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Notice of Appeal.

Notice of Appeal.

Filed December 19, 1916.

New Jersey Supreme Court.

10

ESSEX COUNTY.

THE TITLE GUARANTY & SURETY
COMPANY, a corporation,

Plaintiff,

vs.

FUSCO CONSTRUCTION COMPANY,
a corporation, and DONATO
FUSCO,

Defendants.

*Notice of
Appeal.*

20

To Messrs. COHN & COHN,
Attorneys of Plaintiff.

TAKE NOTICE that the defendant, Donato Fusco,
appeals to the Court of Errors and Appeals from
the whole of the judgment entered in this cause.

CHARLES M. MASON,
*Attorney of Defendant,
Donato Fusco.*

30

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

Filed January 16, 1917.

New Jersey Court of Errors and Appeals

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THE TITLE GUARANTY & SURETY
COMPANY, a corporation,
Plaintiff and Appellee,

vs.

FUSCO CONSTRUCTION COMPANY,
a corporation, and DONATO
FUSCO,
Defendants and Appellants.

On Appeal.

*Grounds of
Appeal of
Appellant,
Donato Fusco.*

20

The appellant, Donato Fusco, states the following as grounds of appeal:

1. The court erred in admitting the so-called ledger cards in evidence.

2. The court erred in permitting the witness Moser to testify from the so-called ledger cards.

3. The court erred in admitting Exhibit P. 9 as a standard of comparison of handwriting.

30 4. The court erred in admitting the bonds and contracts without the attesting witness being called or their signatures proven.

5. The court erred in admitting Exhibit P. 14 as a copy of bond B.

6. The court erred in not directing a non-suit for the defendant Donato Fusco on bond A, being the contract dated December 5, 1912. Exhibit P. 3.

40 7. The court erred in not directing a non-suit for the defendant Donato Fusco as to con-

Grounds of Appeal.

tract C, the same being dated December 6, 1912. Exhibit P. 4.

8. The court erred in not directing a non-suit for the defendant Donato Fusco on contract B, Exhibit P. 14.

9. The court erred in refusing to direct a verdict for the defendant Donato Fusco on bond A, being the contract dated December 5, 1912. Exhibit P. 3. 10

10. The court erred in refusing to direct a verdict for the defendant Donato Fusco as to contract C, the same being dated December 6, 1912. Exhibit P. 4.

11. The court erred in refusing to direct a verdict for the defendant Donato Fusco on contract B, Exhibit P. 14.

12. The court erred in the construction of the alleged agreement of December 19, 1912. 20

13. The court erred in overruling the defense of Donato Fusco as to the execution of the instrument of December 19, 1912.

14. The court erred in directing a verdict for the plaintiff against the defendant Donato Fusco.

CHARLES M. MASON,
Attorney of Appellant, 30
Donato Fusco.

Complaint.

Complaint.

Filed July 24, 1915.

New Jersey Supreme Court.

10

ESSEX COUNTY.

THE TITLE GUARANTY & SURETY
COMPANY, a corporation,
Plaintiff,

vs.

FUSCO CONSTRUCTION COMPANY,
a corporation, and DONATO
FUSCO,

20

Defendants.

*Action at
Law.*

Complaint.

Plaintiff, The Title Guaranty & Surety Company, a corporation of Scranton, Pennsylvania, says that:

30 (1) At all times hereinafter mentioned, the plaintiff was and now is a corporation duly organized and existing under the laws of the State of Pennsylvania, and duly authorized to issue bonds of indemnity.

(2) At all times hereinafter mentioned, the defendant, Fusco Construction Company, was and now is a corporation duly organized and existing under the laws of the State of New Jersey.

(3) On or about December 19, 1912, the defendant, Fusco Construction Company, being then about to enter into certain contracts with the Town of Harrison, New York, for the con-

40

Complaint.

struction of sewers, requiring the giving of certain bonds conditioned for the faithful performance of said contracts, the defendants, Donato Fusco and Fusco Construction Company, entered into an agreement with the plaintiff, a copy of which is annexed as a part of this complaint, in consideration of the execution and delivery by the plaintiff of said bonds, binding themselves and agreeing, among other things, to pay in cash to the plaintiff, in advance, the annual premium or charge in respect of each of such bonds, and to continue to pay the same until the plaintiff shall, in the manner provided by law, be discharged or released from any and all liability or responsibility upon and from such bond or bonds, and all matters arising therefrom. 10

The defendants further agreed at all times, to indemnify and keep indemnified and save harmless the said plaintiff from and against any and all liability, loss, damages, costs and expenses of whatever nature or kind which it shall or may, at any time, sustain, incur, or be put to, for or by reason or in consequence of its having given and executed said bonds on behalf of the defendants, including disbursements, costs and counsel or attorneys' fees incurred in collecting a premium or premiums or a loss sustained on said bonds. 20 30

(4) The plaintiff, confiding in said promise of the defendants, and at the request of said defendants, duly executed and delivered to the Town of Harrison, New York, three certain bonds of the plaintiff in the sum of \$23,282, \$35,330 and \$15,000, respectively, conditioned for the faithful performance of all the conditions and provisions of three certain contracts for the construction of sewers for the said town, said con- 40

Complaint.

tracts being designated "A," "B," and "C," respectively.

(5) The plaintiff has not been discharged or released from liability or responsibility on said bonds, in the manner provided by law.

10 (6) The annual premiums on said bonds, given for the said contracts "A," "B" and "C" amounting to \$232.83, \$353.30 and \$147.30, for the year 1914, became due and payable December 6, 1913. The annual premiums on said bonds for the year 1915, in the same amounts, became due and payable December 6, 1914.

(7) The defendants did not pay the said premiums, nor any part thereof, although payment thereof has been duly demanded of the said defendants.

20 (8) By reason of the failure of said defendants to pay said premiums, the said plaintiff has been put to the expense of attorneys' fees in the sum of \$150.00.

30 Judgment will be claimed for the sum of Sixteen Hundred and Sixteen Dollars and Eighty-six cents, with interest on Seven Hundred and Thirty-three Dollars and Forty-three cents from December 6, 1913, and interest on Seven Hundred and Thirty-three Dollars and Forty-three cents from December 6, 1914, together with costs.

COHN & COHN,
Plaintiff's Attorneys.

Complaint.

Form C 715 General Indemnity Agreement.

Revised 8-10—2500-2151-11-28-11.

THE TITLE GUARANTY & SURETY
COMPANY,

SCRANTON, PENNSYLVANIA.

10

Capital and Surplus over \$1,500,000.

THIS AGREEMENT, made and entered into on the 19th day of December, 1912, by and between Fusco Construction Company (hereinafter called the "Contractor"), and Donato Fusco, parties of the first part, and THE TITLE GUARANTY & SURETY COMPANY, of Scranton, Pennsylvania (hereinafter called the "Surety Company"), party of the second part, WITNESSETH:

WHEREAS, the Contractor, in the transaction of business, and in the performance of certain contracts, and in the fulfillment of certain obligations generally, may desire or be required from time to time to give certain instruments in the nature of consents, preliminary guaranties, bonds, undertakings, stipulations or other obligations, and the Surety Company requires indemnification as hereinafter provided, in respect of any such instrument or instruments which it may execute on behalf of the Contractor. And these presents are signed by the parties of the first part as an inducement to the said Surety Company to execute such instruments.

20

30

NOW, THEREFORE, in consideration of the premises, and of the execution and delivery from time to time by the Surety Company of any such instrument or instruments, the parties of the first part hereby agree and bind themselves, their heirs, executors, administrators, successors and

40

Complaint.

assigns, jointly and severally, as follows, to wit:

FIRST: The parties of the first part shall pay in cash to the Surety Company, in advance and at such times and in such manner as may be agreed upon, the premium or charge of the Surety Company in respect of each such instrument, and shall, where such premium or charge is annual, continue to pay the same, until the Surety Company shall, in the manner provided by law, be discharged or released from any and all liability or responsibility upon and from such instrument or instruments, and all matters arising therefrom.

SECOND: The parties of the first part shall at all times, indemnify, and keep indemnified, and save harmless the Surety Company from and against any and all liability, loss, damages, costs and expenses of whatever nature or kind which it shall or may, at any time, sustain, incur, or be put to, for or by reason, or in consequence of its having given and executed any such instrument or instruments on behalf of the Contractor, including disbursements, costs and counsel or attorneys' fees incurred in collecting a premium or a loss sustained on any such instrument and shall reimburse the Surety Company for any and all moneys, with legal interest thereon, advanced or loaned by it to the Contractor for the purposes of any contract or contracts; and for all costs, counsel fees and expenses which it may incur in investigating any claim made thereunder, or investigating any application for advances or loans, or in prosecuting or defending any action, suit or other proceeding which may be commenced or prosecuted against the Contractor, or against the Surety Company, upon any such instrument or instruments, or

Complaint.

in any wise relating thereto, whether such action, suit or other proceeding be rightfully or wrongfully brought or instituted. The parties of the first part further agree that in any accounting which may be had between them and the Surety Company, the Surety Company shall be entitled to charge for any and all disbursements in and about the matters herein contemplated made by it in good faith, under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed. 10

THIRD: The parties of the first part hereby further agree that in the event of being unable to complete or carry on any contract covered by the suretyship of the said Surety Company, executed on behalf of the former, to assign and does hereby assign to the said Surety Company, all right, title and interest of the said parties of the first part in and to all the tools, plant, equipment and materials of every nature and description that the said parties of the first part may have upon the work provided for in the contract covered by said suretyship, or in, on or about the site thereof, including as well materials purchased for or chargeable to such contracts, which may be in process of construction, on storage elsewhere, or in transportation to said site; and the said parties of the first part further agree to assign and hereby does assign to the said Surety Company, all the former's rights in and to all sub-contracts which may be entered into and the materials embraced therein appertaining to said contract; and the said parties of the first part further 20 30 40

Complaint.

10 agree, in the event of any breach or default on their part in any of the provisions of any contract covered by the suretyship of the said Surety Company executed in pursuance of such contract, that the said Surety Company, as surety, shall be subrogated to all the rights and prop-
erties of the said parties of the first part in such contracts, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may there-
after become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety Company by reason of its suretyship as aforesaid.

20 IT IS UNDERSTOOD AND AGREED, however, that the liabilities of the said parties of the first part shall not be changed or altered by reason of any modification made, either before or after execution by the parties thereto in any of the terms or conditions of any contract or contracts referred to in any instrument or instruments now or hereafter executed or procured by the Surety Company, or in the plans or specifica-
30 tions accompanying any such contract or contracts, or by reason of any extension of time given to complete the same, or by reason of any payment or advance being made thereunder before the same may be due, or by the assign-
ment of any such contract or contracts to the Surety Company; and it shall not be necessary to notify the said parties of the first part, or any of them, or procure their assent to any of the foregoing; and the Surety Company is here-
40 by authorized and empowered to advance or loan to the Contractor any money or moneys which

Complaint.

the Surety Company may see fit for the purposes of any contract or contracts assured by it, or to assent to any modification or modifications in the terms or conditions thereof, or in the plans and specifications, either before or after execution, or to any extension of time, or to any such payment or advance thereunder, or take an assignment of any such contract or contracts without notice to the said parties of the first part, or any of them, and without procuring their assent thereto. 10

AND IT IS FURTHER AGREED, that any and all moneys expended in the completion of any such contract or contracts by the Surety Company, or loaned or advanced from time to time by it to the Contractor for the purposes of any contract or contracts, and all costs, counsel fees and expenses incurred by the Surety Company in relation thereto, unless repaid, with legal interest, by the Contractor to the Surety Company when due, shall be conclusively presumed to be a loss by the Surety Company for which the parties of the first part shall be responsible, notwithstanding said moneys, or part thereof, so loaned or advanced by the Surety Company, to the Contractor for the purposes of any contract or contracts, should not be used by the Contractor for the purposes of such contract or contracts, it being the intent hereof that the Surety Company shall not be obligated in any way to see to the proper application by the Contractor, of such advances or loans or of any part or parts thereof. 20 30

AND THE SAID PARTIES OF THE FIRST PART hereby waive all notice of default or defaults, or any other act or acts, giving rise to any claim under any such instrument or instru- 40

Complaint.

ments given by the Surety Company on behalf of the Contractor as aforesaid, or of any and all liability on the part of the parties of the first part, as well as notice of any and all liability of the Surety Company under any such instrument or instruments executed by it as
 10 surety, to the end and effect that the parties of the first part shall be and continue liable to the Surety Company hereunder, notwithstanding any notice of any kind to which the parties of the first part might have been or be entitled, and notwithstanding any defense they might have been or be entitled to make.

The Surety Company may regard a letter, telegram or written application, signed by the Contractor, or, if the Contractor be a corporation,
 20 then a letter, telegram or written application, signed by its President, Vice-President, Secretary, Treasurer, Assistant Secretary or Assistant Treasurer, General Manager, or any officer, and addressed to the Surety Company, as sufficient and ample authority for the Surety Company to execute the bond or undertaking specified in such letter, telegram or written application, and a bond or undertaking executed upon such authority shall be embraced in the indemnity
 30 hereby given.

The Surety Company does not guarantee the prompt issuance of such instruments upon such request, nor their acceptance by the obligee or obligees, promisee or promisees, named therein, and reserves the right to decline to entertain any application or to refuse to execute any instrument, as it may see fit.

AND IT IS FURTHER UNDERSTOOD AND AGREED, that in case of any of the parties of the first
 40 or second parts herein mentioned may fail to

Complaint.

execute this obligation, or in case the execution hereof by any of the parties of the first and second parts may be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this obligation or the liability hereunder as to any and all of the parties of the first and second parts executing this obligation; but each and every of the parties of the first and second parts joining herein shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed. 10

IT IS FURTHER UNDERSTOOD AND AGREED, that this obligation shall be for the benefit of any company or companies that have joined or may hereafter join at the request of the said THE TITLE GUARANTY & SURETY COMPANY as co-surety or reinsurer on said bond on which it may require it on account of its suretyship thereon. 20

AND THIS AGREEMENT OR INDEMNITY, shall be liberally construed, so as to fully protect and indemnify the Surety Company.

DONATO FUSCO. (SEAL)
 FUSCO CONSTRUCTION CO. (SEAL)
 JAMES J. FUSCO, President. (SEAL)

30

THE TITLE GUARANTY & SURETY
 COMPANY.

By..... (SEAL)

Attest.

.....

40

Complaint.

CORPORATE ACKNOWLEDGEMENT.

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

On this 19th day of December, 1912, before
 me personally appeared James J. Fusco, to me
 10 known, who being by me duly sworn, did depose
 and say; that he resided in the Town of Mont-
 clair, N. J.; that he is the President of Fusco
 Construction Co., the corporation described in
 and which executed the above instrument; that
 he knew the seal of said corporation; that the
 seal affixed to said instrument was such cor-
 porate seal; that it was so affixed by order of
 the Board of Directors of said corporation,
 and that he signed his name thereto by like
 20 order;

And the said James J. Fusco further said, that
 he was acquainted with James J. Fusco and
 knew him to be the President of said corpora-
 tion; that the signature of said James J. Fusco
 subscribed to the said instrument is in the genu-
 ine handwriting of said James J. Fusco, and
 was thereto subscribed by like order of said
 Board of Directors and in the presence of him,
 the said

30

OLIVER BUNA FERRIS,
Attorney at Law of N. J.

INDIVIDUAL ACKNOWLEDGMENT.

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

On the 19th day of December, 1912, before
 me personally came Donato Fusco, Montclair,
 N. J., to me known, and known to me to be the
 40 individual described in, and who executed the

Answer of Donato Fusco.

foregoing instrument, and he acknowledged that he executed the same.

OLIVER BUNA FERRIS,
Attorney at Law of N. J.

10

Separate Answer of Donato Fusco.

Filed September 9, 1915.

Defendant, Donato Fusco, residing at No. 18 Glen Ridge avenue, in the Town of Montclair, in the County of Essex and State of New Jersey, answering separately, says that:

1. As to the allegations in the first paragraph of the complaint he has no knowledge or information thereof sufficient to form a belief, and therefore denies the same. 20

2. He admits the allegations in the second paragraph of the complaint.

3. He admits the allegations in the third paragraph of the complaint, except as hereinafter set forth in "Second Defense."

4. As to the fourth paragraph of the complaint he says that he has not sufficient knowledge or information thereof to form a belief. 30

5. He denies the allegations of the fifth paragraph of the complaint.

6. He denies the allegations of the sixth paragraph of the complaint.

7. He denies the allegations of the seventh paragraph of the complaint.

8. He denies the allegations of the eighth paragraph of the complaint.

40

Answer of Donato Fusco.

FIRST DEFENSE.

10 This defendant further answering says that, the work under the contract between defendant, Fusco Construction Company, and the Town of Harrison, referred to in the complaint, was completed prior to December 6, 1913, and that plaintiff has not since the execu-
tion of the bonds referred to in paragraph four of the complaint, been in any manner damnified by reason thereof.

SECOND DEFENSE.

20 This defendant further answering says that, the supposed agreement of indemnity, bearing date December 19, 1912, is not the deed of this defendant and that this defendant was induced by the agent of plaintiff to sign said agreement of indemnity on the representation of said agent that it related to matters other than those set forth in said agreement.

CHURCH & HARRISON,
Attorneys of Defendant,
Donato Fusco.

30

40

Answer of Fusco Construction Company.

Separate Answer of Fusco Construction Company.

Filed.

The defendant, Fusco Construction Company, a corporation of the State of New Jersey, with its principal office located at No. six hundred sixty-five Broad street, in the City of Newark, answering separately, says that: 10

1. It has no knowledge or information with reference to the allegations contained in the first paragraph of the complaint, sufficient to form a belief, and therefore desires the plaintiff to make such proof of the same as may be necessary.

2. It admits the second paragraph.

3. It admits the third paragraph. 20

4. It admits the fourth paragraph.

5. It denies the fifth paragraph.

6. It denies the sixth paragraph.

7. It denies the seventh paragraph.

8. It denies the eighth paragraph.

FIRST DEFENSE.

This defendant further answering says that the work under the contract between it and the Town of Harrison, referred to in the complaint, was completed prior to December sixth, nineteen hundred and thirteen, and that all premiums for which it was liable have been paid for in full, and that the plaintiff has not, since the execution of the bonds referred to in paragraph "4" of the Complaint, been in any manner damnified by reason thereof. 30

E. R. McGLYNN,
Attorney for Defendant,
Fusco Construction Com- 40
pany, a corporation.

Judgment.

Reply to Separate Answer of Donato Fusco.

Filed September 14, 1915.

Plaintiff denies every allegation contained in the "first defense" and in the "second defense" in the separate answer of Donato Fusco.

10

COHN & COHN,
Attorneys for Plaintiff.

This action was tried before Honorable Nelson Y. Dungan, Judge, to whom the matter was referred as a Circuit Court Judge on agreement by the attorneys of plaintiff and of the defendants, and that the order of the Justice of the Supreme Court referring the same may be signed at his convenience *nunc pro tunc*, at the Essex County Circuit Court on December 7, 1916.

20

The cause having been heard the court directed the jury to find a verdict in favor of the plaintiff for the sum of \$1,003.40 and costs. Whereupon it was adjudged that the plaintiff recover of the defendants the sum of \$1,003.40 and its costs of \$73.06.

30 Judgment entered December 17, 1916.

Opening.

NEW JERSEY SUPREME COURT,
ESSEX CIRCUIT.

TITLE GUARANTY & SURETY COM-
PANY

vs.

FUSCO CONSTRUCTION COMPANY
and DONATO FUSCO.

10

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., December 7, 1916.

Before Honorable Nelson Y. Dungan, Judge, and a jury. 20

Cohn & Cohn, for plaintiff.

E. R. McGlynn, for the defendant, The Fusco Construction Company.

Mason & Souter, for the defendant, Donato Fusco.

Jury drawn and sworn.

The Court. I think this should appear upon the record. This is a Supreme Court issue, and has not been referred to me, as a Circuit Court judge, but was referred to Judge Adams, and it is agreed by the attorneys of the plaintiff, and the respective defendants, that the case shall be tried before me, and that the order of the Justice of the Supreme Court referring it to me for trial may be signed at his convenience, *nunc pro tunc*. Now, Mr. Cohn, you agree to that? 30
40

Opening.

Mr. Cohn. Yes, sir.

The Court. Do you agree to it, Mr. Mason?

Mr. Mason. Yes, sir.

The Court. And you agree to it, Mr. McGlynn?

10

Mr. McGlynn. Yes, sir.

Mr. Cohn opened for plaintiff.

Mr. Mason opened for the defendant, Donato Fusco.

Mr. McGlynn opened for the defendant, The Fusco Construction Company.

20

Mr. Cohn. I desire to offer in evidence an exemplified copy of a certificate of incorporation of the plaintiff, The Title Guaranty & Surety Company, of Scranton, Pennsylvania.

(The same is marked Exhibit P. 1.)

30

Mr. Cohn. I also offer in evidence an indemnity agreement dated the 19th day of December, 1912, between The Fusco Construction Company and Donato Fusco, as parties of the first part, and The Title Guaranty & Surety Company of Scranton, Pennsylvania, party of the second part.

Mr. Mason. I cannot consent to the admission of this. There are two separate papers; one has a separate acknowledgment here; it is not a part of it.

Mr. Cohn. The separate paper is a certificate of acknowledgment, which was appended to it subsequently. If there is any objection we have the attorney here who took it.

40

Alfred A. Walter, direct.

The Court. I assume it is the one sent out in the pleadings. It does not make any difference whether you admit that one or not, it is admitted that the one set out in the pleadings is the one that was executed.

Mr. Cohn. This is the agreement to which was added the certificate of acknowledgment which is on this original agreement, and was drawn up in the New York form, and feeling I would have difficulty in offering it in evidence on that certificate, we have since obtained the certificate of the same attorney at law, who took the original certificate of acknowledgment. 10

The Court. Is that all you object to, that certificate of acknowledgment? 20

Mr. Mason. Yes, sir.

The Court. You may detach that certificate of acknowledgment, and it will be admitted.

(Said paper marked Exhibit P. 2.)

ALFRED A. WALTER, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Are you an officer of The Title Guaranty & Surety Company of Scranton, Pennsylvania, the plaintiff in this action? A I am. 30

Q What office do you hold? A Resident vice-president in the City of New York.

Q How long have you held that office? A Since 1914, the 11th day of April, 1914.

Q Can you state what moneys are due the plaintiff corporation for premiums on three certain bonds that were given by your company 40

Alfred A. Walter, direct.

to the Town of Harrison on certain contracts marked A, B and C, respectively?

Mr. Mason. Objected to.

The Court. I sustain the objection; that would be a conclusion; that is what we are here to determine.

10

Q Will you state whether the plaintiff gave three certain bonds to the Town of Harrison to cover certain certificate sewer contracts?

Mr. Mason. I object to that because it shows by the evidence that those bonds were executed in December, 1912; this witness says he did not become connected with this company until April, 1914. There is better proof than that if there were any bonds given.

20

The Court. The objection will be sustained.

Q Did you see the three certain bonds which were executed, or given, by the Title Guaranty & Surety Company to the Town of Harrison to cover certain sewer contracts of the Fusco Construction Company, and given in connection with contracts designated as A, B and C?

30

The Court. The question involves the contents of the bonds, and if there were such bonds the best evidence of that fact would be the bonds themselves.

Mr. Cohn. The bonds are outside the jurisdiction of this court, and we are suing upon an indemnity on those bonds.

The Court. Do you not intend to prove the bonds were given?

40

Mr. Cohn. Yes, sir, we do, by the best evidence obtainable, and the best evidence

Alfred A. Walter, direct.

we have is that those bonds were actually signed by the parties.

The Court. That is not the best evidence. We have a procedure by which you can take testimony outside of the state.

Mr. Cohn. We have the bonds here. It had escaped me that we have the bonds here. 10

Q I show you two certain bonds given to the Town of Harrison—

Mr. Mason. Hadn't he better tell him—

The Court. One minute. We will let Mr. Cohn conduct his side of the case.

Q I show you what purports to be a bond by the Title Guaranty & Surety Company, bearing date December 6, 1912, and given to the Town of Harrison, and ask you if that is a bond given by your company? 20

Mr. Mason. I object. Of course, he can ask him—I will withdraw the objection to that, if that is a bond given by his company.

A Yes.

Q I show you another bond purporting to be given by the Title Guaranty & Surety Company, and bearing the same date, and given to the Town of Harrison, Westchester County, New York, in connection with the sanitary sewerage system— 30

Mr. Mason. What I object to is his reading so much into the record.

The Court. There must be enough read to identify it.

Alfred A. Walter, direct.

Q Was that given by your company? A It is, and it was.

Mr. Cohn. I desire to offer in evidence these two bonds.

Said papers handed to counsel for the defendants.

10

Mr. Mason. I object to one on the ground it is not executed by the Fusco Construction Company; there is no signature to it by the Fusco Construction Company, and there is an attesting witness to it, and that attesting witness is not called. That is one ground for one of them. I object to the admission of the second one because it purports to have an attesting witness, and that attesting witness has not been produced.

20

Mr. Cohn. If your Honor please, I believe the giving of these bonds is admitted by the pleadings.

The Court. Only by one of the defendants. No objection comes from Mr. McGlynn for the Fusco Construction Company. Mr. Fusco, represented by Mr. Mason, does object. They would be admissible as against the Fusco Construction Company.

30

Mr. Mason. It appears also that they were dated one, the 5th day of December, 1912, and the other the 6th day of December, 1912, and this contract of indemnity on which they are suing is dated December 19th, two weeks after.

Mr. Cohn. We will explain that.

The Court. These contracts will be admitted as against the Fusco Construction Company, but are not admitted as against Donato Fusco.

40

Alfred A. Walter, cross.

Said papers marked Exhibits P. 3 and P. 4, being the bonds marked A and C.

The Court. So B is not presented?

Mr. Cohn. B is not presented.

Q Do you know whether the premiums on those two bonds have been paid?

10

Mr. Mason. I object. It has not been shown—he said he became a resident vice-president on April 11, 1914.

The Court. The objection will be overruled.

Mr. Mason. I would like to examine him as to his method of knowledge.

The Court. Your objection does not go to this particular question; I think you are anticipating the next question. The question may be answered yes or no.

20

A Will you please read the question?

Q (Question read as follows: 'Do you know whether the premiums on those two bonds have been paid?') A I do.

Q Will you state whether they have been paid?

Mr. Mason. Now I object.

The Court. You may have an opportunity to cross examine him.

30

By Mr. Mason.

Q What position did you hold in this company? A Pardon me!

Q You say you became connected with this company in April 11, 1914? A No, sir; I said I became resident vice-president in the City of New York on that date.

40

Alfred A. Walter, cross.

Q What connection did you have prior to that time? A Claims attorney.

Q Did this company keep books? A What sort of books do you mean?

10 Q Well, books in which accounts with different persons who had taken bonds out were entered? A No, not in the sense that you mean. I can explain their system.

Q Answer the question. A The only way I can answer the question is no, not in the sense you imply. I cannot answer it yes or no. I can explain the system, if your Honor please.

Q Where is the home office of this company located? A Scranton, Pennsylvania.

20 Q And do you mean to tell us that the home office at Scranton, Pennsylvania, did not keep a ledger, or book of account, with different persons who had taken out bonds from this company? A I am sure they did not.

