# INDEX.

Filed November 19th, 1926.

# In Chancery of New Jersey

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,*

*Complainants,*

and

THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey, and* GILBERT STOUT,

*Defendants.*

On Bill, etc.
Bill.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, John B. Grover and John H. R. Gulick, partners, trading as GROVER & GULICK LUMBER COMPANY, of the Borough of Princeton, in the County of Mercer and State of New Jersey, respectfully show:

1. By agreement dated on or about the ninth day of July, A. D. 1926, the defendant, Gilbert Stout, agreed to erect and construct for the defendant, the

Board of Education of the Township of Franklin, in the County of Somerset and State of New Jersey, a public school, known as the Middlebush School House.

2. The complainants were thereafter employed by the defendant, Gilbert Stout, to supply and furnish the lumber and mason materials for the execution and construction of the said school house as mentioned in paragraph one hereof.

3. The lumber and mason materials for the execution and construction of a part of the said school house were furnished by the complainants and a statement thereof is annexed hereto and made a part hereof and marked Exhibit "A," at a total cost of $8,690.53.

4. Complainants admit to have received payment from the defendant, Gilbert Stout, for the furnishing of lumber and mason materials to the said defendant, Gilbert Stout, in accordance with Exhibit "A," in the sum of $1,800.00, and for which amount the said defendant, Gilbert Stout, has been properly credited.

5. Of the moneys retained by the said defendant, the Board of Education of the Township of Franklin, in the County of Somerset, and State of New Jersey, for the account of the defendant, Gilbert Stout, for the payment of the construction of the school house designated as the Middlebush School House, in the Township of Franklin, in said County, there is due to the complainants the sum of $6,890.53.

Your complainants therefore pray that the Court of Chancery may enter its order and decree, seting forth the extent and justice of the claim of the complainants and all other claimants who are or might become a part of this proceedings, and to direct the defendants, or any of them, to pay to your claimants, the sum so found to be due, together with

interest and costs, and to grant such other relief as may be just.

(Signed) OLIPHANT & MITCHELL,
*Solicitors for and of counsel with complainants.*

"EXHIBIT A"

GROVER & GULICK LUMBER COMPANY
Princeton, New Jersey

To GILBERT STOUT
Middlebush Schoolhouse

| | | | |
|---|---|---|---|
| 1926 | | | |
| Aug. | 11 | 15213 Sq. Ft. NCR ..... | 532.46 |
| | 16 | Contract as per List ..... (Itemized below) | 7,418.00 |
| | 31 | 4 Rolls 3 Ply Rfg. ..... | 10.00 |
| Sept. | 13 | 231 Barrels Cement ..... | 607.53 |
| | | 40 Bags Hy. Lime ..... | 18.00 |
| | | 1 Keg 6 P. Nails ..... | 5.10 |
| | | 1 " 20 P. Nails ..... | 4.50 |
| | 18 | 4 Bags Fire Clay ..... | 3.80 |
| | 22 | 444 Pcs. Henseshoe File ..... | 37.74 |
| | 23 | 240 " " " ..... | 20.40 |
| Oct. | 11 | 40 Pcs. 6" T. C. Pipe ..... | 17.60 |
| | 12 | 35 " " T. C. Pipe ..... | 15.40 |
| | | | $6,890.53 |

CREDIT

| | |
|---|---|
| Rift. Rfg. ..... | 1,800.00 |
| | $8,690.53 |

*Bill.*

CONTRACT LIST

165 Pcs. 2x 8-10 Fir
145 " 2x 8-18 "
40 " 2x 8-16 "
145 " 2x10-18 "
443 " 2x 6-12 "
93 " 2x 6-16 "
206 " 3x14-24 "
277 " 2x 6-24 "
140 " 2x10-24 "
165 " 2x 6-10 "
123 " 2x 3-16 "
13 " 2x10-16 "
2 " 4x10-12 "
345 " 2x 4-16 "
218 " 2x 4-12 "
4000 Common Brick
2700 Brick, Fire
83 Pcs. 1¼x6-16 Spr.
38688 Sq. Ft. 1x8 T&G NCR
19,000 Lin Ft. 1x2 Spr. Lath
10,000 Lin. Ft. ¾x2 Spr. Grds.
18443 Sq. Ft. Rift Y. P. Flg.
All for the sum of $7,418.00.

Filed Dec. 24th, 1926.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,* *Complainants,* and THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey, and* GILBERT STOUT, *Defendants.* | On Bill, etc. Answer. |

The defendants, the Board of Education of the Township of Franklin, in the County of Somerset and State of New Jersey, having its principal location at Middlebush in the said Township of Franklin, answering the bill of complaint in this cause filed, says:

1. Paragraph one of the said bill of complaint is admitted.

2. Defendants have not sufficient information to form a belief regarding the statements contained in paragraph two of the said bill of complaint.

3. Defendants have not sufficient information to form a belief regarding the statements contained in paragraph three of the said bill of complaint, but leaves complainant to its proof as to the amount of materials, if any, furnished.

4. Defendants have not sufficient information to

form a belief regarding the statements contained in paragraph four of the said bill of complaint.

5. Defendants have not sufficient information to form a belief regarding the statements contained in paragraph five of the said bill of complaint and leaves complainant to its proof as to the amount due, if any.

JOHN P. CULLEN,

*Sol'r for and of Counsel with defendant the Board of Education of the Township of Franklin, Somerset County, New Jersey.*

Filed January 4th, 1927.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,* *Complainants,* and GILBERT STOUT *and* BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, *Defendants.* | On Municipal Mechanic's Lien. Order. |

This matter being opened to the Court by William C. Vandewater, Esquire, of Counsel with the Petitioner, Charles A. Williamson, on a Petition praying that the said Charles A. Williamson, be made a party Defendant, in the above stated cause, and it appearing that all parties herein concerned have consented thereto:

It is, on this 4th day of January, 1927, ORDERED that the said Charles A. Williamson be admitted as a party Defendant in this cause, and that he have 10 days from the date of this Order to file his Answer to the Bill of Complaint herein.

Respectfully advised,

E. R. WALKER, *C.*

BAYARD SROCKTON, *A. M.*

Filed January 17th, 1927.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,* *Complainants,* and GILBERT STOUT *and* BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, *Defendants.* | On Municipal Mechanic's Lien. Answer of Charles A. Williamson, Trading as Princeton Quarries. |

The Answer of Charles A. Williamson, trading as Princeton Quarries, to the Bill of Complaint filed herein shows that:

1. On or about the 22nd day of November, 1926, the Defendant, Charles A. Williamson, duly filed a lien with the said Board of Education of the Township of Franklin, County of Somerset and State of New Jersey, for materials furnished in the erection of said school house, a copy of which materials is hereto annexed and made a part hereof.

2. The Defendant, Charles A. Williamson, further shows that no payment has been made thereon, and there is still due him, by the said Board of Education of the Township of Franklin, the sum of $414.75, together with interest from November 1st, 1926.

The Defendant, Charles A. Williamson, therefore prays that the Court of Chancery may enter its Order and Decree, setting forth the extent and justice of the claim of the Defendant, above named, along with other claimants who are or might become

a part of these proceedings, and to direct the Defendants, or any of them, to pay to this Defendant the sum so found to be due, together with interest and costs, and to grant such other relief as may be just.

WILLIAM C. VANDEWATER,
*Solicitor for and of Counsel with the Defendant, Charles A. Williamson, Trading as Princeton Quarries.*

PRINCETON QUARRIES
C. A. Williamson
P. O. Box 311

Princeton, N. J., Nov. 20, 1926.
MIDDLEBUSH SCHOOLHOUSE JOB
Gilbert Stout,
Kingston, N. J.

TO PRINCETON QUARRIES, Dr.

| | | No. | | | | | |
|---|---|---|---|---|---|---|---|
| Aug. | 10 | 7497 | sand | 7 | tons | @ $2.75 | $12.25 |
| | | 7499 | " | 14 | " | 1.75 | 24.50 |
| | 11 | 7692 | " | 7 | " | 1.75 | 12.25 |
| | | 7724 | " | 7 | " | 1.75 | 12.25 |
| | | 7728 | " | 7 | " | 1.75 | 12.25 |
| | | 7729 | " | 7 | " | 1.75 | 12.25 |
| | | 7736 | " | 7 | " | 1.75 | 12.25 |
| Sept. | 9 | 7765 | " | 7 | " | 1.75 | 12.25 |
| | 15 | 7943 | " | 7 | " | 1.75 | 12.25 |
| | | 7968 | " | 7 | " | 1.75 | 12.25 |
| | | 7969 | " | 7 | " | 1.75 | 12.25 |
| | | 7970 | " | 7 | " | 1.75 | 12.25 |
| | | 7971 | " | 7 | " | 1.75 | 12.25 |
| | 16 | 7972 | " | 7 | " | 1.75 | 12.25 |
| | 17 | 7978 | " | 7 | " | 1.75 | 12.25 |
| | | 7981 | " | 7 | " | 1.75 | 12.25 |

*Answer—Charles A. Williamson.*

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | 20 | 7983 | " | 7 | " | 1.75..... | 12.25 |
| | | 7997 | " | 7 | " | 1.75..... | 12.25 |
| | 21 | 7998 | " | 7 | " | 1.75..... | 12.25 |
| | | 8301 | " | 7 | " | 1.75..... | 12.25 |
| | | 8303 | " | 7 | " | 1.75..... | 12.25 |
| | | 8304 | " | 7 | " | 1.75..... | 12.25 |
| | 22 | 8307 | " | 7 | " | 1.75..... | 12.25 |
| | | 8308 | " | 7 | " | 1.75..... | 12.25 |
| | | 8311 | " | 7 | " | 1.75..... | 12.25 |
| | | 8312 | " | 7 | " | 1.75..... | 12.25 |
| Oct. | 15 | 8650 | " | 6.5 | " | 1.75..... | 11.37 |
| | 16 | 8647 | " | 7 | " | 1.75..... | 12.25 |
| | | 8654 | " | 6.5 | " | 1.75..... | 11.38 |
| | | 8655 | " | 7 | " | 1.75..... | 12.25 |
| | | 8656 | " | 7 | " | 1.75..... | 12.25 |
| | | 8657 | " | 7 | " | 1.75..... | 12.25 |
| | | 8659 | " | 7 | " | 1.75..... | 12.25 |
| | | | | | | | $414.75 |

Filed January 27th, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,*
*Complainants,*
and
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset, and* GILBERT STOUT,
*Defendants.*

On Bill, etc. Order Admitting Party Defendant.

Application having been made by The Metropolitant Casualty Insurance Company of New York to be admitted as a party defendant in the above entitled cause, and it appearing that said The Metropolitan Casualty Insurance Company of New York is surety on the bond of Gilbert Stout, defendant, conditioned for the faithful performance of the contract between the defendant, The Board of Education of the Township of Franklin in the County of Somerset and the said Gilbert Stout for the erection of the Middlebush School building, mentioned in the bill of complaint herein and as such surety is a proper party in said cause.

It is on this twenty-seventh day of January, nineteen hundred and twenty-seven ORDERED that the said The Metropolitan Casualty Insurance Company of New York be and is hereby admitted as a party defendant in the above entitled cause, and that such

*Order.*

defendant have twenty days in which to answer the bill of complaint of complainant.

E. R. WALKER, *C.*

We hereby consent to the entry of the above ORDER.

OLIPHANT & MITCHELL,
*Solrs. of Complainants.*

JOHN P. CULLEN,
*Solr. for The Board of Education of the Township of Franklin, in the County of Somerset.*

A true copy.
THOMAS BARBER,
*Clerk.*

WM. C. VANDEWATER,
*Solicitor for C. A. Williamson.*

VOORHEES KLINE,
*Solicitor for Gilbert Stout, Defendant.*

Filed February 5th, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,*
*Complainants,*
and
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset, and* GILBERT STOUT, *et al.,*
*Defendants.*

On Bill, etc.
Answer of Defendant, The Metropolitan Casualty Insurance Company of New York.

The Answer of the Defendant, The Metropolitan Casualty Insurance Company of New York, admitted as a party defendant by order dated January 27th, 1927.

This Defendant answering the Bill of Complaint, says that:

1. Paragraph one is admitted.
2. Paragraph two is admitted.
3. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph three.
4. Answering paragraph four, this Defendant says that it is informed and believes that the said complainants failed to complete their contract for the furnishing of the lumber and mason materials for the erection and construction of said school house as proposed by them, and that the credit of $1,800.-

00 mentioned in said paragraph four of said bill of complaint represents their selling price for 18,443 feet of yellow pine flooring which said complainants had contracted to deliver, but which were never delivered for the erection and construction of said school building, and which, by the terms of complainants' contract with the said Gilbert Stout, they were required to furnish.

5. Paragraph five is denied.

6. This defendant further answering says that on or about the 27th day of September, 1926, the said Gilbert Stout received from the said The Board of Education of the Township of Franklin, in the County of Somerset, a payment amounting to $10,494.04 on account for work and labor performed and materials furnished on the said Middlebush School building under his said contract with said Board of Education, and that on or about the same date the said Gilbert Stout out of the payment of $10,494.04, received by him from said Board of Education as aforesaid, paid to complainants $8,000.00 on account of their contract for the materials furnished and to be furnished by them toward the erection and construction of said Middlebush School building, which payment of $8,000.00 complainants have failed to credit and apply on their contract account for materials furnished and to be furnished to the said Gilbert Stout under their said contract with him.

7. This defendant further answering says that on or about July 20, 1926, at or about the time of the execution of the said contract between the said The Board of Education of the Township of Franklin, in the County of Somerset, and the said Gilbert Stout for the erection of said Middlebush School building, and contemporaneously with the execution and delivery of said contract, the said Gilbert Stout as principal, and this defendant as surety, entered into

a bond to the said The Board of Education of the Township of Franklin, in the County of Somerset, in the sum of $72,185.00, conditioned for the faithful performance by the said Gilbert Stout of his contract with the said Board of Education and indemnifying the said Board of Education from all costs and damages which it might suffer by reason of the failure of the said Gilbert Stout to perform and complete his said contract and agreeing thereby to pay all persons contracting with the said Gilbert Stout for labor or materials on said school building, should the said Gilbert Stout default therein.

8. This defendant further answering says that on or about the 13th day of November, 1926, the said Gilbert Stout defaulted in the performance of his said contract with the said Board of Education, and that on November 17th, 1926, a notice of such default was given to this defendant by the said Board of Education, whereupon this defendant elected under its rights as surety to take over and complete the said contract made as aforesaid between the said Board of Education and the said Gilbert Stout, and that thereupon this defendant succeeded to the rights and credits of the said Gilbert Stout under said contract, and is entitled to have the payment of $8,000.00 made by the said Gilbert Stout to complainants mentioned in paragraph six hereof, applied and credited in satisfaction of complainants debt for materials furnished under said contract and mentioned in complainants bill of complaint.

This defendant therefore prays that such decree may be made herein as shall preserve this defendant's rights in the premises and require complainants to credit in satisfaction of their alleged claim, the said payment of $8,000, received by them from the said Gilbert Stout on account of the moneys due or to grow due to them for materials furnished un-

der their contract with the said Gilbert Stout for the erection of said Middlebush School building.

JOHN F. REGER,
*Solicitor of Defendant, The Metropolitan Casualty Insurance Company of New York.*

Filed June 2, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK *Lumber Company,*

*Complainants,*

and

THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey,* GILBERT STOUT *and* CHARLES A. WILLIAMSON, *Trading as* PRINCETON QUARRIES, *and* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

*Defendants,*

On Bill, etc.
Substitution of Attorney.

It appearing to the Court that Oliphant and Mitchell, Solicitors of Complainants in the above entitled cause, having dissolved partnership on account of the appointment of A. Dayton Oliphant as Circuit Court Judge of the State of New Jersey, it is on this 2nd day of June, 1927,

ORDERED, that Louis Gerber be substituted as solicitor for the complainants in the place and stead of Oliphant and Mitchell.

E. R. WALKER, *C.*

We hereby consent to the entry of the above order.

JAMES MITCHELL.

Filed June 2nd, 1927.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY, *Complainants,* *and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey,* GILBERT STOUT, *and* CHARLES A. WILLIAMSON, *Trading as* PRINCETON QUARRIES, *and* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *Defendants.* | On Bill, etc. Replication to Answer of Defendant, The Metropolitan Casualty Insurance Company of New York. |

The complainants join issue on the answer of the defendant, The Metropolitan Casualty Insurance Company of New York.

LOUIS GERBER,
*Solicitor for Complainants.*

Service of the above is hereby acknowledged this 24th day of May, 1927, as within time.

JOHN F. REGER,
*Solicitor of The Metropolitan Insurance Company Department.*

Filed June 23rd, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants,*
*and*
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey,* GILBERT STOUT, *and* CHARLES A. WILLIAMSON, *Trading as* PRINCETON QUARRIES, *and* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
*Defendants.*

On Bill, etc.
Replication to Answer of Defendant, The Board of Education of the Township of Franklin.

The complainants join issue on the answer of the defendant, The Board of Education of the Township of Franklin.

LOUIS GERBER,
*Solicitor for Compl'ts.*

Service of the above is hereby acknowledged this 13th day of June, 1927, as within time.

