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Notice of Appeal.

New Jersey Supreme Court.

STANDARD GAS POWER CORPORATION,

*Plaintiff,*

*vs.*

NEW ENGLAND CASUALTY COMPANY,

*Defendant.*

10

To ROBERT STRANGE, Esquire,

Attorney of Defendant-Appellee:

20

Take notice that the plaintiff appeals from the whole of the judgment entered in this cause in favor of the defendant and against the plaintiff, to the Court of Errors and Appeals, on the following grounds, in all of which plaintiff alleges there was error:

1. The Court found for the defendant against the plaintiff and adjudged that the defendant have judgment against the plaintiff for its costs.

2. Said judgment is based upon a decision of the trial court that the claim of the plaintiff to be entitled to recover upon the bond in suit as a person for whose benefit said bond was made, is untenable. 30

3. Said judgment is based upon a decision and ruling of the trial court that the condition of said bond clearly indicates that the bond is solely for the benefit of the obligee and that the condition of the bond is a mere limitation and restriction upon the generality of the language found in the 40

*Notice of Appeal.*

obligation thereof to the effect that the principal and surety are held and firmly bound unto the Passaic Valley Sewerage Commissioners.

4. Said judgment is based upon a decision and ruling of the trial court that the contract mentioned in said bond does not provide that the bond is intended for the protection of third parties, but that the language clearly states that the bond is for the benefit of and to protect the Passaic Valley Sewerage Commissioners from any liability arising from and in connection with claims for labor and materials used in connection with the work.

5. Said judgment is founded upon a finding and ruling of the trial court that in New Jersey a materialman or laborer furnishing material or labor used in a public improvement, has adequate protection by virtue of the mechanics' lien laws applicable to public improvements.

6. Said judgment is founded upon a finding and ruling of the trial court that the New Jersey mechanics' lien laws apply to the work prosecuted by the Passaic Valley Sewerage Commissioners.

7. Said judgment is based upon a finding and ruling in effect that plaintiff should not be permitted to recover because a rule permitting such recovery might operate to inconvenience the surety in being subject to possible suits for sixteen years, and might also operate to give no priority in favor of the public body.

8. Said judgment is based upon a decision, which, among other things, rules that the assumed novelty of the plaintiff's action is presumptive evidence of its infirmity.

9. Said judgment is founded upon a decision, among other things, finding that in this case

*Notice of Appeal.*

there exists no facts to indicate an intention on the part of the parties to the bond of extending the benefit of the bond to third parties so as to enable them to sue thereon, but that on the contrary from the internal evidence of the contracts themselves and the circumstances both of fact and law which surrounded the parties at the time the contract was made, it seems perfectly clear that this was a mere contract of indemnity running solely to the Passaic Valley Sewerage Commissioners and was not intended to create any obligation in favor of laborers and materialmen. 10

10. Said judgment is founded upon a decision and finding, among other things, that it seems perfectly clear that the bond given in the present case was one of mere indemnity, and not an affirmative contract to do the specified act or to pay the specified sum. 20

11. The Court refused to find plaintiff's 11th request and found the contrary.

12. The Court refused to find plaintiff's 12th request.

13. The Court refused to find part of plaintiff's 13th request.

14. The Court refused to find part of plaintiff's 14th request.

McDERMOTT & ENRIGHT, 30  
Attorneys of Appellant.

**Judgment Record.****NEW JERSEY SUPREME COURT.**

HUDSON COUNTY.

STANDARD GAS POWER CORPORATION	}	On Postea. Judgment for Defendant
<i>vs.</i>		
10 NEW ENGLAND CASUALTY COMPANY.		

New England Casualty Company, the defendant in this cause, was summoned to answer unto Standard Gas Power Corporation, the plaintiff therein, in an action at law upon the following complaint.

(Summons Issued July 17, 1914.)

**Complaint.**

20

(Filed July 22, 1914.)

Plaintiff, the Standard Gas Power Corporation, formerly known as Cockburn-McIlvrid Corporation, a body corporate having its office and place of business in the City of Jersey City, Hudson County, New Jersey, complaining against the New England Casualty Company, says:

30 1. That prior to the tenth day of December, 1912, the Passaic Valley Sewerage Commissioners, a public corporation created by and existing under the laws of the State of New Jersey, charged with the power and duty of building a certain public improvement, to wit, a public sewer in the Passaic Valley, advertised for bids for the building of a portion of said sewer designated as Section No. 8, with notice to all bidders that the successful bidder would be required before the acceptance of his contract to enter into bond with satisfactory

40

*Complaint.*

surety, with condition as prescribed by said Commissioners and as hereinafter set forth.

2. That Healey Contracting Company pursuant to said advertisement did make a bid for said work, which was accepted by said Commissioners subject to conditions, among others, that a bond should be executed and delivered as aforesaid.

3. That Healey Contracting Company did thereafter enter into contract with the Passaic Valley Sewerage Commissioners under date of December 10, 1912, under which contract said Healey Contracting Company did agree to do all the work and furnish all tools, labor and material, except as particularly specified, necessary or proper for performing and completing Section No. 8 of said sewer, and in connection therewith and for the purpose of inducing said Commissioners to enter into said contract, said Healey Contracting Company as principal, and the defendant, New England Casualty Company, as surety, did execute and deliver unto said Commissioners, under their respective seals, a certain bond or obligation in the sum of Twenty thousand dollars, with condition that if the said principal should well and truly keep and perform all the obligations, agreements, terms and conditions of said contract on its part to be kept and performed, and should, also, pay for all labor performed and furnished and for all materials used in carrying out said contract, then said obligation to be void, otherwise to remain in full force and virtue, a copy of which bond or obligation is hereto annexed as part hereof.

4. That thereafter William McIlvrid, Receiver of Cockburn Company, a body corporate of the State of New Jersey, conducting the business of said Cockburn Company pursuant to order of the United States District Court for the District of New Jersey, did furnish to said Healey Contract-

*Complaint.*

ing Company certain material to be used by said Healey Contracting Company in carrying out its aforesaid contract, to wit, certain tunnel plates designed as part of the structure of said tunnel, also certain airlock doors.

That the material furnished by said William McIlvrid as Receiver as aforesaid, to wit, said tunnel plates and doors, was actually used by the Healey Contracting Company in carrying out its aforesaid contract.

That there is still due and owing for such materials so used the sum of \$2246.75.

That annexed hereto is a bill of particulars of the items making up said indebtedness, which is hereby made part hereof and marked Exhibit "A".

5. That thereafter subsequent to the contracting of the aforesaid indebtedness all of the assets of the Cockburn Company and of William McIlvrid as Receiver thereof in the hands of said Receiver, including the aforesaid claims and demands against the Healey Contracting Company for materials furnished to and used in the carrying out of the aforesaid contract, were sold, assigned, transferred and set over, pursuant to the order and decree of the United States District Court for the District of New Jersey, in the cause therein pending wherein Frederick S. Flower is complainant and the Cockburn Company is defendant, by John M. Enright as Special Master, to Henry M. Ward, his executors, administrators, heirs and assigns:

That the said Henry M. Ward thereafter sold assigned, transferred and set over the aforesaid assets, including the claims and demands against said Healey Contracting Company as aforesaid, to the plaintiff, the Standard Gas Power Corporation, formerly the Cockburn-McIlvrid Corpora-

*Complaint.*

tion, which corporation has ever since been and now is the owner thereof, and of all rights of action pertaining thereto.

6. That under date of the twenty-first day of October, nineteen hundred and thirteen, the Court of Chancery of New Jersey, in a cause therein pending wherein Laurence H. Hendricks is complainant and the Healey Contracting Company is defendant, adjudged said corporation Healey Contracting Company to be insolvent and appointed Thomas L. Raymond as Receiver thereof with power to take possession of all the assets of said corporation and to continue the business thereof and carry out the contract theretofore entered into with said Healey Contracting Company. 10

That said Receiver thereupon qualified as such and entered upon the duties of his trust and thereupon, by operation of law, became vested with all the property of the corporation and power to exercise all of its franchises. 20

7. That thereafter said corporation, Healey Contracting Company, acting through its said Receiver, did enter into a contract with plaintiff Cockburn-McIlvrid Corporation, wherein and whereby plaintiff did agree to sell and deliver 5000 additional tunnel plates for use in the carrying out of the aforesaid contract, at the price of \$1.15 per plate delivered, and further did agree to sell and deliver for said work certain circles at the agreed price of \$165.00. 30

That under the last mentioned contract between plaintiff and said Healey Contracting Company, acting through its Receiver, plaintiff has furnished materials, to wit, tunnel plates and circles used in carrying out said contract between Healey Contracting Company and Passaic Valley Sewerage Commissioners, of the agreed price and value of \$5085.20 over and above all credits and off-sets, 40

*Complaint.*

of which a bill of particulars is hereto annexed and made part hereof, marked Exhibit "B".

8. That the defendant herein, through its agents and servants, was instrumental in having a Receiver appointed for said corporation and also in procuring the aforesaid order of the Court of Chancery authorizing and directing the  
10 continuance of the business of said corporation by its Receiver, and did further agree that said Receiver should continue to carry out said contract in the place and stead of said Healey Contracting Company.

9. That said Healey Contracting Company, acting through its Receiver as aforesaid, subsequently, about the twenty-fourth day of March, 1914, defaulted upon the aforesaid contract with the Passaic Valley Sewerage Commissioners and  
20 abandoned the same, and said Commissioners thereafter, taking advantage of certain provisions of their contract, have terminated the same and have entered into contracts for the completion of the work left unfinished by Healey Contracting Company and its Receiver.

That the cost of such completion exceeds the amount remaining unpaid by the Commissioners under said contract by more than the amount due to the plaintiff.

30 10. That the Healey Contracting Company (being the principal named in the aforesaid bond) did not, nor did its Receiver, well and truly keep and perform all of the obligations, agreements, terms and conditions of the aforesaid contract with said Commissioners on the part of said Company to be kept and performed, nor did said Healey Contracting Company or its Receiver pay for all labor performed and furnished and for all  
40 materials used in carrying out the aforesaid contract with said Commissioners, but did fail to

*Complaint.*

pay to William McIlvrid, Receiver of Cockburn Company, or to plaintiff the moneys due as aforesaid for materials used in the carrying out of said contract.

11. That an action has accrued to plaintiff against the defendant on account of its joint and several undertaking as surety on the aforesaid bond (said bond having been made for its benefit) to recover for the value of the materials so furnished by it and its assignor. 10

Judgment will be demanded for \$20,000.

McDERMOTT & ENRIGHT,  
Attorneys of Plaintiff.

**Exhibit A.**

1913.	20
March 26th. 4 Air Lock Doors for 15 lb. pressure .....	\$ 351.00
Cartage .....	3.00
90 10" x 12" x 40" tunnel plates of the agreed price and reasonable value of \$1.66 each .....	149.40
April 10th and 11th. 15 10" x 12" x 20" tunnel plates of the agreed price and reasonable value of \$1.14 each .....	17.10
90 10" x 12" x 40" tunnel plates of the agreed price and reasonable value of \$1.66 each .....	149.40
April 18th. 15 10" x 12" x 20" tunnel plates of the agreed price and reasonable value of \$1.14 each .....	17.10 40

*Complaint.*

		200 10" x 12" x 40" tunnel plates of the agreed price and reasonable value of \$1.66 each .....	332.00
	May 3rd and 17th.	33 10" x 12" x 20" tunnel plates of the agreed price and reasonable value of \$1.14 each .....	37.62
10	May 16th.	6 10" x 36" x 120" tunnel plates, 995 lbs., of the agreed price and reasonable value of \$.03 per pound .....	29.85
		550 10" x 12" x 40" tunnel plates of the agreed price and reasonable value of \$1.66 each .....	913.00
20	May 22, 23, 27, 28.	217 10" x 12" x 20" tunnel plates of the agreed price and reasonable value of \$1.14 each .....	247.38
		Total .....	<u>\$2246.75</u>

**Exhibit B.**

30	Receipt No.	Date of Delivery.	No. of Tunnel Plates.	Price.
		1914		
	1	1/17	350	
	2	1/20	350	
	3	1/23	350	
	4	1/29	350	\$1610.
	5	2/7	300	
	6	2/9	300	
	7	2/9	300	
40	8	2/10	300	1380.

*Complaint.*

9	2/20	2210 (by rail)	
10	2/21	100	2656.50
11	3/24	148	170.20
Total .....		5058	

The circles and other pieces were delivered as follows:

12	2/15	2½ circles		10
13	2/21	6½ circles	165.00	
			\$5981.70	
			\$5981.70	

CREDIT.

1843 Plates re-sold at 50¢ per				
plate .....	\$921.50			
Less cartage .....	25.00	896.50		20
Balance .....		\$5085.20		

**Bond.**

KNOW ALL MEN BY THESE PRESENTS, That we, Healey Contracting Company, of No. 705 Park Row Building, New York City, New York, as principal, and New England Casualty Company of No. 55 John Street, New York City, New York, as surety, are held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of twenty thousand dollars (\$20,000), lawful money of the United States of America, to be paid to the Passaic Valley Sewerage Commissioners, for which payment, well and truly to be made they bind themselves and their respective heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the said principal has made a con- 40

*Complaint.*

tract with the Passaic Valley Sewerage Commissioners bearing date the 10th day of December, nineteen hundred and twelve, for constructing a part of Section 8 of the Passaic Valley Main Intercepting Sewer in tunnel in the City of Newark, in New Jersey.

Now, the condition of this obligation is such,  
 10 that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then  
 this obligation shall be void; otherwise it shall remain in full force and virtue.

In Witness Whereof, we have hereunto set our hands and seals on this 10th day of December,  
 20 nineteen hundred and twelve.

HEALEY CONTRACTING COMPANY,  
 By Patrick J. Healey, Prest.

(Seal).

Attest:

CATHARINE C. COPPENGER, Secy.  
 NEW ENGLAND CASUALTY COMPANY,  
 By George T. Parker,  
 President-Vice President.

30 Attest:

J. FRANK ANDERSON,  
 Resident Asst. Secretary.

Approved as to form and manner of executing.

ADRIAN RIKER,  
 Counsel.

(A certificate of authority and corporate acknowledgment is attached.)

**Answer.**

(Filed Oct. 27, 1914.)

The defendant, New England Casualty Company, a body corporation, organized and existing under and by virtue of the Laws of the State of Massachusetts, answering the complaint of the plaintiff above named,

FIRST: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in Paragraphs numbered "4," "5," "6," "7," "9" and "10" of said complaint contained. 10

SECOND: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in paragraph numbered "3" in said complaint contained except that it admits that it executed and delivered its certain bond as surety for the Healey Contracting Company as principal but begs leave to refer to the original thereof at the time of the trial herein for the particulars therein contained. 20

THIRD: Denies each and every allegation in paragraphs "8" and "11" in said complaint contained.

Wherefore, defendant demands judgment that the complaint herein be dismissed.

ROBERT STRANGE, 30  
 Attorney for Defendant,  
 O. & P. O. Address, 165 Broadway,  
 Borough of Manhattan,  
 New York City.

**Judgment.**

This case was tried before Judge William H. Speer, without a jury, at the Hudson Circuit October 8th, 1915.

The Court found for the defendant against the plaintiff.

10 Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff its costs, which are taxed at twenty-nine dollars and fifty cents.

Costs \$29.50.

Judgment entered January 20, 1916.

WM. S. GUMMERE,  
C. J.

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**SUPREME COURT.**

20

HUDSON COUNTY.

STANDARD GAS POWER CORPORATION,

*vs.*

NEW ENGLAND CASUALTY COMPANY.

APPEARANCES:

30 McDERMOTT & ENRIGHT, for the Plaintiff.  
ROBERT STRANGE and STUART MCNAMARA of Counsel for the Defendant.

The above entitled cause was heard October 9, 1915, before HON. WILLIAM S. SPEER without a jury.

**Minutes of the Trial.**

JOSEPH QUIGG, sworn.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Mr. Quigg, you are the secretary of the Passaic Valley Sewerage Commissioners? A. I am.

Q. And you are attending here under subpoena to-day? A. I am. 10

Q. Will you produce the original bid made by the Healey Contracting Company for Section 8, Passaic Valley sewer? A. I will. (Produces paper.)

MR. ENRIGHT: I offer that in evidence.

MR. STRANGE: It is the form of the contract?

MR. ENRIGHT: It is.

MR. STRANGE: You mean this whole document? Is that your idea? What portion are you offering? 20

MR. ENRIGHT: I am offering the whole thing.

MR. STRANGE: I have no objection to that, of course.

The paper was received in evidence and marked Plaintiff's Exhibit 1.

Q. Now, this document which you have just produced as the bid is made out on a printed form which includes also the form of the contract to be executed by the contractor in the event that the bid is accepted, and the form of bond; does it not? A. It does. 30

Q. Was that bid accepted by the commissioners? A. It was.

Q. And a formal contract executed? A. Yes, sir.

*Joseph Quigg—Direct.*

Q. Will you produce the contract, please? A. I will. (Produces paper.)

Q. Now, this document now produced as the contract has attached to it a bond, has it not? A. It has.

Q. Is the bond printed on pages 37 and 38 of this document the bond given by the contractor upon the execution of that contract? A. Yes, sir.

MR. ENRIGHT: You do not require formal proof?

MR. STRANGE: No; that is the bond in issue.

MR. ENRIGHT: I offer in evidence the contract and the attached bond.

The papers were received in evidence and marked Plaintiff's Exhibit 2.

MR. ENRIGHT: Formal proof of execution being waived.

MR. STRANGE: Yes.

Q. The contract and bond as executed are in identical form with the form attached to the bid, are they not? A. Yes, sir.

MR. STRANGE: This is the original, as I understand it, that was in possession of the Passaic Valley. Am I right.

MR. ENRIGHT: They are both originals.

Q. Has the work called for by the contract, Section 8, been completed? A. Yes, sir.

MR. STRANGE: I don't think he is in position to answer that question. Is he?

Q. Now, will you produce a letter from McDermott & Enright to the Passaic Valley Sewerage Commissioners dated, I think, in 1914—July, 1914? A. Yes, sir. (Witness produces paper.)

Q. Letter produced dated June 17, 1914.

MR. STRANGE: I object to this as incompe-

*Joseph Quigg—Direct.*

tent, immaterial and irrelevant, and not binding upon the defendant in any way. I don't think that is material to this issue, your Honor.

THE COURT: Well, that brings us at once, of course, to the question as to whether or not under this bond the parties who furnished these materials are parties for whose benefit the contract was made, under the language of the twenty-eighth section of the old practice act. If they are I do not think they would have to ask the permission of the Passaic Valley Sewerage Commission to sue. If the bond was made for their benefit I do not see any necessity to ask them to sue (the commission), and if they didn't sue, sue themselves. I think they would have the right to sue at once for their own benefit. So that, looked at from either angle of the case, it would seem to me that that is a matter of immateriality. But in case this action is to be reviewed this will be an important link in the establishment of your right to maintain the suit. You first asked the named beneficiary to bring suit and he refused. I will permit you to prove it, and you may have your objection entered on the record.

MR. STRANGE: Will you note my objection?

THE COURT: Oh yes; that will go on the record.

The paper was received in evidence and marked Plaintiff's Exhibit 3.

Q. Was that communication referred to counsel for the commission? A. It was.

Q. And who was the counsel at that time? A. Mr. Riker; Adrian Riker.

Q. Of the firm of Riker & Riker? A. Yes, sir.

Q. Have you a copy of his answering communication? A. I have not.

*Joseph Quigg—Direct.*

MR. ENRIGHT: I offer in evidence letter from Adrian Riker addressed to McDermott & Enright, dated July 9, 1914, purporting to be an answer to letter of McDermott & Enright addressed to the Passaic Valley Sewerage Commission, dated June 17, 1914.

10 MR. STRANGE: I object to that, your Honor, on the ground stated in my last objection, and the fact that it is a discussion of law which is not binding upon us in any way.

20 THE COURT: Oh, no; it won't be binding upon me, either. But the point is they made application to the commission, and they want to show that that commission answered by refusing. The discussion of law is entirely immaterial. It happens to be part of the communication. So the objection will go to this whole line of testimony directed to showing that they applied for the Sewerage Commission to sue, and they refused to do it.

MR. STRANGE: That is all I want.

30 MR. ENRIGHT: The pertinent part of the letter is, "I suggest for your consideration, however, the question whether or not the condition of this bond can be enforced by the commissioners for the benefit of materialmen and laborers employed on the work." Mr. Riker had doubt whether the commissioners themselves could enforce it for the benefit of the materialmen.

THE COURT: And it is apparently a contract for the benefit of three parties. It would seem that it might be enforceable.

MR. ENRIGHT: Under the statute they had authority to sue in their own names.

40 Paper received in evidence and marked Plaintiff's Exhibit 4.

*Joseph Quigg—Direct.*

Q. Mr. Quigg, was a claim filed with the commissioners by the Cockburn-McIlvrid Corporation for any moneys due to it for materials that went into this job?

MR. STRANGE: I object to that. Let the answer speak for itself.

Q. Have you produced that claim? A. I have 10  
it here.

MR. ENRIGHT: I offer in evidence notice of lien claim of Cockburn-McIlvrid Corporation endorsed, "Received June 18, 1914."

Q. Is that the date when it was filed with the commissioners? A. Yes, sir.

Paper received in evidence and marked Plaintiff's Exhibit 5.

MR. STRANGE: Have my exception noted. 20

THE COURT: Oh, yes; it goes to the whole line. This is only part of the same.

MR. STRANGE: I only want to be sure.

THE COURT: I will announce now that it goes to the whole line. This is only a piece of it. I am sure they would not ask for payment on a claim without submitting the claim.

Q. Have you produced the bond filed by the claimant of that claim? A. Yes, sir. 30

MR. ENRIGHT: I offer in evidence the bond of Cockburn and McIlvrid Corporation, dated June 17, 1914, endorsed, "Received June 18, 1914."

Paper received in evidence and marked Plaintiff's Exhibit 6.

MR. ENRIGHT: That is all.

Witness excused.

*John William Barnett—Direct.*

JOHN WILLIAM BARNETT, SWORN.

## DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Mr. Barnett, were you the bookkeeper of the business carried on by William McIlvrid as receiver of Cockburn & Company in 1913? A. I was.

10 Q. And after that receivership was closed the business was continued by Cockburn and McIlvrid Corporation, was it not? A. Yes, sir.

Q. Were you also bookkeeper of the Cockburn-McIlvrid Corporation from the time it started in business until subsequent to March, 1914? A. I was.

Q. Did William McIlvrid, as shown by the books, sell any materials to Healey Contracting Company? A. He did.

20 Q. In 1913. Will you turn to the account? Does this book that you have just produced—that is, account book of William McIlvrid as receiver of Cockburn & McIlvrid Company—this book was kept by you? A. It was.

Q. On page 35 appears the account "Healey Contracting Company"? A. It does.

Q. The left-hand columns are the debits of charges for material? A. They are.

30 Q. And the right hand is the credit? A. The right hand.

Q. Now, from what record were the postings made on the debit side? A. From the card which I have now before me here. I could show you.

MR. STRANGE: I would like to note an exception to all testimony given by this witness with regard to the transaction of the Healey Company and the McIlvrid Company. I don't think there is any connection shown between those matters.

*John William Barnett—Direct.*

MR. ENRIGHT: That will be shown as a matter of record, Mr. Strange.

MR. STRANGE: All right. Are you marking that book for evidence, Mr. Enright?

MR. ENRIGHT: Not until I have proven it.

Q. I show you certain cards. Are those the cards to which you have referred? A. They are.

Q. They are numbered 8132—just check these off—8110, 8243, 7991, 8201 and 8205. A. Correct. 10

Q. Do they cover all the unpaid items on that account? A. It does.

Q. And these cards show the detail of the merchandise entered in the book on page 35, do they not? A. They do.

Q. The cards containing a description of the material. And how about the price that appears on there? A. It is correct. 20

Q. That is the price per unit which is entered into the book? Is it? A. Right.

Q. These cards to the extent that they have marked on them prices, etc.—they are put in there by you, your handwriting? A. Right.

Q. And where the prices were put in in type writing, that was done under your direction? A. Right.

Q. These cards are the original record? A. They are. 30

Q. Now, from this book of outstandings, were entries made into a ledger, or is that the ledger? A. That is the ledger.

Q. What is the balance shown on that account in the ledger? A. \$2246.85.

MR. ENRIGHT: I offer in evidence the book of account, particularly page 35 identified by the witness, and the cards bearing the serial numbers enumerated. 40

*John William Barnett—Direct.*

10 MR. STRANGE: I object to that, your Honor, on the ground that that has not been shown to be a book of account, and it has not been shown that those entries were made in the regular course of business, as I understand is necessary; nor has it been shown that he has received them in due course of business from one who had actual knowledge and experience of the facts contained therein.

THE COURT: I will sustain the objection at the present time.

Q. Was this book which you have referred to as the ledger kept by you in the regular discharge of your duties? A. It was.

Q. Were the entries made in the ledger account made by you—well, just state how they were made. A. Do you want a detail, from beginning to end, on it?

20

Q. Yes. Give it from beginning to end, if the other side wants it.

MR. STRANGE: I want the book qualified; that is all.

THE COURT: What was your system of bookkeeping? Tell us that.

A. Double entry; regular bookkeeping.

30 THE COURT: I don't mean the characterization of it. How did you do it? When you sold goods where did you make your first entry?

A. The first entry was made on cards and the second entry in this book.

THE COURT: Those are the only books you kept?

40 A. Those are the only two outside of a cost book; sales book, in other words.

*John William Barnett—Direct.*

THE COURT: Had that anything to do with these charges at all—the sales book?

A. That is only a copy of it; that is all.

Q. Have you got the sales book here? A. Yes, sir.

Q. Turn to the account in the sales book.

THE COURT: These are all the books that contain these accounts? 10

A. The sales book has an entry.

THE COURT: I see. You have that, too, haven't you?

A. Correct, sir.

THE COURT: And they were entered originally as the sales were made, on the cards; from the cards transferred into the ledger, and copied from that into the sales book? 20

A. Right, sir.

THE COURT: All right. Now what is the objection to the books, Mr. Strange?

MR. STRANGE: I don't think he has shown that the cards are the first entries made.

THE COURT: He answered directly and said they were.

MR. STRANGE: I misunderstood that, then. 30

THE COURT: That is the fact, isn't it?

A. These are the first entries of the charge.

MR. STRANGE: Did you make those entries?

A. I did.

MR. STRANGE: On the cards?

A. Yes.

MR. STRANGE: From where did you get the knowledge that you put on those cards? 40

*John William Barnett—Direct.*

A. That knowledge was furnished by the order. or Mr. McIlvrid personally, who was receiver of the Cockburn Company.

Q. When an order came into the shop to do work, what was the first record made of it? A. Shop order.

10 MR. ENRIGHT: At this point I will say that I will prove the shop orders by another witness, unless you recognize these papers produced here bearing the same serial numbers as the cards. For instance, this first paper marked in red ink, 8132—

Q. Is that a shop order? A. That is, sir.

Q. Now, when the shop order is entered is this card which you have identified made out about the same time? A. It is, sir.

