furnished the said material for the said job at Sayreville but for the repeated representations of the defendant that it, the said defendant, would pay for the same.

10. The plaintiff expressly relying upon the representations of the defendant did on or about September 6th, 1923, deliver the said goods to the job at Sayreville, New Jersey.

11. The defendant has not paid for the same.

Plaintiff demands as damages $3,165.00 with interest from September 6th, 1923, on the third count.

FOURTH COUNT

1. The plaintiff repeats 1, 2, 3, 4, 5, 6 and 7 of the third count.

2. The defendant Royal Indemnity Company represented to the plaintiff that the said Carle was its agent and servant.

3. The said Carle was an employee of the defendant, Royal Indemnity Company, and the plaintiff's representative saw him at the offices of the Royal Indemnity Company several times and there consulted with him concerning the Sayreville contract.

4. The defendant Royal Indemnity Company permitted the said Carle to use its stationery in the correspondence with the plaintiff and with others regarding the Sayreville job.

5. The said Carle on behalf of the defendant Royal Indemnity Company agreed with the plaintiff that if the plaintiff would furnish the said machinery for the said job at Sayreville, New Jersey, the defendant Royal Indemnity Company would pay the sum of $3,165.00 for the same.

6. The plaintiff would not have furnished said material for the said job but for the representations of the defendant that the said Carle was its agent and that he was duly authorized by the defendant to enter into said agreement on behalf of the defendant.

7. The defendant well knew that the plaintiff would not have furnished the said material for the said job at Sayreville but for the representations of the defendant as aforesaid.

8. The plaintiff repeats paragraphs 10 and 11 of the third count.

Plaintiff demands as damages $3,165.00 with interest from September 6th, 1923, on the fourth count.

FIFTH COUNT

1. The plaintiff repeats all of the allegations contained in the fourth count.

2. The defendant has obtained the benefit of the materials furnished by the plaintiff as aforesaid, but has fraudulently denied that it authorized Carle to enter into the said agreement in order that it might evade the payment for same.

3. The defendant has recognized and paid many other claims contracted in its behalf by said Carle for the Sayreville job but has fraudulently failed and refused to pay the claim of the plaintiff contracted as aforesaid.

Plaintiff demands as damages $3,165.00 with interest from September 6th, 1923, on the Fifth Count.

SIXTH COUNT

1. The plaintiff repeats 1, 2, 3, 4, and 5 of the third count.

2. The defendant in order to relieve itself of liability was determined to complete the said job but was not desirous of sustaining any loss because of said completion.

3. The defendant thereupon authorized one L. W. Carle who was an employee in its office to take over the Proctor contract and complete the said work for the benefit of the defendant Royal Indemnity Company.

4. The said Carle was not financially respon-

sible and was not, in fact, a contractor and had never been engaged in the contracting business on his own account.

5. The defendant Royal Indemnity Company authorized the said Carle to proceed with the said work well knowing that he was financially irresponsible and not competent to handle the same, for the purpose of obtaining the necessary material for the completion of the said job but to relieve the said defendant from responsibility for the payment of said material.

6. The said Carle approached the plaintiff and, with full knowledge and approval of the defendant, agreed with the plaintiff that if the plaintiff would furnish the said pumps for the sum of $3,165.00 for the said job at Sayreville, New Jersey, the defendant, Royal Indemnity Company would pay for the same.

7. The plaintiff would not have furnished the said material for the said job at Sayreville but for the representations of the said Carle with the knowledge and approval of the defendant, Royal Indemnity Company.

8. The plaintiff expressly relying upon the representations of the said Carle made with full knowledge and approval of the said defendant did on or about September 6th, 1923, deliver the said goods to the job at Sayreville, New Jersey.

9. The defendant did thereafter pay other indebtedness incurred by said Carle in a like manner, but has fraudulently denied the authority of Carle and has failed and refused to pay the plaintiff.

The plaintiff demands as damages $3,165.00 with interest from September 6th, 1923, on the Sixth Count.

FLEMING & HANDFORD,
Attorneys for Plaintiff.

"SCHEDULE A"

THE AMERICAN WELL WORKS

Aurora, Ill., U. S. A.

Sold to Royal Indemnity Company,
c/o Mr. Carle, Agent,
84 William Street, New York City, N. Y.

1 2½" type CMB vertical centrifugal pump #40117, 3" suction and 3" discharge openings. Distance from underside of floor plate to suction flange 10'. Disch. of pump provided with 3" x 4" incr. elbow, and 4" disch. pipe brought up thru the pit plate and capped, with 4" x 4" x 4" tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 12', at a speed of 850 RPM, mechanical efficiency guaranteed 50%. Pump bronze fitted with open type impeller. Arranged for direct connection to 2 HP. N.W. motor #54517 furnished by customer.

1 2½" CBF pump #40016 arranged for belt drive, 3" suction, 3" discharge openings. Provided with open type bronze impeller and bronze fitted. Distance from underside of floor plate to suction flange 11' 6". Discharge

of pump provided with 3″ x 4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″ x 4″ x 4″ flanged tee in disch. pipe. Designed for a capacity of 150 GPM, against a total head of 16½, at a speed of 850 RPM, guaranteed mechanical efficiency 50%.

1 2½ CBF pump #40114 arranged for belt drive, with 3″ suction, 3″ discharge opening, with open type bronze impeller and bronze fitted. Discharge of pump provided with 3″ x 4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″ x 4″ x 4″ flanged tee in discharge pipe. Distance from underside of floor plate to suction flange 11′ 6″. Designed for a capacity of 150 GPM, against a total head of 30′ at a speed of 1150 RPM, efficiency guaranteed 49%.

1 2½″ type CMB pump #40115, with 3″ suction, 3″ discharge openings and provided with bronze open type impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Pump discharge provided with 3″ x 4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″ x 4″ x 4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 16½′ at a speed of 850 RPM, guaranteed mechanical efficiency 50%. Motor #54516.

1 2½″ type CMB special pump #40113 with 3″ suction, 3″ disch. openings, with bronze open type impeller and bronze fitted. Distance

from underside of floor-plate to suction flange 11′ 6″. Pump discharge provided with 3″ x 4″ increaser elbow, and 4″ disch. pipe brought up thru pit plate and capped. With 4″ x 4″ x 4″ flanged tee in disch. pipe. Designed for a capacity of 150 GPM, against a total of 30′, at a speed of 1150 RPM, efficiency guaranteed 49%. Pump arranged for direct connection to 3 HP. N. W. motor #54980 furnished by customer.

1 2½″ type CBF pump #40112 arranged for belt drive. With 3″ suction, 3″ discharge opening, with open type bronze impeller and bronze fitted. Distance from underside of floorplate to suction flange 11′ 6″. Discharge of pump provided with 3″ x 4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″ x 4″ x 4″ flanged tee in discharge pipe. Designed for a capacity of 150-GPM, against a total head of 32′, at a speed of 1150 RPM, guaranteed mechanical efficiency 49%.

1 2½″ type CMB Special Pump #40111 with 3″ suction, 3″ discharge openings, bronze open type impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Discharge of pump provided with 3″ x 4″ incr. elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″ x 4″ x 4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 32′, at a speed of 1150 RPM, guaranteed mech. efficiency 49%. Arranged for direct connection to 3 HP. N.W. motor #54983 furnished by customer.

1 3½″ type GBF American vertical centrifugal pump #40110 arranged for belt drive. With open type bronze impeller and bronze fitted, and mounted in heavy steel framework. With enclosed line shafting and bearings. Distance from suction flange to underside of pit plate 17′ 2″. Designed for a capacity of 500 GPM against a total head of 26′, at a speed of 1150-RPM, guaranteed mechanical efficiency 55%.

1 3½″ Special Type GMB pump #40109, 4″ suction, 4″ discharge, provided with bronze open type impeller and bronze fitted. Pump mounted in heavy steel framework and provided with enclosed line shafting and bearings, distance from suction flange to underside of pit plate 17′ 2″. Designed for a capacity of 500 GPM, against a total head of 26′, at a speed of 1150 RPM, guaranteed efficiency 55%. Pump furnished with flexible coupling arranged for direct connection to 7½ HP. N. W. motor #54581 furnished by customer.

1 2½″ type CBF pump #40118 arranged for belt drive, provided with 3″ suction, 3″ discharge opening, with open type bronze impeller and bronze fitted. Distance from underside of floor plate to suction flange 10′. Discharge of pump provided with 3″ x 4″ increaser elbow, and 4″ discharge pipe brought up thru pit plate and capped, with 4″ x 4″ x 4″ flanged tee in discharge pipe. Designed for a capacity of 150-GPM against a total head of 12′, at a speed of 850-RPM, guaranteed mechanical efficiency 50%. $3,165.00

Terms: $3055.00 in 30 days.
Balance in 60 days. Shipped to Order of John R. Proctor, Sayreville, N. J.

Answer

(Filed Sept. 19, 1929)

NEW JERSEY SUPREME COURT

Essex County

American Well Works,
a corporation,
Plaintiff,

v.

Royal Indemnity Company,
a corporation,
Defendant.

Action at Law

Defendant, Royal Indemnity Company, a corporation of the State of New York, duly authorized to transact business in the State of New Jersey, with its office in the latter state in Newark, Essex County, New Jersey, says that:

First Defense to First Count

1. It denies the allegations of paragraph 1 and says that it ordered no goods from the plaintiff as alleged therein and none was delivered to this defendant, and this defendant did not agree to pay for any such goods as alleged.

First Defense to Second Count

1. It denies paragraph 1, and further, reiterates its answer to paragraph 1 of the first count.

2. It denies paragraph 2.

Answer.

3. It admits paragraph 3.

First Defense to Third Count

1. It has no knowledge or information sufficient to form a belief as to paragraph 2 and therefore denies the same and calls upon the plaintiff for proof.

3. It has no knowledge or information sufficient to form a belief as to paragraph 3 and denies the same.

4. It has no knowledge or information sufficient to form a belief as to paragraph 4 and therefore denies the same.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

8. It denies paragraph 8.

9. It denies paragraph 9.

10. It denies paragraph 10.

11. It admits paragraph 11.

First Defense to Fourth Count

1. It repeats its answers to paragraphs 1, 2, 3, 4, 5, 6 and 7 of the third count.

2. It denies paragraph 2.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

8. It repeats its answers to paragraphs 10 and 11 of the third count.

First Defense to Fifth Count

1. It repeats all of its answers to the allegations of the fourth count.

2. It denies paragraph 2.

3. It denies paragraph 3.

First Defense to Sixth Count

1. It repeats its answers to paragraphs 1, 2, 3, 4 and 5 of the third count.

2. It denies paragraph 2.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

8. It denies paragraph 8.

Answer.

9. It denies paragraph 9, except that it admits that it has refused to pay the complainant.

SECOND DEFENSE TO EACH COUNT

1. The defendant made no agreement with the plaintiff for the purchase of the material referred to in Schedule "A" annexed to the complaint and did not obligate itself to pay for any such materials.

THIRD DEFENSE TO EACH COUNT

1. The above action of the plaintiff was not commenced and sued within six years next after said alleged cause of action accrued.

FOURTH DEFENSE TO EACH COUNT

1. The alleged goods sued for in the complaint in this action are of a value of $500 or upwards and the alleged agreement or contract of sale of said goods to this defendant and the alleged purchase of said goods by this defendant is not enforceable by action because said alleged goods, or any part thereof, were not accepted by this defendant and actually received by it; nor was anything given in earnest to bind the alleged contract or agreement or in part payment thereof; and there was no note or agreement in writing of the said alleged contract or agreement signed by the defendant or its agent duly authorized in that behalf. Therefore the plaintiff cannot recover.

FIFTH DEFENSE TO EACH COUNT

1. The bond written by this defendant for John R. Proctor, Inc. and the Borough of Sayre-

ville in the County of Middlesex, State of New Jersey for the construction of a sewer, was written a long time prior to April 1, 1923, and said work was accepted by the Borough of Sayreville a long time ago, at least several years. The exact date is unknown to this defendant at this time.

2. The plaintiff did not furnish the defendant as surety on said bond, with a statement of the amount due the plaintiff, within eighty days after the acceptance of said work as required by the statute in such case made and provided, and therefore the plaintiff cannot recover as against this defendant.

SIXTH DEFENSE TO EACH COUNT

1. It reiterates the allegations of paragraph 1 of the fifth defense to each count.

2. This suit was not brought or commenced by the plaintiff within one year from the date of the acceptance of said work as required by the statute in such case made and provided and therefore the plaintiff cannot recover.

COLLINS & CORBIN,
Attorneys of Defendant.

Reply

(Filed Oct. 9, 1929)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

AMERICAN WELL WORKS, a corporation, *Plaintiff*, v. ROYAL INDEMNITY COMPANY, a corporation, *Defendant*.	Action at Law

The plaintiff joins issue on the answer of the defendant.

FLEMING & HANDFORD,
Attorneys for Plaintiff.

Judgment

(Entered February 28, 1931)

This case was tried before the Honorable Nelson Y. Dungan, to whom the matter was referred for trial with a jury at the Essex County Circuit on February 25th, 1931.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Forty Five Hundred Dollars ($4500.00).

Whereupon it is adjudged that the plaintiff American Well Works, a corporation, do recover of the said defendant Royal Indemnity Company, a corporation, the sum of Four Thousand Five Hundred Dollars Damages together with its costs which have been taxed at the sum of Seventy-six Dollars and Ten Cents, making in the whole the sum of Four Thousand Five Hundred Seventy-six Dollars and Ten Cents.

$4500.00	
76.10	
$4576.10	

Judgment signed and entered February 28, 1931.

WILLIAM S. GUMMERE,
C. J.

Case

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Wednesday, February 25, 1931.

AMERICAN WELL WORKS,
a corporation,
Plaintiff,

v.

ROYAL INDEMNITY COMPANY,
a corporation,
Defendant.

Action at Law

Before:

Hon. NELSON Y. DUNGAN, *J.*, and a jury.

For plaintiff appear FLEMING & HANDFORD (by JAMES L. HANDFORD).

For defendant appear COLLINS & CORBIN (by EDWARD A. MARKLEY).

(A jury is called and sworn.)

Mr. Handford opens for plaintiff.

Mr. Markley opens for defendant.

JOHN R. PROCTOR called by the plaintiff.

The Court Officer: Put your hand on the Bible, please.

Mr. Proctor: I object to doing that.

The Court Officer: (Addressing the Court.) This gentleman wants to affirm by raising his right hand, your Honor.

The Court: That is not an affirmance. What is the trouble?

Mr. Proctor: I object to placing my hand on the Bible. I consider that mockery. I will tell the truth without the necessity of putting my hand on the Bible.

The Court: Well, do I understand then that it is not that you are asking to be affirmed, it is that you are willing to take your oath to tell the truth by the uplifted hand? Is that what I understand?

Mr. Proctor: Yes, sir.

The Court: It may be done.

JOHN R. PROCTOR sworn in behalf of plaintiff.

Witness: My hearing is bad, so I will have to ask you to talk loud.

Direct examination by Mr. Handford:

Q. Mr. Proctor, were you president of any corporation in 1922 and 1923? A. Yes, sir.

Q. And what was that company? A. John R. Proctor, Inc.

Q. Now, in the year 1922 did you have any dealings with the Royal Indemnity Company? A. Yes, sir.

Q. And could you tell us the name of the man in the company with whom you dealt? A. Mr. L. W. Carle.

Q. Now, will you just tell us what those dealings were in 1922?

Mr. Markley: I object to that on the ground that there is no proof yet that there

is any authority to Carle from the defendant indemnity company.

The Court: I suppose the purpose is to prove the authority of Mr. Carle by the acts which the company permitted him to perform.

Mr. Markley: It seems to me that before they can prove what Carle said or did, they must first prove what authority he had to act for the defendant.

The Court: Well, perhaps not what he said, but I suppose it is the nature of the transaction generally which Mr. Handford is inquiring about now.

Mr. Markley: The transactions, sir, are all in writing; the contracts are all in writing, that were entered into with the Borough of Sayreville, and I wish to object.

The Court: Suppose he applied for his indemnity bond to Mr. Carle, and through Mr. Carle it was issued to him—all that, it seems to me, would be proper, would it not?

Mr. Markley: This question is a manifest one—"Tell us about your dealings with Mr. Carle."

The Court: Perhaps the question is a little broad at this stage of the case, Mr. Handford. I am not ruling that you may not show that his transactions at that time with the Royal Indemnity Company were with Mr. Carle; I am not ruling that at all; I think that may be shown; but at this time to state the conversations with Mr. Carle may be improper.

Mr. Handford: I will withdraw the question and reframe it.

Q. What was your dealing with the Royal Indemnity Company in 1922?

Mr. Markley: I object to that on the ground that the Royal Indemnity Company is a corporation only as to its agents or servants, and therefore it is necessary to prove that these dealings were with various representatives before it can be proven what, in fact, was done.

The Court: That is so as involving conversations, just as I said, about Mr. Carle. To the extent that it involves conversations, it is probably improper; but to the extent that it results in this witness telling that he obtained a bond, an indemnity bond, of the Royal Indemnity Company, I think it is not improper—if that be the purpose of the question.

Mr. Markley: The only objection, I think, sir, is that we do not know whom he is talking about when he says "Royal Indemnity Company"; it can only act through agents and servants.

The Court: You know that what is referred to in the question relates to the delivery to him of a bond, don't you? Any question about that, can there be?

Mr. Markley: No, but I want my objection timely. After this witness has testified that the Royal Indemnity Company did so and so, it probably would be too late for me to say that whoever did or said they did something for the Royal Indemnity Company were not authorized to do it.

The Court: So far as it involves conver-

sations with agents of the company, they may be improper, except as they may involve conversations with servants in the office. I think the question might be inquired into, first, where the transactions occurred.

Mr. Handford: Has your Honor changed his ruling on the question?

The Court: I am making a suggestion as to how you proceed about it, Mr. Handford. The question itself perhaps is not entirely improper, but the answer to the question, if it should involve conversations with people who are not shown to be the authorized agents of the company, would be improper, and perhaps after the testimony is in, it would be damaging testimony, even though stricken out. Now, he said that he had dealings with the defendant through Mr. L. W. Carle. What they resulted in and where those dealings were, and so forth—upon that would depend perhaps whether or not you can give the conversations with Mr. Carle.

Q. Where were these conversations you had with Mr. Carle in 1922—or these dealings, I should say? A. The majority of the conversations were held in my office. There was only one conversation held in the New York office of the indemnity company.

Q. And referring to that conversation in the New York office of the Royal Indemnity Company, what was the nature of that conversation?

Mr. Markley: I object to that, your Honor, as immaterial and improper; that

there is no connection yet established; no foundation laid for the cause of action that is contained in this complaint, to single out one conversation; no time fixed, even though it was in the office of the Royal, of Mr. Carle. Without showing what authority he had to speak first, it seems to me not to have a proper foundation laid.

By the Court:

Q. As to the result of these conversations, Mr. Proctor, what did you receive, if anything, from the Royal Indemnity Company? A. I do not quite understand that question.

Q. As the result of these conversations, what, if anything, did you receive from the Royal Indemnity Company? A. What did I receive? There were so many conversations I have got to differentiate between one and the other.

Q. We are talking now about the one—— A. (Interposing.) The one in New York?

Q. Didn't all this lead up to a bond of indemnity? A. We had several bonds of indemnity.

Q. Relating to this matter? A. No; prior to that. Prior I have had considerable dealings with Mr. Carle. Mr. Carle was a frequent visitor to my office.

Q. Well, what resulted from those—— A. (Interposing.) Visits?

Q. (Continuing.) Visits. A. I gave him contracts. I gave him orders for to furnish bonds on several different jobs. Among those was the Sayreville contract, for one thing.

Q. Were all your negotiations with Mr. Carle? A. Yes, sir.

Q. And as a result of those conversations, the bonds were furnished? A. Yes, sir.

Q. Did you ever meet Mr. Carle himself in the office of the Royal Indemnity Company? A. Yes, sir.

Q. Upon this one occasion you are mentioning? A. I did, yes. We had a dinner afterwards.

By Mr. Handford:

Q. And do you know what position Mr. Carle held with that company?

Mr. Markley: I object.

The Court: The question may be answered.

Mr. Markley: May I state the grounds?

The Court: You may. It would be well to do that, you know, before the Court speaks, Mr. Markley.

Mr. Markley: I will try to do that, sir. I object to it on the ground that it calls for a conclusion, and no proper basis has been laid for it; that he should first establish whether he has knowledge such as would justify answering that question, or whether it is merely hearsay; and it is not the best evidence.

The Court: Repeat the question.

(Last question read.)

The Court: The question may be answered yes or no.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. That is difficult to answer yes or no. I would have to have that qualified.

By the Court:

Q. It calls for a yes or no answer. A. Do I know what position——

Q. What position Mr. Carle held with the company. A. If I take his word for it, that is the only answer I can give you.

Q. Then your answer is—if you are relying entirely upon his representations, your answer would have to be no, legally. A. If I relied upon his representations?

Q. If you relied solely upon his representations of what his position was, your answer would legally have to be "no" to this question. A. It would have to be "no," then.

By Mr. Handford:

Q. Well, just a minute. Did you see the bond after it was executed—any of these bonds? A. Yes.

Q. And did Mr. Carle's name appear on those bonds?

Mr. Markley: I object to that.

The Court: I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: The bonds speak for themselves; that is the reason for that ruling, of course. They are written documents, and the contents of them may not be proved except by the production of the documents, unless they are lost or destroyed.

Q. Now, you say, as a result of these conversations with Mr. Carle, the Royal Indemnity Company issued bonds? A. That is right.

Q. And did you have a conversation with Mr. Carle regarding the issuance of a bond on this Sayreville job? A. Yes, several.

Q. And as a result of that conversation was a bond issued by the Royal Indemnity Company on this Sayreville job? A. Yes.

Q. Now, what was this conversation you had with Mr. Carle, concerning this bond, prior to its issue?

Mr. Markley: I object to that on the ground that the bond is a written document, under seal, and is the best evidence of its contents.

The Court: I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Who delivered the bond to you on this Sayreville job?

Mr. Markley: I object to that as immaterial.

The Court: I will overrule the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Mr. Carle, personally.

Q. And who delivered the other bonds to you of the Royal Indemnity Company?

Mr. Markley: The same objection.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Mr. Carle, in every case

The Court: How is that?

Witness: With the exception of one, on every occasion the bonds were delivered by Mr. Carle, with the exception of one, and his son brought that down.

Q. And the one which his son brought—— A. (Interposing) That, I think, was in connection with the Governor's Island job.

Q. And through whom, through what man did you order that bond?

Mr. Markley: I object to that as immaterial.

The Court: He said all of his bonds were ordered through Mr. Carle.

Q. And do you know where Mr. Carle's son was employed at the time he delivered you that bond?

Mr. Markley: I object to that as immaterial and irrelevant, and no way related to the issues in this case. This suit is not on a bond.

The Court: I understand that very well.

Mr. Markley: The bond has been delivered. The contract with the Borough of Sayreville is in writing, and the contract is involved.

The Court: I realize that, and even though Mr. Carle may have had all the

authority in the world to deliver a bond, he may not have had authority to bind the company for the purchase of machinery.

Mr. Markley: No, sir.

The Court: But I am permitting this testimony to show what the relations with Mr. Carle were—tending to show that. The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Last question read.) A. He was employed by the Royal Indemnity Company, because I met him there at the same time that I met his father there.

Mr. Markley: I object to that, as it calls for a conclusion. He concludes that the man was employed there by the Royal Indemnity Company because he happened to meet him at the Royal Indemnity office, and I think the answer itself shows that.

The Court: You just met him there, is that what you mean?

The Witness: Yes, sir.

The Court: It will be stricken out.

Q. Now, when you went to the Royal Indemnity offices, did you notice any names on the door? A. I think I recollect that Mr. Carle's name was on the door.

The Court: Which Mr. Carle?

The Witness: L. W.—that is quite a long time ago.

Q. Now, can you recall what these offices looked like as you went in? A. I have a vague idea.

Q. Well, what is your recollection? A. Well, as I recall it, I may—I must have visited it twice now, because Mr. Carle told me on one——

Mr. Markley: I object, your Honor, to the conversation.

The Court: Do not give conversations with Mr. Carle.

The Witness: Sir?

The Court: Do not give conversations with Mr. Carle.

Witness: Oh. Well, he occupied a section of an office; in other words, it was glass-partitioned off, where there were several desks in the office. I went in and I was directed to go to that department where he was, and I sat there and talked to him at that time.

Q. And was that a part of the offices of the Royal Indemnity Company? A. Yes, sir. It was in the—the whole floor was occupied there, and this section was partitioned off.

Q. Now, when you went to the Royal Indemnity Company, when you first went in the door, whom did you inquire for? A. There was a young lady there that was doing some filing at the time, and she asked me who I wished to see, and I told her Mr. L. W. Carle.

By the Court:

Q. Do you remember what the department, where Mr. Carle's name was on the door, was, as indicated there, or wasn't there any indication?

A. It was, I think, in the Bond Department, they call it. It was up on the——

Q. Was there any indication of what Mr. Carle's position was? A. No, just the name on the door. There were several names on the door.

By Mr. Handford:

Q. Now, did you start this Sayreville job? A. Yes, sir.

Q. And did you have any dealings with the American Well Works? A. Yes, sir.

Q. Just tell us what that was.

Mr. Markley: I object to that as immaterial, incompetent and irrelevant. The Sayreville job is, so far as we know, a mere myth. There is no proof here of a contract, what it was. Mr. Proctor is not the defendant here.

The Court: I will overrule the objection. This is all incidental, as I understand it, to the charges that were made against the defendant company.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Will you proceed, please? A. When the bond was delivered and the contract was signed

———

By the Court:

Q. With Sayreville? A. With Sayreville.

Q. What bond was delivered? A. The bond, the Royal Indemnity Company bond. We had to deliver the bond and turn over all necessary

papers and sign the contracts; and when those papers came back to me, then I immediately began to place orders for materials, and among those orders was the order for the American Well Works pumps.

By Mr. Handford:

Q. And with whom did you place your order for the motors on these pumps? A. The motors went to the Northwestern; they were the low bidders on the motors.

Q. Now, with regard to your order to the American Well Works, whom did you deal with in that company? A. I did business with Mr. Whinery and Mr. Gaus.

Q. And is this the order for those pumps (handing witness document)? A. (Examining.) Yes, that is the order.

Q. And that is your signature (indicating)? A. That is right.

Mr. Handford: I offer the order in evidence.

Mr. Markley: May I see it?

(Document handed to Mr. Markley.)

Mr. Markley: I wish to object to this order in this suit, on the ground it is immaterial, irrelevant and incompetent. It is an order by John R. Proctor, Inc., apparently signed by Mr. Proctor, the witness, to S. B. Whinery for certain pumps, and I submit it is in no way binding on the defendant.

The Court: It may be marked for identification. I assume these figures on the back you do not intend to offer?

Mr. Handford. Oh, of course. It is not proper evidence?

The Court: It is not.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: It may be marked for identification.

(Document referred to marked Exhibit P-1 for identification.)

The Court: I want to say that it is not contended that the defendant is liable at all under this order, is it?

Mr. Handford: No; no, your Honor, except that we have another document which refers to this, as to figures.

The Court: Perhaps, if that be admitted in evidence, that will make this one admissible; so for the present it will be marked only for identification.

Q. Now, did you receive these pumps from the American Wells Works? A. No, sir.

Q. Did you complete the Sayreville job? A. No, sir.

Q. When did you approximately cease work on the Sayreville job? A. Cease work on the Sayreville jobs?

Q. Yes. A. Sometime in the early part of 1923.

Q. And after you had ceased work on the Sayreville job, was there a meeting at your office —answer yes or no. A. Yes, there was.

Q. And was there anyone there from the Royal Indemnity Company at that meeting? A. Yes.

Q. How many were there from the Royal? A. Mr. Carle was the only representative that we met.

Q. And was there anyone there representing the American Well Works? A. Mr. Whinery and his brother.

Q. Who is Mr. Whinery's brother that you refer to, do you know? A. That is, Mr. Whinery introduced me to him as his brother, and said he was an attorney.

Q. Where are your offices, Mr. Proctor? A. 16-18 West 9th Street, Bayonne.

Q. And is that more than a one-story building or one story? A. Two-story and a half brick building.

Q. Now, were there other people at this meeting besides the ones you have mentioned? A. Yes, sir.

Q. And where was this general meeting held? A. On the second floor.

Q. Now, was there any meeting between the American Well Works people and Mr. Carle, or anyone else in that building on that day? A. No, sir.

Q. Where is your private office? A. On the first floor.

Q. And was there any meeting down there? A. Yes.

Q. Who was there at that meeting? A. Mr. Whinery and Mr. Whinery's brother and myself; that was all.

Q. Now, do you know the purpose of that meeting? A. Yes.

Q. What was it?

Mr. Markley: I object to that as immaterial, incompetent and irrelevant.

The Court: I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. At this meeting downstairs, do you know what was said? A. What is that?

Q. Do you know what was said? A. What was said? A. Yes.

Mr. Markley: I don't object to a yes or no answer to that; I object to what was said at the meeting downstairs.

The Court: You may answer. The question may be answered yes or no. The question is, do you know what was said?

The Witness: I do.

Q. What was said?

Mr. Markley: I object to that as immaterial, incompetent and irrelevant. This is a meeting, sir, downstairs, between Mr. Whinery, his brother and Mr. Proctor.

The Court: At which he was present.

Mr. Markley: Just the two of them.

Mr. Handford: No.

The Court: Oh, no—Mr. Carle.

Mr. Markley: I understood that the only place they held a meeting was on the second floor, and he is now asked the question—then he was asked, "Wasn't there any meeting downstairs in your private office?" and he says, "Yes; Mr. Whinery's brother and myself."

The Court: Is that the conversation you are asking for now?

Mr. Handford: Yes.

The Court: What was said by Mr. Whinery and his brother and him? (Addressing the witness.) Was Mr. Carle present at the time?

The Witness: No, sir.

The Court: I will sustain the objection.

Q. Was there any conversation between Mr. Carle and Mr. Whinery's brother which you heard that day? A. No, sir.

Q. Not which you heard? A. No, not that I know of.

Q. And did you have any conversation with Mr. Carle? A. Yes—at that particular time?

Q. Yes. A. Yes. Not—well, that was afterwards and before; in other words, Mr. Carle was in my office downstairs before he went to the meeting upstairs, and then after the meeting he came downstairs. There were a number of people came in at the time.

By the Court:

Q. What was the purpose of your visit to the Royal Indemnity Company's office, and when was it, with reference to the issuing of this bond? Suppose we take that question first. When was your visit to the office of the Royal Indemnity Company, when you saw Mr. Carle, with reference to the issuing of the bond involved in the Sayreville job? A. I never visited Mr. Carle in the New York office with reference to the bond on Sayreville. We already had the bond. My visit to Mr. Carle was in reference to adjusting

the affairs of Sayreville, so that Mr. Carle could handle the work, and I assisted him in that direction.

Q. This was after your failure, you mean, there? A. Yes. That was during the process of the creditors' committee handling the affairs of the company.

Q. Well, then, whom beside Mr. Carle did you discuss the adjustment of those affairs with—anybody? A. Pertaining to this particular contract?

Q. Relating to this particular contract. A. Nobody but Mr. Carle.

By Mr. Handford:

Q. What was the nature of the discussion with Mr. Carle regarding adjustment of this Sayreville job?

Mr. Markley: I object on the ground that there is no proof of Mr. Carle's authority to speak or bind the defendant to anything. As a matter of fact, the witness has already testified that he did not know what authority Carle had except only as what Carle himself might have told the witness; and, under the cases, you cannot prove the authority of a man to act for a corporation by proving what he said, and it is mere hearsay, and I object to it.

The Court: We have now the fact that Mr. Carle was the one, and the only one, who solicited Mr. Proctor for these bonds, or, if Mr. Proctor did the soliciting, that all his business was done through Mr.

Carle; that when he went to the company's office in New York, the person to whom he was directed was Mr. Carle; that all his conversations relative to the issuing of bonds, in this case and in other cases, were with Mr. Carle; that when he got into difficulties in Sayreville, the person who came to adjust those differences between Mr. Proctor and the Town of Sayreville, and the creditors of Mr. Proctor, was Mr. Carle. No one else appears to have had anything to do, so far as these transactions were concerned, but Mr. Carle.

Now, I think that comes pretty close to creating a question for the jury as to whether or not, whatever was done through Mr. Carle, was not impliedly authorized by the company.

Mr. Markley: May I answer that, sir?

The Court: Yes; that is exactly why I am saying it, so that you may.

Mr. Markley: Thank you, sir. Mr. Carle's authority, I submit, cannot be drawn from those facts without proof of what his authority is, because, as I understand it, he was only over there once or possibly twice, to New York. If the witness is asked, he will undoubtedly say that the offices he went to were the general offices in New York.

The Court: He has said that.

Mr. Markley: I think he has, yes.

The Court: He went to a particular department, the Bond Department.

Mr. Markley: He went there and asked for Mr. Carle, and that he has shown in

to Mr. Carle, whose name was on the door, without any designation of any kind indicating his authority. It is true that he obtained his bonds from Mr. Carle, but I submit that that does not prove any authority on Carle's part except, perhaps, as broker.