JOHN P. CULLEN,
*Sol'r of Board of Education of Franklin Twp., Somerset Co., N. J.*

Filed August 10th, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants,*
*and*
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey,* GILBERT STOUT, *and* CHARLES A. WILLIAMSON, *Trading as* PRINCETON QUARRIES, *and* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
*Defendants.*

On Bill, etc.
Order of Reference.

Upon consent of the defendants in the above cause hereunder written.

It is on this 10th day of August, 1927, ORDERED, that the above entitled cause be and the same is hereby referred to Hon. M. G. Buchanan, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and advise what order or decree should be made therein.

E. R. WALKER, *C.*

*Order of Reference.*

We consent to the making of the foregoing order of reference.

LOUIS GERBER,
*Solicitor of Complainant.*

JOHN P. CULLEN,
*Solicitor of Board of Education.*

JOHN F. REGER,
*Solicitor of Metropolitan Casualty Insurance Company of New York.*

SAMUEL D. LENOX,
*Solicitor for Charles L. Conard, Trustee in Bankruptcy, Gilbert Stout, Bankrupt.*

Filed Sept. 13th, 1927.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants,*
*and*
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *in the County of Somerset and State of New Jersey,* GILBERT STOUT, *and* CHARLES A. WILLIAMSON, *Trading as* PRINCETON QUARRIES, *and* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
*Defendants.*

On Bill, etc. Designation.

Application having been made to fix a time and place for the hearing of the above stated cause, and it appearing that the defendants have consented thereto, it is hereby, on this sixth day of September, 1927,

ORDERED, that Thursday, the twelfth day of January, 1928, at the hour of 10.30 o'clock in the forenoon at the Chancery Court in the State House at Trenton, be, and the same is hereby designated

*Designation.*

as the time and place for the hearing of the said cause.

MALCOLM G. BUCHANAN, *V. C.*

We hereby consent to the time fixed in the above designation.

LOUIS GERBER,
*Solicitor of Complainant.*

JOHN P. CULLEN,
*Solicitor of Board of Education, etc.*

JOHN F. REGER,
*Solicitor of Metropolitan Casualty Insurance Company of New York.*

SAMUEL D. LENOX,
*Solicitor for Charles L. Conrad, Trustee in Bankruptcy, Gilbert Stout, Bankrupt.*

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER, *et. al.*,
*Complainants,*
and
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *et. al.*,
*Defendants.*

On Bill, etc.
Testimony.

Testimony taken in the above entitled cause, at the State House, Trenton, New Jersey, on Thursday, the twelfth day of January, 1928, at 11 o'clock A. M.

Before HON. MALCOLM G. BUCHANAN, Vice-Chancellor.

Appearances—

LOUIS GERBER and JAMES J. McGOOGAN, Esquires,
For Complainants.

JOHN F. REGER, Esquire,
For Defendant, Metropolitan Casualty Insurance Company of New York.

JOHN P. CULLEN, Esquire,
For Board of Education of Township of Franklin.

SAMUEL D. LENOX, Esquire,
For Charles L. Conard, Trustee in Bankrutpcy of Gilbert Stout, Bankrupt.

*Thomas E. Gibson—Direct.*

THOMAS E. GIBSON, a witness produced on behalf of the Complainants, being duly sworn, testifies as follows:

Direct Examination by Mr. McGoogan:

Q. Are you the Clerk of the Board of Education of Franklin Township, in Somerset County? A. Yes, sir.

Q. Have you produced, in response to a subpoena, the contract between the Board of Education of Franklin Township and Gilbert Stout? A. Yes, sir. (Producing paper).

The Court: There is no dispute about that, is there?

Mr. Reger: No.

The Court: Let it be received and marked.

Said contract is marked Exhibit C-1.

Mr. Reger: We might expedite matters by admitting the contract which is now offered; and I also have the original application for the bond, with the indemnity agreement attached. I think that can be agreed upon.

Mr. McGoogan: I offer the bond. Said bond in the sum of ——— made between the Metropolitan Casualty Insurance Company of New York and Gilbert Stout, dated ——— is marked Exhibit C-2.

Mr. McGoogan: I offer the lien claim of the complainants.

Mr. Reger: I think I should object to the offer of the lien claim, inasmuch as there is no allegation in the bill as to any lien claim.

The Court: I suppose an amendment would be permitted in that behalf.

Mr. Reger: There was notice of a lien claim given. I want to enter a formal objection, in order that the record may show the objection, and if an amendment is asked for, well and good.

Mr. McGoogan: I ask to amend by inserting a paragraph alleging the filing by the complainants with the Board of Education of the lien claim, served on the Board on October 20, 1926, a copy of which is attached to the bill of complaint, and I ask that the copy be attached to the bill of complaint.

The Court: Is there any objection?

Mr. Reger: I am anxious to have the question at issue, litigated. I don't like— No, no objection.

Mr. McGoogan: I offer the lien claim.

Said lien claim is marked Exhibit C-3.

By the Court:

Q. What payments have been made by the Board of Education on account of this contract? A. The first payment, $10,494.04.

Q. What date? A. September 25th.

Q. What year? A. 1926.

Q. The next? A. $10,896.47, on October 30th.

Q. 1926? A. '26, yes, sir.

Q. Any other payments? A. No, sir.

*Thomas E. Gibson—Cross.*

Q. What is the amount of the balance in the hands of the Board? A. $70,895.00, the original contract, $49,564.49.

Q. The contract has been completed by the Surety Company? A. Yes, sir.

Q. Completed on what date? A. It was accepted on January 9th.

Q. This year? A. This year; yes, sir.

Q. Two or three days ago? A. Two or three days ago; yes, sir.

Cross-Examination by Mr. Reger:

Q. Can you give us the date of the notice of the service of the lien claim?

By the Court:

Q. The date endorsed in ink, October 26th, 1926, is that the date it was served upon the Board? A. Yes, sir.

Q. What moneys were due at that time, if any, to the contractor, Gilbert Stout? A. Well, the work had ceased at that time.

Q. Had there been any payment approved by the architect at that time? A. Not after the last payment of $10,896.47.

By the Court:

Q. That was made on October 30th? A. Yes.

Q. That payment was made four days after the service of this notice, apparently? A. Yes, sir.

Q. Is there any mistake in those dates A. Not to my knowledge.

Q. Did either member of the firm of Grover & Gulick make application to the Board previous to

the payment on September 25th, for a payment on account of materials furnished by them? A. Yes, sir.

Q. Who appeared, if anybody, before the Board, on behalf of Grover & Gulick? A. Mr. Gulick and Mr. Potts.

Q. Mr. Gulick, one of the complainants here? A. Yes.

Q. What, if anything, did he state to the Board, about moneys due him at that time, from the Middlebush School? A. He stated he wanted money very badly, and he needed it; there had been considerable lumber put on the ground, and he needed it.

Q. Was Mr. Stout there at the time? A. No, sir; not to my recollection.

Q. Did Mr. Gulick bring any order or any other paper from Mr. Stout? A. I understood him to say he had one.

Q. Did you, yourself, examine the paper which he had? A. I did not.

Q. Was any statement made to him by the Board, as to whether any of the money which was then due would be paid to him?

The Court: How is that material?

The evidence is that it was paid to the contractor; not to him.

Mr. Reger: I am seeking to show that the complainants had knowledge that the money which they subsequently received out of this payment, was money which came from the payment due under this contract.

The Court: I suppose that will be admitted.

Mr. McGoogan: Yes, sir.

*John H. R. Gulick—Direct.*

JOHN H. R. GULICK, a witness produced on behalf of the complainants, being duly sworn, testifies as follows:

Direct Examination by Mr. McGoogan:

Q. Are you one of the complainants in this case? A. Yes, sir.

Q. And one of the partners of Grover & Gulick? A. Yes, sir.

Q. Have you produced the book account of the firm with Gilbert Stout, the contractor on the Middlebush School? A. Yes.

Q. Have you also produced the delivery slips used by your firm, in showing the deliveries of material? A. Yes.

Q. To this school on the Stout job? A. Yes, sir.

Q. Have you produced a record showing this account of your firm with Stout on the Middlebush School, and the present balance? Y. Yes, sir.

Q. Will you please read from your books, first the balance due on the Stout job on the Middlebush School?

Mr. Reger: I suppose it ought to be shown whether the witness kept the books or not.

Mr. McGoogan: He did not, but I have the bookkeeper here. I will put him right on if you want him.

Q. Tell us the amount of the balance? A. The amount due to the Middlebush School is $6,890.53.

Q. As of what date? A. As of October 12th.

Q. What year? A. 1926.

Q. Have you produced the delivery slips, showing the delivery of the material to the school? A. Yes, I have.

Q. Produce them, please? A. (Witness produces papers).

Q. Are they in order? A. I don't know; it is according to the way the bookkeeper has arranged them.

Mr. McGoogan: I offer this sheaf of delivery receipts.

Q. You refer to a copy of the contract between you and Stout? A. Yes, sir.

Q. Is that in writing? A. Yes, sir.

Q. Signed by him? A. No, sir; it isn't signed by him.

Q. Is it signed by you? A. It is signed by me, yes, sir. The original copy I have before me.

Q. Was the original signed by him? A. No, sir.

Q. What was that? A. An estimate given by Grover & Gulick to Mr. Stout, agreeing to furnish certain material at Middlebush for so much money.

Q. Did he accept it? A. He accepted it and ordered the material delivered to Middlebush.

Q. What is the total amount of the contract price? A. $7,418.00, according to his list.

By the Court:

Q. That is, according to the original estimate or according to what was actually furnished? A. That is according to the original estimate.

Q. Was all of that furnished? A. No, sir; there was a credit of the flooring on the contract amounting to $1,800.00 given,—rip flooring.

By the Court:

Q. Why? A. Because the material wasn't ordered.

Q. Have you been paid any part of this balance of $6,890.53? A. No, sir, we have not.

Q. Were there any extra materials furnished? A. Yes, sir, there were.

Q. What was the total amount of the extra materials? A. Well, they are divided off in months. I can read them off to you.

Q. All right? A. August 11, 1926, 15,213 square feet of North Carolina roofers at three and a half cents a square foot, $532.46; on August 16th, the original contract was charged on the ledger as per list of $7,418.00; on August 31st, there were four rolls of two-ply roofing paper, at $2.50 a roll, $10.00. That balance then as of September 1st was $7,960.46. On September 13th there was delivered one carload of 231 barrels of cement at $2.63 a barrel, amounting to $607.53. There was delivered forty bags of hydrated lime at 45c. a bag, amounting to $18.00; one keg of six penny nails, $5.10; one keg of twenty penyn nails, $4.50; four bags of fire clay at 95c. a bag, $3.80; on September 22nd there were 444 pieces of horseshoe tile at eight and a half cents a piece, $37.74. On September 23rd there were 240 pieces of horseshoe tile at eight and a half cents a piece, amounting to $20.40. On October 11th there were forty piece of six-inch terra cotta pipe, eighty feet, at 22c. a foot, amounting to $17.60. On October 12th, thirty-five pieces of six-inch terra cotta, seventy feet at 22c. a foot, amounting to $15.40, making a total amount owing them of $8,690.53, and a credit given of $1,800.00 for the flooring not delivered and not called for deducted, leaving an amount due us of $6,890.53.

Q. That is the balance? A. Yes, sir.

Q. Have you any knowledge of your own as to whether or not all this material was used by Stout in the erection of this school building? A. The only thing I know was, this material was delivered on the

job, and whether Stout removed any of his own free will on some other job, I couldn't say exactly as to that.

Q. It was delivered? A. Yes, sir.

The Court: Is it admitted that these are the delivery slips for this material, Mr. Reger?

Mr. Reger: Yes, sir.

The Court: I will admit them.

Said delivery slips, twenty-seven in number, are marked Exhibit C-4.

Cross-Examination by Mr. Reger:

Q. When did you learn that there was a payment due Mr. Stout under this contract? A. I didn't learn there was any payment due Mr. Stout under the contract. On September 1st, Mr. Stout owed $38,000.00, and I had been prevailing upon Mr. Stout for payment.

Q. Did you at any time during September learn there was a payment due him under the contract on the Middlebush School? A. I went to Mr. Stout one time with an order for money from Mr. Stout, and Mr. Stout signed it. The order was written at Mr. Dayton Oliphant's office.

By the Court:

Q. Did you learn that there was a payment due him? A. I had this order—

Q. Did you? A. I did when I went to Middlebush, yes.

Q. You were not asked when. Answer the questions asked you. Your counsel will take care of anything that might be necessary to bring out.

*John H. R. Gulick—Cross.*

Q. When did you learn that there was a payment due to him, Mr. Gulick? A. When I took the order to the Board of Education.

Q. I thought you said you took it to Mr. Stout? A. No, to the Board.

Q. When was that? A. If I remember, it was sometime in September.

Q. Was it at a regular meeting of the Board of Education that you presented the order? A. I believe it was, sir.

Q. It was? A. I believe so.

Q. Was the order honored by the Board? A. It was not, sir.

Q. Did you then see Mr. Stout about it? A. I told Mr. Stout—I saw him afterwards and told Mr. Stout that the Board of Education wouldn't honor the order he signed.

Q. What did you ask him then to do? A. I told Mr. Stout that he owed our firm $38,000.00, and we had to have the money.

Q. Did he agree when he received payment from the Board to give you some of the money? A. He told me he would try to collect some money in and would pay us some money on account.

Q. Did you ask him to give a check to you out of the proceeds of the check which he gave, or received, from the Board?

The Court: It has been admitted by counsel that the firm knew when they received this payment, that it came from moneys which were received by the Board of Education on this contract. What more do you want?

Mr. Reger: The examination tends to show there was the equivalent of an objection to applying this on the contract.

The Court: Well, you are entitled to show that if you can.

Q. I show you a check for $8,000.00, signed by Gilbert Stout, and ask you if that is the check you received from Mr. Stout on the contract which you had with him. Is that? A. This check was given by Gilbert Stout by Grover & Gulick Lumber Company, the old company, I think you can make—

The Court: Strike it out. Pay attention to the questions asked you and simply answer those questions.

Q. (Question repeated). A. I didnt receive this check on the contract we had with him. I received it on account.

Q. When you were before the Board of Education you stated to them that there was money due you on the school contract? A. I don't know that I stated there was money due on the school. I stated there was money due us by Stout and he hadn't paid us anything from the school, and he owed accounts of long standing, so he owed the school money. I said that.

Q. When you received that check you accepted it and applied it on materials furnished to that school, did you not, Mr. Gulick? A. No, sir, I—

Q. You didn't? A. No, sir, I accepted and applied it on accounts older than the school, because there wasn't any specific account where to apply it.

Q. When did you apply it to the general account? That is what you mean? A. Yes.

Q. When did you apply it to the general account? A. As soon as I received the check I returned the check to the bookkeeper and he applied it on the account.

Q. The bookkeeper did? A. Yes.

*John H. R. Gulick—Cross.*

Q. You didn't give any directions to the bookkeeper? A. The bookkeeper had knowledge that any time Mr. Stout—

Q. Answer the question. Did you give any directions to the bookkeeper? A. No, sir, not—

Q. You didn't? A. No, sir, not where to apply it.

Q. Did you tell the bookkeeper it came from the Middlebush School payment? A. No, sir; I didn't.

Q. You at that time expected to furnish all of the material which you had contracted to furnish for the Middlebush School, did you not? A. Yes, sir.

Q. And the total amount of that was upwards of $8,000.00, $8,600.00, I think? A. That was with the extra outside of the contract.

Q. The extras had been furnished at that time, had they not? A. As of October 12th, yes.

Q. The credit of $8,000.00 which you have attached to the bill, or appears in the bill of complaint here, is not a payment, but is a credit for materials. Is that right?

The Court: Do you mean $1,800.00?

Mr. Reger: Yes, sir.

Q. $1,800.00? A. Yes, that is a credit for materials.

Q. When did you apply that credit of $1,800.00? A. We had to apply the credit of $1,800.00 when we filed the lien.

Q. When did you make the application on your books? A. The application was made on the books just before we got ready to file the lien.

Q. When was that? A. When was it?

Q. Yes. A. Well, I think the lien was filed somewheres in October, October 20th, I think.

Q. How much was charged on your books against

Mr. Stout at the time you received this $8,000.00 for materials furnished on the Middlebush School job? A. There was a charge on the books of $8,690.53, less $1,800 credit.

Q. I understood you to say the $1,800.00 credit was not applied until later? A. The $1,800.00 credit was applied just before the filing of the lien.

Q. It was later than the time when you received the $8,000 check, of course? A. Yes, sir; the lien was filed October 20th.

By the Court:

Q. The question is whether you applied the credit of $1,800.00 after you got the check for $3,000.00? A. I believe it was after.

Q. You knew, did you not, that Mr. Stout had given a surety bond for the performance of the contract on the Middlebush School? A. Yes, sir.

Q. You knew that under that bond the Surety Company would be obligated to pay the claimants for the materials, didn't you? A. No, sir; I didn't know at that time.

Q. When did you learn that? A. I learned that from my counsel later, as this case came up.

Q. When you went before the Board of Education, did you not then state that you had not then received a cent on this job, and that you must have some money? Didn't you say that? A. I stated to them I must have money, yes.

