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BILL FOR INJUNCTION.

(Filed April 3, 1926.)

IN CHANCERY OF NEW JERSEY.

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

The complainants, the City of Millville, a municipal corporation of the State of New Jersey; and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville, respectfully show:

1. The Board of Education of the City of Millville in the County of Cumberland entered into four several contracts providing for the construction of a new high school in the Fourth Ward of the City of Millville, duplicates of which are on file with the State Board of Education, with the following contractors, for the purposes and at the dates following:

(1) On February 18, 1924, with respondents George W. Shaner & Sons, for the general work.

(2) On February 18, 1924, with respondent J. H. Hutchinson, for the heating and ventilating.

(3) On February 18, 1924, with respondents Shearman & Tompkins, for the plumbing work.

(4) On March 17, 1924, with respondent Jackson Electric Company, for the electrical work.

B. Each of said contracts provided that the contractor therein named should complete the work

provided for in his contract within fourteen months from the date thereof. Following is a copy of the pertinent section (13) of the contract made with the general contractors George W. Shaner & Sons:

"13. All work enumerated in this contract shall be completed and ready for acceptance within fourteen months from date as of which this agreement is made, without respect to weather conditions. In case of the non-completion of said work within the time above specified and allowed, the board may deduct and retain out of the moneys due or which may become due the contractor and the contractor shall be obliged to pay, in addition to the penalty hereinafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work appointed by the board for each and every working day from the time so allowed for the completion of said work up to the time when the same shall have been completed, provided, however, that if in the performance of said work it shall be found that the work actually to be done and performed is in excess of the quantity herein specifically provided for then such deduction for the payment of such inspector's wages shall be allowed only from and after the time, in addition to the time first allowed, when such excessive work could reasonably be expected to be completed. The board may, at its election, recover from the contractor such inspector's wages in an action on the bond. It is distinctly understood that the time specified for the completion of such work is of the essence of this contract, and the contractor shall not be entitled to claim performance of this contract unless the work, is en-

tirely completed in every respect on or before the time limited and fixed for its performance as aforesaid shall expire; and in case this contract is not completely performed by the contractor within the time so fixed, and the contractor is permitted to finish the work, which he shall be obliged to do if the board so elect, the contractor agrees to pay to the board the sum of seventy-five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty, and may be retained by the board from any sums in its hands due from it to the contractor, or the same may be collected by a suit on bond of the contractor in this agreement mentioned."

3. The other three contracts contained identical paragraphs, except that in the case of the contract with J. H. Hutchinson the stipulated damages are fixed at forty dollars per diem; in the contract with Shearman & Tompkins said agreed damages are stipulated to be thirty dollars per diem; and in the contract with Jackson Electric Company they are stipulated to be thirty dollars per diem; as by said several contracts, reference being thereto had, will more particularly appear.

4. Copies of said contracts are here shown into court. The originals are on file with the Secretary of the Board of Education of the City of Millville, and copies thereof are on file with the State Board of Education. Complainants are ready to produce and prove said contracts as this Honorable Court may direct. A copy of the contract with the gen-

eral contractors is hereto attached, marked Exhibit C and made part hereof. The contracts with J. H. Hutchinson, Shearman & Tompkins and Jackson Electric Company are in substantially the same form, with the variances heretofore noted in paragraph three.

5. The work provided to be done by said several contracts was not performed in the time specified for completion thereof.

Thereupon a resolution of the following purpose was adopted, on or about April 20, 1925, and a copy thereof served immediately on the contractor therein named:

RESOLUTION NUMBER.....

A Resolution electing that George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons, complete the work provided for in their contract with the Board of Education of the City of Millville bearing date February eighteenth, nineteen hundred and twenty-four.

Whereas, in and by the contract made and entered into by and between the Board of Education of the City of Millville in the County of Cumberland George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons, all of Palmyra, New Jersey, it is, among other things, provided as follows:

13. All work enumerated in this contract shall be completed and ready for acceptance within fourteen months from the date as of which this agreement is made, without respect to weather conditions. In case of the non-

completion of said work within the time above specified and allowed, this board may deduct and retain out of the moneys due or which may become due the contractor and the contractor shall be obliged to pay, in addition to the penalty hereinafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work appointed by the board for each and every working day from the time so allowed for the completion of said work up to the time when the same shall have been completed, provided, however, that if in the performance of said work it shall be found that the work actually to be done and performed is in excess of the quantity herein specifically provided for then such deduction for the payment of such inspector's wages shall be allowed only from and after the time, in addition to the time first allowed, when such excessive work could reasonably be expected to be completed. The board may, at its election, recover from the contractor such inspector's wages in an action on the bond. It is distinctly understood that the time specified for the completion of such work is of the essence of this contract, and the contractor shall not be entitled to claim performance of this contract unless the work is entirely completed in every respect on or before the time limited and fixed for its performance as aforesaid shall expire; and in this case this contract is not completely performed by the contractor within the time so fixed, and the contractor is permitted to finish the work, which he shall be obliged to do if the board so elect, the contractor agrees

to pay to the board the sum of seventy-five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty, and may be retained by the board from any sums in its hands due from it to the contractor in this agreement mentioned.

And whereas, the said work has not been completed and ready for acceptance within said time; therefore;—

RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE:

1. The Board of Education of the City of Millville in the County of Cumberland doth hereby elect that the said contractors George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner co-partners trading as George W. Shaner & Sons do complete the work provided for in their said contract with the Board of Education of the City of Millville in the County of Cumberland bearing date February eighteenth nineteen hundred and twenty-four, according to the covenants and conditions and penalties in said contract contained.

2. The Secretary of the Board is ordered to serve a copy of this Resolution forthwith upon the contractors and their bondsman, the Aetna Casualty and Surety Company, by mailing a certified copy thereof by registered letter directed to the post office address of the contractors and their bondsman if the same can be ascertained by him, or by delivering the same to the contractors and their bondsman.

For the purpose of making such service the Secretary is authorized to employ any of the

regular or special police officers or constables of the city, whose expenses and reasonable compensation for such service shall be paid by the Board.

6. Identical resolutions, except as to amount of stipulated damages, were adopted and served on or about April 20th, 1925, with respect to the contracts with J. H. Hutchinson for heating and ventilating and Shearman & Tompkins for the plumbing work.

On or about May 18, 1925, an identical resolution was adopted and served with respect to the contract with Jackson Electric Company for the electric work.

7. Said several contractors thereupon proceeded to complete the work specified in their respective contracts; and on, or not before, November first, nineteen hundred twenty-five, said contractors, respectively, tendered to the said Board of Education as having been finally completed, the work undertaken under their several and respective contracts.

8. On November 17th, 1925, said Board of Education accepted the several items of work covered by said contract, by resolutions identical in form, except as to name of contractor and description of work, the resolution adopted with respect to the general contractor and his work being as follows:

A Resolution finally accepting the work done by George W. Shaner & Sons, consisting of George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, under their GENERAL CONTRACT for the construction of a new High School for the Board of Educa-

tion of the City of Millville bearing date the eighteenth day of February, 1924.

WHEREAS, the said general contractors George W. Shaner & Sons did on the third day of November, 1925, tender to the Board of Education of the City of Millville as having been completely performed the general work of constructing a new High School for the Board of Education of the City of Millville undertaken by said George W. Shaner & Sons under their said contract with the Board of Education of the City of Millville dated February 18th, 1924, and the architect has proceeded to make final inspections and estimates of said work and has certified in writing to the Board of Education of the City of Millville that said contract has been completely performed;

And, whereas the Board of Education of the City of Millville has inspected said work and the same appears to have been completed (except as to time of performance) according to the terms, covenants and provisions contained in the aforesaid contract; therefor,—

RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE,—

That the aforesaid work, to wit, the general work required for the construction of the said New High School building for the Board of Education of the City of Millville done by said George W. Shaner & Sons under their said contract with this Board dated February eighteenth, nineteen hundred and twenty-four, be and the same is hereby accepted by this Board as having been completely performed in accordance with the provisions of said contract, except with respect to the time of completion

of said work, said work not having been completed until and including the third day of November, 1925.

9. For greater certainty complainants beg leave to refer to the original resolutions hereinbefore in this complaint mentioned.

10. No reason appears in the records and proceedings of the Board of Education why, and there is no lawful reason, why the damages stipulated under Section 13 of the several contracts are not due the Board of Education of the City of Millville in the County of Cumberland, and should not be retained out of the moneys due the several said contractors, or collected by suit on their respective bonds. Following is a statement showing approximately the amount due from each contractor for such damages:

Name of Contractor	Date when work should have been completed.	Date when work actually was completed.	Number of days delay	Stipulated damages per day	Total damages due Board
Shaner & Sons.	Apr. 18, 1925.	Nov. 1, 1925.	163	$75.	$12225.
Shearman & Tompkins.	Apr. 18, 1925.	Nov. 1, 1925.	163	$30.	4890.
J. H. Hutchinson.	Apr. 18, 1925.	Nov. 1, 1925.	163	$40.	6520.
Jackson Electric Co.	May 21, 1925.	Nov. 1, 1925.	130	$30.	3900.
				Aggregate of Damages,	$27535.

11. Notwithstanding the premises, the Board of Education of the City of Millville, disregarding its duty in that behalf did not nor would deduct said liquidated damages or any part thereof from the money due the said several contractors from the said Board of Education of the City of Millville in the County of Cumberland, but on the contrary by cer-

tain orders, resolutions, motions and proceedings, had, made or adopted on January 20th, 1926, unlawfully, and fraudulently did order paid to said contractors, respectively, the whole of the moneys due to them on their several said contracts, without deducting said liquidated damages, or any part thereof; and without taking any steps or proceedings whatsoever to retain from said contract money the liquidated damages stipulated to be paid, and due, under Section 13 of the several contracts with said parties or directing suit on said several contractors bonds, or otherwise.

12. By the proceedings complained of, the City of Millville, and its tax payers will be defrauded in a large sum of money, to wit, to the amount of twenty-seven thousand dollars ($27,000) and upwards, unless the payment of said moneys in pursuance of said orders and proceedings had on the twentieth day of January, 1926, are restrained and set aside.

13. Immediately after the adoption of said orders and proceedings had January twentieth, 1926, by the said Board of Education of the City of Millville directing payment of said moneys the City of Millville appealed to the Commissioner of Education of the State of New Jersey, from said orders and proceedings had January twentieth, 1926. A copy of said notice of appeal is hereto annexed and marked "A;" and a petition of appeal to the Commissioner of Education of the State of New Jersey in said matter is also filed a copy of said petition of appeal being attached and marked "B." The Commissioner of Education dismissed said appeal of the City of Millville and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville, for lack of juris-

diction. Thereupon complainants, said appellants, appealed from the order of the Commissioner of Education of the State of New Jersey dismissing their said appeal to the Board of Education of the State of New Jersey, a copy of said notice of appeal being annexed, marked "C." Said appeal is now depending before the State Board of Education and argument thereon is set down for April 3rd, 1926, before the Law Committee of the State Board of Education. Complainants file this bill of complaint with the intention of pursuing its prayer for process hereinafter contained, in the event that complainants appeal now depending before the State Board of Education shall be dismissed, and its proceedings for remedial relief in the educational system of the State be exhausted.

14. Said moneys so ordered to be paid under the proceedings complained of are now in the hands of the Custodian of the Board of Education of the City of Millville pending the litigation aforesaid.

15. Said orders, resolutions or motions had and made on January twentieth, 1926, by the Board of Education of the City of Millville, are, and every of them is unlawful, and a fraud on the tax payers of the City of Millville because the several sums of money so ordered to be paid are not justly and honestly due in said contractors from the Board of Education of the City of Millville in the County of Cumberland; and in ordering said payments the said Board of Education, failed, neglected and refused, fraudulently and unlawfully, and without justifiable cause, to deduct and retain from the money due said contractors the liquidated damages stipulated to be paid and due, under Section 13 of their separate con-

tracts with the parties; and the moneys ordered to be paid are not nor is any part thereof justly due and owing by the Board of Education to said contractors and the payment of said moneys, without deduction of the stipulated damages that have accrued to the complainants under the terms of the several contracts amounts to an unlawful diversion of the public funds, because made without consideration, and are a fraud on the tax payers of the City of Millville.

16. Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That the Board of Education of the City of Millville in the County of Cumberland; Newton B. Wade, president, and Harold Headley, secretary of said board; George W. Shaner; George B. Shaner; Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons; Jackson Electric Company; J. H. Hutchinson; John Shearman and Percy Tompkins, co-partners trading as Shearman & Tompkins and George B. Worstall, custodian of school funds of the City of Millville, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

2. That the aforesaid orders and proceedings had by the Board of Education of the City of Millville January 20th, 1926, ordering payment of said moneys as aforesaid to the said several contractors George W. Shaner & Sons, Jackson Electric Company, J. H. Hutchinson and Shearman and Tompkins, be decreed fraudulent and be set aside and vacated.

3. That the said Board of Education, and its officers and agents and George B. Worstall, custodian of school funds of the City of Millville, be restrained and enjoined from paying out any moneys whatsoever in pursuance of said orders and proceedings had by said board on January 20th, 1926, as aforesaid.

4. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as the Court may make in the premises.

LOUIS H. MILLER,
Solicitor and Counsel with Complainants.

EXHIBIT "A."

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE.

The City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville, Appellants,

v.

