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**Summons.**

(Filed February 7, 1924.)

*The State of New Jersey to Gus Dreher and  
Maryland Casualty Company, a Corpora-  
tion, Greeting:* 10

YOU ARE SUMMONED to answer the  
the annexed complaint of Fireproof  
(L. S.) Products Co., a Corporation, in an  
action at law in the New Jersey Su-  
preme Court, Essex County Circuit,  
and TAKE NOTICE, that unless you file your answer  
with the Clerk of the New Jersey Supreme Court  
at Trenton, within twenty days after service upon 20  
you of this writ and the annexed complaint, then  
the plaintiff may proceed in the suit and judg-  
ment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice  
of the New Jersey Supreme Court, at Trenton,  
this 24th day of January, 1924.

EDWARD J. KELLEHER,  
Clerk.

THOMAS A. KENNY,  
Attorney. 30

**Complaint.**

(Filed February 7, 1924.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

FIREPROOF PRODUCTS Co., INC., a  
corporation,  
Plaintiff,

vs.

GUS DREHER and MARYLAND  
CASUALTY Co., a corporation,  
Defendants.

20

Action at  
Law.

Summons issued Jan. 17th, 1924.

Plaintiff, a corporation of the State of New York, authorized to do business in the State of New Jersey, shows that:

30

1. On or about June 26, 1922, the defendant, Gus Dreher, entered into a contract, as principal, with the Board of Chosen Freeholders of the County of Passaic, whereby he agreed for the consideration of \$61,810.79 to do work therein specified in repairing and improving Belmont Avenue, a public highway and county road in the City of Paterson and County of Passaic and State of New Jersey.

40

2. On June 26, 1922, the defendants, Gus Dreher, as principal, and Maryland Casualty Co., as surety, entered into a bond with said County of Passaic, in the sum of \$61,810.79, the condition of which was that if the said Gus Dreher shall pay all lawful claims of subcontractors, material-

*Complaint.*

men and laborers for labor performed and material furnished in performing said contract, agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborer as well as for the obligee herein, then the obligation shall be void, otherwise the same shall remain in full force and effect.

10

3. Plaintiff sold and delivered to defendant, Gus Dreher, material which was used for repairing and improving said Belmont Avenue, for which the defendant agreed to pay the sum of \$8,855.40, and of which the annexed statement is a true copy, taken from the books of original entry of said plaintiff, and made a part hereof, which said amount said defendant, Gus Dreher, has refused to pay to plaintiff.

20

4. The defendant, Gus Dreher, completed the work according to the terms of said contract with said Board of Chosen Freeholders, which work was duly accepted by said Board of Chosen Freeholders, and the plaintiff within the time prescribed by law served a statement on the defendant, Maryland Casualty Co., setting forth the claim aforesaid, and that defendant, Gus Dreher, had failed to pay to the plaintiff the aforesaid sum of \$8,855.40 due plaintiff for material furnished as aforesaid, but defendant, Maryland Casualty Co., has failed to pay plaintiff the aforesaid amount.

30

Plaintiff demands of the defendants, Gus Dreher and Maryland Casualty Co., the aforesaid amount of \$8,855.40, with interest on said amount from October 11, 1922.

THOMAS A. KENNY,  
Attorney for Plaintiff.

40

## Complaint.

The Fireproof Products Co., Inc.,  
sold to  
Gus Dreher.

Aug. 28, 1922:

10 Aug. 31, " 350 pcs. Carey Elastite Exp. Joint  
3/8" x 10 1/2"  
Straight 10' long 3500 ft. 16.63 C ft. 582.05  
A. S. & W. Rect. Galv. Mesh 65#/100  
sq. pc. All Sheet 5-0 Wide Cut to  
the following lengths.

No. of Sheets	Lg. of Sheets	Sq. Ft. per Sht.	Sq. Ft. Total	
22	5'8"	28.35	624	
110	6'2"	30.835	3392	
88	7'2"	35.835	789	
28	7'8"	38.35	3375	
9	8'0"	40.	1120	
24	8'8"	43.35	391	
30	9'0"	45.	1080	
30	9'4"	46.7	1401	
6	9'10"	49.17	1476	
28	10'0"	50.	300	
22	10'4"	51.7	1448	
6	10'10"	54.17	1192	
20	18	11'0"	55.	330
12	11'4"	56.7	1021	
124	11'10"	59.17	710	
20	12'0"	60.	7440	
36	12'4"	61.7	1234	
487	12'10"	64.17	2310	
52	13'0"	65.	31655	
598	13'4"	66.7	3469	
14	13'5"	67.0835	40116	
22	14'0"	70.	980	
24	14'2"	71.70	1562	
28	14'4"	71.7	1721	
27	15'0"	75.0	2100	
27	15'2"	76.	2052	
8	16'0"	80.	640	
401	16'2"	81.	32481	
30	143	17'0"	85.	12158
22	17'2"	86.0	1892	

160459 ft.

17,829 sq. yds. 27.3¢ sq. yard \$4867.32  
Oct. 2, 1922: 5200 pcs. Plain Rd. Bars 3/4" x 1'6"  
long 1154 lbs. LUMP SUM  
520 pcs. angles 4" x 3" x 3/8" 7800  
ft. 66300 lbs. 2654.35

Oct. 11, 1922: 1800 Axtec Expansion Joint 1/4" x  
10" x 4' lengths straight 7200 ft.  
10.44 C ft. 751.68

Total \$8855.40

40 Filed Feb. 25, 1924.

Separate Amended Answer of Defendant  
Maryland Casualty Company.

SUPREME COURT OF NEW JERSEY,

ESSEX COUNTY.

FIREPROOF PRODUCTS COMPANY,  
Plaintiff,

vs.

GUS DREHER and MARYLAND  
CASUALTY COMPANY,  
Defendant.

10

Action  
at Law.

Defendant, Maryland Casualty Company, a for-  
eign corporation duly authorized to transact busi-  
ness in the State of New Jersey, answering com-  
plainant's complaint separately says:—

20

1. It admits the first paragraph of the com-  
plaint.

2. It admits the second paragraph of the com-  
plaint.

3. As to the allegations contained in paragraph  
three of the complaint, this defendant has not suf-  
ficient knowledge or information to form a belief.

30

4. This defendant denies all the allegations con-  
tained in paragraph four of the complaint except  
those alleging the service of a statement upon the  
defendant, and the non-payment of the sum of  
\$8,855.40 which facts are admitted.

FIRST SEPARATE DEFENSE.

1. At the time of the execution of the bond by  
this defendant, chapter 75 of the laws of 1918, page  
203, was in full force and effect.

40

*Separate Amended Answer of Defendant  
Maryland Casualty Company.*

2. Section 4 of said act provides as follows:—

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

3. Among other provisions, said act specifies in section 3 as follows:—

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

30

4. Under the provisions of section 4 of said act, all conditions specifically enumerated in paragraph 3 of said act of 1918, are a part of the bond executed by the defendant to the same extent as if those conditions were fully incorporated therein.

40 5. All the provisions of section 3 of said act, being embodied in the bond by reference, by vir-

*Separate Amended Answer of Defendant  
Maryland Casualty Company.*

tue of section 4 of said act, became conditions precedent, all of which plaintiff is obliged to perform before suit can be maintained on the bond.

6. Plaintiff has failed to comply with all of the conditions specified in section 3 of the said act. 10

SECOND SEPARATE DEFENSE.

1. This defendant repeats all the allegations of the first separate defense.

2. Plaintiff served the Notice alleged in paragraph 4 of the complaint upon this defendant on the 15th day of May, 1923, while the work under the contract mentioned in paragraph one of the complaint was still progressing, and before the work had been accepted by the duly authorized board or officer. 20

3. The contract mentioned in paragraph one of the complaint was finally completed and accepted by the authorized board of officers on the 18th day of July, 1923.

THIRD SEPARATE DEFENSE.

1. This defendant repeats all the allegations of the first and second separate defenses. 30

2. Among other provisions, chapter 75 of the session laws of 1918 specifies in section 3 as follows:

40 “Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, WITHIN EIGHTY (80) DAYS AFTER THE ACCEPTANCE THEREOF BY THE DULY AUTHORIZED BOARD OR OFFICER, SHALL FURNISH THE

*Separate Amended Answer of Defendant  
Maryland Casualty Company.*

SURETIES ON SAID BOND A STATEMENT OF THE AMOUNT DUE TO ANY SUCH PERSON, FIRM OF CORPORATION.

10 3. Said work under the contract mentioned in paragraph one of the complaint was completed on July 18th, 1923, and the job was then accepted by the Board of Chosen Freeholders of the County of Passaic who were the duly authorized board and officers thereof.

20 4. Plaintiff has failed to comply with the statute mentioned in paragraph two of this separate defense in that it has not within eighty (80) days after July 18th, 1923, furnished this defendant the surety on said bond, a statement of the amount due to the plaintiff corporation.

FOURTH SEPARATE DEFENSE.

1. This defendant repeats all the allegations of the first, second, and third separate defenses.

2. Among other provisions chapter 75 of the session laws of 1918 specifies in section 3 as follows:

30 "No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement."

3. Plaintiff has failed to furnish this defendant with the statement herein, in accordance with and pursuant to this provision of the statute.

FIFTH SEPARATE DEFENSE.

40 1. This defendant repeats all the allegations contained in the first, second, third and fourth separate defenses.

*Separate Amended Answer of Defendant  
Maryland Casualty Company.*

2. At the time of the completion of the work and the acceptance thereof by the duly authorized Board of Chosen Freeholders of Passaic County, Dreher was indebted to the plaintiff in the sum of \$8,855.40, the amount involved in this suit.

10 3. On the 18th day of November, 1922, the defendant Gus Dreher executed and delivered to the plaintiff herein his promissory note for \$5,000 payable December 23rd, 1922.

4. On the same day said defendant Gus Dreher accepted a trade acceptance made by the Fireproof Products Company, payable December 28th, 1922, for the sum of \$3,855.40, both sums aggregating \$8,855.40, being the full amount then due from the defendant Gus Dreher to the plaintiff herein.

5. The acceptance of this note and trade acceptance and renewals thereof extended the time of payment of plaintiff's claim by the plaintiff from the defendant Gus Dreher was without the knowledge or consent of this defendant Maryland Casualty Company.

At various times subsequent to December 28th, 1922, a promissory note and trade acceptance were renewed, the renewal being delivered by the defendant Gus Dreher and accepted by the plaintiff without the knowledge or assent of the defendant Maryland Casualty Company.

6. This defendant Maryland Casualty Company became discharged of all liabilities by reason of the acceptance of the promissory note and trade acceptance and renewals thereof.

LEVITAN & LEVITAN,  
Attorneys for Defendant  
Maryland Casualty Company.

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**Reply to Separate Amended Answer of Maryland Casualty Company.**

SUPREME COURT OF NEW JERSEY,  
ESSEX COUNTY.

10	FIREPROOF PRODUCTS Co., Plaintiff,  <i>vs.</i>  GUS DREHER and MARYLAND CASU- ALTY COMPANY, Defendants.	}	Action at Law.
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20 Plaintiff, Fireproof Products Co., a foreign corporation duly authorized to transact business in the State of New Jersey, replying to the separate answer of defendant Maryland Casualty Company, says:

AS TO THE FIRST SEPARATE DEFENSE.

- 1. Denies each and every allegation contained in paragraph 4 of the first separate defense.
- 2. Denies each and every allegation contained in paragraph 5 of the first separate defense.
- 30 3. Denies each and every allegation contained in paragraph 6 of the first separate defense.

AS TO THE SECOND SEPARATE DEFENSE.

- 1. Denies each and every allegation contained in paragraph 2 of the second separate defense.

AS TO THE THIRD SEPARATE DEFENSE.

- 40 1. Denies each and every allegation contained in paragraph 4 of the third separate defense.

*Findings of Facts and Postea.*

AS TO THE FOURTH SEPARATE DEFENSE.

- 1. Denies each and every allegation contained in paragraph 3 of the fourth separate defense.

AS TO THE FIFTH SEPARATE DEFENSE.

- 1. Denies each and every allegation contained in paragraphs 4, 5, 6 and 7 of the fifth separate defense. 10

Attorney for Plaintiff.

**Findings of Facts and Postea.**

NEW JERSEY SUPREME COURT, 20  
ESSEX COUNTY.

FIREPROOF PRODUCTS COMPANY, Plaintiff,  <i>vs.</i>  GUS DREHER and MARYLAND CASU- ALTY COMPANY, Defendants.	}	Action at Law.	30
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1. This case was tried before Honorable NELSON Y. DUNGAN, Judge of the Essex County Circuit, without a jury, by consent of both of the parties thereto on October 16th and October 25th, 1925.

2. After hearing the evidence and the Counsel for the plaintiff and the defendant, the Court finds the facts in issue to be as follows: 40

*Findings of Facts and Postea.*

3. On June 26, 1922, defendant Dreher entered into a contract with the Board of Freeholders of Passaic County, State of New Jersey, to make certain improvements on Belmont Avenue, Paterson, New Jersey (hereinafter called "The Belmont Avenue Job") for the total sum of \$61,810.79. 10

4. Shortly thereafter and pursuant to chapter 75 of the Laws of 1918 defendant Maryland Casualty Company executed its bond, guaranteeing the payment, among other things, of all lawful claims of materialmen for materials furnished on the Belmont Avenue job.

5. Between August 28, 1922, and October 11, 1922, plaintiff sold and delivered to defendant Dreher and the latter accepted and used in the Belmont Avenue job the goods described in the complaint, the total agreed value of which was \$8,855.40. 20

6. No part of said sum has been paid to plaintiff, although due demand has been made upon defendant Dreher.

7. On October 20, 1922, defendant Dreher executed and delivered to William Brown, plaintiff's duly authorized representative, a note for \$6,000 due November 28, 1922, and a trade acceptance for \$3,879.97 due December 28, 1922. The aggregate amount of said note and trade acceptance included the total sum owed by Dreher for materials furnished on the Belmont Avenue job and in addition thereto an overdue account in the sum of \$1,024.57 owed for goods purchased by defendant Dreher prior to August 28, 1922, and used on another job. 30

8. At the time said note and trade acceptance were delivered the plaintiff made no agreement 40

*Findings of Facts and Postea.*

extending defendant Dreher's time to pay the debt owed by him.

9. On November 28, 1922, the due date of said \$6,000 note Dreher paid plaintiff the sum of \$1,000 on account and executed and delivered a new note for \$5,000 due December 23, 1922. At the time plaintiff accepted said note for \$5,000 no agreement was made by plaintiff extending defendant Dreher's time to pay said debt. 10

10. On December 23, 1922, said \$5,000 note was duly presented but was not paid.

11. On December 28, 1922, said trade acceptance for \$3,879.97 was duly presented but was not paid.

12. On May 15, 1923, plaintiff, by Wood McKee, its attorney, delivered to Henry A. Wilson, the duly authorized agent of defendant Maryland Casualty Company, a typewritten notice of the amount due plaintiff for material furnished on the Belmont Avenue job, pursuant to Chapter 75 of the laws of 1918. 20

13. A carbon copy of said notice was also delivered to said Wilson at that time.

14. On July 18, 1923, the Belmont Avenue job was accepted by the Board of Freeholders of Passaic County, the Board duly authorized to make such acceptance. 30

15. During the eighty day period immediately following the acceptance of this job said Brown made many calls on said Wilson at the Paterson office of defendant Maryland Casualty Company and talked with said Wilson about this claim, asking said Wilson when it would be paid. 40

16. On several of those visits during said period Wilson showed Brown the carbon copy of

*Findings of Facts and Postea.*

said notice and informed Brown that the original had been sent to the main office of defendant Maryland Casualty Company in Maryland.

17. Defendant Maryland Casualty Company having failed to pay any part of said claim plaintiff instituted this suit against defendant Maryland Casualty Company and Gus Dreher on January 29, 1924.

CONCLUSIONS OF LAW.

1. The acceptance of the notes and trade acceptance by the plaintiff in October and November, 1922, did not operate as an extension of time or as payment of the debt owed by defendant Gus Dreher for the goods sold and delivered by plaintiff to Dreher, described in the complaint and used on the Belmont Avenue job.

2. The conversation between said Brown and said Wilson, together with the production of a carbon copy of the notice dated May 15, 1923, by said Wilson during the eighty day period immediately following the acceptance of the Belmont Avenue job did not constitute the furnishing of a notice within said eighty day period, and did not operate as a waiver of the requirement of the furnishing of said notice, in accordance with the statute in such case made and provided.

3. Because plaintiff did not furnish a notice of its claim on defendant Maryland Casualty Company within 80 days of the acceptance of the work by the Board of Freeholders in accordance with the statute in such case made and provided judgment should be rendered in favor of defendant Maryland Casualty Company.

40

NELSON Y. DUNGAN,  
JUDGE of Essex County.

**Rule for Judgment.**

(Entered November 13, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY CIRCUIT.

10

THE MARYLAND CASUALTY Co.,

ADS.

FIREPROOF PRODUCTS Co., INC.

Action at Law  
and Postea.

IT IS ORDERED that judgment be and hereby is entered in favor of defendant against the plaintiff with costs to be taxed *nisi*.

Entered November 13, 1926.

On Motion of Levitan & Levitan.

Costs \$73.75.

30

40

**Stipulated Facts.**

SUPREME COURT OF NEW JERSEY,

ESSEX COUNTY.

10	FIREPROOF PRODUCTS COMPANY, Plaintiff,  <i>vs.</i>  GUS DREHER and MARYLAND CAS- UALTY COMPANY, Defendants.
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20 For the purposes of the trial of this action, the parties hereto admit that the following facts are true;

1. On or about June 26, 1922, defendant Dreher entered into a contract with the Board of Freeholders of Passaic County to make certain improvements on Belmont Avenue, Patterson, N. J. (hereinafter called "the Belmont Ave. job") for the sum of \$61,810.79. Shortly after that time defendant Maryland Casualty Company duly executed its bond guaranteeing the payment of all  
 30 lawful claims of materialmen for materials furnished on that work. A copy of said bond will be furnished at the trial.

2. Between August 28, 1922, and October 11, 1922, plaintiff sold and delivered to defendant Dreher and defendant Dreher accepted and used in the Belmont Avenue job the goods set forth on page 3 of the transcript of the pleadings for trial in this cause; and the total agreed value of said  
 40 goods was \$8,855.40.

*Stipulated Facts.*

3. Plaintiff has not been paid by anyone for said material so furnished, although payment has been duly demanded of defendant Dreher.

