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SUMMONS.

New Jersey Supreme Court

ESSEX COUNTY.

The State of New Jersey to Continental Casualty Company, a corporation, (L. S.) You Are Summoned to answer the annexed complaint of J. Jacob Shannon & Co., a Corporation of Pennsylvania, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this fifteenth day of March, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

Andrew J. Whinery,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff*, *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant*.	*Action at Law.* *Complaint.*

The plaintiff, J. Jacob Shannon & Co., a corporation of the State of Pennsylvania, and having its principal office in the State of Pennsylvania, says that:

1. It is in the business of selling, among other things, hardware supplies.

2. The defendant herein, Continental Casualty Company, is a corporation engaged in the business of furnishing bonds.

3. That Tyler M. Gibbs, trading as the T. M. Gibbs Construction Company, entered into a contract with the Board of Education of the Town of Irvington, in the County of Essex and State of New Jersey, for the construction of a high school building in said Town of Irvington, and that the Continental Casualty Company furnished the bond which was given by the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, to the Board of Education of Irvington, in the County of Essex, a copy of

which bond is attached hereto and made a part hereof.

4. That one of the terms of said bond provided for the payment by the said contractor, Tyler M. Gibbs, trading as T. N. Gibbs Construction Company, or by the Continental Casualty Company, of any and all lawful bills or claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in carrying forward, completing or performing said contract for said high school building, as particularly set forth in said bond attached hereto and made a part hereof.

5. That the plaintiff entered into a contract with said Tyler M. Gibbs, trading as the T. M. Gibbs Construction Company, to furnish all the hardware to be used in said building, at a specific contract price of fifty-six hundred dollars ($5600.).

6. That in addition to the items contained in said general contract between plaintiff and the contractor, the plaintiff also furnished to the said contractor the following items, which are extras and in addition to the items contained in said general contract:

Quantity	Description	Price	Amount	Total
2	April 28, 1926 folio 3633 Ruttle Door Checks with brackets.....	$8.50		$17.00
10	May 24, 1926 folio 1790 Ruttle #3 Door Check Brackets.....	1.20	$12.00	
	Parcel Post & Ins.....		.41	12.41
	June 3, 1926, folio 4900 1 Dutch Door			
2	prs B B Butts 4½ x 4½.....	1.60	3.20	
1	set Locks x top strike D35 x cast shank x H223 x D812 bz 110....	5.52	5.52	
2	Bolts	.85	1.70	10.42
				$39.83

7. That the total amount due from the said contractor, Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, to the plaintiff amounted to fifty-six hundred and thirty-nine dollars and eighty-three cents ($5639.83), and the plaintiff has received on account thereof the sum of six hundred dollars ($600.), leaving a balance justly due and owing from Tyler M. Gibbs, trading as T. M. Gibbs Construction Company to the plaintiff herein the sum of fifty-three hundred and eighty-nine dollars and eighty-three cents ($5039,83).

8. That all of the goods and materials supplied by the plaintiff to the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, including the items which are extras and not within the contemplation of the general contract, were furnished and delivered to the said contractor on or before June 3, 1926.

9. That pursuant to the statute in such case made and provided, the plaintiff herein, within eighty days after the acceptance of the said high school building by the municipality, furnished to the surety on the bond attached hereto and made a part hereof, namely, the Continental Casualty Company, a statement of the amount due to the plaintiff, J. Jacob Shannon & Co., a corporation, which statement was furnished to the said surety, Continental Casualty Company, on or about August 16, 1926.

10. That the bond furnished to the said Board of Education of Irvington, in the County of Essex, in which Tyler M. Gibbs, trading as the T. M. Gibbs Construction Company, is the principal and the Continental Casualty Company, a corporation of the State of Indiana, is the surety

was made not only for the benefit of the Board of Education of Irvington, in the County of Essex, but also for the benefit of creditors of the said Tyler M. Gibbs, trading as the T. M. Gibbs Construction Company, including the plaintiff herein.

11. That the plaintiff has made demands for payment upon Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, and the said Tyler M. Gibbs as aforesaid, has failed to pay the amount of plaintiff's claim.

12. The plaintiff has demanded payment of the said claim from the Continental Casualty Company, a corporation, the defendant herein, as surety under said bond, but the said defendant has failed and refused to pay said claim amounting to fifty-three hundred and eighty-nine dollars and eighty-three cents ($5389.83) together with interest from June 3, 1926.

Wherefore, the plaintiff demands damages against the defendant Continental Casualty Company, in the aforesaid sum of fifty-three hundred and eighty-nine dollars and eighty-three cents, ($5389.83) together with all costs and disbursements in this suit.

ANDREW J. WHINERY,
Attorney of Plaintiff.

KNOW ALL MEN BY THESE PRESENTS, That we, Tyler M. Gibbs, trading as T. M. GIBBS CONSTRUCTION COMPANY, of the City of Philadelphia, County of Philadeplhia and State of Pennsylvania (hereinafter called the principal) as principal, and Continental Casualty Company,

a corporation organized and existing under the laws of the State of Indiana, and having an office and place of business at No. 75 Fulton Street in the Borough of Manhattan, City, County and State of New York, as surety, are held and firmly bound unto the Board of Education of Irvington, in the County of Essex, in the penal sum of Five Hundred Ninety Six Thousand Two Hundred Fifty One Dollars ($596,251.00) for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this 28th day of January, 1925.

The Condition of the Above Obligation is Such, that Whereas, the above named principal did, on the 28th day of January, 1925, enter into a contract with The Board of Education of Irvington, in the County of Essex, which said Contract is made a part of this bond, the same as though set forth herein.

Now Therefore, if the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, shall well and faithfully do and perform the things agreed by him to be done and performed, according to the terms of said Contract, including any and all alterations, addition or modification of the work called for by said Contract, in accordance with the provisions thereof, the advertisement, instructions to bidders, drawings and specifications which are made a part thereof, within the time and for the price in said Contract specified; and if the said Contractor shall pay to the said obligee above named, its successors and assigns, all sums of money it, the

said obligee, may expend for fully completing said work over and above the amount which the Contractor would have been entitled to receive had said Contractor completed the work under said contract, according to the terms and conditions thereof, and all loss or damage which may result to said obligee above named, its successors or assigns, by reason of the omission, failure, neglect or refusal of the said Contractor to commence, prosecute or complete said work as in the said Contract provided, or by reason of the non-performance or malperformance on the part of the said Contractor of any of the covenants, conditions, requirements, stipulations and agreements of said contract, including all alterations, additions and modifications, and shall guarantee and maintain all materials and workmanship in good condition for one year as required in the general conditions of the specifications, and shall promptly pay all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in carrying forward, performing or completing said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborers having a just claim, as well as for the obligee herein and shall defend and settle, without expense to the Board, liens, claims for personal injury or otherwise, or from other liabilities arising from the execution of the work or from the use of patented articles, and when required in the specifications or contract and before the certificate of final payment shall be due, shall provide additional satisfactory bond or bonds covering all other guarantees for maintenance and repairs in the amount and for the period of time stated in the specifications or contract,

without any fraud or other delay, then said obligation shall be void, otherwise the same shall remain in full force and virtue.

Said surety hereby expressly waives whatever right it may have to be notified of any such alterations, additions and modifications which may hereafter be agreed to by the parties to the said contract and acknowledges itself to be bound for all such alterations, additions and modifications and as fully as though notice thereof had been given it and it had consented thereto.

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

If the said obligee should desire to increase the total extra cost of such alterations, additions and modifications in excess of ten per cent. of the price mentioned in said contract, the parties hereto, upon written notice of the amount of such increase, agree to increase the penal sum of this bond, by written consent to be hereto attached, to an amount equal to 33 1-3% of said contract price, including the amount of all alterations, additions and modifications thereto.

T. M. GIBBS CONSTRUCTION COMPANY

By Tyler M. Gibbs,
Proprietor.

By George Young Casey,
Attorney in fact.

Countersigned at Newark, N. J.
J. Durahoenz, Jr.

ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff*, *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

The answer of defendant, Continental Casualty Company, to the complaint of the plaintiff, says that:

FIRST DEFENSE.

1. The defendant has no knowledge sufficient to form a belief as to the matters stated in the first paragraph.

2. The defendant admits the second paragraph.

3. Answering paragraphs 3 and 4 of the complaint the defendant admits that Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, as principal, and this defendant as surety, made and executed a bond to the Board of Education of Irvington, and it requires the production of the original bond as to the terms and conditions thereof, and, except as herein admitted, it denies paragraphs 3 and 4 of the complaint.

Answer.

4. Answering the 5th paragraph, this defendant has no knowledge sufficient to form a belief as to the matters stated in said paragraph.

5. Answering paragraphs 6, 7, 8, 9 and 10 of the complaint, this defendant denies each of said paragraphs and the matters therein contained and it denies that it is indebted in any respect to the plaintiff.

6. Defendant has no knowledge sufficient to form a belief as to the matters stated in paragraph 11 of the complaint.

7. Defendant admits paragraph 12 of the complaint.

SECOND DEFENSE.

8. The plaintiff has no lawful claim for the payment of labor performed and materials furnished and the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, is not in default to the plaintiff.

THIRD DEFENSE.

9. Plaintiff has no just claim as a material man or laborer, and said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, is not in default to the plaintiff.

FOURTH DEFENSE.

10. No money is due the plaintiff on account of having performed any labor or furnished any material in connection with the furnishing of hardware for the said school building mentioned in paragraph 3 of the complaint.

FIFTH DEFENSE.

11. (a) The materials alleged to have been furnished and the labor alleged to have been

performed by the plaintiff for the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, was pursuant to an agreement between the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, and the plaintiff.

(b) The materials included in the said contract were, according to the terms thereof, to be subject to the approval of and acceptance by the architect and the contractor.

(c) Plaintiff failed to furnish the materials required to be furnished by the said contract to the satisfaction of the said architect, as a result of which the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, suffered damage and was required to pay out money in excess of the amount now claimed by the plaintiff to be due to it.

SIXTH DEFENSE.

12. (a) Any right of action which the plaintiff claims to have against this defendant is by reason of an act entitled: "An Act to Protect Persons Performing Labor or Furnishing Materials for the Construction, Alteration or Repair of Public Works," being Chapter 75 P. L. 1918, and the acts amendatory thereof.

(b) Plaintiff failed, within eighty (80) days after the acceptance of the labor performed and material furnished for the construction and erection of the public building mentioned in the contract between Board of Education of Irvington and the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, to furnish this defendant with a statement of the amount due to date as required by said statute.

Answer.

SEVENTH DEFENSE.

13. (a) This defendant repeats 12 (a) of the Sixth Defense.

(b) Plaintiff failed, within eighty (80) days after the acceptance of the labor performed and material furnished for the construction and erection of the public building mentioned in the contract between the Board of Education of Irvington and the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, to furnish this defendant with a proper and sufficient statement, as required by said statute, of the amount due to date.

EIGHTH DEFENSE.

14. Plaintiff herein, by release duly executed by it on April 6, 1926, duly released T. M. Gibbs Construction Company, this defendant's principal, from all liens, claims and demands whatsoever which it, the said plaintiff, had or might or could have against the said T. M. Gibbs Construction Company for work done or for materials furnished for erecting and constructing the building mentioned in paragraph 2 of the complaint, or otherwise.

OBJECTION IN POINT OF LAW.

Defendant hereby objects to the complaint herein on the ground that it discloses no cause of action against the defendant and hereby reserves the right to move to strike out the said complaint at the trial for said reason.

McCARTER & ENGLISH,
Attorneys of Defendant, Continental
Casualty Company.

ORDER AMENDING ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff,*	*Action at Law.*
vs.	*Order Amending Answer.*
CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	

Defendant desiring to amend its answer by filing a ninth, tenth and eleventh defense, and the attorneys for the plaintiff consenting, it is ORDERED on this 2nd day of July, 1927, that the defendant have leave to amend its answer by adding thereto a ninth, tenth and eleventh defense in the form annexed to this Order. Plaintiff reserves the right to file a reply to the within amendment.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Rule actually entered this 5 day of July 1927, on motion of

McCARTER & ENGLISH,
Attorneys of Defendant.

We consent to the foregoing Order.

ANDREW J. WHINERY,
Attorney of Plaintiff.

AMENDMENT TO ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff*,	*Action at Law.*
vs.	
CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	*Amendment to Answer.*

NINTH DEFENSE.

15. (a) Plaintiff repeats paragraph 14 of the Eighth Defense herein.

(b) The said release was executed by plaintiff and delivered to the Board of Education of Irvington with the intent that said Board of Education of Irvington should in reliance thereon pay to Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, monies under the terms of the contract mentioned in paragraph 3 of the complaint herein, said contract being between said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company and said Board of Education of Irvington, and the said release was executed and delivered to said Board of Education with the further intent that this defendant should rely thereon and consent to the payment of monies by said Board of Education of Irvington to said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, under the terms of said contract.

(c) Said Board of Education induced by said release did on June 19, 1926, pay to said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, under the terms of the said contract, a large sum of money, to wit Fifteen Thousand ($15,000.) Dollars, which it would not otherwise have paid, and this defendant, induced by said release, did consent to the said payment.

(d) Said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, used said sum of money for purposes other than the payment of claims arising out of the erection of the high school building mentioned in paragraph 3 of the complaint herein.

(e) By reason of the said acts of the plaintiff, the position of the defendant as surety in the bond mentioned in paragraph 3 of the complaint herein was greatly prejudiced and the defendant thereby suffered loss, as a consequence of which, the defendant, is discharged and released from any and all liability to the plaintiff herein under said bond and the plaintiff herein has thereby waived any right or claim which it might otherwise have against this defendant under said bond.

TENTH DEFENSE.

16. (a) On March 27, 1926, the plaintiff herein accepted two notes from Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, one in the amount of Twenty-Three Hundred ($2300.) Dollars, payable in two months, the other in the amount of Twenty-Three Hundred ($2300.) Dollars, payable in three months.

(b) On May 27, 1926, Three Hundred ($300.) Dollars was paid on the note then due and said note was renewed for two months. On June 27,

1926, when the second note became due, Three Hundred ($300.) Dollars was paid and said note was renewed for two months.

(c) On June 28, 1926, plaintiff herein accepted from Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, a note in the amount of One Thousand ($1,000) Dollars, due on September 27, 1926.

(d) Said notes and renewals thereof were delivered and accepted in part payment for the hardware furnished by the plaintiff to said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, under the contract mentioned in paragraph 5 of the complaint herein.

(e) Defendant by reason of the bond mentioned in paragraph 3 of the complaint herein, is entitled to pay the claims of any sub-contractors furnishing labor or materials to Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, for the erection of the high school mentioned in said bond, and thereby acquire by subrogation, any rights to security or lien which said sub-contractors may have.

(f) By reason of the acceptance of said notes as aforesaid, the amount alleged to be due to the plaintiff from Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, was not due at any time within sixty days after either the completion of the whole work to be performed by said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, or the acceptance of said work by resolution of the Board of Education of Irvington under the terms of said contract mentioned in paragraph 3 of the complaint, as it might have been if said notes had not been accepted, and the defendant was thereby deprived

of its right to acquire a lien upon the monies in the control of the Board of Education of Irvington due or to grow due under said contract between it and said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company.

(g) The acceptance of the said notes by the plaintiff herein was a material alteration of the terms of the contract between said plaintiff and Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, mentioned in paragraph 5 of the complaint herein.

(h) By reason of the premises, the position of defendant as surety upon the bond mentioned in paragraph 3 of the complaint herein was greatly prejudiced and the defendant suffered great loss, as a consequence of which it has been discharged of any and all liability to the plaintiff herein upon the said bond and the plaintiff herein has waived any right or claim which it may have against the defendant upon said bond.

ELEVENTH DEFENSE.

17. (a) On August 16, 1926, the plaintiff was the holder of two notes made by Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, totaling Three Thousand ($3,000) Dollars, which said notes were not at that time due.

(b) On said date, the plaintiff furnished to this defendant a statement in which it was claimed that there was due to the plaintiff from Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, the sum of Five Thousand Six Hundred Thirty-Nine Dollars and Eighty-Three Cents ($5,639.83) which is the amount claimed in this suit.

Amendment to Answer.

(c) Said notes were delivered to and accepted by the plaintiff in part payment for the hardware furnished by the plaintiff to said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, under the contract mentioned in paragraph 5 of the complaint herein.

(d) By reason of the acceptance of the said notes, the said claim of the plaintiff to the amount of the said notes to wit, Three Thousand Dollars ($3,000.00) was not due at the time said statement was furnished to this defendant, and the said statement so furnished to this defendant was not a correct or legal notice as required by P. L. 1918, Chapter 75.

McCARTER & ENGLISH,
Attorneys of Defendant.

REPLY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff*, *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant*.	*Action at Law.* *On Bill, etc.* *Reply.*

The Reply of the plaintiff, J. Jacob Shannon & Co., a corporation, to the Answer and Amended Answer filed by the defendant, says that:

1. It denies the allegation set forth in the second defense as set forth in the Answer.

2. It denies the allegation of the third defense as set forth in the said Answer.

3. It denies the allegation of the fourth defense as set forth in said Answer.

4. It denies the allegations of the fifth defense, except as the same may be substantiated by the contract entered into between the plaintiff and the defendant, and it further denies that it failed to furnish the materials as required by said contract, and it further denies that said Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., suffered any damage or was required to pay out any money because of any failure on the part of the plaintiff to furnish materials as provided in said contract.

Reply.

5. It denies the allegation of the sixth defense as set forth in said Answer, except that it admits that it is entitled to bring an action by virtue of the act cited therein.

6. It denies the allegations of the seventh defense as set forth in said Answer, except that it admits it has a right of action by virtue of the act cited therein.

7. It denies the allegations of the eighth defense as set forth in said Answer.

8. It denies the allegations of the ninth defense as set forth in the Amendment to the Answer, except that it admits that the Board of Education of the Town of Irvington did pay to Tyler M. Gibbs, trading as T. M. Gibbs Construction Co. a large sum of money, and that the said Tyler M. Gibbs did not use any of the said money for the payment of plaintiff's claim, or any part thereof.

9. It admits that it accepted certain notes from Tyler M. Gibbs, trading as T. M. Gibbs Construction Co. The amounts and terms of said notes, however, are not hereby admitted, but the plaintiff refers to said notes when and if produced, for the terms, amounts and details thereof. It denies that any of said notes were accepted as payment or part payment for the goods furnished by plaintiff to Tyler M. Gibbs, and it denies each and all of the other allegations contained in said tenth defense.

10. It admits that it did furnish to the defendant a statement showing that there was due from Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., Five Thousand Six Hundred and Thirty Nine Dollars and Eighty Three Cents

Reply.

($5,639.83). It denies, however, the allegations pertaining to the notes mentioned therein, except such facts as the notes themselves would disclose when and if produced, and it denies that any of said notes were delivered to and accepted by the plaintiff in payment, or part payment, of the goods furnished by it to Tyler M. Gibbs, trading as T. M. Gibbs Construction Co.

ANDREW J. WHINERY,
Attorney for Plaintiff.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation of Pennsylvania,
Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY, a corporation,
Defendant.

Postea.

This case was tried before Judge Nelson Y. Dungan, Circuit Court Judge, to whom this case was referred for trial with a jury at the Essex Circuit on Thursday, March 14, 1929. The jury rendered a general verdict against the defendant, Continental Casualty Company, a corporation, and in favor of the plaintiff, J. Jacob Shannon & Co., a corporation, for Twenty-three Hundred and Thirty-five Dollars and Sixty Cents ($2335.60).

NELSON Y. DUNGAN,
Judge of the Essex County Circuit Court
trying Supreme Court issues.

JUDGMENT.