The Board of Education of the City of Millville in the County of Cumberland; Mark Brannin, President, and Harold Headley, Secretary of said Board; Geo. W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons; Jackson Electric Co., J. H. Hutchinson; John Shearman and Percy H. Tompkins, co-partners trading as Shearman & Tompkins, and George B. Worstall, Custodian of School Funds of the City of Millville,—

TO THE ABOVE NAMED RESPONDENTS:

Take notice that the City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of said

City, appeal to the Commissioner of Education of the State of New Jersey, from the whole and every part of the order or orders, motion or motions, resolution or resolutions, of the Board of Education of the City of Millville, made, passed or adopted by said Board on the twentieth day of January, 1926, ordering or directing the payment of certain sums of money to said George W. Shaner & Sons, J. H. Hutchinson, Shearman and Tompkins and Jackson Electric Co., for or on account of their several claims for the final payment of moneys alleged to be due under the several contracts lately entered into by them with said Board of Education in connection with the construction of a New High School Building in the City of Millville on the following grounds:

1. The said orders, resolutions or motions directing said payments of money are, and every of them is, unlawful because the several sums of money ordered to be paid are not, nor is any part thereof justly and honestly due any of said contractors from the Board of Education of the City of Millville in the County of Cumberland.

2. In ordering said payments the Board failed, neglected and refused, unlawfully, and without justifiable cause, to deduct and retain from the money due said contractors the liquidated damages stipulated to be paid, and due, under Section 13 of the several contracts with said parties.

3. The moneys ordered to be paid, are not, nor is any part thereof, justly due and owing by the Board of Education to said contractors.

4. The moneys ordered to be paid are in excess of the moneys justly due the said contractors under the terms of their several contracts.

5. The payment of said moneys, without deduction of the stipulated damages that have accrued to the

Board under the terms of the several contracts, amounts to an unlawful diversion of the public funds, because made without consideration.

6. Said orders are made without consideration with respect to the whole, or a large part, of the amount of said orders for payment of said moneys.

Dated Millville, N. J., January 20, 1926.

Louis H. Miller,
Attorney of City of Millville and Irwin W. Kirk, Director of Revenue and Finance of said City.

EXHIBIT "B."

COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY.

The City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville,
Appellants,

vs.

The Board of Education of the City of Millville in the County of Cumberland; Mark Brannin, President, and Harold Headley, Secretary of said Board; George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons; Jackson Electric Co., J. H. Hutchinson; John Shearman and Percy H. Tompkins, co-partners trading as Shearman & Tompkins, and George B. Worstall, Custodian of School Funds of the City of Millville,
Respondents.

Petition of Appeal.

TO THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY:

The City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville, respectfully show unto the honorable Commissioner of Education of the State of New Jersey:

1. That they appeal from the orders, motions, resolutions and proceedings, the whole and every part thereof, made, adopted, had or taken by the Board of Education of the City of Millville in the County of Cumberland on January 27, 1926, providing for the payment to the above named several respondents George W. Shaner & Sons; Jackson Electric Co.; J. H. Hutchinson; and Shearman & Tompkins; of certain several sums of money, specified in such orders, motions, resolutions and proceedings, to the Commissioner of Education of the State of New Jersey.

2. Petitioners have served on said respondents a notice of Appeal in the premises, the original whereof, with affidavit of services endorsed thereon, is attached and which notice, and affidavit of service, are made part of this petition.

3. Specifying, more particularly, petitioners' objections and objections to said proceeding, petitioners respectfully show:

A. The Board of Education of the City of Millville in the County of Cumberland entered into four several contracts providing for the construction of a new high school in the Fourth Ward of the City of Millville, duplicates of which are on file with the State Board of Education, with the following contractors, for the purposes and at the dates following:

(1) On February 18, 1924, with respondents George W. Shaner & Sons, for the general work.

(2) On February 18, 1924, with respondent J. H. Hutchinson, for the heating and ventilating.

(3) On February 18, 1924, with respondents Shearman & Tompkins, for the plumbing Work.

(4) On March 17, 1924, with respondent Jackson Electric Company, for the electrical work.

B. Each of said contracts provided that the contractor therein named should complete the work provided for in his contract within fourteen months from the date thereof. Following is a copy of the pertinent section (13) of the contract made with the general contractors George W. Shaner & Sons:

> 13. All work enumerated in this contract shall be completed and ready for acceptance within fourteen months from date as of which this agreement is made, without respect to weather conditions. In case of the non-completion of said work within the time above specified and allowed, the board may deduct and retain out of the moneys due or which may become due and retain out of the moneys due or which may become due the contractor and the contractor shall be obliged to pay, in addition to the penalty hereinafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work appointed by the board for each and every working day from the time so allowed for the completion of said work up to the time when the same shall have been completed, provided, however, that if in the performance of said work it shall be found that the work actually to be done and performed is in excess of the quantity herein specifically provided for then such deduction for the payment of such inspector's wages shall be allowed only from and after the time, in addition to the time

first allowed, when such excessive work could reasonably be expected to be completed. The board may, at its election, recover from the contractor such inspector's wages in an action on the bond. It is distinctly understood that the time specified for the completion of such work is of the essence of this contract, and the contractor shall not be entitled to claim performance of this contract unless the work is entirely completed in every respect on or before the time limited and fixed for its performance as aforesaid shall expire; and in case this contract is not completely performed by the contractor within the time so fixed, and the contractor is permitted to finish the work, which he shall be obliged to do if the board so elect, the contractor agrees to pay to the board the sum of seventy five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty, and may be retained by the board from any sums in its hands due from it to the contractor, or the same may be collected by a suit on bond of the contractor in this agreement mentioned.

C. The other three contracts contained identical paragraphs, except that in the case of the contract with J. H. Hutchinson the stipulated damages are fixed at forty dollars per diem; in the contract with Shearman & Tompkins said agreed damages are stipulated to be thirty dollars per diem; and in the contract with Jackson Electric Company they are stipulated to be thirty dollars per diem; as by said several contracts, reference being thereto had, will more particularly appear.

D. Said contracts are made part hereof. Appellants beg leave to refer to the copies thereof on file with the State Board of Education, if it shall be necessary so to do.

E. The work provided to be done by said several contracts was not performed in the time specified for completion thereof.

Thereupon a resolution of the following purport was adopted, on or about April 20th, 1925, and a copy thereof served immediately on the contractor therein named:

RESOLUTION NUMBER.....

A Resolution electing that George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons, complete the work provided for in their contract with the Board of Education of the City of Millville bearing date February eighteenth, nineteen hundred and twenty-four.

Whereas, in and by the contract made and entered into by and between the Board of Education of the City of Millville in the County of Cumberland and George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons, all of Palmyra, New Jersey, it is, among other things, provided as follows:

> 13. All work enumerated in this contract shall be completed and ready for acceptance within fourteen months from the date as of which this agreement is made, without respect to weather conditions. In case of the non-completion of said work within the time above specified and allowed, this board may deduct and retain out of the moneys due or which may become due the contractor and the contractor shall be obliged to pay, in addition to the penalty here-

inafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work appointed by the board for each and every working day from the time so allowed for the completion of said work up to the time when the same shall have been completed, provided, however, that if in the performance of said work it shall be found that the work actually to be done and performed is in excess of the quantity herein specifically provided for then such deduction for the payment of such inspector's wages shall be allowed only from and after the time, in addition to the time first allowed, when such excessive work could reasonably be expected to be completed. The board may, at its election, recover from the contractor such inspectors' wages in an action on the bond. It is distinctly understood that the time specified for the completion of such work is of the essence of this contract, and the contractor shall not be entitled to claim performance of this contract unless the work is entirely completed in every respect on or before the time limited and fixed for its performance as aforesaid shall expire; and in this case this contract is not completely performed by the contractor within the time so fixed, and the contractor is permitted to finish the work, which he shall be obliged to do if the board so elect, the contractor agrees to pay to the board the sum of Seventy-five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty, and may be retained by the board from any sums in its hands due from it to the contractor in this agreement mentioned.

And whereas, the said work has not been completed and ready for acceptance within said time; therefore,—

RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE:

1. The Board of Education of the City of Millville in the County of Cumberland doth hereby elect that the said contractors George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner copartners trading as George W. Shaner & Sons do complete the work provided for in their said contract with the Board of Education of the City of Millville in the County of Cumberland bearing date February eighteenth nineteen hundred and twenty-four, according to the covenants and conditions and penalties in said contract contained.

2. The Secretary of the Board is ordered to serve a copy of this Resolution forthwith upon the contractors and their bondsman, the Aetna Casualty and Surety Company, by mailing a certified copy thereof by registered letter directed to the post office address of the contractors and their bondsman if the same can be ascertained by him, or by delivering the same to the contractors and their bondsman for the purpose of making such service the Secretary is authorized to employ any of the regular or special police officers or constables of the City, whose expenses and reasonable compensation for such service shall be paid by the Board.

Dated.....1925.

.....

President of the Board of Education of the City of Millville.

Attest:

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Secretary.

F. Identical resolutions, except, as to amount of stipulated damages, were adopted and served on or about April 20, 1925, with respect to the contracts with J. H. Hutchinson for heating and ventilating and Shearman & Tompkins for the plumbing work.

On or about May 18, 1925, an identical resolution was adopted and served with respect to the contract with Jackson Electric Company and for the electric work.

G. Said several contractors thereupon proceeded to complete the work specified in their respective contracts; and on, or not before, November first, nineteen hundred twenty-five, said contractors, respectively, tendered to the said Board of Education as having been finally completed, the work undertaken under their several and respective contracts.

H. On November 17, 1925, said Board of Education accepted the several items of work covered by said contract, by resolutions identical in form, except as to name of contractor and description of work, the resolution adopted with respect to the general contractor and his work being as follows:

A Resolution finally accepting the work done by George W. Shaner & Sons, consisting of George W. Shaner, George W. Shaner, Edgar F. Shaner and Arthur H. Shaner, under their GENERAL CONTRACT for the construction of a new High School for the Board of Education of the City of Millville bearing date the eighteenth day of February, 1924.

WHEREAS, the said general contractors George W. Shaner & Sons did on the third day of November, 1925, tender to the Board of Education of the City of Millville as having been completely performed the general work of constructing a new High School for the Board of Education of the City of Millville undertaken by said George W. Shaner &

Sons under their said contract with the Board of Education of the City of Millville dated February 18th, 1924, and the architect has proceeded to make final inspections and estimates of said work and has certified in writing to the Board of Education of the City of Millville that said contract has been completely performed;

And, whereas the Board of Education of the City of Millville has inspected said work and the same appears to have been completed (except as to time of performance) according to the terms, covenants and provisions contained in the aforesaid contract; therefore,—

RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE,—

That the aforesaid work, to wit, the general work required for the construction of the said New High School Building for the Board of Education of the City of Millville done by said George W. Shaner & Sons under their said contract with this Board dated February eighteenth, nineteen hundred and twenty-four, be and the same is hereby accepted by this Board as having been completely performed in accordance with the provisions of said contract, except with respect to the time of completion of said work, said work not having been completed until and including the third day of November, 1925.

I. For greater certainty appellants beg leave to refer to the original resolutions herein before in this petition of appeal mentioned.

J. No reason appears in the records and proceedings of the Board of Education why, and there is no lawful reason, why the damages stipulated under Section 13, of the several contracts are not due the Board of Education of the City of Millville in the County of Cumberland, and should not be retained

out of the moneys due the several said contractors, or collected by suit on their respective bonds. Following is a statement showing approximately the amount due from each contractor for such damages:

Name of Contractor	Date when work should have been completed.	Date when work actually was completed.	Number of days delay	Stipulated damages per day	Total damages due Board
Shaner & Sons.	Apr. 18, 1925.	Nov. 1, 1925.	163	$75.	$12225.
Shearman & Tompkins.	Apr. 18, 1925.	Nov. 1, 1925.	163	$30.	4890.
J. H. Hutchinson.	Apr. 18, 1925.	Nov. 1, 1925.	163	$40.	6520.
Jackson Electric Co.	May 21, 1925.	Nov. 1, 1925.	130	$30.	3900.
				Aggregate of Damages,	$27535.

K. Notwithstanding the premises, the Board of Education of the City of Millville, disregarding its duty in that behalf, did not nor would deduct said liquidated damages or any part thereof from the moneys due said several contractors from said Board of Education of the City of Millville in the County of Cumberland, but on the contrary, by certain orders, motions, resolutions and proceedings, being the same referred to in said attached notice of appeal, did order paid to said contractors, respectively, the whole of the moneys due them on their several contracts, without deducting said liquidated damages, or any part thereof, and without taking any steps or proceedings whatsoever to conserve the public interest by retaining said damages from said contract money or directing suit on said several contractor's bonds, or otherwise.

4. By the proceedings complained of the City of Millville, and its tax payers, are aggrieved.

5. Said moneys so ordered to be paid under the proceedings complained of are now in the hands of the custodian of the Board of Education of the City of Millville pending the litigation in the premises.

6. Because of the premises the City of Millville, and Irwin W. Kirk, Director of Revenue and Finance, the chief financial officer of said City, alleges that they are aggrieved, and that the public interest are jeopardized, for the reasons particularly set forth herein and in the notice and grounds of appeal.

Appellants therefore pray that said resolutions, motions, orders and proceedings had and taken January 27, 1926, ordering said moneys to be paid over to said contractors, as aforesaid, be set aside, and said Board of Education ordered to retain, and take proper proceedings by suit on said contractor's bonds, or otherwise, to retain, recover, sue for or collect said stipulated damages for the benefit of the Board of Education of the City of Millville in the County of Cumberland.

CITY OF MILLVILLE,
By Harry Jones,
Mayor.

Attest:
John H. Fisher,
Clerk.

(SEAL)

Irwin W. Kirk,
Director of Revenue and Finance.

Louis H. Miller,
City Solicitor, Attorney of Appellants.

State of New Jersey }
Cumberland County } ss.

Irwin W. Kirk, being duly sworn, on his oath says: I am Director of Revenue and Finance of the City of Millville and one of the appellants named in the

foregoing petition of appeal. The facts set forth in said petition are true, as I verily believe.