4. On October 6, 1922, defendant Dreher assigned to E. J. Ricker all of his payments and certificates to be made on the Belmont Avenue job giving said assignee full power of attorney to sue  
 10 thereon. This assignment was filed with the treasurer of Passaic County in due course on or about the following day.

5. Plaintiff served Henry A. Wilson, a duly authorized agent of defendant Maryland Casualty Company on May 15, 1923, with a notice. Defendant will produce this notice or statement at the  
 20 trial.

6. On June 20, 1923, the sixth and so-called semi-final payment on the Belmont Avenue job was recommended by the County Engineer and approved by the Board of Freeholders. The sum of \$14,002.50 was thereafter on July 6, 1923, paid to E. J. Ricker and defendant Dreher signed a receipt therefor.

7. On July 18, 1923, the County Engineer recommended that the seventh and final payment be made to Gus Dreher on the Belmont Ave. job and the Board of Freeholders on that day formally  
 30 accepted and approved said final payment. This act constituted the formal acceptance of the Belmont Ave. job and the balance of \$5,030.88 then due thereon was paid by the County Treasurer on August 17, 1923, to E. J. Ricker and Dreher signed the receipt therefor.

It is further stipulated and agreed by and between the attorneys for the parties hereto that either side may read portions or all of the testi-  
 40

*Notice and Grounds of Appeal.*

mony taken at the deposition before Commissioner Stockton. Plaintiff will produce all notes, vouchers, trade acceptances given by Dreher after acceptance of the Belmont job, after Nov., 1923.

Dated: Newark, N. J., October 13, 1925.

10

CHARLES FOSTER BROWN,  
Attorney for Plaintiff.

LEVITAN & LEVITAN,  
Attorneys for Defendant  
Maryland Casualty Co.

20

**Notice and Grounds of Appeal.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

FIREPROOF PRODUCTS COMPANY,  
Plaintiff,

vs.

GUS DREHER and MARYLAND  
CASUALTY COMPANY,  
Defendants.

30

Action  
at Law.

*To Levitan & Levitan, Attorneys of defendant  
Maryland Casualty Company, or to whom it  
may concern:*

PLEASE TAKE NOTICE that the plaintiff in the  
above entitled cause appeals to the Court of  
Errors and Appeals in the last resort in all causes

40

*Notice and Grounds of Appeal.*

in New Jersey from the judgment in favor of defendant Maryland Casualty Company, entered in this cause on the following ground, to wit;

(1) Because the Supreme Court erred in giving judgment to the defendant Maryland Casualty Company instead of the plaintiff, in that

10

(a) The Court erred in holding that the plaintiff did not furnish a statement of the amount due plaintiff to defendant Maryland Casualty Company in accordance with Chapter 75, laws of 1918.

(b) The Court erred in holding that its findings of the fact, numbered 12 to 16 inclusive, did not constitute the furnishing of a statement of the amount due plaintiff to Maryland Casualty Company in accordance with Chapter 75, laws of 1918.

20

(c) The Court erred in holding that defendant Maryland Casualty Company did not waive the statutory requirement that plaintiff furnish to said defendant Maryland Casualty Company, a statement of the amount due plaintiff.

(d) The Court erred in holding that its findings of fact, numbered 16, did not constitute a waiver by defendant Maryland Casualty Company of the statutory requirement that the plaintiff furnish to said defendant Maryland Casualty Company a statement of the amount due plaintiff.

30

Respectfully yours,

CHARLES FOSTER BROWN,  
Attorney of Plaintiff.

40

Testimony.

NEW JERSEY SUPREME COURT.

Monday, October 19, 1925.

10 FIREPROOF PRODUCTS COMPANY, a corporation,

vs.

GUS DREHER and MARYLAND CASUALTY COMPANY.

Action at Law.

Before:

20 Hon. NELSON Y. DUNGAN, J., without a jury.

For the Plaintiff appears CHARLES F. BROWN.

For the Defendants appear LEVITAN & LEVITAN (by ABRAHAM LEVITAN).

30 Mr. Brown opens in behalf of plaintiff.

Mr. Levitan opens in behalf of defendants.

Wood McKee—Direct—Cross.

WOOD MCKEE, sworn in behalf of plaintiff.

Direct examination by Mr. Brown:

Q. Were you the attorney for the plaintiff, the Fireproof Products Company, in 1923 in connection with this case against the Maryland Casualty Company and Gus Dreher? A. I was. 10

Q. As said attorney did you talk with Henry H. Wilson or any other agent of the Maryland Casualty Company with reference to the claim amounting to \$8,855.40? A. I did.

Q. I show you a form of notice and ask you to look at it. A. Yes, sir.

Q. You caused that notice to be served on Dreher? A. I did. 20

Q. Served in duplicate on the Maryland Casualty Company? A. Yes, sir.

Q. And where—in Paterson? A. In Paterson.

Mr. Brown: I ask counsel to stipulate that this is the notice.

Mr. Levitan: We have already stipulated that this is the notice received.

Q. This notice was served on or about the 15th of May, 1923. Did you afterwards communicate with any representative of the Maryland Casualty Company with reference to this claim? A. Not to my recollection. 30

Q. You don't remember distinctly that you did or did not? A. No.

Q. Served what day? A. May 15, 1923.

Cross-examination by Mr. Levitan:

Q. Did you ever notify any other representative of the Maryland Casualty Company with ref- 40

*William Brown—Direct.*

erence to its claim or communicate with them? A. Other than Mr. Wilson?

10 Q. Other than Mr. Wilson. A. There was another representative in Paterson and I just can't think of his name. I think that he had charge of that just prior to the time that Mr. Wilson was appointed.

Q. Confine yourself, if you please, to the dates after May 15, 1923? A. No, I did not.

Adjourned until tomorrow, Tuesday, October 20, 1925, at ten o'clock A. M.

SECOND DAY.

20 Tuesday, October 20, 1925.

Continued pursuant to adjournment.  
Present, counsel as before stated.

WILLIAM BROWN sworn in behalf of plaintiff.

30 Mr. Brown: I would like to offer in evidence the notice served May 15, 1923, by Wood McKee, as attorney for the Fireproof Products Company and on the Maryland Casualty Company, which the defendant admits was served on that day on Henry H. Wilson, the duly authorized agent of that defendant.

(Marked Ex. P-1.)

Mr. Brown: Also a copy of the bond executed by the defendant, the Maryland Casualty Company, under which this suit is brought.

40 (Marked Ex. P-2.)

*William Brown—Direct.*

*Direct examination by Mr. Brown:*

Q. How long have you been associated with the Fireproof Products Company? A. Approximately six years.

Q. Continuously for the last six years? A. Yes, sir. 10

Q. What was the nature of your work in the year 1922 and 1923? A. Salesman.

Q. Whereabouts? A. Territory of Newark, New Jersey.

Q. As such salesman, did you have anything to do with the sales of materials on the Belmont Avenue job? A. I did.

Q. You had complete charge of that? A. Yes, sir.

Q. When did you actually learn of the assignment by Dreher to Ricker of all his rights and moneys on the Belmont Avenue job, which assignment it is admitted was filed about October 6th or 7th, 1922? 20

Mr. Levitan: I object to this as irrelevant and immaterial.

The Court: Objection overruled.

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

Exception noted as ground of appeal. 30

A. I am quite sure it was the following January.

Q. January, 1923? A. Yes, sir.

Q. Did you know anything about that assignment before that time? A. I did not.

Q. In the early part of January, 1923, Wood McKee acted as attorney for your corporation with reference to this claim? A. Yes, sir.

Q. Did you confer with him during the month of May, 1923? A. I did. 40

*William Brown—Direct.*

Q. With reference to the service of a written notice on the Maryland Casualty Company? A. I did.

10 Q. After May 15, 1923, did you call on Mr. Wilson, the agent of the Maryland Casualty Company, with reference to this claim? A. I did, several times.

Q. Did you call on him during the month of June? A. I did.

Q. July? A. July and August.

Q. At any one of those times did you see a copy of the notice which has been marked Ex. 1 in evidence on Mr. Wilson's desk? A. Several times I did.

20 Q. What did he ever say to you about that notice? A. Mr. Wilson, you mean?

Q. Yes. A. He told me—

Mr. Levitan: I object. He has no right to make any statements which will bind this corporation. It is a very large corporation, and the authority of each man is specifically limited.

The Court: What is the stipulation of fact as to the authority of Mr. Wilson?

30 Mr. Levitan: As to the service of the notice only.

The Court: He admits that he was a duly authorized agent of the defendant Maryland Casualty Company. The question may be answered.

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

Exception noted as ground of appeal.

40 A. Mr. Wilson, the agent, showed me a copy of the notice served by Wood McKee and he also told

*William Brown—Direct.*

me that he had sent the original to the Maryland Casualty Company in Maryland.

Q. This was in the month of August, as you recall it? A. Either in July or August.

Q. But you did talk to him in August about it? A. Yes, sir.

10 Q. And also in September, 1923? A. Yes, sir.

Mr. Levitan: I object to that as leading.

The Court: It is leading.

Q. I will withdraw it. Will you please tell me when after July 18th, or around that date, you talked with Mr. Wilson about this in his office or elsewhere? A. I can't tell you the exact date, but I was in to see Mr. Wilson at least twenty or thirty times after that asking when our case was to be settled or when we may expect any money from them.

20 Q. But you saw correspondence Mr. Wilson had with the home office of the Maryland Casualty Company about this matter? A. Yes, sir.

Mr. Brown: I ask counsel to produce a copy of the letter written by Mr. Wilson on July 24, 1923, to the Maryland Casualty Company.

30 (A paper is produced by defendant's counsel.)

Mr. Brown: Do you admit this is a copy of a letter written by Mr. Wilson to Mr. Dreher in reference to this matter?

Mr. Levitan: I object to this going into evidence.

40 The Court: Of course, your objection will have to be sustained, unless you make the admission that Mr. Brown has asked you to make.

*William Brown—Direct.*

Mr. Brown: The letter has not been proven, of course.

Mr. Levitan: I object further on the ground that Mr. Dreher is here in court and he can testify himself as to what transpired.

10

The Court: With that admission, I shall be obliged to sustain that objection.

Mr. Brown: The only unfortunate part is that that witness was subpoenaed to come here, and upon the understanding that the file was to be available for use in this case, he was allowed to return to his office. Here is a letter dated after the 18th of July, written by the Surety Company to the contractor.

20

The Court: I cannot consider that statement at all. If Mr. Wilson is disobeying your subpoena, we will issue a bench warrant and bring him here. All that is asked is to admit that that is a copy of the letter written by Mr. Wilson to Mr. Dreher. With that admission, then the court can act upon your other objection.

Mr. Levitan: Yes, I will admit that it is a copy.

30

The Court: Now, I will consider the other objection.

Mr. Levitan: I now renew my objection. This is a letter, correspondence between the principal and the surety in this case, and in no way is relevant or material to the plaintiff in this issue.

The Court: What do you think is the relevancy of it?

40

Mr. Brown: The attorney for the defendant surety company did, in his opening, what I characterize as blowing hot and

*William Brown—Cross.*

cold. First, he said the notice was too early and then not good, and then he said, "We didn't give them early enough notice, but extended the time," and their position was changed because we didn't notify them before we issued acceptances and notes.

10

The Court: I am inclined to sustain the objection to the admission of this letter in evidence as being immaterial and irrelevant. It may be marked for identification. There doesn't, in the letter, seem to be the slightest reference to the claim of this plaintiff.

(Paper referred to is marked Ex. P-3 for identification.)

20

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

Exception noted as ground of appeal.

Q. Have you computed the amounts of interest on the sum of \$8,055.40 from May 15, 1923, to date?

A. I have. From May 15, 1923, to date is \$1,284.03.

Q. In order that the record may be complete, I also ask you if you computed the interest from July 18, 1923? A. From July 18, 1923, to date is \$1,195.48.

30

*Cross-examination by Mr. Levitan:*

Q. You were the outside man for the Fireproof Products Company, were you not? A. I was.

Q. And you knew all the people on the Belmont avenue job and on the other jobs that you were supplying material to? A. I did not, no.

Q. How did you come to meet Mr. Wilson? A. Mr. Wilson, through Mr. Dreher, told me that he was the agent for the company.

40

*William Brown—Cross.*

Q. What brought you to his office? A. Looking for money.

Q. You just came there to ask for money? A. Yes, sir.

Q. You being the agent of the company? A. Yes, sir.

10 Q. Would you say, "How do you do, Mr. Wilson, have you got any money for me?" and then go away? A. Yes, sir.

Q. And that is what you did on all occasions that you were there? A. Yes, sir, and showed me the bond and showed me correspondence and letters that he got from the company and everything. We had quite a few matters to transact on my visits.

20 Q. Just tell the court specifically what you did go there for? A. To find out what action the defendant company was taking on our claim.

Q. On account of the notice that was served by Mr. McKee? A. Yes, sir.

Q. You didn't serve any other notice? A. No, sir.

Q. You just went there to see if the Surety Company would recognize your claim and pay it? A. Yes, sir.

30 Q. You were never in communication with the engineer? A. No.

Q. Where did you find out? A. The County Treasurer.

Q. And you never went to the engineer's office to find out what was the situation there? A. Oh, yes, I was in touch with the engineer, but not in regard to the money.

40 Q. You were watching the Dreher situation from the engineer's office, were you not? A. Yes, sir.

*William Brown—Cross.*

Q. So you didn't go to Mr. Wilson to give him any notice of the amount due to your company after that first notice was served? A. Mr. Wilson and I talked about that many times.

Q. Just casually? A. Not casually, no; real earnest.

Q. What did you say to Mr. Wilson? A. I don't remember just the words at the present time, but it was all in connection with our claim, and I was there to get some information out of Mr. Wilson when his company was going to act on our claim. 10

Q. Did you go there to furnish him with a statement of the amount of the claim? A. He knew the amount of the claim.

Q. He knew that from the statement of May 15th? A. Yes, and I spoke to him many times about that. 20

Q. And you had relied on that statement as to the furnishing of a—

Objected to.

Q. You relied upon Mr. McKee's service of that notice for furnishing the statement of the claim in accordance with the statute upon Mr. Wilson?

Mr. Brown: I object.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the court. 30

Exception noted as ground of appeal.

A. I don't know what you mean, that I relied upon previous statements that were filed. I didn't rely upon anything. I was out to collect the money.

By the Court:

Q. I do not suppose there was any other statement served on Mr. Wilson except the one of May 15th? A. That is the only one I know of. 40

*William Brown—Cross.*

By Mr. Levitan:

Q. You saw that statement? A. Yes, sir.

Q. And you made up the data for that statement? A. Yes, sir.

10 Q. And you knew immediately about the service of the statement? A. Yes, sir.

Q. You saw him a day or two after? A. Yes, sir; I saw it on his desk.

Q. Immediately after? A. It was served a month after.

Q. That is, a copy of it? A. Yes.

Q. And you are quite sure that after the furnishing of this statement on the 15th of May no other statement was furnished to Mr. Wilson after that?

20 Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A. There was no other written statement that I know of, but there was lots of oral statements served on him.

Q. Are you sure about that? A. Absolutely sure.

30 Q. When was an oral statement served on him—shortly after that? A. I can't remember dates.

Q. What did that oral statement contain? A. It contained a conversation between Mr. Wilson and me as to the claim and what action he was going to take on it.

Q. What was the amount? A. I can't remember exactly.

Q. What was it? A. Around \$8,000.

40 Q. And that was the amount in the written statement furnished by Mr. McKee? A. I am quite sure it was.

*William Brown—Cross.*

Q. That was the same amount and the same statement you talked about on the different occasions that you saw Mr. McKee? A. I don't remember the amount—\$8,055.

Q. \$8,055 or thereabouts? A. I think that was it.

10 Q. You never went there to furnish Mr. Wilson with any other statement other than the one Mr. McKee, your counsel, had furnished him with? A. Oh, yes, I did.

Q. When? A. At least on the 20th of August, during the month of July or August.

Q. Do you remember testifying before Mr. Stockton, when Mr. Kenny and Mr. Levitan were there? A. I do.

20 Q. Do you remember my asking you questions with regard to serving this notice? A. You used the word "service". The only notice was a written notice.

Q. What do you consider giving an oral notice?

The Court: The statute says "furnishing".

The Witness: Furnishing would be the oral notice.

30 Q. Do you remember my asking you, under oath, before Commissioner Stockton, folio 22, page 9, these questions—

The Court: Your form of question is not proper to lay a foundation for rebuttal. You are asking him if he remembers. He may say he does not remember. The proper form is to ask him if he so testified.

40 Q. Do you remember testifying before Commissioner Stockton as follows: "Did you also sell

*William Brown—Cross.*

Dreher material for other jobs?" *Answer:* "Yes." A. Yes.

Q. *Question:* "When were they commenced, before or after the Belmont avenue job?" *Answer:* "Before." A. Yes, sir. *Question:* "Were they all paid for at the time the Belmont avenue job began?" *Answer:* "Except a small balance." Is that right? A. Right.

Q. *Question:* "Has he done any work since the Belmont avenue job?" *Answer:* "Yes." *Question:* "Did you supply the material to him?" *Answer:* "No, sir." *Question:* "You prepared and looked after the serving of the notice on the Maryland Casualty Company?" *Answer:* "I did, through Mr. McKee, counsel." Is that correct? A. Yes.

Q. *Question:* "I show you a notice and ask you if you ever saw that?" *Answer:* "I saw a copy of it." Is that correct? A. Correct.

Q. *Question:* "Did you serve it?" *Answer:* "Mr. McKee's office." A. Correct.

Q. *Question:* "On Mr. Wilson?" *Answer:* "Yes". *Question:* "Did you ever serve any other notice on Dreher?" *Answer:* "No". Meaning apparently Wilson, and the answer was, "No." *Question:* "That was the only notice your company ever served on Dreher in connection with this job?" *Answer:* "Yes, sir." Meaning Wilson. A. Meaning a regular notice.

Q. You understood that at the time the name Dreher was mentioned, that that refers to Wilson, did you not? A. No, I didn't.

Q. What did you understand "Dreher" means, when the word "Dreher" was mentioned? A. I don't get the meaning at all. How did I answer it?

Q. Did you get the meaning at that time? A. Not that I remember now.

*William Brown—Cross.*

Q. You don't recall now? A. No.

Q. Will you please refer to this testimony, which is the original testimony taken before Commissioner Stockton by stipulation, and let me know whether the word "Dreher" there means "Dreher" or some other name?