The Court: He goes further than that. He says when he got into difficulty he said it was Carle who came to adjust the difficulty.

Mr. Markley: As a matter of fact, your Honor, the very thing I anticipated is happening—we are dealing purely with speculation. Carle himself undertook to finish this job, and actually got the contract to complete Proctor's job with Sayreville. There is actually a written contract on file.

Mr. Handford: I do not think that counsel should speak about that.

Mr. Markley: You have got here the interest of the man Carle, his own interest. You talk about adjusting a thing. You have first got to show his authority to adjust. We do not know whether he is adjusting it for himself or for the Royal or anyone else.

The Court: We do not know; but what is the permissible inference from that fact? He apparently is the company's representative, and the difficulty was not with Mr. Carle; it was the company's responsibility at that time under their bond between Mr. Proctor and the Town of Sayreville; and he goes there to arrange it. Now, what is the permissible inference from that situation?

Mr. Markey: I don't think you can infer, merely from those bald facts, any concrete authority with respect to an adjustment. I think it is plain, sir, that a man might have authority as a broker to write and issue a bond, and yet not be an agent of the company at all.

The Court: If it had stopped there, I would be entirely in agreement with you, if you have shown nothing but the issuing of a bond.

Mr. Markley: Every insurance company's office has brokers who have desk space. These brokers are not authorized any farther than to write bonds. You cannot infer, simply because they have a desk, with a name on the door, that therefore they are authorized, after issuing a bond, or, at least, in taking the writing of a bond as a broker, to proceed, on behalf of the company, and in an important matter of this kind agree to expend large sums of money, without first getting some real evidence as to their authority. I do not think, sir, you can infer authority to bind the company without proof of that definite authority, and I do not think that has been shown so far in this case.

The Court: What was the last question?

(Question read.)

The Court: The question may be answered, and an exception to that ruling may be noted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Markley: May we have the time fixed, your Honor?

The Court: Yes. The question is asked about the time.

The Witness: It was shortly—around noontime.

The Court: I think the month and the day is what is wanted, and the year, if you can give it, as nearly as possible.

The Witness: It was in the summer of 1923. I could, by consulting records——

The Court: Have you them with you?

The Witness: No, sir; I have not.

Mr. Markley: Was the talk at your office? I just want to fix the place.

The Court: He said it was in his office. His office was on the first floor, and this took place on the second floor.

The Witness: The general meeting took place on the second floor, but the conferences that Mr. Carle and myself had were always on the first floor.

The Court: And was this before or after this general meeting?

The Witness: We had a meeting before and we had a meeting afterwards.

The Court: Now the question is——

The Witness: (Interposing.) What was said at that particular time?

The Court: I think that is what Mr. Handford means.

Mr. Markley: Now, may my exception to this be noted?

The Court: Yes.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: In one of these meetings——

Mr. Markley: I assume we are talking about a definite meeting.

The Witness: Are you talking about the meeting in New York or the meeting in Bayonne?

The Court: Did you have one meeting in New York and one meeting in Bayonne, after the failure?

The Witness: Yes, sir—more than one; a dozen. That is what I want to get at, which one they are talking about.

By Mr. Handford:

Q. The first one. A. One of the first meetings in Bayonne?

Q. The first meeting you had with Mr. Carle, after your failure.

The Court: Whether it was in New York or Bayonne.

A. Our first meeting, my first talk with Mr. Carle was with reference to try and carry on the job.

The Court: No. Where was this first meeting?

The Witness: In Bayonne.

The Court: In your office?

The Witness: Yes.

The Court: Go ahead.

The Witness: The question was discussed as to how this job could be handled.

The Court: With Mr. Carle?
The Witness: With Mr. Carle, yes.

Q. And what did you say?

Mr. Markley: May my exception be noted on the grounds urged?
The Court: To all these conversations with Mr. Carle—your exception to them will be noted, without taking any further exception, because I am inclined now to permit those conversations relating to this failure, and any conversations leading up to a contract with the American Well Works.

A. The conversations were principally because we had a large investment in tool equipment at Sayreville, which I was very anxious to save. The creditors' committee refused to go on with the contract.

The Court: Is this part of your conversation with Mr. Carle?
The Witness: Well, of course, I have to tell you that so that you——
The Court: All right. Now, let us get directly to the conversation with Mr. Carle.
The Witness: When the creditors' committee refused to go on with the contract, it was necessary that the contract be assigned to somebody; and it was my understanding——
Mr. Markley: I object.
The Court: Not what your understanding was; you cannot tell that.

The Witness: Let me see how I can express that. We discussed how the job would be handled by getting another contractor to take it over. I said I would be in favor to do so.

The Court: Yes?

The Witness: And I did make arrangements with another contractor to look the job over, but, after some little talk with this other contractor, he decided that he did not care to go on with it.

By the Court:

Q. This you told Mr. Carle? A. This I told to Mr. Carle.

Q. Go ahead. A. Then it was Carle said that he would make the necessary arrangements and take over the contract. I said to him, "If you take over the contract, how do you propose financing it, and where will you get somebody to do the engineering in connection with prosecuting the work?" He replied that he could get a friend of his to do the engineering, and the finances he was to get from the Royal Indemnity Company.

By Mr. Handford:

Q. Did he say anything further about the Royal Indemnity Company's connection with it? A. I will come to that in a minute. I said, "If the Royal Indemnity Company are going to finance you, this job, the way it stands now, will not be a loss; in fact, I would like to save my tool equipment," and why couldn't he finance me, because the creditors' committee won't furnish the cash to prosecute the work—there is no reason why

the job should run in a hole. To this he replied that that couldn't be done.

Q. Is that all? A. No, that isn't all. I said, "Well, if you can't do anything in that direction, I will give you all the cooperation possible, so as to still keep in mind the saving of the tool equipment," because we had something like $15,000 worth of tools on the job. So in connection with this cooperation I gave Mr. Carle a copy of all of the orders we had placed with the various dealers and manufacturers for material and equipment, and he assured me that he would see that I got my tool equipment returned when the job was completed.

Q. Is that all there was said? A. Yes.

Q. Now, during this conversation that you have mentioned, was either Mr. Whinery or Mr. Gaus there? A. At any of these conversations?

Q. That you have just mentioned. A. No.

Q. They were not there? A. No.

Cross examination by Mr. Markley:

Q. Carle did take the contract in his own name, didn't he?

Mr. Handford: I object. The contract will speak for itself.

The Court: I will sustain that objection, if it be a written contract.

Q. A written contract was entered into with the Borough of Sayreville? A. I didn't hear you.

Q. Was a written contract entered into with the Borough of Sayreville? A. Between the John R. Proctor Company and the Borough of Sayreville, yes.

Q. And was there a written contract entered into between Mr. Carle and the Borough of Sayreville? A. No; an assignment.

Q. An assignment of your contract? A. Yes

Q. This office of yours was down in Bayonne, was it? A. Yes.

Q. And you had known Carle, had you, for sometime? A. Yes.

Q. How long? A. Oh, I should say for a year and a half, two years.

Q. He was a friend of yours? A. No, sir.

Q. Well, you had become friends, hadn't you? A. Like all other men looking for business.

Q. Did he live in Bayonne? A. No, he lived in Englewood.

Q. He had his office in Englewood? A. I couldn't say that.

Q. Do you know whether his son was in his office in Englewood, if he had one? A. I couldn't tell you that either; I never was there.

SAMUEL B. WHINERY sworn in behalf of plaintiff.

Direct examination by Mr. Handford:

Q. Mr. Whinery, what was your business in 1922 and 1923? A. Manufacturers' agent, representing several manufacturers in New York.

Q. And did you represent the American Well Works? A. Yes.

Q. Do you know Mr. Proctor, the last witness on the stand? A. Yes.

Q. And did you have any dealings with him in 1922? A. Yes. We sold him pumps for several jobs, including his Sayreville job.

Q. And whose pumps did you sell? A. The American Well Works'.

Q. Now, did you get a written order from him? A. Yes, sir.

Q. I show you a paper marked P-1 for identification, and ask you if that is the order (handing witness document? A. Yes, that is the order.

Q. Now, were those goods shipped to Mr. Proctor? A. No.

Q. Why not? A. Mr. Proctor's company failed before the goods had been shipped; consequently the shop were instructed to hold up all work.

The Court: Does that refer to all the jobs? That is, no equipment was ever sent to him on any of his jobs?

The Witness: On some of the jobs, yes. There were, I think, two or three jobs on which the pumps had not been shipped at the time of his company failing.

The Court: And that included Sayreville?

The Witness: That included Sayreville.

Q. Do you know a man by the name of L. W. Carle? A. I met him.

Q. When did you first meet that gentleman? A. At Mr. Proctor's office, at the time of the creditors' meeting.

Q. When was that creditors' meeting, approximately? A. In the spring of 1923; sometime in the latter part of April or early May.

Q. And where was the general creditors' meet-

ing held in Mr. Proctor's building? A. In a large room on the second floor.

Q. And did you remain in that large room on the second floor all the time you were there, or did you go elsewhere in the building at the time? A. I remained in the large room at the creditors' meeting for a short time, and I was then asked to go downstairs to Mr. Proctor's private office. I think I was there for the rest of the afternoon. I don't recall whether I went back upstairs to the general meeting or not.

Q. Did you have any conversation with Mr. Carle downstairs? A. Yes.

Q. And who else was there when this conversation was taking place? A. My brother, Mr. A. J. Whinery, and, as I recall it, Mr. Carle or one of his representatives, Mr. Parsons, and, to the best of my recollection, there was also another gentleman who represented the Globe Indemnity Company.

Q. Globe or Royal? A. Royal.

Q. Now, will you tell us what you said to Mr. Carle and what Mr. Carle said to you?

Mr. Markley: I object to that, your Honor, on the grounds already stated; on the further ground that apparently there was a Mr. Parsons present instead of Mr. Carle, and there is also still another man whom the witness has identified from the Royal; and on the ground that there is no evidence yet on the authority of any one of those three men to bind the Royal Indemnity Company with respect to any adjustment of the loss, or to undertake any obligation for the Royal.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Will you please answer the question? A. What is the question?

Q. (Read.) A. Mr. Carle stated that his company were going to continue the Sayreville contract, and would be responsible for the payment of the bill, and asked that we proceed to ship the pumps.

Q. And did he tell you who this company was? A. The Royal Indemnity Company.

Q. What did you say to Mr. Carle? A. I told him that I wouldn't authorize or wouldn't instruct the factory to continue working on that order and ship the pumps until we had some written confirmation of his verbal instructions.

Q. And what did Mr. Carle say to that? A. He said he would have that written confirmation sent within the next two or three days.

Q. Now, did you get the written confirmation within the next two or three days? A. No, we did not.

Q. What did you then do? A. I went over to the office of the Indemnity Company, Royal Indemnity Company, went to their general office, and asked for Mr. Carle. They directed me to, I think, one of the other floors; I went to his office and told him that we would have to have that written confirmation.

Q. And will you explain just how that floor looked when you went in there, when you found Mr. Carle? A. My recollection is that there were

a number of desks in the room. Mr. Carle had a desk on one side or in one corner of the room, and Mr. Carle's name was on the door leading into the room—the name of the company and the name of Mr. Carle, and possibly other gentlemen, whom I don't remember.

Q. Now, did you meet Mr. Carle there? Did you see him there on that day? A. Yes.

Q. What did you say to him and what did he say to you?

Mr. Markley: My objection, I understand, continues, your Honor, to these conversations with Mr. Carle as heretofore, on the ground that there is no proof of his authorization, as heretofore stated.

The Court: Yes, your objection may continue, and I am allowing the statements of Mr. Carle against your objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I told him that we had not received the written confirmation for which I had asked, and he assured me again it would be sent within a few days.

Q. And did you receive it? A. No. We did not receive it, as I recall it, for some ten days or two weeks after the meeting in Bayonne.

Q. Now, in your various conversations with Mr. Carle, was the name "American Well Works" mentioned? A. Yes, sir.

Q. And was there any discussion as to your connection with the American Well Works? A. I don't remember whether anything very definite was said about that or not, but it was recognized

by everybody that I was the representative of the American Well Works.

Mr. Markley: I object to that, sir.

The Court: It will be stricken out. Strike out from the words, "it was recognized."

Q. Can you recall anything that was said in your conversations with Mr. Carle in regard to your connection with the American Well Works? A. At the meeting in Bayonne, I was introduced to him as the representative of the American Well Works.

Q. And then you say you did receive a letter? A. Yes.

Q. I show you a letter dated May 16, 1923, and ask you if that is the letter (handing witness document)? A. (Examining.) Yes.

Mr. Handford: I offer this letter in evidence.

Mr. Markley: May I see it?

(Document handed to Mr. Markley.)

Mr. Markley: I object to this letter on the ground, first, that it is not written by any authorized representative of the defendant; that the L. W. Carle, who signed it, there is no proof that he was authorized to write it, or that he was duly authorized with respect to the matter, and on the further ground that the letter clearly indicates that Carle was acting in his own personal capacity rather than as any agent of the company, because he says, "I will pay for same as per your agreement of November 8th"—"I will," not "the com-

pany will''—''I will''; that he was personally assuming that obligation rather than this defendant. For this reason the letter is immaterial, irrelevant and incompetent in this case as against this company.

The Court: Let me see it.

(Document handed to the Court.)

Mr. Markley: Also, it might be noted, it is on the stationery of the Royal, to be sure, on the Compensation Department of the company.

Mr. Handford: And Carle's name is printed on the side.

Mr. Markley: Without any designation of any authority at all.

The Court: It will be admitted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Letter referred to is received in evidence and marked Exhibit P-2.)

(Mr. Handford reads Exhibit P-2 to the jury.)

Mr. Handford: Now I offer in evidence P-1 for Identification.

Mr. Markley: I object to it for the reasons heretofore stated; on the ground, first, that it is not made by the defendant, not authorized by the defendant.

The Court: Is that one of the instruments referred to in that letter?

Mr. Handford: It is the instrument, your Honor, referred to in this Royal letter.

The Court: What is the date of it?

Mr. Handford: The date is November 8, 1922.

The Court: It will be admitted.

Mr. Markley: May I complete my objection, your Honor?

The Court: Yes.

Mr. Markley: Not the order of the defendant, and this material was not ordered by any authorized agent of the defendant. It is an attempt to bind the defendant to a contract which is clearly within the Statute of Frauds, as alleged in our answer—and your Honor will note my exception.

The Court: It will be noted.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Document previously marked Exhibit P-1 for Identification is received in evidence as Exhibit P-1.)

Q. After you received the letter of May 18, 1923, what was done in regard to the pumps? A. I authorized the company to proceed with the construction of the pumps and ship them as soon as completed.

Q. And do you know whether they were ever delivered? A. Yes, they were shipped sometime, I think, in early September.

Q. And do you know whether they were installed and used on the job? A. Yes, they were.

Q. Now, did you make any attempt to obtain payment for the pumps? A. Yes. When the American Well Works notified me that they had not received payment, I telephoned the Royal

Indemnity office several times and called there a couple of times, in an attempt to secure payment.

Q. And whom did you see the first time you called and attempted to secure payment? A. I think the first time I called I saw no one. I was told that Mr. Carle was the only one who was familiar——

Mr. Markley: I object to what he was told.

The Court: I will sustain the objection.

Q. Whom did you see when you called on this occasion?

The Court: And about when was it, Mr. Whinery?

A. The latter part of the late fall, I would say probably November.

The Court: What year?

The Witness: 1923.

The Court: And whom did you see, is the question.

The Witness: The only one I saw, I think, was the young lady at the reception desk.

Q. And what did you say to her?

Mr. Markley: I object to that as immaterial.

The Court: I will sustain the objection.

Q. Well, did you see Mr. Carle? A. No.

Q. And did you call again? A. I called once

more, I think, and also at that time I was told that Mr. Carle was not in.

Q. I show you a letter dated May 23, 1923, and ask you if you received that letter (handing witness document)? A. (Examining.) Yes.

Mr. Handford: I offer the letter in evidence.

Mr. Markley: May I see it?

(Document handed to Mr. Markley.)

Mr. Markley: I object to this letter, if your Honor please, for the same reasons previously stated: to the effect and on the ground that it is written by L. W. Carle; no indication as to his authority; and on the ground that his authority to write any letter for the company has not been proven; also that the letter indicates that he is speaking with respect to a personal obligation, pure and simple; and on the grounds that it is generally immaterial, incompetent and irrelevant to this inquiry.

The Court: I will look at it.

(Document handed to the Court.)

The Court: It will be admitted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Document referred to is received in evidence and marked Exhibit P-3.)

Mr. Handford: May I read this to the jury?

The Court: You may.

(Mr. Handford reads Exhibit P-3 to the jury.)

Q. Now, Mr. Whinery, did you address any letter to the Royal Indemnity Company regarding this matter after the goods had been shipped? A. Yes. As I recall it, I wrote two or three letters, at least, demanding payment.

Q. And did you receive prompt replies to those letters? A. Yes, in most cases, as I recall it.

Q. And was that from Mr. Carle or from someone else? A. Those letters, I think, were signed by someone else; at least one of them, to the best of my recollection, was signed by one of the vice-presidents.

Q. Now, can you tell us the reasonable value of those pumps? A. Three thousand one hundred and some odd dollars, all total.

Cross examination by Mr. Markley:

Q. You say you received several letters from the Royal in response to your demands for payment? A. Yes.

Q. Where are those letters? A. In the file, I suppose.

Q. Counsel has them? A. I suppose so.

Q. Is this one of the letters that you received in response to any of your letters (handing witness document)? A. (Examining.) I wouldn't say positively without seeing the original, with my "received" stamp on it.

Mr. Markley: Please let me have the original of this, Mr. Handford.

(Mr. Handford produces document and the same is handed to the witness.)

The Witness (Examining): Yes, that is a letter received by me.

Mr. Markley: I would like to mark this

letter of December 10, 1923, for identification, your Honor, at this time.

The Court: It will be so marked.

(Document referred to marked D-1 for identification.)

Mr. Handford: To save time, I am willing that it go in evidence.

The Court: That is from the Royal Indemnity Company to Mr. Whinery?

Mr. Markley: Letter dated December 10, 1923, to S. B. Whinery, M.E.—Mechanical Engineer, I suppose it means.

The Court: From the Royal Indemnity Company?

Mr. Markley: Well, it is signed by W. A. Foley, Superintendent.

The Court: It is on the letterhead of the Royal, I mean?

Mr. Markley: Yes, sir.

Mr. Markley: Now, I also ask for this letter of May 20th.

The Witness: On the same letterhead as letters received previously, your Honor.

Mr. Markley: I ask that that be stricken out.

The Court: It will be stricken out.

(Mr. Handford produces document.)

Mr. Markley: I will mark this for identification.

The Court: It has not been identified as yet.

Mr. Markley: I just got it from the file of my adversary, sir.

The Court: A letter of what date?

Mr. Markley: Dated May 20, 1924, signed by Nathaniel E. Wheeler, counsel, and addressed to Andrew J. Whinery.

The Court: On the letterhead of the Royal?

Mr. Markley: On the letterhead of the Royal.

(Document referred to marked Exhibit D-2 for identification.)

Mr. Markley: Now, these two letters referred to—each refers to a letter received from the other side, and Mr. Handford has suggested that he would like to put those in now, in connection with these, and read them. I have no objection to that, if it is agreeable to the Court.

The Court: You have no objection?

Mr. Markley: No, sir.

The Court: Then they may be admitted.

Mr. Markley: Suppose you give me those two and then we will have them in chronological order.

The Court: You have them, Mr. Markley.

Mr. Markley: I haven't got them, your Honor. This is way back in 1923. I have looked for them.

The Court: You are willing to take their copies?

Mr. Markley: Yes, I am willing to take their copies. I haven't got the originals.

Mr. Handford: What were the dates?

Mr. Markley: One is May 23rd. I will put this in, if there is no objection. He says there is not, and I will read them and that will give us the story.

Mr. Handford: That is perfectly satis-

factory. Are you putting them in as plaintiff's exhibits?

The Court: Just identify them.

Mr. Markley: This is a letter to the Royal Indemnity Company, 84 William Street, dated December 7, 1923, from S. B. Whinery, New York Representative, American Well Works.

(Document referred to received in evidence and marked Exhibit P-4.)

Mr. Markley: There is one other he cannot find. I will mark mine in evidence, and I will read them all and have them together.

(Document previously marked Exhibit D-1 for identification now received in evidence as Exhibit D-1.)

(Document previously marked Exhibit D-2 for identification now received in evidence as Exhibit D-2.)

(Mr. Markley reads Exhibit P-4.)

Q. I suppose it was signed S. B. Whinery? A. Yes.

Mr. Markley: It is blank here. (Reads Exhibit D-1 and Exhibit D-2.)

Q. Now, these pumps, Mr. Whinery, you say were shipped to the job at Sayreville? A. Yes.

Q. After this talk you mentioned with Mr. Carle? A. Yes.

Q. Were they all shipped at one time to Sayreville? A. I think they were.

Mr. Handford: I offer in evidence a letter dated November 16, 1923, on the stationery of the Royal Indemnity Company,

signed by W. A. Foley, Superintendent, the same signature appearing on it as on this letter, D-1, which is already in evidence.

Mr. Markley: I object to it as immaterial.

The Court: It will be received.

(Document referred to received in evidence and marked Exhibit P-5.)

(Mr. Handford reads Exhibit P-5 to the jury.)

Mr. Handford: Now I call upon counsel to produce the letter and bill of November 6, 1923.

Mr. Markley: I haven't got them.

Mr. Handford: I just cannot locate those letters. I will offer them a little later, when I have an opportunity.

WILLIAM O. DUDLEY, sworn in behalf of plaintiff.

Direct examination by Mr. Handford:

Q. Mr. Dudley, what is your business? A. I am sales agent for the Northwestern Manufacturing Company.

Q. And in 1922 did your company have any dealings with John R. Proctor, Inc? A. Yes, sir.

Q. And did your company furnish any material for a job in Sayreville? A. Yes, sir. We sold some motors to drive some pumps.

Q. And did you have any dealings with a Mr. Carle? A. Yes, sir, afterward; later.

Q. Now, was that before you had delivered the motors or afterwards? A. Before.

Q. And how did you happen to meet Mr. Carle?

Mr. Markley: I object to that as immaterial. That is with respect to an entirely different account than the one here presented, and the fact that there is an analogy of two different accounts I do not think makes it evidential, under the rule that similar acts cannot be offered to prove the particular act in question.

The Court: What is the purpose of this?

Mr. Handford: Cases hold, if your Honor please, that similar dealings by the agent, recognized by the principal, are evidential as to the agency primarily in question.

The Court: You expect to show that these transactions were called to the attention of Mr. Proctor?

Mr. Handford: I expect to show, if your Honor please——

The Court: Perhaps I ought to say called to the attention of the American Well Works.

Mr. Handford: Yes.

The Court: Called to the attention of the American Well Works—transactions which you are now going to question Mr. Dudley about?

Mr. Handford: The American Well Works knew of this transaction with Carle and Mr. Dudley.

The Court: The question may be answered.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Read.) A. John R. Proctor gave up the job, and we heard that the Royal Indemnity Company——

Mr. Markley: I object to what they heard.

The Witness: Well, we knew that the Royal Indemnity Company——

Mr. Markley: I object to that on the ground that this is a conclusion, what they knew.

Mr. Handford: Perhaps I can solve it.

Q. Did you have any discussion with Mr. Gaus, of the American Well Works, just at that time? A. Oh, yes. Mr. Gaus and I were working together on the data, getting these pumps and the motors to fit one another.

Q. But when Mr. Proctor's company failed, did you have any discussion with Mr. Gaus regarding the completion of the job by anyone else?

Mr. Markley: I object to that.

The Court: Answer it yes or no.

A. Yes.

Q. And what did Mr. Gaus tell you about the completion of that job?

Mr. Markley: I object to that.

The Court: I will sustain the objection.

Q. Well, as the result of your conversation with Mr. Gaus, did you see Mr. Carle? A. Yes, sir.

Q. And what did Mr. Carle tell you?

The Court: What is Mr. Gaus' position? Who is Mr. Gaus? I know it is stated that he was present at the office of Mr. Proctor, but I have not yet heard what relation Mr. Gaus has to the plaintiff company.

Mr. Handford: He is a representative of the American Well Works, together with Mr. Whinery—he will testify later.

Q. (Last question read.)

Mr. Markley: I object to his conversation with Mr. Carle, on the ground that what he said to Mr. Carle and what Carle said to him is not relevant or competent to prove authority in Carle to obligate the defendant in any way to the plaintiff in this action.

The Court: I do not think we are concerned with what Mr. Carle said to him in his transaction at all, Mr. Handford.

Q. Did you get any order for the delivery of your motors?

Mr. Markley: I object to that as immaterial.

The Court: Was your order with reference to materials for the Sayreville job?

The Witness: Yes, sir.

Q. (Last question read.) A. I did.

Q. And with whom was that?

Mr. Markley: I object to that. I suppose you are asking the name of a person?

Mr. Handford: Yes.

The Court: The question may be answered.

A. I got an order from Mr. Carle at the Royal Indemnity Company's office.

Mr. Markley: I object to that. "Whom did you get it from" is the question. I object to anything more than that.

The Court: You cannot object to that unless it is improper. You cannot object to it unless it goes beyond the scope of the question, unless the material in the answer is objectionable otherwise.

Mr. Markley: May I object to it on the ground that it is improper, in that it is with respect to an entirely different transaction than the one under examination and trial here, and, therefore, not relevant or material to this issue.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: Where was it?

The Witness: In the Royal Indemnity's office.

Q. And you saw Mr. Carle there? A. Yes, sir.

The Court: A written or verbal order?

The Witness: A verbal order, and written order later.

Mr. Markley: Was it verbal?

The Witness: A verbal order at that time.

Q. Now, did you deliver the motors then to the Sayreville job?

Mr. Markley: I object to that as immaterial.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Yes, sir.

Q. And were the motors paid for?

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

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Yes, sir.

Q. I show you a letter dated November 7, 1923, on Royal Indemnity Company stationery, and ask you if you received that letter (handing witness document)? A. (Examining.) Yes, sir.

Q. And did you receive the check mentioned in the letter, of $518.11? A. Yes, sir.

Q. Whose check was it? A. Royal Indemnity's.

Mr. Handford: I offer the letter in evidence.

Mr. Markley: I object to it on the ground that, first, the order does not ap-

pear to be in evidence—who actually gave the order, whether it was a personal order of Mr. Carle or not. I object to this letter on the ground it does not appear under what basis this payment was made and what the arrangement was for the payments. This is merely a letter enclosing a draft.

The Court: Where is the written order?

The Witness: I haven't got it.

Mr. Markley: It does not appear whether Carle was the contractor, or whether it was paid merely to finance him. All this is, is a letter enclosing a draft, and I object to it as immaterial, incompetent and irrelevant, and not evidential with relation to any obligation of Royal to this plaintiff.

The Court: I am asking where this written order is which he says verified his verbal order.

Mr. Handford: I do not have that.

The Witness: The original order is always sent to the factory. The factory is in Milwaukee.

The Court: I will see this letter, then, which you are now offering.

Mr. Handford: I call your Honor's attention to it—it is the same signature of Foley that we have on the other letters which we have identified and which are in evidence.

The Court: What was this $518 for, mentioned in this letter?

The Witness: That is a payment for the motors.

The Court: Furnished for what job?

The Witness: The Sayreville job.

The Court: It will be admitted.

Mr. Markley: I object on the grounds already stated.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Document referred to received in evidence and marked Exhibit P-6.)

(Mr. Handford reads Exhibit P-6 to the jury.)

The Court: Let me ask you if that claim number is the same claim number as in the exhibits which you have introduced before.

Mr. Handford: "4654" all the way through.

Q. Now, Mr. Dudley, were you, in 1923, connected with the Dudley-Curry Electric Company? A. Yes, sir.

Q. And did the Dudley-Curry Electric Company have any dealings with the Borough of Sayreville job? A. I do not understand your question.

Q. Did the Dudley-Curry Electric Company have anything to do with the Sayreville job, with regard to motors?

Mr. Markley: I object to that as immaterial.

By the Court:

Q. Before you go to that—whose check was this that was enclosed with this letter of November 7, 1923? A. The check that I received?

Q. Yes. A. The Royal Indemnity check.

Q. Royal Indemnity Company? A. Yes, sir.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Handford:

Q. And who furnished the control equipment on the motors?

Mr. Markley: I object to that as immaterial, irrelevant and incompetent. I do not wish to be objecting all the time. May I have an objection noted to the dealings with this other company, on the ground that you cannot prove this particular transaction with the American Well Works by trying to prove other transactions with other contractors?

The Court: The objection will be overruled. Your objection may go to other questions of similar character with reference to this transaction—the Dudley-Curry Electric Company.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Read.) A. I don't remember.

Q. I show you a letter dated November 7, 1923, addressed to the Dudley-Curry Electric Company, and ask you if that refreshes your recollection (handing witness document)?

Mr. Markley: Who is it written by?

Mr. Handford: By the Royal Indemnity Company, "Foley, Superintendent."

Mr. Markley: I object to the witness refreshing his recollection by a letter which was not written by him but by another person altogether.

By the Court:

Q. Did that letter come to your attention? A. Yes, sir.

Q. And it does refresh your recollection? A. Yes, sir.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Handford:

Q. Now, can you tell us——

Mr. Markley: I object to the question on the ground that he is basing his answer on the recollection that he gets by examining a letter which was not written by him.

The Court: I will overrule the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The Dudley-Curry Electric Company furnished the controls.

The Court: That is, the electric controls?

The Witness: The electric controls.

Q. I show you a letter dated September 22, 1923, signed by L. W. Carle, and ask you if you received that letter (handing witness document)? A. (Examining.) Yes, sir.

Mr. Handford: I offer this letter in evidence.

Mr. Markley: May I see it?

(Document handed to Mr. Markley.)

Mr. Markley: I do not object to that letter.

(Document referred to received in evidence and marked Exhibit P-7.)

Mr. Handford: It is addressed to the Dudley-Curry Electric Company, signed by Mr. Carle, again on Royal Indemnity letterhead.

(Mr. Handford reads Exhibit P-7 to the jury.)

Q. Now, Mr. Dudley, I again show you a letter signed by Mr. Foley to the Dudley-Curry Electric Company, dated November 7, 1923, and ask you if you received that letter (handing witness document)? A. (Examining.) Yes, sir.

Q. And that letter mentions a check for $295, payable to the order of the Dudley-Curry Electric Company. Did you receive the check with that letter? A. Yes, sir.

Q. And whose check was it? A. Royal Indemnity.

Mr. Handford: I offer this letter in evidence.

Mr. Markley: I object to this as immaterial, incompetent and irrelevant. The basis for the payment has not been proven, and it has not been shown whether it is a payment under the bond obligation of the defendant or not. They attempt to prove a specific obligation such as the one presented in the case at bar, and prove it by trying to prove a payment on some other contract, the circumstances of which do not appear, nor the nature of the obligation under which the check was given. I submit it is immaterial, incompetent and irrelevant.

Mr. Handford: It is the same subject, the same claim.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Document referred to received in evidence and marked Exhibit P-8.)

Mr. Handford: This is a letter on Royal Indemnity Company letterhead (reading Exhibit P-8 to the jury).

The Court: What is the number of the claim?

Mr. Handford: "4654."

Cross examination by Mr. Markley:

Q. When was your merchandise first shipped to the job? A. When?

Q. Yes. A. I don't remember.

Q. You had a written order, you say, for it? A. Yes, sir.

The Court: Do you know when Proctor failed?

The Witness: Yes; it was after Proctor failed. We had an order from Proctor, and when he failed we got the order from Mr. Carle.

Q. You had a written order from Proctor which you accepted? A. Yes, sir.

Q. Now, when, with relation to that, were the goods shipped? A. The goods were shipped after I got an order from Mr. Carle.

Q. Have you got a copy of your order here that you had from Proctor? A. No, sir.

Q. I understand you haven't got the original order from Carle either, here? A. I don't know whether we have got it or not.

Q. You say counsel has it? A. He may have it; I don't know.

Mr. Handford: I haven't it, and never have had it.

GILBERT H. GAUS sworn in behalf of plaintiff.

Direct examination by Mr. Handford:

Q. By whom are you employed, Mr. Gaus? A. I am the manager of the New York Office of the American Well Works.

Q. And were you manager of that office in 1922 and 1923? A. No, sir.

Q. By whom were you employed at that time? A. By Mr. S. B. Whinery.

Q. And did you have any connection with the American Well Works through Mr. Whinery? A. Yes. Mr. Whinery represented the American Well Works, and I sold pumps as one of his employees, salesman.

Q. In that capacity, as representing Mr. Whinery and the American Well Works, did you ever meet Mr. L. W. Carle? A. Yes, sir.

Q. And when was it you first met that gentleman? A. Well, it is pretty hard to remember the exact date, but it was early in 1923; around April, May.

Q. Did you see the letter from Mr. Carle which had been addressed to Mr. Whinery, ordering these pumps? A. Yes, sir.

Q. And would the date of that letter refresh your recollection as to when you saw Mr. Carle? A. Yes, sir; I think it would.