Irwin W. Kirk.

Sworn to and subscribed before me this 3rd day of February, 1926.

John H. Fisher,
City Clerk.

[Endorsed]

THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY.

City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville,
Appellants,

vs.

The Board of Education of the City of Millville, et al.,
Respondents.

Petition of Appeal

Louis H. Miller,
Attorney of Appellants,
218 High Street,
Millville, N. J.

EXHIBIT "C."

THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY.

The City of Millville and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville,
Appellants,
vs.
The Board of Education of the City of Millville; the President of the Board of Education of the City of Millville; Harold Headley, Secretary of said Board; George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners; trading as George W. Shaner & Sons; Jackson Electric Co.; J. H. Hutchinson; John Shearman and Percy H. Tompkins, co-partners trading as Shearman & Tompkins; and George B. Worstall, Custodian of School Funds of the City of Millville,
Respondents.

On Appeal, &c.
Notice of Appeal from Decision of the Commissioner of Education.

TO THE ABOVE NAMED RESPONDENTS:

Take notice that the appellants in the above matter, the City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville, appeal from the whole and every part of the decision entered herein February 4, 1926, a copy of which decision is hereto attached and is made a part hereof, to the State Board of Education, on the following grounds:

1. The Commissioner dismissed the appeal, for lack of jurisdiction, whereas he should have entertained the appeal and should have heard the parties upon the merits of the matters set forth in the notice of appeal and petition of appeal filed by appellants with said Commissioner.

2. The Commissioner of Education should have entertained jurisdiction of the proceedings on the merits, whereas he refused to hear the petition and dismissed the same, without a hearing of the parties, on his own motion.

3. The proceedings of the Commissioner in dismissing the appeal without a hearing was unlawful.

4. The Commissioner should have heard the parties and decided that the proceedings complained of in the notice, grounds and petition of appeal filed with him, were illegal and should be set aside.

5. The Commissioner was not authorized by law to decide the matters adjudicated by him without a hearing of the parties.

6. The dismissal of the appeal by the Commissioner was not due process of law.

7. By the decision of the Commissioner, without a hearing on due notice, the property of the tax payers, and the public funds, are taken without due process of law, contrary to the mandates of the Federal Constitution.

8. The Commissioner should have decided that the proceedings complained of were unlawful and ordered the same set aside, whereas the Commissioner refused so to decide and dismissed appellants' appeal.

9. The Commissioner of Education decided the cause or matter without having brought before him the record of the proceedings complained of, and without a hearing.

Dated February 8, 1926.

Louis H. Miller,
Attorney of Appellants.

The City of Millville and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville,
Appellants,
vs.
The Board of Education of the City of Millville in the County of Cumberland; Mark Brannin, President, and Harold Headley, Secretary of said Board; George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner and Sons; Jackson Electric Co.; J. H. Hutchinson, John Shearman and Percy H. Tompkins, Co-partners trading as Shearman & Tompkins, and George B. Worstall, Custodian of School Funds of the City of Millville,
Respondents.

Decision of the Commissioner of Education.

This action is brought by the above named appellants to contest the legality of proceedings taken by the Millville Board of Education on January 27th, 1926, in awarding to the above named contractors the full amounts due them under their several con-

tracts for the construction of a new high school building in the City of Millville without any deduction from such amounts as a result of delay in the completion of the work of the liquidated damages required by the contracts to be deducted in the event of such delay.

The Court presided over by the Commissioner of Education is a special tribunal for the settlement of school controversies, and Section 17, Article II of the 1925 Compilation of the School Law provided that

> "The Commissioner of Education shall decide, subject to appeal to the State Board of Education and without cost to the parties, all controversies and disputes that shall arise under the school laws or under the rules and regulations of the State Board of Education."

In the opinion of the Commissioner of Education the allegations of the appellants in the case under consideration involve no violation of any of the school laws or rules of the State Board of Education regulating the control and management of the public schools of this State, but that on the other hand the case appears to involve general questions of law belonging properly to a court of law.

On the ground of lack of jurisdiction, therefore, of the subject-matter of the dispute, the appeal is accordingly hereby dismissed.

John H. Logan,
Commissioner of Education.

February 4, 1926.

[ENDORSED]

THE STATE BOARD OF
EDUCATION OF THE STATE
OF NEW JERSEY.

The City of Millville and Irwin W. Kirk, Director of Revenue and Finance of the City of Millville,
Appellants,

vs.

The Board of Education of the City of Millville; the President of the Board of Education of the City of Millville; Harold Headley, Secretary of said Board; George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners trading as George W. Shaner & Sons; Jackson Electric Co.; J. H. Hutchinson; John Shearman and Percy H. Tompkins, co-partners trading as Shearman & Tompkins; and George B. Worstall, Custodian of School Funds of the City of Millville,
Respondents.

On Appeal &c.

Notice of Appeal from Decision of the Commissioner of Education.

Louis H. Miller,
Attorney of Appellants
218 High Street,
Millville, N. J.

EXHIBIT "D."

GENERAL CONTRACT FOR THE CONSTRUCTION OF A NEW HIGH SCHOOL FOR THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE.

THIS AGREEMENT, made and entered into by and between the Board of Education of the City of Millville in the County of Cumberland, State of New Jersey, a body corporate of said State, hereinafter called the "board," party of the first part, and George W. Shaner & Sons, consisting of George W. Shaner, Geo. B. Shaner, Edgar F. Shaner and Arthur H. Shaner, all of Palmyra, N. J. hereinafter called the "contractor," party of the second part, WITNESSETH:

I.

For and in consideration of the payments and covenants hereinafter mentioned, on the part of the said board to be made and performed, the contractor covenants and agrees to and with said board as follows:

1. The contractor shall and will provide and furnish all tools, equipment, machinery, labor and materials necessary to perform in a perfect and thoroughly workmanlike manner the construction of all the general work required for the construction of a new school house, designed and intended for use as a High School, on the site heretofore acquired for the purpose situate on the northerly side of East Broad Street, between Fifth and Seventh Streets, in the City of Millville, Cumberland County, New Jersey, as covered by this agreement and set forth, described and exhibited in the plans and specifications for such work prepared by Guilbert and

Betelle, Architects, filed with the Secretary of said Board of Education September twentieth, nineteen hundred and twenty-three, as finally amended and approved by said Board and by the State Board of Education; the work and materials embraced in and covered by this specific contract being particularly set forth, described and exhibited (1) in "Section B, General Contractors Work," at pages nineteen to one hundred and four, inclusive, of said Specifications, and (2) in "Section A" containing the Instructions to Bidders and the General Conditions accompanying the said specifications at pages two to eighteen, inclusive.

The said work, however, shall include not only the work covered by the base bid of the contractor but shall be done in accordance with the alternative proposals numbered as follows: Alternative Number one, Weather Strips; Alternative Number Three, Painting Class Rooms; Alternative Number Four, Painting Corridors Etc.; Alternative Number Five, Buff Brick in Gymnasium; Alternative Number Six, Limestone Exterior Trim; Alternative Number Eight, Metal Toilet Partitions.

The entire said work shall be done for the aggregate contract price or sum of two hundred fifty four thousand one hundred fifty seven dollars ($254,157.00) as hereinafter provided in section twenty.

This general contract requires the contractor to furnish all of the labor and all of the materials required for the faithful performance of the entire work of constructing said new school house; at the site aforesaid, according to said plans and specifications, excepting only that part of the work included in and covered by the

following Sections of the said Specifications, to wit, (1) Section K. Plumbing Work, pages one hundred five to one hundred twenty-five, inclusive, of the said Specifications; (2) Section L, Heating and Ventilating, pages one hundred twenty-six, to one hundred sixty-seven, inclusive, of the said specifications; (3) Section M. Electrical Work, pages one hundred sixty-eight to one hundred ninety-nine, inclusive, of the said specifications.

In case of any variance or inconsistency between said Specifications or Instructions to Bidders or General Conditions, and his Specific contract, then the conditions, terms, and covenants of this specific contract shall govern and be binding and effective between the parties.

II.

It is agreed between the parties that whenever the word "architects" is used in this contract and specifications it refers to Guilbert & Betells, the architects in charge of the work, employed by the board and acting in conjunction with the board, or in case of the death, resignation or removal of the said architects, such other architect of established professional standing as may be appointed for that purpose by the board; and all explanations or directions necessary for the proper construction of the work shall be given by the architects.

3. It is expressly agreed by and between the parties hereto that the work included in this contract is to be done under the directions of the said architects, and that the decision of the architects as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed that such additional drawings and explanations as may be necessary to detail and il-

lustrate the work to be done are, if necessary, to be furnished by the architects.

4. No alterations shall be made in the work except by written order of the board, the amount (if any) to be paid by the board, or allowed the contractor by virtue of such alterations, to be stated in said order. Should the board and the contractor not agree as to the amount to be paid or allowed, the work shall go on under the order required above, and the determination of the said amount shall be settled and fixed by the architect, whose decision and determination shall be final and binding on the parties.

5. It is agreed and understood that in the event of any reasonably necessary or proper part of the work (of which the architects shall be the sole judge) having been omitted to be shown in the drawings or plans or to be described in the specifications, through oversight, or error, the contractor shall, notwithstanding execute and provide all such omitted work and things as if they had been severally shown and described, without any extra charge and according to the directions of the architects and to his satisfaction; provided, that if such added work shall constitute an alteration in the general plans and specifications of such building the same shall be made and compensated for under the provisions of the next preceding sub-division (4) of this article.

6. If alterations diminish the quantity of the work to be done they shall not constitute a claim for damages for anticipated profits for work dispensed with, and the contract price shall be that abated accordingly to an amount to be agreed upon; and if the board and contractor shall fail to agree as to the amount to be so abated, such amount shall be determined by the architects as hereinbefore provided.

7. In case of repetition, variations or discrepancies in the specifications and drawings or of this contract, the interpretations and determinations of which are doubtful, it is distinctly understood that the architects may adopt the interpretation or construction which shall secure in all cases the most substantial and complete performance of the work and be most favorable to the board and secure to it the most ample protection.

8. It is agreed that any changes or alterations shall in no wise affect the validity of the bond nor require the board or contractor to notify the bondsman either as to the time, nature of or extent of such changes; the bond here referred to being the bond given by the contractor to guarantee the performance of his contract.

III.

9. The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architects, by the board, or by any of the committees or members or by the manager of the board; and the contractor shall, within twenty-four hours after receiving written notice by the architects to that effect, proceed to remove from the grounds or building all materials condemned by the architects, whether worked or unworked, and to take down all portions of the work which the architects by like written notice condemns as unsound and improper, within a like period of time after service of such notice, and upon like notice the contractor shall take down and remove any work or material that shall in any way fail to conform to the drawings and specifications; and the contractor shall, at his own expense, make good all work damaged or destroyed thereby.

10. It is the intention of this contract to secure

the best workmanship and materials of the grade specified, and the contractor agrees to provide and furnish the same. And if, after being passed in the first place by the architects, doubt exists as to the character of the work it must, at the written request of the architects, be taken out and replaced by new work, provided such written request be served on the contractor at any time prior to the final acceptance of the entire work.

11. The contractor agrees to guarantee and indemnify the said board against any loss whatsoever by reason of any obligation the contractor shall have incurred or may incur.

12. If any sub-contractor or employe employed by the contractor on the work is or shall appear to the architect to be incompetent to perform the work entrusted to him, or shall in the opinion of the architects be untrustworthy, or who shall act in a disorderly manner, he shall be discharged immediately on the requisition of the architects and shall not be again employed on the work without the written approval of the architect.

13. All work enumerated in this contract shall be completed and ready for acceptance within fourteen months ..... from date as of which this agreement is made, without respect to weather conditions. In case of the non-completion of said work within the time above specified and allowed, the board may deduct and retain out of the moneys due or which may become due the contractor and the contractor shall be obliged to pay, in addition to the penalty hereinafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work appointed by the board for each and every working day from the time so allowed for the completion of said work up to the time when the

same shall have been completed, provided, however, that is in the performance of said work it shall be found that the work actually to be done and performed is in excess of the quantity herein specifically provided for then such deduction for the payment of such inspector's wages shall be allowed only from and after the time, in addition to the time first allowed, when such excessive work could reasonably be expected to be completed. The board may, at its election, recover from the contractor such inspectors' wages in an action on the bond. It is distinctly understood that the time specified for the completion of such work is of the essence of this contract, and the contractor shall not be entitled to claim performance of this contract unless the work is entirely completed in every respect on or before the time limited and fixed for its performance as aforesaid shall expire; and in case this contract is not completely performed by the contractor within the time so fixed and the contractor is permitted to finish the work, which he shall be obliged to do if the board so elect, the contractor agrees to pay to the board the sum of seventy-five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty, and may be retained by the board from any sums in its hands due from it to the contractor, or the same may be collected by a suit on bond of the contractor in this agreement mentioned.