Q. You told them that? A. Yes.

Q. And didn't you say you hadn't received a cent on the job? A. I don't remember saying that, sir.

Mr. Reger: I ask counsel to produce the order.

Mr. Gerber: It is not here now.

*John H. R. Gulick—Cross.*

Q. I show you a paper purporting to be a copy of an order, and ask you if that is the form of the order which you presented to the Board of Education? A. I believe it is, sir.

Mr. Reger: I offer it in evidence.

Mr. McGoogan: No objection.

By the Court:

Q. That is a copy of the order signed by Mr. Stout and given to you, is it? A. Yes, sir.

Said order is marked Exhibit D-1.

By the Court:

Q. When the Board refused to honor that order, what was done with the order? A. The order was left with the clerk, of the Board.

Q. You received an additional payment on this account from the Middlebush School moneys, in November, did you not, Mr. Gulick? A. If I remember correctly, we received money after this $8,000.00 from Stout, yes, sir.

Q. How much did you receive? A. The amount of money due from the Finderne lien—

Q. How much was it? A. I received in cash on November 1st, at my house, I received $6,836.70.

Q. You received that? A. Yes, sir.

Q. Where did that money come from? A. That money was delivered at my house by Theodore Potts, sir.

Q. It was part of a payment made on the Middlebush School, wasn't it? A. No, sir, it—

Q. It was not? A. No, sir, it was paying off the lien Grover & Gulick had on the Finderne School.

Q. Do you know where the money came from? A. No, sir, it was cash.

Q. It was cash? A. It was.

Q. Do you know where Mr. Potts got the money from? A. He said from Mr. Stout.

Q. From Stout? A. Yes, sir.

Q. Did he say that Mr. Stout got it from the Middlebush School? A. He did not.

Q. You knew it came from the Middlebush School? A. I did not.

Q. You applied it on the Finderne School? A. Yes.

By the Court:

Q. A lien had been filed for that claim? A. Yes, sir.

Re-direct Examination by Mr. McGoogan:

Q. Did you serve the lien claim yourself, Mr. Gulick? A. Yes, I did.

Q. If I show it to you can you tell on what date you served it on the clerk of the Board? A. Yes, sir.

Q. (Paper shown witness). Can you tell us the date on which it was served? A. The date on which it was served was October 20, 1926.

Q. How do you fix that date? A. I fix that date because I went to Dayton Oliphant, who was the attorney for Grover & Gulick, and he made out this lien claim and gave it to me, and I went to—or he told me to serve that on the Clerk of the Board of Education, and that was Mr. Gibson, and I went right over from Mr. Oliphant's office to Mr. Gibson's home, and within two hundred yards of Mr. Gibson's home I met him coming up the road leading a cow and I stopped him and gave him this paper.

*Gilbert Stout—Direct.*

Q. At that time? A. Yes.
Q. On the road? A. Yes, sir.

By the Court:

Q. And that is the way you fix the date? A. Yes, sir.
Q. How does that fix the date? A. I delivered it the same day it was made out at Mr. Oliphant's office.
Q. That is how you fix it? A. Yes, sir.
Q. And the date was? A. October 20, 1926.
Q. That was the date it was made out? A. Yes, sir.
Q. You delivered it to the Clerk on October 20th? A. Yes.
Q. There was no meeting of the Board that day? A. Not to my knowledge, sir.

Complainants rest.

GILBERT STOUT, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination by Mr. Reger:

Q. Mr. Stout, you are the contractor, or you were the contractor, for the erection of the Middlebush School for the Board of Education of Franklin township? A. I was.
Q. Did you before beginning work apply to the Metropolitan Casualty Insurance Company for a surety bond? A. Yes.
Q. I show you a paper purporting to be an application for a bond, with an agreement of indemnity attached— A. Yes.

Q. And I ask you whether or not that is the application you signed, and the agreement which you signed, and whether that is your signature? A. It is.

Q. That is your signature? A. Yes, it is.

Mr. Reger: I offer that in evidence.

Mr. McGoogan: I object to the offer of the application, first because it has no binding effect upon the complainants; and secondly, upon the ground that if it contained an assignment it is void under Section 6 of the Act, which provides that the lien of any laborer or material man shall have priority over any—

The Court: I understand that the purpose for which it is offered is to show the right to subrogation?

Mr. Reger: Yes, sir.

The Court: I will admit the paper, and leave the question of its effect upon your client to be argued at the conclusion of the hearing.

Said document is marked Exhibit D-2.

Q. Prior to the payment which you received on this contract on September twenty-fifth or sixth or seventh, had Grover & Gulick applied to you for a part of the money which was due you under this contract? A. Yes, sir.

Q. Did you pay them a part of the money which you received under this contract? A. Yes, sir.

Q. You paid them—

The Court: That already appears, Mr. Reger.

Q. At that time did you direct them as to how they should apply it on your account? A. No.

Mr. McGoogan: Objected to as leading.

The Court: Well, if you object— 10

Mr. McGoogan: I will withdraw my objection.

Q. Did you? A. No.

Q. When did you receive an additional payment under this contract? A. I don't remember the exact date.

Q. Was it in the month of October, do you know? A. The latter part of October or the first part of No- 20 vember, I would say.

Q. Did you pay any part of that money which you then received, and which has been testified to have been $10,896.00, to Mr. Gulick? A. I sent it to Mr. Gulick through Mr. Potts.

Q. How much did you send? A. Between six and seven thousand dollars.

Q. Do you know whether Mr. Gulick had any knowledge as to where this money came from? A. I don't. 30

Q. What negotiations did you have with Mr. Gulick before this first payment was given, with reference to payments on this job? A. I signed an order for payment.

Q. An order for payment? A. Yes.

Q. Did you go to the Board with Mr. Gulick to receive this payment? A. No.

Q. When did you give the check for $8,000.00? A. I don't remember the date.

40

By the Court:

Q. On the day that it bears date? A. The check?

Q. Yes. A. No, if I remember, it was on a Saturday I made out the check and dated it the following Tuesday.

Q. Why did you do that? A. I didn't have the money, and I knew there was a payment coming Monday from the Middlebush School.

Q. Did you tell Mr. Gulick? A. What?

Q. Did you state to Mr. Gulick the reason you dated it on Tuesday? A. Yes.

Q. What was the reason you gave him? A. That the payment was coming from the Middlebush School on Monday, and I dated it on Tuesday so I could make a deposit.

Q. How did you know you were to receive a payment on the Middlebush School? A. Mr. Gulick told me.

Q. He told you? A. Yes, sir.

Q. Did you make any further statement to him as to the check you were giving him for $8,000.00, than what you have testified to? A. Not to my knowledge, no.

Q. State everything you said to him about the check of $8,000.00? A. Well, I guess I have said about all. He told me I was going to have a payment on the Middlebush School. He told me on the Saturday. He said I could get that at Mr. Laird's store on the Monday. I told him I would make out a check and date it to him Tuesday, and if he heard from me not to cash it, I would let him know if I didn't get the check, so he wouldn't get it cashed.

Q. If you did receive the check, then you were not to notify him? A. No.

Q. But if you didn't receive the check, then you were to notify him not to use the check? A. Yes.

*Conrad Icke—Direct.*

Q. That is what was said? A. Yes.

Q. Did you communicate with him at all? A. I don't remember it, no.

Mr. McGoogan: No questions.

CONRAD ICKE, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination by Mr. Reger:

Q. Mr. Icke, where do you live? A. Franklin Park.

Q. Are you a member of the Board of Education of the Township of Franklin? A. Yes, sir.

Q. Were you present at the meeting of September 25th? A. Yes.

Q. 1926? A. Yes, sir.

Q. Did you see Mr. Gulick of the Grover & Gulick Lumber Company at that meeting? A. I did.

Q. Did you have any conversation with him at that time? A. Yes.

Q. Will you state what that conversation was? A. Well, Mr. Gulick says to me, he says, "I furnished in the neighborhood of $15,000.00 worth of material and I haven't had a cent of Mr. Stout yet, and I got to have the money, and I got to have it today." I said, "Today is Saturday; you couldn't cash a check; you had better go to see the custodian the first thing Monday morning and get him to go down with you and see if there is a check, and he can turn it right over to you."

Q. Did you see the order which he presented? A. He had a paper in his hands I supposed to be the order; I didn't read it.

*Conrad Icke—Cross.*
*Conrad Icke—Re-Direct.*
*John L. Totten—Direct.*

Cross-Examination by Mr. McGoogan:

Q. But the Board did not honor the order, did it? A. No, sir.

Re-Direct Examination by Mr. Reger:

Q. You did pass the payment of $10,494.04? A. Yes, we did that.

JOHN L. TOTTEN, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination by Mr. Reger:

Q. Mr. Totten, where do you live? A. Middlebush.

Q. Are you a member of the Board of Education of Franklin Township? A. Yes, sir.

The Court: Is there anything you desire to bring out by this witness that is different from what was brought out by Mr. Icke?

Mr. Reger: It is simply corroboration.

The Court: I am unable to see that anything he testified to was necessary to the case, or that he added anything to what was brought out by the complainants' proofs.

Mr. Reger: I can't bring anything further out by this witness. Is it admitted that the building was completed by the Metropolitan Casualty Insurance Company?

Mr. McGoogan: I am not prepared to admit that, as to how it was completed,—what arrangements the company had with the Board. If Mr. Reger will tel me what he wants I may admit it without any proofs.

Mr. Reger: Here is the contract.

Mr. McGoogan: I have no objection to the admission in evidence of this copy of the contract, dated December 20, 1926, between the Metropolitan Casualty Insurance Company of New York and the Perth Amboy Construction Company of Perth Amboy, New Jersey.

Mr. Reger: I offer it in evidence.

Said copy of contract is marked Exhibit D-3.

FRED T. FLYNN, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination by Mr. Reger:

The Court: You admit, Mr. McGoogan, that the contract was completed by the Surety Company, through the instrumentality of this subsequent contract?

Mr. McGoogan: Yes, sir, I do.

Q. Can you state what the cost was to the Metropolitan Casualty Insurance Company, of the completion?

The Court: How is that material?

Mr. Reger: It would show that it was in excess of the original contract price, of which they had become surety.

The Court: I don't think it is material, but you may put it in.

A. The figures are here in the file. I think the amount to date is about $19,000.00.

Q. In excess of the contract price? A. In excess of the original contract price.

By the Court:

Q. What do you mean by that? A. The difference between the amount in the hands of the School Board and what we had to pay the contractor to complete, plus the amount we paid for outstanding bills, material and labor.

Q. You mean your total payments amounted to approximately the sum of $70,000.00? A. Approximately that, yes.

Cross Examination by Mr. McGoogan:

Q. Did your company use materials that were left on the job by the defaulting contractor? A. That I don't know, there were materials left on the job, and we left the work to the Perth Amboy Construction Company, and the consideration was that they would be allowed those materials.

Q. You don't know whose materials were used or how much? A. No, I don't.

The Court: Is it admitted by counsel on both sides that there are no other lien claims?

Mr. Reger: I know of none. The Surety Company, I understand, has paid the other claims.

The Court: The answer which was filed by Mr. Williamson, with Mr. Vandewater as solicitor, is there no one here representing Mr. Williamson?

Mr. Reger: I believe not. I think we can show by proof that the claim was paid, if your Honor desires it.

The Court: I think that had better be made, Mr. Reger.

Mr. Reger: Is it admitted that all other claims have been paid?

Mr. McGoogan: Yes, so far as we are concerned.

Mr. Reger: I offer in evidence the check to Grover & Gulick Lumber Company, dated September 28, 1926, for $8,000.00, made by Gilbert Stout.

Said check is marked Exhibit D-4.

Mr. Reger: We rest.

Case Closed.

EXHIBITS.

*Exhibits.*

Filed March 19th, 1928.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER, *et al.*, *Complainants,*
*and*
BOARD OF EDUCATION OF TOWNSHIP OF FRANKLIN, *et al.*, *Defendants.*
} Conclusions.

ON FINAL HEARING.

MR. LOUIS GERBER and MR. JAMES J. McGOOGAN, for Complaiants.

MR. JOHN F. REGER, for Defendant, Metropolitan Casualty Insurance Co., etc.

BUCHANAN, V. C.:

Defendant Stout contracted with defendant Board of Education to build a public school house at Middlebush, for $72,185.00. He gave bond to the Board in this sum, with defendant Metropolitan Casualty Insurance Company as surety thereon, for the faithful performance of the work and the payment of all sub-contractors, material men and laborers, substantially in accordance with the provisions of *Chapter* 175, *P. L.* 1918, *p.* 203.

Complainants furnished the lumber and mason materials, for the price of $6,890.53. On October 20th, 1926, they filed notice of lien claim for this amount, and thereafter filed their bill in this cause against the contractor and the Board, to enforce

such lien claim, under section 8 of the Municipal Lien Act, (Rev. 1918).

One or two subsequent lien claimants later applied and were made parties to this suit,—also the defendant Insurance Company.

Stout abandoned the contract about November 15th, and the Insurance Company, as surety, took it over. The Board of Education had still in its hands over $50,000.00 of the contract price. On December 20th the Insurance Company contracted with Perth Amboy Construction Company to finish the job for some $53,000.00,—the latter to use, and the Insurance Company to pay for, the materials theretofore delivered on the job, including complainants' lumber, etc.

About September 27th, the Board had made a payment of $10,494.04 to Stout on account of the contract, and on September 28th, Stout had paid to complainants, out of the funds so received, $8,000.00. Stout was already indebted to complainants to the amount of $30,000.00 on open account, in addition to the indebtedness on this Middlebush school job and complainants applied this payment of $8,000.00 on account of that prior indebtedness. About October 30th the Board paid another sum of over $10,000.00 to Stout on account of this contract, out of which Stout paid $6,000.00 to complainants, who applied it also to the open account.

The contract was duly completed and accepted. The other lien claimants have been paid. The fund in the hands of the Board should be paid to the Insurance Company, less the claim of complainant for the $6,890.53, if that claim be valid.

The Insurance Company contends that the complainants' lien claim must be deemed to have been paid out of the moneys received from Stout in September, inasmuch as complainants knew that Stout was making this payment out of moneys received by

*Conclusions.*

Stout from the Board on account of the very building contract for which the Insurance Company was surety. (The Insurance Company's contract was one of guaranty in the nature of suretyship: the Insurance Company will hereinafter be called the surety company.)

Admittedly the question is of novel impression in New Jersey. It has been considered in a number of cases cited by the defendant surety company, decided in some of the Western States, and it seems that the weight in number of those decisions is to the effect that complainants under the circumstances of this case, were equitably bound to apply the September payment to the debt due on the school building, since they knew that the payment came from moneys received on the school building contract,—although in the absence of such knowledge complainants would not have been under such duty.

The difficulty in the way of accepting these adjudications as authoritative is that they assume, without proving, that such an equity exists in favor of the surety.

As between debtor and creditor it is the debtor's legal right to direct that any payment he makes shall be applied to whichever of two or more debts he chooses; equally it is the creditor's legal right to select the application if the debtor fails to do so at the time of payment. *Terhune v. Colton,* 12 *N. J. Eq.* 232, *at* 237; *aff'd Id.* 312, *at* 320. These two rules of law are well established not only in New Jersey but generally. See *tit "Payment,"* 30 *Cyc.* 1228, *et seq.;* 21 *R. C. L.* 88 *et seq.*

It is also well established that these two principles are equally the law, as a general rule, notwithstanding that there be a surety for one of the debts, like all rules there are some exceptions to it, but as a general rule a surety has no right to insist that a debtor shall pay the debt guaranteed by the surety

instead of an unsecured debt; nor has he a right, where the debtor makes a payment to a creditor without direction as to which debt is to be credited, to insist that the creditor apply the payment to the secured debt instead of the unsecured debt. 30 *Cyc.* 1234; 21 *R. C. L.* 108; 32 *Cyc.* 170, *tit. Principal and Surety;* 28 *C. J.* 1005, *tit. Guaranty; Pingrey, Suretyship & Guaranty, Section* 97; *Stearns, Suretyship, 3d ed., Section* 96, *p.* 134; *Wilcox v. Fairhaven Bank,* 89 *Mass.* 270, *at* 274.

This general rule is quite logical. A surety is a contingent creditor. If and when he pays the debt which he has guaranteed, he becomes a creditor and stands in the shoes of the creditor whom he paid; but he has no greater rights, and there is no reason why he should have. As between two ordinary creditors neither one has a greater right than the other to insist on his debt being paid; a debtor has a right recognized in equity as well as law to prefer a creditor,—except to the extent that bankruptcy statutes interfere. So assuredly a contingent creditor would have no greater right than an actual creditor.

As has been said, there are exceptions to this general rule. They are variously stated in the different opinions and texts, but it is conceived that they are not susceptible of classification under any principles other than this; that where circumstances exist such as give rise to superior equities in favor of the surety, the legal rights of the debtor and creditor, above stated, will be subordinated to such rights of the surety. In other words, they are not legal exceptions to a legal rule, but cases where equitable rights arise to override legal rights.

