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New Jersey Court of Errors and Appeals

Notice of Appeal

(Filed, Nov. 20, 1917)

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE
CITY OF WILDWOOD,

Plaintiff,

vs.

RICHMAN CONSTRUCTION COM-
PANY and MASSACHUSETTS
BONDING COMPANY,
Defendants.

20

Action at Law

To Fort and Fort, Attorneys of Defendants:

Take notice, that the plaintiff appeals to the
Court of Errors from the whole of the judgment 30
entered in this cause in favor of the defendants.

SHARPLESS AND WAY,
Attorneys of Appellant.

Grounds of Appeal

(*Filed, Dec. 4, 1917.*)

NEW JERSEY COURT OF ERRORS AND APPEALS

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BOARD OF EDUCATION OF THE
CITY OF WILDWOOD,
Plaintiff-Appellant,

vs.

RICHMAN CONSTRUCTION COM-
PANY and MASSACHUSETTS
BONDING AND INSURANCE COM-
PANY,
Defendants-Respondents.

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The appellant states the following grounds of appeal:

1. The learned trial Judge erred in striking out all evidence pertaining to the making of a contract between the Board of Education and Goslin & Pfeiffer, dated November 20, 1916.

30 2. The learned Trial Judge erred in refusing to admit in evidence the contract dated November 20, 1916, made between the appellant and Goslin & Pfeiffer.

3. The learned Trial Judge erred in refusing to permit the plaintiff-appellant to introduce evidence relating to the making of the contract dated November 20, 1916, between the appellant and Goslin & Pfeiffer.

4. The learned Trial Judge erred in directing that the plaintiff be non-suited.

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SHARPLESS AND WAY,
Attorneys of Appellant.

Complaint

(*Filed, Nov. 22, 1916.*)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY

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BOARD OF EDUCATION OF THE
CITY OF WILDWOOD, NEW JER-
SEY,

Plaintiff,

VS

RICHMAN CONSTRUCTION COM-
PANY and MASSACHUSETTS
BONDING AND INSURANCE COM-
PANY,

Defendants.

Action at Law.

20

The plaintiff, a municipal corporation organized under the laws of the State of New Jersey, complains:

1. On the 19th of November, 1915, the defendant, Richman Construction Company, hereafter called "Principal," was a corporation organized under the laws of the State of New Jersey, and the defendant, Massachusetts Bonding and Insurance Company, hereafter called "Surety," was a corporation organized under the laws of the State of Massachusetts.

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2. On November 9, 1915, plaintiff entered into a contract in writing with the principal, whereby the latter agreed, for the consideration of \$64,698, to provide all the materials and perform all the labor necessary for the erection and completion of a two story and basement, brick and stone school

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Complaint

building at Wildwood, New Jersey, as shown on certain plans, and described in certain specifications provided by Clyde S. Adams, Architect.

3. A copy of said contract is attached hereto and forms part hereof, to which reference is hereby made.

10 4. In order to carry out and fulfil the terms of said contract, the defendants, as principal and surety, made and executed their bond, dated the 19th of November, 1915, whereby they became held and firmly bound to the plaintiff in the sum of \$32,349, the condition of said bond being that if the principal should indemnify the plaintiff against loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then the obligation should be
20 void, otherwise, to remain in full force and virtue, which bond was delivered by the said defendants to the plaintiff as security for the faithful performance by the principal of the contract above mentioned.

5. A copy of said bond is hereto attached and forms part hereof, to which reference is hereby made. In said bond the contract with the principal is stated to have been dated November 19, 1915, whereas, as a matter of fact, it was dated
30 November 9, 1915.

6. The principal entered into the performance of said contract, and partially completed said building, but subsequently defaulted in the performance of said contract, and abandoned the construction of said building, and refused and neglected to supply a sufficiency of workmen and materials, and failed to prosecute the work with
40 promptness and diligence, and otherwise failed in

Complaint

the performance of its covenants contained in said agreement, and, upon the proper certificate of said architect, the said plaintiff terminated the employment of said principal, as provided by the terms of said contract, of all of which the said defendants had notice.

7. After the said principal began work under said contract, and until its employment was terminated, as provided by the same, plaintiff paid the principal, on account of said contract price, the sum of \$34,556.40, to which sum he was entitled under the terms thereof, leaving a balance in the hands of the plaintiff, with which to complete the said building, of \$30,141.60.

8. Plaintiff was obliged, in order to secure the completion of said building, in accordance with the said contract with the said principal, and the plans and specifications referred to therein, to enter into a contract with the firm of Goslin and Pfeiffer, and was obliged to agree to pay the said firm of Goslin and Pfeiffer to complete said building in accordance with the contract with the said principal, the sum of \$42,850, of all of which the said defendants had notice.

9. Plaintiff, on its part, has performed each and every condition, covenant and stipulation contained in the said contract with the said principal, as well as in the bond above referred to, and has fully and entirely fulfilled and performed the conditions referred to in said bond as conditions precedent to the right of the plaintiff to recover under said bond.

10. Subsequently to the execution of said contract between the plaintiff and the said principal, the plaintiff extended the time within which said

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Complaint

contract might be performed until November 25th, 1916, and the said surety consented to said extension.

10 11. The principal aforesaid has not indemnified the plaintiff against loss or damage arising by reason of its failure to faithfully perform said contract, as set forth in said bond, and the defendants were notified by said plaintiff that the latter would be obliged to expend a sum in excess of \$12,708.40, in order to complete the said building, as required by the contract with said principal, and the said defendants were also notified by the said plaintiff to complete said building, in accordance with said contract, or pay to the said plaintiff the sum which it would be obliged to ex-
20 pend for that purpose, and the said defendants have refused to either complete said building, or pay to said plaintiff the said sum of money, whereby a right of action has accrued in favor of the plaintiff against the defendants, to recover such loss and damage, amounting to the sum of \$12,708.40, with interest from the 21st day of November, 1916.

12. This suit is brought within six months from the expiration of the time limited in said contract
30 for the completion of said school building.

13. Plaintiff claims, as damages, the sum of \$12,708.40, with interest as aforesaid.

SHARPLESS AND WAY,
Attorneys of Plaintiff.

Contract

Annexed to Complaint

THIS AGREEMENT, made the NINTH day of NOVEMBER in the year one thousand nine hundred and FIFTEEN by and between RICHMAN CONSTRUCTION Co. MOORESTOWN NEW JERSEY party of the first part (hereinafter designated the Contractor), and THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, WILDWOOD, NEW JERSEY, party of the second part (hereinafter designated the Owner),

WITNESSETH that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

ARTICLE I. The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a two story and basement brick and stone school building at Wildwood, New Jersey, as shown on the drawings and described in the specifications prepared by CLYDE S. ADAMS, 1509 ARCH STREET, PHILADELPHIA, PENNA. Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

ART. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and

Complaint—Contract

abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

10 It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

20 ART. III. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

30 ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed
40 thereby.

Complaint—Contract

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for fin-

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Complaint—Contract

ishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

10 ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to-wit:

The building shall be complete and ready for occupancy within ONE HUNDRED AND SIXTY (160) WORKING DAYS from date of signing of this contract.

20 It is understood and agreed that this contract includes Sheet No. 5, dated September 22nd, 1915, in addition to Sheet 1, 2, 3 & 4 dated April 26th, 1915, also the Addenda, dated September 22nd, 1915.

It is further understood and agreed that this contract also includes Alternate No. 2, providing for the finishing of Boys' Locker Room as shown on second floor; but does not include the fire escape as originally shown.

30 ART. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes
40 aforesaid, which extended period shall be deter-

Complaint—Contract

mined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

ART. VIII. The owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; and the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be SIXTY-FOUR THOUSAND SIX HUNDRED NINETY-EIGHT AND 00/100ths (\$64,698.00) DOLLARS, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon the certificates of the Architect, as follows:

Upon the first day of each month, contractor will submit to Architect, statement of material furnished and erected the previous month and certificate will be issued for Eighty-five (85%) per cent of amount he approves.

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Complaint—Contract

An approved Surety Company, bond, satisfactory to the Owners in the amount of THIRTY-TWO THOUSAND THREE HUNDRED AND FORTY-NINE (\$32,349.00) DOLLARS is to be furnished Owners by the contractors within TEN (10) DAYS from date of signing of this contract, guaranteeing full payment of all just sub-contractors claims.

The final payment shall be made within THIRTY days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable, to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XI. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, the contractor will

Complaint—Contract

carry fire insurance the policies to cover all work incorporated in the building, and all materials for the same in and about the premises, and to be made payable to the parties hereto, as their interest may appear.

ART. XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ARTICLE XIII. It is mutually agreed by the parties hereto that the contracts shall be filed in the County Clerks Office at Cape May Court House, N. J., immediately after the signing of the same, and it is further agreed that no liens shall be filed or maintained by any material men at work on the building or by any one except the party of the first part.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Complaint—Bond

RICHMAN CONSTRUCTION Co.

W. A. Richman Pres & Treas.

(Contractors)

(Corporate Seal)

BOARD OF EDUCATION OF WILDWOOD, NEW
JERSEY,

10

S. T. Dowler,

(President)

Wm. C. Todd,

(Dis. Clerk)

In Presence of
Thos. C. McKenna
(Witness)

Acting Secty.

Joshua Bush

20

(Witness)

SHARPLESS & WAY,

Attorneys for Plaintiff

Bond*Annexed to Complaint*30 MASSACHUSETTS BONDING AND INSURANCE COMPANY
HOME OFFICE, BOSTON, MASSACHUSETTS.

KNOW ALL MEN BY THESE PRESENTS:

40 That we, RICHMAN CONSTRUCTION COMPANY of
MOORESTOWN, NEW JERSEY (hereinafter called the
Principal), as Principal, and Massachusetts
Bonding and Insurance Company, a Corporation
established under the laws of the Commonwealth
of Massachusetts and having its principal office

Complaint—Bond

in Boston in said Commonwealth, (hereinafter called the Surety), as Surety, are held and firmly bound unto THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY (hereinafter called the Obligee), in the sum of THIRTY TWO THOUSAND THREE HUNDRED FORTY NINE DOLLARS (\$32,349.00) for the payment whereof said Principal binds heirs, administrators, and executors and said Surety binds itself, its successors and assigns, firmly by these presents. 10

WHEREAS, said Principal has entered into a written contract dated November 19th, 1915, with said obligee, for Erection and completion of a two story and basement brick and stone School Building at Wildwood, New Jersey.

Now, THEREFORE, the condition of this obligation is such that if the Principal shall indemnify the Obligee against any loss or damage directly arising by reason of the failure of the Principal to faithfully perform said contract, then this obligation shall be void; otherwise, to remain in full force and effect. 20

This bond is executed by the surety upon the following express conditions, which shall be conditions precedent to the right of the Obligee to recover hereunder: 30

FIRST: That in the event of any default on the part of the Principal in the performance of any of the terms, covenants, or conditions of said contract, a written statement of the particular facts showing such default and the date thereof shall be delivered to the Surety by registered mail at its office in the City of Boston, Mass., promptly and in no event later than ten days after the Obligee or his representative or the Architect or Engi- 40

Complaint—Bond

neer, if any, shall become aware of such default; that the Surety shall have the right, at its option, after receipt of such statement, to proceed with or procure others to proceed with the performance of such contract and shall thereupon immediately be subrogated to all the rights of the Principal and of the Obligee, and as such contract is performed, any and all reserves, and all other payments due at the time of said default or thereafter to become due under said contract to be paid to the Principal shall be paid to the Surety, or whomever it may procure to proceed with the performance of said contract, at the same time and under the same conditions as by the terms thereof such payments would have been paid to the principal had the contract been duly performed by the Principal.

SECOND: That no claim, suit, or action by reason of any default shall be brought against the Principal or Surety after the expiration of six months next succeeding to the date specified for the completion of said contract, nor shall any recovery be had for damages accruing after that period; that service of writ or process commencing any suit or action shall be made on or before the expiration of said period of six months; that the Principal shall be made a party to any suit or action, and be served with process commencing the same if said Principal can with reasonable diligence be found; that no judgment shall be entered against the Surety in excess of the penalty hereof.

THIRD: That the Surety shall not be liable for any damages resulting from strikes or labor diffi-

Complaint—Bond

culties, or from mobs, riots, fire, the elements, or acts of God; or for the repair or reconstruction of any work or materials damaged or destroyed by any of such causes; of the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof or repairs thereto; or for the furnishing of any bond or obligation other than this instrument. 10

FOURTH: That the Obligee shall faithfully perform all the terms, covenants, and conditions of such contract on the part of the Obligee to be performed, exclusively at the times and in the manner therein specified, and shall also retain that proportion, if any, of the contract price, which such contract specifies the Obligee shall or may retain until the complete performance by the Principal of all the terms, covenants and conditions of said contract on the Principal's part to be performed; and until the expiration of the time within which liens or notices of liens may be filed, and until the discharge of such liens, if any, and the Obligee shall at all times preserve and exercise all rights provided for his protection by the laws relating to liens of the State wherein said contract is to be performed. 20

FIFTH: That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the Obligee herein named; that the obligation of the Surety is and shall be construed strictly as one of suretyship only. 30

Signed and sealed, this 19th day of November,
1915.

RICHMAN CONSTRUCTION Co.,

W. A. Richman,

Pres. & Treas.

(Corporate Seal)

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MASSACHUSETTS BONDING AND INSURANCE,
COMPANY,

By William E. Wood,
Resident Vice President.

Corporate Seal)

Attest:

Thos. C. McKenna,

Acting Secty.

Attest:

Horace E. Anderson,

Resident Assistant Secretary.

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(Revenue Stamps.)

SHARPLESS & WAY,
Attorneys for Plaintiff.

Answer of the defendant, Massachusetts Bonding and Insurance Company

(Filed, February 8, 1917.)

NEW JERSEY SUPREME COURT

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CAMDEN COUNTY

BOARD OF EDUCATION OF THE
CITY OF WILDWOOD, NEW JER-
SEY,

Plaintiff,

and

RICHMAN CONSTRUCTION COM-
PANY, *et al.*,

Defendants.

Action at Law.

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The defendant, Massachusetts Bonding and Insurance Company, a corporation of the Commonwealth of Massachusetts, with its principal office in the City of Boston, Massachusetts, says in answer to the complaint:

1. It admits paragraph one.
2. It admits paragraph two.
3. It admits paragraph three.
4. It says that the bond was delivered by this defendant to the plaintiff upon the conditions therein mentioned, and admits the balance of this paragraph.
5. It has no knowledge sufficient to form a belief as to paragraph five, except that it admits that the copy of the bond is correct.

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Answer of defendant, Massachusetts Bonding
and Insurance Company

6. It admits that its principal started to perform the contract with the plaintiff and did some work upon the school building and states that it has no knowledge of the other facts except that certain communications were sent by the plaintiff
10 addressed to the Massachusetts Bonding and Insurance Company, Philadelphia, although the defendants home office is in Boston, Massachusetts and this fact is known to the plaintiff, and were received September 28th, in the former city, and that on the 16th of October a communication was received by defendant at its home office from the plaintiff. As to the other matters in the paragraph defendant calls upon the plaintiff for proof.

7. Defendant has no knowledge of the amount
20 the plaintiff paid the Richman Construction Company, its principal, and calls for proof, but whatever sum was paid, defendant says that its principal received a sum of money largely in excess of the amount which its principal should have been paid in pursuance of the terms of the contract entered into between the plaintiff and the Richman Construction Company.