14. In case of any unnecessary or inexcusable delay in the general conduct of the work, or in the event of an actual or practical abandonment of the work, the board will notify the contractor and his bondsman to that effect; if the contractor or his bondsman (who if they shall proceed with the work

shall assume all the obligations and be subject to all the restrictions and conditions herein imposed upon the contractor) shall not, within five consecutive days thereafter, take such measures as will, in the judgment of the architects, insure the satisfactory completion of the work, within the time specified or in a reasonable time thereafter, if the contractor has been permitted to continue beyond the time specified as provided for elsewhere in this contract in this contract, the board may then notify the aforesaid contractor and his bondsman to discontinue all work under this contract and it is agreed that the contractor and his bondsman will immediately respect such notice and stop work. The board may then notify the aforesaid contractor and his bondsman to discontinue all work under this contract and it is agreed that the contractor and his bondsman will immediately respect such notice and stop work. The Board shall then have the right to advertise the work and relieve the same to another contractor or to complete the work under its own directions according to law, using the same or similar materials herein contracted to be furnished. All expense to be paid the party to whom the work may be relet, and any other claims arising under this contract, shall be deducted and paid by the board of the moneys then due the contractor, or which may thereafter become due under and by virtue of this agreement or any part thereof; and in case such expense and deduction are less than the sum which would have been payable for such work under this contract, if the same had been completed by the party of the second part, the contractor shall not be entitled to receive the difference; and if the expense and deductions are greater, after due allowance of material other than herein contracted to be fur-

nished be used, then the contractor and his bondsman shall be liable for the difference. The penalty provided in section thirteen for non-completion of the work within the time specified shall continue to run, and the contractor shall be liable for the same, whether or not the said work is taken out of his hands or is completed by his bondsman, or the Board or by a secondary contractor if the work be relet by the board.

15. During the prosecution of the work herein contemplated the contractor shall in the employment of workmen and mechanics, give the preference to citizens of this state and shall pay them at current prices for such labor and shall observe the requirements of the laws of New Jersey, making it unlawful to employ laborers who are not citizens of the United States, entitled "An Act respecting the employment of mechanics and laborers upon the public work of this State and the municipalities within the same," passed March 24, 1899 (P. L. 1899, page 524) and relating to the hours of employment of laborers, workmen and mechanics (P. L. 1913, Chap. 253, page 479, etc.).

16. The contractor shall furnish complete proper releases of liens from time to time as required by the board. It is understood and agreed that the party of the second part shall indemnify and save harmless the said board for all claims and for all costs and expenses of suits or proceedings resulting or arising therefrom for the labor performed or materials furnished under this contract and shall furnish the board with satisfactory evidence when called for that all persons who have done work or furnished materials for which the board may have been or shall be liable have been fully paid and satisfied, and otherwise the board shall have the right

to pay all such claims out of any moneys that may be due or that may afterwards become due the contractor. In the event of the abandonment of the work the money remaining due the contractor for work done up to the date of the abandonment shall be applied to the payment of labor, but this shall not include the retained percentage or other moneys held for the benefit of and to indemnify the board. The contractor shall, if required, notify the board each month of the names and amounts of accounts of all creditors for materials and supplies furnished during the preceding month. If such amounts are not paid out of the estimate next received, after said accounts are due or are presented to the board, the board may, and shall have the right, but shall not be bound or obliged, if requested by the contractors said creditors to deduct such amounts from the next or any other succeeding estimate, which amounts may be paid the creditors when they fully satisfy the board of the correctness and validity of their claims.

17. The contractor agrees, and the bond accompanying this agreement is among other things intended to indemnify and save harmless the board from all suits or actions of any kind or description and the costs and expenses thereof for or on account of any injuries or damages received or sustained by any person or persons or property or properties by or from the contractor, his servants, agents, employes or workmen, during the prosecution of the work, or by or in consequence of any improper materials in its construction or by or on account of any act of negligence or omission whatsoever of the contractor or any of his servants, workmen or agents or employes, or by reason of his failure, neglect or omission to pay out any claim for labor,

work or materials, employed or used in the prosecution of or performance of this contract; and in case of suit or suits, claim or claims therefor being made, so much of the money due or to become due to the contractor under or by virtue of this contract as shall be considered necessary by the board may be retained by the board and withheld from the contractor until all such suits or claims shall have been settled by the contractor, including all costs, damages, charges and expenses incurred by the board in defending the same, and evidence of such settlement furnished to the board to its satisfaction, and the board shall not in any way be liable therefor, and in case of loss, damages or expenses being incurred by the board by reason of such claims, the amount thereof may be deducted from the moneys so retained and held under this section, and applied and used towards the satisfaction of the said losses, damages and expenses.

18. The contractor shall enter into and furnish a bond with sureties of some indemnity corporation authorized to transact business in this State and satisfactory to the board, in a penal sum equal to the full amount of the contract price, which bond shall be in the form annexed hereto and marked "Contractor's Bond," and this contract shall not become operative unless the contractor shall, concurrently herewith, execute and deliver said bond.

19. Wherever herein the board is given any power or discretion touching the subject-matter of this contract such power may be exercised by any proper committee of the said board empowered thereto by said board, and the contractor shall be subject to the directions and decisions of any said committee as fully and in the same manner as though said board has acted as a body.

IV.

20. The Board agrees to pay to the contractor, in full payment and satisfaction for all work included in and to be done and performed and for all materials to be furnished under this contract and specifications the sum of Two Hundred and Fifty four Thousand One Hundred Fifty seven dollars; which moneys shall be paid to the contractor, upon proper certificates of the architects, as follows, to wit:

The architects on the first day of each calendar month or within five days thereafter, during construction, will estimate and certify to the board approximately the amount of work completed during the proceeding calendar month according to the contract and specifications, and eighty-five per cent of the estimated cost thereof under this contract shall then be due and shall be paid to the contractor, except as provided for elsewhere in this contract, on or before the fifteenth day of each month, for the work of the proceeding calendar month, and the balance, fifteen per centum of said contract price, shall be paid within forty days after the final completion and acceptance of the work. When this contract shall have been notified performed by the contractor and the board shall have been notified to that effect by the contractor the board shall forthwith make a final inspection of the work and if the same shall be accepted by it, the said board, shall, except for cause herein specified, pay to the contractor within forty days thereafter the balance which shall be due, excepting therefrom such sums as may lawfully be retained under any of the provisions of this contract.

21. It is agreed that the covenants, stipulations and agreements in this contract set forth shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties. And it is further agreed that the contractor shall not

make any assignment of this contract, or of the moneys to be paid or payable to him thereon, without special permission in writing from the board.

22. This contract is one of four several contracts made on the award by the Board of Education for the following work: (a) the general work of building said school, (b) the heating and ventilating apparatus for the same; (c) the plumbing and kindred work; (4) the electrical work; all of which contracts are awarded concurrently herewith. It is distinctly understood that the contractor in this particular contract named shall so carry on the work by him hereby undertaken that in the prosecution thereof he will in no wise unnecessarily or improperly hinder, interfere with, obstruct or delay the work undertaken by any co-contractor; and the contractor in this agreement shall named be liable for all damages sustained by the board arising from any breach of the covenants contained in this paragraph of this agreement, and the said contractor shall be liable for the same by suit on his bond.

23. It is further understood and hereby agreed by the contracting parties that the following documents, all and singular, are integral and essential portions of this contract, as fully as though set out herein at large, to wit; the advertisement, all drawings, maps, plans and profiles hereto attached or herein referred to or described, the specifications, the proposal, this specific contract and the contractor's bond.

The contractor hereby guarantees that all labor to be employed on the work will be performed in a proper and workmanlike manner and that all materials used thereon shall be good and sufficient and of the kind and quality required by the terms of this contract, and agrees to repair and make good, for the period set forth in the specifications, at his ex-

pense, any or all defects which may appear in his work and materials during that time and which in the judgment of the architects arose from defective workmanship or inferior materials.

The party of the second part hereby admits and affirms that he has read each and every clause in this contract and that he has examined the maps, plans and drawings, and the site of the proposed work and that he fully understands the scope and meaning of the same; and hereby agrees that he will comply with all the terms, covenants and agreements herein set forth.

IN WITNESS WHEREOF the party of the First part has caused its corporate seal to be hereto affixed, and these presents to be signed by its president and attested by its secretary, and the party of the second part has hereunto affixed his hand and seal as of the eighteenth day of February, nineteen hundred and twenty-four.

Executed in duplicate: but if there is any variance between the copies, that held by the Board shall govern and bind the parties.

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, By

.....

President.

Attest.

.....

Secretary.

.....(SEAL)

Contractors.

(Seal of the Board)
Witness to signature
of contractor

.....

NOTICE OF MOTION TO STRIKE OUT BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

(Filed May 10, 1926.)

Between THE CITY OF MILLVILLE, *et al.*, *Complainants,* and THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*, *Defendants.*	On Bill for Injunction, etc. Notice of Motion to Strike Out Bill of Complaint.

To Louis H. Miller, Esq., Solicitor for Complainants:

Please take notice that on Monday, May 10, 1926, at ten o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard thereon, at the Chancery Chambers, in the City of Camden, I will apply to the Chancellor for an order striking out the bill of complaint filed by you in the above-stated cause, for the following reasons:

1. The bill is without equity and discloses no

cause of action against the defendant, the Board of Education of the City of Millville in the County of Cumberland.

2. The Court of Chancery is without power to disturb the contract rights existing between the defendant, The Board of Education of the City of Millville in the County of Cumberland, as owner of the school house property in the City of Millville, and the other defendants who are contractors for the erection of a school house building in said city.

3. Neither the municipal governing body of the City of Millville nor the Director of Revenue and Finance of said city possess any visitorial or supervisory function or powers over the Board of Education of the City of Millville in the County of Cumberland.

4. The object of the bill is to secure the aid of the Court of Chancery in the recovery of a penalty or forfeiture, which is contrary to equity.

WALTER H. BACON,
Solicitor for Defendant, The Board of Education of the City of Millville, in the County of Cumberland.

NOTICE OF MOTION TO STRIKE OUT BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

(Filed May 10, 1926.)

Between

THE CITY OF MILLVILLE, and IRWIN W. KIRK, Director of Revenue and Finance of the City of Millville, *Complainants*,

and

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE, *et al.*, *Defendants*.

On Bill for Injunction, etc.

Notice of Motion to Strike Out Bill of Complaint.

To Louis H. Miller, Esq., Solicitor for Complainants:

Please take notice, that on Monday, May 10th, 1926, at ten o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard thereon, at the Chancery Chambers, in the City of Camden, we will apply to the Chancellor for an order striking out the bill of complaint filed by you in the above stated cause, for the following reasons:

1. The bill discloses no cause of action against this defendant individually or in combination with his co-defendants.

2. The bill affirmatively discloses that the complainant is a stranger to the contract between the Board of Education of the City of Millville, in the County of Cumberland, and State of New Jersey, and this defendant, George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners, trading as George W. Shaner & Sons. The complainant is without interest therein, and is not entitled to sue thereon or thereunder or defend against it.

3. Neither the municipal governing body of the City of Millville, nor the Director of Revenue and Finance of said city possess any visitorial or supervisory function or powers over the Board of Education of the City of Millville in the County of Cumberland.

4. The object of the bill is to secure the aid of the Court of Chancery in the recovery of a penalty or forfeiture, which is contrary to equity.

BLEAKLY, STOCKWELL AND BURLING,
Solicitors for and of Counsel with Defendants, George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, co-partners, trading as George W. Shaner & Sons.

NOTICE OF MOTION TO STRIKE OUT BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

(Filed May 10, 1926.)

Between

THE CITY OF MILLVILLE, and IRWIN W. KIRK, Director of Revenue and Finance of the City of Millville,
Complainants,
and
THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE, *et al.*,
Defendants.

On Bill for Injunction, etc.
Notice of Motion to Strike Out Bill of Complaint.

To Louis H. Miller, Esq., Solicitor for Complainants:

Please take notice, that on Monday, May 10th, 1926, at ten o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard thereon, at the Chancery Chambers, in the City of Camden, we will apply to the Chancellor for an order striking out the bill of complaint filed by you in the above stated cause, for the following reasons:

1. The bill discloses no cause of action against this defendant individually or in combination with his co-defendants.

2. The bill affirmatively discloses that the complainant is a stranger to the contract between the Board of Education of the City of Millville, in the County of Cumberland and State of New Jersey, and this defendant, J. Howard Hutchison. The complainant is without interest therein, and is not entitled to sue thereon or thereunder or defend against it.

3. Neither the municipal governing body of the City of Millville, nor the Director of Revenue and Finance of said city possess any visitorial or supervisory function or powers over the Board of Education of the City of Millville in the County of Cumberland.

4. The object of the bill is to secure the aid of the Court of Chancery in the recovery of a penalty or forfeiture, which is contrary to equity.

BLEAKLY, STOCKWELL AND BURLING,
Solicitors for and of Counsel with Defendant, J. Howard Hutchison.

NOTICE.

IN CHANCERY OF NEW JERSEY.

(Filed May 10, 1926.)

Between
THE CITY OF MILLVILLE, *et al.*,
Complainants,
and
THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE, *et al.*,
Defendants.

On Bill, Etc.
Notice.

To Louis H. Miller, Esq., Solicitor of Complainants:

Sir:

Please take notice that on Tuesday, April 27, 1926, at 10 o'clock in the forenoon at the State House in Trenton, I shall move before his Honor the Chancellor or such Vice-Chancellor as shall sit in his stead, for an order striking out the bill of complaint filed by the complainants in the above entitled cause, for the following reasons:

1. The bill of complaint discloses no cause of action in that:

(a) It prays for no equitable relief from this Court that could not be obtained in the courts of law of this State.

(b) Complainants are estopped from seeking relief in this court by reason of their appeal to the State Board of Education.

(c) Complainants have elected to try out their rights before the State Board of Education.

2. For lack of jurisdiction:

(a) The bill of complaint seeks relief for which complainants have a full and complete remedy in the courts of law.

(b) The bill of complaint discloses no ground of equitable relief.

(c) Complainants have no right, in equity, to intervene in the contractual relations of the defendants set out in the bill of complaint.

Respectfully yours,

JAMES J. McGOOGAN,
Solicitor of Defendants, Jackson Electric Company and Shearman and Tompkins.

Dated, Trenton, N. J., April 20, 1926.

ORDER TO STRIKE OUT BILL.

IN CHANCERY OF NEW JERSEY.

(Filed October 27, 1926.)

Between THE CITY OF MILLVILLE, *et al.*, *Complainants,* and THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*, *Defendants.*	On Bill, &c. Order to Strike Out Bill.