Q Have you ever been to their home office? A Many times.

Q Who kept the books there? A I can't tell you. I can tell you the officers in charge of the department. They had many clerks there, many employees.

30 Q As a matter of fact, you were merely a lawyer that was supposed to collect some claims that were put in your hands, were you not? A No, sir, I was not.

Q What other position did you hold besides claims attorney? A I was in complete total charge of the company's business in the City of New York from the time I became connected with it.

40 Q When did you become connected with it? A About November, 1912.

Alfred A. Walter, cross.

Q Now, then, you have had a number of sub-agents, didn't you, throughout the State of New York? A Not at that time.

Q Didn't you afterwards? A Not after that time.

Q Well, did you ever? A Prior to the time that I became connected with the company. 10

Q And you had no sub-agent afterwards? A The company was in the course of liquidation when I became connected with it; it had stopped writing business.

Q You say you became connected with it in November, 1912? A About November, 1912.

Q Don't you assert you wrote those bonds in December, 1912? A They might have written an occasional bond, but it was done in the course of liquidation; might have written one or two; three or four. 20

Q Don't you assert here you wrote those bonds in December, 1912? A I assume so.

Q You assume so? A I don't question it. The company commenced to go out of business long before that time; might not have actually stopped writing every kind of bonds, but that was its general situation; everybody knew it.

Q How do you know that the premiums are due if you do not know whether or not the bonds were written? A I do know the bonds were written. 30

Q (*By the Court.*) The question is how do you know the premiums are due? A By the records of the company.

Q (*By Mr. Mason.*) What records? A The folder which I delivered to counsel.

Q Where is it? A He has it.

Mr. Mason. Then he has not produced the best evidence, I think. 40

Alfred A. Walter, cross.

Q (*By the Court.*) You mean that is your source of information? A By looking at the folder I can tell from the marking whether or not the premiums have been paid.

Q (*By Mr. Mason.*) Where is that folder? A I delivered it to counsel.

10 Q Then do you know through whom the Fusco Construction Company got these bonds?

A Yes.

Q Through whom? A They first went to a broker located in William street, New York, by the name of Philip Rydel, I think his name is. They did not get the bond finally from him.

Q But the company gave these bonds to a sub-agent, or insurance broker, to deliver, didn't they? A They gave the bonds to a broker, not to a sub-agent.

20 Q They gave the bonds to an insurance broker? A To an insurance broker.

Q And that broker had authority to collect premiums on the delivery of the bonds, didn't he? A He did not, most emphatically he did not.

Q As a matter of fact when an insurance broker presents a bond has not he the implied authority to collect the premium?

30 *Mr. Cohn.* I object.

The Court. I sustain the objection.

Q To whom were these premiums charged when these bonds were issued? A The Fusco Construction Company.

Q How were the premiums to be paid? A Annually in advance.

Q I mean how was the broker to get his premium for writing the insurance? A I don't know.

40

Alfred A. Walter, cross.

Q You don't know? A No. I can tell you what the custom is, but I don't know what the arrangement between the broker and the company was.

Q You don't know what the arrangement was between this broker and the company as to these bonds? A Not this specific arrangement. I can tell you what the custom is. 10

Q Do you know the arrangement, how these bonds were to be paid for? A Annually in advance.

Q Is not that what you are testifying to, simply from what someone has told you since? A No, it is not.

Q Did you know anything about the arrangements at the time you say these bonds were delivered? A Please repeat the question. 20

Q Did you know anything about the arrangement for the paying of the premiums of the bonds at the time the bonds were delivered? A Arrangement with whom?

Q Between the broker and the company? A I did not know anything about it at that time, and I don't know anything about it now specifically. I can tell you the custom.

Q I would like to see this folder that has been spoken of; will you please come down and get it? A There are two more. 30

Mr. Mason. Where are they?

Mr. Cohn. We simply have one. I understand the case is going off for the purpose of producing some testimony, and we will produce the other two.

The Court. You have not them here now?

Mr. Cohn. No, we have not them now. 40

Alfred A. Walter, cross.

10 *The Court.* Mr. Mason, you have proceeded far enough to satisfy the Court that Mr. Walter cannot answer this question, because he says he received his information from the folders; it plainly is not first hand information from which he could answer the question.

Mr. Cohn. Then I ask that this case go over until tomorrow, and we will send to Scranton for the officers, in view of the fact that we are to take the testimony of Donato Fusco tomorrow; the only place I know where they have this other information, these folders, which I don't happen to have, if that is the only evidence that is admissible we will have to have that.

20 *The Court.* The Court is not ruling that that is the only evidence admissible, the Court is only ruling on evidence as it is offered. The defendants upon those matters are going to require strict proof, as it is their right to do, except such matters as they have admitted. Do you mean you have not any other testimony you can offer this afternoon?

30 *Mr. Cohn.* We have other testimony, and I will offer that other testimony. I withdraw Mr. Walter for the present.

Mr. Mason. I ask that this paper be impounded.

The Court. It may be marked for identification.

 Said paper marked P. 5 for identification.
(The witness is withdrawn.)

Fred F. Teno, direct.

FRED F. TENO, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Where do you reside? A Harrison, New York.

Q What is your occupation? A Civil engineer. 10

Q Were you a sewer commissioner of the Town of Harrison in 1912? A Yes, sir.

Q Do you know whether three certain bonds were given to the Town of Harrison in connection with certain sewer contracts in December, 1912? A Yes, sir.

Q I show you Exhibit P. 3 and P. 4 and ask you whether they are two of the bonds which were delivered by the Title Guaranty & Surety Company to the Town of Harrison on account of a contract which the Fusco Construction Company had with the Town of Harrison for the construction of sewers? 20

Mr. Mason. I object; the instruments speak for themselves.

The Court. I suppose whether they were the bonds delivered to them—

Mr. Mason. I do not object to that.

A Yes, sir. 30

Q Do you know whether there was another bond given?

The Court. Had not you better pursue that inquiry now? Perhaps you had better ask another question to put that in proper form.

Q Was there another bond given at that time? A Well, there was a few days between the bonds, a week or so, I shouldn't wonder. 40

Fred F. Teno, direct.

Q Was a third bond given? A Yes.

Q What were those bonds given for?

Mr. Mason. Won't they speak for themselves?

The Court. You mean these two?

10

Mr. Cohn. Yes, these two, and I will take up the other bond, and find out what became of that.

The Court. I think he may answer that question. It is true the bonds speak for themselves, and anything he may say which—he may answer the question.

A What is the question?

Q (*By the Court.*) What were those two bonds given for? A The construction of a sewerage system through the Town of Harrison.

20

Q (*By Mr. Cohn.*) Between the Town of Harrison and whom? A The Fusco Construction Company.

Q What became of that other bond you have just mentioned? A I cannot get the bonds from the town clerk, or supervisor, unless I got an order of the Court, and he was not there present, and I could not get the third bond.

30

Mr. Mason. I object to any testimony about it then.

The Court. Perhaps it will not be offered.

Q Well, is that bond in existence? A Yes, sir.

Q Will you state what work was done by the Fusco Construction Company under those contracts, and when the work under those contracts was accepted by the Town of Harrison?

40

Mr. Mason. I object to that; I do not think that is the best evidence, when they were accepted; that is a matter of record.

Fred F. Teno, direct.

The Court. That does not amount to anything without following it up by the next question; perhaps that is not objectionable, if you insist upon it.

Q Do you know the work which was done under those sewer contracts by the Fusco Construction Company was accepted by the Sewer Commissioners of the Town of Harrison? A Yes, sir. 10

Q What office did you hold on that commission? A Secretary of the commission.

Q Will you state when the work under those contracts was completed and accepted?

Mr. Mason. Now, I object to that.

Q (*By the Court.*) Did you keep minutes? A Yes, sir. 20

Q Did you act together? A Yes, sir, the commission of three acted together, and kept minutes; we had a secretary to keep the minutes of the commission.

Q (*By Mr. Mason.*) Have you those minutes with you? A I have copies of the letters when the contract was completed, and forwarded to the town board.

Q Could you get those minutes? A Yes, sir, with the order of the Court. I am not allowed to take anything out of the Town of Harrison without an order of the Court. 30

Q (*By the Court.*) What court do you mean? A I don't know. I suppose it is a question.

Mr. Cohn. I think we might ask the Court to give us a writing, or something.

The Court. I would be very proud to know that an order of this court would be effective in the State of New York. 40

Fred F. Teno, direct.

Mr. Cohn. If we are required to produce the minutes I feel I will have to ask for an adjournment, and we will have those minutes here tomorrow if it is in any way possible.

10 *The Court.* The Court has not suggested that you must or must not. All I can do is to rule upon objections when they are made, Mr. Cohn, I am not ruling that you must present your case in one way or another. Of course, the Court must hold that if you are required to make strict proof, you must do so in a legal way.

20 *Mr. Cohn.* I was under the opinion it would not be necessary to produce the minutes if the witness is the one who wrote the minutes and it is within his own knowledge.

The Court. If this was a duly constituted statutory body, having minutes, then they can only act by themselves, and minutes are the best evidence. I mean they can only act together, and the minutes of what they did is the best evidence of their act.

30 *Mr. Cohn.* But in view of the fact that the contracts themselves, or these bonds, or the work that was done under them—here were three bonds—

40 *The Court.* There is no question about the Fusco Construction Company. They admit that you entered into bonds for these contracts, and I doubt if it would be necessary to produce any of those bonds by the Title Guaranty & Surety Company, so far as the Fusco Construction Company is concerned. But it is not admitted on behalf of Donato Fusco, and if it is your desire to

John C. Hardy, direct.

hold him, then, of course, as a condition precedent to your right to recover against him, it must be shown that you did enter into these bonds which entitle you to the premiums. I must ask that you will have things in order tomorrow morning so that we can proceed quickly.

10

ADJOURNED to December 8, 1916.

SECOND DAY.

Newark, N. J., December 8, 1916.

Continued pursuant to adjournment.

Appearances as before.

20

Mr. Cohn. I just received a telephone message that Mr. Teno, the last witness on the stand, is on his way here from Harrison, New York. He must have missed his train, and he should be here a few minutes before twelve, and I will ask your Honor's permission to put on some other witnesses, if your Honor will give me a minute or two to consult with them; they are from Harrison also.

30

JOHN C. HARDY, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Mr. Hardy, where do you reside? A Paterson, New Jersey.

Q What is your business? A Cashier and bookkeeper.

Q Of what? A The Globe Indemnity Company of New York City.

40

John C. Hardy, direct.

Q Were you connected with the Title Guaranty Insurance Company, of Scranton, Pennsylvania, in 1912 and 1913? A At their New York branch office, 84 William street.

Q For how long a period were you connected with this company? A Three years, about.

10 Q From what time? When did you begin your connection with the company? A In the first part of 1910.

Q What office did you hold in that company? A Cashier and bookkeeper, and resident assistant secretary.

Q Do you know of the giving of any bonds by this company in December, 1912, to the Town of Harrison, in connection with the sewerage system there, for the Fusco Construction Company? A That question again, please?

20 Q (Question read.) A It was not my position in the office to know of the giving of any bonds to any contractor; my duties were to enter—

Q (*By the Court.*) Well, you do not; your answer is no? A No.

Q (*By Mr. Cohn.*) Have you any knowledge as to whether any such bonds were given by the company? A I have.

30 Q Are any records, or were any records, kept by you for the company at that time in connection with such bonds? A There was.

Q Will you state what those records were? A The records were entered upon a bond register from which our ledger cards were made, completing the record for the transaction of the cancellation and collection of the premiums, and the reserve carried on the bonds.

40 Q Have you those records for 1912 and 1913? A I believe we have here, yes, sir.

John C. Hardy, direct.

Q Can you produce those records? A I can.

Q Will you produce them? A (Witness produces papers.)

Q Are these the records as to bonds given by the Title Guaranty & Surety Company to the Town of Harrison, the applicant, for the Fusco Construction Company? A They are.

10

Q Who kept those records? A I did.

Mr. Cohn. I desire to offer in evidence these records.

By Mr. Mason.

Q By whom was the typewriting on these cards done? A Under my direction by a stenographer.

Q Then you say that these were the ledger cards? A Yes, sir.

20

Q Then the amount, as to what was paid, was entered into the ledger? A They were entered from the cash-book, posted on the cards, and entered in total in the ledger at the end of the month.

Q And you did have books there. You had, first, a cash book? A Yes, sir.

Q And when any payment was made to your company that payment was entered on the cash-book? A Yes, sir.

30

Q And then after the payment had been entered on the cash book then you made a memorandum on these cards? A No, sir.

Q Was the memorandum on the cards made first? A The entries were made from the cards on the cash-book.

Q And then made from the cash-book to the ledger? A In total.

Q In your ledger did you keep an account with the different persons? A No, sir.

40

John C. Hardy, cross.

Q Where is your cash-book? A I haven't got it here.

Mr. Mason. I object to this being introduced.

The Court. Because the cash-book is not here?

10

Mr. Mason. Yes, sir.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant Donato Fusco as ground of appeal.

Mr. Mason. Then your Honor admits them?

The Court. Yes.

20

Mr. Mason. And I object; they are not books of original entry.

Mr. Cohn. I understood he testified they were the original entries.

The Court. I understood that to be so.

Witness. Yes, sir.

Said documents marked Exhibits P. 5, P. 6 and P. 7.

By Mr. Cohn.

30

Q Do these cards contain the credits? A They do.

Q And they also show the amount of the premium on each of those bonds? A They do.

Cross examination by Mr. Mason.

Q What is this memorandum on here "Contract declined?" A That is not contract declined, this card is made up originally reading "Contract." This is a stamp made by the

40

John C. Hardy, cross.

American Surety Company, so far as I understand, declining the reinsurance of this case. It says "Declined, A. F. Co."

Q And you don't know what that part of the writing of the card is of your own knowledge, do you? A No, sir, I don't.

Q Now, what does this mean on the other card, "Contract declined," do you know what that means of your own knowledge? A Of my own knowledge, no. 10

Q Do you know by whom that memorandum was put there? A I do not.

Q I show you the third one and ask you do you know what that statement there "Contract declined" means? A No, sir.

Q Do you know by whom it was put there? A I do not. 20

Mr. Mason. Then I renew my motion that the admission of these cards in evidence be taken out.

Mr. Cohn. If your Honor please, I can explain it.

The Court. The motion will be denied.

To this ruling an exception is noted by the defendant Donato Fusco as ground of appeal. 30

Q What does this mean on the card where it says "Agent Ritch, Hughes & Co."? A They were the representatives of the Fusco Construction Company at the time the business was taken with the Title Guaranty & Surety Company.

Q They were the agents of the Fusco Construction Company? A Representatives of the Fusco Construction Company.

Q What does that mean there, "Commission fifteen per cent"? A That is the commission paid to the Ritch, Hughes Company. 40

John C. Hardy, cross.

Q By whom? A By the Title Guaranty & Surety Company.

Q In other words, the Title Guaranty & Surety Company paid the agents of the Fusco Construction Company for getting your company business? A No, sir.

10 Q Why did your company pay Ritch, Hughes & Company if they were the agents of the Fusco Construction Company? A I didn't say they were agents, I said they were representatives, and they are brokers holding a license under the State of New York, and under the laws of the State of New York they were entitled to commission.

20 Q Didn't you say just now they were the agents of the Fusco Construction Company? A I did not.

Q Then you paid the representatives of the Fusco Construction Company? A Yes, sir.

Q Have you the cash-book showing the accounts between the Fusco Construction Company and the Title Guaranty & Surety Company? A I have no book.

Q There are books, aren't there? A There are books showing totals.

30 Q Where are those books? A I could not say; I am not now in the employ of the company.

Q Were they in the possession of the Title Guaranty & Surety Company when you left their employ? A They were.

40 Q Do you know when these bonds were executed? A The bonds were executed, one under date of December 28, 1912, one under date of December 6, 1912, and the other under December 6, 1912.

John C. Hardy, cross.

Q What does that mean on this bond where it says "Cancelled 12/2/1914?" A That represents a cancellation evidence on the bond; that was given to our office as evidence to cancel.

Q (*By the Court.*) Which bond is that? A Bond No. 25,975.

Q (*By Mr. Mason.*) What date is that? A Evidence of cancellation was received in our office on 12/2/1914. 10

Q That is as shown by this card? A Shown by this card.

Q Where does it appear from what source you got that evidence? A It would appear in the files.

Q Where are those files? A I have not the files in my possession.

Q Was it in the custody of the Title Guaranty & Surety Company when you left their employ? A It was. 20

Q When did you leave the employ of the Title Guaranty & Surety Company? A November, 1913.

Q November, 1913; so you don't know anything about these cards after November, 1913? A No, sir.

Q For how long a time was the first premium on those bonds to be, the first premium? A For how long a time? 30

Q Yes. A From December 6, 1912, to December 6, 1913.

Q And you left the employment of the company in November, 1913? A Yes, sir.

Q So you left the employment of the company before the premium for the first year had expired? A Yes, sir.

Q So you don't know anything about any payment of premiums that may have been made 40

John C. Hardy, cross.

to the Title Guaranty & Surety Company after you left their employ, do you? A I do not.

Q Now, then, do you want us to understand that these cards were kept by you after you left their employment in 1913? A I do not.

10 Q Didn't you tell the Court when these cards were first admitted that they were prepared and kept under your direction? A I did.

Q And now don't you say that you left the employment of the company before the time for the first year's premium had expired? A Yes, sir.

Q Then how could these cards have been kept under your direction after that time? A They were not.

20 Q Then you don't know whether or not these cards are correct or not after the time you left the employment of the company? A I do not.

Cross examination by Mr. McGlynn.

Q Does it appear from these cards whether the premium was paid on any of those bonds?

A It appears from these cards that the original premiums were all paid.

Q Does it appear who paid those? A No, sir.

30 Q Would it appear from your cash-book who paid those? A No, sir.

Q In what book, or on what cards, were the first entries made of the payment of cash? A This is the first entry.

Q First entry of the payment of cash? A First entry.

Q And from there it is posted to the cash-book? A Cash-book.

40 Q And from there to the ledger? A To the ledger.

John C. Hardy, cross.

Q The ledger, then, has the account of the entire amount of premiums in totals, you said?

A In totals.

Q And total amount of payment? A Total amount of payment.

Q Nothing to indicate who paid the premium? A No, sir. 10

By the Court.

Q Was the cash entered from these cards to the cash-book in detail? A In totals.

By Mr. McGlynn.

Q Nothing on the cards to show who paid? A Nothing. We might receive a check from you to pay the premium of some one else.

Q As a matter of fact you say the Ritch Hughes Company were the brokers? A Yes, sir. 20

Q On all three bonds? A Yes, sir.

Q Is there anything to indicate on that card whether your company paid the Ritch, Hughes Company their commission of fifteen per cent. by the company's check, or whether the Ritch, Hughes Company retained that out of moneys they had in their possession? A Nothing on this card to indicate. 30

Q Do you know of your own knowledge whether the Ritch, Hughes Company was paid by check, or whether they kept it out of moneys due you? A This card would not show it.

Q What was the practice of brokers in 1912 when you were with the company?

Objected to as not cross examination.

The Court. The objection will be overruled. 40

John C. Hardy, cross.

To this ruling an exception is noted by the plaintiff as ground of appeal.

Q (Question read).

The Court. I suppose you mean with respect to collecting premiums, and retaining commission?

10

Witness. Premium is paid direct to the the company, the company's check then was made out to the order of the broker for his commission; the broker paying premiums deducted his commission at the time of the payment.

Q Then it was the practice for brokers to collect the premium, send the company the check for the net amount of the premium, that is, the gross, less their commission, is that right? A It was, yes, sir.

20

Q And there is nothing to indicate in the record whether the broker did that in this instance, or not? A Not from the records, no, sir.

Q The Ritch, Hughes Company were brokers authorized by your company to write indemnity bonds and surety bonds for them? A No, sir.

Q How did they obtain the bonds? A The bonds were drawn by the company, the Ritch, Hughes Company, brokers, are given a license by the State of New York to conduct brokerage business, the bonds are executed by the office in which they presented the bonds, they did not have authority to execute the bonds for us at that time.

30

Q Do you know whether a man by the name of Cox, had anything to do with those bonds? A I do not.

40

John C. Hardy, cross.

Q Do you know of your own knowledge anybody connected with the company, or having anything to do with those bonds, by the name of Cox? A I do not.

Q Is there a record on any of those cards of a check of date May 19, 1913? A There is a record here of payment received under date of May 22, 1913. 10

Q What is the amount of the payment? A The amount of the gross payment was \$353.30.

Q Did that check or payment pass through your hands personally? A Yes, sir.

Q I show you a check dated May 19, 1913, to the order of the Title Guaranty & Surety Company, in the sum of \$353.30, signed James J. Fusco, and ask you whether you recognize that check? A Yes, sir. 20

Q Was that the check which is entered on your record as payment of the premium called for by that card? A Yes, sir.

Said check marked D. 1 for identification.

Q From your record does it appear what the date of the last payment was, so far as dates were concerned? A The last payment?

Q Yes, so far as dates, chronologically. Was May 19, 1913, the last payment? A The last payment received as per these cards here, yes. 30

Q Then the other two premiums were paid before the receipt of that last check, is that right? A Yes, sir.

Q Then, when you left the company, in November, 1913, there was nothing due the Title Guaranty & Surety Company on those bonds for premium? A Not on those bonds.

Q Now, Mr. Hardy, from these cards it would appear that there is a space which is printed "Second Annual," and then the next 40

Frederick W. Moser, direct.

column has at the top of it, "Premium," will you tell me the purpose of that on that card? A The date of the execution of the bond shows upon the card; it shows that the original premium was entered at that time to carry the risk for one year; the second annual premium
10 marked upon the card here would then fall due upon the anniversary date.

Q Now, as a matter of fact, this is the card upon which the bookkeeping department of the Title Guaranty & Surety Company charge people who obtain bonds for premium, is that right? A That is right.

Q Now, looking at those three cards, has there been any charge made by the Title Guaranty & Surety Company to anybody for any premium outside of the first one? A From
20 these cards, no.

FREDERICK W. MOSER, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Where do you reside? A Scranton, Pennsylvania.

Q What is your occupation? A Treasurer
30 of the Title Guaranty & Surety Company.

Q How long have you held that office? A Since January 30, 1914.

Q Did you hold there any other position prior to that time? A I did.

Q What was that? A Auditor.

Q Who succeeded Mr. Hardy in the matter of these cards, making entries? A I did; at least, under my jurisdiction.

Mr. Mason. I don't think that answers
40 the question.

Frederick W. Moser, direct.

Q Will you explain how, under these cards, it is shown what premiums are due?

Mr. Mason. Well, is he in a position? I object to the question.

The Court. Are not you wasting a whole lot of time on the question of payment? Payment is a defense. 10

Mr. Cohn. In view of the fact that the other witness brought out about the cards only have one premium on, I thought I would clarify that, but if it is not necessary, I won't go into it.

The Court. It may be desirable to do that if this witness can testify.

Q Will you explain those cards?

Mr. Mason. I object to his explaining those cards. 20

Q (*By the Court.*) Ever see them before?

A Yes, sir.

Q When? A From time to time at the home office of the company where they were under my jurisdiction.

By Mr. Mason.

Q Out in Scranton? A In Scranton.

Q These New York records? A These New York records. 30

Q You didn't know anything about who made any of the entries personally, did you? A No, the entries that were on these cards were made at the former New York office, Mr. Hardy.

Q You didn't know who made them, did you, until you heard Mr. Hardy say it? A Not of personal knowledge, no.

Mr. Mason. Then I object to his explaining it. 40

Frederick W. Moser, direct.

By Mr. Cohn.

Q Can you explain this card from November 30, 1913, or 1914?

The Court. 1913.

Q 1913? A I can.

10 Q Will you explain them from that time?

Mr. Mason. I object, and would like to cross examine him.

By Mr. Mason.

Q Do you know who put any of those other marks on there since 1913 personally? A Not personally, no.

Mr. Mason. Then I object to it.

The Court. Do you abandon the question?

20 *Mr. Cohn.* I withdraw the question.

By Mr. Cohn.

Q Can you state whether the New York office was continued after November, 1913? A The New York office of the company was discontinued on November 15th, or 16th, 1913.

Q And then those cards were sent to the home office at Scranton? A Yes, sir.

30 Q And they then came under your jurisdiction or supervision? A They did.

Q Were the entries on those cards after that date made in your department, and under your direction? A They were.

Q Can you explain those cards now?

Mr. Mason. I would like to cross examine him.

By Mr. Mason.

40 Q What is your position in this company?
A Treasurer.

Frederick W. Moser, direct.

Q How many of these accounts are there under your supervision as the treasurer? A I could not enumerate the accounts; there are quite a few of them.

Q Well, about how many, run up in the thousands? A Offhand I should say they did.

Q And as you said before you don't know of your own personal knowledge who put these different memoranda upon the cards, do you? A Prior to the time the cards came to the home office I do not. 10

Q After the time they came to the home office do you know of your own knowledge who put the memorandum upon the cards? A I do.

Q Where were you at the time they were put there? A At the office of the company, I presume. 20

Q Are those cards, the typewriting on those cards—you presume? Now, are those memoranda on those cards made when you were present? A There does not seem to have been any typewritten memorandum made on those cards after they came to the home office.

Q What are those stamps on the top part where it says "Contract declined?" A Well, that requires quite a lengthy explanation, but I can give it. 30

Q That has been made since the card came to the home office, hasn't it? A No, no.

Q As a matter of fact the Title Guaranty & Surety Company has been absorbed by another company, hasn't it? A No, they have not been absorbed, they re-insured some of their business with another company.

Q You are not writing—the Title Guaranty & Surety Company is not writing any business? A We are not writing any new business, no. 40

Frederick W. Moser, direct.

By Mr. McGlynn.

Q Since when have you discontinued writing new business? A We discontinued writing new business—

10 *The Court.* This cross examination is simply for the purpose of determining whether or not he may answer.

Mr. McGlynn. Pardon me.

Mr. Mason. He said there had been no memorandum made there since the cards came to the home office.

Witness. I said no typewritten memorandum.

By Mr. Mason.

20 Q Why did you qualify it by saying no typewriting? A Because on one card there is a pencil memorandum which was made at the home office.

Q Is not part of that in typewriting, the word "Cancelled," in typewriting? A No, sir; it is a rubber stamp.

30 Q Then is that the part that has been made since it came to the home office, that rubber stamp? A That stamp and the date underneath it, "12/2/1914," was made at the home office.

By the Court.

Q Was that the date of the cancellation? A Of that particular risk; it was cancelled on our records on that date, that one.

Q December 2, 1914? A 1914.

Q And what was the premium on that bond?

A On that particular bond?

40 Q Yes. A \$353.30. per annum.

Frederick W. Moser, direct.

By Mr. Cohn.

Q Will you explain the cancellation on that card?

Mr. Mason. I do not think that requires much explanation.

Mr. Cohn. He can say whether it does or not. 10

The Court. Proceed.

A I don't think there was—

Mr. Mason. Objected to.

The Court. No, not unless you know, it is not evidence.

Mr. Mason. I want to renew my objection to anybody testifying from these cards except the person who put the memorandum there. I think the only way these cards can possibly be used would be as memorandum to refresh a person's memory. 20

By Mr. Cohn.

Q Do you know of your own knowledge? A I don't know of my own knowledge.