Q. I show you P-2 (handing witness document). A. (Examining.) Yes.

Q. Now, can you tell us when you first saw Mr. Carle? A. Well, it seems to me that it was a few days before that time of that letter, May 16th.

Q. And where did you see Mr. Carle? A. At his—at the office of the Royal Indemnity Company.

Q. Now, you had not met Mr. Carle before that time, had you? A. No, sir.

Q. When you first entered the office of the Royal Indemnity Company, whom did you see? A. Well, there was a girl there, or somebody, that took your name and asked what you wanted.

Q. And did she ask you what you wanted? A. Yes. I said I wanted to go to whoever it was that was handling the Sayreville, New Jersey, job.

Q. And what did she tell you? A. Well, as I recall it——

Mr. Markley: I object to what she said, on the ground it is immaterial.

Mr. Handford: I think it is material.

The Court: Not what she said. As a result of what she said, what did you do?

The Witness: As I recall it, she went inside somewhere and came out and said I wanted to speak to Mr. L. W. Carle, and referred me to room something or other, and I went up there, and it was upstairs—from the reading of the letters here, evidently the seventh floor—and I went inside, and there was the name on the door, "Royal Indemnity Company," and there was his name, and I believe there was one or two other names, possibly—and I went inside, to a big room, and there was a lot of desks, and they referred me to some corner, and I met Mr. Carle.

Q. Which Mr. Carle did you meet? A. Well, the first man was a younger man, and I said I wanted to speak to Mr. Carle, and he said, "I am Mr. Carle," and I said, "I want to talk about the Sayreville job," and he said, "You do not want to talk to me, you want to talk to my father"; and he referred to his father, who was right there at the desk.

Q. And do you recall the kind of a man—the looks of Mr. Carle? A. Yes. He was quite an old man, very hard of hearing, and wore heavy glasses.

Q. Do you know whether he is living or dead at present? A. Well, I know he is dead now.

Q. And did you talk with Mr. Carle about the Sayreville job? A. Yes. I referred to——

Mr. Markley: I object. Yes or no I do not object to, your Honor.

The Witness: Yes.

Q. What conversation did you have with Mr. Carle on that occasion?

Mr. Markley: I object to that on the grounds heretofore urged, particularly that Mr. Carle has not been proven——

The Court: That comes under your objections.

Mr. Markley: That his authority to speak for the company has not been proven, and therefore it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I told him I came to get the order for the pumps for Sayreville, New Jersey.

Q. You mean a written or an oral order? A. Well, I expected any verbal order would be confirmed.

Mr. Markley: I object to what the witness expected.

The Court: It will be stricken out.

The Witness: I wanted to get an order and, of course, if I could walk away with a written order I would take it, and, if not, we would wait for the original order.

Q. What did Mr. Carle say? A. He said he saw no reason why he shouldn't give us the order, in view of the fact that Proctor had given the American Well Works—had decided to purchase American Well Works pumps; that he did not see that his company could do any better shopping around than what Proctor had probably done when he gave us the order—so why shouldn't his company give us the order.

Q. And did he say who was going to complete the Sayreville job? A. In the conversation, it never entered my mind at all that I was not talking——

Mr. Markley: I object to that.

The Court: Strike it all out. Your mental operations are not evidence, Mr. Gaus.

The Witness: What is the question?

Q. (Read.) A. Yes.

Q. Whom did he say would— A. (interposing) Royal Indemnity Company.

Q. And that was prior to the receipt of this letter of May 16th? A. Yes, sir.

Q. After these goods were shipped, did you ever go down to the Sayreville job? A. Not after —oh, after they were shipped, did I go down to Sayreville, New Jersey?

Q. Yes. A. Yes, sir.

Q. And did you see Mr. Carle there? A. No, sir.

Q. Did you see the pumps? A. Yes, sir.

Q. And where were they? A. Running.

Q. And was there any name plate on the pumps? A. Yes, sir.

Q. And whose name plate was it? A. The American Well Works.

Q. Did you ever see Mr. Carle— A. (Interposing.) Yes.

Q. (Continuing.) After the pumps were delivered? A. After the pumps were delivered?

Q. Yes. A. I don't believe I did, no.

By the Court:

Q. Did you ever see Mr. Carle before this time that you met him in the office in New York? A. Before I met him this first time in his office? Before I met him at this conversation I mentioned before?

Q. Yes. A. No, I never met him. In Bayonne —I noticed your Honor say something before about somebody saying I was down there. I don't think it was mentioned that I was down in Bayonne. It might have been in the conversation somebody mentioned my name.

Q. You were not at Bayonne? A. I never was at Bayonne, no.

By Mr. Handford:

Q. No—Mr. Whinery's brother, Mr. Andrew Whinery, I think.

The Court: Somebody did say that Mr. Gaus was in Bayonne, as I understood it.

A. I had been to see Proctor about the job way at the beginning.

Q. And did you see Mr. Carle again after that first time you saw him? A. Yes. We had the drawings, the blue-prints, which were certified as correct by—approved by the consulting engineer,

and I took those down to him about, oh, I would say about, maybe a week later than that letter there, probably about the 22nd, something like that.

Q. And did you show those blue-prints to Mr. Carle? A. Yes, sir.

Q. I show you some blue-prints, and ask you if those are the ones (handing witness documents)? A. (Examining.) Yes, sir.

Mr. Handford: I offer the blue-prints in evidence.

Mr. Markley: I object to them as immaterial, incompetent and irrelevant.

The Court: I will sustain the objection. I do not see the materiality.

Cross examination by Mr. Markley:

Q. You did not get the order when you went down there, did you? A. No, sir.

Q. How long before this letter of May 16, 1923, was it that you were there? A. Well, I make a guess that it was within a week.

Q. And when you did get this letter of May 16th, it was signed by L. W. Carle? A. Well, that letter came into the office, and I did not get it.

Q. You did not see this? A. It was shown to me, because I was handling the job in the office, the details in connection with it; but the letter came in addressed to Mr. Whinery, and it just went to the file as the confirming order.

Q. You did not see it then at that time? A. Well, I may have, but I never looked to see whether it was signed by the Royal Indemnity Company or Mr. Carle, because I never thought there would be any doubt about it.

Q. You did not look to see whom it was signed by? You did not examine the order to see how it was framed or anything, is that it? A. Why, you don't look for any——

Q. Please—did you or didn't you? A. Yes, I read the letter.

Q. Well, how long after you received it did you read it? A. I cannot tell you that; probably the next day.

Q. And didn't it seem peculiar to you when you were down to his office, and you were talking to him there, and asking him for an order, and he said he could not give you an order, that he would mail it to you and, when you got it, this order was signed individually by him, in which he says (reading): "I will pay $3,055"—did that seem at all peculiar to you? A. No, not at all; no.

Mr. Handford: If your Honor please, I have located the copy of the letter of November 6th, and the bill, which were referred to in the letter of November 16th, signed by Mr. Foley.

The Court: Show it to Mr. Markley. There may be no objection, since he asked for it.

Mr. Markley: No, I did not ask for this. This is the American Well Works. I was asking for that other order of the other company.

The Court: This is a letter of American Well Works of November 6, 1923, enclosing a bill.

Mr. Markley: Now, we do not deny, your Honor, that we received the original of

this, of which I haven't the original copy now. We do not deny we received the letter of November 6, 1923, and the annexed bill, if that is a true copy of what was sent us—I do not know—but we do object to it on the ground that it is immaterial, incompetent and irrelevant, and a mere self-serving declaration on the part of the American Well Works, the plaintiff.

The Court: Haven't you already, in D-1, offered a letter which is a part of that correspondence? That is a letter of December 10, 1923.

Mr. Markley: We offered a letter that the witness reported as having received, in answer to his letters from the company, but I haven't offered any letter which this would be a reply to, or an answer to; I haven't offered any at all. This is a part of the correspondence during that period of a year or more that occurred between the two companies, but I object to it as a self-serving declaration on the part of the American Well Works.

The only purpose of offering it, I assume, would be to prove our obligation, and that cannot be used to prove the obligation of the Royal, and therefore I object to it on the grounds that it is immaterial, incompetent and irrelevant.

(Documents handed to the Court.)

The Court: They will be admitted: the letter of November 6th, from the American Well Works to the Royal Indemnity Company, which apparently encloses copy of the bill for those pumps.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Documents referred to received in evidence and marked Exhibits P-9 and P-9A.)

Mr. Handford: I would like to read the letter.

The Court: You may.

(Mr. Handford reads Exhibit P-9 to the jury.)

The Court: Although it is in evidence as P-5, perhaps you had better read that other letter in connection with this one—P-5.

Mr. Handford: And the bill is in evidence, also, addressed to the Royal Indemnity Company. Then we have this letter, on the stationery of the Royal Indemnity Company, Surety Division—(reading Exhibit P-5 to the jury).

PLAINTIFF RESTS.

NATHANIEL E. WHEELER sworn in behalf of defendant.

Direct examination by Mr. Markley:

Q. Mr. Wheeler, did you write this letter of May 20, 1924, which has been marked in evidence as D-2?

Mr. Handford: May I see it before he answers the question?

The Court: Yes.

A. (Examining.) I did.

Q. In here you say (reading): "Your letter of the 23rd ult. You refer to an alleged claim of the American Well Works against this company. We have heretofore advised Mr. S. B. Whinery, of the American Well Works, that we do not consider that they have any claim against this company, and we absolutely deny all liability. This company never had any contract or agreement with the American Well Works with regard to the pumps and apparatus mentioned in your letter, or any other matter. The only connection the Royal Indemnity Company has with this job is through the bond which it executed in behalf of the John R. Proctor, Inc."

The Court: What is the purpose of reading this letter again?

Mr. Markley: I was going to ask him whether that was the fact.

The Court: That is a legal conclusion, and his stating that it is a fact would not amount to anything. It is his opinion, I suppose.

Mr. Markley: Well, suppose I go at it in another way. Maybe your Honor is right about it. I was trying to get at it perhaps as briefly as I could.

The Court: We have not yet heard what Mr. Wheeler's connection is with the company or anything else.

Q. What was your connection with the Royal Indemnity Company at the time of the writing of this letter of May 20, 1924? A. Counsel.

Q. And are you a member of the Bar? A. I am.

Q. Of the State of New York? A. I am.

Q. Anywhere else? A. The Federal Courts.

Q. Now, did you know this man Carle, L. W. Carle? A. I did.

Q. Do you know what his connection with the company was in——

Mr. Handford: I object to that.

Mr. Markley: Let me finish the question.

The Court: It may be answered yes or no.

Q. Do you know what the connection or employment, if any, of L. W. Carle was with the Royal Indemnity Company, the defendant, in 1923 and 1924? A. I do.

Q. What was it?

Mr. Handford: I object to that.

The Court: I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: Merely being counsel of the company would not enable him to know what the connection was, without his first stating how he knows the connection of Carle with the company. It would be mere hearsay on his part.

Mr. Markley: Well, I will be glad to go into that a little more fully.

Q. Did you know Carle personally? A. I did.

Q. How do you know what his connection with the company was? A. I was employed by the company. Through that I know what his connec-

tion was. I supervised, in a legal way, these bond matters, of which this is one.

Q. Were you counsel for the company with respect to bond matters, such as this Sayreville bond job? A. I was.

Q. And in connection with being counsel for the company, were you actually employed at the company's office? A. I was.

Q. And were you an employee on the basis of an annual salary of the company? A. I was.

Q. You did not have a general practice outside of your company connection? A. I did not.

Q. Did you devote all your time to company matters? A. I did.

Q. And as an employee of the company, and in charge of its bond work, do I understand? A. Of the legal end of it.

Q. You knew what Carle's connection was? A. I did.

Q. Now, will you state what his connection with the company was?

Mr. Handford: I object. His secret arrangements with his company would not be binding upon a third party, the plaintiff in this case. It is what they held him out to be.

The Court: I suppose, if you are depending upon express authority, that can only be conferred by officers of the company to whom such power is given, or by the board of directors. The mere statement by some other employee of the company that he knows what the position with the company of another employee was, does not entitle him to give that evidence. I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What work did Carle do, if any, at the offices of the Royal Indemnity Company? A. Not any.

Q. What did he do with respect to bonds, if anything? A. Solicited bonds, placed them with the company.

Q. And how was he paid for soliciting bonds? A. Commission.

Q. Did he have any salary arrangement with the company? A. None at all.

Mr. Handford: I move that that be stricken out, if your Honor please; the salary arrangement and payment is not binding on the plaintiff.

The Court: It may remain.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. And in this Sayreville job, did he have any work to perform for the company, with respect to the completing of that job after Proctor defaulted?

Mr. Handford: I object to that.

The Court: I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: What he actually did, and not what the opinion of this employee of the company is.

Q. What did Carle do with respect to the completion of that job for the company?

Mr. Handford: I object to that.

The Court: The question may be answered.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. He took an assignment of the contract from the general contractor.

Mr. Handford: I object to that and move it be stricken out.

The Court: That is exactly what Mr. Proctor said. It may remain.

Q. Was that assignment in the name of the company? A. It was not.

Q. Now, with respect to the adjustment of the losses or claims arising out of the Proctor default on the Sayreville job, what did Carle do, if anything, for the Royal Indemnity Company?

The Court: I suppose within his knowledge. Of course, if Carle came out to Proctor's office and did work there for the company, or apparently for the company, Mr. Wheeler may not know about that; but anything within his knowledge he may state what Carle did.

A. Nothing.

Q. Now, then, I believe——

The Court: I suppose you mean within your knowledge.

The Witness: That is true, sir. I think he turned over some letters that might have been received; that is, to the Claims Department, turned over to the proper Claims Department, letters received.

Q. Did he have any work to do in the Claim Department? A. None at all.

Q. Now, then, your company, it has been testified, was on the bond of Proctor to the Borough of Sayreville for this job that has been discussed here. Were claims presented to your company under that bond? A. Many.

Q. And were they paid?

Mr. Handford: I object to that; it is immaterial, if your Honor please, to the issue—were they paid.

The Court: I suppose that refers to these two claims which you have offered in evidence here, which were outside of the claims of this plaintiff company. I do not suppose they are obliged to leave them right there where you have left them, if there is any explanation of why they were paid.

The Witness: Will you give me the question?

Q. (Read.) A. The bond penalty was exhausted. There was a certain percentage paid when we settled with the Borough of Sayreville, to each claimant. May I go on?

Q. I wish you would.

The Court: Until I hear some objection.

A. This claimant did not present a claim under the bond, but presented a claim directly to the surety, on the basis that he was the contractor. That we denied.

Q. And did they file a claim within eighty days after the Borough of Sayreville job was accepted? A. They did not. They took the position that we were the contractor and did not make claim under the bond.

Q. Did they file any suit within a year under that bond?

Mr. Handford: I object to that as immaterial.

The Court: That is the statute under that Municipal Lien Act?

Mr. Markley: Chapter 75 of the Laws of 1918.

The Court: That may account for why these claims of Mr. Dudley, or the Northwestern Manufacturing Company, and the Dudley-Curry Electric Company were paid. He has already said that the bond became exhausted, the bond was exhausted at a certain time. Now, it may be, after these claims were paid, that these claims were filed under the Municipal Lien Act. I don't know if that is what Mr. Wheeler is about to testify to——

Mr. Markley: That is what I am asking about.

The Court: I think that may explain away entirely the reason for paying those claims by the company. I think that is proper, if it did go through your department (addressing the witness).

The Witness: Yes, sir; I handled the settlements.

Q. And up to the point that your bond was exhausted, you continued to pay, did you not? A. We paid some claims. The Borough of Sayreville—Mr. Carle defaulted in the contract. The contract was relet to a man named Gilbert. The Borough of Sayreville had a very substantial claim against the bond. In the settlement of that claim there were materialmen who had claims under the bond. We made a settlement with the Borough of Sayreville, in which it exhausted the penalty of our bond, and each materialman who did come in under the Municipal Lien Law was paid a percentage of his claim, so that it exhausted the bond penalty, if you understand.

Q. Was any suit brought by the plaintiff within a year after the acceptance of that job in Sayreville? A. It was not.

Q. And they neither filed a claim within 80 days, or suit within a year? A. They did not. In fact, they declared that we were contractors and proceeded on the other theory.

The Court: There is absolutely no contention of this defendant that they have a right to recover under the Municipal Lien Act.

Mr. Markley: No.

The Court: This is a suit upon a direct contract of the Royal Indemnity Company.

Mr. Markley: Yes, sir.

(At one o'clock, P. M., a recess is taken until two o'clock, P. M.)

After Recess.

NATHANIEL E. WHEELER resumes the stand.

Direct examination (continued) by Mr. Markley:

Mr. Markley: There is one answer, your Honor, that Mr. Wheeler made, in answer to a question which apparently was interrupted and he did not get the full purport of the question. May he correct his answer to that question? I have checked it with the stenographer and witness.

The Court: Just read the question and the answer.

(The following question and answer was thereupon read by the stenographer: "Q. What did Carle do with respect to the completion of that job for the company? A. He took an assignment of the contract from the general contractor.")

Q. Do you wish to correct that answer? A. I do. I did not hear the words "for the company." My answer now is "nothing."

Q. Now, then, it has been testified in this case that Mr. Carle was visited by Mr. Proctor, and, I believe, one or more of the other witnesses at the company's general offices in New York, in 1923 or 1924, perhaps both years.

Q. Where were the Royal Indemnity's general offices in 1923 and 1924?

Mr. Handford: If I might just interrupt—I do not think there was any testimony regarding 1923 and 1924.

Mr. Markley: Well, what years were they?

Mr. Handford: 1922 and 1923.

The Court: There is no specific testimony that he was visited at the company's office in 1923 and 1924.

Mr. Markley: If it is 1922, I would like to change it to the actual years.

The Court: I should say it was probably 1922 and 1923, instead of 1923 and 1924.

Q. Well, 1922 and 1923? A. 84 William Street, New York City.

Q. You have testified that Mr. Carle solicited bond business for the company, and received, I think you said, commission for such business for the company? A. Yes, sir.

Q. Did the company permit him to have desk-room at the company's——

Mr. Handford: I object to that. I object to what the arrangement was.

Mr. Markley: Let me finish.

The Court: I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Markley: Now, I wonder if I may complete my question.

The Court: No, because the objectionable part has already been asked—what the company permitted him to do. The company's permission would be something

which could only be hearsay from this witness. Whether or not he actually did have his office in that company may be testified to by this witness. What he knows of his own knowledge, I think, he may testify to, but not his opinion.

Q. Of your own knowledge, Mr. Wheeler, what did you know about Mr. Carle having an office at the general office building of the company? A. He had a desk there.

The Court: At 84 William Street?
The Witness: Yes, sir.

Q. Did other men, who also solicited business, on the basis of commission, likewise have desk-room there?

Mr. Handford: I object to the form of the question. He said "desk-room"; it may have a technical meaning.
The Court: I am just wondering what it could have, Mr. Handford.
Mr. Handford: Having a desk——
The Court: You think there is a distinction between having a desk and desk-room?
Mr. Handford: Yes.
The Court: I think you might change that then and leave out the word "room."
Mr. Markley: Leave out "room"—is that the objection?
The Court: Yes, I think so.

Q. Did other men who sought and solicited business, on the basis of obtaining commission

from the company, also have a desk there? A. Yes, sir.

Q. And is that a common practice in insurance companies? A. It is.

Q. Now, then, I believe you testified, before the recess, that when Proctor defaulted, Carle took the contract with Sayreville over, and that when he defaulted it was taken over by a man named Gilbert; is that right? A. The Borough of Sayreville served the notice of default upon Carle, defaulting his contract with the Borough of Sayreville, advertised and relet the job to a man named Gilbert.

Q. And Gilbert completed it, did he? A. Gilbert did.

Q. Now, then, at the time when Proctor defaulted, was your company requested by the Borough to give its consent to an assignment of the contractor contract to Carle? A. It was.

Q. And in my hand—and I am about to show you—is that the consent that was given and filed with the Borough, or, at least, a duplicate-original of it, at the time when that request was made to your company (handing witness document)? A. (Examining.) It is.

Q. And was it after that consent was accepted that Carle took over the contract? A. Yes, sir. It was necessary to get that.

Q. It was necessary to have this (indicating)? A. The Borough of Sayreville had to have that.

Mr. Markley: I offer that in evidence.

Mr. Handford: I object to that on two grounds: first, it is a copy; and, secondly, it is not binding on this plaintiff, in any event.

The Court: I suppose it is objectionable as a copy; I am not impressed by the other.

Mr. Markley: It is a duplicate-original of the one that was filed, and the original one is actually on file. I think the witness knows that.

The Witness: I know that of my own knowledge.

By the Court:

Q. On file where? A. With the Borough of Sayreville. I handled the settlement with the Borough of Sayreville. The Borough acted on the original of that instrument.

Q. Where does this come from, your files? A. It comes from our files.

The Court: I will let Mr. Handford look at it.

(Document handed to Mr. Handford.)

The Court: You may cross examine upon it, if you desire.

Mr. Handford: I object to it on the further ground——

The Court: Do you desire to cross examine upon it before I rule?

Mr. Handford: No—except that I have another objection to it after reading it: it is a self-serving declaration as to the standing of Carle in regard to the Royal Indemnity Company—the very last sentence in the statement.

The Court: I will sustain the objection.

Mr. Markley: Your Honor would not want to hear me any further on it?

The Court: If you think you can change my views about it——

(Argument.)

The Court: An exception will be noted.

Mr. Markley: Your Honor overrules the offering?

The Court: Yes.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Markley: May I have it marked for identification?

The Court: Yes.

(Document referred to marked Exhibit D-3 for identification.)

Cross examination by Mr. Handford:

Q. How long have you been practicing law? A. The April Term of 1920.

Q. And when did you go with the Royal Indemnity Company? A. In the fall, October, 1919.

Q. And are you still with them? A. I am, sir.

Q. And still hold the same position you did in 1922 and 1923, as counsel for the company? A. In the latter part of 1922—yes, sir.

Q. And you still hold that same position? A. Yes, sir.

Q. You do not practice law on your own account, except for the Royal Indemnity Company? A. No, sir.

By the Court:

Q. Just what is your position with the Royal

Indemnity Company? What is your title, I mean? A. Counsel.

Q. You are the chief counsel? A. We have two counsel; we have a bond counsel and we have a casualty counsel. Our work is divided as to casualty insurance and as to bonding insurance.

Q. What do you say then? A. I say I am counsel for all bond matters; head of this bonding-legal division.

Q. Legal department? A. Yes, sir.

By Mr. Handford:

Q. Now, speaking of this legal department, are there any other lawyers in the bonding-legal department but yourself? A. Oh, yes; I have got seven right now.

Q. All admitted to practice law in New York? A. Not all of them; they have all studied law; not all admitted.

Q. Well, how many did you have in 1922 and 1923? A. I should say three or four.

The Court: Were you at that time counsel or assistant——

The Witness: I was counsel; not all of 1922.

Q. About what month of 1922, did you become counsel? A. The latter part of September or the first of October.

Q. 1922. And you had been admitted to practice then about two years, two years and a half? A. That is right, sir. I was admitted the April Term, First Department, in 1920.

Q. Now, who was head of the bonding department in 1922 and 1923? A. There were two

heads: one for fidelity and one for surety. The one for fidelity was Mr. Pope, and for surety, was Mr. Saylor.

Q. And did you have a Mr. Foley in the bonding department? A. We had him in the legal department of bonds; yes.

Q. He was under you? A. Yes, in an advisory way, general way.

Q. Is he an attorney? A. He was; he is dead; he was, in the State of Minnesota. I am not certain whether at that time he had been admitted to the State of New York or not—he was, before his death.

Q. Now, you say that you are familiar with what Mr. Carle did for the company in 1922, 1923; is that right? A. Yes.

Q. And isn't it a fact that he had his name on the door in the room there where his desk was? A. I heard that testified to this morning. If so, I never saw it. Now, I wouldn't swear, positively.

Q. You do not know? A. I will say I never saw it. May I explain the reason why I don't? We have changed our offices. During that year we changed our offices, as a matter of fact. We have from time to time, brokers that have a desk in our offices. It might be possible, at sometime, his name did appear on the door. If so, I don't remember it at all.

Q. And didn't you know that his name appeared on the Royal Indemnity stationery? A. I did.

Q. You knew that? A. Yes, sir. We gave——

Q. That is all. And did Mr. Foley know it? A. I only assume that he did. He should have known it.

Q. He should have known it. Then, having his name on the stationery was not anything of a secret in the office? A. No.

Q. And I suppose, it was not anything of a secret in the offices that Mr. Carle signed correspondence on that stationery, was it? A. No.

Q. You knew all that. And it was not any secret in the offices that the stationery had, at the upper top: "Address all communications to the company, not to individuals"? A. That is our regular letterhead.

Q. I suppose you knew Mr. Carle ever since you came with the company in 1919, didn't you? A. No, not when I first came with the company. I knew Mr. Carle first in the fall of 1920.

Q. And you saw him, I suppose, every day in the bonding department? A. Yes, sir. How I knew Mr. Carle in 1920 is, that is the time I went over into bond work, and I was connected with bond work continuously from then on.

Q. And for how long after that did you continue to see Mr. Carle every day at the offices of the company? A. I did not see him every day. Mr. Carle was in the office from time to time. He was out soliciting business most of the time.

Q. Well, how long was he connected with the company after you first knew him? A. "Connected with the company"—you mean that he placed business with the company?

Q. No, I mean that he had a desk there. A. He had a desk up—I think this contract was defaulted in the Spring of 1923—the year 1922 is not involved except the placing of the bond. April, 1923, according to this letter, is when the contract was defaulted; so it is 1923 and 1924, that is involved here. It was in the Spring of 1924, that he ceased to have a desk there.

Q. And do you know when he died? A. Subsequent to that time. I couldn't state when he died. It came to me in a general way. I heard that he was dead, that is all; sometime quite subsequent to that.

Q. And you knew, of course, that his son was employed by the company, didn't you? A. His son was never employed by the company, sir.

Q. You knew his son had desk room there in the company's office? A. He assisted his father in soliciting business.

Q. Don't you know that on one occasion Mr. Carle signed a check as vice-president of your company? A. I know that that was done.

Q. Do you know when that was? A. Just let me have that question, please.

Q. (Read as follows: "Don't you know that on one occasion Mr. Carle signed a check as vice-president of your company?") A. I guess my question will have to be "No."

Q. Did you ever hear that? A. He signed a check purporting to be as vice-president of the company, but not acting as vice-president.

The Court: Well, was he a vice-president of the company?

The Witness: He was not, sir. That is why I qualify my question, because you say "as vice-president." He did not sign any check as vice-president, because he was never a vice-president.

Q. And do you know when that was? A. No, I don't.

By the Court:

Q. Do you know of his having signed his name

as a vice-president of the company, that is, designating himself as vice-president of the company? A. Yes, I know that to be a fact.

Q. Will you tell us what that occasion was? A. Someone—it had to do with some bills on this job. He was pressed in some way and signed a—drew a check—not on the company's form, but a mere check, a counter check. He was in trouble with some bank.

Q. Can you tell us when that was? A. I cannot. I saw the check and that is why I say I know it, but that is about all. The check was exhibited to me at one time, and I saw it, and I know that that was done, but the time and the circumstances of it I don't know.

The Court: Did that have anything to do with his leaving the company, losing his desk room, I mean, with the company? Maybe you do not know that.

The Witness: Yes, I do know. It did—that and some other things.

Q. Well, can you tell us how long prior to his severing his connections with your company was it that this check was signed by him? A. I cannot answer that; I don't know, but I think that it was about the same time, whether it is a few days or a week, but it is about that time. I think his desk was there, but he never came into the office for sometime; he never came near the office.

Q. Isn't it a fact that he could be found and was consulted there at your office after that episode? A. I don't believe so.

Q. Do you know? A. If so, it was connected with that check.

Nathaniel E. Wheeler, cross.

Q. I suppose you were familiar with Carle's financial responsibilities?

Mr. Markley: I object to it as immaterial. I haven't asked him anything about that.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Only as he owed the company balances or had balances, or had paid money over to the company, I knew the state of his account.

Q. Did your company investigate to determine whether Carle was financially able to go through with this contract on his own account?

Mr. Markley: I object to that as immaterial, incompetent and irrelevant.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Not any full investigation.

Q. As a matter of fact, Carle had no financial standing of any amount, did he?

Mr. Markley: The same objection, your Honor. I assume it will be the same ruling and same exception.

The Court: I am inclined to sustain the objection to that question.

Q. You say that your company did not make

any investigation of any amount to determine his financial responsibility before this job was taken over, is that correct? A. No further than his representations. He represented that he could get finances through his bank in Jersey.

Q. And, without investigating that, you were satisfied that Carle himself should take over the job?

Mr. Markley: I object to that as immaterial, incompetent and irrelevant.

The Court: I have not understood that the satisfaction of Mr. Wheeler would have accomplished that for him, and I think that is objectionable. I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, you say Carle was a bond man? A. He placed other insurance.

Q. He had never been in the contracting business, had he, to your knowledge?

Mr. Markley: I object to that.

The Court: I will overrule the objection.

A. He represented he had.

Q. And Carle, on his representation that he had been in the contracting business—you were satisfied to let him take the job over?

Mr. Markley: I object to this for the reason that this company did not have the control; it is the Borough that he had to satisfy.

Mr. Handford: Counsel has just stated that this could not go through unless they consented to the arrangement.

The Court: Yes, but these questions that relate to the satisfaction of Mr. Wheeler—I do not understand that it has been shown that Mr. Wheeler's satisfaction had anything to do with it.

Mr. Handford: I will withdraw the question.

The Court: It may have been that he was charged with the investigation of Mr. Carle and everything with reference to it, but it does not so appear now.

Q. Do you know whether any investigation was made by the Royal Indemnity Company as to the financial standing of Mr. Carle?

Mr. Markley: I object to that, sir, on the ground that it is immaterial, incompetent and irrelevant.

The Court: The question may be answered yes or no, whether Mr. Wheeler knows.

A. Not an extended investigation.

Q. Well, do you know the extent of the investigation? A. My recollection is that he submitted a letter from a bank concerning credits that he was to get, a report of an engineer that he had go over the job, who said that there was a profit in the job for him; and on that, I think, I am not certain about whether that was in his financial statement, but on that we gave our consent.

Q. On that alone? A. That is what we do: we execute a lot of bonds on less than that, sir. We

act on representations entirely, and we did that with Mr. Proctor.

Q. Do you know whether the Royal Indemnity Company made any investigation to determine Whether Mr. Carle was competent to handle this job as a contractor?

Mr. Markley: I object to that as immaterial.

The Court: I think you have already asked that question. He said he represented that he had been in the contracting business. That was not just answering the question you asked, but that was the answer which Mr. Wheeler gave. You mean any investigation beyond his mere representations?

Mr. Handford: Yes, that is what I mean.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I guess—I think I will have to have the question, your Honor.

The Court: The question is whether the company made any investigation of Mr. Carle's representation that he had been in the contracting business.

The Witness: I don't think—there were two contracts involved—I don't think we checked those contracts. We believed what he said, as we do every other contractor that comes in and asks for a bond; we act

on the papers submitted. He had an engineer go over the job.

Q. Now, you testified this morning that the Royal Indemnity Company paid some claims, did you not? A. Yes, sir.

Q. And did they pay those claims in full or did they pay them pro-rata? A. Some in full, up to a certain point. Under the Proctor contract they presented claims; some we paid.

Q. But those were claims where the goods were delivered while Proctor was handling the job, wasn't it? A. You mean Proctor, or——

Q. Before Proctor defaulted. A. Some of them, I think.

By the Court:

Q. Were there any paid by the company's check for materials which had been ordered after the contract went to Carle? A. In full?

Q. Either way: either in full or partly. A. Yes, because Carle became our principal under the bond, and our bond liability still continued, and those people who were not paid under Carle, the same as under Proctor, had a claim under our bond. As to whether they were paid in full or partially depends upon the time they presented their claim. We paid some claims in full, until we seen that quicksand and various unforeseen obstacles on the job was going to eat up our bond penalty, and so we quit and didn't pay any more, and several started suit against our bond.

By Mr. Handford:

Q. Now, when did you stop paying claims in full? A. Sometime shortly after. I wouldn't be

surprised if we paid some in full even after Carle had defaulted.

Q. And do you know when Carle defaulted? A. I cannot tell you the date. Carle took and sort of nursed the job along for a long time, and I don't know just when the Borough gave it notice and gave it to Gilbert. We didn't take a very active part in that.

Q. I show you Exhibit P-8, and ask you if that refreshes your recollection as to when Carle defaulted (handing witness document)? A. (Examining.) No, it does not.

Q. Was it before November 7, 1923, or after? A. I cannot tell you. I think Carle took the job sometime in April, 1923. This is November; it is on or about that time, I should judge. I would want to see the records of the Borough. The Borough did the defaulting, you understand, not us.

Q. Well, did you pay any claims in full after Carle defaulted?

The Court: He just answered that and said he would not be surprised if they did.

A. I think we had.

The Court: Now he says, "I think we had."

The Witness: There were claims under the bond, understand. They still had right to make claim against the bond.