Mr. Brown: If you know.

Mr. Levitan: Beginning right about the upper half of the page.

Mr. Brown: I don't like to seem technical—

Mr. Levitan: I object to it.

A. I do. Well, it is perfectly clear. You asked me if I served any notice on Dreher and I said no.

Q. Did you ever serve any notice on Dreher? A. No, sir.

Q. You were asked this question: "That was the only notice your company ever served on Dreher in connection with this job?" *Answer:* "Yes, sir." A. On Dreher?

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

Q. Look at the question. A. (Reading) "Did you ever serve any other notice on Dreher?" *Answer:* "No." *Question:* "That was the only notice your company ever served on Dreher in connection with this job?" *Answer:* "Yes, sir." A. No.

Q. Don't you know that the name of Dreher slipped in by error in this testimony? A. I didn't know.

Q. Don't you know it now? A. No, I don't. I didn't know at the time you asked me that question just what to do, that is where your mind—

Q. You just said that you never served any notice at all on Dreher. A. I admit it.

*William Brown—Cross.*

10 The Court: This examination is going away beyond anything permissible. You are asking the witness what was in the mind of the person asking the question. That certainly is not the way to lay a foundation for contradictions: Let me refer to this question. "You are quite sure about that, are you?" *Answer*: "Yes—after the service of notice was referred to." *Question*: "No notice was served either before or after this one." *Answer*: "Not to my knowledge." A. Written notice, you mean?

Q. Just what the question says. A. I mean, a written notice.

20 The Court: Did you answer that way?

Q. I will read it again: "No notice was served either before or after this one?" *Answer*: "Not to my knowledge." A. That is right.

Q. You answered the question that way? A. Yes, sir.

30 Q. "If there was notice served, any other, you would have known of it, you having been the outside representative?" *Answer*: "Yes." A. Correct; yes, sir.

Q. *Question*: "How did you come to serve a notice in this case?" *Answer*: "Because we saw we were not going to get the money from Dreher." Is that right? A. Absolutely right.

40 Q. *Question*: "Did Dreher tell you he was not going to pay?" *Answer*: "I went to the engineer's office and found out he only had a certain amount coming to him and it would not cover our bill?" Is that correct? A. The engineer or treasurer.

Q. Is that answer correct? A. Yes, sir.

*William Brown—Cross.*

Q. *Question*: "The job was not completed, there was still another payment coming when the notice was served?" *Answer*: "Yes." *Question*: "Do you know how much was still coming to him?" *Answer*: "I don't." *Question*: "You are quite sure from your own personal examination of the records of the County Engineer's office that there was a payment still coming to Dreher and the job was nearly completed?" *Answer*: "Yes." That is correct, is it? A. Yes, sir.

Q. *Question*: "How much more work had he to do?" *Answer*: "Probably two weeks work." Is that correct? A. Yes; as far as I know; that is correct.

Q. *Question*: "And at that time the job was completed and accepted?" *Answer*: "It was completed." 20

The Court: Why are you asking these questions?

Mr. Levitan: I want to show the plaintiff's contention on the question of notice. We had anticipated an action of this kind, that is, of claiming proof under another notice, and that was the object of our examination before trial.

The Court: How is this proper cross-examination? 30

Mr. Levitan: He has testified that he served other notices.

The Court: He has not testified to that at all.

Mr. Levitan: He tried to convey that impression. He said he served twenty oral statements.

Witness: We were talking about that written statement that day, were we not? 40

*William Brown—Re-direct.*

Mr. Levitan: That is for the court to conclude. Your testimony is here. I will just retrace one or two questions to clear that up.

10 Q. Question: "You are quite sure about that, are you?" Answer: "Yes." Question: "No notice was served either before or after this one?" Answer: "Not to my knowledge." Question: "If there was a notice served, any other, you would have known of it, you having been the outside representative?" Answer: "Yes, sir." A. Yes, sir.

*Re-direct examination by Mr. Brown:*

20 Q. I would like to ask you, when you called on Mr. Wilson at his office and saw the copy of the notice of May 15, 1923, did you see that more than once? A. Oh, yes.

Q. Several times? A. Yes, sir.

Q. Once was about a month after the service of the notice, you said that you saw it after that? A. I saw it at least fifteen times within a month.

By the Court:

30 Q. Within a month, you say? A. Yes, sir. The statement laid on Mr. Wilson's desk and Mr. McKee didn't call for it.

By Mr. Brown:

Q. You were in there almost every day? A. I wouldn't say every day. At least twice a week.

Q. You said fifteen times a month and then twice a week; there is a little inconsistency there.

40 A. There is a little inconsistency there, yes. I don't recall how many times. He showed me cor-

*William Brown—Re-direct.*

respondence from the Baltimore office asking if Dreher hadn't paid the Fireproof Products Company, wanted to know if Dreher had paid the Fireproof Products Company.

10 Q. In your examination before trial was anything asked you at any time by Mr. Levitan or anyone else as to whether or not you had any oral communication with Mr. Wilson or any other authorized representative of the company?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

20 Q. I want to ask you, during the period after July, 1923, you had several talks with Mr. Wilson, during the course of which, of course, you demanded of him that he pay the amount due, talked with him about this notice which he had on his desk, and asked him what the company was going to do about it.

Objected to as leading.

30 The Court: Objection sustained. He has already said it. He said he furnished them with at least twenty oral statements after July 18th.

By Mr. Levitan:

Q. [Showing witness paper.] I show you Ex. P-1 and ask you if that is the notice you refer to in your testimony? A. Yes, sir, that is the notice.

40 Q. That is the identical paper, is it? A. I wouldn't say identical paper, no. It looks like a copy of it to me or something.

*William Brown—Re-direct.*

Q. You referred to a notice. A. It looks like the same notice that was served on the bonding company, a copy of which laid on Mr. Wilson's desk. Whether this is the copy or not I don't know.

10 Q. You wouldn't say that is the same paper?  
A. No, I wouldn't say it was the same.

Q. Did you read the paper that was on Mr. Wilson's desk? A. Yes, sir; it reads the same way.

Q. You don't know whether this is the identical paper that laid on Mr. Wilson's desk or not? A. No, I wouldn't swear to that.

Q. What was the last time that you saw that on Mr. Wilson's desk? A. I don't remember that.

20 Q. Did you say that it was May, during the month of May? A. I don't remember, no. I think it was July or August.

Q. And you know that the notice was served on Mr. Wilson the 15th of May? A. Yes, sir, the 15th of May.

Q. By Mr. McKee, and he kept that notice on his desk all through the months of May, June, July and August? A. Maybe three months.

30 Q. Kept it right on his desk? A. Every time I would come in he would say, "There is the notice still lying on my desk"—a copy of it.

Q. A copy of it? A. Yes, sir; originally it had been sent to the Casualty Company in Baltimore.

Q. And that would open up the conversation as to the Dreher job? A. Yes, sir.

Q. If he pointed to the notice and said, "There is the notice," what was the necessity of giving him another notice, as you say you did?

Objected to as a conclusion.

40

*William Brown—Re-direct.  
Motion for Non-suit.*

Q. You saw Mr. Wilson point to that notice on his desk. Why did you give him another notice if he brought this notice to your attention first? A. I don't know. I probably did because I didn't hear anything from the first notice.

10 Q. Did you think more than one notice would make it stronger when he told you that he had the matter on his desk? A. Yes, sir. I wanted to be sure.

Q. And you gave him other notices? A. Yes, sir.

Q. If that is a fact, why didn't you so testify in your examination before trial? You were asked: "If there was a notice served, any other, you would have known of it, you having been the outside representative?" And your answer was: "Yes, sir." A. We were speaking of the written notice then, I am quite sure. 20

Q. That is your explanation? A. Yes.

Q. What did you understand that at that time to mean, "Any other notice"? A. Written.

## PLAINTIFF RESTS.

30 Mr. Levitan: I ask for a nonsuit on the following grounds: First, that it is an admitted fact that the notice in this case was furnished on the 15th day of May, 1923. The stipulation, as part of the record in this case, admits the fact that the job was formally accepted July 18th. Secondly, if the plaintiff relies on another or subsequent notice, the plaintiff has failed to establish that by the preponderance of the evidence, 40 or even, I think, a *prima facie* case, by the

*Harold J. Cordner—Direct.*

10 witness Mr. Brown. Thirdly, the notice not having been served within the eighty days after the acceptance of the job, the suit is prematurely started because the subsequent part of section 3 provides that "No suit shall be brought against said sureties on such bond until the expiration of sixty days after the furnishing of said statement." No statement, we contend, having been furnished this suit, therefore, is prematurely brought.

The Court: The motion will be denied.

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

Exception noted as ground of appeal.

20

HAROLD J. CORDNER, sworn in behalf of the defendant.

*Direct examination by Mr. Levitan:*

Q. You are a bookkeeper for the Fireproof Products Company? A. No, sir.

Q. What is your position with the company? A. Treasurer.

30 Q. And you are familiar with the transactions of a Gus Dreher and your company? A. To a certain extent, yes.

Q. To what extent? A. The general accounting and bookkeeping is under my supervision.

Q. On the 18th of November, 1922, or the 18th of October, 1922, Mr. Dreher was indebted to your firm in approximately the sum of \$9,000 as represented by these two notes?

40

Mr. Brown: I object to that part "As represented by two notes."

*Harold J. Cordner—Direct.*

Q. Or trade acceptances or these two papers?

A. I am not quite certain I get the whole question.

By the Court:

Q. Do they represent the amount of the indebtedness of Mr. Dreher to your company? A. I am not certain. There were several renewals. I am not quite sure of it, whether these two covered the total. 10

The Court: The amount is admitted and these two papers amount to \$8,879.97.

The Court: It is more than the amount admitted.

By Mr. Levitan:

20

Q. What was the excess for? A. I can't say off-hand, but I would judge it would be interest of some sort.

Q. Charged up on the paper? A. It may have been; it may be on the open account.

Q. Do you know of your own knowledge what the extra amount is? A. I do not.

Q. What was the conversation had between you and Mr. Dreher when this trade acceptance and a note was given and accepted by you? A. I had none. 30

Q. With whom was the conversation had? A. I don't know of any conversation.

Q. What were the circumstances under which Dreher gave this note and trade acceptance to your company? A. I cannot recall at the moment whether those notes were obtained by Mr. Brown and sent to the office or whether the notes were given to us in the office by Mr. Dreher. I am not certain of that point. 40

*Harold J. Cordner—Direct.*

Q. You don't recall of your own personal knowledge? A. I don't think I made any arrangement with Mr. Dreher as to the acceptance of those two notes myself.

10 Q. Mr. Brown has authority from your company to negotiate for the payment and the settlement of debts with debtors? A. To a certain extent.

Q. He had authority to negotiate with Mr. Dreher in this case, did he? A. I believe he may have. I don't know of any reason why he wouldn't have.

20 Q. That was within his general scope of authority? A. Mr. Brown, as manager of the office, had certain authority, which was subject to the approval of the home office as to him accepting payment of accounts.

Q. And usually his recommendations were approved, as a matter of course? A. I would say that as a general rule. There are exceptions, of course.

Q. Following the usual custom, he being on the field and the local man; is that right? A. Yes, sir.

30 Q. What was the condition of Dreher's account on your books when these two papers were accepted by you?

Mr. Brown: I object on the ground that it is an admitted fact that this debt has not been paid.

The Court: You mean on this job?

Q. All my questions are directed to Dreher's account concerning this job, and you so understand my question? A. I do now.

40 Q. I ask the previous question: "What was the condition of Dreher's account on the books at the

*Harold J. Cordner—Direct.*

time you accepted these two negotiable instruments?"

Objected to.

A. The account has not been paid.

10 Q. What was on the books at the time you accepted these two negotiable instruments?

Objected to.

Objection overruled.

A. I am not sure whether I understand that question.

The Court: I suppose he means whether you credited his account when the notes were given.

20 Witness: The usual procedure would be to credit the open account with the notes or trade acceptances.

Q. Is that what you did in this case? A. Yes, I did.

Q. So that for the period that elapsed between the date of these negotiable instruments and their maturity Dreher's account on your books appeared paid?

30 Mr. Brown: I object. The only reason that this case is tried without a jury is because I agreed to waive trial by a jury with the understanding that the bill for the material had not been paid.

The Court: The third stipulation is that the plaintiff has not been paid by anyone for material furnished, although payment has been demanded of the defendant Dreher.

*Harold J. Cordner—Direct.*

Mr. Levitan: I am only asking that in order to lay a foundation as to the question of law.

(Question read.)

10 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. The open account appeared paid and in the note account the obligation was still open.

Q. What happened, then, after the notes were not paid? A. I may mention here that it is not the policy of our company ever to accept notes—

20 Q. Don't give us voluntary statements.

Mr. Brown: Let him answer the question.

(Question read.)

Q. Tell us what happened as to your books. We want the facts. A. You mean the bookkeeping transaction?

Q. Yes. A. When the notes were protested, was not paid, as the case may have been, they were again charged to the open account.

30 Q. Charged back again? A. Yes, sir.

Q. How many times were those notes renewed?

The Court: Are you referring to these notes?

Mr. Levitan: Not these particular ones, the notes that were given for this transaction.

40 A. I can't recall that at this time.

*Harold J. Cordner—Direct.*

By the Court:

Q. Was there any renewal of those two instruments? A. I can't answer that off-hand.

Mr. Levitan: I offer one instrument dated November 18, 1922 for \$3879.97, which is a trade acceptance dated December 28, 1922, "Pay to the order of ourselves \$3879.97," payable at the Paterson National Bank—dated November 18, 1922—payable December 28, 1922. 10

(Marked Ex. D-1 for identification.)

Mr. Levitan: And a promissory note dated November 18, 1922, due December 23, 1922, "Payable to the order of the Fireproof Products Company, Inc., \$5000, at the Paterson National Bank, Paterson, New Jersey." 20

(Marked Ex. D-2 for identification.)

Q. Exhibits D-1 and D-2 for identification are in the possession of your company, are they not at the present time? A. Yes.

Q. And this note and this trade acceptance were both delivered by August Dreher and accepted by your company at the time stated on their faces? A. They were. 30

Mr. Levitan: I offer these in evidence.

Mr. Brown: I object to their going in evidence on the ground that the acceptance of a note, there is no presumption arises from it that it is accepted as payment or as an extension of time for the debt. It may just as well be taken as security as any other way. 40

*Harold J. Cordner—Direct.*

The Court: I suppose the purpose is not to show payment, because it is admitted there was no payment by the stipulation, but only that the terms of payment were changed by the parties, that is, Dreher and the Fireproof Products Company, without any notice, but was sent by the defendant Dreher.

Mr. Brown: My objection is on the ground that the acceptance of notes creates no presumption to that effect.

The Court: This matter being before the court, and without a jury, I am inclined to admit them at this time and consider them for what they are worth, if anything, and reject them when we come to the decision of the case, if they ought to be rejected.

(Papers referred to are marked Exhibits D-1 and D-2 respectively.)

Q. Can you tell us whether or not there were any other trade acceptances? A. In payment of that account?

Q. Yes. A. As I recall it, there were originally two either notes or trade acceptances, maybe one of each, accepted, and one of those, was, I recall it, matured and reduced by a lump sum and renewed for an additional period. That is my recollection. I am not absolutely certain without looking at the record.

Q. Do you remember testifying in this case before Mr. Stockton when you had all your records? A. Yes, sir.

Q. Would a reference to your testimony before the Commissioner refresh your recollection of this account? A. Possibly. It is quite a long time ago.

Q. (Showing witness paper.) I hand you the

*Harold J. Cordner—Direct.*

testimony taken before the Commissioner and ask you to glance over it and see if you can refresh your recollection on the transaction. A. (Refers to papers.)

Q. Do you recall now more in detail the transaction of Mr. Dreher with your company with reference to this account in the suit concerning the negotiable instruments? A. To what point?

Q. As to the giving and renewing of the different negotiable instruments? A. Any recollection I may have would be only from my knowledge of the records themselves and not through any conversation or arrangement with Mr. Dreher and myself direct.

Q. Concern yourself with the record and tell us how many times negotiable instruments were given by Mr. Dreher to your company with reference to this particular account and how often they were renewed? A. If my recollection serves me right, the original account amounted to something over \$9,000; around \$9,900, approximately.

Q. That is on the Belmont avenue job? A. That is the entire account.

Q. On Belmont avenue? A. Belmont place, any balance left over there on that job.

Q. Were you interested in the balance on other jobs? A. How much did it amount to? A. The two interlocked. One of the trade acceptances or two of them not only covered the Belmont avenue job, but also any other unpaid balance. The sum against the Belmont avenue job was eighty-eight hundred something, and the entire balance was something over \$9,000. These trade acceptances, or notes, one was for \$6,000 and the other was \$3,879.97.

*Harold J. Cordner—Direct.*

By the Court:

Q. You mean then that the note of November 28th was a renewal note? A. I believe it was.

By Mr. Levitan:

10 Q. You testified on page 14 as follows: "In other words, on the 18th of November Mr. Dreher gave you a note for \$5,000, Exhibit D6, and a trade acceptance for \$3,879.79, Exhibit D8, the total of both instruments aggregating \$8,879.97, which paid your account in full, these two instruments, if they had been paid." A. "Yes, if they had been paid." That is correct? A. Yes, sir.

20 Q. How much was the original note or trade acceptance given prior? A. I think it was \$6,000 and reduced by \$1,000 and another one for \$5,000.

Q. How long was that? A. I believe it was two months, something like that.

Q. Had that been a renewal of a prior note? A. I don't believe it was. I think it was an original note or trade acceptance, whichever it was.

Q. How many times all told were those trade acceptances or notes renewed? A. That is the only time that I recall now.

30 Q. A period of about two months elapsed between each acceptance and renewal? A. You are taxing my memory pretty much. As I recall it, the original \$6,000 was for either one or two months.

By the Court:

40 Q. Would it refresh your recollection any if you recall that the trade acceptance is dated October 18th, and that the \$5,000 note is dated November 18th? A. If that is the case, I would say it was just a one month note.

*Harold J. Cordner—Direct.*

Q. You think they were both originally given on the same date? A. I believe they were given on the same date, but not payable on the same date.

Mr. Brown: Mr. Cordner did not have dealings with Dreher in this matter at all. All he did was receive some papers and some documents. All he is giving is his idea. 10

The Court: He ought not to give his idea. He is testifying to facts.

Mr. Brown: He knows what he did.

The Court: That is all he ought to testify to.