Q Will you state how a second premium would become due, and would appear on those cards, if they would appear on those cards? 30

Mr. Mason. I object to telling how they would appear on these cards.

The Court. Whether or not they would appear. The objection will be overruled.

A The renewal premiums do not appear on these cards, which is not essential, because they have not been—

Mr. Mason. I object, and ask that that answer be stricken out, he is arguing. 40

Frederick W. Moser, cross.

The Court. Yes, that part will be stricken out.

Q Will you state when the renewal premiums are posted on those cards? A They are not.

10 Q (*By the Court.*) When, in the usual course of business, Mr. Moser? A When the renewal premium is paid.

Q (*By Mr. Cohn.*) Were the second premiums on those bonds paid? A They were not.

Cross examination by Mr. McGlynn.

20 Q Do you know why it is that your company is suing here for a premium on one of these bonds—all the bonds, as a matter of fact—for the year 1915, which became due and payable December 6, 1914, when you just told us that one of the bonds, at least, was cancelled on December 2, 1914? A That bond was cancelled, but the evidence might not have been conclusive.

Q Then you still claim premiums although on your record that bond is marked "Cancelled"? A If the bond was in force after that date.

30 Q Will you kindly answer my question? (*Question read.*) A Yes.

Q And that is your usual method, of demanding premiums, even although on your record that bond is marked "Cancelled"? A Not always.

Q Why the exception? A The cancellation evidence might not have been conclusive.

40 Q Do you have any other different rubber stamp which indicates whether the evidence is conclusive or not? A We have not.

Frederick W. Moser, cross.

Q How can you tell from the card itself, of your own knowledge, whether the evidence was conclusive or not? A I cannot tell from the card whether the evidence was conclusive or not.

Q Are any of the other bonds marked "Cancelled" on those cards? A They are not. 10

Q Only the one? A Only the one.

Q Do you know of your own knowledge whether they all apply to practically the same work, of your own knowledge, not from the card? A Not of my own knowledge, no.

Q And you say that your company never puts on these cards, never posts on these cards, the second or third or fourth or fifth annual premium until it is paid? A I did not say that.

Q What did you say? I think the Judge asked you when, in the usual course of business, your company posted to this card, which I understand is the only bookkeeping record, the original bookkeeping record, the second annual premium? A Sometimes the charge is made when it becomes due; other times the renewal charge is not made until it has been paid. 20

Q That is the only explanation you can give us? There is no explanation you can give us as to why it is not on there, is there? A No. 30

Cross examination by Mr. Mason.

Q You want the jury to understand that, even though on the card it appeared that you have marked this bond as "Cancelled," do you want the jury to understand that that entry on that card might not be correct? A It might not be conclusive.

Q In other words, statements that appear on this card, the records of the company, might 40

Philip P. Riddell, direct.

not be correct? A As regards that cancellation.

Q But as regards all the other parts you want the jury to understand that they are correct? A They are correct as far as my knowledge.

10 Q Well, is not the rubber stamp part, the cancel, correct as far as you know? A As far as I know.

Q Then, if that bond was cancelled in December 2, 1914, would your company be entitled to any premium in the year 1915? A If the contract was not completed, and the bond was in force, yes.

Q (Question read.) A If the bond was in force.

20 *The Court.* That is entirely a legal proposition, Mr. Mason.

PHILIP P. RIDDELL, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Where do you reside? A New York.

Q What is your occupation? A Broker.

Q Insurance broker? A Yes.

30 Q Is this your signature (showing witness a paper)? A Yes.

Mr. Cohn. I desire to offer in evidence the application for this Fusco insurance signed by the Fusco Construction Company.

Mr. McGlynn. I do not see why any prior application, or writing, which is merged in the agreement at issue, is evidential. He is suing on the agreement itself, which took place after the applica-

40

Philip P. Riddell, cross.

tion. I do not see why we should go back of that.

Mr. Mason. It is only admissible for showing that an application was made.

The Court. It will be admitted.

Same marked Exhibit P. 8.

An exception to the admission of this paper is noted by the defendant Donato Fusco as ground of appeal.

10

Cross examination by Mr. Mason.

Q Were you an agent for the Title Guaranty & Surety Company? A No.

Q Just an insurance broker? A A broker, yes.

Cross examination by Mr. McGlynn.

20

Q Were you connected with the office of Ritch Hughes & Company? A No.

Q Then what did you do with this application? A We were agent for the Aetna, and I gave it to the Aetna, and they didn't do it, and placed it with the Title Guaranty.

Q Do you know how this application first came to Ritch Hughes & Company? A Well, if it went through them, of course they would have to get it; if it went through Ritch Hughes, naturally they placed it with the company.

30

Q Did you have any connection with the firm of Ritch Hughes & Company so far as placing this bond was concerned? A No, acted as broker for Fusco.

Q With what company did you place the bond, if any? A I placed one bond directly with the company, and the other two bonds, one with the Ritch Hughes Company.

40

Philip P. Riddell, cross.

Q Did you collect the premium on these bonds? A No; I think Mr. Fusco paid them, some to the company direct, and some to the Ritch Hughes people.

Q Did you have a man named Cox in your office? A No, Mr. Cox was a local agent in
10 Harrison.

Q Agent of whom? A A local agent for several companies.

Q Just another insurance broker? A Yes.

Q Was he a broker for the Title Guaranty & Surety Company? A Not so far as I know.

Q You don't know, then? A Well, I don't know.

By the Court.

Q Mr. Riddell, was the bond issued pursuant to that application, or was that application abandoned? A I understand the bond was
20 issued on that application.

Q Well, do you know about that? A Well, I know it, yes.

By Mr. Mason.

Q You would judge it was so on account of the application, I understand? You don't know of your own personal knowledge, do you? A
30 I do, yes.

Q How do you know? A Well, I know a bond was issued, and we made the application and the bond was issued; that is all I know about it.

Q You did not have anything to do with the issuing of the bond yourself, did you? A Well, I did not execute the bond.

Q Did you see the bond written? A No, I didn't see it written, but it was issued, I know
40 that.

Oliver B. Ferris, direct.

Q Did you deliver the bond personally? A I don't remember.

Q Did you see it delivered personally? A I don't remember; it is three years ago.

Q Then you don't know of your own knowledge whether the bond was delivered, do you?

A Yes, I know it was delivered because I— 10

Q All you know about it is what somebody else told you? A Not at all; I received a commission on it, I think.

Q You did not receive any commission from the Fusco Construction Company, did you? A No.

Q From whom did you receive a commission? A The Ritch Hughes people.

Q From the Ritch Hughes people? A Yes. You see, they acted as the broker— 20

Q Never mind. You received a commission from the Ritch Hughes people. You don't know of your own knowledge for what purpose the Ritch Hughes people got the money, do you? A Well, I know they wouldn't have paid the commission if they hadn't received the premium.

Q But that is mere inference?

The Court. Rather a reasonable one. 30

OLIVER B. FERRIS, sworn for the plaintiff.

Direct examination by Mr. Cohn.

Q Where do you reside, Mr. Ferris? A I reside at Manhattan Beach, New York.

Q You are an attorney at law of the State of New Jersey? A Yes.

Q Do you know the defendant, Donato Fusco? A I do. 40

Oliver B. Ferris, direct.

Q Are you familiar at all with his handwriting? A I have taken his acknowledgment two or three times; that is all I can say.

Q Could you say whether that is his signature or not (showing witness paper)? A As far as I can say I should think it was his signature.

The Court. Referring to what?

Mr. Cohn. Referring to the name "Donato Fusco" on a letter—

The Court. You had it marked as an exhibit, didn't you?

Mr. Cohn. I am referring to P. 8 for identification. I desire to offer this in evidence.

By Mr. Mason.

20

Q You are not a handwriting expert, are you? A No, I am not a handwriting expert.

Q How often have you ever seen Mr. Fusco write? A Twice.

Q After having seen Mr. Fusco write twice you are willing to swear that that is Mr. Fusco's signature? A As far as I know, as far as I can judge. I am not a handwriting expert, Mr. Mason, do not profess to be.

30

Q As far as you can see, that is Mr. Fusco's handwriting? A As far as I can judge that is his handwriting, from what I saw.

Q After having seen it twice. Now, then, I show you some checks, and ask you is that Mr. Fusco's handwriting? A As far as I can judge, yes. As I say, I am not a handwriting expert, don't profess to be.

40

Q I show you another instrument; is that Mr. Fusco's handwriting? A As far as I can judge, yes.

Oliver B. Ferris, direct.

Q Now, then, I show you another signature, and ask you if that is Mr. Fusco's handwriting?

A It resembles it, yes.

Q It resembles it? A As far as I see. I say I have seen him write twice; I am not qualifying as an expert in writing.

Mr. Mason. I ask that his testimony as to this signature be stricken out. 10

By the Court.

Q Under what circumstances did you see him write? A I was asked to take his acknowledgement a couple of times; once I went to his house, I saw him write personally, then, in my presence.

Q How many times did he write his name in your presence? A About twice. 20

Q Did he write anything else? A Just his name.

Q How long ago has that been? A About three years ago.

Q Do you think you can carry that in your mind three years so as to give it as your positive opinion that a certain signature is his?

A I give it as far as I can judge, your Honor; as far as I can tell from the—

Q By "judge" you mean your opinion? A My opinion, yes. 30

Q Is that what you mean? A That is my opinion.

The Court. I suppose, taken for what it is worth, we are obliged to admit it. We are not limited to handwriting experts. Lay witnesses are constantly testifying to their opinion of the signature of another person, having seen him write; but, of course, the jury have before them the testi- 40

Oliver B. Ferris, direct.

mony now that it was three years ago when he saw the signature made twice, and they may judge his testimony by that fact.

By Mr. Mason.

10 Q Now, then, I ask you again, and ask you are you ready to swear, in your opinion, that is the signature of Donato Fusco? A As far as I can judge from my knowledge of his writing that is his signature.

Q And when was the last time that you ever saw him write? A 1913.

The Court. I think as a standard of comparison of signatures it is admissible.

Mr. Mason. I would like to have my objection noted.

20 Said paper marked Exhibit P. 9.

The Court. That is the only purpose for which this letter is offered, I presume, as a standard for comparison of handwriting.

Mr. Cohn. Yes, sir. We would like to have it admitted for general purposes.

30 *The Court.* That was not so understood. Have you any objection to the letter being admitted for the general purposes of the case? I mean, subject to its relevancy. It is only admitted now for the purpose of a standard for comparison of the signature. That is all.

Mr. Mason. I object.

The Court. The objection will be sustained.

By Mr. Cohn.

40 Q Who sent you to the house of Donato Fusco to obtain his acknowledgement to the

Oliver B. Ferris, cross.

execution of that agreement? A The bond agreement?

Mr. Mason. Well, he has not been shown the agreement.

The Court. No, he has not.

Q I show you Exhibit P. 2, and ask you who sent you to the house of Donato Fusco to take this acknowledgment to the execution of this agreement? A Mr. Fusco's son asked me to take his acknowledgment. 10

Q Did you see him execute or sign, this agreement? A I did.

Q Did you explain to him the contents of the instrument? A I did.

Q And you took his acknowledgment? A I did. 20

Cross examination by Mr. Mason.

Q Now, then, you had an office with young Mr. Fusco? A I did.

Q You were a kind of licensee of his, weren't you? A I was not.

Q Well, he permitted you to have desk room in his office, and the office of the Fusco Construction Company? A I paid rent for it.

Q And you did services for him? A I did some services for him, yes. 30

Q Now, then, do you remember when it was you say you went to Mr. Fusco's house? A In December, 1913.

Q In December, 1913? A As I remember the case—or, 1912, I think it was; it is several years ago. As I say, I take a great many acknowledgments, and it is pretty hard for me to tell just when.

Q (*By the Court.*) Can you tell by looking at the paper? A I might, yes, your Honor. 40

Oliver B. Ferris, cross.

Q (*By Mr. Mason.*) Can you tell in whose handwriting the body of the acknowledgment is?

A That I cannot tell, no.

Q Isn't that just the same handwriting as that of James J. Fusco? A Yes, I should think so.

10 Q Now, then, you did not fill out the body of the acknowledgment yourself, did you? A I didn't fill it out, no.

Q Now, then— A It is often done, prepared that way.

Q Was this brought to you prepared? A I think so. It was prepared at the time I took the acknowledgment, yes.

Q You say you saw Mr. Fusco sign twice?

A Yes.

20 Q You know that Mr. Fusco cannot read or write the English language, don't you? A What say?

Q You know Mr. Fusco cannot read the English language, don't you? A I don't know anything about that, whether Mr. Fusco can read it or not.

Q You know Mr. Fusco is very ignorant— A I know he is ignorant, but I don't know whether he can read the English language or not.

30 Q You know he cannot write anything except his name, don't you? A I don't know that at all of my own knowledge

Q Now, then, before Mr. Fusco—before you took the acknowledgment, did you read this contract to Mr. Fusco? A I told him what it was.

Q Answer the question; I ask you did you read this contract to Mr. Fusco? A I don't think I read the whole thing, no.

Oliver B. Ferris, cross.

Q What part of it did you read, if anything?

A I simply told him what it was.

Q And what did you tell him it was? A I told him it was a—I told him what it was, as I said before.

Q What did you tell him it was? A Mr. Mason, I cannot remember, four years ago, what it was; I simply remember I told him what that paper was.

10

Q What did you tell him it was? A How can I keep that in my memory.

Mr. Cohn. I think the witness has answered the question two or three times; I object to it.

The Court. The objection will be overruled.

Q Do you remember what you said to Mr. Fusco? A I simply told him what that agreement contained. That is all.

20

Q What did you tell him it contained? A I can hardly remember four years ago just exactly what I did say.

Q As a matter of fact you don't remember what you did say, do you? A I don't remember just what I said, no.

Q And as a matter of fact you don't remember if you said anything, do you? A I remember I told him in a general sort of way what it was.

30

Q What was your general sort of way? A Well, it is four years ago, I have taken a good many acknowledgments, it is pretty hard to remember exactly what the paper contained; I don't remember exactly what the paper contains now.

40

Oliver B. Ferris, cross.

Q Was this body of the acknowledgement filled out before you told Mr. Donato Fusco what this instrument contained? A Yes.

Q It was filled out before? A It was filled out, yes.

10 Q And it was all ready for your signature at the time? A It was ready for my signature.

Q You did not sign that as attesting witness to Mr. Fusco, did you? A I simply took his acknowledgment, that is all.

Q Can you tell in whose handwriting that writing is where it says "James J. Fusco"? A I don't know whose writing.

Q You don't know? A I don't know, no.

Q You have seen James J. Fusco write his signature very frequently, haven't you? A I can't say very frequently, no.

20 Q You have seen James J. Fusco write his name more than twice, haven't you? A I have seen him write once or twice, a few times, I don't remember how often.

Q How can you remember Mr. Donato Fusco's signature, and do not remember Mr. James J. Fusco's signature? A Because his writing was of a peculiar nature.

Q Whose? A Donato.

30 Q How long were you in James J. Fusco's office? A Five or six months I should imagine, I can't tell exactly.

Q Can you say in whose handwriting the body of this acknowledgment is? A I can't say, no.

Q And yet that is the body of the acknowledgment to which you signed your name, isn't it? A That is the body of the acknowledgment to which I signed my name, yes.

40 Q But you cannot tell in whose handwriting? A No.

Oliver B. Ferris, cross.

By the Court.

Q Where did you take that acknowledgment?

A At his house.

Q Who was present besides Mr. Fusco? A I don't remember who was present.

By Mr. Mason.

10

Q Did you take up this paper with you? A I did—no, it was there when I got there.

Q How did you come to start to answer the question by saying "I took it up"? A I didn't say I took it up.

Q It was there when you got there? A Yes.

Q And already filled in? A Already filled in. He acknowledged his signature there.

20

By the Court.

Q You mean it was signed? A It was signed, but he acknowledged his signature.

Q It was not signed in your presence? A It was not actually signed in my presence.

By Mr. Mason.

Q Didn't you say just now in answer to Mr. Cohn's question that you saw Mr. Donato Fusco sign this? A I don't think I did; I took his acknowledgment of the signature.

30

Q Didn't you say just now in the presence of the jury, in answer to Mr. Cohn's question, that you saw him sign this instrument? A I said I had seen him sign; I didn't say that particular paper; I said I had seen him sign two or three times.

Q You saw him sign twice? A Yes.

Q What were the other times you saw him sign? A Prior to that; I don't know the exact

40

Oliver B. Ferris, cross.

date; I don't keep a memorandum of the different times I take acknowledgments.

10 *Mr. Cohn.* I desire to offer in evidence written interrogatories and answers, and I will read the interrogatories and the answers, but I desire to have the answer to the third interrogatory stricken out, as irresponsible.

The Court. This is not the time to make that motion.

Mr. Cohn. May I simply put in the answers to the first two interrogatories, or must I put them all in?

20 *The Court.* It is not necessary to put them all in, but the other side may put in any interrogatories and answers which relate to those you do introduce.

Mr. Cohn. The first interrogatory submitted by the plaintiff to the defendant, and only answered by the defendant Donato Fusco, the defendant the Fusco Construction Company never having answered the interrogatories. The interrogatory is as follows:

30 "First Interrogatory. State the dates respectively on which the plaintiff was released or discharged, from any and all liability on the bonds given by it to the town of Harrison on contracts A, B and C." Answer to the first interrogatory. "A"—meaning, I take it, contract A—"June 2, 1914." "B, October 2, 1914." "C, October 2, 1914." Second interrogatory: "What notice, oral or written, was given to the plaintiff, of the acceptance by the Town of Harrison of said contracts A, B and C. (B) To whom was the notice given? (C)

40

Frederick W. Moser, direct.

By whom was it given? (D) When, and (E) Where?" Answer to second interrogatory: "A, oral notice and written notice. B, notice was given to Walter Cox and Philip Riddell, and one Walter, attorney of plaintiff. C, James J. Fusco, president of Fusco Construction Company. D, June 2, 1914. October 2, 1914. E, Harrison, New York, New York City, and wrote them from Newark, N. J." 10

I will ask the other side to produce the following letters, one addressed to Donato Fusco dated April 6, 1915; and all the other letters were addressed to Fusco Construction Company. April 6, 1915; October 19, 1914; August 17, 1914; August 7, 1914; December 15, 1913; November 29, 1913, and February 14, 1913. 20

Mr. Mason. I have never received any letter to Donato Fusco, and do not know anything about it.

(Mr. McGlynn produces certain letters and hands same to plaintiff's counsel.)

FREDERICK W. MOSER, recalled for the plaintiff. 30

Direct examination by Mr. Cohn.

Q Can you explain on Exhibits P. 5, P. 6 and P. 7 the notation "Declined, A. S. Co?" A That is a memorandum—

Mr. Mason. He just asked you if you can explain it?

The Court. Answer that yes or no.

A Yes, I can.

Q Will you explain it? 40

Frederick W. Moser, direct.

Mr. Mason. Now, I object, unless he knows of his own personal knowledge by whom it was put there.

The Court. Not necessarily by whom it was put there, but if he can explain what that notation means he can do so.

10 Q (*By the Court.*) If you know of your own knowledge; do you? A I do.

The Court. You may explain.

A Why it was put there?

The Court. Yes.

A It is a memorandum stamp to show that the American Surety Company has examined these three risks with a view of reinsuring our liability when we discontinued business. This
20 shows they have examined the risks and declined to reinsure them.

Q What date? A There is no date given.

Q (*By the Court.*) Is that your stamp or their stamp? A That is our stamp, our memorandum for our information.

Mr. Cohn. I have only one other witness, that is Mr. Teno, who was on the stand yesterday, who had the two bonds, and was to procure the third bond.

30 *The Court.* Mr. Walter is not to be recalled?

Mr. Cohn. No, he is not to be recalled. Mr. Teno is the only witness. And I desire to put in evidence these letters, the originals of which I have just demanded. Letter dated August 7, 1914, sent by the claims attorney to the Fusco Construction Company.

40 Letter marked Exhibit P. 10, and read.

Morris Cohn, direct.

Mr. Cohn. Letter dated October 19, 1914, sent to the Fusco Construction Company by A. A. W., Alfred A. Walter, the claims attorney of the company.

(Same marked Exhibit P. 11, and read.)

Mr. Cohn. Letter dated April 6, 1915, addressed to Donato Fusco, care of Fusco Construction Company, 665 Broad street, Newark, N. J., from the Title Guaranty & Surety Company, by Cohn & Cohn, attorneys. 10

(Same marked Exhibit P. 12, and read.)

Mr. Cohn. And letter sent to Donato Fusco, Glen Ridge avenue, Glen Ridge, N. J., dated April 6, 1915, to the same effect.

(Same marked Exhibit P. 13, and read.)

20

MORRIS COHN, sworn for the plaintiff.

Direct examination by Mr. Walter.

Q Are you an attorney and counsellor-at-law? A I am.

Q Admitted to practice in the State of New Jersey? A I have been admitted the last eighteen years; I mean, I was admitted eighteen years ago.

30

Q Been practicing in the State of New Jersey since that time? A Yes, sir.

Q You are the attorney for the plaintiff in this transaction? A I am.

Q Please proceed and state what, as attorney for plaintiff, you did in the prosecution of this action? A When the matter was placed in my hands, we first wrote to the defendant, Donato Fusco, and also to the defendant, Fusco Construction Company, making demand for the 40

Fred F. Teno, direct.

10: payment of the premiums which were due the Title Guaranty & Surety Company, the plaintiff; we then prepared the complaint, and went over the answers which were filed by the two defendants; we prepared formal replies; we prepared interrogatories which were served upon both defendants; there were several conferences with the claims attorneys of the plain-
New York, to inspect the bonds which had been filed by the Title Guaranty & Surety Company; tiff company; we went to the town of Harrison, we interviewed Mr. Ferris—

The Court. Is it questioned but that if they are entitled to recover counsel fees, that \$150 is a reasonable fee?

20: *Mr. Mason.* We will admit that would be reasonable.

The Court. That is all you claim?

Witness. That is all we claim.

The Court. The amount you claim is \$150?

Witness. \$150.

The Court. And it is admitted that if you are entitled to recover at all that that is a reasonable fee?

30: *Mr. Mason.* Yes, sir.

FRED F. TENO, recalled for the plaintiff.

Direct examination by Mr. Cohn.

40: *Mr. Cohn.* The defendant, Donato Fusco, has admitted in his answers to the interrogatories that the work under these different contracts, three contracts, was finished at three different times. I can prove that same thing by the same witness,

Fred F. Teno, direct.

if it is necessary, but I do not want to waste the time of the Court. In other words, Donato Fusco admits, or sets up in his answers to the interrogatories that the work on the contract A, B and C was not accepted by the town of Harrison until June 2d and October 2d.

10

The Court. That would only include one year's premiums.

Mr. Cohn. We intend to waive the premiums for the third year, in view of the testimony that has developed, that the work was actually accepted, although we did not get notice, we do not think it is fair to ask for premiums for the third year, after the time the work was actually accepted by the town of Harrison; that is, we are now only asking for premiums from December, 1913, to December, 1914, because, under one contract, the work was completed in June, 1914, and under the other two in October, 1914; and, while the application says that they are entitled until notice is brought home to the home office, we are not going to stand on that part of the case; now we want to know whether the Fusco Construction Company claims the work was done at an earlier date?

20

30

The Court. The question is whether you desire further proof than the answer of Donato Fusco to the interrogatories as to the date of the completion of the contract?

Mr. McGlynn. No, we do not want any further testimony on that.

The Court. The question is whether Mr. McGlynn, on the part of the Fusco Construction Company, is willing to accept that

40

Fred F. Teno, direct.

as the date of the completion of the contract. You say you are, Mr. McGlynn?

Mr. McGlynn. Yes, sir.

Q Did you bring with you the third bond, bond B, that you did not have with you yesterday? A No, sir.

10 Q Where is that bond? A I could not find it.

Q Did you search for it? A Yes, sir.

Q What has become of the bond? A I don't know; it is mislaid somewhere.

Q Where did you get those other two bonds from? A The town clerk.

Q That is, you obtained them from the official custody. Did you endeavor to get the third bond from the same custody? A Yes, sir.

20 Q Wasn't it there? A No, sir.

Mr. Mason. That question I object to.

The Court. The question whether or not he was able to obtain it will be admitted. If he made any search for it himself he may tell.

Q What search did you make to find that bond? A Why, I went into the town clerk's room, and asked him to produce the same, and searched with the supervisor, and could not locate it.

30 Q (*By the Court.*) Did you assist in the search yourself? A Yes, sir.

Q (*By Mr. Cohn.*) Did you ever see that bond yourself? A Yes, sir.

Q Where? A At the commissioners' room, when I signed it.

Q Oh, you signed it? A Yes, sir; not the bond, I signed the contract with the bond attached to it.

Fred F. Teno, direct.

Q What was the date of it?

Objected to.

A I could not exactly remember.

Mr. Mason. I object because it is not shown application was made to the proper custodian to produce this bond; it does not show that this man had anything to do with the custody of the bond. 10

The Court. It is shown it is out of the State.

Mr. Mason. Yes, sir, but it does not show there is any effort made to take testimony out of the State, which could have been done.

The Court. I have just been considering the effect on this case, and on that proposition. First, the case of *Hartman vs. Dobar*, 51 Vroom, page 250, where Judge Minturn, writing the opinion of the Court—and he has also written another one of which I shall speak later—says, as to the production of the contract, “We conceive that the rule requiring the production of the best evidence does not apply to transactions which are incidental or collateral to the question at issue in the case. In such cases, and the one *sub judice* is an example, evidence secondary in character cannot be excluded on the ground that primary evidence is obtainable.” Then he cites 17 Cyc. at 469, which I have read only casually. Justice Minturn writes the opinion also in the Court of Errors and Appeals in the case of *Breslin vs. Donnelly*, in 52 Vroom at page 691. On page 692 he says, referring to rulings upon similar matter, “The 20 30 40

Fred F. Teno, direct.

10 ground upon which the rulings were made by the learned trial court was the fundamental rule that the deed between the parties contained the best evidence of the transaction. This, of course, as to the direct transaction between the parties, is undoubtedly the law. But upon a collateral inquiry, such as that involved in the present question, the production of the documents involved is not necessary, since they are only incidentally involved in the main inquiry, and are not in issue in the case." I think they are a little more than incidentally involved here, because, I think before you can recover these premiums, it is necessary to show that you entered into these contracts. But I am inclined to think

20 that they are not so involved in the present question as to make that strict proof necessary which might be necessary if those contracts were the exact contracts in controversy. I would be glad to have your views upon that, Mr. Mason.

(Mr. Mason replied.)

30 *The Court.* Mr. Mason, I want to say that some of the questions the Court is now about to ask Mr. Teno may be, from your point of view, objectionable, and I want you to feel at liberty to object to questions asked by the Court precisely the same as though they were asked by counsel.

By the Court.

Q How many contracts had the Fusco Construction Company with the town of Harrison in New York? A Three contracts.

Fred F. Teno, direct.

Q One minute—where the plaintiff company in this case was security for the faithful performance of the work? A Three.

Q And they performed those contracts, did they? A Yes, sir.

Q All three of them? A Yes.

Q You have produced here two of them? A Yes, sir. 10

Q And you say that they are two of the contracts under which the work was done. That is, they are two of the contracts—two of the bonds—given by the plaintiff company for the faithful performance of two of the contracts? A Yes.