Pursuant to the postea filed herein, judgment was entered in the New Jersey Supreme Court in favor of the plaintiff and against the defendant in the sum of $2,335.60.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation, *Plaintiff,* *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Appeal and Grounds.*

To McCarter & English, attorneys of defendant, 763 Broad street, Newark, N. J., or to whom it may concern:

Gentlemen:

PLEASE TAKE NOTICE, that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals, in the last resort in all cases in New Jersey, from the whole of the judgment in this case, on the following grounds, to wit:

1. Because the Supreme Court erred in its charge to the jury, directing a verdict in favor of the plaintiff for Two Thousand and Thirty-nine Dollars and Eighty-three Cents ($2,039.83) with interest from October 16, 1926, instead of the full amount plaintiff claimed of Five Thousand and Thirty-nine Dollars and Eighty-three Cents ($5,039.83) with interest, exception being taken thereto by plaintiff.

2. Because the Supreme Court, in its charge to the jury, limited the amount of the verdict in

favor of the plaintiff to the sum of Two Thousand and Thirty-nine Dollars and Eighty-three Cents ($2,039.83) with interest from October 16, 1926, exception thereto being taken by the plaintiff.

3. Because the Supreme Court ruled that the plaintiff was not entitled to recover from the defendant a portion of its claim, amounting to Three Thousand Dollars ($3,000) for which a note and a trade acceptance were given by the T. M. Gibbs Construction Co. to the plaintiff after the original debt between the parties had matured and which note and trade acceptance were not payable by their respective terms until after August 18, 1926, the date of service in the statutory notice by the plaintiff on the defendant, which ruling was error by the Supreme Court, and to which exception was taken by the plaintiff.

4. Because the Supreme Court ruled, as a matter of law, that plaintiff was not entitled to recover a portion of its claim amounting to Three Thousand Dollars ($3,000) out of the total claim of Five Thousand and Thirty-nine Dollars and Eighty-three Cents ($5,039.83) on the ground that said sum of Three Thousand Dollars ($3,000) was not due to the plaintiff at the time of the service of the statutory notice upon the defendant, under the intent and meaning of Chapter 75 of the Pamphlet Laws of 1918, which ruling was erroneous, and to which exception was taken by the plaintiff.

Respectfully yours,

ANDREW J. WHINERY,
Attorney for Plaintiff.

NOTICE OF CROSS-APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

J. JACOB SHANNON & Co., a corporation, *Plaintiff,* *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Cross-appeal and Grounds.*

To Andrew J. Whinery, Esq., attorney of plaintiff, 790 Broad street, Newark, N. J.

SIR:

TAKE NOTICE that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of the judgment in this case as included interest on the sum of $2,039.83 from October 16, 1926 to March 14, 1929, on the following grounds:

1. Because the Trial Judge erred in denying the defendant's motion to direct the jury not to include in their verdict interest on the sum of $2,039.83.

2. Because the Trial Judge erred in directing the jury to add to their verdict, in favor of the plaintiff and against the defendant, in the sum of $2,039.83, "interest at 6% from October 16th, 1926 to March 14th, 1929."

Yours respectfully,

McCARTER & ENGLISH,
Attorneys of Defendant.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Thursday, March 14, 1929.

J. JACOB SHANNON & COMPANY, *Plaintiff,*

vs.

CONTINENTAL CASUALTY COMPANY, *Defendant.*

Action at Law.

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appear Andrew J. Whinery and Sidney E. Smith, a member of the Pennsylvania Bar.

For the defendant appear McCarter & English (by Conover English).

A jury is called and sworn.

Mr. Whinery opens the case in behalf of the plaintiff.

Mr. English opens the case in behalf of the defendant.

Mr. Whinery: May it please your Honor, before we proceed may I introduce Mr. Sidney E. Smith of Philadelphia of the Pennsylvania Bar, who will be associated with us.

I call for the notice which I served upon your client.

Mr. English: Here it is.

Mr. Whinery: August 16, 1926, is the date of that letter.

Mr. English: That was received by the company on August 16, 1926.

Mr. Whinery: I will offer that notice in evidence, which I gave to the bonding company on behalf of my client.

(The same, consisting of several papers, are received in evidence and marked Exhibit P. 1.)

The Court: Is there any question about the giving of this notice, the time within which the notice was given, whether that complied with the statute?

Mr. English: You mean the form of the notice for the time within which?

The Court: The pleadings are a little too long for me to have read them, and I don't know whether the pleadings raise the question of whether or not the notice was given within the eighty days.

Mr. English: I think it was as a matter of fact, your Honor. There is some little dispute about the exact date. I can answer better after I hear the date he gives, but my present impression is that it was within time.

HENRY A. SCHWEDES, sworn in behalf of the plaintiff.

Direct examination by Mr. Whinery.

Q Mr. Schwedes, what is your position? A Secretary of the Board of Education of Irvington, New Jersey.

Henry A. Schwedes, direct.

Q Were you secretary of that Board of Education in May and June, 1926? A I was.

Q And in July and August thereafter? A I was.

Q You have been since that time? A I have been.

Q Do you know whether your Board of Education had a contract with T. M. Gibbs Construction Company for the erection of the high school building in Irvington? A Yes, they did.

Q Was that a general contract or a special contract for the erection of the building? A I don't understand the question.

Q By that I mean was it a general contract for the erection of the entire building? A It was a general contract, yes.

Q At the time this contract was entered into between the Board of Education and the T. M. Gibbs Construction Company, was a bond given to the Board of Education? A There was.

Q Have you that bond there? A I have.

Mr. English: Ought not we to have the contract first, your Honor?

Q Have you a copy of the contract? A I have a copy of the contract.

Q That is a true copy of the contract between the Board of Education and the T. M. Gibbs Construction Company? A Yes.

Mr. Whinery: I offer that in evidence.

By Mr. English.

Q Is this the original or a copy? A That is the original, I am pretty sure. Yes, it is the original.

(The same is received in evidence and marked Exhibit P. 2.)

By Mr. Whinery.

Q Have you the bond? A This is the bond.

Q This is the original bond? A This is the original bond.

Q Signed T. M. Gibbs Construction Company by Tyler M. Gibbs, and Continental Casualty Company by George W. Yuengling, attorney in fact.

(The same is received in evidence and marked Exhibit P. 3.)

Mr. Whinery: May I read the condition of that bond to the jury now?

The Court: All right.

Mr. Whinery: In this bond, which is signed by the Continental Casualty and T. M. Gibbs Construction Company, given to the Board of Education of Irvington, is this condition: "Now, therefore, if the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, shall do the work, etc., and if the said contractor shall pay to the obligee above named, his successors and assigns all sums of money it, the said obligee"—that is the Board of Education—"may expend for fully completing said work over and above the amount which the contractor would have been entitled to receive had the terms and conditions thereof and all loss or damage which may result to the obligee above named, his successors or assigns by reason of the omission, failure, neglect or refusal of the said contractors to commence to do

the finishing of the work." Then comes this condition which I want to bring out. "Shall promptly pay all lawful claims of said contractors, material men and laborers for labor performed and materials furnished in carrying forward, performing or completing said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material man or laborer having a just claim, as well as for the obligee herein, and shall defend and settle without expense to the board liens, claims for personal injury or otherwise or from any other liabilities arising from the execution of the work or from the use of patented articles, and so forth." It is that part that I want to call your attention to.

By Mr. Whinery.

Q Now, was the building ever finished, the high school building? A Was it ever finished? Yes.

Q Was it accepted by the Board of Education? A It was.

Q Can you give us the date when it was so accepted? A If I may read the minutes of that meeting.

Mr. Whinery: The witness refers to the minutes of the Board of Education of Irvington.

A (Continuing.) On June third the following communication was received: that the office of John Barber, architects for the Frank H. Merrill High School, located on Clinton avenue, Irvington, New Jersey, recommend that you accept the

work performed by the T. M. Gibbs Construction Company of Philadelphia.

By the Court.

Q And that was the school for which this contract was given? A It was.

Q Then continue the reading. A In this building with the following reservations: The replacement of a rejected window glass, the unfinished and unsatisfactory painting, the unfinished blocks, right-end blocks, the defective cement floors, some unfurnished hardware, stucco finish, and the pitch of the roofing. Signed by L. J. Eaton of John Barber. And the motion that followed was this: "Mr. Stout moved that the report of the architect be received and the recommendations be concurred in."

By Mr. Whinery.

Q Was any action taken at a subsequent meeting with reference to that acceptance? A Only the payment of the bills after the reservations had been taken care of.

By the Court.

Q They were the minutes of June third? A June 3, 1926.

By Mr. Whinery.

Q Can you tell us what payments were made to the T. M. Gibbs Construction Company from say about June first on to the final payment? A On the ninth of June there was a check of $15,000; also on the ninth of June a check of $14,653.37.

By the Court.

Q What did you say the first one was? A $15,000.

Q What was the date of the second one? A The same date; and the third was also the same date, which was for $36,101.41. Then on July 14, a check for $2,589.53. On August 18, a check for $5,600. On the same date another for $685.50; and on the same date still another, $608.25; and the last one on the same date, $12,788.74.

By Mr. Whinery.

Q That was the final payment on the job, the last check? A That was the final payment on the job, for which certificate I have here from the architect.

Q Have you those? May I see the last check, the twelve thousand dollar check? A $12,788.74.

Q Were you present when this check was delivered to the T. M. Gibbs Construction Company? A I was.

Q Who else was there? A Mr. Kruttschnitt, the president of the board; a Miss Christie Hartman, who was acting, who had the power of attorney for Mr. Gibbs; and Mr. Hall from the Continental Casualty Company; and Mr. Eaton from the architect's office, and Mr. Burnett from the architect's office.

By the Court.

Q Those are the ones who were present when that check was delivered? A Exactly.

By Mr. Whinery.

Q Can you tell us what was done with the check at that time? A The check was given to Miss Christie Hartman.

Henry A. Schwedes, direct.

Q By whom? A By myself; who endorsed it in my presence.

Q Then what was done with it? A As I recall, she said what she was going to do with it. I don't know as I feel as if I want to swear—

Mr. English: Do not tell any hearsay, Mr. Schwedes.

Q Just tell what was done with the check. Was it given to anybody else after Miss Hartman received it? A I can't say.

By the Court.

Q In your presence? A In my presence I can't say. Many of those checks were handed to other people who came in later on. Several of these checks were to contractors.

By Mr. Whinery.

Q I ask you to look at the check, the indorsements on the check, and see if that refreshes your memory any differently. A Well, it only refreshes my memory to the fact that I know she said it was to be handed to the Continental Casualty Company.

Q This check? A Yes.

Q And does the indorsement show that it was?

Objected to on the ground that the check speaks for itself.

By the Court.

Q I suppose it was not indorsed in your presence? A By Miss Hartman in my presence.

Q No, I mean by the Continental Casualty Company. A No.

By Mr. Whinery.

Q Do you know the signature of Mr. Yuengling, an agent of the Continental Casualty Company? A I know it possibly from seeing it on the bond, if that is his signature. I can't swear to that. That is the only place I have seen it. I never saw him sign that paper.

The Court: There may be no question about it.

Mr. Whinery: I offer this check in evidence.

The Court: I say there may be no question about it. Is there any objection to it?

Mr. English: Yes, sir; I object to it. I do not think it is material. It does not come within any issue of the case that is set up in the pleadings, that I know of.

The Court: Then I suppose it is not admissible; that is, not as proving the signature of the indorser of the check. The check may be admissible in evidence as a final payment made, but not as showing the indorsement.

Mr. Whinery: I will offer the check for that purpose at this time.

Mr. English: May I be heard to object to that, your Honor? It seems to me that in a contest between Mr. Whinery's company and Gibbs that would be very material, but he is suing on a bond and I do not know of anything in the pleadings that makes that check material for any purpose. He said he had a bond by which we had to pay his bill.

The Court: That is right. I will hear what Mr. Whinery has to say about it.

(Argument.)

The Court: Again I am at a little disadvantage from not having yet read the pleadings. I do not know whether or not your claim is based upon the statute and the bond or whether upon that different situation which you have just mentioned.

Mr. Whinery: I do not know that the situation is specifically set forth in the pleadings, may it please the Court, but as a matter of law holding the body regardless of whether it is in the pleading or not, it seems to me.

The Court: My chart and compass must be the transcript I have here.

Mr. Whinery: But under the transcript we are suing them for the money which was due us from Gibbs.

The Court: Under the statute?

Mr. Whinery: Under the statute.

The Court: And the bond.

Mr. Whinery: And they have received money. I think we have a perfect right to show that they have received the money. But if all the money had been paid to them under an agreement that they had with the Board of Education—

The Court: Then you should have set it up in the pleadings.

Mr. Whinery: May I ask the privilege of amending that complaint to set forth the situation?

The Court: I think you had better draw an amendment, because I think that would

be rather an amendment which ought to be made with some care, and perhaps during the adjournment hour you may make up such an amendment and submit it to Mr. English.

Mr. English: Your Honor, I do not know what this is going to bring me into.

The Court: I am not now allowing the amendment. I will not allow any amendment until you have had an opportunity to examine it and object to it.

Mr. English: I may be surprised in a perfectly legitimate sense, because I do not know where it will lead me at all. The case is on a bond.

The Court: I will sustain the objection at the present time.

Mr. Whinery: May I offer one more suggestion on it, may it please the Court? In the pleadings the defendant has alleged that they have been injured by these payments. It seems to me we have a right to show that this payment went to them; rather than injuring them it went into their own hands.

The Court: Then you would like to introduce your rebuttal now, I see.

Mr. Whinery: No, sir; but I am showing the materiality of it. That is all. May I do what I started to do in the first place, prove the check for showing payment by the Board of Education to T. M. Gibbs Construction Company?

The Court: I understand that to be objected to.

Mr. Whinery: And it is that that you are sustaining?

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

(Argument.)

Mr. Whinery: May I have the check marked for identification?

(The same is marked Exhibit P. 4 for identification.)

By Mr. Whinery.

Q Can you tell us, Mr. Schwedes, whether a release was ever delivered to the Board of Education, signed by J. Jacob Shannon & Company, the plaintiff in this suit? A Not to my knowledge.

Q Have you looked through your files for such a release? A I have.

Q Can you find such a release? A I have not.

Q Did you ever see such a release?

The Court: Again you are meeting the defense. Is not this rebuttal? Of course, if there be no objection to it, if you want to excuse Mr. Schwedes, I suppose you may go ahead.

Mr. Whinery: That was my idea.

The Court: Is there any objection to this rebuttal testimony?

Mr. English: I am not saying a word so far.

The Court: I see no reason why the Court should object. There is no objection on the other side. So you may continue, then.

(The last question is read by the stenographer.)

A I did not.

Q In that report of John Barber's that you read that was incorporated into the minutes of the meeting of the board, there is some mention of unfinished hardware. Can you tell us what that hardware was that was unfinished? A In detail?

Q Do you know what the items were? A Oh, there was such items as screws in door plates, and not so much unfinished as they were not the proper kind.

Q Were all of those objections remedied? A Oh, yes, positively.

Q And they were remedied before this last payment was made, do you know? A I don't know as I can answer that, because some things were done after the last payment was made during that following summer. During that summer they may have been started before the payment was made.

Q Well, were the items of hardware done after the last payment? A I can't answer that. I have no way of determining that.

Q Do you know whether all the hardware which was to be incorporated in the building was furnished and completed by the contractor? A Yes.

Cross examination by Mr. English.

Q Was it Shannon & Company hardware that you were referring to, Shannon & Company hardware that you were talking about? A I presume so. I simply say "presume so" because we were dealing with Gibbs, not with Shannon.

Q Shannon did contract with Gibbs to furnish the hardware, you know? A Yes.

Henry A. Schwedes, cross.

Q Now, Mr. Schwedes, your board records June 3, 1926, as the date of acceptance of this building, does it not? A It does.

Q And as far as the official attitude of the board is, that is the date of acceptance? Is that correct? A It is.

Q You gave some payments on June ninth, and then you gave a payment of $2,985.53. I didn't get the date of that payment. A I have a list of them here.

By the Court.

Q July 14th? A July 14th is correct.

Q The other four were August 18th? A That is correct.

By Mr. English.

Q The first three, as I understand it, were June ninth; the next one July 14th, and the final four August 18th; is that correct? A My note here. May I change my testimony? I note here that these two checks in June are June 18th and not June 9th.

By the Court.

Q All of them are June 18th? A All of them June 18th instead of ninth.

Q That is the 18th? A Yes. I wasn't looking at the checks before when I gave you those dates.

Q June 18th that is? A Yes, it is June 18th. June ninth was the date of the meeting.

Q To authorize the payments, you mean? A Yes, but there is the payment and the 18th was the actual check.

Henry A. Schwedes, re-direct.

By Mr. English.

Q You knew that a release had been executed by the material men, did you not, even though you didn't see it? You knew that as a fact, didn't you?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A I don't know as I did.

Q You never saw it? A No.

Re-direct examination by Mr. Whinery.

Q Have you the check there, the $5,600 check which was paid on the 18th of August? May I look at all the checks that you have mentioned, Mr. Schwedes? A There is the fifteen thousand dollar check.

Q May I ask, Mr. Schwedes, if you know of any other hardware concern that furnished hardware for this building besides the Shannon Company? A I must say that I am not familiar at all with the sub-contractors on the job, and I don't know as I knew at the time the checks were handed over who were the people furnishing hardware. I took the position as secretary on the fifteenth of April, 1926. I attended the May meeting and this was the second meeting that I attended, the June meeting. It really was the first meeting that I took minutes, so I didn't know much what had gone on before the time. I know now that he furnished hardware, but I didn't know at the time.

John W. Ruttle, direct.

Re-cross examination by Mr. English.

Q Mr. Schwedes, you produce a check, which is one of those you mention, for $15,000, dated June 18, 1926.

Mr. English: I would like to mark that for identification.

(The same is marked Exhibit D. 1 for identification.)

(Discussion.)

By Mr. English.

Q That is August 18th? A I may be wrong. There is another August check there. They were all the same.

Q The eighteenth? A I am sure it is the eighteenth, because they were after the fifteenth.

Q Dated August 18th to the order of T. M. Gibbs Construction Company. It appears to have been indorsed by Gibbs and the Board of Education. A Yes, and it was put in the Irvington Trust Company on deposit and then turned right over to Mr. Gibbs after he completed these things.

Q A sort of security? A Exactly, because the thing had to be done in one afternoon.

JOHN W. RUTTLE, sworn in behalf of the plaintiff.

Direct examination by Mr. Whinery.

Q Mr. Ruttle, what is your business? A Salesman.

Q For whom? A J. Jacob Shannon & Company.

Q Were you a salesman for them in April, 1925? A I was.

Q Did you conduct any negotiation with T. M. Gibbs relative to the hardware for the Irvington high school? A Known as T. M. Gibbs Construction Company.

Q Did you conduct those negotiations for that sale? A Yes.

Q With whom did you talk about the sale?

Mr. English: I object. The complaint alleges a contract, your Honor, between Gibbs and Shannon Company, and I assume that any conversations would be merged in it.

Q I ask you if this is the contract which was made between the Shannon Company and Tyler M. Gibbs Construction Company. A That is the contract, yes, sir.

Q And it was pursuant to that contract that the hardware was delivered? A Yes, sir.

Q For what school was this contract made? A The Irvington High School.

Mr. Whinery: I offer that in evidence.

(The same is received in evidence and marked Exhibit P. 5.)

Q Now, in addition to the material that was sold under that contract, was any other material sold by you to the T. M. Gibbs Construction Company for this Irvington High School job? A Yes. There were several items of extras.

Q I show you an order blank of T. M. Gibbs Construction Company and ask you if this is the

order blank for one of the extras. A Yes, sir; that is one of them.

The Court: The order blank or the order?

Mr. Whinery: The order, the order form.

Q What was that order for? A Two door checks with brackets.

Q Do you know is that a copy of the bill? A There is a copy of the receipt made out for the checks; yes, sir.

Q How much was that amount? A Total was seventeen dollars.