Mr. Levitan: Under the stipulation they had agreed to produce all instruments. 20

Mr. Brown: I stipulated to produce all notes and trade acceptances made after the acceptance of the Belmont avenue job and there were none. I am perfectly willing to let him look in my files and take any other notes.

Q. Can you now tell us how many times the negotiable instruments that were given were renewed? 30

Mr. Brown: Which ones?

Mr. Levitan: Which were given by Dreher to your company.

A. The only renewal that I can recall at the moment is the one of \$6,000 to \$5,000.

Q. You are not positive about that? A. I am not positive. That is the only one I can recall now. There were a lot of other trade acceptances or notes in the Dreher account and I am not ready 40

*Harold J. Cordner—Direct.*

to say that these are the two particular ones that were renewed or that only one of those was renewed without looking at the record.

10 Q. You were asked on cross-examination by Mr. Kenny, your counsel. "Q. At the time this trade acceptance, Exhibit D-8, and this promissory note, Exhibit D-6, were given to your company was there more due your company than appeared on the face of these two instruments? A. The facts in connection therewith are these: D-6 is a renewal of a trade acceptance or a note, I am not certain which, for \$6,000 that was due on November 28, 1922, and on that date Dreher paid \$1,000 in cash and renewed it for the balance of \$5,000, as is witnessed by Exhibit D-6. The original \$6,000 item was dated October 20th and that was given in connection with Exhibit D-8." D-6 is the note for \$5,000. A. That verifies it.

20 Q. Exhibit D-8 is our Exhibit D-1 and the other Exhibit D-6 that the witness refers to is our Exhibit D-2. Do you recall the transaction now? A. That verifies what I testified to.

30 Q. There is no question in your own mind that there were at least two renewals? A. That wasn't brought out; just one renewal; the original was for \$6,000 and at maturity it was reduced by \$1,000 and renewed for \$5,000, and that made the one renewal and this is the one \$5,000 renewal.

Q. And the other was not renewed? A. Evidentially not.

Q. You notified the Maryland Casualty Company of your acceptance of these promissory notes or trade acceptances or their renewals? A. No, sir.

40

*Harold J. Cordner—Cross.*

*Cross-examination by Mr. Brown:*

Q. In connection with the Dreher account with your corporation did you ever have any dealings with Mr. Dreher himself or any of his agents concerning the terms under which any of those negotiable instruments which have been mentioned were offered in evidence were received by you as a corporation? 10

Mr. Levitan: I object to that as irrelevant and 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. 20

A. No, I did not.

Q. In writing or orally? A. No, I didn't, not to my recollection, I know I did not orally. I may have demanded payment in writing, but I am not certain on that.

30 Q. Confine yourself to my question, please. When your corporation discovered that it had in its possession these negotiable instruments which have been offered in evidence and you mention, did you yourself at that time, or any time after, enter into any agreement or arrangement with Dreher or any of his representatives concerning the circumstances or terms under which your company took those pieces of paper?

Mr. Levitan: I object to that as immaterial.

The Court: Objection overruled.

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

Exception noted as ground of appeal. 40

*Harold J. Cordner—Re-direct.*  
*Gustave Dreher—Direct.*

The Court: You may answer the question yes or no.

A. No.

10 Q. Defendant's Exhibit 1 and 2 are the last negotiable instruments received by the plaintiff from Dreher in the course of dealing with him?

A. I believe they are.

Q. Your testimony with reference to the entries or the circumstances under which the notes and their acceptances were received is based purely upon your recollection as derived from entries made in the book and not from any agreements of any kind made with Dreher? A. That is right.

20 *Re-direct examination by Mr. Levitan:*

Q. And the entries in your books disclose the transactions between your company and Dreher?

A. They do.

Mr. Brown: I object to that because it calls merely for a conclusion as to what the books may or may not represent.

The Court: The answer may remain.

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

30

Exception noted as ground of appeal.

GUSTAVE DREHER, sworn in behalf of the defendant.

*Direct examination by Mr. Levitan:*

Q. Where do you reside? A. 9 Pearl Street, Paterson.

40 Q. You are the contractor in this case, August Dreher, in this bond? A. Yes, sir.

*Gustave Dreher—Direct.*

Q. Do you recall the time you started work on this Belmont Avenue job? A. I think it was in 1922.

Q. Do you also recall the time when you purchased material from the plaintiffs in this suit? A. Yes, sir.

10 Q. Will you tell us the time you went to the Fireproof Products Company and gave them a promissory note or a trade acceptance in payment of your debt?

Objected to.

20 Q. Do you recall the circumstances at the time you called at the Fireproof Products Company and delivered to them certain trade acceptances or promissory notes? A. Mr. Brown came on the job one day and he told me he had to have some money, so I told him, "I can't do anything for you now. What I can do is give you some notes." And he said, "All right," and I gave him the notes.

Q. How much were those notes? A. I think one was for \$5,000, but the other one I couldn't tell you; I can't remember that any more.

30 Q. What were those notes given for? A. For the wire used on the Belmont Avenue job.

Q. What happened when those notes or trade acceptances became due? A. They were protested and showed a loss on the job and Mr. Ricker didn't want to go no further, and that is how it came.

Q. Did you at any time renew those notes or trade acceptances? A. I think the one was renewed. I can't recall that any more.

Q. Was there anything paid by you, do you recall? A. Yes, I paid some.

40 Q. How much? A. I couldn't tell you; I couldn't recall it.

*Gustave Dreher—Direct.*

Q. Mr. Cordner, the treasurer of the company, testifies that you paid a thousand dollars at the time of renewal. Do you recall that? A. I couldn't say whether it was a thousand or more. I knew I paid them a couple of times.

10 Q. Renewal notes? A. On notes and what I owed them.

Q. All this was in connection with the Belmont Avenue job? A. Some of it is and some not.

Q. Just confine yourself, your testimony, to the Belmont Avenue job alone, and tell us, if you can, how many times you renewed those notes or trade acceptances? A. When I gave them trade acceptances I owed them around \$6,700, something like that, and they didn't pay a nickel on that any more after that, the notes were protested, and the job laid there.

20 Q. When you gave the trade acceptances and the notes to the Fireproof Products Company did you ever notify the Maryland Casualty Company? A. No.

Q. Ever communicate with them at all? A. No, sir.

Q. So as far as you know, they had no knowledge whatever of your payment or method of payment or transactions with the Fireproof Products Company? A. No—well, when I fell down on paying the notes they notified the company and Mr. Wilson wrote me one letter to the effect and I went there and told him the whole thing.

Q. You told the Fireproof Products Company? A. No, I told Mr. Wilson.

Q. Was any conversation had between you and Mr. Brown when you delivered the notes and the trade acceptances to him? A. You mean between Mr. Wilson—

40

*Gustave Dreher—Direct.*

Q. Mr. Brown, for the Fireproof Products Company. A. When he came up that day and asked me for money I said, "I ain't got any money, all I can do is give you notes."

Q. What did he say? A. I couldn't tell you whether they are notes or trade acceptances or what they are. 10

Q. I show you Exhibit D-1 and D-2 and I ask you if those are some of the papers given? A. This is mine.

Mr. Levitan: Witness indicates Exhibit D-2.

Witness: This one is paid.

Q. You say that this Exhibit D-1 is paid? A. I think so. That is what they had the money on. 20

Q. Is that your signature? A. Yes.

Q. Was there anything else said between you and Mr. Brown at the time? A. No.

Q. Was there any conversation had between you and Mr. Brown when the renewals were given? A. I told you I don't know if they were renewed. There may have been notes renewed before, but this was the last.

Q. What was said before Exhibit D-2 was given for the \$5,000 when the \$6,000 note became due? A. I can't remember it any more. When I could pay something, when the note was due, I paid it as long as I could pay it, but when the trouble started then I could not pay any more. 30

Q. For a period of how many months would you say you conducted your negotiations and transactions with the Fireproof Products Company by the promissory notes and trade acceptances? A. Oh, about a year—do you mean from the day when I started to do work? 40

*Gustave Dreher—Cross.  
Motion to Strike Out Testimony.*

10 Q. No, but the time when you started to give them notes and trade acceptances until the time that you stopped. A. On the Belmont Avenue job this is only trade acceptances given, on the Belmont Avenue job, and Mr. Ricker refused to give me the money for it, and I told him, "I give you notes for it," and I gave them trade acceptances, and when they came due they were no good, they were refused.

*Cross-examination by Mr. Brown:*

Q. The original notes and trade acceptances were given to Mr. Brown? A. Yes, sir.

20 Q. One renewal was given to Mr. Clark in his office in New York, was it not? Didn't you go over to New York in November and talk with Mr. Clark about this matter? A. Yes, I remember I was over there.

Q. That was the time you made a thousand dollar payment on the Belmont Avenue job? A. I couldn't tell you.

Q. You remember having a talk with him? A. I remember now that I was over there.

DEFENDANT RESTS.

30 Mr. Brown: I would like to move to strike out all the testimony offered by the defendant with reference to these notes and trade acceptances, upon the ground that the defendant has not proved or offered a scintilla of evidence in that matter to the effect that these notes were given under any agreement whereby the plaintiff agreed to extend the time for payment.

40 The Court: The evidence may remain.

*Paul Clark—Direct.*

The court will consider it at the close of the case.

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

Exception noted as ground of appeal.

DEFENDANT RESTS.

10

PAUL CLARK, sworn in behalf of plaintiff in rebuttal.

*Direct examination by Mr. Brown:*

Q. You were the president of the Fireproof Products Company in 1922 and 1923 and have been up to date? A. I am.

20 Q. Some time in the year 1922, did you ask Mr. Dreher to come to your office to talk about his account and did he come? A. I believe Mr. Brown asked him to come.

Q. Did he come? A. He did.

Q. You talked with him about how he was going to take care of the debt for the material he owed you? A. Yes, sir.

30 Q. Tell the Court the circumstances of the conversation that you had with him at that time and what took place? A. As I remember it, I explained to Mr. Dreher that we needed money, that we were under-financed, and when a payment was held up on a job the only possible way we could meet our expenses was to borrow money at the bank, and the bank would not loan us enough on what we called our own single paper, but they would discount customers' paper. Mr. Dreher told me that he could not make a payment, and he offered us a trade acceptance or note to help us get the money.

40 Q. And you took a renewal of that paper? A. I did.

*Paul Clark—Cross.*

Q. Did you enter into any agreement with Mr. Dreher aside from taking delivery of these negotiable instruments; did you enter into any agreement extending his time to pay his bills?

Objected to.

10 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 did not.

Q. Despite it, it is the usual thing for material men to sell contractors who are in business doing public work to have slow pay, isn't that true?

20 Objected to as immaterial.

Mr. Brown: I think it is, in fairness, to show that the general custom in the building material trade, that materialmen oftentimes are compelled to await payment.

The Court: I will sustain the objection.

Mr. Brown: I am attempting to offer in evidence sufficient testimony to allow your Honor to take notice of that fact.

30 The Court: The objection will be sustained.

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

Exception noted as ground of appeal.

*Cross-examination by Mr. Levitan:*

40 Q. When you accepted these notes and trade acceptances Dreher's account, for the time being, on the books, appeared paid, did it not? Just answer that yes or no.

*Paul Clark—Cross.*

Mr. Brown: If you know.

Witness: I don't know. I can't answer that question.

Q. You heard the treasurer testify to that this morning? A. Yes, but I can give you a qualifying answer. 10

Q. Suppose you answer it as best you can. A. I would answer it this way: When a man has a limit of \$5,000 and he gives us a note for \$5,000 for material which is past due and he then comes and asks us for a bill of goods for another \$5,000, I would not consider that he has paid the \$5,000 note. Technically that might not be correct, but under those circumstances I don't think he would be entitled to another \$5,000. 20

Q. The account laid dormant; it wasn't actually paid; it was dormant and extended during the period of the date of the issuance of the paper and the maturity of it? A. I don't know what you mean by lying dormant. If we had collateral security you might call it dormant. 20

Q. Isn't it a fact that by the acceptance of these papers Dreher's account automatically extended from the 18th of November until the 18th day of December, as indicated on the paper? A. No, I wouldn't say that. 30

Q. What then would you say? A. I would say that we were privileged—I don't know about this particular case—but I would say—

Q. Confine yourself to this particular case. A. Will you state your question again?

Q. [Question read.] A. No.

Q. It was not extended? A. No, sir, substantially not.

Q. What was the result of the acceptance of the papers? A. The result was that we could bor- 40

*Paul Clark—Cross.  
Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

row money from the bank and pay our bills. The paper didn't do us any good except as a medium to finance our business.

10 Q. If these negotiable papers had been paid at maturity you would have credited Dreher's account as paid from what date, from the date of acceptance of these notes or from the date of payment? A. We would accept them from the date of the payment of the notes. If Dreher had come to us and asked us additional credit and he owed us notes and—

The Court: You are not answering the question.

20 Q. If those notes had been paid at maturity would Dreher's account have appeared paid from the date of the acceptance and delivery to you of those notes or from the date that they were actually paid in the bank? A. I should think they would have probably showed on our books as paid from the time we accepted the notes, but on the future credit we had been paid from the time he paid the notes.

30 Mr. Levitan: I offer the testimony taken before the Commissioner as part of the record—that is, the examination before trial.

The Court: In an examination before trial, where the party is a corporation, you may read into the record any portion of that that you desire. The court will admit those portions to which you have called the witnesses' attention during your examination and any other portion which you now call to the court's attention.

40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

Mr. Levitan: I will offer, as corroboration of the giving of these notes, in evidence at this time so much of Mr. Cordner's testimony as refers to the account and the notes, which begins on page 12 and ends on page 14. Most of it is in evidence here, and also the cross-examination by Mr. Kenny of Mr. Cordner on page 14, together with the re-direct examination of Mr. Cordner on page 15 and recross on pages 15 and 16, and I also offer in evidence at this time the testimony of Mr. Brown commencing on page 9 and going to page 11 concerning the furnishing of the statement. 10

The Court: You say there is nothing in it that the court ought to know other than what has been read? 20

Mr. Brown: I object to that; there are portions in there on direct examination—

The Court: I will not consider, nor has there been admitted in evidence, any testimony taken before trial except that to which the attention of the witnesses has been called on direct examination.

I have told you that if there is any testimony to which the attention of the witnesses has not been called, and you desire it in evidence, it must be read at this time. If not read at this time it will not be considered in evidence. Everything to which the attention of the witnesses was called during the examination will be considered in evidence. 30

Mr. Levitan: I am now reading from page 9 of Mr. William W. Brown's testimony. Most of this has been read to the 40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

witness with the exception of a line here and there. [Reading:]

10 "Question: Were they all paid for at the time the Belmont job began? Answer: Except a small balance. Question: Has he done any work since the Belmont avenue job? A. Yes. Q. Did you supply the material to him? A. No, sir. Q. You prepared and looked after the serving of the notice on Maryland Casualty Co." A. I did, through Mr. McKee, counsel. Q. I show you a notice and ask if you ever saw that? A. I saw a copy of it. Q. Did you serve it? A. Mr. McKee's office. Q. On Mr. Wilson? A. Yes. Q. Did you ever serve any other notice on Mr Dreher? A. No. Q. That was the only notice your company ever served on Dreher in connection with this job? A. Yes, sir. Q. You are quite sure about that, are you? A. Yes. Q. No notice was served either before or after this one? A. Not to my knowledge. Q. If there was a notice served, any other, you would have known of it, you having been the outside representative? A. Yes, sir. Q. How did you come to serve a notice in this case? A. Because we saw we were not going to get the money from Dreher. 30 Q. Did Dreher tell you he was not going to pay? A. I went to the Engineer's office and found out he only had a certain amount coming to him and it would not cover our bill. Q. The job was not completed, there was still another payment coming when the notice was served? A. Yes. Q. Do you remember how much was still coming to him? A. I don't. Q. You are quite sure from your own personal examination of the records in the County Engineer's office that there was a payment still coming to Dreher and the job was nearly com- 40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

pleted? A. Yes. Q. How much more work had he to do? A. Probably two weeks work. Q. At that time the job was completed and accepted? A. It was completed. Q. Do you know when the job was actually accepted? A. A long time after its completion. Q. A long time after service of the notice that the job was completed and accepted? A. Yes, a long time after the completion of the job before the State accepted it. It was a County job with State aid. Q. What was the reason of the refusal to accept the job on the part of the authorities? A. On account of borings made by State Highway Department and tests made on the concrete, which I presume was not up to standard. Q. Did Dreher have to do some of the work over? A. I think there was a portion of it in question that I cannot answer whether it was repaved or what. Q. But some additional work was done on it? A. I think a section had to be taken out. Q. Was that after the notice was served? A. Quite a while. Q. The work was done quite a while after the notice was served on Mr. Wilson? A. The notice was served before the completion of the job and a great while before acceptance by the State. 10 20 30

Mr. Levitan offers said notice in evidence and the Commissioner marks it Exhibit D-5.

Q. This notice purports to have been served May 15, 1923, and according to your best recollection the job was not completed until after two months, or about the middle of August, 1923? A. Yes."

As to Mr. Cordner's testimony, the oral testimony previously showed that he had 40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

knowledge of the books and led up to a subsequent adjourned day. I am reading from page 12 (Reading)

10 "Harold J. Cordner, being recalled by Mr. Levitan, testified further as follows:

Q. Have you brought with you today the things you agreed to at the last hearing? A. Yes. (Witness produces papers.) Q. What are these? A. These are certain trade acceptances, some have been paid and some have not. (Witness produces six trade acceptances with notice of protest.)

The Commissioner marks same as Exhibits D-6 to D-12 for identification.

20 Q. Will you please look at these exhibits D-6 to D-12 for identification and tell us which were given for the Belmont job? A. Here are some. (Witness hands Mr. Levitan three papers.)

The Commissioner marks same as Exhibits D-6, D-7 and D-8 for identification.

30 Mr. Levitan offers said three papers in evidence; Mr. Kenny objects thereto as being irrelevant and immaterial and that they have not been paid; the Commissioner marks same as Exhibits D-6, D-7 and D-8. The said exhibits are as follows:

D-6. Promissory note dated November 18, 1922, by Gus Dreher for \$5,000., payable December 23, 1922, to the order of the Fireproof Products Co., Inc., at the Paterson National Bank, Paterson, N. J., with interest, Endorsed: The Fireproof Products Co., Inc., Paul R. Clark, Pres.

40 D-7. Notice of protest dated December 26, 1922, from the Paterson National Bank

*Reading Testimony of William W. Brown and  
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of Paterson, protesting said note of \$5,000., the amount of the protesting being \$5,031.67 and the protest fees \$2.46, protested by Charles C. Stalter, Notary Public, file number 523.