Q Now, just tell us what search you made for the other one? A Why, I went up to see the supervisor last night, they held a general board meeting, and he did not have time to come over and look over the stuff for me, and he said, “I will be there”— 20

Mr. Mason. Objected to.

Q Not what he said, just what you did. A He said, “I will be there in the morning to meet you, and we will search over things.” So the town clerk said that he had—

Q Not what he said. A He said that he had one contract— 30

Mr. Mason. Objected to.

Q You must not say what he said. A We started looking for the extra bond, and contract, and could not find it.

Q Where did you look? A Looked in the safe and also in the desk which the commissioners used.

Q And what kind of search did you make?

A Why, I don't know, we searched pretty well 40

Fred F. Teno, direct.

so I turned all the papers I could possibly turn over in their drawer.

Q Where did you get the two contracts from that you produced here? A They were held by the commission for a period of time from the last time I was in court here with them, some
10 time a year ago.

Q Where originally did you obtain them from? A From the town clerk.

Q And when you were here before did you have the third one? A No, sir.

Q Did your commission, the sewer commission, ever have these contracts in their possession? A Yes, sir.

Q And when they left their possession what did you do with them? A Turned them over
20 to the town clerk's office.

Q All three of them? A All three, to be put on file.

Q And was it in the town clerk's office you searched for the third one? A Yes, sir. They just moved from one place into the other, and the things are in quite, I suppose, not very good file, and may be laid some place, and may turn up later on.

Q What had the sewer commissioners to do
30 with the construction of this work? A The whole supervision of the work.

The Court. The contracts themselves are made by the town of Harrison that are produced here?

Mr. Cohn. Yes, sir.

Witness. They were made by the commissioners.

Q You had nothing to do, as commissioner,
40 with the making of the contract? A Yes, sir.

Fred F. Teno, direct.

Q Oh, you did make the contracts? A Yes, sir.

Q For the construction of the sewer? A Yes, sir.

The Court. Let me see those contracts.
(Contracts handed to the Court.)

10

Q The third contract which is not produced was in what general form with reference to these contracts which are produced?

Mr. Mason. I object to that.

The Court. The objection will be overruled, and an exception noted.

An exception to this ruling is noted by the defendant, Donato Fusco, as ground of appeal.

A They were in the same condition as them. 20

Q You mean the same general form as these you do produce? A Yes, sir.

The Court. I am inclined to permit—I emphasize the word “permit”—testimony as to the variations in the general form from the contract now in evidence of the contract which is not produced. I will hear you as to why I should not do so.

Mr. Mason. Those contracts are not in evidence as to Donato Fusco. 30

The Court. I am going to admit them as to Donato Fusco shortly, because I think they should be.

Mr. Mason. They are not, as yet.

The Court. I will admit them now, and an exception to that ruling may be noted.

An exception to this ruling is noted by the defendant, Donato Fusco, as ground of appeal.

40

Fred F. Teno, direct.

Mr. Mason. May I interrogate the witness?

The Court. You may.

By Mr. Mason.

Q Did you tell Mr. Cohn, over a year ago,
10 that you did not have this third contract? A
A year ago I only had one of the contracts at
the court.

Q You only brought one a year ago? A
Yes, sir.

Q Now, then, Mr. Cohn and Mr. Walter
knew a year ago that you only brought one con-
tract, didn't they? A Why, I don't know; I
don't remember if they were produced or not.

Q Didn't you talk with them about the bring-
20 ing of the contracts? A I did for this trial;
they called me up and asked me if I would get
them for them.

Q Did not they tell you that a year ago?
A They asked me to get records of the sewer
work, and I did not know what records they
wanted, and I brought leaves, and one of the
contracts, and a few other articles pertaining
to the sewer construction.

Q Didn't you tell them that you did not have
30 this contract? A This time I did, yes, sir.

Q Didn't you tell them that before? A No,
sir.

Q When did they just move these records?
A About a year ago, I guess, or so.

Q So it is not recently that the records were
moved? A Why, not recently, no, sir.

Q Did you look for these contracts a year
ago? A No, sir.

Q Then how was it you only brought one
40 contract a year ago? A A year ago we had

Alfred A. Walter, direct.

the contracts in the sewer commissioners' possession.

Q Then why didn't you bring all three of them a year ago if you had them in your possession? A I wasn't asked to bring them.

Q Why did you happen to bring one of them? A Why, I just brought up different stuff which I thought would be required; I was asked to bring up different evidence. 10

Mr. Mason. I now formally object to the admission of the testimony.

The Court. The objection will be overruled.

By Mr. Cohn.

Q Do you know what the contents of the third bond and contract were? In other words, in what respect it differed from the other two contracts as to date and amount? A I could not answer that. 20

ALFRED A. WALTER, recalled for the plaintiff.

Direct examination by Mr. Cohn.

Q Did you go to the clerk's office, and the sewer commissioners' office, in the town of Harrison, New York? A When? 30

Q Within the past year? A I did.

Q Could you tell us about what time you went there? A Well, I think it was March or April of this year; it was about two months before the case was up before, and I think it was in June before.

Q Who accompanied you? A You did.

Q (*By the Court.*) To whose office? A To the sewer commissioners, and town clerk of Harrison, New York. 40

Alfred A. Walter, direct.

Q (*By Mr. Cohn.*) Did you, or did you not, see on file in either of those offices at that time the three bonds and contracts, A, B, and C, which are referred to in this case? A I did; I saw them in the town clerk's office, Harrison, New York.

10 Q Can you tell us the date and the amount of the contract and bond B? A I can from referring to record that I made at the time.

Q Have you that record with you? A I have.

Q Will you refer to it?

Mr. Mason. I wish to renew my objection.

20 *The Court.* The objection will be overruled, and an exception noted. In fact, your exception will be understood as going to all evidence relating to the contents of bond B, without specifically being made, upon the ground already stated.

Q In whose handwriting is the record from which you are about to refresh your recollection? A Yours.

Q In my handwriting. Did you see me write it? A I did.

30 Q Now, will you refresh your recollection and state the date of that contract, whether it was signed and the amount.

The Court. I think you have not gone quite far enough to permit him to use this memorandum. It was made by you.

By the Court.

Q The question is whether or not you, at that time, verified from the bond itself the memorandum made by Mr. Cohn? A I dic-

Alfred A. Walter, direct.

tated it to him, dictated it from the original bond, and he took it down, and he redictated it, he read it back to me. A part of this record I am referring to is in typewriting; we had, when we went up there, I believe, a copy of the bond in question, that part in typewriting he checked up, that completed it, and then we checked that up. 10

By Mr. Mason.

Q When did you put in this typewritten part? A I didn't put it in; it was on this form of copy we had on the files, when I went there.

Q In whose handwriting is this part here?

A Mr. Cohn's.

Q The gentleman here? A Yes, sir.

Mr. Mason. I object. I want to further state that this shows and purports to be a contract bond made by the Fusco Construction and the Title Guaranty Company, and it is not signed by the Fusco Construction Company. 20

The Court. Does that make any difference under that contract with them, even though it were not signed, if they had entered into bonds with the town of Harrison for the faithful performance by the Fusco Construction Company of the main contract would it make any difference that the Fusco Construction Company had not signed the bond which the surety company sent to the Town of Harrison? 30

Mr. Mason. I think it would; the bond would be void.

The Court. It appears to be attached to the contract which was signed by the Fusco Construction Company. 40

Alfred A. Walter, direct.

Mr. Mason. But this appears to be a joint bond which the Fusco Construction Company were not a party to.

The Court. They never entered into it, but I assume it is a bond for the faithful performance by Fusco of the contract which precedes it.

Mr. Mason. But the Fusco Construction Company never joined in that bond, and, therefore, I think it is not a bond.

The Court. You may give us the terms of the bond, omitting, of course, those portions of it which are printed.

Mr. Mason. Under the circumstances I think this should go in evidence as a sworn copy.

The Court. Are you willing to do that?

Mr. Mason. We are willing.

Witness. I must make one explanation. When we examined this bond up there I don't know whether the original bond was signed by Fusco, or not, I was not interested in that—we were not, rather—we went up there to find out whether they had a bond executed by us. I am unable to say—

Mr. Mason. I object to this, because it is not an answer to any question.

The Court. I think it is not improper.

Witness. I went up there to find out whether this bond was signed by us; we took off from the original bond on file such facts as we believed showed our liability on it. I did not examine the original bond to find out whether it was signed by the Fusco

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Alfred A. Walter, direct.

Company, and I cannot at this time say it was, or was not.

The Court. With that explanation are you willing this paper should go in?

Mr. Mason. No, sir.

Mr. Cohn. In other words, we are not responsible for the dereliction, or laches—

10

The Court. That is argument. We are admitting this copy as a copy of bond B.

(Said paper marked Exhibit P. 14.)

By Mr. Cohn.

Q That contract is dated December 28th, I think? A December 28th, the bond, 1912.

Q And the amount is \$35,330.

The Court. Is there any question about the annual premium on bonds A, B, C?

20

Mr. Mason. We do not know anything about them.

The Court. All right, that has not been shown.

Mr. Cohn. I understood that was shown by those cards. I did not read them to the jury.

By the Court.

30

Q Was there a flat rate for such a bond in 1912? A There was.

Q What was it? A One-half of one per cent. of the amount of the contract, not the amount of the bond, one-half the amount of the contract.

Q (*By Mr. Cohn.*) Can you tell us what the premium on each of those bonds was? A One-half of one per cent. of the amount of the contract.

40

Alfred A. Walter, cross.

Q (*By the Court.*) That is an annual premium, is it? A Yes, sir.

Q (*By Mr. Cohn.*) How are those premiums payable? Annually in advance.

10 *The Court.* I suppose they are payable in accordance with the contract which was executed.

Q The premium on contract A, was that \$232.83 (showing witness a card)? A It was.

Q And on contract B, \$353.30? A It was.

Q And on contract C, \$147.30? A Correct.

Cross examination by Mr. Mason.

20 Q Did not different agents of the company have authority to make different arrangements as to payment of premium? A Not to my knowledge.

Q The amount of premium that Fusco agreed to pay you do not know of your own knowledge? A No, I don't think I do.

By the Court.

Q I think you said you were connected with the company in 1912, when those contracts were executed? A I had nothing to do with the execution of them.

30 Q No, no, but I think you said you were connected with the company? A Yes, sir.

Q And when you stated what the rate was did you state that to be the rate as of April 11, 1914, when you came with the company, or was that the rate in November and December, 1912? A That was the rate in 1912, and was also the rate in 1914, I believe, although I am not sure, and that is the rate today.

Motion for Non-Suit.

Q We are not interested in what the rate is today, of course. A There is no question that that was the rate then.

PLAINTIFF RESTS.

Mr. Mason. I wish to make a motion for a non-suit, first, on what is known as Exhibit A; this is the bond that is purported to be dated December 5, 1912; the contract, as your Honor will recall, under which they seek to recover, is dated December 19, 1912. Your Honor will notice the contract reads, under which they seek to recover, in the beginning, it recites "made between Fusco Construction Company and Donato Fusco," and recites the provisions of the contract. This, as you will see, is dated after the delivery of Exhibit A, or the contract A. As to Exhibit P. 3, which is known as contract C, I make the same motion for non-suit, on the ground that this purports to have been signed and sealed the 6th day of December, 1912, and on the further ground that while it purports to be a contract bond, reading "Know all men by these presents that we, the Fusco Construction Company"—

The Court. It does not recite the contract.

Mr. Mason. Not only that, but it is not signed or executed on behalf of the Fusco Construction Company, and under those circumstances, it not being a valid bond of surety, the law is, where a bond of surety, or any contract, purports to be made by two or more parties, and it has never been signed or executed by one or more of

Motion for Non-Suit.

10 those parties, it is a nullity, and, therefore, this company, in this instance, never executed a valid bond to the Town of Harrison, and, therefore, never having executed the bond, being defective, there was no liability on their part, no valid obligation to the town to Harrison was ever delivered, and, therefore, not only was it dated prior to the time on which this alleged contract with Donato Fusco is stated to have been made—

The Court. I would like to have your authority for that proposition.

20 *Mr. Mason.* I have not a case right off-hand, but there are several cases on that under the heading of "Surety" in Parker's Digest.

The Court. You may proceed with the other one. I suppose you want to make the same motion on contract B.

30 *Mr. Mason.* On contract B, known as Exhibit P. 14, I think, which is alleged to be a bond between the Fusco Construction Company and the Title Guaranty & Surety Company, it shows on its face, on the sworn copy, that it was never executed by one of the alleged parties to this agreement, that is, the Fusco Construction Company, the party referred to in the recital as one of the parties to the bond. And I want to make a further objection that all of these alleged contract bonds recite "Whereas the said contractor has entered into a written contract dated 19 , with the said obligee, a copy of which contract is hereto annexed," and there being that defect in the bond, that there is a further

40

Motion for Non-Suit.

ground that all three of these agreements are defective. I seriously urge the other two points. And, besides, it shows by these cards from the plaintiff's own case, that no charge for these premiums is entered there, and there is no evidence that those premiums are unpaid.

10

The Court. Is not payment a defense?

Mr. Mason. Yes, sir.

The Court. Then must payment, or non-payment, be shown on the plaintiff's case?

Mr. Mason. It must be shown that the payment is due.

The Court. I cannot grant a non-suit on that point. One of these bonds appears to be signed by the Fusco Construction Company. Therefore I will deny the motion for non-suit, and your motion will probably come up for a motion on the direction of a verdict at the close of the case, at which time I will ask you to show me the authorities upon which you rely for that proposition.

20

An exception to this ruling is noted by the defendant, Donato Fusco, as ground of appeal.

30

The Court. I suppose you also want to move for a non-suit on the same ground, Mr. McGlynn?

Mr. McGlynn. I might as well, your Honor.

The Court. The motion will be noted on the same ground, and denied, and an exception noted.

An exception to this ruling is noted by the defendant, the Fusco Construction Company, as ground of appeal.

40

Donato Fusco, direct.

The testimony of Donato Fusco, taken at his residence, by direction of the Court, is read as follows:

“DONATO FUSCO, defendant, sworn in his own behalf.

10 “*Direct examination* by Mr. Mason.

“Q Mr. Fusco, you are one of the defendants in this suit? A I don't know.

“Q Well, your name is Donato Fusco, isn't it? A Yes.

20 “Q A suit has been instituted against you by the Title Guaranty & Surety Company, of Scranton, Pennsylvania, to recover premiums alleged to be due upon three bonds, alleged to have been executed by the Title Guaranty & Surety Company for the Fusco Construction Company, and they are suing you upon a written agreement alleged to have been signed and executed by you, the alleged contract being Exhibit P. 2. A If you find any name like that, all right; if you find any name signed by me.

“Q I show you this Exhibit P. 2, and ask you if that writing, 'Donato Fusco,' is your signature?

30 “*Mr. Cohn.* I object, on the ground that he has admitted in his pleadings that he executed the instrument.

“*The Court.* The pleadings do acknowledge that, but they say that the signature was obtained by fraud. The answer will be recorded, however.

“*Plaintiff's counsel* prays an exception and the same is allowed.

“A No, sir.

40

Donato Fusco, direct.

“Q Did you authorize any one to sign that paper for you? A I never saw nobody, Mr. Mason; I never saw nobody; I don't know who this is; I never seen nothing.

“*Mr. Cohn.* I object to the answer.

“*The Court.* The answer may be recorded. 10

“Plaintiff's counsel prays an exception and the same is allowed.

“Q Did you authorize anybody to sign your name there? A Nobody ever asked me for anything; nobody; I could sign my name on a thousand checks; I can show my name.

“Q Can you read English? A No; that is the only trouble; I don't read English; I don't write. 20

“*Mr. Cohn.* I object to that line of examination on the ground that his acknowledgement to the execution of the instrument and its contents was made known to him, and such evidence is incompetent, irrelevant and immaterial.

“*The Court.* The answer may be recorded.

“Plaintiff's counsel prays an exception and the same is allowed. 30

“Q Do you write any English except your name? A No; just my name, that is all; I don't write English, I write Italian, not English.

“Q Part of this provision states ‘That on the 19th day of December, 1912, before me personally came Donato Fusco, Montclair, New Jersey, to me known and known to me to be the individual described in and who executed 40

Donato Fusco, direct.

the foregoing instrument, and he acknowledged that he executed the same.' It is signed by Oliver Bunce Ferris, attorney at law of New Jersey. Do you know Mr. Ferris? A I knew Mr. Ferris when he lived in Montclair eight or nine years ago. He came here once to see
10 Jimmie, but I never spoke to him. I have never seen him since. He used to live in Montclair. His father was in Elm street.

"Q Did you ever acknowledge to Oliver Bunce Ferris that you signed and executed this instrument? A I never saw this Ferris at all I tell you, Mr. Mason; they never asked me.

"Q Did you ever appear before him? A No, sir; I never saw him, I tell you; I never been in his office since he has got it; never been to Harrison, New York; never did.
20

"Q You are in the contracting business yourself, are you? A Yes, twenty-five years.

"Q Did you ever know, before this suit was instituted, that this paper was in existence? A When the paper came up to me the night before I don't know, no; I don't know anything about since they came; they sent me paper just like this. That was the 19th day of December. I saw that Ferris; I never saw them; I never
30 know; I never been in his office. I can write my name.

"Q I show you a number of checks and ask you by whom were those checks signed? A I can show you a thousand checks.

"Q I show you some checks and ask you by whom were those checks signed? A What checks?

"Q These papers. (Handing papers to witness.) By whom were those checks signed? A They were signed by me.
40

Donato Fusco, cross.

“Q All of them? A All of them.

“*Mr. Mason.* I would like to offer them in evidence.

“*Mr. Cohn.* No objection.

“Bundle of nine checks marked Exhibit D. 1.

10

“Q Did Jimmie, your son, ever ask you to sign this paper? A No, sir.

“Q Did anyone ever ask you to sign this paper? A Nobody, Mr. Mason, mentioned about this paper, about the bond. I told you before, Jimmie went—

“Q One moment. Did you go to the office of Messrs. Church & Harrison about putting in a defense for you? A Yes.

“Q In this answer it states that you admit the execution of this instrument, that you admit that you signed this? A No, sir.

20

“*Mr. Cohn.* I object.

“Q Whom did you see at the office of Messrs. Church & Harrison? A Mr. Harrison.

“Q Did you, at that time, tell Mr. Harrison that you had signed this paper?

“*Mr. Cohn.* I object.

“*The Court.* Objection sustained.

30

“*Cross examination* by Mr. Cohn.

“Q Did your son reside, or live with you, in 1912? A He always stopped here, sleep, that is all, but he didn't do business with me; he did business down in 1904, until he was—about eleven years ago he started in business for himself.

“Q You say he only sleeps here? A That is all.

40

Donato Fusco, cross.

“Q You saw him every day? A Not every day; he was staying away, you know; he comes in and out, you know; he don't stay here steady.

“Q Did you ever go to your son's office in 1912? A Never go; never saw his office; I don't want him to keep that office.

10 “Q Were you ever in your son's Jimmie Fusco's office? A Never been in.

“Q Ever been in the Fusco Construction Company's office? A I tell you I never know what it is; I don't want him to keep; I tell him, 'Here is my office, ten cents a book; why do you want to pay \$33 a month rent.'

“Q Will you write your name on a piece of paper? Write it on the back of one of those checks. A (Witness signs name.)

20 “Q Is that your handwriting on there (handing another paper to witness)? A No, sir; not on your life.

“*Mr. Cohn.* I would like to have that marked for identification.

“*Mr. Mason.* No objection.

“Said paper Marked Ex. A as of Dec. 8th for identification.

“Q Is that your handwriting (showing another paper to witness)? A This is, yes.

30 “*Mr. Cohn.* I ask that it be marked for identification.

“Said paper marked Ex. B as of Dec. 8th for identification.

“Q Are you sure this one, Exhibit A as of December 8th, is your signature? What do you say? A No, it is not; you can see yourself; anybody can see.

40 “Q Is that your signature (showing another paper to witness)? A No, sir; it is not.

Donato Fusco, cross.

“*Mr. Cohn.* I ask that that be marked for identification.

“Marked Ex. C as of Dec. 8th for identification.

“Q Did you know that the Fusco Construction Company had a big contract for sewer construction work in Harrison, New York, in 1912? A I just heard that they had, but I never took any notice or any interest; I never been; never saw them; I never know anything; I know they were talking about it, that is all. 10

“Q After you went out of the contracting business the Fusco Construction Company was formed, was it not? A I was not out of the business; I am in the business now.

“Q You are still in the contracting business? A Sure. 20

“Q And your son, James Fusco, is in the contracting business as an officer of the Fusco Construction Company? A That is what he used to have; I don't know if he has got it now or not.

“Q Isn't the Fusco Construction Company in existence any more? A I don't know anything about it. Don't ask me those questions.

“Q Don't you see your son every day? A I see my son, but I don't talk to him; I just let him stay here. 30

“Q Is your son married? A No, sir.

“Q He takes his meals at home, doesn't he? A Sometimes.

“Q Don't you know whether he, or the Fusco Construction Company, is doing any business? A I don't know anything about it; I never took any interest in it; I never knew anything at all about his business. 40

Donato Fusco, cross.

“Q Since when haven't you taken any interest in his business? A Never at all; I never been in it; I never had anything to do with it since he started.

10 “Q Do you mean to say that in the last six or seven years you never took any interest? A Since eleven years, since he has been in business, I never had anything to do with his business.

“Q Do you remember asking him anything about his business? A I never say to him nothing. He asked me. I said, 'You keep away from me.'

20 “Q Are you on bad terms with your son? A I am not on no bad terms, but I am a little bad. He stuck me on the first contract he had; he stuck me \$7,500; Mr. Mason knows.

“Q (*By Mr. Mason.*) What contract was it that he stuck you on? A On Park place, Newark.

“Q (*By Mr. Cohn.*) How long ago was that? A The first contract he had, eleven years ago. He was twenty years old, going to school, and yet he went and put in a bid for himself, \$27,000 for sewer, under Mr. Rankin.

30 “Q Do you know when the Fusco Construction Company was formed? A I don't know, at that time; I didn't know it was any Fusco Construction Company; I think it was personal, himself; I don't know anything at all about this company.

“Q Did you swear to an affidavit in Mr. Mason's office? A To what?

“Q In September, 1916? A For what? Yes, I did.

“Q I am asking you, did you swear to that affidavit in Mr. Mason's office? A In 1916?

40 “Q September, 1916. A Yes.

James J. Fusco, direct.

“Q What did you swear to at that time? A Well, I swear I didn’t have anything to do with this bond.

“Q Is that all that you swore to at that time? A That is all, I think; I don’t know; I don’t remember.

“Q Did you ever receive a letter from Cohn & Cohn, asking you to pay certain premiums? 10

A No sir; never had any letter from nobody.

“Q Certain premiums which were owing to the Title Guaranty & Surety Company? A No, sir.

“Q Did you hand this letter of Cohn & Cohn, which was dated April 6, 1916, to your son, James Fusco? A I don’t know nothing about it; he didn’t brought it to me; he didn’t say anything to me about the letter or anything. 20

“Q You are sure you didn’t receive a letter? A I am sure I didn’t have no letter, only that first paper, about December 19, 1912. That is all I know.

“*By Mr. Mason.*

“Q Do you mean by that paper that, was the paper the Sheriff brought here? A Yes, that is all I got; I never had no paper before, and never after, or nothing.” 30

JAMES J. FUSCO, sworn for the defendant,
the Fusco Construction Company.

Direct examination by Mr. McGlynn.

Q Mr. Fusco, you were president of the Fusco Construction Company, December, 1912?

A I was.

Q Do you remember how you paid the premium on the bonds the Title Guaranty & Surety 40

James J. Fusco, direct.

Company wrote for your company on the Harrison sewer contract? A I paid for them in checks.

10 Q I show you a check dated December 6, 1912, on the Roseville Trust Company, Newark, N. J., pay to the order of Ritch, Hughes Company \$380.12, stamped "Paid, Roseville Trust Company, December 10, 1912," and ask you if that is one of the checks with which you paid the premium on these bonds? A That is.

Mr. Cohn. We are not suing for the premium this represents, we are suing now only for the 1913 to 1914 premium; we do not dispute the fact that this is paid.

Said check marked Exhibit D. 2.

20 Q I show you another check dated May 19, 1913, on the Roseville Trust Company, pay to the order of the Title Guaranty & Surety Company, \$353.30, with the notation, "Payment in full for premium on bonds for Harrison, New York, sewer contract," signed "James J. Fusco," and stamped "Roseville Trust Company, paid May 24, 1913" and endorsed "Pay to Title Guaranty & Surety Company, Fred C. Williams, resident manager."

30 (Said check handed to plaintiff's counsel.)

Mr. Cohn. We object to this check on the ground we are not suing for this, and also on the ground it is a self-serving document.

Mr. McGlynn. I had not finished my question.

40 Q And ask you whether you gave this check to the Title Guaranty & Surety Company in payment of premium? A I did.

James J. Fusco, direct.

Q And the amount of this check, plus the amount of the first check, amounts to exactly the first year's premium on all three bonds, am I right? A Yes, sir.

Q When you gave this check dated May 19, 1913, to the Title Guaranty & Surety Company, was the notation "Payment in full," and so forth, on that check? A It was made right there in the office, in the presence of Mr. Williams. 10

Q Where was that office? A 84 William street.

Q Did you have a conversation with Mr. Williams of the Title Guaranty & Surety Company when you gave him that check? A Quite a lengthy one.

Mr. Cohn. I object to this evidence on the ground it does not appear who Mr. Williams was, or is, and on the ground it is incompetent, irrelevant and immaterial. 20

The Court. The fact that he had a conversation with Mr. Williams—

Mr. Cohn. The fact that he had a conversation with Mr. Williams.

The Court. The question may be answered that he had a conversation with Mr. Williams; it may be quite improper to go further. 30

Q Now, Mr. Fusco, will you explain the circumstance of giving this check, and the conversation with Mr. Williams at the time it was given?

Mr. Cohn. I object.

The Court. I sustain the objection. 40

James J. Fusco, direct.

Mr. Mason. It appears from these contracts offered in evidence they are all executed and signed by the Title Guaranty & Surety Company by Frederick D. Williams, resident vice-president.

10 *Mr. Cohn.* I object to the check on the ground it is a self-serving document.

The Court. The check has not been offered.

Mr. Cohn. As to the conversation, if it was made with this gentleman, I cannot object.

The Court. No, I did not understand that. You may state the conversation.

Q Just the conversation with reference to this check, and the reason for the notation on it?

20 A Mr. Williams summoned me down to his office, he wanted to get the premiums on these bonds, because I promised to pay them, half of it in advance, and half within sixty days, I think it was; and he stated to me at the time that if I would pay these premiums in full, covering one year's premiums, that if the contracts ran over a year they would not charge anything on the other premiums. So I went down to his office to make the payment, and before making
30 the payment I had a discussion with him about that matter, and then finally gave him that check that is signed.