Defendant further says that the terms of payment expressed in the contract entered into between the plaintiff and defendants principal, the
30 Richman Construction Company, were as follows:

“ARTICLE NINE. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be \$64,698.00, subject to additions and deductions as hereinbefore provided and that such sum shall be paid by the owner to the
40 contractor in current funds and only upon

Answer of defendant, Massachusetts Bonding
and Insurance Company

certificates of the architect as follows: Upon the first day of each month, contractor will submit to architect a statement of the material furnished and erected the previous month and certificate will be issued for eighty-five percent (85%) of the amount approved." 10

And the defendant asserts that the plaintiff did violate the terms of its agreement with this defendant and did violate paragraph four of the bond given by this defendant to the plaintiff because the said plaintiff did authorize and consent to and make payments of money to the Richman Construction Company contrary to and in violation of the above quoted terms of payment and largely in excess of the sums which defendants principal was entitled to receive under the above quoted terms of payment, and defendant asserts by reason of the breach of obligation on the part of the plaintiff and by reason of the excess payments made to defendants principal by the plaintiff, this defendant is entirely discharged and released from all liability to the plaintiff upon its bond given to plaintiff. 20

This defendant has no knowledge of the amount in the hands of the plaintiff at the time of the default of the defendants principal. 30

8. Defendants state that the contract price for the completion of the job submitted by Messrs. Goslin and Pfeiffer is largely in excess of the amount necessary to complete the work left unfinished by defendants principal and that the estimates of the said Messrs. Goslin and Pfeiffer include matters which are not properly part of *these estimates and the moneys quoted in said es-* 40

Answer of defendant, Massachusetts Bonding
and Insurance Company

timates cover material and labor which are not properly a part of this contract and those facts were known to plaintiff.

9. Defendant denies paragraph nine.

10 10. This defendant has no knowledge of any extension of time granted to the plaintiff and denies that it consented to any such extension, and if any such extension was granted this defendant is released from its liability as surety. Defendant further states that if any such extension was granted at the time alleged in the complaint then defendant is released from liability on its bond because plaintiff made payments to the defendants principal after such extension without the consent of this defendant.

20 11. Defendant has no knowledge sufficient to form a belief as to the acts of its principal with reference to indemnifying the plaintiff and say that it received a communication from the plaintiff on the 18th of October, 1916, containing a copy of a resolution adopted by the plaintiff. This defendant admits that it has refused to complete said building and to pay the plaintiff the sum demanded by it and asserts that it is not liable in the amount demanded or in any amount to the plaintiff and says that the plaintiff has suffered no loss and denies that plaintiff is entitled to any damages whatever from this defendant because this defendant has been released from all liability upon its bond by violations of the obligations of the bond on the part of the plaintiff and by violations of the terms of the contract between the plaintiff and defendants principal.

30 12. Defendant denies that the plaintiff is entitled to damages and states that the plaintiff has
40 suffered no loss.

Answer of defendant, Massachusetts Bonding
and Insurance Company

FIRST DEFENCE. The defendant asserts and charges that it is not liable in any amount whatever to the plaintiff under the terms of its bond because the plaintiff has suffered no financial loss and cannot suffer any financial loss at any time; the contract entered into between the plaintiff and Messrs. Goslin and Pfeiffer for the completion of the school building upon the abandonment of its contract by the Richman Construction Company, is illegal and is not binding upon the plaintiff and plaintiff is not required to pay the sums agreed to be paid therein; for the reason that plaintiff at the time of awarding the said contract did not have on hand the contract price which the plaintiff agreed to pay Messrs. Goslin and Pfeiffer nor had sufficient moneys been raised to carry out the terms of the contract at the time that it was awarded and the awarding of a contract under such circumstances is illegal and this defendant is not liable to the plaintiff for any moneys which plaintiff alleges to be due under the terms of an illegal contract. Defendant further asserts that in awarding the contract under such circumstances the plaintiff has violated Section 31 of the Crimes Act of the State of New Jersey, (P. L. 1914, page 444).

SECOND DEFENCE. Defendant asserts that the plaintiff cannot recover in this action because it has paid no moneys in excess of the amount which it has on hand to complete the contract and has only incurred an obligation for any such excess.

FORT & FORT,
Attorneys for the Defendant.

Reply*(Filed, Mar. 1, 1917.)*

NEW JERSEY SUPREME COURT

CAMDEN COUNTY

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BOARD OF EDUCATION OF THE
CITY OF WILDWOOD,

Plaintiff,

VS

RICHMAN CONSTRUCTION COM-
PANY, *et al.*,

Defendants.

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Reply of plaintiff to answer of Massachusetts Bonding and Insurance Company.

1. Plaintiff denies that it violated the terms of the agreement with the defendant, and further denies that it violated paragraph four of the bond given by the defendant to the plaintiff.

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2. Plaintiff denies that it authorized or consented to or made payments of money to the Richman Construction Company contrary to and in violation of the terms of payment contained in said agreement or bond, and largely in excess of the sums of money to which the Richman Construction Company was entitled to receive under the terms of payment set forth in said answer.

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3. Plaintiff denies that the defendant is discharged or released by reason of any matter or thing set forth in paragraph seven of the answer.

Reply

4. Plaintiff denies the facts set forth in paragraph eight of the answer.

5. Plaintiff denies the facts set forth in paragraph ten of the answer.

6. Plaintiff denies that the plaintiff has suffered no loss by reason of the facts set forth in paragraph eleven of the answer. 10

7. Plaintiff denies that the defendant has been released from liability by violations of the obligation of the bond of the defendant, or by violations of the terms of the contract between the plaintiff and the Richman Construction Company.

8. Plaintiff denies the facts set forth in the first defense of the answer.

9. Plaintiff denies the facts set forth in the second defense of the answer. 20

10. Plaintiff will claim that the facts set forth in the first defense are insufficient to constitute a defense to the plaintiff's right of recovery for the cause of action set forth in the complaint.

11. Plaintiff will claim that the facts set forth in the second defense are insufficient to constitute a defense to the plaintiff's right of recovery for the cause of action set forth in the complaint.

SHARPLESS AND WAY,

Attorneys of Plaintiff. 30

Testimony

NEW JERSEY SUPREME COURT

10	BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JER- SEY,	}	Action at Law.
	Plaintiff,		
	VS		
	RICHMAN CONSTRUCTION COM- PANY, <i>et al.</i> ,	}	
	Defendants.		

April Term, 1917.

Appearances:

20 For the Plaintiff, Lewis Starr, Esq., Palmer
 Way, Esq.,
 For the Defendant, Fort & Fort, Esqs.,

Before LLOYD, J., and a Jury.

The Case for the Plaintiff.

Mr. Starr opens the case for the plaintiff to the
 jury.

30 Mr. Fort opens the case for the defendant to the
 jury.

The Court: What is the provision of the con-
 tract? Will you read it to me, as to the right of
 reletting or recontracting?

Mr. Fort: (Reading). "Should the Contractor
 at any time refuse or neglect to supply a sufficien-
 cy of properly skilled workmen, or of materials of
 40 the proper quality, or fail in any respect to pros-

Testimony

ecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.”

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Sterling W. Cole—Direct

STERLING W. COLE, Esq., sworn:

By Mr. Starr: Q. Are you in any way connected with the County Clerk's office of Cape May County? A. I am Deputy County Clerk.

10 Q. Is there on file in the office of the County Clerk a contract between the Richman Construction Company and Wildwood Board of Education for the construction of a school building at Wildwood? A. There is.

Mr. Starr: I offer that contract in evidence.

Said contract is marked Exhibit P-1.

The Court: What is the date of the contract?

20 Mr. Starr: It is dated the 9th of November, 1915, and the total of the contract is \$64,698.

Q. Now, were there specifications and plans filed in your office as part of this contract? A. There were, yes, sir. They were not filed at the same time.

Mr. Starr: I offer the specifications and plans which are produced by Mr. Cole.

Said papers are marked Exhibit P-2.

30 Q. Have you also a contract on file in your office between the Board of Education and Goslin & Pfeiffer? A. There is such on file, yes.

Q. Is this the contract? (Showing witness paper). A. That is the contract.

Mr. Starr: I offer that contract in evidence.

The Court: What is the date of that?

40 Mr. Starr: That is dated the 20th day of November, 1916.

Sterling W. Cole—Direct

Q. I notice specifications are attached; were they attached at the time it was filed? A. Yes, they were attached at the time it was filed.

Mr. Fort: That I object to on the ground that it has not yet appeared to be material in any way to this controversy.

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The Court: I suppose it is one of the steps, Mr. Fort, isn't it, in the proofs, which, if they fail to establish the propriety of it, will fall to the ground?

Mr. Fort: I think it goes deeper than that and it raises at once a legal question as to whether or not the contract or the contract price or anything contained in that contract is in any way evidential as against the defendant.

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The Court: That may be, but it is essential for the other side to show, is it not, what expenses they have incurred over and above the contract price that you guaranteed?

Mr. Fort: Perhaps so.

The Court: One of the ways of showing that is to show they made a contract with somebody else. Now, if that was not a proper contract or a contract that is valid against you, it goes for nothing in the end, but how can the Court refuse it as one of the steps that the plaintiff is obliged to prove?

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Mr. Fort: My point is this, if your Honor please, that as a matter of strict law it makes absolutely no difference to this defendant whether the City of Wildwood contracted to have this work done for five 40

Argument

cents or five million dollars, nor is it evidential against us what it contracted to have it done for.

The Court: That is true if there is no liability, but if there is liability, what then?

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Mr. Fort: The question and the whole question under the language which I just read to your Honor from the contract is the certificate of the architect as to the actual expense paid. It makes no absolute difference what the contract would be. We have filed, if your Honor please, a special defense on this point, if your Honor will look at the pleadings.

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The Court: You mean that there is no obligation on the part of the bonding company until the moneys are actually paid out under the contract?

Mr. Fort: Absolutely, and that that payment must be proved.

The Court: And is this action predicated upon such payment or is it predicated upon the liability only?

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Mr. Starr: It is predicated upon the liability incurred in the words of the contract. The contract says, "The expense incurred in the completion of the building."

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Mr. Fort: We specially plead that as a second defense: "Defendant asserts that the plaintiff cannot recover in this action because it has paid no moneys in excess of the amount which it has on hand to complete the contract and has only incurred an

Argument

obligation for any such excess." We further plead in regard to this particular contract—the other plea would more particularly relate if the contract is once in as to its being excessive, etc., but we contend very strongly, your Honor, that this action can only be based upon a loss paid and not upon a loss in prospect, and that the language of the bond so provides. 10

The Court: That depends wholly upon what your contract declares, of course.

Mr. Fort: Well, if your Honor please, the bond does so provide, I think, clearly.

The Court: Let's hear what it reads.

Mr. Starr: The bond is an indemnification against loss by reason of the failure of the contractor to complete, and the fifth clause of the contract, as I read it, provides for the recovery of any expense incurred by the City caused by the breach of the contract. 20

Mr. Fort: If your Honor please, the contract itself to which the bond is attached, the language of which I have already read to your Honor—I simply desire to re-state it. Of course, I think Judge Starr will agree with me that the liability of the bonding company must be predicated upon the liability of the contractor, that is, if no recovery could be had against the contractor, none could be had against the bonding company, and the test of our liability is the same test that would be the test of the contractors, under certain conditions; at least, no recovery could be had against us 40 30

Argument

10 if there is none recoverable against him. The language here is, "And in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties." Now, the very use of the word "audited" precludes a determination upon a mere incurred liability subsequently to be paid.

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30 The Court: Well, is there anything ambiguous about the language of the contract to the effect that it is the incurring of the liability which permits the architect to certify?

Mr. Fort: It is the expense incurred, not the liability. Incurring an expense is a distinct thing from incurring liability. The cases, if the Court please, I think are clear upon this question.

40 The Court: I see your distinction.

Argument

Mr. Fort: I have three or four cases which bear on it, it seems to me. *Corpus Juris* is clear upon it, that there has to be an actual loss before a recovery, and various cases, one in the Federal Reporter, one cited in L. R. A. from—I don't know just what state; I don't seem to have the State in there, from the Southeastern Reporter, three cases which I have— 10

The Court: Have these moneys been paid yet?

Mr. Starr: Most of them have. If the Court please, the situation was this: There is no other possible way by which a recovery could be had. The original contract between the Richman Construction Company and the Board of Education provided that the building should be completed within 160 working days. The bond provided that a suit upon the bond should be within six months of the time set forth in the contract for the completion of the building. The 160 days expired sometime in the summer, as I understand it, of 1916; the default occurred in about the first of October, 1916. The Bonding Company was advised of all the proceedings which were taken by the Borough to bring the employment of the contractor to an end, and they were also advised of the proceedings which the Borough took to secure bids for the completion of the building, and they were given an opportunity to do the work. They were also notified that it was the purpose of the Borough unless the bonding company took 20
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Argument

10 over the work to enter into this contract. Now, it seems to me, as the period of six months would have expired before it was possible for the Borough or the City to have paid out the money under the terms of the new contract or to complete the work, that the language of the contract must be construed to cover the expense incurred, which would mean the amount of a new contract to complete the work, not necessarily the money being paid out, because the language of the contract does not contemplate that; it says, "expense incurred." Now, certainly a contract made between the Board of Education and a new contractor, by which the Board of Education became obliged to pay the amount of that contract for the completion of the work, is an expense incurred under the terms of the contract, and it was upon that theory that this suit was brought, because the statute of limitations, or rather the time limited in the bond, the time of six months limited in the bond, would make it utterly impossible to have waited until the money had actually been paid out, and it seems to me we are entirely within the cases under the terms of the contract which entitles the Board to recover the expense incurred by reason of the breach of the contract.

30 The Court: Judge Starr, is that argument wholly applicable to this case? Here was a contract which called for its

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Argument

completion within 160 days. Now, undoubtedly the performance of that work was regarded by the parties as—the very expedition of it indicates haste. Now, when they provide that you shall have six months more in which to go on and finish after a default, it is adding practically the entire body of time that you originally allowed for the performance of the old contract, within ten days of it, and can it be said under those circumstances that the parties did not contemplate that the building should be completed within six months more at least after the default? 10

Mr. Starr: Well, that may be so; that may be a construction that would be put upon the contract, but that does not at all affect the language of the contract, which provides that the amount recoverable under the bond would be the expense incurred. 20

The Court: Yes, but I am trying to get at the meaning of the words “expense incurred.” Your theory is that inasmuch as six months was the time within which this contract was to be carried out, and inasmuch as no right of action would accrue after that, that it could not have been contemplated that the money should actually be paid within that time. 30

Mr. Starr: As it is, if your Honor please, this contract was made for the completion of the building in November; the work has not been finished as yet, over six months. I was speaking of that as to the practical question which confronted the Board. 40

Argument

The Court: Yes, I can see that, but does that argue, does that throw any light upon the determination of the meaning of those words?

10 Mr. Starr: Well, possibly not, but that was the situation that confronted the Board.

The Court: The real question for me is; What do the words "expense incurred" mean?

Mr. Starr: It seems to me, if the Court please, that any contract, any arrangement that was made, the assumption is that the Board will pay whatever is due on this contract.

20 The Court: Well, I take it to be a contract for faithful performance, and then a contract to pay whatever is deficient.

30 Mr. Starr: It is to indemnify against loss; that is the language of the bond; now, it seems to me when the Board was obliged to enter into a contract and the bonding company knew of this situation and they made no objection, as I understand the situation, to the entering into this contract, or only upon the ground not that that was not a proper form by which the work should be done, but that the contract was excessive, the amount paid the new contractors was in excess of the actual value of the work to be done, there may be a question of waiver, if the Court please, involved in this case by reason of the dealings between the parties, because they

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Argument

were notified of the purpose of the Board to enter into this contract.

The Court: I think it better to receive the contract and deal with the full effect of the proofs when they are in. I will note an exception to the ruling.

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Mr. Fort: May I add one thing for the purpose of the record, if the Court please, as to a probable reason why we think that should not be done, and that is this: Under the terms of this contract the City itself is permitted, if it so choose, instead of re-letting the work to go in and finish the work. Now, if there is anything in Judge Starr's argument at all the City would have been permitted to start in on the completion of this work and dilly-dally along on it for three or four years and bring suit within the six months period on an estimate of what it was going to cost them.

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The Court: Well, I have already referred to the fact that presumably all parties were interested in the completion within the time named.

Mr. Fort: Your Honor will permit me to renew the motion to strike out?

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The Court: Yes; unless the terms of this contract, Mr. Fort, bring you within the liability of the situation, there is no case made out, of course; this is only one step in the chain which the other side must establish.