10 D-8. Trade acceptance dated November 18, 1922, for \$3,879.97 made by The Fireproof Products Co., Fred R. Hesser, Treas. marked accepted October 18, 1922, payable December 28, 1922, payable at Paterson National Bank, Paterson, N. J. Gus Dreher, and stamped across the face October 18, 1922, payable at Paterson National Bank, Paterson, N. J. signed Gus Dreher and endorsed The Fireproof Products Co., Inc., Fred R. Hesser, Treas." 20

The examination before trial does not account for Exhibits D-10, 11 and 12 and I don't believe they were there, trade acceptances, and there were other documents. We now offer them in evidence.

The Court: I have said I will not consider anything that is not in evidence.

(Continuing) "Q. What is the total amount of the note, protest fees and the trade acceptance, Exhibits D-6, 7 and 8? A. \$8,914.10. Q. And the sum total of your suit is how much? A. \$8,855.40. Q. When was the difference paid? A. It was not paid. Q. What did you do, waive the difference? A. The amount of these papers you just mentioned is in excess of the amount of the suit. Q. The difference consists of interest and protest fees? A. And two other items. These acceptances were received in payment of the balance in Dreher's account at the time, and in addition to the material 40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

on the Belmont avenue job there was an item of \$11.24, it being interest, on a note which had previously not been paid. Q. In other words, on the 18th of November, Mr. Dreher gave you a note for \$5,000., Exhibit D-6, and a trade acceptance for \$3,879.97, Exhibit D-8, the total of both instruments aggregating \$8,879.97, which paid Dreher's account in full, these two instruments, if they had been paid? A. Yes, if they had been paid. *By Mr. Kenny:* Q. Was the account of Gus Dreher on the Belmont avenue job kept as a separate account? A. It was not. Q. You had one general account of all Dreher's business conducted by you? A. Right."

20 At one o'clock P. M. the Court took a recess of one hour.

—  
AFTER RECESS.

Mr. Levitan: (Continuing) Q. "At the time this trade acceptance, Exhibit D-8, and this promissory note, Exhibit D-6, was given to your company was there more due your company than appeared on the face of these two instruments? A. The facts in connection therewith are these: D-6 is a renewal of a trade acceptance or a note, I am not certain which, for \$6,000 that was due on November 28, 1922, and on that date Dreher paid \$1,000 in cash and renewed it for the balance of \$5,000, as is witnessed by Exhibit D-6. The original \$6,000 item was dated October 20th and that was given in connection with Exhibit D-8. *By Mr. Levitan:* Q. I show you Exhibit D-8 and ask if it was given to your company at the time in October

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

when Dreher gave you the note or trade acceptance for \$6,000 which you have just referred to? A. The item of \$3,879.97, Exhibit D-8, was received together with the original note of \$6,000. Q. So at that time in October, 1922, the aggregate total of the two instruments, D-8 and the trade acceptance which was reduced by \$1,000 amounted to \$9,879.97? A. Correct. Q. And this sum represented the total of all moneys due your company from defendant for all jobs at that time? A. The total amount of these two instruments marked D-6 and D-8 was given in payment of the balance due on the Dreher account, the \$1,000 which was paid in November, previous to the delivery of the two instruments aforesaid, D-6 and D-8, was credited to the Dreher account, which was composed of items for material delivered to the Haledon avenue job and the Belmont avenue job, the Haledon avenue job being the older of the two jobs. Furthermore, we had previously received a trade acceptance on the Haledon avenue job, which when due was met with the exception of \$1,000 balance, that balance of \$1,000, not being included in the \$6,000 item. *By Mr. Kenny:* Q. Did your company receive payment of these two instruments marked D-8 and D-6? A. They certainly did not.

Mr. Kenny objects to the admission of the trade acceptances marked Exhibits D-6 and D-8 on the grounds that they were never paid and that the proof shows that the account with Gus Dreher was an open account and that the balance due on all material furnished previous to that of the Belmont avenue job had been paid for.

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

10 Q. "In this general account which was conducted in the Dreher account, all payments made previous to November 18, 1922, you credited Dreher with those payments against the oldest items charged against his account, didn't you? A. We did. Q. So by that method that left all the material delivered to Dreher on the Belmont avenue job unpaid for on your books? A. Correct. *By Mr. Levitan:* Q. "Did Mr. Dreher specify to what account he wanted any particular payment credited? A. Not as far as I know. Q. He just made payments and your firm credited Dreher with those payments on whatever account you saw fit? A. To the oldest items of the account. Q. Have you the account of Gus Dreher there, the original? 20 A. Yes. (Witness produces same.) Q. This page you have produced is the account of Gus Dreher on the Belmont avenue job? A. It is the account of Gus Dreher on all jobs.

Mr. Levitan offers said account in evidence and the Commissioner marks it Exhibit D-9.

30 Q. What are those letters, code letters, indicated under the column, 'Reference'? A. The page number of the cash book or other record. Q. What does J. E. mean? A. Journal entry. Q. And N. R.? A. Notes receivable. *By Mr. Kenny:* Q. What is this account, this paper? A. Ledger sheet. *By Mr. Levitan:* Q. According to this sheet, as of date of January 2, 1924, a balance is due your company from Gus Dreher, \$8,997.25, for which a note had been given and accepted by your company and marked under column N. D. 40 12/28/22, is that correct? A. It is not correct. On the 28th of December, 1922, there was due on

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

the general account \$3,879.97. Q. Plus the note which became due on the 28th of December, 1922, and was not paid, making a total balance due from Dreher of \$8,997.25? A. Balance due on January 1, 1923, but was not made up as explained in your question. Q. Please tell us how the balance was made up? A. \$8,997.25 was made up by note of \$5,000, dated November 18th, due December 23rd, which was protested and charged back on the account in the amount of \$5,034.13, consisting of the face of the note, \$5,000., interest, \$31.67, protest fees, \$2.46; and the trade acceptance dated November 18, 1922, due December 28, 1922, for \$3,879.97. It also included an item of \$83.15 invoice to Dreher for material furnished on the Haledon job. Q. Was there a note or trade acceptance given prior to the one for \$6,000, that you have not mentioned in your testimony? A. In connection with the Belmont avenue job, no, that was the first. Q. For the Belmont avenue job you only received three notes, one of which was renewed and the other two you have produced here; by notes I mean notes and trade acceptances? A. Yes. Q. You testified the other day that you had a separate account for each job of Gus Dreher, did you not? A. I did not. Q. 30 Didn't you keep a separate account for each job in any book at all? A. We did not. Q. How then can you testify that the balance due, that you are suing for, is exclusively for the Belmont avenue job if you did not keep individual accounts for each job?

Mr. Kenny objects to the question on the ground that it calls for a conclusion of law.

A. I answered the question at the last examination. Q. Will you just answer the question again? 40

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

A. When a note was received we must know the place where the material is to be delivered, the record of the account would show that place. Q. And it is on that information that you base your testimony that the balance due is for the Belmont avenue job? A. It is. *By Mr. Kenny:* Q. You state that you did not run separate accounts of these various jobs? A. Correct. Q. Each payment that was made to you by Dreher was credited, regardless of the job to which the material was supplied, to the oldest charges against him? A. Correct. Q. As appeared in that account? A. Yes. *By Mr. Levitan:* Q. Exhibit D-8 is dated November 18, 1922, and accepted October 18, 1922, can you explain the discrepancy in those dates? A. I don't think I recall. Very often a road contract such as Dreher's is dependent entirely on the way he collects the money from the municipality for whom he is doing the work to pay us. I assume we agreed to give him an extension of time, something of the kind, provided he gave us acceptances at that particular time so we could discount it, I don't know of any other reason. It is commonly done, it is not unusual. *By Mr. Kenny:* Q. You don't know whether it was done in this case or not? A. No. *By Mr. Levitan:* Q. The trade acceptance D-8 is dated November 18, 1922? A. Yes. Q. And it is stamped across the back that it is accepted October 18, 1922, one of those dates must be erroneous? A. Not necessarily. Q. How then can a trade acceptance be accepted a month or so before it is given or dated? A. It can be dated ahead, an acceptance is different from a note, an acceptance is an acknowledgment by the signer or acceptor that he has already received value in merchandise equivalent to the

*Reading Testimony of William W. Brown and  
Harold J. Cordner into Record.*

amount of the acceptance. Q. The instrument only came into life on the 18th of November, 1922? A. I believe if you refer to the date on the back that it was in the bank before that date so therefore it must have been negotiable. Q. The bank stamps indicate: 23rd Ward Bank November 21, 1922; Irving National Bank November 27, 1922? A. But the revenue stamps have as date of cancellation November 6, 1922, which indicates the date it was discounted in the bank by Fireproof Products Co. Q. So your object in accepting this trade acceptance from Dreher and this promissory note was to give Dreher an extension of time to make his payments to you relying upon the time when the municipality or County would pay him? A. I can't say that. Q. What did you mean before? A. I said it was possibly what happened. Q. Do you know whether or not any other extensions of time for the payments were granted to Dreher by your company? A. Notes were renewed at various times. Q. So it was a common occurrence for your company to permit Dreher to pay obligations as they became due by extending the time for him from time to time? A. Very often it was made necessary for us to do so. Q. What was the necessity?"

Mr. Kenny objects to the question on the grounds that it is irrelevant and incompetent.

"A. Dreher told us he did not have the money to pay and would give us as much as he could, which he tried to do. Q. And upon those representations by Dreher you extended the time for the payment to him? A. Yes, and also through those representations several of the notes were

*Harold J. Cordner—Recalled.*

protested, which bears out the original contention that it was often necessary for us to do so.”

Mr. Brown: To explain that testimony I would like to call Mr. Cordner.

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HAROLD J. CORDNER, recalled.

By Mr. Brown:

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Q. A portion of your testimony before Commissioner Stockton has been read, which reads as follows (I am reading from folio 55): “Do you know whether or not any other extensions of time for the payments were granted to Dreher by your company? A. Notes were renewed at various times.” I want to ask you again to make certain of this fact, was your testimony before the Commissioner your interpretation of the books which were then before you and which were offered in evidence, or was it the result of negotiations or communications which you had with Mr. Dreher or any of his representatives?

Objected to.

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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. That was only my interpretation of the records themselves.

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Q. And you didn’t have any dealings with reference to any alleged extensions of time by Mr. Dreher or any of his representatives? A. No, sir.

*Motion for Judgment for the Defendant.  
Motion for Non-suit.*

By the Court:

Q. You mean by that that you had no knowledge of the transaction itself except what you got from the books themselves? A. Only what I got from the books themselves.

10

Mr. Levitan: I now renew my motion for judgment for the defendant on the following grounds: First, that the notice which was served in this case was not in compliance with Section 3, chapter 75 of the Laws of 1918.

The Court: Are the reasons the same as on the motion for a non-suit?

Mr. Levitan: For the same reasons urged on the motion for a non-suit. Secondly, if the plaintiff relies upon the oral statement or statements furnished by the plaintiff to the defendant, or its agent, there should be judgment for the defendant on the ground, first, that there was no specific time fixed for the oral statement. Thirdly, the nature of the statements were not in accordance with the statute, the statute being specific as to the contents of the statement made, oral testimony, in substantiating that phase of the statute. Fourthly, that the testimony offered here is contradictory to the testimony of the witnesses taken at the examination before trial, in which he says there were no other statements. The Court is familiar with the testimony, which it is useless to read here. As a fifth ground for judgment for defendant, I urge expressly the fact that the statute says that a statement must be furnished, and that

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*Motion for Non-suit.*

10 naturally presupposes a written statement and not an oral statement, so that if the Court finds that there were oral statements furnished they still do not comply with the requirements of the statute, which requires a written statement, notwithstanding the fact that the statute is silent as to whether it should be written or oral, and the inference would be that the statement would be in writing and not an oral one. Also on the additional ground, if your Honor please, that prior to the 18th day of November, 1922, the exact time being immaterial for the purposes of argument in this case, a negotiable instrument or instruments were accepted by the plaintiff from the debtor without the knowledge or consent of this defendant. The purport of those instruments was, as is purely evidenced by the testimony, to extend the time of payment without the knowledge or assent of the surety for some time, at least a month prior to the 18th day of November, 1922; that on that day a thousand dollars was paid and a further extension was granted for another month, or a month and ten days, until the 28th of December, 1922. I respectfully urge that by that act, which was without the knowledge and consent of this defendant—and that was testified on both sides—the surety was relieved and released of any liability under this bond. In connection with the statute, I ask for a judgment for the defendant, on the ground that a suit was improperly started, the statute being specific in the fact that it recites

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*Opinion.*

that no suit can be begun within sixty days after finishing of said statement.

The Court (after argument): The motion for the direction of a verdict will be denied.

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Mr. Brown: I offer the stipulation in evidence.

(Marked Ex. P-4.)

*Opinion.*

NEW JERSEY SUPREME COURT, 20

ESSEX CIRCUIT.

FIREPROOF PRODUCTS COMPANY,

vs.

GUS DREHER and MARYLAND CAS-  
UALTY COMPANY.

Action  
at Law.

For the Plaintiff appears CHARLES F. BROWN. 30

For the defendant appear LEVITAN & LEVITAN,  
(by ABRAHAM LEVITAN).

DUNGAN, J.:

This action is brought by the plaintiff, who furnished materials for municipal work to the defendant, Gus Dreher, the contractor, who had furnished a bond under the provisions of Chapter 40

*Opinion.*

75, laws of 1918 (p. 203) with the Maryland Casualty Company, the other defendant, as surety.

10 There is no question but that the materials were furnished by the plaintiff to Dreher and it is admitted that the amount claimed by the plaintiff is due and owing to it from Dreher, the only question being whether or not the notice required under Section 3 of the above-quoted act was prematurely given so as to defeat the plaintiff's suit.

20 The act requires that the corporation furnishing any material shall "within eighty days after the acceptance thereof by the duly authorized board or officer" of the municipality, "furnish the sureties on said bond a statement of the amount due to any such \* \* \* corporation." In this case it is admitted that the statement was furnished on May 15, 1923, and that the work was not accepted by the municipality until July 18, 1923.

30 This question has been decided by the Supreme Court in the very recent opinion in the suit of Franklin Lumber Company v. Globe Indemnity Company which holds that a statement furnished prior to the acceptance of the work by the municipality is not a compliance with the act and that where it appears that such statement was furnished prior to such acceptance the plaintiff cannot recover. That is decisive of this case and judgment is therefore given in favor of the defendants.

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

Exception noted as ground of appeal.

**Exhibit P-1.**

<hr/> IN THE MATTER of Claim of FIREPROOF PRODUCTS Co., INC., vs. GUS DREHER. <hr/>	}	Notice to Surety.	10
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TO MARYLAND CASUALTY COMPANY,  
a corporation organized and existing under the laws of the State of Maryland, and duly authorized to transact business in the State of New Jersey: 20

You are hereby NOTIFIED, that Gus Dreher who received a contract from the Board of Chosen Freeholders of the County of Passaic, State of New Jersey, dated June 26th, 1922, for building a road through Belmont Avenue in the Borough of Hawthorne, Passaic County, N. J., is justly and lawfully indebted to the undersigned Fireproof Products Co., Inc., a corporation of the State of New York, duly authorized to transact business in the State of New Jersey, in the sum of \$8,855.40 as follows: 30

The sum of \$4,867.32 for 17,828 sq. yds. A. S. & W. Rect. Galvanized mesh, 65 x 100 sq. pc; all sheets 5-0 wide, cut to lengths.

The sum of \$582.05 for 350 pcs. Carey Elastite Exp. Joint. 3/8 x 10 1/2" straight 10' long. 3500 ft.

The sum of \$2654.35 for 5200 pcs. plain rod bars, 3/4" x 1' 6" long, 1154 lbs.; 40

*Exhibit P-1.*

520 pcs angles 4" x 3" x 3/8" 7800 ft. 66300 lbs.  
The sum of \$741.68 for 1800-Aztec Exp. Joint  
1/4" x 10" x 4" lengths, straight 7200 ft.

10 And as Surety for said Gus Dreher, according  
to the bond filed by him and executed by you,  
dated June 26th, 1922, you guaranteed payment  
of all lawful claims of sub-contractors for ma-  
terial, men and labor furnished for performing  
and carrying forward and completing the said  
contract; and you are hereby NOTIFIED that the  
undersigned look to you for payment of said ac-  
count, the total amount of which is still due and  
unpaid and lawfully owing to the undersigned.

Dated Paterson, N. J. May 9th, 1923.

20

THE FIREPROOF PRODUCTS CO. INC.  
(signed)

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**Exhibit P-2.**

SURETY CORPORATION BOND.

KNOW ALL MEN BY THESE PRESENTS, That we,  
Gus Dreher, principal, and Maryland Casualty  
Company, surety, a corporation organized and ex- 10  
isting under the laws of the State of Maryland  
and duly authorized to do business in the State of  
New Jersey, surety, are held and firmly bound  
unto the County of Passaic, in the sum of Sixty  
One Thousand Eight Hundred Ten and 79/100  
dollars, lawful money of the United States of  
America to be paid to the said County of Passaic,  
or to its certain attorney, successors or assigns,  
to which payment well and truly to be made we do 20  
hereby bind ourselves, our successors, heirs, execu-  
tors, administrators and assigns, jointly and sev-  
erally, firmly by these presents.

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

The condition of the above obligation is such,  
that whereas the above named principal did on  
the twenty-sixth day of June, 1922, enter into a  
contract with the County of Passaic.

Now, if the said Gus Dreher shall well and faith- 30  
fully do and perform the things agreed by him to  
be done and performed according to the terms of  
said contract, or any changes or modifications  
therein made as therein provided, and shall pay  
all lawful claims of sub-contractors, materialmen  
and laborers, for labor performed and materials  
furnished in carrying forward, performing or com-  
pleting of said contract; we agreeing and assent-

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*Exhibit P-2.*

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

30 The said surety hereby stipulates and agrees  
that no modifications or omissions, or additions  
in or to the terms of the said contract or in or to  
the plans or specifications therefor, shall in any-

*Exhibit P-2.*

wise affect the obligations of said surety on its  
bond.