By the Court.

Q Do you yourself know whether deliveries were made under that order? A Yes, sir.

Q Those articles were delivered? A Yes, sir.

The Court: What is the date of that order?

Mr. Whinery: April 2, 1926.

(The same is received in evidence and marked Exhibit P. 6.)

By Mr. Whinery.

Q I show you another order dated April 2, 1926, on the letterhead of the T. M. Gibbs Construction Company, and ask you if that is another extra order which you say you received from them outside of the contract. A Yes, sir; that is another extra order.

Q What was that for? A It was the hardware for one door.

John W. Ruttle, direct.

Q Is that the statement that was made for that extra? A That is the delivery receipt, shipment of material.

Q How much was the charge for that? A $10.42.

By the Court.

Q Was it delivered? A Yes.

Q The goods were delivered? A Yes.

Mr. Whinery: I offer this in evidence.

(The same is received in evidence and marked Exhibit P. 7.)

By Mr. Whinery.

Q I show you another delivery receipt showing on your stationery, J. Jacob Shannon Company, the name T. M. Gibbs Construction Company on there, dated May 8, 1926, and I ask you if you can tell us whether you received an order for the items shown on that bill. Just answer yes or no. A Yes, sir.

Q How did you receive that order? A Telephone.

Q From whom? A Mr. Moore.

Q Did you recognize his voice when you talked with him at that time? A Yes, sir.

By the Court.

Q Who is Mr. Moore? A He is the purchasing agent for the T. M. Gibbs Construction Company.

By Mr. Whinery.

Q And your dealings were with Mr. Moore on this contract? A Yes.

John W. Ruttle, cross.

Q What was that item for? A One No. 3 door check.

Q What was the charge for that? A $12.41.

Mr. Whinery: I offer that in evidence.

(The same is received in evidence and marked Exhibit P. 8.)

By the Court.

Q These are the only items of extras, are they, these three? A All that I know, your Honor.

Cross examination by Mr. English.

Q You are a salesman, are you, Mr. Ruttle? A Yes, sir.

Q Do you have anything to do with the management of the company at all? A I have charge of the builders hardware department.

Q Are you an officer of the company? A No, sir.

Q Who is the president? A Mr. Leon Rosenbaum.

Q Do you know his signature when you see it? A Yes, sir.

Q I show you a release signed by a number of concerns and individuals, and among others the name J. Jacob Shannon Company, stamped, and under that the signature Leon Rosenbaum. Is that Mr. Rosenbaum's signature? A Yes.

Mr. English: Mark this for identification, please.

(The same is marked Exhibit D. 2 for identification.)

John W. Powell, direct.

By the Court.

Q Mr. Rosenbaum is president? A Yes, sir.

JOHN W. POWELL, sworn in behalf of the plaintiff.

Direct examination by Mr. Whinery.

Q Mr. Powell, what is your business? A I am bookkeeper of the J. Jacob Shannon & Company.

Q You have charge of the books that show the account with T. M. Gibbs Construction Company? A Yes.

Q Do you know what the contract price was for delivery of this hardware to the Irvington High School? A $5,600.

Q Do you know how much has been paid on account of that $5,600 in cash? A Six hundred dollars.

Q Leaving five hundred dollars on the contract? A Five thousand dollars.

Q Five thousand dollars on the contract? Has anything been paid on account of any of the extra items which have been put in evidence, one for $12.41, one for seventeen dollars?

The Court: Amounting altogether to $39.83.

A Nothing has been paid.

Q How much is due at this time? A $5,039.83.

John W. Powell, cross.

Cross examination by Mr. English.

Q I have the complaint which says that $5,389.83 is due. Then that is wrong, is that right? A What is that?

Q The complaint in this case says that $5,389.83 was due. That is wrong? A $5,039.83.

Q $5,039.83; that is your bill, is it? A Yes.

Mr. Whinery: The complaint apparently is wrong, your Honor.

Mr. English: $5,039.83.

Mr. Whinery: That is our case subject to the amendment which I would like to put in on that other point.

The Court: Does your notice show when it was served?

Mr. Whinery: The notice of the defendant?

The Court: Yes.

Mr. Whinery: I think it was admitted by Mr. English that the notice was served on the defendant on the 16th of August.

Mr. English: That is true.

Mr. Whinery: 1926, and here is a copy of the notice which was served.

Mr. English: I ask Mr. Whinery to produce some original notes. Have you got those, Mr. Whinery?

The Court: Now, your complaint reads and the amount is $5,639.83, the plaintiff has received $250, leaving a balance of $5,389.83. That should be changed, should it not?

Mr. Whinery: Yes. The amount that has been paid on account is six hundred dollars, leaving a balance of $5,039.83.

The Court: Do you want me to change that in the transcript? Is there any objection to that?

Mr. English: Oh, no, not a bit.

The Court: Then the complaint may be amended in the seventh paragraph by making the item two hundred fifty dollars read six hundred dollars, and the amount due $5,039.83 instead of $5,389.83.

CHRISTIE M. HARTMAN, sworn in behalf of the defendant.

Direct examination by Mr. English.

Q Were you ever connected with the T. M. Gibbs Construction Company? A Yes, I was cashier and office manager.

Q That was Mr. Gibbs' business, I think? A Yes. It was his personal business.

Q Under that company. Are you employed with that concern now? A I am with the Cinderella Appliances Corporation now in New York.

Q How long ago did you sever your connection with the Gibbs concern? A Well, I still do bookkeeping and that sort of thing for Mr. Gibbs.

Q You were with Mr. Gibbs during the time that he had the contract for this Irvington school? A Yes, I was.

Q And you say you were office manager and what else? A Cashier.

Q You were pretty familiar with the situation generally? A Yes.

Q You kept pretty close touch with it? A I had charge of the books there.

Mr. English: At my request on the other side they have produced a note dated May 27, 1926, signed by T. M. Gibbs Construction Company by T. M. Gibbs for two thousand dollars payable two months, to order of J. Jacob Shannon Company.

Q Do you recognize that as a note which was given by Mr. Gibbs to the Shannon Company as payment on account of Shannon's bill against Gibbs under this contract?

(Discussion.)

Q What do you say, Miss Hartman? A Well, this is a note issued by the T. M. Gibbs Construction Company, Philadelphia, apparently as of this date.

Q To Shannon? A To Shannon, yes.

Q And it applied on the indebtedness of Gibbs to Shannon, did it not? A Yes.

Q Do you know whether or not the note was renewed or any payment made on account of it when it became due in two months, which would have been July 27, 1926?

Mr. Whinery: The question is whether she knows.

A I don't know without consulting the records.

Q Have you got the records with you? A I will see. What is the date of it? May 27th?

Q May 27th. There is an earlier one. There is a March 27th. A No, I haven't got the records here.

Q I call your attention that on the note itself are stamped the words "Payment stopped." Does that indicate whether it was paid or not paid? A Yes.

Q What does it indicate? A That it wasn't paid.

Objected to.

Objection sustained.

Q Can you say from your knowledge as cashier of the Gibbs concern whether this note, which was dated May 27, 1926, was paid when it became due two months from that date?

Mr. Whinery: I object to that except that she may answer yes or no to it.

Q Can you say whether it was paid or not paid? A Yes, I can say.

Q What is the fact? The question is whether or not this note was paid when it became due two months from its date.

(The previous question is read by the stenographer as follows: "Can you say from your knowledge as cashier of the Gibbs concern whether this note, which was dated May 27, 1926, was paid when it became due two months from that date?")

Mr. Whinery: May I cross examine?

Cross examination by Mr. Whinery.

Q Were you present when anything was done with the note? A Yes. I made out this particular note myself and I know it wasn't paid when it was due.

Q You know it wasn't? A It wasn't paid when it was due.

Direct examination (continued) by Mr. English.

Q So it wasn't paid when it became due. Now, was it an outstanding obligation from Gibbs to Shannon from the due date, July 27th, on through August 16, 1927?

Objected to.

Objection sustained.

Q Was the note paid at any time between its due date, July 27, 1926, and August 16, 1926?

Objected to.

Objection overruled.

A No, it wasn't paid.

Mr. English: Mark that note for identification, please.

(The same is marked Exhibit D. 3 for identification.)

Q Do you know whether, Miss Hartman, an earlier note was given prior to May 27, 1926, which was either paid or partly paid, to the note D-3 for identification subsequently given? A I don't know offhand.

Q Now, I show you another note produced by the other side, which is dated June 28, 1926, for two thousand dollars, payable in two months, to the order of Jacob Shannon & Company, signed T. M. Gibbs Construction Company, T. M. Gibbs. Was that note given by Gibbs to Shannon as payment on account of its indebtedness?

Objected to as leading and as calling for a conclusion.

Objection sustained.

Christie M. Hartman, direct.

Q Was the note given by Gibbs to Shannon? A Yes, it was.

Q Have you as cashier knowledge of whether or not it was paid two months from its date, which would have been August 28, 1926? A It wasn't paid.

Mr. English: Mark that for identification.

(The same is marked Exhibit D. 4 for identification.)

Q Now, I show you a trade acceptance which has been produced by the opposite side also dated June 28, 1926, for one thousand dollars, drawn by J. Jacob Shannon Company by Leon Rosenbaum, president and treasurer on T. M. Gibbs Construction Company, payable on September 28, 1926. Have you seen that before, Miss Hartman? A Yes.

Q That was outstanding and unpaid on August 16, 1926? A Yes.

By the Court.

Q Was that accepted? A Yes, it was.

By Mr. English.

Q Was it accepted by Gibbs? A That is their acceptance on there.

By the Court.

Q Is the date of the acceptance on there? A No. Their signature is all that is necessary.

By Mr. English.

Q The signature of Shannon is all that is necessary? A Yes.

By the Court.

Q The question is whether it was accepted by Gibbs. A No. It is issued by Gibbs and accepted by Shannon.

The Court: I thought you said it was drawn by Shannon on Gibbs.

Mr. English: I said that. Maybe I misspoke, because I do not know anything about a trade acceptance.

The Court: I think that is right. I think your statement would ordinarily be right on a trade acceptance.

Mr. English: That is what I thought.

The Witness: Well, it is right except as a matter of actual fact that the thing was written in our office, and it could be so proved, and then their signature makes it an acceptance, you see.

By the Court.

Q Whose signature? A Shannon's signature.

Q You are wrong about that legally.

By Mr. English.

Q I see on this, Miss Hartman, that it has on the left-hand side buyer's signature, T. M. Gibbs Const. Co. by agent or officer, T. M. Gibbs. A That is right.

By the Court.

Q Is that the Gibbs signature? A That is right.

The Court: That was apparently the acceptance.

By Mr. English.

Q So then it is a perfectly valid paper on the face of it? A Undoubtedly.

Objected to.

Mr. English: I guess that is a conclusion from what we have already arrived at. I will mark for identification this trade acceptance dated June 28, 1926, for one thousand dollars.

(The same is marked Exhibit D. 5 for identification.)

Q Now, Miss Hartman, were all three of those exhibits, D. 3, D. 4 and D. 5, outstanding and unpaid on August 16, 1926?

Mr. Whinery: If she knows. I object to the form of the question.

A On what date?

Q August 16, 1926.

Mr. Whinery: I think the papers speak for themselves, may it please the Court, as far as the notes give. I do not think the witness is qualified to answer it.

The Court: If she knows she may state that.

Mr. English: She was the cashier of this concern.

Q Do you know? A Yes, I do.

Christie M. Hartman, direct.

Q What is the fact? A They weren't paid.

Q And they were outstanding, not paid, on August 16, 1926? A Absolutely.

Q When these notes or any notes were given, did you make any entry or cause any entry to be made in the books of the Gibbs Company? A Yes.

Q What entry?

Objected to on the ground that any entry made in the Gibbs Company is not binding on the Shannon Company in any way.

Objection sustained.

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

Exception noted as ground of appeal.

Q Now, Miss Hartman, have you any knowledge of whether a release was executed by the Shannon Company among other material men applicable to this high school job? A Yes.

Q I show you a release which has already been marked Exhibit D. 2 for identification, the signature of which has already been proved has been made by Mr. Leon Rosenbaum on behalf of the Shannon Company. Have you seen that before? A Yes.

Q And that release was executed by the person signing it, including the Shannon Company, and given to Mr. Gibbs?

Objected to unless the witness knows.

(Discussion.)

By the Court.

Q Were you present at the time that was executed? A According to my recollection I was

present, but there have been statements made to the contrary.

By Mr. English.

Q We do not care anything about statements to the contrary. Were you present or weren't you? A Yes.

Q And Mr. Rosenbaum signed it in your presence? A In my presence.

By the Court.

Q And it was you who executed on behalf of the Gibbs Company for Mr. Gibbs? A Well, there was no execution at that time on behalf of Gibbs Construction. Mr. Powell, who is here I understand, is a witness to Mr. Rosenbaum's signature. Yes, I executed that.

Q You executed that? A That is right, at a later date.

Q On the 9th of June, 1926? A Yes. Rosenbaum's is April 6, 1926, you see, on the inside.

Mr. English: Now, I will offer in evidence the release, your Honor.

(The same, which has previously been marked for identification, is received in evidence and marked Exhibit D. 2.)

A recess is taken from one to two o'clock P. M.

CHRISTIE M. HARTMAN, resumed in behalf of the defendant.

Direct examination (continued) by Mr. English.

Q Miss Hartman, I show you the release which was offered in evidence just before adjournment, which is D. 2. Have you any knowledge of whether that ever came to the attention of the school board of Irvington or any of its members?

Mr. Whinery: Yes or no on that, please.

A Yes, I have.

Q What is your knowledge of that? A Well, I presented it to the school board.

Q You presented it to the school board? A Yes.

Q And about when, if you remember? A I presented it between June 1st and June 15th in 1926.

Q Do you remember the names of any of those who were present at the time? A Well, the architect's representative was there, Mr. Burnett, and the secretary of the school board, Mr. Schwedes, and the president, Mr. Kruttschnitt.

Q The president of the school board? A Yes. And there were other members present, but I don't remember their names.

By the Court.

Q The architect did you say? A The architect's representative, the man who supervises the construction of the job.

Christie M. Hartman, cross.

By Mr. English.

Q At the time you exhibited that release or presented it to the school board, had it been signed by the Shannon Company as it now is? A Oh, yes.

Q It is in the same form it now is? A Yes.

Mr. English: I offer in evidence Exhibit D. 4 for identification, which is the note dated June 28, 1926, for two thousand dollars payable in two months.

The Court: It will be received.

(The exhibit previously marked Exhibit D. 4 for identification is received in evidence and marked Exhibit D. 4.)

Mr. English: I also offer in evidence the trade acceptance, Exhibit D. 5 for identification, dated June 28, 1926, and payable on September 28, 1926.

(The paper previously marked Exhibit D. 5 for identification is received in evidence and marked Exhibit D. 5.)

(Discussion.)

Cross examination (continued) by Mr. Whinery.

Q Miss Hartman, you say this release was shown to the representatives of the Board of Education? A Yes.

Q And Mr. Schwedes was one of them that you showed it to? A Yes.

Q You didn't leave the release with them? A No.

Q The Gibbs Construction Company is in the business of building, contracting and building buildings? A That is right.

Q Don't you ordinarily leave a release with the owner at the time that you present it? A Well, at the time—

Q Can you answer me yes or no? A Yes.

Q But this release wasn't left there? A That is right.

Q Now, were you present at the Board of Education on August 18, 1928, when a check for $12,788.14 was delivered by the secretary of the Board of Education?

Objected to as not being cross examination and that the check has been ruled out by the Court.

Objection overruled.

A Yes, I was.

Q Is this the check which has been marked for identification? Is that the check that was given at that time? A Yes.

Q Was that check delivered to you by Mr. Schwedes? A That is right.

Q What did you do with the check at the time? A Gave it to a representative of the Continental Casualty Company.

Q Who is that?

Mr. English: I object. I would like to object to all this line of testimony, if your Honor please. I think it has gone about as far as it can under your Honor's previous ruling.

The Court: The question may be answered.

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

Exception noted as ground of appeal.

A Mr. Hall from the New York office of the Continental Casualty Company.

Q Then T. M. Gibbs Construction Company did not disburse the proceeds of that check?

Objected to as not being within the knowledge of the witness.

Objection overruled.

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

Exception noted as ground of appeal.

A They transferred the check to the Continental Casualty Company.

Q And you didn't disburse the money? A It was disbursed by the Continental Casualty Company for our account, for the account of T. M. Gibbs Construction Company.

Q Do you know the signature of Mr. Yuengling of the Continental Casualty Company? A Yes.

Q Is that his signature?

Objected to.

A I don't know. I am not qualified to identify signatures.

Q You do remember turning it over to the agent? A Yes. There is no reason to doubt that that is his signature, but I really could not qualify to say whether it was or it was not.

Mr. Whinery: At the proper time I want to make an offer again of this check, may it please the Court.

DEFENDANT RESTS.

Mr. Whinery: I would like to offer this check for $12,788.84, which was marked Exhibit P. 4 for identification, it now having been again identified by this witness, who testified that she turned it over to the agent of the Continental Casualty Company whom we are suing.

The Court: I understand that you object to that.

Mr. English: I do, sir.

The Court: I am inclined to admit it and limit the effect which it may have.

Mr. English: Do you want me to state the grounds of the objection?

The Court: Perhaps in order to save the exception.

Mr. English: I object because I think it is immaterial to the issues in the case. The suit under the complaint and the pleadings is on a bond, and as I view this offer, it is an effort to turn the suit into some different kind of action than that which appears on the papers. I think it is entirely immaterial to the issue.

The Court: I entirely agree with your view on that subject, but notwithstanding that fact, I am inclined to admit the check because so much has been said about it. The effect of it may be limited, I think, either by a request to charge or by the charge of the Court itself.

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

Exception noted as ground of appeal.

(The paper previously marked Exhibit P. 4 for identification is received in evidence and marked Exhibit P. 4.)

Mr. Whinery: I think that is our case, too, if it please the Court.

Mr. English: With your Honor's permission, in view of the evidence and that the check has gone in evidence, I would like to recall Miss Hartman for another question.

The Court: You may do that.

CHRISTIE M. HARTMAN, recalled, for the defendant.

Direct examination by Mr. English.

Q Miss Hartman, referring to check Exhibit P. 4 for $12,788.14, to which your attention was called, you said it was paid out by the bonding company for the account of Gibbs. Was it disbursed for payments in connection with this Irvington High School?

Objected to unless the witness knows.

Q Well, do you know whether it was disbursed? A Yes, I know.

Q Was it in fact to your knowledge disbursed on payments in connection with this high school job?

Mr. Whinery: Before she answers that may I ask a question?

Christie M. Hartman, recalled, cross.

Cross examination by Mr. Whinery.

Q Did you see the checks that were sent out by the Continental Casualty Company from the proceeds of this check? A I have seen receipts for payments. I have not seen the checks.

Q You don't know whether the checks were sent by the Continental Casualty Company or not, then, of your own knowledge? A If the claims were paid.

Q Can't you answer my question? A I can't see how I can answer it. I mean, I do not see your point.

Q You don't know of your own knowledge how this money was disbursed? A Yes, I do know.

Q Of your own knowledge? A Surely.

Q Did you disburse the money? A No.

Q Did you see it disbursed? A Not exactly.

Q Did you see the checks that were sent out by the Continental Casualty Company? A Not all of them. I saw some of them.

Mr. Whinery: I object to her testimony.

Direct examination (continued) by Mr. English.

Q Do you know yourself, Miss Hartman, that Gibbs did not pay the items that you are now speaking about? A Yes.

Q Did you afterward see receipts for these payments? A Yes.

Q Were those receipts made by the creditors after the date of this check?

Mr. Whinery: I object to all this testimony.

Christie M. Hartman, recalled, direct.