The defendants having on due notice to the complainants moved the Court to strike out complainants' bill and the matter coming on to be heard in the presence of Louis H. Miller, Esquire, of counsel for the complainants, Walter H. Bacon, Esquire, counsel for the Board of Education of the City of Millville, James J. McGoogan, Esquire, counsel for Jackson Electric Company and Shearman & Thompkins, and Bleakly, Stockwell & Burling, counsel for defendants, George W. Shaner & Sons and J. H. Hutchinson, and the Court having read and considered the bill of complaint and heard and considered

the arguments of the respective parties upon said motion and being of the opinion that said bill does not state a cause of action and should be stricken out:

It is thereupon ordered, adjudged and decreed on this 27th day of October, 1926, on motion of Walter H. Bacon, Esquire, James J. McGoogan, Esquire, and Bleakly, Stockwell & Burling, counsel for the several defendants respectively, that the bill of complaint be stricken out, with costs.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

Approved as to form,
WALTER H. BACON,
Solicitor for the Board of Education of Millville in the County of Cumberland.

A true copy,
THOMAS BARBER,
Clerk.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

(Filed October 27, 1926.)

Between
THE CITY OF MILLVILLE, *et al.*,
Complainants,
and
THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*,
Defendants.

On Bill, &c.
On Motion to Strike Out Bill.
Conclusions.

MR. LOUIS H. MILLER for the complainants.
MR. WALTER H. BACON for the defendant, the Board of Education of the City of Millville, in the County of Cumberland.
MR. JAMES J. MCGOOGAN for the defendant, Jackson Electric Co. and Shearman & Thompkins.
MESSRS. BLEAKLY, STOCKWELL & BURLING for the defendants, George W. Shaner & Sons and J. H. Hutchinson.

INGERSOLL, V. C.:
The complainants, the City of Millville, a munici-

pal corporation of this State, and Irwin W. Kirk, the Director of Revenue and Finance of said city, file this bill alleging that the Board of Education of said city entered into four separate contracts for the building of a high school in said city. Each of said contracts being for certain portions of work necessary. In each of said contracts was a provision that the work called for would be completed within a certain time therein specified, and providing for liquidated damages in the event of failure to so complete.

That the work was not completed within the specified time; that resolutions were passed calling upon the respective contractors to complete it.

That said contractors completed their contracts and the Board of Education accepted the work, at a time considerable later than that called for in the several contracts; that the damages stipulated for in said contracts amounted to approximately $27,535; but that said Board of Education ordered paid the amount due said contractors without deducting the said damages.

That by the proceedings complained of the City of Millville and its taxpayers would be defrauded to the amount of $27,000.

That the City of Millville appealed to the Commissioner of Education of the State, from said order and proceedings. That the Commissioner of Education dismissed said appeal for lack of jurisdiction. That the complainants appealed from the order of said Commissioner to the State Board of Education, which appeal at the time of the filing of the bill, had not been heard.

That said orders, resolutions or motions by the Board of Education of the City of Millville are unlawful and a fraud on the tax payers.

The prayers were that:

"2. That the aforesaid orders and proceedings had by the Board of Education of the City of Millville, January 20, 1926, ordering payment of said moneys as aforesaid to the said several contractors, George W. Shaner & Sons, Jackson Electric Company, J. H. Hutchinson and Shearman and Thompkins, be decreed fraudulent and be set aside and vacated.

"3. That the said Board of Education, and its officers and agents and George B. Worstall, custodian of school funds of the City of Millville, be restrained and enjoined from paying out any moneys whatsoever in pursuance of said orders and proceedings had by said Board on January 20th, 1926, as aforesaid."

An order to show cause was granted.

A motion is now made to strike out the bill of complaint, upon the several grounds—one of which questions the jurisdiction of this Court.

This point is discussed by the defendants in their brief under the heading:

"Certiorari to the Supreme Court is the proper remedy if any rights of the complainant have been invaded, and that the Supreme Court is the proper tribunal for review of the resolution awarding payment,"—and by the complaint, that the Court has jurisdiction.

The complainants cite no cases but say:

"II. The Court has jurisdiction. It is charged in the bill that the Board of Education has ordered paid out of the moneys appropriated to construct and furnish the new high school, to contractors, a sum exceeding $27,000 which the Board has a right to retain in satisfaction

of stipulated damages which have accrued to, and are due the Board of Education.

On the face of the bill such action of the Board is unlawful and is a fraud on the City of Millville, and the public. It amounts to a gift to the contractors of $27,000 of public moneys or credits. If so, equity may restrain the fraudulent act under its general grant of equity powers."

Vice Chancellor Backes in *Berdan v. Passaic Valley Sewerage Commissioners,* 82 N. J. Eq. 235, at page 243 said:

"In *Tucker v. Freeholders of Burlington,* 1 N. J. Eq. (Saxt.) 282, the complainants protested in this court against the construction of a bridge by the Board of Freeholders, which they insisted would injure them irreparably. Chancellor Vroom in dissolving the injunction (on p. 287) said:

'If the Board have power to act in the premises; if they have jurisdiction over the subject-matter, this Court can take no cognizance of the complaints contained in the bill. The right of supervision and correction is in another tribunal. In England it belongs to the King's bench, and in this State to the Supreme Court. The principle is universal, that wherever the rights of individuals are invaded by the acts of persons clothed with authority to act, and who exercise that authority illegally the persons aggrieved must seek redress by *certiorari.*' Numerous cases exist where the Supreme Court has exercised this power.

"The Supreme Court may in its discretion at the instance of a private person act by *mandamus, certiorari,* or *quo warranto,* for the redress

or prevention of public wrongs by public bodies and officers, whose official sphere is confined to some political division of the state, whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired." *Ferry v. Williams,* 41 N. J. Law. 332.

"The general rule that a person who applies for a writ of *certiorari* must show that he will suffer a special injury beyond that which will affect him in common with the rest of the public is subject, as I think will appear from a careful consideration of our cases, to this qualification; where the municipal ordinance is *ultra vires,* and will furnish no justification for the authorized act, so that if the power purporting to be granted is executed, the work will be a public nuisance or a tortious act, the writ of *certiorari* will be denied, not because the prosecutor is without interest in the subject-matter, but for the reason that there is another remedy by indictment or by civil action." *Oliver v. Jersey City,* 63 N. J. L. 96, at page 99.

But "where a municipal corporation, by action *ultra vires* or otherwise, embarks in a scheme which will result in an unlawful expenditure of public funds, any ordinary taxpayer may be admitted to prosecute a *certiorari* to review such action." *Rehill v. East Newark and Jersey City,* 73 N. J. L., 220, and cases therein cited.

The bill will be dismissed.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

(Filed November 25, 1926.)

Between

THE CITY OF MILLVILLE. and IRWIN W. KIRK, Director of Revenue and Finance of the City of Millville,
Complainants,

and

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*,
Defendants.

On Bill for Injunction.
Notice of Appeal.

Complainants hereby appeal from an order to strike out complainant's bill of complaint bearing date October 27, 1926, whereby it was ordered that the bill of complaint of the complainants be stricken out with costs, and from the whole and every part of said order or decree, to the Court of Errors and Appeals in the last resort in all causes.

Dated Millville, N. J., November 24th, 1926.

LOUIS H. MILLER,
Solicitor for and of Counsel with Complainants.

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

LOUIS H. MILLER,
Of Counsel with Complainants.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

(Filed November 28, 1926.)

Between
THE CITY OF MILLVILLE, and IRWIN W. KIRK, Director of Revenue and Finance of the City of Millville,
Complainants,
and
THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*,
Defendants.

On Bill for Injunction.
Amended Notice of Appeal.

Complainants hereby appeal from a decretal order to strike out complainant's bill of complaint, advised by the Honorable Robert H. Ingersoll, Vice-Chan-

cellor, and made by his Honor the Chancellor, bearing date October 27th, 1926, whereby it was ordered that the bill of complaint of the complainants be stricken out with costs, and from the whole and every part of said order or decree, to the Court of Errors and Appeals in the last resort in all causes. Dated Millville, N. J., November 27th, 1926.

LOUIS H. MILLER,
Solicitor for and of Counsel with Complainants.

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

LOUIS H. MILLER,
Of Counsel with Complainants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

(Filed November 24, 1926.)

THE CITY OF MILLVILLE, and IRWIN W. KIRK, Director of Revenue and Finance of said City, *Complainants*, v. THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *Defendants*.	On Bill for Injunction. On Appeal from Order Dismissing Bill of Complaint. Petition of Appeal.

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of the City of Millville, a municipal corporation of the State of New Jersey, and Irwin W. Kirk, Director of Revenue and Finance, and chief financial officer of said city, complainants in

the above stated cause; respectfully show that your petitioners find themselves aggrieved by a certain order made in the above stated cause bearing date on the twenty-seventh day of October, 1926, by his Honor, the Chancellor, filed in the Court of Chancery on that date, in this respect, to wit:

That the said order or decree orders that the bill of complaint be stricken out, with costs. And your petitioners humbly appeal from the whole and every part of the said decree on the ground that the same is erroneous for that:

1. The said decretal order decrees that the bill of complaint be stricken out, with costs, whereas the learned Chancellor should have decreed that the said bill of complaint was good and sufficient and that upon the facts alleged in the bill of complaint complainants were entitled to the relief prayed for.

2. The Chancellor held that the bill of complaint does not state a cause of action and decrees that the same should be stricken out, whereas the Chancellor should have decreed that said bill does state a cause of action and should not be stricken out.

And your petitioners humbly appeal from the whole and every part of said decretal order on the ground that the same is erroneous for the reasons hereinbefore set out.

Your petitioners therefore pray that said decretal order may in all respects be reversed, set aside and for nothing holden and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

Dated Millville, N. J., November 20, 1926.

LOUIS H. MILLER,
Solicitor for and of Counsel with Appellants.

ANSWER OF THE BOARD OF EDUCATION OF MILLVILLE IN THE COUNTY OF CUMBERLAND TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THE CITY OF MILLVILLE, *et al.*, *Complainants-Appellants,* and THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND, *et al.*, *Defendants-Respondents.*	On Appeal from Court of Chancery. Answer of the Board of Education of Millville in the County of Cumberland to Petition of Appeal.

The answer of the Board of Education of the City of Millville in the County of Cumberland, one of the above-named respondents, to the petition of appeal of the City of Millville and Irwin W. Kirk, Director of Revenue and Finance of said city, the above-named appellants.

This respondent, not admitting the truth of any or all of the matters in said petition of appeal con-

tained, for answer thereto nevertheless admits that an order was on October 27, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order is agreeable to equity, and prays that the same may be affirmed with costs to be taxed in favor of this respondent.

Solicitor for and of Counsel with Respondent, the Board of Education of the City of Millville in the County of Cumberland.

ANSWER OF JACKSON ELECTRIC CO. AND SHEARMAN & TOMPKINS TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE CITY OF MILLVILLE, *et al.*, *Complainants-Appellants*, v. BOARD OF EDUCATION OF MILLVILLE, *et al.*, *Defendants-Appellees.*	On Appeal From Chancery. Answer of Jackson Electric Co. and Shearman & Tompkins to Petition of Appeal.

The answer of Jackson Electric Company and Shearman & Tompkins, two of the appellees named in the above-entitled cause, to the petition of appeal of the City of Millville and Irwin W. Kirk, director, etc., the appellants in said cause.

1. These appellees, 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 October 27, 1926, made and entered in the Court of Chancery in New Jersey in

the above-entitled cause, for the purposes in said petition mentioned and as therein 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 the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

JAMES J. McGOOGAN,
Solicitor for and of Counsel with Jackson Electric Co. and Shearman & Tompkins, Appellees.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THE CITY OF MILLVILLE and IRWIN W. KIRK, Director of Revenue and Finance of the said City, *Complainants-Appellants,* and THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE, *et al.*, *Defendants-Respondents.*	On Appeal from an Order of the Court of Chancery Dismissing Bill of Complaint. Answer to Petition of Appeal.

The answer of George W. Shaner, George B. Shaner, Edgar F. Shaner and Arthur H. Shaner, copartners, trading as George W. Shaner & Sons, and J. H. Hutchinson, respondents in the above cause, to the petition of appeal of City of Millville, a municipal corporation of the State of New Jersey and

Irwin W. Kirk, Director of Revenue and Finance and chief financial officer of said city, the above-named appellants.

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 an order bearing date the twenty-seventh day of October, 1926, striking out and dismissing the bill of complaint, was made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said order is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

Solicitors for and of Counsel with Respondents.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE CITY OF MILLVILLE and IRWIN W. KIRK, Director of Revenue and Finance of said City,

Complainants,

and

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE, *et al.*,

Defendants.

ON BILL, &C.

ON APPEAL FROM ORDER TO STRIKE OUT BILL.

BRIEF FOR COMPLAINANTS- APPELLANTS.

The City of Millville, pursuant to Sec. 76 of the State School Law (4 C. S. p. 4746; amended P. L. 1924 p. 176), appropriated money, to the amount of $375,000, by Ordinance No, 239. The court will take notice of this by-law of the city.

By the express terms of the ordinance, and of the stipulation written in the bonds themselves, and by force of law, the money so appropriated was to be employed for the purpose of defraying all the

expenses of erecting and furnishing a new high school building.

The Board of Education let the four several contracts for erecting the new high school building. The general contract was with Shaner & Sons; the contract for the electrical work with Jackson Electrical Company; the contract for the plumbing work with Shearman & Tompkins; and the contract for heating and ventilating with J. H. Hutchinson.

Each of the contracts contained stipulation that the work therein provided for should be completed by a specified time. In default of completion within the time agreed upon, the board had the right of election whether the contractor should proceed to finish the work, the contractor stipulating to pay the Board a certain sum per diem for each day thereafter employed by the contractor in furnishing the work.