20 Q. Then when the work is finished in the shop it is checked off as shipped, isn't it? A. As being ready to ship, and then as shipped.

Q. Now, after the shop order is checked off by the man in there—

MR. STRANGE: Mr. Enright, I think it is all right. I will withdraw my objection to that book to save time. I will want the general objection.

30 THE COURT: As to the relevancy?

MR. STRANGE: Yes.

THE COURT: All right.

The paper was received and marked Plaintiff's Exhibit 7.

Q. What is the balance now for materials shown in this book? A. \$2246.85.

MR. ENRIGHT: I offer in evidence also the sales book, which I think was not included in the other offer.

40 MR. STRANGE: No objection to that.

*James McIlvrid—Direct.*

The book was received in evidence and marked Plaintiff's Exhibit 8.

MR. ENRIGHT: I withdraw this witness so as to prove up the shop record now. Mr. McIlvrid.

(Witness excused.)

10

JAMES MCILVRID, sworn.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Where do you live, Mr. McIlvrid? A. 46 Armstrong Avenue, Jersey City.

Q. Were you employed by your father when he was acting as a receiver for Cockburn Company? A. Yes, sir.

Q. In what capacity? A. Superintendent.

20

Q. Of the shop? A. Yes, sir.

Q. Do you recall orders coming in for work to be furnished to Healey Contracting Company? A. Yes, sir.

Q. Were they manufactured under your direction? A. Yes, sir.

Q. Where is the shop, by the way? A. Monmouth Street, Jersey City.

Q. As the order came in was it your system to prepare a sheet for the shop, of the character shown on this sheet marked 8132? A. Yes, sir; that was an order on the shop for to supply that quantity of plates.

30

Q. Now, down at the bottom of this sheet appears "ready to ship; O. K. 41832." A. Yes, sir; my signature.

Q. And your initial? A. Yes; my signature on it.

Q. And was that material actually ready to ship as indicated on that card? A. Yes, sir.

40

Q. Was it shipped out under your direction on

*James McIlvrid—Cross.*

the several dates marked "shipped?" A. Yes, sir.

Q. And then after you had shipped the stuff out—and, by the way, the shipment was made to the address shown on the sheet? A. Yes, sir.

Q. Then you turned these sheets into the office? A. I turned them in as the job was completed.

10 Q. Then I call your attention to certain other items—documents that appear to be filled in on a regular printed bill of lading form. A. Yes, sir.

Q. Are those the forms that were given to the truckman when he made the delivery? A. Yes, sir.

Q. They were furnished him in duplicate, weren't they? A. Yes, sir.

Q. And he returned one to the office signed? A. Yes, sir.

20 Q. And the other was delivered to whoever was in charge of the work? A. Of the job; yes, sir.

Q. Now, these delivery receipts and the shop record, and the cost sheet, all bear certain serial numbers. Each is identified by the number of the particular job, isn't it? A. Yes, sir.

Q. And that number was then entered into the books? A. Yes, sir.

MR. ENRIGHT: I offer in evidence the shop record sheets on this job, numbered 8132, 8201, 8110, 7991, 8205 and 8243. Any objection?

30

MR. STRANGE: No; but may I ask a question or two?

## CROSS EXAMINATION BY MR. STRANGE:

Q. What was your capacity with the Cockburn Company at the time you made out these slips? A. Superintendent.

40 Q. Superintendent. For instance, when you made out this first slip, number 8132, for whom did you make that out; for what company? A. The delivery slip?

*James McIlvrid—Re-Direct.*

Q. This present slip here that is going in evidence. Shop slip, is it? A. No; that is delivery slip.

Q. I mean for whom were you acting then? A. I was acting for the company. I didn't make that out.

Q. What company were you acting for at the time? A. For the Cockburn—I don't just remember whether it was the receiver or whether it was the Cockburn—McIlvrid corporation. 10

MR. STRANGE: Well, your Honor, I object to this testimony on the ground that it has not been indicated at all whether this was furnished actually by the priors of the Standard Gas and Electric Company, the plaintiff. In other words, there has not been any connection between the successive corporations. One man testified that the McIlvrid corporation succeeded the Cockburn company, but there has been no proof to that effect; he was not competent to testify to that. I must object to it until that is connected up, and Mr. Enright assures me that it will be connected up. 20

MR. ENRIGHT: I said before I will connect it up. I am endeavoring first to prove the debt due to Mr. McIlvrid as receiver. Then I will prove the devolution of that credit to the plaintiff. 30

MR. STRANGE: Then I withdraw the objection subject to that proof.

THE COURT: All right.

## RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You were in the continuous employment first of William McIlvrid, receiver— A. Yes, sir. 40

*James McIlvrid—Re-Cross.*

*Patrick J. Healey—Direct.*

Q. —and then when the Cockburn-McIlvrid corporation was formed you continued in that employ? A. Yes, sir.

Q: And you do not now just recall when one stopped and the other began? A. I don't just recall when.

10 MR. ENRIGHT: That is all from this witness.

RE-CROSS EXAMINATION BY MR. STRANGE:

Q. What was the date that the work was completed out here on this particular section of the sewer; do you know? A. I don't know.

Q. You were never out there anyway? A. No.

20 MR. STRANGE: I suppose these slips show the last shipment made.

MR. ENRIGHT: May 28, 1913.

MR. STRANGE: That is all.

(Witness excused.)

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PATRICK J. HEALEY, SWORN.

DIRECT EXAMINATION BY MR. ENRIGHT:

30 Q. Where do you live, Mr. Healey? A. 116 Park Avenue, Newark, New Jersey.

Q. You were the president of the Healey Contracting Company, were you? A. Yes, sir.

Q. Did you purchase tunnel plates from William McIlvrid, receiver of the Cockburn Company, in 1913? A. Yes, sir.

Q. And that work of the Healey Contracting Company, by the way, was the constructing of section number 8 of the Passiac Valley sewer, was it not? A. Yes, sir.

40 Q. These tunnel plates were designed for use in the building of that sewer? A. Yes, sir.

*Patrick J. Healey—Direct.*

Q. Just tell me how they are used. A. In the form of a circle, in accordance with the diameter of the sewer, and the circumference.

Q. And they became a part of the sewer? A. They became a part of the sewer; yes, sir.

Q. Were the plates which were purchased from William McIlvrid, receiver, used—actually used in building the sewer? A. A part of them, yes, sir, 10 while I was there.

Q. And when your company went into the hands of a receiver were the unused plates still on the premises occupied by your company? A. Yes, sir.

Q. To whose possession had they then passed? A. I turned them over on July 13th to the Nassau National Bank. Mr. Katsky took charge of them at that time.

Q. Was that before the time of the receivership? A. No; it was after that. The Nassau National 20 Bank carried on the work after that for about two months, I believe, before the receiver was appointed.

Q. Were you familiar with the work as carried on by them? A. No, sir.

Q. By the bank? A. Had nothing to do with it. I was on the work a part of the time for about five weeks, and I refused to serve any longer.

Q. Well, there weren't any of those plates carted off the job? A. No, sir; not to my knowledge; 30 none whatever.

Q. And there were still some there when the receiver was appointed? A. I could not say that.

Q. Well, you spoke of a Mr. Godsped. He became an officer of the Healey Contracting Company, didn't he? A. Yes, sir.

Q. Did he supersede you as president? A. No; I believe he was secretary of the company. Mr. Hendrickson superseded me as president.

Q. Mr. Godsped was secretary of the company 40

*Patrick J. Healey—Direct.*

at the time of the appointment of the receiver? A. Yes, sir.

Q. And this work while it was in the hands—while it was under his direction was still the work of the Healey Contracting Company, was it not?

A. Yes, sir.

Q. There is a charge on the books of Mr. McIlvrid of \$2,246, I think, unpaid balance on these plates; is that right, do you know? A. There is a balance of some amount. I don't know the amount.

Q. Well, to the best of your recollection. A. To the best of my recollection the statement is right.

Q. I call your attention to certain shipping receipts from Mr. McIlvrid, numbered "Job number 8132, 8201, 8110, 7991, 8205 and 8243. One of these—I think it is 8205, is receipted in your name. Is that your handwriting? A. Yes, sir.

20 Q. Will you look at the others and say whether they were receipted for by people employed by your company. A. This looks like my writing, this number here.

MR. STRANGE: I think it might be well to take them up separately, Mr. Enright.

MR. ENRIGHT: He is looking over all of them.

A. That is my signature on that number.

30 Q. Well, I ask you whether these that are not signed by yourself personally—whether they were signed by employes of your company. Take the first one, 8132. Who is that, Thompson? A. Thompson; that is the superintendent on the work.

MR. STRANGE: I object to that, your Honor. He has not testified he is qualified to recognize the signatures of those employes of his.

THE COURT: He hasn't yet. I strike the answer out.

*Patrick J. Healey—Direct.*

Q. Do you know Thompson's signature when you see it? A. Yes, sir.

Q. Is that it? A. Yes, sir.

Q. Next one, 8201, is signed by the name "F. Cross." Who is F. Cross? A. Foreman on the work.

Q. Do you know his handwriting? A. Yes, sir.

Q. Is that it? A. Yes, sir.

10

Q. Next one, 8201, is signed "Healey Contracting Company, Callahan." Who is Callahan? A. Engineer on the work.

Q. Do you know Callahan's writing? A. Yes, sir.

Q. Is that his handwriting? A. Yes, sir.

Q. 8110, signed "Healey Contracting Company, by Callahan." Same Callahan? A. Same Callahan, engineer.

Q. And that is his handwriting? A. Yes, sir.

20

Q. Here is another one for 8110, "Healey Contracting Company, per Thompson." That is the same Thompson? A. Yes, sir.

Q. And that is his handwriting? A. Yes, sir.

Q. Number 7991, "Healey Contracting Company, per Thompson." Do you recognize that as Thompson's handwriting? A. No; that has been very much blurred.

Q. Well, look at it closely. A. It looks to me like it, but I would not swear that was his handwriting.

30

Q. Look at the signature on 8132. A. That is Thompson's handwriting.

Q. And on 7991? A. It looks like it; it looks like it; it is blurred so that I can not distinguish.

MR. STRANGE: What is the amount of the 7991, Mr. Enright?

MR. ENRIGHT: Four air-lock doors.

Q. And 8205—that is yours; you have identified.

40

*Patrick J. Healey—Direct.*

Q. 8205, part of that signed "Shea." Who is Shea? A. Superintendent on the work.

Q. Do you know his handwriting? A. No, sir.

MR. STRANGE: What is the amount of that?

MR. ENRIGHT: 185 tunnel plates.

Q. 8205; is that Callahan's handwriting? A.

10 Yes, sir.

Q. Also the next one for 8205; that is Callahan's handwriting? A. Yes, sir.

Q. And 8243, Cross; that is his handwriting?

A. Yes, sir.

MR. ENRIGHT: I offer these slips in evidence.

MR. STRANGE: I offer the same objection as before. I do not think the witness is qualified as to his knowledge of those signatures to the documents. He seems to be uncertain about some of them.

20

THE COURT: With respect to the ones that he is uncertain of, I do not see how you can get past that. He says he does not know them, recognize them.

MR. ENRIGHT: The proof is they were sent out with the truckman from our shop in the regular course of business, in duplicate. The truckman comes back and turns these things in signed. They go into the books and become part of the corporation's records; and I now propose to call witnesses and show that the goods were billed to correspond with these.

30

THE COURT: Suppose you prove all that—

MR. ENRIGHT: And this man says that the indebtedness claimed and shown by our books to the best of his recollection is correct.

THE COURT: It does not show how much his recollection is. The mere fact that a man

40

*Patrick J. Healey—Direct.*

bills things and a truckman comes back with a signed paper does not prove anything.

MR. ENRIGHT: That does not prove anything; but if bills are rendered and not objected to—

THE COURT: That does not prove anything. There was a famous case in the home of Judge Raymond that settles that, the case of the State against McAllister, in which it was held that either bills or letters sent, without any answer, do not prove the authenticity of either the bills or the letters. 10

MR. ENRIGHT: Well, our book accounts are evidence of sale and delivery.

THE COURT: I am not arguing that now. You ask now to put in these papers. I am simply passing upon that offer.

MR. ENRIGHT: Well, all of those, except the ones he is uncertain about, are admitted? 20

MR. STRANGE: Will you read off the amount so that I can check it up with the declaration, the ones in question?

MR. ENRIGHT: For instance, this one for four air-lock doors, which he says he is uncertain about. He is, of course, not familiar with that signature of Thompson because it is blurred. Now he has identified the same signature on this first, and he says this looks —though it is blurred—it looks like the same signature. I submit there is some testimony that entitles that evidence to be received. 30

THE COURT: You have not qualified him as an expert to pass upon signatures by comparison. It is perfectly settled that neither the Court nor the jury is permitted to draw that comparison.

MR. ENRIGHT: It is not altogether a matter of expert opinion. I suppose he knows the signature. 40

*Patrick J. Healey—Cross.*

THE COURT: Yes, but he does not know that signature; that is the point—

MR. ENRIGHT: By comparison.

THE COURT: If he says that is the signature it is not expert testimony at all; it is testimony as to a fact.

10 Q. I will ask you to look at that signature, 7991, and look at it closely; take as long as you want to; and then I am going to ask you when you get through to say whether that is the signature— A. I haven't brought my glasses.

Q. You have not? A. No; I have forgotten them.

MR. ENRIGHT: I will have to subpoena your glasses next time.

20 A. I can't swear Mr. Thompson signed that. Probably if I had my glasses I would be able to identify it a little more closely.

MR. ENRIGHT: That is all.

CROSS EXAMINATION BY MR. STRANGE:

Q. What dates were you actually on the work out on this section of the sewer? From when to about when? A. From December 20 until July 13.

30 Q. Of what year? A. 1912, until July 13, 1913; that is while I had charge of the work.

Q. Were you there customarily when these materials were delivered? A. Yes, sir.

Q. And you saw them delivered? A. Yes, sir.

Q. You have testified that you know the signature of J. Thompson in this first paper. A. Yes, sir.

40 Q. Where else have you seen the signature of Mr. Thompson? A. Mr. Thompson worked for me for about five months.

*Patrick J. Healey—Cross.*

Q. In what capacity? A. Superintendent.

Q. Out on the work? A. Out on the work; yes, sir.

Q. I repeat my question: When did you see his signature before this; in what paper? A. Never saw his signature until he came into my employ; never seen it since.

Q. I mean before that. What opportunity did you have to see it then? A. He was superintendent on the work, had to make all reports, order all these plates, all things connected with the work while he was acting superintendent. 10

Q. He signed these reports? A. Yes, sir.

Q. Did you go over them? Did you ever see him sign the report? A. Yes, sir.

Q. Did you ever see him signing receipts? A. I can't swear I seen him signing these receipts, but I seen him sign other receipts. 20

Q. And there is no question in your mind about this signature of Thompson? A. Yes, sir.

Q. Now, I show you this exhibit marked 8201, signature—whose name is that? A. Mr. Cross, isn't it? A. I could not tell you that; I can't see it.

Q. I show you that signature. "Healey." A. Healey Contracting Company; that is my signature.

Q. That is your signature? A. Yes, sir. 30

Q. You mean this writing down here at the bottom of the exhibit? A. Yes, sir.

Q. I show you that. Whose signature is that? A. That is Mr. Callahan's.

Q. What was his capacity in this work? A. Engineer.

Q. What opportunity did you have to see Mr. Callahan's writing? A. By being on the work all the time.

Q. Did he sign reports? A. Yes, sir. 40

*Patrick J. Healey—Cross.*

Q. Did you ever see him sign any? A. Yes, sir.

Q. Did you ever see him sign any of the receipts? A. Yes, sir.

Q. I show you that exhibit, 8110, and ask you whose signature that is. A. That is Thompson's.

Q. Are you familiar with that? A. Yes, sir.

Q. I show you that signature on 8205 and ask  
10 you whose signature that is. A. I had a superintendent of that name; that might be his signature—Mr. Shea.

Q. That might be his signature? A. Mr. Shea.

Q. You generally wear glasses, Mr. Healey? A. Yes, sir.

Q. You had glasses on when you saw Mr. Thompson sign these papers? A. If I was not reading, no.

Q. But if you saw him cross the room you could  
20 identify his signature all right? A. Not across the room; no, sir.

Q. You would recognize he was signing his name? A. No.

Q. Were you standing by his shoulder when he would sign? A. I saw him signing, yes, sir.

30 MR. STRANGE: I object to those papers that are signed by Cross and Shea. The witness has been unable to identify Cross' signature in one place and thinks he could identify it in another. I do not think that is a sufficient qualification for him to be a witness on the question of the signatures of these particular agents of the plaintiff.

MR. ENRIGHT: Shea and Thompson he spoke of.

40 MR. STRANGE: He knows Thompson unquestionably, but Cross he does not seem to know. I have shown him twice; I have turned this up. He is not able to identify it. That

*Patrick J. Healey—Re-Direct—Re-Cross.*

is the Shea one. He was unable to identify that. If he can not identify one I do not see how he can identify the other. Do you want my objection specific?

THE COURT: I think unless he is further qualified to express an opinion on that, Mr.—

MR. ENRIGHT: Mr. Strange is mistaken about the two that there was question about. 10

THE COURT: No, he is not mistaken about it, because while you were not looking at all precisely what he says occurred. He showed him that handwriting of Cross's and he didn't know it; and he showed him the one of the other, Shea, and he said it might be Shea's.

MR. ENRIGHT: I recall the one about Shea. On the direct he says he did know Shea's.

THE COURT: On the cross he says he does not. 20

## RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Look at it again. Do you know it? A. I beg your pardon. I thought you asked me this name here. That name I don't know. This name here is Cross.

## RE-CROSS EXAMINATION BY MR. STRANGE:

Q. You recognize that as Cross's signature? A. 30  
Yes, sir.

Q. No question about that at all? A. No question at all.

MR. ENRIGHT: He pointed to a man connected with our company.

MR. STRANGE: I withdraw my objection, except to the name Shea.

THE COURT: What about Shea, Mr. Enright? 40

*Patrick J. Healey—Re-Direct.*

MR. ENRIGHT: He does not know Shea's signature.

A. I never saw Shea writing.

## RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. How long is the section of the sewer that  
10 you were on, Mr. Healey? A. 1775 feet.

Q. Were there more than one set of air-locked doors on this? A. Two air-locked doors.

Q. How were they situated on the work? I mean relative to the ends of the section on which you were working? A. They were about sixty feet, I believe from the entrance to the manhole, a piece of sewer. These locks were inserted into masonry.

Q. There were two of them? A. There were two of them.

20 Q. Which one did the material received from Healey Company go into?

MR. STRANGE: From McIlvrid, you mean.

Q. From McIlvrid. A. North end.

Q. What went into the south end? A. I don't know what went into the south end.

Q. These air locks were exactly the same, were they not? A. Exactly the same.

30 Q. If they had been mixed around they would not have told one from the other, could they? A. Well, there were two of these.

Q. Yes, but there was no means of identifying what came from McIlvrid Company and what from Cockburn Company if they were on the ground? A. Oh, yes; that could be distinguished.

Q. I thought you testified they were exactly alike. A. I didn't testify that, did I?

Q. (Repeated by the stenographer) These air locks were exactly the same, were they not? A.

*Colloquy.*

(Repeated by the stenographer) Exactly the same.

A. Exactly the same.

MR. ENRIGHT: That is all.

MR. ENRIGHT: I offer in evidence interlocutory decree of sale—certified copy of it—entered into cause pending in the United States District Court, District of New Jersey, between Frederick S. Flower, plaintiff, against Cockburn Company, defendant, directing the sale of all the assets of the Cockburn Company, including accounts; the order of sale being dated May 1, 1913. 10

Also a certain other order entered in the same cause confirming the report of sale of John M. Enright as Special Master, named in the first order, to Henry M. Ward. 20

And another final decree in the same cause further confirming the sale, dated March 23, 1914.

Those are the certified copies. While you are looking at those I will make the further formal offer:

I further offer the original special master's deed from John M. Enright, Special Master, to Henry M. Ward, dated August 5, 1913, transferring all the assets of the Cockburn Company, including the cause of action. 30

Also original deed, duly recorded, dated August 6, 1913, made by Henry M. Ward to Cockburn—McIlvrid Corporation, transferring the same assets.

MR. STRANGE: Together with the formal objection as to the irrelevancy of this matter, I wish to object to paragraph 5 which consists of outstanding accounts saleable—outstanding in the account uncollected—on the 40

*Colloquy.*

ground that it does not cover the cause of action in the present suit.

THE COURT: I will admit it.

MR. STRANGE: Objection.

Papers received in evidence and marked Plaintiff's Exhibits 10, 11, 12, 13 and 14.

10 MR. STRANGE: I object to the certified copy of the final decree filed March 23, 1914, on the ground that it does not include the claim involved in the present action.

THE COURT: I will admit that subject to your objection.

MR. ENRIGHT: I presume the deeds or instruments of transfer will be admitted subject to the same objection.

20 THE COURT: Yes; all those that are executed in pursuance of the order will be admitted subject to the same objection.

MR. STRANGE: That is, the two objections; the general objection and the specific.

MR. ENRIGHT: I offer in evidence exemplified copy of an order of the New York Supreme Court in the matter of the application of the Cockburn-McIlvrid Company for authority to change its name to the Standard Gas Power Corporation, entered May 21, 1914.

30 MR. STRANGE: No objection, sir.

Paper received in evidence and marked Plaintiff's Exhibit 15.

MR. ENRIGHT: I offer in evidence certified copy of an order in the Court of Chancery made in the cause pending between Lawrence H. Hendricks, plaintiff, and Healey Contracting Company, dated October 21, 1913, appointing Thomas L. Raymond, receiver and directing the continuance of business of the Healey Contracting Company.

40 MR. STRANGE: Same objection.

*Colloquy.*

THE COURT: I will admit it. You may may have your objection noted.

Paper received in evidence and marked Plaintiff's Exhibit 16.

MR. ENRIGHT: I offer certified copy of a petition of the receiver in the same cause, filed November 7, 1913, petitioning for leave to borrow money for the purpose of continuing work. 10

The paper was received in evidence and marked Plaintiff's Exhibit 17.

MR. ENRIGHT: I offer certified copy of another order in the same cause, filed March 26th—no; strike that out.

Another order in the same cause, filed November 7, 1913, authorizing the receiver to borrow \$12,500.00 for the prosecution of the work. 20

Paper received in evidence and marked Plaintiff's Exhibit 18.

MR. ENRIGHT: I also offer certified copy of order in the same cause, filed March 26, 1914, authorizing the receiver to abandon the work under the contract.

MR. STRANGE: No objection to that except the general one.

THE COURT: I will admit them. You may have your objection noted. 30

Paper received in evidence and marked Plaintiff's Exhibit 19.

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*James McIlvrid—Direct.*

JAMES MCILVRID, recalled.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Have you got the shop records on the work supplied to Mr. McIlvrid as receiver? A. They have in the office. I haven't got it.

10

MR. STRANGE: Your Honor, I think to save time we will admit the receipt of the articles in the bill of particulars, providing the charges—we give them full credit for the value of the material returned. They credit with only fifty cents a ring, I believe it is, and we are entitled to \$1.15. You will concede that, won't you, Mr. Enright?

20

MR. ENRIGHT: Oh, yes, sir. The sale and delivery of the materials set forth in Schedule B annexed to the complaint are admitted upon the concession of the plaintiff that of the materials there charged, plates to the number of 1843 did not go into the work but were returned to the plaintiff, and should be credited at \$1.15 per plate instead of .50 per plate as appears on the schedule annexed to the complaint.

30

That is all, Mr. McIlvrid.  
(Witness excused.)

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40

*John William Barnett—Direct.*

JOHN WILLIAM BARNETT, recalled.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. While you were bookkeeper under Mr. McIlvrid as receiver did you send out bills for all of the materials charged in your books, as you previously identified those entries? A. They were sent out under my direction. 10

Q. Under your direction? A. Yes, sir.

Q. Was any objection ever made by any one connected with the Healey Contracting Company to any of those bills? A. No, sir.

MR. STRANGE: I object to that. There is no account pleaded here, and I do not see that it has any bearing upon the issue.

THE COURT: I do not see, in the first place, that this testimony is proper testimony, any- 20 way. The mere fact that he sent a bill out does not show that the man it was sent to received it; and the mere fact that it was sent out does not at all indicate that anyone would ramble about and make a complaint to the bookkeeper about it. So it does not appear that this man has any information of any value at all to communicate to the Court.

Q. Were those bills sent out by mail? A. They were. 30

Q. To what address were they mailed? A. To Park Row, New York City.

THE COURT: How do you know that? Did you mail them yourself, put them in the post box?

A. No, sir.

THE COURT: Then you don't know anything about it, do you? 40

*John William Barnett—Direct.*

MR. STRANGE: If you will indicate to me what you are trying to reach, perhaps I might help you out.

10 MR. ENRIGHT: You said you didn't make any serious objection; that you only required prima facie proof of sale and delivery of these materials. Now, one of these receipts is signed by a man named Shea, whose signature Mr. Healey does not happen to know.

MR. STRANGE: It is to prove that?

MR. ENRIGHT: Yes; we haven't anything else to prove.

MR. STRANGE: I will see if Mr. McNamara is willing to concede that.

20 MR. ENRIGHT: The sales to Mr. Raymond are admitted. On the prior sales, by Healey Contracting Company, there is one delivery sheet signed by a man named Shea that Mr. Healey is unable to identify as to his signature. Of course the shop records and books have that entry in satisfactory form—

MR. McNAMARA: Well, does Mr. Healey know that he made that article represented by the entry?

MR. ENRIGHT: The article represented by the entry is 185 tunnel plates; one tunnel plate is like another.

30 MR. McNAMARA: Does anybody know that they got those made? If anybody will say that I will waive all technical objections, of course, but I suppose it is my duty simply to see that the goods were delivered.

MR. ENRIGHT: Here is the receipt for them. (Side discussion between Mr. McNamara and Mr. McIlvrid.)

THE COURT: If these things were received the whole course of the business has been

*Stuart McNamara—Direct.*

proven here. It has been proven that they were put down in a sort of bill of lading; that they were sent out by a man who came back with the receipt as he had always done previously; that that receipt bore the name of a man named Shea, and that a man named Shea actually was the foreman of the job; and you have the bills charged up on the books of 10 account, which prima facie raises the inference of sale and delivery and price. It would seem perfectly normal and reasonable to suppose that if this regular course were pursued with respect to this one item, appearing in the course of a lot of other items as to which there is no question—it is very likely that this item also reached the destination for which it was intended.

MR. STRANGE: We will waive the objection 20 on that point.

