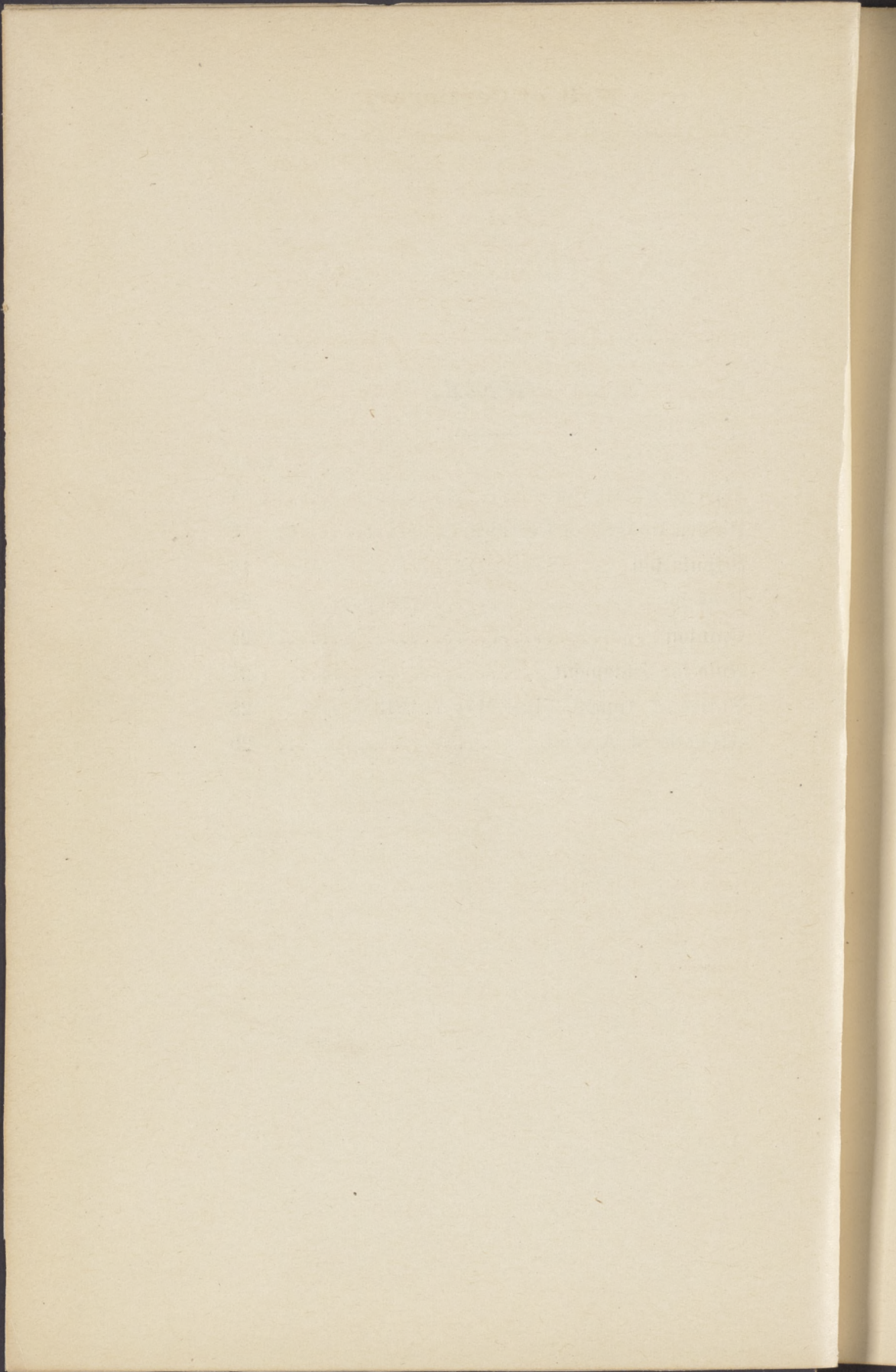


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Writ of Certiorari.

New Jersey, to wit: The State of New Jersey to
the Board of Education of
(SEAL.) Kearny in the County of
Hudson; Charles R. Hill, the
Secretary thereof and the
American Concrete Steel
Company, Greeting:

We being willing for certain reasons to be cer- 10
tified of a certain resolution passed by the Board of
Education of Kearny in the County of Hudson, on
the seventeenth day of July, A. D. one thousand
nine hundred and twelve, whereby a certain con-
tract for the erection and completion of the un-
finished portion of a free public school, known as
Washington School in the Town of Kearny, was
directed to be entered into between the said The
Board of Education and the American Concrete 20
Steel Company.

We do command you the aforesaid resolution,
passed by the said The Board of Education of
Kearny in the County of Hudson on the seven-
teenth day of July, A. D. one thousand nine hun-
dred and twelve, with the records of the meeting
of the said The Board of Education at which the
said resolution was introduced and passed, and
the records of the previous meetings of the said 30
Board when the said resolution was considered,
together with all other things touching and con-
cerning the same and directing a contract to be en-
tered into with the said American Concrete Steel
Company for the erection and completion of the
unfinished portion of a free, public school, known as

Washington School in the said Town of Kearny, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature at Trenton, on the twenty-third day of August, A. D. one thousand nine hundred and twelve, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

10

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this twentieth day of July, in the year one thousand, nine hundred and twelve.

WILLIAM RIKER, Jr.,
Clerk.

Pierre P. Garven,
Attorney.

20 Endorsement:

New Jersey Supreme Court.

Henry Holden, *et al.*,
Prosecutors,

v.

Board of Education of Kearny,
et als.,
Defendants.

30

Writ of Certiorari.

I allow the within writ. Let it be sealed.

James F. Minturn,
J. S. C.

Law offices of
Pierre P. Garven,
586 Newark Avenue,
Jersey City,
N. J.

40

Return.

NEW JERSEY SUPREME COURT.

HENRY HOLDEN, <i>et al.</i> , Prosecutors,	}	On Certiorari.	10
<i>v.</i>			
THE BOARD OF EDUCATION OF THE TOWN OF KEARNY <i>et al.</i> , Defendants.			