The several contractors did default in completing the work undertaken by them, respectively. Thereupon the Board, by appropriate resolutions served on the contractor, exercised its election of requiring the contractors to complete their work, under the clause providing for the payment of the liquidated damages stipulated in the contracts.

The contractors then did proceed to finish the several items of work they had contracted to perform, and, upon inspection of the work, the Board, by Resolution adopted November 3, 1925, accepted the work as having been completed in all respects except as to time of performance.

Under the terms of the several contracts the amount of liquidated damages that had accrued to the Board aggregated about $27,000.

On January 20, 1926, the Board of Education ordered that the contractors be paid the entire amount

due under their contracts, without deduction of the liquidated damages, or any part thereof.

The City of Millville, and Irwin W. Kirk, Director of Revenue and Finance of the City, its chief financial officer, appealed to the Commissioner of Education from the orders and proceedings directing such payments, without deduction of the accrued damages due the Board under the terms of the contracts. The Commissioner of Education dismissed the appeal for lack of jurisdiction. An appeal was taken to the State Board of Education from the ruling of the commissioners. At the time the bill was filed the appeal to the State Board of Education was still pending, though since dismissed for lack of jurisdiction.

POINTS.

1. The complainants have a right to bring this action.

2. The Court has jurisdiction.

3. On the face of the bill the yielding up the contractors of the accrued liquidated damages is unlawful and is a fraud on the City and the Board of Education.

I.

THE COMPLAINANTS HAVE A RIGHT TO BRING THIS ACTION.

The City appropriated the money under the act, and the bonds issued to raise the school moneys are city bonds. The money is paid over to the school board upon a plain trust to apply the fund inviolably

for the purposes mentioned in the ordinance and plainly contemplated by the statute. The statute provided:

> "The Statute, Sec. 76 (2 S. C. S. p. 3183), for raising the money for new school houses, provides:
>
> "185-76. (1) Whenever a City Board of Education shall decide that it is necessary to raise money for the purchase of land for school purposes, or for erecting * * * a school house, it shall prepare a statement, &c, &c. (7) * * * The proceeds of any bonds issued under the act shall be paid to the custodian of school moneys of the school district, who shall in no event disburse the same except * * * for the purposes for which such bonds were issued.
>
> "2 S. C. S. 3183, 3185-6.
>
> "Clearly defined by statute is a legislative scheme regulating the raising of moneys for the construction of new school houses, providing (by Secs. 52, &c., hereinafter cited *) for the construction of new buildings, by contract and controlling the disbursements of the moneys raised for constructing the building.

If, as is charged in this case, the Board of Education has attempted to divert the trust funds of the City to purposes other than the erecting and finishing of the new high school building, it would seem that the City, charged with raising the money, has the right to file a bill to restrain the fraud.

II.

THE COURT HAS JURISDICTION.

It is charged in the bill that the Board of Education has ordered paid out of the moneys appropriated to construct and furnish the new high school, to contractors, a sum exceeding $27,000 which the Board is in duty bound to retain in satisfaction of stipulated damages which have accrued to, and are due, the Board of Education.

On the face of the bill such action of the Board is unlawful and is a fraud on the City of Millville, and the public. It amounts to a gift to the contractors of $27,000 of public moneys or credits. If so equity may restrain the fraudulent act under its general grant of equity powers. 1 Dillon's Mun. Corp. 4 Ed. par. 311; also Secs. 914, 921, 923, citing *Colburn v. Chattanooga,* 17 Am. L. Reg. N. S. 191.

If warrants have issued for the money even the Board itself is not estopped to set up the defense of *ultra vires,* or fraud or failure of consideration. And it may maintain a bill in equity to cancel warrants illegally issued. Taxpayers may enjoin the issue of illegal warrants or scrip.

An injunction will issue against the fraudulent or unlawful appropriation of the public moneys. *McKinley v. Chosen Freeholders,* 29 Eq. 164, at page 165, citing *Kerr on Injunctions,* 573, *High on Injunctions,* 373, 393.

The Chancellor, in *McCormick v. New Brunswick,* 83 N. J. Eq. 1, 3, said this Court might properly interfere by injunction to save the city's money from wilful waste or fraudulent diversions.

See also *Watters et al., v. Bayonne,* 89 L. 385; *New Yorker Staats-Zeitung v. Nolan,* 105 At. 72.

III.

ON THE FACE OF THE BILL THE GIFT TO THE CONTRACTORS OF THE $27,000 OF LIQUIDATED DAMAGES IS UNLAWFUL AND A FRAUD ON THE CITY AND BOARD OF EDUCATION.

The damages are liquidated damages, and not a penalty.

McClintic Marshall Co. v. Hudson Freeholders;
Wood v. Ocean City, 85 Eq. at p. 330;
Ferber v. Hasbourck Heights, 902, 193;
Monmouth Park Ass'n. v. Wallis Iron Works, 55 N. J. L 132;
Robinson v. Centenary Fund, 68 N. J. L. 723;
Moore v. Durnam, 63 N. J. Eq. 427;
Gussnow v. Beineson, 76 L. 209;
Jersey City v. Flynn, 74 N. J. Eq. 104, affirmed 76 N. J. Eq. 607;
Tilton v. McLaughlin, 83 L. 107;
Van Buskirk v. Board of Education, 78 N. J. L. 650.

The Van Buskirk case, Court of Errors, is practically dispositive of the merits of this case. Here, as in that case, there was no claim for extension of time presented to the architect nor the Board, and no allowance for such extension. The proivsions of the contract in the Van Buskirk case were substantially those in the contracts now before the Court.

Therefore, here, as in the Van Buskirk case, the liquidated damages stipulated upon plainly accrued, and were due the public treasury, and might and

ought now be retained from the contract money, and held and disposed of to the use of the Board of Education.

The sole question remaining is, has the Board of Education the right to waive or surrender those stipulated damages under the circumstances disclosed by the bill, without consideration?

The answer is, that if the Board have the power of waiver, at law, yet such act would amount to a clear fraud on the public, and ought to be enjoined. Otherwise it is easy to conceive the evils that are bound to result touching the performance of public contracts.

It is respectfully submitted, however, that such pretended waiver of an important feature of the contract is wholly beyond the power of the Board, the statute rigidly controls the making of contracts for the construction of public schools.

Several sections of the law are in point *—Sections 52, 53 and 60, 61 (4 C. S. 4741, 4743).

> "52. * * * No contract shall be entered into for the building of a new school house, &c., except after advertisement made under such regulation as the Board may prescribe.
>
> "53. No bid for building or repairing school houses or for supplies shall be accepted, which does not conform to the specifications furnished therefor, and all contracts shall be let to the lowest responsible bidder.
>
> 129. No contract for the erection of any public school building or any part thereof shall be made until and after plans and specifications therefor have been submitted to and approved by the State Board of Education. A copy of the plans and specifications as approved shall be filed forthwith with the State Board of Educa-

> tion with a copy of the contracts for the erection of the whole or any part of the school building and for the furnishing therefor shall be filed with the State Board of Education within ten days, after the same have been signed. No change in the plans and specifications shall be legal unless the same have been submitted to and approved by the State Board of Education. A copy of all changes as approved shall be filed forthwith with the State Board. School Law, Sec. 129 as amended by P. L. 1911 p. 764."

It is denied by complainants that, after award of a contract for the erection of a public school, the school board, without adequate consideration may waive, alter or amend the provisions of the contract in important and material parts beneficial to the public. Such action would amount to a practical abandonment of the contract and of all those provisions of the statute which are intended to regulate carefully the award of contracts by public boards and bodies.

For the foregoing reasons the bill ought not be stricken out, and the decree below should be reversed.

Respectfully submitted,
LOUIS H. MILLER,
Of Counsel with Complainants-Appellants.

December 18, 1926.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

THE CITY OF MILLVILLE, *et al.*,
Complainants-Appellants,
v.
THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE
IN THE COUNTY OF CUMBERLAND, *et al.*,
Defendants-Respondents.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF FOR THE BOARD OF EDUCATION.

The bill was filed by the municipal governing body of the City of Millville and the Director of Revenue and Finance, in his official capacity, and not as a taxpayer, against the Board of Education and four contractors who had recently constructed a new school house in Millville.

By the terms of the contract set out in the bill of complaint, it appears that each of the contractors agreed to perform the work within a specified time and for failure so to do the Board of Education had the option to enforce a penalty, and, if so enforced, had the further option to deduct the penalty from the final payment or to collect from the contractor by suit on his bond.

(State of Case, page 20, lines 22-26.)

The bill is filed on the theory that complainants have the authority to ask the aid of a Court of Equity to require the Board of Education to (a) exercise the option of enforcing the penalty by enforcing it, and (b) to exercise the option of collecting the penalty, if enforced, by deducting it on final settlement instead of by suit on the bond.

This authority was challenged in the Court of Chancery by the Board of Education by motion to strike out the bill on the following grounds:

1. The bill is without equity and discloses no cause of action against the defendant, The Board of Education of the City of Millville in the County of Cumberland.

2. The Court of Chancery is without power to disturb the contract rights existing between the defendant, The Board of Education of the City of Millville in the County of Cumberland, as owner of the school house property in the City of Millville, and the other defendants who are contractors for the erection of a school house building in said city.

3. Neither the municipal governing body of the City of Millville nor the Director of Revenue and Finance of said city possess any visitorial or supervisory function or powers over The Board of Education of the City of Millville in the County of Cumberland.

4. The object of the bill is to secure the aid of the Court of Chancery in the recovery of a penalty or forfeiture, which is contrary to equity.

Similar motions were made on behalf of the con-

tractors, and some of them raised the question that the remedy, if any, was by *certiorari* and not by bill in equity, and the Court of Chancery so held.

(State of Case, page 59.)

Under the School Law of 1903, the Board of Education in a city school district is a body corporate, with the usual corporate powers, and is vested with the title to all the school property within the city.

Section 76 of the Act as amended by Chapt. 234, P. L. 1921, prescribes the method to be pursued by a city Board of Education in obtaining the money for the erection of a new schoolhouse.

In *Heston v. State Board of Education,* 89 N. J. L. 486, it was held that money raised under this section may not lawfully be used for any other purpose, not even for repairs to other schoolhouses.

In *Montclair v. Baxter,* 76 N. J. L. 68, it was held under this section that when the Board of School Estimate have fixed and determined the amount necessary for the purchase of land and erection of a schoolhouse, it is mandatory upon the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax or to borrow the same and secure its re-payment by the issue of bonds.

To the same effect, see *Board of Education of Long Branch v. Board of Commissioners of Long Branch,* 2 N. J. Misc. Rep. 150, where mandamus was issued requiring the municipal governing body to raise and appropriate the money called for by the Board of School Estimate under Section 76. The cases on the subject are cited in the opinion.

All these cases indicate that when the municipal governing body has complied with the requirements of the Board of School Estimate under Section 76, it has no further control whatever over the fund.

Boards of Education are undoubtedly subject to supervision by the Commissioner of Education and by the State Board of Education in the manner prescribed by the School Law. And their acts may, of course, be reviewed by the Courts when challenged in a lawful manner. All that the Board of Education is claiming at this time is:

(a) That complainants are without power or authority to supervise or cause to be reviewed any act of the Board in the matters committed by law to its charge.

Complainants' counsel does not cite any case in his brief in support of his contention that they have such authority.

(b) The Court of Chancery is without jurisdiction. hTis subject is fully covered from one viewpoint by the opinion on page 59 of the State of the Case, to which may be added the following:

The Court of Chancery cannot disturb contract rights. See *Unger v. Haines,* 94 N. J. E. 458 (E. & A.).

Equity will not assist the recovery of a penalty or forfeiture.

Morris v. Kettle, 56 N. J. E. 826 (E. & A.);
Godfrey v. Atlantic City, 95 N. J. E. 183.

It is respectfully submitted that the decree should be affirmed.

February Term, 1927.

WALTER H. BACON,
Solicitor for and of Counsel with Board of Education of Millville.

New Jersey Court of Errors and Appeals

BETWEEN
CITY OF MILLVILLE ET AL.,
Appellants-Complainants,
and
BOARD OF EDUCATION OF THE CITY OF MILLVILLE ET AL.,
Respondents-Defendants.
} On Appeal.

BRIEF FOR RESPONDENTS, JACKSON ELECTRIC COMPANY, AND SHEARMAN & TOMPKINS.

The City of Millville and the Director of Revenue and Finance of that city filed in Chancery a bill of complaint against the Board of Education of Millville, and several contractors, among whom are Jackson Electric Company and Shearman & Tompkins. This brief is presented in behalf of those two contractors.

The bill alleges that a contract between the builders and the Board of Education was duly made for the erection of a school in Millville, and that the building was not completed within the time required, but that it has been accepted by the Board of Education, and that a resolution of the Board of Education authorized payment of the entire balances respectively due to the contractors.

The city contends that the work was not finished within the time stipulated in the contract, and that under the penalty clause, the Board of Education should have deducted certain amounts from the contractors' balances, by reason of delay in the completion of the work, and prays that the resolutions awarding payment be set aside, upon the ground that the action of the Board of Education is a fraud upon the City of Millville and its taxpayers.

Motion was made by the contractor defendants to strike out the bill of complaint, upon the grounds that the Court of Chancery had no jurisdiction to entertain it, and that it sets forth no cause of action.

The decree of dismissal should be affirmed, because the Board of Education had complete control of the contract and all matters arising thereout. See Vol. 4, Comp. Stat., pp. 4751-4752.

The allegations in the bill are conclusions and no specific act of fraud or abuse of discretion is charged.

It has been decided in *Kraft* v. *Board of Education*, 67 N. J. L. 512, that a board of education is only answerable for abuse of discretion or for fraud in matters of this kind.