Q At that time did Mr. Williams ask you how near the contracts were completed, and the approximate length of time to complete? A Well, I told him when he gave me those bonds it would take from a year to a year and six months. He said, "If you pay the premiums the first year half in advance, and half in sixty
40 days, if you go over a few days we won't

James J. Fusco, cross.

charge you anything for the over, for it is customary to do that; and I paid him fifty per cent., and three or four months elapsed, and we had difficulty in getting money up there, the weather was bad; we were not doing much work, and I went down and saw him and told him how far we had advanced, and how long it would take to complete the work. He said: "If you give me a check now in full for the first year's premium we will call the whole thing off; and so I gave it to him about that, and I asked him if that was satisfactory to give a receipt, and he said the check will be a receipt; and we didn't hear anything further from him until 1915, when those people commenced suit. Said check is offered in evidence. 10

Mr. Cohn. Objected to on the ground it is self-serving. 20

Objection overruled.

To this ruling an exception is noted by the plaintiff as ground of appeal.

Said check marked Exhibit D. 3.

Cross examination by Mr. Cohn.

Q Do you know whether Mr. Williams is an employee of the plaintiff company at this time?

A Why, I don't know, I haven't seen him since that day that I gave him that check. 30

Q Did you make any effort to bring him as a witness in this case to corroborate your statement? A No.

Q Why didn't you? A I didn't think it was necessary.

Q (Showing witness a paper.) Is that your signature.

Mr. McGlynn. I object to that as not proper cross examination. 40

James J. Fusco, cross.

The Court. The objection will be overruled. To this ruling an exception is entered by the defendant Fusco Construction Company as ground of appeal.

10 Q Is that your signature to this indemnity agreement which is being sued upon? A That is the company's signature.

Q Did you sign it? A I signed it as agent, yes.

Q What did you do with the paper—did it have at that time the name of Donato Fusco on it when you signed it?

Mr. Mason. I object.

The Court. Objection sustained, that is not cross examination.

20 Q Was there anything else on that paper at the time you signed it?

Mr. Mason. I object.

The Court. Why do you think that is proper cross examination?

30 *Mr. Cohn.* The fact that he had signed it, as leading up to whether or not, in view of the contents of that paper, there would likely have been made the promise which he said Mr. Williams made to him, was probable, but further than that, I think that any examination with reference to the paper is incompetent.

Q You can read and write, can't you? A Yes, sir.

Q Did you read this agreement?

Mr. Mason. I object to that as not cross examination.

The Court. I overrule the objection.

James J. Fusco, cross.

To this ruling an exception is noted by the defendant Donato Fusco as ground of appeal.

A Let me see it.

The Court. As bearing upon the probability of the story he told about what happened with Mr. Williams, his attention may be called to that provision of the contract. To that extent I think it is proper cross examination.

10

A Why, yes, before it had been fully executed.

Q You read that agreement? A Yes.

Q Why didn't you get this agreement back, or have it cancelled, in view of what Mr. Williams said to you.

20

Mr. Mason. I object.

The Court. I overrule the objection.

A I didn't know there actually was any such agreement in existence; when I had it, it was just simply a blank form of indemnity agreement given to me by Mr. Riddell, and asking me to get indemnity on it, and I told him there wasn't any indemnity agreed upon, and I didn't think I could get any indemnity, and gave it back to him in that condition. This is the first time I have ever seen it from then, the time it was blank.

30

Q Do you mean to say that you gave this paper back as it is, simply your signature on as Fusco Construction Company by James Fusco?

A Yes. I had given Mr. Riddell a list of some people that might go indemnity, and he wanted to have it all ready for execution.

Q Did you give him your father's name.

40

James J. Fusco, cross.

Mr. McGlynn. I object. I think this cross examination is going too far afield.

The Court. I think it is very important.

An objection to this ruling is noted by the defendant, the Fusco Construction Company, as ground of appeal.

10 Q Did he ask your father's name? A I think he did at first. I told him that—

Q Why did you say a moment ago that you did not? A I said I gave him a list of names that did not include my father. He said, "Why don't you get your father's indemnity on this?" I said, "I don't think it could be done, he was not a party to the contract, and I don't think he would agree to sign anything like that;" and it wasn't understood that any indemnity was to be given, and I didn't think I could get any, and they would have to accept the bonds as they were, and I didn't hear anything further from them until this suit came up.

20

Q Tell us what names you gave as indemnity? A I don't remember now, four years ago.

Q Did you give any names? A I think I did.

Q How many? A I can't remember, four years ago.

30

Q You can remember there was nothing else on this agreement? A Certainly.

Q But you can't remember any of the names that you gave for indemnity? A Yes.

Q Where was this conversation you had with Mr. Williams? A In the Title Guaranty & Surety office, 84 William street, on the seventh or eight floor.

Q What was the date of this conversation? A The date of that check, it was between May 19th and May 22d, some time between then.

40

James J. Fusco, cross.

Q May 19th and May 22d of 19— A '13.

Q '13? A Yes.

Q Tell us that conversation again, if you can tell it the same way that you stated on your direct examination. A Why, Mr. Williams wanted to collect the premiums that were due, half of them, because the other half had been paid in advance, and also wanted to know what the progress of the work was up there. I went in there and stayed there about an hour talking about things, and particularly about this contract, and the premiums, and he asked if I could not pay him the balance. So I told him I could pay the balance, but it was understood when these bonds were written if they were paid for half in advance and half in sixty days, if the contracts ran over a few months I was not to be charged any second annual premium. "Well," he said, "you give me a check for the first year's premium in full, and we will call it off." So I took a check book, and wrote the check, and asked for a receipt, and he said, "You don't need a receipt, just put it on the check, 'Payment in full for premiums on Harrison sewer contract,'" so I did that, and never got a bill, or heard from him until this suit was instituted.

10

20

30

Q But you have forgotten an important part of that conversation you gave a few minutes ago, tell us the rest of it. A What is that?

Q You said you did not think the contract could be completed for a year, or a year and a half, and he said "All right, I will give you a year and a half." A I told him that when we started, he asked how long it would take to complete the contract, and I said under

40

James J. Fusco, cross.

favorable conditions we might finish in a year, but if we had any difficulties, which usually occur in the course of such work, it might take us a year and six months, or a little more; and he agreed if it took a year and a few months they would not charge for any second annual premium, provided we paid the first annual premium before the first year expired.

10 Q Don't you know that you stated to your attorney that that work was all done before September 6, 1913? A No, that is not so.

Mr. McGlynn. I object, if it please the court.

Q Did you tell your lawyer, Mr. Edward R. McGlynn, that the work under that contract was completed prior to December 6, 1913? A He must have misunderstood me.

20 Q He must have misunderstood you, you never told him that? A I never told him that, no.

Q You never told your lawyer that this work was completed, that under the contract between you and the Town of Harrison referred to in the complaint, was completed Thursday, December 6, 1913, and that all premiums for which it was liable had been paid in full, and that the plaintiff has not, since the execution of the bonds referred to, been in any manner damaged by reason thereof? A That must be a mistake in date, because we only started work about that time.

30 Q You mean you only started work December 6, 1913? A That is when the season practically began; we got these contracts in the winter time, four months of winter.

Q I am referring to December 6, 1913. A December 6th? A I thought you said June.

40

James J. Fusco, cross.

Q No, no, December 6, 1913, your lawyer says that you claim that the work had been all done? A 1914, that was the date I gave.

Q Then, in other words, it took two years? A Took about thirteen months on one contract, and about sixteen months on the other two.

Q Where do you think that your attorney got the idea that the work was all done prior to December 6, 1913? A I don't know. May it please the Court— 10

Mr. McGlynn. I desire to have objection on the record to the latitude of the cross examination.

The Court. Yes, it has gone way beyond the direct examination now.

By the Court.

Q Mr. Fusco, was this conversation with Mr. Williams before or after this contract of indemnity entered into by their company? A Well, I had two conversations with him. 20

Q The first one was when, before or after? A The first was before any of those bonds had been actually executed.

Q What was the conversation before any of the bonds had been executed? A Do you want me to go into detail? 30

Q Was this conversation where you told him that it might take one year and five or six months to complete the contract, and he told you that if you paid in full one annual premium that that would be all you would be required to pay in substance? A He told me that when I gave him that check, and that was also—

Q I want to know when was the first time? A The first time when I made application for these bonds. 40

James J. Fusco, cross.

Q And before any— A Before any contract had been signed.

Q The next time, you say, when he told you specifically, that was when you gave this check for \$353? A Yes, sir; that was payment in full for the first year's premium.

10 *By Mr. Cohn.*

Q To whom did you apply for these bonds?

Mr. McGlynn. Objected to as not cross examination.

The Court. I think it is, because he said he had this conversation with Mr. Williams before he entered into the bonds.

Q To whom did you apply for these bonds?

A Why, Mr. Riddell, he solicited the bonds, he
20 came to me, well, the same night we were awarded the contract, we submitted the bid, Mr. Riddell presented a letter and gave me a card and asked me to give him an opportunity to furnish the bonds to a local agent up there acting as his representative.

Q Who was that local agent? A Mr. Walter Cox.

Q And who actually procured the bonds for him? A The Ritch, Hughes Company.

30 Q How did you come to Mr. Williams then?
A Mr. Riddell asked me up to the Ritch, Hughes Company, and told me that they were people that handled a lot of bonds of that kind, and had considerable influence with some of the insurance companies, and in that it was a difficult bond to obtain quick, under the circumstances, they were specialists and could get the bond for me if anybody could. So he introduced me to Mr. Smith of the Ritch, Hughes
40 Company, and left us, and I sat down and had

James J. Fusco, cross.

a talk with him and he took me down to Mr. William's office, and he had me talk to Mr. Williams as to my past experience in that kind of work, and as to my capability to carry out the contract; and he told us he would let us know in a few days.

Q Who asked you to get this indemnity? A 10
Mr. Riddell, after the contract had been executed, some time after.

Q And was it to him that you gave the names of these parties who were to indemnify the surety company? A To him, and the Ritch, Hughes Company.

Q Did you give it to anybody else?

Mr. McGlynn. I object to that as not being cross examination.

Objection sustained. 20

Q (Showing witness paper.) Is this your handwriting? A I signed it, yes.

Q And is the contents—just read that letter and let us know whether the contents of it are true?

Mr. Mason. Is that cross examination?

The Court. I can't tell, I don't know. If it relates to payment of premiums, it probably is. A Yes, that is true. 30

Said paper marked P. 15 for identification.

Q Did you state that you went to Mr. Riddell's office with a Mr. Smith? A Went to Mr. Riddell's office, did you say?

Q Yes. Oh, Mr. Williams's office? A I met Mr. Riddell somewhere in New York.

Q With whom did you go to Mr. Williams's office? A Mr. Smith, of Ritch, Hughes Company. 40

James J. Fusco, re-cross.

Q Where is Mr. Smith? A The last time I saw him, about two years ago, still in their employ.

Q Employ of the title company? A No, of Ritch, Hughes.

Q Didn't you make any effort to produce him? A I did not.

By Mr. Mason.

Q Do you know whether or not this signature, Donato Fusco, attached to this Exhibit P. 2, is the signature of your father?

Mr. McGlynn. I object to that, I don't think that is proper cross examination of any witness, either.

The Court. Probably making him his own witness.

Mr. McGlynn. Then I think he should say so.

Mr. Mason. I will call him as my witness for the defendant Donato Fusco.

The Court. All right, what is your answer? A Why, it doesn't look like it.

Q I show you some other papers and ask you if those checks were signed in the handwriting of your father, Donato Fusco?

The Court. That is not denied, Mr. Mason, probably he can't deny it.

A They are.

Re-cross examination.

Q Was that signature there when you signed that paper? A It was not.

Q When did it get there? A I don't know.

Q Didn't you write it there? A Why, certainly not.

James J. Fusco, re-cross.

Q Just write the name "Donato Fusco" yourself on a piece of paper. A (Witness writes.)

By the Court.

Q Just write it again, two lines below that. A (Witness writes.)

Q Now, once more, two lines below that. A (Witness writes.)

10

Mr. Cohn. I desire to offer this in evidence. Same marked Exhibit P. 16.

By Mr. Cohn.

Q Have you any idea who signed, or do you know who could have signed the name Donato Fusco to that paper, other than yourself or your father? A Why, the Title Surety Company had my father's signature; he used to do business with them when they had their office in Newark here, and they had his signature on some other application blanks, and that was the only other source that I know of.

20

Q Then you think that the Title Guaranty & Surety Company put your father's signature on there?

Mr. Mason. Objected to, the answer does not so state.

30

The Court. The question may be answered.

Q Then you think that the Title Guaranty & Surety Company put your father's signature on that agreement? A I am not positive about it.

Q What do you think? A That is pretty difficult to answer.

Q Can you conceive of anybody else that could have put that signature on that agree-

40

Alfred A. Walter, direct.

ment other than your father or yourself? A
Hundreds of people could put it on there.

Q Tell us who could have.

Mr. Mason. Objected to.

The Court. Objection sustained.

10 Q After you signed this paper to whom did
you give it? A I think Mr. Riddell.

Q Are you sure you gave it to him? A
Either Riddell or Ritch, Hughes Company.

Q You cannot say whether it was Riddell or
Ritch, Hughes Company or somebody else? A
I cannot be positive, there were so many trans-
actions regarding those dates.

Q Isn't it peculiar you can remember so dis-
tinctly for four years this conversation you had
with Mr. Williams in 1914—

20 *Mr. Mason.* Objected to.

The Court. Yes, that is argument.

Mr. McGlynn. We close the defense so
far as I am concerned.

Mr. Mason. We offer in evidence Ex-
hibit P. 5 for identification.

Same marked Ex. D. 4.

30 *Mr. Mason.* I wish to call attention to
the fact that it says time of completion
September 15, 1913, and it is marked "Can-
celled 12/2/1914," and I would like to call
Mr. Walter.

ALFRED A. WALTER, recalled for the de-
fendant Donato Fusco.

Direct examination by Mr. Mason.

40 Q Where did you get this folder from? A
Sent to me either by the New York office, or
home office; the New York office, when it was

Alfred A. Walter, direct.

open, or, after that, the home office, The Title Guaranty & Surety Company, one or the other, I don't recall.

Q Do you remember testifying yesterday that The Title Guaranty—

The Court. He is your witness now. 10

Q Where did you look? Did you make any effort to find the other two folders? A No. When I left here last night I discovered the other two folders had been lost.

Q How did you discover last night? A Referring to private correspondence we had previously given to Mr. Cosey.

Q That is all. A May I make an explanation?

The Court. I think not. 20

Mr. Mason. The defendant Donato Fusco rests.

ALFRED A. WALTER, recalled for the plaintiff in rebuttal.

Direct examination by Mr. Cohn.

Q Is Mr. Williams an employee of The Title Guaranty & Surety Company at the present time? A He is not. 30

Q Since when has he not been an employee of the company? A About November, 1913.

Q Do you know of any authority given to agents to go contrary to the agreements of the company?

Mr. Mason. I object.

The Court. Well, he may answer.

A I know of none. 40

Alfred A. Walter, cross.

Cross examination by Mr. Mason.

Q Mr. Williams was more than an agent, wasn't he? A That seems to me to be a question of law. Do you want me to answer it?

Q Well, he was resident vice-president, wasn't he? A Resident manager, I think.

10 Q Well, he signed the contract as resident vice-president, didn't he? A Probably resident vice-president also.

Q And resident manager for the State of New York, wasn't he? A I don't think the State of New York, City of New York.

Q He had entire jurisdiction and management of the business of The Title Guaranty & Surety Company for the City of New York and vicinity, didn't he? A I should say no, not
20 when you say "entire."

Q Didn't he hold office as general officer of the surety company? A No, he was not general officer.

PLAINTIFF RESTS.

30 *Mr. McGlynn.* Mr. Cohn said that the interrogatories read to the jury had been served upon the Fusco Construction Company, and had not been answered, and I thought that was a mistake, that we had no recollection of any being served on us.

The Court. That statement should be withdrawn unless he has an affidavit of service, or acknowledgment of service.

40 *Mr. Cohn.* We have a letter from Mr. McGlynn acting as attorney for the Fusco Construction Company from the conception of this case, and afterwards became attorney for Donato Fusco, who has had three

Motion for Direction of Verdict.

separate attorneys during the pendency of this action.

Mr. McGlynn. Your Honor will see that I acknowledged service of those interrogatories for Donato Fusco; no statement that I acknowledge them as attorney for the Fusco Construction Company, in fact, the interrogatories are addressed solely as such in the body of the interrogatories. 10

The Court. If this is all you have I will rule there has never been served on the Fusco Construction Company any interrogatories, and, consequently, there was no obligation upon the Fusco Construction Company to answer them.

Mr. Mason. We have a motion to make.

The Court. It looks to me very much like a question of law right here at this time. I really do not see that there is very much to leave to this jury as the case now stands. I will hear your motion. 20

Mr. Mason. I want to make a motion for the direction of a verdict in favor of the defendant Donato Fusco for the same grounds stated in the motion for non-suit, and on the grounds that as the evidence stands now, uncontradicted, The Title Guaranty & Surety Company on May 19, 1913, received a check of James J. Fusco in the sum of \$353.30, and that it recites "Payment in full for premiums on bonds for Harrison, New York, sewer contracts." 30

The Court. Now, Mr. Mason, that was all that was then due, wasn't it? That was in full for premiums then due, wasn't it? I mean the amount of that check was all the premiums then due on those bonds. 40

Motion for Direction of Verdict.

Mr. Mason. There is no evidence here, as we are concerned, what the amount was due.

10 *The Court.* This evidence of \$232.80, and \$137.40, which makes exactly the amount of that check, so that those two checks together, that check of May 19th and December 6th, is payment for all the accounts due up to that time, isn't it?

20 *Mr. Mason.* As far as we are concerned, because there is no evidence here, except some slight evidence given by Mr. Walter, as to what the premiums should be for the first year. One-half of one per cent., he says, that is the general premium, he said. he wasn't sure, so, so far as Donato Fusco is concerned, we do not know whether that is the amount or not.

The Court. What do the contracts call for? What was the amount of contract A?

Mr. Mason. Contract C was \$15,000, the amount of the bond.

The Court. The amount of the contract?

Mr. Mason. \$29,460.25.

30 *The Court.* One-half of one per cent. of that is \$137.40. Now what is the next one?

Mr. Mason. Contract B, \$70,660.02.

The Court. One-half per cent. of that would be \$353.30. Now what is A?

Mr. Mason. \$46,565.82.

40 *The Court.* One-half of one per cent. of that would be \$232.82, exactly the amount of the check. I think we can pretty safely assume that those were the correct amounts, in view of the testimony. There is no de-

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nial of that, and the only inference the jury can draw from the evidence is that those are the correct amounts. Now, that being so, the first conversation Mr. Fusco said he had with Mr. Williams was before the contract was executed. That, as an agreement, was certainly merged into the contract itself. Then the contract was made. Then, he says he paid this other check of \$380.12, which was exactly the amount of the premiums of A and C, that was exactly the amount due for that year's premium. Now, what is the possible consideration for any promise, even assuming it was made, on the part of Mr. Williams for a variation of that contract? 10

Mr. Mason. I do not see that there is any. 20

The Court. Then what is your argument that the plaintiff company is bound by any such agreement by Mr. Williams, assuming it was made?

Mr. McGlynn. Does your Honor think the jury should consider the testimony of the gentleman who said that he kept the books and records of this company, which records disclose the fact that no charge was made by the company on those records? 30

The Court. He said it was sometimes charged up when the premiums were paid, and sometimes when due. Suppose they were not charged up, what difference does that make, if, in the contract of these people, they had agreed.

Mr. McGlynn. I think that that testimony, together with this testimony, taken 40

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together, would give the jury absolute right to infer that was the arrangement and that this company is bound by their own records.

The Court. Any other grounds?

10

Mr. Mason. Yes, on the further ground it has never been shown that those bonds were executed.

The Court. That is the ground you urge?

20

Mr. Mason. On the ground the attesting witness was never called to prove the proper execution of these bonds, particularly in the bond A, which is the only bond which has been signed by Fusco Construction Company. There is an attesting witness, and the witness has never been called, nor has the resident assistant secretary of the company been called on any of the bonds. The attesting witness—and I think while your Honor has admitted them, which, I think, was an error of law —

The Court. Well, you were going to find me in Parker's Digest authority for your proposition.

30

Mr. Mason. I have not been able to get the volume containing the references yet, and am not able to cite the cases now.

Mr. Cohn. We can prove that the attesting witness is out of the state, and we can prove the handwriting of the attesting witness by a witness who is present.

The Court. It may be important for you to do that.

Mr. Mason. I suggest, if your Honor have any doubt, that you leave it to the jury to find as to the fact.

40

Alfred A. Walter, direct.

The Court. I thought you were making a motion for the direction of a verdict?

Mr. Mason. I am making a motion first, and those are the grounds upon which I base it.

The Court. You may make that proof you suggest.

10

ALFRED A. WALTER, recalled for the plaintiff.

Direct examination by Mr. Cohn.

Q Do you know where George W. Youngling, resident secretary of The Title Guaranty & Surety Company, resides? A I do.

Q Where? A In the City of New York.

Q Are you acquainted or familiar with his handwriting? A Very familiar.

20

Q Could you state whether the bond B, a copy of which I show you, and the original of which you saw in Harrison, New York, was signed by him?

Mr. Mason. I object. He has not got the handwriting before him, and he is simply trying to testify now from memory.

The Court. You may examine him.

30

By Mr. Mason.

Q Where, in New York, is Mr. Youngling?

A His business?

Q Yes. A 19 Liberty street.

Q Is he still in that business? A Yes.

Q And you know where his residence is?

A Yes, I think I do.

Q And you have known him for some time?

A Yes; only learned his residence last night.

40

Alfred A. Walter, direct.

Q I mean his place of business? A Yes, I know that for a long time.

Q How long a time? A Two years, I should say.

10 *Mr. Mason.* Under the circumstances I do not think that brings it within the exception.

The Court. The exception is where they live outside the state; it does not make any difference whether they live one mile, or one hundred miles. The answer may be given to the question.

20 Q (Question read as follows: "Can you state whether the bond B, a copy of which I show you, and the original of which you saw in Harrison, New York, was signed by him?") A It was.

Q (*By the Court.*) As a witness? A Attested by him.

Q (*By Mr. Cohn.*) I show you bond B—

Mr. Mason. There was another party there.

By Mr. Mason.

30 Q In whose handwriting is the other party to that contract, the Fusco Construction Company, in whose handwriting is the signature of the officer of the Fusco Construction Company to that bond? A Of the Fusco Construction Company?

Q Yes. A I am sure I don't know.

Q You say that is a true copy? A Yes, it is a true copy.

40 Q Is there any signature attached to that alleged bond of any officer of the Fusco Construction Company? A I explained to the

Alfred A. Walter, direct.

court when I testified before that I did not make a copy of it if there was such a signature.

By the Court.

Q Still you don't know, do you? A I do not know.

By Mr. Mason.

10

Q So far as you know that is a true copy?
A Yes, I think, as far as it is possible to make a copy true; it was checked back by Mr. Cohn and myself, twice, I guess, examined carefully, and went there for that purpose.

By Mr. Cohn.

Q Do you know Richard R. McGonigal? A I do.

Q Where does he reside? A In the City of New York.

20

Q Are you familiar with his handwriting? A Yes.

Q Do you know whether that is his signature (showing paper to witness)? A Yes, it is.

Q And that contract, or bond, C, will you state whether the signature of George Youngling is his signature, or not? A That is the signature of George Youngling.

30

NOT CROSS EXAMINED.

TESTIMONY CLOSED.

The Court. Now, the motions will be considered as having been made at the close of this testimony.

Mr. Mason. Yes, and I renew the objection to the admission of these bonds because they are executed by two parties, and

40

Argument of Motion to Direct Verdict.

there has been only an attesting witness called as to one of the parties.

The Court. Yes, and I understand you were to spend a few minutes in endeavoring to find the law upon that.

10 *Mr. Mason.* I have not been able to find it yet.

The Court. Are you willing now to endeavor to find it?

20 *Mr. Mason.* Yes, if your Honor rules against me on these motions I was going to suggest that on any matters of fact you desired to submit to the jury you submit them, and the jury can return answers yes or no to the different questions, and make special findings, and then any memorandum be submitted to the Court before we enter up judgment.

The Court. We will meet that when you find if you do—

Mr. Mason. May I go down to the library?

The Court. You may, if the case is entirely closed.

30 *Mr. Cohn.* Yes, we are through.

The Court. And you think also the case ought to go to the jury?

Mr. Cohn. I think the case should go to the jury.

The Court. It is very important for the Court to have that quotation of law. If you will show that to the Court.

(Mr. Mason submits authorities to the Court.)

40 *The Court.* Mr. Mason has referred me to a case here which rather intimates that

Argument of Motion to Direct Verdict.

the proposition set forth by him is a correct proposition. He refers me to 5 Cyc., 735, that the bond should be signed by all who purport to be the parties. What have you to say about it?

(Argued.)

The Court. What is your view as to the facts the Court should leave to this jury?

10

Mr. Cohn. It seems to me there are no facts which should be left to the jury, and I would ask at this time for the direction of a verdict in favor of the plaintiff. It appears that there are premiums admittedly due, admitted by the contractor in the pleadings—I mean the contractor in the pleadings admits that these bonds were duly executed and delivered. They are set forth in paragraphs 3 and 4 of the complaint, and the Fusco Construction Company, the contractor, admits that those bonds were duly executed and delivered to the Town of Harrison. The bonds that were given were the bonds that were to be executed, not by Donato Fusco, but by the Fusco Construction Company, and if the Town of Harrison wanted to waive that, they did not waive obtaining from The Title Guaranty & Surety Co. its bonds; whether the bond was good, or not; if it was the fault of the Town of Harrison, none the less, The Title Guaranty & Surety Company had performed its part of the agreement. And if the contractor admits from the interrogatories and the answers thereto, that there are three premiums due for the period commencing in December, 1913,

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30

40

Argument of Motion to Direct Verdict.

and we have waived the premium for the year 1914, in view of the fact it developed the work was accepted in June and October, 1914.

10 *The Court.* This is the way the case strikes me at this time. It appears that three contracts were executed between the Fusco Construction Company, and the Town of Harrison, New York, for sewer work. That is admitted, or, at least, it is not denied. It appears that these contracts were executed in the early part of December, 1912. It also appears that as a condition to the awarding of these contracts it was necessary that the Fusco Construction Company should give bond for the faithful performance of those contracts.

20 It appears by the agreement on file between the plaintiff company and Donato Fusco, one of the defendants, and the Fusco Construction Company, the other defendant, that in consideration of the plaintiff company becoming surety for the faithful performance of these contracts, they bound themselves to pay such premiums as should become due for the bond. It is urged that upon two

30 of these contracts the bonds are not complete, that is, the bonds given to the Town of Harrison are not complete, because not signed by the Fusco Construction Company, and, hence, not a bond at all. But I am not inclined to agree with that contention, because of the peculiar wording of the indemnity agreement between Fusco and the Fusco Construction Company, which says that "Whereas the contractor in the prosecution of business, and the perform-

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Argument of Motion to Direct Verdict.

ance of certain contracts, and in the fulfillment of certain obligations, may desire or be required from time to time to give certain instruments in the nature of preliminary guarantees, bonds and undertakings, stipulations and other obligations, now, therefore, in consideration of the premises, 10
and of the execution and delivery from time to time by the surety company"—not by the surety company—"of any such instrument or instruments, then the parties of the first part," which includes Fusco, "bind themselves to the performance of the indemnity agreement, namely, to pay the premiums, and to pay the attorney fees, if any should accrue; and they also bind themselves"—that is, the Fuscos, Donato Fusco 20
and the Fusco Construction Company—"to pay in cash to the surety company in advance, and at such times and in such manner as may be agreed upon, the premium or charge of the surety company in respect to each of said instruments, and shall, where such premium or charge is annual, continue to pay the same until the surety company shall, in the manner provided by law, be discharged or released from any or all 30
liability, or responsibility, upon or under any such instrument or instruments, and all matters arising therefrom."