(Witness excused.)

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STUART MCNAMARA, SWORN.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Mr. McNamara, you are the same Stuart McNamara named in the order authorizing the receiver to abandon the work as being present at that hearing? A. I don't remember the hearing. I was present at one hearing before the vice-chancellor of Newark. 30

Q. You were the attorney for the New England Casualty Company from the time of the appointment of the receiver until after the abandonment of the work; were you not? A. Yes, sir; I was the attorney prior to and am still attorney.

Q. And continuously during that time? A. 40 Yes, sir.

*Stuart McNamara—Direct.*

Q. Were you in court when the receiver was appointed? A. I was in court as a citizen.

Q. I simply asked you if you were in court or not. A. Physically I was in court.

Q. Who was your local representative, or the local representative of your company, during this period? A. We had none, except by particular designation.

10 Q. Well, wasn't Mr. Frazer your local attorney in connection with this litigation? A. He was not.

Q. At any time? A. No.

Q. You have an office over in the New York office of the New England Casualty Company, haven't you? A. 80 Maiden Lane.

Q. And you have a desk there? A. I?

20 Q. Yes, personally. You spend part of your time there? A. No; I am in private practice.

Q. And you were looking after the interest of your company during this receivership and in connection with it, weren't you? A. I was not in the way in which you put it. I was looking after the interests of the New England Casualty Company in any respect. I didn't participate in the proceedings appointing the receiver, did not consent thereto or oppose it.

30 Q. But you were there when it was done? A. I was there when the act was performed.

Q. And it was pursuant to some notice sent to the New England Casualty Company? A. I don't think so; I think it was pursuant to notice sent to Mr. Armstrong, who was a stockholder of the Healey Contracting Company, and he was also an agent of the New England Casualty Company. If I may be allowed to state—

Q. No; I just want you to answer my questions, if you will pardon me.

40 Q. Did you appear in court on any other occasions? A. At no time.

*Stuart McNamara—Cross—Re-Direct.*

## CROSS EXAMINATION BY MR. STRANGE:

Q. Mr. McNamara, you were about to state the circumstances of your being physically present in this Chancery Court when the receiver was appointed. Will you please give me the facts in the case. A. I was curious about what was going to happen, but not interested in the legal sense. I was asked to go there and see what occurred. My purpose was to— 10

MR. ENRIGHT: I object to what your purpose was.

THE COURT: I will sustain the objection.

A. I appeared in the court and asked the vice-chancellor if he would consent to postpone the proceedings until the surety had a chance to look around and see what had happened; and I was promptly notified that I had no status as I was not a creditor; and the subsequent proceedings interested me no more. 20

## RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Didn't you talk over with Mr. Frazer the personnel of the proposed receivership? A. No, sir; I didn't even know who he was. I didn't participate in any suggestion as to the amount of the bond because I was told I had no status. 30

Q. Who told you that? A. The vice-chancellor.

Q. Do you remember who was first suggested as receiver? A. No, sir.

Q. You do not recall that you and Mr. Frazer opposed the first suggestion? A. I do not; I don't recall that; no, sir. Understand Mr. Frazer was our counsel for the commissioners, the Passaic Valley; and he was incompetent to represent us in this transaction.

*Stuart McNamara—Re-Cross—Re-Direct.*

## RE-CROSS EXAMINATION BY MR. STRANGE:

Q. Had you been following the affairs of the Healey Contracting Company in behalf of the New England Casualty Company prior to the appointment of this receiver? A. No, sir; I never heard of it prior to the day this receivership took place.

10 Q. If a proper notice, official notice of the time or appointment of receiver had been given to the New England Casualty Company, would you have known it? A. Yes, sir.

MR. ENRIGHT: I object to that as speculative.

20 THE COURT: I do not see what difference it makes, anyway. The object Mr. Enright had in view was to endeavor to fasten a connection in some way with the New England Casualty Company of this receivership in proceeding by showing they were notified; they were present or were notified to be present, and participated. That has conspicuously failed, because there has been absolutely no evidence.

MR. ENRIGHT: I withdraw the objection.

THE COURT: There is no need to go any further on it.

## 30 RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. After the appointment of the receiver did you keep in touch with what was going on? A. Yes, sir.

Q. Kept yourself informed of what? A. Of the actual happenings in connection with the job, with the Passaic Commissioners, as we were surety on that job.

40 Q. And how did you keep yourself informed?

*Thomas L. Raymond—Direct.*

A. By communicating with the commissioners and with their counsel.

Q. And who were their counsel? A. Messrs. Riker & Riker. I saw both Mr. Adrian Riker and Mr. Frazer. I do not pretend to ignorance of the conditions over there, for it was my duty, and, of course, did see what was going on, having in mind liability, if any, to the Passaic Valley Sewer- 10  
age Commissioners.

Q. Liability of the surety on the bond? A. To the commissioners.

Q. And with reference to that liability you did familiarize yourself with the proceedings to the extent you stated? A. Yes, sir. I inquired from time to time how the work was going on. I saw Mr. Raymond, who I believe was the receiver.

MR. ENRIGHT: That it all. 20

(Witness excused.)

THOMAS L. RAYMOND, sworn.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Mr. Raymond, you were the receiver of the Healey Contracting Company? A. I was.

Q. How soon after your appointment did you 30  
have any communication with Mr. McNamara about the progress of the work? A. I am unable to state exactly, but I think within two weeks I called at his office in New York.

Q. What was said by you to him and by him to you with respect to the progress of the work at that time—the proceedings with the work? A. Well, I have a rather hazy recollection of what was said, but I went to see him to see if he would finance the receivership, and I remember it was— 40

*Thomas L. Raymond—Direct.*

the conference was unsatisfactory; he did not finance it; and I then went to the bank, the National Nassau Bank, took the matter up with them; that is my recollection.

Q. Do you recall whether there was anything said between you and Mr. McNamara about your going to the bank? A. Yes, sir.

10 Q. What was that, to the best of your recollection? A. My recollection is Mr. McNamara said: "You better see what the Bank will do. If the bank won't do anything you can take it up again."

Q. And after that conversation did you go to see the Bank? A. I went to see the Bank.

Q. And did they agree to finance the proceeding by the receiver? A. They did.

20 Q. And was it pursuant to that conversation with the Bank people that the petition for the \$12,500.00 of additional receiver certificates was filed? A. It was.

Q. After the order of the Court authorizing those additional receivers certificates did the bank in fact advance money? A. The bank advanced seventy-five hundred dollars in all.

Q. Did they refuse to advance the balance? A. They refused to advance any more.

30 Q. Now, after they refused to make further advances did you have any further communication with Mr. McNamara? A. I did.

Q. How was that? The same, or how was that communication made? A. I saw him and talked to him over the telephone, and indirectly through Mr. Frazer, or Riker & Riker.

Q. I am asking you now for your direct communication with him. A. Yes; but those are three ways in which I heard about it. When the bank refused to—I can't fix the dates, Mr. Enright, as I told you the other day; I can't fix

*Thomas L. Raymond—Direct.*

any dates, except February 28, 1914, was Saturday morning. I had been unable to get the bank to take a decided position, whether it would advance any further money or not. I was unable to meet the pay rolls and bills had been accumulating, and there had been negotiations with Mr. McNamara.

Q. By you? A. Yes, sir.

10

Q. Yes? A. But nothing definite had been determined upon. So I called him up on the telephone and I said: "This Healey job is in a fearful condition. It is Saturday morning, and I am unable to pay the men, and I am unable to pay the bills;" and I said, "I am going to drop the work today, this noon, and I don't care what happens to it, unless you do." And he said: "Don't do that; don't do that." he said, "Well," I said, "I can't go on this way any longer; might just 20 as well drop it now as any other time, and if it it dropped the street will probably fall in;" and I said, "I have no money with which to finance this thing further and the bills are piling up." He said: "We are going to take care of your bills, and you go on and just keep it going, and next week we will have a conference." And I said: "Well, if you are going to take care of the bills, all right." On that assurance I let it go on over Sunday 'till next week. The next Monday I went 30 to the National Nassau Bank, and my recollection is that they said then that they would advance no money. Then I took up the matter with Mr. Frazer and Mr. McNamara, and I believe we had two conferences in the surety company office in New York City, which Mr. McNamara attended. I attended, and I believed at one of the conferences the counsel of the bank attended. My engineer attended one of them. There were others present, I think. 40

*Thomas L. Raymond—Direct.*

Q. Well, was any other representative of the surety company present at that time but Mr. McNamara? A. I am unable to say. I think there was. I am unable to say.

Q. Tell us what your conversation was. A. None that I knew he had anything to do with. If he was there it didn't make any impression on me. Well, we talked over the situation. I took the engineer over so that everything that could be known would be known, and we talked for an hour or two. It is a long conversation; I could not possibly give it all, but I can tell the substance of it.

Q. Your best recollection. A. The idea is the surety company would consent to the release of the retained percentages in order to facilitate the progress of the work.

Q. Percentages retained by the commissioners? A. Yes, sir. There were, I think, ten or twelve thousand dollars of retained percentages at that time, most of which had been earned under my administration, and the general plan was to relinquish—to the surety—to relinquish those retained percentages and let the work go on; and then I think it was said—by Mr. Frazer, I think—“Mr. McNamara, you know that this means that your company is taking over the work, practically;” and Mr. McNamara said: “Yes; I know it.” That was about the conversation, and nothing came of it.

Q. Well, would the commissioners consent to release the—A. (Interrupting) I think that was the trouble—

Q. —the percentages? A.—as I recall it, that the Commissioners would not consent. I believe that the surety company did consent to certain amounts being released from the retained percentage, and I believe the trouble was that the com-

*Thomas L. Raymond—Cross.*

mission would not permit the release of the moneys.

Q. And after that this order for the abandonment of the work was entered? A. When I found nothing could be done I went to the Court, yes, and that order was entered.

## CROSS EXAMINATION BY MR. STRANGE:

10

Q. Mr. Raymond, you have testified as to conversations had with Mr. McNamara. The date of that conversation, approximately, was just prior to your retiring as receiver, was it not? A. No; it was the 28th of February.

Q. When did you withdraw as receiver? A. I am still receiver, I am sorry to say; but I was directed to abandon the work. I think that order is dated March 28th, isn't it?

20

MR. ENRIGHT: March 26th.

Q. Between the period when you saw him and March 25th was the work going on? A. There was not work going on. But you understand that that is a hole through the street, a tube, and it was necessary for us to keep the furnaces going and the air on in order to prevent the street falling in, and it costs so many dollars a week to do it; and I wouldn't dare take the air off for fear the whole street and the houses would tumble in on it—in the hole.

30

Q. There was no construction going on except to maintain things *statu quo*? A. I won't be sure of that now; I am not sure.

Q. You heard the testimony here in regard to the furnishing of materials amounting approximately to four or five thousand dollars, as shown by Exhibit B, the declaration herein; that was furnished all prior to this time, was it not? A.

40

*Thomas L. Raymond—Re-Direct.*

I don't know. Mr. McIlvrid kept piling the stuff in there; he kept piling it in.

Q. But you won't testify—A. I won't say; I don't know anything about it.

Q. The fact is, is it not, Mr. Raymond, the time you had that conversation with Mr. McNamara you were trying to pull the proposition out of a hole and get the company to finance it, were you not?  
 10 You went to the bank and to Mr. McNamara for that purpose? A. True.

Q. And the company refused to finance it, did they not? A. What company?

Q. The surety company or the bank? A. To me?

Q. Yes. A. Well, I won't say that they did.

Q. Well, they didn't finance it, did they? A. They did not.

20 MR. STRANGE: That is all.

## RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. I think, Mr. Raymond, you said that before this date in February, this Saturday which you fixed definitely in your mind, there had been some previous communication between you and Mr. McNamara? A. My recollection is that there were. My recollection is there were; in order to  
 30 at that time—in order to raise money for the pay rolls. But I would not be positive that there were; but I think there were conversation with Mr. McNamara. I think he came over to Newark, and I think I met him in Mr. Frazer's office. I don't know whether he was talking or not. I think I saw him then. But the conferences which I have spoken of were in his office at the surety company office.

Q. Now, prior to this Saturday in February that  
 40 you have fixed, when the pay roll came to you,

*Thomas L. Raymond—Re-Direct.*

have you any recollection as to any conversation or previous communication in Newark or otherwise with Mr. McNamara, in which the subject of going ahead with the work was discussed? A. You mean a general plan of going ahead and finishing the contract?

Q. Anything, whether it was a general plan, or anything that was said. A. I am trying to remember whether I had a conversation directly with Mr. McNamara or whether it was with Mr. Frazer. But one Saturday it was agreed that some money—that the pay roll would be paid; there was an agreement that the pay roll should be taken care of over Saturday and Sunday in order to protect the thing, and I do not recall whether I had a talk with Mr. McNamara about it or not— 10

MR. STRANGE: I object to that testimony. I do not think he has identified it with the defendant in any way. 20

THE COURT: Who?

MR. STRANGE: His recollection is so vague in regard to who was present at that meeting, whether Mr. Frazer or Mr. McNamara. I do not think it ought to be received.

A. (Last answer repeated by the stenographer.)

THE COURT: That ought to be stricken out because it is not in any way shown that Mr. Frazer is connected with the company; and if the recollection should be that the talk was with Mr. Frazer manifestly it could not be binding upon this company. 30

MR. ENRIGHT: I think that is so.

THE COURT: Mr. Raymond, you said this conversation was the 28th of February?

A. Yes, sir.

*Thomas L. Raymond—Re-Direct.*

THE COURT: That was in 1914?

A. Yes, sir.

(Witness excused.)

(Witness recalled.)

RE-DIRECT EXAMINATION BY MR. ENRIGHT:

10 Q. In these previous conversations you had with Mr. McNamara was any objection ever made to your going ahead with the work? A. No.

Q. Sure about that? A. Yes, sir.

20 THE COURT: Mr. Enright, what is the precise bearing of that evidence upon the claim that is made here now, for materials furnished prior to that time? I do not see any particular relevancy to it. I can readily see if you were claiming for expenditure that were made by Mayor Raymond as receiver after the time of the conversation and upon the strength of the conversation and a promise made by Mr. McNamara, assuming him to be properly authorized to make such promise, to pay the bills or to take over the work, so-called, that the company might very well be estopped—there might arise a contract by estoppel or an expressed contract to pay for the work thereafter indulged in, upon the strength of such promise; but I do not understand that such subsequent conversations can have

30 any part in the legal construction of the bond with respect to obligations that arose thereunder prior to this conversation.

40 MR. ENRIGHT: It has this bearing, I think: The Mayor's testimony is when he was first appointed—you will notice the first order authorizes him to go ahead with the business and to borrow \$2,500.00.

*Thomas L. Raymond—Re-Direct.*

THE COURT: Yes.

MR. ENRIGHT: Now, after they looked over the work, in this conference which he had with Mr. McNamara—

THE COURT: In which Mr. McNamara said their company wouldn't have anything to do with financing it.

MR. ENRIGHT:—in which he spoke about 10  
the bank—

THE COURT: He went to the bank and the bank wouldn't do it.

MR. ENRIGHT: No, the bank agreed to do it to the extent of—

THE COURT: Twelve thousand dollars.

MR. ENRIGHT: Twelve thousand, five hundred dollars. Their agreement bound them for fifteen thousand dollars. They advanced seventy-five hundred and then quit. Then 20  
the Mayor said he did go back; he informed Mr. McNamara of that, and that was, as I recall his testimony, not for the first time on the 28th of February at all, but prior to that date.

THE COURT: Well, what time? It was some time.

MR. ENRIGHT: Well, he fixes—perhaps I would better ask him about that if there is any uncertainty about it. 30

THE COURT: There does not appear to be any uncertainty, because nobody seems to know. You don't know what time it was; I don't know, I confess. He didn't say what time it was.

Q. What is your best recollection, Mayor, as to the length of time prior to this Saturday on February 28th, that you communicated with Mr. McNamara, and informed him that the National 40

*Thomas L. Raymond—Re-Direct.*

Nassau Bank had refused to go on further? A. Well, to make it clear, I got messages which purported to come from Mr. McNamara, or I had talks with Mr. McNamara the week before or two weeks before. Within two weeks of that conversation there had been negotiations.

10 THE COURT: That is within two weeks prior to February 28th, 1914?

A. Within two weeks prior to February 28, 1914; yes, sir.

Q. Did those negotiations date any further back, do you know, than two weeks? A. It is possibly three weeks; it possibly is three weeks, because the things were in bad shape financially and I was trying to shape them out.

20 Q. Well, what would be your best recollection?  
A. Well, I would say three weeks would cover it; constant negotiations, constant conversations between me and Frazer, and talks between me and Mr. McNamara once or twice; but I don't recall —

MR. STRANGE: I object to this, your Honor. He does not seem to be able to testify—identify Mr. McNamara with this proceeding at all. He thinks it comes through Mr. Frazer, but he is not sure.

30 THE WITNESS: I can identify him.

MR. STRANGE: I mean identify conversations with him.

THE COURT: It seems to me that this is the view of the case, legally considered: These goods, the value of which is being sued for, are goods which were furnished almost a year prior to the time of these conversations, no matter with whom they took place. Now, the point I am trying to discuss with Mr. Enright is what possible relevancy those

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*Thomas L. Raymond—Re-Direct.*

arrangements, whatever they may have been, that were made between Mr. Raymond and Mr. McNamara, have with relation to the bill for goods that were furnished almost a year prior to the time they took place, and the bearing of which conversation seems to be upon the further prosecution of the work and the keeping of it non-dangerous.

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MR. ENRIGHT: Well, the lapse of time is not as significant as that, your Honor. The goods sold to Mr. Raymond as receiver, which were unpaid for, according to this statement here, January 29, 1914—

THE COURT: Yes.

MR. ENRIGHT:—and February 10, February 21, and one on March 24—

THE COURT: 1913?

MR. ENRIGHT: 1914.

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THE COURT: 1914.

MR. ENRIGHT: Yes, sir. The first of these deliveries is about the time that he has placed the first of these conversations with Mr. McNamara.

THE COURT: Now, assuming that it be so; for the sake of the argument assuming that it be so, that would not give you any right to recover on this bond for the goods thus furnished: that would be a recovery on a contract that arose entirely aside from the provisions of this bond, and which would have to be recovered for in appropriate proceedings.

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MR. ENRIGHT: When I come to argue the case I do not rely on Mr. McNamara's consent to this thing as creating a right which otherwise there would not be against him; but taken in connection with the receivership and the status of a receiver under our law here,

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*Motion for Non-Suit.*

I think it is a circumstance that makes towards a conclusion.

10 THE COURT: It seems to me perfectly plain that you can not change the construction of a bond by subsequent proceedings. The bond entered into differed altogether from the subsequent proceedings with respect to the further prosecution of work, where a conversation took place with Mr. McNamara who is not shown to have had any power or authority to change that bond.

MR. ENRIGHT: I think that is our case—one other question of Mayor Raymond—I think our stipulation covers everything except the returns? Well, that is all. We understand our goods, except those which we give credit for, went into the work.

20 MR. STRANGE: Do you want to ask Mr. McNamara further to clear up—

MR. ENRIGHT: I am through with my case.

MR. STRANGE: Well, your Honor, I move here to non-suit the plaintiff on the ground that he has not stated a cause of action against this defendant.

THE COURT: Now we have come to what you call "the real point of the start."

30 MR. STRANGE: At Mr. McNamara's suggestion I move first off that the evidence shows that the plaintiff is a New York corporation, and that he has failed to show that he has complied with the statute allowing him to do business within the state of New Jersey.

MR. ENRIGHT: Not pleaded as a defense.

40 MR. STRANGE: It does not have to be pleaded in the defense. The proof is that it is a New York corporation. Section 98 provides that until such foreign corporation shall

*Motion for Non-Suit.*

have obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made in this state. The proof discloses that the McIlvrid-Cockburn corporation is a New York corporation and by appropriate proceedings it had its name changed to The Standard Gas Power Company. 10

THE COURT: Does it appear quite clearly in this case that the contract was entered into in this state?

MR. STRANGE: Absolutely; all of them.

THE COURT: My impression about that is this: That all presumptions are in favor of honesty in dealing; all presumptions are in favor of regularity of dealing and lawfulness of dealing; and anybody who alleges that the contrary is true has the burden of 20 establishing it. I think if you want to claim that the company has not complied with the law that in the first place you have to allege that fact, and secondly, you have to establish it. I do not think that the mere fact that you show that a corporation which is plaintiff is a foreign company and that the contract was entered into here throws a man out of court; and I do not think there is any law in this 30 state that holds that every time a foreign company brings a suit it must establish its right to bring the suit by showing that it has a certificate issued upon its application, and its compliance with certain conditions of the corporation law of the state. I don't think that is the law and I don't think you can show me in any case that it is the law either here or in New York.

THE COURT: Well, I will overrule that 40 motion. You may have your objection.

*Motion for Non-Suit.*

MR. STRANGE: Objection.

THE COURT: I am perfectly clear that you have the burden of satisfying on that, not the other side.

MR. STRANGE: I renew, then, your Honor, my motion to non-suit the plaintiff on the ground that the complaint failed to state a cause of action against the defendant.

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MR. STRANGE: I think the record ends with a motion to dismiss the complaint.

MR. MCNAMARA: That is reserved, isn't it?

THE COURT: Yes; that is reserved.

MR. ENRIGHT: To make a perfect record the case ought to be closed, and these questions considered as on a motion of defendant for judgment.

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THE COURT: You want to have it straight that it is a judgment when the court of errors examines it?

MR. ENRIGHT: Yes.

THE COURT: Do you want to put in any defense?

MR. STRANGE: I don't think that I do.

THE COURT: Why not do this: It is quite as important to you to have this thing entered as it is to Mr. Enright, because if this were a mere motion to dismiss and I dismissed it because there isn't any right of action, he would have the right to start over again; whereas, if you close the whole case and you ask judgment for the defendant and he for judgment for the plaintiff, then, manifestly whatever the judgment is, it is a definitive judgment so far as this right of action is concerned. The plaintiff closes his case and you make a motion to dismiss which I refuse and

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*Colloquy.*

say I will hear the thing at the close of the whole case. Then you close your defense and move to non-suit, upon which decision is reserved.

MR. ENRIGHT: And the plaintiff moves for judgment.

THE COURT: Oh, precisely; and we do this, too: You want to have the record in shape so it won't go up unavailingly. The regular practice has been—and it is the correct practice, too, I think—that when I determine these two law questions which have emerged from the facts in the case, you gentlemen will have me find certain findings of fact and law, and I will make those findings, so as to rest right, on the record, the fact that you ask me to find this fact and that fact, and this rule of law and that rule of law. You will, of course, ask me to find as you have today. Mr. Enright will ask me to find to the contrary; and I will draw up a judgment saying that I find so and so, so and so, and so and so, and your requests to find and the findings will appear on the record.

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**Plaintiff's Requests to Find.****NEW JERSEY SUPREME COURT.**

HUDSON COUNTY.

10	STANDARD GAS POWER CORPORATION, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	} Action at Law.
	<div style="text-align: center; padding-bottom: 5px;"><i>vs.</i></div> NEW ENGLAND CASUALTY COMPANY, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	

20 This action being moved for trial before Hon. William H. Speer, Circuit Judge sitting without a jury, and the testimony of both parties being closed, the plaintiff now requests the Court to find the following facts:

1. That prior to December 10, 1912, the Passaic Valley Sewerage Commissioners (a public corporation of the State of New Jersey) advertised for bids for the building of a portion of the Passaic Valley sewer designated as Section No. 8, with notice to all bidders that the successful bidder would be required to execute a contract and bond with satisfactory surety in a certain form prescribed.
- 30 2. That Healey Contracting Company, a corporation created under the laws of New Jersey, pursuant to said advertisement did bid in writing for said work upon the form prescribed by said Commissioners, which form of bid did have annexed thereto the form of contract and bond prescribed by the Commissioners to be executed by the bidder, if successful; said bid and annexed forms being proved as plaintiff's Exhibit —.

*Plaintiff's Requests to Find.*

3. That said bid was accepted by said Commissioners and Healey Contracting Company did thereupon enter into contract with said Commissioners for the execution of said work in the form prescribed, delivering to said Commissioners concurrently therewith and attached thereto its bond in the sum of \$20,000, executed by it as principal and by defendant New England Casualty Company, as surety, both contract and bond being in the form prescribed and being plaintiff's Exhibit

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4. That the condition of said bond is as follows:

"Now the condition of this obligation is such that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed, and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then this obligation shall be void; otherwise it shall remain in full force and virtue."

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5. That Healey Contracting Company did thereafter enter upon the performance of its contract with said Commissioners and in the course thereof did purchase from William McIlvrid, acting as Receiver of the Cockburn Company, under the appointment and direction of the United States District Court for the District of New Jersey in a cause then depending therein between Frederick S. Flower, complainant, and Cockburn Company, defendant, certain materials for the carrying out of said contract of the character, description and agreed price specified in Exhibit "A" attached to plaintiff's complaint herein;

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That said materials were delivered to Healey Contracting Company at the site of said work between the 26th day of March and the 28th day

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*Plaintiff's Requests to Find.*

of May, 1913, and that the agreed price and value thereof was \$2,246.75, payable upon delivery;

That all of said materials were used in the carrying out of the aforesaid contract between Healey Contracting Company and said Commissioners.

10 6. That thereafter all of the assets of Cockburn Company in the hands of said William McIlvrid, as Receiver, were sold under an order and decree of the United States District Court for the District of New Jersey, in the above stated proceedings (with certain specified exceptions not affecting the aforesaid claim against Healey Contracting Company), to one Henry M. Ward, and said sale duly confirmed and said assets thereafter assigned, conveyed and transferred by Special  
20 Master's deed dated August 5, 1913;

20 That thereafter said assets, including the aforesaid claim against Healey Contracting Company, were sold, assigned, transferred and conveyed by said Henry M. Ward to Cockburn-McIlvrid Corporation, the plaintiff herein, by indenture dated August 6, 1913;

30 That thereafter Cockburn-McIlvrid Corporation, a corporation of the State of New York, by judgment of the Supreme Court of said State, changed its name to the Standard Gas Power Corporation.

30 7. That under date of October 21, 1913, the Chancellor of the State of New Jersey made an order or decree in a certain cause therein pending between Laurence H. Hendricks, complainant, and Healey Contracting Company, defendant, adjudging said corporation to be insolvent and unable to meet its current obligations or to continue its business with safety to the public or advantage to the stockholders thereof, and there-  
40 upon appointing Thomas L. Raymond as Receiver

*Plaintiff's Requests to Find.*

of said corporation, with the statutory powers incident to such appointment, and expressly authorizing and empowering said Receiver until the further order of the Court to continue all the operations of the contract of the Healey Contracting Company with the Passaic Valley Sewer Commissioners for the construction of Section No. 8 of the Passaic Valley trunk sewer;

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That said Receiver did thereupon duly qualify as such and continue the performance of said contract;

That thereafter the Chancellor upon the petition of said Receiver did make his further order, under date of November 6, 1913, authorizing and directing the further continuance of work under said contract by said Receiver and in connection therewith authorizing said Receiver to borrow money for the purpose of carrying on said work, and that said Receiver did continue the work under said contract until March 25, 1914.