The Court: I suppose it must be her own knowledge. I am not quite sure that Miss Hartman knows what is apprehended by that thought, within her own knowledge.

Mr. English: Miss Hartman is a clear and very intelligent witness, but she was, if I may use the expression, the whole works in the Gibbs office, and she knows all about it.

By the Court.

Q Was this amount, this twelve thousand dollars, disbursed when you were present? A It was not disbursed all at one time anyway.

Q I do not think that quite answers the question. Was it disbursed in any part of it when you were present? A Yes, part of it.

The Court: Well, I suppose she can testify to the portion of it that was disbursed in her presence.

Mr. Whinery: If she can name the particular items that were disbursed at that time. Further than that I think her testimony is immaterial as being a conclusion..

By Mr. English.

Q Did Gibbs owe money to other contractors and material men on this job? A What do you mean other contractors?

Q Other material men or sub-contractors of his. A You mean besides Shannon?

Q Besides Shannon. A Oh, yes, surely.

Q Can you name any of them who received money, part of the proceeds of this check we are talking about?

Mr. Whinery: I object on a different ground, too. It seems to me we are suing the Continental Casualty Company.

(Argument.)

(The last question is read by the stenographer.)

Mr. Whinery: May I have my objection noted on that, may it please the Court?

The Court: It may be noted.

Mr. Whinery: I object to this question on the ground that it calls for a conclusion on her part because she has testified that she did not see this money disbursed.

The Court: She has not said that.

Mr. Whinery: Except a part of it. I will change that.

The Court: And it is only that part of it which she saw disbursed.

Mr. Whinery: And on the further ground that the best testimony as to how this money was disbursed can come from the representative of the Continental Casualty Company, the defendant in this suit, and not from someone who is not employed or concerned in the company.

The Court: I do not see what difference that makes if a person has knowledge of it, whether they are part of the Continental Casualty Company or somebody entirely disconnected from them, if they know about it. The question may be answered.

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

Exception noted as ground of appeal.

Christie M. Hartman, recalled, cross.

(The last question is read by the stenographer.)

Mr. Whinery: May I say one more thing, but I take it that that question is limited that she herself knows and saw the check sent out. The question is not limited in its wording and the question does not limit it.

A Yes, I know several people who received the checks from the proceeds of that.

Q Name them. A One was the Pittsburgh Glass Company.

Q How much? A Approximately $3,000.

Q What other concern? A R. Young & Sons, about $3,900.

Q What other concern? A August Lacombe, $3,600.

Q What others? A That is all that I have actual knowledge of.

Cross examination (continued) by Mr. Whinery.

Q Did you personally see these checks that you have mentioned here mailed or made out for these three parties? A Yes, I saw those three checks.

Q Did you deliver them yourself? A I was present when they were delivered.

Q When were they delivered? A Two of them were in Mr. English's office at the time settlement was made on account of suits.

Q Where was the third? A The third I think was in the office of Mr. Yauch, another attorney.

Q And all these three payments that you saw were used to settle suits that had been started? A Yes. I think so. Just a minute.

Christie Hartman, recalled, re-direct.

Re-direct examination by Mr. English.

Q These three concerns you name are all material men or sub-contractors on this high school job? A Absolutely.

Q Did you see receipts from any other material men or contractors the payments of which you didn't actually see made as you did these you testified to?

Mr. Whinery: I object to that. The question is all right if she just answers yes or no.

The Court: Yes. It may be answered yes or no.

A Yes.

Q Will you give us the names of those concerns from whom you saw receipts for payments made?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q The concerns whose names I asked for and which the Judge ruled out—were those moneys which were represented by these receipts paid by Gibbs himself?

Objected to.

The Court: I doubt from what she says whether she can answer that from first-hand information. All she has testified to is to receipts that she saw, unless she was the the disbursing clerk.

Christie Hartman, recalled, re-direct.

Q Did you see the payment of moneys by Gibbs when Gibbs paid his own money? A Yes.

Q You were the cashier, you said? A Yes.

Q Did you have a complete knowledge on that subject? You have, have you not? A Yes.

Q These other sub-contractors or material men whose receipts you saw—were those receipts given as a result of moneys which were paid by Gibbs? A No.

Q Gibbs' money? A No.

The Court: If you desire to object your objection will be timely.

Mr. Whinery: I would like to object to that question.

The Court: The objection will be overruled.

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

Exception noted as ground of appeal.

Q Do you know whose money did pay those bills, the receipts of which you saw?

Objected to.

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

A Yes.

Q Will you say whose money it was?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Re-cross examination by Mr. Whinery.

Q You don't know, do you, Miss Hartman, that the three checks that you said you saw, were paid out of the proceeds of this $12,788.12? All you know is that there were checks of the Continental Casualty Company for these three amounts, isn't that correct? A No, that is not correct.

Q When did you see at the time these payments were made? A I saw the checks.

Q Whose checks were they? A Continental Casualty Company.

Q And that is all you saw, just the checks from the Continental Casualty Company? A I don't understand what you are trying to get at. I mean I am not trying to evade the question.

Mr. Whinery: I think she has answered the question.

Defendant's counsel moves for a direction of a verdict on the ground that it has been proved that the release was given, which is in evidence as Exhibit D. 2, and that following the giving of that release the school board paid out large sums of money to the contractor Gibbs to the prejudice of the surety, the defendant in this case.

Motion denied.

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

Exception noted as ground of appeal.

Mr. English: Your Honor, I want to discuss some questions which will be submitted in the requests to charge. I have them prepared here, and they cover two main ques-

tions. One is that the plaintiff is not entitled to interest, and the other that the plaintiff's claim in any event must be credited or at least there must be deducted from the plaintiff's claim the sum of $3,000.

(Argument.)

The Court: I am prepared to decide that now. I will decide that when the notice was given the surety company had then sixty days within which to pay up, under the statute. When they failed to pay at the end of sixty days, the claim against them would draw interest, and that interest may be collected in this case from sixty days from the date of the service of the notice of the surety company. Will you agree as to what date that would be?

Mr. English: It would be October 16th, sixty days from August 16, 1926.

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

Exception noted as ground of appeal.

Mr. English: Now, the other question of law which I have in mind and which I am going to ask your Honor to deal with is that there must be deducted from the amount sought to be recovered by the plaintiff the sum of three thousand dollars. I reach that conclusion from the evidence, from the fact that we have in evidence a note and a trade acceptance, both for the total of three thousand dollars, each of them according to their terms not due until September 28, 1926, which is after the time when they filed their claim with the surety company, which is admitted to have been on August 16th; so

that when they filed their claim for five thousand odd dollars, three thousand dollars of it, according to these papers, this note and this trade acceptance, were not then due. Now, my position is that they are required to deduct that or that your Honor should direct that the amount should be deducted.

(Argument.)

Mr. English: If there is any question when the notes were given on account of this indebtedness, I would like to ask leave to reopen on that point. I do not believe we ought to close the case with that in doubt. There is no other indebtedness between Gibbs and Shannon and there is no other reason to give notice.

The Court: Is there any objection to that?

Mr. Whinery: It would seem to me the case was all closed. I object.

Mr. English: It was closed. It is in the judge's discretion.

The Court: If there is any question about it the case may be opened.

CHRISTIE M. HARTMAN, recalled, in behalf of the defendant.

Direct examination by Mr. English.

Q Miss Hartman, I show you Exhibit P. 5, which is the contract between Gibbs and Shannon. You are familiar with that? A Yes.

Q Did Gibbs have any contractual relations with Shannon on this high school job on any

other paper except this contract P. 5? A There were extra orders issued.

Q I mean some extra orders, some thirty-nine or forty dollars extras, but apart from that. A Apart from them, no.

Q Did Gibbs owe Shannon money on anything except this contract, P. 5, and the extras? A Yes, he did.

Q What? A He owed him—he didn't owe him as an individual.

Q I mean, did T. M. Gibbs trading as T. M. Gibbs Construction Company owe any money to Shannon except under that contract? A No, not that I know of.

Q I show you Exhibit D. 4 and Exhibit D. 5. Do you know whether or not those notes were given in connection with the indebtedness of Shannon to Gibbs growing out of this contract, Exhibit P. 5, and the extras? A Yes, I do.

Q What is the fact? A They were given to apply on account of the contract on the Irvington High School.

Cross examination by Mr. Whinery.

Q When you say they were given to apply, you mean they were just notes made for part of that indebtedness and forwarded to the Shannon Company? A These two particular notes are renewals of other notes.

Q You received no word from Shannon Company that those notes had been accepted in payment, did you?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A No, we did not.

Q Now, you have testified that part of this $12,800 was used to settle other lawsuits. Can you tell us when those lawsuits were settled; before or after August 16, 1926? A Oh, after August 16th.

Q Some time in 1927? A This is 1929. I can't recall the year. It is either 1927 or 1928.

Q So those three payments that were made were all after August 16, 1926? A Yes, they were after that, yes.

(Argument.)

The Court: Of course, there is no ruling required now, but I think I might as well express my opinion as a suggestion to counsel in their arguments before the jury, although I wonder whether there is very much to present to this jury in view of what has been said in the case. Those questions are—I will ask you what you think there is presently.

The case of Taylor *v.* Wahl, 72 New Jersey Law, was a case upon a stop notice under the Mechanics' Lien Act. The stop notice was served at a time when a note had been given to the plaintiff for the debt which it was sought to recover by virtue of the stop notice. It was contended that the plaintiff's claim was not due at the time of the service of the stop notice, because prior to that time a note had been given which had not matured.

Chief Justice Gummere in the opinion expressing the view of the Supreme Court upon that situation said, "A promissory note, given for an antecedent debt, although it does not operate to discharge the debt, in the absence of any agreement that it should have that effect, extends the credit until the note matures." In other words, if a note has been given and at the time the stop notice is served it has not matured, the debt for which it was given is not due because of that extension.

The third section of the act under which this suit is brought provides that any person, firm or corporation to whom any moneys shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, shall give notice, and so forth. There is no question about that. Under the evidence in this case a note or trade acceptance aggregating three thousand dollars, which was not due at the time of the stop notice, was given, and the evidence is that there was no other debt existing between the general contractor and the plaintiff in this suit, the subcontractor at that time, and that the notes, therefore, were undoubtedly given for that debt. If they were, then I feel bound by the decision in Taylor *v.* Wahl, and to hold that if they were given for that debt that amount cannot now be recovered.

Mr. English: May I have an exception if it is proper to be noted at this time?

The Court: So you might take an exception to that view now as a ruling in the case as ground of appeal.

Mr. Whinery: I should think you might raise the question on the record.

Defendant's counsel moves for a direction of a verdict on the ground of the release.

Motion denied.

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

Exception noted as ground of appeal.

Mr. English: Now, I ask your Honor to direct the jury that in any verdict which they find they must deduct the sum of three thousand dollars, representing the aggregate of the note and trade acceptance. If your Honor grants that motion Mr. Whinery has his exception on the record.

The Court: Are you willing that I should direct a verdict for the difference? I do not mean for you to consent to it, but I mean under the ruling of the Court—

Mr. Whinery: With my exception. I would like to reserve my right, because I want to try it out.

The Court: Yes.

Mr. English: I should think, your Honor, then, would charge the jury to bring in the verdict for a figure less three thousand dollars. I will except to that because it is contrary to my motion on the release. Mr. Whinery will except because it takes three thousand dollars away from what he is claiming.

The Court: Do you agree to that?

Mr. Whinery: I do not understand the first part.

The Court: Under the ruling of the Court, all you are entitled to recover in this case is

$2,039.83 with interest from October 16, 1926, at the rate of six per cent. Are you willing that I should direct this jury to find a verdict for that amount? I am reserving of course your exception to the ruling of the Court that you may not recover the three thousand dollars which was not due at that time.

Mr. Whinery: I am perfectly willing to do that.

Mr. English: I will object to your Honor's charging the jury to bring interest in.

The Court: Then, gentlemen, you have heard what has been said, and there is nothing to be gained by multiplying words. The record shows the view and ruling of the Court, and the Court will therefore direct you to find a verdict in favor of the plaintiff and against the defendant in this case for $2,039.83 with interest at six per cent. from October 16, 1926, to March 14, 1929.

Mr. English: And I respectfully except to the direction of the Court to bring in interest.

The Court: That may be noted. And you except, of course, to the limitation of the right of recovery to $2,039.83.

Mr. Whinery: And the releasing of the three thousand dollar claim from the defendant.

Exhibit P. 1.

EXHIBIT P. 1.

To
Continental Casualty Company
c/o Commissioner of Insurance & Banking
Trenton, New Jersey
or
Continental Casualty Company
75 Fulton Street
New York City

Gentlemen:

TAKE NOTICE that J. Jacob Shannon & Co., a corporation having its principal office in the City of Philadelphia, State of Pennsylvania, has performed labor and furnished material for the construction and erection of the High School Building in the Town of Irvington, Essex County, New Jersey, having furnished said labor and material to the T. M. Gibbs Construction Company, having its office in the City of Philadelphia, Pennsylvania. That the materials furnished by the J. Jacob Shannon & Co., were hardware and similar materials which were used in said school. That such materials were furnished at the contract price of $5600.00, a copy of the contract and acceptance being attached hereto and made a part hereof. That in addition to said contract price, certain small items of extras were also supplied by the J. Jacob Shannon & Co., to the T. M. Gibbs Construction Company for use in said High School Building, making a total amount due the J. Jacob Shannon & Co., of $5639.83. That the J. Jacob Shannon & Co., has received on account of said moneys due, by cash or credits, the sum of $250.00. That there now remains justly due and owing to J. Jacobs Shannon & Co., from the T. M. Gibbs Construc-

Exhibit P. 3.

tion Company, the sum of $5389.83. That attached hereto is a copy of the schedule of hardware for the Irvington High School, Irvington, N. J., and also a copy of a statement showing the amount due from the T. M. Gibbs Construction Company to J. Jacob Shannon & Co.

That this notice is furnished to and served upon you because you furnished and supplied the bond given by the T. M. Gibbs Construction Company to the Board of Education of Irvington, or the Municipality of Irvington, New Jersey in which bond you undertook and agreed to see that all materialmen or laborers who furnished work or supplied materials for the erection of said High School pursuant to the contract of T. M. Gibbs Construction Company would be fully paid, and this notice is given pursuant to the Statutes of the State of New Jersey in such case made and provided.

J. J. SHANNON & CO.

By Andrew J. Whinery,
Attorney.

EXHIBIT P. 3.

KNOW ALL MEN BY THESE PRESENTS, That we, Tyler M. Gibbs, trading as T. M. GIBBS CONSTRUCTION COMPANY, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania (hereinafter called the principal) as principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, and having an office and place of business at No. 75 Fulton Street in the Borough of Manhattan, City, County and State

Exhibit P. 3.

of New York, as surety, are held and firmly bound unto The Board of Education of Irvington, in the County of Essex, in the penal sum of Five Hundred Ninety Six Thousand Two Hundred Fifty One Dollars ($596,251.00) for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this 28th day of January, 1925.

The Condition of the Above Obligation Is Such, that Whereas, the above named principal did, on the 28th day of January, 1925, enter into a contract with The Board of Education of Irvington, in the County of Essex, which said Contract is made a part of this bond, the same as though set forth herein.

Now Therefore, if the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, shall well and faithfully do and perform the things agreed by him to be done and performed, according to the terms of said Contract, including any and all alterations, addition or modification of the work called for by said Contract, in accordance with the provisions thereof, the advertisement, instructions to bidders, drawings and specifications which are made a part thereof, within the time and for the price in said Contract specified; and if the said Contractor shall pay to the said obligee above named, its successors and assigns, all sums of money it, the said obligee, may expend for fully completing said work over and above the amount which the Contractor would have been entitled to receive had said Contractor completed the work under said contract, according to the terms and condi-

Exhibit P. 3.

tions thereof, and all loss or damage which may result to said obligee above named, its successors or assigns, by reason of the omission, failure, neglect or refusal of the said Contractor to commence, prosecute or complete said work as in the said Contract provided, or by reason of the non-performance or malperformance on the part of the said Contractor of any of the covenants, conditions, requirements, stipulations and agreements of said contract, including all alterations, additions and modifications, and shall guarantee and maintain all materials and workmanship in good condition for one year as required in the general condition of the specifications, and shall promptly pay all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in carrying forward, performing or completing said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborers having a just claim, as well as for the obligee herein and shall defend and settle, without expense to the Board, liens, claims for personal injury or otherwise, or from other liabilities arising from the execution of the work or from the use of patented articles, and when required in the specifications or contract and before the certificate of final payment shall be due, shall provide additional satisfactory bond or bonds covering all other guarantees for maintenance and repairs in the amount and for the period of time stated in the specifications or contract, without any fraud or other delay, then said obligation shall be void, otherwise the same shall remain in full force and virtue.

Said surety hereby expressly waives whatever right it may have to be notified of any such

Exhibit P. 3.

alterations, additions and modifications which may hereafter be agreed to by the parties to the said contract and acknowledges itself to be bond for all such alterations, additions and modifications and as fully as though notice thereof had been given it and it consented thereto.

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

If the said obligee should desire to increase the total extra cost of such alterations, additions and modifications in excess of ten per cent. of the price mentioned in said contract, the parties hereto, upon written notice of the amount of such increase, agree to increase the penal sum of this bond, by written consent to be hereto attached, to an amount equal to 33 1/3% of said contract price, including tye amount of all alterations, additions and modifications thereto.

T. M. GIBBS CONSTRUCTION COMPANY

By Tyler M. Gibbs,
Proprietor.

By George Young Casey
Attorney in fact.

Countersigned at Newark, N. J.
J. Durahoenz, Jr.

Exhibit P. 4.

EXHIBIT P. 4.

Irvington, N. J. Aug. 18, 1928.

A No. 1430

BOARD OF EDUCATION
Irvington, N. J.

Pay to the order of T. M. Gibbs Const. Company $12,788.14

The sum of $12788 and 14 cts for and on account of New Building

G. A. Kruttschnitt
President.

Henry A. Schwedes
Secretary.

Pay to
CONTINENTAL CASUALTY CO.
or
GEO. W. YUENGLING, Agent.
T. M. GIBBS COS. CO.
Geo. W. Yuengling Agent.
Pay to
Bank of Manhattan Co.
or order.
Geo W. Yuengling Agent.

Exhibit P. 5.

EXHIBIT P. 5.

T. M. GIBBS CONSTRUCTION COMPANY
1510 Chestnut St.,
Philadelphia, Pa.

SHOW THIS ORDER NUMBER
On All Invoices, Shipping Papers
and Correspondence

Address All Communications
Regarding This Order to the Company at Issuing
Office, (Shown on Right) and Mark
☛ Order Number 474
Date Apr. 14, 1925.
Issued at Phila. Office

For Attention of Mr. R. S. Moore,
To J. Jacob Shannon Co., 1744 Market St., Phila., Pa.
Ship to T. M. Gibbs Construction Co., New High School Bldg., at Irvington, N. J. via Lehigh Valley R. R.

Ruttle

Shipment Must Be Made As Required.
(The right is reserved to cancel this order if shipment is not made as specified)
Prices F. O. B. Irvington, N. J. Freight or Express Charges
Send Two Copies of Invoices and All copies of Shipping Papers as Soon as Shipment Is Made to the Company's Office at 1510 Chestnut Street, Phila., Pa.

This order is to cover the finished Hardware for High School Building which we are erecting at Irvington, New Jersey, and is to be according to Plans and Specifications prepared by Donn Barber, Architect, subject to the approval of and acceptance by said Architect, and ourselves.

Exhibit P. 5.

This order does not include Hardware for folding partitions, tin clad doors, outside windows, hand rail brackets or rough or construction hardware of any kind.

It is understood that all the Hardware covered by this order is to be delivered from time to time as required so as not to delay the completion of the building, and in the event that you do not furnish part or all of this Hardware in time for our requirements, we reserve the right to buy the same in the open market and charge to you.