The bill alleges that the money is available to pay the contractors, and there is no question raised that the legal voters did not authorize the erection of the school building, this act being a prerequisite under the school law for the building of the school.

The complainants were not parties to the contracts, nor is the board of education by any statute or rule made the agent of the complainants. It is a separate and distinct corporate body, having complete jurisdiction and control over the contracts.

Contrary to the expressed intention of the board, the City of Millville, by its intervention, asked the court to declare a forfeiture. This attempt is not in consonance with the doctrine that a court of equity will never enforce

a penalty or a forfeiture. *Bird* v. *Hawkins*, 58 Eq. at p. 243.

The board was not obliged to deduct the penalty, because the provision in the contract is not mandatory. The word "may" is used, instead of the words "shall" or "must." (See pages 2 and 3, State of Case). There is nothing in the contract compelling the board to exact the penalty, nor is there any clause in the contract, nor any law, holding that the City of Millville may intervene to exact the penalty, in the face of the adoption by the Board of Education of the meaning of the word "may" to exclude a mandatory construction.

Therefore, the penalty for delay was a matter for the exercise of the sound discretion of the board in taking or waiving that right, and the construction of the word "may" adopted by the parties to the contract cannot be reviewed.

The bill of complaint is barren of any suggestion that the board did not act in the circumstances as any other contracting body or person could lawfully act.

The Supreme Court is the proper tribunal for review of the resolutions awarding payment. *Lewis* v. *Freeholder of Cumberland*, 56 N. J. L. 416. But a court of equity may interefere where the case is "marked by some well-defined principle of equity." *McCormick* v. *New Brunswick*, 83 Eq. 1, as in *Watters* v. *Bayonne*, 89 Eq. 384, where "the price to be paid by a municipality is so excessive as to shock the conscience." See also *Berdan* v. *Passaic Valley Sewerage Com.*, 82 Eq. 235, affirmed 91 Atl. 1067, and cases cited on pages 241 et seq. of the Vice-Chancellor's opinion.

In *Harrison Land Co.* v. *Crucible Steel Co.*, 82 Eq. 414, affirmed in 86 Eq. 249, it was held that "a court of equity will not enjoin the passage of ordinances which are within the scope of the powers of the municipality," and on page 421 of the Vice-Chancellor's opinion he says that, "under our practice, when the validity of an ordinance, contract or other act, within the power of the mu-

nicipality, is attacked, because of fraud or other improper motives, or abuse of legislative discretion, such as being solely for the benefit of private interest, it has always been by certiorari, removing the complete act which is questioned to the Supreme Court."

Fraud must be set out in the pleading. *Connor* v. *Dundee*, 50 N. J. L. 257; *Lord* v. *Brookfield*, 37 N. J. L. 552. "The facts showing fraud must be pleaded, and allegations of conclusions of law are unavailing." *Bloomer* v. *Fowler*, 85 N. J. Eq. 600 (opinion in 97 Atl. 950).

In *Kohler* v. *Guttenberg*, 38 N. J. L. 419, on certiorari, a penalty for delay in the performance of the contract was not exacted by the municipality, and the Supreme Court held that an assessment for the improvement was not thereby invalidated when it appeared that the penalty could not or ought not to be enforced.

Respectfully submitted,

JAMES J. McGOOGAN,

Of Counsel for Jackson Electric Company and Shearman & Tompkins.

NEW JERSEY COURT OF ERRORS AND APPEALS.

The City of Millville and Irwin W. Kirk, Director of Revenue and Finance of said City,
Complainants-Appellants,
and
The Board of Education of the City of Millville, *et al.*,
Defendants-Respondents.

On Bill, &c.

On Appeal from Order to Strike Out Bill.

BRIEF FOR RESPONDENTS, GEORGE W. SHANER & SONS AND J. H. HUTCHISON.

This appeal is brought from a decree of the Court of Chancery (Vice-Chancellor Ingersoll) striking out the bill of complaint filed herein by the City of Millville and the Director of Revenue and Finance of the City of Millville against the Board of Education of the City of Millville and four contractors, including these respondents.

I. ABSTRACT OF THE BILL.

The bill of complaint was filed by the City of Millville and by Irwin W. Kirk as its Director of Revenue and Finance, against the Board of Education of the City of Millville and four contractors whose work co-ordinated in the building of the Millville Memorial High School, under contracts made by each contractor with the Board of Education of Millville.

Each contract required the contractor to complete his work within 14 months from the date thereof under aggregate "penalties" in the four contracts of $175 per day for each day's delay in completion and in addition "such sum as will be sufficient to pay the wages of the inspector or inspectors * * * for each and every working day" until completion. The work not being completed within the time limited, the Board of Education adopted a resolution elected that the contractors complete their work "according to the covenants and conditions and penalties in said contract contained." Copies of the resolution were served on the contractors and their sureties. The contractors completed their contracts and on November 1, 1925, tendered their work as completed. On November 17, 1925, the Board of Education accepted the work by resolutions reciting that the work "appears to have been completed (except as to time of performance) according to the terms, covenants and provisions contained in the aforesaid contracts." The penalties which the complainants say the Board of Education should deduct are:

Shaner	$12,225.
Shearman & Tompkins	4,890.
Hutchison	6,520.
Jackson Electric Co.	3,900.
	$27,535.

The Board of Education did not make said deduction and the bill charges that:

> "On the contrary by certain orders, resolutions, motions and proceedings, had, made or adopted on January 20th, 1926, unlawfully and fraudulently did order paid to said contractors, respectively, the whole of the moneys due to them on their said several contracts, without deducting said liquidated damages, or any part thereof,"

and without ordering suit on the contractors' bonds.

The complainants appealed to the Commissioner of Education on January 20, 1926, who dismissed the appeal, whereupon the complainants appealed to the State Board of Education. The bill of complaint was filed in this cause January 27, 1926, to be pursued "in the event that complainant's appeal now depending before the State Board of Education shall be dismissed."

The moneys ordered to be paid "are now in the hands of the Custodian of the Board of Education of the City of Millville."

The bill avers the "orders, resolutions or motions had and made on January 20, 1926, by the Board of Education of the City of Millville are, and every of them is unlawful and a fraud on the taxpayers of the City of Millville," and amount to "an unlawful diversion of the public funds, because made with-

out consideration, and are a fraud on the taxpayers of the City of Millville."

The Chancellor was requested to restrain the payment of these sums to the contractors.

II. STATUTORY POWERS OF THE BOARD OF EDUCATION.

The Board of Education is given power to purchase or condemn land for school purposes (C. S. 4740, Sec. 47) and required to:

> "Provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings" (C. S. 4768, Sec. 126).

The statutes impose no restrictions upon the Board of Education concerning any term, condition, provision, or penal clause of any contract for a school building, although they provide that no contract shall be entered into except after advertisement (C. S. 4741, Sec. 52); that no bid shall be accepted which does not conform to the specifications, and all contracts shall be awarded to the lowest responsible bidder (C. S. 4741, Sec. 53) and that:

> "No contract for the erection of any public school building, or any part thereof, shall be made until and after plans and specifications therefor have been submitted to and approved by the State Board of Education. A copy of the contracts for the erection of the whole or any part of the school building and for the fur-

nishing thereof, shall be filed with the State Board of Education within ten days after the same have been signed. No change in the plans or specifications shall be legal unless the same have been submitted to and approved by the State Board of Education. A copy of all changes as approved shall be filed forthwith with the said Board'' (Supp. 1924, Sec. 185-129).

Then the Board of Education is given many general powers.

It is made a body corporate (C. S. 4740, Sec. 45); its powers are enlarged so that it may:

> ''In and by its corporate name, sue and be sued; and shall have power to submit to arbitration and determination any and all matters or dispute or controversy which have heretofore arisen, may now exist, or hereafter arise within the terms and provisions of the act 'An Act for regulating references and determining controversies by arbitration' (Revision 1877, page 34, *et seq.* 1 Comp. Stat. N. J., page 103 &c.). * * * It shall do all acts and things necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the school district'' (L. 1922 Supp. 1924, Sec. 185-47).

It may make, amend and repeal rules, regulations and by-laws not inconsistent with the Act, and the rules and regulations of the State Board: (a) for its own government; (b) for the transaction of business; (c) for the government and management of the public schools and the public property in said

district; and (d) for the employment and discharge of principals and teachers (C. S. 4741, Sec. 51).

School buildings are to be erected from funds derived from current tax levies or by the sale of bonds and

> "The proceeds of any bonds issued under this act shall be paid to the custodian of school monies of the school district, who shall in no event disburse the same except to pay the expenses of issuing and selling the same and for the purpose or purposes for which such bonds were issued. If, for any reason, any part of such proceeds are not applied to or necessary for such purpose or purposes, the Board of Education may transfer the balance remaining unapplied to the building and repairing account of the school district." (C. S. 4676, Sec. 76, as amended by Supp. 1924, p. 3183).

The disbursements of the Board of Education are to be made by warrants:

> "Drawn on the custodian of the school moneys of the district" (C. S. 4743, Sec. 62).

In the event that there should be a city comptroller, auditor or other officer:

> "Authorized by law to audit claims and demands against the municipality in which such district shall be situated, said comptroller * * * shall be the auditor of the school district." * * *

He shall audit the warrants, signing them when found correct, otherwise:

> "He shall return such warrants and statement to the secretary of the Board of Education with a statement of the reasons why the

same should not be paid. * * * If said Board shall find that the claim or demand for which said warrant was issued is correct and just, it shall, by a vote of the majority of all the members of said board, order that it be paid and said auditor shall, upon receipt of the warrant and statement thereof, together with a statement of the action of the Board of Education thereon, countersign the warrant and forward it to the custodian of school moneys'' (C. S. 4743, Sec. 62).

III. STATUTORY POWERS OF THE CITY WITH RELATION TO THE BOARD OF EDUCATION.

After action by the Board of School Estimate, the City is required to raise the necessary money:

> ''In the same manner as moneys appropriated for other purposes in such City are raised, assessed, levied and collected; or said governing body may appropriate and borrow such sum or sums for the purpose * * * and may secure the repayment of the sum * * * by the issue of bonds designated School Bonds'' (C. S. 4746, Sec. 76, as amended by Supp. 1924, p. 3183).

Which are to be sold by the City in the manner outlined in the statute, after which the proceeds ''shall be paid to the custodian of school monies of the school district,'' when City control ceases.

The bonds are to be paid in the following manner:

> ''Such City shall, in its annual tax levy, raise money sufficient to pay the principal and the interest of such bonds as they mature during

that year; the proceeds of the sale of such bonds shall be deposited with the custodian of school moneys of such school district, and shall be paid out only on the warrants or orders of the Board of Education" (C. S. 4746, Sec. 76, as amended by Supp. 1924, p. 3186).

IV. THE BILL DISCLOSES NO CAUSE OF ACTION AGAINST THE DEFENDANTS INDIVIDUALLY OR IN COMBINATION.

Each contract was separate and distinct, although the combined and co-ordinated labor and material of all was requisite to create a complete school building. However, the complainants have seen fit to join all contractors in the one bill. How they can do this is not very clear.

The contract was lawfully made. It was fully performed. Performance was delayed.

The complainant's counsel argue the matter as if the terms of the contract were unchangeable. But the contract, itself, provided for changes, as will be noted by referring to paragraphs 4, 5, 6 and 8.

Even if not provided for, changes could lawfully be made therein after it had been executed:

Schwitzer v. Board of Education of Newark, 75 Atl. 447.

There is no suggestion in the bill of any fraudulent act on the part of any defendant. The complainants' sole contention is that if the Board of Education be permitted to waive the penalty, or relieve the contractors from the penalty, that action will constitute a fraud upon the taxpayers of Millville. But certainly no inference of fraud is to be

drawn from the action of the Board of Education in not exacting these penal sums.

If the Board of Education has the power to make and alter contracts, to make and alter its rules, to sue and to be sued, and to submit disputes to arbitration, it surely has the power to compromise a dispute and above all to deal honorably and fairly with a contractor. The right to sue involves the power to employ counsel. The right to sue involves a right to compromise—to settle the dispute. The Board, as defendant, has a right to compromise—to settle —to pay. It is an incident of the power of being sued. The right to submit its disputes to arbitration, does not mean that it is powerless to agree with its adversary. The grant of the right to arbitrate involves the right to voluntarily adjust the dispute without calling in a third person. The Board has done nothing else in the present case. A dispute having arisen between the contractors and the Board, it has done what was wholly within its province—it has recognized the justice of the contractors' contentions and has agreed to pay them what is justly due. The payment does not exceed the stipulated price. The amounts are certified by the architect to be due. There is no gift being made. The Board has received its school building at the price which the School Board lawfully agreed to pay. It has received full value for its money. Having the right to compromise it does so. Who may complain of this? Surely neither of the present complainants; and we submit, not even a taxpayer.

The law is clearly stated in that very excellent work on Municipal Corporations by Dillon. His text and citation of authority justifies these defendants and the Board of Education.

2 *Dillon on Mun. Corp.*, Sec. 815 (5th Edition).

"But with respect to authorized contracts a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon in the same manner as individuals."

Citing:

Hight v. Monroe Co., 68 Ind. 576;
Seibrecht v. New Orleans, 12 La. Ann. 491;
Strauss v. Eagle Ins. Co., 5 Ohio St. 59;
Douglass v. Virginia City, 5 Nev. 147.
2 *Dillon on Mun. Corp.*, Sec. 820 (5th Edition):

"A city or other municipal corporation having the power to make a contract can deal with the contract in the same manner as if it were a natural person, and may, in the absence of statutory limitation upon its powers, or conformably with such limitation, change, modify it, or cancel it in the same manner as it might originally contract."