To the Honorable Justices of the Supreme Court
of Judicature of the State of New Jersey:

I, Charles R. Hill, Secretary of the Board of
Education of the Town of Kearny, in the County 20
of Hudson, in obedience to the command of the
writ hereto annexed do hereby certify and send
to you the said Justices of the Supreme Court, a
certain resolution passed by the Board of Educa-
tion of Kearny in the County of Hudson on the
seventeenth day of July, nineteen hundred and
twelve, whereby a certain contract for the erec-
tion and completion of the unfinished portion of a
free public school, known as Washington School 30
in the Town of Kearny, was directed to be entered
into between the said Board of Education and
the American Concrete Steel Company, and the
records of the meeting of the said Board of Edu-
cation, at which said resolution was introduced
and passed, and the records of the previous meet-
ings of the said Board when said resolution was
considered, together with all other things touch-
ing and concerning the same, and directing a con-
tract to be entered into with the said American 40
Concrete Steel Company for the erection and com-

pletion of the unfinished portion of a free public school, known as Washington School, in the said Town of Kearny, as fully and as entirely as the same remains, in my hands and possession as by the said writ I am commanded.

In witness whereof, I have hereunto set my hand and seal this sixteenth day of August, nineteen hundred and twelve.

10

CHARLES R. HILL,
Secretary, Board of Education
of the Town of Kearny.

Edward Kenny,
Attorney for Defendant.

Endorsements:

Henry Holden, *et al.*,
Prosecutors,

20

v.

The Board of Education of
the Town of Kearny, *et al.*,
Defendants.

On Certiorari.

RETURN.

30

Edward Kenny,
Atty. Deft.,
Town of Kearny,
800 Broad Street,
Newark, N. J.

Kenny & Conway,
Counsellors at Law,
800 Broad Street,
Newark, N. J.

40

MINUTES.

July 1st, 1912.

A special meeting was held in accordance with the following call:

A special meeting of the Board of Education of the Town of Kearny, will be held at the Town Hall, in the Town of Kearny on Monday evening, July 1st, 1912, at 8 o'clock, to take such action as may be deemed necessary by the Board of Education because of the action of the Court of Errors and Appeals of the State of New Jersey in the setting aside of the contract heretofore entered into by and between the Board of Education of the Town of Kearny and the American Concrete Steel Company of Newark, N. J., for the erection of School No. 2 in the Town of Kearny.

Also to consider the proposed addition to No. 1 school in the Town of Kearny.

Respectfully,

Gerrish Newell,
Pres.
C. R. Hill,
Sec'y.

The Secretary reported that this notice was served by the Clerk to each member personally, except Mr. Dawson, whose notice was forwarded by mail.

The meeting was called to order by President Newell and the following members were present on roll call: Messrs. Alexander, Banta, Dawson, Mrs. Eakins, Mrs. Latham, Messrs. Presbrey, Salmond, Sonn and President Newell.

A copy of the decision of the Court of Errors and Appeals of the State of New Jersey in which John P. Kay, Prosecutors and Plaintiffs-in-Error

v. The Board of Education was read by the Secretary.

10 Mr. Salmond, Chairman of the Building and Grounds Committee, offered the following resolution: Resolved by the Board of Education of the Town of Kearny, that whereas the contract heretofore entered into between the Board of Education of the Town of Kearny and the American Concrete Steel Company of Newark, N. J., having been set aside by the Court of Errors and Appeals of the State of New Jersey; there now being no contract for the erection of said school, the school building being almost completed and it being necessary that it should be completed as soon as possible for the accommodation of the school children of the Town of Kearny, therefore be it resolved that the architect, H. King Conklin, 20 be and hereby is directed to prepare and submit to the Board of Education of the Town of Kearny, without compensation, plans and specifications for the completion of said school building so that figures may be obtained for the completion of said building.

On motion seconded by Mr. Banta, the resolution unanimously adopted. All members voting "aye" on roll call.

30 On motion the Secretary was instructed to write the Fidelity and Deposit Co. of Baltimore, and the National Surety Company of New York City, advising them that the contract between the Board of Education and the American Concrete Steel Company of Newark, N. J., has been stopped by the decision of the Court of Errors and Appeals on the Washington School No. 2.

40 On motion, all members voting "aye" it was so ordered.

On motion, meeting adjourned.

C. R. HILL,
Secretary.

July 6th, 1912.

A special meeting was held in accordance with the following call:

A special meeting of the Board of Education of the Town of Kearny will be held at the Board rooms, Saturday, July 6th, 1912, at 3:00 P. M., to consider, approve and authorize advertising for bids, plans and specifications as submitted to the Board of Education by H. King Conklin, for the completion of concrete School No. 2, Town of Kearny, per resolution adopted July 1, 1912. 10

GERRISH NEWELL,
President.

C. R. HILL,
Secretary.

The Secretary reported that a copy of this notice was served by him to each member personally. 20

The meeting was called to order by President Newell, and the following members were present: Messrs. Alexander, Banta, Dawson, Mrs. Eakins, Messrs. Presbrey, Salmond, Sonn and President Newell; Mrs. Latham, absent.

Mr. Salmond offered the following resolution: Resolved by the Board of Education of the Town of Kearny, that whereas architect H. King Conklin, having submitted to the Board of Education specifications and plans for the completion of Washington School as heretofore directed by the Board of Education, and the said plans and specifications, and by the members of the Board are hereby approved; now, therefore, be it resolved that the Clerk of the Board be and is hereby directed to advertise for proposals and bids to complete said school building in accordance with said plans and specifications. All such bids to be sealed and delivered to the Clerk of the Board 30 40

at or before 8:00 P. M., at the regular meeting of the Board to be held at the Town Hall in the Town of Kearny on Wednesday evening, July 17th, 1912. All bids must be accompanied by a certified check for the sum of 5% of the bid, or a surety bond, conditioned that the bidder will execute a proper contract within one week of this award of the contract to the successful bidder. The successful bidder will be obliged to furnish a surety bond acceptable to the Board of Education in amount of one-third ($1/3$) the contract price.

On motion seconded by Mr. Dawson, the resolution was adopted. All members voting "aye" on roll call.

Mr. Salmond also offered the following resolution: Resolved, by the Board of Education of the Town of Kearny, that the Secretary of the Board be and is hereby directed to send to the State Board of Public Instruction at Trenton, N. J., two (2) copies of the plans and specifications providing for the completion of the Washington School No. 2, of Kearny, N. J.

Resolved, by the Board of Education of the Town of Kearny, that the architect, H. King Conklin, be and he is hereby directed to furnish to the Board at its next regular meeting July 17, 1912, a statement of the amount of money necessary to complete the building known as Washington School No. 2.

On motion, all members voting "aye" it was so ordered.

Clerk reported that he sent notice to the Fidelity and Deposit Company, and to the National Surety Company of New York City, as per request at meeting held on the evening of July 1, 1912.