Hardware is to be Yale & Towne Manufacture.

Price $5600.00 f. o. b. Irvington, New Jersey.

On or about the 15th of the month, payment will be made in the amount of 85% of the value of the material delivered up to the first of the month.

Final payment is to be made within thirty (30) days after final delivery and acceptance of your material.

T. M. GIBBS CONSTRUCTION COMPANY

By R S Moore

Fill Out, Sign and Return at Once the Attached Acknowledgment Slip

If for any reason the order cannot be shipped complete as specified, telegraph or telephone us immediately stating exceptions.

Exhibit P. 6.

EXHIBIT P. 6.

T. M. GIBBS CONSTRUCTION CO.
Corn Exchange Bank Building
1510 Chestnut Street
Philadelphia

SHOW THIS ORDER NUMBER
On All Invoices, Shipping Papers
and Correspondence

☛ Order Number 664
Date 4/2/26
Issued at Phila. Office

Address All Communications
Regarding This Order to the Company at Issuing
Office (Shown on Right) and Mark
For Attention of Mr. R. S. Moore,
To J. Jacob Shannon & Co., 1744 Market St., Phila.
Ship to T. M. Gibbs Construction Co.,
At Irvington, N. J. Via Parcel Post or Express.
Shipment Must Be Made At Once!
(The right is reserved to cancel this order if shipment is not made as specified)
Prices F. O. B. Irvington, N. J. Freight or Express Charges
Send Three Copies of Invoices and All Copies of Shipping Papers as Soon as Shipment Is Made to the Company's Office at 1510 Chestnut St., Phila., Pa.
√√ 2 Door Checks with brackets, to match others furnished
Price....$8.50 each f. o. b. Irvington.
Ruttle

Exhibit P. 6.

N. B. Please render invoice in triplicate showing on same the order number, job to which shipment was made, etc.

T. M. GIBBS CONSTRUCTION CO.

By R S Moore

Fill Out, Sign and Return at Once the Attached Acknowledgment Slip

If for any reason the order cannot be shipped as specified, telegraph or telephone us immediately stating exceptions.

ACKNOWLEDGMENT AND ACCEPTANCE OF ORDER

Order No. 664-I.
Dated 4/2/26

T. M. Gibbs Construction Company
At 1510 Chestnut St., Phila.

Gentlemen:—The above order is hereby acknowledged and accepted, subject to all specifications, conditions and instructions given herein.
Shipment will be made.....from.....
Manufacturer or Dealer's Reference
Order Accepted .....
Order No.....Date .....By.....

Exhibit P. 7.

EXHIBIT P. 7.

T. M. GIBBS CONSTRUCTION CO.
Corn Exchange Bank Building
1510 Chestnut Street
Philadelphia

SHOW THIS ORDER NUMBER
On All Invoices, Shipping Papers
and Correspondence

☛ Order Number 663
Date 4/2/26
Issued at Phila. Office

Address All Communications
Regarding This Order to the Company at Issuing
Office (Shown on Right) and Mark
For Attention of Mr. R. S. Moore,
To J. Jacob Shannon & Co., 1744 Market St.,
Phila.
Ship to T. M. Gibbs Construction Co.,
At Irvington, New Jersey, Via Parcel Post or
Express.
Shipment Must Be Made At Once.
(The right is reserved to cancel this order if
shipment is not made as specified)
Prices F. O. B. Freight or Express Charges
Send Three Copies of Invoices and All Copies of
Shipping Papers as Soon as Shipment Is
Made to the Company's Office at 1510
Chestnut St., Phila., Pa.
√√ Hardware complete for one Dutch Door.
same as item #309.
4/6/26 B. 34900 Rhoads

Exhibit P. 7.

N. B. Please render invoice in triplicate, showing on same the order number, job to which shipped, etc.

T. M. GIBBS CONSTRUCTION CO.

By R S Moore

Fill Out, Sign and Return at Once the Attached Acknowledgment Slip

If for any reason the order cannot be shipped as specified, telegraph or telephone us immediately stating exceptions.

ACKNOWLEDGMENT AND ACCEPTANCE OF ORDER

Order No. 663-I
Dated 4/2/26

T. M. Gibbs Construction Company
At 1510 Chestnut St., Phila.

Gentlemen:—The above order is hereby acknowledged and accepted, subject to all specifications, conditions and instructions given herein.

Shipment will be made.....from.....

Manufacturer or Dealer's Reference

Order Accepted .....

Order No.....Date.....By.....

Exhibit P. 8.

EXHIBIT P. 8.

J. JACOB SHANNON & CO.
1744 Market Street 1744
Philadelphia

Construction Equipment and Supplies

Date, 5/8/26

Name T. M. Gibbs Const. Co.
Billing Address 1510 Chestnut St.
Job Irvington-New Jersey-Drawer "A"
Date Billed May 24 1926
Salesman Ruttle Assembled by Rhodes Customer's Order No. .... Req. No. .... Folio 1790

OFFICE

Quantity	Description	Price Per	Amount	Total
	P. P. Value 15.00			
10 only	#3 Door check brackets @ 1.20 ea			
	P. P.		12.00	
	Stamps 33c			
	due 8c		41	12.41

Received in good order items listed hereon,
Received by (Firm Name).....
Per.....

Any Claim for Error or Shortage Should Be Made at Once Quoting Our Numbers.

Exhibit D. 2.

EXHIBIT D. 2.

WHEREAS, WE, THE SUBSCRIBERS, have erected and furnished materials for erecting A PUBLIC SCHOOL BUILDING on a lot or piece of ground situate 1275 CLINTON AVENUE, IRVINGTON, NEW JERSEY BOARD OF EDUCATION IRVINGTON NEW JERSEY OWNERS
T. M. GIBBS CONSTRUCTION COMPANY
1510 CHESTNUT STREET
PHILADELPHIA PENNSYLVANIA
GENERAL CONSTRUCTORS
And have agreed to release all Liens which we, or any or either of us have, or might have, on the said public school building by reason of materials furnished, or work performed, for erecting the same. NOW THESE PRESENTS WITNESS, That we, the Subscribers, for and in consideration of the Premises, and of the sum of One Dollar, to each of us at or before the sealing and delivery hereof by the said T. M. GIBBS CONSTRUCTION COMPANY well and truly paid, the receipt whereof we do hereby acknowledge, HAVE remised, released, and forever quit claimed, and by these Presents DO remise, release, and forever quit claim unto the said T. M. GIBBS CONSTRUCTION COMPANY and to their Heirs and Assigns, all and all manner of Liens, claims, and demands whatsoever, which we, or any or either of us now have, or might or could have, on or against the said PUBLIC SCHOOL BUILDING and Premises, for work done, or for materials furnished, for erecting and constructing the said PUBLIC SCHOOL BUILDING or otherwise howsoever. So that the said BOARD OF EDUCATION Heirs and

Exhibit D. 2.

Assigns, shall and may have, hold and enjoy, the said PUBLIC SCHOOL BUILDING and Premises, freed and discharged from all Liens, claims and demands whatsoever, which we, or any or either of us, now have, or might or could have, on or against the same, if these Presents had not been made.

IN WITNESS WHEREOF, we have hereunto set our Hands and Seals, the day of the date written opposite our respective signatures.

DATE WITNESSES AT SIGNING.

(Signatures, dates and witnesses of other persons signing release omitted.)

April 6th, 1926 John W. Powell.
J. Jacob Shannon & Co.
Leon Rosenbaum. L. S.
Pres. & Treas. Hardware

STATE OF NEW YORK
COUNTY OF NEW YORK. } *ss*

BE IT REMEMBERED, that on this 9th day of June, 1926, before me, the subscriber, a Foreign Commissioner of Deeds for the State of New Jersey, residing in the City of New York, personally appeared C. M. Hartman who being duly sworn according to law, doth depose and say that the foregoing is a full and complete Release or Waiver of liens, and has been signed by all persons who have done work or furnished material in and about the erection and construction of the building mentioned at the head of the foregoing Release, except as noted and that all persons who have done work or furnished material in and about the erection and construction of the said building have been paid in full, in cash or by check presently payable, except as noted that

Exhibit D. 4.

the said building has been entirely finished and completed; that the costs thereof did not exceed $650,000; and that she makes this affidavit for the purpose of inducing the Board of Education of the Town of Irvington, N. J. to make payment of retained percentage under said contract.

C. M. Hartman L. S.

Sworn and Subscribed before me this
9th day of June, A. D. 1926.

C. Hazel Kirk.
Notary Public.
Commission expires
A Foreign Commissioner of Deeds

EXHIBIT D. 4.

2020.00

20
$2000.00 Philadelphia Pa June 28th 1926

Two Months after date we promise to pay to the order of J. Jacob Shannon Company
Two Thousand .....Dollars
Payable at First National Bank Toms River New Jersey Without defalcation, for value received.
No. 1989
Due with int.
T. M. GIBBS CONSTRUCTION COMPANY
T. M. Gibbs
1510 Chestnut St Philadelphia
(Stamped) Payment Stopped

Exhibit D. 5.

EXHIBIT D. 5.

TRADE ACCEPTANCE

No. 1990 Philadelphia Pa June 28th 1926
To T. M. Gibbs Construction Company
1510 Chestnut St Philadelphia
On September 28th 1926 Pay to the order of
J. Jacob Shannon & Company
One Thousand.....Dollars ($1000.00)
15

1015.00

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawer may accept this bill payable at any bank, banker or trust company in the United States which he may designate. With Int.
Accepted at Philadelphia on 6-26-26
Payable at First National Bank
Bank Location Toms River New Jersey
Buyer's Signature T. M. Gibbs. Const. Co.
By Agent or Officer T. M. Gibbs

J. JACOB SHANNON & CO.

By Leon Rosenbaum
Pres. & Treas.

(Stamped) Payment Stopped

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

J. JACOB SHANNON & Co., a corporation of Pennsylvania, *Plaintiff*, *vs.* CONTINENTAL CASUALTY COMPANY, a corporation, *Defendant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, entered into a written contract with the Board of Education of Irvington, N. J., for the erection of a High School building. He furnished to the Board of Education a bond, with himself as principal and the Continental Casualty Company, a corporation, as surety. The surety is in the business of furnishing bonds for compensation. This bond was in the general statutory form and provided, among other things, for the payment by the principal or the surety of all lawful bills or claims of subcontractors or materialmen for labor and materials furnished in connection with the erection of said high school building. The plaintiff, J. Jacob Shannon & Co., pursuant to a contract with Gibbs, furnished the hardware for this building. After this material had been delivered and installed, the plaintiff attempted to collect its claim from Gibbs. On or about March 27, 1926, after the materials had been so delivered and installed, the plaintiff accepted two trade acceptances from Gibbs as collateral

for the debt, one being for $2,300. payable in two months and the other for $2,300. payable in three months. On May 27, 1926, when the first trade acceptance became payable, $300. was paid on account thereof and a note for $2,000. was received, payable July 27, 1926. When the second original trade acceptance became payable on June 27, 1926, $300. was paid on account and a note for $2,000. given, payable on August 27, 1926. On June 28, 1926, the plaintiff received from Gibbs another trade acceptance for $1,000. payable on September 27, 1926. There was no evidence that any of these negotiable papers were accepted as payment by the plaintiff. The indebtedness for goods sold and delivered remained in existence. The high school building was accepted by the Board of Education on June 3, 1926. Pursuant to the terms of the bond and the provisions of Laws of 1918, Chapter 75, the plaintiff did, on August 16, 1926, serve upon the defendant, the surety on the bond, the notice required under said statute, being within eighty days from the date of acceptance of the building. Subsequently, after waiting the sixty-day period required by statute after service of the notice, plaintiff started suit against the defendant, Continental Surety Company, for the balance due it under its contract with Gibbs, namely $5,039.83.

At the conclusion of the trial, the Court directed a verdict in favor of plaintiff for the amount of its claim, less the sum of $3,000. represented by the two negotiable papers which by their terms were not yet payable on August 16, 1926, the date on which notice of indebtedness of Gibbs was served upon Continental Casualty Company. The $2,000. note became payable on August 27, 1926, and the trade acceptance for $1,000. became payable on Septem-

ber 27, 1926, both being within the sixty-day period required by statute between the date of service of notice and the date when suit might be started. The Court based its direction to the jury to deduct $3,000., represented by these two negotiable instruments, from plaintiff's claim, upon the theory that on August 16, 1926, when the notice was served upon the defendant, the obligation to the extent of $3,000. was not then "due" under the meaning of *Chapter 75 Laws of 1918* wherein it is provided that a materialman shall, within eighty days after acceptance of the work, "furnish the surety on the bond a statement of the amount due to any such person, firm or corporation." An exception to this ruling was taken by plaintiff and this appeal is taken thereon.

The evidence disclosed that on August 18, 1926, (two days after plaintiff served its statement on the defendant) a check for $12,788.74 was delivered by the Board of Education to the representative of Gibbs, who immediately endorsed it to the order of this defendant, Continental Casualty Company, and delivered it simultantously to the defendant's representative who was there present. Testimony was given by defendant's witness, Christine Hartman, that this money was held by the defendant, Continental Casualty Company, and that a portion of it disbursed, to her knowledge, in 1927 or 1928, in settlement of other litigation resulting from the contract between Gibbs and the Board of Education.

Plaintiff's claim is based upon its contract price of $5,600. plus items of extras amounting to $39.83, on which claim the sum of $600. was paid by Gibbs. This left a balance due plaintiff of $5,039.83. After the Court's instructions rel-

ative to the deduction of $3,000, (because of the two negotiable instruments not payable on August 16, 1926) the jury returned a verdict in favor of plaintiff for $2,039.83 with interest thereon from October 16, 1926 to March 14, 1929.

Plaintiff, by this appeal, seeks to assert its right to collect the full amount of its claim, $5,039.83 with interest, from the defendant as surety for Gibbs.

The result of this appeal depends upon the construction to be given by this appellate court to the word "due" as used in the statute (Chapter 75, Laws 1918, paragraph 3) wherein it is stated that the materialmen "shall furnish the sureties on the bond a statement of the amount *due* to any such person, firm or corporation."

ARGUMENT.

I.

The purpose of Chapter 75, Laws 1918, is to provide protection to materialmen and subcontractors furnishing materials or labor in connection with the completion of a public work.

The act is entitled "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works." Under paragraph 2 of this Act it is provided that the bond to be furnished shall be "conditioned for the payment by the contractor —of all *indebtedness* which may accrue to any person, or firm or corporation, on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such building, works or improvement." Paragraph 3 provides that "any person, firm or corporation to whom any money shall be *due on*

account of having performed any labor or furnished any material in the construction * * * of any such building, work or improvement, within eighty days after the acceptance thereof * * * shall furnish the sureties on said bond a statement of the amount *due* to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty days after the furnishing of said statement. If said *indebtedness* shall not be paid *in full* at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond * * *." Paragraph 4 of the Act sets forth substantially the form of the bond and in the condition there set forth is the following: "Now, if the said * * * shall well and faithfully do and pefrom * * * and shall *pay all lawful claims* of subcontractors, materialmen, and laborers, for labor performed and materials furnished in carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of *any materialman or* laborer *having a just claim,* as well as for the obligee herein; then this obligation shall be void * * *."

This Act of 1918 should be construed, if possible, to achieve its purpose to protect materialmen and laborers. In its interpretation, the Act should be read as a whole: If these two principles are observed, it must be quite apparent that when the legislature provided in paragraph 3 for furnishing a statement to the sureties of the amount *"due"* the materialmen, it intended to use that word in the sense of an outstanding obligation or simple indebtedness merely and not as denoting a matured debt in the sense that a note is not due until its due date. Thus we

find in the Act the following expressions; "indebtedness;" "lawful claims;" "just claims;" these expressions must, in reading this act, be taken as synoymous with the expression, "amount due."

When Gibbs purchased the materials, he became indebted to plaintiff in the sum of $5,639.83. Subsequently, plaintiff accepted negotiable paper from Gibbs as collateral to this debt, and as evidence of it, but not in payment thereof. The acceptance of a note for an existing debt does not pay the debt unless there be an agreement between the parties to that effect. (*Joslin* v. *Giese,* 59 N. J. L. 130.) On August 16, 1926, when plaintiff served its statement "of the amount due" from Gibbs on the defendant as surety, the debt due from Gibbs amounted to $5,039.83, the sum of $600. having been paid on account by Gibbs. As collateral evidence for this debt, plaintiff held negotiable paper of Gibbs for $5,000. (a note for $2,000. which had become payable on July 27, 1926, a note for $2,000. payable on August 27, 1926, and a trade acceptance for $1,000. payable on September 27, 1926). There can be no question but that the "indebtedness," "the lawful claim" and the "just claim" of the plaintiff against Gibbs on August 16, 1926, amounted to $5,039.83; the fact that the note and trade acceptance, taken as collateral or as an admission of indebtedness, were not yet payable under their terms, could not in any sense change the fact that the amount of the debt of Gibbs remained $5,039.83. Thus in the statement of the "amount due" which was served upon the surety, the entire indebtedness was properly set forth, according to the very apparent meaning of the Act itself.

II.

Under the terms of the bond signed by the defendant as surety in this case, the defendant is liable for the full indebtedness of $5,039.83.

The bond (Exhibit P. 3) provides that either Gibbs or the surety "shall promptly pay all *lawful claims* of subcontractors, materialmen or laborers for labor performed and materials furnished in * * * completing said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborers having a *just claim* * * *."

It will be noticed that, if the materialman has a "*lawful claim*" or a "*just claim,*" it is to be protected by the bond. These terms are synonymous with a simple indebtedness. Nothing in the bond indicates that if notes are taken as collateral evidence of the debt and are not yet matured, the surety or the contractor is relieved. The obligation is simply that any lawful or just claim of a materialman will be paid. The surety by signing the bond assures the materialman of the payment of his lawful and just claim, regardless of the nature of materials furnished or terms of payment. It undertakes the insurance of payment and cannot escape this liability upon grounds of highly technical nature. In effect, it says we guarantee the payment of all just claims for materials used in this particular work. It does not limit this liability to debts which mature for payment within eighty days of the acceptance of the work; it promises payment to all materialmen furnishing materials to complete the job, regardless of terms of payment or credit extended. As soon as the materials are accepted by the contractor, the surety becomes responsible for the payment to the materialman of his lawful claim.

III.

Chapter 75 of the Laws of 1918 has been construed by our courts favorably to the creditor.

In *Franklin Lumber Co.* v. *Globe Indemnity Co.*, 102 N. J. L. 9, Chief Justice Gummere construes the eighty day provision to mean eighty days after the final acceptance of the work by the municipality, rather than eighty days after the materials were furnished by the materialmen.

In *Board of Education* v. *Zink, Receiver,* 5 A.R. 975, Vice-Chancellor Backes holds that the condition of the bond creates a direct engagement between the materialmen and the surety and that the materialmen may alone sue the surety.

In *Grover* v. *Board of Education,* 141 Atl. 81, Vice-Chancellor Buchanan states that the statute gives the materialman a right and assurance of payment which did not exist prior to the statute; that a surety for compensation might insist, as a condition of its suretyship, upon special agreements for its protection, such as requiring that payments by the municipality be made jointly to it and the contractor, and he finally says "If the municipality or contractor should refuse such an arrangement, the surety company need not go on the bond. If it does go on the bond, without any such arrangement, it does so as a matter of business and for the sake of fairly high premiums exacted."

In *Hammill* v. *Commercial Casualty Co.,* 5 Misc. 685, the Supreme Court says that the purpose of this statute was to secure the payment by the contractor for all labor performed or materials furnished in the construction of the public work.