For instance it is said by some of the authorities that where the money which is paid to the creditor is the very money for the payment of which a surety is surety, the surety has the right to insist that the payment shall be applied to that debt instead of to

another indebtedness,—and *Merchants Ins. Co. v. Herber,* 68 *Minn.* 420, is cited. In that case Herver was an agent of the Insurance Company,—and under his contract was to collect premiums, which were the property of the Insurance Company, and remit them to the Company. A surety gave bond for the faithful performance by the agent of his duties. The first month, the moneys collected by the agent and remitted to the company, were by the agreement of both applied to the discharge of a prior indebtedness of the agent to the company, on which the surety was not liable; the next month's collections were applied to the indebtedness due the first month; and so on; leaving an unpaid balance at the end of the agency, although in fact the agent had remitted to the company all the moneys he had collected during the term for which the surety was liable. The Court determined and rightly so, that the surety was not liable for the unpaid balance due to the company from the agent; the Court says that the surety was equitably entitled, so far as his liability was concerned, to have the remittances by the agent applied so as to extinguish the surety's liability. It would seem, however, that no equitable principles were really involved; the surety was discharged on pure legal principles; the agent had in fact done that which the surety had bound himself that the agent should do, namely to remit to the company all moneys of the company collected by him during the year of his agency.

It seems to be upon this so-called principle of the surety's right to direct the application of the payment of the very money for the payment of which he is liable, that the Western States reach their result in the cases similar to the case now *sub judice.* Let us see whether the circumstances are analogous to the Minnesota case; or whether under the circum-

stances of the present case, the surety has an equitable right superior to the legal right of the creditor.

It is conceded by all that if the payment made by Stout to the materialman lien claimant had been made out of Stout's own money,—say out of a legacy received by him,—the surety would have no right to insist that the payment should be applied to the debt on the Middlebush school for which it was surety. In fact it was made out of moneys received by Stout from the School Board, as a payment due him under his contract.

But the moment the money was paid over to Stout by the Board, it became and was his own money,—money which he had legally earned and which belonged to him alone; just as much as any other money he could have. It was not the money of the lien claimant,—hence the case is not like the Minnesota case. Neither was it the money of the Board, or of the surety company. Stout had made no assignment to the surety company. (There is a clause in Stout's agreement or application for the bond, which purports to operate as an assignment by Stout to the surety company, in the event of a breach or default by Stout, of all moneys then in the hands of the Board due or to become due to Stout under the contract,—but at the time of the payment by Stout to the lien claimant Stout had not defaulted on the contract.)

Not only was it Stout's own money, but there is nothing in the case from which this Court can find that the surety company had any right or interest therein. Stout had made no promise or agreement either to the board, or to the surety company, or to the materialman, that he would apply moneys received by him from the Board primarily to the satisfaction of claims of laborers and materialmen on the Middlebush school job. Neither is there any provision in the Mechanics Lien Act, (*Municipal*

*Mechanics Lien Act. Rev.* 1918, *p.* 1041), or in the statute under which the surety bond was given, (*P. L.* 1918, *p.* 203), nor in any other statute to which the attention of the Court has been directed, requiring either the contractor or the contractor's creditors, to make such primary application of moneys received by the contractor on his contract,—nothing either expressed or arising by necessary implication.

All this being so, how can this Court read into the statute a provision which the legislature has not enacted; or upon what grounds can the Court say that natural justice or equity requires a judicial extension of legal or equitable principles so as to accomplish that result for the benefit of the surety?

It is conceded by the surety company, and by most, if not all, of the authorities upon which it relies,—indeed no contention has ever been made to the contrary by any Court or text writer so far as this Court is aware,—that the moneys received by Stout from the Board are so far Stout's own money, unencumbered by any rights of others, that he could use such moneys to pay creditors who were entire strangers to the school house contract, even though such creditors knew the source of the moneys paid to them, and that the surety could not be heard to complain. This admission, it would seem, is fatal to the maintenance of the surety's claim; for if either the Board or the surety company had any equitable right in the moneys, after they were paid by the Board to Stout, to require Stout to pay or distribute such moneys in liquidating debts which he owed for labor or materials on the school house contract, it would be just as much of a wrong for Stout to use it in paying an antecedent debt to a stranger as to use it in paying an antecedent debt to the present lien claimant. Conversely, if Stout by using the money to pay an antecedent debt to a stranger would not violate the alleged equitable right of the Board or of the Surety

Company, he could not violate such alleged right by paying an antecedent debt to the lien claimant. A right which could be violated in the one instance and not in the other, (unless it be created by statute or arise out of some special contract or dealings between Stout and the Board or the Surety Company), —is a right of a kind of which this Court has no knowledge.

Indeed we may go one step further. If this Court had the power to create such a hybrid right, why should it exercise that power in the present instance? What sound argument is there for asking the Court to read such a provision into the statutes, or to adjudicate that a special equity to that effect arises in favor of the surety company in the present case?

First, as to the contention which has been made in some instances, that even where no surety is involved, the contractor is bound to use the moneys received by him on the contract, in paying the debts incurred by him on the contract. It is not apparent why there should be any greater legal or equitable restriction placed upon a building contractor as to what he shall do with the money he earns and has paid to him, than would be the case in any other business of similar nature. If A. as purchaser and B. as manufacturer enter into a contract for $100,000 worth of tires, it has never been contended that B. should be required to utilize the payments he receives from A. solely or primarily in paying for the cotton and rubber and labor used in the making of those particular tires.

Such a restriction, if it generally existed, would obviously be difficult of enforcement,—would be productive of a great amount of litigation, and would impose an almost intolerable handicap to business.

It may be thought that the existence of the Mechanics lien statute destroys the analogy between the two cases,—but why? That legislation was designed

to benefit laborers and materialmen on building contracts but it was not intended to impose any undue hardship on the owner,—nor does it. It does not make the owner liable for anything further than the contract price he agrees to pay,—unless he disregards the provisions of the act. Under the Municipal Mechanics Lien Act the lien is given only on the unpaid funds remaining in the hands of the municipality,—and so also in the general Mechanics Lien Act if the owner files his contract, the materialmen and laborers have no lien, and can acquire no rights to anything but the moneys remaining unpaid in the owner's hands.

Secondly, from the standpoint of a surety being involved. Here again it would be equally inadvisable to adopt such a restriction, generally, in all businesses,—nor has any such contention been urged, —nor is there any reason why it should be adopted. As has been seen, a surety is only a contingent creditor, and fundamentally is not entitled at most to any greater rights than an actual creditor,—and no one creditor has any greater right to payment than any other. No one is compelled to become a surety; he does so voluntarily (either for or without compensation) and has it open to him to demand some special agreement or protection for himself, if he thinks best, before becoming surety.

What is there in the case of a building contract that should require any different rules?

It is true that the statute requires that a municipality shall require a contractor to furnish a bond to insure the payment of all laborers and materialmen, and further enables such laborers and materialmen to recover from the surety who executes such bond, in the event they do not receive payment from the contractor or the municipality. This gives to the laborers and materialmen a right and an assurance of payment which they did not have prior to the

statute, and it might not be unfair to them for the legislature to require of them that they apply all payments received by them out of moneys paid by the municipality on the particular contract to the liquidation of claims arising out of that contract. But the legislature has not done this, so far,—and it is not perceived that there is anything inequitable or contrary to natural justice to the sureties in this legislative omission. There is no legal or other compulsion on a surety company to enter into such surety bonds; when surety companies do so, they do so for compensation, and are at liberty to insist, as a condition to their becoming sureties, upon special agreements or arrangements for their protection. They might require for instance that the instalments of contract price be paid by the municipality to the contractor and the surety jointly, so that the surety could control the application of such moneys. If the municipality or the 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 the fairly high premiums exacted.

It is concluded therefore that in the instant case, the lien claimant's claim has not been paid, and that the surety company has no legal or equitable right to insist that it must, so far as concerns the surety company, be deemed to have been paid.

Perhaps it should be said that some contention was made by the surety company, that the payment in question was not applied by the lien claimant to the antecedent debt. The proofs showed that it was so applied and credited on the creditor's books at the time it was received; the most that could be argued was that this was done by the bookkeeper without the special direction of any officer of the creditor company. But this would not be material: ob-

viously such act was the act of the company by its agent, and was accepted and thereby ratified by the company.

Moreover, even if there had been no application by the creditor, the result would be the same, for of course the antecedent debt was older than the lien claim debt, and under the law in this State if a payment be made without application by either debtor or creditor, the law will direct its application either to the older debt or to an unsecured debt instead of a secured debt. *Terhune v. Colton* 12 *N. J. Eq.* 232, *at* 238; *Id.* 312, *at* 320.

It is also argued by the surety company that an express declaration by the debtor as to the application of the payment is not necessary: it is sufficient if the intent clearly appear from the circumstances. That is true,—except that there must be some sufficient communication of that intent to the creditor. *Terhune v. Colton, supra, at p.* 237. There is no reason for such an argment in the instant case, however, for the debtor (Stout) was called as a witness, and not only testified that he made no direction as to application of the payment, but did not even claim that he had had even an undisclosed intent that application should be made to the debt on the Middlebush School, or that he had ever had any objection to the application which was made by the creditor.

The lien claimant is entitled to decree for its lien claim; the surety company is entitled to the balance of the moneys in the hands of the Board, under its right of subrogation to the rights of the contractor, having as surety performed the contractor's obligation, and having paid the other lien claimants.

Filed April 3rd, 1928.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER, *et al.*,
*Complainants,*
*and*
BOARD OF EDUCATION OF TOWNSHIP OF FRANKLIN, *et al.*,
*Defendants.*

On Bill, etc.
Final Decree.

This matter coming on to be heard, on notice, in the presence of Louis Gerber and James J. McGoogan, solicitors for the complainants, and John F. Reger, solicitor for the defendant Metropolitan Casualty Insurance Company of New York, and no one appearing for the other defendants:

And it appearing to the satisfaction of the court that the defendant Board of Education in the Township of Franklin in the County of Somerset, in this state, on July 9, 1926, entered into a contract in writing with the defendant Gilbert Stout for the erection of a public school building in said Township of Franklin wherein said Gilbert Stout agreed to erect said building for $72,185.00; that said work constituted a public improvement and was not completed by said contractor, but was completed by the defendant Metropolitan Casualty Insurance Company of New York; that said defendant Metropolitan Casualty Insurance Company had given its bond to said Board of Education of the Township of Franklin for the performance of said contract between said Board and Gilbert Stout; that said work was accepted by said Board of Education on January 9, 1928, and that there is a balance of $50,794.49

in the hands of said Board, remaining after the payment of $21,390.51 to said Gilbert Stout under said contract.

And it further appearing that the complainants on October 20, 1926, filed with said Board of Education of Township of Franklin their notice of lien claim for $6,890.53, the amount due them from said Gilbert Stout, for the value of materials furnished in the erection of said building under said contract; that said claim is a just lien for materials furnished in the execution of said contract; that said claim was duly filed; that there is due from the defendant Gilbert Stout to the complainants the sum of $6,890.53 with interest from October 30, 1926, and that said defendant Metropolitan Casualty Insurance Company of New York is entitled to the balance of the moneys in the hands of said Board of Education under its right of subrogation to the rights of said contractor Gilbert Stout, having as surety on his said bond performed his obligation under said contract, and having paid the other lien claimants; and no cause being shown or appearing to the contrary:

It is thereupon, on this twenty-seventh day of March, 1928, ordered, adjudged, and decreed, that the defendant Board of Education of the Township of Franklin, in the County of Somerset, do forthwith pay to the complainants, or their solicitor, out of the moneys remaining unexpended under said contract the sum of $6,890.53, being the amount for which said complainants filed their notice of lien claim, with interest at six per centum per annum from October 20, 1926, to date amounting to $581.10.

It is further ordered, adjudged and decreed, that the defendant Metropolitan Casualty Insurance Company of New York do forthwith pay to the complainants or to their solicitor their costs of this suit including a counsel fee of $300.00 which is hereby

allowed to said complainants, and to be taxed by the clerk in said costs.

Respectfully advised,
MALCOLM G. BUCHANAN, *V. C.*
E. R. WALKER, *C.*

Filed June 23rd, 1928.

IN CHANCERY OF NEW JERSEY.

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| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY, *Complainants,* *and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, GILBERT STOUT, THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *et al.*, *Defendants.* | On Bill, etc. Notice of Appeal. |

The Defendant, The Metropolitan Casualty Insurance Company of New York hereby appeals from the final decree made in the above entitled cause on March 27th, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated June 7th, 1928.

JOHN F. REGER,
*Solicitor for and of Counsel with Defendant, The Metropolitan Casualty Insurance Company of New York.*

I conceive there is good cause for appeal in the above entitled cause.

JOHN F. REGER,
*Of Counsel with Defendant, The Metropolitan Casualty Insurance Company of New York.*

Filed July 17th, 1928.

IN CHANCERY OF NEW JERSEY.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants,*
*and*
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, GILBERT STOUT, THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *et al.*,
*Defendants.*

On Bill, etc.
Amended Notice of Appeal.

The Defendant, The Metropolitan Casualty Insurance Company of New York, hereby appeals from the final decree made in the above entitled cause on March 27th, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey on the advice of the Honorable Malcolm G. Buchanan, Vice Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated June 7th, 1928.

JOHN F. REGER,
*Solicitor for and of Counsel with Defendant, The Metropolitan Casualty Insurance Company of New York.*

I conceive there is good cause for appeal in the above entitled cause.

JOHN F. REGER,
*Of Counsel with Defendant, The Metropolitan Casualty Insurance Company of New York.*

Filed June 26th, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants-Appellees,*
*and*
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, *et al.*,
*Defendants,*
THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
*Appellant.*

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On Appeal from the Court of Chancery of New Jersey.
Petition of Appeal of The Metropolitan Casualty Insurance Company of New York.

To the Honorable The Court of Errors and Appeals in the Last Resort in all Causes:

The petition of The Metropolitan Casualty Insurance Company of New York, the appellant in the above entitled cause respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey on the advice of the Honorable Malcolm G. Buchanan, Vice Chancellor, bearing date March 27th, 1928, in a certain cause in said Court of Chancery wherein the said John B. Grover and John H. R. Gulick, partners, trading as Grover & Gulick

Lumber Company, were complainants and the Board of Education of the Township of Franklin in the County of Somerset, Gilbert Stout, The Metropolitan Casualty Insurance Company of New York and others were defendants, in this respect, to wit, that the said decree Adjudges and Decrees that the defendant, The Board of Education of the Township of Franklin in the County of Somerset do forthwith pay to complainants or to their solicitor out of the moneys remaining unexpended under their contract with defendant, Gilbert Stout for the erection of a public school building in the said Township of Franklin and for the performance of which contract defendant, The Metropolitan Casualty Insurance Company of New York gave its bond as surety to said The Board of Education of the Township of Franklin, the sum of $6,890.53, the amount for which said complainants filed their notice of lien claim, with interest thereon at six per cent per annum from October 20th, 1926, amounting to $581.10 and in that it further Adjudges and Decrees that the defendant, The Metropolitan Casualty Insurance Company of New York do pay to the complainants their costs of suit including a counsel fee of $300.00 which was thereby allowed to said complainants and to be taxed by the Clerk in said costs.

And petitioner appeals from the final Decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous, in that:

1. It decrees that there be paid to complainants or their solicitor the said sum of $6,890.53 out of the moneys remaining unexpended under the said contract between defendant, The Board of Education of the Township of Franklin in the County of Somerset and defendant, Gilbert Stout for the erection of a public school building, the performance of which contract was secured by the bond of petitioner, and thereby denies to petitioner, The Metropolitan

*Petition of Appeal.*

Casualty Insurance Company of New York, the right to have applied in satisfaction of complainant's claim for materials furnished to said building, a payment of $8,000.00 made to complainants by said defendant, Gilbert Stout on September 27th, 1926, out of moneys received by him from defendant, the said The Board of Education of the Township of Franklin in the County of Somerset, and then known by said complainants to be a payment on said contract for the erection of said school building.

2. It adjudges that there is due to complainants from said defendant, Gilbert Stout, the contractor for the erection of said school building, the sum of $6,890.53 being the amount for which complainants filed their notice of lien claim, whereas said defendant, Gilbert Stout, fully paid and satisfied said claim prior to the filing of said notice.

3. It grants to complainants the relief prayed for when it should have denied to complainants such relief.

Petitioner therefore prays that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

JOHN F. REGER,
*Solicitor for and of Counsel with Appellant.*

Service of the within petition of appeal is hereby acknowledged this 23rd day of June, 1928.

LOUIS GERBER,
*Solicitor of Complainants.*

Filed July 23rd, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY, *Complainants-Appellees,* *and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, *et al.,* *Defendants.* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *Appellant.* | On Appeal from the Court of Chancery of New Jersey. Acknowledge-of Service. |

Service of a copy of the Petition of Appeal filed by The Metropolitan Casualty Insurance Company of New York in the above entitled cause is hereby acknowledged this 28th day of June, Nineteen Hundred and Twenty-eight.

JOHN P. CULLEN,
*Solicitor for The Board of Education of the Township of Franklin in the County of Somerset.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY, *Complainants-Appellees,* *and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, *et al.,* *Defendants,* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *Appellant.* | On Appeal from the Court of Chancery of New Jersey. Acknowledgment of Service. |

Service of a copy of the Petition of Appeal filed by The Metropolitan Casualty Insurance Company of New York, in the above entitled cause is hereby acknowledged this 29th day of June, nineteen hundred and twenty-eight.