Q. For goods delivered while Carle was in control? A. Sure; sure they did. Carle became our principal under the bond; that is the big distinction.

Q. And Carle used his name on your letterheads, too? A. As a broker, yes.

Q. It does not say so, does it, on the letterhead? A. No. We print stationery for all our agents throughout the country. Every insurance agent has the stationery of half a dozen companies of ours.

Q. If Carle was merely a broker, why didn't you designate him as merely a broker on these letterheads?

Mr. Markley: I object to that, your Honor, as immaterial.

The Court: I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: What is the designation?

The Witness: Merely—nothing—just the name.

Q. "L. W. Carle, Room 702." Well, why didn't you pay this claim of the American Well Works, which was submitted in September, 1923? A. They did not present a claim against our bond. They presented a claim against us as contractor, which we denied.

Q. And didn't the Dudley-Curry Company present a claim against your bond? A. I believe so.

Q. Do you know that they did? A. They presented a claim against us, which we assumed was against the bond. The American Well Works stated that it was not against it; it was against us as contractor, and so stated.

Q. You heard Mr. Dudley testify that he had a contract with you through Carle, didn't you?

Mr. Markley: I object to that, your Honor, as characterizing Mr. Dudley's testimony, and otherwise as——

The Court: The question may be answered.

A. The question is whether I heard him?
Q. Yes. A. Yes, I heard the testimony.

The Court: I suppose that question is to be followed up as to whether or not that refreshed his recollection, or anything of that kind. That question and answer, standing alone, mean nothing, Mr. Handford. If that is your only question and answer, then I will strike both out.

Mr. Handford: I will get along with it.

Q. And does that change your mind at all about what you do testify in relation to a claim upon the bond by Dudley-Curry? A. Not at all.

Q. Now, can you tell us then just what Dudley-Curry did to obtain this check from your company?

Mr. Markley: I object to that as immaterial, incompetent, and not cross-examination.

The Court: I suppose the only question, in view of Mr. Wheeler's testimony, is whether or not he knows whether the claim was presented under the bond, or whether or not there was a claim presented under an assumed contract of his company. He may answer such a question as that, but that, I think, is as far as he can go.

A. The claim came in to us as surety. They made no claim that we were contractors; we paid it on that theory.

Q. Now, as a matter of fact, all you know about

the Dudley matter is that you received a bill of the Dudley-Curry and paid it, isn't that so? A. Presented to us as surety, that is true.

Q. Why do you insist it was presented as surety? There was nothing on the bill that indicated that, was there? A. Nothing to indicate, surely, that we were the contractors. We were receiving claims from various people, you understand. We were the surety. We had a liability, and we did not try to evade that liability.

Q. It was a bill addressed to the Royal Indemnity Company, and you paid it, isn't that true? A. That is true, sir.

Q. And in that respect they received, did they not, the letter with the bill of the American Well Works, P-9, offered in evidence, this letter (indicating)? A. Yes, sir. The American Well Works wrote a letter, which is in evidence, telling us that we were the contractors, and they looked to us on that theory.

Q. Didn't Dudley-Curry write you a letter? A. Not to that tenor.

Q. Didn't Curry write you a letter saying "Here is a bill for the motors that have been furnished, and we would like to receive your check"?

Mr. Markley: I object to that, first, as a characterization of letters, and not cross-examination.

The Court: I think it is proper cross-examination.

A. I don't recall any letter called to our attention to that effect; and, of course, the letter speaks for itself, if there has been such a letter.

Mr. Markley: That is our case, your Honor.

The Court: Any rebuttal?

Mr. Handford: Mr. Proctor would like to correct a statement that he made this morning, if the Court will permit him.

The Court: He will be permitted to do so.

JOHN R. PROCTOR, recalled for plaintiff.

Direct examination by Mr. Handford:

Q. Mr. Proctor, I think you testified this morning that you were not present at the conversation between Mr. Andrew Whinery and his brother, and Mr. Carle, in your offices, the day of the creditors' meeting, didn't you? A. Yes, I think I did.

Q. Now, is that correct? Is that statement of yours correct? A. There were so many there at the meeting in the office upstairs—you see, there was a meeting upstairs, and there was a subsequent visit of a number of gentlemen downstairs —at the time that I recall the thing, Mr. Whinery and his brother—I talked to Mr. Carle first; Mr. Carle went out and went upstairs. Mr. Whinery and his brother came down, and I talked to them afterwards; and there was one of the former members of the company there at the time, and he talked with Mr. Whinery and Mr. Carle; but you see, with a partition between the two offices, and in and out, it is hard to remember just exactly what all was said or what went on; but I know this: in talking with Mr. Carle, if he was to take over the job, he would assure that the insur-

ance company would pay the bills. That is what he said to me personally. In fact, the way—how that came about was——

Mr. Markley: I think we have been all over this, and I do not think we should rehear this witness' testimony.

The Court: No, I do not think so either.

Q. Then there was a conversation between Mr. Whinery and Mr. Carle, which you saw but did not overhear? A. Yes.

(Cross examination waived by Mr. Markley.)

Mr. Handford: Plaintiff rests.

Mr. Markley: I respectfully move for a direction of verdict in favor of the defendant, on the following grounds:

First, that there is no evidence that the defendant entered into any agreement with the plaintiff whereby the defendant agreed to pay this alleged bill, which is annexed to the complaint;

Second, that all of the evidence in this case is limited to alleged statements made by this man Carle, which statements of Carle are not binding, under the evidence, on this defendant;

Third, that there is no evidence that Carle was authorized, with respect to the Sayreville job, to obligate the defendant in any way to pay this bill of the plaintiff;

Fourth, under the evidence, the only obligation of the defendant was that of surety under a bond, which bond is not in evidence,

and which bond is not, in fact, sued on here, and which bond, if it were sued on here, would be unavailable to the plaintiff at this stage, because no claim was filed thereunder, or suit brought thereon within the time required by law. I am relying on the Municipal Mechanics Lien Act, which, of course, your Honor is familiar with.

The Court: When you refer to the Statute of Limitations, you do not refer to the six-year statute?

Mr. Markley: No. The statute I refer to is, I think it is Chapter 75 of the Laws of 1918.

The Court: Although I think that is your defense.

Mr. Markley: Well, I am not urging that; I do not think it is sustainable. I think this suit was brought within six years; but I do urge that any claim against the surety would have to be brought, claim would have to be filed, in accordance with the statute, within eighty days, and suit be brought within one year.

The Court: From the time the work was accepted?

Mr. Markley: Yes. Now, there is no proof here of any such claim filed or of any such suit. This suit is not based on that bond at all.

The Court: Of course, there would be another ground upon which you would be entitled to a municipal lien: that is, there is no proof in the suit that the work has ever been accepted.

Mr. Markley: No. And if the proof was

as to the actual date of acceptance, it would bar this claim, because not brought within a year after. This suit was brought in 1929.

Now, finally, I urge the defense set up in the fourth defense of the answer—this is within the Statute of Frauds—alleged goods sued for are in excess of the amount fixed by the statute, and the alleged agreement or contract that this defendant is alleged to have made with the plaintiff for the purchase of these goods is not enforceable.

The Court: Isn't there an exception in that statute requiring the contract to be in writing—the Statute of Frauds? What section is that?

Mr. Markley: I think it is the 7th section, sir. Well, that comes under the Sale of Goods Act. Now, the Sale of Goods Act has a provision fixing the amount of $500, and I think that supersedes, under the old cases, the Statute of Frauds. You will have to look at the Sale of Goods Act, I think, for that.

The Court: It is not under Section 7 of the Frauds Act?

Mr. Markley: Section 4 of the Sale of Goods Act supersedes this section here; this is Section 6, I should say, in the Frauds Act. At any rate, I rely on that Section 4.

(Argument.)

The Court: I shall distinctly hold that this is not a suit upon a bond.

Mr. Markley: Your Honor will so hold?

The Court: The motion will be denied,

and an exception to that ruling will be noted.

Mr. Markley: Is your Honor going to leave to the jury the question of fact as to the authority of Carle?

The Court: I am going to leave that to the jury and all the facts in this case.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Markley: May I ask your Honor verbally, when it comes time to say to the jury, that your Honor's ruling on my motion is merely a ruling on law, and not a ruling on fact?

The Court: Yes.

Mr. Markley sums up for defendant.

Mr. Handford sums up for plaintiff.

Charge

The Court charges the jury as follows:

DUNGAN, *J.*:

Gentlemen, Mr. Markley, the attorney for the defendant, asks me to say, at the outset, that you are not to be at all influenced by denial by the Court of his motion to direct a verdict in favor of the defendant at the close of this case, and I have no hesitation in saying that you should give that no consideration in your determination of the verdict in this case. The effect of that decision was only to decide that the questions involved

in this case are questions of fact, which it is your peculiar province to decide, and do not involve questions of law, which it would be the duty of the Court to decide; in other words, that this case cannot be decided as a question of law, to which the motion was directed, but can be decided only upon the facts appearing in this case, which it is your province and not the province of the Court to decide.

You are the judges of the fact. The judge of the Court is the judge of the law, and neither ought to trespass upon the functions of the other. In other words, you are obliged to accept the views of the Court upon the questions of law involved, and the Court is obliged to accept your views on the questions of fact involved.

This case grows out of a contract which was entered into by Mr. John R. Proctor with the Borough of Sayreville, in Middlesex County, in the early part of 1923, or the latter part of 1922, to do some municipal work for that borough. The statutory requirement in this state, with reference to municipal work, is that every contractor shall enter into a bond of indemnity with that municipality, requiring him to complete the work according to the plans and specifications and the contract which he has with the municipality. Thereupon, Mr. Proctor applied to the defendant, the Royal Indemnity Company, for such a bond, which was issued by the defendant company, as required by the statute.

After the contract had been made and the bond given, Mr. Proctor says he started assembling his machinery for doing that work, which necessitated the purchase of some machinery, and among other machinery required were pumps, which he

ordered from the plaintiff in this case, the American Well Works. Subsequent to the ordering of these pumps, and before their delivery, Mr. Proctor defaulted in his contract, and thereupon Mr. L. W. Carle took over Proctor's contract, by assignment from Proctor to him, which was by the consent of both the Borough of Sayreville and the Royal Indemnity Company, after a conference with Mr. Proctor, Mr. Carle, and Mr. Whinery, representing the American Well Works, and perhaps others, in which we are not interested, except incidentally, in this case.

The plaintiff insists that the assignment to Mr. Carle was not to him individually, although on its face it was, but as the representative of the Royal Indemnity Company, and that the proofs establish that fact; and on behalf of the defendant it is insisted, on the other hand, that Carle individually was the contractor in his own right, and not as the representative of the Royal Indemnity Company, and that the proofs do not show that he was acting on behalf of the defendant company.

Before the plaintiff is entitled to your verdict in this case, it is necessary that the greater weight of the evidence should show that the real contractor, the real contractor with the American Well Works, through Carle, was the Royal Indemnity Company. This is not a suit upon any bond issued by the Royal Indemnity Company to the Borough of Sayreville at all; but the theory of the plaintiff is that these pumps, not having been delivered to Proctor, who was the person who originally ordered them, that the Royal Indemnity Company was the purchaser, under a letter which has been here produced and which is dated

Charge.

May 16, 1923. It appears that when these people had the conference at Mr. Proctor's office in Bayonne, and when it was agreed by Mr. Carle that they would take these pumps and the equipment for doing this work, Mr. Whinery told him that he was not willing to accept a verbal order, but would require written confirmation within a few days; not having been done, a call was made at the office of the Royal Indemnity Company in New York, and a written confirmation requested. It was not offered them at that time, but a few days later this letter of May 16th was received.

This letter is upon the letterhead of the Royal Indemnity Company, 84 William Street, New York. It has, on the upper left, "L. W. Carle, Room 702," and is to this effect (reading):

"Mr. S. B. Whinery,
95 Liberty Street,
City.

Will you kindly ship to Sayreville, New Jersey, at once, the machinery for pumping station ordered by John P. Proctor on October 16, 1922. We would like to have these pumps and necessary machinery delivered as soon as possible, and I will pay for same, as per your agreement of August 23rd"——

(that was Mr. Proctor's agreement)

"$3,355 in thirty days, and balance in sixty days.

Yours very truly,

L. W. CARLE."

Charge.

Now, your attention is called, by the attorney for the defendant and by the Court, to the fact that this letter is signed individually by L. W. Carle and not by the company; but your attention is also called, at the same time, to the first word of the last paragraph (reading): "*We* would like to have these pumps and necessary machinery delivered as soon as possible." It is under this letter of May 16, 1923, the order contained in that letter, that the plaintiff insists upon its right to recover against the Royal Indemnity Company, the defendant in this suit.

Of course, corporations can only act through their agents. A corporation is an aggregation of persons who can only speak through their duly authorized officers, employees and agents; and in this case it is not shown that any express authority was conferred upon Mr. Carle by any formal action of the board of directors of that company to speak and act for the company, nor that there was any express authority conferred upon Mr. Carle by any officer of the company who was authorized by the board of directors to confer such authority upon employees or agents. But sometimes a corporation is bound by the implied authority to certain people who may be employees, who may be agents, who may be nothing but salesmen, even, acting upon commission, if the corporation by acts which it permits its employees or agents to exercise in its behalf, or acts of such agents or employees which it afterwards ratifies, so as to lead the business public to understand that that employee or agent has authority of the company to act as he does for that company.

There is no question but that this company au-

thorized Mr. Carle to solicit for bonds of the company—you would have no difficulty in finding that —but the mere fact that Mr. Carle was authorized to solicit the bonding business of the company did not necessarily confer upon him the authority to speak and act for the company in other respects than in the soliciting and writing and delivery of bonds; but that fact, in connection with the other facts of this case, it will be for you to consider in determining whether or not what this company permitted Mr. Carle to do and to say would lead an ordinarily careful business man into understanding that he had the authority to deal with other people for the company in such a way as to bind that company under the circumstances presented in this case.

According to Mr. Proctor, he had had many bonds from the defendant company, and all of these bonds were solicited by Mr. Carle; they were all delivered to him by Mr. Carle. He says that some of his negotiations and business with Mr. Carle was at the general office of the company in New York, and that at this general office in New York Mr. Carle had a desk which he habitually occupied when he was there; not only that, but that Mr. Carle's name was on the door of the room where his desk was located. Mr. Carle was permitted to use the stationery of the Royal Indemnity Company, with his name on that stationery. Letters were written to the company which were answered upon the stationery of the company, sometimes by Mr. Carle and sometimes by others connected with the company. For instance, the letter to which I have called your attention, this letter of May 16th, is signed by Mr. Carle, but upon the stationery of the company, with his name

on the letterhead. On November 7th a letter was written, signed by Mr. Foley, the superintendent, who is now dead and who cannot be produced, "In re Claim 4654," and all of these letters which are answers from the company, letters written by the company to the plaintiff in this case, are signed by that same number, "4654." This letter of November 7th is in reply to a claim sent by the plaintiff to the defendant, and Mr. Foley, who signs this, says (reading): "We are enclosing herewith draft payable to the Northwestern Manufacturing Company in the amount of $518.11, as per statement of October 1st"; but this now is in respect to another matter, which I shall presently call to your attention; but all the letters which have numbers upon them, by whomsoever they are signed, have that same claim number, and perhaps this is more important than all in this case, because up to this time all the matters to which I have called your attention, except this letter of May 16th, may relate only to the bond business which was being done by Mr. Carle; but it appears that when Mr. Proctor got into his trouble down at the Borough of Sayreville, and this matter was reported to the defendant, the Royal Indemnity Company, it was Mr. Carle, and he only, so far as the evidence in this case shows, who appeared for the company in Mr. Proctor's office to endeavor to straighten out this matter with Mr. Proctor and with the American Well Works, the plaintiff in this case.

It might be well for you to understand, at the outset of your consideration of this case, gentlemen, that an agency cannot be established by the things which the agent says—that is, his own declarations of his agency—so that in this case anything which Mr. Carle said as to his agency,

if he said anything, is not sufficient to establish his agency; but if that agency be otherwise established, be established by the apparent authority which the company holds the agent out as possessing, then you may consider what that agent said and for which he was apparently authorized to speak for the company.

Now, I told you that I would speak about these letters which were testified to by Mr. Dudley. It appears that two companies, with which Mr. Dudley was connected, submitted their claims to the defendant company, and those claims were paid, as I understand it, in full—perhaps not—certainly the claims were settled by the company; and it is insisted, on behalf of the plaintiff in this case, that since Carle was the one who had the contract for the completion of this work, the company's recognition of and the payment in full of the Dudley claims were ratifications by the defendant company of the acts of Carle; and without any other explanation you would have a right to consider whether or not that was not so. However, Mr. Wheeler, who was the general counsel of the bond division, or who was the counsel of the bond section of the Royal Indemnity Company, explains that, and he says that these claims were put in under the bond, and, of course, if proper steps were taken under the statute to file claims with the indemnity company under the bond—that is, within eighty days after the work is accepted, or suit brought within one year after the work is accepted—the defendant company would have been obliged to have recognized and paid those claims, or, if there was money enough to pay, to pay those claims pro-rata, and that is what Mr. Wheeler insists was done with these Dudley

claims. In addition to that, Mr. Wheeler says that he was with the defendant company from 1919. He was there during the whole time that Mr. Carle was with the company, and though he says that it is true that Mr. Carle was authorized to solicit the bonding business for the company, and that he had a room and desk in the main office of the defendant company, that that was a privilege extended to all the agents of the company—any agent of the company—and that it was the practice of the company to print the name of the agent upon the stationery of the company, and that every agent perhaps has in his office the printed stationery of a great many insurance companies. He says that he does not remember Mr. Carle's name being upon the office door, and he says that through his, Wheeler's, familiarity as the head of the legal-bonding department of the company, he knows that this contract was taken by Mr. Carle as an individual and not as representing the company.

Now, gentlemen, the testimony is for you to decide. As I have told you, there was no express authority given to Mr. Carle to represent and to bind this company in matters of this kind; but if you determine that the greater weight of the evidence in the case shows that the acts which this defendant company permitted Mr. Carle to exercise, with its apparent authority, or acts which they afterwards ratified, would lead a reasonably careful business man to believe that its agent, this man Carle, had implied authority from the company, and that the greater weight of the evidence shows that Carle did not enter into this contract, take the assignment of this contract with the Borough of Sayreville, in his individual capacity, but as the agent of and for the Royal

Indemnity Company, and that it was really the Royal Indemnity Company which performed this contract and which wrote this letter of May 16th, and that the plaintiff furnished these bills actually to the Royal Indemnity Company, and that its bill is properly against the Royal Indemnity Company, then the plaintiff is entitled to your verdict for the full amount of this bill, which is $3,165, with seven years' interest.

If you decide that the greater weight of the evidence does not show the implied authority of Mr. Carle, and believe that he individually was performing this contract and not the company, then your verdict should be in favor of the defendant.

There is no chance here, gentlemen for a compromise at all. I am told that sometimes juries compromise between a small verdict and no verdict at all. This is not a case in which that can be done. Your verdict must be in favor of this plaintiff for the full amount of the principal and interest, or it must be in favor of the defendant.

(The jury retires at 3:56 P. M.)

Mr. Markley: May I note an exception, if your Honor please, to that part of your Honor's charge wherein your Honor said that it is the claim of the plaintiff that the Royal is the purchaser of this material, under the letter of May 16, 1923, and the Court is leaving that question to the determination of the jury as a question of fact, or words to that effect, which your Honor says—whatever your Honor did say in that respect;

To your Honor's pointing out to the jury, "This letter is on the stationery of the Royal Indemnity Company, and gives the room number

and Carle's name," and the calling by the Court to the attention of the jury that the beginning of the last sentence or paragraph was "We desire this material," that is, indicating that that said it was the Royal rather than Carle individually, and that they had a right to consider it in that aspect;

And to that part of your Honor's charge where your Honor said to the jury that there was no express authority given Carle—which I don't object to—but what immediately followed that—your Honor leaving it to the jury as to whether there was any implied authority to be gathered from this evidence that has been offered by the plaintiff;

And to that part of your Honor's charge wherein you said, "Sometimes a corporation is bound by the implied authority of agents, salesmen on commission, if a corporation permits agents to act in its behalf," on the ground that there is no evidence that the company did permit Carle to act in its behalf in respects pertaining to this claim of the plaintiff;

Now, then, to that part of your Honor's charge in several places where your Honor said that the plaintiff could recover, if the defendant by its acts ratified the conduct of Carle, my objection being that that is not an issue in the case, and that there is no evidence of ratification to go to the jury.

And to that part of your Honor's charge following the part where your Honor said the mere fact that he solicited the bond business would be no indication of its authority in this instance, that fact, taken in connection with the other facts, makes it a jury question for the jury to determine whether what Carle was permitted to do by the Royal made the Royal liable for his acts;

To that part of your Honor's charge which your Honor left it to the jury, as a question of fact, to say whether Carle was authorized to act and authoritatively bind the defendant because he was permitted to use a desk and to have stationery with his name on;

Now, then, to that part of your Honor's charge where your Honor said he thought he was the only one who appeared in connection with the matter at the office of Proctor in Bayonne——

The Court: Well, there was testimony that showed that there were two other men there, but I did not understand that it was shown that they were connected with the company. Is it your idea that they were?

Mr. Markley: Yes. I think one of the witnesses said that these other two men were from the Royal, and I think he even mentioned the name of one of the men, although I forget the name that he did, in fact, mention.

The Court: That, I think, was Mr. Whinery. Do you recall who that was?

Mr. Markley: I think, sir, that it was either Mr. Whinery or Mr. Gaus—I am not sure.

Mr. Handford: I don't think we ever did succeed in identifying them.

The Court: Who was it?

Mr. Handford: I think it was either Mr. Whinery or Mr. Proctor.

The Court: I will have the stenographer examine that, and if he finds it, and I find I am wrong about that, I will make that correction.

Mr. Markley: Then to that part of your Honor's charge wherein your Honor pointed out, as alleged facts to be considered by the jury, that all this correspondence had the same claim num-

ber, indicating that there might be some authority upon Carle's part to represent the company or was authorized to speak for it—that in connection, of course, with the use of the desk and stationery, alleged answering letters for the company, and so on, on the ground that those facts were not evidential of authority, or of what the extent or nature or quality of the authority was;

Now, then, I except to that part of your Honor's charge which immediately follows the statement that what Carle said could not prove what his agency was, or the nature and extent of his authority—that I do not object to, but what follows it: "but if there was a holding-out, otherwise, than by his own words," or words to that effect.

The Court: I do not think that is just what I said. I just happen to have that written down.

Mr. Markley: No, I think your Honor said anything Carle said could not be used by the jury to determine what his authority or agency was, if any existed, but if there was a holding-out——

The Court: I said, "if that agency was otherwise established."

Mr. Markley: Yes; that then the jury could find "that he was authorized to speak"; my point being that, outside of what he held himself out——

The Court: If that other agency was otherwise established, then they might consider what he said, in which he apparently was authorized to speak for the company.

Mr. Markley: I except to that part of your Honor's charge in which your Honor said to the jury they might consider the plaintiff's claim—

that the payment of the Dudley claim—that every claim was a ratification of the acts of Carle, on the ground that those independent acts, while similar to the one contended for here, could not be considered by the jury for the purpose of determining whether or not Carle had authority in this particular instance to bind the company, as far as the plaintiff's claim was concerned;

And then may I note an exception, finally, to the last part of your Honor's charge, where your Honor said, beginning with "If the greater weight of the evidence shows acts which the defendant company permitted Mr. Carle to exercise, with its apparent authority, or his acts, which they afterwards ratified, would lead a reasonably careful man to believe that Carle had implied authority, that Carle did not take the contract individually on his own authority, but as agent for the Royal, and the Royal was really the contractor, and wrote the letter to the defendant, which is the basis of the plaintiff's claim, for the furnishing of the pumps, and that the plaintiff properly billed the Royal, that then the plaintiff is entitled to recover." It seems to me that the evidence clearly indicates—leaving out his own statement of what his authority was, which I submit was hearsay—that the other evidence is not sufficient to indicate that he did have authority in this instance to bind the company. If your Honor is going to call the jury back, may I suggest that you might say a word to them about that—about the burden of proof? I don't think your Honor did say that the plaintiff had the burden of establishing the greater weight of its claim.

The Court: I said that they must find that fact established by the preponderance or the greater weight of the evidence.

Mr. Markley: I am not taking exception to it, anyway.

Mr. Handford: I only have two points to make, your Honor. One is, I except to that part of your charge wherein your Honor said Mr. Wheeler says the claims were put in under the bond. I think, on cross examination it came out pretty clearly, that what Mr. Wheeler meant was that a bill was sent in, and it was just his thought that it went under the bond. As far as the evidence goes, it was just a bill.

And I would like to except to that part of your Honor's charge in which you said, "If you believe Carle was individually performing this contract, then your verdict must be for the defendant." My objection there is that even though he were actually performing that contract individually, if we were reasonably led to believe that he was representing the company, then we could still recover, and the verdict would have to be for the plaintiff.

The Court: I think I have fully covered and submitted that, although your exception may be noted.

(Following a short discussion, the jury was recalled to the court room at 4:20 P. M., and the following ensued):

The Court: Gentlemen, since your retirement, my attention has been called by the attorneys to two or three matters in which they think I misquoted the testimony. In one of the matters I am satisfied that that is correct. You will remember I said to you that when the people met, after Mr. Proctor's failure on the Borough of Sayreville job, and they met at his office, that Mr. Carle was the only person who was present representing the company. Perhaps I ought to read you an answer

made by Mr. Whinery. In answer to the question, "Who else was there?"—at Mr. Proctor's office in Bayonne we are talking about, when this conversation was taking place—he says, "My brother, A. J. Whinery, and, as I recollect, Mr. Carle and one of his representatives." Now, that does not mean that he was necessarily a representative of the company, unless Mr. Carle was also a representative of the Company. And he continues to say, "and, to the best of my recollection, there was also another gentleman who represented the Royal Indemnity Company." He does not say whom it was in that answer; but if there be any answer, and if it be a matter of importance in your consideration of this case, and there be any testimony as to whom it was, you will recall it.

Then I might say this, gentlemen: that if there are any other misquotations of testimony in the case by the Court, disregard what I said and bring to bear, upon your consideration of this case, your own recollection of what the testimony was; but, of course, it was my duty to call your attention to this particular answer of Mr. Whinery to the question that was asked of him.

You may retire.

(The jury again retires at 4:28 P. M.)

Exhibit P-1

JOHN R. PROCTOR, INC.

DESIGNING AND CONSTRUCTING ENGINEERS

Date, November 8, 1922.

Job No. 4202 Order No. 5342

To S. B. Whinery
95 Liberty Street, New York City.

Ship to Our order
Sayreville, N. J.

Via Raritan River R. R.

Furnish the following pumping units:

1—3½ Type GMD vertical centrifugal pumps
1—3½ " GBF " " "
4—2½ " CMB " " "
4—2½ " CBF " " "

All as per your quotation of October 16, 1922, for the lump sum of $3055.00

For the additional sum of 110.00

furnish for the Sanfield Road pumps

4 x 6 in. discharge ells. The balance of the pumps to have 3 x 4 ells.

4 in. discharge pipe to plate with 4 x 4 tee inserted as per notation given on sketch furnished by you.

Delivery 4 weeks after notification and receipt of certified prints.

Payment to be made for 85% of the lump sum 30 days after receipt of pumps; balance in 60 days.

The following conditions are part of this order and must be observed:

Address all correspondence regarding this order to John R. Proctor, Inc., Bayonne, N. J.

Advise if there is to be any delay in making shipment.

Above material is ordered F. O. B. destination unless otherwise noted.

Mail invoices and bill of lading on day of shipment to this office.

Invoices received after the 30th of the month will be considered as of the following month.

Mark our Order Number on All invoices, bills of lading and packages.

No charge allowed for package, packing or drayage.

Invoice each order separately.

If prices are not specified they are not to be higher than last quoted or billed price.

All above material to be in accordance with rules of the National Board of Fire Underwriters.

JOHN R. PROCTOR, INC.,
by JOHN R. PROCTOR.

Exhibit P-2

(Letterhead of Royal Indemnity Company)

New York, May 16, 1923.

S. B. Whinery, M. E.
95 Liberty St.,
City.

Gentlemen:

Will you kindly ship to Sayreville, New Jersey,

at once, the machinery for pumping station ordered by John P. Proctor of October 16, 1922.

We would like to have these pumps and necessary machinery delivered as soon as possible, and I will pay for same as per you agreement of November 8, 1923, $3055 in 30 days, and balance in 60 days.

Yours very truly,

L. W. CARLE.

LWC/VP

Exhibit P-3

(Letterhead of Royal Indemnity Company)

New York, May 23, 1923.

S. B. Whinery, M.E.
95 Liberty St.,
New York City.

Dear Sir:

Att: Mr. Gilbert H. Gaus.

In answer to your personal call at my office yesterday, it is my idea to have your machinery installed by John R. Proctor. In fact, that has been my understanding with Mr. Proctor. If he will install the machinery as cheap as anyone else, I do not see why I should not give it to him. I will take it up with him again this week at his office in Bayonne.

Yours very truly,

L. W. CARLE.

Exhibit P-4

December 7, 1923.

Subj: Sayreville, N. J. Job

American Well Works Account

Royal Indemnity Co.,
#84 William St.,
New York City.

Gentlemen:

We have consulted counsel relative to our claim against you for the material furnished for the work at Sayreville, N. J.

We understand that under the terms of the bond that you gave for the performance of this work the bonding company is liable for the payment of debts incurred in completing the job.

At the meeting of Creditors held at the office of John R. Proctor, Inc., Bayonne, N. J., your agent represented that your Company would take over the Sayreville job and would see that all creditors for that job were paid and that your company would be liable for all material supplied for the job.

Subsequent correspondence was had between your representative and this office which substantiated and verified the statement made at the meeting. Acting upon these statements and upon your express liability for the material, we caused to be delivered for use on the job the material which was desired from us. We expect to look to your company for payment for this work.

The amount due on the material, namely $3,165.00 is past due, and if the bill is not paid within the next ten days we shall place the matter in the hands of our attorney for collection. We trust that this will not be necessary.

Yours very truly,

.....

N. Y. Representative
THE AMERICAN WELL WORKS.

SBW-D

Exhibit P-5

(Letterhead of Royal Indemnity Company)

New York, November 16, 1923.

The American Well Works
Aurora, Illinois

Gentlemen:

Re: Claim 4654 John R. Proctor, Inc.
Borough of Sayreville, N. J.

Mr. Carle has turned over to us your letter and bill of November 6th. Please be advised that we are checking over this account and you will hear from us shortly.

Very truly yours,

W. A. FOLEY,
Superintendent.

WAF:EW

Exhibit P-6

(Letterhead of Royal Indemnity Company)

New York, November 7, 1923.

The Northwestern Mfg. Co.
409 Broadway
New York City

Att: Mr. Dudley

Gentlemen:

Re: Claim 4654 John R. Proctor
Borough of Sayreville

We are enclosing herewith draft payable to the Northwestern Mfg. Company in the amount of $518.11 as per statement of October 1st.

Very truly yours,

W. A. FOLEY,
Superintendent.

WAF:EW
Enc.

Exhibit P-7

(Letterhead of Royal Indemnity Company)

New York, September 22nd, 1923.

Dudley-Curry Electric Company,
409 Broadway,
New York, N. Y.

Gentlemen:—

This is to acknowledge receipt of your letter of September 21st, regarding an amount of $295.00 past due.

I wish to advise that this amount shall be mailed to you on or about the first of the month. All these various obligations have been lined up and we are now in a position to pay them.

In the future will you kindly address any of your communications to L. W. Carle and not the Royal Indemnity Company.

Yours very truly,

L. W. CARLE.

CC:em

Exhibit P-8

(Letterhead of Royal Indemnity Company)

New York, November 7, 1923.

Dudley-Curry Electric Company
409 Broadway
New York City

Att: Mr. Dudley

Gentlemen:

Re: Claim 4654 John R. Proctor—
Borough of Sayreville

We are enclosing herewith draft in the amount of $295.00 payable to the order of the Dudley-Curry Electric Company as per your statement of August 14th.

Very truly yours,

W. A. FOLEY,
Superintendent.

WAF:EW

Exhibit P-9

RWR/DG

Nov. 6, 1923.

Royal Indemnity Co.,
c/o Mr. L. W. Carle,
84 Williams St.,
New York City, N. Y.

Gentlemen:—

Attached find bill of Nov. 1st for $3165.00 to cover equipment we have furnished on the John R. Proctor job for Sayreville, N. J., this equipment being furnished thru our New York office, Mr. S. B. Whinery.

Under date of Sept. 13th we sent you the bill covering the original shipment which was made Sept. 6th, with the request that you comply with the terms agreed upon with Mr. Whinery, namely $3055.00 30 days, the balance in 60 days.

These terms have not been complied with, and we respectfully request that you send us your check by return mail for $3165.00 which is the total amount which is now due.

Yours truly,

THE AMERICAN WELL WORKS.

Credit Dept.