In *Lavino & Co.* v. *National Surety Co.*, 6 Misc. 478, Justice Katzenbach, for the Supreme Court, says

> "The bond itself states that it shall be for the benefit of any materialman or laborer having a just claim. No question has been raised that the plaintiff did not furnish the material for which it seeks payment. The defense sought to be interposed is that the defendant has been released because the contract was assigned * * *. This defense is highly technical * * *. The statute is designed for the benefit of those furnishing materials and labor for a public work. In the broadest language possible this intention is shown by the statute and by the language of the bond * * *. The question in this case seems to me to be whether the plaintiff actually furnished the materials * * *. There has been no evidence submitted which shows that the plaintiff did not furnish the materials. The surety was responsible for these materials under its bond whether ordered by King or the construction company * * *. When a surety signs a bond containing the broad provisions of the bond sued upon, taken in connection with the provisions of the law, it is presumed to know the extent of its liability. The extent of the defendant's liability in this case included payment to the plaintiff for the materials it furnished. I see no meritorious defense which can be interposed."

From the above decisions, the trend of our decisions under this statute is clearly to hold the surety company to its obligations and not to release it upon some highly technical defense. The claim in this case, namely that the phrase "amount due" deprives the plaintiff of a recovery of the full amount of its debt merely because it took negotiable paper as collateral evidence of the debt, which paper was not itself matured when notice was given to the surety, al-

though the debt itself was certain and accrued, is highly technical. If this statute is for the protection of the materialmen, as our courts have stated, then certainly it should be construed to attain that end. The surety on this bond, entered into the obligation knowing that it was ignorant of the parties with whom Gibbs might deal, the value and nature of materials he might purchase or the terms of credit he might receive. It was an obligation for an uncertain liability but the surety assured the materialmen that the contractor or it would promptly pay all lawful claims of materialmen for materials furnished in carrying forward, performing or completing the contract (See Bond, Exhibit P. 3).

The defendant, surety for compensation, under the properly liberal interpretation of this statute by our courts, is in this case liable for the full indebtedness, due from Gibbs to the plaintiff, regardless of the maturity dates of the two notes which were accepted by the plaintiff, not as payment, but as collateral evidence of the debt.

IV.

The phrase "Amount Due" as used in Laws 1918, Chapter 75, paragraph 3, denotes a simple indebtedness.

The word, "due," in law has been interpreted as having a double meaning. It sometimes means simply indebtedness without reference to the time payment and at other times it means that the day of payment has passed or that it is presently payable.

Scudder v. *Coryell,* 10 N. J. L. 403;
Hoyt v. *Hoyt,* 16 N. J. L. 138, 143;
Green v. *McCrane,* 55 N. J. E. 436;

Lester v. *Patterson Bank,* 97 N. J. E. 396, 399;

Reading v. *Reading,* 24 N. J. L. 358.

In *Metropolitan Fixture Co.* v. *Albrecht,* 70 N. J. L. 150, Justice Swayze, speaking for the Supreme Court, says:

> "The word 'due' does not necessarily mean 'owing and payable.' It is often used to signify merely the present existance of a debt to be paid hereafter."

And in *Smith* v. *Weaver,* 75 N. J. L. 31, affirmed 76 N. J. L. 584, Justice Garrison says, at page 34:

> "Nor do the words 'justly and honestly due and owing' limit the indebtedness for which judgment can be entered to such only as present an accrued right of action. Debts now due and owing, in the sense that they are unpaid indebtedness, is what is meant, not that a fixed day of payment has been reached and passed."

In the case at bar, it is submitted that the phrase "amount due" denotes merely the existence of a simple indebtedness and that the materialman shall furnish the surety with a statement of debt. As shown in the preceding points, this is clearly the spirit of the statute when its purpose and its general wording is considered. If it were otherwise, the act could furnish no protection to a materialman who sold materials to a contractor under an agreement whereby some of his money would not actually be payable until more than eighty days after the acceptance of the work. In present-day business, materials for buildings are usually sold upon a basis of credit and the act should not be construed to penalize one selling materials for public work upon a liberal credit basis. Again, if a materialman should accept a note from the contractor as col-

lateral evidence of an obligation, the actual debt continuing until paid, and such note should not be payable until after the eighty day period had expired, such a materialman would be deprived of the protection of this statute if the interpretation of the trial court be correct. This statute, being for the protection of such materialman, should be construed favorably to that end.

As used in this statute, in the third paragraph, the words "amount due" clearly mean a simple indebtedness, whether then payable or payable at a later date.

V.

The defendant is a paid surety. As such, questions relating to its liability are construed most strongly against it.

The rules of *strictissimi juris* do not apply in the case of a surety for compensation. Its contract is one of indemnity or insurance rather than of strict suretyship, (See note in 12 A. L. R. 382 and in 33 L. R. A. (NS) 513, with many cases cited therein).

The courts are almost unanimous in holding that, in the case of a surety for compensation, the contract will be construed most strongly against the surety, and in favor of the indemnity which the assured or obligee has reasonable grounds to expect. (See notes in 12 A. L. R. 382 and in 33 L. R. A. (NS) 513.) If the contract is ambiguous or fairly open to two constructions, it will be construed in favor of the assured (Note in 33 L. R. A. (NS) 513). By this same reasoning, the words "amount due" as used in *Laws 1918, Chapter 75, paragraph 3,* if open to two constructions, should be construed most favorably

to the plaintiff, the defendant being a surety for hire.

It has been held in many cases that an extension of time for payment given by the materialman to the contractor will not relieve a paid surety, even though such an extension of time arises from the acceptance of a note or notes, unless the surety can prove an actual injury by such extension.

Philadelphia v. *F. & D. Co.,* 231 Pa. St. 208; 80 Atl. 62; Ann Cas. 1912 B. 1085 and note; 21 R. C. L. 1163;

U. S. F. & G. Co. v. *U. S.,* 191 U. S. 416; 425;

So. Surety Co. v. *Guaranty Bank* (Tex.) 275 S. W. 436;

Young v. *Amer. Bonding Co.,* 228 Pa. 373;

Murray v. *American Surety Co.,* 219 P. 246;

Montague v. *Axman,* 153 Fed. 982;

U. S. v. *Lynch,* 192 Fed. 364;

Heine Boiler Co. v. *U. S.,* 35 App. D. C. 273;

U. S. v. *U. S. F. & G. Co.,* 172 Fed. 268; affd. in 178 Fed. 692.

The evidence in this case clearly indicates that the notes were taken as collateral evidence of debt and not as payment (S. C. 72-73.) It has been held that the mere taking of collateral security, even if it extends the time, will not relieve the surety.

Firemens Insurance Co. v. *Wilkinson,* 35 N. J. E. 160;

Morris Canal v. *Van Vorst,* 21 N. J. L. 100;

Dodson v. *Taylor,* 56 N. J. L. 11.

It is submitted that the defendant, being a paid surety, cannot be relieved of liability because of the acceptance of the notes, even though

the time for payment was thereby extended. It follows that the defendant is liable to the plaintiff for the full amount of the debt, viz. $5,039.83.

VI.

This suit is based upon a claim for goods sold and delivered and which became due before any negotiable paper was executed.

This suit is based upon the original indebtedness and not upon the negotiable paper. The original debt became due when the materials were delivered and the debt continues until it is paid. It had not been paid on August 16, 1926 when the notice was served on the defendant, pursuant to the statute. Despite the fact that negotiable paper was accepted as collateral evidence of debt, the original debt continued in existence and was due when the notice of "amount due" was delivered to defendant. The negotiable paper did not alter the fact that a debt was due from Gibbs to the plaintiff, even though that paper by its terms was not presently payable.

In *Montagüe* v. *Axman,* 153 Fed. 983, Judge Morrow says:

> "In this case a promissory note was given by Axman * * * for the amount of the account stated and it is claimed by the defendant that this note has released the surieties on the bond; but this suit is brought upon the account and not upon any other obligation. It is not brought upon the promissory note in this case and the giving and receiving of the note did not release the sureties on the bond."

VII

Plaintiff's entire claim, guaged by the negotiable paper, was due and payable at the time when it was permitted to sue defendant.

Under the statute, plaintiff was compelled to serve a notice of the amount due it from Gibbs upon the defendant within eighty days of the acceptance of the work. It then had to wait sixty days before it could start suit against the defendant. Presumably this additional time was given to permit the surety to investigate the claim. The notice of amount due was served on August 16, 1926. The $2,000. note became payable on August 28, 1926 and the $1,000. trade acceptance became payable on September 28, 1926. Plaintiff could not sue defendant until October 16, 1926. Thus it is clear that on the last mentioned date, when suit could be started, the entire debt, even with the alleged extensions occasioned by the notes, was then due and presently payable. The defendant proved no actual injury by these alleged extensions.

In *Philadelphia* v. *F. & D. Co.*, 231 Pa. St. 208; 80 Atl. 62, the materialman accepted a note from the contractor and renewed it four times but the last renewal did not extend the date beyond the time when suit might be started. Justice Moschzisker held that the surety was not relieved by the extensions if the extension did not go beyond the time limit for suit on the bond and the surety suffered no material harm.

It is submitted that, in this case, where the negotiable paper became prior to the time when suit could be started on the bond, the surety is not relieved from payment and is liable for the full amount of $5,039.83.

VIII.

The defendant, holding funds of Gibbs, should have paid the deft from such funds.

The last check from the Board of Education to Gibbs, amounting to $12,788.74 was delivered on August 18, 1926 by him to the defendant and its proceeds collected and held by defendant (S. C., 59-61). Some of this money was used in 1927 and 1928 to settle other litigation arising out of this High School job (S. C., 62-68, 73). Thus two days after the plaintiff filed its claim with defendant, which claim was never contested or denied by Gibbs, the defendant received from Gibbs funds amply sufficient to pay this debt. This defendant, by the receipt of this money, placed itself in the shoes of Gibbs, and should have paid plaintiff's claim therefrom. It had no right to deprive plaintiff of payment in order to withhold funds with which to settle claims disputed by Gibbs, which later came into litigation.

In *Stearns on Suretyship* (2nd Ed.) at page 124, is the following statement of law:

> "If the surety has in his possession property of the principal, or has some lien upon the property of the principal, sufficient to pay the debt, it is of no importance to him what alteration of the main contract is agreed upon by the principal and the creditor. Under these circumstances, the surety is in the situation of the principal and must pay the debt out of the property committed to his trust the same as if he were the principal debtor."

IX.

The case of Taylor v. Wahl does not control the determination of this case.

The trial court relied upon *Taylor* v. *Wahl,* 72 N. J. L. 10 in its direction to the jury to deduct from plaintiff's claim the total of the note for $2,000. and the trade acceptance for $1,000. He held that, because these two negotiable instruments, taken by plaintiff as collateral evidence of debt, were not payable on August 16, 1926 when the notice of "amount due" was served upon the defendant, plaintiff could not recover that amount of its claim against Gibbs.

In *Taylor* v. *Wahl,* the plaintiff had furnished materials to a contractor who was erecting a house for defendant. The plaintiff had accepted a note from the contractor, which, it was held, extended the time of payment to August 23d. On August 10th, the plaintiff served a stop-notice on defendant for his claim. The defendant expended all money due the contractor to pay other creditors. He did not retain the amount of plaintiff's claim and plaintiff sues defendant for his failure to do so. The Supreme Court held that, under these facts, the defendant was not liable to the plaintiff because the debt was not presently payable at the time of the service of the stop-notice.

Wahl was under a duty imposed by the Mechanic's Lien Law to retain funds due from him, as owner, to the contractor in order to pay a materialman whose claim was actually matured. He was merely a stake-holder, or, at best, a gratuitous surety, under the terms of the statute. He had no contractual obligation. Under those circumstances, it was a natural effort of the Supreme Court to relieve him from payment of

the claim. As a gratuitous surety, if he may be so considered, the rule of *strictissimi juris* would apply.

But in the case at bar, the surety was paid for its service. In consideration, therefor, it bound itself to see that all "lawful claims" or "just claims" of materialmen should be paid. No limitation of this obligation appears in the bond. It unconditionally assured the creditors of payment, if their claims were lawful and just. Moreover, as has been heretofore shown, the statute, which required the service a statement of the "amount due," clearly shows by its wording that those two words merely denote a simple indebtedness. Certainly, the statute was never intended to abrogate or change the contractual obligations assumed in the bond itself; it was rather intended to carry out the terms of the bond, providing for the payment of lawful and just claims. It is not asserted in this case that the claim of the plaintiff was unlawful or unjust; the defense is merely that, as to $3,000. of the claim, the plaintiff cannot recover from defendant because of a highly technical objection that the two notes for that amount were not presently payable when the notice was served.

The case of *Taylor* v. *Wahl* concerned an obligation as gratuitous surety imposed by statute. In the instant case the obligation was assumed voluntarily by the surety for compensation; it knew, or should have known, that it was undertaking an obligation in favor of creditors then unknown, of contracts for materials and labor then indefinite, uncertain and perhaps not yet made, of unknown terms of credit to be agreed upon between Gibbs and his creditors on this job. Yet it agreed to assure payment of all lawful and just claims.

It is common knowledge that materials are sold to builders upon credit and that payment therefor depends not only on the buyer's financial responsibility but also upon the periodical payments by the municipality or owner. If credit were extended to Gibbs on a basis of payment 90 or more days after acceptance of the building, such materialmen could not hold the surety, if the lower court properly interpreted the statute. If the municipality withholds a percentage of the contract price for three months or more after acceptance of the work, the surety would then be relieved, under the lower court's holding, of liability for debts due materialmen over the amount withheld. To affirm the lower court would in effect be judicially inserting in the bond a provision, not therein found, that the materialman must restrict credit given to the contractor to less than 80 days after acceptance of the building. Under *Taylor* v. *Wahl* an owner is forced by statute into a position of liability without any consideration and it was proper for the Court to apply the doctrine of *strictissimi juris* to him as a gratuitous surety. In our case, the surety for compensation says that it will assure creditors on that job of payment of all just claims, without any other limitation whatsoever, and it does so probably in complete ignorance of the laborers and materialmen so assured or of the terms of credit extended.

As opposed to the decision in *Taylor* v. *Wahl,* the Court's attention is respectfully directed to the New Jersey cases cited under division IV of this argument and particularly to *Smith* v. *Weaver*, 75 N. J. L. 31, affirmed in 76 N. J. L. 584, wherein the phrase "justly and honestly due and owing" was interpreted to mean simply an unpaid indebtedness, and not that a fixed day of payment has been reached and passed.

It is submitted that, under the circumstances of this case, and under the terms of the statute and bond herein involved, the case of *Taylor* v. *Wahl* is not decisive of this case.

SUMMARY.

It is respectfully urged that the trial court erred in directing the jury to deduct the sum of Three Thousand Dollars ($3,000) from the total claim of plaintiff, and that the plaintiff was entitled to recover the full amount of Five Thousand and Thirty-Nine Dollars and Eighty-Three Cents ($5,039.83) and it is further urged that the lower court be reversed as to its ruling on this point.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

J. JACOB SHANNON & COMPANY, *Plaintiff-Appellant,* *vs.* CONTINENTAL CASUALTY COMPANY, *Defendant-Appellee.*	*Action at Law.* *On Appeal.*

PLAINTIFF'S BRIEF ON CROSS-APPEAL.

The cross-appeal raises the sole question as to whether the trial judge properly instructed the jury to include interest on the sum of $2,039.83, which sum it directed the jury to find in favor of plaintiff and against the defendant.

Facts.

The plaintiff sued defendant as surety on the bond given by Gibbs to the Board of Education of Irvington, N. J., the action being brought under *P. L.* 1918, *Chapter* 75. The suit was for $5,039.83 and interest. The court directed the jury to disregard $3,000 of this claim, which direction is the basis for the main appeal. On the balance of $2,039.83 he directed the jury to compute interest from October 16, 1926, the date when plaintiff's right to sue accrued under the statute. The statement of amount due plaintiff was served on defendant on August 16, 1926, and, under the statute, the defendant then had 60 days within which to investigate and pay the claim. The court directed the jury to start its interest computation from the end of this 60-day period.

The defendant took exception to this and has filed this cross-appeal.

ARGUMENT.

The Court was correct in directing the jury to include interest from October 16th, 1926, in its verdict.

As against the contractor, Gibbs, there can be no question of the right of the plaintiff to collect interest from the date when the obligation became payable to it, considerably prior to October 16th. Under the statute, the plaintiff was compelled to serve a notice on the surety, of the amount due from the contractor, within 80 days of the acceptance of the high school by the Board. This it did on August 16, 1926. The statute then provides that suit cannot be started against the surety for a period of 60 days, presumably in order that the surety may have a reasonable time within which to investigate and pay the claim. If the plaintiff is entitled to recover against the surety, the right to such recovery matured at the expiration of this 60-day period, namely on October 16, 1926. It follows, therefore, that after this latter date, plaintiff's money has been detained or held by the surety.

Where interest is not mentioned in the contract, it is usually allowed as damages for the detention of plaintiff's money, *Fidelity &c. Co.* v. *Wilkes-Barre Co.*, 98 N. J. L., 507, page 110; *Note in Ann. Cas.* 1914, C. 1194; *Empire State Surety Co.* v. *Lindenmeier*, 54 Col. 497; 131 Pac. 437; *Ann. Cas.* 1914, C. 1189; *Bank of Brighton* v. *Smith*, 12 Allen (Mass.) 243; 90 *Amer. Decisions* 144; 17 *C. J.* 811; 818-819; *Stearns on Suretyship, Second Ed. pages* 93, 222, 233; *Pingry on Suretyship, Second Ed.* page 336; 21 R. C. L. 1087.

The bond in this case did not provide for the payment of interest. Under the statute, providing for the bond, there is a provision, however, fixing the time within which the surety shall pay, or if it does not then pay, the claimant may sue it for the debt. In other words, upon the expiration of the 60-day period, the surety became liable for the debt of plaintiff unless it were shown that the plaintiff had no claim for a "just debt." In this case the court and jury established the fact that plaintiff did have a just debt and it was eminently proper for interest to be added as damages for its detention after the surety became liable to pay it.

The only case under this particular statute which considers the payment of interest is *Warren Bros. Co.* v. *Hartford,* 102 N. J. L. 616. In that case, the Court of Errors and Appeals held that, if the surety pays the debt within the 60-day period, it is not liable for interest thereon. As to the surety's liability for interest after the running of the 60-day period, the court specifically stated that it rendered no decision. Therefore that case does not dispose of the question herein raised. In the opinion, however, is a statement that usually interest "is awarded as damages for the detention of a debt." This is exactly the situation in the instant case. The defendant surety company has detained payment to the plaintiff after the expiration of the 60-day period and it should be held liable for interest as damages for such detention.

It is somewhat significant that in the case of *Hammill* v. *Commercial Casualty Co.,* 137 Atl. 884, the Supreme Court affirmed a judgment of the East Orange District Court which included interest on the accounts. This case was also brought under *P. L.* 1918 *Chapter* 75. The court

there held also that the clearly expressed purpose of the act was to protect laborers and materialmen in public works and that the judgment creditors were getting nothing more than the benefit of the protection which the statute clearly gave to them.

The defendant's brief asserts that its obligation is not to be extended by implication and that such obligation is fixed by the bond and the statute. It is not necessary to extend its obligation at all. Under the statute it is liable to pay the plaintiff's claim within 60 days of service of a statement of the amount due. If it had done so, no interest could be added. But by its refusal to pay the claim, it rendered itself liable for damages, measured by the legal rate of interest on the debt. *See cases hereinabove cited.* It resisted and obstructed the payment to plaintiff of money lawfully due under its obligation and under such a situation the cases hold that a surety is liable for interest, 27 *Am. & Eng. Ency.* 453; *Note in Ann. Cas.* 1914 *C.* 1197, *cited cases.*

There was no evidence adduced in this case to show that the penal amount of the bond would have been exceeded by the payment of the interest and the debt; in other words, neither the public nor the Board of Education could have been prejudiced by the inclusion of interest. But even if such evidence had been introduced, it could not affect the right of plaintiff to collect interest, extra the bond, from the defendant. *Long* v. *Long,* 16 N. J. E. 59; *Gloucester City* v. *Eschbach,* 54 N. J. L. 150; *Camden* v. *Ward,* 67 N. J. L. 558.