On motion, meeting adjourned.

C. R. Hill,
Sec'y.

Extracts from minutes of meeting held July 17, 1912.

Protest from Pierre P. Garven, counsellor-at-law, Bayonne, N. J., in behalf of certain tax payers, protesting against action of the Board in asking for proposals for the completion of unfinished portion of the New Washington School Building.

Mr. Salmond, Chairman of the Building and Grounds Committee, offered the following resolution: Resolved by the Board of Education of the Town of Kearny, that whereas bids having been received in accordance with previous advertisements for the completion of the work on Washington School No. 2 in the Town of Kearny; said bids being as follows:

10

American Concrete Steel Co. \$43,559.58

Webber Construction Co. 58,317.00

20

Charles L. Pitts Co. 55,929.00

and it having been found that the lowest bids submitted was that of the American Concrete Steel Company. Be it, therefore, resolved by the Board of Education of the Town of Kearny, that the American Concrete Steel Co. be engaged to complete the work on said school building and that a contract as entered into with the said American Concrete Steel Company by the Board of Education of the Town of Kearny for the work of completing the work on said school for the sum of forty-three thousand five hundred fifty-nine and 58/100 dollars (\$43,559.58), and that the President of the Board be and he is hereby authorized to sign said contract on behalf of the said Board be directed to attest the same, and be it further resolved that the said American Concrete Steel Company file with the said Board of Education a bond equal to the sum of 33 1/3%

30

40

of the amount of the contract to finish the said school.

On motion all members voting "aye" on roll call it was so ordered.

Extracts from minutes of meeting held July 17, 1912.

- Secretary read the Certificate No. 6, from H. King Conklin, in favor of the American Concrete Steel Company, showing amount of work done on Washington School (New No. 2), to date, showing \$29,859.11 paid to date and balance due of \$17,331.31, accompanied by an itemized statement.

BOARD OF EDUCATION.

Town of Kearny, N. J.

PROPOSALS.

20

Sealed proposals for a general contract, exclusive of heating and ventilating, for the erection and completion of the unfinished portion of reinforced concrete school, known as Washington School, located at corner of Belgrove Drive and Woodland Avenue, will be received at the Town Hall on or before 8 P. M., July 17, 1912. Said proposals must conform to the plans and specifications prepared by H. King Conklin, architect, 665 Broad Street, Newark, N. J., to whom all applications for plans and specifications must be made. Plans and specifications may be seen at the office of the Board of Education at the Town Hall, or may be secured at the architect's office by depositing a certified check to the amount of \$25.00.

30

- All bids must be accompanied by a certified check or surety bond for an amount equal to 5% of the amount of the bid. A bond for 33 1/3% of the amount of the contract will be required of the successful contractor, said bond to be from a

40

surety company satisfactory to the Board of Education.

The right is reserved by the Board to reject any or all bids.

(Signed) Gerrish Newell,
President.
C. R. Hill,
Sec'y.

10

American Concrete Steel Co.,
Engineers and Contractors,
Essex Building,
Newark, N. J.

July 17, 1912.

Board of Education,
Kearny, N. J.

20

Gentlemen:

For the lump sum price of forty-three thousand five hundred and fifty-nine dollars and fifty-eight cents (\$43,559.58) we will furnish all labor and material for and completely finish the Washington School, Kearny, New Jersey. All to be in accordance with plans and specifications dated July 12, 1912, prepared by H. King Conklin, architect.

Enclosed please find our bid bond as required by the specifications.

30

This estimate is for prompt acceptance only, and we reserve the right to change our price if there is any delay in awarding contract for same.

Respectfully submitted,

John T. Simpson,
President.

40

AMERICAN CONCRETE STEEL COMPANY,
Engineers & Contractors,
Essex Building,
Newark, N. J.

July 17, 1912.

Board of Education,
Kearny, N. J.

10

Gentlemen:

In compliance with the specifications, we beg to advise you that if awarded the work of completing the Washington School, the sub-contractors employed by us in the various work will be the same as those to whom we originally awarded the contract for this work.

Yours respectfully,

20

John T. Simpson,
President.

WEBBER CONSTRUCTION COMPANY,
Engineers & Contractors,
162 East 23rd Street,
New York.

July 17, 1912.

Board of Education,
Kearny, N. J.

30

Gentlemen:

We propose to furnish all labor and materials necessary to complete your new Washington School, Belgrove Drive and Woodland Avenue, Kearny, N. J., in accordance with plans and specifications, dated July 1, 1912, by H. King Conklin, architect, for the lump sum price of fifty-eight thousand three hundred seventeen (\$58,317.00) dollars.

40

Enclosed please find surety bond for 5% of the amount of our bid.

Yours respectfully,

WEBBER CONSTRUCTION COMPANY,
W. F. Thoman, Treas.

WEBBER CONSTRUCTION COMPANY,
Engineers & Contractors,
162 East 23rd Street, 10
New York City.

July 17, 1912.

Board of Education,
Kearny, N. J.

Gentlemen:

Referring to our proposal for the completion of your new Washington School, Kearny, N. J., we beg to name you the following subcontractors 20 in connection with this work.

Carpenter work; Hugh Getty.
Painting work; J. S. Kelly.
Electric work; Nimis & Nimis.
Plumbing work; L. D. Hosford.
Iron work; Mulcahey & Gibson.

Yours respectfully,
WEBBER CONSTRUCTION CO., 30
W. F. Thoman, Treas.

CHARLES L. PITTS COMPANY

Contractors

58-64 East Park Street,

Newark, N. J.

July 17, 1912.

Board of Education,
Kearny, N. J.

10

Gentlemen:

We hereby propose to erect and complete the unfinished portion of the reinforced concrete school, known as Washington School, located at the corner of Belgrove Drive and Woodland Avenue, Kearny, N. J., conforming with plans and specifications prepared by H. King Conklin, architect, and dated July 1, 1912, for the sum of fifty-five thousand

20

nine hundred and twenty-nine dollars (\$55,929.00). We close a bond (surety) of the United States Fidelity & Guaranty Company.

Should the contract be awarded to us, the following named will do the work for us as sub-contractors.

30

Steel & Iron	William A. Kinsey
Painter	Louis Jensen
Carpenter	William Nairn
Plumber	John Wallwork
Electrician	L. G. Vanzile

Respectfully submitted,

CHAS. L. PITTS CO., Inc.,

F. Rosenberg.

Endorsed :

New Jersey Supreme Court.