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8. That in the performance of said work under the orders aforesaid, the Receiver did purchase from the plaintiff herein, between January 17th and March 24th, 1914, additional materials for use in carrying out said contract of the agreed price and value of \$5981.70, all of which sum was due and owing on or before March 24, 1914;

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That all of said materials were actually used by said Receiver in carrying out said contract, except 1843 tunnel plates, which, although delivered, were not actually used by said Receiver;

That the price of the materials not so used is \$2119.45, which should be deducted from the total price of the materials purchased by said Receiver as aforesaid;

That the agreed price and value of the materials sold by the plaintiff to said Receiver and actually

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*Plaintiff's Requests to Find.*

used in carrying out said contract is the sum of \$3862.25, which amount became due and owing on March 24, 1914.

9. That under date of March 25, 1914, the Chancellor did make a further order in the aforesaid cause authorizing said Receiver to abandon work under the aforesaid contract, and upon such  
 10 abandonment to notify said Passaic Valley Sewerage Commissioners of the surrender of said contract and the abandonment of said work by him.

10. That pursuant to said order the Receiver did thereupon abandon further work under said contract and the Commissioners did thereupon proceed with the completion of the work covered by said contract and have since fully completed the same, and that all work specified for under  
 20 said contract has now been fully completed and accepted by said Commissioners.

11. That defendant New England Casualty Co. was cognizant of the appointment of said Receiver and represented in Court at the time thereof, and did acquiesce in the continuance of the work of performing said contract by said Receiver;

That said Receiver did apply to the defendant for the advance of funds for the purpose of carrying on said work, and that the defendant did there-  
 30 upon direct the Receiver to first apply to the Nassau National Bank for the advance of such funds, and if refused by said Bank then to renew his application to the defendant;

That said Nassau National Bank did agree to advance certain funds to the Receiver and did actually advance part of the funds agreed;

That upon the refusal of said Bank to advance further funds the Receiver did renew his applica-  
 40 tion for advances to the defendant and that the defendant did, on or about the twenty-eighth day

*Plaintiff's Requests to Find.*

of February, 1914, agree with said Receiver to advance the moneys needed by him to meet his obligations, if he would further continue the performance of said contract;

That the Receiver did in consequence of such undertaking by the defendant further continue the performance of said contract, but the defendant did refuse to advance moneys as promised to said Receiver whereupon the work was abandoned as aforesaid; 10

12. That plaintiff is entitled to recover from the defendant the sum of \$2,246.75, with interest thereon from May 28, 1913, and the further sum of \$3,862.25, with interest thereon from March 24, 1914;

13. That on June 18, 1914, the plaintiff filed notices with said Commissioners notifying them of the amount claimed by it for materials purchased from it and used in the performance of said work as aforesaid and in connection therewith a bond, said bond and notices being in the form prescribed by the Municipal Lien Law of this State. 20

14. That on or about the 17th day of June, 1914, plaintiff did, in writing, further notify said Commissioners of the amount due to it for materials sold to said Healey Contracting Company and said Receiver and that said amount was unpaid and did thereupon request said Commissioners to enforce the aforesaid bond for its benefit; 30

That said Commissioners did thereupon refer said communication to their counsel, who did suggest to the plaintiff that the aforesaid bond "is apparently a contract for the benefit of third parties. It would seem that it might be enforceable under our statute by such third parties in their own name." 40

*Plaintiff's Requests to Find.*

## NEW JERSEY SUPREME COURT.

	STANDARD GAS POWER CORPORATION,	} <i>Plaintiff,</i>
		<i>vs.</i>
10	NEW ENGLAND CASUALTY COMPANY,	} <i>Defendant.</i>

This action being moved for trial before Hon. William H. Speer, Circuit Judge sitting without a jury, and the testimony of both parties being closed, the plaintiff now requests the court to find the following facts:

- 20 1. That prior to December 10, 1912, the Passaic Valley Sewerage Commissioners (a public corporation of the State of New Jersey) advertised for bids for the building of a portion of the Passaic Valley sewer designated as Section No. 8, with notice to all bidders that the successful bidder would be required to execute a contract and bond with satisfactory surety in a certain form prescribed.

THE COURT: I find.

- 30 2. That Healy Contracting Company, a corporation created under the laws of New Jersey, pursuant to said advertisement did bid in writing for said work upon the form prescribed by said Commissioners, which form of bid did have annexed thereto the form of contract and bond prescribed by the Commissioners to be executed by the bidder, if successful; said bid and annexed forms being proved as plaintiff's Exhibit.

THE COURT: I find.

*Plaintiff's Requests to Find.*

3. That said bid was accepted by said Commissioners and Healey Contracting Company did thereupon enter into contract with said Commissioners for the execution of said work in the form prescribed, delivering to said Commissioners concurrently therewith and attached thereto its bond in the sum of \$20,000, executed by it as principal and by defendant New England Casualty Company, as surety, both contract and bond being in the form prescribed and being plaintiff's Exhibit. 10

THE COURT: I find.

4. That the condition of said bond is as follows:

"Now the condition of this obligation is such that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed, and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then this obligation shall be void; otherwise it shall remain in full force and virtue." 20

THE COURT: I find.

5. That Healey Contracting Company did thereafter enter upon the performance of its contract with said Commissioners and in the course thereof did purchase from William McIlvrid, acting as Receiver of the Cockburn Company, under the appointment and direction of the United States District Court for the District of New Jersey in a cause then depending therein between Frederick S. Flower, complainant, and Cockburn Company, defendant, certain materials for the carrying out of said contract of the character, description and agreed price specified in Exhibit "A" attached to plaintiff's complaint herein; 30

That said materials were delivered to Healey 40

*Plaintiff's Requests to Find.*

Contracting Company at the site of said work between the 26th day of March and the 28th day of May, 1913, and that the agreed price and value thereof was \$2,246.75, payable upon delivery;

That all of said materials were used in the carrying out of the aforesaid contract between Healey Contracting Company and said Commissioners.

THE COURT: I find.

6. That thereafter all of the assets of Cockburn Company in the hands of said William McIlvrid, as Receiver, were sold under an order and decree of the United States District Court for the District of New Jersey, in the above stated proceedings (with certain specified exceptions not affecting the aforesaid claim against Healey Contracting Company) to one Henry M. Ward, and said sale duly confirmed and said assets thereafter assigned, conveyed and transferred by Special Master's deed dated August 5, 1913;

That thereafter said assets, including the aforesaid claim against Healey Contracting Company, were sold, assigned, transferred and conveyed by said Henry M. Ward to Cockburn-McIlvrid Corporation, the plaintiff herein, by indenture dated August 6, 1913:

30 That thereafter Cockburn-McIlvrid Corporation, a corporation of the State of New York, by judgment of the Supreme Court of said State, changed its name to the Standard Gas Power Corporation.

THE COURT: I find.

7. That under date of October 21, 1913, the Chancellor of the State of New Jersey made an order or decree in a certain cause therein pending between Laurence H. Hendricks, complainant, and Healey Contracting Company, defendant, ad-

*Plaintiff's Requests to Find.*

judging said corporation to be insolvent and unable to meet its current obligation or to continue its business with safety to the public or advantage to the stockholders thereof, and thereupon appointing Thomas L. Raymond as Receiver of said corporation, with the statutory powers incident to such appointment, and expressly authorizing and empowering said Receiver until 10 the further order of the court to continue all the operations of the contract of the Healey Contracting Company with the Passaic Valley Sewer Commissioners for the construction of Section No. 8 of the Passaic Valley trunk sewer;

That said Receiver did thereupon duly qualify as such and continue the performance of said contract;

That thereafter the Chancellor upon the petition of said Receiver did make his further order, 20 under date of November 6, 1913, authorizing and directing the further continuance of work under said contract by said Receiver and in connection therewith authorizing said Receiver to borrow money for the purpose of carrying on said work, and that said receiver did continue the work under said contract until March 25, 1914.

THE COURT: I find.

8. That in the performance of said work under 30 the orders aforesaid, the Receiver did purchase from the plaintiff herein, between January 17th and March 24th, 1914, additional materials for use in carrying out said contract of the agreed price and value of \$5,981.70, all of which sum was due and owing on or before March 24, 1914.

That all of said materials were actually used by said receiver in carrying out of said contract, except 1843 tunnel plates, which, although delivered were not actually used by said Receiver; 40

*Plaintiff's Requests to Find.*

That the price of the materials not so used is \$2,119.45, which should be deducted from the total price of the materials purchased by said Receiver as aforesaid;

That the agreed price and value of the materials sold by the plaintiff to said receiver and actually used in carrying out said contract is the sum of  
 10 \$3,862.25, which amount became due and owing on March 24, 1914.

THE COURT: I find.

9. That under date of March 25, 1914, the Chancellor did make a further order in the aforesaid cause authorizing said receiver to abandon work under the aforesaid contract, and upon such abandonment to notify said Passaic Valley Sewerage Commissioners of the surrender of said contract and the abandonment of said work by  
 20 him.

THE COURT: I find.

10. That pursuant to said order the receiver did thereupon abandon further work under said contract and the Commissioners did thereupon proceed with the completion of the work covered by said contract and have since fully completed the same, and that all work specified for under said contract has now been fully completed and  
 30 accepted by said Commissioners.

THE COURT: I find.

11. That defendant New England Casualty Company was cognizant of the appointment of said Receiver and represented in court at the time thereof, and did acquiesce in the continuance of the work of performing said contract by said receiver.

THE COURT: I refuse to find this and find the  
 40 contrary.

*Plaintiff's Requests to Find.*

That said receiver did apply to the defendant for the advance of funds for the purpose of carrying on said work, and that the defendant did thereupon direct the Receiver to first apply to the Nassau National Bank for the advance of such funds, and if refused by said Bank then to renew his application to the defendant;

That said Nassau National Bank did agree to advance certain funds to the receiver and did actually advance part of the funds agreed; 10

That upon the refusal of said Bank to advance further funds the receiver did renew his application for advances to the defendant and that the defendant did, on or about the twenty-eighth day of February, 1914, agree with said Receiver to advance the moneys needed by him to meet his obligations, if he would further continue the performance of said contract; 20

That the Receiver did in consequence of such undertaking by the defendant further continue the performance of said contract, but the defendant did refuse to advance moneys as promised to said Receiver whereupon the work was abandoned as aforesaid.

THE COURT: I refuse to find the requests in these four paragraphs, in the form in which they are phrased. What took place between Mr. Raymond and Mr. McNamara appears fully in the evidence, and whether it be as contended or not, a recovery could not be had therefor in this action, which is on the bond and not on a contract extrinsic thereto. 30

12. That plaintiff is entitled to recover from the defendant the sum of \$2,246.75, with interest thereon from May 28, 1913, and the further sum of \$3,862.25, with interest thereon from March 24, 1914. 40

THE COURT: Refused.

*Plaintiff's Requests to Find.*

13. [That on June 18, 1914, the plaintiff filed notices with said Commissioners notifying them of the amount claimed by it for materials purchased from it and used in the performance of said work as aforesaid and in connection therewith a bond,] said bond and notices being in the form prescribed by the Municipal Lien law of this State.

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THE COURT: I find the part in brackets, and refuse to find that outside thereof because irrelevant to the inquiry.

14. [That on or about the 17th day of June, 1914, plaintiff did, in writing, further notify said Commissioners of the amount due to it for materials sold to said Healey Contracting Company and said receiver and that said amount was unpaid and did thereupon request said Commissioners to enforce the aforesaid bond for its benefit;

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That said Commissioners did thereupon refer said communication to their counsel,] who did suggest to the plaintiff that the aforesaid bond "is apparently a contract for the benefit of third parties. It would seem that it might be enforceable under our statute by such third parties in their own name."

THE COURT: I find the part in brackets, and refuse to find the part following because immaterial and irrelevant, and a mere expression of counsel's opinion of the law.

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**Decision.****NEW JERSEY SUPREME COURT.**

HUDSON COUNTY.

STANDARD GAS POWER CORPORATION,	}	<i>Plaintiff,</i>	Action	10
NEW ENGLAND CASUALTY COMPANY,				
		<i>vs.</i>		
		<i>Defendant.</i>	at Law.	

McDERMOTT & ENRIGHT, ESQS., Attorneys for plaintiff.

ROBERT STRANGE, ESQ., and STUART McNAMARA, of counsel for defendant.

WILLIAM H. SPEER, Circuit Judge. 20

This action is tried before me without a jury. by consent of the parties. The facts are as follows:

Prior to December 10, 1912, the Passaic Valley Sewerage Commissioners (a public corporation of the State of New Jersey) advertised for bids for the building of a portion of the Passaic Valley sewer designated as section No. 8, with notice to all bidders that the successful bidder would be required to execute a contract and bond with satisfactory surety in a certain form prescribed. The Healey Contracting Company, a corporation created under the laws of New Jersey, pursuant to said advertisement, bid in writing for said work upon the form prescribed by said commissioners, which form of bid had annexed thereto the form of contract and bond prescribed by the commissioners to be executed by the bidder, if

*Decision.*

successful; which said bid and annexed forms are in evidence in the case. Said bid was accepted by said commissioners and Healey Contracting Company did enter into contract with said commissioners for the execution of said work in the form prescribed, delivering to said commissioners concurrently therewith its bond in the sum of

10 \$20,000, executed by it as principal and by New England Casualty Company as surety, both contract and bond being in the form prescribed and being in evidence as exhibits in the case. The bond provides that the principal and surety are "held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of \$20,000." The bond further provides that such sum is "to be paid to the Passaic Valley Sewerage Com-

20 missioners, for which payment, well and truly to be made, they bind themselves," etc. The condition of the bond is as follows:

"Now, the condition of this obligation is such, that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used, in carrying out of said contract, then this obligation shall be void; otherwise

30 it shall remain in full force and virtue."

It is to be noted that the bond is conditioned upon the proper performance of the terms and conditions of the contract. Article 13 of the contract provides that:

"The Contractor shall take all responsibility of the work, and take all precautions for preventing injuries to persons and property in or about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because the

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*Decision.*

nature of the land in or on which the work is done is different from what was estimated or expected, or on account of the weather, elements or other cause; *and he shall assume the defense of, and indemnify and save harmless, the Commissioners and their officers and agents, from all claims relating to labor and materials furnished for the work,*" etc.

Article 17 of the contract specifies how claims **10**  
 for labor and materials are to be paid, and by it the contractor agrees to permit the commissioners to "keep any moneys which would otherwise be payable at any time hereunder and apply the same or so much as may be necessary therefor to the payment of any expenses, losses or damages incurred by the commissioners, and determined as herein provided, and may retain, *until all claims are settled,* so much of such moneys as the commissioners shall be of opinion **20**  
 will be required *to settle all claims against the commissioners and other officers and agents as specified in Art. XIII, and all claims for labor on the work and also all claims for materials used in the work,*" etc. "If the moneys retained under this contract are insufficient to pay the sums found by the commissioners to be due under the claims for labor and materials, the commissioners may, at their discretion, pay the same, and the contractor shall repay *to the commis-* **30**  
*sioners* all sums so paid out. The commissioners may also, with the written consent of the contractor, use any moneys retained, due or to become due under this contract, for the purpose of paying for both labor and materials for the work, for which *claims have not been filed in the office of the commissioners.* While it is understood that the *security required to be given by the contractor is furnished by the contractor by his giving the bond accompanying this contract,* the **40**

*Decision.*

commissioners may, nevertheless, if they should deem it just and equitable so to do, cause any moneys retained, due or to become due, to be held and applied to the payment for labor or materials for which security is required under the provisions of said section."

The Healey Contracting Company did there-  
**10** after enter upon the performance of its contract with said commissioners and in the course thereof did purchase from William McIlvrid, acting as Receiver of the Cockburn Company, under the appointment and direction of the United States District Court for the District of New Jersey in a cause then depending therein between Frederick S. Flower, complainant, and Cockburn Company, defendant, certain materials for the carrying out of said contract of the character, description and agreed price specified in Exhibit A.  
**20** Said materials were delivered to Healey Contracting Company at the site of said work between the 26th day of March and the 28th day of May, 1913, and the agreed price and value thereof was \$2,246.75, payable upon delivery. All of said materials were used in the carrying out of the aforesaid contract between Healey Contracting Company and said commissioners.

Thereafter all of the assets of Cockburn Company in the hands of said William McIlvrid, as  
**30** Receiver, were sold under an order and decree of the United States District Court for the District of New Jersey, in the above stated proceedings, with certain specified exceptions not affecting the aforesaid claim against Healey Contracting Company, to one Henry M. Ward, and said sale duly confirmed and said assets thereafter assigned, conveyed and transferred by Special Master's deed dated August 5, 1913.  
**40** Thereafter said assets, including the aforesaid

*Decision.*

claim against Healey Contracting Company, were sold, assigned, transferred and conveyed by said Henry M. Ward to Cockburn-McIlvrid Corporation, the plaintiff herein, by indenture dated August 6, 1913. Thereafter Cockburn-McIlvrid Corporation, a corporation of the State of New York, by judgment of the Supreme Court of said State, changed its name to the Standard 10 Gas Power Corporation.

Under date of October 21, 1913, the Chancellor of the State of New Jersey made an order or decree in a certain cause therein pending between Laurence H. Hendricks, complainant, and Healey Contracting Company, defendant, adjudging said corporation to be insolvent and unable to meet its current obligations or to continue its business with safety to the public or advantage to the stockholders thereof, and thereupon appointing Thomas L. Raymond as Receiver of said corporation, with the statutory powers incident to such appointment, and expressly authorizing and empowering said Receiver until the further order of the Court to continue all the operations of the contract of the Healey Contracting Company with the Passaic Valley Sewerage Commissioners for the construction of Section No. 8 of the Passaic Valley trunk sewer. Said Receiver did thereupon duly qualify as such 20 and continue the performance of said contract. 30

Thereafter the Chancellor upon the petition of said Receiver did make his further order, under date of November 6, 1913, authorizing and directing the further continuance of work under said contract by said Receiver and in connection therewith authorizing said Receiver to borrow money for the purpose of carrying on said work, and said Receiver did continue the work under said contract until March 25, 1914. 40

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In the performance of said work under the orders aforesaid, the Receiver did purchase from the plaintiff herein, between January 17th and March 24th, 1914, additional materials for use in carrying out said contract of the agreed price and value of \$5,981.70, all of which sum was due and owing on or before March 24, 1914. All of  
10 said materials were actually used by said Receiver in carrying out said contract, except 1843 tunnel plates, which, although delivered, were not actually used by said Receiver. The price of the materials not so used is \$2,119.45, which should be deducted from the total price of the materials purchased by said Receiver as aforesaid. The agreed price and value of the materials sold by the plaintiff to said Receiver and actually used in carrying out said contract is the sum of  
20 \$3,862.25.

Under date of March 25, 1914, the Chancellor did make a further order in the aforesaid cause authorizing said Receiver to abandon work under the aforesaid contract, and upon such abandonment to notify said Passaic Valley Sewerage Commissioners of the surrender of said contract and the abandonment of said work by him. Pursuant to said order the Receiver did thereupon abandon further work under said contract and  
30 the commissioners did thereupon proceed with the completion of the work covered by said contract and have since fully completed the same, and all work specified for under said contract has now been fully completed and accepted by said commissioners.

On June 18, 1914, the plaintiff filed notice with said commissioners notifying them of the amount claimed by it for materials purchased from it and used in the performance of said  
40 work as aforesaid. On or about the 17th day

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of June, 1914, plaintiff did, in writing, further notify said commissioners of the amount due to it for materials sold to said Healey Contracting Company and said Receiver and that said amount was unpaid and did thereupon request said commissioners to enforce the aforesaid bond for its benefit, but the said commissioners thereupon referred the communication to their counsel, 10 and subsequently refused to enforce the bond for the benefit of the plaintiffs herein. Thereupon this suit was brought, and plaintiff contends that the action is maintainable by the plaintiff herein as one for whose benefit the bond was given, and urges his contention upon the statute which reads as follows:

“Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon 20 in any court, and may use the same as matter of defense in any action brought against him, notwithstanding the consideration of such contract did not move from him.” Vol. 3, C. S., p. 4059.

I think that the contention of plaintiff's counsel is untenable. The bond in this case is a contract of indemnity for the benefit of the Passaic Sewerage Commission. The language of the bond, aside from the conditions therein, clearly 30 indicates that the bond is solely for the benefit of the obligee, and the condition of the bond is a mere limitation and restriction upon the generality of the language found in the obligation thereof to the effect that the principal and surety “are held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of \$20,000,” and the person to whom said obligation is to be discharged is manifested by the further provision of the bond to the effect that 40

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such sum is "to be paid to the Passaic Valley Sewerage Commissioners." The intent of the parties must be gathered from the language not only of the bond but of the contract as well, which by reference thereto in the bond is made part of the bond.

I have hereinbefore quoted articles 13 and 17  
 10 of the contract, which together manifest that the commissioners are given two means of protecting themselves from loss resulting from unpaid claims for lumber and materials, first by paying the claims themselves and calling upon the contractor to repay them, and if the contractor fails to make such repayment, to rely upon the security, i. e., the bond furnished by the contractor, or, secondly, to retain any moneys due or to become due for the payment of such claims.  
 20 Nowhere in the contract is it provided that the bond is intended for the protection of third parties furnishing labor and materials to the contractor, but the language clearly states that the bond is for the benefit of and to protect the Passaic Valley Sewerage Commissioners from any liability arising from and in connection with claims for labor and materials used in the work.

I think, furthermore, that section 28 of the compiled statutes, page 4059, permitting a third  
 30 party not privy to a contract to sue thereon has never been extended to include one who merely receives indirectly a benefit and is not primarily the one for whose benefit the security was taken. It has been held in all our cases that have dealt with the subject that an action may be maintained by a third party, by virtue of said statute, only where the contract was made for the third party, and the fact that he may receive a possible benefit is not sufficient. *Styles v. Long*, 67  
 40 N. J. L., 413, 418; *Styles v. Long*, 70 N. J. L.,

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301, 305; *American Malleable Co. v. Bloomfield*, 83 N. J. L., 728, 736; *Lawrence v. Union Ins. Co.*, 80 N. J. L., 133.

It seems to me that the clear intention of the legislature in enacting the statute in question was to provide, if the third party is to be entitled to maintain an action upon the contract, that "the contract must be made for his benefit as to its object and he must be a party intended to be benefited," as was said in the case of *Simpson v. Brown*, 68 N. Y. L., 355. 10

Plaintiff in his brief has cited a great many cases from other states bearing upon this subject. I have looked into these cases with as much care as the limited time at my disposal would permit and I have concluded that the summarization of the laws in the various states would give rise to the following general principles, which are mentioned by defendant in his brief, with reference to the rights of a laborer or material man to sue a surety on a contractor's bond: 20

1. A material man or laborer is permitted to sue only when there is no other method of protection afforded by the laws of a particular state.

2. Statutes permitting such suits, thereby extending a surety's liability, at the same time restrict such liability either by a shorter period of limitation or requiring a notice, etc. 30

3. In many of the cases mentioned by plaintiff's attorney, the bond either fails to mention to whom payment of the penal sum is to be made or specifically provides that it shall be payable to the parties in interest. The bond in the present case provides that payment is made to the obligee.

4. In many cases where a suit of this nature 40

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is allowed, the pleadings and proof show that the labor or materials were furnished in reliance upon the terms of the bond, in other words the doctrine is the doctrine of estoppel.

In dealing with these various general principles which as I have indicated a review of the decisions and statutes in the various states will  
 10 evolve, it may not be unprofitable to say that with respect to the first principles evolved, that a material man or laborer is permitted to sue only when there is no other method of protection afforded by the laws of a particular state, that in New Jersey such parties have adequate protection by virtue of the mechanics' lien laws applicable to public improvements. Section 36 et seq. of the mechanics' lien law, (C. S. 3315, etc.) provides that any person who, as laborer,  
 20 etc., in conformity with any terms of any contract for any public improvement made between any person or persons and any city, town, township, or other municipality, shall perform any labor or furnish any materials, shall have a lien therefor upon the moneys in control of the city, town, township or other municipality.

This section has been held to apply to any public corporation whose functions include the making of public improvements, whether in any  
 30 other sense of the word "municipality" the said public corporation could be properly included or not. *Union Stone Co. v. Board of Freeholders of Hudson County*, 65 Atl., 466; *Herman & Grace v. Board of Chosen Freeholders*, 71 N. J. Eq., 541.

Under the second general rule above stated, that "Statutes permitting such suits, thereby extending a surety's liability, at the same time restrict such liability either by a shorter period of limitation or requiring a notice, etc."—it may  
 40 not be amiss to remark that there are no statutes

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in New Jersey restricting a surety's liability but full common law liability is enforced. This would naturally bring us to consider the consequences of the application of such a rule in the absence of such a statute. It would permit a suit to be brought against the surety company by any laborer or material man at any time within sixteen years from the time the cause of action accrued, and, worse still, it would give no priority in favor of the public body for the security for which it had contracted and for which it had expended the public money. In the cases of *U. S. v. Heaton*, 124 Fed. Rep., 699, decided by Judge McPherson, and *U. S., etc., v. U. S. Fidelity and Guaranty Co.*, decided by Judge Cross, both judges held that under a bond given in compliance with the federal statute, conditioned for the performance of the work and the payment for labor and materials, the United States had no priority over material men. 10 20

And so in this case if the action of one material man when established was sufficient to eat up the whole amount for which the indemnity was given, the public would be without any security whatever; and it must not be lost sight of either that the statute upon which the claim in this suit is rested was passed in 1903, and no reported case evidences that an action similar to the one sub judice has been brought under it. While it is true that the novelty of the action is not conclusive of its infirmity, still, having in mind the antiquity of the statute, the frequency with which similar claims must have arisen, and the well known acuteness of the members of our bar, it is at least presumptive evidence of such infirmity. 30

The following states have statutes permitting material men or laborers to sue upon a bond 40

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given for the proper performance of a contract for a public improvement by a contractor, and the citation of cases from those states subsequent to the enactment of such statutes would be inapplicable.

Iowa: Code of 1897, Sec. 3467 (Code of 1873, sec. 255). Case of *Gretchell v. Peterson*, 124  
 10 Iowa, 599.

California: Code of Civil Procedure, 1203. *Carpenter v. Flurrey*, 128 Cal., 655.

Michigan: Howell Statutes, Sec. 13,839-42 (Act 94 of Laws of 1883).

Utah: Comp. St. 1907, Sec. 1400 X.

Kansas: General Statutes of 1909, Sec. 6255 (Gen. St. 1901, Sec. 5129). *Urich v. Globe Surety Co.*, 166 S. W., 845 (1914).