WM. C. VANDEWATER,
*Solicitor for Charles A. Williamson, Trading as Princeton Quarries.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| *Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners, Trading as* GROVER & GULICK LUMBER COMPANY, *Complainants-Appellees,* *and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, *et al.,* *Defendants,* THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *Appellant.* | On Appeal from the Court of Chancery of New Jersey. Acknowledgment of Service. |

Service of a copy of the Petition of Appeal filed by The Metropolitan Casualty Insurance Company of New York, in the above entitled cause is hereby acknowledged this 12th day of July, nineteen hundred and twenty-eight.

SAMUEL D. LENOX,
*Solicitor for Charles L. Conrad, Trustee in Bankruptcy for Gilbert Stout, Bankrupt.*

Filed July 3rd, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| *Between* JOHN B. GROVER, *et al.*, *Complainants-Appellees, and* THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, *et al.*, *Defendants-Appellants.* | On Appeal. Answer to Petition of Appeal. |

The Answer of John B. Grover and John H. R. Gulick, partners trading as Grover and Gulick Lumber Company, the above named Appellees, to the petition of appeal of the Metropolitan Casualty Insurance Company of New York, the Appellant.

1. These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on March 27th, 1928, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned and set forth; but, as to the substance and form of said decree these appellees beg leave to refer thereto when the same shall be produced.

2. These appellees are advised and believe that said decree is agreeable to equity, and they therefore pray that the same may be affirmed with costs to be taxed in favor of these appellees.

LOUIS GERBER,
*Solicitor of Appellees.*
JAMES J. MCGOOGAN,
*Of Counsel with Appellees.*

EXHIBIT C 1.

AGREEMENT BETWEEN
BOARD AND CONTRACTOR.

THIS AGREEMENT made this 19th day of July, A. D. 1926, by and between the BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, COUNTY OF SOMERSET AND STATE OF NEW JERSEY, party of the first part, hereinafter called the BOARD, and
GILBERT STOUT, having a place of business at KINGSTON, MIDDLESEX COUNTY, AND STATE OF NEW JERSEY, party of the second part hereinafter called the CONTRACTOR.

WITNESSETH: That the contractor and the Board for the considerations hereinafter named agrees as follows:

ARTICLE 1—SCOPE OF THE WORK

The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications entitled "GRADE SCHOOL BUILDING" to be erected on AMWELL ROAD AT MIDDLEBUSH, FRANKLIN TOWNSHIP, COUNTY OF SOMERSET AND STATE OF NEW JERSEY, the work comprising all "GENERAL CONSTRUCTION WORK" which includes Masonry, Steel and Iron, Roofing and Sheet Metal, Carpentry and Painting, all as prepared by JOHN NOBLE PIERSON & SON, CITY OF PERTH AMBOY, AND STATE OF NEW JERSEY, acting as and in these Contract Documents entitled the ARCHITECTS, and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

ARTICLE 2—TIME OF COMPLETION

The work to be performed under this contract shall be commenced immediately, and shall be substantially completed within 10 months from date hereof.

ARTICLE 3—THE CONTRACT SUM

The Board shall pay the contractor for the performance of this contract, subject to additions and deductions provided therein, in current funds, as follows:

SEVENTY THOUSAND, EIGHT HUNDRED NINETY-FIVE ($70,895.—) 00/100 DOLLARS, the price being made up as follows:—

| | | |
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| BASE BID ..... | | $66,011.— |
| ADDITIONS | | |
| Alternate No. 3A—For Ceramic Tile side walls for basement toilets ..... | | $1079.— |
| " No. 3B—For Ceramic Tile for floor of the main entrance; wainscot of the main entrance ..... | | 200.— |
| Forward Total ..... | | 1279.— |
| BASE BID FORWARDED..... | | $66011.— |
| TOTAL ALTERNATES FORWARDED ..... | | $1279.— |
| ADDITIONS CONTINUED | | |
| Alternate No. 4—For Alberene | | |

*Exhibits.*

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|---|---|---|
| | Stone toilet partitions ..... | 500.— |
| " | No. 6—For enamel brick window sills ..... | 145.— |
| " | No. 7—For plaster in the basement... corridors—walls | 540.— |
| " | No. 8—For Septic Tank and Tile Field.. | 250.— |
| " | No. 10A—For Johns Manville Roof.. | 1650.— |
| " | No. 12—For Chestnut trim ..... | 520.— |
| | | $4884.— |

4884.—

TOTAL AMOUNT OF CONTRACT. $70895.—

ARTICLE 4—PROGRESS PAYMENTS

The Board shall make payments on account of the Contract as follows: 85% of the value of labor and materials satisfactorily incorporated into the building at the time of calculating payments, and representing 50% of the value of materials delivered to the site, properly stored and protected and otherwise provided for, thus accumulating a reserve of 15% on labor and materials until the final payment is made which will be not less than 10 days after completion and acceptance of the work.

The contractor is required to file with the Architects on or before the fifth day of each month, an itemized statement of work done during the previous month. This statement when audited by the Architects and certified to by them shall be placed in the hands of the Board for action at their meet-

ing; payment to the contractor will occur during the same month the certificate is presented.

At the signing of this contract, the contractor shall deliver to he Architects, subject to their approval a Unit Schedule showing a complete list of the items entering into the construction of this building, the total of which shall equal the total contract price; the furnishing of this Unit Schedule is hereby made mandatory.

ARTICLE 5—ACCEPTANCE & FINAL PAYMENT

Final payment shall be due 10 days after substantial completion of the work, provided the work be then fully completed and the contract fully performed. Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architects shall promptly make such inspection, and when they find the work acceptable under the contract and the contract fully performed, they shall promptly issue a certificate for final payment, over their own signature, stating that the work provided for in this contract has been completed, and is accepted by them under the terms and conditions thereof, and that the entire balance found to be due the contractor and noted in said final certificate is due and payable. Before issuance of final certificate, the contractor shall submit satisfactory evidence to the Architects that all pay rolls, material bills and other indebtedness connected with the work have been paid.

If, after the work has been substantially completed, full completion thereof is materially delayed through no fault of the contractor and the Architects so certify, then the Board shall upon certificate of the Architects and without terminating the contract make payment of the balance due for that portion of the work fully completed and accepted.

Such payment shall be made under the terms and conditions governing final payment except that it shall not constitute a waiver of claims.

ARTICLE 6—THE CONTRACT DOCUMENTS

The general conditions of the contract, the specifications and the drawings together with this Agreement form the contract, and they are as fully a part of the contract as if hereto attached or herein repeated, and the following is an exact enumeration of the specifications and the drawings.

SPECIFICATIONS

Instructions to Bidders ..... 1- 7 inclusive
General Conditions ..... 1-16 "
Form of Agreement and Bond.
List of Separate and
Alternate Figures ..... 1- 2 "
Addenda to specifications dated
July 19, 1926.
General Construction Work..... 1-41 "

DRAWINGS

1-2-3-4-5-6-7-8.
Detail of Wardrobe.

ARTICLE 7—OPTION

The Board reserves the right at any time within a period of ninety days from date hereof of accepting any or all of the following separate or alternate figures:

Alternate No. 9, For Steel stairs and Alberne stone treads for the additional sum of.....$920.—
" No. 13, For window guards for the additional sum of... 290.—

*Exhibits.*

" No. 14, For Stadium seats for the additional sum ..... 645.—

ARTICLE 8—RESPONSIBILITY OF CONTRACTOR

It is further agreed that the contractor shall be responsible for any or all damages that may or shall happen to personal property, life or limb, either through the act, fault or neglect of himself or his workmen, of any subcontractor or the workmen of any subcontractor, and shall hold the Board free from any suits at law for such damages.

The Contractor and the Board for themselves, their successors and assigns, hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the party of the first part under the authority of a resolution to that effect has caused these presents to be signed in its behalf by its President and the attestation of its District Clerk, and its corporate seal to be hereto attached, and the party of the second part in like manner has hereunto set his hand and seal the day and year first above written.

BOARD OF EDUCATION
OF FRANKLIN TOWNSHIP
By CHAS. N. HOAGLAND, L. S.
*President.*

Attest:
THOMAS E. GIBSON, L. S.

Witness:
JOHN VOSS, L. S. as to
GILBERT STOUT, L. S.
GILBERT STOUT.

DATE, August 12, 1926.

JOB, Middlebush School.
ORDER Uo. 1.
FROM: Board of Education, Franklin Township.
OWNER.
TO: Gilbert Stout, CONTRACTOR.
TO: John Noble Pierson & Son, ARCHITECTS.

You are hereby authorized to use the Barnhart & Turner grey brick full—range of shades as selected and approved by the Building Committee and Architects, Factory No. 6, charging therefor the sum of $5. per M. additional to that allowed in the specifications. Total charges to be based on 35,000 at $175.

You are further authorized to use the Carey Built Up Roof, No. 14, to be put on under the supervision of the Carey Representative with no change in the price of the contract.

BOARD OF EDUCATION, FRANKLIN TOWNSHIP.
By J. E. Gibson, *District Clerk.*
O.k by Building Committee.
} OWNER

Gilbert Stout,
By Gilbert Stout.
} CONTRACTOR

John Noble Pierson & Son.
By Aylin Pierson.
} ARCHITECTS

Copy for Architects.

*Exhibits.*

DATE, Sept. 2, 1926.

JOB, Middlebush School.

ORDER No. 2.

FROM: Board of Education, Franklin Township, OWNER.

TO: Gilbert Stout, CONTRACTOR.

TO: John Noble Pierson & Son, ARCHITECTS.

You are hereby authorized to include the Stadium seats as set forth in alternate No. 4 of the bid and referred to in the contract and specifications and to charge therefor the sum of $645 additional to the contract.

BOARD OF EDUCATION, FRANKLIN TOWNSHIP.
By C. N. Hoagland, *President.*
Attest: T. E. Gefner, *D. C.*
} OWNER

Gilbert Stout.
By Gilbert Stout.
} CONTRACTOR

John Noble Pierson & Son.
By Aylin Pierson.
} ARCHITECTS

Copy for Owner.

*Exhibits.*

EXHIBIT C 2

General 25.

CHARTERED APRIL 22ND, 1874.

THE METROPOLITAN
CASUALTY INSURANCE CO.
OF NEW YORK.

No. 55725-26. $72,185.00.

KNOW ALL MEN BY THESE PRESENTS, That we, Gilbert Stout, of Kingston, New Jersey, as principal, and THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a corporation organized and existing under the laws of the State of New York, and authorized to do business in the State of New Jersey, are held and firmly bound unto THE BOARD OF EDUCATION OF MIDDLEBUSH, Franklin Township, New Jersey, in the sum of Seventy-two Thousand One Hundred Eighty-five and 00/100 Dollars, for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

SIGNED this 22nd day of July, 1926.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that whereas the above named principal did on the day of , 19 , enter into a contract with the BOARD OF EDUCATION OF MIDDLEBUSH, Franklin Township, New Jersey,

for the construction of the Middlebush Grade School, Middlebush, New Jersey,

which said contract and specifications are hereto annexed and is made a part of this the bond the same as though set forth herein:

Now, if the said Gilbert Stout,

shall well and faithfully do and perform the things agreed by it 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 materialmen or laborer having just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modification, omission or additions in or to the terms of the said contract or in or to the plans or specifications therefor shall in any wise affect the obligation of said surety on its bond, and that said surety shall at its or their own cost, defend the Board of Education of Middlebush, Franklin Township, N. J., in all actions or proceedings founded upon a claim growing out of the award of said contract, which may be instituted by any person not a party to said contract.

GILBERT STOUT.

. . . . . .

Sealed and delivered in the presence of
CHAS. VASS.

*Exhibits.*

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK
By FRANK J. BURNS,
*Attorney-in-fact.*

Attest:
GENEVIEVE DEVINE,
*Attorney-in-fact.*

F. & S. 1080A—5M—12-24—RY.

THE METROPOLITAN CASUALTY INSURANCE COMPANY
OF NEW YORK

HOME OFFICE, 55 FIFTH AVENUE, NEW YORK, N. Y.

No. 204-1

GENERAL POWER OF ATTORNEY

(BONDS FOR LIMITED AMOUNTS)

---

KNOW ALL MEN BY THESE PRESENTS:

That THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a New York Corporation, having its principal office in the City, County and State of New York, doth hereby make, constitute and appoint *HENRY P. REARDON, FRANK J. BURNS, GENEVIEVE DEVINE, CHARLES D. BRUNET AND MILDRED A. BINDER,* all of the State of New Jersey, its true and lawful Attorneys-in-Fact, with full power and authority, to execute on behalf of the Company, as Surety, bonds, recognizances, undertakings and contracts of suretyship: provided the penal sum of

no one of such bonds, recognizances, undertakings and contracts of suretyship: provided the penal sum of no one of such bonds, recognizances, undertakings and contracts shall be in excess of Unlimited Dollars, and provided such bonds, recognizances, undertakings and contracts shall be signed by either Henry P. Reardon or Frank J. Burns jointly with Genevieve Devine, Charles D. Brunet or Mildred A. Binder, and the said bonds, recognizances, undertakings and contracts, when so signed, sealed and delivered shall bind the Company as fully, to all intents and purposes, as if done by the duly authorized officers of the Company with the seal of the Company thereto affixed; and the Company hereby ratifies and confirms all and whatsoever the said Attorneys-in-Fact may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, pursuant to a resolution passed by its Board of Directors, at a meeting held on the 12th day of September, A. D. 1923, a certified copy of which is hereto annexed, has caused these presents to be sealed with its corporate seal, duly attested by the signature of its Vice-President and Assistant Secretary this 15th day of July, A. D. 1926.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.

By L. E. MACKALL,
*Vice-President.*

S. K. MCCLURE,
*Assistant Secretary.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss:

On this Fifteenth day of July, in the year 1926, before me personally came L. E. Mackall, to me

known, who, being by me duly sworn, did depose and say: That he resides in New York, N. Y.; that he is Vice-President of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority.

J. V. HINDES,
*Notary Public.*

COPY OF RESOLUTION.

Resolved, That this Company do, and it hereby does, authorize and empower its President or one of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed; and, in its name and as its attorney or attorneys-in-fact, or agent or agents, to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or territory of the United States, or by rules, regulations, orders,

customs, practice or discretion of any board, body, organization, office or officer, local, municipal, or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of the same; the nature, class or extent of the instruments so authorized to be specified in such power of attorney.

I, S. K. McClure, Assistant Secretary of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, hereby certify that at a meeting of the Board of Directors of said Company, duly called and held at the office of the Company at City of New York, on the 12th day of September, A. D. 1923, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and seal of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, this Fifteenth day of July, A. D. 1926.

S. K. McClure,
*Assistant Secretary.*

*Exhibits.*

I, S. K. McClure, Assistant Secretary of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, do hereby certify that I have compared the copy of the power of attorney overleaf with the original now on file in the home office of said Company, and that the same is a true and correct copy, and that the said power of attorney has not been revoked and is now in full force and effect.

Given under my hand and the seal of the said Company, at New York, N. Y., this Fifteenth day of July, A, D. 1926.

S. K. McClure,
*Assistant Secretary.*

FINANCIAL STATEMENT OF

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

March 31st, 1926.

*Assets.*

| | |
|---|---|
| Government Bonds | $735,357.12 |
| State, County and Municipal Bonds | 256,480.00 |
| Railroad Bonds | 460,740.00 |
| Public Utility Bonds | 651,075.00 |
| Miscellaneous Bonds | 440,120.00 |
| Stocks | 1,926,325.25 |
| First Mortgage Loans | 477,650.00 |
| Collateral Loans | 100,000.00 |
| Cash on Hand and in Bank | 2,790,212.62 |
| Premiums in Course of Collection Not Overdue | 1,796,990.91 |
| Interest Accrued | 46,768.49 |
| All Other Assets | 62,810.99 |
| | $9,744,530.38 |

*Exhibits.*

*Liabilities.*

| | |
|---|---|
| Reserve for Unearned Premiums.... | $3,224,353.04 |
| Reserve for Unadjusted Losses ..... | 1,347,926.85 |
| Reserve for Federal and State Taxes | 112,370.67 |
| Commissions on Uncollected Premiums ..... | 354,784.64 |
| Voluntary Reserve for Contingencies ..... | 100,000.00 |
| All Other Liabilities ..... | 103,890.21 |
| CAPITAL ..... | 2,250,000.00 |
| NET SURPLUS ..... | 2,251,204.97 |
| | $9,744,530.38 |

| | |
|---|---|
| SURPLUS TO POLICYHOLDERS | $4,501,204.97 |
| Amount of All Losses Paid to Date. | $11,867,601.15 |

State of New York, }
County of New York. } ss:

S. K. McClure, being duly sworn, says that he is Assistant Secretary of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK; that the foregoing is a true and correct statement of the financial condition of said Company, as of March 31, 1926, to the best of his knowledge and belief.

S. K. McClure.

Subscribed and sworn to before me this 23rd day of June.