Said contract is marked Exhibit P-3.

No Cross-examination.

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William C. Todd—Direct

WILLIAM C. TODD, sworn:

By Mr. Starr: Q. Mr. Todd, have you any official connection with the Board of Education of Wildwood? A. I am secretary of the Board of Trade or of the Board of Education.

10 Q. How long have you been secretary? A. Since May, 1914.

Q. Were you secretary all during the time that the work was carried on under the contract with the Richman Construction Company? A. I was.

Q. Have you the estimates and orders which were paid to the Richman Construction Company? A. I have.

Q. Will you produce them, please?

20 (Witness produces bundle of papers.)

Q. I show you a paper which is called certificate No. 1566 for first payment, and ask you whether or not that is a certificate given by the architect, Mr. Adams? A. Yes, this is.

Mr. Starr: I offer that in evidence.

By Mr. Fort: Q. How do you know that is given by the architect, Mr. Todd? A. Because it has his signature attached to it.

30 Q. You did not see him sign it? A. No, I did not.

Q. Did he hand that certificate to you? A. I don't know whether he handed it or the builder handed it in.

Mr. Starr: I desire to have marked for identification, if the Court please, certificate No. 1566, which calls for \$1346.

Said paper is marked Exhibit P-4 for identification.

40 The Court: What course did that take, Mr. Todd?

William C. Todd—Direct

The Witness: It was presented at a meeting of the Board of Education. They ordered the bill paid on the strength of the architect's certificate.

The Court: Well, it was paid?

The Witness: Yes.

Mr. Starr: The amount of the order was paid \$1346? 10

The Witness: Yes.

Mr. Starr: Now, I offer to have for identification—

The Court: Gentlemen, can't you save some time by having these offered in bulk? I suppose they are all—

Mr. Fort: Well, I think they perhaps ought to be marked separately, but I suggested to Judge Starr they all be offered for identification generally as far as they can be. 20

Mr. Starr: Well, there are nine other similar certificates; I offer to have these marked.

The Court: Aggregating what, the total amount?

By Mr. Starr: Q. Mr. Todd, how much in all was paid to the Richman Construction Company on the orders issued upon the certificate of the architect? A. If I may refer to these certificates, I can tell you. 30

By the Court: Q. Don't you know without figuring them up? We can do that. A. I relied on these figures.

Q. Well, never mind.

Said certificates are marked for identification Exhibits F-5 to P-13, both inclusive. 40

William C. Todd—Direct

Mr. Fort: It is possible we may agree on that amount.

Mr. Starr: That is there; you furnished me that.

The Witness: Yes, \$34,556.40.

10 By the Court: Q. Those amounts were paid, were they? A. Yes, they were.

By Mr. Starr: Q. They were paid on these orders? A. Yes.

Q. Now, won't you turn to the minutes of the meeting of September 26, 1916, the minutes of the Board of Education? A. I have it.

Mr. Starr: Mr. Fort, will you produce the letter, please, dated September 20, 1916, written by the architect?

20 Mr. Fort: To whom?

Mr. Starr: It is written to the Richman Construction Company and was sent to the Bonding Company. There was a series of letters passing between these parties prior to the time the employment was terminated. I don't know whether there is any controversy in the case as to the fact that the Board did terminate the employment of Richman.

30 The Court: Has this reference in September to the termination of the contract?

Mr. Starr: A resolution passed terminating the contract.

The Court: Do you offer that?

Mr. Starr: I offer that in evidence, yes, also offer in evidence letter dated September, 20th.

40 The Court: What is the date of that minute?

William C. Todd—Direct

Mr. Starr: September 26th, isn't it?

The Court: Annulling the contract?

Mr. Starr: Yes.

Mr. Fort: We received such a letter.

Mr. Starr: I offer this letter in evidence dated September 20, 1916, signed by the architect and addressed to the Richman Construction Company. (Reading). "Gentlemen: *In re* High School Building at Wildwood. Inasmuch as you have failed to supply a sufficiency of skilled mechanics and material on the above building, you will consider this letter sufficient notice under Article V of your contract that unless a marked showing is made within three days after receipt of this notice, I shall certify to the Board of Education that they are entirely within their rights to terminate the contract and to enter and take possession for the purpose of completing the work included in the contract." A copy of that was sent to the Bonding Company. 10
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By Mr. Starr: Q. Now, will you read the minute showing the action of the Board of Education at a meeting held on the 26th of September, 1916?

A. "The Secretary read a copy of a notice to the Richman Construction Company, dated September 20, 1916, that unless they would supply a sufficiency of skilled mechanics and material on the High School Building that they would consider said letter sufficient notice under Article V of their contract, and that unless a marked showing was made within three days after the receipt of said letter, the architect, Mr. Clyde S. Adams, would certify to the Board of Education that they 30
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William C. Todd—Direct

were entirely within their rights to terminate the contract and to enter and take possession for the purpose of completing the work included under their contract. Said notice was ordered received and filed. Mr. Clyde S. Adams, the architect, in person certified that the contractor on the High School Building, the Richman Construction Company, had not made an effort within the last week or ten days to proceed with the work, and that the Board was entirely within their rights to terminate the contract and to enter and take possession for the purpose of completing the work. The secretary read a communication from the Massachusetts Bonding and Insurance Company stating that their representative had been in Wildwood and had gone over the building in a general way and reported that eliminating the unpaid material and labor"—

Mr. Fort: If your Honor please, I don't know that the minutes can be read to show the contents of another communication.

Mr. Starr: That is not my object, if the Court please.

Q. Read the minutes showing the action taken by the Board with reference to these minutes. A. "The following resolution was offered by Mr. Harris, seconded by Mr. Anderson: 'Whereas: The Richman Construction Company has failed to complete the contract entered into between them and this Board of Education by neglecting or refusing to supply a sufficiency of skilled workmen and material to complete the contract according to the terms thereof.'

"And Whereas: The Architect, Mr. Clyde S. Adams, has certified to this Board of

William C. Todd—Direct

Education that on September 20th, 1916, he did notify the said Richman Construction Company in writing to supply a sufficiency of skilled mechanics and material on the above building, and that they should consider the said letter sufficient notice under Article V of their contract, and that unless a marked showing was made within Three (3) days after the receipt of said notice, he would certify to the Board of Education that they were entirely with-
in their rights to terminate the contract and to enter and take possession for the purpose of completing the work included under their contract. 10

‘Therefore, be it Resolved: that the contract between the Richman Construction Company and this Board of Education be terminated as per Article V of said contract. 20

‘And Be It Further Resolved: that a copy of this resolution be sent to the Richman Construction Company and their Surety, the Massachusetts Bonding and Insurance Company, respectively.’ ”

Q. Now, there was a communication received from the Bonding Company read at that meeting; have you that communication?

(Witness produces letter and hands same to examining counsel.) 30

Mr. Starr: I offer that in evidence.

The Court: What is the date of that?

Mr. Starr: September 25th.

The Court: What does it say?

Mr. Starr: It is addressed to Mr. Dowler, President of the Board of Education:

“In connection with the above matter we are in receipt of the report of our engineer, 40

William C. Todd—Direct

10 Mr. Leary, who recently made an investigation of this situation. It appears clear that eliminating the unpaid material and labor bills the balance left in this contract and in your hands is more than adequate to cover the cost of completion. Our bond was one of performance only and there is no obligation on the part of this Company, so far as any material or labor bills are concerned. It appears to be clear, also, that under the New Jersey law the full balance left in this contract is available to you to cover the cost of completion and no portion of this must be diverted to take care of any outstanding material or labor bills.

20 It appears clear to our representative that the contractor's superintendent, Mr. Phifer, is competent to carry on the work of completion and while we cannot authorize you in any way relative to what course you should take in the method of completion, we are pointing this out so that for your own benefit you will give due consideration to the advisability of having him complete this contract for you. It would appear that this is the most economic method which you could pursue, but as we have stated above, this suggestion is merely for your benefit because this Company cannot admit any liability in connection with the matter. The point which we wish to convey is this, that if you handle the matter carefully there is more than sufficient mon-

30 eys in your hands to complete this contract, and neither you nor this Company

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William C. Todd—Direct

being liable for any outstanding labor or material bills, no loss will result.”

Said paper is marked Exhibit P-14.

Q. Now, did you send to the Bonding Company a copy of the resolution which had been adopted by the Board on the 26th of September? A. I did. 10

Mr. Starr: Have you the original of that, Mr. Fort?

Mr. Fort: September 26th?

Mr. Starr: Yes, letter received from the Board, and also copy of the resolution which was passed.

Mr. Fort: I think I have, sir. Well, I have a letter of September 28th referring to a resolution adopted September 26th.

Mr. Starr: That is right. Have you a copy of the resolution also? 20

Mr. Fort: Yes.

Mr. Starr: I offer that in evidence, if the Court please. The communication states: “At a regular meeting of the Board of Education, held Sept. 26th, 1916, the enclosed resolution was adopted and spread upon the minutes. I have been instructed to communicate with you, that some decision may be reached at once. The building as it stands to-day is in a most exposed and unprotected condition and immediate action must be taken to protect the work completed to date. Therefore, in view of the above, the Board desires an expression of your intentions in the matter at the possible moment. Stop notices under the municipal lien law have been filed to the extent of \$5404.71.” 30

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William C. Todd—Director

Said paper is marked Exhibit P-15

Q. Now, have you any answer to that communication from the Bonding Company? A. I have a letter dated September 29th.

10 Mr. Starr: I offer this letter in evidence, it is dated September 30th, addressed to the Board and signed, "M. F. Carney, Attorney."

Said letter is marked Exhibit P-16.

The Court: Who is that from, the Bonding Company?

20 Mr. Starr: The Bonding Company to the Board. (Reading). "Your communication of September 28th addressed to our Philadelphia Office has been forwarded here and we would refer you to our letter of September 25th addressed to Mr. Dowler, President of your Board. Under all the circumstances and facts in connection with this matter we must decline to undertake the completion of this contract and it is incumbent on you to see that in completing the cost is kept at a minimum. In our letter of the 25th we suggested what we believed to be the most economic method which you could adopt and our investigation shows that there is an ample balance in your hands to cover same. This Company, therefore must reserve all its rights in the premises."

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The Court: Is that an acknowledgment of the communication served in Philadelphia?

Mr. Starr: Yes.

40 The Court: Mr. Fort, is there any question raised on that? You raised some ques-

William C. Todd—Direct

tion in your opening that the Bonding Company did not receive notice until late in October.

Mr. Fort: No, sir, not until late in October; I raised the question, if your Honor please, that notice of alleged extension of time under the contract, the request for the Bonding Company to consent to the extension of time under the contract was sent to the Boston office. 10

Mr. Starr: May I ask Mr. Fort what significance that has if the suit was brought within six months after the time prescribed in the contract for the completion of the work?

Mr. Fort: Well, it remains to be seen whether it was, but it further, I think, has a very direct bearing on the issues as to whether or not the City of Wildwood has modified the terms of the contract, which would release the surety. 20

By Mr. Starr: Q. Now, at the meeting of September 26, 1916, did the Board take any action with reference to advertising for bids to complete the building? If so, will you read what action was taken? A. Meeting of September 26, 1916: "On motion by Mr. Harris seconded by Mr. Harbison, that the president and secretary insert in the local papers an ad. calling for bids to complete the unfinished High School Building, such bids to be sealed and presented not later than Monday evening, 8 p. m. October 16, 1916." 30

Mr. Fort: If your Honor please, this method of asking the witness to read something from the minutes without knowledge 40

William C. Todd—Direct

as to what is coming is rather cumbersome. I think that is rather improper.

10 The Court: I suppose, Mr. Fort, it is to show that the contract that was subsequently entered into was authorized by the Board.

Mr. Starr: And in accordance with the statute, if your Honor please; the statute requires advertisement.

The Court: That is included in the authorization.

20 Mr. Fort: The trouble is I have an objection on the record to the admission of that contract, and I would like that objection, if the minutes are to be read in this form, I would like a general objection to the reading or admission of any evidence relating to that contract or to any of the proceedings leading up to its making.

30 The Court: Well, as I have before stated, Mr. Fort, if these steps are adequate steps to create a liability in the defendant they are all proper; if they are not adequate steps, the failure of any one of them possibly may defeat the plaintiff's right of action, but at all events if they are not effective in their completed state, then they go for nothing against you.

Mr. Fort: Well, may I have a general objection in the record, your Honor, to the admission of any evidence relating to that contract, and that will save me—

40 The Court: Yes, if it is based on the question of liability only, not on the question of the form of proof.

William C. Todd—Direct

Mr. Fort: No, I don't mean that; I don't want to be technical on that, but I mean simply on the general question.

Mr. Starr: There is no objection to that.

The Court: All right.

Q. Were advertisements inserted requesting the submission of bids in accordance with that resolution? A. They were. 10

Q. Now, will you turn to the minutes of the meeting of October 16, 1916? Were bids received at that meeting from prospective contractors for the completion of the building? A. In answer to our advertisement we received bids from Shaner & Sons at Palmyra—

Q. And the amount of that? A. For \$43,673, and from Goslin & Pfeiffer of Wildwood for \$43,550. 20

Q. Now, what action did the Board take with reference to those bids as shown by the minutes? A. A resolution was passed.

Q. Will you read that please? A. "Whereas: This Board did at its last regular meeting on September 26th, 1916, order advertisements to be placed in the newspapers calling for sealed proposals to be presented on Monday, October 16th, 1916, at 8 p. m. for the completion of the unfinished High School Building. 30

And Whereas, The said sealed proposals were duly presented and read and the firm of Geo. W. Shaner and Son, of Palmyra, N. J., bid the sum of Forty-three Thousand Six Hundred and Seventy-three Dollars (43,673.00), and the firm of T. S. Goslin and Walter C. Pfeiffer bid the sum of Forty-three Thousand Five Hundred and Fifty Dollars (43,550.00) for completion, 40

William C. Todd—Direct

And Whereas, the amount of money remaining in the possession of this Board to complete this contract, being the sum of Thirty Thousand One Hundred Forty-one and Sixty cents (30,141.60), is not sufficient,

10 Now Therefore, Be It Resolved, That The Massachusetts Bonding and Insurance Company be requested to forward the amount in difference between the bid of \$43,550.00 and the said amount on hand of \$30,141.60 immediately, in order that the contract may be awarded, and that a copy of this resolution be sent to the said Bonding Company.”

Q. Was that resolution adopted? A. That resolution was adopted.

20 Q. Now, as Clerk of the Board, did you send the Bonding Company a copy of that resolution and also a communication? A. I did.

Mr. Starr: Will you produce that, Mr. Fort, please?

Mr. Fort: Go ahead, Judge Starr; put it in.

30 Said paper is marked Exhibit D-17 and read as follows: “Enclosed herewith please find Resolution passed by the Board of Education to-day. The Board has been doing all that is possible to ascertain what is the most inexpensive way to complete the building according to plans and specifications. The Resolution shows the only bids that were submitted. Some minor expenses, such as watchman, protection from the weather, are running. We might say that the Board is advised that any work

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William C. Todd—Direct

exceeding \$500.00 must be duly advertised and let on contract. Kindly let us hear from you immediately as a delay will have the tendency to damage the building in its present state of completion."