In *Gloucester City* v. *Eschbach* (*supra*) Justice Magie, speaking for the Supreme Court, says, at *page 155:*

> "The true rule, in my judgment, is that, upon an action on a bond with condition an-

> nexed, if it appears that the condition has been broken, and that the sum really due, or the damage actually sustained, exceeds the penalty, the plaintiff may recover the penalty as a debt, and substantial damages for its detention, measured by interest thereon from the time the penalty ought to have been paid and not exceeding in the whole the sum really due or the damage actually sustained."

In *Camden* v. *Ward* (*supra*) Justice Dixon, speaking for the Court of Errors and Appeals, approves without qualification the holding in the Gloucester City case above cited and says, at *page 565:*

> "By the postea it appears that the jury assessed the difference between the actual cost of the work and the contract price as the damages of the plaintiff on occasion of the detention of the debt—that is, the penal sum mentioned in the bond. The damages for the detention of the debt could not be other than the interest upon the debt from the time when it was due under the pleadings until the time for the entry of judgment."

In the case of *Long* v. *Long,* 16 N. J. E. 59, Chancellor Green discusses many cases involving the question and says, *at page 65:*

> "The American authorities very generally, if not uniformly, maintain the doctrine, that at law in an action upon a penal bond, interest may be recovered in the form of damages, to an amount exceeding the penalty of the bond. Smedes *v.* Houghtaling, 3 Caines R. 48; Moffatt *v.* Barnes, 3 Caines R. 49, note a; Cook *v.* Tousey, 3 Wend. 444; Lyon *v.* Clark, 4 Seldon 148; Perit *v.* Wallis, 2 Dallas 252; Tennant's Ex'r *v.* Gray, 5 Munford 494; Moss *v.* Wood, R. M. Charlton 42; Goldhawk *v.* Duane, 2 Wash. C. C. R. 323; Sedgwick on Dam. (3rd ed.), 446; 2 Greenleaf's Ev. par. 263."

That plaintiff's money was unlawfully detained by defendant is clear from a reading of the testimony. No defense whatsoever was interposed as to the amount of $2,039.83, the defense being solely on the ground that as to $3,000 of the total debt of $5,039.83, that amount was not due on the date of service of statement of "amount due" because that portion of the original debt was represented by notes taken as evidence of debt which by their terms were not matured on August 16th. No proffer was ever made by defendant of the sum of $2,039.83; it was a wrongful detention as to that amount certainly and the plaintiff is entitled to interest thereon by way of damages for this detention.

If defendant's claim be correct that it, as surety, is not liable under any circumstances for more than the amount of debt and that interest cannot run against it on claims such as this, a very unfair situation is developed. The surety then may refuse in every instance to pay the claimants until judgment is entered for the debt without interest and in that manner the surety may always receive the benefit for itself of interest on the claim up to the date of the entry of judgment. Thus the surety may obtain a profit in every case in the nature of interest on money withheld from a claimant rightfully entitled to payment under the bond and the statute. This would be an absurd, inequitable and unfair situation and one which would shock the conscience of any court.

In its brief, defendant alleges that interest should not run until the entry of judgment, that being the time of determination of plaintiff's "just claim." This is patently erroneous. The statute provides for the service on the surety of a statement of the "amount due," which phrase

is under the wording of the statute synonymous with "just debt," "lawful claim" or "indebtedness." The surety has a 60-day period to investigate the claim and upon failure to pay, suit may be started against it. Its liability is fixed as of that date. If the claim of the materialman is a "just debt" upon the entry of judgment, it was in the same status when the 60-day period expired. If this were not so, it would be just as reasonable for every ordinary debtor to claim that the "just debt" against him was fixed by judgment alone and consequently no interest could ever be permitted until that had been accomplished. The determination of the court and jury must of necessity be that, when the 60-day period expired, the plaintiff had at that time a just debt against the surety company; its finding relates back to the date when defendant became liable and interest thereafter is a proper element of damages for the detention of the money from plaintiff.

II. The bond in this case was for the benefit of the plaintiff and it has the right to sue defendant on the bond.

The above statement is justified by the case of *Board of Education* v. *Zink,* 5 A. R. 975, 137 Atl. 713; which was brought under *Laws* 1918, *Chapter* 75. It specifically upholds the right of the materialman to sue the surety on the bond.

The cases of *Skillman* v. *U. S. Fidelity,* 101 N. J. L. 511, and *Standard Gas Power Corp.* v. *New England Cas. Co.,* 98 N. J. L. 570, both cited in defendant's brief, are not helpful in this case because they each refer to an act other than that involved in the instant case. In the bond given by the defendant as surety, it specifically agreed that "this undertaking shall be for the benefit of

any materialman or laborer having a just claim." The Zink case, *supra,* decides that under this statute, and the bond given pursuant thereto, the materialman does have the right to sue the surety.

It is also pertinent here to point out that the statement "the contract of suretyship being *strictissimi juris*" found in the Skillman case refers only to the decision that one not named in the bond as a beneficiary cannot sue the surety thereunder. The broad general principle, adopted in practically every State of the United States, that a paid surety is under an obligation of insurance or indemnity rather than of strict suretyship, is not therein considered. It is the almost universal rule that in the case of a surety for hire the contract is construed strictly against the surety and in favor of the creditor or obligee. (See plaintiff's brief on main appeal.) Apparently no New Jersey appellate court has yet directly considered and decided this question, but it is presumed that this court will give due regard to the holding of practically every other state to that effect.

SUMMARY.

It is respectfully submitted that the trial judge property instructed the jury to include interest in the verdict, and that the cross-appeal of the defendant should be dismissed, and the finding of the lower court as to the allowance of interest affirmed.

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New Jersey Court of Errors and Appeals

J. Jacob Shannon & Company, *Plaintiff-Appellant,* *vs.* Continental Casualty Company, *Defendant-Appellee.*	*Action at Law.* *On Appeal.*

BRIEF FOR DEFENDANT.

This case was tried at the Essex Circuit, before Judge Dungan and a jury.

The trial judge directed a verdict for the plaintiff for $2,039.83 with interest from October 16, 1926.

Both parties have appealed: the plaintiff because the trial judge limited the verdict to $3,000 less than the plaintiff demanded; the defendant because the trial judge allowed interest on the verdict.

In this brief we argue (1) our own appeal, and then (2) reply to the appeal of the plaintiff.

First, then, as to the defendant's Cross-Appeal.

Defendant's cross-appeal raises the single question of whether the defendant surety should have been charged with interest on the amount found due.

The question was raised and disposed of at the trial, as shown by the record, as follows:

Record, page 69, l. 36:

"Mr. English: Your Honor, I want to discuss some questions which will be sub-

mitted in the requests to charge. I have them prepared here, and they cover two main questions. One is that the plaintiff is not entitled to interest, and the other that the plaintiff's claim in any event must be credited or at least there must be deducted from the plaintiff's claim the sum of $3,000.

(Argument.)

The Court: I am prepared to decide that now. I will decide that when the notice was given the surety company had then sixty days within which to pay up, under the statute. When they failed to pay at the end of sixty days, the claim against them would draw interest, and that interest may be collected in this case from sixty days from the date of the service of the notice of the surety company. Will you agree as to what date that would be?

Mr. English: It would be October 16th, sixty days from August 16, 1926.

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

Exception noted as ground of appeal."

And in directing the jury to return a verdict, the trial judge said (Record, page 76, l. 18):

"The record shows the view and ruling of the Court, and the Court will therefore direct you to find a verdict in favor of the plaintiff and against the defendant in this case for $2,039.83 with interest at six per cent. from October 16, 1926, to March 14, 1929.

Mr. English: And I respectfully except to the direction of the Court to bring in interest.

The Court: That may be noted."

The question now presented was referred to, but not decided, by this Court in *Warren Bros. Co.* v. *Hartford &c. Co.*, 102 N. J. Law, 616, at page 620, where this Court said:

"Whether the surety would be liable thereafter for interest (that is after the time

limit has run: namely, sixty days from the date the plaintiff served its demand), and, if so, whether it could charge the interest against the bond, or would have to meet it *extra* that instrument, are matters not presented on this record."

The question of whether the surety is liable for interest under any circumstances on a bond given under Chapter 75, P. L. 1918, is now squarely before this Court for decision. The question is an important one not only to this defendant, but to the many other surety companies operating within our State, which are constantly entering into bonds under this statute.

Chapter 75, P. L. 1918 by Sec. 1 relates solely to public buildings or public works constructed or repaired at the public expense. Section 1 reads as follows:

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

Section 2, as amended (P. L. 1920, p. 243), provides for fixing the amount of the bond.

Section 3 reads as follows:

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

Section 4 sets forth the form of the bond and limits the claimant's recovery to the language of the act. Section 4 says the

> "recovery of any claimant thereunder shall be subject to the conditions and provisions of this act to the same extent as if such conditions and provisions were fully incorporated in said bond form."

Section 4 also specifies the condition of the bond to be as follows:

> "Now, if the said * * * shall well and faithfully do and perform the things agreed by * * * to be done and performed according to the terms of said contract, and shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material-man or laborer having a just claim, as well as for the obligee herein; then

this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

ARGUMENT.

I.

In directing the payment of interest, as against the surety, the Trial Judge overlooked the difference in obligation between the contractor and the surety.

The contractor is bound by reason of a contract which requires it to make payments at certain specified times. The surety is bound not upon that contract, but upon a bond which becomes obligatory upon its part only in the event that the contractor fails to perform the contract. The surety does not do the work and is not, in the first instance, liable for the payment of the moneys which may become due to the sub-contractors and materialmen. The work must be done and the payments made by the contractor. It is no part of the duty of the surety company to keep in touch with the work and to exercise vigilance to see that the contractor is living up to the obligations of his contracts with his sub-contractors and materialmen. This being so, the surety cannot in any event be charged with interest, as in the case of default.

II.

The surety is entitled to a strict construction of its bond.

Whatever the rule may be in other jurisdictions, it is now settled in this State, by this Court, that a contract of suretyship is *strictissimi juris.*

In *Skillman* v. *U. S. Fidelity &c. Co.,* 101 N. J. Law, 511, this Court said, page 516:

> "As against sureties, no implications are to be made in giving construction to the terms of a bond not clearly embraced within the language used, as it is well settled that sureties are only chargeable according to the strict terms of the bond. 9 C. J. 32; citing *Miller* v. *Stewart,* 9 Wheat. (U. S.) 680; 6 L. Ed. 189. See, also, *Leggett* v. *Humphrey,* 21 How. (U. S.) 66; 16 L. Ed. 50. The undertaking of a surety on a bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking. *Ovington* v. *Smith,* 78 Ill. 250. So strictly is this doctrine enforced in this case (*Ovington* v. *Smith*) that on a bond given to two parties who were enjoined—the condition being that the obligors should pay all damages that might be awarded against the complainant on dissolution of the injunction, which was dissolved as to one of the defendants, and damages assessed in his favor in a suit brought on the injunction bond—the surety was held not liable, his undertaking being to pay damages to the two parties upon dissolution, and not to one upon dissolution of the injunction as to him alone. See, also, *Lang* v. *Pike,* 27 Ohio St. 498. Sureties are favored in law, and the contract of a surety must be strictly construed and cannot be extended by implication beyond the precise terms of the undertaking. *Baker* v. *Peterson,* 300 Ill. 526.
>
> Now, as the plaintiff-respondent was not named as obligee in the bond sued on, and

> as it was not by express terms nor impliedly made for his benefit, the defendant-appellant being only a surety on that instrument, its liability must be strictly construed, and cannot be extended by implication so as to make the plaintiff-respondent a beneficiary of its provisions—the contract of suretyship being *strictissimi juris*. *First Com. Bank* v. *Valentine,* 139 N. Y. Supp. 1037, 1039."

The whole question must be approached, therefore, from the standpoint of this rule of law: namely, that the obligation of the defendant surety is not to be extended by implication, and that its obligations are fixed by the language of the statute and the bond.

The case was tried on that theory. See Record, p. 35, l. 25.

The language of the statute has already been quoted. The pertinent language of the bond is as follows (Record, p. 80, l. 18).

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

Now, whatever the obligation of the contractor (Gibbs) may be, as between him and the materialman (the plaintiff), the obligation of the surety, as between it and the materialman (the plaintiff), is fixed and determined by the statute and the bond.

This Court analyzed the statute in *Warren Bros. Co.* v. *Hartford, &c. Co.,* 102 N. J. Law 616, at page 618.

That case differed on the facts from the case at bar in this: that in the *Warren Bros. Co. case* the surety had paid the amount due within the sixty days after the demand had been made; whereas in the case at bar the surety did not make any payment.

The trial judge placed his decision on that ground (Record, p. 70, l. 15).

But whether the surety paid or failed to pay within the sixty days does not determine the question.

III.

The question can only be determined by a right construction of the statute and the bond, and the fact of payment or no payment has no bearing, if, as a matter of construction, the surety is not obligated to pay interest, in any event, by the terms of the statute and bond.

In the *Warren Bros. Co. case* this Court said (102 N. J. Law 616, at page 618):

> "Were it not for chapter 75 of the laws of 1918, and the special form of bond prescribed thereby, it would seem that the surety would be liable solely to the county, and not at all to the plaintiff. *Skillman* v. *U. S. Fidelity Co.*, 101 N. J. L. 511. And even, under the act of 1918, it should be borne in mind that the primary purpose of the bond is the protection of the public body, the clause favoring the materialmen, &c. being, by express language of the statute, an 'additional obligation.' Pamph. L. 1918, p. 203; *Franklin Lumber Co.* v. *Globe Indemnity Co., supra.* If this be so, it follows that the protection of the public against defaults by a dishonest or irresponsible contractor should not be whittled away by too liberal a construction in favor of private claimants, when every

dollar allowed them over the face of their claims, to that extent, impairs the security of the public.

When we proceed to examine the statute itself, it is noticeable that the word 'interest' does not occur in it at all. It calls for a bond 'with an additional obligation for the payment * * * for all labor performed or materials furnished,' &c. The bond is to be conditioned (section 2) for the payment by the contractor and by all subcontractors of all *indebtedness* which may accrue to any person * * * on account of any labor performed or materials furnished, &c. By section 3, any person * * * to whom any money shall be *due* on account of having performed any labor, &c., on such building, work or improvement, within eighty days after acceptance thereof by the board, shall furnish the surety a statement of the *amount due,* &c., and the condition of the bond as enacted in the statutory form is for the payment by the principal contractor of all lawful claims of subcontractors, &c., *for labor performed* and materials furnished. When notice is served on the surety of the 'amount due' the surety is entitled to sixty days in which to pay. 'If *said indebtedness* shall not be *paid in full* at the expiration of said sixty days, said person,' &c., may bring an action on the bond. It is fair to say that if the legislature had mean 'in full, with interest,' it would have said so.''

In supplementing this comment by the Court it may be further pointed out that the action which the claimant may bring at the expiration of the said sixty days is for the ''said indebtedness'' (§3). The ''said indebtedness'' is the amount due to the materialman or laborer as shown in the statement filed with the surety by the claimant. There is no suggestion in the statute that the action may be brought for the ''said indebtedness'' with interest. The statute

provides that the action may be brought "upon such bond" for the "said indebtedness" and, as this Court pointed out in the *Warren Bros Co. case,* if the legislature had meant that the action on the bond to recover the "said indebtedness" was to have been with interest, it would have said so.

The further observations of this Court in the *Warren Bros. Co. case* on the question of interest, as bearing on Chapter 75, P. L. 1918, are pertinent here. This Court said (102 N. J. Law 616, at page 619):

> "In considering this question, we should bear in mind the fundamental principle of law, often overlooked that interest is no part of a debt unless so stipulated in the contract; that, usually, it is of statutory origin, and is awarded as damages for the detention of a debt. 33 C. J. 182. This principle is illustrated by such cases as *North Hudson County Railway Co.* v. *Booraem,* 28 N. J. Eq. 593 (interest on award of commissioners denied to a mortgagee); *Freeholders* v. *Veghte* (Mr. Justice Magie, Somerset Circuit), 7 N. J. L. J. 145; *Anderson* v. *Huff,* 49 N. J. Eq. 349, 355; *Hills* v. *Aetna Life Insurance Co.* (Mr. Justice Speer, Hudson Circuit), 39 N. J. L. J. 132, 135; *Hoover Co.* v. *Schaefer Co.,* 90 N. J. Eq. 515, and *Fidelity Co.* v. *Wilkes-Barre Co.,* 98 N. J. L. 507. Further illustrations occur in the form books. An execution in debt requires the sheriff to make 'a certain debt of..... dollars, which A. B. lately in,' &c., recovered, &c., and also.....dollars which * * * were adjudged to said plaintiff for his damages * * * as well by occasion of the detention of that debt as for his costs, &c. So, in a foreclosure of mortgage, the principal and interest stipulated in the bond are totaled as of the date of the master's report, and the decree provides that the premises be sold to pay complainant the

sum (reported by the master), with interest, from the date of the report, and that out of the proceeds of sale the complainant be paid 'said debt, interest and costs,' the *debt* being the amount reported.

These considerations lead us to the conclusion that when chapter 75 speaks of 'indebtedness' and of 'amount due for work and labor' and the like, the language connotes the face of the claim, and that the legislature did not intend to diminish the security of the public by permitting the recovery of interest as against the face of the bond, when the surety has paid before the time limit has run. Whether the surety would be liable thereafter for interest, and, if so, whether it could charge the interest against the bond, or would have to meet it *extra* that instrument, are matters not presented on this record. It is urged that the Lien act allows interest on claims, but that is against the contract price, and prejudices only the defaulting contractor and other claimants, not the public.''

The Lien Act referred to in the opinion is the Municipal Lien Act, P. L. 1918, page 1046, §10.

IV.

There are no facts in this case which justify the charging of interest as damages for an illegal detention of the plaintiffs claim.

Now the interest which was allowed by the trial judge in the case at bar is not interest payable under any agreement of the surety company to pay interest or under any guarantee for the payment of interest under any agreement.

No interest could be allowed, therefore, as a matter of contract.

The event of the trial (particularly if the judgment is sustained for the sum of $2,039.83)

demonstrates that the surety was well within its rights in refusing to pay the amount set up in the statement of claim filed by the plaintiff. That is so because the amount set up in that statement must be established to be a "just claim" within the purview of the statute and the bond.

In addition to what this Court said in the *Warren Bros. Co. case,* that interest is no part of a debt unless so stipulated in the contract and is awarded as damages for the detention of a debt (102 N. J. Law, at page 619), this Court also said in *Fidelity, &c. Co.* v. *Wilkes-Barre Co.,* 98 N. J. Law 507, page 510:

> "Interest when allowed is in contemplation of law, damages for the illegal detention of a legitimate claim or indebtedness. *Brown* v. *Hiatts,* 15 Wall. (U. S.) 177; *Cochran* v. *Boston,* 211 Mass. 171; *McCracken* v. *Bank,* 164 N. C. 24; S. C. Ann. Cas. 1915D. 105."

Now, the claim of plaintiff was disputed.

It could not be known to be, and, in fact, it was not known to be, a "just claim" until so determined by the Court.