Henry Holden, *et al.*,
Prosecutors,

v.

The Board of Education of
Kearny, *et al.*,
Defendants.

10

On Certiorari.

RETURN

Pierre P. Garven,
Atty. Prosecutors,
586 Newark Avenue,
Jersey City,
N. J.

20

Mailed Clerk Aug. 23, 1912.

30

40

Stipulation.

NEW JERSEY SUPREME COURT.

10	HENRY HOLDEN, <i>et al.</i>, Prosecutors, <i>v.</i> BOARD OF EDUCATION OF KEAR- NY, <i>et al.</i>, Defendants. } On Certiorari.
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It is hereby stipulated by and between the parties hereto as follows:

20 First. That Henry Holden and James K. Allen are freeholders and taxpayers in the Town of Kearny, County of Hudson and State of New Jersey;

Second. That in the said Town of Kearny there is a Board of School Estimate, the said town having adopted the City School System as provided in Section 243 of the School Law of 1903, Compiled Statutes, 4805;

30 Third. That the plans and specifications referred to in the reasons filed in this cause were not stamped "Approved" by the State Board of Education on or before the seventeenth day of July, nineteen hundred and twelve, but the said plans and specifications were in fact offered to the State Board of Education by H. King Conklin, for and in behalf of the Board of Education of Kearny, on or about the fifteenth day of July, nineteen hundred and twelve, for filing and approval, and the filing and approval thereof was declared by the State Board of Education to be unnecessary, and subsequently

40 the following correspondence ensued:

July 29th, 1912.

Mr. Calvin N. Kendall,
Sec. State Board of Education,
Trenton, N. J.

Dear Sir :—

Owing to the decision of the Court of Errors and Appeals, setting aside the contract with the American Concrete Steel Company, of Newark, N. J., for the erection of the new Reinforced Concrete School, known as the "Washington School," Kearny, N. J., we were compelled to readvertise to complete the work. The Bids were opened on the 17th of July, and the contract again awarded. 10

I saw Mr. Morse of your department and he notified me personally that it would not be necessary to have the plans and specifications approved again, as we are completing the original building, as approved by your department. 20

Mr. Newell, President of the Board of Education of Kearny, N. J., wishes me to get a statement in writing that it would not be necessary to file these plans again with your department for approval.

Will you kindly give me this statement in writing so that the Board will be protected in their actions. 30

Thanking you, believe me,

Yours very truly,

(Signed) H. King Conklin.

H. K. C.—SAK

State of New Jersey
Department of Public Instruction
Trenton.

July 30th, 1912.

Mr. H. King Conklin;
665 Broad Street,
Newark, N. J.

10

Dear Sir:—

In reply to your letter to Dr. Kendall, with reference to having the plans for the new Washington school building resubmitted for approval, I desire to say that unless some change is made in these plans, it will not be necessary to have them resubmitted.

20

If, however, any changes are made from the original plans as on file in our Department, they should be sent here for approval. Otherwise, the approval you already have is sufficient.

Very truly yours,

(Signed) Charles McDermott,

Inspector of Buildings.

30

The original plans and specifications for School No. 2, referred to in said correspondence, were approved by the State Board of Education on October 17th, 1911. The original resolution awarding the contract was passed October 2, 1911.

40

Fourth. That on the second day of October, nineteen hundred and eleven, The Board of Education of Kearny awarded a contract to the American Concrete Steel Company for the erection of a free public school, known as No. 2 and now known as Washington School No. 2. After the award of the contract but before the contract had

actually been signed, a writ of certiorari, prosecuted by John P. Kay, Henry Holden and Alfred L. Moorshead issued out of the Supreme Court to review the award of this contract. Testimony was taken under this writ and the writ was brought on for argument before the Honorable Francis J. Swayze, one of the Justices of the Supreme Court, sitting as a single Justice for the Supreme Court by consent of the parties. 10
After argument of the writ Justice Swayze filed an opinion upholding the legality of the award of the contract, and an order was, on December 27, 1911, thereupon entered dismissing the writ of certiorari. After this order was entered, a contract for the erection of the school building was duly executed, on January 2, 1912, between the Board of Education of Kearny and the American Concrete Steel Company, and the work of construction pursuant to the plans and specifications was begun. After the contract was signed and the work begun, the prosecutors in the said writ of certiorari on January 5, 1912, caused a writ of error from the judgment of the Supreme Court to be issued out of the Court of Errors and Appeals. The writ of error did not provide for a stay of proceedings, nor was any application ever made to the Court of Errors and Appeals or the 20
Supreme Court for a stay of proceedings. The work, therefore, progressed. The writ of error was argued before the Court of Errors and Appeals at the March Term, nineteen hundred and twelve, and at the time of the argument it was stated in open Court that the work upon the school building was progressing. At the June Term, nineteen hundred and twelve, the Court of Errors and Appeals reversed the judgment of the 30
Supreme Court and set aside the award of the 40

contract to the American Concrete Steel Company. Immediately upon the handing down of the decision of the Court of Errors and Appeals, work upon the building ceased, and nothing further has been done, and no further work in the erection of the building has been done since that time. At the time of the decision of the Court of Errors and Appeals, and at the time of the passing of the resolution which is brought up by the present writ of certiorari, and at the present time, the condition of the building was and is as follows:

The excavation for the entire building is completed. All the footings for the walls are completed. All the exterior walls and interior columns and girders of reinforced concrete in connection with the basement work are completed, and the reinforced concrete exterior walls, interior columns and floor slabs in connection with the main first story are completed. All the reinforced concrete floor slabs, interior columns and exterior walls, up to the north wing, in connection with the second story, are completed. The reinforced concrete roof slabs on the southern wing are in place, and the steel trusses for the roof of the auditorium are in place. On the second floor most of the form lumber has not been removed from the work that has been cast. The exterior cement finish on the entire concrete work has not been done. The window frames for the entire building are in place. The rough plumbing for the entire building is practically completed. The electric conduits have been run through the entire building. Almost all of the material necessary to complete this building, which has been specially made for the building, is in the mills and shops ready for delivery.

The plans and specifications which are referred

to in the reasons filed in this cause provide for the completion of the said school building from its condition as described above to complete erection, in accordance with the plans and specifications approved by the State Board of Education on October 17, 1911, and referred to in Paragraph 3 of this stipulation.