Q. Did you get any response from that communication? A. I received a letter from the Massachusetts Bonding & Insurance Company dated October 19th. 10

Said letter is read as follows: "We have for acknowledgment your letter of October 16th and would refer you to our wire of the 18th. It is clear that these bids are most excessive and as suggested in our wire, your interests clearly demand that you do not make any contract on these bids at this time. We are looking into this matter and you will hear from us further at an early date." 20

Mr. Starr: The wire referred to, which I offer in evidence, reads as follows: "Understand you have opened bids for completion school building that are greatly excessive must suggest and advise that no contract in accordance with said bids be made by you will give you further advice immediately." 30

Said letter and telegram are marked Exhibits P-18 and P-19 respectively. 30

Q. Now, will you turn to the minutes of October 31, 1916? Was any action taken with reference to the making of a new contract or dealings between the Bonding Company and the Board regarding the old contract? A. October 31st, the following resolution was adopted: "WHEREAS, This board of Education did receive a letter from the Mass- 40

William C. Todd—Direct

Massachusetts Bonding and Insurance Company, dated October 19th, 1916, stating that they would advise us within a few days after date of said letter, relative to the Richman Construction Company matter,

10 “AND WHEREAS, this board has waited to hear from said Massachusetts Bonding and Insurance Company, advising us further of their intended course of procedure in this matter,

AND WHEREAS, it is the opinion of this Board that some action must be definitely taken owing to the condition that the building is now in and because of the fact that cold weather is fast approaching,

20 “NOW THEREFORE BE IT RESOLVED that this Board notify the said Massachusetts Bonding Company that unless this Board is in receipt of definite instructions from said Massachusetts Bonding and Insurance Company as to their intended election in the matter, this Board will proceed within five days from the date hereof with the completion of the school building according to the terms of their contract.”

Q. Now, did you send to the bonding Company a copy of that resolution with a communication? A. I did.

— Said communication and the resolution already read are marked respectively Exhibit P-20 and Exhibit P-21.

40 Mr. Starr. This letter, if your Honor please, has a copy of the resolution and a letter signed by the secretary and reads as follows: “I enclose herewith a copy of a resolution adopted by the Board of Ed-

William C. Todd—Direct

ucation at its last regular meeting held on October 31st, 1916, which is self explanatory.”

The Court. What is the date of that letter?

Mr. Starr. October 31st. 10

The Court. The same date?

Mr. Starr. Yes.

Q. Won't you turn to the minutes of the meeting which authorized the execution of the contract with Goslin & Pfeiffer and read the minute with refererence to the action?

Mr. Fort: My general objection, of course goes to this matter.

The Court. Yes.

A. “On motion of Mr. Harbison, seconded by 20 Mr. Ober, that the contract for the completion of the unfinished High School Building be awarded to T. S. Goslin and Walter C. Pfeiffer, the lowest bidder, under their proposal of October 16, 1916, revised November 11, 1916, for the sum of \$42,850.”

Mr. Starr. Now, Mr. Fort, have you the original telegram signed, “Sharpless & Way,” dated November 13th?

Mr. Fort. To me? 30

Mr. Starr. To the Massachusetts Bonding Company.

Mr. Fort. That is all right.

Mr. Starr. Is it admitted also that Sharpless and Way were the attorneys of the Board?

Mr. Fort. Yes.

Mr. Starr. I offer this telegram in evidence dated, “November 13, 1916, Mass- 40

William C. Todd—Direct

10 Massachusetts Bonding & Insurance Co., Boston, Mass. Wildwood Board of Education has bid from Goslin & Pfeiffer of Forty-two Thousand Eight Hundred Fifty Dollars to complete school building partially erected under contract with Richmond Construction Company. Board proposes to execute contract for completion with above bidders for price above named on Wednesday this week. If you object notify Board immediately. Sharpless & Way, Attorneys.”

Said paper is marked Exhibit P-22.

Q. Was any communication received by the Board in answer to the telegram sent by Sharpless & Way, Exhibit P-22? A. No.

20 Said paper is marked Exhibit P-22.

Mr. Starr. If your Honor please, I have a letter signed by Mr. Fort addressed to Sharpless & Way, dated November 10, 1916, which was three days before the sending of that telegram.

Mr. Fort. I also admit I was attorney for the Bonding Company.

30 Mr. Starr. I offer this in evidence: “Messrs. Sharpless & Way, Camden, New Jersey. Gentlemen:— Confirming our conversation of to-day, you may inform the Board of Education of Wildwood that the Massachusetts Bonding and Insurance Co. will not take over and complete the construction of the School Building originally contracted to be built by Richman Construction Co. We understand that you have a bid in hand of \$43,550 from Thomas S.

40

Argument

Goslin and Walter C. Pfeiffer for the completion of the work and that they are prepared to accept the contract for some \$2500 less than their bid.

Under the conditions and in view of the various matters affecting the whole question of our liability on the bond, you may treat this as the final decision of the Massachusetts Bonding and Insurance Co. and a reaffirmation of their letter of September 30th, 1916. Yours very truly, Fort and Fort, Attorneys, by Franklin W. Fort." 10

The Court. Just let me get that; I don't know that I quite understand what it means. Let me see it. What is the decision here, Mr. Fort, which is referred to? 20

Mr. Fort: Well, sir, I don't know that I am on the stand yet, your Honor.

The Court. I thought maybe you might throw some light on what you meant by this letter.

Mr. Fort. I might, your Honor, but I don't know that I care to just now—I am sorry—at this stage of the case I think that letter will have to go in on its face.

The Court. Does it refer to the company's decision not to complete when you say, "You may treat this as the final decision of the Massachusetts Bonding and Insurance Company."? 30

Mr. Fort. Well, if your Honor please, the letter begins with a reference to a conversation, and I don't see how I can attempt to add— 40

Argument

The Court. Well, I don't suppose you can amplify the letter, Mr. Fort, but I am trying to get at what the letter means.

10 Mr. Starr. It refers to a communication of September 30th. Now, this is a communication of September 30th written by Mr. Carney who was evidently the general counsel of the company in Boston, addressed to the Board: "Your communication of
20 September 28th addressed to our Philadelphia office has been forwarded here and we would refer you to our letter of September 25th addressed to Mr. Dowler, president of your Board." That is the letter in which they make the suggestion that Goslin & Pfeiffer would be the proper persons to complete. In their letter of the 30th they say, "Under all the circumstances and facts in connection with this matter we must decline to undertake the completion of this contract and it is incumbent on you to see that in completing the cost is kept at a minimum. In our letter of the
30 25th we suggested what we believed to be the most economic method which you could adopt and our investigation shows that there is an ample balance in your hands to cover same. This Company, therefore must reserve all its rights in the premises."

40 Mr. Fort. Judge, I think you unconsciously made a little mistake as to that part of the letter containing the reference to Mr. Pfeiffer. You said Goslin & Pfeiffer.

William C. Todd—Direct

Mr. Starr. Oh, I beg your pardon; the letter reads, "It appears clear to our representative that the contractor's superintendent, Mr. Pfeiffer, is competent to carry on the work to completion, and while we cannot authorize you in any way relative to what course you should take in the method of completion, we are pointing this out so that for your own benefit you will give due consideration to the advisability of having him complete this contract for you. 10

Q. Have you the bond which was executed by this Bonding Company to the Board? A. I have.

Q. Will you produce it, please?

(Witness complies.)

20

Mr. Starr. I offer the bond in evidence. Said bond is marked Exhibit P-23.

Q. What is the amount of the contract entered into with Goslin & Pfeiffer?

The Court. I see there is a discrepancy of \$300; the figures given me were \$850, the witness gives \$550.

Mr. Fort. If the contract is here that is the best proof of that, Judge.

Mr. Starr. I expect it is, but I wanted it on the record. 30

A. \$42,850.

The Court. That is the minutes?

Mr. Starr. Here it is \$42,850.

The Court. The \$550 is wrong, is it?

Mr. Starr: \$42,850; I am reading from the contract.

Mr. Fort. This is subject, of course, to my objection in regard to that contract. 40

William C. Todd—Cross

The Court. Yes, I so understand.

CROSS-EXAMINATION by Mr. Fort:

Q. Mr. Todd, I notice that on Exhibit P-12
for identification there is no estimate attached
10 as there is to the other exhibits for identification.
Do you know where that estimate is? A. It is
with the contractor, Richman Construction Com-
pany; they were at the meeting, as was the archi-
tect, and they revised their estimate and they
took it back with them stating they would return
it to me when they had drawn up a new estimate.

Q. Have they ever returned it? A. No, I have
never been able to find it.

By the Court. Q. There was something suggest-
20 ed in one of these letters from the Bonding Com-
pany that Pfeiffer would shade their contract
\$2500. A. That is because of these conditions; I
think Goslin did shade some there; that was the
cause of the difference in the figures.

Q. Was that done, that allowance made? A.
Yes. You notice in their revised estimate—there
is not that much difference, your Honor; there
is some difference between their original bid
and the contract price but it is not \$2500. Mr.
30 Leary calls my attention to the fact that that is
probably where that confusion came a minute ago.
The original bid was \$43,550 and the contract
was \$42,850, \$700 difference.

By Mr. Starr. Q. How much money, Mr. Todd,
has the Board paid upon the contract with Gos-
lin & Pfeiffer?

Mr. Fort: I object, if your Honor please
to any payments under the contract with
Goslin & Pfeiffer for two reasons: The
40 pleadings do not raise the question in any

William C. Todd—Cross

way whatever as to the amount paid by the City, and second—

The Court: I do not know that it is a very material circumstance except as part of the history of the thing.

Mr. Starr. I don't think the amount is important; I think it is important to show that the contract was carried out and Goslin & Pfeiffer completed the building and we made payments on account of the contract. 10

The Court. Well, if it bears upon the question of the completion, I suppose, but if your theory is correct that the incurrence of the expense in good faith is the criterion of liability on the part of the defendant, it does not make any difference whether it was paid before suit was brought or after or not paid at all yet. 20

Mr. Fort. It does make a vital difference to us, your Honor, I think. The pleadings not raising it I strongly object to the admission of any proof on that subject.

The Court. Well, Mr. Fort, I don't think it is admissible against you as a matter of liability unless it was before suit was brought, then it may have a bearing upon the contention that you make, that the words of the contract only contemplated an indemnity for an expense actually made. 30

Mr. Fort. Well, if that be so, your Honor, then the proof should not be put in in that form as to the amount that has been paid, but should be put in by dates. 40

William C. Todd—Cross.

10 The Court. To make it effective for that purpose, perhaps that is so, but as a matter of the history of the transaction I think perhaps the plaintiff is entitled to show it as showing their good faith. In point of fact, were any moneys upon which its liability could be predicated actually paid at the time suit was brought?

20 Mr. Starr. No, because the contract was made on the 20th of November and suit was brought on the 21st. The whole theory of the thing, the reason for it, was this six months limitation. We did not know where we stood with reference to the time and that is the only thing we could do, and it seems to me it is competent as a matter of good faith to show that the contract was carried out.

The Court. I have said I think it is competent on that line.

Exception noted for the defendant.

A. \$34,266.50.

Q. Up to the present time? A. Up to the present time.

30 The Court. Gentlemen, perhaps it would be as well at this point to hear counsel on this question of construction, in view of the statement that no moneys were actually paid and no actual moneys made the basis of liability at the time suit was brought. It is too late, in any aspect, I suppose, for a new suit now, is it?

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Argument

Mr. Starr. Yes, because the building has not been completed yet.

The Court. No, but you have paid out a lot more moneys.

Mr. Fort. The six months are up.

The Court. Yes, but you asked delays, 10
Mr. Fort; that may account for some of that six months.

Mr. Fort. What did you say, your Honor?

The Court. Your Company asked for some delays which might tide over some portion of that time.

Mr. Fort. It is a year in any event now. The time for completion was up July 16th. If there was an extension it was to November 16th, but the actual stoppage of the 20
work was on September 16th, so I don't think it is possible.

The Court. No, I suppose there is no possibility of a new suit.

Mr. Fort. If your Honor cares to hear further argument on that subject—

The Court. I would like to have the authorities on it as to the meaning of such expression in the contract.

Mr. Fort. The case of the American 30
Bonding & Trust Company, *et al.*, *v* Gibson County, in the Circuit Court of Appeals for the 6th Circuit, reported in 145 Federal Reporter, the opinion of Chief Circuit Judge Lurton, then, afterwards of the United States Supreme Court, page 871, is a suit to construe Article V, the uniform clause, the exact language which is in Art-
40

Argument

10 ticle V of our contract here, the uniform contract. The situation was a public building, just as it is here, a court house, however, and eventually after making five payments out of six on account of the work the architect certified the refusal and neglect exactly as has been done in this case. This case, if your Honor please, came up twice in the Federal Court, the Circuit Court of Appeals; it was reversed and came back twice with a judgment for the plaintiff and was sent back both times.

The Court. On the same question?

20 Mr. Fort. Not exactly; this opinion recites why it was sent back the second time and I would say perhaps it did come up twice on the same question. It is not very long, I will read it. (Reading opinion).

The Court. Those provisions are not in this contract.

Mr. Fort: Yes, Article V of the contract is identical in language, of the Court please, with Article V quoted in this case; I have personally compared them.

30 The Court: I am trying to get at the point as to what is meant by the language here, "Expense incurred." You have mentioned to the Court that you had authorities that that meant actual payments and not mere liability.

Mr. Fort: Yes, I have that, if the Court please.

40 The Court: As a matter of fact, do you contend that these conditions were not performed in this case?

Argument

Mr. Fort: Oh, yes, sir.

The Court: In other words that the contractor was not certified?

Mr. Fort: It is not pleaded that he was.

The Court: Well, the performance of all conditions is alleged, isn't it? 10

Mr. Fort: I think not, sir.

The Court: Isn't the performance of conditions generally alleged?

Mr. Fort: No, sir, there is simply a specific allegation that the contract was entered into.

Mr. Starr: No, we alleged that we performed.

Mr. Fort: All the conditions precedent to the default, Judge Starr, but not the conditions precedent to the right to recover subsequently. There is an allegation in the complaint: "Plaintiff is obliged in order to secure the completion of said building in accordance with the said contract with the said principal and the plans and specifications referred to therein, to enter into a contract with the firm of Goslin & Pfeiffer, and was obliged to agree to pay the said firm of Goslin & Pfeiffer, to complete said building in accordance with the contract with the said principal, the sum of \$42,850, of all of which the said defendants had notice." It does say here, "Plaintiff, on its part, has performed each and every condition, covenant and stipulation contained in the said contract with the said principal, as well as in the bond above 20 30 40

Argument

10 referred to, and has fully and entirely fulfilled and performed the conditions referred to in said bond as conditions precedent to the right of the plaintiff to recover under said bond." Yes, it does do that; I will take that back. Now, we specifically pleaded, however, to this, your Honor—

The Court: That raises an issue of fact; it doesn't make a defective plaintiff's pleading.

20 Mr. Fort: Now, the other case to which I particularly call your Honor's attention is that of *Clark v. Bonsall & Company*, 72 Southeastern, the Supreme Court of North Carolina. This is on the form of insurance known as the Liability Insurance Bond. The language of the syllabus, which is substantiated entirely by the text, is,

"If the indemnity provided in an employer's accident insurance policy is against loss or damage, an action will not lie against the insurer where he has not suffered damage (reading syllabus).

30 In other words, the ruling of this case is that an indemnity contract gives no right of action even after judgment as an ordinary proposition until the judgment is paid, and that is an entirely familiar rule of law on all of these indemnity contracts in these liability cases. I just had trouble collecting a judgment I got myself. That rule is repeated in the case of *Orinoco Supply Company v. Illinois Surety Company*, another North Carolina case reported

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Argument

in the L. R. A., 42. The rule is stated in *Corpus Juris*, Volume 1, page 1151, paragraph 396, as "Except as otherwise provided by statute as in the case of attachments, the general rule is well settled that an action commenced before the cause of action accrued, as upon a debt or judgment not yet due, is prematurely brought and cannot be maintained, provided an objection on this ground is properly and seasonably interposed." 10

The Court: I guess we all assent to that. The question is whether or not this is prematurely brought and that depends upon what is meant by that provision of the contract, whether it means that there must be an actual payment, or whether it means there is an incurrence of liability fixed. 20

Mr. Fort: Well, if your Honor please, the particular meaning, as I take it, of this ruling of Judge Lurton's must be that the incurrence of liability is not enough: there must a certified audited liability on the architect's certificate. Now, that architect's certificate, I think Judge Starr will not dispute, that in reference to that sort of architect's certificate the certification and auditing by the architect must refer to a certification and auditing of completed work, of expenses paid; it cannot refer to a certification and audit of expense to be paid in the future. That is a contradiction in terms. 30 40

Argument

10 The Court: I am not so sure that the language of Judge Lurton there bears that construction. He speaks interchangeably there of expense and damages and says that the contract was for an indemnity against loss on the contract and for damages. Was this certified by the architect?