Reference may be made to what this Court said in *Standard Gas Power Corp.* v. *New England Cas. Co.,* 90 N. J. Law 570, at page 573, and in *Skillman* v. *U. S. Fidelity, &c. Co.,* 101 N. J. Law 511, at page 513, where this Court held that a bond conditioned for the "payment of all proper charges for labor and materials required in the aforementioned work" did not extend to a third person not the obligee named in the bond, even though the plaintiff was in fact one who had furnished labor and materials for the work. The doctrine of those cases, as I read them, as applied to a situation

such as that at bar, is that a third person, materialman or laborer, obtains no benefit from a bond given by a contractor upon a contract for the construction of a building or other work, except as the statute creates such a benefit and obligation for it (Chapter 75, P. L. 1918). But since, without the aid of the statute, the materialman or laborer would obtain no benefit from the bond, and further, since the bond is *strictissimi juris* (*Skillman* v. *U. S. Fidelity, &c. Co.*, 101 N. J. Law 511), and it, as it must follow the bond, as well as the statute, is to be strictly construed, it must follow that no interest is to be allowed against the surety until such time as the claim of the materialman or laborer is found to be a "just claim."

That means that interest does not begin to run until after a trial and entry of judgment determining that the claimant's claim is a "just claim."

This result must follow from the very theory upon which interest is allowed, namely, that it is awarded as damages for the illegal detention of a legitimate claim for indebtedness. *Warren Bros. Co.* v. *Hartford, &c. Co.*, 102 N. J. Law 616, page 619; *Fidality, &c. Co.* v. *Wilkes-Barre Co.*, 98 N. J. Law 507, page 510.

To sum it up, therefore, in the case at bar, the plaintiff as materialman was entitled under the statute and the bond to recover from the surety payment of its "just claim." In view of the doubt cast upon the justness of its claim (see defendant's answer, pp. 9 to 18) and the fact that the trial court threw out $3,000, over half, of the claim, the surety was entitled to wait until the determination of the issue as to whether or not the plaintiff's claim, or any part thereof,

was a "just claim." That fact being determined and the amount fixed by judgment of the Court, interest would then properly begin to run on that judgment, but until the fact was determined and the amount fixed and the judgment entered, no interest could or ought to be allowed on the claim.

In *North Hudson R. R. Co.* v. *Booraem,* 28 N. J. Eq. 593, this Court said (p. 595):

> "The liability of the company is not only in itself dependent upon a contingency, but, until the happening of that contingency, the amount of its contribution is also unliquidated. It will not be in default until the contingency happens, and the sum it is bound to pay is ascertained. This cannot be done until sale is made of the residue of the mortgaged premises. A tender of readiness to pay before the sum payable is ascertained would be superfluous. Interest, therefore, cannot be allowed on the ground of any default of the company heretofore incurred."

See also *Hoover Steel Ball Co.* v. *Schaefer Ball Bearing Co.,* 90 N. J. Eq. 515, where the Court said (p. 516):

> "An amount more than sufficient to satisfy the decree in favor of the mortgagees with interest was raised from the sale of the property, but, as I understand the law, interest is allowed on a decree as matter of damages for the detention of the debt. There is no statute in this state that I am aware of specifically covering the subject. The practice is, on the foreclosure of a mortgage, to allow interest from the date of the decree at the legal rate to the date of payment. Interest runs not at the rate provided in the mortgage or bond but at the legal rate. *Wilson* v. *Marsh,* 13 N. J. Eq. 289; *Cox* v. *Marlatt,* 36 N. J. Law 389; *Deshler* v. *Holmes,* 44 N. J. Eq. 581; *Moore* v. *Durnan,* 70 N. J. Eq. 1. See also 1 Jones Mort. (7th ed.) § 74; 27 Cyc. tit. 'Mortgages'

1657; *Wilson* v. *Cobb*, 31 N. J. Eq. 91; 19 R. C. L. tit. 'Mortgages' 569 § 380."

We say, therefore, that the trial judge erred in allowing interest on the plaintiff's claim, as directed to be found by the jury.

We next discuss the plaintiff's appeal.

The Trial Judge, in directing a verdict by the jury, properly excluded the sum of $3,000.00 from the amount of the plaintiff's claim.

The trial judge directed a verdict for the plaintiff. The plaintiff now complains that it was not large enough.

It claimed a balance of $5,039.83 (R., p. 47, l. 40). The Court directed a verdict for the plaintiff for $2,039.83 (R., p. 76, l. 21).

The plaintiff's appeal goes to the correctness of the action of the trial judge in holding that $3,000 of plaintiff claim could not be recovered.

Foundation for the position of the defendant, that the plaintiff was not entitled to recover $3,000 of its claim, is found in the tenth and eleventh defenses set up in the answer (pp. 15 to 18).

At the conclusion of the trial defendant's counsel moved the Court to instruct the jury to deduct from the amount sought to be recovered by the plaintiff, the sum of $3,000 (R., p. 70, l. 27; p. 71, l. 20). Following that the case was re-opened to permit further testimony. The motion was then renewed and argued (R., p. 73). The trial judge placed his decision squarely on the case of *Taylor* v. *Wahl*, 72 N. J. Law 10, and said (R., p. 74, l. 22):

"Under the evidence in this case a note or trade acceptance aggregating three thou-

> sand dollars, which was not due at the time of the stop notice, was given, and the evidence is that there was no other debt existing between the general contractor and the plaintiff in this suit, the subcontractor at that time, and that the notes, therefore, were undoubtedly given for that debt. If they were, then I feel bound by the decision in *Taylor* v. *Wahl*, and to hold that if they were given for that debt that amount cannot now be recovered."

Following that pronouncement by the trial judge defendant's counsel asked the Court to direct the jury

> "that in any verdict which they find they must deduct the sum of $3,000 representing the aggregate of the note and trade acceptance."

(R., p. 75, l. 14.) Thereupon the trial judge did direct the jury

> "to find a verdict in favor of the plaintiff and against the defendant in this case for $2,039.83, with interest at 6% from October 16th, 1926, to March 14th, 1929."

(R., p. 76, l. 20.)

The plaintiff excepted to the direction of a verdict for

> "the releasing of the $3,000 claim from the defendant"

(R., p. 76, l. 30), and the defendant excepted to the inclusion of interest in the amount of the verdict (R., p. 76, l. 25). (This exception is the basis of the defendant's cross-appeal.)

All the testimony with respect to the giving of the notes comes from the defendant's witness, Christie Hartman, and is not denied or controverted. The notes in question are, a note, dated June 28, 1926, for $2,000, payable in two months (Exhibit D. 4, p. 92) and a trade acceptance,

dated June 28, 1926, for $1,000, payable on September 28, 1926 (Exhibit D. 5, p. 93).

These notes were given to the plaintiff by Gibbs in connection with the indebtedness growing out of the contract between the plaintiff and Gibbs (Exhibit P. 5, p. 83), and were given to apply on account of the contract on the Irvington High School (R., p. 72, ll. 20 to 26).

Nothing was said by the plaintiff as to whether the notes had been accepted in payment (R., p. 72, l. 35; p. 73, l. 9).

Both the note for $2,000 and the trade acceptance for $1,000 became due, according to their terms, on September 28, 1926. They were unpaid and outstanding on August 16, 1926 (R., p. 52, l. 23), which is the date on which the plaintiff filed its notice of claim with the defendant surety, as required by Chapter 75, P. L. 1918 (R., p. 27, ll. 1 to 10). It was admitted that the statement of claim was served on the defendant on August 16, 1926 (R., p. 47, ll. 25 to 30).

We, therefore, have a situation where the plaintiff, pursuant to Chapter 75, P. L. 1918, filed its statement of claim with the defendant surety, stating the amount which it alleged to be due on the date of filing, August 16, 1926, and the fact appearing uncontradicted in the case that on that date $3,000 of the claim alleged was not due, inasmuch as it was represented by notes for that amount, which, according to their terms, did not become due and payable until September 28, 1926.

Under these circumstances, the trial judge was not only justified in, but bound to follow the ruling of the Supreme Court in *Taylor* v. *Wahl*, 72 N. J. Law 10.

The plaintiff, on its appeal here, does not attack the correctness of the ruling of the Supreme Court in *Taylor* v. *Wahl,* but argues that it does not control the determination of this case.

Section 3 of Chapter 75 P. L. 1918, reads as follows:

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

Observe that the important word in that section is the word "due." Applied to this case it required the plaintiff, as a corporation to whom money was "due on account" of having performed labor and furnished material in the erection of the Irvington High School, to, within eighty days after the acceptance thereof by the board (see *Franklin* v. *Globe,* 102 N. J. L. 9 and 715), furnish the defendant surety "a statement of the amount due" and required the plaintiff, if the amount of "said indebtedness" (that is, the amount stated to be due) was not paid at the expiration of sixty days, to bring an action on the bond.

Compare this section with section 3 of the Mechanic's Lien Act of 1898, referred to in *Taylor* v. *Wahl* (P. L. 1898, p. 538). That section provided that whenever any master workman or contractor refused upon demand to pay any materialman or laborer "the money or wages due to him" it should be the duty of the materialman or laborer to give notice in writing to the owner of such refusal

> "and of the amount due to him, or them, and so demanded"

and the owner was then authorized to "retain the amount so due and claimed" by the laborer or materialman out of the amount owing by him on the contract.

In *Taylor* v. *Wahl, supra,* Taylor had furnished labor and materials to Cramer, the contractor, for the construction of buildings for the defendant, Wahl, and the action was brought under the third section of the Mechanic's Lien Law (P. L. 1898, p. 538). The "stop-notice" was dated August 10, 1901 and delivered to the defendant the same day. The defense was that at the time of the service of the stop-notice the sum of $1,000, therein claimed to be due and owing from Cramer to the plaintiff, was not in fact then due, and that the defendant had subsequently paid out to other creditors of Cramer the monies earned under his contract. The Chief Justice said (72 N. J. Law 10) at page 12:

> "To support the contention that the plaintiff's claim was not due at the time of the service of the 'stop notice,' the defendant proved that on the 23rd day of May, 1901, Cramer had given to the plaintiff his promissory note for $1,000, payable in three months from date, and produced testimony to show that this note was given on account of the indebtedness of Cramer for materials and

labor furnished by the plaintiff upon the defendant's buildings. The plaintiff denied this and testified that the note was given to him by Cramer purely as accommodation paper, and not on account of Cramer's indebtedness. The trial judge, in charging the jury as to the effect of this defense, instructed them that the plaintiff was entitled to their verdict, unless they should find as a fact that the note was given to and accepted by the plaintiff as a *payment* of his claim to the extent of $1,000.

In this instruction there was error. A promissory note, given for an antecedent debt, although it does not operate to discharge the debt, in the absence of any agreement that it should have that effect, extends the credit until the note matures. *Fry* v. *Patterson,* 20 Vroom 612. In the present case, therefore, the effect of the note, if it was given on account of Cramer's indebtedness to the plaintiff, was to extend the time for the payment of that indebtedness until the maturity of the note, August 23d, 1901, thirteen days after the 'stop notice' was served. No obligation rests upon the owner of a building, under section 3 of the Mechanics' Lien law, to retain in his hands money of the contractor to meet the demand of a stop notice, unless the sum claimed in such notice is *actually* due at the time when it is served. *Kirtland* v. *Moore,* 13 Stew. Eq. 109. The trial court should have instructed the jury that if they found the note was given on account of Cramer's indebtedness to the plaintiff, then, even though it was not given and accepted as payment of that indebtedness, still it extended the time for the payment thereof until the date of the maturity of the note, and that as the plaintiff's demand on the defendant was made prior to that time the defendant was justified in refusing to recognize that demand and in paying out to other creditors of Cramer the funds of the latter in his hands."

In *Dey* v. *Anderson,* 39 N. J. Law 199, there was a running account against Anderson for materials furnished him as the builder of several houses (p. 203). For the entire account a note was given, which note was later renewed by another (p. 203). At the maturity of the last note the claim was divided and two notes were given covering the entire account. When the first note matured, it was not paid. The remaining note did not mature until after the statutory period for filing a lien for any of the account had elapsed (p. 203). The Supreme Court by Justice Reed said (p. 203):

> "The effect of giving such a note was to suspend all right of action upon the account, *pro tanto,* until the maturity of the note. *Green* v. *Fox,* 7 Allen 85; *The Highlander,* 4 Blatch. C. C. 55; *Edwards* v. *Derrickson,* 4 Dutcher 33."

In *Fry* v. *Patterson,* 49 N. J. Law 612, the Supreme Court by Justice Knapp, speaking of the effect of the giving of a note for a debt, said (p. 613):

> "The giving of a note for a debt is not a payment. It merely extends the credit until the note matures. If the note is not paid, the creditor has his election to sue upon the note or the original cause of action.
>
> This rule is too well established to need citation of authorities in its support."

Whether or not the giving and acceptance of a note is to be regarded as payment is a question of fact. The mere acceptance of the note in itself is not payment. *Joslin* v. *Giese,* 59 N. J. Law 130, p. 133.

We are not concerned in this case with the question of whether or not the $3,000 of notes were given and accepted as payment. It may be conceded that they were not accepted as pay-

ment. That question is entirely immaterial to the issue. Regardless of whether the notes were given and accepted as payment, or whether they were, as plaintiff's counsel says,

"collateral evidence for this debt."

(plaintiff's brief, pp. 6 and 13), the effect of the notes was to extend the credit until the notes matured. In *Taylor* v. *Wahl,* the Chief Justice says, page 12:

> "A promissory note given for an antecedent debt, although it does not operate to discharge the debt, in the absence of any agreement that it should have that effect, extends the credit until the note matures."

citing *Fry* v. *Patterson, supra.*

And, as in the case of *Taylor* v. *Wahl,* so here, the effect of the giving of the notes was to extend the time of payment of that indebtedness until the maturity of the notes, September 28th, 1926, more than a month after the date (August 16, 1926), on which the plaintiff filed its statement with the surety of the amount which it claimed to be due and for which it subsequently brought its suit pursuant to section 3 of Chapter 75, P. L. 1918.

The trial judge, therefore, was entirely correct in excluding from the plaintiff's claim the amount of $3,000 represented by the notes not due or payable at the time the statement of claim was filed on August 16th, 1926.

The arguments of the plaintiff-appellant answered as stated in its brief.

Point I, pages 4 to 6.

Plaintiff argues that the debt of Gibbs to the plaintiff was in the total sum of $5,639.83; that while the debt was one, it was divided into two

parts, of which $5,000.00 was represented by notes and the balance on open account. Counsel speaks of the negotiable paper "as collateral to this debt and as evidence of it but not in payment thereof." It is true that there is nothing in the Record to indicate that the notes were given and accepted as payment, but the Record will be searched in vain to find even a scintilla of evidence to indicate that the notes were given as collateral. The plaintiff gave no testimony whatever with respect to these notes. All the testimony came from defendant's witness, Miss Hartman, who merely testified to the fact of the giving of the notes in connection with the indebtedness of Gibbs to Shannon under his contract in connection with the High School job (Record, p. 72, l. 20). The plaintiff does not attempt to build up any argument on the theory that the notes were given as collateral, as indeed it could not, for there are no facts to support it. Counsel contents himself with saying that the notes were given "as collateral evidence for this debt." (Plaintiff's brief, page 6 and page 13.) Presumably, by that he means that if the notes were not paid at maturity, the plaintiff would have its election to either sue on the note or on the open account, and that the fact of the making of the note would be additional evidence of the fact that the money was owing. But that situation, if true, aids the plaintiff nothing here.

Point II, page 7, and Point VI, page 14.

Plaintiff argues that its total claim of $5,039.83, $3,000 of which was represented by the notes, was a "lawful claim" and a "just claim" and, hence, was entitled to be protected by the bond, and that his suit was based on the claim, and not on the notes (Point VI).

But whatever "lawful claim" or "just claim" a materialman might have, the enforcement of his rights under the statute (Chapter 75, P. L. 1918) is controlled by the word "due." Under the statute, he was required to furnish the surety with a statement of the amount due and the amount so found to be due as set up in the statement constitutes the "lawful claim" or "just claim" for which the bond was given.

The statute limits the liability of the surety to claims which were "due" at the time of the filing of the notice just as the statute of limitations precludes recovery on a claim, no matter how just or lawful, which may not have been sued on within the prescribed time.

Point III, pages 8 to 10.

Plaintiff argues that Chapter 75, P. L. 1918 should be construed favorably to the creditors. Assuming that, the rights of the creditors cannot rise higher than the statute since the obligation of the surety under its bond is purely statutory. Inasmuch as the statute limits the amount of the recovery in the action to the amount that was due at the time of the filing of the statement of claim with the surety (sec. 3, Chapter 75, P. L. 1918) the rights of the materialman are limited accordingly, even on the most favorable construction.

Point IV, pages 10 to 12.

Plaintiff contends for a different construction of the word "due" than that given it in *Taylor* v. *Wahl*. The two main cases on which it relies, however, are not in point and relate to entirely different situations.

Metropolitan Fixture Co. v. *Albrecht,* 70 N. J. Law, 150 (plaintiff's brief, page 11), was a case

involving the construction of an affidavit under a chattel mortgage, and when the Court said (p. 151) that the word "due" does not necessarily mean "owing and payable" it was speaking with respect to the requirement of the chattel mortgage act which requires the mortgagee in his affidavit to state "the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon."

Smith v. *Weaver,* 75 N. J. Law, 31 (plaintiff's brief, page 11) was a case involving a judgment entered by virtue of a warrant of attorney and the Court pointed out (p. 33):

> "In prescribing what the affidavit shall contain, the act says that it shall state the true consideration of the bond. It then adds in a separate clause, 'and shall further set forth that the debt or demand for which judgment is confessed is (not "was") justly and honestly due and owing.' The first clause has reference to the validity of the bond; the second to the legal propriety of the judgment. It treats them as two different things, leaving the connecting links to be controlled by the principles ordinarily applicable to these two distinct subjects of adjudication. The latter requirement is not that the original debt, or so much thereof as remains unpaid, may be set forth and recovered, but that judgment may be confessed for any debt honestly due and owing under said bond—that is, any honest debt supported by the consideration upon which the validity of the bond itself depends."

When, therefore, the Court in the course of its opinion (p. 34) said that the words "justly and honestly due and owing" did not limit the indebtedness for which judgment can be entered to such only as presented an accrued right, it was speaking with respect to the character of the affidavit required by the statute.

Point V, page 12.

Plaintiff argues that the rule of *strictissimi juris* does not apply in the case of a surety for compensation and, hence, that the defendant here cannot avail itself of that doctrine.

This contention of the plaintiff is clearly overruled by the determination of this Court in *Skillman* v. *U. S. Fidelity &c. Co.*, 101 N. J. Law, 511. In that case the surety was one of the well-known surety companies which act as surety for compensation and this Court said, referring to the surety company, page 516:

> "the defendant-appellant being only a surety on that instrument, its liability must be strictly construed, and cannot be extended by implication so as to make the plaintiff-respondent a beneficiary of its provisions—the contract of suretyship being *strictissimi juris. First Com. Bank* v. *Valentine*, 139 N. Y. Supp. 1037, 1039."

All of the cases which the plaintiff cites under this point are not authorities in this State, or else must be deemed overruled by the *Skillman* decision.

Point VII, page 15.

There is no comfort for the plaintiff in the fact that the statute required it to wait sixty days before starting suit, because the suit which was commenced after the sixty days was for the "said indebtedness" which means the amount which was "due" on August 16th, 1926, the date the plaintiff served its statement of claim.

Point VIII, page 16.

The use by the surety of the last check for $12,788.74 paid to Gibbs by the Board of Education on August 18th, 1926, for payment of claims

other than the plaintiff's aids the plaintiff nothing. Its rights are circumscribed entirely by the language of the statute and the bond, and if the "said indebtedness" for which it brought its action and which the bond was given to secure, was not "due" on August 16th, 1926, the date it served its statement of claim on the defendant surety, it could not recover, in any event, regardless of what Gibbs or the surety did or did not do after the date of August 16th, 1926.

The trial Court properly excluded the $3,000 represented by the unmatured notes, and the judgment for the lesser amount ($2,039.83) should stand; but the direction to add interest should be reversed as prayed in the defendant's cross appeal.

Respectfully submitted,

CONOVER ENGLISH,
Of Counsel with Defendant.

May Term, 1929.