J. V. Hindes,
*Notary Public, New York County, No.* 477.
*New York County Register No.* 7582.

My Commission Expires March 30, 1927.
Gen'l 111 Sworn Financial Statement Rev. 4-26.
Made in U. S. A.

EXHIBIT C 3.

NOTICE OF LIEN CLAIM.

NOTICE IS HEREBY GIVEN by John B. Grover and John H. R. Gulick, partners, trading as GROVER & GULICK LUMBER COMPANY, having their principal office for the transaction of business in the Township of Princeton, County of Mercer and State of New Jersey, that it has furnished material which was actually used in the execution and completion of a certain contract for the construction of a public school in the Township of Franklin, in the County of Somerset and State of New Jersey, which said contract was made between the Board of Education of the said Township of Franklin and Gilbert Stout, contractor, and bears date the 19th day of July, A. D. 1926; that the said material was furnished for the said Gilbert Stout, the contractor aforesaid.

A statement of the materials furnished as aforesaid by claimant is as follows:

The supplying and furnishing of lumber and mason materials in the execution and construction of the aforesaid work.

The amount of the claimants' demand after deducting all just credits and off-sets is the sum of $6,890.53, which is the sum claimed as justly due and owing to the claimants from the said Gilbert Stout, contractor.

For the full value of said materials furnished by claimants, a lien is claimed upon the moneys in the control of the Board of Education of the Township of Franklin, in the County of Somerset and State

of New Jersey due or to grow due under the said contract between the said Board of Education and the said Gilbert Stout.

GROVER & GULICK LUMBER COMPANY.
By JOHN H. R. GULICK.

Dated October 20th, 1926.

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } SS:

John H. R. Gulick, of full age, being duly sworn according to law on his oath, deposes and says that he is a member of the partnership consisting of himself and John B. Grover, partners, trading as Grover and Gulick Lumber Company, the above-named claimant; that he is familiar with the subject matter of the above mentioned claim, that he has read the foregoing notice of claim and is familiar with the subject matter thereof and that all the matters and things therein stated and alleged are true.

JOHN H. R. GULICK.

Subscribed and sworn to before me this 20th day of October, A. D. 1926.

O. DAYTON OLIPHANT,
*M. C. C. of N. J.*

EXHIBIT D-1.

To—

You are hereby authorized, empowered and directed to pay to the Grover and Gulick Lumber Company the sum of $ out of and from any and all monies due or to become due to me from the Board of Education of

under a contract between the said Board of Education of
and myself, dated the day of , 1926, for the erection of a public school building in said Township.

.....

EXHIBIT D 2.

AGREEMENT OF INDEMNITY.

In Consideration of THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (hereinafter called the Company), becoming surety on the bond of Gilbert Stout of Kingston, New Jersey, in favor of Board of Education, Middlebush, Franklin Township, New Jersey, which bond is hereinbefore more particularly described, for which the undersigned (hereinafter called the Principal) makes application, and to induce said Company to become surety on said bond, said Principal having heretofore made the foregoing statements, which statements are made a part of this agreement, and well knowing in the event of the execution of said bond by said Company that it will rely on the truth thereof, said Principal hereby warrants to be true each and every of said statements, and the said Principal for himself, his heirs, executors, administrators, executors and assigns, or for itself, its successors and assigns, agrees jointly and severally as follows:

That said Principal will pay to the Company in advance a premium or premiums of $..... for the bid or proposal bond (the same to be credited on the premium for the faithful performance bond), and a premium of $1082.78 being computed at the rate of $15.00 per thousand dollars of the [contract]

amount stated above for the { term of two years / or fraction thereof, } and an additional premium of $541.34 at the rate of $7.50 per thousand dollars of the [contract] amount stated above, annually in advance thereafter, until the Principal shall have served upon THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, at its office in the City of New York, competent legal written evidence of its discharge from such suretyship and from all liability by reason thereof. Should the contract exceed the amount stated herein, the Principal agrees to pay to THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK as excess, or additional premium, a further sum calculated at the same rate per thousand dollars for such excess contract amount. If the contract or specification carries a guaranty or maintenance provision extending the bond beyond acceptance of the work, or if the bond applied for herein is one to guarantee the maintenance, the said Principal agrees to pay in advance and in addition to above consideration premium or charge, a maintenance premium or charge of $..... for the entire term thereof, said maintenance premium being computed at the rate of $..... per thousand dollars of the { bond / contract } amount per annum. √ No Maintenance.

That, in further consideration of its becoming surety as above, the said Principal does hereby covenant and agree to indemnify the said Company, and save it harmless against all loss, cost, damage, charge and expense that may accrue to it, whether sustained or incurred by reason of the act, default, or neglect of said Principal, or on account of claims made under or in connection with the said bond, or any extension or continuation thereof, or in connec-

tion with any collateral deposited hereunder; hereby agreeing to repay to said Company all such loss, cost, damage, charge and expense, including the fees or other compensation and expenses of any and all attorneys and agents employed by it to investigate or adjust such claims.

That for the better protection of the said Company, and as of the date hereof, the said Principal does hereby assign, transfer and convey to the said Company, all right, title and interest in and to all the tools, plant equipment and materials of every nature and description that said Principal may now or hereafter have upon said work, or in or about the site thereof, including as well materials purchased for or chargeable to said contract, which might be in process of construction, or storage elsewhere, or in transportation to said site, hereby assigning and conveying also all rights in and to all sub-contracts, which have been, or may hereafter be entered into, and the materials embraced therein, and authorizing and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of such tools, plant equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect as of the date hereof should the said Principal fail, or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in the event of any default on the part of the said Principal under the terms of said contract.

That the said Company, as surety on said bond, as of this date, shall be subrogated to all our rights, privileges and properties as principal and otherwise in said contract, and said Principal does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and

any and all moneys and properties that may be due and payable to said Principal at the time of such breach or default, or that may hereafter become due and payable to said Principal on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that all such moneys and the proceeds of such payments and properties shall be the sole property of the said Company, and to be by it credited upon any loss, damage, charge and expense sustained or incurred by it as above set forth under its bond of suretyship.

That the vouchers or other evidence of payments made by the Company under its obligations of suretyship shall be conclusive evidence of the fact and extent of the liability of the undersigned to the said Company under said obligation, whether said payments were made to discharge a penalty thereunder, incurred in the investigation of a claim made thereon, adjusting a loss or claim in connection therewith, or in completing the work covered by said contract, and whether voluntarily made or paid after suit and judgment against said Company.

That if the said Company shall obtain co-surety or co-sureties on said bond, or if the said Company shall reinsure all or any part of the said bond, such co-suretyship or such reinsurance shall in no way release the said Principal from any of the covenants, agreements or obligations contained in this agreement, it being the intention of this instrument that the obligation of the said Principal shall apply as well to such co-surety or co-sureties and said reinsuring companies as to the said Company, and the said Principal will in like manner indemnify any other surety or sureties which the said Company has procured or may procure to execute or join with it in executing said bond; and the said Principal will in like manner pay to said other surety or sureties

all damages for which said Principal shall become responsible before said Company shall be compelled to pay the same, it being hereby agreed that this instrument shall insure to the benefit of any and all such surety or sureties.

That any changes in the contract or bond hereinafter made, whether or not consented to by the said Principal, shall in no way relieve the said Principal from any liability under the terms of this agreement, the said Principal hereby waiving notice of any such changes.

Witness the signature and seal of said Principal this 1st day of September, 1926.

IF INDIVIDUAL, SIGN HERE:

GILBERT STOUT,
*Applicant.* [Seal].

Witness:
ALBERT C. PENN, JR.

EXHIBIT D 3.

This agreement made this 20th day of December, 1926, between the Metropolitan Casualty Insurance Company of New York, and the Perth Amboy Construction Company of Perth Amboy, New Jersey, WITNESSETH: that,

WHEREAS, on or about July 20th, 1926, the Metropolitan Casualty Insurance Company became surety upon the bond of Gilbert Stout, guaranteeing the faithful performance of its contract with the Board of Education of Middlebush, New Jersey, to construct a schoolhouse described as the Middlebush Grade School; and,

WHEREAS, the said Gilbert Stout defaulted his contract on or about November 13th, 1926—notice of the said default having been given to the Metropol-

itan Casualty Insurance Company by the Board of Education on November 17th, and

WHEREAS, the Metropolitan Casualty Insurance Company has elected under its rights as surety, to take over and complete the said contract; and

WHEREAS, The Perth Amboy Construction Company has proposed to the Metropolitan Casualty Insurance Company to assume the unfinished original contract and complete it in accordance with the original plans and specifications for the consideration of $53,190.00.

NOW THEREFORE, in consideration of the payment by the Metropolitan Casualty Insurance Company of New York to the Perth Amboy Construction Company of the sum of $53,190.00 in the manner hereinafter provided, the said Perth Amboy Construction Company agrees as follows:

(1) To furnish and pay for all the labor and material necessary to complete the erection of the Grade School at Middlebush, Franklin Township, New Jersey, in strict accordance with the contract, plans and specifications under which the said Gilbert Stout was obligated to perform, and the said contract, plans and specifications are by reference thereto incorporated herein.

(2) To perform the contract and complete the same under the direction and to the satisfaction, approval and acceptance of Aylin Pierson, Architect.

(3) To assume all of the existing sub-contracts made and entered into by the said Gilbert Stout in connection with the contract aforesaid; to wit:

Outstanding on existing sub-contracts as known

to date; to be assumed by the Perth Amboy Construction Co.

| | |
|---|---|
| Ross Fireproofing Co.—New Brunswick, N. J. | $4082.24 |
| Arny Steel Co.—Elizabeth, N. J. | 325.00 |
| Howell Lumber Co.—New Brunswick, N. J. | 6400.00 |
| Atlantic Terra Cotta Co.—New York City | 1065.00 |

(4) To furnish a surety bond before entering into the work, guaranteeing the faithful performance of this contract, and the payment of all labor and material bills, the said surety bond to be payable to the Metropolitan Casualty Insurance Company and in the manner and form satisfactory to it. Premium on said bond to be paid by the Metropolitan Casualty Insurance Company.

(5) To provide whatever insurance is required by the Laws of the State of New Jersey.

THE METROPOLITAN CASUALTY INSURANCE COMPANY agrees as follows:—

(1) To pay the sum of $53,190.00 in monthly installments upon estimates earned by the contractor as and when allowed by the Architect under the terms of the original contract between Gilbert Stout and the Board of Education. The difference between the amount as received on the estimates and the agreed price as set forth herein to be paid by the Metropolitan Casualty Insurance Company to the Perth Amboy Construction Company upon completion of the work as accepted by the Architect.

*Exhibits.*

(2) The Metropolitan Casualty Insurance Company agrees to pay all bills for labor accrued up to the date of this contract and to pay for all material delivered on the site of the contract up to the date hereof; to wit:

| | |
|---|---|
| Lumber—Grover & Gulick ..... | $6890.53 |
| Sand & Gravel—Federal Trucking Co. | 817.30 |
| Steel-Ross Fireproofing Co. ..... | 317.76 |
| Cinder Brick — Hudson Fireproof Block Co. ..... | 3518.25 |
| Structural Steel—Massilon Steel Co.. | 1075.00 |
| Steel—Arny Steel Company ..... | 800.00 |
| Millwork—Howell Lumber Company. | 1350.00 |
| Cement—Howell Lumber Company... | 502.09 |
| Terra Cotta—Atlantic Terra Cotta Co. | 735.00 |
| Brick—Barnhart & Doremus ..... | 1000.48 |
| Gas & Oil—E. T. Smith ..... | 15.42 |

WITNESSETH herewith our signature in consideration of the above terms as set forth, executed this 20th day of December, 1926.

THE METROPOLITAN CASUALTY INS. CO. OF N. Y.

By Arthur B. Cross,
*Supt. of Claims.*

Perth Amboy Construction Co.
Leon Gutman,
*Pres.*

Witnessed:
F. T. Flynn,
Herman F. G. Hartung.

*Exhibits.*

EXHIBIT D 4.

PRINCETON BANK AND TRUST COMPANY 55-303

GILBERT STOUT
CONTRACTOR & BUILDER

PRINCETON, N. J., Sept. 28, 1926. No. 110794

Pay to the Order of
GROVER & GULICK LBR. CO. $8000.00/100

Eight Thousand and 00/100.....Dollars

3 Members Federal Reserve Bank 3
Brown, Lent & Pett, 110 William St.

GILBERT STOUT.

ENDORSEMENT.

Pay to the Order of
PRINCETON BANK & TRUST CO.
For Account of
GROVER & GULICK LUMBER CO.

# New Jersey Court of Errors and Appeals

*Between* JOHN B. GROVER *and* JOHN H. R. GULICK, *Partners Trading as* GROVER & GULICK LUMBER COMPANY,
*Complainants-Appellees,*

*and*

THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN IN THE COUNTY OF SOMERSET, *et al.*,
*Defendants.*

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
*Appellant.*

Brief of Appellant.

This is an appeal from a final decree of the Court of Chancery of New Jersey in favor of complainants, and advised by Vice Chancellor Buchanan, to enforce a municipal lien claim on moneys of the Board of Education of the Township of Franklin, in the County of Somerset.

## STATEMENT OF THE CASE.

The Bill in this case was filed by John B. Grover and John H. R. Gulick, partners, trading as Grover & Gulick Lumber Company, complainants, for the purpose of enforcing an alleged lien on moneys of the

Board of Education of the Township of Franklin, in the County of Somerset, under the act known as the "Municipal Mechanic's Lien Law" (Revision of 1918), P. L. 1918 page 1041, for the price and value of materials furnished by complainants to Gilbert Stout, contractor, under his contract with the said Board of Education for the erection of a new school building at Middlebush, in the Township of Franklin, Somerset County, New Jersey. The appellant, The Metropolitan Casualty Insurance Company of New York, is the surety on the Bond of the contractor.

The final decree advised by Vice Chancellor Buchanan adjudges and decrees that the defendant, The Board of Education of the Township of Franklin, in the County of Somerset, pay to complainants out of the moneys unexpended under said contract the sum of $6,890.53, being the amount for which complainants filed their lien claim, with interest thereon from October 20, 1926.

Subsequently to the execution of the contract between the Board of Education and Gilbert Stout, Grover and Gulick, complainants-appellees, agreed with Stout to furnish certain materials for the erection of said school building at a cost of $7,418.—. In addition to this list of materials agreed to be furnished, Stout later ordered other materials at a cost of $1,272.53, making the total charge of appellees against Stout for materials for the Middlebush school $8,690.53. All of these materials were furnished for the building as per contract except a quantity of flooring, for which a credit of $1,800.— is given on appellees' bill, leaving an allegel balance due appellees of $6,890.53. (See testimony of John H. R. Gulick, page 31).

During the week preceding a meeting of the Board of Education held on September 25, 1926, appellees went to the contractor, Stout, with an order for money directed to the Board of Education, which they had had prepared by their attorney, and which Mr.

Stout signed at their request. This order directed a payment of $8,000.— to appellees out of the moneys due, or to become due, to Stout from the Board of Education under the contract for the erection of said school building. (Page 32, line 30). The original of this order could not be produced at the hearing, but it was admitted that a copy offered in evidence by consent of Counsel was the form of the order and reads as follows: (Exhibit D 1, page 88).

"To

You are hereby authorized, empowered and directed to pay to the Grover and Gulick Lumber Company the sum of $ out of and from any and all moneys due, or to become due, to me from the Board of Education of under a contract between the said Board of Education of and myself, dated the day of , 1926, for the erection of a public school building in said Township.

. . . . . ."

Mr. Gulick attended the meeting of the Board on September 25 and presented the order which the Board refused to honor, but did authorize a payment to the contractor of $10,494.04. (See testimony of Conrad Icke, p. 4 and l. 10). Thereupon Mr. Gulick saw Stout and solicited and received from him a check for Eight Thousand Dollars, dated September 28, two days ahead, with the understanding and agreement that appellees might use the check if the payment actually came through to Stout from the Board, it being arranged that if the money was not received by Stout, that Stout would notify appellees not to use the check. (Page 42, line 30). The payment was received by Stout and appellees' check of Eight Thousand Dollars was paid out of these moneys. This shows conclusively and it was admitted

at the hearing that appellees knew that the payment which they then received came from the Board of Education out of moneys due to Stout under his contract for the Middlebush school. (Page 28, line 40).

This check for $8,000.— was handed by Mr. Gulick to his bookkeeper without any specific direction as to its application. (Page 35, line 10). It is claimed, however, by appellees that just before the Notice of Lien Claim was filed application was made of the payment to the older items of Stout's account. (Page 34, line 30).

On October 30, 1926, Stout received another payment on the Middlebush school of $10,896.47, and out of this there was paid to appellees through Mr. Theodore Potts, $6,836.70. (See testimony of Gilbert Stout, page 41, line 20, and John H. R. Gulick, page 37, line 30). This payment of $6,836.70 appellees also applied to the other items of their account with Stout. There was no proof that appellees had knowledge that this last payment was a part of the moneys received by Stout on the Middlebush school, although the testimony does show that appellees' Notice of Lien Claim was served on the Board of Education on October 20, only ten days before the second payment was made to appellees, and it is rather significant that this second payment made by Stout to appellees was for almost the same amount for which the Notice of Lien was given.