Fifth. Before the resolution of the Board of Education of Kearny, which is sought to be reviewed by the writ in this cause, was passed, due advertisement for bids for the completion of said school building was had, and in consequence of the advertisement three different bids for the completion of the building were received by the Board of Education, of which that of the American Concrete Steel Company was the lowest. 10

Sixth. Prior to the execution of the contract which is referred to in the fourth paragraph above, the Board of School Estimate of Kearny fixed and determined upon the sum of one hundred and eight thousand dollars to be expended for the erection and construction of the said Washington School No. 2, which said sum was thereupon appropriated for that purpose. The amount of the bid of the American Concrete Steel Company, on which the resolution was based, which is sought to be reviewed in this cause, added to the amount which was paid by the Board of Education of Kearny on account of materials and labor installed in the said school building prior to the decision of the Court of Errors and Appeals, and the amount for which the said Board of Education is still liable on account of said labor and materials, amounts in all to less than the sum of \$108,000, which was fixed and determined upon by the Board of School Estimate and duly appropriated for that purpose. No further action or appropriation was taken or made by 20 30 40

the Board of School Estimate prior to the passage of the resolution now under review in this case.

PIERRE P. GARVEN,

Attorney for Prosecutors,
Pitney, Hardin and Skinner,
Board of Education of Kearny.
McCARTER & ENGLISH,

10

Attorneys of
American Concrete Steel Co.

Reasons.

NEW JERSEY SUPREME COURT.

20

HENRY HOLDEN, *et al.*,
Prosecutors,

v.

BOARD OF EDUCATION OF KEARNY,
et al.,
Defendants.

On Certiorari.

30

The said Prosecutors, by Pierre P. Garven, their attorney, come and pray that the resolution of the Board of Education of Kearny, in the County of Hudson, passed the seventeenth day of July, 1912, awarding a contract to the American Concrete Steel Company for the erection and completion of the unfinished portion of a free, public school, known as Washington School, in the Town of Kearny, be set aside

40

1. Because the said Board had no legal right to award the contract to erect and complete the unfinished portion of the said school.

2. Because the said Board had no power to award the said contract.

3. Because there was no competition as contemplated by the statute.

4. Because the awarding of the said contract was not in compliance with the requirements of an act, entitled "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October 19th, 1903.

10

5. Because the action of the said Board in passing the resolution awarding the said contract, before the Board of School Estimate fixed and determined the amount to be expended for such purpose was contrary to law.

6. Because the plans and specifications adopted by the said Board were not submitted to and approved by the State Board of Education.

20

7. Because the plans and specifications of the said Board were not submitted to the State Board of Education as required by law.

PIERRE P. GARVEN,
Attorney for Prosecutors.

Endorsed:

New Jersey Supreme Court.

Henry Holden, *et al.*,
Prosecutors,

30

v.

Board of Education
of Kearny, *et al.*,
Defendants.

On Certiorari.

REASONS.

Service acknowledged,
Sept. 4, 1912.

40

McCarter & English,
Attorneys of Defendants.

Opinion.

NEW JERSEY SUPREME COURT,

	HENRY HOLDEN, <i>et al.</i> ,	}
	<i>v.</i>	
10	THE BOARD OF EDUCATION OF KEARNY, <i>et al.</i>	

Certiorari heard before a single Justice, pursuant to the statute.

PIERRE P. GARVEN, for Prosecutors.

JOHN R. HARDIN, for the Board of Education.

20 SWAYZE, J.:

At the time of the decision of the Court of Errors and Appeals in *Kay v. Board of Education of Kearny*, 83 Atl., 954, the school house was partially completed. Further work was halted by the judgment of the Court. The contract now under review is a contract for the completion of the building.

30 I think the approval of the plans and specifications for the schoolhouse by the State Board sufficed and that it was not necessary to secure a further approval of the plans and specifications for the completion of the unfinished work, as long as no change was made thereby in the original plans and specifications. It would be a mere idle ceremony for the State Board to approve once more what they had already approved. The approval of the original plans and specifications
40 must have included the work now proposed, as the whole includes every part. Counsel for the

prosecutors in his brief does not suggest that there was any change or variation, and I think this reason fails.

The second reason urged also fails, and for substantially the same reasons. The total expenditure has already been sanctioned by the Board of School Estimate. No increase of cost is involved.

It is, however, urged that the Board of Education has no power to award a contract for the completion of the building, but can only contract for building, enlarging or repairing a schoolhouse. It would require no great strain of language to hold that the completion of a schoolhouse in an advanced stage of construction was an enlarging or repairing but it is unnecessary to rest on this language. Section 52, to which reference is made, is not the section giving power to the Board of Education. It is the section requiring advertisement before awarding the contract. The power is given by Section 126, which makes it the duty of the school board to provide suitable school facilities, which are to include proper school buildings. I can think of no better way to do this than to proceed to complete a building already owned by the Board of Education. As counsel for the defendant forcibly argues, it cannot be that the Board cannot complete a building which has been abandoned by the contractor or which he is unable to finish by reason of bankruptcy. I cannot accede to the suggestion of counsel for the prosecutor that this opens the door to the award of a contract illegally, and the carrying out of that illegal contract by a new contract for the finishing of the work. The question involved here is not whether the contractor under the illegal contract can recover for his work, nor

whether moneys paid under that contract can be recovered.

10 Here the Board of Education owns an unfinished schoolhouse on its land. Whether it acquired it legally or illegally, whether it has paid for it or not; whether any one is liable to refund money already paid therefor or not, it cannot be required to destroy or remove the existing structure, nor can the public be required to suffer the loss of the land as the alternative or equivalent to keeping it as the site of a useless building. The Board may accept the building as it stands and complete it. Who shall suffer the pecuniary loss growing out of the fact that the original contract was illegal is another question that may well be settled in another form of action. To hold otherwise would put it in the power of a Board of
20 Education to deprive the public of any beneficial use of public property except at the cost of removing the building thereon.

I think the writ of certiorari should be dismissed with costs.

Rule for Judgment.

NEW JERSEY SUPREME COURT.

HENRY HOLDEN, <i>et al.</i>, Prosecutors, v. THE BOARD OF EDUCATION OF KEARNY, <i>et al.</i>, Defendants.	} On Certiorari. 10
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The Court having inspected the resolution and proceedings thereunder of the Board of Education of Kearny, returned with the writ of certiorari in this cause, and the reasons for setting aside said resolution, and having heard and duly considered the argument of counsel thereon, do order that the said resolution of the Board of Education of Kearny and the proceedings thereunder be in all things affirmed, and that the writ of certiorari in this cause be dismissed with costs.