It is testified to here that this premium is annual, and it has been testified to that the amount fixed is annual, that is, one-half of one per cent. of the amount of the contract, which, in contract A, was \$232.82, in contract B, \$353.30, and in contract C, \$147.30. Those amount altogether to \$733.42. 40

Argument of Motion to Direct Verdict.

Both of these defendants admit the execution of the contract upon which suit is brought. I will deal first with the Fusco Construction Company as to its liability. The Fusco Construction Company, in the first place, admits the execution of the agreement in suit; admits that the contracts with the city were entered into, and that the surety agreements were executed by the Fusco Construction Company, and by the surety company. In their answer they set up only one defense, and that is that the contract was completed before the first year's premium expired. Manifestly, that is an error, because Donato Fusco, in his answer to the interrogatories, says they were not completed until August and October, 1914, after the second annual premium would have accrued, if payable in advance. But the president of the Fusco Company, Mr. James J. Fusco, admits that they were not completed by December 5 and 6, 1913. If they were not completed by December 5th and 6th, 1913, then the annual premiums for the next year had accrued. That being true, it seems to me that no defense has been made out by the Fusco Construction Company, which would warrant the Court in leaving the question to the jury to say whether or not it had been made out. Even though this case were argued to the jury, and the Court should charge the jury, the Court would be obliged to charge that that was the situation; that is, that there had been no defense made out of the Fusco Construction Company, under the pleadings in this case.

Argument of Motion to Direct Verdict.

Now, taking up the defense of Donato Fusco. The first defense is a denial that these contracts of suretyship were entered into by the plaintiff company. That the Court has already ruled upon, and said that it had been shown beyond contradiction in this case that these contracts were entered into. 10

The second defense is—or, rather, that is not set up as a defense, it is set up as a denial of the plaintiff's complaint. The first affirmative defense is the same as the affirmative defense in the Fusco Construction Company answer, that is, that the work was completed before the second annual premium accrued. I have already stated that it is an admitted fact in the case that it was not completed. He next sets up that it is not his signature to the indemnity agreement. A complete answer to that is that there is no such defense introduced. What he sets up in his answer by his second defense is that the proposed agreement of indemnity, bearing date December 19, 1912, is not the deed of this defendant, and that this defendant was induced by the agent of the plaintiff to sign such agreement of indemnity on the representation of such agent that it referred to matters other than those set forth in said agreement. It may be urged that the statement that it was not his deed would be sufficient to set up the defense of forgery. But the Court is obliged to construe pleadings, as well as construe contracts, and in view of his admission of the execution of the contract in suit, and in view of what 20 30 40

Argument of Motion to Direct Verdict.

10 follows the statement in this answer that it is not his deed, the Court must construe this as meaning that all he intended to say was not that this signature was a forgery, but that he was induced by the agent of the plaintiff company to sign such agree-
ment. That is, he was induced to sign it
by fraud. The Court cannot, with this
wording of this second defense, admit the
claim that it was forgery, and was not
his signature. It was not his deed, because
he was induced by the agent of the plain-
tiff to sign such agreement of indemnity on
the misrepresentation of such agent that it
related to matters other than those set forth
in the agreement. And that has not been
20 shown in this case at all. The most that
has been shown is that it was not his sig-
nature at all, and that such a defense as that
is not warranted by the pleadings in this
case. And that being true there would
seem to be made out no defense, so far as
Donato Fusco is concerned.

30 One thing I omitted to mention with ref-
erence to the Fusco Construction Company,
and that was the testimony of Mr. James
Fusco as to his conversation with Mr.
Williams. He said that before this contract
of indemnity was executed he had a con-
versation with Mr. Williams in which he
told Mr. Williams he could not complete
this contract in a year, it would take him
sixteen months or more, to complete it, and
that Mr. Williams then said to him he would
only charge him one annual premium. Not-
withstanding that fact, he executed an agree-
ment following that time by which he agreed
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Argument of Motion to Direct Verdict.

to pay annual premiums in advance up to the time of the completion of the contract. So we must, as a matter of law, assume that any agreement he had with Mr. Williams before was merged into the executed agreement between the parties. He said that when he paid this check of \$380.12, that the agreement was completed, and he was discharged. But it appears that when he paid his check of \$380.12 that was the exact amount due for the first annual premiums upon that policy, nothing more, nothing less, it was exactly the amount due; and, even assuming that Mr. Williams made that agreement, as he said he did, it was an agreement made entirely without consideration, and, therefore, was an unauthorized act of the agent or employee of the company, which would not be binding upon it.

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Under this view it seems to me that this case must be decided as a matter of law, and the jury directed to find a verdict in favor of the plaintiff for the sum of \$733.42, with interest from the 19th day of December, 1913, to this 8th day of December, 1916, which would be three years and about eleven days, at the rate of six per cent., which would amount to the total sum of \$853.40, and to that direction of a verdict an exception will be noted on behalf of both the defendants.

30

Mr. Mason. Before you direct the verdict may I make a further motion?

The Court. No, I do not think you can do that.

Mr. Cohn. As to the \$150 item of attorney fee.

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Exhibits.

The Court. Yes, I did overlook that. That will make the total amount \$1,003.40, with the \$150 attorney fee.

10

Counsel for the defendant the Fusco Construction Company enters an objection to the direction of the verdict as ground of appeal.

Counsel for the defendant Donato Fusco enters an objection to the direction of the verdict as ground of appeal.

Annexed is list of the documentary evidence relevant to the questions on review arranged in order.

20

1. It is admitted by appellant that the plaintiff was and is a corporation duly organized and existing under the laws of the State of Pennsylvania and duly authorized to issue bonds of indemnity.

2. Exhibit P. 2 is the same as the contract of indemnity annexed to the complaint.

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Exhibits P. 3, P. 4 and P. 14 are bonds annexed to three contracts, which are the same in form, differing in amounts and dates, and work to be done and materials furnished. The bond for contract "A" was in the amount of \$23,282.00, and was executed December 6th, 1912, the bond for contract "C" was in the amount of \$15,000.00, and was executed December 6th, 1912, and the bond for contract "B" was in the amount of \$35,330.00, and was executed December 28th, 1912.

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The said bonds were attached to contracts "A", "B" and "C" for the construction of the sanitary sewers of the Sewerage System for the Town of Harrison, N. Y., and were executed by the plaintiff.

Exhibit P. 14.

EXHIBIT P. 14.

CONTRACT BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, Fusco Construction Company, of 671 Broad street, Newark, N. J. (hereinafter called the contractor), as principal, and The Title Guaranty & Surety Company (hereinafter called surety), as surety, are jointly and severally held and firmly bound unto the Town of Harrison, Westchester County, a municipal corporation of the State of New York (hereinafter called the obligee) in the sum of \$35,330.00 for the payment whereof said contractors bind..... heirs, executors, administrators, successors and assigns and said surety binds itself and its successors and assigns firmly by these present.

10

WHEREAS the said contractor has entered into a written contract, dated.....191....., with the said obligee for the construction of a system of sewers in the Town of Harrison, Sewer District No. 1, a copy of which contract is hereto annexed:

20

AND WHEREAS the surety has read the contract and specifications and agrees to be bound by all the stipulations and agreements therein in respect to them;

30

NOW, THEREFORE, the condition of this obligation is such that if the contractor shall well and truly keep and perform all of the terms and conditions of the said contract on his part to be kept and performed. both concerning the work immediately contemplated and of any extensions and alterations thereof (of which extensions and alterations the said sureties hereby waive notice and agree that all of the provisions of this obligation shall apply to said contract, as

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Exhibit P. 14.

it may from time to time be extended and altered either by the engineer under the provisions therein contained or by the parties hereto in the same manner as if such extensions and alterations were actually inserted therein, that may be ordered by the said Town of Harrison; and shall indemnify and save harmless the said town from all suits or actions of any name or description brought against the said contractor or the said town for or on account of any injuries or damages received or sustained by any person or persons by or from the said contractor, his servants or agents in the construction of said work, or in consequence of any negligence in guarding the same, or any improper materials used in its construction or by or on account of any act or omission of the said contractor, his servants, or agents in or about the premises, then this obligation shall be void, otherwise to remain in full force and effect.

Signed and sealed this 28th day of December, 1912.

25975 THE TITLE GUARANTY &
SURETY COMPANY.

30 Corporate seal By FRED C. WILLIAMS,
Title, etc., Co. *Res. Vice President.*

Attest: GEO. W. YOUNGLING,
Resident Secretary.

Exhibits P. 5—P. 6.

EXHIBIT P. 5.

Dec.
 No. 25755. Contract Declined A. S. Co. H. O. No.....
 Applicant, Fusco Construction Co. Address, Newark, N. J.
 In favor of Town of Harrison, N. Y. Address
 Description, Constr. of Sewers "Contract A."

	Time.	Maintenance.	Amount.
Surety Agt. Executed	To	From	
Proposal Ex. Premium	Paid	Due to from Co-Surety	Paid
Final Executed 12/6/12.	\$23283.	Mar. 11-1913.	\$232.82.
2nd Annual			
3rd Annual			
4th Annual			
5th Annual			

Agent, Ritch-Hughes & Co. Address
 Commission 15%. Paid Mar. 11-1913.
 Attorney Address
 Not Listed.
 Declined A. S. Co.

Remarks, Contract \$46,565.82.
 Time 9/30/13.
 U. S. Card Index Co., N. Y. 124598

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EXHIBIT P. 6.

Dec.
 No. 25754. Contract Declined A. S. Co. H. O. No.....
 Applicant, Fusco Construction Co.
 Address, Broad St., Newark, N. J.
 In favor of Town of Harrison, N. Y. Address
 Description, Constr. of Sewers, &c. Contract "C."

	Time.	Maintenance.	Amount.
Surety Agt. Executed	To	From	
Proposal Ex. Premium	Paid	Due to from Co-Surety	Paid
Final Executed 12/6/12.	\$147.30.	Mar. 11-1913.	\$15,000.
2nd Annual			
3rd Annual			
4th Annual			
5th Annual			

Agent, Ritch-Hughes & Co. Address
 Commission 15%. Paid Mar. 11-1913.
 Attorney Address
 Not Listed.
 Declined A. S. Co.

Remarks, Contract \$29,460.
 Time 9/30/13.
 U. S. Card Index Co., N. Y. 124598

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Exhibits P. 7—P. 8.

EXHIBIT P. 7.

Dec.
 No. 25975. Contract Declined A. S. Co. H. O. No.....
 Applicant, Fusco Construction Co.
 Address, Broad St., Newark, N. J.
 In favor of Town of Harrison, N. Y. Address
 Description, Constr. of Sewers, &c. Contract "B."
 10 Time. Maintenance. Amount.
 Surety Agt. Executed To From
 Proposal Ex. Premium Paid Due to from Co-Surety Paid
 Final Executed 12/28/12. \$353.30. May 22-1913. \$35,330.
 2nd Annual
 3rd Annual
 4th Annual
 5th Annual
 Agent, Broker. Address, 1123 Bway, City.
 Commission Paid
 Attorney, P. P. Ruddel Address, 76 Elm St.
 Cancelled 12/2/1914.
 Declined A. S. Co.
 20 Remarks, Contract \$70,660.02.
 U. S. Card Index Co., N. Y. 124598

EXHIBIT P. 8.

P. P. Riddell, 76 William street.
 Form 700.

CONTRACTOR'S APPLICATION.

30 Home Office Bond No.....
 Agency Bond No. 25975.
 Application No.....

THE TITLE GUARANTY & SURETY
 COMPANY.

Home Office: Scranton, Pennsylvania.

1. Full name of applicant, Fusco Cons. Co.;
 age.....
2. Business address, 665 Broad St., Newark,
 N. J.
- 40 3. Residence

Exhibit P. 8.

- 4. To whom is Bond given? (Give full name. If to a corporation, give exact corporate title and names of officers required to sign corporate instrument.) Town of Harrison, N. Y. Business address.....
- 5. Amount of bond required, \$35,330. If proposal, so state..... 10
- 6. Contract price, \$.....
- 7. Nature of contract, Construction of Sewers, Contract B, Town of Harrison, N. Y.
- 8. If contract price is per unit of measure, give also probable total of contract. Total of contract, \$70,660.02.....
- 9. Names of other bidders, including highest and lowest.
- (Name.) (Address.) (Amount of Bid.)
- 20
-
-
-
-
- (See list.)
- 10. Name of Architect or Engineer in charge.
- 11. Address
- 12. What is estimated cost of work (by Architect or Engineer)..... 30
- 13. What is your estimate of the cost of the work to you.....
- 14. How long must work be kept in repair after completion
- 15. Give nature and value of work to be kept in repair
- 16. Percentage reserved therefor.....
- 17. State what portion of this contract is to be sub-let

Exhibit P. 8.

- 18. Will sub-contractors be required to give bond
- 19. What arrangements, if any, have been made to finance this work? State particulars
- 20. When will work commence? At once. When will it be completed.....
- 10 21. Penalty for non-completion at above date
- 22. Premium for completion before above date
- 23. Payments, monthly.....
- 24. Are payments made in cash? Yes. If not, in what.....
- 25. Percentage reserved from payments until completion
- 26. Will a lien lie in this case for material furnished and work done.....
- 20 27. Will a sub-contractor's lien lie.....
- 28. Have you ever applied for a contract bond to this or any other company.....
- 29. Give name of company.....
Was application accepted.....
- 30. If declined, state reasons.....
- 31. Mention experience in line of work to be undertaken
- 32. Number of uncompleted contracts.....
- 30 33. Name Surety Company bonding above—
1..... 2..... 3..... 4.....
- 34. Statement of Assets and Liabilities. As of
- 35. Can material listed above be used to advantage on this contract.....
- 36. Is real estate listed in foregoing statement, or any part of it, subject to homestead exemption
- To what extent

Exhibit P. 8.

- 37. What insurance do and will you carry on present contract? \$10,000. Fire, \$.....
- 38. Amount of Employer's liability insurance carried, \$10,000.
- 39. Give names of companies.....
- 40. What indemnity do you offer to induce the Company to execute this bond..... 10
- 41. If a firm, or co-partnership, reply in detail as follows:
- 42. Has any member of the firm ever failed in business? If so, give particulars.....

IF A CORPORATION ANSWER THESE QUESTIONS

- In what State incorporated..... When incorporated..... Principal office Authorized capital..... Subscribed capital..... Paid in capital..... President..... Vice-President..... Secretary..... Treasurer..... 20

REFERENCES

In consideration of THE TITLE GUARANTY & SURETY COMPANY, becoming surety on the bond herein applied for, the undersigned does hereby covenant and agree: 30

FIRST. To pay IN ADVANCE a premium or fees hereinafter agreed upon; namely, Three Hundred and Fifty-three (30/100) Dollars annually, and an additional premium to be adjusted and paid upon the completion of the contract, based on any increase of the original price, such annual payments to be made until the undersigned shall serve upon said Company at its Home Office in the City of Scranton, Pennsylvania, competent 40

Exhibit P. 8.

written evidence of its discharge from such suretyship and all liability by reason thereof. Should the contract covered by the aforesaid bond provide for maintenance after the term of work, the undersigned covenants and agrees to pay in advance a premium of.....

10 for the term of the maintenance period.

SECOND. The undersigned hereby further covenants, promises and agrees, and does hereby bind the heirs, executors, administrators, successors and assigns of the undersigned, to indemnify the said THE TITLE GUARANTY & SURETY COMPANY against all loss, cost, damages, counsel fees, charges and expenses whatsoever resulting from any act, default or neglect of the undersigned, that the said THE TITLE GUARANTY & SURETY

20 COMPANY may sustain or incur by reason of its having executed said bond or any continuation thereof, and the undersigned hereby further agrees to reimburse the said Company for any expense that it may be put to in making or enforcing the collection of any premium chargeable for this bond or any continuation thereof.

The undersigned does hereby further agree to indemnify the said THE TITLE GUARANTY & SURETY COMPANY against any suit or claim

30 brought or instituted against said Company, whether such suit or claim be rightfully or wrongfully brought or instituted, and in case suit shall be brought upon said bond, the Surety shall be at liberty to employ an attorney of its own selection to appear and defend the suit in its behalf at the expense of the undersigned.

THIRD. The undersigned hereby further agrees, that in the event of the undersigned being unable to complete or carry on the aforementioned

40 contract, to assign and hereby does as-

Exhibit P. 8.

sign to THE TITLE GUARANTY & SURETY COMPANY all right, title and interest of the undersigned in and to all the tools, plant, equipment and materials of every nature and description that the undersigned may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract which may be in process of construction, on storage elsewhere, or in transportation to said site; and the undersigned further agrees to assign and hereby does assign to THE TITLE GUARANTY & SURETY COMPANY all rights in and to all sub-contracts which have been or may hereafter be entered into and the materials embraced therein. 10

FOURTH. The undersigned further agrees to accept vouchers or other evidence of any loss paid by the said THE TITLE GUARANTY & SURETY COMPANY, under the aforesaid obligation, together with vouchers or other evidence of payment of all costs and expenses whatever incurred by the said THE TITLE GUARANTY & SURETY COMPANY in adjusting such loss or in completing said contract, as conclusive evidence against the undersigned and the heirs, executors, administrators, successors and assigns of the undersigned, of the fact and extent of the liability of the undersigned under said obligation to the said THE TITLE GUARANTY & SURETY COMPANY. 20 30

FIFTH. And the undersigned further agrees in the event of any breach or default on the part of the undersigned, in any of the provisions of the contract hereinbefore mentioned, that THE TITLE GUARANTY & SURETY COMPANY, as surety upon the aforesaid bond, shall be subrogated to all the rights and properties of the undersigned as principal in said contract, and that deferred 40

Exhibit P. 8.

10 payments and any and all moneys and properties that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may hereafter become due and payable on account of said contract, shall be credited upon any claim that may be made upon THE TITLE GUARANTY & SURETY COMPANY under the bond above mentioned.

20 These covenants shall be binding not only upon the undersigned, jointly and severally, but as well upon the respective heirs, executors, administrators, successors and assigns of the undersigned, and shall be liberally construed as against the undersigned and each of them whether signed as principal on said bond or as indemnitor to the said THE TITLE GUARANTY & SURETY COMPANY.

It is further expressly agreed by the undersigned that the statement of assets and liabilities as above set forth or attached hereto is true and is made to the said THE TITLE GUARANTY AND SURETY COMPANY for the purpose of inducing the said Company to execute the bond herein applied for.

Dated December 28th.

30

FUSCO CONSTRUCTION CO. (SEAL)
(Member of Firm or Official with Title.)

By JAMES J. FUSCO, (SEAL)
President.

(Member of Firm.)

P. P. RIDDELL, Witness.
45M-8-10

40

Exhibit D. 4.

EXHIBIT D. 4.

P. 5 for indent.

THE TITLE GUARANTY & SURETY COMPANY.

CLASS CONTRACT.

N. Y. No. 25975. 10

Principal, Fusco Construction Co.
 Address, 665 Broad street, Newark, N. J.
 Assured, Town of Harrison, N. Y.

Address
 Name and address of attorney.....
 Description, Construction of Sewers, etc. "B."

TENO.

Proposal—
 Sub. Sur. Agent.
 Date effective 20

Liability Premium To Entered

Co-Surety To
 Re-Ins. From
 Final—Date effective

December 28, 1912 \$35,330.00 \$353.30 12 28 13

Co-Surety To
 Re-Ins. From

Renewal No. To From Premium

2nd Annual	R	30
3rd Annual	R	
4th Annual	R	
5th Annual	R	
6th Annual	R	
7th Annual	R	
8th Annual	R	

Cancelled.

Rebate or Return Premium —
 Amount. Entered.

Exhibit D. 4.

Remarks:

Contract price, \$70,660.02.

Time completion, Sept. 15/13.

Maintenance, 1 year.

Scranton.

10	Declined by A. S. Co.	Cancelled 12-2-1914.
	Agent.	Commission
	Broker	Commission
	Approved	Declined

It is admitted that demands were made for the payment of premiums by the plaintiff by letters.

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New Jersey Court of Errors and Appeals

THE TITLE GUARANTY & SURETY
COMPANY, a corporation,
Plaintiff and Appellee,

vs.

FUSCO CONSTRUCTION COMPANY,
a corporation, and DONATO
FUSCO,
Defendants and Appellants.

On Appeal.

Brief of Appellant, Donato Fusco.

Abstract of the Case.

This action was instituted by The Title Guaranty & Surety Company, a corporation, against the defendants, Fusco Construction Company and Donato Fusco, on an alleged contract of indemnity to recover the premiums alleged to be due for the years 1913 and 1914, on three bonds executed by the plaintiff as surety for the Fusco Construction Company to the Town of Harrison, New York.

The appellant Donato Fusco is an illiterate Italian and can not read English and can only write his name in English and had no connection at all with the Fusco Construction Company which took its name from his son, James J. Fusco.

The complaint alleges that on December 19, 1912, the Fusco Construction Company, being then about to enter into certain contracts with the Town of Harrison, New York, requiring the giving of bonds for the performance of said contracts, the defendants Fusco Construction

Courtesy E. J. A.

Company and Donato Fusco entered into the agreement, which was annexed to and made part of the complaint, in consideration of the execution and delivery by the plaintiff of said bonds, binding themselves to pay the premiums on said bonds until discharged and to indemnify the plaintiff against any loss or expense in collecting the premiums on the said bonds.

Paragraph four of the complaint alleges that the plaintiff confiding in the said promise of the defendants and at the request of the said defendants executed and delivered to the Town of Harrison, New York, three certain bonds of the plaintiff for the performance of three certain contracts designated as "A," "B," and "C" respectively.

Paragraph five of the complaint alleges that the plaintiff had not been discharged from liability on the said bonds and that the premiums for the years 1913-1914 and 1914-1915 were due to the plaintiff.

At the time the answer for Donato Fusco was filed, Fusco thought some one had gotten him to sign a paper by misrepresenting the contents to him, as it was alleged the contract had been executed by him. His answer was, therefore, prepared on the theory that it was his signature on the instrument but that it had been obtained fraudulently.

The answer of Donato Fusco admitted the allegations in the complaint as to the execution of the alleged contract of indemnity with this qualification, "except as set forth in the second defense."

The second defense was as follows: "This defendant further answering says that the supposed agreement of indemnity bearing date December 19, 1912, is not the deed of this defend-

ant and that this defendant was induced by the agent of plaintiff to sign said agreement of indemnity on the representation of said agent that it related to matters other than those set forth in said agreement.”

As to the allegations in the fourth paragraph of the complaint, namely that the plaintiff executed and delivered three bonds for the Fusco Construction Company at the request of said defendants, the answer of Donato Fusco sets forth “that he had not sufficient knowledge or information to form a belief.” The other allegations of the complaint were denied.

The answer further sets up payment as a separate defense.

To sustain the allegations of the complaint, the plaintiff offered in evidence the alleged contract of indemnity dated December 19, 1912. The plaintiff did not offer any evidence as to the time when this alleged contract of indemnity was delivered to the plaintiff. The plaintiff did not offer any evidence as to how the alleged contract of indemnity was obtained. The plaintiff did not offer any evidence as to the party who asked for or delivered this alleged contract of indemnity to the plaintiff. In fact, the only evidence given as to the obtaining of the contract of indemnity or the request for the contract of indemnity was that of James J. Fusco on page 101, at which time James J. Fusco testified as follows: “I didn’t know there actually was any such agreement in existence; when I had it, it was just simply a blank form of indemnity agreement given to me by Mr. Riddell and asking me to get indemnity on it, and I told him that there wasn’t any indemnity agreed upon and gave it back to him in that condition.”

Again on page 107 James J. Fusco stated in reply to the question, "Who asked you to get this indemnity?", as follows: "Mr. Riddell, after the contract had been executed, sometime after."

Oliver B. Ferris testified that he took the acknowledgment of Donato Fusco to the instrument, but Ferris does not testify that he delivered the document or took it from Fusco's house. Donato Fusco denied when he saw the signature that that was his signature and produced a number of checks to show that it was not his signature. Donato Fusco also testified that he was unable to read or write English and had never seen or heard of this alleged contract of indemnity before he was served with papers by the sheriff.

Riddell was a witness for the plaintiff and was in court, but did not deny that the alleged contract of indemnity was obtained after the bonds had been executed and delivered.

To prove the execution and delivery of bonds to the Town of Harrison on which the plaintiff was claiming premiums against the appellant as surety on the alleged contract of indemnity, the plaintiff called one Alfred A. Walter to identify two bonds and offered in evidence two bonds, dated December 6, 1912. These bonds were admitted without calling the attesting witnesses or proving the time of delivery, although the attorney for the defendant Donato Fusco objected to the admission of the bonds on the ground that they were executed prior to the time of the contract of indemnity.

On page 24, when the bonds that were dated December 6, 1912, were offered, the attorney for the plaintiff stated that he would explain how it was that the plaintiff was offering bonds

that were executed prior to the time of the contract of indemnity. The attorney for the plaintiff never explained how or why the plaintiff was entitled to recover on bonds that were executed prior to the date of the contract of indemnity.

The witness Hardy on page 40 testified that the bonds were executed; one under date of December 28, 1912, one under date of December 6, 1912, and the other under date of December 6, 1912.

The exhibit cards P. 5, 6 and 7 show that two of the bonds were executed on December 6, 1912. The complaint claims the second year premiums from December 6, 1913, although the contract of indemnity was not alleged to have been executed until December 19, 1912. The court also directed a verdict on the two bonds that were executed on December 6, 1912, two weeks prior to the time of the alleged contract of indemnity of December 19, 1912.

The court admitted Exhibit P. 14 to prove the execution and delivery and contents of the third bond as a sworn copy after the witness Walter stated (p. 82) he was not sure it was a true copy.

To prove the allegation of the complaint as to the execution of these bonds at the request of the Fusco Construction Company the plaintiff offered in evidence an application which was admitted as Exhibit P. 8, but if the court will inspect this exhibit it will be seen that it is for only one bond. No proof was produced of any application or request for the execution of the other two bonds.

To prove the accounts and the amount of premiums due and the amount of the bonds, the plaintiff offered in evidence over objection three

index cards. These were admitted as Exhibits P. 5, 6 and 7 (p. 38).

The witness Hardy had stated (p. 36) that the records of the bonds were entered upon a bond register from which our ledger cards were made and the amounts paid were entered from the cash book, posted on the cards, and entered in the ledger. No permanent books were produced. No explanation was made of the failure to produce the bond register which would show the time and delivery of the bonds and the amount of the bonds and premiums. No cash book or ledger was produced.

The court also permitted the witness Walter to testify, as to the amount of the premiums alleged to be due, from these cards, Exhibit P. 5, 6 and 7, over objection, because the witness did not have any personal knowledge of the memoranda on the cards.

The court also permitted the witness Moser to testify about the memoranda on these cards, although he did not know the truth of the memoranda nor by whom the memoranda were placed on the cards.