It, therefore, appears that out of the two payments made to the contractor on this Middlebush school aggregating $21,390.51, appellees received $14,036.70, all of which they claim was applied to other items of Stout's account instead of to their account with him on the Middlebush school, and they claim a lien for the whole amount due them for materials furnished on this job.

On or about November 13, 1926, after receiving the two payments above mentioned, Stout defaulted on

his contract and the appellant, The Metropolitan Casualty Insurance Company of New York, as surety, on the bond of the contractor, was obliged to complete the building and the contract for the completion of the building was let by the Surety Company to Perth Amboy Construction Company. (Exhibit D 3, page 94).

The building was completed at a loss to the surety company of approximately $19,000.— in excess of the balance due on the contract (page 46, line 10) and its loss will be further increased if appellees are permitted to enforce their lien.

## GROUNDS OF APPEAL.

Appellant contends that this decree is erroneous in that it denies to appellant the right to have applied in satisfaction of appellees claim for materials furnished to said school building, the payment of $8,000.— made to appellees by said contractor, Gilbert Stout, during the progress of the work and before the default of the contractor, out of moneys received by him from the said Board of Education, and then known by appellees to be a payment on said contract for the erection of said school building.

## ARGUMENT.

The title of the act known as the "Municipal Mechanics' Lien Law," revision of 1918, P. L. 1918, page 1041, under which appellees' lien is claimed is as follows:

> "AN ACT TO SECURE THE PAYMENT OF LABORERS, MECHANICS, MERCHANTS, TRADERS AND PERSONS EMPLOYED UPON OR FURNISHING MATERIALS TOWARD THE PERFORMING OF ANY WORK IN CITIES, TOWNS, TOWN-

SHIPS AND OTHER MUNICIPALITIES IN THIS STATE;''

and the first section of the act provides as follows:

1. Any person who as laborer, mechanic, merchant or trader or sub-contractor, shall hereafter, in pursuance of or conformity with the terms of any contract for any public improvement made between any person or corporation and any county, city, town, township, public commission, public board or other municipality in this State authorized by law to make contracts for the making of any public improvement, perform any labor or furnish any materials toward the performance or completion of any such contract shall, on complying with the provision of the second section of this act, have a lien for the value of such labor or materials, or both, upon the moneys in the control of said municipality due or to grow due under said contract to the full value of such claim or demand, and these liens may be filed, and to the extent of the amount due or to grow due under said contract, become absolute liens to the full or par value of all such work, and materials in favor of every person and his representatives and assigns who shall be employed by or furnish materials to the contractor or to any sub-contractor under him; provided, that no such municipality shall be required to pay a greater amount than the contract price of the work and materials furnished, or the value thereof when no specific contract is made with respect to the same by the contractor or sub-contractor, respectively.

It will be observed that while the purpose of the act as stated in the title is to secure the payment of laborers, mechanics, merchants, traders and per-

sons employed upon or furnishing material toward the work of municipalities; the liability of the municipality under the proviso contained in the first section is limited to the amount of the contract price of the work and materials furnished, which would seem to indicate a legislative intent that moneys due under the contract should be applied to the claims arising under the contract; for, if a materialman or laborer, after receiving payment of moneys due under the contract might apply those moneys to other accounts and then file a lien claim and enforce payment out of the remaining moneys due under the contract, there would not be enough money to go around, and it would result in defeating or reducing the claims of other laborers or materialmen. If materialmen and laborers are to be paid in full, and the title of the act expresses that purpose, money paid under the contract could not be diverted to other purposes and a lien claimed for money thus diverted.

The act requiring bonds to be given to secure the performance of contracts for the erection of public buildings (P. L. 1918, page 203) is entitled as follows:

> "AN ACT TO PROTECT PERSONS PERFORMING LABOR OR FURNISHING MATERIALS FOR THE CONSTRUCTION, ALTERATION OR REPAIR OF PUBLIC WORKS."

This act provides 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 sub-contractors, 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, page 243).

Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer, or agent acting on behalf of the State or any county, city, town, township, village, borough, municipality, governed by a board of commissioners, or improvement commission, or school district aforesaid, in an amount not more than one hundred per centum (100%) of the contract price, and conditioned for the payment by the contractor, and by all sub-contractors of all indebtedness which may accrue to any person, firm or corporation, on account of any labor performed or materials furnished in the construction, erection, alteration or repair to such building, works or improvement.

Such bond shall be deposited with and held by such board, officer or agent for the use of any party interested therein.

The form of the bond as prescribed by Section 4 of this act (P. L. 1918, page 205) contains the following clause:

"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."

It seems clear that these two acts passed and approved in the same year evidence a legislative intent that the moneys due under municipal contracts for public work should be applied first to the payment for labor and material furnished under the contract and not diverted to other purposes.

The bond given by the appellant in the amount of $72,185.— was in the form prescribed by the statute and was conditioned as follows: (Exhibit C 2, page 79):

> Now, if the said Gilbert Stout,
> shall well and faithfully do and perform the things agreed by it to be done and performed acording to the terms of said contract, and shall pay all lawful claims of sub-contractors, 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 materialmen or laborer having just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.
>
> The said surety hereby stipulates and agrees that no modification, omission or additions in or to the terms of the said contract, or in or to the plans or specifications therefor shall in any wise affect the obligation of said surety on its bond, and that said surety shall at its or their own cost, defend the Board of Education of Middlebush, Franklin Township, N. J., in all ac-

tions or proceedings founded upon a claim growing out of the award of said contract, which may be instituted by any person not a party to said contract.

By the terms of the indemnity agreement which accompanied the contractor's application for the bond (Exhibit D 2, page 89) it was agreed as follows:

That the said Company, as surety on said bond, as of this date, shall be subrogated to all our rights, privileges and properties as principal and otherwise in said contract, and said Principal does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to said Principal at the time of such breach or default, or that may hereafter become due and payable to said Principal on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that all such moneys and the proceeds of such payments and properties shall be the sole property of the said Company, and to be by it credited upon any loss, damage, charge and expense sustained or incurred by it as above set forth under its bond of suretyship.

At the time of the contractor's default on his contract there remained in the hands of the Board of Education $49,564.49 (page 27, l. 10), and as appellant was required to complete the school building it was thereby subrogated to the rights of the contractor in the moneys payable under the contract. In completing the building appellant expended approximately $70,000. (Page 46, l. 20).

## POINT I.

### APPELLANT HAS AN EQUITY IN THE MONEYS DUE UNDER THE CONTRACT FOR THE PERFORMANCE OF WHICH IT BECAME SURETY, SUPERIOR TO ANY EQUITY OF APPELLEES, AND IS ENTITLED TO HAVE THE MONEYS HERETOFORE PAID TO APPELLEES, APPLIED IN DISCHARGE OF THEIR ALLEGED LIEN CLAIM.

As surety on the bond and under the terms of the indemnity agreement above quoted, appellant having completed the building is subrogated to the rights of all the other parties to the contract, and has an equitable interest in the application of the moneys paid or to be paid under the contract.

In the case of Columbia Digger Co. vs. Rector, 215 Fed. Rep., p 670, it was held that materialmen who have received payment from the contractor, with knowledge that the money was part of the proceeds of the work, were bound as to the sureties to apply the payment to the indebtedness of the contractor on that particular work.

The Court said:

> "It is contended that the sureties had no equity in this money. The rule has been laid down in this Circuit, under a statutory bond, similar to the one in question, that the materialman has a lien (an equitable lien) upon the funds in the hands of the city, not limited to the percentage retained under the terms of the contract, and that the surety who, upon the failure of his principal, discharges the claim of the materialmen has a like lien by subrogation, superior to that of his principal's assignee. First National Bank vs. City Co., 114 Fed. 529, 52 C. C. A. 313; Hemingsen vs. U. S. and Co., 143 Fed. 810, 74 C. C. A. 484. This is but another

way of stating the rule laid down by the Washington Court that the money to be paid under the contract was the very money, the payment of which, to the laborers and materialmen was secured by the bond. If the surety has such a lien upon the money in the hands of the city, he must retain such lien or equity in the money as far as it can be clearly traced, which the Courts will protect until it is borne down by some superior equity, and in a case of this character, upon principles analogous to those controlling the marshalling of securities, the creditor may not realize upon such security, and, over the objection of a bondsman, having a potential equity in such security, apply it to an unsecured debt, depriving the bondsman of all benefit from it, and hold said bondsman for the secured debt."

That the surety on a building contract has an equitable interest in the moneys due under the contract which will be enforced in New Jersey is indicated by the case of St. Peter's Catholic Church vs. Van Note (66 N. J. Eq., page 78). In that case the sureties on the bond of the contractor were compelled to complete the contract after it had been abandoned by the contractor, and materialmen claimed an equity in the balance of the moneys due under the contract superior to the right of the sureties. It was held that the right of sureties is superior to the claims of materialmen and laborers for work done for and materials furnished to the contractor, as to the indemnity fund in the hands of the owners, and that sureties on a contractor's bond who, with the permission of the owner, had finished a house abandoned by the contractor, are entitled to be repaid, out of the moneys which thus became due upon the contract in preference to materialmen and laborers, who had served notices upon the owner when there was still nothing due and unpaid, and

Where a contractor defaults, and his sureties complete the contract, they are entitled to be subrogated to the rights of the owner against the contractor, and against persons furnishing materials to the original contractor, to the extent necessary to reimburse them for their necessary outlay.

The right of subrogation does not depend on any privity of contract, but is independent of any agreement, and rests upon principles of natural justice and equity.

Hackensack Brick Co. vs Borough of Bogota 86 N.J. Eq. p 143.

To the same affect is Union Stone Co. vs Freeholders of Hudson County 71 Eq. p 657 in which case it was held that the sureties' right relates back to the making of the contract.

See also note to State vs Schlesinger 45 A.L.R. p 379.

progress of the work, and that the surety's right of subrogation related back to the execution of the contract.

The same rule was laid down in the case of Hardaway Surety Co., 211 U. S., p. 552.

In the case of Cox vs. New England Eq. Insurance Co., 247 Fed. Rep., p. 955, a firm of contractors for a government building gave a bond conditioned as required by statute to pay all claims for materials and labor; and, in order to obtain the surety, agreed that in case of its default, all sums then or thereafter due on its contract should be the property of the surety, to be credited on any indebtedness arising out of the obligation. They completed the building, but left claims for labor and materials unpaid. The government without knowledge of such claims made the final payment to the contractors who paid it on an indebtedness to a bank, from which it was recovered by their trustee in bankruptcy.

Held that the fund having been traced and recovered the surety which had settled the claims covered by its bond, was entitled to an equitable lien thereon and to priority of payment over general creditors.

that this applied to a percentage of the contract price retained by the owner as indemnity till completion of the building.

In this case the Court said (page 83): "By the mere fact of performance of their contract they (the sureties) became equitable assignees of so much of the money held by the owners as was required to requite them for their expenditures."

In the case of Prairie State Bank vs. U. S., 164 U. S. 227, it was held that the equity of the surety on the Bond of a contractor for the erection of a government building in the money due under the contract was superior to the equity of a bank which had advanced money to the contractor during the progress of the work, and that the surety's right of subrogation related back to the execution of the contract.

The same rule was laid down in the case of Hardaway Surety Co., 211 U. S., p. 552.

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Held that the fund having been traced and recovered the surety which had settled the claims covered by its bond, was entitled to an equitable lien thereon and to priority of payment over general creditors.

Appellant insists that the foregoing cases support its contention that under the circumstances of the case at bar, it is subrogated to the rights of the parties for whose benefit the bond was given, and has an equitable lien on the moneys paid, or to be paid, under the contract, superior to any lien of appellees.

## POINT II.

## IT WAS INEQUITABLE FOR APPELLEES, WITH KNOWLEDGE OF THE SOURCE OF THE MONEY, TO APPLY TO OTHER PURPOSES, PAYMENTS RECEIVED BY THEM UNDER THE CONTRACT FOR THE SCHOOL BUILDING.

The appellees received the payment of $3,000.00 on September 26th, 1926, under circumstances which required them to credit it on their account for materials furnished to the school building. At the meeting of the Board of Education at which the payment was approved, out of which appellees received $8,000.00, Mr. Gulick attended before the Board with an order for $8,000.00 signed by the contractor, and according to Mr. Conrad Icke, a member of the Board, the fololwing conversation ensued: (Page 43, l. 30).

A. Well, Mr. Gulick says to me, he says: "I furnished in the neighborhood of $15,000.00 worth of material and I haven't had a cent of Mr. Stout yet, and I got to have the money, and I got to have it today." I said: "Today is Saturday; you couldn't cash a check; you had better go to see the custodian the first thing Monday morning and get him to go down with you and see if there is a check, and he can turn it right over to you."

When the Board declined to honor the order for

$8,000, Mr. Gulick went to Stout and what occurred was testified to by Stout as follows: (Page 42, line 20).

Q. How did you know you were to receive a payment on the Middlebush school? A. Mr. Gulick told me.

Q. He told you? A. Yes, sir.

Q. Did you make any further statement to him as to the check you were giving him for $3,000.00, than what you have testified to? A. Not to my knowledge, no.

Q. State everything you said to him about the check of $8,000.00? A. Well, I guess I have said about all. He told me I was going to have a payment on the Middlebush school. He told me on the Saturday. He said I could get that at Mr. Laird's store on the Monday. I told him I would make out a check and date it to him Tuesday, and if he heard from me not to cash it. I would let him know if I didn't get the check, so he wouldn't get it cashed.

Q. If you did receive the check, then you were not to notify him? A. No.

Q. But if you didn't receive the check, then you were to notify him not to use the check? A. Yes.

Q. That is what was said? A. Yes.

Q. Did you communicate with him at all? A. I don't remember it, no.

This testimony shows not only that appellees had knowledge of the source of the payment but that it was reasonably within the contemplation of all parties that the payment would be credited to the materials furnished on the school, for it was solicited from the board for that purpose. Then, too, it was received by appellees and turned over to their bookkeeper without directions. (Page 35, line 10).

It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for if his intention and purpose can

be clearly gathered from the circumstances of the case, the creditor is bound by it.

Dorris vs. Cummins, 157 Ill. App. 10.
2 Parsons on Contracts (5 Ed.) 630.
Note to McWherter vs. Bluthenthac, 96 A. S. R., p. 77.

The facts in the case of Dorris vs. Cummins above cited are very similar to the facts in the case at bar. The suit was to foreclose a lien for materials on a building and the materialman had applied a payment received by him from the contractor to another account of the contractor. The payment was turned over by the materialman to his bookkeeper who without any direction applied it to other items.

It was held that it would be unreasonable and unjust to permit it to be so applied.

But whatever may have been in contemplation of the parties, the appellees, knowing the source of the money and knowing that the performance of the contract was secured by appellant's bond, are chargeable in equity with the application of the payment to the materials furnished on the school job.

The general rule as to the application of payments is well stated by Pingrey in his work on Suretyship and Guaranty as follows:

The rule in regard to the application of payments is this: (1) The debtor at the time of payment has a right to designate the claim to which it shall apply. (2) If the debtor fails to make the application when he has the opportunity of so doing the creditor may apply the payment to any of several legal claims at his option. (3) If neither debtor nor creditor makes the application the law itself will apply the payment as justice and equity require.

As to a surety this doctrine aplies when the principal makes the payment from funds which are his

own free from any equity in favor of the surety. Thus, where the specific money paid to the creditor and applied to a debt of the principal for which the surety is not bound, is the very money for the collection and payment of which he is surety, he is not bound by such application and can have it applied to the debt for which he is surety. When justice and equity show that the surety has rights in the application of the money, it must be applied at his command.

Pingrey on Suretyship & Guaranty (2nd Ed.) Sec. 97.

Where a surety has become responsible for the payment of money by the principal, and the latter receives money under his contract which he pays over, the creditor or obligee has no right to apply such payments in any other way than to the relief of the surety.

32 Cyc. 171.

The rule that application will be made for the relief of a surety when justice and equity require it is stated as follows:

Where the money paid or property delivered by the principal to the creditor is the identical money or property for the payment or delivery of which the guarantor or surety is bound, or the payment is made with the proceeds or fruits of the very contract, business, or transactions covered by the obligation of the surety or guarantor, the latter is not bound by an application of the payment or property to some other debt of the principal—at least, if the source of the funds is known to the creditor or person receiving the payment; and in such case the surety or guarantor is equitably entitled to have the payment made or the property delivered applied to

the discharge of the debt, or the liquidation of the obligation, for which he is bound.

Vol. 21 A. L. R., p. 716.

The general rule that a surety cannot control the application of a payment is applicable solely in those cases where the principal makes the payment from funds which are his own and are free from any equity in favor of the surety to have the money applied in payment of the debt for which the surety is liable, but where the specific money paid, or property delivered to the creditor, is the identical money or property for the payment or delivery of which the debtor and his sureties have obligated themselves by the contract and undertaking, the surety is not bound by an application thereof to some other debt for which the surety is not liable, he is entitled to have the money or property applied to the payment of the debt for which he is liable.