Exhibit P-9a

(Billhead of The American Well Works)

(COPY)

File No. 7939
Our Order No. 1222028-27-30-31
Your Order No. 2750
Shipped by C. B. & Q.
Terms Below

Sold to Royal Indemnity Company,
c/o Mr. Carle, Agent.
84 William Street, New York City, N. Y.

1 2½" type CMB vertical certifugal pump, #40117, 3" suction and 3" discharge openings. Distance from underside of floor plate to suction flange 10'. Disch. of pump provided with 3"x4" incr. elbow, and 4" disch. pipe brought up thru the pit plate and capped, with 4"x4"x4" tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 12', at a speed of 850 RPM, mechanical efficiency guaranteed 50%. Pump bronze fitted with open type impeller. Arranged for direct connection to 2 HP. N.W. motor #54517 furnished by customer.

1 2½" CBF pump #40016 arranged for belt drive, 3" suction, 3" discharge openings. Provided with open type bronze impeller and bronze fitted. Distance from underside of floor plate to suction flange 11' 6". Discharge of pump provided with 3"x4" increaser elbow, and 4" discharge pipe brought up thru the pit plate and capped. With 4"x4"x4"

flanged tee in disch. pipe. Designed for a capacity of 150 GPM, against a total head of 16½′, at a speed of 850 RPM, guaranteed mechanical efficiency 50%.

1 2½″ CBF pump #40114 arranged for belt drive, with 3″ suction, 3″ discharge openings, with open type bronze impeller and bronze fitted. Discharge of pump provided with 3″x4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″x4″x4″ flanged tee in discharge pipe. Distance from underside of floor plate to suction flange 11′ 6″. Designed for a capacity of 150 GPM, against a total head of 30′, at a speed of 1150 RPM, efficiency guaranted 49%.

1 2½″ type CMB Pump #40115, with 3″ suction, 3″ discharge openings and provided with bronze open type impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Pump discharge provided with 3″x4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″x4″x4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 16½′, at a speed of 850 RPM, guaranteed mechanical efficiency 50%. Motor #54516.

1 2½″ type CMB Special pump #40113 with 3″ suction, 3″ disch. openings, with bronze open type impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Pump discharge provided with 3″x4″ increaser elbow, and 4″ disch. pipe brought up thru pit plate and capped. With 4″x4″x4″ flanged tee in disch. pipe. Designed

for a capacity of 150 GPM, against a total of 30′, at a speed of 1150 RPM, efficiency guaranteed 49%. Pump arranged for direct connection to 3 HP. N.W. motor #54980 furnished by customer.

1 2½″ type CBF pump #40112 arranged for belt drive. With 3″ suction, 3″ discharge opening, with open type bronze impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Discharge of pump provided with 3″x4″ increaser elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″x4″x4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 32′, at a speed of 1150 RPM, guaranteed mechanical efficiency 49%.

1 2½″ type CMB Special Pump #40111 with 3″ suction, 3″ discharge openings, bronze open type impeller and bronze fitted. Distance from underside of floor plate to suction flange 11′ 6″. Discharge of pump provided with 3″x4″ incr. elbow, and 4″ discharge pipe brought up thru the pit plate and capped. With 4″x4″x4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM, against a total head of 32′, at a speed of 1150 RPM, guaranteed mech. efficiency 49%. Arranged for direct connection to 3 HP. N.W. motor #54983 furnished by customer.

1 3½″ type GBF American vertical centrifugal pump #40110, arranged for belt drive. With open type bronze impeller and bronze fitted, and mounted in heavy steel framework.

With enclosed line shafting and bearings. Distance from suction flange to underside of pit plate 17′ 2″. Designed for a capacity of 500 GPM against a total head of 26′, at a speed of 1150 RPM, guaranteed mechanical efficiency 55%.

1 3½″ Special Type GMB pump #40109, 4″ suction, 4″ discharge, provided with bronze open type impeller and bronze fitted. Pump mounted in heavy steel framework and provided with enclosed line shafting and bearings, distance from suction flange to underside of pit plate 17′ 2″. Designed for a capacity of 500 GPM, against a total head of 26′, at a speed of 1150 RPM, guaranteed efficiency 55%. Pump furnished with flexible coupling arranged for direct connection to 7½ HP. N.W. motor #54581 furnished by customer.

1 2½″ type CBF pump #40118, arranged for belt drive, provided with 3″ suction, 3″ discharge opening, with open type bronze impeller and bronze fitted. Distance from underside of floor plate to suction flange 10′. Discharge of pump provided with 3″x4″ increaser elbow, and 4″ discharge pipe brought up thru pit plate and capped. With 4″x4″x4″ flanged tee in discharge pipe. Designed for a capacity of 150 GPM against a total head of 12′, at a speed of 850 RPM, guaranteed mechanical efficiency 50%.

$3,165.00

Terms: $3055.00 in 30 days.
Balance in 60 days.

Shipped to: Order of John R. Proctor,
Sayreville, N. J.

Exhibit D-1

(Letterhead of Royal Indemnity Company)

New York, December 10, 1923.

S. B. Whinery, M. E.
95 Liberty Street
New York City

Dear Sir:

Re: Claim 4654 John R. Proctor, Inc.
Borough of Sayreville, N. J.

This will acknowledge receipt of yours of December 7th. The only connection the Royal Indemnity Company has with this matter is through the bond which it wrote in behalf of the John R. Proctor Company, Incorporated to the Borough of Sayreville.

The John R. Proctor Company was assigned to Mr. L. W. Carle, who is not an officer of the Royal Indemnity Company or an agent of the company in this transaction. He took the assignment in his individual capacity and the Royal Indemnity Company has no interest therein.

Yours very truly,

W. A. FOLEY,
Superintendent.

WAF:EW

Exhibit D-2

(Letterhead of Royal Indemnity Company)

New York, May 20, 1924.

Andrew J. Whinery, Esq.,
Counselor at Law,
790 Broad Street,
Newark, New Jersey.

Dear Sir:—

Re: Claim 4654 File 114905 Bond SX88234
John R. Proctor, Inc.—Borough of Sayreville.

Your letter of the 23rd ult. You refer to an alleged claim of the American Well Works against this Company. We have heretofore advised Mr. S. B. Whinery of the American Well Works that we do not consider that they have any claim against this Company and we absolutely deny all liability in the premises.

This Company never had any contract or agreement with the American Well Works in regard to the pumps and apparatus mentioned in your letter or any other matter. The only connection the Royal Indemnity Company has with this job is through the bond which it executed in behalf of the John R. Proctor Company, Inc., to the Borough of Sayreville, N. J. The John R. Proctor Company assigned this contract to Mr. Leslie W. Carle. Mr. Carle never has been an officer or employee of the Royal Indemnity Company or an agent of the Company in this transaction.

You fall in error when you state that these

pumps were sold to this company after John R. Proctor Co., Inc. failed.

Yours very truly,

NAT. E. WHEELER,
Counsel.

NEW:HK

Exhibit D-3 for Identification

April 21, 1923.

Hon. Edward E. Clark, Mayor,
Borough of Sayreville,
Middlesex County, N. J.

Dear Sir:

Re: Bond SX-88234—John R. Proctor, Inc.
Principal—Borough of Sayreville, N. J., Insured

We have been requested to consent to an assignment by John R. Proctor, Inc., Bayonne, New Jersey of contract for the construction of a sewerage system for the Borough of Sayreville, dated on or about the 19th day of September, 1922, to L. W. Carle.

Please be advised that we consent to such assignment with the understanding, however, that such consent does not, in any way, release John R. Proctor, Inc. from liability to us for any loss that we may sustain as surety under the above captioned bond given in connection with the aforesaid contract. Please be advised that L. W. Carle

is not an officer or an employe or an agent of the Royal Indemnity Company in this transaction.

Very truly yours,

C. E. TRINDER,
Second Vice President.

CET/VK

Grounds of Appeal

(Filed April 2, 1931)

NEW JERSEY COURT OF ERRORS AND APPEALS

AMERICAN WELL WORKS, a corporation, *Plaintiff-Respondent,* *v.* ROYAL INDEMNITY COMPANY, a corporation, *Defendant-Appellant.*	Action at Law

The appellant states the following grounds of appeal:

The following questions were admitted:

To the witness, John R. Proctor:

1. "Q. Who delivered the bond to you on this Sayreville job?"

2. "Q. And who delivered the other bonds to you of the Royal Indemnity Company?"

3. "Q. Just tell us what that was."

4. "Q. What was the nature of the discussion with Mr. Carle regarding adjustment of this Sayreville job?"

5. "Q. What was said at that particular time?"

6. "Q. And what did you say?"

7. "Q. Now, let us get directly to the conversation with Mr. Carle."

8. "Q. This you told Mr. Carle?"

9. "Q. Did he say anything further about the Royal Indemnity's connection with it?"

10. "Q. Is that all?"

11. "Q. Is that all there was said?"

12. "Q. Now, during this conversation that you have mentioned, was either Mr. Whinery or Mr. Gaus there?"

13. "Q. They were not there?"

The following questions were admitted:

To the witness, Samuel B. Whinery:

14. "Q. Now, will you tell us what you said to Mr. Carle and what Mr. Carle said to you?"

15. "Q. What did you say to him and what did he say to you?"

16. "Q. And did you receive it?"

17. "Q. Now, in your various conver-

sations with Mr. Carle, was the name 'American Well Works' mentioned?''

18. ''Q. And was there any discussion as to your connection with the American Well Works?''

19. ''Q. Can you recall anything that was said in your conversations with Mr. Carle in regard to your connection with the American Well Works?''

The following questions were admitted:

To the witness, William O. Dudley:

20. ''Q. And how did you happen to meet Mr. Carle?''

21. ''Q. And what did Mr. Carle tell you?''

22. ''Q. Did you get any order for the delivery on your motors and with whom was that?''

23. ''Q. Now, did you deliver the motors then to the Sayreville job?''

24. ''Q. And were the motors paid for?''

25. ''Q. Did the Dudley-Curry Electric Company have anything to do with the Sayreville job with regard to motors?''

26. ''Q. And who furnished the control equipment on the motors?''

The following questions were admitted:

To the witness, Gilbert G. Gaus:

27. "Q. What conversation did you have with Mr. Carle on that occasion?"

28. "Q. What did Mr. Carle say?"

The following documents were admitted in evidence:

29. "Exhibit P-1, dated November 8, 1922. Order signed by John R. Proctor, Inc. to S. B. Whinery."

30. "Exhibit P-2. Letter dated May 16, 1923 from L. W. Carle to S. B. Whinery, M. E."

31. "Exhibit P-3. Letter dated May 23, 1923 from L. W. Carle to S. B. Whinery."

32. "Exhibit P-5. Letter dated November 16, 1923 from W. A. Foley, Superintendent, to the American Well Works."

33. "Exhibit P-6. Letter dated November 7, 1923 from W. A. Foley, Superintendent, to the Northwestern Manufacturing Co."

34. "Exhibit P-8. Letter dated November 7, 1923 from W. A. Foley, Superintendent, to Dudley-Curry Electric Co."

35. "Exhibit P-9, and P-9A, being respectively letter dated November 6, 1923 from American Well Works to Royal Indemnity Company and bill of American Well Works to Royal Indemnity Company dated September 6, 1923."

The following questions were overruled:

To the witness, Nathaniel E. Wheeler:

36. "Q. What was it?"

37. "Q. Now, will you state what his connection with the company was?"

38. "Q. And in this Sayreville job did he have any work to perform for the company with respect to the completion of that job after Proctor defaulted?"

39. "Q. Did the company permit him to have desk room at the company's?"

The following document was excluded:

40. "Exhibit D-3 for identification, being letter dated April 21, 1923, by C. E. Trinder, Second Vice President of the Royal Indemnity Company, to Hon. Edward E. Clark, Mayor of the Borough of Sayreville."

The following questions were permitted to the witness, Nathaniel E. Wheeler:

41. "Q. I suppose you were familiar with Carle's financial responsibilities?"

42. "Q. Did your company investigate to determine whether Carle was financially able to go through with this contract on his own account?"

43. "Q. Do you know whether the Royal Indemnity Company made any investigation to determine whether Mr. Carle was competent to handle this job as

a contractor beyond his mere representations?''

The trial court denied the motion of the defendant for a direction of verdict in its favor, which motion was rested on the following grounds:

44. ''First, that there is no evidence that the defendant entered into any agreement with the plaintiff whereby the defendant agreed to pay this alleged bill, which is annexed to the complaint.''

45. ''Second, that all of the evidence in this case is limited to alleged statements made by this man Carle, which statements of Carle are not binding, under the evidence, on this defendant.''

46. ''Third, that there is no evidence that Carle was authorized, with respect to the Sayreville job, to obligate the defendant in any way to pay this bill of the plaintiff.''

47. ''Fourth, under the evidence, the only obligation of the defendant was that of surety under a bond, which bond is not in evidence, and which bond is not, in fact, sued on here, and which bond, if it were sued on here, would be unavailable to the plaintiff at this stage, because no claim was filed thereunder, or suit brought thereon within the time required by law. I am relying on the Municipal Mechanics Lien Act, which, of course, your Honor is familiar with.''

48. "Now, finally, I urge the defense set up in the fourth defense of the answer—this is within the Statute of Frauds—alleged goods sued for are in excess of the amount fixed by the statute, and the alleged agreement or contract that this defendant is alleged to have made with the plaintiff for the purchase of these goods is not enforceable."

The trial court charged the jury:

49. "This letter is upon the letterhead of the Royal Indemnity Company, 84 William Street, New York. It has, on the upper left, 'L. W. Carle, Room 702,' and is to this effect (reading):

'Mr. S. B. Whinery,
95 Liberty Street,
City.

Will you kindly ship to Sayreville, New Jersey, at once, the machinery for pumping station ordered by John P. Proctor on October 16, 1922. We would like to have these pumps and necessary machinery delivered as soon as possible, and I will pay for same as per your agreement of August 23rd'——

(that was Mr. Proctor's agreement)

'$3,355 in thirty days, and balance in sixty days.

Yours very truly,

L. W. CARLE.'

Now, your attention is called, by the at-

torney for the defendant and by the Court, to the fact that this letter is signed individually by L. W. Carle and not by the company; but your attention is also called, at the same time, to the first word of the last paragraph (reading): '*We* would like to have these pumps and necessary machinery delivered as soon as possible.' It is under this letter of May 16, 1923, the order contained in that letter, that the plaintiff insists upon its right to recover against the Royal Indemnity Company, the defendant in this suit."

50. "But sometimes a corporation is bound by the implied authority to certain people who may be employees, who may be agents, who may be nothing but salesmen, even, acting upon commission, if the corporation by acts which it permits its employees or agents to exercise in its behalf, or acts of such agents or employees which it afterwards ratifies, so as to lead the business public to understand that that employee or agent has authority of the company to act as he does for that company."

51. "But, the mere fact that Mr. Carle was authorized to solicit the bonding business of the company did not necessarily confer upon him the authority to speak and act for the company in other respects than in the soliciting and writing and delivery of bonds; but that fact, in connection with the other facts of this case, it will be for you to consider in determining whether or not what this company permitted Mr. Carle

to do and to say would lead an ordinarily careful business man into the understanding that he had the authority to deal with other people for the company in such a way as to bind that company under the circumstances presented in this case."

52. "According to Mr. Proctor, he had had many bonds from the defendant company, and all of these bonds were solicited by Mr. Carle; they were all delivered to him by Mr. Carle. He says that some of his negotiations and business with Mr. Carle was at the general office of the company in New York, and that at this general office in New York Mr. Carle had a desk which he habitually occupied when he was there; not only that, but that Mr. Carle's name was on the door of the room where his desk was located. Mr. Carle was permitted to use the stationery of the Royal Indemnity Company, with his name on that stationery. Letters were written to the company which were answered upon the stationery of the company, sometimes by Mr. Carle and sometimes by others connected with the company. For instance, the letter to which I have called your attention, this letter of May 16th, is signed by Mr. Carle, but upon the stationery of the company, with his name on the letterhead. On November 7th a letter was written, signed by Mr. Foley, superintendent, who is now dead and who cannot be produced, 'In re Claim 4654', and all of these letters which are answers from the company, letters written by the company to the plaintiff in this case, are

signed by that same number, '4654'. This letter of November 7th is in reply to a claim sent by the plaintiff to the defendant, and Mr. Foley, who signs this, says (reading): 'We are enclosing herewith draft payable to the Northwestern Manufacturing Company in the amount of $518.11, as per statement of October 1st'; but this now is in respect to another matter, which I shall presently call to your attention; but all the letters which have numbers upon them, by whomsoever they are signed, have that same claim number, and perhaps this is more important than all in this case, because up to this time all the matters to which I have called your attention, except this letter of May 16th, may relate only to the bond business which was being done by Mr. Carle; but it appears that when Mr. Proctor got into his trouble down at the Borough of Sayreville, and this matter was reported to the defendant, the Royal Indemnity Company, it was Mr. Carle, and he only, so far as the evidence in this case shows, who appeared for the company in Mr. Proctor's office to endeavor to straighten out this matter with Mr. Proctor and with the American Well Works, the plaintiff in this case."

53. "But if that agency be otherwise established, be established by the apparent authority which the company holds the agent out as possessing, then you may consider what that agent said and for which he was apparently authorized to speak for the company."

54. "Now, I told you that I would speak about these letters which were testified to by Mr. Dudley. It appears that two companies, with which Mr. Dudley was connected, submitted their claims to the defendant company, and those claims were paid, as I understand it, in full—perhaps not—certainly the claims were settled by the company; and it is insisted, on behalf of the plaintiff in this case, that since Carle was the one who had the contract for the completion of this work, the company's recognition of and the payment in full of the Dudley claims were ratifications by the defendant company of the acts of Carle; and without any other explanation you would have a right to consider whether or not that was not so."

55. "But if you determine that the greater weight of the evidence in the case shows that the acts which this defendant company permitted Mr. Carle to exercise, with its apparent authority, or acts which they afterwards ratified, would lead a reasonably careful business man to believe that its agent, this man Carle, had implied authority from the company, and that the greater weight of the evidence shows that Carle did not enter into this contract, take the assignment of this contract with the Borough of Sayreville, in his individual capacity, but as the agent of and for the Royal Indemnity Company, and that it was really the Royal Indemnity Company which performed this contract and which

wrote this letter of May 16th, and that the plaintiff furnished these bills actually to the Royal Indemnity Company, and that its bill is properly against the Royal Indemnity Company, then the plaintiff is entitled to your verdict for the full amount of this bill, which is $3165. with seven years' interest."

Dated, March 24, 1931.

Respectfully,

COLLINS & CORBIN,
Attorneys for Defendant-Appellant.

Served March 31, 1931.

New Jersey Court of Errors and Appeals

AMERICAN WELL WORKS, a corporation, *Plaintiff-Respondent,* *v.* ROYAL INDEMNITY COMPANY, a corporation, *Defendant-Appellant.*	Action at Law On Appeal from Supreme Court

BRIEF FOR APPELLANT

1

Statement of the Case

This appeal reviews a judgment of $4,576.10 in favor of the plaintiff in an action wherein it sought to collect *from the defendant* for pumps ordered by Proctor, who had a municipal contract with the Borough of Sayreville. Proctor defaulted and his contract was assigned by him with the consent of the Borough and of the defendant (the surety on his bond) to one Carle. Carle confirmed the order for the pumps which were shipped by the plaintiff to the job at Sayreville. Carle defaulted and the plaintiff was not paid. This action is an attempt (years after the entire transaction was closed) to hold the defendant as the contrac-

tor and Carle as its agent on the theory of *respondeat superior*. The defendant *never* was the contractor. No claim was filed by the plaintiff against the defendant under the bond. The time to file such a claim expired years ago. The Court instructed the jury that this was *not* a suit under the bond and the only theory upon which the defendant could be held was that it was the contractor and Carle its agent.

During the trial the Court permitted questions to be answered by various persons as to conversations with Carle to prove his authority as agent of the defendant; also certain letters were admitted. At the close of the case the defendant moved for a direction of verdict which was denied. A number of exceptions were taken to the Court's charge. The jury brought in a verdict for the plaintiff and from the judgment entered thereon the present appeal is taken.

2

Grounds of Appeal

The grounds of appeal may be divided into six parts as follows (p. 147):

1. Questions admitted to prove L. W. Carle's agency for the defendant.
2. Documents admitted for the same purpose.
3. Questions (overruled) for the purpose of proving that Carle was not defendant's agent.
4. Document excluded which tended to prove that Carle was the contractor.
5. The denial of the defendant's motion for a direction of verdict.
6. Errors in the charge.

3

Brief of the Argument

I

The Court permitted questions to the witness, Proctor, as to conversations with Carle to prove he was the agent of the defendant when his authority to act as such was not proven.

Proctor, the first witness, testified that he knew Carle in 1922 and 1923, and had a number of conversations with him then, all of which were in Proctor's office in Bayonne with the exception of one at the office of the defendant in New York (p. 20, ll. 25-35; p. 23, ll. 30-40). As a result he gave Carle orders for bonds (p. 24, ll. 30-40). He did not know what position Carle held with the defendant (p. 26, ll. 1-20). One bond was given by the defendant as surety for John R. Proctor, Inc., for the Sayreville contract (p. 27, ll. 1-10). Carle delivered the bond after it was executed by the defendant (p. 27, ll. 30-40). On the occasion when he went to the office of the defendant in New York he had a "vague idea" (and "I may have visited it twice") that the name of L. W. Carle was on the door of a glass-partitioned-off space in the general offices in which space there were a number of desks (pp. 30 and 31). He asked a young lady who was doing some filing to see L. W. Carle (p. 30, ll. 30-35). On the door there appeared not only the name of Carle, but several other names. There was no designation after Carle's name (p. 30, l. 30; p. 31, l. 10). He testified (p. 30, l. 30):

> "There was a young lady there that was doing some filing at the time and she asked me who I wished to see and I told her Mr. L. W. Carle."

After obtaining the Sayreville contract, Proctor began to place orders for materials including the order for the pumps with the plaintiff (p. 32, ll. 1-10).

Actually he did not receive the pumps. The order was not accepted. He did not complete the Sayreville contract. He stopped work in the early part of 1923. Then there was a meeting at his office in Bayonne. Mr. Carle attended the meeting. So did a representative of the plaintiff. The meeting was held on the second floor of the building. There was no meeting between the plaintiff and Carle (p. 34, ll. 20-40; p. 35, ll. 10-40; p. 36, ll. 1-20).

Proctor had not visited Carle at the office of the defendant with reference to the bond. His only visit to New York was with reference to the adjustment of affairs at Sayreville "so that Mr. Carle could handle the work and I assisted him in that direction" (p. 36, l. 40; p. 37, l. 5). That was after his failure and while a creditors' committee was handling his affairs.

After the above testimony had been adduced Proctor was asked,

> "What was the nature of the discussion with Mr. Carle regarding adjustment of this Sayreville job?" (p. 37, l. 20)

This question was objected to on the ground that there was no proof that Carle had any authority to speak for or bind the defendant. The colloquy following is given at length (p. 37, ll. 25, *et seq.*). The Court permitted the question to be

answered and allowed an exception (p. 40, l. 40). This exception is preserved in the grounds of appeal (p. 148, ll. 1-10).

Not only was this question permitted but numerous other questions eliciting conversations with Carle were permitted over objection and exception. These exceptions are preserved in the grounds of appeal (pp. 148, *et seq.*). The questions are as follows:

> "Q. What was said at that particular time?" (p. 41, l. 35)
> "Q. And what did you say?" (p. 43, l. 5)

After the foregoing questions the Court stated that counsel did not have to object to all of the questions calling for conversations with Carle but that an exception would be regarded as having been allowed to any and all questions eliciting such conversations (p. 43, ll. 10-20). Those questions were:

> "Q. Is this part of your conversation with Mr. Carle?" (p. 43, l. 25)
> "Q. Now let us get directly to the conversation with Mr. Carle." (p. 43, l. 32)
> "Q. This you told to Mr. Carle?" (p. 44, l. 20)
> "Q. Did he say anything further about the Royal Indemnity's connection with it?" (p. 44, l. 30)
> "Q. Is that all?" (p. 45, l. 5)
> "Q. Is that all there was said?" (p. 45, l. 20)
> "Q. Now, during this conversation that you have mentioned, was either Mr. Whinery or Mr. Gaus there?" (p. 45, l. 20)
> "Q. They were not there?" (p. 45, l. 22)

In a later point we argue that Proctor's testimony does not raise a fact question for the jury as to whether Carle was the agent of the defend-

ant in the completion of the Proctor contract with Sayreville. We here contend that the questions above quoted which the Court permitted Proctor to answer should have been overruled because Carle's authority to speak for and bind the defendant as its agent was not first established. The Court in permitting the first question above quoted said (p. 37, l. 30; p. 38, l. 20):

> "The Court: We have now the fact that Mr. Carle was the one, and the only one, who solicited Mr. Proctor for these bonds, or, if Mr. Proctor did the soliciting, that all his business was done through Mr. Carle; that when he went to the company's office in New York, *the person to whom he was directed was Mr. Carle* [*Counsel point out that this is not the fact*]; that all his conversations relative to the issuing of bonds, in this case and in other cases, were with Mr. Carle; that when he got into difficulties in Sayreville, the person who came to adjust those differences between Mr. Proctor and the Town of Sayreville, and the creditors of Mr. Proctor, was Mr. Carle [no proof that defendant sent or authorized Carle to appear for it]. No one else appears to have had anything to do, so far as these transactions were concerned, but Mr. Carle. [This is not the fact as will appear later.]
>
> "Now, I think that comes pretty close to creating a question for the jury as to whether or not, whatever was done through Mr. Carle, was not impliedly authorized by the company."

Counsel for the defendant replied (p. 38, l. 20; p. 39, l. 30):

> "Mr. Markley: May I answer that, sir?
>
> "The Court: Yes; that is exactly why I am saying it, so that you may.
>
> "Mr. Markley: Thank you, sir. Mr.

Carle's authority, I submit, cannot be drawn from those facts without proof of what his authority is, because, as I understand it, he was only over there once or possibly twice, to New York. If the witness is asked, he will undoubtedly say that the offices he went to were the general offices in New York.

"The Court: He has said that.

"Mr. Markley: I think he has, yes.

"The Court: He went to a particular department, the Bond Department.

"Mr. Markley: *He went there and asked for Mr. Carle,* and that he was shown in to Mr. Carle, whose name was on the door, without any designation of any kind indicating his authority. It is true that he obtained his bonds from Mr. Carle, but I submit that that does not prove any authority on Carle's part except, perhaps, as broker.

"The Court: He goes further than that. He says when he got into difficulty he said it was Carle who came to adjust the difficulty.

"Mr. Markley: As a matter of fact, your Honor, the very thing I anticipated is happening—we are dealing purely with speculation. *Carle himself undertook to finish this job, and actually got the contract to complete Proctor's job with Sayreville. There is actually a written contract on file.*

"Mr. Handford: I do not think that counsel should speak about that.

"Mr. Markley: You have got here the interest of the man Carle, his own interest. You talk about adjusting a thing. You have first got to show his authority to adjust. We do not know whether he is adjusting it for himself or for the Royal or anyone else."

The Court in giving the reasons why he permitted the questions to Proctor as to conversations with Carle, made three misstatements of a material fact. The first was that when Proctor called at the general offices of the defendant he

was directed to Mr. Carle. Proctor testified that when he called at the defendant's office *he asked for Mr. Carle* (p. 30, ll. 30-35). The second misstatement was that no one for the defendant had anything to do with the matter except Carle. The trial court in his charge to the jury corrected that error (p. 128, l. 30; p. 129, l. 20).

Whinery, without contradiction, testified that at the meeting in Bayonne not only was Carle present, but there was also present a Mr. Parsons, and another gentleman from the defendant (p. 48, ll. 15-30). Also, when Whinery, the plaintiff's representative, called at the office of the defendant, he asked for Mr. Carle and for no one else (p. 49, ll. 30-40). He first met Carle in Bayonne at Proctor's office after Proctor had defaulted in April or the early part of May, 1923 (p. 47, ll. 30-40).

Finally, there was no proof that the defendant sent Carle to Bayonne in its behalf or authorized him to adjust the matter or do anything for it.

It will therefore be seen, that simply because Carle solicited bond business from Proctor and attended a creditors' meeting of Proctor when he defaulted and Proctor had visited Carle at the New York office of the defendant on one or possibly two occasions (both of which Proctor was very hazy about), the Court permitted Proctor to testify to conversations with Carle for the purpose of proving that Carle was the duly authorized agent of the defendant, first, to appear at the creditors' meeting and adjust whatever loss there might be by reason of Proctor's default, and second, from those fragmentary facts to likewise conclude that Carle was authorized by the defendant to take over and complete the municipal contract which Proctor had with the Borough of Sayreville

as the contractor in the place and stead of Proctor and as the agent and servant of the defendant. In short, that the defendant was the contractor for the completion of the job.

The law is that a defendant cannot be proven to be the employer of a man simply by proving the conversations which that man had with other persons. Those conversations the law regards as hearsay and not binding upon the alleged employer until the authority of the alleged servant to act has first been established, either expressly or impliedly by the apparent authority which the employer knowingly permits the agent to assume or which he holds the agent out to the public as possessing.

Smith v. *Del. & A. T. & T. Co.*, 64 N. J. E. 770;
Heckel v. *Cranford Golf Club*, 97 N. J. L. 538;
White Door Bed Co. v. *U. S. Mortgage & T. Co.*, 146 Atl. (E. & A. of N. J.) 216;
Feist & Feist v. *Spitzer*, 150 Atl. (E. & A. of N. J.) 406.

In *Smith* v. *Del. & A. T. & T. Co.*, 64 N. J. E. 770, this Court held that a person cannot by his own mere assertion prove that he is the agent of another. In that case a letter was written to the defendant company and later the complainant's lawyer called at the defendant company's office and was shown into the office of the General Manager, Mr. Westbrook. Westbrook had a conversation with the attorney and stated that he was the General Manager and authorized to speak for the defendant; that he had received the letter from the complainant to the defendant company for-

bidding the placing of certain wires and wanted to know whether a money consideration would settle the matter. This Court, at page 772, held:

> "A person cannot by his own mere assertion prove that he is the agent of another. A person may, by permission, recognition or acquiescence, occasion a reasonable inference that another is his agent. Did the evidence in this case tend to prove that Mr. Westbrook was an agent of the defendant, and that his declarations would bind it? Mr. Early called at the office of the company in Philadelphia and was shown, no doubt, in answer to some inquiry, to an office purporting to be that of the general manager. There he found Mr. Westbrook installed, assuming to act as general manager, and already informed about the letter that the complainant had written to the defendant. Which is the more natural supposition, that Mr. Westbrook was an intruder or usurper, who had possessed himself in some unauthorized way of the contents of the complainant's letter, or that he was acting with the knowledge and by the direction of the defendant? The mind readily accepts the latter alternative. There was thus, evidence tending to prove agency, aside from Mr. Westbrook's averment that he was agent, and this evidence made his declarations competent, for they were admissions of the defendant by the mouth of one who appeared by uncontradicted proof to be its agent, made in the conduct of business entrusted to him."

In *Heckel* v. *Cranford Golf Club*, 79 N. J. L. 538, a steward of a golf club ordered supplies for the club consisting of meats and produce. The goods were charged to the club, delivered to the club, accompanied by charge slips addressed to the club with each order delivered. Bills were sent by mail monthly to the club addressed in the name of the club and the checks of the club had

been received in payment of some of the bills. Also, the president of the club had been spoken to and he admitted that the club owed the plaintiff money for the supplies and assured the plaintiff that the club would pay. This Court, on page 540, held:

> "The law governing an agent's power to bind his principal is well settled. Mr. Justice DEPUE (afterwards Chief Justice) stated the law clearly in the case of *Law* v. *Stokes,* 32 N. J. L. 249, in the following language:
>
> " 'A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established it must flow from the act of the principal. And when established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor, on the other hand, be enlarged by the unauthorized representations of the agent.' * * *
>
> "The difficulty always arises in the applica-

tion of the law to the facts of the given case. In the present case did the club place Roachman in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, would be justified in presuming that Roachman had authority to order provisions for the club? Did the plaintiffs present such evidence of Roachman's apparent authority as to justify the trial court in submitting to the jury the question of his authority to bind the club? We think these two questions should be answered in the affirmative.

"It is admitted that the club employed Roachman as manager or steward and paid him a salary. It is a matter of common knowledge that one of the duties of a steward of a country club is to obtain the supplies necessary to serve the members of the club with meals and refreshments. While it is true that as between Roachman and the club Roachman was to be responsible for the payment of the supplies ordered by him; yet by his employment as steward the club had apparently clothed Roachman with the powers usually appertaining to the position of steward, of which one was the purchase of supplies for a club. When, therefore, Roachman approached the plaintiffs, informed them of the position he held with the club, ordered provisions which were charged to the club, delivered to the club house, and bills therefor were mailed to the club monthly, and this course of dealing continued for approximately five months, without either repudiation of Roachman's authority or any intimation from the club that he was without authority to bind it, we feel that such evidence presented a question for the determination of the jury."