The witnesses Hardy and Moser admitted that the cards did not show any charge against the Fusco Construction Company due on any of the bonds.

The witness Hardy admitted that one of the cards showed that the bond issued December 28, 1912, had been cancelled December 2, 1914, on their records, although the plaintiff was claiming this premium was due and owing to them.

The witness Riddell called by the plaintiff testified that the bond No. 25975, being the bond dated December 28, 1912, was issued pursuant to the separate application of the Fusco Construction Company, namely Exhibit P. 8.

The attorney for the appellant made a motion for a non-suit on the following grounds:

1. That the bond dated December 5, 1912, was executed prior to the contract of indemnity of December 19, 1912.
2. That the bond dated December 6, 1912, was executed before the contract of indemnity was signed.
3. That the bond was not signed or executed on behalf of the Fusco Construction Company.
4. That contract B, known as Ex. P. 14, was never executed by the Fusco Construction Company.
5. That from the cards produced by the plaintiff it was shown that no charge for these premiums were entered and there is no evidence that the premiums were unpaid.

The Court overruled the motion and an exception was allowed.

The appellant Donato Fusco on his own behalf testified that the signature to the alleged contract of indemnity of December 19, 1912, was not his signature and that he did not know anything of the alleged contract until he was served with the summons and complaint by the sheriff. He denied that he had ever signed the instrument or authorized anyone to sign it for him or that Ferris had ever taken his acknowledgment.

James J. Fusco, the president of the Fusco Construction Company stated that the alleged contract of indemnity was a blank agreement when he gave it to the witness Riddell and that he never asked his father to sign the contract, and he also stated that the signature to the contract of indemnity was not the signature of his father.

A motion to amend the answer of the defendant, Donato Fusco, had been made in Septem-

ber, over two months before the case was actually tried, but the motion was denied on the ground that it was made too late.

At the close of the defendants' case, the attorney for the defendant, Donato Fusco, moved for a direction of a verdict in favor of the defendant, Donato Fusco, on the same grounds stated in the motion for a non-suit, and on the further grounds that there was no evidence as to the amount of premiums that were due on the bonds and on the further grounds that it had never been shown that the bonds referred to in the complaint had ever been executed and that the attesting witnesses had never been called to prove the proper execution of the bonds which had been admitted in evidence.

After the motion had been made, the witness Walter was called to prove the signature of the attesting witness of one of the parties, but no attesting witness was called to prove the signature of the other party.

The Court refused to direct a verdict for the defendant Donato Fusco, and an exception was allowed.

The attorney for the plaintiff moved to direct a verdict for the plaintiff on the ground that there were no questions to go to the jury. The Court granted this motion, construing the contract of indemnity of December 19, 1912, as applying to bonds executed by the plaintiff for the Fusco Construction Company prior to the agreement dated December 19, 1912, and as indemnifying the plaintiff for the premiums that might become due on bonds executed prior to the contract of indemnity.

The Court also directed that an exception to the direction of the verdict be noted on behalf of the defendants.

Brief of Argument.

I. THERE WAS A VARIANCE OF ALLEGATIONS AND PROOF.

In arguing these points we will proceed on the basis that the Court was correct in overruling the defense of the appellant, Donato Fusco, as to the forgery of his signature and his denial of the execution of the contract of indemnity, or knowledge of its contents under the construction of the pleadings, as set forth in the answer of the defendant Donato Fusco.

The appellant contends that the direction of a verdict for the plaintiff was erroneous on account of the material variance between the allegations of the complaint and the proof submitted by the plaintiff. The execution and delivery of bonds for the Fusco Construction Company prior to the date of the contract of indemnity do not support the allegations of the complaint. The complaint alleges that about December 19, 1912, the defendant Fusco Construction Company being about to enter into contracts with the Town of Harrison, Donato Fusco entered into this contract of indemnity in consideration of the execution and delivery of said bonds for the performance of these contracts.

The complaint in paragraph four alleges that the plaintiff confiding in the promise of the defendants and at the request of the defendants executed and delivered three bonds to the Town of Harrison. The plaintiff produced evidence that it had executed three bonds to the Town of Harrison for the Fusco Construction Company. Two of these bonds were executed and delivered on December 6, 1912, about two weeks before the contract of indemnity was alleged to have been signed. Surely proof of the exe-

cution and delivery of these bonds prior to the time of execution of the alleged agreement of indemnity did not sustain the allegations in the complaint that the plaintiff executed these bonds relying on the promise and at the request of Donato Fusco.

Again the evidence of the plaintiff's witness Riddell shows that a bond, No. 25975, was issued on the application of the Fusco Construction Company on December 28, 1912. This contract of the Fusco Construction Company of December 28, 1912, with the plaintiff was a new, separate and distinct contract of the Fusco Construction Company alone. The appellant under the terms of the contract (Ex. P. 8) was not a party and was not liable as an indemnitor even though the bond, No. 25975, was issued for the construction company. There was no evidence to show that it was issued at the request of, or in accordance with the agreement of Donato Fusco. Thus there was a material variance between the allegations and proof. A direction of a verdict, therefore, was illegal. *Jordan v. Reed*, 77 N. J. L. 584; 71 Atl., p. 28. *United States Fidelity & Guaranty Company v. Donnelly*, 68 N. J. Law 654; 54 Atl. 457.

These facts were called to the attention of the Court in objecting to the admission of the bonds (p. 25 and p. 77), and also on a motion for a non-suit and on a motion for a direction of a verdict for the defendant Donato Fusco (p. 85).

II. THERE WAS NO CONSIDERATION FOR PROMISE OF SURETY TO PAY PREMIUMS ON BONDS EXECUTED PRIOR TO CONTRACT OF INDEMNITY.

The promise of Donato Fusco to pay premiums due or to grow due on bonds executed prior to

the contract of indemnity would be void for want of consideration. As to those bonds there was no new benefit to the obligor or detriment to the obligee.

9 Cyc. 319.

It was error, therefore, to direct a judgment for premiums due on bonds executed on December 6, 1912, when the contract of indemnity was dated December 19, 1912.

This principle of law is well set forth in the case of *Schaus v. Henry*, recently decided by the Court of Errors and Appeals as reported in 99 Atl. Rep. 188. This was a case in which it was sought to recover on an indorsement on a note made after delivery. Justice Trenchard in the opinion of the court, in referring to the indorsement, said, "It was made after delivery of the note—after the contract creating the debt was fully consummated. It was, in fact, a promise to pay the debt of another and required a new consideration to support it."

III. THE ALLEGED CONTRACTS OF INDEMNITY WERE PROSPECTIVE AND NOT RETROSPECTIVE.

Assume again for the sake of argument that Donato Fusco executed the contract of indemnity of December 19, 1912. Is he liable for premiums on the bonds executed and delivered to the Town of Harrison prior to the execution of the contract of indemnity? In other words, is this contract of indemnity retrospective so that there would be imposed a liability on the surety as to contracts prior to his becoming an indemnitor?

The law is and the courts of New Jersey have held that contracts of indemnity are prospective

and not retrospective unless there is a clear intent that it should be retrospective.

Burlington County Railway Company v. New Jersey Rapid Transit Company, 77 N. J. Law 737; 73 Atl. 504.

Warwick v. Hutchinson, 45 N. J. Law, p. 61.

IV. CONSTRUCTION OF CONTRACT BY COURT IS ERRONEOUS.

The trial judge, however, in his construction of the contract of indemnity held that the contract provided for the payment of any and all premiums that might become due to the plaintiff from the Fusco Construction Company after the execution of the contract of indemnity. The appellant respectfully contends that this construction of the contract of indemnity is erroneous. The agreement reads:

“Whereas, the Contractor in the transaction of business and in the performance of certain contracts may desire or be required from time to time to give certain instruments in the nature of consents, and the Surety Company requires indemnification in respect to any such instrument which it may execute on behalf of the contractor, etc. And these presents are signed by the parties of the first part as an inducement to the said Surety Company to execute such instruments.”

“NOW, THEREFORE, in consideration of the premises and of the execution and delivery from time to time by the Surety Company of any such instruments, the parties of the first part hereby agree to bind themselves, etc.”

The appellant contends that this preamble clearly demonstrates that the contract should only be construed as referring to bonds executed contemporaneously with or subsequent to the contract of indemnity, and that the direction of a verdict for premiums on bonds issued prior to the contract of indemnity was erroneous.

Besides, the trial judge entirely disregarded the testimony of James J. Fusco. James J. Fusco testified as follows (p. 101): "I didn't know there was any such agreement in existence; when I had it, it was just simply a blank form of indemnity agreement given to me by Mr. Riddell and asking me to get indemnity on it, and I told him there wasn't any indemnity agreed upon and I didn't think I could get any indemnity and gave it back to him in that condition."

On page 107 James J. Fusco was asked, "Who asked you to get this indemnity?" and replied, "Mr. Riddell, after the contract had been executed; some time afterwards."

Riddell was in court and did not undertake to contradict this testimony. This evidence shows plainly that the contract of indemnity was executed after the bonds had been given and was, therefore, *nudum pactum*.

The question whether or not the contracts executed December 6, 1912, were executed and delivered prior to December 19, 1912, the time when it is alleged the contract of indemnity was executed, was at least a question of fact for the jury when there was no evidence that the bonds executed December 6, 1912, by the plaintiff were not delivered until after the alleged contract of indemnity of December 19, 1912. It was error for the Court to direct a verdict for premiums on those bonds.

V. ADMISSION OF LEDGER CARDS ERRONEOUS.

In order to prove the amount of premiums and the amount due on the bonds, the Court admitted three ledger cards and they were marked Exhibits 5, 6 and 7 against the objection of the appellant. The witness Hardy for the plaintiff had testified the company kept a bond register on which were entered the dates, amounts and premiums of bonds executed, and also a cash book and ledger. He said the company had ledger cards on which were entered items which were taken from the bond register. Without producing any of the books, the Court admitted these ledger cards as books of original entry. Plainly under the law, these cards are not books of account or books of original entry, and could only be used in connection with permanent books.

Diamant v. Colloty, 66 N. J. Law 295.

Hamilton v. Fusco Construction Co., 94 Atl. 50.

Railroad Co. v. May, 48 N. J. L. 401-5, at 276.

It was also erroneous to permit the witnesses Hardy, Moser and Walter to use these cards as memoranda for the purpose of testifying from these cards.

These cards were not made by them and these witnesses did not even know by whom the memoranda on the cards were made. The cards could not be used by them and could not be adopted as their past recollection.

Meyers v. Weger, 62 N. J. L. 432-42, at 280.

Cottenin v. Myer, 80 N. J. Law; 76 Atl. 341.

Bayonne v. Standard Oil Company, 78
Atl. 146.

The evidence shows that the complaint of the plaintiff was prepared so that it would not appear on the face of the complaint that two of the bonds on which they were seeking to recover premiums were executed prior to the time of the alleged contract of indemnity. Their attempts to withhold the primary evidence, namely their permanent records, showed that they were trying to avoid the established rules of evidence in order to try to recover premiums on three bonds when their own records showed that they had cancelled on their own records the risk on December 2, 1914.

There is every reason to believe that the plaintiff withheld the other permanent records, like the bond register, the cash book and the ledger, because these books would prove conclusively that these bonds were executed and delivered prior to December 19, 1912, and that, therefore, their permanent books would operate against them. It was, therefore, error to permit them to introduce these ledger cards.

Eckel v. Eckel, 49 N. J. Eq. 587; 27 Atl. 433.

It was error for the Court to permit Ex. P. 14 to be introduced as a sworn copy after the witness had stated that he was not sure of the contents of the copy that he produced. There was, therefore, no legal proof of the execution of any bonds on December 28, 1912.

The evidence also shows that there were two attesting witnesses and the witness Walter only identified the hand-writing of one of the attesting witnesses.

VI. NO PROOF OF DEBT FOR PREMIUMS.

The cards admitted as Exhibits P. 5, 6 and 7 did not show that any premiums were owed by the Fusco Construction Company to the plaintiff. In fact, the witnesses Hardy and Moser testified that the cards showed no charges against the Fusco Construction Company. No books were introduced showing the account or charges, or did any person testify of his own knowledge what the amounts of the premiums were or that the premiums were due and owing. The only evidence as to the amount of the premiums alleged to be due was the evidence of the witness Walter. The evidence that he gave was read from the three cards, the use of which the appellant contends was illegal, as the witness did not prepare these cards, and did not know of his own personal knowledge that the memoranda on the cards were correct. Walter admitted on page 84 that he didn't know amount of premiums.

The Court, however, contended that the burden of proving payment was on the defendants on account of the defendants having filed a defense of payment.

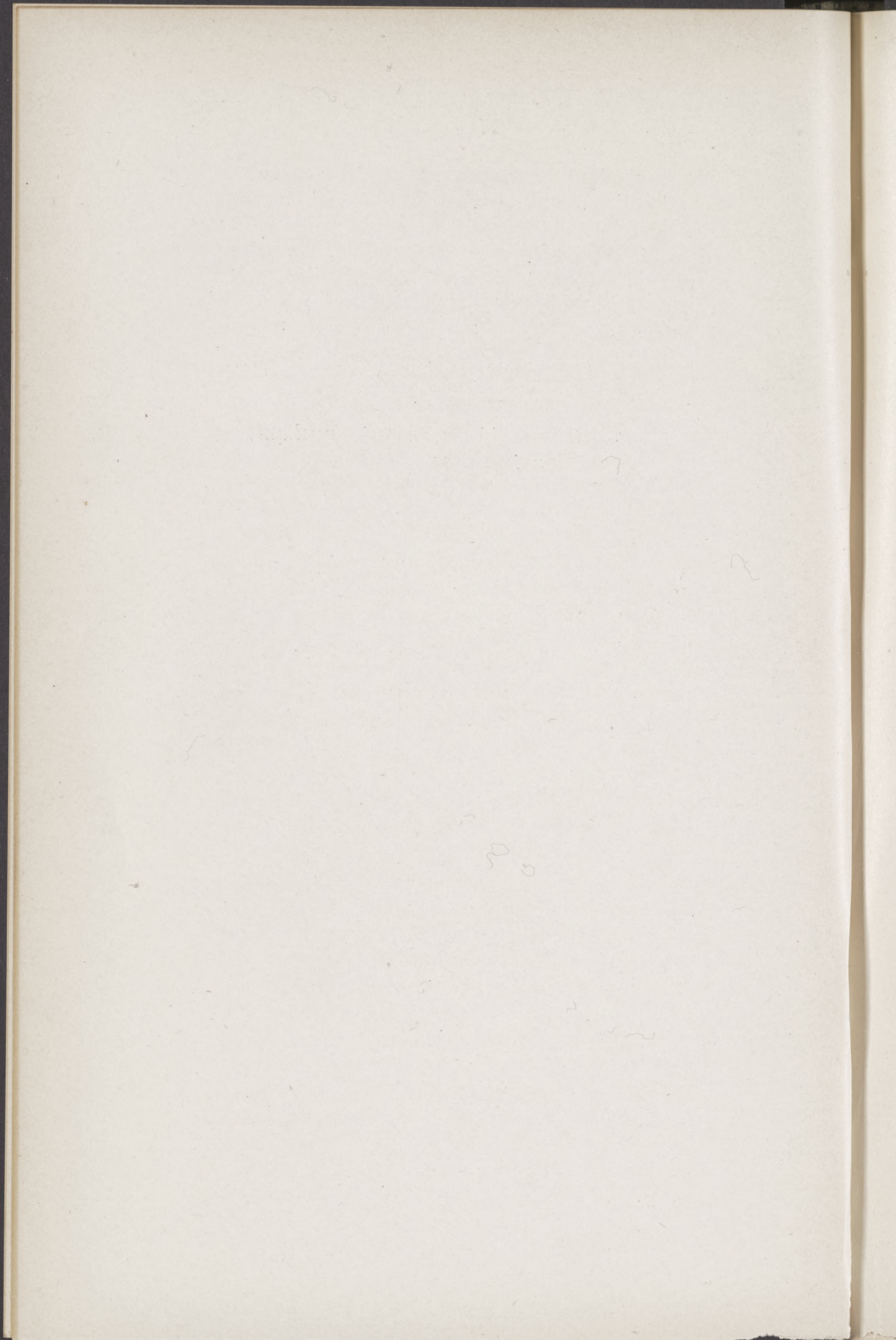
The Court apparently overlooked the fact that there was a denial of any liability for premiums in the body of the answer of Donato Fusco. The fact that the answer of Donato Fusco set up a separate and inconsistent defense of payment did not relieve the plaintiff of proving the facts alleged in the complaint, namely, that there were premiums due and owing on bonds executed subsequent to the contract offered.

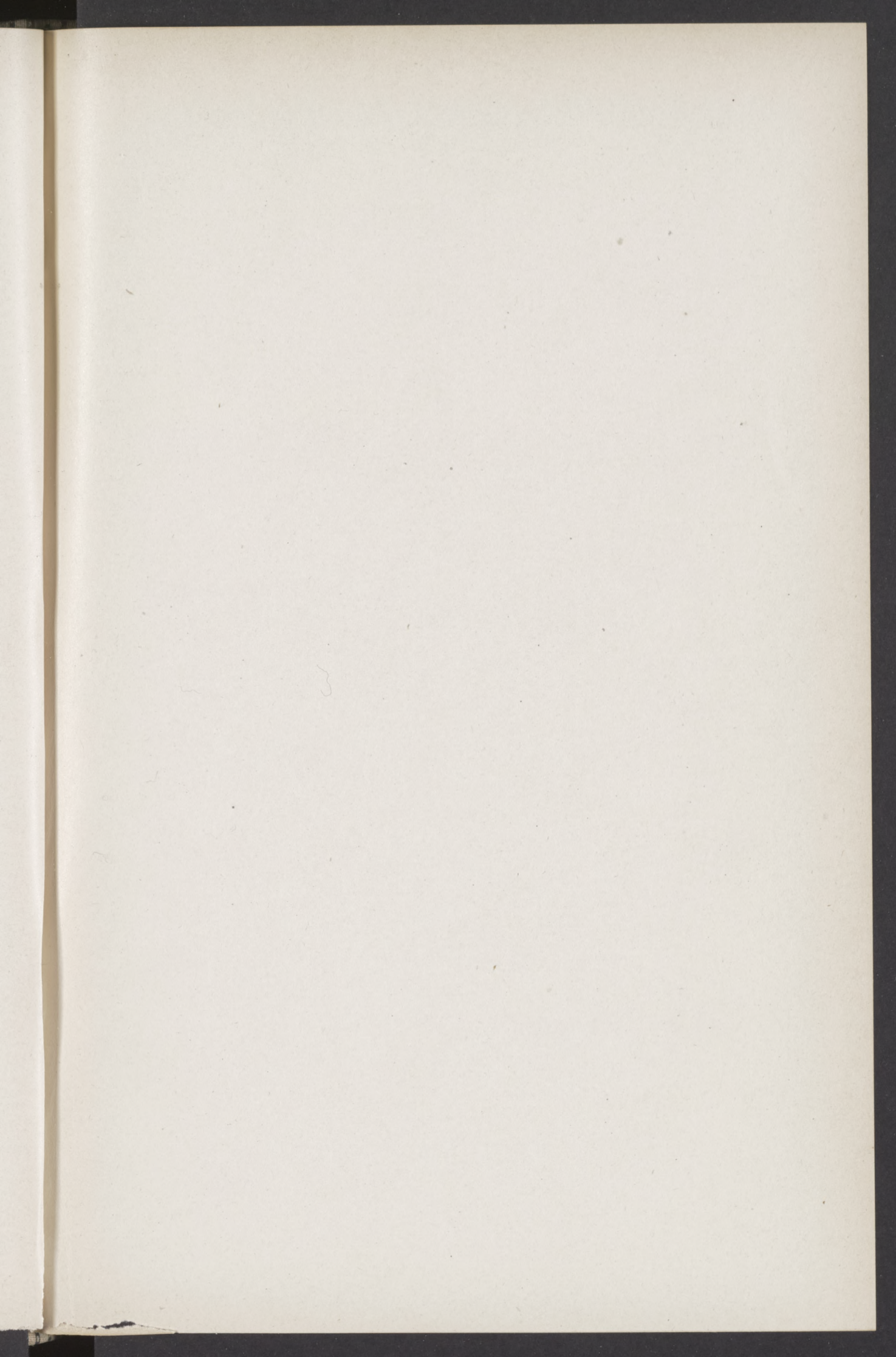
Livesey v. Besson, 82 Atl. 509.

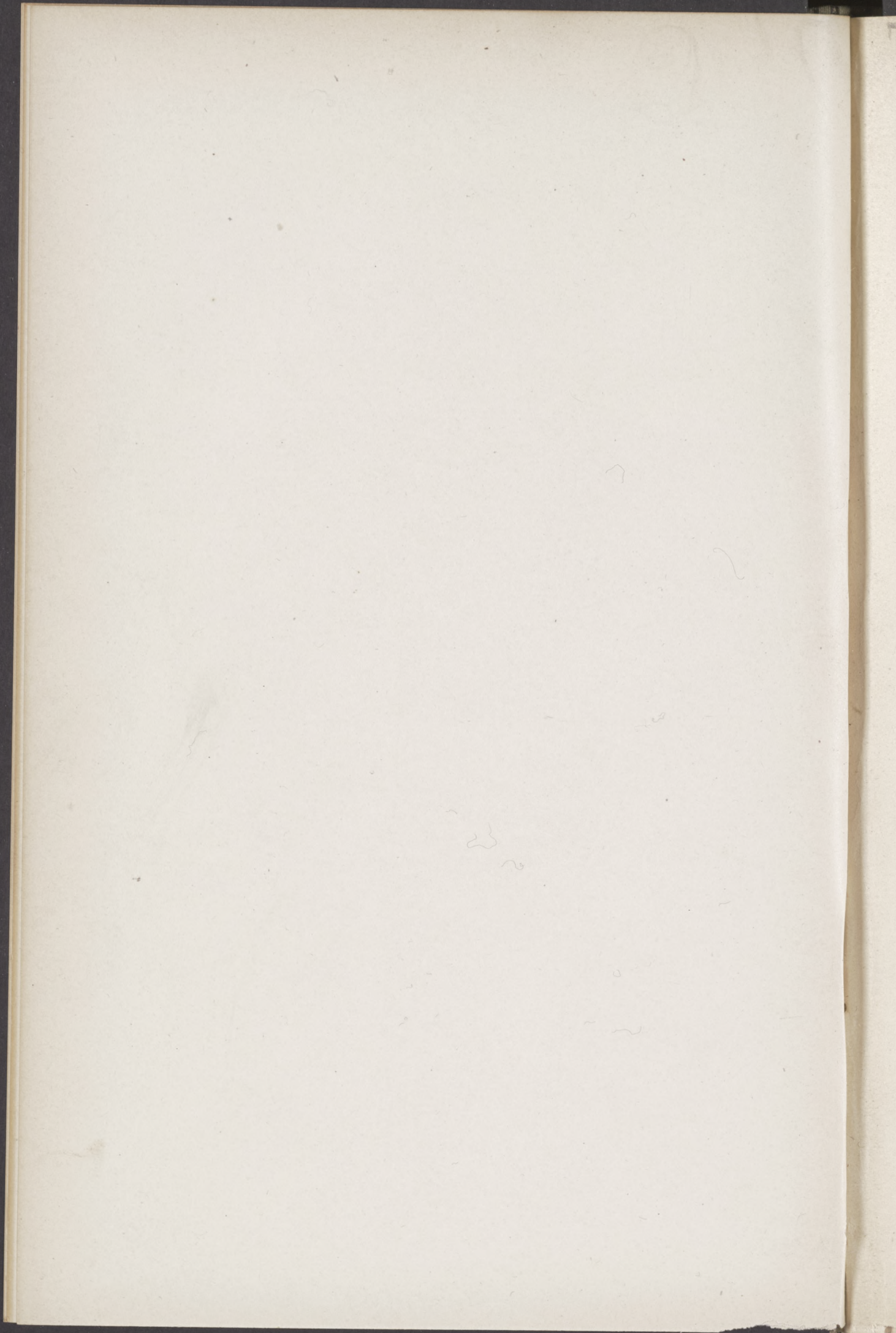
The appellant, therefore, respectfully submits that this judgment against him should be set aside and that this appellant should be permitted to file an amended answer, so that he could defend as to the forgery of his signature and to deny the execution of the alleged contract of indemnity.

Respectfully submitted,

CHARLES M. MASON,
Attorney of Defendant-Appellant,
Donato Fusco.







71 B

New Jersey Court of Errors and Appeals 10

THE TITLE GUARANTY & SURETY
COMPANY, a corporation,
Plaintiff and Appellee,

vs.

FUSCO CONSTRUCTION COMPANY,
a corporation,
Defendant,
and

DONATO FUSCO,
Defendant and Appellant.

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BRIEF OF APPELLEE.

Statement.

This action was instituted by The Title Guaranty & Surety Company, a bonding Company, against the defendants on the agreement of indemnity attached to the complaint (pages 7-13) to recover premiums on three separate bonds given by the plaintiff as surety for the Fusco Construction Company, one of the defendants, to the Town of Harrison, New York, in connection with three contracts entered into between the said town and the defendant Fusco Construction Company for the

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construction of the Sanitary Sewer System of that town.

The cause was tried before Hon. Nelson Y. Dungan, C. C. J., and a jury, at the Essex Circuit on the 7th and 8th days of December, 1916, and resulted in a direction of a verdict in favor of the plaintiff and against the defendants of One thousand and three and 40/100 (\$1003.40) Dollars and costs.

From the judgment entered upon the verdict, the defendant Donato Fusco appeals; the defendant Fusco Construction Co. does not appeal.

On this appeal the appellant fails to point out any defense that he has to this action, and urges a reversal of the judgment merely upon alleged failure of proof on the part of the plaintiff-appellee.

The appellant Donato Fusco is not an illiterate Italian. He writes his name in English and writes in Italian (page 89, fol. 30). He now is and for the past twenty-five years has been a contractor (page 90, fol. 20; page 93, fol. 20). His entire testimony was given in English without the aid of an interpreter (pages 88-96).

The complaint in this action alleges:

(1) The capacity of the plaintiff and its authority to issue bonds (page 4, fol. 30). This is admitted by the appellant (page 128, fol. 20).

(2) The capacity of the defendant Fusco Construction Company. This is admitted by the appellant (page 15, fol. 20).

(3) That on or about December 19th, 1912, the defendant Fusco Construction Company being *then* about to enter into certain contracts with the Town of Harrison, requiring the giving of certain bonds, the defendants Fusco Construction Company and Donato Fusco, this appellant, entered into an agreement with the plaintiff-appellee, a copy of which is annexed to the complaint (page 7, starting at fol. 10), *in consideration of the execution and delivery by the plaintiff-appellee of said bonds*, binding themselves to pay the premiums of said bonds to the plaintiff in cash in advance, until the plaintiff should be discharged from the liability on such bonds, and to pay the plaintiff's counsel or attorneys' fees incurred in collecting such premiums. 10

This allegation is admitted by this appellant (paragraph 3 in answer page 15, fol. 30), with this qualification: That he was induced to sign said agreement through misrepresentations of plaintiff's agent. 20

(4) "The plaintiff confiding in said promise of the defendants and at the request of said defendants, duly executed and delivered to the Town of Harrison, New York, three certain bonds of the plaintiff in the sum of \$23,282, \$35,330 and \$15,000 respectively, conditioned for the faithful performance of all the conditions and provisions of three certain contracts for the construction of sewers for the said twon, said contracts being designated 'A,' 'B,' and 'C' respectively." 30

As to the fourth paragraph of the plaintiff's complaint, this appellant alleges:

"4. As to the fourth paragraph of the complaint he says that he has not sufficient knowl- 40

“edge or information thereof to form a belief” (page 15, fol. 30).