21 R. C. L., p. 108.

In the case of Crane vs. Pac. Heat & Power Co., 36 Wash. 95, 78 Pac. 460 it was held:

Where a surety company guarantees the faithful performance of a school building contract pursuant to the statute for the benefit of laborers and materialmen, and the contractor pays the money received from the school district to a party who furnished material for the building and to whom the contractor was indebted also, upon an older unsecured account, the surety is not bound by an application of the school money to the old account, but is entitled to have the same applied on the school contract in discharge of its liability.

The Court said: "It will be seen that the moneys applied upon the old debts by the respondent were

the very moneys for the collection and payment of which the surety was obligated to the creditor, and under the rule announced, which seems to us to be the right and equitable rule, the surety is not bound by such application.''

Where the specific money paid to the creditor, and applied on a debt for which the surety is not bound is the very money for the collection and payment of which he is surety, he is not bound by such application and he is equitably entitled to have the money applied to the payment of the debt for which he is liable unless the creditor shows a superior equity.

Merchants Ins. Co. vs. Herber, 68 Minn. 420, 71 N. W. 624.

Sureties on the statutory bond of a contractor for a public improvement, conditioned for the faithful performance of the contract and the payment of all claims for labor and material, have the right to have payments made by the contractor to a materialman, from the proceeds of the contract applied in payment for materials furnished under such contract and are not bound by an application of such payments to a pre-existing indebtedness.

Columbia Digger Co. vs. Sparks, 227 Fed. 780. See also Cox vs. New Eng. Eq. Ins. Co., 247 Fed. 955.

In the case of Columbia Digger Co. vs. Sparks, 227 Fed. 782 above cited, it was contended by the plaintiff in error that the judgment was contrary to the weight of authority and cited in support of its position the case of Merchants Ins. Co. vs. Herber, 68 Minn. 420, 71 N. W. 624, which was reviewed by Vice Chancellor Buchanan in his conclusion filed in this case. The Court said of this case: ''The Minnesota case announces the general rule that a surety

cannot direct the application of payments made by a principal to another, and that he is bound by any application made by the principal and the creditor, or either of them; but the court goes on to say that this rule applies only to cases where the principal makes the payment from funds which are his own, free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable, and that where there is a special equity in favor of the surety the latter is entitled to have the money applied according to that equity. If as we hold, there was in the case at bar an equity in favor of the sureties to have the money applied in payment of the liabilities incurred by the contractor under the contract, the decision in the Minnesota case is authority in support of the doctrine last cited from Cyc., rather than against it."

In the case of the United States vs. January, 11 U. S., p. 572, the Court said:

"The law with respect to the application of particular payments where the debtor owes distinct debts has long since been settled. The debtor has the option if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it.

If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application.

In this case a majority of the Court is of the opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is; where the receiver is a public officer not interested in the event of the suit, and who receives an account of the United States, where the payments are indiscriminately made and where different sureties under distinct obligations are interested.

It will be generally admitted that moneys arising due and collected subsequent to the execution of the

second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety in the second bond.''

The same rule was applied in U. S. vs. Eckford, 42 U. S., p. 250.

A materialman cannot, by applying money paid him by a building contractor, who had received it on account of a particular job, upon accounts against the contractor, arising out of other jobs, retain a lien against the building upon account of which the money was paid, although he acts in ignorance of the source of the money and by his application of payment releases his lien on the property upon account of which the application is made.

Sioux City Foundry & Manufacturing Co. v. W. G. Merten, et al., 156 N. W., p. 367.

In the case of Sturtevant Co. vs. Fidelity, etc., Co., 92 Washington, page 52, 158 Pacific 740, the Court discussing a former opinion said:

Counsel for respondent call our attention to and rely upon our decision in Puget Sound State Bank v. Gallucci, 82 Wash., 445, 457, 144 Pac. 698, Ann. Cas.1916 A,767, where our holding seems to be, in effect, that a creditor of a contractor, the debt, being one incurred in the performance of his work and secured by a bond of this nature, may apply money paid to it by the contractor to a debt other than the one secured by the bond, even though such creditor knows that the money paid to it came to the contractor in part payment of his contract. The writer of this opinion being the writer of that one feels free to criticize this holding in so far as that decision is susceptible of such interpretation. That case

involved other important issues which were argued by counsel and examined by the Court at great length, and which almost wholly absorbed the attention of both counsel and the Court. The question of the proper application of the credit there involved seems to have been almost lost sight of. It was presented to us with but little argument and without citation of our own or other decisions, and we disposed of it in an equally summary manner. Indeed, the knowledge on the part of the creditor as to the source of the money was not considered as a factor touching the right of the creditor to make application of the payment. We are now of the opinion, in view of these facts and in the light of the authorities we have here reviewed, that our holding in the Gallucci Case should not now be regarded as establishing a rule of law permitting a creditor with knowledge of the source of money like that here involved to apply such money to a debt other than that secured by the bond, while such debt secured by the bond remains unsatisfied. We, therefore, reach our conclusion here, independent of the Gallucci decision, and recognize the error of that decision in so far as it failed to recognize the doctrine of our former decisions in the light of the creditor's knowledge there involved.

A materialman, to whom the contractor furnished materials used in the building cannot credit the contractor on an old account for the materials so furnished, and retain a lien upon the building.

Mills v. Olsen (1911) 43 Mont. 129, 115 Pac. 33.

A materialman who receives from the contractor with full knowledge that it was turned over to the latter for the purpose of paying for the material for the owner's house, money or other obligations of the

owner, must apply the money upon the materials for the owner's house, and cannot even at the direction of the contractor, apply it to an older or other debt of the contractor, thus retaining a lien upon the house of the owner.

Farr v. Weaver (1919) 84 W. Va. 182, 99 S. E. 395.

Where the rights of third persons are involved the law will make the credit according to principals of justice and equity.

Williams vs. Willingham, 5 Ga. App. 533, 63 So. E. 584.

In this case a lienor was denied his lien on a building when he had applied money received under the contract to other debts.

In the case of U. S. vs. American Bond Co., 89 Fed. 921, it was held that a materialman could not recover on the bond where he had applied payments under the contract secured by the bond to a pre-existing indebtedness.

In this case a materialman was paid moneys under the contract in excess of his indebtedness and applied these moneys to a pre-existing indebtedness. Held that he was bound to apply such payments arising under the contract and the surety was released from liability.

The rule requiring the application of payments to the contract under which they accrue is supported by the following cases from other states:

Hanson vs. Cardano, 96 Cal. 441, 31 Pac. 457.

Brown vs. Dresser, 179 Cal. 232, 176 Pac. 453.

Hammond Lumber Co. vs. Fantu, 179 Cal. 652, 178 Pac. 503.

Jos. B. Clow & Sons vs. Goldstein, 147 Ill. App. 571.

Central Planing Mill vs. Betz, 29 Ky. 252, 92 S. W. 591.

L. J. Mueller Furnace Co. vs. Calvin, 146 Minn. 252, 178 N. W. 496.

Crane Bros. vs. Keck, 35 Neb. 683, 53 N. W. 606.

Boyer, etc., Co. vs. Colonial & Co., 94 Neb. 180, 142 N. W. 519.

Harris vs. Gilbert, 128 Atl. 11.

Gerlach vs. North Texas & Co., 244 S. W. 662.

Hughes & Co. vs. Flint, 61 Wash. 460, 112 Pac. 633.

J. F. Kane vs. Woodbury & Co., 121 Wash. 149, 208 Pac. 1107.

Bross vs. McNicholas, 66 Ore. 42, 133 Pac. 782.

Some of these cases cited are Mechanics Lien cases in which the lien of a materialman was denied where he applied the money received to a prior indebtedness; holding that the owner has the right to have it applied on the contract under which it was received.

The surety on the bond stands in the place of an owner and the same equity exists in his favor.

The Vice Chancellor in his conclusions while admitting that the question at issue is one of novel impression in New Jersey, and that the weight of authority seems to support appellant's contention that the appellees under the circumstances of this case were equitably bound to apply the September payment, at least, to the debt on the school building, nevertheless concludes, that the court cannot accept these adjudications as authoritative because, as he says, "they assume without proving that such an equity exists in favor of the surety."

What further proof of the surety's equity is need-

ed is not clear. The equity arises when the party for whose benefit the surety is given, fails to do that which fairness and justice require.

If appellant was seeking relief in a court of law, it might be claimed that relief could not be granted because of the hard and fast rules of law governing application of payments, but equity corrects that "wherein the law by reason of its universality is deficient."

Both the Municipal Lien Law and the Bonding Act assure to a materialman payment for materials furnished to the building. The contract which the surety is required to make is for the special benefit of materialmen as well as laborers. The bond specifically provides that the surety will pay the claims of materialmen and laborers, and they are given a right of action at law against the surety in addition to the remedy by lien notice.

The obligation given by the surety company in this case being for the special benefit of appellees, a corresponding obligation arose on their part to use the money paid them under the contract to discharge their debt for materials. How can it be said that a contract for the benefit of appellees imposes no equitable duty upon them as to the moneys received?

The contract price is the primary fund for the payment of the contractors debts for labor and materials. Justice and fairness would seem to require that appellees should not be permitted to divert to other purposes the fund to which the surety must look for indemnity.

If the Court shall hold that the surety has no equity in this fund under the circumstances of this case then there is nothing to prevent a materialman to whom a contractor on a public building, in failing circumstances, may be heavily indebted, from inducing the contractor to pay over to him all the moneys payable under the contract, apply these moneys on old accounts and compel the surety to assume

payment of the entire contract price. Who could safely then become surety?

He who seeks equity must do equity and must come into Court with clean hands.

The maxim that "He who seeks equity must do equity" is not limited to any particular class of cases, but may be applied whenever it is necessary to the promotion of justice.

Mutual Benefit Life Ins. Co. vs. Brown, 30 N. J. Eq. 193, 21 Corp. Jur. 176.

To warrant the application of the maxim that "He that comes into equity must come with clean hands," it is not necessary that the misconduct complained of should be actually fraudulent or such as to constitute the basis of legal action. Any act which would be pronounced wrongful by honest and fair minded men will be sufficient to make the hands of the applicant unclean. Where the result in any degree, induced by his misconduct, will be unconscionable either in benefit to himself or injury to others, the Court should deny him relief.

See 21 Corp. Jur., p. 183-184.
Camden Iron Works vs. Camden, 64 N. J. Eq. 723.

It is submitted that the complainants are not "doing equity" within the meaning of the maxims above quoted in seeking to appropriate the moneys received by them to other channels, thereby imposing on the surety a burden not contemplated; the effect being to make the surety company responsible for debts of the contractor other than those for which it agreed to be liable. The equity of requiring each building contract to pay its own way is clear, indeed this would seem to be one of the purposes of the mechanics lien laws and recognized by legislatures in enacting them, for if the moneys be

diverted elsewhere someone is bound to suffer if the contractor fails, and the laborers and materialmen for whose benefit the laws are enacted will lose out in the end.

The jurisdiction of the Court of Chancery in the matter of the enforcement of municipal liens is conferred by the statute prescribing the lien, P. L. 1918, p. 1041, but the question at issue as to the application of a payment, relates to matters of account, jurisdiction of which, from time immemorial has been exercised by Courts of Equity.

Story's Eq. Jur., Vol 2 (14 Eq.), p. 1; also p. 17, Sec. 603.

In the exercise of this jurisdiction courts of equity require that the accounting and the application of payments be reasonable, fair and just as between the parties and the books are full of cases where, in matters of account, a determination has been reached, based on principles of common honesty, justness and fairness.

While the diversion of these payments by complainants is not such perhaps as to constitute an actual fraud on the surety, the effect on the surety if the appropriation be upheld, will be the same as if there had been a fraudulent diversion of the fund. The effort of complainants to apply the entire payment, $8,000.00, and the subsequent payment of $6,836.70 to other debts of the contractor, knowing that the loss must fall on the surety, is violative of those general principles of fairness and justice, the application of which in matters of account is the peculiar province of a court of equity.

The Vice Chancellor also concludes that when the payments were made by the Board to Stout, the money became Stout's own money which he might appropriate as he saw fit. He reasons as follows:

"It is conceded by all that if the payment

made by Stout to the materialman lien claimant had been made out of Stout's own money, —say out of a legacy received by him,—the surety would have no right to insist that the payment should be applied to the debt on the Middlebush school for which it was surety. In fact it was made out of moneys received by Stout from the School Board, as a payment due him under his contract.

But the moment the money was paid over to Stout by the Board, it became and was his own money,—money which he had legally earned and which belonged to him alone; just as much as any other money he could have. * * *

Not only was it Stout's own money, but there is nothing in the case from which this Court can find that the surety company had any right or interest therein, Stout had made no promise or agreement either to the board, or to the surety company, or to the materialman, that he would apply moneys received by him from the board primarily to the satisfaction of claims of laborers and materialmen on the Middlebush school job."

Because, as he reasons, the money was Stout's own, the Vice Chancellor argues that Stout was at liberty to apply it to any purpose the same as he might apply a legacy received by him, and that when he had applied it to other purposes the surety could not complain. This would, of course, be so if the money came to the contractor from other sources, but this money was not Stout's own as would be money earned by him which was the product of his labor or skill, or which was coming to him in the nature of a bequest. Stout had not earned this money. It had not been given to him. It was money chiefly representing the value of materials and labor of others which had gone into the school build-

ing for which he was obligated to pay and for which the surety company was further obligated to pay.

Much of the Vice Chancellor's reasoning is predicated upon the assumption that the contractor had the right to do as he pleased with the moneys received under the contract. If this was his legal right it was not his equitable right. He was, in equity, charged with the duty of paying for his labor and material out of the moneys paid him under the contract.

But the courts do not evolve the principle invoked in the case by appellants so much from the duty owing by the contractor as from the duty owing by the materialman, who, with knowledge of the source of the money, unequitably applies it to purposes other than those to which it should be applied.

It was not Stout who directed the application in the case. He gave no directions although the circumstances are such as to indicate an expectation on his part that it would be applied to the school job.

The appellees made the application themselves with knowledge of its source.

While it is true as suggested by the Vice Chancellor that there is no legal or other compulsion on a surety company to enter into such surety bonds, and that when they do so they are at liberty to insist as a condition to their becoming sureties, upon some special agreements or arrangements for their protection; nevertheless if the surety fails to make some such special arrangement it ought not to be denied equitable relief, for in making a contract sureties, like any other parties, have the right to rely upon the application by our courts of the equitable principle laid down by the authorities cited herein, irrespective of any legislative enactments on the subject.

The Vice Chancellor also attempts to distinguish the facts in the present case from those in a case like that of Merchants Ins. Co. vs. Herber, 68 Minn. 420,

where the surety bond was given to secure the faithful performance by an agent of the collection and payment of moneys due the creditor, and it is suggested in the opinion that the equitable principle supported by the authorities above quoted is confined or should be confined to cases where the money which is paid to the creditor is the very money for the payment of which a surety is surety. It is difficult to discover any difference in principle between a case where the surety is bound for the payment of particular moneys collected by the principal and a case where the surety is bound for the payment of other debts incurred by him; as in this case, for the payment of the claim of the materialman who received a payment under the contract and applied it elsewhere. It is submitted that a careful reading of the authorities will show that no distinction is made between cases where the bond secures money collected by an agent or secures money due and payable under a contract.

It is further argued by the Vice Chancellor that since Stout might have used the money paid him by the Board of Education to pay creditors who were entire strangers to the school house contract, even though such creditors knew the source of the money, therefore the surety cannot complain because the money paid to appellees was applied to other debts. This reasoning ignores the fact that the appellees were in effect parties to the surety company's contract, that this contract was for their peculiar benefit, that they had knowledge of the bond and the source of the money and therefore owed a duty to appellants to apply the money in reduction of the sureties' obligation. The equity of the case arises out of the peculiar relation of the parties under the contract and bond, and it is this equity which the Court below failed to recognize, but which is generally recognized by text book writers and applied in the numerous cases cited herein.

A stranger to the contract would not be under the same equitable obligation.

It was argued in the Court below on behalf of the appellees that the surety company should be denied relief because, in the contract made by it with the Perth Amboy Construction Company for the completion of the building, it agreed to pay all claims for labor and material theretofore contracted, including the claim of complainants.

It is submitted that this contract did not in any way affect the equities existing between appellant and appellees. The contract with the Perth Amboy Construction Company only reiterates the terms of the bond which required the surety company to pay all claims for labor and material. This contract was made for the protection of the Perth Amboy Construction Company and the Board of Education, and there was no privity of contract therein between the surety company and appellees, nor does it appear anywhere that appellant at the time this contract was made had any knowledge of the payments theretofore made by the contractor to appellees. Certainly, in the absence of such knowledge, appellant could not be held estopped in this proceeding. It would hardly be contended that if at the time this contract was made appellees had been paid in full for the materials furnished by them, they could, nevertheless, because of this contract insist upon being paid again. If appellant's position is correct in this proceeding appellees must be held to have been paid in full for their claim.

They have already been paid out of the proceeds of the school contract $14,036.70, which amount, if this decree be affirmed, will be increased $6,890.53, or a total of $20,927.23, besides interest; whereas, they only furnished under the contract, materials to the value of $6,890.53.

Appellant prays that the decree of the Chancellor be reversed.

JOHN F. REGER,
*Solicitor for and of Counsel with Appellants.*