Citing:

Doland v. Clark, 143 Cal. 176;
Meech v. Buffalo, 29 N. Y. 198;
Moore v. Albany, 98 N. Y. 396;
Weston v. Syracuse, 158 N. Y. 274;
Fitzgerald v. Walker, 55 Ark. 148.
2 *Dillon on Mun. Corp.*, Sec. 821 (5th Edition):

"Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to settle disputed claims, against it,

and an agreement to pay these is not void for want of consideration. If it has obtained a contract which by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an additional compensation, or to modify or annul it, is not in the absence of special restriction invalid for want of consideration."

2 *Dillon on Mun. Corp.*, Sec. 822 (5th Edition):

"As a general proposition municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities."

The right of a municipality to relieve the other party to a contract from the penalty therein prescribed, is valid, and no third person may object.

State-Kohler v. Guttenberg, 38 N. J. L. 419.

On certiorari.

Dixon, J.

"The seventeenth reason alleges as a ground for reversal that by the contract the contractor

was to incur a penalty of $5 for each day the work should remain unfinished after January 1, 1873; and that although his job was not completed until May 22, 1874, yet this penalty was not exacted. It is, undoubtedly, the duty of the municipal authorities to enforce the rights of the public, and of the land owners they represent against the contractor, and claim from him all proper deductions to lessen the expense of the work. But in order to contend successfully for such a penalty as this, the town would need to establish a clear case of fault upon his part. The proofs in this case, so far as they bear upon the question of delay, indicate that it arose from encroachments upon the street by the buildings of abutting owners. As early as May, 1872, the contractor formally requested the councilmen to cause such obstructions to be removed, so that he might work according to the surveyors' stakes; and as late as October 31st of that year, the council was still resolving that the obstructions be removed. Then followed the winter with its delays, and on December 12th, 1873, the engineer in charge considered the contract performed. It is quite easy to believe that the councilmen, with these facts before them, could honestly conclude, in the exercise of a sound discretion, that the forfeiture ought not, either in law or common fairness, to be enforced."

And for similar rulings see:

Gulick v. Connely, 42 Ind. 134;

People v. Brennan, 18 Abb. Prac. 100 (N. Y).

In *Fitzgerald v. City of Huron,* 199 N. W. (S. D.) 775, it was held that under a contract for paving, with a penalty if improvement was not completed in contract time, the municipality had power to waive the penalty, since it had no relation to assessment for the improvement, no injury to abutting owners by contractor's delay being shown.

If the question be one within the discretion of the Board of Education as indicated in

Eckerson v. Mitchell, 74 N. J. L. 345;
Kraft v. Board of Education, 51 Atl. 482;
Schwitzer v. Board of Education of Newark, 79 N. J. L. 342, then, as there is no averment of actual fraud or abuse of discretion apparent from the averments of the bill, it becomes clear that the complainants have failed to make out a case, and the bill failing to state a cause of action should be dismissed for that reason.

V. THE COMPLAINANTS ARE STRANGERS, WITHOUT INTEREST AND NOT ENTITLED TO SUE OR DEFEND.

The contracts were made by the Board of Education with the respective contractors. The complainants had no voice therein or control thereover either in the making or performance. The Board of Education, alone, is concerned with the terms of the contract and the manner of performance. It may not be interfered with, even by the State Board of Education except in the event that changes are made in the plans and specifications (Supp. 1924 Sec. 185-129). It will be noted that the State Board of Education has no control over changes in the contract—

the only requirement being that a copy of the contract must be filed within ten days.

The sole relation of the City of Millville to the transaction is that it is charged with the duty of using the municipal machinery for the purpose of providing the desired funds, either by levying a tax or by the sale of school bonds. For reasons best known to complainants, they have not averred whether the funds for the Millville High School were raised by taxation or by the sale of bonds. The Chancellor cannot take judicial notice of such facts not pleaded.

Mr. Kirk as Director of Revenue and Finance has still less warrant for being a party complainant. He claims in his official capacity and he has no relation to the Board of Education, its contract, or its funds.

In order that a party may appeal to a court of law or chancery for relief, it is imperative that he show some pecuniary interest in himself which requires judicial protection. Want of interest in the subject-matter bars relief. See Chancery Rule 5.

In *Kean v. Bronson,* 35 N. J. L. 468, it was held:

> "A party, though a land holder and taxpayer cannot call in question the proceedings of the commissioners unless the natural and necessary consequences of their acts will subject him to taxation or injuriously affect or interfere with his property or legal rights."

And similar rulings will be found in:

Hunt v. Rahway, 39 N. J. L. 646, affirmed in 40 N. J. L. 615;

Middleton v. Robbins, 54 N. J. L. 566.

In *Cullen v. Woolverton,* 65 N. J. L. 279, the Court

of Errors and Appeals quoted approvingly the definition of "parties" given in 2 *Bouviers Dic.* (11th Ed.) 284, and said:

> "Persons not having these rights are regarded as strangers to the cause."

In *U. S. v. Henderlong,* 102 Fed. 2, Baker, Dist. J. (p. 4) said:

> "In order that the U. S. shall become plaintiffs in a case or controversy in a judicial tribunal, they must have some interest in the matter in issue. Where the plaintiff's statement of his case affimatively discloses that he has no interest in the controversy, and it affirmatively appears that the right to the matter in controversy is vested wholly in some one else, it is difficult to perceive how such person can be said to have a case or controversy. The term 'parties' includes all persons who are directly interested in the subject-matter in issue, who have a right to make a defense, control the proceedings, or appeal from the judgment. Strangers to the suit are persons who do not possess these rights: Hunt v. Hanen, 52 N. H. 162."

Followed in *Burrell v. U. S.,* 147 Fed. 44.

The general rule as to who may be parties and the effect of want of interest will be found stated in:

20 *R. C. L.,* p. 662, Sec. 2;
20 *R. C. L.,* p. 699, Sec. 37-38.

The plaintiffs may not come in under the theory in *Burlew v. Hillman,* 16 N. J. Eq. 25, which holds that "a party beneficially interested in a contract may maintain a suit in equity in his own name to enforce

such rights, though he be not a party to the instrument creating them," for the reason that neither the City of Millville nor its director of finance are parties beneficially interested.

VI. THE COMPLAINANTS ARE WITHOUT VISITORIAL OR SUPERVISORY FUNCTIONS OR POWERS OVER THE BOARD OF EDUCATION.

An examination of the statutes discloses the Board of Education to be a body corporate wholly independent of the City of Millville. While the city, having control of the revenue raising machinery, is charged with certain duties toward the Board of Education in the performance of them, it acts as the agent of the School Board. When the duty has been performed, the connection between City and School Board ceases. On the City devolves the duty of raising the revenue needed by the Board of Education. When raised, it is either to be paid over on requisition or in the case of school bonds—forthwith and without requisition. The disbursal of the money is within the discretion of the Board of Education; the city has nothing to do with it.

The City of Millville has no comptroller or auditor—a fact of which the Chancellor will take judicial notice—but if it had, he would be controlled in the present case by the provisions of C. S. 4743, Sec. 62. His veto upon the disbursement would cease upon the majority vote of the Board of Education finding that its warrant as issued was "just and correct."

There being no comptroller, the Board of Education has performed that function, and there is no right to review or revise their acts vested in the

City of Millville. In passing upon the contractors' claims the Board of Education sat, practically, as a board of audit, as was done in *Butts v. Hoboken,* 38 N. J. L. 391, where common council, passing upon claims, was adjudged to sit as a board of audit, and the presumption arose that they properly performed their duties.

VII. THE OBJECT OF THE BILL IS TO SECURE THE AID OF THE COURT OF CHANCERY IN THE RECOVERY OF A PENALTY WHICH IS CONTRARY TO EQUITY.

The complainants strenuously contend that the deduction which they think the Board of Education should make is liquidated damages, and to sustain their view they point to that part of paragraph 13 of the contract which reads:

> "The contractor agrees to pay to the Board the sum of seventy-five dollars per diem for each business day thereafter consumed by him in completing such work, which moneys the parties hereto agree upon as liquidated damages and not as a penalty."

But elsewhere in paragraph 13 the contract provides:

> "In case of the non-completion of the work within the time above specified * * * the Board may deduct * * * in addition to the penalty hereinafter mentioned, such sum as will be sufficient to pay the wages of the inspector or inspectors of any such work * * * up to the time when the same shall have been completed."

Again, in paragraph 14 it is stipulated:

> "The penalty provided in section thirteen for non-completion of the work within the time specified shall continue to run"

even though the work be taken out of his hands.

For failure to complete within the stipulated time, the contract provides:

(a) for the payment of the actual damage to the Board of Education caused by the outlay for the inspector's wages;

(b) the "penalty" for the delay.

The contract calls it "penalty" in unmistakable terms, and establishes the deduction as a penalty by expressly fixing and providing for payment of the actual loss—the additional inspector's wages. Therefore, the deduction is a penalty.

Even the resolution of April 20, 1925, called on the contractors to complete "according to the covenants and conditions and penalties in said contract contained."

In *Bagley v. Peddie*, 16 N. Y. 469, it was held:

> "Where the word 'penalty' is used in fixing a sum to be paid on breach of a contract, it is generally conclusive against its being held liquidated damages, however strong the language of the other parts of the instrument in favor of such construction."

In *Meyer v. Estes*, 164 Mass. 457, the contract provided for the furnishing of certain electrotypes by Meyer to Estes, *et al.*, to be used by the latter only for the purpose of illustrating works published by them. It further provides that Estes was to be responsible for every and all wrong use of the electrotypes to the amount of any damage which may be

caused thereby to Meyer and "to pay furthermore a fine to" Meyer equal to ten times the price of the wrongly used electrotypes. The fine was held to be a penalty.

Field, C. J., p. 466:

> "As by the terms of the contract the fine is in addition to the amount of any damages which may have been caused by the wrong use of the electrotype plates, it is impossible to hold that by our law the fine can be considered as liquidated damages. The amount of the fine is plainly intended as a penalty to be paid in addition to the amount of any actual damages suffered * * * The agreement does not provide that the damages suffered shall be considered to be tenfold the price of the wrongly used electrotype plates, but it leaves the damages to be assessed in the usual way, and provides that the fine shall be paid in addition to the damages, whatever they may be."

In *Tayloe v. Sandiford,* 7 Wheat. 13, where a building contract provided that the buildings were to be completely finished on or before a certain day, "under a penalty of 1000 dollars, in case of delay," this was held that this was not intended as liquidated damages for the breach of that single covenant only, but applied to all the covenants by that party and was in the nature of a penalty.

Marshall, C. J., p. 17:

> "The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture

would justify the Court in saying that the parties were mistaken in the import of the terms they have employed."

In *The Monmouth Park Ass'n. v. The Wallis Iron Work,* 55 N. J. L. 132 (Ct. Er. & Apps. 1892), Dixon, J., said, page 140, 141:

"In determining whether a sum, which the contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the non-payment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity."

VIII. A MUNICIPAL CORPORATION IS AS MUCH BOUND BY THE RULES OF FAIR AND HONORABLE DEALING AS IS A PRIVATE INDIVIDUAL.

If it is unfair and unjust and oppressive to exact a penalty when in common morals none should be exacted under the facts before the Board of Education, clearly that Board has no justification, either in morals or in law, to exact that penalty. In the present case there are four distinct contracts, all working simultaneously and in co-ordination to produce a completed school building. The bill of complaint does not disclose the part taken by any particular contractor to produce the final result, to wit, a delay in completion. A delay on the part of one contractor might well delay another contractor. A delay on the part of the general contractor might delay one of the other contractors and *vice versa*. The Board of Education awarded the construction of this work in parcels. It is, therefore, unfair, unjust and oppressive to seek to hold all contractors for a possible delay of one or to hold one for a possible delay of all the rest. If the intention of the parties be construed as fixing the penalty as liquidated damages instead of a penalty, then those contracts are most harsh in their terms and unjust. The Board of Education and the contractors know better than anybody else what the intention was with respect to the true meaning of the word "penalty." The Board has, in fact, audited the claim and directed that it be paid. It acted within its discretion in dealing fairly and honorably with the contractors. We say that to charge a penalty where no damage was sustained would have savored of harsh dealing and would have been repre-

hensible in a private owner under the conditions. Certainly a public corporation is held to as high a standard of moral conduct as is a private citizen.

IX. CERTIORARI TO THE SUPREME COURT IS THE PROPER REMEDY IF ANY RIGHTS OF THE COMPLAINANTS HAVE BEEN INVADED.

> "Certiorari is a prerogative writ by which the Supreme Court exercises a jurisdiction to supervise the proceedings of inferior tribunals and governmental establishments, including municipal corporations, and the adjudication of the Supreme Court setting aside municipal proceedings operates in rem to nullify what has been unlawfully done to obliterate the record thereof, and to deprive all parties of any justification afforded by the record; the parties being the State on the one hand and the municipality or other custodian of the record on the other."
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> *Specht v. Central Passenger Railway Co.* (N. J. Sup. Ct.) 68 Atl. Rep. 785.

In New Jersey the Courts have extended the application of the writ of certiorari further than the Courts of almost any other State. It is frequently used to review municipal ordinances and to supervise the proceedings of governmental establishments, including municipal corporations. It has even been held in New Jersey that the writ may be made to apply to a resolution of City Council directing payment of a claim; in short, applying the

writ to the audit of the claims. *Fagan v. Mayor and Council of Hoboken* (N. J. Sup. Ct.) 83 Atl. Rep. 772.

It is perfectly clear that a full and complete remedy is afforded to complainants touching all matters covered by their bill of complaint. The subject-matter of the bill is clearly not for a Court of equity but for a Court of law.

We respectfully submit that the [redacted] decree of the Court below should be affirmed.

Respectfully submitted,
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