As to the fourth paragraph of the plaintiff's complaint the defendant Fusco Construction Company alleges:

10 “4. *It admits the fourth paragraph*” (page 17, fol. 20).

The fifth paragraph of the plaintiff's complaint alleges that the plaintiff had not been discharged from liability on these bonds.

20 Both defendants deny this allegation, but it was conceded upon the trial and by the answers to the interrogatories of the defendant Donato Fusco, that the plaintiff was not so released until June, 1914, and October, 1914 (pages 70-72, page 66, fol. 30).

The plaintiff-appellee in the trial waived its claim to premiums accruing subsequent to these dates (page 71).

Paragraph six of the complaint alleges the premium charges. This paragraph is denied by the answer of this appellant and also by the answer of the other defendant.

30 Paragraph seven alleges the non-payment of these charges. This is denied by this appellant and by the other defendant.

Paragraph eight alleges, that, by reason of the failure of the defendant to pay the premiums, the plaintiff was put to the expense of One hundred Fifty (\$150.00) Dollars for attorneys' fees. This is also denied by both defendants, but the reasonableness of this charge was conceded on the trial, and it was stipulated that if the plaintiff is entitled to recover this item, that sum would be reasonable (page 70, fols. 10-30).

This appellant, for a first defense, alleged that the work which the bonds ^{were} ~~was~~ given to cover was completed prior to December 6th, 1913. This defense was abandoned upon the trial, as heretofore pointed out.

For a second defense, this appellant alleged: That his signature to the contract of indemnity attached to the complaint (page 7) was procured by misrepresentation. 10

Upon the trial he offered no testimony to support this allegation, and he concedes in his brief (page 9) that the Court below was correct in overruling his alleged defense of forgery, which he tried to sustain under the allegations of the second defense in his answer.

An examination of the record will disclose that he was allowed to put in evidence all the testimony that he had in this regard, but the defense of forgery was overruled in the direction of a verdict (see the opinion of Mr. Justice Dungan, commencing at page 122; especially at page 125, commencing at fol. 20). 20

There is no basis or foundation of fact in the entire record to warrant the statement in the appellant's brief (page 2), that "at the time the answer for Donato Fusco was filed, Fusco thought that someone had gotten him to sign a paper by misrepresenting the contents to him, as it was alleged the contract had been executed by him. His answer was therefore prepared on the theory that it was his signature on the instrument, but that it had been obtained fraudulently." 30

The appellant's answer was not prepared by his present or trial attorneys. It was prepared by Messrs. Church & Harrison (page 16, fol. 20). The answer of the co-defendant Fusco Construction Co. was prepared by Mr. E. R. McGlynn 40

(page 17, fol. 40), who subsequently became the attorney of the appellant (page 113, fol. 10). Later Messrs. Mason & Souter became the attorneys of the appellant.

10 The execution of the contract of indemnity, a copy of which is attached to the complaint, dated December 19th, 1912 (page 7), was duly acknowledged by the appellant before Oliver Buna Ferris, an attorney-at-law of New Jersey, who testified that he made known the contents thereof to him (page 61, fol. 10, page 62, fol. 30 and page 63).

The execution of the contract of indemnity as has been pointed out, was admitted by this appellant, and the original document was admitted in evidence without objection on his part, the paper being marked Exhibit P2 (pages 20-21).

20 It is stipulated that Exhibit P2 is the same as the contract of indemnity annexed to the complaint (page 7, see stipulation, page 128).

The appellant, on page 3 of his brief, states that his answer sets up payment as a separate defense. A mere examination of his answer will show that this is not the fact (page 16).

30 The appellant in his brief (pages 3 and 4) devotes considerable space to the alleged failure on the part of this appellee to offer evidence as to when this contract of indemnity Exhibit P2 was delivered to the appellee and how it was obtained.

This appellee must confess, in view of the fact that the execution of this contract of indemnity, Exhibit P2, was admitted, and the document received in evidence without any objection on the part of the appellant, it fails to see the point of this
40 argument.

The statement contained on page 4 of the appellant's brief, that Riddell, witness for the plaintiff, was in Court but did not deny that the contract of indemnity was obtained after the bonds had been executed and delivered is entirely misleading, as an examination of the testimony of Riddell, which appears in the record (pages 54-57) will show that he was not interrogated by any party to the litigation upon this subject. 10

The statement contained on page 4 of the brief that the two bonds dated December 6th, 1912, were admitted in evidence without calling attesting witnesses, is not at all supported by the record.

The bonds were first admitted against the defendant FUSCO CONSTRUCTION COMPANY, because their due execution and delivery, pursuant to Exhibit P2, the contract of indemnity here sued upon, as alleged in paragraph 4 of the plaintiff's complaint (page 5), was admitted by that defendant in its answer (page 17, fol. 20). These bonds were admitted in evidence, page 25, and are marked Exhibits P3 and P4, and at this time were admitted only as against the defendant FUSCO CONSTRUCTION COMPANY. 20

Thereafter, the Court coming to the conclusion that they were also admissible as against the appellant, admitted them also as against this appellant (page 77, fol. 30). 30

Subsequently the signatures of the attesting witnesses, as to the execution of these bonds, Exhibits P3, P4 and P14, so far as the signature of the plaintiff-appellee is concerned (the attesting witnesses themselves having been shown to have been out of the state), were proved (page 117, starting at fol. 10, to page 119).

The theory of the Court below, as an examination of the record will disclose, in admitting these 40

bonds, as against this appellant, was that both parties to the bonds, to wit, the plaintiff, this appellee, and the other defendant, FUSCO CONSTRUCTION COMPANY, admitted their due execution and delivery under the pleadings, and that the bonds were not directly in issue, but were collateral to the issue. However, as pointed out, thereafter, the proof of the handwriting of the attesting witnesses, as to the signature of the plaintiff, was given. To have called the attesting witness to the signature of the other defendant herein, FUSCO CONSTRUCTION COMPANY, who was the principal upon those bonds, would have been sheer redundancy, as that defendant had already expressly admitted the execution of those bonds (see paragraph 4 of its answer, page 17, fol. 20).

The theory upon which these bonds were admissible as against this appellant, we will point out in our brief of argument.

The statement contained on page 4 of appellant's brief, that the time of the delivery of these bonds was not proved, is correct, and the reason therefor and the needlessness thereof will be pointed out in our brief of argument. It is very clear, as we will point out in our brief of argument, that the admissions contained in the pleadings, evidence as a matter of law, that these bonds were delivered subsequent to the execution of the contract of indemnity, Exhibit P2, and in pursuance thereof.

As to the statement contained on the bottom of page 4 and at the beginning of page 5 of the appellant's brief, that the appellee's counsel promised to explain how it was that he was offering bonds that were executed prior to the bond of indemnity and then failed to explain same, it is true that no detailed explanation appears in the record. The explanation was a matter of law, in

view of the admissions in the pleadings, and was clearly understood by the Court below, and will be dealt with in our brief of argument.

The statements contained on page 5 of the brief, as to the testimony in regard to the dates upon which the bonds Exhibits P3, P4 and P14 were executed, are wholly immaterial to this controversy. We shall point out in our brief of argument that bonds become valid and speak *as of the date of their delivery and acceptance*, and that the dates of execution are immaterial. We shall further point out that the delivery and the acceptance of the three bonds given by the plaintiff-appellee on behalf of the FUSCO CONSTRUCTION COMPANY to the Town of Harrison, were made subsequent to the time of the execution and delivery of the contract of indemnity Exhibit P2, which it is admitted was delivered by this appellant to the plaintiff-appellee on December 19th, 1912, and that this fact is clearly shown, as against this appellant, by admissions in the pleadings, as construed by law, and that further proof upon this branch of the case, it was not incumbent upon this appellee to make.

The statement on page 5 of the appellant's brief, that the Court admitted Exhibit P14 to prove the execution and delivery and contents of that bond as a sworn copy, after the witness Walter stated (page 82) he was not sure it was a true copy, is again entirely misleading. As we have already pointed out, we shall show in our brief of argument, that the time of the delivery of this bond is admitted in the pleadings, as construed by the law of the State, and an examination of the testimony of the witness Walter, will show that he testified that this bond was an exact copy of the original which was lost, with the exception that he was unable to testify as to whether the original

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had been executed by the FUSCO CONSTRUCTION COMPANY (pages 79-83). As to whether this bond was executed by the defendant FUSCO CONSTRUCTION COMPANY, the Court below ruled that, under the form of the bond and the form of the indemnity contract Exhibit P2, this was immaterial. Apparently the appellant agrees with this contention, because he does not raise it in his brief. We, therefore, do not feel called upon to argue the proposition as an examination of the authorities shows that there is no question as to its soundness.

The statement contained on page 5 of the appellant's brief that Exhibit P8 was introduced to show the execution of the bonds Exhibits P3, P4 and P14, is again misleading. This exhibit was not introduced for any such purpose. The execution of these bonds at the request of these defendants is admitted by the defendant FUSCO CONSTRUCTION COMPANY (page 17, fol. 20), and this admission is binding upon the appellant here, as we shall show in our brief of argument. Indeed, every admission made by the defendant FUSCO CONSTRUCTION COMPANY in this litigation is binding upon the appellant here, as we shall show in our brief of argument.

The statement contained on pages 5 and 6 in the appellant's brief, as to the ledger cards of the plaintiff, Exhibits P5, P6 and P7, that these were improperly admitted because not the original records, is not supported by the testimony. The witness Hardy, the bookkeeper of the plaintiff at the time the records were made, testified that these were the original entries. The entries upon these ledger cards were made first, and were made by a stenographer under his direction (see page 38).

"Mr. Mason: Then your Honor admits them?

"The Court: Yes.

"Mr. Mason: And I object; they are not books of original entry.

"Mr. Cohn: I understood he testified they were the original entries.

"The Court: I understood that to be so. 10

"Witness: Yes, sir.

"Said documents marked Exhibits P5, P6 and P7.

"By Mr. Cohn:

"Q. Do these cards contain the credits? A. They do.

"Q. And they also show the amount of premium on each of those bonds? A. They do."

(Page 37.) 20

"By Mr. Mason:

"Q. By whom was the typewriting on these cards done? A. Under my direction by a stenographer.

"Q. Then you say that these were the ledger cards? A. Yes, sir.

"Q. Then the amount as to what was paid was entered into the ledger? A. They were entered from the cash book, posted on the cards, and entered in total in the ledger at the end of the month. 30

"Q. And you did have books there. You had, first, a cash book? A. Yes, sir.

"Q. And when any payment was made to your company that payment was entered on the cash book? A. Yes, sir.

"Q. *And then after the payment had been entered on the cash book then you made a memorandum on these cards?* A. No, sir. 40

"Q. Was the memorandum on the cards made first? A. The entries were made from the cards on the cash book.

"Q. And then made from the cash book to the ledger? A. In total.

"Q. In your ledger did you keep an account with the different persons? A. No, sir."

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It will, therefore, be seen that the original entries were the entries on the ledger cards, Exhibits P6, P7 and P8, and that the only other entries that were made were entries of amounts in total, and that the cards were the only books which set forth the detailed entries. Further, that all of the other entries were made from the original entries which were first made upon the cards.

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The witness further testified that he kept these cards until November, 1913, at which time he left the employ of the Company. The testimony further shows that after that time they were kept by the witness Moser, the plaintiff's Treasurer; that they came into his possession after November, 1913, when the witness Hardy testified that he had left the employ of the Company, and that the entries on the cards after that date were made in his department and under his direction, and that after the time they came under his jurisdiction he knew who put the entries on the cards. His testimony appears commencing on page 48 of the record.

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We cannot conceive that the plaintiff was required to call, in order to get these cards in evidence, every stenographer and bookkeeper who made entries on them under the direction of these two witnesses, who testified that these entries were made under their directions and that they knew that they were true. If this were the law, it would be practically impossible for any large corporation

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ever to prove its book entries.

The entries on these cards were in law made by the witnesses Hardy and Moser. The stenographers who performed the mere physical act of making the entries were as much the instruments of these witnesses as a fountain pen would have been had the entries been made by that method. The cards produced were the permanent records. They were the original entries. It is true that the testimony showed that there were other entries made upon secondary books which were not original. 10

It was not incumbent upon this plaintiff-appellee to produce these books, although had this appellant required them for any purpose they would have been produced by the plaintiff-appellee upon a mere request. No such request was made by the appellant, and the record does not show any such request. Under these circumstances, this appellant should not be allowed to complain of the non-production of these secondary records at this time. 20

The statement contained on page 6 of the appellant's brief that the witness Walter testified as to the amount of premiums alleged to be due from the cards, is not borne out by the record. The witness Walter did not testify entirely from the cards. An examination of his testimony will show that he was and had been from the 11th day of April, 1914, the resident Vice-President of the plaintiff Company in the City of New York; that prior to that time and since about November, 1912, he has been in addition Claims Attorney for that Company, and that since his connection with that Company he has been in complete total charge of its affairs in his district. 30

The Court will take judicial notice of the fact that the plaintiff is an insurance corporation and that one of its officers connected with it for a long time would, naturally, be familiar with the rates at which it issued its obligations. 40

This appellant raises no question in his brief that the premiums of the plaintiff were not payable annually in advance.

10 The statement on page 6 of the appellant's brief that one of the Exhibits showed that the bond issued on December 28th, 1912, Exhibit P14, was marked cancelled on the card, Exhibit P7, is irrelevant to this appeal, as the plaintiff, as has been pointed out, *supra*, has waived the premium which became due and payable on December 28th, 1914, and the premium which became due on December 28th, 1913, and carried the bond to December 28th, 1914, was due and payable in advance, and no contention otherwise is made in the appellant's brief.

20 We cannot see how the statements contained on page 7 of the appellant's brief as to the testimony of Donato Fusco are necessary to the decision of this appeal, in view of the admission on page 9 of his brief, that he raises no point on this appeal as to the correctness of the Court below in rejecting this testimony under the defense of fraud that was pleaded, the situation in regard to which we have pointed out, *supra*.

30 The appellant states disingenuously (bottom of page 7 of brief) that an application to amend the answer was made over two months before the case was actually tried. The record of appeal does not disclose anything in regard to the making of this motion by the appellant, but for the information of the Court we feel that the actual facts in reference thereto should be stated. This action was commenced in July, 1915 (page 4, fol. 105). An application to amend was made by the appellant through his attorneys, Messrs. Mason & Souter, on April 26th, 1916, when the case first came up for trial before Mr. Justice Dungan and was denied.

On April 28th, 1916, for which day notice of an application to amend was served previous to the application just mentioned, on the appellant's default, Mr. Justice Dungan signed an order again denying the application. A third application, which is the one referred to in appellant's brief, was then made on September 16th, 1916, but was denied by Chief Justice Gummere.

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BRIEF OF ARGUMENT.

POINT I.

There was no variance of allegations and proof.

As pointed out in the statement of the case, the complaint alleged the making of the contract of indemnity upon which this action is based, upon the 19th day of December, 1912, by both of the defendants in this action, in consideration of the plaintiff executing and delivering the three contract bonds (Exhibits P3, P4 and P14), which the FUSCO CONSTRUCTION COMPANY was required to give to the Town of Harrison to enable it to obtain the three contracts "A," "B" and "C" for the construction of the sanitary sewage system of that town. This is admitted by the pleadings of both defendants; further, the complaint alleges that, confiding in the promise of the defendants given in said indemnity agreement, Exhibit P2, the plaintiff duly executed and delivered these bonds in large amounts. As to this allegation this appellant says that he has no knowledge or information; and the other defendant, who was the principal in said bonds and the joint

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obligor in said indemnity agreement, admits the allegations.

10 Attention is here called to plaintiff's Exhibit P2, the contract of indemnity upon which this action is brought, which appears at page 7 of the record and to the language, especially at folio 30, which is as follows :

“Now, therefore, in consideration of the premises and of the execution and delivery *from time to time* by the surety company of any such instrument or instruments, the parties of the first part hereby agree and bind themselves, their heirs, executors, administrators, successors, and assigns *jointly and severally* as follows :” to wit, etc.

20 It, therefore, clearly appears, and a further examination of the recitals and agreements contained in Exhibit P2, which is printed at page 7 of the record will accentuate that the indemnity agreement upon which this action is based was the JOINT AND SEVERAL undertaking of these defendants.

A bond or contract speaks not as of the date of execution, but as of the date of delivery and acceptance. No citation of authority is necessary for so elementary a proposition.

30 As this appellant's co-defendant, Fusco Construction Co., admitted the due execution and delivery of these contract bonds which were given to the Town of Harrison in order to enable it to obtain contracts for the construction of the sanitary sewerage system involving large amounts, to wit, \$73,613.00, subsequent and pursuant to Exhibit P2, the said contract of indemnity, this admission was binding upon this appellant, and the plaintiff-appellee was
40 not called upon to furnish further proof as to the

time of the delivery of these bonds. The appellant furnished no proof whatsoever as to the time when the bonds were delivered, and the common law presumption of delivery upon the date of execution was rebutted by the admission of the appellant's co-defendant and joint obligor, Fusco Construction Co.

The admission of a defendant in his answer renders the facts admitted indisputable by him; and the admissions of a defendant are evidence against a co-defendant who is privy in obligation. 10

Walling vs. Rosevelt, 1 Harr., 42;
 Black vs. Lamb, 12 N. J. E., 108 (page 122);
 Barrick vs. Austin, 21 Barb., 241;
 Wigmore on Evidence, Sect. 1064, Vol. 2, page 1240, and Sect. 1077, page 1277; 20
 Greenleaf on Evidence, 16th Edit., page 296, Sect. 174.

“The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, but judicial admissions, i. e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. This much being generally conceded, it follows that a party may at any and all times invoke the language of his opponent's 30 40

10 “pleading as rendering certain facts indisputable; and that, in doing this, he is on the one hand neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer. He is merely advocating a construction of the judicial act of waiver of proof, and no rule of evidence is involved.”

Wigmore on Evidence, Sect. 1064 (supra).

20 “So far as one person is privy in obligation with another, i, e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration. There being an identity of legal liability, the two persons are one so far as affects the propriety of discrediting one by the statements of the other.

30 “When does this privity of obligation exist? This is plainly a matter for definition by the substantive law, not the law of evidence. The rule of evidence assumes whatever is otherwise established in the substantive law; and
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“it would require a lengthy and inappropriate digression to examine here the conclusions of that law upon the variety of situations in which the question is presented. It is enough to note that the principle finds constant application chiefly to the admission of a co-promisor, of a principal (against his surety), and of one or two other classes of liability which may now be examined in order to distinguish the present question from certain genuine rules of evidence.” 10

Wigmore on Evidence, Sect. 1077 (supra).

In *Walling vs. Rosevelt*, supra, Hornblower, C. J., on page 45 says:

* * * “Nothing is more familiar to us, or better settled, as a rule of law, than the general principle, that the acknowledgment of one co-partner, or joint debtor, is good evidence against all of them.” 20

In *Black vs. Lamb* (supra), at page 122, we quote from the Chancellor’s opinion:

“The fourth objection to evidence is that to the declarations of Joseph Smith. Joseph Smith is a co-obligee in the covenant and a party to the record. His declarations were properly admitted. The general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit, whether others are joint parties on the same side with him or not, and howsoever the interest may appear, and whatever may be its relative amount. 1 Greenleaf’s Ev., Sect. 172. And 30

“in the absence of fraud, if the parties have a
 “joint interest in the matter in suit, whether as
 “plaintiff or defendant, an admission made by
 “one is, in general, evidence against all. Sect.
 “174.”

10 This rule has even been applied in criminal mat-
 ters, where liberty, and sometimes life itself, are
 at stake.

State vs. Tomlin, 5 Dutcher, 13, page 24.

The bonds, Exhibits P3, P4, and P14, were prop-
 erly admitted in evidence, it appearing that the
 subscribing witnesses were out of the State.

N. J. Zinc Co. vs. Lehigh Zinc Co., 59 N.
 J. L., 189.

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Worman vs. Seybert, 78 N. J. L., 176.

30 The co-defendant and co-joint-debtor of this ap-
 pellant, to wit, Fusco Construction Co., the very
 principal on said contract bonds, having admitted
 the due execution and delivery of the bonds “A,”
 “B,” and “C,” Exhibits P3, P4, and P14, pursuant
 to the indemnity agreement (Exhibit P2, page 7),
 and subsequent to its execution and delivery, the
 plaintiff-appellee was not called upon to make any
 further proof to show that the same were executed
 and delivered subsequent to and in pursuance of
 that indemnity agreement. The plaintiff-appellee
 had a right to rely upon the legal effect of these
 admissions. This, of course, only applies as to
 two of the bonds (Exhibits P3 and P4), Exhibit
 P14 concededly having been delivered subsequent
 to the delivery of the contract of indemnity.

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IT MIGHT BE HERE POINTED OUT, THAT
 AS TO THIS ONE BOND, EXHIBIT P14, THE

PREMIUM OF WHICH AMOUNTS TO \$353.30, THIS APPELLANT RAISES NO QUESTION THAT SAME WAS EXECUTED AND DELIVERED SUBSEQUENT TO THE CONTRACT OF INDEMNITY, EXHIBIT P2 (PAGE 7), DATED DECEMBER 19TH, 1912.

And he further raises no question as to the reasonableness of the attorneys' fees, amounting to \$150, so that in his own brief, he concedes that as to \$503.30 of this judgment, exclusive of interest, he has no basis for complaint. 10

Even disregarding all this, on the admission in the appellant's answer alone, there is ample proof that the contract bonds "A," "B" and "C," Plaintiff's Exhibits P3, P4 and P14 were delivered subsequent to December 19th, 1912, the date that the ~~bond~~^{agreement} of indemnity, Exhibit P2, was concededly executed and delivered. 20

First: as to bond P14—this is dated December 28th, 1912, and the appellant raises no contention that it was either executed or delivered prior to that date.

Now, as to bonds P3 and P4, paragraph 3 of the complaint (page 4) (admitted by paragraph 3 of this appellant's answer, page 15), alleges: that on December 19th, 1912, the FUSCO CONSTRUCTION COMPANY, the other defendant in this litigation, was *then* about to enter into certain contracts with the Town of Harrison, requiring the giving of bonds, Exhibits P3, P4, and P14; in other words, the contracts "A," "B," and "C," which are referred to in the testimony, and to which these bonds, Exhibits P3, P4, and P14 were attached, *were not at that time even executed*, and this paragraph recites that this appellant executed the ~~bond~~^{agreement} of indemnity, Exhibit P2, page 7, in consideration of the agreement of plaintiff-appellee to furnish those bonds attached to those contracts, which at 40

that time had not even been executed; and the appellant further admits that he executed Exhibit P2 upon the agreement of the plaintiff-appellee to furnish these bonds. The appellant admitting that the contracts themselves were not even then executed, but that the other defendant, FUSCO CONSTRUCTION COMPANY, was then about to enter into them, and that he executed the contract of indemnity (Exhibit P2, page 7), upon the agreement of this plaintiff-appellee to furnish these bonds, would have the Court draw the inference that two of the bonds, Exhibits P3 and P4, were not written and delivered subsequent to and in pursuance of the ^{agreement} bond of indemnity (Exhibit P2, page 7) from the mere fact that these bonds happened to be dated prior to that time. The law is settled that *a bond speaks as of the date of delivery and acceptance.*

It is common knowledge that surety companies date bonds as of the day application is made, and that it is not customary to make delivery until the indemnity agreement is given to the company.

If we are correct in our argument as to the law in this case, upon the admissions contained in the pleadings, there is no merit to points marked II, III and IV of appellant's brief, and we need not deal with them.

As to Point V of appellant's brief, we have pointed out in our statement of the case, that the ledger cards which were admitted in evidence were the original, primary entries, identified by the witnesses, in whose custody they were and under whose direction the entries were made by subordinate employees. They were the original entries; they were produced from the proper custody; and their correctness was properly proved.

We think that the quotation from the testimony set forth in our statement of the case clearly

shows this. After the colloquy between the appellant's counsel on page 38 of the record and the plaintiff's counsel, where the former objected to their introduction, on the ground that they were not the books of original entry, the Court and plaintiff's counsel stated that they understood the witness to have testified that they were.

The witness then testified that they were. There was no further objection to their reception by the counsel for the appellant; so that these statements made by the appellees's counsel, the Court, and the witness must have been so understood by him at the time. Therefore, the cases that he sets forth in his brief under Point V, to the effect that secondary evidence of book entries is not admissible, have no application. 10

In addition, if we even assume without for a moment conceding that the admission of these cards was an error, it was, at best, a harmless error from which this appellant did not suffer and for which this judgment should not be reversed. 20

This action was not based upon a book account, but upon a contract of indemnity, Exhibit P2, which provided for the payment of premiums, annually *in advance*. The first annual premium on each of the bonds was admittedly paid, and the amount not open to dispute.

The testimony of James J. Fusco, the President of the FUSCO CONSTRUCTION COMPANY, appearing in the record commencing at page 95, shows that he paid the first year's premium, amounting to \$733.42, which equals exactly the annual premiums on these bonds. 30

Exhibit P8 shows that the premium on Bond Exhibit P14 was \$353.30; that it was an annual premium and that it was to be paid annually in advance (page 135).

The testimony of the witness Walter to the same effect brought out by the appellant's counsel on 40

cross examination without objection shows that these premiums were to be paid annually in advance.

(Page 28):

“Q. How were the premiums to be paid?

A. Annually in advance.”

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Page 29:

“Q. Do you know the arrangement how these bonds were to be paid for?

A. Annually in advance.”

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In addition, the witness Walter, who concededly was connected with the plaintiff since November, 1912 (page 26, fol. 40), and who has been its resident vice president since April 11th, 1914 (page 25, fol. 40), testified (page 83, fol. 30) that there was a flat rate for bonds such as these in 1912, and that this rate was $\frac{1}{2}$ of 1%, not of the amount of the bonds but of the amount of the contract price.

And the record further shows, on page 114, the amounts of the various contracts and what $\frac{1}{2}$ of 1% of these amounts would be, which on computation will total \$733.42, the amount for which the Court directed a verdict, together with attorneys' fees of \$150 conceded by the appellant to be reasonable.

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We call specific attention to the Court that this appellant does not contend in his brief that these premiums were not to be paid annually in advance. He neither alleged or proved any defense of payment, nor did he introduce any defense or offer any other testimony supporting any other plea in bar.

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We therefore submit that outside of the evidence of the ledger cards, which were introduced in evidence (Exhibits P5, P6 and P7), there is ample proof in the record of the amount due. An examination of the record in this case convinces that this appellant has no meritorious defense to this action, and that on the trial below, as here, his efforts are directed to defeating the plaintiff's just claim and escaping liability on alleged technical defects in the plaintiff's proof. The judgment below should be affirmed, with costs. 10

Respectfully submitted,

COHN & COHN,
Attorneys for Plaintiff-Appellee,
The Title Guaranty & Surety Co. 20

MAURICE COHN,
of Counsel.

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