GUS DREHER  
MARYLAND CASUALTY COMPANY

(L. S.) by EDW. J. BAIRD (?) 10  
Vice President

Attest: H. B. SPRAGUE,  
Asst. Secretary

Signed, Sealed and Delivered  
in the presence of  
HETTY W. DE BOW

A True Copy  
JOHN M. MORRISON 20  
Clerk, Passaic County Board of  
Freeholders

SEAL OF THE  
COUNTY OF PASSAIC

**Exhibit P-3.**

(Lost) 30

**Exhibit P-4.**

(Stipulation of facts printed at page 16, *et seq.*,  
*supra.*)

Exhibit D-1.

No..... DATE: Nov. 18, 1922 \$3879.97

10 ON December 28, 1922 Pay to the order of  
OURSELVES PROTEST IF NOT PAID  
Thirty-eight hundred Seventy-nine 97/x Dollars  
Value Received and charge the same to the Ac-  
count of  
To Gus Dreher THE FIREPROOF PRODUCTS, INC.  
9 Pearl St, Paterson, N. J. (sd) FRED R. HESSER  
Treas.

(STAMPED)

20 TRADE ACCEPTANCE  
The obligation of the Acceptor of  
this Bill arises out of the Pur-  
chase of Goods from the Drawer

.....  
Acceptor

Accepted Oct 18, 1922  
Payable at Paterson Natl Bank  
Paterson, N. J.  
(sd) Gus Dreher

30

(ENDORSEMENTS.)

THE FIREPROOF PRODUCTS Co INC.  
(sd) FRED R. HESSER, Treas.

Federal Documentary Stamps amounting to 78  
cents attached thereto.

40

Exhibit D-2.

\$5000.00 November 18, 1922  
On December 23, 1922 I promise to pay to the  
order of THE FIREPROOF PRODUCTS Co. INC.  
Five Thousand.....00/100 Dollars  
at the Paterson National Bank, Paterson, N. J. 10  
Value Received with interest.

PROTEST IF NOT PAID  
(sd) GUS DREHER

(ENDORSEMENTS.)

THE FIREPROOF PRODUCTS Co INC.  
(sd) PAUL R. CLARK, Pres. 20

Federal Documentary stamps amounting to one  
dollar attached thereto.

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**New Jersey Court of Errors and Appeals**

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FIREPROOF PRODUCTS Co., INC.,  
a corporation,  
Plaintiff-Appellant,

*vs.*

GUS DREHER and MARYLAND  
CASUALTY Co., a corporation,  
Defendant-Respondent.

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Action at Law  
**ON APPEAL  
FROM  
NEW JERSEY  
SUPREME  
COURT**

**BRIEF OF APPELLANT.**

**Statement.**

This appeal arises out of an action commenced by the plaintiff against the defendants in the Supreme Court on the statutory form of bond prescribed by Chapter 75, Pamph. L., 1918, entitled "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works."

On June 26, 1922 defendant Dreher entered into a contract with the Board of Freeholders of Passaic County to make certain improvements on Belmont Avenue, Paterson, N. J. (hereinafter called "The Belmont Avenue Job") for the sum of \$61,810.79 (Finding of Fact No. 3; State of Case, p. 12). Shortly thereafter and pursuant to Chapter 75 of the laws of 1918 defendant Maryland Casualty Company executed its bond guaranteeing the payment, among other things, of all lawful claims of materialmen for materials fur-

nished on the Belmont Avenue job (Finding of Fact No. 4; State of Case, p. 12).

Between August 28, 1922 and October 11, 1922 plaintiff sold and delivered to defendant Dreher and the latter accepted and used in the Belmont Avenue job the goods described in the complaint, the total agreed value of which was \$8,855.40 (Finding of Fact No. 5; State of Case, p. 12). No part of this sum has been paid to plaintiff, although due demand has been made therefor upon defendant Dreher (Finding of Fact No. 6; State of Case, p. 12).

On May 15, 1923 plaintiff, by Wood McKee, its attorney, delivered to Henry A. Wilson, the duly authorized agent of defendant Maryland Casualty Company, a formal typewritten notice of the amount due plaintiff for materials furnished on the Belmont Avenue job, pursuant to Chap. 75 of the Laws of 1918 (Finding of Fact No. 12; State of Case; p. 13: Ex. P-1; p. 77). A carbon copy or duplicate original of said notice was also delivered to Wilson at that time (Finding of Fact No. 13; State of Case, p. 13).

On July 18, 1923 the Belmont Avenue job was accepted by the Board of Freeholders of Passaic County, the board duly authorized to make such acceptance (Finding of Fact No. 14; State of Case, p. 13), and the balance due Dreher thereon was ordered paid by said Board (State of Case, p. 17; l. 30).

During the eighty-day period immediately following the acceptance of the Belmont Avenue job, Brown made many calls on Wilson at the Paterson office of defendant Maryland Casualty Company, talked with him about plaintiff's claim and asked when it would be paid (Finding of Fact No. 15; State of Case, p. 13). On several of those visits during that eighty-day period Wilson showed Brown the carbon copy of said written

notice, dated May 15, 1923, and informed Brown that the original notice had been sent to the main office of defendant Maryland Casualty Company in Maryland (Finding of Fact No. 16; State of Case, pp. 13, 14). At those times Brown referred to said written notice as it lay before him on Wilson's desk, told Wilson how much his company owed plaintiff (State of Case, pp. 30 and 31), but Brown did not pick up said notice and hand it to Wilson.

Maryland Casualty Company having failed to pay any part of said claim within said eighty day period or within sixty days thereafter, plaintiff thereafter instituted this suit against Dreher and Maryland Casualty Company within one year from the date of the acceptance of said work to wit, on January 29, 1924 (Finding of Fact No. 17; State of Case, p. 14).

Defendant Dreher did not file an answer to plaintiff's complaint and judgment was entered against him by default, but no part thereof has been collected. Defendant Maryland Casualty Company, by its separate amended answer, denied the material allegations of the complaint and pleaded five separate defenses, which may be summarized as follows:

*First separate defense:* At the time the bond of defendant Maryland Casualty Company was executed, Chapter 75 of the Laws of 1918 was in full force and effect; and under the provisions of said act, all conditions precedent mentioned in said act must be performed by plaintiff, even though not mentioned in said bond, to entitle plaintiff to proceed under the bond.

*Second separate defense:* The notice served by plaintiff on May 15, 1923 was served prior to the acceptance of the public work.

*Third separate defense:* Plaintiff has failed to comply with the statute in that it did not, within eighty days after the acceptance of the work, furnish defendant Maryland Casualty Company a statement of the amount due plaintiff.

*Fourth separate defense:* Plaintiff has failed to furnish defendant Maryland Casualty Company with the statement as required by such statute.

*Fifth separate defense:* Without the consent of defendant Maryland Casualty Company, plaintiff accepted from defendant Dreher the latter's notes and trade acceptance for the amount due plaintiff and thereby extended Dreher's time, thus discharging defendant Maryland Casualty Company from all liability as surety on said bond.

In its reply plaintiff denied the material allegations contained in each and every separate defense and the cause was thereafter regularly set down for hearing.

The case was reached for trial on October 19, 1925 and was tried before Judge Dungan, sitting without a jury, at the Essex County Circuit.

At the close of the trial, Judge Dungan announced that he was of the opinion that plaintiff had proved its case but that he would withhold his decision until a case entitled *Franklin Lumber Company vs. Globe Indemnity Company*, then pending in the Supreme Court, had been determined. Subsequently, on the authority of said case, Judge Dungan gave judgment for defendant Maryland Casualty Company and noted plaintiff's exception thereto as ground of appeal.

For the convenience of the court, we have annexed hereto a copy of the opinions of the Supreme

Court, (4 N. J. Adv. Rep. 16), and of this Court, (133 Atl. 919, not otherwise reported), in the *Franklin* case and have also annexed hereto a copy of said statute.

### Argument.

The appeal presents three issues for the decision of this Court:

1. Did plaintiff furnish the surety a statement as required by Chapter 75 of the Laws of 1918?
2. Did the surety waive the furnishing of such a statement?
3. Is the *Franklin* case controlling; should the principle of that case be applied here, or should its application be limited to the facts involved therein?

### POINT I.

**Plaintiff "furnished defendant surety a statement of the amount due plaintiff" in accordance with Chapter 75 of the Laws of 1918.**

The Belmont Avenue job was "accepted", as that term is defined by the Act, on July 18, 1923 (Finding of Fact No. 14; State of Case, p. 13). The court below found the following facts concerning the furnishing of a statement to defendant Maryland Casualty Company of the amount due plaintiff:

"On May 15, 1923, plaintiff, by Wood McKee, its attorney, delivered to Henry A. Wilson, the duly authorized agent of defendant Maryland Casualty Company, a typewritten notice of the amount due plaintiff for material furnished on the Belmont Avenue job,

pursuant to Chapter 75 of the Laws of 1918" (Finding of Fact No. 12; State of Case, p. 13).

"A carbon copy of said notice was also delivered to said Wilson at that time" (Finding of Fact No. 13; State of Case, p. 13).

"During the eighty day period immediately following the acceptance of this job said Brown made many calls on said Wilson at the Paterson office of defendant Maryland Casualty Company and talked with said Wilson about this claim, asking said Wilson when it would be paid" (Finding of Fact No. 15; State of Case, p. 13).

"On several of those visits during said period Wilson showed Brown the carbon copy of said notice and informed Brown that the original had been sent to the main office of defendant Maryland Casualty Company in Maryland" (Finding of Fact No. 16; State of Case, p. 13).

The evidence upon which the above findings were based was not disputed or questioned by defendant. The court below, however, decided as a matter of law, that said facts " \* \* \* did not constitute the furnishing of a notice within said eighty day period \* \* \* " (Conclusion of Law No. 2, State of Case, p. 14).

Said written notice dated May 15, 1923, (Ex. P-1; State of Case, p. 77), set forth in detail the items of material furnished by plaintiff to Dreher on the Belmont Avenue job, the agreed price thereof and the amount due plaintiff therefor. In other words, that written notice gave the surety the information which the statute required be "furnished" and satisfied the statute as to *form*. Under the authority of the *Franklin* case, however, said written notice was prematurely served and did not, on May 15, 1923, entirely satisfy the statute. Plaintiff admits that said written notice was the only *written notice served* on defendant; but plain-

tiff claims that the statute does *not* require the *service* of a *written* notice.

(A). **An oral statement of the amount due is sufficient to satisfy the requirements of statute.**

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

"Any \* \* \* corporation to whom any money shall be due on account of having \* \* \* furnished any material on the construction \* \* \* of any such \* \* \* work \* \* \*, within eighty (80) days after the acceptance thereof by the duly authorized board of officers, shall FURNISH *the sureties on said bond* a STATEMENT of the amount due to any such \* \* \* corporation \* \* \* " (Italics and capitalization ours).

Said Act merely requires plaintiff to "*furnish a statement*" of the amount due and makes no mention of the necessity for the "service" or "delivery" of any "written" document. Plaintiff's witness Brown testified (State of Case, pp. 30 and 31) that he had furnished defendant surety with oral statements of the amount due plaintiff within the eighty day period immediately following the acceptance of the work. At page 37 (State of Case), the following appears during Brown's examination:

"Q. I want to ask you, during the period after July, 1923, you had several talks with Mr. Wilson, during the course of which, of course, you demanded of him that he pay the amount due, talked with him about this notice which he had on his desk, and asked him what the company was going to do about it.

Objected to as leading.

The Court: Objection sustained. He has already said it. *He said he furnished them with at least twenty oral statements after July 18th.*" (Italics ours.)

Again at page 39 (State of Case), we find in the cross-examination of the witness Brown:

“Q. You saw Mr. Wilson point to that notice on his desk. Why did you give him another notice if he brought this notice to your attention first? A. I don’t know. I probably did because I didn’t hear anything from the first notice.

Q. Did you think more than one notice would make it stronger when he told you that he had the matter on his desk? A. Yes, sir. I wanted to be sure.”

It is respectfully submitted that the conversations had between Brown and Wilson at the time said carbon copy of said notice was on Wilson’s desk constituted the “furnishing” of a statement to the defendant surety which satisfied the statute. The statute does not attempt to set forth the form of the notice or statement and it seems clear that *any* notice or statement to the surety, either *oral* or written, advising it of a claim for material should be sufficient to give a right of action on the bond. Surely Brown could “incorporate by reference” the written notice into the oral demand made during the eighty day period.

Counsel for plaintiff have been unable to find any authoritative definition of the entire phrase “furnish a statement of the amount due,” but in *Brobst v. Whitall-Tatum Co.*, 89 N. J. L. 531, this Court used the following language in paragraph 3 of the syllabus:

“Where a statute provides for the giving of a notice but does not prescribe the manner of its service, it is sufficient if actual notice to the person to be affected is conveyed to him.”

Furthermore, the following definitions of the component parts of the phrase “furnish a statement of the amount due,” are of interest:

In Webster’s *New International Dictionary* (Ed. 1926) the noun “statement” is defined as follows:

1. Act of stating, reciting or presenting, orally or on paper; \* \* \*
2. That which is stated; an embodiment in *words* of facts or opinions; a narrative; recital; report \* \* \*
3. An abstract of an account showing the balance due. (*Italics ours.*)

The verb “furnish” is defined in Webster’s *New International Dictionary* (Ed. 1926), as follows:

4. To provide; supply; give; afford; specify; A. To supply (a person or thing) with something; to *furnish* a mind with ideas; \* \* \* B. To supply or offer (something); to give; present; yield; as to *furnish* food to the hungry; to *furnish* sound reasons.

The verb “furnished” was defined in *Bliss Company v. United States*, 248 U. S. 37. There Bliss Company made a contract with the United States wherein Bliss Company agreed that it “will not make use of any device the design for which is *furnished* to it” by the United States in any torpedo to be constructed for any person or for government other than the United States. The United States sought to enjoin Bliss Company from exhibiting to a foreign government a torpedo constructed in accordance with ideas given, with the tacit consent of the United States, to Bliss Company by an United States Navy officer. The court granted the injunction, saying at page 45:

“Yet the word of the contract is ‘furnished’ not invent, and the words are of different significance. To invent means to create; to *furnish* means to *supply*” (*Italics ours.*)

Taking the statute at face value, in the light of the definitions above cited, it is respectfully submitted that plaintiff's oral statement to the surety of the amount due satisfied the requirements of the statute.

**(B). The production of a carbon copy of plaintiff's original statement during the eighty-day period satisfied the requirements of the statute.**

The court below found as a fact that during the eighty-day period Wilson produced and discussed with Brown the carbon copy of the statement theretofore furnished the surety by plaintiff (Finding of Fact No. 15 and No. 16; State of Case, p. 13). As we proved above, the written statement furnished on May 15, 1923 satisfied the statute in every particular as to *form*. Said written statement would have been a full and complete compliance by plaintiff with the statute if it had been furnished within the eighty-day period immediately following the acceptance of the work. The fact that such statement was furnished prematurely can be regarded in no sense as derogatory to any right or harmful to any interest of defendant surety. It gave defendant surety certain information to which it was not entitled until a later date. A strict compliance with the statute would necessitate a duplication of the procedure then followed. We respectfully submit that any act on the part of plaintiff within the eighty-day period, which places the defendant surety in the same position in which it would have been, had plaintiff re-performed the entire ceremony, should be held to be sufficient to establish his right against defendant surety. Surely this plaintiff would have been entitled to judgment against defendant surety, if Brown had picked up the copy of the written notice as it lay on Wil-

son's desk and had handed it to Wilson during any one of the conversations had between them during the eighty-day period. In all good conscience, it does not seem equitable or fair to bar plaintiff from recovery because of Brown's failure to perform that seemingly perfunctory gesture. This is particularly true when the court takes into consideration the growing tendency of the common law, as will be shown under Point III, *infra*, to hold corporate sureties to strict account and deny them protection where they seek to take advantage of technical defenses.

Counsel for plaintiff contend that this statute should be liberally construed. The *Heard Act* (Sec. 6923, *et seq.* U. S. Rev. Stat), as will be seen under Point III, *infra*, is quite similar to our statute, in that it provides for the giving of a bond to protect materialmen in connection with public contracts for the Federal Government, and that Act has been very liberally construed by the Federal courts.

*London & Lancashire Indemnity Co. v. Smoot*, 287 Fed. 952;  
*Byrant Co. v. N. Y. Steam Fitting Co.*,  
 235 U. S. 327;  
*Vermont Marble Co. v. National Surety Co.*, 213 Fed. 429.

In the *London & Lancashire* case (*supra*), cited with approval by the United States Supreme Court in the *Bryant* case (*supra*), the court said at page 956:

“Statutes should be so construed as will effectuate the legislative intention and, if possible, *avoid injustice or absurd results*” (Italics ours).

With these decisions before us, counsel for plaintiff contend that Brown's conversations with

Wilson, during the sacred eighty day period, together with the production of the carbon copy of the written statement, constituted the furnishing of a statement as required by the statute; and we respectfully submit that Brown's failure to pick up a document which was then in the surety's possession and re-deliver it to that surety should not cause the "absurd result" of defeating plaintiff's claim.

## POINT II.

### **Defendant surety waived the furnishing of a statement by plaintiff in the eighty day period following the acceptance of the work.**

Except as limited by grounds of public policy, any duty owed to a party by another may be waived by him, either by express words or by conduct which entitles the party owing the duty to believe that it will not be demanded.

Where reliance is placed on the conduct of a party to establish waiver, it may be evidenced by any acts which would lull a reasonably prudent man into a belief that it will be unnecessary to take action otherwise essential to establish his rights.

In the present case we are presented with a set of facts calling most forcefully for the application of the doctrine of waiver. The duty required of the plaintiff, in order to secure its rights against defendant surety, was the *furnishing* of a *statement* of the amount due it, within eighty days after acceptance of the work. But surely the performance of this duty could be waived; and on principles of common sense and justice should be regarded as waived, by defendant's act in *accepting and retaining without objection* the

statement *before* that time. The *Franklin* case (*supra*), which is more fully discussed in Point III (*infra*) does not purport to hold that the surety *may* not waive the furnishing of a statement altogether,—nor surely that it may not waive such furnishing *in time*. But on the facts of that case it does not appear that the issue of waiver was raised or that facts implying a waiver were presented.

In our case, however, we may go even further. Passing the question of waiver by the acceptance and retention of the original statement, let us consider the situation at the later conversations between the representatives of the parties. Here we find, *within the statutory period*, the duly authorized agent of the defendant surety company, Wilson, *himself* producing and showing to Brown, the agent of plaintiff, a copy, otherwise completely satisfying the statute, of the statement which had theretofore been furnished to defendant surety (Finding of Fact No. 16; State of Case, p. 13). This is a long advance beyond the mere negative acceptance of the original statement. There is an *active* step by the defendant,—a *direct representation by conduct* of the fact that the defendant was *already furnished with a statement*. Surely the reasonably prudent man would be justified in the inference that defendant surety, *producing* the exact duplicate of the statement to which it was *then* entitled, was disclaiming the necessity that he must go through all the details again, *pro forma*.