In *White Door Bed Co.* v. *U. S. Mortgage & T. C.*, 146 Atl. 216, the representative of the defendant admittedly was one of its very active vice-presidents. At page 217 this Court held:

"The first ground urged before us for a reversal is that Perselay, who signed the paper which is the basis of this suit, had no authority to represent the appellant company in executing the alleged acceptance of the assignment by the appellant company to the respondent, and that, for this reason, the trial court should have granted appellant's motion for a nonsuit. The proofs submitted on the part of the appellant clearly showed that its president was little more than a figurehead in the corporation, and that the management of its business was left in complete control of its three vice presidents; that each one of them assumed to act for the company in any matter submitted to him; and that no objection to such assumption of power to represent the company was ever made either by the president or the board of directors. These facts go far towards supporting the conclusion that Ward was acting as the duly authorized representative of the corporation in designating Perselay as the company's agent to consider and act upon the assignment of the Acropolis Realty Company to the respondent of the moneys in the hands of the latter to become due to the Acropolis Company under the mortgage made by it to the appellant. But, assuming that no such authority was actually vested in Vice President Ward, that fact is not necessarily a bar to the respondent's right of action. As was stated by Mr. Justice Trenchard in *Wiss & Sons Co.* v. *H. G. Vogel Co.*, 86 N. J. Law, 621, 92 A. 361: 'As between the principal and third persons the true limit of the agent's power to bind the principal is the apparent authority with which (he) is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, * * * and the reason is that to permit the principal to dispute the authority of the agent in such cases would enable him to commit a fraud upon innocent persons.' In

> view of the testimony to which reference has been made, it was clearly the function of the jury, and not of the court, to determine whether or not Ward, in referring the matter of the respondent's assignment to Perselay for the latter's consideration and determination, was acting as the duly authorized representative of the appellant, and, if not, whether his action was within his apparent authority as vice president of the corporation. For the reason indicated, we conclude that this ground of appeal is without legal substance.''

In *Feist & Feist* v. *Spitzer,* 150 Atl. 406, the defendant admittedly sent his son, a New York lawyer, together with a New Jersey lawyer, both of whom had attended previous conferences at the request of the defendant, to consummate the negotiations in which the defendant was interested. The question was whether the defendant had given apparent authority to his son to consummate the lease. This Court said at page 406:

> ''The case turns on whether there was sufficient evidence of the apparent authority of the defendant's son to justify sending the case to the jury. The trial court charges as follows: 'Yet, if it appear by what the father permitted his son to do, what he held him out as possessing authority to do, that he actually did give his son authority to bind him and to close this lease, then he would be bound by what his son said and did on this 26th day of September, 1925, because agency may be conferred in two ways. It may be conferred by express authority or it may be conferred by a person in permitting another person to act in his behalf, sanctioning his acts in such a way as to indicate to the persons with whom he is dealing that that person has authority as his agent to bind him in that transaction.'
>
> ''In view of the evidence adduced, the ques-

tion was properly submitted to the jury. *Law* v. *Stokes,* 32 N. J. Law, 249, 90 Am. Dec. 655; *J. Wiss & Sons Co.* v. *H. G. Vogel Co.,* 86 N. J. Law, 618, 92 A. 360; *Heckel* v. *Cranford Golf Club,* 97 N. J. Law 538, 117 A. 607; *White Door Bed Co.* v. *United States Mortgage Co.,* (N. J. Err. & App.) 146 A. 216.

"It is apparent from the testimony adduced that the proposed tenant was entirely satisfactory to the defandant at the time he turned over his title deed and the survey of the premises for the purpose of having the lease drawn. It is further apparent that the defendant discussed the form of the lease on two other occasions and that the understanding of the parties was reduced to substantially a written form. Only certain matters of phraseology remained for adjustment at the conference fixed for September 26, 1925, in New York. The defendant's son was conversant with the matter and appeared instead of his father at the final conference, went over the matter in detail, and approved of the questions under discussion. He now states that he was entirely lacking in authority and was obliged to report back to his father the outcome of the conference for approval. There might possibly be something in this contention were it not for the fact that the parties were in substantial agreement before the final conference was ever undertaken. All that remained to be done was to reduce to legal phraseology the expressed understandings of the parties.

"Under the cases, *supra,* the test for the submission of the issue of apparent authority to a jury seems to be whether a person of ordinary prudence, conversant with business usages and the particular business in hand, would believe that the defendant had sent his son to represent him and to act for him at the conference. The point of discussion was not a matter of business policy, but a matter of legal form. It seems only reason-

> able that those who were at the conference, knowing the business to be undertaken and familiar with the business usages, would believe that the son, because of his peculiar fitness as a lawyer, had been sent to agree upon the final form of language in which the agreement of the parties should be settled."

Those cases show the line of demarcation. The defendant must of necessity give apparent authority to the alleged agent before the conversations with the alleged agent are admissible to bind it.

The testimony of Proctor is barren of any act of the defendant indicating any authority in Carle to act for it other than in the mere solicitation of bonds.

Proctor knew Carle. Carle had solicited and obtained from Proctor a number of bonds. There the authority of Carle ended.

We submit that the conversations of Carle with Proctor should have been excluded.

II

The Court permitted questions to the witness, Whinery, as to conversations with Carle.

Whinery (the second witness) testified he was manufacturers' agent of several companies, including the plaintiff. He obtained the order for the pumps from Proctor. Proctor defaulted before the pumps were shipped. The plaintiff did not deliver the pumps. Whinery first met Carle in Proctor's office in Bayonne at the time of the creditors' meeting in the Spring of 1923 (p. 47, ll. 30-40). Whinery attended the meeting of creditors in a large room on the second floor. Later

he went to Proctor's private office on the first floor. Whinery said he had a conversation with Carle in the private office downstairs in the presence of Whinery's brother who also represented the plaintiff. There were present Mr. Parsons of the defendant, and another gentleman representing the defendant in addition to Carle. In short, there was Carle and two representatives of the defendant present. It does not appear what authority either Parsons or the other man had any more than it appears what authority Carle had. Whinery was then asked the question which was objected to, namely,

> "Now, will you tell us what you said to Mr. Carle and what Mr. Carle said to you?" (p. 48, l. 25).

This question was objected to on the ground that Carle's authority to bind the defendant did not appear and likewise the authority of the other two men did not appear. Over objection and exception duly noted (preserved in the grounds of appeal, p. 148, ll. 30, *et seq.*) this question was answered as well as the following questions:

> "Q. What did you say to him and what did he say to you?" (p. 50, l. 12).

At this point the Court stated that the defendant's objection would continue to all questions with respect to conversations with Carle (p. 50, l. 15). Other questions were:

> "Q. And did you receive it?" (p. 50, l. 30)
> "Q. Now, in your various conversations with Mr. Carle was the name 'American Well Works' mentioned?" (p. 50, l. 35).
> "Q. And was there any discussion as to your connection with the American Well Works?" (p. 50, l. 40).

"Q. Can you recall anything that was said in your conversations with Mr. Carle in regard to your connection with the American Well Works?" (p. 51, ll. 10-20).

These questions were objectionable for the same reason that the conversations of Carle with Proctor were objectionable, namely, Carle's authority to speak for and bind the defendant was not first proven.

It is clear, under the authorities cited in Point I, that the conversations with Carle were not admissible and the questions calling for those conversations should have been overruled. No attempt was made to ascertain Carle's authority before taking his order for the pumps. No attempt was made at the trial to prove that Carle had any authority to bind the defendant.

On cross examination Whinery was asked what he did when he was not paid by Carle and he said he then wrote a letter for the first time, addressed to the defendant company (Exhibit P-4, p. 133), wherein he advises the defendant that his company has consulted counsel relative to payment of the claim. In this letter Whinery makes a claim on December 7, 1923, that the defendant had taken over the completion of the Sayreville job as contractor (p. 134, ll. 1-10). That of course, was not the fact and was rather startling news to the defendant. The letter was answered by the superintendent of the defendant, William A. Foley under date of December 10, 1923, as follows (p. 144):

"This will acknowledge receipt of yours of December 7th. The only connection the Royal Indemnity Company has with this matter is through the bond which it wrote in behalf of the John R. Proctor Company, Incorporated to the Borough of Sayreville.

"The John R. Proctor Company was assigned to Mr. L. W. Carle, who is not an officer of the Royal Indemnity Company or an agent of the company in this transaction. He took the assignment in his individual capacity and the Royal Indemnity Company has no interest therein."

Still another letter was sent to the lawyer for the plaintiff in response to his of April 23, 1924, addressed to the defendant company. This letter to the plaintiff's lawyer was written by Nathaniel E. Wheeler, counsel for the defendant under date of May 20, 1924, and is as follows (p. 145):

"Your letter of the 23rd ult. You refer to an alleged claim of the American Well Works against this Company. We have heretofore advised Mr. S. B. Whinery of the American Well Works that we do not consider that they have any claim against this Company and we absolutely deny all liability in the premises.

"This Company never had any contract or agreement with the American Well Works in regard to the pumps and apparatus mentioned in your letter or any other matter. The only connection the Royal Indemnity Company has with this job is through the bond which it executed in behalf of the John R. Proctor Company, Inc., to the Borough of Sayreville, N. J. The John R. Proctor Company assigned this contract to Mr. Leslie W. Carle. Mr. Carle never has been an officer or employee of the Royal Indemnity Company or an agent of the Company in this transaction.

"You fall in error when you state that these pumps were sold to this company after John R. Proctor Co., Inc. failed."

As soon as plaintiff, by its representative, Whinery, got in touch with any authorized representative of the defendant, he was immediately

informed that Carle had no authority to act for the defendant.

We submit that the Court erred in permitting the questions to Whinery as to conversations with Carle for the purpose of proving Carle's authority to represent the defendant.

III

The Court admitted evidence of alleged similar transactions with the Northwestern Manufacturing Company and Dudley-Curry Electric Co. to prove agency of Carle for defendant in his transactions with plaintiff and to prove ratification of same.

Dudley, called by plaintiff, testified he was agent for the Northwestern Manufacturing Company. In 1922 he sold Proctor motors for the job at Sayreville. Later, he had some dealings with Carle. These dealings were before the motors were delivered to the job (p. 60). He was then asked the questions which were objected to because they dealt with an entirely different transaction, and therefore, they were not evidential of Carle's authority to act for the defendant in ordering the pumps from the plaintiff.

> "Q. And how did you happen to meet Mr. Carle?" (p. 61, l. 1).
>
> "Q. Did you get any order for the delivery of the motors?" (p. 63, l. 30).
>
> "Q. And with whom was that?" (p. 63, l. 40).
>
> "Q. Now did you deliver the motors then to the Sayreville job?" (p. 65, l. 10).
>
> "Q. And were the motors paid for?" (p. 65, l. 10).

Dudley answered that he received an order for motors from Carle. That he delivered the motors to the job at Sayreville. The motors were paid for by the check of the defendant (pp. 64-65).

A letter dated November 7, 1923, over objection was admitted in evidence as P-6 (p. 65, l. 30 to p. 67, l. 10). It was from the Superintendent of the defendant to the Northwestern Manufacturing Company sending it a draft for $518.11.

Dudley was agent for the Dudley-Curry Electric Co., and that company furnished control equipment for the motors on the Sayreville job.

He was shown a letter dated Nov. 7, 1923, signed by W. A. Foley, superintendent, addressed to the Dudley-Curry Electric Co., and that letter was received in evidence over objection to its relevancy. This Exhibit P-8 (printed at p. 138) enclosed a draft for $295.

The objection to these exhibits and questions is stated a number of times in the record (pp. 66, 68, 71). It was that the payment of those claims was immaterial, incompetent and irrelevant because there was no proof as to the basis or reason for those payments. They were separate, and distinct transactions in no way connected with the alleged transaction with the plaintiff. Whether those claims were paid under the bond of the defendant as surety or special circumstances justified the payment, did not appear. It was an attempt to prove the obligation of the defendant (as contractor and principal of Carle) to the plaintiff by proving payment to two other corporations (p. 71, ll. 1-20).

As a matter of fact the defendant's proof was undisputed that those claims were paid by the defendant under its bond obligation.

Chapter 75 of the Laws of 1918 (under which bonds for municipal work are given) (P. L. 1918, Ch. 75, p. 203) provides that the bond shall not only be for performance to the municipality but shall be:

> "an additional obligation for the payment by the contractor and by all sub-contractors for all labor performed or materials furnished in the construction, erection, alteration, or repair of such building, works or improvements."

Under paragraph 3 of the statute it is provided that any person having a claim shall within eighty days after acceptance of the work furnish the sureties statement of the amount due. No suit shall be brought until sixty days after furnishing the statement. If the claim is not paid, suit must be commenced within one year from the date of the acceptance of the improvement.

Wheeler, counsel for the defendant, having charge of its bond work (p. 96, ll. 1-10) testified that the claims of the Northwestern Manufacturing Company and the Dudley-Curry Electric Co., were paid under the bond. The plaintiff did not file any claim under the bond but attempted to present a claim against the defendant on the theory that the defendant was the contractor.

It is important to clearly understand this phase of the case because any possible inference that might be gathered from the payment of the two claims represented by Dudley was completely wiped out by Wheeler's testimony *which showed that not only were claims paid but the entire penalty of the bond was exhausted* (pp. 88, *et seq.*).

In 22 C. J. 744, the rule is stated as follows:

> "Similar Acts—1. Rule Stated. The gen-

eral rule is that the law will not consider evidence that a person has done a certain act at a particular time as probative of a contention that he has done a similar act at another time. Accordingly, it cannot be shown, as bearing on the question of negligence on a particular occasion that the person whose conduct is involved has met with a number of similar accidents, or has been guilty of negligence on other occasions, especially where such other occurrences are remote in point of time; and conversely, one cannot show that he was careful on a particular occasion by evidence that he was careful and prudent on other occasions. So also, one vice or moral dereliction cannot be proved as a circumstance to show the existence of another not necessarily or vitally connected with it as cause or effect. It is even clearer that a person cannot be shown to have done an act by evidence that another person has done a similar act, although both persons are under the control of a single management."

The following New Jersey cases are cited in support of the rule:

Crosby v. *Wells,* 73 N. J. L. 790, 67 A. 295;

Scull v. *Skillton,* 70 N. J. L. 792, 59 A. 457;

Apgar v. *Woolston,* 43 N. J. L. 57;

Temperance Hall Assoc. v. *Giles,* 33 N. J. L. 260;

Clark v. *Clark,* 2 N. J. L. 104;

Coryell v. *Colbaugh,* 1 N. J. L. 90, 1 Am. D. 192;

Livingston v. *Combs,* 1 N. J. L. 50;

Coyne v. *Sayre,* 54 N. J. Eq. 702, 36 A. 96;

Jacobus v. *Mutual Ben. L. Ins. Co.,* 27 N. J. Eq. 604.

In *Crosby* v. *Wells,* 73 N. J. L. 790, *supra,* at page 807, this Court said:

> "At least as long ago as *Clark* v. *State* (1885), 18 Vroom 556, 558, and as recently as the case of *State* v. *Hummer, ante* p. 714, this court has said that, for the purpose of showing a defendant likely to commit a crime charged, it is not proper to prove that he committed other crimes, although of a like nature."

In that case the court held further that as an exception to the general rule similar acts of a person may be proven for the purpose of showing knowledge, intent, or design which are elements of fraudulent conduct.

At page 808, the court points out that the rule applies to civil cases as well as to criminal cases as follows:

> "All of the authorities quoted above have reference to evidence in criminal cases, but the principle has a place in civil cases as well. Professor Wigmore (1 Wigm. Evid. Sec. 370) says: 'The peculiarity of the question involved is merely whether, and under what conditions, other similar acts are receivable to show knowledge, intent or design as to the act charged. This question is of much less frequent occurrence in civil than in criminal cases merely because the issues of intent and the like are less commonly open in civil cases; but whenever knowledge, intent or design is relevant in a civil case, the principles are equally applicable.' "

In *State* v. *Neuman,* 73 N. J. L. 202, at page 205, the Supreme Court said:

> "This testimony was admitted over objection, and it seems to us was clearly incompetent. In the case of *State* v. *Bullock,* 36

Vroom 557, 574, the Court of Errors and Appeals declares that on the trial of the accused for a crime, it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that the accused would be more likely to commit the crime charged in the indictment. It is not relevant to show that the defendant has committed other similar crimes that are not connected in any way with the one in question. In the Bullock case the defendant had testified on cross examination that he had never had any previous trouble with any person whatever, whereupon the state called a man named Campbell to contradict this story and prove the occurrence of an assault upon him by the defendant. The admission of Campbell's testimony was held to be error, and for that reason the conviction was set aside."

In *Temperance Hall Assoc.* v. *Giles,* 33 N. J. L. 260, at page 263, the Supreme Court said:

"The rule is everywhere stated, in general terms, that the evidence must be confined to the issue. This rule excludes all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. 1 Greenleaf's Ev. Sec. 52.

"It is not practicable to lay down any principle by which a judge should be governed in determining whether any class of facts offered to be proved, comes short of the requisite of affording a reasonable presumption as to the matter in issue, but the inclination of the cases is to exclude all proof of facts which are *res inter alios acta,* unless their probative force, as presumptions, clearly appears, for the obvious reason that the other party cannot be prepared to meet such proof by counter proof, as to the truth of the facts offered."

In *Scull* v. *Skillton,* 70 N. J. L. 792, at page 793, this Court held:

> "Those that relate to the overruling by the court of evidence offered by the plaintiff have no force, because the evidence so offered was remote and immaterial. It did not prove, nor tend to prove, that the defendant was a principal or proprietor in the conduct of the Hotel Champlaine for the season of 1899, for the use of which the goods were claimed by the plaintiff to have been furnished. That at another time, and with another hotel, the relationship was such between this third person and the defendant that the latter paid the debts contracted by such person, had no legal significance in, or bearing upon, the issue on trial."

The reasons for the rule are stated in 22 C. J. 744, as follows:

> "Courts have felt that in such cases the jury could not well be permitted to consider the inference at all without giving it undue importance; that, so far as the consideration of similar acts or occurrences had weight, it would probably be overestimated. They have also realized the practical inconvenience of trying a number of collateral issues at the same time, and the mischief of protracting trials, surprising, and otherwise prejudicing litigants, by permitting the use of evidence so well calculated as to bewilder and mislead a jury."

The error of the Court in admitting the transactions with Dudley is further emphasized by the reference thereto in the Court's charge. The Court instructed the jury as follows (p. 121, ll. 10-25):

> "Now, I told you that I would speak about these letters which were testified to by Mr.

> Dudley. It appears that two companies, with which Mr. Dudley was connected, submitted their claim to the defendant company, and those claims were paid, as I understand it, in full—perhaps not—certainly the claims were settled by the company; and it is insisted, on behalf of the plaintiff in this case, that since Carle was the one who had the contract for the completion of this work, the company's recognition of and the payment in full of the Dudley claims were ratifications by the defendant company of the acts of Carle; and without any other explanation you would have a right to consider whether or not that was not so."

Exception was duly noted to this instruction (p. 126, l. 40 to p. 127, l. 10). That exception was preserved in the grounds of appeal (p. 157, ll. 1-20). This instruction is erroneous for two reasons: first, there was no claim of ratification; second, the testimony of Wheeler was uncontraverted that the payment of the Dudley and Northwestern claims was under the bond before the penalty of the bond had been exhausted.

The present suit was not instituted until September 7, 1929, although it was based on a claim which arose in September, 1923 (p. 3, l. 30) six years before. The payments to Dudley and Northwestern were not made until November 7, 1923 (pp. 136, 138). Carle's written order to the plaintiff was made on May 16, 1923, six months before. How could payment six months later prove Carle's authority six months before? The evidence was undisputed that those claims were paid under the bond obligation whereas the plaintiff right from the beginning was claiming that the defendant was the contractor and not the surety under a bond (p. 134, ll. 1-10). It is apparent that

the defendant would not be the contractor because if it were, its bond penalty would be eliminated with the result that it would be liable for any and all claims even though in excess of the bond penalty.

It is submitted that the court erred in permitting the evidence as to the payment of the claims of Northwestern Manufacturing Company and Dudley-Curry Electric Co. Also, in permitting the jury to infer from the payment of those claims that Carle had authority to purchase the pumps from the plaintiff or that defendant ratified Carle's said purchase.

IV

The Court denied defendant's motion for a direction of verdict whereas it should have been granted, because there was no evidence that the defendant had entered into any agreement with the plaintiff to purchase the pumps. There was no evidence that Carle was acting as defendant's agent in his dealings with the plaintiff.

The grounds in support of the motion were as follows (p. 111, l. 20–p. 112, l. 10):

> "First, that there is no evidence that the defendant entered into any agreement with the plaintiff whereby the defendant agreed to pay this alleged bill, which is annexed to the complaint;
>
> "Second, that all of the evidence in this case is limited to alleged statements made by this man Carle, which statements of Carle are not binding, under the evidence, on this defendant;

> "Third, that there is no evidence that Carle was authorized, with respect to the Sayreville job, to obligate the defendant in any way to pay this bill of the plaintiff."

The motion was denied and exception noted (p. 113, l. 40–p. 114, l. 15). This exception is preserved in the grounds of appeal (p. 152, l. 10). The court ruled as a matter of law that this action was not against the bond of the defendant (p. 113, ll. 35-40). The only theory upon which the defendant could be held was that it was the contractor for the completion of the contract with the Borough of Sayreville upon the default of Proctor and that Carle was the duly authorized agent of the defendant when he ordered the pumps from the plaintiff.

Proctor does not support the contention that Carle was acting as agent for the defendant. Proctor said that Carle was acting in his own behalf. He testified that after his default he had a meeting of creditors which was attended by Carle (p. 42). He had a large investment in tool equipment which he was anxious to save. The creditors' committee refused to finance the contract. Proctor desired to assign the contract to another contractor. He could not get another contractor to take it over. Carle said he would take over the contract (p. 44, l. 20). Proctor then said to Carle, "If you take over the contract, how do you propose financing it, and where will you get somebody to do the engineering in connection with prosecuting the work?" Carle replied that he would get a friend of his to do the engineering work and that he would get the finances from the defendant (p. 44, ll. 20-30).

The foregoing testimony makes it clear that Proctor understood, so far as words could convey

meaning, that the defendant was not taking over the contract, but that Carle individually was. That Proctor so understood is clear from what followed. Proctor then said to Carle that if the defendant would finance Carle, why should not the defendant finance him, Proctor? To this Carle replied that the defendant would not do so (p. 44, l. 30–p. 45, l. 10). Proctor then said to Carle that he would give Carle all the co-operation he could so as to save his tool equipment worth approximately $15,000. He gave Carle copies of all of the orders for material placed with the various dealers and manufacturers and Carle assured him that he would return to Proctor the tool equipment when the job was completed (p. 45, ll. 1-20).

Proctor said that the foregoing was all the conversation with Carle (p. 45, ll. 20-25). Proctor also testified that Carle personally took the assignment of the contract which Proctor held with the Borough of Sayreville (p. 46, ll. 1-10). Exhibit D-3 for Identification (p. 146) demonstrates that the assignment to Carle was not to him as the agent of the defendant. This exhibit was excluded and will be dealt with later.

Proctor's testimony, instead of supporting the plaintiff's claim, destroyed it, because Proctor unequivocably testified that the completion contract was taken over by Carle personally and individually and not as the agent of the defendant.

Whinery, plaintiff's agent in the transaction with Carle, did not meet Carle until after Proctor had defaulted. He first met Carle at the creditors' meeting in the Spring of 1923 (p. 47, ll. 30-40). Not only was Carle present, but there were two other persons present who apparently (according to Whinery) represented the defendant

(p. 48, ll. 10-30). In Point II, *supra,* we deal with the objectionable character of the conversations of Whinery with Carle. Whinery did not agree at the meeting to give Carle the pumps. He refused to do so and said that he would not give any order to ship the pumps to Sayreville "until we had some written confirmation of his verbal instructions" (p. 49, ll. 20-255). Carle told Whinery that he would send the written confirmation within the next two or three days. The written confirmation was not sent. Whinery went to the offices of the defendant and "asked for Mr. Carle." He again asked Carle for the written order. Carle assured Whinery that he would obtain the order and send it to him within a few days (p. 50, ll. 20-30). Another ten days or two weeks went by and still there was no written order (p. 50, ll. 30-35).

Some time later, shortly after May 16, 1923, Whinery received a letter, not from the defendant, not from any officer or agent of the defendant or any person having a title or office with the defendant, but a letter from Carle dated May 16, 1923, which on its face plainly shows that it is not written by any authorized agent of the defendant, but by L. W. Carle individually, in which he personally says: "I will pay for same (the pumps) as per your agreement of November 8, 1923 (with Proctor), $3,055 in thirty days and balance in sixty days" (p. 51; p. 131, l. 30–p. 132, l. 10). It is important to note that this letter is signed simply "L. W. Carle." It is on the stationery of the defendant with Carle's name in the upper left-hand corner (see supplement to state of case). But there is nothing after Carle's name and nothing in the letter indicating that he had

authority of any kind to enter into any such contract for the defendant.

The next letter from Carle, dated May 23, 1923, addressed to Whinery, likewise is an individual personal letter by Carle, in which he speaks in the first person. There is no designation after his name that he held any position with the defendant and no reasonable person could have believed from the receipt of that letter that it was written by Carle as a duly authorized agent of the defendant, but rather the only conclusion that could be reached by any honest man is that it was written by Carle for himself alone (p. 132). Certainly there was no evidence in the case of any kind indicating that Carle had any right to write it as the authorized agent of the defendant.

The next letter was from the plaintiff, addressed to the defendant, "c/o Mr. L. W. Carle," dated November 6, 1923 (p. 139). This letter was given by Carle to the defendant. The defendant so stated through its superintendent, who signed himself as such in a letter to the plaintiff, dated November 16, 1923 (p. 135). Foley stated that he would check the matter. Three days later, on December 10, 1923, Foley, signing himself superintendent, answered the letter, stating that Carle was in no way acting for the defendant in the matter, but, on the contrary, that Carle was acting in his individual capacity in completing the Sayreville job (p. 144). On May 20, 1924, plaintiff's attorney was likewise advised by Mr. Wheeler, counsel for defendant, in a reply to a letter by the attorney (p. 145).

In Point III, we gave the testimony of Dudley with respect to the separate and distinct transactions which he conducted for the Northwestern Manufacturing Company and the Dudley-Curry Electric Company.

The last witness for plaintiff was Gaus, its manager, who first came in contact with Carle shortly before May 16, 1923, when he went to Carle's office to get the order for the pumps (p. 73, ll. 20-40). His talk with Carle on this occasion was objected to because there was no proof that Carle was authorized to speak for the defendant. The court permitted the question over objection (p. 75). That exception is preserved in the grounds of appeal (p. 150, ll. 1-10). Without presenting the exception in a separate point, we wish to press it here. Gaus asked Carle for the written order for the pumps. Carle replied that he saw no reason why there should not be a written order. Gaus then asked Carle who was completing the job and Carle said the defendant (p. 72, ll. 30-40). Carle was dead at the time of the trial (p. 74, l. 40). He had never seen Carle before the conversation in question (p. 77, ll. 10-20).

Gaus did not get the written order, although he and Whinery had been after it for some time (p. 79). Carle eventually sent it as a letter by mail. Gaus read the letter, which is supposed to be the order dated May 16, 1923 (p. 78; p. 131, l. 30), the day after it was received and knew it was signed individually by Carle and not by the company. The form of the letter did not impress him as peculiar.

The defendant called Wheeler, who testified that he was a member of the bar of New York and counsel for defendant in complete charge of its bond work (p. 95, l. 25, *et seq.*). He began his employment with defendant in October, 1919 (p. 95, ll. 20-30). He gave all of his time to defendant (p. 95, ll. 30-40). He knew Carle and knew his connection with defendant in 1923 and 1924 (p. 83). Carle's only connection was to solicit

bonds. Carle was paid a commission for such bonds as he obtained (p. 85, ll. 1-20). Carle did no other work for the defendant (p. 85, l. 10). Carle took the assignment for the completion of the Sayreville job in his own name (p. 86, ll. 1-20). Carle had nothing to do with the adjustment of law suits or claims arising out of the default of Proctor (p. 86). With respect to the completion of the job, Carle did nothing for the company, but for his own account alone (p. 86, ll. 1-10; p. 90, ll. 1-30). Carle was not in the claim department of defendant and had no connection with it (p. 87, ll. 1-15).

The defendant did not receive any claim under its bond from the plaintiff, but a claim as contractor. That claim was denied (p. 88, ll. 1-10). No suit under the bond was started within the time required by law (p. 89, l. 20). No claim was filed within eighty days after acceptance of the job (p. 85, l. 25). Other claims were filed against the bond and paid until the penalty of the bond was exhausted (p. 89; p. 91).

In 1922 and 1923 Carle had desk room in the general offices of the defendant, which he was permitted to use in soliciting his bond business (p. 91, l. 20; p. 92, l. 10). Other solicitors of business also had desk room (p. 92, l. 20). They received a commission for the business they obtained (p. 92, l. 40). It was the common practice of other insurance companies to provide desk room for solicitors of business (p. 93, ll. 1-10). After Carle defaulted on the Sayreville job the Borough advertised and relet the contract to a man named Gilbert and he completed the contract (p. 93, ll. 1-20). Carle's son was never employed by the defendant in any capacity (p. 99, ll. 10-20). Wheeler said stationery was printed for brokers

soliciting business, which had their names in the upper left-hand corner. That other insurance companies did likewise. Every insurance agent or broker has the stationery of half a dozen companies with his name in the upper left-hand corner, but without designation of any authority or office (p. 106, l. 40; p. 107, l. 10).

The claims of Northwestern Manufacturing Company and Dudley-Curry Electric Company were presented as claims under the bond and were so paid (pp. 108-109).

The foregoing is a summary of all the testimony. We refer to the cases cited in Point I, which show that in every instance (where a jury question was raised) the plaintiff was led to believe that the person who acted for the defendant had apparent authority to do so by some act or statement made by an executive officer or authorized agent of the defendant. In the case at bar there was no such apparent authority given to Carle by anyone.

In *Smith* v. *Del. & A. T. & T. Co.*, 64 N. J. Eq. 770, it was the general manager of the defendant, Mr. Westbrook, who acted for the defendant and who received the letter addressed to the defendant company and who offered to settle for the defendant. There was no dispute about that. In *Heckel* v. *Cranford Golf Club*, 97 N. J. L. 538, previous orders made by the steward were filled and the bills therefor sent to the club and paid by the club and the president of the club had stated to the plaintiff that the defendant would pay the bills incurred by the steward. In *White Door Bed. Co.* v. *U. S., Etc., Co.*, 146 Atl. 216, the person who acted for the defendant was one of its very active vice-presidents, the president being nothing more than a figurehead. In *Feist* v.

Feist, 150 Atl. 406, the defendant admittedly sent his son, a New York lawyer, together with a New Jersey lawyer, to consummate a lease agreement, after having previously introduced his son as his representative.

Carle was not held out by the defendant as its representative to either Proctor or the plaintiff. If the alleged conversations with Carle (who was dead at the time of the trial) were out of the case, there would be no evidence to support the plaintiff's claim, even as against Carle. Proctor's testimony proves the defendant's contention that Carle was acting for himself. Whinery and Gaus testify to a time and occurrence subsequent to Proctor's default. The order from Carle to the plaintiff is an individual personal order. There was no proof that he was authorized to write the order as the agent of the defendant, even if it be assumed that the letter on its face may be construed as a letter by the defendant to the plaintiff.

As soon as plaintiff wrote to the defendant, it was immediately informed that Carle had no authority.

We submit that the court should have directed a verdict for the defendant.

V

The letter, Exhibit P-2, was admitted.

This is the letter from Carle individually to Whinery ordering the pumps. It is dated May 16, 1923 (p. 131, l. 30). At the time that it was offered (p. 53) there was no proof that Carle had any right on behalf of the defendant as its agent to order the pumps. We have discussed this question in Points II and IV.

We submit that without proof that Carle was authorized to write the letter it should have been excluded. Exception was duly noted to its admission (p. 53, ll. 20-30). This exception is preserved in the grounds of appeal (p. 150, ll. 10-20).

VI

The letter, Exhibit P-3, was admitted in evidence.

This letter is dated May 23, 1923 (p. 132). It was offered over objection, and exception was noted to its admission (p. 55, ll. 20-40). This letter should have been excluded for the same reasons as Exhibit P-2. There was no evidence that Carle had any right to write it as the agent of the defendant. The exception is preserved (p. 150, l. 20).

VII

The letters dated November 7, 1923, from W. A. Foley, superintendent of the defendant, to Northwestern Manufacturing Company and Dudley-Curry Electric Company, should not have been admitted.

These letters were duly objected to (p. 65, l. 30–p. 57, l. 10; p. 68, l. 40–p. 69, l. 20). These exceptions are preserved (p. 150, ll. 30-35). The reasons why these letters should have been excluded are fully given in Point III. That argument will not be reiterated, except to say that the letters dealt with separate and distinct acts and transactions between the defendant and the two

companies to whom they were addressed. There was no evidence that those claims were identical with the claim of the plaintiff. The undisputed evidence was that the claims were presented under the bond obligation of the defendant and within time under the statute. The letters are printed in the record (pp. 136, 138).

VIII

Certain questions put to the witness, Wheeler, were overruled.