Mr. Starr: No, sir, it was not until after the suit was brought.

The Court: Well, Judge, how do you get away with that?

Mr. Starr: Well, if your Honor please, I don't think that is important.

The Court: In the opinion of Judge Lurton that was the precise point.

20 Mr. Starr: I understand; in the first place it is not pleaded here; that is the first suggestion. There is no suggestion in the answer filed denying the fact of the existence of the condition precedent. It seems to me that under the rules of pleading that cannot be considered now.

The Court: That is true if it is not pleaded.

Mr. Fort: We deny paragraph 9.

30 Mr. Starr: I know, but you are obliged to set it up specifically. We can allege generally, but you cannot deny generally. Now, that question is not raised in this answer that I can find. It seems to me that is a very material matter to the consideration of that as a defence now. But, in any event, if your Honor please, if we are right in our contention that the expense was incurred upon making of this

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Argument

contract, there is no necessity for the certificate of the architect as to the damage or the expense incurred; the amount of the obligation and expense is settled by the execution of the contract; that is the expense incurred. Now, where it is intended to recover damages in addition to the amount which is fixed by a new contract, then it might be necessary to allege and prove the certificate of the architect, but where the expense is incurred by the making of a contract which apparently was done without protest, as far as the correspondence shows—they had knowledge of the purpose of the Board to make this contract, and the only objection that was interposed was that the bids were excessive—it seems to me that they have waived that objection. Your Honor will remember the case of *Camdem v. Ward*; some question arose as to whether or not the City adopted the correct method in making a new contract after the default of the original contractor, and the Court of Errors held that in view of the fact that the Bonding Company had notice of all the steps taken antecedent to the making of the new contract, if there was any defect in reference to that it had been waived by their conduct. Now, the contract sued upon, if your Honor please, in this case is a bond; the condition of the bond is that the principal will indemnify the obligee against all loss or damage directly resulting by reason of the failure of the principal to

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Argument

10 perform the contract. Now, there is nothing in that bond with reference to any certificate of the architect, nothing in there to indicate that the money must be actually paid out before there is an incurrence of liability; they indemnify the obligee against loss or damage. Now, if the obligee in this case was obliged to enter into a new contract to complete the building, it seems to me that was a loss and expense incurred under the terms of the contract, the terms of the bond; but I urge primarily that the question as to the failure to have the certificate of the architect cannot be raised in this case because it is not pleaded. On 20 the other hand, the other objection as to whether or not suit could be brought before the money was actually paid, I contend that the language of the bond, the language of the contract was sufficient to warrant the recovery of any expense, and certainly it is an expense incurred when the Board is obliged to enter into a new contract.

30 Mr. Fort: If the Court please, on the question of waiver as argued by Judge Starr, I think there can be nothing in that.

The Court: If the failure is not pleaded it is out of the case.

40 Mr. Fort: I am speaking now of this waiver point that Judge Starr makes, that we by, as he says, permitting the City to go ahead and make a contract with our knowledge that we have waived our rights.

Argument

Now, he raised the question that they had a certificate of the architect, that is impossible, of course—

The Court: What difference does it make if you have not pleaded it?

Mr. Fort: Well, if that is the only point in your Honor's mind—I am simply answering Judge Starr. On the waiver we contend there can be no question but that we have raised it. The only ground of liability raised to this point of the Bonding Company is the entering into the contract with Goslin & Pfeiffer to do certain work. Now, that we specifically answer and set up as a second defence, "Defendent asserts that plaintiff cannot recover in this action because it has paid no moneys in excess of the amount which it has on hand to complete the contract and has only incurred an obligation for any such excess." Now, that is the issue we are brought in here to meet, whether the signing of that contract put on us a liability.

The Court; No, you are called upon to meet every condition which it was incumbent upon the plaintiff to carry out before bringing this suit. Now, among those conditions are that the architect shall certify to the contractor the expense of finishing—

Mr. Fort: Well, I take it, if your Honor please, if they had come in here today with the architect's certificate certifying to this price as a debt prior to the bringing of the suit, I don't know that we could be

Argument

heard, but Judge Starr concedes they are not going to do it, and I am treating the matter as though there was no such situation.

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The Court: Yes, but what I am getting at is whether or not you can deny there is such an issue in the case which is admitted; the averment, in other words, that this thing was done on the one side and on the other side no denial.

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Mr. Fort: But, if your Honor please, where there is a specific averment in the pleadings that a thing was done in a certain way and that was answered, a mere general averment in the pleadings of the performance of all conditions precedent with a denial seems to me to make the issue clear upon the matter alleged.

The Court: Well, the statute makes a distinction, though.

Mr. Fort: Not if there is a specific allegation, though, your Honor, it does not.

30

The Court: I think the statute carries with it all that it contemplates, namely, that where there a number of conditions which the plaintiff must allege performance of before he brings his action that a general allegation of performance carries with it all of them. Now, if he wants to more specifically allege the doing of certain things in connection with it, I would not apprehend that that took away the force of the statute.

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Mr. Fort: Well, if your Honor please, we are here faced with a suit for a specific

Argument

sum of money, \$42,850. As I take it from Judge Starr, the proof of that sum of \$42,850 is limited to this contract. Now, we are here disputing first—I am now renewing my objection in the form of a motion to strike out the contract and any evidence relating to the contract on the ground— 10

The Court: I understand your position on that is that that is not a basis of liability under this contract.

Mr. Fort: Yes.

The Court: Your theory is that the basis of liability is the actual expense actually paid.

Mr. Fort: Not only that, if your Honor please, but my theory is that under the pleadings and under the proofs and under the contract and under the cases that that is not admissible evidence as a measure of liability in any way. 20

The Court: Well, why? Because they made no such contract?

Mr. Fort: No, sir, but because the making of a contract is not the basis of liability. 30

The Court: I see, because that is not your contract?

Mr. Fort: Their contract, not our contract; the contract with Goslin & Pfeiffer I am referring to.

The Court: I say, that is not your contract, that you should pay somebody else's bill; you haven't agreed to that; you have only agreed to pay the certified difference.

Mr. Fort: No. 40

Argument

The Court: That is your point?

Mr. Fort: That is my point, plus the fact that on the certified difference it could not relate to an expense yet to be incurred; it could only relate to the money actually expended.

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The Court: I understand your point on that; that only goes to when the liability attaches, before or after payment.

Mr. Starr: The Ward case, if your Honor please, that I spoke there, the measure of damages was—

The Court: Was that against the Surety.

20

Mr. Starr: That was against the Surety, against Ward and the National Surety, and it so says, that in that case suit was brought after the work was completed on the second contract, but the amount fixed was the amount of the second contract, as I recall it.

The Court: Was that under this same clause?

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Mr. Starr: It is substantially the same clause; the syllabus of the case is this: "A contract between the defendant Ward and the City of Camden for the paving of a street with asphalt provided that, if the defendant stopped the work before completion, the commissioner of streets of the city might procure the necessary materials and labor, and proceed with the construction of the work according to the plans and specifications, and the expense so incurred should be chargeable by the city against the defendant and his surety,

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Argument

the other defendant. Held: (a) That, Ward having left the work incomplete, the mode of procuring the labor and materials necessary for completion was committed to the discretion of the street commissioner, and that his failure to procure them at a reasonable cost formed no defense against the city's claim on the defendants for the expense actually incurred: (b) that a city ordinance requiring "any department under the city government, or any committee or board appointed by the city counsel," to advertise for proposals before binding the city for work or, materials, was not applicable to such contract; (c) that, if the defendants had the right to have any particular mode adopted for procuring the necessary labor and materials, their failure to object to the method actually chosen, when they were kept informed, by timely notice from the commissioner, of each step taken by him in the premises, was a waiver of that right."

Now, a contract was made between Ward and the City containing these provisions; Ward defaulted and the Commissioner notified Ward and the Bonding Company of the fact that only one bid had been received, that was from the Vulcanite paving Company of Philadelphia, and gave the details of that bid. The notice further stated that he proposed to award the contract to that company on the bid, and would ask the council at its meeting on June 29, 1899, to ratify such award.

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Argument

The Court: There don't seem to be any point made in that case that the line of certificates required in this paragraph—

10 Mr. Starr: No, that point is not made in this. Now, under this case it seems to me that there can be a suit brought upon the incurrence of liability or the incurrence of expense without the actual payment of the money under the contract, and it seems to me if that is the fact, the measure of the damage is the difference between the money retained under the old contract and the price to complete, which was the measure of damages awarded in the Ward case.

20 The Court: Undoubtedly that would be so unless the parties have done something to militate against it.

of the Mr. Fort: It is entirely conceivable, your Honor, that the work may never be finished under the Goslin & Pfeiffer contract; the City may never be put to the damage which it here alleges, may never pay the amount, and in that case they get a recovery against us for the work—

30 The Court: Well, I am very deeply impressed, Judge Starr, with the efficacy of the requirement as to a certificate. It is the right of both parties, your own right, as well as the other side, to have that matter determined by the architect before anybody is liable to pay or anybody is entitled to collect, and it is not only that, but his finding is made conclusive on the

40 parties.

Argument

Mr. Starr: That is not pleaded, if your Honor please.

The Court: Well, I am not so sure about that. You see it is a right of both parties as well on that phase to have the judgment of the architect and have that binding effect upon you as well as upon them, and upon them as well as upon you. 10

Mr. Fort: It is sufficiently pleaded, your Honor.

The Court: Just a moment; I hadn't finished. Now, this action is brought apparently upon a different theory not within this contract, namely, that you have gone outside and made a new contract, substituted that for the judgment and the conclusive judgment of the architect as the basis of your action. I am very much inclined to think there is real substance in it. You see, if it were otherwise, if you were permitted to go into extraneous evidence of value, you are dethroning entirely the architect's judgment which both parties have agreed to, and which both parties have agreed to be bound by, and you are opening the door to the estimates which other parties may make and which may or may not be fair and just. 20 30

Mr. Starr: Well, the Bonding Company, your Honor please, had notice of the purpose of the Board to enter into the contract.

The Court: Yes, but you don't think you could give them notice of what you were going to do and then bind them by what 40

Argument

you do if it is a departure from the contract.

Mr. Starr: Well, I don't think it is a departure from the contract, if the Court please.

10 The Court: In their correspondence they expressly disclaim any responsibility for what you were doing; there was one letter in which they suggest that for your own well-being Pfeiffer is a proper man to talk to or consult with, but that is as far as I recall their correspondence going. On the other hand they disclaim any liability throughout.

20 Mr. Starr: Well, they disclaim any liability only upon the ground that the contract, the bids were excessive, but not that it was improper to make a contract with these men; no other ground of objection is alleged, and the principal ground or principal point I desire to make is that there is no suggestion in the pleadings that there is any defect with reference to a condition precedent to the bringing of this suit. It is not raised in the pleadings at all; as I said before, the only ground
30 is the claim is made that the payments were made in excess of the amounts of money which Richman was entitled to under the original contract, and that the contract made by the Board with Goslin & Pfeiffer was in violation of the terms of the thirty-first section of the Crimes Act, and also there could be no obligation,
40 because no money had been paid; those

Argument

are the only defenses that are urged, and I insist at this stage of the proceedings it is not possible for them—

The Court: Well, I am not so sure that they haven't answered. You set up that you have performed the conditions of this contract and then you go on to say that there is a liability to the plaintiff by reason of the fact that you were obliged, not to incur the expense certified by the architect, but that you were obliged to pay out or will be obliged to pay out a sum of money because you have made a contract with a third person, which the contract does not call for at all. Now, if it reaches that stage—

Mr. Starr: Well, if that is the expense incurred, it is under the terms of the contract. The fifth section is this. "The owner shall be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the

Argument

10 expense incurred by the owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties." Now, we allege in our pleadings that we have complied with all the requirements and conditions provided for in the contract and in the bond. Now, the only
20 defense—there is a general denial of paragraph 9, and then the defense alleged—

The Court: Let me see the statute, won't you, the Practice Act?

30 Mr. Starr: The first defense is that the defendant asserts and charges that it is not liable in any amount whatever to the plaintiff under the terms of its bond, because the plaintiff has suffered no financial loss and cannot suffer any financial loss at any time (reading answer). Now, there is no suggestion in that clause that liability can be avoided because of the failure of the architect to certify. The second defense is that the plaintiff cannot recover because it has
40 paid no moneys in excess of the amount which it has on hand to complete the contract. Those are the only elements of

Argument

defence alleged raising the question of whether a contract could have been made with Goslin & Pfeiffer.

Mr. Fort: If your Honor please, you must come back to the point on which we are at the moment, I think, technically arguing, that is, the motion to strike out certain evidence. Now, the question of the admissibility of evidence in this case is raised under the pleadings. 10

The Court: No, but you catch Judge Starr's point, that the fundamental purpose of this contract is that you will make good the default of the other party. Now, they say you did not do that, that he did not perform and that you haven't paid, and that they were obliged to incur a liability for the completion of his contract in a certain sum of money. 20

Mr. Fort: Yes, sir, I understand that. Now, we say in our pleadings—

The Court: You say it is not relevant to show under that that they have made a contract with this third party.

Mr. Fort: No, sir, that that is not relevant, that that is not evidence in this case, that that does not go to make any liability, leaving out the question that follows after that as to what method of proof they must use. 30

The Court: Suppose there had been in this case a certification by the architect that he had audited this amount and that it was a proper cost for the defendant to pay? 40

Argument

Mr. Fort: In advance of the completion of the work, I should say it was no good.

The Court: That would have left only the question as to whether or not this was an expense incurred.

10 Mr. Fort: Yes, that would have left only that question.

The Court: But it would have complied with the provision that the architect was to certify the damages.

Mr. Fort: Yes, sir.

20 The Court: Now, the plaintiff says that he has so certified them here, alleges it in their complaint and you don't deny it, but you say this amount was not a fair one and give other reasons why it should not be paid.

Mr. Fort: We are entitled to the production of the certificate here. We allege it or plead it did not—

The Court: Well, have you—haven't you admitted it?

Mr. Fort: No, sir, I don't think so

30 The Court: Isn't the rule of law in pleading absolute that any fact asserted upon the one side and not denied upon the other is admitted?

Mr. Fort: I think that is true as to specific assertions, yes.

40 The Court: I know, but doesn't the statute in dealing with this say that the defendant shall only be permitted to answer specifically as to what particular conditions precedent have not been performed, and thereby raise the issue as to

Argument

that alone (reading from the statute) Here it is: "Either party to an action may aver performance of conditions precedent generally, and the opposite party shall not deny said averments generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest." That language could not be more specific. 10

Mr. Fort: Well, we say they cannot recover in this action because they have paid no moneys in excess of the amount which they have on hand to complete the contract. Now, that raises clearly the issue as to payment.

The Court: Yes, I think that question is still open in the case. 20

Mr. Fort: Now, we have also pleaded—and this is the thing, your Honor, it seems to me, so clear at this time in approaching this argument which we are now having, and it seems to me we are all acting as though it were a motion at this stage for a non-suit, where these particular questions might be more material as to the certificate or the lack of the certificate—but at this stage we are concerned with the validity of certain documents, of certain evidence read from the minutes of the Board of Education as evidence, the admissibility of that as evidence in this suit. Now, we have raised in the pleadings squarely the issue as to that particular contract with Goslin & Pfeiffer and the proceedings leading up to it. We have 30

40

Argument

10 raised clearly the question that that has nothing to do with us, but the question which your Honor has to decide at this time, it seems to me, is whether or not that evidence is admissible as against the defendant, and there is no other question now. In order for that evidence to be admissible—

The Court: How does that differ from going to a doctor and finding out how much expense you have to go to to get your broken leg straightened up?

Mr. Fort: You are referring now to liability.

20 The Court: Well, the principle is the same; the principle running through all cases is that the things that are contemplated are the things that are to be paid for, the natural consequences.

Mr. Fort: Possibly, but this is the thing I am getting at. Your Honor in this argument is developing the idea that we are perhaps estopped by the pleadings to deny the giving of a certificate by the architect.