Entered April 24, 1913.

On motion of Eward Kenny, attorney for, and of Pitney, Hardin & Skinner, of counsel with the defendants.

Rule entered April 24, 1913.

Notice of Appeal, Filed May 7, 1913.

NEW JERSEY SUPREME COURT.

HENRY HOLDEN, *et al.*,
Prosecutor and Appellant,

v. ✓

10 THE BOARD OF EDUCATION OF
KEARNY, *et al.*,
Defendants and Respondent.

On Certiorari.

To Pitney, Hardin & Skinner, and McCarter & English, Attorneys for Respondent:

Gentlemen :

20 Take notice, that the prosecutor of the writ of certiorari appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated April 26th, 1913.

PIERRE P. GARVEN,
Attorney of Appellant.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND AP- PEALS.

HENRY HOLDEN, <i>et al.</i> , Appellants,	}	10
<i>v.</i>		
THE BOARD OF EDUCATION OF KEARNY, <i>et al.</i> , Respondents.		

The appellant states the following grounds of appeal:

1. The Supreme Court erred in dismissing the writ of certiorari, whereas for the reasons assigned in the Supreme Court or some or one of them, said Court should have set aside the resolution of the Board of Education of Kearny, in the County of Hudson, passed on the 17th day of July, 1912, and brought up for review by the said writ of certiorari. 20

2. The Supreme Court should have reversed and set aside the said resolution for one or more of the reasons filed by the prosecutor. 30

3. Said Board of Education had no legal right to award the contract to erect and complete the unfinished portion of the said school.

4. Said Board had no power to award the said contract.

5. The action of the said Board in passing the resolution awarding the said contract, before the Board of School Estimate fixed and determined the 40

amount to be expended for such purpose was contrary to law.

6. The resolution under review was without the jurisdiction of the said Board.

7. The plans and specifications adopted by the said Board were not submitted to and approved by the State Board of Education, as required by law.

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Dated May 20th, 1913.

PIERRE P. GARVEN,
Attorney of Appellant.

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New Jersey Court of Errors and Appeals.

HENRY HOLDEN, <i>et al.</i> , Appellants,	}	On Appeal to the Supreme Court.
v.		
BOARD OF EDUCATION OF KEARNY, <i>et al.</i> , Respondents.		

BRIEF FOR APPELLANTS.

Mr. Justice Swayze sitting alone for the Supreme Court decided that the objections of the prosecutors below, to the award of the contract to the American Concrete Steel Company for the erection of the unfinished portion of a Free Public School building were unavailing, and therefore dismissed the writ of certiorari and a rule for judgment was entered accordingly.

Facts.

In September, 1911, the Board of Education of Kearny approved plans and specifications for the erection of a school house in the town of Kearny.

On October the second of that year, the Board awarded the contract to the American Concrete Steel Company, one of the defendants in this case. At the time of the award the plans and specifications had not been approved by the State Board of Education nor did the Board of Estimate of that

town appropriate funds for that purpose. The resolution awarding the contract was brought by a writ of certiorari into the Supreme Court and subsequently the Supreme Court dismissed the writ.

A few days later a rule for judgment was entered dismissing the writ. A writ of error was issued out of this Court and in June, 1912, the resolution was set aside. During the litigation the contractor started work upon the school and continued working thereon until the decision of this Court. Then work stopped.

On July 6th, 1912, the School Board adopted plans and specifications for the completion of the school and on the 17th of July, a contract was awarded to the American Concrete Steel Company. It is this resolution which is now before this Court.

ARGUMENT.

ONE.

The award of the contract was invalid because the plans and specifications were not approved by the State Board of Education.

Mr. Justice Swayze disposes of this objection as follows:

“I think the approval of the plans and specifications for the schoolhouse by the State Board sufficed and that it was not necessary to secure a further approval of the plans and specifications for the completion of the unfinished work, as long as no change was made thereby in the original plans and specifications. It would be a mere idle ceremony for the State Board to approve once more what they had already approved. The approval of the original plans and specifications must have included the work now proposed, as the whole includes every part.

Counsel for the prosecutors in his brief does not suggest that there was any change or variation, and I think this reason fails."

Section 129 as amended in 1911 (P. L., page 764), reads as follows:

"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 Education. A copy of the contracts for the erection of the whole or any part of the school building and for the furnishing 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."

It is admitted that the particular plans and specifications in question were not approved by the State Board of Education before the awarding of the contract (Case, page 16, line 30).

On July 1st, nineteen hundred and twelve, the Board directed the architect to prepare plans and specifications. On July 6th the Board approved the plans and specifications submitted and advertised for proposals in accordance with those plans and specifications. At that same meeting the Secretary was directed to send to the State Board of Public Instruction two copies of the plans and specifications (Case, page 8, l. 16). The contract was awarded on the 17th day of July, 1912.

At the time of the award, in fact even up to the present time, the plans and specifications have

not been approved by the State Board. The excuse given is that the plans and specifications for the erection of the entire building approved October 17, nineteen hundred and eleven, is a sufficient approval of the plans and specifications now under discussion.

The contract mentioned in Section 129 of the School Act does not refer to the formal contract. The bid and its acceptance by the Board gives the contractor the vested right for a formal written document and under that section before proposals are accepted the plans and specifications therefor must first receive the approval of the State Board of Education. The present contract and the plans and specifications are absolutely independent of the original award and the plans and specifications submitted at that time. The original contract was for a completed school. The present contract is for the erection of a part of a school and under the Section 129 above referred to, "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."

Another reason given why the contract was awarded before the plans and specifications were approved is that on or about the 15th of July (about the time the bids were to be received), the architect claims to have offered the said plans to the State Board for filing and approval and it was declared by the Board that such filing and approval was unnecessary. But the fact that the State Board refused to comply with a clear provision of the statute, affords no excuse to the Board to proceed in violation of the law.

Among other things Justice Swayze said (Case, page 24, line 31), "That it was not necessary to

secure further approval of the plans and specifications for the completion of the unfinished work as long as no change was made in the original plans and specifications." The statute (School Law, Section 129) refers to a contract for the erection of an entire school building and also a contract for the erection of any part of a school building. The contract under discussion admittedly is not a contract for the erection of an entire building but merely a part thereof and, although, combining the original plans and specifications and the present one we eventually might have a completed building similar in every detail to the original plans, nevertheless each of the plans are separate and distinct, one which has been abandoned and refers to the erection of an entire building, the other relating merely to a part of the structure.