20 The cases which have been decided in the various states of this country as I have said can mostly all be reconciled by the application of the general principles which I have said are deducible from an examination of the laws of the various states in the particular under consideration, but among those supporting the views which I have hereinbefore set forth may be mentioned the following:

30 *Styles v. Long*, 67 N. J. L., 413-18, where Mr. Justice Pitney says:

“But the rule entitling third parties to maintain an action for breach of the contract is limited to those for whose benefit the contract was made, and is not extended to third parties who, indirectly and incidentally, would be advantaged by its performance.”

And *Chambers v. Philadelphia Pickling Co.*, 79 N. J. L., p. 1, where Chief Justice Gummere says:

40 “Under this statutory provision the sole test of the plaintiff’s right to maintain this

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action is whether or not the contract set out in the declaration was made for his benefit."

It must be manifest that in each case the question is, what was the intention of the parties to the contract? And the courts of several of the states whose decisions are cited on the brief of plaintiff's counsel have laid hold of the absence of mechanics' liens or other protection furnished to a material man or laborer in those jurisdictions and of language of a more or less general and ambiguous character as facts tending to demonstrate that the parties in entering into the contract must have entertained the intention of extending the benefit of the contract to third parties so as to enable them to sue thereon. In this case there exist no such facts nor evidence of any such intention, but on the contrary from the internal evidence of the contracts themselves and the circumstances both of fact and of law which surrounded the parties at the time the contract was made, it seems perfectly clear that this was a mere contract of indemnity running solely to the Passaic Valley Sewerage Commissioners and was not intended to create any obligation in favor of laborers and material men; and I so hold.

I may, in passing, say that in the State of New York the case of *Buffalo Cement Co. v. McNaughton*, 35 N. Y. Suppl., 453, affirmed 156 N. Y., 702, is an illuminating case upon this subject and shows in the very interesting opinion there delivered the evil consequences that would flow from the adoption of the rule contended for by the plaintiff.

*Wolff*, 163 Ill., 467, is authority for the proposition that under a bond similar to the one in

In Illinois, the case of *City of Sterling v.*

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suit here the court held that the laborer or material man could not sue the surety, and said:

“The rule has been re-announced by this court in almost numberless cases that the undertaking of a surety is strictly construed and may not be extended by implication or construction.”

- 10 In Oregon a like rule was announced in *Brower Lumber Co. v. Miller*, 28 Or., 565; and in Minnesota, in the case of *American Building & Loan Assn. v. Waleen*, 52 Minn., 23, a bond provided that the principal should pay or cause to be paid all claims or liens for labor and material furnished for the construction of a building and do all other acts and things necessary or required to be done. The court construed this bond to be a contract of indemnity and not
- 20 an absolute affirmative contract to pay all claims. “In some of the early cases, the courts, without perhaps, giving due weight to the manifest purpose of the bond as indicated by its provisions as a whole, and the relations to the parties of its subject matter, were inclined to lay hold of the language of a particular clause, and because it was in the form of a stipulation to do a particular act or pay a certain sum to hold that the bond was not one of mere indemnity but
- 30 an affirmative contract to do the specified act or to pay the specified sum, but the tendency of the more modern authorities is to adopt as a cardinal principal to be applied in the construction of such bond that actual compensation can only be given for loss actually sustained, unless it is evident that the parties have stipulated for some other or more extensive remuneration, and to give more weight to the general purpose of the bond as indicated by its provisions as a
- 40 whole, and the interest of the parties in the

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subject matter than to the precise form of words used in a particular clause."

And so here it seems perfectly clear that the bond given in the present case was one of mere indemnity and not an affirmative contract to do the specified act or to pay the specified sum.

The more recent cases in the State of Minnesota will not be applicable because there now exists a statute providing that no contract for public improvement is valid unless a bond for payment when due of all labor and material, etc., is given, on which any person entitled to protection of the bond may maintain an action. Gen. Stat. 1913, Sec. 8247 (Special Laws 1889, Chap. 360). 10

The fact that in so many states it has been deemed necessary to enact legislation to specifically provide for the remedy which plaintiff seeks to invoke in the suit now being tried, would seem to make it quite clear that such remedy does not exist unless such specific provision has been made therefor. 20

In Washington, in *Stetson v. McDonald*, 5 Wash., 496, the bond contained a covenant to pay for materials and labor, and it was held that the materialmen had no right of action against the assured.

In the State of Massachusetts it is held that "only parties to an instrument under seal can sue on it." (*Congress Construction Co. v. Worcester*, 182 Mass., 355.) 30

In the State of Missouri, and likewise in the State of Nebraska, the courts have permitted an action to be maintained upon a bond similar to the one in suit in this case by laborers and materialmen and have based their decisions upon the fact that there was no mechanics' lien law which 40

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would protect laborers and materialmen. Since 1899 there has been a statute in Nebraska (Rev. Stat. 1913, Sec. 3840) governing the subject.

Several cases are cited in the brief of plaintiff's counsel, and several more could easily be found in that jurisdiction, favorable to the view contended for by him, but they are based upon the  
 10 theory that there is no lien to protect a materialman in material furnished for a public building; and in the case of *Snider v. Greer Wilkenson Co.*, 51 Ind. Ap., 348, it was said:

20 "It has frequently been held in this State that a bond given to secure the performance of a contract for the construction or repair of public buildings which are not subject to liens inures to the benefit of persons furnishing material or labor on such contracts when there is an express stipulation either in the contract or bond that the contractor shall pay all claims."

In several other cases in Indiana the conclusion was based upon the statutes permitting suits by a laborer or materialman on all bonds given for the performance of contracts for public improvements under Section 5897 and 5899 Burns Statutes, 1908.

30 In Texas, in the case of *Nelson v. Stephenson*, 168 S. W., 61, a bond was conditioned upon the furnishing of labor and the faithful performance of the contract and of payment of all indebtedness incurred, and the bond was held to inure to the benefit of the materialmen on the ground that otherwise there could be no protection afforded such parties as the laws provided no liens against public improvements.

No such action would lie on a similar bond in England.

40 In the case of *Gastonia Engineering Co.*, 131

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N. C., 363, much relied upon by plaintiff in his brief, the court in permitting suit upon such a bond by a materialman, based its decision upon cases in other States where there was no mechanics' liens permitted; and it is the fact that at that time no lien on public improvements was permitted in the State of North Carolina.

This review of the authorities and the reasons **10** upon which they rest makes it clear that such an action will not lie in the State of New Jersey on behalf of a laborer or materialman against a surety company on a bond furnished by such surety company to a municipality to secure the faithful performance of its contract by a contractor under contract with such municipality to furnish material and perform work for the public.

This makes it unnecessary for me to consider the question as to whether or not the plaintiff is **20** entitled to recover for goods sold to the receiver of Healey Contracting Company as though to the company before the receivership, because if the materialman himself is not entitled to recover on the contract it is obvious that his representative has no greater rights to do so than he has.

It remains to say, further, with respect to the contention that

"The defendant New England Casualty **30** Company was cognizant of the appointment of said receiver and represented in court at the time thereof, and did acquiesce in the continuance of the work of performing said contract by said receiver; and that the receiver did apply to the defendant for the advance of funds for the purpose of carrying on said work, and that the defendant did thereupon direct the receiver to first apply to the Nassau National Bank for the advance of such funds, and if refused by said bank then to renew his application to the defend- **40**

*Decision.*

ant; and that said Nassau National Bank did agree to advance certain funds to the receiver and did actually advance part of the funds agreed; and upon the refusal of said bank to advance further funds the receiver did renew his application for advances to the defendant and that the defendant did, on or about the 28th day of February, 1914, agree with said receiver to advance the moneys needed by him to meet his obligations, if he would further continue the performance of said contract; and that the receiver did in consequence of such undertaking by the defendant further continue the performance of said contract, but the defendant did refuse to advance moneys as promised to said receiver, whereupon the work was abandoned as aforesaid"—

that I find as a fact and as matter of law that the defendant New England Casualty Company was not represented in court at the time of the appointment of said receiver and did not acquiesce in the continuance of the work of performing said contract by said receiver, and I further find that even if there were any right of action growing out of the transactions referred to in plaintiff's requests to find, that the same could not in any way be attributed to its liability under the bond nor could the same be recovered in a suit on the bond. If there were rights growing out of such transactions they would be the subject matter of a separate suit and do not in any way come within the issues framed in this suit.

This disposes of all the questions that have been raised and results in my ordering judgment in favor of the defendant.

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### Plaintiff's Exhibits.

Exhibits 1 (Proposal) and 2 (Contract and Bond) :

(These two exhibits are bound up together in a printed pamphlet. Each bidder, including Healey Contracting Company, submitted his bid by filling up the blanks in the part of the pamphlet entitled "Proposal for constructing a part of Section 8 of the Passaic Valley Main Intercepting Sewer.") 10  
(Ex. 1.)

(Attached thereto was the "Notice to Contractors" and form of contract and bond to be executed by the successful bidder. Upon acceptance of the bid the form of contract and bond contained in the pamphlet annexed to the bid were executed. The pertinent parts of these exhibits are abridged by consent of counsel, as follows:)

#### Exhibit 1. 20

##### NOTICE TO CONTRACTORS.

Notice is hereby given that the Passaic Valley Sewerage Commissioners have designated Tuesday, the 12th day of November, nineteen hundred and twelve, at two o'clock in the afternoon, as the time when they will meet at their usual place of meeting, Essex Building, Clinton Street, Newark, New Jersey, to receive proposals in writing for constructing a part of Section 8 of the Main Intercepting Sewer, in tunnel, in the City of Newark. 30

All bids must be made upon the blank form of proposal annexed hereto and should give the price of each item of the proposed work, both in writing and in figures, and be signed by the bidder with his business address and place of residence.

*Exhibit 1.*

Each bid must be accompanied by a certified check drawn upon a National Bank or a Trust Company established in the City of Newark or the City of New York for two thousand dollars (\$2,000), payable to the Passaic Valley Sewerage Commissioners, such check to be returned to the bidder, unless forfeited under the condition herein stipulated. This check should not be enclosed in the sealed envelope containing the bid, but should be delivered to the Passaic Valley Sewerage Commissioners or their Clerk, who will give a proper voucher for the deposit.

10

A bond in the sum of twenty thousand dollars (\$20,000) and in form approved by the Passaic Valley Sewerage Commissioners with two or more sureties, or with a surety company as surety, will be required for the faithful performance of the contract. Sureties must be satisfactory to the Passaic Valley Sewerage Commissioners, and individual sureties must be residents of New Jersey.

20

The party to whom the contract is awarded will be required to present forthwith to the Passaic Valley Sewerage Commissioners the names of the sureties or surety to be offered, and to execute the contract and furnish the bond, duly executed, with satisfactory sureties or surety, within six days (not including Sunday) from the date of mailing of a notice from the Passaic Valley Sewerage Commissioners to the bidder, according to the address given by him, that the contract is ready for signature; and, in case of his failure or neglect so to do, the Passaic Valley Sewerage Commissioners may, at their option, determine that the bidder has abandoned the contract, and thereupon the proposal and acceptance shall be null and void, and the check accompanying the proposal shall be forfeited to the Passaic Valley Sewerage Commissioners.

30

40

*Exhibit 1.*

## QUANTITIES.

All bids will be compared on the basis of the Engineer's Estimate of Quantities of work to be done, as follows:

- Item 1.—Earth or rock excavation and refilling, in tunnel, for 132-inch concrete sewer . . . . . 1,775 linear feet. 10
- Item 2.—Concrete masonry, in tunnel, Portland cement mortar . . . . . 5,000 cubic yards.
- Item 3.—Brick masonry, in manholes, Portland cement mortar, and appurtenant work . . . . . 50 cubic yards.

The quantities are approximate only, being given as a basis for the comparison of bids and the Passaic Valley Sewerage Commissioners do not expressly or by implication agree that the actual amount of work will correspond therewith, but reserve the right to increase or decrease the amount of any class or portion of the work as may be deemed necessary by the engineer. 20

It is the purpose of the Passaic Valley Sewerage Commissioners not to award the contract to any bidder who does not furnish evidence satisfactory to them as to his responsibility, and that he has sufficient capital, ability, experience and plant to enable him to prosecute the same successfully, and to complete it within the time named in the contract. 30

The attention of bidders is especially called to Articles X, XI and XV in the proposed form of contract.

The Passaic Valley Sewerage Commissioners reserve the right to reject any or all bids, or to ac-

*Exhibit 1.*

cept any bid should they deem it to be for their interest so to do.

PASSAIC VALLEY SEWERAGE COMMISSIONERS.

FRANCIS CHILD,  
Chairman.

JOHN S. GIBSON,  
Clerk.

10 Office of the Passaic Valley Sewerage Commissioners,  
31 Clinton St., Newark, N. J., October 8, 1912.

PROPOSALS FOR CONSTRUCTING A PART OF SECTION 8  
OF THE PASSAIC VALLEY MAIN INTERCEPTING  
SEWER IN TUNNEL IN NEWARK, NEW JERSEY.

To the Passaic Valley Sewerage Commissioners:

20 The undersigned, as bidder, declares that the only persons or parties interested in this proposal as principals are named on page 7; that the proposal is made without collusion with any other person, firm or corporation; that he has carefully examined the location of the proposed work, the annexed proposed form of contract and bonds and the drawings referred to; that he proposes and agrees, if this proposal is accepted, to contract with the Passaic Valley Sewerage Commissioners in the form of the copy of the contract deposited in the office of the Passaic Valley Sewerage Commissioners, to provide all necessary machinery, tools, apparatus and other means of construction, and do all the work and furnish all the materials specified in the contract, in the manner and time therein prescribed, and according to the requirements of the Engineer as therein set forth, and that he will take in full payment therefor the following sums, to wit:—

40 Item 1.—For all earth or rock excavation, or both, in tunnel, above sewer grade, for 132-inch

*Exhibit 1.*

concrete sewer, and for furnishing, laying and excavating for under-drains, including excavations for shafts, manholes, branches and all structures; for disposal of material by removal or by refilling, by packing over arch and around sewer, including bracing and shoring whether left in or taken out; for all bridging and fencing, and removal of same; for all pumping or bailing or otherwise disposing of water; for all protection and restoration of buildings, fences, existing sewers, cisterns, culverts, water pipes, gas pipes, house drains etc.; for all resurfacing of streets accommodation and protection of travel, and for all incidental work, the sum of .....

10

If this proposal shall be accepted by the Passaic Valley Sewerage Commissioners, and the undersigned shall fail to contract as aforesaid, and to give a bond in the sum of twenty thousand dollars (\$20,000) in form and with sureties or surety satisfactory to the Passaic Valley Sewerage Commissioners, within six days (not including Sunday) from the date of the mailing of a notice from the Passaic Valley Sewerage Commissioners to him, according to the address herewith given, that the contract is ready for signature, then the Passaic Valley Sewerage Commissioners may at their option determine that the bidder has abandoned the contract, and thereupon the proposal and acceptance shall be null and void, and the certified check for two thousand dollars (\$2,000) accompanying this proposal shall become the property of the Passaic Valley Sewerage Commissioners; otherwise the accompanying check shall be returned to the undersigned. (Signature of bidder, with residence and business address.)

20

30

(Signed) HEALEY CONTRACTING CO.

40

**Exhibit 2.**

(Contract and Bond.)

(For form of bond see copy printed in full as part of the complaint.)

(The pertinent parts of the contract are as follows:)

## PROPOSED FORM OF CONTRACT.

10

STATE OF NEW JERSEY,

PASSAIC VALLEY SEWERAGE COMMISSIONERS.

CONTRACT FOR THE CONSTRUCTION OF A PART OF SECTION 8 OF THE PASSAIC VALLEY MAIN INTERCEPTING SEWER, IN TUNNEL, IN THE CITY OF NEWARK, NEW JERSEY.

20 Passaic Valley Sewerage Commissioners, a body corporate, organized under the laws of the State of New Jersey, herein acting without personal liability to any member thereof, and HEALEY CONTRACTING COMPANY, hereinafter designated as the Contractor, agree as follows:

ARTICLE 1. The Contractor shall do all work and furnish all tools, labor and materials, except as hereinafter specified, necessary or proper for performing and completing the work herein specified.

30 ARTICLE 11. The word "Commissioners" shall mean the Passaic Valley Sewerage Commissioners or any board or officer duly authorized to act in the execution of the work covered by the contract.

The word "Engineer" shall mean the person holding the position or acting in the capacity of Chief Engineer to the Passaic Valley Sewerage Commissioners.

40

*Exhibit 2.*

Wherever in the specifications or upon the drawings the words "as directed," "as required," "as permitted," or words of like effect, are used, it shall be understood that the direction, requirement or permission of the Engineer is intended, and similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by or acceptable or satisfactory to the Engineer. 10

ARTICLE 111. All work under this contract shall be done to the satisfaction of the Engineer, who shall in all cases determine the amount, quality, acceptability and fitness of the several kinds of work and materials, which are to be paid for hereunder, and shall decide any questions which may arise as to the fulfillment of this contract on the part of the Contractor, and his determination and decision thereon shall be final and conclusive; and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder. 20

## ARTICLE IV. SPECIFICATIONS.

SECTION 1. The work included under this contract is known as a part of Section 8 of the Passaic Valley Main Intercepting Sewer and is located in the City of Newark and consists of a concrete sewer constructed in tunnel and extending from a point on Ogden Street northerly through the said Ogden Street and Third Avenue, to a point near Passaic Street, a total distance of about 1,775 feet, together with all structures appertaining thereto. Its location and general character are shown on a set of drawings consisting of a title page and three drawings, in the office of the Commissioners, entitled "State of New Jersey, Passaic Valley Sewerage Commissioners, Main Intercepting Sewer, Con- 30 40

*Exhibit 2.*

tract Drawings, Part of Section 8, City of Newark," signed by William M. Brown, Chief Engineer, dated September 3, 1912, and bearing Accession Numbers B-1361, B-1370, B-1373 and B-1374.

The work is to be constructed in accordance with working drawings to be furnished from time to time by the Engineer.

- 10** SECT. 2. The Contractor shall furnish and do everything except as herein otherwise provided, necessary to complete the work in accordance with the terms of the contract and with the requirements of the Engineer thereunder. He is to make the requisite excavations for building the sewer, branches, and all other appertaining structures; to strip all loam; to do all ditching, tunneling, diking, pumping, bailing and draining, and furnishing and laying of underdrain, if required; to
- 20** do all sheeting, shoring, bracing and supporting; to do all fencing, lighting and watching; to make all provisions necessary to maintain and protect existing structures of whatever kind; to repair all damage done to such structures; to provide all bridges, fences or other means of access to houses or other premises; to construct all foundations, all brick, cement, stone and timber work; to set in place all iron work; to build all roadways and refill all trenches and tunnels and other excava-
- 30** tions; to clean away all rubbish and surplus material; to furnish all materials (except those mentioned as furnished by the Commissioners), tools, implements and labor required; and to do all other things necessary to build and put in complete working order the specified section of sewer.

- SECT. 3. All iron work, such as manhole frames and covers, and manhole steps, will be furnished by the Commissioners, and will be delivered as near the work as can be conveniently done, and
- 40** the cost of placing the same in the work shall be

*Exhibit 2.*

included in the price bid per cubic yard for brick masonry and concrete in tunnel.

SECT. 4. The Contractor shall, at his own expense, convey the materials furnished by the Commissioners from where they are delivered, and store the same in the vicinity of the works. He shall be responsible for loss incurred or damage done to materials furnished by the Commissioners from the time of their delivery until the work is accepted. 10

SECT. 5. The plots of borings, pipes and other underground objects are supposed to be approximately correct, but should they be found to be otherwise, or should the Contractor encounter quicksand, springs, demoralized rock or other difficulties, he shall have no claim on that account, it being understood that the Commissioners do not warrant the plot of underground objects to be even approximately correct. 20

SECT. 6. All work, during its progress and on its completion, shall conform to the lines and levels given by the Engineer, and shall be built in accordance with the contract drawings and directions given from time to time by him, subject to such modifications and additions as shall be deemed necessary by him during its execution; and in no case will any work in excess of the requirements of the drawings and specifications be paid for unless ordered in writing by the Engineer. 30

SECT. 7. The Contractor shall not (except after consent from the proper parties) enter or occupy with men, tools or materials any land outside the rights of way shown on the contract drawings.

The Contractor shall, whenever so required by the Engineer, erect and maintain fences along the roadway and around the grounds occupied by him, of such a character as will be sufficient for the protection of the adjoining property. 40

*Exhibit 2.*

SECT. 8. Wherever it is necessary to cross roads or railroads the Contractor shall, at his own expense, provide suitable and safe bridges or other sufficient crossings for the accommodation of the travel on said roads; and shall maintain the same in good and safe condition until the roads can be restored in as good condition as before, when he shall remove all bridges and other temporary expedients, and shall restore said roads to a condition suitable for use; all to be satisfactory to the Engineer. The Contractor shall give reasonable notice to the owners of railroads and private ways before interfering with them.

SECT. 9. The Contractor shall provide watchmen, red lights and fences at his own expense, and take all such other precautions as may be necessary to protect life and property, and shall be liable for all damage occasioned in any way by his act or neglect, or that of his agents, employees or workmen.

ART. XIII. The Contractor shall take all responsibility of the work, and take all precautions for preventing injuries to persons and property in or about the work; shall bear all losses resulting to him on account of the amount or character of the work or because the nature of the land in or on which the work is done is different from what was estimated or expected, or on account of the weather, elements or other cause; and he shall assume the defense of, and indemnify and save harmless, the Commissioners and their officers and agents, from all claims relating to labor and materials furnished for the work; to inventions, patents and patent rights used in doing the work; to injuries to any person or corporations received or sustained by or from the Contractor and his employees in doing the work, or in consequence of any improper materials, implements or labor used

*Exhibit 2.*

therein; and to any act, omission or neglect of the Contractor and his employees therein.

ART. XVII. The Commissioners may keep any moneys which would otherwise be payable at any time hereunder, and apply the same, or so much as may be necessary therefor, to the payment of any expenses, losses or damages incurred by the Commissioners, and determined as herein provided, and may retain, until all claims are settled, so much of such moneys as the Commissioners shall be of opinion will be required to settle all claims against the Commissioners and their officers and agents, specified in Article XIII, and all claims for labor on the work and also all claims for materials used in the work, or the Commissioners may make such settlements and apply thereto any moneys retained under this contract. If the moneys retained under this contract are insufficient to pay the sums found by the Commissioners to be due under the claims for labor and materials, the Commissioners may, at their discretion, pay the same, and the Contractor shall repay to the Commissioners all sums so paid out. The Commissioners may also, with the written consent of the Contractor, use any moneys retained, due or to become due under this contract, for the purpose of paying for both labor and materials for the work, for which claims have not been filed in the office of the Commissioners. While it is understood that the security required to be given by the Contractor is furnished by the Contractor by his giving the bond accompanying this contract, the Commissioners may, nevertheless, if they shall deem it just and equitable so to do, cause any moneys retained, due or to become due to be held and applied to the payment for labor or materials for which security is required under the provisions of said section.

ART. XVIII. The Commissioners shall pay and

*Exhibit 2.*

the Contractor shall receive as full compensation for everything furnished and done by the Contractor under this contract, including all work required but not included in the items hereinafter mentioned, and also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstruction or difficulty encountered in the prosecution of the work, and for all risks of every description connected with the work, and for all expense incurred by or in consequence of the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and the whole thereof, as herein provided, as follows: (Here follows details of prices.)

ART. XIX. The Engineer shall, once in each month, make an estimate in writing of the total amount of the work done to the time of such estimate and the value thereof. The Commissioners shall retain fifteen per cent. of such estimated value as part security for the fulfillment of this contract by the Contractor, and shall monthly pay to the Contractor while carrying on the work, the balance not retained as aforesaid, after deducting therefrom all previous payments and all sums to be kept or retained under the provisions of this contract. No such estimate or payment shall be required to be made when, in the judgment of the Engineer, the total value of the work done since the last estimate amounts to less than two thousand dollars (\$2,000). Payment may at any time be withheld if the work is not proceeding in accordance with the contract. The Commissioners may, if they deem it expedient so to do, cause estimates to be made more frequently than once each month, and they may cause payments to be made more frequently to the Contractor. The Commissioners may at their option

*Exhibit 2.*

retain, temporarily or permanently, a smaller amount than as aforesaid, and may cause the Contractor to be paid, temporarily or permanently, from time to time during the progress of the work, such portion of the reserve as they deem prudent.

The Engineer shall, as soon as practicable after the completion of this contract, make a final estimate of the amount of work done thereunder and the value of such work, and the Commissioners shall, within sixty-five days after such final estimate is so made, and is approved by the Commissioners, pay the entire sum so found to be due hereunder after deducting therefrom all previous payments and all amounts to be kept and all amounts to be retained under the provisions of this contract, including the five per cent. of the amount of the contract to be retained as herein-after provided for the making of repairs. All prior estimates and payments shall be subject to correction in the final estimate and payment.

ART. XX. The Commissioners may retain out of the moneys payable to the Contractor under this contract the sum of five per cent. on the amount thereof, and may expend the same in the manner hereinafter provided for in making such repairs on said work as the Engineer may deem expedient.

If, at any time during a period of six months from the date of the final completion of the work contemplated in this contract, as determined by the Engineer, any part of such work shall, in the opinion of the Engineer, require repairing, the Engineer may notify the Contractor, in person or by mail, to make the required repairs. If the Contractor shall neglect to make such repairs to the satisfaction of the Engineer within three days from the date of giving or mailing such notice, then the Engineer may employ other persons to

*Exhibit 2.*

make the same. The Commissioners shall pay the expenses of the repairs out of the sum retained for that purpose. And upon the expiration of the said period of six months, provided that the work shall at that time be in good order, the Contractor shall be entitled to receive the whole or such part of the sum last aforesaid as may remain after the expense of making the said repairs, in the manner aforesaid, shall have been paid therefrom.

It is, however, agreed that the Commissioners may apply or keep the sum so retained to or for the payment of other claims arising and made payable by the Contractor under the provisions of this contract, but remaining unsatisfied.

ART. XXI. Neither the inspection of the Commissioners or Engineer, or any of their employees, nor any order, measurement or certificate by the Engineer, nor any order by the Commissioners for the payment of money, nor any payment for, nor acceptance of, the whole or any part of the work by the Engineer or Commissioners, nor any extension of time, nor any possession taken by the Commissioners or their employees, shall operate as a waiver of any provision of this contract, or of any power herein reserved to the Commissioners, or any right to damages herein provided; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach. Any remedy provided in this contract shall be taken and construed as cumulative, that is, in addition to each and every other remedy herein provided; and the Commissioners shall also be entitled as of right to a writ of injunction against any breach of any of the provisions of this contract.