30 The Court: Yes.

40 Mr. Fort: Now, I say that that particular question is parallel to the question in your suggestion if in a similar case it was necessary to have a written certificate from a doctor as to what he had said, but the question here that we are immediately concerned with is not that question, as to whether or not there is a certificate.

Argument

The Court: Well, why isn't it? You are not paying the bill simply because there is a certificate of the architect; you are paying it, if at all, because some large expenditure has been contracted by the defendant of which that is but the evidence. 10

Mr. Fort: That is the evidence, yes, sir.

The Court: Now, the plaintiffs say they have got that evidence and you don't deny it.

Mr. Fort: But that does not entitle them, if that is true, that does not entitle them to bring in some collateral evidence, the validity of which we do deny.

The Court: It is perfectly competent 20 for you to deny the efficacy of what you might call the substituted evidence, but doesn't it come down to the fundamental question that here you have agreed to make good somebody's default and that default means the substance of it, and the amount of the default is the amount that had to be paid to make good that which you did not pay, which your man did not perform. Now, the certificate of the ar- 30 chitect is but the evidence of what that is; it is not the thing itself; it is but a condition which you are entitled to have before you pay, and you are entitled to have his judgment on it before you pay, but that has all been given under these pleadings. Now, you wouldn't say, I suppose, that if there were nothing but the architect's opinion without any real thing 40

Argument

to back it, you wouldn't say there was liability there.

10 Mr. Fort: The contract says it is conclusive in the absence of fraud; I would have to plead fraud then, yes, sir, but I say this, your Honor, that Judge Starr cannot come to this Court and prove his damages by evidence which the contract does not make evidence on this point, and that is what he is seeking to do. Now, there are three ways in which he attempts to set up his measure of damages; first he says they have this contract; we say that doesn't make any difference; second he alleges general performance of conditions precedent, and we simply generally deny. That, of course, means an allegation on his part that he has the certificate of the architect, we don't deny that he has the certificate of the architect, but we do deny that he has suffered any loss, and we deny that \$42,850 is the amount of that loss; and he is attempting to fix the amount of that loss and fixes the fact that he has incurred a loss not by the production and offering in evidence of the architect's certificate, the existence of which we concede at this stage of the case—he does not prove his case by that—he attempts to prove now and offers this contract to prove his measure of damages, and the incurred loss, and we say that that contract is not the measure and that that contract has no relation to the measure. I will say this, that we would say

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Argument

that the architect's certificate based solely on that contract would not be the measure or that any architect's certificate given in advance of the completion of the work would not be the measure.

The Court: Mr. Fort, suppose this were 10
a question on fire insurance and there is
a provision in there for the proofs of
loss, as there is in all fire insurance poli-
cies, and the plaintiff alleged the per-
formance of conditions and among the
denied averments in the answer, there
is none denying furnishing the proofs of
loss. Now, the proofs of loss would not
be the thing that you were paying for;
it would be the fire that had burned up 20
the man's property. Now, when he comes
into Court and proves that his property
was so much and the fire had consumed
so much of it, that would be the substan-
tial thing that you were indemnifying
against. Your answer that there had been
no preliminary proof of it would fall
by the wayside because you had not denied
it. Now, the only difference between that
an this, as I apprehend, is that in that 30
case it is a condition precedent for the
benefit solely of the insurer; that is to
say, performance of an act which would
give them some information; in this case
it contemplates something further than
that, a valuation by a party that is deter-
mined upon in advance, to which the
parties are entitled. It does look to
me as though you had not adequately 40

Argument

answered that. The question is turning in my mind as to whether I ought to permit an answer at this time, whether that is substantive or whether it is technical.

10 Mr. Fort: I think in view of the language of the pleadings—I was coming to that question if your Honor thought it was important—in view of the language of the pleadings raising liability or alleging liability specifically because of a contract, and the direct issue alleged on the face of the pleadings, and the only particular issue alleged, it seemed to me that with our general denial of the performance of the conditions precedent that we were
20 in a position to ask leave at this time to amend to specifically set up the failure of the architect's certificate. But even apart from that, I still feel that on the pleadings as they stand, the evidence sought to be introduced is evidence only in connection with the architect's certificate; and in the face of Judge Starr's statement that at the time suit was brought—

30 The Court: Your theory is that the only evidence of liability is the certificate of the architect, that that is the only evidence that can be adduced in this litigation?

Mr. Fort: Absolutely so, sir.

The Court: That seems to be the view taken in Judge Lurton's Court.

40 Mr. Fort: That there is absolutely no other evidence, and that our meeting of the pleading of the plaintiff which based

Argument

their suit on that contract specifically measured their damages by that contract, that our meeting of that pleading with the direct pleading that that hadn't anything to do with the case and was not the measure of the damages entitles us certainly to the privilege of amendment if it be necessary, but really makes it unnecessary that we should have to. 10

The Court: Well, Judge Starr, I confess that the contract looks to me as though the parties had substituted the judgment of the architect as the sole criterion of liability under this contract. If it is binding on the parties, as it undoubtedly is, it is essential to the right to recover, not as a condition precedent but as the basis of the liability itself, as was pointed out by Judge Lurton in the Circuit Court of Appeals. In other words, you have a situation where your contract has been defaulted in, and in that situation both parties have agreed that the architect shall certify the cost of completion and also the difference between the amount of money remaining and the additional cost, and his judgment and finding is the basis of your right to recover, and not the mere fact that you go outside and pay money. 20 30

Mr. Starr: That could not have been done, if the Court please, in advance of the—

The Court: Why not? Why could not an estimate and certification be made? 40

Argument

Mr. Starr: The contract made by the Board, this new contract, was the evidence of that.

10 The Court: You see, in the opinion cited the very point is raised whether it is substantive or whether it is a matter of pleading, and the Court held point plank that it was substantive; the right of action was predicated upon it.

Mr. Starr: Where you are relying upon that, if your Honor please, I can conceive that might be necessary, but where the plaintiff relies upon the expense incurred, and that is the language of this contract—

20 The Court: No, but you have gone much further in the contract than that; you have incurred expense and you have agreed how it shall be determined and by whom, and that his certificate shall be binding on both of you. Now, they are entitled to that binding effect, the benefit of that provision of the contract just as you are. The certificate of the architect may have been very different from the amount that was actually incurred here.

30 Mr. Starr: Well, I still stick to my point that it has not been raised in the pleadings, and I do not think that defense can be taken advantage of. As I said before, the only defenses were whether or not the suit could be brought in advance of the paying of the money—

40 The Court: No, but what I am calling to your attention is that it is not a matter of pleadings; it is a matter of substance

Argument

if Judge Lurton's opinion is correct. In that case a matter of pleadings on the same cause of action could have been amended even after suit brought and the action proceeded with, but it is not a matter of pleadings at all; it is a matter of substance which goes to the foundation of the action. In other words, you are suing on a feature or a phase of testimony which is not in the contract at all as it now develops here, rather than on the criterion of liability determined in the contract itself. 10

Mr. Starr: Well, I don't know that I can say anything more, if your Honor please; it seems to me that the suggestion that is urged now was not raised in the pleadings and it is a matter that cannot be taken advantage of. As a fundamental proposition as to whether or not a suit could be maintained before the building had been completed and the contract price actually paid to the new contractors and then certified by the architect— 20

The Court: Well, I am not so strongly impressed with the actual payment feature of it. 30

Mr. Starr: The contention of Mr. Fort is that no certificate could have been given until the work had been completed.

The Court: I know that is his theory about it, but I am not so clear that that is true, although it is very arguable; but the other proposition does seem to me to be pretty clearly true, and that is that 40

Argument

10 your right of action is predicated upon the determination of the architect whose judgment is available to both parties, and they have a right to have that. In bringing your action upon a theory of damages as shown by what you paid somebody else or what you are liable to pay somebody else—that is not the theory of damages which the contract has set up; in other words, you are seeking to establish their liability by a method which the contract has forbidden. Now, I don't know what shape this leaves the case in, but I suppose if this view is correct that it is not worth while to proceed to take further testimony.

20 Mr. Starr: If your Honor is right on that question.

The Court: What have you to say to the question that an amendment should be allowed, Judge Starr, where a party undertakes to plead—

30 Mr. Starr: I don't think that should be done, if your Honor please. If this question had been raised when the answer was filed, it might have been possible to have had an action brought within the time prescribed by the bond and the right of the Board would not have been lost by that situation. Now, it seems to me under these circumstances if we are entitled to rely upon the pleadings and stand upon our strict rights, that the amendment should not be allowed at this stage because the statute has run against the

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Argument

time when a suit could be maintained. If that defense had been interposed, the Board could have had an opportunity to meet that difficulty and brought a new action.

The Court: Well, there is a great deal 10
of force in that.

Mr. Starr: I think in that situation your Honor ought not to allow the amendment.

The Court: So that you can have the matters disposed of on the pleadings as they stand—

Mr. Fort: I do not understand, your Honor, that that is quite necessarily true. I do not mean by that that Judge Starr 20
means to influence your Honor's judgment, but it is the question as to when the six months were up that would decide that.

The Court: When was this suit brought?

Mr. Starr: The 21st of November.

The Court: Well, if the plea had been set up that the condition had not been performed, that could have been performed and a new suit brought in any case.

Mr. Fort: Yes, it would have been with- 30
in the six months.

The Court: Yes; I think I should deny any application to amend.

Mr. Fort: Except, if your Honor please, that if the action is now going to be pressed on the theory of the existence of any architect's certificate at any stage of the proceedings, that not having been specially pleaded, other things having been 40
pleaded as causes of action—

Argument

The Court: I think, Mr. Fort, that the admission of counsel that there has been no certificate of the architect—

Mr. Fort: Prior to the bringing of the suit.

10 The Court: Prior to the bringing of the suit, specially disposes of that question regardless of pleadings. I think the parties may admit facts which are effective, even if there are no pleadings to sustain them. Now, gentlemen, what disposition shall I make of it? We don't want to go on here and sit this hot day for hearing something that in the end must take the same course.

20 Mr. Fort: Your Honor has directed that the evidence be stricken out?

The Court: That is the effect of it, of course. This is not the liability that the parties have contracted for.

Mr. Starr: Does the motion specifically state that evidence which is to go out? I want to take an exception to that.

30 The Court: I suppose it is all the evidence pertaining to the making of this new contract.

Mr. Fort: And the new contract; the new contract itself and all evidence relating to the making.

The Court: Yes.

Mr. Starr: Very well; you will allow an exception?

The Court: Yes. Now, won't that protect the rights of the parties?

40 Mr. Starr: I don't think of anything else, if your Honor please, except I can

Argument

put the architect on the stand to prove the correspondence which occurred between the parties, also these certificates as to the payments, but I doubt very much if that would help the situation in any way.

10

Mr. Fort: You mean the correspondence with us, Judge?

Mr. Starr: Yes.

Mr. Fort: I am perfectly willing, if you want it for your record's sake, to admit anything of that sort, any correspondence, that is, that does not fall within his Honor's ruling.

Mr. Starr: Will you admit, Mr. Fort, that Richman did default in the performance of the contract?

20

Mr. Fort: I will admit, Judge, that the proper and legal proceedings under the contract were taken to declare a default.

Mr. Starr: Well, that is all, if the Court please; we rest.

The Court: Well, then, would it be of any value if I would enter a non-suit? I think I will take that course anyway; then if at any time in the future it should develop that anything is open to the parties they will have the benefit of it.

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(Exception noted for the defendant.)

The Court: (To the jury). Gentlemen, the Court has disposed of this case without your participation further than you have already gone, which relieves you from the further consideration of it.

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On Postea*(Filed August 14, 1917)*

NEW JERSEY SUPREME COURT

10	MASSACHUSETTS BONDING AND INSURANCE COMPANY, Implead- ed, &c., ads. BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY.	}	Action at Law.
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It is ordered that judgment of non-suit be
 and hereby is entered in favor of defendant and
 20 against the plaintiff with costs to be taxed nisi.
 Entered August 14, 1917.

On motion of Fort & Fort, Attys.

A true copy,
 Wm. Gebhardt,
 Clerk.

Exhibits

30

Exhibits P-14, P-15, P-16, P-17, P-18, P-19,
 P-20, P-21 and P-22 are copied in the record of
 the proceedings at the trial.

Exhibits P-1 and P-23 are attached to the com-
 plaint as printed in the case.

Exhibits P-2 are plans and specifications.

Exhibits P-4 to P-13, both inclusive, are archi-
 70 tect's certificates, the printing of which is not
 material in the present proceeding.

Exhibit P-3

THIS AGREEMENT, made the Twentieth (20th) day of November in the year one thousand nine hundred and sixteen by and between THOMAS S. GOSLIN and WALTER C. PFEIFFER, Trading as Goslin & Pfeiffer, party of the first part (hereinafter designated the Contractors), and BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY, party of the second part (hereinafter designated the Owner),

WHEREAS, on November ninth, nineteen hundred fifteen, the owner entered into a contract with Richman Construction Company, for the construction of a two story and basement, brick and stone school building at Wildwood; AND

WHEREAS, the said Richman Construction Company entered in the performance of said contract, and partially finished said building, but subsequently defaulted in the complete execution of said contract, and the owner, pursuant to the terms thereof, terminated the employment of said Richman Construction Company; AND

WHEREAS, the contractor, above named, has agreed, for the consideration hereinafter set forth, to furnish all materials and labor necessary to fully complete said unfinished school building under the terms and conditions hereinafter set forth;

WITNESSETH that the Contractors, in consideration of the agreement herein made by the Owner, agree with the said Owner as follows:

Article I. The Contractors shall and will provide all the materials and perform all the work for the entire and full erection and completion of said two story and basement brick and stone building at Wildwood, New Jersey, as

Exhibit P-3

shown on the drawings and described in the specifications prepared by Clyde S. Adams, 1509 Arch Street, Philadelphia, Pa., Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

10 Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail
20 and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain
30 his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

Art. III. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractors by virtue of such alterations to be stated in said order. Should the Owner and Contractors not agree as to
40 amount to be paid or allowed, the work shall

Exhibit P-3

go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Art. IV. The Contractors shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby. 10
20

Art. V. Should the Contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or, fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractors under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the con- 30
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Exhibit P-3

tractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or
10 persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractors they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Con-
20 tractors; but if such expense shall exceed such unpaid balance, the Contractors shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Art VI. The Contractors shall complete the
30 several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

The building shall be completed and ready for occupancy on or before the first day of July, in the year of our Lord one thousand nine hundred and seventeen.

It is understood and agreed that this contract includes Sheet No. 5, dated September
40 22nd, 1915, in addition to Sheet 1, 2, 3 & 4

Exhibit P-3

dated April 26th, 1915, also the Addenda, dated September 22nd, 1915.

It is further understood and agreed that this contract also includes Alternate No. 2, providing for the finishing of Boys' Locker Room as shown on second floor; but does not include the fire escape as originally shown. 10

Art. VII. Should the Contractors be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractors employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay. 20

Art. VIII. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractors, agree that they will reimburse the Contractors for such loss; and the Contractors agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall 30 40

Exhibit P-3

reimburse the Owner for such loss. Should the Owner and Contractors fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this
10 contract.

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractors for the said work and materials shall be Forty-two thousand Eight Hundred and Fifty (42,850) Dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractors, in current funds, and only upon certificates of the Archi-
20 tect, as follows:

Upon the first day of each month, contractors will submit to Architect, statement of material furnished and erected the previous month and certificate will be issued for Eighty-five (85) per cent of amount he approves.

An approved Surety Company, bond, satisfactory to the Owners in the amount of Twenty-one Thousand Four Hundred and Twenty-five (21,425) Dollars is to be furnished Owner by
30 the Contractors within Ten (10) days from the date of signing of this contract.