TWO.

The award of the contract was invalid because made before the Board of School Estimate fixed and determined the amount to be expended for that purpose.

Mr. Justice Swayze in disposing of this point said (Case, page 25, line 6): "The total expenditure has already been sanctioned by the Board of School Estimate. No increase of cost is involved."

The 76th Section of the School Act (Comp. Statutes, p. 4746) provides that "whenever a city Board of Education shall decide that it is necessary to raise money for erecting, enlarging, repairing or furnishing a school house or school houses, it shall prepare and deliver to

each member of the Board of School Estimate of the said school district a statement of the amount of money estimated to be necessary for such purpose or purposes; said Board of School Estimate shall fix and determine the amount necessary for such purpose or purposes." No request was made to the Board of School Estimate to fix and determine the amount necessary under the contract in question (Case, p. 25). The Board of Education relied upon the action of the Board of School Estimate in fixing and determining the amount of money to be spent under a contract awarded nine or ten months previous to the contract in question.

In *Wendel v. Board of Education of Hoboken*, 47 Vroom, 499-501, it was held that the "principal function of the Board of School Estimate is to supervise the expenditures proposed to be incurred by the Board of Education." The Board in this instance proposed to incur an expenditure for the completion of an unfinished part of a school building; nevertheless, the Board of School Estimate had no opportunity to supervise this particular expenditure, and it might well be that the amount involved in the contract in question would be considered too high a figure for the proposed work.

THREE.

The award of the contract was invalid because the Board had no power or legal right to make the contract.

The facts in this case disclose that work was continued under the original contract during the pendency of the litigation. When this Court set

aside the award, the walls of the building were partly constructed and a vast amount of the work completed. All of this work was done without authority of law and the School Board is now attempting to construct that portion of the building unfinished at the time the original award was set aside.

Mr. Justice Swayze in disposing of this point among other things said (Case, p. 25, line 15): "It would require no great strain of language to hold that the completion of a school house in an advanced stage of construction was an enlarging or repairing, but it is unnecessary to rest on this language." We respectfully insist that it would indeed require a great strain of language to hold that the completion of an unfinished structure can in any manner be construed as an enlarging or repairing and unless it is shown that this unfinished part of the building is an enlarging or repairing, the award cannot stand.

The School Board has no authority to act except as may be given it by the statute (General School Law, Compiled Statutes, p. 4724). That Act permits a Board to erect, enlarge, repair and furnish a school house. There is no authority given to award a contract for the unfinished portion of a school. Mr. Justice Swayze held that the power is given by Section 126 of that act (Case, p. 25, line 25). Under that section each school district shall provide suitable school facilities. These facilities include proper school buildings. In order to provide such facilities it is absolutely necessary for the Board to comply with the terms of the statute. It is limited to the authority vested in it by that statute. In the present instance an effort is being made to spend the money of the taxpayers of Kearny in finishing a structure which the Board had no legal right to place upon the premises. They

have a right to complete a building which has been lawfully placed upon its lands, and we admit that if a lawful contract had been abandoned by reason of the bankruptcy of the contractor, the building could be completed. The counsel in his argument before the Supreme Court suggested that the situation in the present case is no different than in the case of a contractor under a lawful contract deliberately abandoning his work, but the present situation is different. If a lawful contract has been made by the Board and the contractor for some reason or another fails to complete his job, the Board has the right to complete the building or if by reason of fire or a tornado, the building becomes partially destroyed, the School Board has the right under the statute to make repairs. But here we find a partly completed structure which has been placed there under an unlawful contract. We contend there is nothing in the statute which permits the Board to finish this building. It is necessary for them to apply to the Legislature for relief.

A serious situation may arise from the Board's action. In the first place it is possible for the Board or upon their refusal to act, then taxpayers to sue for the moneys paid to the contractors for the work performed and materials furnished under the old contract and if a recovery is had, the contractor would likely demand the return of the materials placed in that structure. This would indeed be a very embarrassing situation if the Board is permitted to carry out the present contract, and no doubt would result in serious loss to the taxpayers of Kearny. In the second place if this method of awarding contracts for the construction of public buildings is held to be lawful, then it is possible for public bodies to evade the statute in respect to awarding contracts to the lowest responsible bidders. Assume that a public Board desires to favor

a particular contractor; he is awarded the bid contrary to law, for instance he might have been the highest bidder; the contractor is aware that before there is a final determination by our courts, the building will be well under construction, possibly completed. The contractor having put up the building and the Board having paid him for the work performed, it makes little difference to him whether the contract was lawfully awarded and if by chance the entire building has not been completed, it is only necessary for the Board to award a contract for the unfinished part of that building. This would open the doors for the perpetration of fraud.

The judgment of the Supreme Court should be reversed and the judgment should be directed to set aside the resolution awarding the contract.

PIERRE P. GARVEN,
Attorney of Appellants.

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New Jersey Court of Errors and Appeals

HENRY HOLDEN, *et al.*,

*Prosecutors,
Appellants,*

vs.

THE BOARD OF EDUCATION OF
KEARNY, *et al.*,

*Defendants,
Respondents.*

On Appeal.

On Certiorari.

Brief for Board of Education of Kearny.

STATEMENT OF CASE.

October 2, 1911, the Board of Education of Kearny awarded a contract to the American Concrete Steel Company for the erection of a new school, known as No. 2 and now known as Washington School No. 2, in Kearny. After the award of the contract but before it had actually been signed, a writ of certiorari prosecuted by John P. Kay, Henry Holden and Alfred M. Moorshead issued out of the Supreme Court to review the award of the contract. On the argument of the writ Justice Swayze filed an opinion upholding the legality of the contract and an order was, on December 27, 1911, entered, dismissing the writ. After this order was entered a contract for the erection of the school building was duly executed on January 2, 1912, and the work of construction pursuant to the plans and specifications begun. After

the contract was signed and the work begun the prosecutors in the writ of certiorari on January 5, 1912, took out a writ of error. There was no stay of proceedings and no application was made for any stay either to the Supreme Court or to the Court of Errors and Appeals. The work therefore progressed. The writ was argued at the March Term, 1912, and opinion was handed down at the June Term reversing the judgment of the Supreme Court and setting aside the award of the contract to the American Concrete Steel Company. Immediately thereafter work upon the building ceased.

On July 17, 1912, a contract was awarded to the American Concrete Steel Company to complete the unfinished building. The present writ of certiorari brought the proceedings culminating in that award before the Supreme Court.