ART. XXII. No person or corporation, other than the signer of this contract as Contractor, now has any interest hereunder, and no claim shall be made or be valid, and neither the Commission-

ers, nor any member or agent thereof, shall be liable for, or be held to pay, any money, except as provided in Articles XI, XIV, XVIII, XIX and XX. The acceptance by the Contractor of the last payment made as aforesaid, under the provisions of Article XX, shall operate as and shall be a release to the Commissioners, and every member and agent thereof, from all claim and liability to the Contractor for anything done or furnished for, or relating to, the work, or for any act or neglect of the Commissioners or of any person relating to or affecting the work, except the claim against the Commissioners for the remainder, if any there be, of the amounts kept or retained as provided in Article XVII. 10

### Exhibit 3.

June 17, 1914.

PASSAIC VALLEY SEWERAGE COMMISSIONERS: 20  
Newark, N. J.

Gentlemen:

We represent the Cockburn-McIlvrid Corporation, which furnished materials, viz.: tunnel plates, used by the Healey Contracting Company, and Thomas L. Raymond, as Receiver of Healey Contracting Company, in carrying out the contract between said Healey Contracting Company and the Passaic Valley Sewerage Commissioners. 30

The amount due for materials furnished to the Healey Contracting Company before the appointment of the Receiver is \$2246.75.

The amount due for materials furnished to the Receiver is \$5981.70, total \$8228.45.

We are informed that at the time of the letting of this contract to the Healey Contracting Company the Commissioners required a bond with sufficient surety, with condition that the principal "shall perform all the obligations, agreements, 40

terms and conditions of this said contract \* \* \* and shall also pay for all labor performed and furnished and for all materials used in carrying out said contract".

We are informed that the moneys in your hands earned under the Healey contract will be insufficient to pay the loss upon the reletting of the contract, so that our client cannot realize anything upon claims filed under the Municipal Lien  
 10 Law.

It would therefore seem that our only recourse is to this provision of the bond.

We would, therefore, respectfully request your Commission to enforce the above condition requiring payment by the Contractor for materials used in carrying out the contract.

Very truly yours,

JME-AMB

MCDERMOTT & ENRIGHT.

20

**Exhibit 4.**

MESSRS. MCDERMOTT & ENRIGHT,  
 75 Montgomery Street,  
 Jersey City, N. J.

Gentlemen:

Your letter of June 17th, addressed to the Passaic Valley Sewerage Commissioners, in the matter of the claim of the Cockburn-McIlvrid Corporation  
 30 against the Healey Contracting Company and Thomas L. Raymond, Receiver, has been referred to me for answer.

It is undoubtedly a fact that the moneys in the hands of the Commissioners reserved under the Healey contract will be insufficient to pay the loss upon the re-letting of the contract and the completion of the work. It is also a fact that the bond given by the Healey Contracting Company is in the form quoted by you.

40

I suggest for your consideration, however, the question whether or not the condition of this bond can be enforced by the Commissioners for the benefit of the materialmen and laborers employed on the work. The form of the bond is one in use in the State of Massachusetts, and in its condition is apparently a contract for the benefit of third parties. It would seem that it might be enforceable under our statute by such third parties in their own names.

10

I would be glad to have your views on this matter.

Yours very truly,

AR/C

ADRIAN RIKER.

#### **Exhibit 5.**

This is a verified notice of lien claim filed by Cockburn-McIlvrid Corporation with the Chairman of the Passaic Valley Sewerage Commissioners, and with the financial officer of said Commissioners, June 17, 1914, claiming a lien upon moneys due Healey Contracting Company or Thomas L. Raymond, Receiver thereof, for work and materials furnished toward the erection and completion of Section 8 of the Passaic Valley main intercepting sewer amounting to \$5981.70, pursuant to the provisions of the New Jersey Municipal Lien Law.

20

#### **Exhibit 6.**

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This is a bond of Cockburn-McIlvrid Corporation as principal, and Henry M. Ward, as surety, to Thomas L. Raymond, Receiver Healey Contracting Co., in the sum of \$1196.34, dated June 17, 1914, filed with the financial officer of Passaic Valley Sewerage Commissioners same date, conditioned for payment of legal interest for the time the money specified in above notice of lien may be

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withheld on account thereof, in the event that the claimant does not perfect its lien by instituting an action thereon or in the event that a decree be made in favor of said Raymond in any such action; also for costs; all pursuant to provisions of Municipal Lien Law.

### **Exhibits 7, 8 and 9.**

10 These are the books and records of the merchandise sold by William McIlvrid, as Receiver of Cockburn Co., to Healey Contracting Co.; are not printed because of defendant's concession of the amount due.

### **Exhibit 10.**

20 Interlocutory decree of United States District Court for the District of New Jersey in the suit of Frederick S. Flower against Cockburn Co., defendant, decreeing:

30 "First, that the defendant Cockburn Company, a corporation created, organized and existing under the laws of the State of New Jersey, is insolvent; second, that all the assets of the said defendant Cockburn Company, consisting of the following property, to wit, (1) real estate (here follows a long description of real estate by metes and bounds); (2) certain factory buildings situated upon the premises above particularly described; (3) manufacturing plant, machinery, tools and equipment contained in said buildings on said premises; (4) certain raw material and material in process of manufacture in said plant; (5) all outstanding accounts receivable of the defendant Cockburn Company, not collected by the Receiver and not adjusted; (6) the good will of Cockburn Company and of the business conducted by William McIlvrid as Receiver of said Company; be sold without valuation, appraisalment, redemption or extension by and under the direction of John M. Enright, Esq.,

of Jersey City, in the State of New Jersey, who is hereby appointed Special Master for that purpose, and directed to make and conduct said sale and to execute a deed or deeds of conveyance of the real estate sold, and a bill or bills of sale of all the personal property sold, to the purchaser or purchasers thereof, upon an order confirming such sale, and upon payment or settlement of the purchase price bid as hereinafter provided."

**Exhibit 11.**

10

Order of United States District Court in last mentioned suit, dated July 25, 1913, confirming sale by John M. Enright as Special Master, to Henry M. Ward, of all property enumerated in Decree, Ex. 10, and directing Special Master to execute and deliver instruments of transfer upon compliance by the purchaser with conditions of sale.

**Exhibit 12.**

20

Final decree of the U. S. District Court in above suit, dated March 23, 1914, confirming delivery of deed by John M. Enright, Special Master, to Henry M. Ward, and decreeing that purchaser "was thereby vested with all the title and ownership of the defendant Cockburn Company in and to all the property, real and personal which belonged to and was in the possession of said defendant company at the time of the filing of the bill herein, and with the title and ownership of all property, real and personal, thereafter acquired by the Receiver of said Company in connection with the Receivership, pursuant to the order of this Court, excepting, however, the three items of property expressly reserved from the said sale under the terms of the interlocutory decree filed herein on May 23, 1913." (This exception does not affect in any way the present suit.)

30  
40

**Exhibit 13.**

Special Master's deed made by John M. Enright, Special Master, to Henry M. Ward, pursuant to orders and decrees Exhibits 10 and 11, dated August 5, 1913, purporting to transfer to Henry M. Ward all assets described in the decree for sale Exhibit 10.

10

**Exhibit 14.**

Deed of Henry M. Ward to the Cockburn-McIlvrid Corporation, dated August 6, 1913, transferring all property, real, personal and mixed, acquired by him under Exhibit 13.

**Exhibit 15.**

Exemplified copy of order of the Supreme Court of the State of New York, dated May 21, 1914, in the matter of the application of the Cockburn-McIlvrid Corporation for authority to change its name to the Standard Gas Power Corporation,

20

“ordering that said petition be and the same hereby is granted, and that the petitioner herein, The Cockburn-McIlvrid Corporation, be and it hereby is authorized to assume another corporate name, to wit, the name The Standard Gas Power Corporation, on and after the 30th day of June, 1914.”

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**Exhibit 16.**  
**IN CHANCERY OF NEW JERSEY.**

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Between

LAURENCE H. HENDRICKS,

*Complainant,*

*and*

HEALEY CONTRACTING COMPANY, a  
 corporation,

*Defendant.*

---

On Bill &c.  
 Order.

10

This matter being opened to the Court by Francis Child, Jr., solicitor for and of counsel with the complainant in the above entitled cause, and the bill of complaint having been heretofore filed, and an order to show cause having been heretofore made requesting the stockholders and creditors of the above named defendant to show cause on the 21st day of October, 1913, before the Chancellor, in the Chancery Chambers in the Prudential Building in the City of Newark, New Jersey, why the said corporation should not be adjudged insolvent and a Receiver appointed; and it appearing to the Court that due notice of said application for Receiver has been given, as required by the order heretofore made, and it appearing to the Court that the said defendant corporation is insolvent and unable to meet the current obligations or to continue its business with safety to the public or advantage to the stockholders, and that a Receiver for the defendant should be appointed by this Court to take charge of and administer all of the assets and property of the defendant;

20

30

It is on this 21st day of October, Nineteen hundred and Thirteen

40

*Exhibit 16.*

ORDERED, ADJUDGED AND DECREED as follows :

1. That Thomas L. Raymond be and he hereby is appointed Receiver of said defendant Healey Contracting Company and of all its property and assets of every character and description, wheresoever situate, with full power to demand, sue for, collect, receive and take into his possession all  
10 the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of any and every description, wheresoever situate, belonging to the said Healey Contracting Company, or to which it may be entitled, and to sell, convey and assign any and all of the real and personal estate of the said Company.

2. It is further ordered that the said Receiver shall give bond to the Chancellor in the sum of  
20 Five thousand Dollars, to be approved by J. H. F. Martin, Esquire, one of the Special Masters of this Court, conditioned that he will faithfully perform the duty of his office, and to account for all moneys and properties which may come into his hands and abide by and perform all things which he shall be directed to do.

3. It is further ordered that the said Receiver shall take possession of all the property and assets of the said defendant and account for the same  
30 as this Court shall hereafter direct and that the said defendant, its officers, directors and agents shall forthwith, assign, transfer, convey and deliver all of the property and assets of said corporation, both real and personal, wheresoever situate and of whatsoever it may consist, to the said Receiver.

4. It is further ordered that the defendant and all persons claiming under it, be and they are hereby restrained from interfering with the said Re-  
40

*Exhibit 16.*

ceiver's taking possession of and managing said property, and that all persons whomsoever, and especially the creditors of the said defendant, be and they are hereby restrained from bringing any action or proceeding at law or otherwise against said corporation, and from taking any further proceedings in any action or proceeding heretofore commenced.

10

5. And it appearing to the Court that for the preservation of the assets of the Company and for the protection of the property in the hands of the said Receiver, that it is advisable that the Receiver continue and carry out the contract heretofore entered into between the Healey Contracting Company and the Passaic Valley Sewerage Commissioners;

It is further ordered by the Chancellor of the State of New Jersey and said Chancellor, by virtue of the power and authority in him vested, order that the said Thomas L. Raymond, Receiver as aforesaid, be authorized and he is hereby ordered and decreed to issue certificates of indebtedness in order to borrow and raise money for the completion of the contract aforesaid, and that said certificates and the amounts secured by them respectively, be and they are declared to be a debt of the Receiver incurred for the benefit and protection of the estate in his hands and to be a first lien upon the net receipts, income and profits of the said Healey Contracting Company, after the payment of the necessary operating expenses, and in case of deficiency of such net receipts, it is ordered and decreed that said certificates be a first lien upon the property in the hands of this Court and said Receiver.

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30

6. It is further ordered that the amount of said certificates shall not exceed the sum of Twenty-

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*Exhibit 16.*

five hundred Dollars until further order of this Court;

And it is further ordered by the said Chancellor that the said Receiver, acting in good faith, shall not be liable individually for any certificate given by him as such Receiver, and further that the said Receiver do report to this Court from time to time the amount and application of issue of said certificates.

And it is further ordered that the said Receiver be and he hereby is authorized and empowered, until the further order of the Court, to continue all the operations of the contract of the Healey Contracting Company with the Passaic Valley Sewer Commissioners for the construction of Section No. 8, of the Passaic Valley trunk sewer, without interruption, and to purchase and buy out of the income and profits of any assets and effects from time to time coming into his hands as such Receiver, necessary supplies for the purpose aforesaid, and to employ and pay all needful agents and servants, and generally to do all acts and things proper or necessary to be done to protect the property and rights of which he is Receiver, with leave to apply from time to time whenever necessary, and as he may be advised, for instructions as to all and singular his rights, duties and liability in the premises.

Respectfully advised,

JOHN R. EMERY,  
V. C.

E. R. WALKER,  
C.

A true copy

ROBERT H. MCADAMS,  
Clerk.

**Exhibit 17.**  
**IN CHANCERY OF NEW JERSEY.**

---

Between

LAURENCE H. HENDRICKS,

*Complainant,*

*and*

HEALEY CONTRACTING COMPANY, a  
 corporation,

*Defendant.*

---

On Bill for  
 Receiver &c.  
 Petition of  
 Receiver to  
 Borrow  
 Money.

10

To his Honor Edwin Robert Walker,  
 Chancellor of the State of New Jersey.

The petition of Thomas L. Raymond, Receiver of Healey Contracting Company the defendant in the above stated cause, respectfully shows:

20

1. That by an order of this Honorable Court made in the above stated cause, bearing date the 21st day of October, 1913, your petitioner was duly appointed Receiver of the said Healey Contracting Company, as by the said order will more fully appear and that in compliance with the said order your petitioner has duly qualified as such Receiver and taken the oath as required by law, and entered into the bond as directed by said order. That he has taken possession of the property and assets of the said defendant company in the State of New Jersey.

30

2. That among the assets of the said corporation there is a subsisting contract made by and between the said defendant and the Passaic Valley Sewerage Commissioners, bearing date December 10, 1912, for the construction of a part of Section 8, of the main intercepting sewer and tunnel from

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*Exhibit 17.*

a point on Ogden Street about 200 feet south from Gouverneur Street; thence northerly through Ogden Street and Third Avenue to a point near Passaic Street, a total distance of 1775 feet, for the contract price of One hundred and Fifty-seven thousand Dollars (\$157,000;) that the said defendant has completed part of the work undertaken to be done by the said contract; that it has  
10 constructed about Two hundred and forty-one feet (241) of the said tunnel; that it has received Sixteen thousand One hundred and Sixteen Dollars (\$16,116), for the work thus done and that the said Passaic Valley Sewerage Commissioners have a retained percentage in their hands of fifteen per cent. (15%) on the value of the work done, amounting to Two thousand Eight hundred and Forty-four Dollars (\$2,844); that the last estimate  
20 of the amount of the work completed under the said contract was made by the Engineers of the said Commissioners on August 30, 1913, and since that time, as your petitioner understands the fact to be, very little work has been done, but that the work already done has been protected by the use of air compressors, which have been kept constantly in action.

3. That your petitioner has consulted an Engineer of high standing with reference to the possibility of completing the work to be done under the said contract and that the said Engineer is of the  
30 opinion that the same can be completed at a profit of somewhere between ten to fifteen dollars (\$10 to \$15) per foot, but that it will be impossible to finance the said work unless your petitioner is assured of financial support to the extent of Fifteen thousand Dollars (\$15,000); that it will probably take several weeks to organize the said work and put the same on a basis where it will yield sufficient  
40 income to pay the running expenses; that it

*Exhibit 17.*

is necessary to repair certain of the said equipment, such as the cars for carrying the earth through the tunnel and putting in additional pipes to conduct the air through the tunnel.

4. That the National Nassau Bank of New York, the creditor having the largest claim against the said corporation, is willing to advance cash to your petitioner to the extent of Fifteen thousand Dollars (\$15,000) to be secured by Receiver's certificates; that they have agreed to purchase a certificate for Twenty-five hundred Dollars (\$2500) under the order of this Court bearing date the 21st day of October, 1913, and that when said money is received by your petitioner it will constitute the only available fund in his hands for the purpose either of preserving the estate of the said corporation or for repairing and supplementing the plant in the particulars before mentioned, and that it is absolutely necessary that your petitioner be given power further to borrow money to the extent of Twelve thousand Five hundred Dollars (\$12,500). 10 20

Your petitioner therefore prays that he may be instructed, authorized and directed to borrow a further amount, not exceeding the sum of Twelve thousand Five hundred Dollars (\$12,500) to be secured by Receiver's certificates or otherwise as the Court may direct, which certificates when issued shall draw interest at a rate not exceeding six per cent. (6%) per annum and which certificates shall be a first lien on the property of the defendant company, which has already come into the hands of your petitioner or which shall come into his hands as Receiver as aforesaid, subject only to the expenses of the said Receiver, and that your petitioner may have such other and further relief as to your Honor shall seem meet and as shall be agreeable to equity and good conscience. 30 40

And your petitioner will ever pray &c.

THOMAS L. RAYMOND,  
Receiver.

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

THOMAS L. RAYMOND, being duly sworn on his oath, according to law, says:

10 That he is the petitioner in the foregoing petition named; that he has read the same and knows the contents thereof and that the same are true in all respects to the best of his knowledge, information and belief.

THOMAS L. RAYMOND.

Sworn and subscribed to before me at }  
 Newark, N. J., this 29th day of Octo. 1913. }

GORDON JAMES,  
 Attorney at Law of New Jersey.

**Exhibit 18.**

20 IN CHANCERY OF NEW JERSEY.

Between

LAURENCE H. HENDRICKS,  
*Complainant,*

and

HEALEY CONTRACTING COMPANY, a  
 corporation,

*Defendant.*

On Bill for Receiver.  
 On Petition of Receiver to borrow money, &c.  
 ORDER.

30

This matter being opened to the Court by Thomas L. Raymond, Receiver of the above named defendant company, heretofore appointed in the above entitled cause, who appears as counsel pro se; and it appearing by the duly verified petition of the said Receiver filed on the day of the date hereof that the said Receiver has not sufficient

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*Exhibit 18.*

funds with which to meet the current expenses respecting his said trust, or to pay the expenses necessary to be incurred to enable him to perform the existing contract between the defendant company and the Passaic Valley Sewerage Commissioners mentioned in the said petition, or to preserve the property and rights of the defendant company; and the said Receiver having further petitioned the Court for leave to borrow a further sum not exceeding twelve thousand five hundred dollars (\$12,500) additional to the sum of twenty-five hundred dollars (\$2,500) already authorized to be borrowed, the payment of which is to be secured by the issue of Receiver's certificates; and it appearing to the Court that the said Receiver should be allowed to continue the said business of the said defendant company, and that in order to continue said business and preserve the said property and rights of the said defendant company in the hands of the said Receiver, it is necessary that he should be authorized to borrow an additional sum or sums not exceeding in the aggregate twelve thousand five hundred dollars (\$12,500) for the purpose aforesaid;

IT IS on this sixth day of November, nineteen hundred and thirteen, on motion of Thomas L. Raymond, Receiver of the defendant company as aforesaid, of counsel pro se,

ORDERED, ADJUDGED AND DECREED and the said Receiver is hereby authorized, allowed and directed to borrow from time to time as may be required a sum or sums of money not exceeding in the aggregate twelve thousand five hundred dollars (\$12,500) for the purpose of meeting the necessary expenses of said Receivership, and the maintenance and preservation of the property of the defendant company and in carrying on the work heretofore

*Exhibit 18.*

authorized to be done, more particularly mentioned in the petition filed this day.

AND IT IS FURTHER ORDERED that the said Receiver, in order to secure the sum of money to be borrowed by him in compliance with the terms of this order, shall be, and he hereby is authorized and empowered from time to time to issue and  
10 sell at not less than par, as may be required, his negotiable certificate or certificates, bearing interest at the rate of not more than six per cent (6%) per annum and payable at the close of such receivership, or at such other time or times antecedently thereto as this Court may direct, and that interest on any such certificate or certificates shall cease in ten days after the order of this Court for the payment thereof, and that upon a  
20 notice being mailed within ten days by the Receiver to the holders thereof, if the address of such holder or holders be known.

AND IT IS FURTHER ORDERED that the said certificates or certificate, when issued and to the extent thereof, shall be a first and paramount lien upon all of the property and assets of the said defendant, Healey Contracting Company, now in the hands of the said Receiver or which shall come into his possession or under his control as such Receiver, subject only to the expense of his  
30 administration and that such certificates when issued shall not have any priority or advantage in payment over any other of the said certificates.

AND IT IS FURTHER ORDERED that the said Receiver's certificates shall not be a personal obligation of the said Receiver, and that the payment thereof is in no way guaranteed by him or by the Court of Chancery of New Jersey and that an endorsement to this effect shall be made upon and be appended to each certificate issued here-  
40

under, and the purchaser or holder thereof shall look exclusively to the fund in the hands of the said Receiver for payment thereof.

Respectfully advised,

E. R. WALKER,  
C.

JOHN R. EMERY,  
V. C.

A true copy,

10

ROBERT H. MCADAMS,  
Clerk.

**Exhibit 19.**

**IN CHANCERY OF NEW JERSEY.**

Between

LAURENCE H. HENDRICKS,

*Complainant,*

*and*

HEALEY CONTRACTING COMPANY, a  
corporation,

*Defendant.*

On Bill for  
Receiver.

Order  
Authorizing  
Receiver  
to Abandon  
Work.

20

Thomas L. Raymond, having heretofore by order of this Court bearing date the twenty-first day of October, 1913, been appointed Receiver of the above named defendant and having by like order of this Court been directed to continue the performance of a certain contract between Passaic Valley Sewerage Commissioners, a corporation of the State of New Jersey, and said defendant, for the construction of that portion of the Passaic Valley sewer known as Section 8, and application now being made to this Court by said Receiver for leave to surrender said contract and to discontinue further work thereunder, which application now comes on

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*Exhibit 18.*

to be heard in open Court; and the Court having been attended by the said Receiver, by Francis Child, Jr., solicitor for the complainant; by Riker & Riker, solicitors for David W. Armstrong, Jr., a creditor; by Runyon Colie solicitor for Ingersoll-Rand Company, and George W. Bristol, solicitor for Marvin Briggs, Inc.; and Stewart McNamara, solicitor for the New England Casualty Company, who has received from the complainant's solicitor a notice that the application would be heard, now attending and stating that he does not desire to appear or be heard for the said Company on the said application; and the Court having considered the facts and having heard argument of the Receiver and of counsel for the parties in interest; and it appearing to the Court that said contract cannot be fulfilled by the said Receiver at a profit and that it is inadvisable that the said Receiver further continue the performance of said contract:

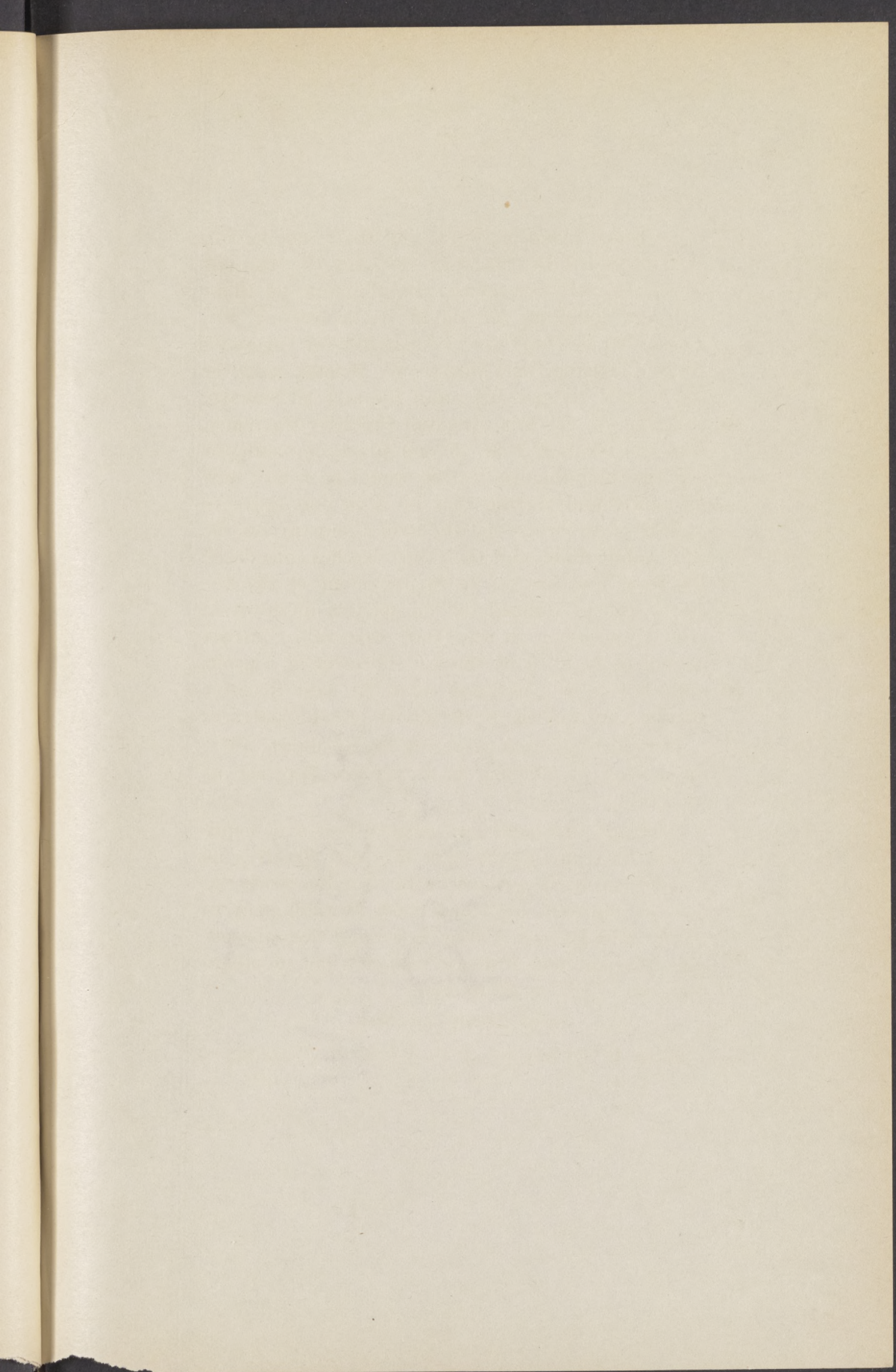
IT IS thereupon on this 25th day of March, 1914, on motion of Thomas L. Raymond, Receiver as aforesaid,

ORDERED, ADJUDGED AND DECREED that said application be granted, and that the said Receiver be and he hereby is authorized to abandon work under the contract, and upon such abandonment to notify said Passaic Valley Sewerage Commissioners of the surrender of said contract and the abandonment of said work by him.

Respectfully advised,

JOHN R. EMERY,  
V. C.

E. R. WALKER.  
C.



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## New Jersey Court of Errors and Appeals

10

STANDARD GAS POWER CORPORATION,  
Plaintiff-Appellant,

and

NEW ENGLAND CASUALTY COMPANY,  
Defendant-Appellee.