These questions were addressed to Wheeler to prove the lack of authority from the defendant to Carle to order the pumps or to represent the defendant in the completion of the Sayreville job.

Wheeler was counsel in bond matters for the defendant, having been connected with the defendant from October, 1919, up until the time of the trial and during the period that Carle was supposed to be acting for the defendant in the completion of the Sayreville job (p. 95, ll. 1-40). He was head of the Bonding Legal Division, in complete charge of all bond matters, and knew Carle's connections with the company in 1922 and 1923 (p. 96, l. 1–p. 97, l. 20). He gave his entire time to the defendant and had no other clients. He worked for the defendant on a salary basis (p. 84). He knew Carle personally (p. 84, l. 35–p. 85, l. 20). Wheeler was then asked the following questions, which were overruled:

> "Q. What was it (meaning Carle's connection) with the company——" (p. 83, l. 20).
>
> "Q. Now, will you state what his connection with the company was?" (p. 84, l. 25)

> "Q. And in this Sayreville job, did he (Carle) have any work to perform for the company, with respect to the completion of that job, after Proctor defaulted?" (p. 85, ll. 25-30)

The exceptions to the overruling of these questions are preserved in the grounds of appeal (p. 151, ll. 1-20). The witness should have been permitted to answer these questions. Assuming there was evidence as to the alleged apparent authority of Carle, it was proper for the defendant to prove that Carle had no actual authority. Such evidence was material and pertinent to the inquiry. Carle's only connection with the defendant was to solicit bonds on a commission basis. Carle had no actual employment with the defendant. He received no salary from it (p. 85, ll. 1-20). *The plaintiff, by very far-fetched inferences, attempts to hold the defendant as the contractor on the theory that Carle was its agent, and this almost six years after the alleged obligation was incurred. This suit was brought only a few days before the statute of limitations had run against the claim, even in its present form. Carle was dead. So was Foley (p. 97). A suit under the bond was long since barred. The defendant had exhausted the penalty of its bond, viz., $50,000, by actually paying out that amount in satisfaction of other claims. The motive behind the present suit stands revealed.*

IX

The Court overruled the offer by the defendant of Exhibit D-3 for identification.

This exhibit was offered to prove that Carle was the contractor; that the contract was assigned to him and not to the defendant. The exhibit is the consent of the defendant given to the Borough of Sayreville to the assignment of the contract to Carle. It was written on April 21, 1923, long before the present controversy arose, and therefore could not in any sense be a self-serving declaration. It was written before Carle ordered the pumps from the plaintiff. It was an original (p. 93, ll. 20-40; exhibit printed p. 146). given to the Borough so that the Borough might assign the contract without losing the bond obligation of the defendant. This exhibit was objected to on the ground that the written consent was not the original, although it was a duplicate original (p. 93, ll. 20-40); exhibit printed p. 146). Also, it was objected to on the ground that it was not binding on the plaintiff. The trial court stated that he thought possibly it was objectionable as a copy, but that he was not impressed with the other objection. The court asked where the original copy was. The witness testified that it was on file with the Borough. The witness was Wheeler, who was in charge of the entire matter. He testified, "I handled the settlement with the Borough of Sayreville."

Wheeler further said that he knew of his own knowledge that the offered exhibit was a duplicate original of the one on file and that the Borough acted on the strength of this exhibit in awarding

the completion contract to Carle. This duplicate original came from the files of the defendant (p. 94).

The court was about to admit the exhibit when counsel for plaintiff urged the objection that the exhibit was a self-serving declaration as to the standing of Carle in regard to the Royal Indemnity Company. This was based on the last sentence in the written consent offered as the exhibit (p. 146). We submit that there was no merit in either the contention that it was a copy or the contention that it was a self-serving declaration. It was not a copy, but a duplicate original made at the same time as the original on file with the Borough. They were identical in form. The defendant had one duplicate original and the Borough the other. This consent was in fact an agreement upon which the Borough acted. Each party to the agreement had a copy. It is absurd to say that the duplicate original of the defendant was not just as much an original as the duplicate original of the Borough. It is just as absurd to say that one party to an agreement must produce the other party's copy of an agreement before the agreement is evidential.

The second objection is equally futile, because in no sense could this written consent to the assignment of Carle which was acted upon, be regarded as self-serving. It was written on April 21, 1923, while the alleged order from Carle to the plaintiff for the pumps was given on May 16, 1923, almost a month later (p. 131). If the Borough did not wish to accept Carle as the contractor, it did not have to do so. That it did is plain from the acceptance of the consent of the defendant contained in the Exhibit D-3, upon

which the Borough acted and awarded the completion contract to Carle.

This document, if admitted, would have strongly tended to prove the defense that Carle was the contractor and that the defendant was not.

X

The Court permitted the following questions to the witness Wheeler:

Wheeler had testified that the contract for the completion of the Sayreville job had been assigned by the Borough to Carle with the written consent of the defendant. He was then asked the following questions on cross examination by the plaintiff:

> "Q. I suppose you were familiar with Carle's financial responsibilities?" (p. 101, ll. 1-5)
>
> "Q. Did your company investigate to determine whether Carle was financially able to go through with this contract on his own account?" (p. 101, l. 20)
>
> "Q. Do you know whether any investigation was made by the Royal Indemnity Company as to the financial standing of Mr. Carle?" (p. 103, l. 20)

These exceptions are preserved in the grounds of appeal (p. 151, ll. 25-40).

The objection to each exception was on the ground that it was immaterial, incompetent and irrelevant; also that it was not cross examination (p. 101, ll. 5-15 and 20-30).

The Borough of Sayreville gave to Carle the completion contract. The defendant merely gave its consent to the assignment of the contract by

Proctor to Carle. If the Borough and Proctor were willing to accept Carle as the completion contractor, the defendant by its consent merely held intact for the benefit of the Borough its bond obligation as surety.

Whether Carle was financially responsible or not, made not the slightest difference one way or the other. The questions therefore as to what investigation the defendant made to determine Carle's financial responsibility was of no probative value and it was not cross examination. It was immaterial to the inquiry. It was irrelevant. The only purpose such an inquiry served was to prejudice the defendant in the eyes of the jury.

XI

The trial court erroneously submitted to the jury the question whether or not the defendant ratified the acts of Carle and thereby made those acts the acts of the defendant.

The trial judge during his instructions to the jury repeatedly stated that the jury could find in favor of the plaintiff if it found that the defendant had ratified the acts of Carle in ordering the pumps from the plaintiff. The first statement of that rule was as follows (p. 118, ll. 30-40):

> "But sometimes a corporation is bound by the implied authority to certain people who may be employees, who may be agents, who may be nothing but salesmen, even, acting upon commission, if the corporation by acts which it permits its employees or agents to exercise in its behalf, *or acts of such agents or employees which it afterwards ratifies,* so as to lead the business public to understand

that that employee or agent has authority of the company to act as he does for that company."

Another statement of it was as follows (p. 122, l. 30–p. 123, l. 10):

> "but if you determine that the greater weight of the evidence in the case shows that the acts which this defendant company permitted Mr. Carle to exercise, with its apparent authority, *or acts which they afterwards ratified,* would lead a reasonably careful business man to believe that its agent, this man Carle, had implied authority from the company, and that the greater weight of the evidence shows that Carle did not enter into this contract, take the assignment of this contract with the Borough of Sayreville, in his individual capacity, but as the agent of and for the Royal Indemnity Company, and that it was really the Royal Indemnity Company which performed this contract and which wrote this letter of May 16th, and that the plaintiff furnished these bills actually to the Royal Indemnity Company, and that its bill is properly against the Royal Indemnity Company, then the plaintiff is entitled to your verdict for the full amount of this bill, which is $3,165, with seven years' interest."

In addition to submitting the question of ratification to the jury, the trial court permitted the jury to infer and conclude that there was ratification because of the payment by the defendant of the claims of Northwestern Manufacturing Company and Dudley-Curry Electric Company. That instruction is as follows (p. 121, ll. 10-25):

> "Now, I told you that I would speak about these letters which were testified to by Mr. Dudley. It appears that two companies, with which Mr. Dudley was connected, submitted their claims to the defendant company, and

> those claims were paid, as I understand it, in full—perhaps not—certainly the claims were settled by the company; and it is insisted, on behalf of the plaintiff in this case, that since Carle was the one who had the contract for the completion of this work, *the company's recognition of and the payment in full of the Dudley claims were ratifications by the defendant company of the acts of Carle; and without any other explanation you would have a right to consider whether or not that was not so.*"

We submit that permitting the jury to conclude that the defendant ratified Carle's acts and to instruct the jury that they might find that there was a ratification of the acts of Carle, even though there was no evidence that he was previously authorized to act, was erroneous. The pleadings did not set forth any such theory. There was no proof at the time of the trial that there was any ratification of Carle's acts. On the contrary, the proof is undisputed that as soon as the defendant knew that Carle was purporting to act for it, it immediately wrote two letters to the plaintiffs denying Carle's right to do so (pp. 144-145). The court also erred in permitting ratification to be inferred from the payment of the Dudley claims. We have shown in Point III that the payment of those claims could not be regarded as a ratification of Carle's act in his dealing with the plaintiff. Under the court's charge, the jury could find the defendant liable merely on the theory of ratification. That conclusion could be arrived at under the charge simply because the defendant paid two claims, one by the Northwestern Manufacturing Company and the other by the Dudley-Curry Electric Company on Nov. 7, 1923 (Carle order for 20 pumps was given on May 23, 1923),

under circumstances which were not disclosed, except only so far as the defendant disclosed them, namely, that said claims were paid under a bond obligation which, if a fact, would deprive the payment of those claims of any evidential value with respect to Carle's authority to act for the defendant with respect to the plaintiff's claim. Those portions of the charge were duly excepted to (p. 124, ll. 25-35; p. 126, l. 30; p. 127, ll. 10-20). These exceptions are preserved in the grounds of appeal (p. 154, ll. 20-30; p. 157, ll. 1-20; p. 157, ll. 25-40).

XII

The Court's charge contains many misstatements of fact, all prejudicial to the defendant.

The trial court instructed the jury that letters were written to the defendant which were answered upon the stationery of the defendant, sometimes by Mr. Carle and sometimes by others connected with the company (p. 119, ll. 30-35). It is not a fact that the letters written to the company were answered by Carle. If we examine the exhibits, all of which are printed in the state of case (beginning p. 130), none will be found written to the company and answered by Carle.

The letters written to the company were all answered either by Foley, the superintendent, or Wheeler, counsel.

In the same breath the court told the jury that all of these letters (which were not written by Carle at all) are answers from the defendant and contained the same identification number (p. 155, l. 35–p. 156, l. 5). Also, "All the letters which

have numbers upon them by whomsoever they are signed, have that same claim number and perhaps this is more important than all in this case'' (p. 156, ll. 10-15). Here the court again is in error, because the two letters written by Carle to the plaintiff, dated May 16, 1923, and May 23, 1923, have no claim number upon them (pp. 131, 132). Neither has the letter written by Carle to the Dudley-Curry Electric Company (p. 137). These are the only three letters written by Carle. The next error made by the court is the statement that when this matter was reported to the defendant, it was Mr. Carle, and he only, who appeared for the company in Mr. Proctor's office to straighten out the matter with Mr. Proctor and the plaintiff (p. 156, ll. 20-30).

There is no evidence that the matter was reported to the defendant prior to the creditors' meeting in Bayonne which Carle attended. There is no evidence that as a result of any such report Carle was sent by the defendant to Bayonne. There is no evidence that Carle was the only one that appeared at Bayonne for the defendant. On the contrary, the evidence was uncontradicted that two other alleged representatives of the defendant appeared at Bayonne (p. 48, ll. 15-30). This last misstatement was so inaccurate that the Court called the jury back and corrected it (p. 128, ll. 30, *et seq.*). There was no straightening out of the claim of the plaintiff at the Bayonne meeting because the plaintiff then had no claim. It had not accepted Proctor's order for the pumps. It refused to accept Carle's order for the pumps at the Bayonne meeting and it was not until weeks or months later that Carle at the earnest and repeated solicitation of the plaintiff wrote his letter of May 16, 1923 (p. 131).

Exception was duly noted to the portions of the charge containing these misstatements of fact (p. 125, ll. 10, *et seq.*). These exceptions are preserved in the grounds of appeal (p. 155, ll. 10, *et seq.*).

To say that the most important thing in the case was the fact that all the letters have the same numbers upon them by whomsoever signed, that is, have the same claim number, is in itself an erroneous instruction even if it accurately stated the testimony. As a matter of fact, Carle's letters did not have any numbers. The letter written by Wheeler dated May 20, 1924, to the plaintiff had three different numbers (p. 145). The letter written by Wheeler to the Borough on April 21, 1923, did not have on it the number that was on the other letters although it had one of the numbers that appeared in his letter of May 20, 1924, to the plaintiff (p. 146). The letter written by Foley to the plaintiff dated December 10, 1923, has a different number than the one to the Borough although it is one of the three numbers in the letter of Wheeler to the plaintiff dated May 20, 1924 (p. 144). We cannot conceive how anyone could draw any conclusion from the various numbers with respect to Carle's authority to act for the defendant. Undoubtedly when Proctor defaulted a claim file was made up by the defendant, probably a number of claim files. There were many claims. There was probably a bond file number. There was also probably a general file number. Three of these different numbers appear in Wheeler's letters of May 20, 1924 (p. 145). But, assuming for the argument that there was only one number given to this case by the defendant it is inconceivable how that proves anything. If we complicate the problem by three different num-

bers or more, the difficulty of making any deduction is even more profound. *To say to the jury that the most important thing in the case was the fact that all the letters by whomever signed had the same claim number, is in fact to tell the jury that the defendant thereby made itself liable to the plaintiff, for no other conclusion is to be drawn from this instruction.*

XIII

CONCLUSION

For these reasons we respectfully conclude that the judgment below should be reversed and that a *venire de novo* should be ordered.

EDWARD A. MARKLEY,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

AMERICAN WELL WORKS, Plaintiff-Respondent, vs. ROYAL INDEMNITY COMPANY, Defendant-Appellant.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF FOR RESPONDENT.

Facts.

On May 16, 1923, the defendant-appellant entered into an agreement with the plaintiff-respondent whereby the plaintiff-respondent agreed to manufacture and deliver certain pumps for a pumping station at Sayreville, N. J., and the defendant-appellant agreed to pay for the same. The pumps were manufactured and delivered by the plaintiff-respondent and are now in use, but the defendant-appellant repudiated its agreement and payment has not been made.

The contract for the erection of the Pumping Station at Sayreville was originally made between John R. Proctor Inc. and the Borough of Sayreville, on November 8, 1922. The defendant-appellant Royal Indemnity Co. had executed a bond, as surety for the completion of the work.

The negotiations between the defendant-appellant and the Proctor Company were carried on by

the defendant-appellant's representative L. W. Carle. The Proctor Company defaulted on its contract. Subsequently there was a creditors meeting at the office of John R. Proctor Inc., at which meeting Mr. Whinery, representing the plaintiff-respondent, and the said L. W. Carle, representing the defendant-appellant, were present. In behalf of the defendant-appellant, the said Carle agreed that the defendant-appellant would pay for the pumps, which had not yet been delivered, if the plaintiff-respondent would proceed with the contract. The representatives of the plaintiff-respondent refused to proceed with the contract, unless and until they were furnished with a written confirmation of this agreement. Mr. Whinery and Mr. Gaus each called at the office of the Royal Indemnity Company in New York City. Mr. Gaus inquired, on entering, for the gentleman who was handling the Sayreville job. He was sent to another floor of the building. On the door of that department was the name of the Royal Indemnity Company, the defendant-appellant in this cause, and underneath that was the name of L. W. Carle, and other names. He entered that department, asked for Mr. Carle, was shown to a young man who said he was Mr. Carle, but when he mentioned the Sayreville job that gentleman said that Mr. Gaus should see his father, who turned out to be Mr. L. W. Carle. Mr. L. W. Carle was established at a desk, either in the corner of the large room, or behind a partition there, was familiar with the entire transaction, and promised to mail the letter confirming the agreement. Thereafter, a letter, on the stationery of the Royal Indemnity Company was received by the representative of the plaintiff-respondent, dated May 16, 1923. The name of L. W. Carle was printed on the side of the letterhead, without designating or limiting his authority to

represent the company. Royal Indemnity Company furnished these letterheads to Mr. Carle, and well knew that his name appeared thereon. The plaintiff-respondent thereupon proceeded with the manufacture of the pumps and delivered them to the job at Sayreville, fully believing that the Royal Indemnity Company was responsible, would pay for the pumps and relying upon the Royal Indemnity Company alone for such payent.

Not receiving payment for the pumps, on November 6, 1923, plaintiff-respondent addressed a letter to the Royal Indemnity Company at its office 84 William Street, New York City, demanding payment for the pumps. On November 16, 1923, W. A. Foley, superintendent of the defendant-appellant, Royal Indemnity Company, addressed a letter to the plaintiff, acknowledging receipt of the letter and bill of November 6th, 1923, and advising that they were checking over this account, and that the plaintiff-respondent would hear from the defendant-appellant shortly. The plaintiff-respondent did not receive any further reply to its letter of November 6th, and on December 7, 1923 the plaintiff-respondent again wrote to the defendant-appellant demanding payment of the bill. It was only after receiving this second letter that Mr. Foley under date of December 10, 1923, over a month after the bill and letter of November 6th, 1923 had been received, addressed a letter to Mr. Whinery, the representative of the American Well Works, in which he repudiated the agreement that the defendant-appellant would pay for the pumps, and it was this letter of December 10th, 1923, which first apprised the plaintiff-respondent of the claim of the defendant-appellant that L. W. Carle was not authorized to bind the defendant in regard to this transaction.

The Northwestern Manufacturing Company had

furnished the motors for these very pumps, and the Dudley Curry Electric Company had furnished the controls for the motors on these pumps. Mr. Dudley, representing both of the aforementioned companies had several conferences with Mr. Gaus, representing the plaintiff. These conferences were prior to the time when the pumps, motors and controls were delivered to Sayreville. As a result of his conferences with Mr. Gaus, Mr. Dudley communicated with Mr. L. W. Carle of Royal Indemnity Company, and entered into an agreement with him that the Northwestern Manufacturing Company and the Dudley Curry Electric Company would proceed with their contract to furnish the motors and controls for the said pumps, and that the Royal Indemnity Company would pay for the same. Northwestern Manufacturing Company and the Dudley Curry Electric Company did furnish the motors and controls for said pumps and delivered them to the job at Sayreville. Not receiving payment for the controls the Dudley Curry Company communicated with Mr. Carle, and under date of September 22, 1923, Mr. Carle, on the letterhead of the Royal Indemnity Company, on which his name was printed on the side, addressed a letter to Dudley Curry Electric Company, acknowledging receipt of the letter of September 21, 1923, and promised to pay for the controls on or about the first of October, 1923, and stated that the various obligations had been lined up and that the company was then in a position to pay them.

Under date of November 7, 1923, W. A. Foley, superintendent of the Royal Indemnity Company, on the letterhead of the Royal Indemnity Company, addressed a letter to Dudley Curry Electric Company, enclosing a draft in full for the controls, and on the same date W. A. Foley, superintendent of

the Royal Indemnity Company addressed a letter to the Northwestern Manufacturing Company, enclosing their check in full settlement for the motors. Both of these letters have the claim No. 4654, which claim number is identical with the claim number contained on the various letters written by the Royal Indemnity Company to the plaintiff-respondent, regarding its claim.

Mr. Foley, however, did not pay plaintiff-respondent for the pumps, and it is the contention of the plaintiff that in all its dealings with Mr. Carle, they believed and were justified in believing, that he was acting as the duly authorized representative of the Royal Indemnity Company, in the same manner that Mr. Dudley considered that his contracts were with the Royal Indemnity Company.

ARGUMENT.

POINT I.

Agency may be established either expressly, or impliedly, by the apparent authority which the employer knowingly permits the agent to assume, or which he holds the agent out to the public as possessing.

Counsel for the defendant-appellant has acceded to the above statement of the law, and in his brief, pages 9 to 16 he cites the cases which lay down this principle. They are as follows:

Smith vs. *Del. & A. T. & T. Co.*, 64 N. J. E. 770;
Heckel vs. *Cranford Golf Club*, 97 N. J. L. 538;
White Door Bed Co. vs. *U. S. Mortgage & T. Co.*, 146 Atl. (E & A of N. J.) 216;
Feist & Feist vs. *Spitzer*, 150 Atl. (E & A of N. J.) 406.

In *Heckel* vs. *Cranford Golf Club*, 97 N. J. L. 538, at page 540, *supra*, the Court quotes from the case of *Law* vs. *Stokes*, 32 N. J. L. 249, and the important part of that decision for this discussion is as follows:

> "Beyond that he is liable for the acts of the agent, within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing."

In the case of *White Door Bed Co.* vs. *U. S. Mortgage & T. Co.*, supra, the court, at page 218

quotes from the language of Mr. Justice Trenchard in *Wiss & Sons* vs. *H. G. Vogel Co.*, 86 N. J. L. 621, 92 Atl. 361, as follows:

> "As between the principal and third persons the true limit of the agent's power to bind the principal is the apparent authority with which (he) is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, * * * and the reason is that to permit the principal to dispute the authority of the agent in such cases *would enable him to commit a fraud upon innocent persons.*"

In *Feist & Feist* vs. *Spitzer*, supra, at page 406, the Court said:

> "It (the agency) may be conferred by a person in permitting another person to act in his behalf, sanctioning his acts in such a way as to indicate to the persons with whom he is dealing that that person has authority as his agent to bind him in that transaction."

It is singular that in all of the cases above cited, which cases are also cited in defendant-appellant's brief, pages 9 to 16, the court refused to reverse the court below, and in all of those cases the question of agency had been decided in favor of the plaintiff.

POINT II.

On an appeal, the order in which the proofs were introduced at the trial is not important, this being discretionary with the trial judge.

The defendant-appellant in his brief has examined the testimony of each witness independently of the other testimony in the case. It is respectfully submitted that the plaintiff-respondent is entitled at this time to consider the matter as it stood when the entire case was closed, and when the motion for a direction of verdict was made. It has been repeatedly held that on an appeal the Court will not reverse merely because the *order* of proofs was improper.

In the case of *Bunting adms. Allen*, 18 N. J. Law, 299, the Judge admitted evidence of what an alleged agent did in regard to the matter in controversy, before any evidence had been given that he was the agent of the party for whom he purported to act. In the progress of the trial however, it was sufficiently proven that he was the duly constituted agent of the defendant. In refusing a rule to show cause, at page 300, the court said:

> "It is objected, that the Judge admitted evidence, of the sayings and doings of an alleged agent of the defendant's, before any proof whatever of such agency had been given. This was certainly an irregularity; and if no evidence had afterwards been given to establish the agency, it would have been fatal to the verdict, unless the Judge before submitting the cause to the Jury had distinctly overruled the evidence, and told the jury they were not to regard it. And even then, it would perhaps be a proper ground for granting a new trial, unless it very satis-

> factorily appeared, that the jury had rendered just such a verdict, as they probably would and ought to have done, if such irregularity had not been committed. But, as in this instance, evidence abundantly sufficient to go to the jury, was afterwards given, that the person, whose doings and sayings had been proved, was the duly constituted agent of the defendant, and fully authorized to act for him in the premises; the court ought not to grant this rule, merely on the ground, that the acts of the agent were suffered to be proved, before his agency had been established. We cannot see, that any possible prejudice could have resulted to the party from this circumstance."

In *Cockran and Meloney* vs. *Taylor*, 77 N. J. Law, 195, the trial court had permitted the items from the plaintiff's ledger to be read to the jury, before the ledger had been properly proven, and before it had been marked in evidence. The ledger was later properly proven and marked in evidence. In holding that this was not a ground for reversal of the judgment, at page 196, the court said:

> "It is next objected that the court permitted items from the plaintiffs' ledger to be read to the jury when said ledger had not been properly proved and had not been marked in evidence. This was undoubtedly a technical error, but as the ledger was afterwards proved, and as we have just held, properly admitted in evidence, and the items therein might then have been read to the jury, no harmful error was committed by anticipating the proper time to read them."

In the case of *State* vs. *Blaime*, 137 Atl. 829, 5 N. J. Misc. Reports, 633, the court permitted a witness at the trial to testify as to the manner of operating a certain automobile, before the identity of the car had been established. Later in the trial

however, it was proven that the car in question was the one which the defendant was operating. In holding that the order of proof was not a ground for reversal of the judgment, at page 831, the court said:

> "The third point relied on for a reversal is 'that the trial judge erred in admitting, over the objections of counsel of defendant, testimony as to the manner of operating a certain automobile at a point remote from the scene of the accident, to wit, between 1½ to 3 miles from the point of the accident and without first proving the identity of the car in question to have been that of the plaintiff-in-error.' There was proof that the automobile in question was identified as the one which the defendant was operating. The fact that this identification was not made before the testimony was adduced as to the operation of the car before the collision took place is of no consequence, since the objection made goes only to the order of the coming in of the proof, and as there was proof introduced which tended to show that it was the car of the plaintiff-in-error, the objection is devoid of any legal force."

To the same effect *State* vs. *Dougherty*, 86 N. J. L. 525; 535: (reversed on another ground *State* vs. *Dougherty*, 88 N. J. Law 209).

To the same effect *State* vs. *James*, 96 N. J. Law 132-145.

Likewise it has been repeatedly held that refusal of the trial court to non-suit for failure of proof is not reversible error, if the defect was supplied by evidence taken in the further progress of the trial:

D. L. & W. Railway Co. vs. *Dailey*, 37 N. J. L. 526; 529.

Esler vs. *Camden & Suburban Railway Co.*, 71 N. J. L. 180; 181.

Benoliel vs. *Homac,* 87 N. J. L. 375; 376.
Sefler vs. *Vanderbeek & Sons,* 88 N. J. Law 636; 639.

In the case of *D. L. & W. Railroad Co.* vs. *Dailey,* supra, at page 529, the court said:

> "After the plaintiffs rested their case, the court below overruled a motion to non-suit, and this is assigned for error. Even if, at that point, there had been a failure of proof, the defect was abundantly supplied by evidence taken in the progress of the cause, and, therefore, the judgment would not be reversed."

The case of *Esler* vs. *Camden and Suburban Railway Co.* supra likewise holds that the failure to non-suit will not be a ground for reversal if the proofs are later supplied. At page 181, the court said:

> "But conceding for the present that a non-suit at this point should have been granted, we think there was later testimony that justified the court in submitting the case to the jury. Refusal to non-suit for failure of proofs is not error, if the defect was supplied by evidence taken in the progress of the cause."

In the case of *Benoliel* vs. *Homac,* 87 N. J. Law at page 376, the court said:

> "It is next contended that the non-suit should have been granted as to the defendant Czuzas because of failure of proof as to his membership in the defendant firm. But a complete answer to this contention is that a refusal to non-suit for failure of proofs will not justify a reversal if the defect was supplied by evidence thereafter taken in the progress of the cause. *Esler* vs. *Camden and Suburban Railway Co.,* 71 N. J. L. 180. As we shall hereafter point out, if there was

> such want of proof at the time the motion for non-suit was denied, it was supplied thereafter in the course of the trial."

In the case of *Sefler* vs. *Vanderbeek & Sons,* supra, the court at page 639 said:

> "It is also contended that the judgment should be reversed because of the refusal of the trial judge to grant the motion for non-suit made at the close of the plaintiff's case. Not so. If, as is argued, there was then no evidence that the person who invited the decedent to 'come upstairs' was the defendant's superintendent, that defect was supplied by the evidence thereafter taken in the progress of the cause. In such case a reversal would not be justified. *Benoliel* vs. *Homac,* 87 N. J. L. 375."

Therefore, in the case at bar, the plaintiff-respondent will discuss the question of Agency, as it stood at the time the defendant-appellant moved for a direction of verdict at the trial.

POINT III.

The Court is not justified in directing a verdict if there is any testimony tending to establish the facts necessary to the plaintiff's cause of action.

It is an established rule of law, that a verdict will not be directed in favor of a defendant, where the question at issue is doubtful, or where a jury would be justified on the facts proven to render a verdict in favor of the plaintiff.

On a motion for direction of verdict the court cannot *weigh the evidence.* Manifestly, that is the province of the jury, and if the facts and circumstances of the case leave any doubt as to the verdict, then the entire question should be submitted to the Jury.

This rule is stated in the case of *Dellabello* vs. *Central Railroad Co.,* 99 N. J. Law, 348; 350; as follows:

> "If there was any testimony, no matter how meagre, adduced on the part of the plaintiffs tending to show liability of defendants and no incontrovertible fact was established by the defendants which fact, as established, would constitute an absolute bar to the plaintiffs' right of recovery, the defendants were not entitled to succeed on either motion."

In the case of *Barry* vs. *Borden Farm Products Co.,* 100 N. J. Law 106; 108; the court said:

> "Motions for non-suit and for the direction of a verdict for the defendant, for the purpose of the motions, in effect admit the truth of the evidence, and of every inference of fact that can be legitimately drawn therefrom, which is favorable to the plaintiff, but deny its sufficiency in law; and where such evidence or inferences of fact will support a verdict for the plaintiff, such motions must be denied. *Weston Co.* vs. *Benecke,* 82 N. J. L. 445."

The ancient case of *Coxe* vs. *Field,* 13 N. J. Law 215 lays down the rule at page 219, as follows:

> "Fifth: The last supposed error of the court is for refusing to non-suit the plaintiff. On the other hand, the power to non-suit a plaintiff, is argued not to be in the court, because it can be exercised only by ordering him to be called; but it cannot prevent him from answering. The court, however, can declare that he has given no evidence in maintenance of his action, and can order him to be called for that reason; it will then have done its duty and be free from error. If a refractory plaintiff will not submit to the opinion of the court in this mild form, he

> will have a verdict ordered against his adversary without some evidence. Therefore, if the plaintiff did not give any evidence of his being the owner of these castings when the action was commenced he ought to have been called, and it would have been a great error not to have ordered it to be done. But if he gave any evidence of ownership, the court did right to leave it to the jury; and our only enquiry is, did he give any evidence of ownership."

In *Kearns* vs. *Waldron,* 76 N. J. L. 370, Mr. Justice Trenchard held that a verdict will not be directed for the defendant, if the evidence is conflicting and leaves the mind in a state of some doubt. In a situation where there is doubt, it is the province of the Jury and not of the Court to decide the issue. The Court in part says:

> "There was evidence that the defendants admitted to the plaintiff that they carried away the stones, and that the foreman of the defendants had told the foreman of the plaintiff that the stones had been sold by the defendants. While this was denied by the defendants' witnesses, it was clearly a question of fact for the jury to decide whether the defendants took the flagstones and converted them to their own use. The credibility of witnesses was a question for the jury."

The rule is again stated in the case of *Fox* vs. *Great Atlantic & Pacific Tea Co.,* 84 N. J. Law 726; 727:

> "'A motion for a non-suit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom but denies its sufficiency in law.' *Weston Co.* vs. *Benecke,* 53 Vroom 445.
>
> And the same rule, by parity of reasoning, is applicable as to a motion to direct a verdict for the defendant, based upon the

> insufficiency of the evidence to establish a legal cause of action."

To the same effect *Overend* vs. *Kiernan*, 137 Atl. 881; 882:

> "The motion to non-suit was, we think, properly refused. If there is any evidence no matter how meager, to support a plaintiff's cause of action, the plaintiff has a right to have the case submitted to the jury. *Barry* vs. *Borden Farm Products Co.*, 100 N. J. L. 106, 125 A. 37; *Dellabello* v. *Central Railroad Co. of N. J.*, 99 N. J. Law, 348; 124 A. 59.
>
> What has been said with reference to the motion to non-suit applies equally to the motion to direct a verdict."

POINT IV.

There was ample testimony as to the authority of L. W. Carle to act as agent for the defendant-appellant, which justified the trial judge in denying the motion for direction of verdict, and in submitting the entire case to the jury.

A.

Testimony of Gilbert H. Gaus.

Gilbert H. Gaus was produced as a witness in behalf of the plaintiff-respondent. At page 73, 74, 75, of the State of Case he testified that he called at the office of Royal Indemnity Co. regarding this Sayreville job in the early part of May 1923. When he presented himself at the office of Royal Indemnity Co. he asked of a girl who was there, that he might see the person who was handling the Sayreville, N.

J. job. She told him that he wanted to speak to Mr. L. W. Carle, and referred him to a room upstairs. He went upstairs to this room on the 7th floor and the name of "Royal Indemnity Co." was on the door. The name of "L. W. Carle" was under that name and there were possibly one or two other names. He went inside and met a gentleman who said he was Mr. Carle, but when Mr. Gaus explained that he desired to talk about the Sayreville job, he was directed to another gentleman, who was Mr. L. W. Carle, whose name was on the door. Mr. L. W. Carle was familiar with the entire transaction, and promised to send a written order within a few days.