To hold plaintiff to a strict compliance with the statutory requirements under these circumstances involves more than a demand that it pursue its claim with due diligence,—more than that it comply with the spirit and intent of the legislation. It involves permitting defendant surety not merely to escape liability by reason of the negli-

gence of plaintiff; it involves allowing defendant surety affirmatively to encourage plaintiff to rest secure in the thought that plaintiff has fulfilled the technical preliminaries to establish its claim; and rewards that affirmative encouragement by sanctioning the defense thus inequitably acquired. We submit that this result would be intolerable in a court of justice; and that the true spirit of the legislation is amply subserved under the facts of the present case by holding that the conduct of defendant surety, as found by the court below, should be held to operate as a waiver of its right to the furnishing of a statement *in time*, and should bar the surety from interposing as a defense its failure to receive such a statement.

### POINT III.

**The principle of the Franklin case should be confined to the narrow limits of the facts therein proved.**

The *Franklin* case is the only decision of this court concerning the time within which a materialman must "furnish a statement of the amount due" him in order to prevail against a surety on a bond executed pursuant to Chapter 75 of the Laws of 1918. Counsel for plaintiff have made a careful examination of the briefs submitted by counsel in the *Franklin* case and have learned that no attempt was there made by the plaintiff materialman to show this court the construction given by the Federal courts of the provisions regarding notice contained in the *Heard Act, supra*, nor was written argument submitted to show the growing tendency of the law to hold corporate sureties to strict account. Accordingly, plaintiff's counsel requests the indulgence of this

court to the end that they may submit various authorities and arguments on each of these propositions.

#### (A). The Heard Act and its significance in construing Chapter 75 of the Laws of 1918.

To the best of our knowledge, no other state has enacted legislation similar to the statute which is here involved. The *Heard Act*, however, is similar, in that its purpose was, among other things, to provide means of protection for materialmen in the construction of Federal works. The only material difference between the two statutes is that under the *Heard Act* the surety can be sued but once, and then only by a materialman "in the name of" the United States. Other unpaid materialmen must "intervene" in that suit and can not institute separate actions of their own. Aside from this difference of practice and the requirement of advertising claims, there is no substantial difference between the *Heard Act* and our statute. In fact, the latter uses much of the language of the former.

In construing a state statute which is similar to a Federal statute, the state court should follow the construction that the Federal courts have given the Federal statute, particularly where the two acts are nearly identical and where the state statute was passed after the Federal statute had been construed.

*Luken vs. Lake Shore Ry. Co.*, 248 Ill. 377.

In the *Luken* case, (*supra*), plaintiff, a switchman in defendant's employ, was injured while attempting to couple two cars which were not equipped with automatic couplers. A Federal statute and a more recently enacted state statute required cars to be equipped with automatic

couplers. The two statutes were passed to protect men engaged in duties similar to those performed by plaintiff but the statutes were not identical. Plaintiff recovered judgment under the *state* statute and, on the appeal which resulted in an affirmance, the Supreme Court said at page 383:

“In construing a federal statute, this court is bound by the construction placed upon the act by the federal courts. In construing a *similar state statute* we are not necessarily bound to follow the construction of the federal courts in construing a federal statute, *but where, as here, the two acts are so nearly identical and the state act was passed after the federal statute had been construed and both acts were intended to accomplish the same object, we would naturally incline to follow the construction given the federal statute by federal courts.*” (Italics ours.)

Accordingly, the following decisions, *decided prior to 1918*, construing the *Heard Act*, are of great importance to this court in construing our statute.

In *Bryant Co. vs. N. Y. Steam Fitting Co.*, 235 U. S. 327, a case where the statutory notice required by the Federal Act had not been given, it was held that the provision for notice was not of the essence of jurisdiction of the court over such a case or a condition precedent to the surety's liability on its bond.

In *Vermont Marble Co. vs. National Surety Co.*, 213 Fed. 429 (Cir. Ct. of App. 3rd Cir.) cited with approval in the *Bryant* case, *supra*, notice was not given as required by the Act but the court allowed the materialman to prevail against the objecting surety.

In *Illinois Surety Co. vs. Davis*, 244 U. S. 376, the Supreme Court held at page 380:

“Decisions of this court have made it clear that the statute (the *Heard Act*), and bonds

given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act. *In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute*” (Italics ours).

In Donnelly, *Law of Public Contracts*, p. 472, we find the following:

“The (Federal) Act is to be construed liberally for the protection of those who furnish labor or materials in the prosecuting of public work.”

We submit that this court should follow the construction that the Federal courts have given the *Heard Act* and accordingly should construe our statute liberally, to the end that “technical rules otherwise protecting sureties from liability” shall not be “applied in proceedings under this statute.”

**(B). Corporate sureties should be held to strict account.**

One of the peculiarities of the law of suretyship is the favor shown to the surety and the readiness with which he is released from his obligation. The various defenses of which courts have allowed sureties to avail themselves were evolved because it was recognized that the sureties, in most cases, had entered into the agreements in question as an accommodation to their principals and without benefit to themselves. Courts have recognized the fact that most private sureties sign a bond without having anything to do with the making of

the separate contract, performance of which is guaranteed by the surety. Accordingly, the law has provided defenses and has applied strict rules concerning the release of the private surety. These were deemed necessary for his protection. But with the recent development of the surety company as a business enterprise, the question is now frequently raised whether the same leniency should be shown toward sureties for profit. While private suretyship is generally for mere accommodation, *corporate suretyship is a business transaction for hire*. The corporate surety has full knowledge of the contract, especially in such cases as this where it is prescribed by law, and has a full understanding of its rights, equities and liabilities. Accordingly, the law should hold that corporate surety to a strict account.

A corporation engaged in the business of suretyship for hire should not be "a favorite of the law." Stearns on *Suretyship*, 3rd ed., p. 413:

"The doctrine that a surety is a favorite of the law largely disappears in the construction of corporate suretyship contracts."

and again at page 415:

"The trend of all our modern decisions, Federal and State, is to distinguish between Individual and Corporate suretyship, where the latter is an undertaking for money consideration by a company chartered (as is the defendant here) for the conduct of such business, in the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration, by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material and prejudicial variance" (Italics ours).

Other cases illustrative of this tendency are:

- Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416;  
*Atlantic Trust Co. vs. Laurinburg*, 163 Fed. 690;  
*Baglin vs. Surety Co.*, 166 Fed. 356 (Aff'd 178 Fed. 682);  
*Philadelphia vs. Fidelity & Deposit Co.*, 231 Pa. 208.

In the *Guaranty Company* case (*supra*) the court said at page 426:

"The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the sub-contractor, with a view of furthering the beneficent object of the statute."

In *Atlantic Trust vs. Laurinburg*, (*supra*), we find the following at page 695:

"The very reason for the existence of this kind of corporation, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of *strictissimi juris*, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them

*before they can ask to be relieved from contracts which they clamor to execute."*

In the *Baglin* case, (*supra*), the Circuit judge stated at page 363, *et seq*:

"Nor is there any reason to be astute in looking about for flaws that may invalidate the transaction. The defendant is not entitled to the tender consideration that is accorded to an individual surety who is a mere volunteer. Surety companies are not to be so described; they are insurers, paid for their services, bound by contracts which are usually carefully drawn by themselves, and, as a general rule, satisfactorily secured by counter-indemnity."

While we firmly believe that the defenses developed by the common law to protect accommodation sureties should be retained, we submit that corporate sureties, who charge for their undertakings in proportion to the risks, should not be allowed to have recourse to those technical defenses.

**(C). The Franklin Case.**

With these authorities before us, let us compare the facts in the *Franklin* case and the facts involved in the present appeal:

*The Franklin Case*

*Our Case.*

1. Materials were furnished by plaintiff to contractor, who used them in a public work.

1. The same.

2. Contractor failed to pay plaintiff for those materials.

2. The same.

3. Written notice of claim was served by plaintiff on surety before acceptance of the public work.

3. The same.

4. No statement of amount due, oral or written, was furnished by plaintiff to surety after acceptance of the public work.

4. Plaintiff orally furnished the surety a statement of the amount due it during the eighty day period following the acceptance of the public work; and also, during that period, orally referred to a written statement then in the surety's possession and actually before both parties.

5. Suit was instituted prior to the acceptance of the public work and before the extent of the liability of the surety, if any, to the public agency could be determined.

5. The public work was accepted, thus discharging the surety from liability to the public agency, and thereafter suit was instituted within the time fixed by the statute.

In the *Franklin* case (4 N. J. Adv. Rep. 16), the Supreme Court said at page 19:

"The primary purpose of the bond, as we understand the statute, is the protection of the public board or body; and the protection of laborers and materialmen is 'an additional obligation' assumed by the surety on the bond."

Accordingly, the Supreme Court rejected plaintiff's contention that the statute gave that plaintiff the right to sue the surety prior to the time when the liability of the surety, if any, to the public agency could be determined, such time being established by the acceptance of the public work. That was as far as the Supreme Court needed to go to decide the *Franklin* case. But the court went further. It added at the end of the decision, at page 19, *et seq.*:

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

We agree with the court's statement that the *primary* purpose of the bond is the protection of the public body, and that the statute "does not disclose a purpose upon the part of the legislature to give preference to the claims of materialmen or laborers over the claims of the public agency by compelling the surety to pay the claims of the former without regard to the rights of the latter." If plaintiff had recovered judgment in that case, the amount for which the surety was responsible to the public agency under the bond might have been so diminished that there might not have been a sufficient balance to satisfy the "primary" obligation. Where, as in our case, the primary obligation is satisfied, and the liability of the surety thereunder eliminated, there is no further need for considering the primary obligation; and the liability of the surety to the secondary obligee should be determined without regard to the primary obligation.

We submit that unless the surety *pleads and proves* that *it, the surety*, has been or may be injured by the premature furnishing of a statement or by the premature institution of suit that such premature action should not bar plaintiff nor protect the surety. The rights of a plaintiff in an action at law are determined as of the date of the beginning of his action; the decision in the *Franklin* case may be explained on that theory. Any right of action which plaintiff in that case possessed against the surety must be derived in accordance with the provisions of the statute as to the commencement of the action. There plaintiff instituted its action prior to the time authorized by the statute. Hence, on the principle above stated, the action was barred at its inception. In our case, suit was instituted within the time fixed by the statute, and plaintiff, *at that time*, had complied with the statute fully.

All that the court was compelled to say, to justify the decision in the *Franklin* case, was that suit had been *prematurely instituted* and we respectfully submit that that decision should not be deemed to go beyond that point.

The doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge on points not necessarily involved therein. Such expressions, being *obiter dicta*, do not become precedents and lack the force of an adjudication. General expressions in every opinion are to be taken in connection with the facts in the case in which those expressions are used. If they go beyond the case, they ought not to control the appellate court in a subsequent suit where the very point is presented for decision. This is particularly true where the court of last resort,—as in the *Franklin* case—affirms by a divided court, and by means of a *per curiam* opinion, the decision of an inter-

mediate appellate court. The reason for this rule of *stare decisis* is obvious. While the questions before the court were undoubtedly investigated with care, their possible bearing on all other cases could hardly have been investigated. It cannot be reasonably expected that every idea contained in a judicial opinion will be so perfect and so complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings and disregarding its context. Accordingly, in applying cases which have been decided, what may have been said in an opinion should be held to and limited by the facts of the case under consideration and should not be extended to a case where the facts are essentially different.

We respectfully suggest that the court consider the liberality of the Federal decision under the *Heard Act* and the cases which deprive a corporate surety of the advantages of technical defenses. With those decisions as a background, we submit that the principle of the *Franklin* case should be confined to the situation there presented, and we respectfully submit that the judgment under review should accordingly be reversed.

#### POINT IV.

**Defendant's contention that the acceptance by plaintiff of Dreher's notes and trade acceptance operated as an extension of time of, or as payment of Dreher's debt, thus discharging defendant surety, has no foundation in law and the trial court's conclusion of law to that effect was correct.**

Defendant surety stipulated before the trial that the *debt* owed by Dreher for said materials had not been *paid* (State of Case; p. 17, l. 1); the

court below found as a fact that, at the times plaintiff accepted Dreher's notes and trade acceptance, *plaintiff made no agreement extending defendant Dreher's time to pay the debt owed by him* (Findings of Fact No. 7, No. 8 and No. 9; State of Case, pp. 12 and 13).

In the absence of an express agreement to that effect, the acceptance by a creditor of a debtor's note does not operate as an extension of time for the debtor to pay said debt.

*Firemen's Insurance Co. v. Wilkinson*,  
35 N. J. Eq. 160;  
*Dodson v. Taylor*, 56 N. J. L. 11;  
*Guaranty Co. v. Pressed Brick Co.*, 191  
U. S. 416.

In the *Firemen's Insurance Company* case, (*supra*), the court said at page 178:

"It will be observed that this result proceeds from the adoption of the proposition that the *mere giving of collateral security*, payable in the future, for a debt, already matured, by operation of law, and in the absence of any accessory agreement, has the effect of suspending the right to enforce the payment of such matured debt. That doctrine I do not think it possible to maintain, for it stands opposed not only by the great weight, but by all of the authorities" (Italics ours).

In the *Dodson* case the court said at page 15 *et seq*:

"The defendants insist that this contract amounted to a valid agreement between the plaintiffs and their primary debtor to extend the time of payment of the debts now in suit, and hence released the sureties, the defendants. \* \* \*"

"Looking at the whole instrument, it is clear that plaintiffs were to accept the new

notes to be given by the parties of the second part, not in lieu of or suspension of the old notes but in addition to them, as a *further security*, and that the parties of the second part *trusted, not to any legal change in the rights and remedies of the plaintiffs on the old notes, but to such indulgence as creditors are likely to exercise when they feel assured of ultimate payment.* The case seems on all fours with *Firemen's Insurance Co. v. Wilkinson* (8 Stew. Eq. 160) and must be decided in accordance with that precedent. This contract did not discharge the defendants (sureties)" (Italics ours).

In the *Guaranty* case, (supra), the court said at page 425:

"The covenant is made solely for their (the materialmen's) benefit. The guarantor is ignorant of the parties with whom the principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and *it is to be assumed that the surety contracts with knowledge of this fact.* Not knowing when or by whom these materials will be supplied or when the bills for them will mature, *it can make no difference to him whether they were originally purchased on a credit of 60 days, or whether, after the materials are furnished, the time for payment is extended 60 days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain*" (Italics ours).

Accordingly, we respectfully submit that the trial court correctly decided that the acceptance of Dreher's notes and trade acceptance did not operate as an extension of time or as payment

of Dreher's said debt and that the defendant surety was therefore not thereby discharged from its obligation to plaintiff under the bond.

#### POINT V.

**The judgment of the trial court should be reversed and judgment should be entered for plaintiff against defendant Maryland Casualty Company for the amount demanded in the complaint with interest from July 18, 1923.**

We respectfully submit that under any and all the points herein argued plaintiff is entitled to judgment against defendant Maryland Casualty Company for the amount demanded in the complaint with lawful interest thereon.

We have demonstrated that plaintiff has complied fully with the requirements of the statute by furnishing a statement to the surety of the amount due in two ways: first, by the conversations between the representatives of the parties which constituted an oral furnishing of a statement sufficient to satisfy the statute; and second, by the production of the carbon copy of the original statement through the agency of the defendant surety's representative during the eighty day period. We have also established that the affirmative action by defendant surety's representative, inducing plaintiff's inaction, should bar defendant surety, under the doctrine of waiver, from setting up the defense interposed by it. We have further shown that, in view of the Federal decisions under the *Heard Act* and particularly in view of the growing body of law restricting corporate sureties to meritorious and non-technical defenses, the principal of the *Franklin* case should not be extended beyond the facts in evidence in

that case, and that the doctrine of that case has no application to the facts at issue here. Under all or any of these principles we respectfully submit that the action of the trial court in rendering judgment for the defendant Maryland Casualty Company and against the plaintiff was erroneous in law and that its action should be reversed by this court.

Respectfully submitted,

CHARLES FOSTER BROWN,  
Attorney for Plaintiff-Appellant.

M. CASEWELL HEINE,  
of Counsel.

## New Jersey Supreme Court

No. 16, JAN. T. 1925.

FRANKLIN LUMBER Co.

*vs.*

GLOBE INDEMNITY Co.

APPEAL FROM  
ESSEX CIRCUIT  
COURT.

Argued before GUMMERE, Chief Justice, and Justices PARKER and KATZENBACH.

For the appellant, William B. Harley.

For the respondent, Harry A. Augenblick.

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

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

The following facts were found by the trial court: In June, 1922, the Board of Education of the Town of Cranford entered into a written contract with Dillon & Wiley, Inc., for the construction of a school house and the supplying of all the materials for and the performance of all the work required in such construction. Upon the same day, pursuant to the provisions of the contract, and in accordance with the requirements of an act of the legislature entitled, "An Act to protect persons performing labor or furnishing ma-

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

The right of the plaintiff to maintain the present action depends upon the true construction of the statute above referred to, in compliance with the provisions of which the bond was given. The

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

The contention before us of counsel for the plaintiff, and the view entertained by the trial court was that the right of action given to a materialman or laborer by this statutory provision becomes complete when the material furnished complies with the specifications annexed to the contract, is actually used in the construction of the building or the making of the improvement, with the implied approval of the public board or body and notice is given to the surety within eighty days thereafter of default in payment by the contractor. In other words, that the clause "within eighty days after the acceptance thereof" refers to the acceptance of the material used in the building or on the improvement, and not the ac-

ceptance of the completed building or improvement. In our opinion, this view of the construction of the statute is unsound. It will be observed that the latter part of the section above quoted permits the person furnishing material or labor to sue the surety at the expiration of sixty days after service of notice of nonpayment by the contractor and, according to the theory of the plaintiff, before it is known whether the contractor has faithfully performed his contract with the public board or body, and if he has not, what, if any, has been the loss sustained by such board or body through such failure of performance. The primary purpose of the bond, as we understand the statute, is the protection of the public board or body; and the protection of laborers and materialmen is "an additional obligation" assumed by the surety on the bond. The construction put upon the statute by the plaintiff, and adopted by the trial court, subordinates the right of the public agency to be protected against loss, by default of the contractor, to the right of materialmen and laborers to the same protection; allowing the latter first to exhaust the security to the extent necessary to satisfy their respective claims, and leaving the former to reimbursement by the surety only to the extent to which its liability has not already been extinguished, although such existing liability may not amount to fifty per cent. of the loss sustained by the public agency. As we read the act the words "after the acceptance thereof" contained in the third section thereof refer to the building or improvement which is the subject matter of the contract, and not to the materials used therein or the work done thereon. It does not disclose a purpose upon the part of the legislature to give preference to the claims of materialmen or laborers over the claims of the public agency, by compelling the surety to pay the claims of the

former without regard to the rights of the latter; but, on the contrary, protects those rights by requiring that no step shall be taken by materialmen or laborers, looking to the enforcement against the surety of their claims against the contractor, until after the building or improvement has been accepted by such public agency. Upon this construction of the statute notice of default by the contractor in the payment of such debts, in order to constitute a basis for a suit against the surety cannot be legally served prior to such acceptance.