**BRIEF OF DEFENDANT-APPELLEE.** 20

### POINT I.

**The language of the bond and the contract clearly indicate that the bond is a contract of indemnity running to the Passaic Valley Sewerage Commissioners.**

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1. The obligation, the vital portion of the bond, provides that the principal and surety:

*“Are held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of \$20,000 lawful money of the U. S. of America, to be paid to the Passaic Valley Sewerage Commissioners, for which payments well and truly to be made, they bind themselves,”* etc. (Exhibit 2, page 11).

40

2. The bond is conditioned upon the terms of the contract (Exhibit 2, page 12).

Article XIII of the contract states that the contractor:

10       *"Shall assume the defense of, and indemnify and save harmless, the Commissioners and their officers and agents, from all claims relating to labor and materials furnished for the work"* (Exhibit 2, page 104).

See also Article XVII seq.

The only reference to the payment of materialmen and laborers in the bond is as follows:

20       *"Now, the condition of this obligation is such, That if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then this obligation shall be void."*

30       It is to be noted that such reference appears only in the condition, the portion of the bond which merely determines the circumstances and contingencies under which the bond becomes void.

40       The statement in the appellant's brief (page 7, lines 18-22) that "the weight of authority is, however, that the intent and purpose of a bond is to be discovered from the condition" is challenged by the appellee. The rule of construction applicable to a bond which has received universal support from all authorities is correctly set forth in 9 Corpus Juris, page 34.

“The entire instrument is what expresses the actual contract; therefore the whole writing, every word, phrase and sentence, must be considered so that the intention may, if possible, be gathered therefrom. In the case of a bond with a condition the latter may be read and taken into consideration in order to explain the obligatory part of the instrument.” 10

“The condition of a bond is the statement, with necessary and appropriate recitals of the circumstances and contingencies under and on which the bond shall be void.”

9 Corpus Juris, page 11.

“The recitals in a bond purporting to express the precise intention of the parties thereto will control its condition given in general terms and prevent a more extensive operation of the bond than was intended by the parties as disclosed by the recitals.” 20

9 Corpus Juris, page 35.

Upon the failure of the principal to truly perform the contract and also to pay claims for labor and materials, the surety immediately becomes liable—but liable to the obligee, the Passaic Valley Sewerage Commissioners and to no one else. 30

The cases beginning with *State vs. Wood*, 51 Ark., 205, and ending with *Holt vs. United Security Life Ins. Co.*, 76 N. J. L., 585 (*Appellant's Brief*, pages 7-10), cited by appellant in support of the argument that a “suit is properly maintainable by the plaintiff though not named in the bond, for the reason that the plaintiff is one of a class for whose benefit the bond was given” (*Point I*), fail to support the contention for which they are cited. 40

In all these cases, having assumed that the facts showed that the bond was intended for the benefit of a third party and that the obligee was merely a trustee, and it appearing through mistake or neglect that the obligee's name was incorrectly stated or entirely omitted, the question decided was, should the Court remedy these defects by permitting the real party intended to be benefited to maintain an action? The appellee would not deny a right to such equitable relief, but claims that these cases beg the question in issue, namely, was the bond intended for the benefit of materialmen and laborers?

In two of these cases, *State vs. Wood*, 51 Ark., 205, and *Bay County vs. Brock*, 44 Mich., 45, where the Court seems to say that the condition of the bond is the important part, the facts show that the rest of the bond was incomplete or defective, and that only by considering the condition could any meaning be given to the bond.

## POINT II.

**The intent and purpose which the Passaic Valley Sewerage Commissioners had in requiring the bond were two-fold. The protection of the public's interest in the proper performance of the work and the protection of the Commissioners from liability for claims on account of the work.**

1. In providing for the bond the Passaic Valley Sewerage Commissioners were concerned with the welfare of the public and not with the protection of those furnishing materials and labor.

The notice to contractors provides that a bond approved of by the Passaic Valley Sewerage Commissioners will be required (Exhibit 1, page 96) :

“For the faithful performance of the contract.”

It does not refer to the payment of labor and material claims. Likewise the contract does not provide for the payment of such claims. The notice is concerned only with a bond for the protection of the Commissioners.

10

The notice goes on to provide :

“It is the purpose of the Passaic Valley Sewerage Commissioners not to award the contract to any bidder who does not furnish evidence satisfactory to them as to his responsibility, and that he has sufficient capital, ability, experience and plant to enable him to prosecute same successfully, and to complete it within the time named in the contract.”

20

Manifestly, the object of the bond is to insure the public interest in the work, namely, its successful prosecution and timely completion.

The sentence following this quotation from the notice especially calls the attention of the bidders to Articles X, XI and XV of the contract. These articles contemplate liability of the contractor on account of violations of State and National laws and municipal ordinances ; and provide against the assignment of moneys payable under the contract and for the payment to the Commissioners by the contractor of losses or damages suffered on account of defective work or default in completion of the work within the time specified. It is not stated or in any way implied that the bond is intended to

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provide for the payment of laborers and materialmen.

2. The second purpose of the bond is to protect the commissioners from all claims arising out of the contract.

10 Article XVII clearly anticipates the possibility of the commissioners being sued on claims of materialmen and laborers :

20 "The Commissioners may keep any moneys which would otherwise be payable at any time hereunder, and apply the same, or so much as may be necessary therefor, to the payment of any expenses, losses or damages incurred by the Commissioners, and determined as herein provided, and may retain, until all claims are settled, so much of such moneys as the Commissioners shall be of opinion will be required to settle all claims against the Commissioners and their officers and agents, specified in Article XIII, and all claims for labor on the work and also all claims for materials used in the work, or the Commissioners may make such settlements and apply thereto any moneys retained under this contract. If the moneys retained under this contract are insufficient to pay the sums found by the Commissioners to be due under the claims for labor and materials, the Commissioners may, at their discretion, pay the same, and the Contractor shall repay to the Commissioners all sums so paid out. The Commissioners may also, with the written consent of the Contractor, use any moneys retained, due or to become due under this contract, for the purpose of paying for both labor and materials for the work, for

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which claims have not been filed in the office of the Commissioners. *While it is understood that the security required to be given by the Contractor is furnished by the Contractor by his giving the bond accompanying this contract*, the Commissioners, may nevertheless, if they shall deem it just and equitable so to do, cause any moneys retained, due or to become due to be held and applied to the payment for labor or materials for which security is required under the provisions of said section" (Exhibit 2, page 105). 10

The last two words of the above quotation refer to Article XIII which provides that the contractors shall indemnify and save harmless the commissioners from claims relating to labor and materials furnished for the work. 20

Considering the two sections together, it appears that there is an expressed stipulation that the bond is for the purpose of indemnifying the Passaic Valley Sewerage Commissioners against claims for material and labor furnished and that in the final analysis the commissioners expected the materialmen and laborers to look to them for the payment of their respective claims, either by filing such claims with them in the form of stop notices or by filing mechanic's liens against the work. To provide for such contingency, the commissioners retained the double right to pay such claims and call upon the contractor to repay same, failing which the bond in question was to be resorted to, or the commissioners could retain funds in their hands due or to become due to the contractor for a similar purpose. 30

In considering the purposes of the bond, it must be remembered that at the time the bond and contract were drawn the decision of Vice Chancellor 40

Stevens in the case of Blaw Steel Construction Co. vs. Passaic Valley Sewerage Commissioners holding that the Mechanic's Lien Law on Public Improvements (Compiled Statute Section 36 et seq., page 3315) did not apply to the Passaic Valley Sewerage Commissioners, had not been decided, and that the Commissioners recognized that the work was sub-

10 subject to the filing of claims under the Lien Law. This accounts for the language of Article XVII permitting the Commissioners to retain funds to meet *expenses, losses or damages* incurred by the Commissioners because of the failure of the contractor to carry out the terms of Article XIII, which simply indemnifies the Commissioners for claims *relating* to labor and material.

That counsel for appellant, as late as June, 1914, also recognized that the Mechanic's Lien Law ap-

20 plied to the Passaic Valley Sewerage Commissioners is indicated by the filing of a notice of lien by the Cockburn-McIlvrid Corporation, predecessor of the appellant herein (Exhibit 5, page 111).

The Mechanic's Lien Statute provides that any person, who as laborer, in conformity with any terms of any contract for any public improvement made between any person or persons and any city, town, township *or other municipality*, shall perform any labor or furnish any materials, shall

30 have a lien therefor upon the moneys in the control of the city, town, township or other municipality.

While the decision of Vice Chancellor Stevens decides that the Passaic Valley Sewerage Commission is not a "municipality" within the technical use of that word and therefore that the Mechanics' Lien Law does not apply, it fails to carry out the intent of the Legislature, as well as the decision in the case of Union Stone Company vs. Board of Freeholders, Hudson County, 61 N. J. E., 657, in which,

40 the Court after an exhaustive examination of the

use of the word "municipality," defines the meaning of such word as used in the Lien Statute as follows:

"Any public corporation whose functions include the making of public improvements whether in any other sense of the word 'municipality' the said public corporation could be properly included or not," 10

a definition which would bring the Passaic Valley Sewerage Commission within the scope of its effect. It is to be noted that the last mentioned case is not mentioned in the Vice-Chancellor's decision.

The case of Herman & Grace vs. Freeholders of Essex, 71 N. J. E., 541, which held that the Essex County Building Commission was the agent of a municipality and therefore subject to the Mechanic's Lien Law, was held not to apply in the Blaw Steel Construction Company case, because in the latter case there was a defect of necessary parties. It is the appellee's contention that if it should be decided that the Passaic Valley Sewerage Commission is not a municipality, it must be held that it is the agent of a municipality and therefore within the ruling of the case of Herman & Grace vs. Freeholders of Essex. 20

In any event until the Vice Chancellor's decision is approved by a higher Court, the question as to whether the Mechanic's Lien Law applies to the Passaic Valley Sewerage Commissioners is still undetermined. Even if the law of to-day precludes the Passaic Valley Sewerage Commissioners from the operation of the Lien Law, nevertheless, the terms of the bond and contract, as manifesting *the intentions of the parties thereto*, must be studied in the light of the laws existing in this state during and prior to the year 1912, when the bond was entered into. 30 40

That the appellant herein would have been properly protected by filing a stop notice with the Passaic Valley Sewerage Commissioners is shown by the cases of Stone Post Company vs. Corcoran, 77 Atl., 1031, and Van Nest vs. Hirsh, 93 Atl., 568, in the first of which Justice Swayze held that where a building contract which provides for the payment by instalments, and a stop notice is served, and instalments sufficient to pay the amount have been earned and are due under the contract, the claimant under the stop notice is entitled to recover the amount from the owner, although the contractor may subsequently default, and the owner, in completing the building under a provision to that effect in the contract, may be put to such expense that the balance of the contract price, after deducting the cost of completion from the payments already made, is less than the amount claimed by the stop notice.

The evidence shows that the plaintiff failed to file a stop notice and, after filing a notice of mechanic's lien, failed to perfect same by commencing an action within the period prescribed by the statute.

In construing the language of the bond in the present case the Court should be loath to extend and enlarge the liability of the surety in favor of one who has failed to avail himself of the adequate protection already provided by law and by contract.

The appellant abandoned the legal remedies available to it without ever being required or requested to do so by the attorney for the Passaic Valley Sewerage Commissioners (Exhibits 3 and 4, pages 109, 110, 111).

It is important to note that the request made by the appellant's attorney upon the Passaic Valley

Sewerage Commissioners to enforce the condition of the bond as to payment of materialmen by the contractor was never refused, but the attorney for the Passaic Valley Sewerage Commissioners suggested that he would be glad to receive the views of the attorney for the appellant as to the rights of the parties in the premises.

In any event, the decision below does not depend for affirmance upon the holding that the Passaic Valley Sewerage Commissioners are subject to the Lien Law. 10

### POINT III.

**Section 28 of the Compiled Statutes page 4059 permitting a third party not privy to the contract and who has given no consideration, to sue thereon, has never been extended to one who merely receives an incidental benefit and with whom the parties never intended to contract.** 20

The above statute is in derogation of the common law and must therefore be strictly construed.

The language of the Act itself restricts its application to one

“for whose benefit the contract is made.” 30

As the Court below well said (Decision, page 85, lines 4-14) :

“It seems to me that the clear intention of the Legislature in enacting the statute in question was to provide, if the third party is to be entitled to maintain an action upon the contract, that ‘the contract must be made for his 40

benefit *as to its object*, and he must be a party intended to be benefited,' as was said in the case of *Simpson vs. Brown*, 68 N. Y., 355."

The authorities in this State explaining the Act further restrict its scope.

10 In *Styles vs. Long*, 67 N. J. L., 413, 418, Mr. Justice Pitney says:

"But the rule entitling third parties to maintain an action for the breach of the contract is limited to those for whose benefit the contract was made and is not extended to third parties who indirectly and incidentally would be advantaged by its performance."

20 On a reconsideration of the case in the Supreme Court (70 N. J. L., 301, 305), Justice Swayze, in writing the opinion, after a unanimous decision of the Court, stated:

"The only effect of the decisions and the statute is that privity of contract is not requisite in order to maintain the action and the consideration need not move from the person for whom the contract is made.

30 "Neither the cases nor the statute go so far as to permit a suit upon contract to be maintained by persons with whom the defendant never meant to enter into contractual relations. It is not enough that the plaintiff may be benefited by performance of the contract; he can only maintain the action when the contract is made for him."

40 That this determination is identical with the opinion held by the Supreme Court of the United States is stated in the case of *Gibson vs. Victor*

Talking Machine Co., 232 Fed., 225-232 (March, 1916).

In *Chambers vs. Philadelphia Pickling Company*, 79 N. J. L., page 1, Chief Justice Gummere says:

“Under this statutory provision the sole test of the plaintiff’s right to maintain this action is whether or not the contract set out in the declaration was made for his benefit.” 10

Appellant in its brief uses the cases of *Cubberly vs. Cubberly*, 33 N. J. E., 82, affirmed 39 N. J. E., 514, and *American Malleables Company vs. Bloomfield*, 83 N. J. L., 728-736, to demonstrate that the laws of this State no longer require privity of contract or consideration passing from the promisee or a duty or obligation owed by the promisee in order to permit a third party to sue. This is not denied by the appellee, but the latter’s contention is that to enable a third party to sue on a contract, *it must have been made for his benefit and he must be the person with whom it was intended to enter into contractual relations.* 20

This contention the Court below, after a careful consideration of the law and facts involved in the present case, decided in the favor of the appellee (Decision, page 89, lines 3-5 and 19-29). 30

“It must be manifest that in each case the question is, what was the intention of the parties to the contract? \* \* \* From the internal evidence of the contracts themselves and the circumstances both of fact and of law which surrounded the parties at the time the contract was made, it seems perfectly clear that this was *a mere contract of indemnity running solely to the Passaic Valley Sewerage Commis-* 40

*sioners and was not intended to create any obligation in favor of the laborers and materialmen; and I so hold."*

*The appellant is attempting to establish a new and radical precedent in reversal of the hitherto long established rulings of the New Jersey courts.*

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#### POINT IV.

**The decisions in other jurisdictions have uniformly refused to permit materialmen and laborers to maintain an action upon similar bonds and contracts.**

20 In all decisions in this country, as well as in England, where the general principles mentioned in Point V herein are not involved, the right of a materialman or laborer to sue upon a similar bond or contract has been denied.

In a recent case in Minnesota, *Moore vs. Mann*, 130 Minn., 318 (July, 1915), in construing a bond which provided:

30 "If the said principal shall faithfully perform his said contract in accordance with its terms \* \* \* and shall pay as they become due all just claims for work, skill and materials to be furnished \* \* \* and shall save the obligee harmless from all costs and charges, \* \* \* then this obligation shall be void, otherwise to remain in full force and effect."

the Court said:

40 "We construe the bond to be one of indemnity only. D—was the sole obligee. \* \* \*

It did not intend to secure others who might do work. \* \* \* It did not intend to give anyone else the right to sue upon it."

In an earlier case in this same State, American Building & Loan Association vs. Waleen, 52 Minn., 23, a bond provided that the principal should pay or cause to be paid all claims or liens for labor and material furnished for the construction of a building and do all other acts and things necessary or required to be done. The Court construed this bond to be a contract of indemnity, not an absolute affirmative contract to pay all claims. 10

"In some of the early cases, the Courts, without, perhaps, giving due weight to the manifest purpose of the bond, as indicated by its provisions as a whole, and the relations to the parties of its subject matter, were inclined to lay hold of the language of a particular clause and because it was in the form of a stipulation to do a particular act or pay a certain sum to hold that the bond was not one of mere indemnity, but an affirmative contract to do the specified act or to pay the specified sum, but the tendency of the more modern authorities is to adopt as a cardinal principle to be applied in the construction of such bond that compensation can be given for loss actually sustained unless it is evident that the parties have stipulated for some other or more extensive remuneration and to give more weight to the general purpose of the bond as indicated by its provisions as a whole and the interest of the parties in the subject matter than to the precise form of words used in a particular clause." 20 30

The cases of First Methodist Episcopal Church vs. Eisenberg et al., 92 Atl., 141 (1914), and Board of Education of Bayonne vs. Mass. Bond Insurance Company, 97 Atl., 688 (1916), where the facts were almost identical with the facts in the present case, the Court sustained demurrers to the complaint on the ground that the plaintiff had  
 10 no cause of action.

The bond provided :

“Whereas said J. L. Eisenberg employs said contractors the above bounded obligors hereby further bind themselves to the payment of said contractors, materialmen and others employed in the erection of the building, etc.,

If the said J. L. Eisenberg shall in all respects fulfil and comply with the terms, conditions, stipulations and agreements on his  
 20 part in said contract contained and also in like manner with said plans and specifications, then the above obligation is void.

The Court said :

“The manifest purpose of the bond was protection to the obligee, the First Methodist Episcopal Church of Huntington. It and the appellants are the sole parties to the obligation as assumed by them. There is no covenant or  
 30 promise in it by them to any sub-contractor or materialman that they will pay him upon the default of the contractor.”

In Illinois, the case of City of Sterling vs. Wolf, 163 Ill., 467, the Court held that the materialman or laborer could not sue the surety, and said :

“The rule has been re-announced by this Court in almost numberless cases that the undertaking of a surety is strictly construed  
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and may not be extended by implication or construction.”

In Oregon and Washington, in the cases of *Brower Lumber Company vs. Miller*, 28 Ore., 565, and *Stetson vs. McDonald*, 5 Washington, 496, a stipulation in a bond for the payment of materials and laborers was held not to give the materialman or laborer right of action against the assured. 10

In *Greenfield Lumber Company vs. Parker*, 159 Ind., 571, an agreement on the part of the contractor to provide materials and labor and to construct a schoolhouse at his own cost and that the town should not be answerable or accountable therefor, was held not to be equivalent to a promise to pay debts contracted and an action could not be maintained by materialmen.

In the case of *Yorke & Crowley vs. DeLong*, 157 Wis., 390 (1914), a contract which provided that the contractor should furnish all materials, etc., and that the owner could deduct amounts to pay claims for same, and where the bond was conditioned upon the faithful compliance with all the terms of the contract, the bond was held to be intended for the obligee and not for the materialmen. 20

Massachusetts has refused to allow one not a party to an instrument under seal to sue thereon.

*Congress Construction Company vs. Worcester*, 182 Mass., 355. 30

The English cases have refused to extend the principle that a stranger to the contract cannot sue.

*Tweedle vs. Atkinson*, 1 B. & S., 393;  
*Rotherham Allum & Chemical Company*,  
 25 Ch. D., 103;  
*Gandy vs. Gandy*, 30 Ch. D., 57. 40

**POINT V.**

**A summarization of the laws in the various states where decisions permitting materialmen and laborers to sue have been sustained, gives rise to the following general principles, none of which is involved in the bond or contract under discussion.**

1. The materialman or laborer is permitted to sue only where there is no other method of protection afforded by the laws of a particular state or the terms of the contract involved.

The appellant company might have secured adequate protection by properly filing a claim with the Commissioners or by filing and duly perfecting a mechanic's lien against the work.

2. Statutes permitting such suits, thereby extending a Surety's liability, at the same time restrict such liability either by a shorter period of limitation or requiring notice, etc.

There is no restriction upon a surety's liability in New Jersey, but the full common law liability is enforceable, making it possible for an action to be brought by any laborer or materialman against the surety company at any time within sixteen years from the time the cause of action accrued.

3. In the majority of cases, the bond either specifically provides that it shall be payable to laborers and materialmen or to the parties in interest, or fails to mention to whom payment of the penal sum is to be made.

The bond in the present case provides that payment is to be made to the obligee, the Passaic Valley Sewerage Commissioner.

4. In many cases where a suit of this nature has been allowed, the pleadings and the proofs show that the labor or materials were furnished in reliance upon the terms of the bond, in other words the determination is based upon the doctrine of estoppel.

There are no such allegations or proof offered by the appellant.

10

A summary of the universal rule applied to contractors' bonds cited by the appellant in his brief (page 15), from 30 American & Eng. Encyclopedia of Law, page 1289, rather supports the contention of the appellee, as the New Jersey cases cited above unquestionably deny the right of suit to an incidental beneficiary.

"Such bonds frequently require the contractor to pay all claims for material used and wages of all laborers, etc., employed by the contractor upon the work. Under such conditions, the right of the persons who furnished materials or performed labor for the contractor to maintain an action upon the bond to enforce their claim, depends on the general rule prevailing in the jurisdiction in which the suit is brought with regard to the right of *incidental beneficiaries of a contract*, though not parties or privies thereto, to maintain an action on the contract."

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#### POINT VI.

**The cases relied upon by appellant all involve one or more of the principles mentioned in Point V herein.**

A consideration of the cases cited by appellant in his brief (pages 18-34), show them all to be based

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upon one of the principles above mentioned, none of which exist in the present case.

10 The case of *Ochs vs. Carnahan*, 80 N. E., 163, a lower Court decision, is not in point, as the Court held that the bond was clearly intended for the benefit of third parties. Even so, the Court felt the necessity of further justifying its position by referring to the case of *King vs. Downey* (24 Ind. Ap., 262), which is an authority to which a great number of cases throughout the various States directly or indirectly refer. The reasoning in this decision is more reconcilable to the obvious intention of the Court to protect materialmen and laborers than to the language of the bond and contract involved.

20 In the case of *U. S. Fidelity & Guaranty Company vs. American Blower Company*, 84 N. E., 555 (1908), a closer consideration of the case shows that the Court arrived at its conclusion permitting the materialmen to sue because the materialman had no right to file a mechanic's lien or to file a claim to protect himself.

30 The case of *United States vs. National Surety Company*, 92 Fed., 549, is not in point because of the Federal statute giving materialmen the right to sue the surety on all bonds made for the protection of laborers and materialmen. The quotation cited by the appellant in his brief clearly shows that it was intended that the materialman or laborer and not the obligee was the real party in interest.

"The United States is merely a nominal plaintiff,—the government's name being used as obligee in the latter agreement merely as a matter of convenience."

40 The quotation cited from the case of *Gastonia Engineering Company*, 131 N. C., 363, commences with the words:

"Though no mechanic's lien could be filed against the property in the hands of the town,"

a further examination of this case will show that it is based upon a line of old cases in Indiana following *King vs. Downey* (supra), permitting an action because no protection whatsoever was afforded the materialman unless he was permitted to sue upon the bond. 10

The most recent case in North Carolina, *Manufacturing Company vs. Andrews*, 165 N. C., 284 (1914), distinguishes the *Gastonia* case, saying:

"The case also involved conditions which made it impossible for materialmen and laborers to protect themselves by filing liens for the reason that the property belonged to a municipality and was not subject to liens." 20

The bonds upon which the cases of *Philips vs. Stewart*, reported in 195 Pa. State, 309, 198 id., 422, and 201 id., 526 (1901), are all required by an ordinance which provided that:

"Any person supplying labor or material shall have a right of action and shall be authorized to bring suit in the name of the city." 30

Compared with these cases in the same jurisdiction are the far more recent cases of *First Methodist Episcopal Church vs. Eisenberg et al.*, supra, and *Board of Education of Bayonne vs. Mass. Bond & Insurance Company*, supra (1916), both of which cases held that materialmen and laborers had no right to sue even where the bond provided that the obligors bound themselves to the payment of contractors, materialmen and others employed in the work. 40

The bond in the case of Union Sheet Metal Works vs. Dodge, 129 Cal., 30, removing any ambiguity regarding the rights of laborers and materialmen, specifically provided that:

10            “This bond shall enure to the benefit of any and all persons who labor for or furnish materials.”

Further the Court held that as the obligors knew, at the time of making the bond, that no liens could be filed by the plaintiff against the building, the obligor was estopped from denying the plaintiff's right of suit.

The language of the bond in the case of St. Paul vs. Von Phul, 133 Mo., 561, is

20            “pay to the *proper parties* all amounts due for material and labor used and employed in the performance thereof.”

In School District of Kansas City vs. Livers, 147 Mo., 580, the bond distinctly states that it is of dual nature and is

“for the benefit of any parties who might furnish materials”

as well as the School District.

30            In Lyman vs. City of Lincoln, 38 Neb., 794, the Court permitted the materialmen to sue on the grounds that otherwise the bond would be meaningless, as the obligee could suffer no damages as no mechanics' liens could be filed against the work.

In this case it would seem that in arriving at this conclusion, the Court was guided by its desire to afford some protection to the materialmen and laborers, rather than by the language of the bond.

40            The cases of Knapp vs. Swaney, 56 Mich., 345, and Baker vs. Bryan, 64 Iowa, 561, would appear

to support the argument advanced in this brief rather than appellant's contention:

"That if one makes a promise to another for the benefit of a third person, such third person may maintain an action upon such terms."

The following States have statutes permitting materialmen or laborers to sue upon a bond given for the proper performance of a contract for a public improvement by a contractor, the citation of cases from those States subsequent to the enactment of such statutes would be inapplicable. 10

California: L. 1911, Chap. 734, page 1422.

Indiana: Act 1907, page 167.

Iowa: 1897, Section 3467 (Code of 1873, Section 255).

Kansas: General Statutes 1909, Section 6255 (Gen. St., 1901, Section 5129). 20

Michigan: Howell Statutes, Sections 13839-42 (Act 94 of Laws of 1883).

Oregon: Laws 1903, page 256.

Utah: Comp. St., 1907, Section 1400, X.

#### POINT VII.

**This action is an attempt on the part of the appellant to obtain an inequitable preference over the other creditors of the contractor; and if such an action lie, a further result will be that the Passaic Valley Sewerage Commission, the only beneficiary intended to be protected, and the one who paid the consideration for the bond, will be ousted from its priority and probably from all protection under the bond.** 30

To allow one of the contractor's creditors to sue upon a bond and perhaps to entirely exhaust this 40

security, would be preferring one creditor at the expense of the others. The Passaic Valley Sewerage Commissioners alone, is in a position to know all to whom the Healy Contracting Company was indebted and after a recovery on the bond, to equitably distribute the proceeds thereof among such creditors.