The final payment shall be made within thirty days after the completion of the work included in this contract; and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and
40 which is chargeable to the Contractors, the

Exhibit P-3

Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractors, shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractors default. 10

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials. 20

Art. XI. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Art. XII. In case the Owner and Contractors fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person 30 40

Exhibit P-3

selected by the Contractors, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

10 Art. XIII. It is mutually agreed by the parties hereto that the contracts shall be filed in the County Clerks Office at Cape May Court House, N. J., immediately after the signing of the same, and it is further agreed that no liens shall be filed or maintained by any material men at work on the building or by any one except the party of the first part.

20 The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In Presence of

“Pfeiffer” misspelled before execution.

Should have been spelled “Phifer.”

WALTER C. PHIFER (Seal)

THOMAS S. GOSLIN (Seal)

30 BOARD OF EDUCATION OF WILDWOOD, NEW JERSEY.
(Seal)

By S. T. Dowler,
President.

Attest W. C. Todd,
Secretary.

Witness

Hiram W. Godfrey

Henry C. Chalmers

Witness

Henry S. Witt.

40 Witness

NEW JERSEY COURT OF ERRORS AND APPEALS.

BOARD OF EDUCATION OF THE
CITY OF WILDWOOD,

Plaintiff-Appellant.

vs.

RICHMAN CONSTRUCTION COM-
PANY AND MASSACHUSETTS
BONDING Co.,

Defendants-Respondents.

ON APPEAL FROM
SUPREME COURT.

BRIEF ON BEHALF OF BOARD OF EDUCA- TION OF THE CITY OF WILDWOOD, PLAINTIFF-APPELLANT.

STATEMENT OF CASE.

This is an appeal by plaintiff (Notice of Appeal, Case, p. 1) from a judgment of non-suit (p. 94) rendered by the Supreme Court on August 14, 1917, after a trial before the Court and a jury, in an action against the contractor in a building contract and its surety to recover damages amounting to \$12,708.40 for breach of the contract on the part of the contractor. Only the surety defended, and the trial resulted in a judgment of non-suit from which plaintiff appeals.

The nature of the errors for which a reversal is sought (Case, p. 2) renders it unnecessary to set out at length the allegations of the pleadings. The building contract (p. 7, *et seq*) was made November 9, 1915, between the plaintiff and the defendant, Richman Construction Company, for the erection of a high school building at Wildwood, New Jersey. The defendant, Massachusetts Bonding Company, was the surety on the contractor's bond (p. 14, *et seq*). The contract was the uniform contract approved by the American Institute of Architects and the National Association of Builders, and contained the following article :

"Art. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said

work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties." (Case, p. 9.)

The bond was in the usual form, with the following condition:

"Now, therefore, the condition of this obligation is
 "such that if the principal shall indemnify the obligee
 "against any loss or damage directly arising by
 "reason of the failure of the principal to faithfully
 "perform said contract, then this obligation shall be
 "void, otherwise to remain in full force and virtue."
 (P. 15, line 19.)

With a provision that no suit should be brought against the surety after six months next succeeding the time specified for the completion of the contract, nor should any recovery be had for damages accruing after that period.

It is alleged in the complaint that the defendant contractor entered upon the performance of the contract, but subsequently defaulted therein, and abandoned the construction of the building, and refused and neglected to supply a sufficiency of workmen and materials, etc., and that, upon a proper certificate of the architect, the plain-

tiff terminated the employment (p. 4, line 31; p. 5, line 10). The unpaid balance of the contract price was alleged to be \$30,141.60 (p. 5, lines 11-18), and the cost of completing the building under a new contract, let to Goslin and Pfeiffer, \$42,850 (p. 5, lines 19-28). Damages were claimed for the difference, namely, \$12,708.40. (P. 6, lines 32-33.)

There is no dispute but that the plaintiff proceeded properly under Article V (quoted *supra*) to terminate the employment of the defendant contractor. (P. 93, lines 19-24.)

The answer sets up three defenses:

A. That the plaintiff violated the terms of the contract and bond by making unauthorized payments to the contractor in excess of the sums to which he would be entitled under the terms thereof. (P. 21, line 13.)

B. That the plaintiff violated Section 31 of the New Jersey Crimes Act (P. L. 1914, p. 444), because it made the new contract for the completion of the building, with Goslin and Pfeiffer, without having in hand the contract price it agreed to pay the latter. (P. 23, line 1.)

C. That the plaintiff had paid no money in excess of the amount on hand to complete the contract, but only incurred an obligation to pay such excess. (P. 23, line 31.)

The principal ground of defense urged at the trial was that the action was premature, in that plaintiff sued prior to actual payment of the expense alleged to have been incurred in the completion of the work. The learned Trial Judge did not, however, direct the non-suit on that

ground, but on the ground that the plaintiff had not, prior to the commencement of the action, procured a certificate of the architect auditing the expense incurred in the completion of the work, which, the Trial Judge ruled, was necessary before suit is instituted, because the action must be predicated upon such certificate. He ruled that the defense was available to defendant, notwithstanding the point was not raised in the pleadings, which only alleged, as in conjunction with other questions, that the action was prematurely brought. Thereupon the evidence by which plaintiff had sought to prove its damage, namely, the new contract, was stricken out (p. 92, lines 20-36), and the non-suit ordered. (P. 93, lines 26-40.)

GROUND OF APPEAL.

The grounds of appeal (p 2) deal with the question of striking out all evidence pertaining to the new contract between the plaintiff and Goslin and Pfeiffer, dated November 20, 1916, for the purpose of completing the building which was abandoned by the contractor, and refusing to permit the plaintiff to introduce evidence relating to the making of such contract, and to the action of the Trial Judge in directing that the plaintiff be non-suited.

Further facts appear in the points. In Points I to VI, inclusive, the case is considered on the theory that the action is under the contract to enforce the liability created by Article V, above quoted, in favor of the owner. In Point VII, however, we discuss the case in another aspect, namely that, as the contractor abandoned the work, the action is not to enforce that liability but is for damages for breach of the contract.

POINT I.

ASSUMING THAT ARTICLE V OF THE CONTRACT IS APPLICABLE, THE FACT THAT THE PLAINTIFF HAD NOT, PRIOR TO THE COMMENCEMENT OF THE ACTION, PROCURED A CERTIFICATE FROM THE ARCHITECT AUDITING THE DAMAGE WAS NOT AVAILABLE TO THE DEFENDANT UNDER THE PLEADINGS, AND THE TRIAL JUSTICE, THEREFORE, ERRED IN REJECTING THE EVIDENCE OFFERED AND ORDERING A NON-SUIT ON THAT GROUND.

Section 118 of the Practice Act provides that:

“Either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest.”

(3 Comp. St., p. 4089.)

In this action the plaintiff averred generally the performance of all conditions precedent specified in both the contract and the bond. (Complaint, par. 9; p. 5, lines 28-35.) The defendant interposed only a general denial to this allegation (Answer, par. 9; p. 22, line 9), and did not set forth that plaintiff had not procured the architect's certificate. Therefore this ground of defense was not available to the plaintiff under the statute.

Ottawa Tribe vs. Munter, 60 N. J. Law (31 Vroom), 459.

Dimick vs. Met. Life Ins. Co., 67 N. J. Law (38 Vroom), 367, 375.

Van Alstyne vs. Franklin Council, 69 N. J. L. (40 Vroom), 15; *aff'd*, *id.* 672.

Del. River Quarry & Cons. Co. vs. Hunterdon Freeholders, 86 N. J. L. (1 Gummere), 294, 296.

In *Dimick vs. Metropolitan Life Insurance Company* (*supra*), and *Ottawa Tribe vs. Munter* (*supra*), the fact of non-performance of the condition precedent appeared in evidence, and in the former of these cases it was urged that the non-performance must therefore be given effect. "We cannot assent to this view," said the Court, by Mr. Justice Collins. "In such a case it is not needful to meet or explain any testimony on the subject except where it may properly be admissible on some issue within the pleadings." (67 N. J. L. (33 *Vroom*), at 375.)

The case of *Delaware River, &c., vs. Hunterdon Freeholders* (*supra*) is directly in point, the syllabus of which is as follows:

"Where the plaintiff sued for a balance due on a contract for the construction of a public road, and the defendant pleaded non-performance and a counter-claim for damages, without alleging the failure of the plaintiff to procure the certificates of certain public officials as a condition precedent to payment. Held, that the failure to plead the condition precedent, precluded the defendant from insisting upon it at the trial as a bar to recovery."

In the course of the colloquy between the Court and counsel plaintiff's counsel stated informally and casually, in answer to a question by the Court, that the damages had not been certified until after the commencement of the action (p. 66, lines 11-13); but counsel at once insisted that the fact was not admissible because not pleaded by defendant (*id.*, lines 20-26). In all the discussion that followed plaintiff's counsel kept on insisting upon this same point (see pp. 66-68; 75, lines 1-2; 76, line 25; 77, line 7; 78, line 17; 79, line 7; 88, lines 30-36; 89,

lines 18-23). That the Trial Justice did not consider the objection waived is clear from the fact that he refused to allow the defendant surety to amend its answer so as to set up the failure to obtain the certificate before suit. (P. 90, line 23; p. 91, line 33.)

It is to be observed that the defense of failure to procure the architect's certificate prior to the commencement of the action is highly technical. Every substantial benefit to the contractor or the surety arising out of the right to have the expense and damages audited and certified by the architect would be preserved by an audit and certification made after action brought and before trial as fully as if made before action brought. As already stated, it appeared that such a certificate had been procured before the trial. If defendant seeks to defend on the highly technical ground that it was not obtained prior to the service of process, defendant should be held to the strictest technical practice on its own part.

The Statute of Frauds is waived as a defense by failure to plead it, and so also is the Statute of Limitations. This is so not only at common law but also under the Practice Act of 1912, Rule 40 (Pamph. L. of 1912, pp. 391-392). The objection to plaintiff's recovery in the instant case, that the certificate of the architect had not been procured prior to suit brought, is of a similar nature to a defense under either of these statutes. That it was to be pleaded by way of traverse rather than confession and avoidance does not alter the fact that it had to be specially pleaded to be available to the defendant. It was, therefore, waived by failure to plead it as required by Section 118 of the Practice Act. After that it was out of the case.

If, as the learned Trial Judge ruled, the plaintiff was obliged to plead and prove the existence of the architect's certificate, showing the damage and expense incurred by the plaintiff in finishing the building, made prior to the time suit was commenced, we insist that under the above mentioned section of the Practice Act, above referred to, the defendant is required to set up such defense in the answer.

In the following cases it has been held that a defense of this character, referring expressly to similar covenants in the standard building contract, must be pleaded.

Fuller Company vs. Doyle, 87 Fed., 687-692.

Heidbrink vs. Shaffner, 127 S. W., 418.

POINT II.

THE DEFENDANT SHOULD NOT BE PERMITTED TO AMEND ITS ANSWER SO AS TO SET UP FAILURE TO OBTAIN THE ARCHITECT'S CERTIFICATE BEFORE ACTION BROUGHT.

The bond on which the defendant surety is sued herein contained a provision limiting the time for the commencement of the action to a period of six months from the date specified for the completion of the contract (p. 16, lines 23, *et seq.*). If, therefore, the amendment of the answer should be permitted and the plaintiff defeated in this action on the technical ground of the non-procurement of the certificate prior to bringing suit, a new action could not be brought.

As urged at the conclusion of the preceding point, the defendant, relying upon a technical ground of defense, should be held to strict practice itself.

Ottawa Tribe vs. Munter, 60 N. J. L. (31 Vroom),
459, 460.

POINT III.

THE FAILURE TO PROCURE THE ARCHITECT'S CERTIFICATE BEFORE ACTION BROUGHT HAVING BEEN WAIVED, ANY OTHER EVIDENCE WHICH TENDED TO SHOW PLAINTIFF'S EXPENSE IN FINISHING THE WORK WAS ADMISSIBLE; AND IT WAS, THEREFORE, ERROR TO STRIKE OUT THE CONTRACT BETWEEN THE PLAINTIFF AND GOSLIN & PFEIFFER (EXHIBIT P3).

This contract was at first admitted in evidence (p. 37, line 37), but afterward stricken out and an exception taken by plaintiff (p. 92, lines 20-36). It showed, or at least it was a link in the chain of evidence to show, the expense to the plaintiff of completing the work.

POINT IV.

THE PROVISION OF ARTICLE V OF THE CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANT CONTRACTOR THAT THE EXPENSE INCURRED BY THE OWNER EITHER FOR FURNISHING MATERIALS OR FOR FINISHING THE WORK AND ANY DAMAGE INCURRED THROUGH THE CONTRACTOR'S DEFAULT SHOULD BE AUDITED AND CERTIFIED BY THE ARCHITECT PRESCRIBED A RULE OF EVIDENCE AND DID NOT IMPOSE A CONDITION PRECEDENT TO THE COMMENCEMENT OF THE ACTION.

In order that a provision of this nature shall be construed to impose a condition precedent, it must be expressly so stated or appear by necessary implication. Thus, in *Adams vs. Haigler*, 123 Ga., 659, the building contract under consideration contained a provision that if

the work was not completed on time, the contractor should pay damages to the owner, and that, if the parties were unable to agree on the amount, the same should be referred to arbitrators. It was held that this did not make reference to arbitrators a condition precedent to bringing suit. Cobb, J., speaking for an unanimous court, said:

“The language of paragraph 8 of the contract is, that if the parties are unable to agree as to the amount due for delay, etc., ‘the same *shall* be referred to arbitrators.’ The question is whether the mere use of the word ‘*shall*’ makes the submission to arbitration a condition precedent to suit. We do not think so. In the case of *Hamilton vs. Insurance Co.*, 137 U. S., 370, a stipulation in an insurance policy, where the word ‘*shall*’ was used in the same connection as it was in this contract, was held not to make the stipulation one which would require arbitration as a condition precedent to an action at law.

* * * Parties have a right to appeal to the courts for the assessment of damages to which they may be entitled growing out of a breach of a contract into which they have entered; and while the law authorizes them to make a binding agreement that the damages shall be assessed in other ways and by other tribunals, either provided by law, or created by themselves for this purpose, before any one will be deprived of an appeal to the courts it must appear from clear and unequivocal language in the contract that such was the intention of the parties.” (p. 666.)

In *Hamilton vs. Home Insurance Company*, 137 U. S., 370, cited in the foregoing excerpt, Mr. Justice Gray, with the apparent concurrence of the entire court, said:

“A provision, in a contract for the payment of money upon a contingency, that the amount to be

paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton vs. Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." (p. 385.)

Again in *Ouast vs. Guetzkow*, 164 Wis., 197, which was an action to foreclose a mechanic's lien for materials furnished in part under a contract and in part under orders for extra work, it was urged that the arbitration of all disputes was a condition precedent to suit. This was held untenable, inasmuch as the contract did not provide that arbitration should precede action upon the contract, so that arbitration was unnecessary unless requested.

See also:

Fontano vs. Robbins, 18 App. D. C., 402, 415-418.

These authorities are opposite to the present case. The contract here says that the expense and damage incurred by the owner shall be audited and certified by the architect, and that his certificate shall be conclusive—which, in effect, makes him an arbitrator as to the amount which can be recovered—but it is nowhere said that this must be done before suit brought, and these cases are therefore

authority for the proposition in the present case; the obtaining of the certificate is not a condition precedent to suit.

Numerous authorities may be found, and doubtless will be cited by the respondent, to the effect that the obtaining of a certificate is a condition precedent to recovery—which means nothing more than that the certificate should be procured before trial. With one exception no case, so far as we have found, goes further than that when the actual point decided is considered. The one case which holds that the certificate must be obtained before suit brought is *American Bonding and Trust Co. vs. Gibson County*, 145 Fed., 871, decided by the U. S. Circuit Court of Appeals, Sixth Circuit, a case in no way binding upon this Court, and the reasoning of which, despite the eminence of the Judge who wrote the opinion, will not, we believe, commend itself to the approval of this Court.

De Mattos vs. Jordan, 15 Wash., 378, 392-3, and *International Cement Co. vs. Beifeld*, 173 Ill., 179, 185, may be cited as examples of the cases which are commonly relied on in support of the doctrine that the architect's certificate is a condition precedent to suit; but in neither of them was it so held. In the former it was merely said by way of *dictum* that an architect's certificate must be produced on the new trial which was granted. In the latter it did not appear that an architect's certificate was at any time obtained, and the action was to recover under the contract and not to recover damages independent of the contract.