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

**Opinion of New Jersey Court of Errors  
and Appeals.**

(Not printed in any official report.)

*Franklin Lumber Company, Appellant v. Globe Indemnity Company, Respondent* (No. 62) (Court of Errors and Appeals of New Jersey. June 23, 1926). Appeal from Supreme Court, Harry A. Augenblick, of Newark, for Appellant. William B. Harley, of Newark, for Respondent.

*Per Curiam.* The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court.

For affirmance: Justices TRENCHARD, CAMPBELL and LLOYD and Judges GARDNER, MCGLENNON, KAYS and HETFIELD.

For reversal: Justices KALISCH and BLACK and Judges WHITE and VAN BUSKIRK.

**Chapter 75—Laws of 1918—New Jersey.**

An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works.

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

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

2. Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer or agent acting on behalf of the state or any county, city, town, township, borough, municipality governed by a board of commissioners or improvement commission, or school district aforesaid, in an amount equal to at least 100% of the contract price (N. B. This clause amended by Chapter 110—Laws 1920—to read as follows: “in an amount not more than 100% of the contract price”), and conditioned for the payment

by the contractor and by all sub-contractors of all indebtedness which may accrue to any person, firm or corporation on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such buildings, works or improvements. Such bond shall be deposited with and held by such board, officer or agent for the use of any party interested therein.

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

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

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, \_\_\_\_\_, as principal, and \_\_\_\_\_, as sureties, are hereby held and firmly bound unto \_\_\_\_\_ in the penal sum of \_\_\_\_\_ Dollars, for the payment of which, well and truly to be

made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 192 .

THE CONDITION OF THIS OBLIGATION IS SUCH that whereas the above named principal did, on the \_\_\_\_\_ day of \_\_\_\_\_, 192 , enter into a contract with \_\_\_\_\_, which said contract is made a part of this bond the same as though set forth herein;

Now, if the said \_\_\_\_\_ shall well and faithfully do and perform the things agreed by \_\_\_\_\_ to be done and performed according to the terms of said contract, and shall pay all lawful claims of subcontractors, material men and laborers for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material man or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated. The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans or specifications therefor shall in any wise affect the obligation of the surety on this bond.

5. This act shall take effect immediately.

Approved: February 16, 1918.

New Jersey Court of Errors and Appeals

FIREPROOF PRODUCTS Co., INC., a  
corporation,  
*Plaintiff-Appellant,*

*vs.*

GUS DREHER and MARYLAND CAS-  
UALTY Co., a corporation,  
*Defendant-Respondent.*

ON APPEAL  
FROM  
SUPREME  
COURT.

**BRIEF OF RESPONDENT MARYLAND  
CASUALTY CO.**

**Statement of Facts.**

On June 26th, 1922, the defendant Gus Dreher, entered into a written contract with the Board of Freeholders of Passaic County for the making of certain improvements known as the "Belmont Avenue Job" for the total sum of \$61,810.79. The respondent, Maryland Casualty Company executed the bond, required by Chapter 75, Laws of 1918, guaranteeing the payment of the construction work. The defendant Gus Dreher failed to pay plaintiff for material supplied, and on May 15th, 1923 appellant served one of the agents of Maryland Casualty Company with a typewritten notice containing a statement of the amount due pursuant to Chapter 75, Laws of 1918, at which time

the work was still in the course of construction, and had not yet been accepted by the Board of Freeholders. More than two months later, to wit, July 18th, 1923, the "Belmont Avenue Job" was accepted by the Board of Freeholders. At no time within eighty days thereafter was any new notice served on the respondent, Maryland Casualty Company, in accordance with the statute.

It also appeared that during the course of the construction, to wit, on October 20, 1922, the defendant Gus Dreher delivered and executed to appellant a note for \$6000.00 which became due more than a month later, and a trade acceptance for \$3879.97 which became due about two months later. At the maturity of the note of \$6000.00, a curtail was paid by Gus Dreher to the appellant and a new note for \$5000.00 was executed which became due December 23, 1922. The notes and trade acceptance were delivered and renewed without any knowledge or consent of the surety company, respondent.

Suit was instituted on February 7, 1924 for the balance due plaintiff-appellant for material furnished amounting to \$8,855.40 against the contractor Gus Dreher and the surety company respondent herein. The case was tried at the Essex Circuit without a jury by consent of both counsel, and resulted in a judgment for the defendant Maryland Casualty Company, respondent herein.

Two questions were raised at the trial. First, whether the delivery and acceptance of the notes by Dreher to the appellant released the surety because of the extension of time of payment without notice to the surety, and secondly, whether the service of the notice under Section 3, Chapter 75, Laws of 1918, was premature, because it was served more than two months before the work was accepted by the Board of Freeholders of Passaic County.

The trial court found as a conclusion of law against the respondent Maryland Casualty Company on the first point, namely that the acceptances of the notes and trade acceptances by the appellant did not operate as an extension of time of payment of the debt, to which ruling an exception was taken and noted, pages 74, 75, case. The trial court sustained respondent's contention on the second point, namely that the statutory notice of the claim was not furnished respondent within eighty days after the acceptance of the work by the Board of Freeholders of Passaic County, in accordance with the statute, and accordingly rendered judgment in favor of the defendant Maryland Casualty Company, respondent herein. This is plaintiff-appellant's appeal from that decision.

### POINT I.

#### **Plaintiff-appellant failed to comply with Paragraph 3, Chapter 75 of the Laws of 1918.**

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

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

after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, said action to be commenced within one year from the date of the acceptance of said building, work or improvement."

In the case of *Franklin Lumber Company vs. Globe Indemnity Company*, reported in 130 Atlantic, page 608, etc., Chief Justice Gummere, speaking for the Supreme Court, says as follows:

"The right of the plaintiff to maintain the present action depends upon the true construction of the statute above referred to, in compliance with the provisions of which the bond was given. That statute provides that bonds of this character shall not only guarantee to the public board or body the faithful performance of the contract, but shall also contain an additional obligation for the payment by the contractor for all labor performed or material furnished in the construction of a public building or the making of a public improvement. The statute then provides (section 3) that—'Any person, \* \* \* to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person \* \* \* No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person \* \* \* may bring an action in his own name upon such bond, said action to be commenced within one

year from the date of the acceptance of said building, work or improvement.' \* \* \*

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

An appeal was then taken from the decision of the Supreme Court to the Court of Errors and Appeals, which affirmed the decision of the Supreme Court for the reasons therein contained and expressed by the Chief Justice.

In the case sub judice, it is conceded by the plaintiff-appellant that the statement was furnished to defendant Maryland Casualty Company on May 15, 1923, and the work was not accepted by the municipality until July 18, 1923, over two months later. The testimony also shows that no written statement was furnished within eighty days after the acceptance of the work by the Board of Freeholders of Passaic County.

It is therefore respectfully urged that the case sub judice being identical with the case of *Frank-*

*lin Lumber Co. vs. Globe Indemnity Company*, cited *supra*, this Court has no alternative but to affirm the judgment.

## POINT II.

**The provisions of the statute as set forth in Paragraph 3, Chapter 75, of the Laws of 1918 require the service of a written statement upon the surety.**

a. Section 3 of Chapter 75 of the Laws of 1918 provides among other things as follows:

“Any person \* \* \* to whom any money shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building work or improvement within eighty days after the acceptance thereof by the duly authorized board or officers shall furnish the sureties of said bond a statement of the amount due to any such person.”

Counsel for the plaintiff-appellant in his brief contends that an oral statement of the amount due is sufficient to satisfy the requirements of the statute as quoted *supra*.

The question arises as to what the intention of the statute is when it says, “*shall furnish the sureties on said bond a statement of the amount due to any such person.*”

It is a fundamental principle of law that where a statute says *shall furnish a statement*, it is clearly the intention of the legislatures that the only way a statement can be furnished to another so as to serve as notice, is by a written statement.

In case of *Franklin Lumber Company vs. Globe Indemnity Company* cited above, Chief Justice Gummere says on page 610a:

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

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

The word “furnish” has been defined in 27 Corpus Juris, page 931, subdivision 69 B, as follows: “Furnish is broader than give. \* \* \* 78 A, “To furnish a person with any article is to supply or provide him with such article.”

The Chief Justice in his opinion uses the word *serve* and *service* with reference to the furnishing of the statement. From this language, it must be concluded that this court construed the language “shall furnish a statement” to be equivalent to the common legal expression of service of a paper. The expression in the statute “shall furnish a statement” is equivalent to the language “shall serve a written notice of claim or statement.”

The word *service* has been defined in 35 Cyc. page 1432 as follows: “Applied to the commencement of a suit, that notice given to the defendant, which makes him a party to the proceeding, and makes it incumbent upon him to appear and answer to the cause, or run the risk of having a valid judgment rendered against him, in consequence of his default; serving the defendant with a copy of the process, and showing him the original if he

desires it; the particular act of the officer by which the copy of the citation was communicated: *the judicial delivery or communication of papers*; execution of process; the delivery or communication of a pleading, notice, or other paper in a suit, to the opposite party, so as to charge him with the receipt of it and subject him to its legal effect."

Bouvier's Law Dictionary, Rawle's third Edition, Volume 3 on page 3048, defines service, \* \* \* "Notices and other papers are served by delivering the same at the house of the party or to him in person."

It is therefore respectfully urged that the statute in question was construed in the *Franklin Lumber* case cited *supra* in two respects; first, the validity of the notice served prior to the acceptance of the work, and secondly, the interpretation of the language "shall furnish a statement."

The time of service was construed not to begin until after the acceptance of the work, and the language "shall furnish" was construed to mean the service or delivery of a written statement to the surety company, and not any mere oral declarations. Furthermore if appellant's contention as to its reliance upon the furnishing of the oral statement were well taken, why should it have resorted to the furnishing of the original statement in writing on May 15, 1923, which is conceded. Appellant's own construction of the statute shows that it intended and understood the statute to mean a written notice such as is commonly used in legal practice, or in commercial pursuits. It is common knowledge that commercially a statement consists of a written memorandum of the amount due as distinguished from a bill which is an itemized written memorandum. Appellant in his brief says on page 6, (toward the bottom):

"Said written notice dated May 15, 1923, (Ex. P-1; State of Case, p. 77), set forth in detail the items of material furnished by plaintiff to Dreher on the Belmont Avenue job, the agreed price thereof and the amount due plaintiff therefor. In other words, that written notice gave the surety the information which the statute required be 'furnished' and satisfied the statute as to form."

It is therefore respectfully urged that the testimony which appellant refers to in its brief on page 7, point 1A, wherein reliance is placed upon oral conversations as a strict compliance with the statute is not well founded in law.

### POINT III.

**The acceptance of the notes and trade acceptances by appellant from Gus Dreher and their subsequent renewals, without the knowledge or consent of the respondent Maryland Casualty Company, constituted a release of the surety, the respondent.**

The fact is conceded that notes were given to appellant by Dreher without the knowledge or consent of the respondent, Maryland Casualty Co. The trial Judge's finding of facts disclose on page 12, paragraph 7 and page 13, paragraph 9 of case:

"On October 20, 1922, defendant Dreher executed and delivered to William Brown, plaintiff's duly authorized representative, a note for \$6,000 due November 28, 1922, and a trade acceptance for \$3,879.97 due December 28, 1922. The aggregate amount of said note and trade acceptance included the total sum owed by Dreher for materials furnished

on the Belmont Avenue job and in addition thereto an overdue account in the sum of \$1,024.57 owed for goods purchased by defendant Dreher prior to August 28, 1922 and used on another job.

. . . On November 28, 1922, the due date of said \$6,000 note Dreher paid plaintiff the sum of \$1,000 on account and executed and delivered a new note for \$5,000 due December 23, 1922. At the time plaintiff accepted said note for \$5,000 no agreement was made by plaintiff extending defendant Dreher's time to pay said debt."

It is a well settled principle of law that a creditor who extends the time of payment for the principal, without the knowledge or consent of the surety, releases the surety or guarantor from any liability.

28 Corpus Juris, page 999, section 160, says as follows:

"It is a well settled rule that a valid agreement between the parties to the principal obligation, without the consent or subsequent ratification of the guarantor for an extension of time for payment or performance by the principal obligor for a definite period, operates to release the guarantor from further liability under the guaranty, except where the rights of the guarantor are preserved by the agreement to extend the time, or where the contract of guaranty expressly provides that an extension of time shall not operate to release the guarantor."

In the case of *Morris Canal v. Van Vorst*, reported in 21 N. J. L. page 100, the court says on p. 121:

"And it is well settled in courts of equity, that the surety is discharged by an agreement of the creditor with the principal, which without the surety's consent alters his situation

for the worse, and increases his risk by postponing the time of payment or otherwise."

In the case of *Haskell vs. Burdette* reported in 35 Equity page 31 the Chancellor speaking for the Court on page 33 says as follows:

"It is an established principle that where the creditor, knowing the surety to be such, without the surety's assent, and without reserving his rights as against the surety, gives time to the principal, the surety is *ipso facto* discharged from his liability, and the rule is the same as to a guarantor."

In the case of *Thompson v. Bowne*, reported in 39 N. J. L. page 3, the court says:

"It was to show that the holder of the note did, without the consent of the surety, agree, for a valuable consideration, to give time to the principal. It has been repeatedly decided in the courts of this state, that the effect of such an agreement was to discharge the surety."

It is therefore respectfully urged that in view of the fact that the appellant several times extended the time of payment of the moneys due it from the defendant Gus Dreher without the knowledge or consent of the surety, Maryland Casualty Company, respondent, Maryland Casualty Company was entirely released from its original contract.

#### POINT IV.

##### **Appellant's contentions and arguments are not well founded in law.**

On page 8 of its brief, appellant cites the case of *Brobst v. Whitall-Tatum Co.*, 89 N. J. L. 531, 99 Atl. 315 and quotes from the syllabus of that case as follows:

"Where a statute provides for the giving of a notice but does not prescribe the manner of its service, it is sufficient if actual notice to the person to be affected is conveyed to him."

That case was a workmen's compensation case and involved the question of notice of certain provisions of the Employer's Liability Act. The Chancellor there expressly says on page 316,

"It is to be observed that the Workmen's Compensation Act does not prescribe the form of notice to be given by or to the parent or guardian of a minor employee, to prevent the operation of the act upon the contract of hiring, nor of the manner of service of such notice. It appears, therefore, that actual notice is all that is necessary to bring the given contract within the purview of the statute."

In the case *sub judice* the question was not merely one of notice, but was the compliance with a statute, to wit, furnishing a statement of figures, amounts etc. as a condition precedent to entitle appellant to any relief. There is no comparison or analogy between the two cases whatever.

On page 10 appellant argues in his brief,

"The production of a carbon copy of plaintiff's original statement during the eighty day

period satisfied the requirements of the statute."

This contention needs no argument or refutation, because the court finds on page 13 case, paragraph 13,

"The carbon copy, (the one discussed in this point) of said notice was also delivered to said Wilson at that time, (on May 15, 1923, when the original was delivered.)"

So whatever discussions took place if any, were covered by the original copy of the notice.

The appellant lays considerable stress on the interpretation of the Heard Act, Compiled Statutes 1913, Section 69, 23 U. S. Revised Statutes. It is difficult to understand what object the appellant has in invoking an interpretation of a foreign and irrelevant statute, when the one in question has been thoroughly considered and construed by this court in the case of *Franklin Lumber Company vs. Globe Indemnity Company* cited *supra*.

Appellant argues on page 14 of its brief that the principle of the Franklin case should be confined to the narrow limits of the facts therein proved. It has already been argued in Point 1 *supra*, that the Franklin case is identical to the instant case. Therefore whatever construction was given the former must necessarily be given the latter.

On page 17 of its brief, appellant contends in point (b) that corporate sureties should be held to strict account. The corporate surety in this case has not violated any rule of law or done anything for which it is obliged to be held to account. It executed a contract under an express act of the Legislature, and is clearly entitled to all benefits of the statute, once it assumes the liabilities

thereof. It needs no argument why the enactment of the section of the statute requires the surety to be furnished with a statement, because in what other manner is the surety going to be apprised of the nature and amount of the claim unless the statute is complied with. The purport of the statute in question is quite apparent to protect the public municipality. The bond referred to was for the protection of the municipality (the Board of Chosen Freeholders), primarily, and secondly for the benefit of materialmen and sub-contractors. It was therefore for that very purpose that the legislature required in paragraph 3, the furnishing of a statement by materialmen and sub-contractors within eighty days after the acceptance of the work; for if materialmen and sub-contractors could proceed against the surety before the work had been completed, they could consume the funds protected by the bond, and the municipality would be left without adequate protection. On the other hand where the work done and materials furnished are rejected by the municipality, the bond protects it in preference to claims of laborers or materialmen, whom the statute prohibits from proceeding against the surety, until the municipality is safeguarded. Where the work is not accepted, there never can arise the "sacred" eighty day period, as has been referred to by appellant on page 12 of his brief, because the statement can only be furnished after the acceptance of the work; the statute inferring that where there is no acceptance, there can be no liability on the part of the surety, to materialmen and laborers, because the entire obligation is primarily to the municipality, and secondarily to materialmen and laborers who are entitled to any surplus.

### Conclusion.

It is therefore respectfully urged that the judgment of the Supreme Court should be affirmed for the reasons herein stated.

Respectfully submitted,

LEVITAN, LEVITAN & AUERBACH,  
*Attorneys for defendant-respondent,*  
Maryland Casualty Company.

ABRAHAM LEVITAN,  
*Of Counsel.*

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