The important testimony, (State of Case, p. 73, l. 25 to p. 76, l. 29) is as follows:

> Q. Now, can you tell us when you first saw Mr. Carle? A. Well, it seems to me that it was a few days before that time of that letter, May 16th.
>
> Q. And where did you see Mr. Carle? A. At his—at the office of the Royal Indemnity Company.
>
> Q. Now, you had not met Mr. Carle before that time, had you? A. No, sir.
>
> Q. When you first entered the office of the Royal Indemnity Company, whom did you see? A. Well, there was a girl there, or somebody, that took your name and asked what you wanted.
>
> Q. And did she ask you what you wanted? A. Yes, I said I wanted to go to whoever it was that was handling the Sayreville, New Jersey, job.
>
> Q. And what did she tell you? A. Well, as I recall it—
>
> > Mr. Markley: I object to what she said on the ground it is immaterial.
> >
> > Mr. Handford: I think it is material.
> >
> > The Court: Not what she said. As a result of what she said, what did you do?

The Witness: As I recall it, she went inside somewhere and came out and said I wanted to speak to Mr. L. W. Carle, and referred me to room something or other, and I went up there, and it was upstairs —from the reading of the letters, here, evidently the seventh floor—and I went inside, and there was the name on the door, "Royal Indemnity Company," and there was his name, and I believe there was one or two other names, possibly—and I went inside, to a big room, and there was a lot of desks, and they referred me to some corner, and I met Mr. Carle.

Q. Which Mr. Carle did you meet? A. Well, the first man was a younger man, and I said I wanted to speak to Mr. Carle, and he said, "I am Mr. Carle," and I said, "I want to talk about the Sayreville job", and he said, "You do not want to talk to me, you want to talk to my father"; and he referred to his father, who was right there at the desk.

Q. And do you recall the kind of a man—the looks of Mr. Carle? A. Yes. He was quite an old man, very hard of hearing, and wore heavy glasses.

Q. Do you know whether he is living or dead at present? A. Well, I know he is dead now.

Q. And did you talk with Mr. Carle about the Sayreville job? A. Yes, I referred to—

* * * * *

Q. What did Mr. Carle say? A. He said he saw no reason why he shouldn't give us the order in view of the fact that Proctor had given the American Well Works—had decided to purchase American Well Works pumps; that he did not see that his company could do any better shopping around than what Proctor had probably done when he gave us the order—so why shouldn't his company give us the order.

Q. And did he say who was going to com-

plete the Sayreville job? A. In the conversation, it never entered my mind at all that I was not talking—

Mr. Markley: I object to that.

The Court: Strike it all out. Your mental operations are not evidence, Mr. Gaus.

The Witness: What is the question?

Q. (Read) A. Yes.

Q. Whom did he say would— A. (interposing) Royal Indemnity Company.

Q. And that was prior to the receipt of this letter of May 16th? A. Yes, sir.

It is respectfully submitted that this circumstance alone would have been sufficient to justify the trial judge in denying the motion for a directed verdict and in leaving the entire question to the Jury. This is very similar to the facts in the case of *Smith* vs. *Delaware & Atlantic Telephone & Telegraph Co.*, 64 N. J. Eq. 770, cited in the brief of the defendant-appellant, at page 9. In that case a letter had been addressed to the defendant company, by the complainant's solicitor. The attorney for the complainant subsequently called at the office of the company in Philadelphia. He was shown to a room, the door of which was marked "General Manager", and there he met a Mr. Westbrook. Mr. Westbrook had the letter which had previously been sent to the company, and Mr. Westbrook told him he was General Manager of the Company. Afterwards the defendant attempted to repudiate the statements made by Mr. Westbrook at that conference, on the ground that Mr. Westbrook was not the agent of the company. Counsel for the defendant-appellant in the case at bar has quoted at length from this case and we will not repeat the quotation. It will be found at page 10 of the Brief of the Defendant-Appellant.

The Court asked the question, in that case as to

which would be the more natural supposition, that Mr. Westbrook was an intruder or usurper, who possessed himself in some unauthorized way of the contents of the complainant's letter, or that he was acting with the knowledge and by the direction of the defendant. The Court immediately answered its question by saying that the mind readily accepts the latter alternative.

The Court held in that case, that the fact that the complainant's counsel appeared at the office of the defendant and asked for the person in charge, was referred to Mr. Westbrook, who was familiar with the transaction, was evidence tending to prove agency, aside from Mr. Westbrook's averment that he was the agent, and that this evidence made his declarations competent.

In the case at bar, not only did Mr. Gaus inquire at the office of the Royal Indemnity Co. for the person in charge of the Sayreville job, but when he was referred to the 7th floor, he found the name of L. W. Carle on the door, beneath the name of the defendant Royal Indemnity Co. When he entered the room he again asked for Mr. Carle, but when he stated his business, the person who first said he was Mr. Carle, referred him to another gentleman, who was L. W. Carle, and L. W. Carle was completely conversant with the Sayreville matter, and promised to send a confirmation of the order for the pumps to the representative of the American Well Works.

It is respectfully submitted that these facts are sufficient to warrant the plaintiff-respondent, as reasonable men, in dealing with Mr. Carle as the duly authorized representative of the defendant-appellant. But this is but one of a chain of instances which led the plaintiff-respondent to assume that they were dealing with the Royal Indemnity Co.

B.

Testimony of John R. Proctor.

Mr. Proctor (p. 20, ll. 26-29) was President of John R. Proctor Inc. during the years of 1922 and 1923. He, as president of that company, had many dealings with L. W. Carle. In fact L. W. Carle issued in behalf of Royal Indemnity Co., many bonds for jobs conducted by the Proctor corporation. (p. 27, ll. 4-40; p. 28, ll. 9 to 40; p. 29, ll. 1-4). Mr. Proctor called at the office of the Royal Indemnity Company in New York City, and found Mr. Carle's name on the door, without any indication limiting or describing his authority. (p. 29, ll. 32-40; p. 31, ll. 3-5) and Mr. Proctor found Mr. Carle installed in a room behind a glass partition. When the Proctor Company defaulted on the Sayreville job, L. W. Carle attended the creditors' meeting, as a representative of the Royal Indemnity Co. (p. 33, ll. 35-40).

At that meeting Mr. Carle had a conversation with Mr. Whinery, who represented the plaintiff (State of Case, p. 111, ll. 34 and 35).

It is respectfully submitted that the fact that Mr. Carle appeared at the creditors' meeting, indicated that he was more than a bond salesman. As soon as he attempted to negotiate with the creditors after the failure of the Proctor Company, it is evidence for a jury to consider, as to whether Mr. Carle was authorized to act generally for the defendant in regard to this transaction.

Counsel for defendant-appellant in his argument before the trial judge (State of Case, p. 125, ll. 10-24) insisted that there were two other men from the Royal Indemnity Co. besides L. W. Carle, at

the creditors meeting at the Proctor offices, and he mentions this in his brief at page 8, and again at page 17.

It is respectfully submitted that neither of these gentlemen had anything to say, so far as the testimony discloses. They apparently stood by and acquiesced in the statements made to Mr. Whinery by L. W. Carle. This is a strong indication that the defendant-appellant then and there was cognizant of and ratified the appearance of L. W. Carle at that meeting as a representative in its behalf.

C.

Testimony of Samuel B. Whinery.

Samuel B. Whinery, the representative of the plaintiff-respondent testified that he met Mr. Carle at the creditors' meeting in Mr. Proctor's office, (p. 47, ll. 31-35). At that meeting Mr. Carle represented to him that the *defendant-appellant* was about to take over the Sayreville job, and would be responsible for the payment of the bill for the pumps and asked Mr. Whinery to ship the pumps (p. 49, ll. 12-18). After that Mr. Whinery called at the office of the Royal Indemnity Co. in New York City and found Mr. Carle's name upon the door, under the name of Royal Indemnity Co., on one of the upper floors, without any designation limiting Mr. Carle's authority to act for the defendant. (p. 49, ll. 30-40; p. 50, ll. 1-12).

As a result of that conversation, Mr. Whinery received *on the letterhead of Royal Indemnity Co., which letterhead on the left, contained the name of L. W. Carle,* without any designation limiting or restricting his authority, a letter in which he asks

that the pumps and machinery be delivered as soon as possible. This letter is Exhibit P-2 and is set out in full in Supplement of State of Case, page 2. This letter was first printed at page 131 of State of Case, but the letterhead of Royal Indemnity Co. containing the name of L. W. Carle printed on the left was inadvertently omitted by counsel for the defendant-appellant and at the request of the plaintiff-respondent, the entire Exhibit P-2 was printed as a supplement to the State of Case, which supplement is before this Honorable Court, as a part of the State of Case on this appeal.

D.

L. W. Carle had similar dealings with the Northwestern Manufacturing Co. and Dudley Curry Electric Co. regarding the motors and controls for the pumps furnished to this very job in Sayreville, New Jersey and their dealings were recognized by the defendant-appellant.

William O. Dudley, sales agent for the Northwestern Manufacturing Company had some conversation with Mr. Gaus of the American Well Works (p. 62, ll. 21-40; p. 63, l. 29) and then Mr. Dudley took an order from Mr. Carle to furnish to the Royal Indemnity Company the motors for the pumps on this job at Sayreville, New Jersey. This was at the office of the Royal Indemnity Co. (p. 64, ll. 8-40). As the result of that order the controls were delivered to the job at Sayreville, N. J. (State of Case, p. 65, ll. 3-18).

On November 7, 1923, Mr. Dudley received a letter on stationery of the Royal Indemnity Company, signed by W. A. Foley, superintendent, enclosing

a check of the Royal Indemnity Co. for $518.11, in full payment for the motors on the Sayreville job, which motors had been ordered by L. W. Carle. (p. 65, ll. 30-40; p. 66, ll. 35-40) Exhibit P-6, page 5 of Supplement to State of Case, which was inadvertently printed without the letterhead (State of Case, page 136).

Likewise after his conversation with Mr. Gaus, Mr. Dudley, as representative of the Dudley-Curry Electric Company agreed with Mr. L. W. Carle, that that company would furnish the controls for the motors for this very Sayreville job. (p. 67, ll. 21-26).

On September 22, 1923, Dudley Curry Electric Company received a letter, *on the stationery of Royal Indemnity Company, with the name of L. W. Carle printed on the side and signed by L. W. Carle,* in which he acknowledges receipt of the bill for the controls in the amount of $295.00, and advises the company that the various obligations have been lined up and check for same would be mailed on or about the first of the month. This letter, Exhibit P-7, is printed on p. 6 of the supplement to State of Case, and on p. 137 of the State of Case, but at that page the letterhead with the name of L. W. Carle printed on the side was inadvertently omitted in the printing.

On November 7, 1923, a letter was written to Dudley Curry Electric Co. on the letterhead of Royal Indemnity Co. and signed by W. A. Foley, superintendent, enclosing the check for $295.00, mentioned in the letter of September 22nd. This check was the check of Royal Indemnity Co. (State of Case, p. 70, ll. 26 to 40).

It is respectfully submitted that these similar dealings between L. W. Carle and Dudley Curry Electric Company, and Northwestern Manufacturing Company, which dealings were ratified by

the defendant are evidential as to the agency primarily in question in this cause.

The claim number 4654 appears frequently in the correspondence of Royal Indemnity Company. This claim number appears on Exhibit P-5 a letter written by W. A. Foley, superintendent to American Well Works; it appears on Exhibit P-6, a letter written by W. A. Foley superintendent to Northwestern Manufacturing Company; it likewise appears on Exhibit P-8, a letter written by W. A. Foley to Dudley Curry Electric Company, and again it appears on Exhibit D-1, a letter written by W. A. Foley to Samuel A. Whinery, M. E. and upon Exhibit D-2 written by Nathan E. Wheeler, counsel to Andrew J. Whinery, Esq.

It is respectfully submitted that when these officers and agents of the Royal Indemnity Company were dealing with the American Well Works, they had in mind the same identical job and transaction, under the same identical circumstances as they did when they wrote the letters Exhibit P-6, and P-8 to Northwestern Manufacturing Company, and Dudley Curry Electric Company.

It is held in the case of *Maagget* vs. *A. Brawer,* 95 N. J. Law 72, that where the authority of one acting as an agent to make a contract is denied, other contracts of a similar nature made at or about the same time and under similar circumstances are admissible in evidence to show the agent's authority to bind his principal.

In that case, there was a letter introduced by the plaintiff dated May 3, 1919, signed by a Mr. Feeney, Manager of the defendant company. Mr. Feeney had in another transaction at about the same time, recognized the alleged agent as the agent of the defendant company. At the trial defendant denied the agency and the letter was ad-

mitted in evidence as proof of the agency. At pages 75-76 the court said:

> "The third ground of reversal is the admission in evidence of a letter signed by one J. P. Feeney. This letter, dated May 3rd, 1919, was a confirmation by Feeney, who was manager of the defendant, A. Brawer Silk Company, of the sale of certain silk by Maagget to Wm. B. Frankel & Co., Inc. Maagget's suit was in part for commissions for effecting the very sale evidenced by this letter. It was, therefore, clearly admissible in the Maagget case to prove the sale which was the basis of his claim for commissions.
>
> The memorandum of the Vogue Silk Company contract was dated May 2nd, 1919, which was one day before the date of the letter signed by Feeney, evidencing the Frankel sale. The Feeney letter showed that at about the time of the sale to the Vogue Silk Company the defendant had recognized Maagget as its agent for the sale of silk. *Where other contracts are of a similar nature and made under substantially similar conditions and circumstances at about the same time as the one in dispute, they are admissible as evidence of an alleged agent's authority to bind his principal.*"

Louisville Cement Co. vs. *Clell Coleman & Sons*, Court of Appeals of Kentucky, Dec. 2, 1927, 300 S. W. 633; 222 Ky. 183. The Court at page 635 says:

> "However, as all the appellees may again amend when this case returns to the lower court and rely on the contract they proved, it becomes necessary to discuss the other points urged by the appellant. It urges that, even had the cause of action been rested on the original contract alleged, it was yet entitled to a peremptory instruction, because the contract was made by Beard, who was only a travelling salesman, and as such

had no authority to make this kind of contract. The case of *Standard Sanitary Mfg. Co.* vs. *Stump,* 212 Ky. 253, 278 S. W. 583 is relied upon. That case correctly lays down the rule applicable to the authority of travelling salesmen. But, to show that Beard here had a greater and wider authority than that of the ordinary travelling salesman, the appellee introduced, as stated, proof to show that he had on a number of other occasions, and with other people, made contracts exactly like or similar to one here in dispute, which contracts had been recognized and carried out by the appellant and further introduced the letter of Mr. Hill to show the appellant knew that Beard had made this contract, but that it had been unable to carry it out. Appellant insists that this evidence concerning what Beard had done with other people on other occasions was not admissible. It is settled that agency may be found from the evidence as a whole and from the facts and circumstances, notwithstanding the categorical answers to the contrary of the alleged principal and agent. *Rosenberg* vs. *Dahl,* 162 Ky. 92; 172 S. W. 113; Ann. Cas. 1916E 110. Among the several ways of showing the existence and scope of an agency, it is admissible to prove circumstances tending to show the exercise of authority on the part of the agent and its recognition by the principal, although they may have no direct connection with the issues tried. In *Vogue Silk Co.* vs. *A. Brower Silk Co.,* 95 L. 72, 111 Atl. 656, a question of evidence like the one now under discussion was presented for decision. The Court said: Where other contracts are of a similar nature and made under substantially similar conditions and circumstances, at about the same time as the one in dispute, they are admissible as evidence of an alleged agent's authority to bind his principal."

To the same effect is *McCormick Harvest-*

ing Machine Co. vs. *Lambert;* 120 Iowa 181, 94 N. W. 497; *Smith* vs. *McDole* (Mo. App.) 269 S. W. 629; and *Welch* vs. *Clifton Mfg. Co.,* 55 S. C. 568; 33 S. E. 739.

In Mechem on Agency (2nd Ed.) Section 263, the author states the rule thus:

"So evidence of agency is often found in the fact that the alleged principal has acquiesced in, recognized or adopted similar acts done on other occasions by the assumed agent.

See also, *Wigmore on Evidence,* Sec. 377."

In the case of *Havill* vs. *U. S. Bond and Mortgage Co. (1930)* 285 Pac. 1117 the court holds that a refusal of the trial judge to admit such evidence of similar transactions was reversible error. At p. 1118 the court said:

"In the course of the examination of Mr. Nicholson, sworn as a witness on appellant's behalf, appellant's counsel asked the witness: 'Did you make a contract on any other loans to pay commissions?' Objections to this and other similar questions were sustained by the trial court. Appellant's counsel then offered to prove by the witness Nicholson that the witness, while in respondent's employ, was in charge of the real estate loan department, and that it was his duty to secure loans for respondent; that in the course of his employment he invited brokers to submit loans to him, offering to pay commissions or brokerage in case a loan should be made through respondent to a client of the broker to whom the offer was made, *and that such brokerage had been paid by respondent to brokers who had dealt with the witness.* (Italics are the court's).

The trial court erred in sustaining objections to this line of testimony. Respondent contended that the witness Nicholson had no real or apparent authority to make such an

agreement with appellant. The testimony rejected by the Trial Court, while irrelevant and immaterial in so far as the question of whether or not any contract was in fact made between Mr. Nicholson and appellant, was relevant upon the issue as to whether or not Mr. Nicholson had real or apparent authority to make such an agreement.

Respondent urges that there was no attempt to show that appellant knew of any of the alleged transactions between Mr. Nicholson and respondent, on the one hand, and different brokers on the other, or that appellant was in any manner influenced or induced by any transactions to believe that Mr. Nicholson had authority to make any contract with her. As above stated, however, we believe that the testimony was competent and relevant on the question as to what Mr. Nicholson's authority in fact was. If appellant could prove that Mr. Nicholson had made with other brokers contracts to pay them brokerage on loans made by respondent to prospective borrowers introduced to respondent by such brokers, and that respondent had recognized such contracts and paid the brokerage, appellant should have been allowed to produce such testimony."

It is respectfully submitted that the above citations are directly in point regarding the testimony of Mr. Dudley, and that his testimony was not only competent and proper, but it would have been a grave error if the trial court had excluded it.

E.

The letterheads of Royal Indemnity Company.

Under this heading we are obliged to refer entirely to Supplement to State of Case, which is before this Honorable Court, as a part of the State of Case, because the defendant-appellant inadvertently omitted the letterheads from the various exhibits when the State of Case was originally made up.

Counsel for the defendant-appellant makes much of the fact that on the letterheads of Exhibit P-2, P-3 and P-7, all of which are set forth in the Supplement to State of Case, the name of "L. W. Carle, Room 702" is printed on the left of the letterhead without giving any designation as to his authority.

It is respectfully submitted that the defendant-appellant cannot gain anything in this cause because of their failure to designate or limit the authority of L. W. Carle on that letterhead. These letterheads were made up and furnished to L. W. Carle by the defendant-appellant company. This is admitted by Mr. Nathan E. Wheeler counsel for the defendant-appellant, and the defendant-appellant company well knew that Mr. Carle was using its stationery with his name upon it, without any designation or limitation of his authority. (State of Case, p. 97, ll. 34-40; p. 98, ll. 10-15; p. 107, ll. 1-20).

It is singular that on all of the other exhibits introduced in this cause, which are on the letterhead of Royal Indemnity Company, the title and department of the person using the same is printed plainly above and after his name. On Exhibit

P-5 on the left of the letterhead is printed "Bonding Claims Department, Surety Division, W. A. Foley, superintendent." Likewise, Exhibit P-6, P-8 and D-1 have the same printing on the letterhead. Also Exhibit D-2 has the following "Bonding Claims Department, Nathanial E. Wheeler, Counsel, H. E. Pendleton, Superintendent of Claims".

At page 107 of the State of Case, line 2, Mr. Wheeler counsel for the company said that they printed stationery for all their agents through the country, but he does not say they omit to print after the names, the designation and limitation of their authority. When counsel for defendant-appellant, at page 35 of his brief states otherwise he is mistaken. We respectfully submit that common experience teaches us all, and ordinary caution requires that in printing such stationery distributed by insurance companies to their various agents and departments, they always designate the authority of the individual or agency to whom their stationery is entrusted.

It is respectfully submitted that this is done for the express purpose of apprising the general public of the limitation of that agency. Referring again to Exhibits P-5, P-6 and P-8, there is no doubt in the minds of the general public, but that the authority of W. A. Foley is limited. He is superintendent of the Surety Division of the Bonding Claims Department. The general public know by that designation that Mr. Foley's authority is limited to that department. It puts the general public on guard that in dealing with the Royal Indemnity Company, in regard to an automobile accident, for instance, Mr. Foley would have no authority to bind his company. That is the reason the insurance companies always designate on their letterheads the authority of the agent whose name is printed thereon.

In the case of L. W. Carle however, when they failed to designate or limit his authority on their letterheads that tended to confuse and mislead the general public. Since *the defendant-appellant* deliberately issued these letterheads for the use of L. W. Carle, without apprising the general public of any limitation of his authority, the defendant-appellant should be held responsible for his acts done in behalf of the defendant-appellant company.

POINT V.

Answer to specific points raised in brief of defendant-appellant.

Counsel for the defendant-appellant took exception to the court's overruling certain questions which he asked Mr. Wheeler regarding Carle's connection with the Royal Indemnity Company. The trial court, however, excluded the answer to these questions merely because of their form. The very questions, in different form, were answered over objection immediately thereafter (page 85) and those answers were before the jury when it retired.

Likewise counsel took an exception to the exclusion of Exhibit D-3 for identification, but even though the plaintiff-respondent considers it not binding on it and a self-serving declaration, nevertheless the contents of that document, in substance, was testified to by Mr. Wheeler (Case, p. 86).

Counsel for the defendant-appellant took an exception to the questions asked Mr. Wheeler concerning their investigation of Mr. Carle's financial

responsibility. It is respectfully submitted that these questions were entirely proper. Proctor had defaulted on the Sayreville job, and the Royal Indemnity Company was liable on that bond. If, as Mr. Wheeler said, they were to go on another bond for Carle then it is but logical that the jury should be permitted to consider whether or not Carle had sufficient financial standing and engineering experience to make it reasonable and likely that the bonding company would consent to an assignment of the contract to him to be completed by him on his own account.

At page 47 of the defendant-appellant's brief he states that at the time of the creditors' meeting at the Proctor offices the plaintiff had no contract with the Proctor Company. There was an executory contract between these parties at that time as shown by Exhibit P-1 (State of Case, p. 130).

Counsel for the defendant-appellant alleges that in his charge to the jury the trial court made many misstatements of fact. But the trial court cured any such error by his general charge (State of Case, p. 129, ll. 20-30) as follows:

> Then I might say this, gentlemen: that if there are any other misquotations of testimony in the case by the court disregard what I said and bring to bear, upon your consideration of this case, your own recollection of what the testimony was; but, of course, it was my duty to call your attention to this particular answer of Mr. Whinery to the question that was asked of him.

POINT VI.

This suit is based on the express contract of the parties and has nothing to do with the surety bond.

Counsel for the defendant-appellant has tried to bring in on several occasions during the trial and in its brief, the allegation that payments were made by the defendant to other people because of its bond. It is respectfully submitted that in all its dealings with the Royal Indemnity Company no mention was ever made by the representatives of the plaintiff-respondent that any claim was made or was intended to be made upon the bond. Under date of *November 6, 1923,* plaintiff-respondent addressed a letter to defendant, Exhibit P-9, (State of Case, p. 139) and enclosed with that letter a bill to Royal Indemnity Co., Exhibit P-9A (State of Case, p. 140-141). That bill begins "Sold to Royal Indemnity Company." That letter was answered by W. A. Foley, superintendent, under date of *November 16th, 1923,* Exhibit P-5, (State of Case, page 135). He does not mention in that letter anything about a bond, nor does he deny the authority of Mr. Carle to act for the Royal Indemnity Company. The letter is very brief and advises that they are checking over the accounts and that the American Well Works will hear from them shortly. It is respectfully submitted that if it were true that Royal Indemnity Company were paying no claims except those made under the bond, Mr. Foley would not have written the letter of November 16th to the American Well Works, which is Exhibit P-5. He specifically referred to letter and bill of November 6th. That letter and

bill of November 6th (Exhibit P-9 and P-9A) makes it very clear to the Royal Indemnity Company that the American Well Works will hold the Royal Indemnity Company for the equipment furnished to the Sayreville job at a specific price. No mention is made in that letter and bill of any claim on the bond, but the letter is specific and the bill itself begins "Sold to Royal Indemnity Company." If Mr. W. A. Foley, superintendent was paying no claims except on the bond, then he certainly would have written an entirely different letter to the American Well Works on November 16th, 1923. It was only a few days before that Mr. Foley had paid the claim of Dudley Curry Electric Company and Northwestern Manufacturing Company, (Exhibit P-6 and P-8), *in full* and not a percentage as testified to by Mr. Wheeler (State of Case, p. 89, l. 20). No mention was made of any bond in those letters on the payment of those claims, either by the debtor or the creditors. It was not until a month later that the plaintiff was first notified that the defendant-appellant had repudiated the contract mentioned in the letter Exhibit P-9 and dated November 16, 1923.

It is respectfully submitted that the real facts of the matter as deduced from the evidence are these: so long as the defendant-appellant could complete the Sayreville job for less than the amount of the penalty on its bond it was willing to be the *contractor,* but when it found it was costing more than that to complete the work, then it repudiated its contract and tried to show that its only interest in the Sayreville matter was that of bondsman.

CONCLUSION.

For these reasons we respectfully submit that the judgment of the Court below should be affirmed with costs.

FLEMING & HANDFORD,
Attorneys of Plaintiff-Respondent.

JAMES L. HANDFORD,
Of Counsel.

E. W. Stillman, Pompton Plains, N. J., Tel. Pompton Lakes 500

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Stipulation

It is hereby stipulated by the counsel of the respective parties that Exhibit P-4 which begins at page 133 of the state of case is continued on page 134. Through inadvertence the printer left half of page 133 blank.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

FLEMING & HANDFORD,
Attorneys of Plaintiff-Respondent.

Exhibit P-2

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY
HEAD OFFICE: NEW YORK
CHARLES H. HOLLAND, President

84 William Street
New York

L. W. CARLE
Room 702

Cable: Compensate, New York
Telephone: John 5500

May 16, 1923.

S. B. Whinery, M. E.
95 Liberty St.,
City.

Gentlemen:

Will you kindly ship to Sayreville, New Jersey, at once, the machinery for pumping station ordered by John P. Proctor of October 16, 1922.

We would like to have these pumps and necessary machinery delivered as soon as possible, and I will pay for same as per you agreement of November 8, 1923, $3055 in 30 days, and balance in 60 days.

Yours very truly,

L. W. Carle

LWC/VP

S. B. WHINERY
New York
RECEIVED
Clock Face Showing
11 O'clock
May 17, 1923

Exhibit P-3

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY
HEAD OFFICE: NEW YORK
CHARLES H. HOLLAND, President

84 William Street
NEW YORK

L. W. CARLE
Room 702

Cable: Compensate, New York
Telephone: John 5500

May 23, 1923.

S. B. Whinery, M. E.
95 Liberty St.,
New York City.

Subject—Sayerville

Dear Sir:

Att: Mr. Gilbert H. Gaus.

In answer to your personal call at my office yesterday, it is my idea to have your machinery installed by John R. Proctor. In fact, that has been my understanding with Mr. Proctor. If he will install the machinery as cheap as anyone else, I do not see why I should not give it to him. I will take it up with him again this week at his office in Bayonne.

Yours very truly,

L. W. CARLE.

S. B. WHINERY
New York
RECEIVED
Clock Face Showing
11 O'clock
May 24, 1923
No Ans.
Ans'd— By—

Exhibit P-5

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY

HEAD OFFICE: NEW YORK

MILFORD E. JEWETT, President

84 William Street
NEW YORK

BONDING CLAIMS DEPARTMENT

SURETY DIVISION
W. A. FOLEY, Superintendent

Cable: Compensate, New York

Telephone: John 5500

November 16, 1923.

The American Well Works
Aurora, Illinois

Gentlemen:

Re: Claim 4654 John R. Proctor, Inc.
Borough of Sayreville, N. J.

Mr. Carle has turned over to us your letter and bill of November 6th. Please be advised that we are checking over this account and you will hear from us shortly.

Very truly yours,

W. A. FOLEY,
Superintendent.

WAF:EW

RECEIVED
Nov. 19, 1923
THE AM. WELL WORKS
Aurora, Ills.

HAD ATTENTION
Nov. 21, 1923
R. W. RUTH

Exhibit P-6

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY
HEAD OFFICE: NEW YORK
MILFORD E. JEWETT, President

84 William Street
New York

BONDING CLAIMS DEPARTMENT

SURETY DIVISION
W. A. FOLEY, Superintendent

Cable: Compensate, New York

Telephone: John 5500

November 7, 1923

The Northwestern Mfg. Co.
409 Broadway
New York City

Gentlemen: Att: Mr. Dudley

Re: Claim 4654 John R. Proctor—Borough of Sayreville

We are enclosing herewith draft payable to the Northwestern Mfg. Company in the amount of $518.11 as per statement of October 1st.

Very truly yours,

W. A. FOLEY
Superintendent.

WAF:EW
ENC.

Exhibit P-7

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY

HEAD OFFICE: NEW YORK

MILFORD E. JEWETT, President

84 William Street
NEW YORK

L. W. CARLE
Room 702

Cable: Compensate, New York
Telephone: John 5500

New York, September 22nd, 1923.

Dudley-Curry Electric Company,
409 Broadway,
New York, N. Y.

Gentlemen:

This is to acknowledge receipt of your letter of September 21st, regarding an amount of $295.00 past due.

I wish to advise that this amount shall be mailed to you on or about the first of the month. All these various obligations have been lined up and we are now in a position to pay them.

In the future will you kindly address any of your communications to L. W. Carle and not the Royal Indemnity Company.

Yours very truly,

CC:em

L. W. CARLE.

Exhibit P-8

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY

HEAD OFFICE: NEW YORK

MILFORD E. JEWETT, President

84 William Street
NEW YORK

BONDING CLAIMS DEPARTMENT

SURETY DIVISION
W. A. FOLEY, Superintendent

Cable: Compensate, New York

Telephone: John 5500

November 7, 1923.

Dudley-Curry Electric Company
409 Broadway
New York City

Att: Mr. Dudley

Gentlemen:

Re: Claim 4654 John R. Proctor—
Borough of Sayreville

We are enclosing herewith draft in the amount of $295.00 payable to the order of the Dudley-Curry Electric Company as per your statement of August 14th.

Very truly yours,

W. A. FOLEY,
Superintendent.

WAF:EW

Exhibit D-1

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS.

ROYAL INDEMNITY COMPANY
HEAD OFFICE: NEW YORK
MILFORD E. JEWETT, President

84 William Street
NEW YORK

BONDING CLAIMS DEPARTMENT
SURETY DIVISION
W. A. FOLEY, Superintendent

Cable: Compensate, New York
Telephone: John 5500

December 10, 1923

S. B. Whinery, M. E.
95 Liberty Street
New York City

Dear Sir:

Re: Claim 4654 John R. Proctor, Inc.
Borough of Sayreville, N. J.

This will acknowledge receipt of yours of December 7th. The only connection the Royal Indemnity Company has with this matter is through the bond which it wrote in behalf of the John R. Proctor Company, Incorporated to the Borough of Sayreville.

The John R. Proctor Company was assigned to Mr. L. W. Carle, who is not an officer of the Royal Indemnity Company or an agent of the company in this transaction. He took the assign-

ment in his individual capacity and the Royal Indemnity Company has no interest therein.

Yours very truly,

W. A. FOLEY
Superintendent.

WAF:EW

S. B. WHINERY
New York
RECEIVED
Clock Face Showing
12 O'clock
Dec. 11, 1923
Ans'd 12/14/23
By S. B. W.

Exhibit D-2

ADDRESS ALL COMMUNICATIONS TO THE COMPANY—NOT TO INDIVIDUALS

ROYAL INDEMNITY COMPANY

HEAD OFFICE: NEW YORK

MILFORD E. JEWETT, President

84 William Street
NEW YORK

BONDING CLAIMS DEPARTMENT

NATHANIEL E. WHEELER, Counsel
H. E. PENDLETON,
Superintendent of Claims

Cable: Compensate, New York

Telephone: John 5500

May 20, 1924.

Andrew J. Whinery, Esq.,
Counselor at Law,
790 Broad Street,
Newark, New Jersey.

Dear Sir:-

Re: Claim 4654 File 114905 Bond SX88234
John R. Proctor Inc.—Borough of Sayreville.

Your letter of the 23rd ult. You refer to an alleged claim of the American Well Works against this Company. We have heretofore advised Mr. S. B. Whinery of the American Well Works that we do not consider that they have any claim against this Company and we absolutely deny all liability in the premises.

This Company never had any contract or agreement with the American Well Works in regard to the pumps and apparatus mentioned in your letter or any other matter. The only connection

the Royal Indemnity Company has with this job is through the bond which it executed in behalf of the John R. Proctor Company Inc. to the Borough of Sayreville, N. J. The John R. Proctor Company assigned this contract to Mr. Leslie W. Carle. Mr. Carle never has been an officer or employee of the Royal Indemnity Company or an agent of the Company in this transaction.

You fall in error when you state that these pumps were sold to this company after John R. Proctor Co. Inc. failed.

Yours very truly,

NAT. E. WHEELER
Counsel.

NEW:HK

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