The construction for which we contend is the construction more likely to work out a result just to all parties. If the owner is required to have the architect's certificate

at the trial, the contractor and his sureties will have the full benefit of the audit of the architect for which the contract provides; but if the contract is construed so as to require the architect's certificate before suit brought, then the owner is likely to be caught, as the owner seems to be in the instant case, between the upper and the nether millstones, that is, between the necessity of procuring the certificate before the suit brought on the one hand, and the necessity of bringing suit against the surety on the bond within six months on the other.

Cases dealing with the requirement that the contractor shall procure certificates of the architect before being entitled to payments, which hold that the obtaining of a certificate is a condition precedent to the institution of suit, are not in point here, for the language of Article IX of the uniform contract with respect to payments to the contractor differs greatly from that of Article V relative to the auditing and certifying of expense and damages. In the former article it is expressly provided that payments shall be made "only upon certificates of the Architect" (p. 11, line 32), the procedure is fully pointed out, and it is further expressly stated that "all payments shall be due when certificates for the same are issued" (p. 12, lines 14-15). This clearly makes the obtaining of a certificate a condition precedent to bringing suit for a payment. But there is no such language in Article V, which would serve to make the architect's certificate a condition precedent to bringing suit for the expenses and damages therein specified.

POINT V.

IT WAS NECESSARY TO PLAINTIFF'S RIGHT OF RECOVERY THAT PLAINTIFF SHOULD HAVE PAID THE EXPENSE OF

FINISHING THE BUILDING; IT WAS SUFFICIENT THAT THE PLAINTIFF HAD BECOME LIABLE THEREFOR. NOR WAS PLAINTIFF REQUIRED TO AWAIT THE COMPLETION OF THE BUILDING BEFORE BRINGING SUIT.

The language of the contract is that "if the unpaid balance of the amount to be paid under this contract shall exceed the expense *incurred* by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner." (P. 9, lines 31-37.) Then follows the provision that the "expense *incurred*" and the "damages *incurred*" through the contractor's default, shall be audited and certified by the architect (p. 9, line 38; p. 10, line 7.)

The word "incur" is defined in Webster's New International Dictionary at "to become liable or subject to * * * as to incur debt" etc. In the discussion of the synonyms it is said: "Incur emphasizes the idea of liability." To hold that the expense of completing the building must be actually paid before suit brought would therefore, do violence to the language of the provision. It would in effect substitute the word "paid" or "suffered" for "incurred." In *Beekman vs. Van Dolsen*, 70 Hun., 288, 294, it appeared that the plaintiffs had agreed to hold themselves responsible for "any costs and damages which may be incurred" by defendant in treating a third person as a trespasser. Such costs and damages were the subject of a counterclaim, and it was held that it was not necessary to show that they had been paid, Van Brunt, P. J., saying:

"The guaranty is not against damage which may be suffered, but against cost and damage which may

be incurred. Suffered means paid; incurred means become liable for."

In *Hoppaugh vs. McGrath*, 53 N. J. L. (24 Vroom), 81, in which there was an implied contract of indemnity, it was held that the general contractors could maintain an action against a subcontractor for defective work of the latter, for which judgment had been recovered against the general contractors by the owner, although the judgment had not been paid. Mr. Justice Depue, writing for the court, quoted from Lord Campbell in *Randall vs. Raper*, El. B. & E., 82, as follows:

"But it is contended, secondly, that even if the damages could be recovered in the event of actual payment, they cannot be recovered upon a mere liability. I think we cannot lay down the rule that a mere liability cannot be the foundation of damages; if it can, the amount may be estimated by a jury. The demand is made, and it is a just one; and though it is not yet satisfied, yet the jury may find to what extent the plaintiffs are damaged by their having become liable to it." (Pp. 84-85.)

Again, referring to the opinion of Baron Martin in *Josling vs. Irvine*, 6 Hurlst. & N., 512, 617, Mr. Justice Depue said:

"The damages the plaintiffs might be compelled to pay Douglas are, to adopt the language of Baron Martin, 'an expense which they incurred by the defendant's default.'" (p. 85.)

In *Hoganson vs. Knutson*, 141 Wis., 98, a subcontract for certain construction work provided that if the subcontractor, Knutson, should neglect or refuse to complete his

contract, then the contractor, Hoganson, might take over the work and complete the same and that if he did so no further payments should be made to the subcontractor until the completion of the work and that, upon the final settlement between the parties, the subcontractor should only be allowed for the actual value, according to the contract, of the material and work he might have furnished, and that, in addition to the liquidated damages, he should be liable to the contractor "for all loss and damage and all increased cost of erecting and completing said building caused by his failure or neglect." (P. 99.) At the time of the commencement of the action part of the work undertaken by the subcontractor remained uncompleted. It was held that the action was not prematurely brought, but accrued upon the subcontractor's default. The Court also said:

"It is, however, averred that the damages are not provable until the plaintiff has actually completed the work *Knutson* failed to perform under this contract. We discover no such absolute obstacle to the enforcement of plaintiff's rights. It may well be that the plaintiff, by having let the contract to other responsible parties, knew definitely before he brought the action how much it would cost him to complete *Knutson's* contract, or that he possessed full information as to the actual cost of the uncompleted part of the work and the material required to complete it." (P. 102.)

The language of the contract in the case cited is substantially the same as that part of Article V of the contract involved in the present case relating to the completion of the work—namely, that after the termination of the

employment no further payment should be made to the contractor until the completion of the work. Yet the Court held that the plaintiff in that case need not await the completion of the work before bringing action.

The case cited is, therefore, a complete authority in favor of plaintiff's right to recover in the instant case. See also:

Illinois Surety Co. vs. Maguire, 150 Wis., 544.

Trinity Parish vs. Aetna Indemnity Co., 37 Wash., 515.

Heidbrink vs. Schaffner, (Court of Appeals of Missouri), 127 S. W. Rep., 418.

POINT VI.

THE DEFENDANT CONTRACTOR ABANDONED THE WORK AND THIS ACTION WAS FOR DAMAGES FOR THE BREACH OF THE CONTRACT THEREBY COMMITTED; HENCE ARTICLE V OF THE CONTRACT DOES NOT APPLY.

In the foregoing points we have discussed this case on the theory that the action is instituted upon Article V of the contract, to recover the excess of the expense of the completion of the building over and above the contract price. The complaint, however, alleges that the defendant contractor abandoned the work (p. 4, lines 34-35) and there was some evidence to show that he did so (p. 42, lines 9-13).

Before the contract of the Richman Construction Company was terminated, on September 26, 1916, by action of the Board of Education, the Bonding Company recognized the fact that the contract had been abandoned by the

contractor in a letter dated September 25, 1917, and sent to Mr. Dowler, the President of the Board, in which suggestions were made as to a plan to be pursued for the completion of the building, and that the superintendent of the contractor, Mr. Pfeiffer, be employed to do the work. Mr. Pfeiffer, in conjunction with Mr. Goslin, was given the contract to complete the building. This letter is a recognition of the fact that the contractor had fallen down on the contract, and it was necessary for the Board, in some way, to complete the job (p. 43, line 38, *et seq.*)

Where the contractor abandons the work, it has been held that provisions such as those of Article V, relative to the auditing and certifying of the expenses and damages by the architect, do not apply.

Fuller Co. vs. Doyle, 87 Fed., 687, 692.

Smith & Sons vs. Jewell, 104 Md., 269.

In the former case the contractor abandoned the job almost as he commenced work, but in the latter case the contractor had partially completed the building. In both cases it was held that compliance with provisions similar to those in Article V of the contract in the instant case was unnecessary, such compliance being required only where the contractor is attempting to proceed with the contract, and the owner terminates it because the progress is not sufficiently expeditious. But an abandonment of the work is not within the contemplation of Article V, and hence the technical procedure therein provided is not essential in such case. That the owner may go through the formality of giving notice to terminate upon a certificate of the architect, as was done in the case of *Smith & Sons vs. Jewell*, *supra*, and in the present case, does not

alter the fact that where the contractor abandons the work a cause of action arises immediately for damages.

See also:

Dobbling vs. York Springs Ry. Co., 203 Pa. St., 628.

POINT VII.

THE LIABILITY OF THE DEFENDANT SURETY WAS CO-EQUAL WITH THAT OF THE DEFENDANT CONTRACTOR.

The condition of the bond is "that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be void," etc. (p. 15, lines 21-25.)

Defendant surety may urge that, under this language, it is not liable unless the plaintiff has suffered actual loss or damage by the payment of the expense of completing the building, even though the contract may be properly construed to render the contractor liable as soon as the plaintiff incurred liability therefor.

Our first answer to this contention, if it shall be made, is that the obvious purpose of the bond is to render the surety liable to the plaintiff in every instance in which the contractor is so liable. In other words, whenever the contractor becomes liable under the contract to indemnify the obligee, the surety also becomes liable. Such was the theory upon which the case was tried in the court below. It is to be remembered that the form of the bond was prescribed by the surety, and therefore, under the familiar rule, the language should be construed most strongly against it.

It is also to be remembered that "the tendency of modern authorities * * * is to attach more importance to the general purpose of a bond, as shown by its provisions as a whole, and the interests of the parties in the subject matter, than to the precise form of words employed." (22 Cyc., p. 92.)

Strawbridge vs. B. & O. R. R. Co., 14 Md., 360, 367.

While this rule has, perhaps, more often worked out in the construction of such a contract as a contract of indemnity merely, it is obvious that its application in the instant case should result in holding the surety liable for all defaults for which the principal is liable.

The Court should be the more strict in its construction against the defendant surety and the more liberal toward the plaintiff because of the very severe contractual limitation of six months from the date of the completion of the original contract (p. 16, lines 23-27.)

The point has, however, been squarely decided in favor of the plaintiff's contention in *Hoganson vs. Knutson*, 141 Wis., 98, discussed in another connection under the point last preceding. There the condition of the bond was "that said principal (sub-contractor) shall well and truly indemnify and save harmless the said obligee (contractor) from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions on the part of said principal to be performed." (141 Wis., p. 100). Comparing this with the condition of the bond in the instant case, above quoted, we see that it is exactly the same in all essential particulars. Yet it was held that plaintiff was entitled to recover, although the work covered by the principal's contract had not been completed and, of course, had not been paid for.

That a liability may constitute damage is shown by the case of *Hoppaugh vs. McGrath*, 53 N. J. L. (24 Vroom), 81, discussed under the last preceding point. (See particularly pp. 84-85.)

See also:

Gennings vs. Norton, 35 Me., 303, 312.

Miller vs. Garrett, 35 Ala., 96.

In the case last cited the condition of the bond was a detinue bond, the condition of which was that "if the said plaintiffs fail in their said suit and do pay to the said defendants all such costs and damages as they (the said defendants) may *sustain* by the wrongful complaint of the plaintiffs, then this obligation to be void," etc.

It is well settled that a bond of indemnity may be for indemnity against liability.

MacArthur Bros. vs. Kerr, 213 N. Y., 360, 366.

Chace vs. Hinman, 8 Wend. (N. Y.), 452.

Bellemeade Lumber Co. vs. Turnbull (W. Va.) 87; S. E., 382.

POINT VIII.

THE DEFENDANT SURETY WAIVED ANY OBJECTION WHICH IT MIGHT HAVE RAISED TO THE CONTRACT WITH GOSLIN & PFEIFFER FOR THE COMPLETION OF THE BUILDING BY NOT OBJECTING THERETO WHEN NOTIFIED BY THE PLAINTIFF OF ITS INTENTION TO ENTER INTO THE SAME.

The defendant surety had notice of plaintiff's intention to enter into the contract with Goslin & Pfeiffer, but

failed to object (p. 53, line 40; p. 54, line 19). This was a waiver of any objection to the new contract.

Camden vs. Ward, 67 N. J. L. (38 Vroom), 558.

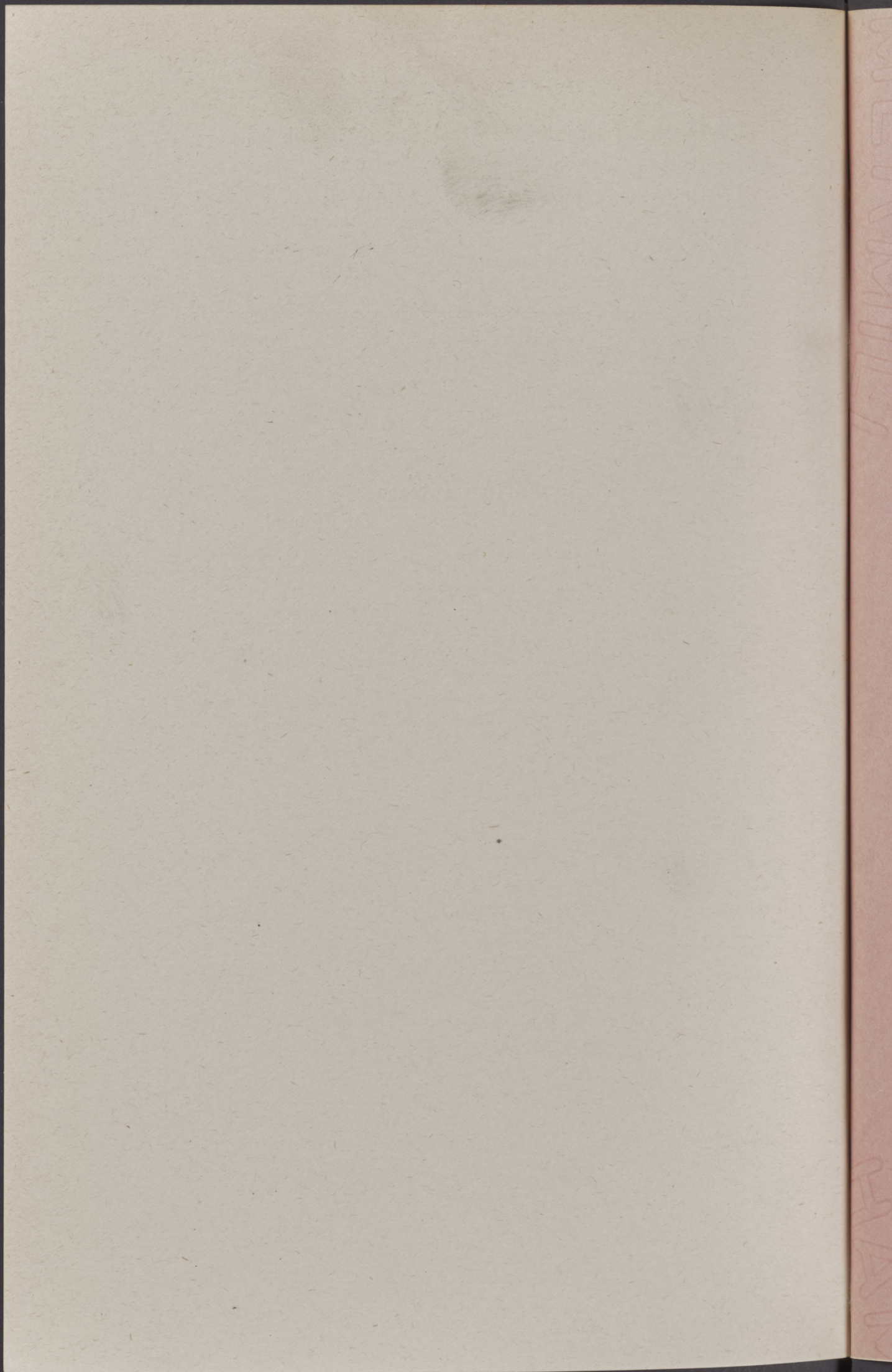
POINT IX.

THE JUDGMENT OF NON-SUIT SHOULD BE REVERSED
AND A VENIRE DE NOVO AWARDED.

Respectfully submitted,

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Attorneys of Plaintiff.

LEWIS STARR,
Of Counsel.



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