The facts fully appear by stipulation beginning on page 16 of the record.

The reasons filed below are on pages 22 and 23 of the record.

The case was argued in the Supreme Court before Justice Swayze and his opinion will be found in the record beginning at page 24.

Judgment was entered affirming the proceedings on April 24, 1913 (Record, page 27).

The grounds of appeal (Record, page 29) merely repeat the reasons filed in the Supreme Court, except that a reason alleging that the contract had been awarded without competition, abandoned below, has been omitted.

Argument.

The brief of the prosecutor makes three points:

1. That the award of the contract was invalid because the plans and specifications were not approved by the State Board of Education.
2. The award of the contract was invalid because made before the Board of School Estimate fixed and determined the amount to be expended for that purpose.
3. The Board had no power or legal right to award the contract.

The first and second points are technical.

I.

As to the first, it appears by the final paragraph of the third stipulation (beginning on page 16 of the record), that the original plans and specifications for School No. 2 were approved by the State Board of Education on October 17, 1911. The state of the building at the time the work was arrested by the decision of the Court of Errors and Appeals appears in the fourth stipulation (beginning at line 13 of page 20) and the concluding paragraph of the fourth stipulation (beginning on the last line of page 20) as follows:

"The plans and specifications which are referred to in the reasons filed in this cause provided for the completion of the said school building from its condition as described above to complete erection in accordance with the plans and specifications approved by the State Board of Education on October 17, 1911, and referred to in paragraph 3 of this stipulation."

It thus appears that the plans and specifications were approved by the State Board of Education on

October 17, 1911, and the correspondence (set forth on pages 17 and 18 of the record) discloses that it was deemed unnecessary by the State Board of Education to re-approve the plans in July, 1912. The original plans and specifications were approved by the State Board, and the plans and specifications referred to in the reasons filed by the prosecutor in the present case provided for the completion of the school building from its condition as described in the stipulation to complete erection in accordance with plans and specifications approved on October 17, 1911.

The controlling section of the law is section 129 of the School Act, as amended by P. L. 1911, 764.

This section as amended requires that no contract shall be made until after the plans and specifications therefor have been submitted to and approved by the State Board of Education. No time is prescribed, and the approval by the State Board in October, 1911, complies with the law. The contract is required to be filed within ten days after making. In the present case no contract has yet been signed by reason of this writ of certiorari.

II.

As to the second point, it appears by the sixth and final stipulation of fact (Record, page 21) that, prior to the execution of the original contract, the Board of School Estimate of Kearny fixed and determined upon the sum of \$108,000 to be expended for the erection and construction of Washington School No. 2, which sum was thereupon appropriated for that purpose. The amount of the bid to complete the school house, on which the resolution brought before the court on the writ in the present case was based, added to the amount actually paid on account of the original contract and the amount for which the Board may be still liable under the old contract, totals a less amount than the sum of \$108,000 fixed and deter-

mined and appropriated by the Board of School Estimate. No further appropriation was necessary, and the completion of the building under the present resolution will not exhaust the appropriation already made.

III.

The real reliance of the prosecutor is on the third point in the brief that "The award of the contract was invalid because the Board had no power or legal right to award the contract."

The proposition advanced is that because the building has been partially completed under an illegal contract, the Board has no lawful right to award a contract for completion. It is claimed that a contract for such completion is not "a contract for building, enlarging or repairing a school house" and therefore not within the authority conferred upon the Board by the school law.

This is equivalent to saying that a Board of Education, which has been interrupted in the erection of a building in course of construction by a judgment of a court declaring the contract to have been illegally awarded, can never complete the building. The land bought for public use must forever lie idle. The Board is without authority to sell it, with or without the partially completed building. The Board has no authority or appropriation to remove the partially completed building from the land, and cannot therefore convert it once more into vacant land. The property must remain in *statu quo*, an eyesore to the neighborhood and a permanent loss of public money invested therein.

It is submitted that such a conclusion is contrary both to good sense and good law.

The question in the present case is not whether the contractor under the illegal contract can recover the

balance of the money under that contract not paid before the invalidating decision.

The question in this case is not whether the contractor under the illegal contract can be compelled at the suit of the Board of Education to return the money paid to it under the illegal contract.

The question here is whether the Board of Education can make a piece of real estate purchased with public money available for public use.

The building so far as erected has become a part of the real estate and public property, and cannot be removed by the contractor because the contract under which it was placed there has been declared illegal. Nor can the building so far as erected be removed by the Board of Education both because the Board is without lawfully appropriated funds for such a purpose and also because to do so would be to destroy without lawful warrant public property.

By section 126 of the School Law (Comp. Stat. 4768) the school district is required to furnish school facilities, including school houses, under penalty of loss of state appropriation of school monies. It is not contemplated by the law that school property shall lie idle or be withheld from public use.

This court has held that Article VI of the School Law, Sec. 38 to 76 (Comp. Stat. 4735 to 4747) providing for the regulation of Boards of Education in cities, applies to the Town of Kearny. See opinion of Mr. Justice Voorhees in *Kay vs. Board of Education of Kearny*, 83 Atl. Rep., 954.

The title to school property real and personal is in the Board of Education and such boards have the supervision and management of all public school property, and must keep such property insured. Secs. 49 and 50.

Boards of Education may not enlarge or repair a school house without advertisement, although they may repair if the expenditure be less than \$500 without such advertisement. Sec. 52.

In this case such advertisement was made and American Concrete Steel Company was lowest bidder. (See Stipulation Fifth, Record, page 21.)

Any reasonable construction of Sections 52 and 126 justify the completion of an unfinished building by a Board of Education.

The situation would be no different so far as power to complete conferred by the act is concerned, if, instead of the building being interrupted by a judgment declaring the contract illegal, the building had been left unfinished by a contractor under a lawful contract becoming bankrupt and thereby rendered unable to finish the work. Could it be said that in such a case the building must remain unfinished forever?

Or, if a contractor under a lawful contract should deliberately abandon the work as contractors sometimes do and throw up the job because unprofitable or for any other cause, must the building remain in its incomplete state forever?

The cause of the interruption of the work is without significance.

The Board not only has power to complete the building but it is to the public interest that it should be completed. It must be insured by positive command of law. It represents idle public property which can only be made useful by completion. To keep it in its present state is indefensible economically and legally objectionable.

IV.

The judgment of the Supreme Court should be affirmed.

EDWARD KENNY,
JOHN R. HARDIN,

*Of Counsel for Board of Education
of Kearny.*