10

The case of Buffalo Cement Company vs. McNaughton, 35 N. Y. S., 453, affirmed 156 N. Y., 702, mentioned by the Court below as an illuminating case on the evil consequences that would flow from an adoption of the rule contended for by the appellant (page 89, lines 29-37), but upon which counsel for the appellant would have us believe that the lower Court chiefly relied in reaching its conclusion (Appellant's Brief, page 16, lines 18-25) states:

20

"The conditions of the bond are very broad. Sureties in terms covenanted that Green (the principal) shall pay for all materials which he shall purchase and use about the work and that in case he fails to do so, the materialmen may bring an action on the bond in their own name to recover for their material.

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\* \* \* In some of the States of the Union statutes have been passed giving a cause of action in favor of materialmen in such a case as this. A like provision may be found in city charters but these statutes will be found to contain provisions, looking to the protection of the sureties—in some instances to a short statute of limitations. The plaintiff is not aided by any such provisions either in our city charter or in statute in our state. If the plaintiff is entitled to recover in this case, the bond

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being a sealed instrument, it would seem to follow that the twenty-year statute of limitations applies. If so, it would follow that the plaintiff or any others who may have furnished material or labor upon the sewer could at any time during that period maintain an action against the securities to recover anything due them from the contractor. Such actions might have been brought before the completion of the sewer and the penalty named in the bond exhausted and the city thereby deprived of the protection which the bond was intended to give to it."

10

Nothing in the evidence shows that the appellant in furnishing the materials was victimized by reliance on the Healy Contracting Company or its surety. In fact, the evidence shows that most of the materials furnished by the appellant were supplied not only after the Healy Contracting Company was in the hands of a receiver, but even with a few days of the abandonment of the work by such receiver because of the lack of funds (page 59, lines 10-21).

20

One who continues to supply materials to a company in the hands of a receiver without inquiring into the credit of such company, does so at its peril and is certainly not entitled to ask court for a preference over other creditors who may have furnished materials at an earlier period and without a realization of the condition of the contractor.

30

If the appellant is permitted to maintain this suit, the consequence will be, as the Court below stated, that there will exist:

"No priority in favor of the public body for the security for which it contracted and for which it had expended the public money. In

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10 the cases of *U. S. vs. Heaton*, 124 Fed. Rep., 699, decided by Judge McPherson, and *United States vs. U. S. Fidelity & Guaranty Co.*, decided by Judge Cross, both Judges held that under a bond given in compliance with a Federal statute, conditioned for the performance of work and the payment for labor and materials, the United States had no priority over materialmen."

### POINT VIII.

#### **The surety is not liable for material furnished to the receiver of the Healy Contracting Company.**

20 The appellee respectfully submits that the question of liability for goods furnished to the receiver is not before this Court on the present appeal, in view of the fact that the Court below did not consider this question (pages 93, lines 19-29). But in order to meet the argument advanced in Point 8 of appellant's brief, the appellee begs to submit the following:

1. The receiver does not represent the insolvent principal on the bond.

30 "A receiver represents neither the claimant or the insolvent, but occupies a neutral middle ground subject only to the orders of the Court." Stearns on Suretyship, Sec. 244.

40 "A receiver who is a bare custodian of property for safe keeping does not represent the parties having the legal title and does not stand as their personal representative responsible for the fulfillment of their personal contracts" (34 Cyc., 258).

2. The appointment of a receiver without the consent of the surety was such an alteration in the contract of indemnity as would discharge the surety.

“If the contract of the principal is changed, or enlarged by legislative enactment, or by order of the Court, the Surety is nevertheless discharged” (32 Cyc., 226). 10

“A bond to pay the obligation of a firm does not cover a new member.”

Parham Sewing Machine Co. vs. Brook,  
113 Mass., 195.

Bensinger vs. Wren, 100 Pa., 500.

Manhattan Gas Co. vs. Ely, 39 Barb., 174.

3. Appellant in contracting with the receiver did so with notice of limitations of his authority and as with a new party, and not the Healy Contracting Co. The receiver himself had his own bond for the proper discharge of his duties. 20

“All persons dealing with receivers do not at their peril and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the Court.”

Lehigh Coal & Navigating Co. vs. Central  
R. R., 35 N. J. E., 426. 30

“A receiver does not simply by virtue of his appointment become liable on the covenants and agreements of the debtor defendant. He is entitled to a reasonable time in which to elect whether he will adopt the contracts of the debtors and make them his or whether he will reject them. If he elects to adopt a con- 40

tract the receiver becomes vested with title to the rights thereunder, and a privity of estate is thereby created between the receiver and the other party to the contract by which the former becomes liable upon the contract."

High on Receivership, Sec. 328.

10

"A receiver authorized by order of the Court to finish and complete the outstanding contracts makes the expense incurred thereafter chargeable against the receivership."

Nason Co. vs. Garden, 52 N. Y. A. D., 363.

20

The fact that the majority of the material furnished to the receiver was furnished within a few days before the date upon which the receiver abandoned the contract indicates the utter recklessness with which the plaintiff entered into such a contract without regard for the solvency of the one with whom it was contracting.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed and the appellee's motion for judgment be granted.

ROBERT STRANGE,

Attorney for Defendant-Appellee.

30

STUART MCNAMARA,  
of the New York Bar,  
of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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STANDARD GAS POWER CORPORATION,

*Plaintiff-Appellant,*

*vs.*

NEW ENGLAND CASUALTY COMPANY,

*Defendant-Appellee.*

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**BRIEF FOR APPELLANT.**

**Statement of the Case.**

This appeal brings up a judgment for defendant entered upon findings by Judge Speer, before whom the case was tried without a jury, at the Hudson Circuit.

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The following facts were established:

Under date of October 8, 1912, the Passaic Valley Sewerage Commissioners gave notice that at a designated time and place they would receive proposals in writing for constructing Section 8 of the Main Intercepting Sewer of the Passaic Valley sewerage system, and that all bids must be made upon a specified form of proposal which annexed as a part of it the form of contract and bond which would have to be executed by the successful bidder.

30

This notice to bidders further provided:

"It is the purpose of the Passaic Valley Sewerage Commissioners not to award the contract to any bidder who does not furnish evidence satisfactory to them as to his responsibility, and that he has sufficient capital, ability, experience and plant to enable him to

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prosecute the same successfully, and to complete it within the time named in the contract" (Ex. 1, p. 95).

10 Healey Contracting Company made its bid upon this form and the bid being accepted entered into contract with the Commissioners upon the prescribed form, dated December 10, 1912, and at the same time entered into a bond to the Commissioners in the sum of \$20,000, with the defendant New England Casualty Company as surety, which bond is in the form annexed to the proposal and prescribed by the Commissioners as part of the bid.

The pertinent parts of the contract are printed as Exhibit 2, p. 100; the bond is printed as an annex to the complaint, p. 11.

This bond runs to the Passaic Valley Sewerage Commissioners with the following condition:

20 "Now the condition of this obligation is such that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed *and shall also pay for all labor performed and furnished, and for all materials used in carrying out of said contract*, then this obligation shall be void; otherwise it shall remain in full force and virtue."

30 The Healey Contracting Company entered upon the performance of the contract and in the course thereof purchased from William McIlvrid as Receiver of the Cockburn Company tunnel plates and other material used in the construction of the sewer, of the agreed price of \$2246.75.

40 All the business and assets of McIlvrid as Receiver of the Cockburn Company were subsequently taken over by a new corporation, incorporated under the name of Cockburn-McIlvrid Corporation, which corporation subsequently changed its name to Standard Gas Power Corporation, and is the plaintiff named in this suit.

On October 21, 1913, Healey Contracting Company (a New Jersey corporation) was adjudged insolvent in a statutory insolvency proceeding pending in the Court of Chancery, and Thomas L. Raymond was appointed Receiver under appropriate orders of the Court vesting in him all the property of the insolvent company and directing him to continue "all the operations of the contract" for the construction of the sewer (Exs. 16, 17, 18).

10

Under these Court orders the Receiver purchased additional tunnel plates from the plaintiff of the agreed price of \$5981.70. Not all of these latter plates were actually used, however, in the building of the sewer.

The agreed price of such plates as were actually used is \$3862.25.

These plates included in the two transactions of the aggregate price of \$6,109.30 constitute the permanent lining of the tunnel and have become a permanent part of this public work. This suit is brought to recover therefor upon the contractor's bond.

20

The Receiver did not entirely complete the contract but on March 25, 1914, abandoned the work by order of the Court (Ex. 19).

The work has since been fully completed (p. 16, l. 30).

There is nothing in the case to indicate that either the Commissioners or any other creditor of the Contracting Company assert any claim against the surety on this bond.

30

If any such claim had been asserted the defendant could have brought such claimants into the suit by adding them as parties under Sect. 4 to 9 of the New Practice Act, but no such application

Plaintiff duly filed notice with the Commission-  
tion was made.

ers, with bond (Ex. 5, Ex. 6, p. 111), in compli-

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ance with the Municipal Lien Act, and thereafter duly brought suit to foreclose this statutory lien, which suit is controlled by the decision of Vice Chancellor Stevens sustaining a plea by the Sewerage Commissioners to a similar bill filed by another creditor, on the ground that the Passaic Valley Sewerage Commissioners, although created a body politic and corporate, are not a municipal corporation within the meaning of the Municipal Lien Act. See *Blau Steel Co. vs. Healey Contracting Co.*, a copy of which unreported opinion is annexed hereto.

In any event the prosecution of this municipal lien claim against the moneys retained by the Commissioners would have been a worthless remedy, even had Vice Chancellor Stevens sustained the creditor's right to lien, because the expense of completing the contract exhausted the money in the hands of the Commissioners and there was nothing left to satisfy liens had they been sustained.

Before bringing this present suit, plaintiff requested the Commissioners to bring suit in their own name upon this bond, to recover the moneys due plaintiff for materials used in carrying out said contract (Ex. 3, p. 109).

This request was referred to counsel for the Commissioners, Mr. Adrian Riker, who raised the contention that the Commissioners were not entitled to enforce this bond for the benefit of creditors of the contractor, stating that the "bond \* \* \* in its condition is apparently a contract for the benefit of third parties. It would seem that it might be enforceable under our statute by such third parties in their own name" (Ex. 4, p. 110).

The plaintiff thereupon brought this suit in its own name pursuant to the suggestion of counsel for the Sewerage Commissioners.

## POINT I.

**The suit is properly maintainable by the plaintiff although not named in the bond, for the reason that plaintiff is one of a class for whose benefit the bond was given.**

The statute is now codified as Section 28 of the Practice Act and reads as follows:

“Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any Court \* \* \* notwithstanding the consideration of such contract did not move from him.”

10

This rule was first enacted as a statute in Pamphlet Laws 1898, p. 481.

Later it was enacted under a separate title as “An Act concerning contracts”, P. L. 1902, p. 709. The revised Practice Act of 1903 contains the provisions above quoted. P. L. 1903, p. 541.

20

The question involved in the present case is whether the bond with condition that the principal obligor “shall *also* pay for all labor performed and furnished and for all materials used in carrying out of said contract” was intended as an agreement by the contractor and his surety to pay for all such labor and materials or was intended as a mere contract of indemnity to the Sewerage Commissioners to indemnify the latter against any loss which they might sustain by reason of the failure of the contractor to make any such payment for labor and materials used on the work.

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The Court below decided against the plaintiff apparently upon the ground that the bond was solely for the benefit of the obligee, viz.: the Sewerage Commissioners; that the bond is a mere contract of indemnity for the benefit of the Sewerage Commissioners and that the laborers and material-

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men under the contractor if they received a benefit at all through the enforcement of the bond, would receive the same indirectly and that said bond was not taken primarily for their benefit.

There have been many decisions in other States dealing with more or less similar bonds and contract provisions, by far the greater number and weight of which sustain plaintiff's contention. Some decisions to contrary effect were cited by  
**10** the defendant below and are referred to in the Court's decision. Examination of these latter decisions disclose that the rule prevailing in such jurisdictions permitting the enforcement of a contract by a third party is qualified by restrictions not prevailing in New Jersey, at least since the enactment of the above statute.

In *Chambers vs. Philadelphia Pickling Co.*, 79 N. J. Law, p. 1, affirmed 83 N. J. Law, p. 543, plaintiff sued the owner of a factory for damages  
**20** resulting from personal injuries. The suit was contested. Pending trial the defendant sold the business and property to a corporation, under a contract which, among other things, obligated the vendee to pay the business debts of the vendor, together with all claims for damages arising from the operation of the business, including plaintiff's claim then in suit. After recovering judgment against the original defendant, plaintiff brought suit against the vendee corporation, relying on  
**30** above contract. Chief Justice Gummere in applying the above statute in the Supreme Court said:

"Under this statutory provision the sole test of the plaintiff's right to maintain this action is whether or not the contract set out in the declaration was made for his benefit. That it was so made is, we think, beyond question. A contract made between A and B, by the terms of which B agrees to pay a debt which A owes to C, is a contract made for the benefit  
**40** of C."

The dissenting opinion in the Court of Errors

indicates that it was there contended as in the present case that the contract was one of indemnity, since it was not to be supposed that the vendor intended to benefit a plaintiff whose suit she was then resisting.

Likewise in *Joslin vs. N. J. Car Spring Co.*, 36 N. J. Law, 141, which was decided independent of any statutory provision, an agreement of a vendee of business property to pay all liabilities of the vendor, was held to be a contract intended for the benefit of a claimant against the vendor whose claim was denied by the vendor, and for whom there was no actual benevolent purpose. 10

The Court below seems to have been influenced largely by the fact that the conventional words of obligation in the bond are to the Commissioners only.

The weight of authority is, however, that the intent and purpose of a bond is to be discovered from the condition and that the obligee need not have any interest in the recovery and may be a mere trustee for those beneficially entitled. 20

The rule is thus stated in Cyc., Vol. 5, p. 820:

“One who is designated in a bond as the obligee is entitled to sue thereon though the bond may be for the use and benefit of a third party and the fact that the obligee designated in a bond has no beneficial interest therein is immaterial. In some jurisdictions, however, the action may be brought in the name of the real party in interest whether he possesses the legal title or not.” (Citing cases.) 30

In *State vs. Wood*, 51 Ark., 205, a statute required a bond with a specified obligee. The specified obligee was not named. Held, p. 205:

“The condition which shows the design of the bond is the important requirement in such an undertaking, and when that is properly framed, the naming of an obligee is, as Judge Cooley expressed it, in delivering the judgment 40

for the Supreme Court of Michigan, 'the merest formality possible, so that if the instrument omitted to name one \* \* \* the substance of the undertaking would remain.' *Bay County vs. Brock*, 44 Mich., 45. The substance remaining, how can the bond be void for informality? \* \* \* And it is immaterial in such cases that the party beneficially interested is not named in the instrument but is undisclosed or unknown. Pomeroy on Remedies, etc., Sec. 177."

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In *Board of Education vs. Grant*, 107 Mich., 151, a statute required a contractor on public work to give bond to the State to pay laborers and materialmen. The bond, however, named the Board of Education as obligee. Suit brought for the use of laborers and materialmen; held enforceable.

"The obligor has consented to make the Board of Education instead of the State the trustee for the interested parties."

20

In *Bay County vs. Brock*, 44 Mich., 45, in an action on a Sheriff's bond given to the wrong obligee, Judge Cooley says (p. 49):

"The obligee is not named because of any interest in the condition *but merely that there may be a promisee and a party in whose name to bring suit*; nothing of importance depends upon its being the State rather than the county; the condition is the important requirement and the naming of an obligee is the merest formality possible. \* \* \* "

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In *Sweetser vs. Hay*, 68 Mass., 49, an official bond was given to the wrong obligee and action thereon sustained, the Court saying (p. 55):

"Our opinion is that the bond in suit is valid; that the defendants have made the plaintiffs trustee for the Town of Stoneham, and that the plaintiffs are entitled to maintain this action for the benefit of the Town."

40 In *Close vs. Farmers Loan & Trust Co.*, 195 N. Y., 92, 87 N. E., 1905, a bond intended to in-

dennify several litigants named one only as obligee. In a suit brought for the benefit of all held that the obligee was trustee for the benefit of all intended to be covered. The Court says:

“We do not regard the name of the obligee as important, because whatever name was inserted, the clear intention was to secure all persons whom the Court by its order sought to care for. In fact, it was for the benefit and protection of every person who had a direct pecuniary interest in the faithful performance by the principal of his duties as such trustee under said will. It might well be that all such persons were not in being when the bond was given, yet they would not lose the benefit of the protection provided by the Court because they were not designated as obligees.”

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In *Stephenson vs. Monmouth Mining & Mfg. Co.*, 84 Fed. Rep., 114, the bond did not name the proper obligee.

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Pg. 118: “The objection that the city as obligee might by conduct or consent release or discharge the sureties on this bond without the consent of those interested is unmaintainable; so far as the bond is for the protection of the city it may deal with it as it chooses, but so far as it is for the benefit of third persons, it is a mere trustee and could do nothing which would legally discharge the bond or affect the interest of beneficiaries.”

In *Holt vs. United Security Life Ins. Co.*, 76 N. J. L., 585, E. & A., defendant agreed to loan money to Holt upon bond and mortgage and other security, which loan was known to be for the benefit of a third party. The defendant afterward refused to make the loan, which caused injury to the third party. Holt brought suit to the use of the third party. Objected that plaintiff Holt was not injured. Chancellor Pitney says (p. 589):

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“Whether it should be brought in the name of Holt is a purely technical question and de-

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pend upon whether the contract was in form made with Holt. We think there was at least evidence that it was so made in form. \* \* \* Under strict common-law rules of practice and pleading it would be necessary in such a situation to bring the action in the name of Holt as the party with whom the contract was made, and it would be proper for him at the same time to declare a trust in favor of Chapman for the proceeds of the suit. Such a trust is properly declared by reciting in the proceedings that Holt sues for the use of Chapman. \* \* \* Therefore the present action might have been brought in the name of Chapman, without the use of Holt's name. But the statute is permissive, not exclusive, and we see no reason to hold that the common law method may not still be pursued.

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"Moreover, the objection, if it were valid, relates to the merest matter of form, not at all affecting the fair trial and determination of the real question in controversy; and therefore if it had been deemed tenable it ought simply to have led to an amendment in the trial court, or, failing that, in this court, under the very liberal policy prescribed by our Practice Act respecting amendments."

20

Applying the reasoning of the above cases to the present controversy, we submit that the extent of the defendant's obligation is to be deduced from the condition of the bond, and if the condition by apt words shows an intent to confer a benefit upon materialmen and laborers, the latter are entitled to recover either in their own names under the contract or in the name of the obligee as their trustee.

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**POINT II.****The language of the condition of the bond imports a direct benefit to the laborers and materialmen.**

The Court below held to the contrary apparently upon the ground that since the bond was literally payable to the obligee, any benefit which might accrue to the creditors would be indirect.

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The plain language of the condition is, however, that the obligor shall pay for all labor and for all materials. Plainly the language means that payment be made to those to whom payment is due, viz.: the creditors. This being a public work the property was not threatened with mechanics' liens. Even had it been determined that the contract was subject to the operation of the so-called municipal lien law, nothing more than the contractor's money in the hands of the Commissioners could be collected by such creditors. The Commissioners had no property or interest to be protected by such a provision in the bond. No other motive could have actuated them in requiring this provision other than the desire that there should be no complications between the contractor and his creditors which might interfere with the work and, perhaps, the sentimental desire to make sure that materialmen and laborers who contributed to this public work should not go unpaid. Neither purpose could be realized unless these debts are collectible out of the bond. If the Commissioners recovered in their own names under this condition of the bond it could not be for their own benefit but they would be regarded merely as trustees for the materialmen and laborers. Either this clause is enforceable for the benefit of such creditors or it is not enforceable at all and was from the beginning meaningless.

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We think it clear that the direct primary purpose of the stipulation was to make sure that the contractor would pay his debts.

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The advantage which the Commissioners might realize from such payment is wholly secondary. It explains the motive for their entering into the contract but does not at all limit or restrict the object of the contract which they made.

It is difficult to see any ground on which an agreement to pay to a man his debt, either directly or through the intervention of a trustee, is not an agreement for his benefit.

10 The Court below cited as authority for its finding that this bond was not intended to confer a benefit on material and labor creditors, the cases of *Styles vs. Long Co.*, 67 N. J. Law 413, 418; 70 N. J. Law 301, 305; *American Malleables Co. vs. Bloomfield*, 83 N. J. Law 728, 736; *Lawrence vs. Union Ins. Co.*, 80 N. J. Law 133.

20 *Styles vs. Long Co.* was an action of tort brought by a member of the public injured in traveling over a bridge under repair. The repair work was being done by defendant company, under a contract with the County Freeholders, under which the contractor agreed to maintain a temporary roadway, and to assume all risks pertaining to its construction and use. The Court held that the above cited statute did not apply to actions of tort. In the course of the opinion, the Court says that in any event the statute does not go "so far as to permit a suit upon contract to be main-  
30 tained by persons with whom the defendant never meant to enter into contractual relations."

In the present case the principal obligor on the bond did intend to enter into contractual relations with his materialmen and laborers.

*American Malleables Co. vs. Bloomfield*, 83 N. J. Law 728, is, we think, an authority supporting the present plaintiff. A railroad had been constructed through Bloomfield at grade with a commercial siding or spur to the manufacturing plant  
40 of the Malleables Company.

Under appropriate legislation the Town and the Railroad Company entered into a contract for the elimination of grade crossings by elevating the track. One of the terms of the contract provided for a new spur to the factory. There was nothing to show that the factory owner had any legal right to the old spur. After the original contract between the Town and the Railroad, both parties thereto attempted to modify it, among other things, by the elimination of the proposed new spur to the factory. 10

The opinion of this court summarizes the rule laid down in *Styles vs. The Long Co.* as follows:

“ \* \* \* that one, not a party to a contract, has no status to sue upon it, if he be a person with whom the contracting parties never meant to come into contractual relations, and that a possible benefit to such party by the performance of a contract is not enough to give him the right to maintain an action upon it.” 20

The Court found that this elevation contract, to the extent that it provided for the spur, was a contract for the benefit of the factory owner.

“It is not an instance of third parties being merely indirectly and incidentally advantaged through performance of the contract.”

In *Lawrence vs. Union Ins. Co.*, a mortgage contained a covenant that the mortgagor would keep the building insured and assign the policy to the mortgagee, and that in default thereof the mortgagee might effect such insurance. The mortgagor neglected to insure, whereupon the mortgagee took out insurance “on his mortgagee interest.” After loss the mortgagor sued the Insurance Company on this policy. Held that the Insurance Company never insured or intended to insure the interest of the mortgagor. 30

This case seems wholly inapplicable in its facts to the present case. 40

### POINT III.

**It is no objection to the suit that the parties to be benefited are not specifically named in the contract nor capable of ascertainment until a later date.**

10 In *Whitehead vs. Burgess*, 61 N. J. Law 75, the owner of a stallion, as an inducement for a contract of service, promised to pay \$750 to the owner of the first one of the foals of the stallion which should trot a mile in a specified time.

Plaintiff purchased the foal from the owner of the mare with whom this contract was made and thereafter brought suit as the party intended to be benefited thereby. Held entitled to recover under *Joslin vs. N. J. Car Spring Co.*, *Supra*, Justice VanSyckel saying (p. 77):

20 "The fact that the person to whose benefit the promise may enure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it."

### POINT IV.

80 **The great weight of authority in other jurisdictions sustains the right of materialmen and laborers to recover upon similar bonds or contract stipulations.**

The practice or policy of securing by a provision of the contractor's bond the payment of laborers and materialmen on public work is now well established in many of the states.

40 The underlying reasons, as pointed out in decisions dealing with such contracts, may be summarized as follows:

That the general public should not be enriched with public improvements constructed with materials and labor, for which payment has not been made;

That it is to public advantage to require the contractor to give security in advance to materialmen and laborers that they will be paid, for presumably the contractor will be facilitated in obtaining his material and labor and obtain better terms thereby, and the contractor will, therefore, presumably be enabled to offer better terms to the public;

10

That if materialmen and laborers are not secured they are more likely to cease furnishing such material or labor in case of non-payment during the progress of the work, and the public work be thereby delayed.

That the requirement of such a bond tends to secure contractors of greater financial responsibility than otherwise would be the case.

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This policy has resulted in an Act of Congress making it obligatory upon all contractors for United States Government work to give such a bond and the legislatures of a number of the States have enacted similar laws.

In the cases hereafter cited wherever there was a statute in force at the time of giving the bond, requiring the same that fact is noted.

It is believed that the general rule is properly summarized in the following quotation from 30 Am. & Eng. Ency. of Law, p. 1289:

30

“Such bonds frequently require the contractor to pay all claims for materials used and the wages of all laborers, etc., employed by the contractor upon the work. Under such conditions the right of the persons who furnish materials or perform labor for the contractor to maintain an action on the bond to enforce their claims depends on the general rule prevailing in the jurisdiction in which the suit is brought with regard to the right

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of incidental beneficiaries of a contract, though not parties or privies thereto, to maintain an action on the contract." Citing many cases.

The rule in *Cyc.* is stated as follows: Vol. 6 *Cyc.* p 83:

10 "On default of the builder, in cases where the contract requires him to pay for all labor and material furnished, a right of action directly against the sureties accrues to unpaid laborers, materialmen and subcontractors."

The authorities cited from other States by the Court below as denying a recovery upon such bonds, upon examination, are rested upon a somewhat narrower and more limited rule authorizing beneficiaries of a contract, who are not parties thereto, to sue, than the rule prevailing in New Jersey.

20 The case of *Buffalo Cement Co. vs. McNaughton*, 35 N. Y. Supp. 453; affirmed 156 N. Y. 702, apparently was chiefly relied upon by the Court below and is typical of all of the other cases cited as denying the right of plaintiff to sue under a contract similar to the one now under consideration.

30 In that case the bond obligated the principal contractor to pay for all materials which he should purchase and use about the work, and provided that in case he failed so to do the materialmen might bring an action on the bond in their own names to recover for the material.

The right of a materialman to recover was denied upon the ground that there was no privity between the materialman and the promisee in the bond.

40 The other cases cited in the opinion below are based on the same qualification of the rule, namely that no matter how specific the promise to benefit a third party may be or how direct the benefit nevertheless it is unenforcible unless the promisee

owed to the third party to be benefited some debt or duty with respect to which the promise is made.

We submit that no such limitation is possible in New Jersey under the statute which gives an action to "any person for whose benefit a contract is made."

Even before the enactment of the statute, the rule had been enforced in favor of beneficiaries to whom the promisee was under no obligation.

In *Cubberly vs. Cubberly*, 33 N. J. Eq. 82, affirmed on opinion below, 39 N. J. Eq. 514, certain next of kin of a testatrix made an agreement with one of their number employing him as their attorney to manage a contest of decedent's will, and to pay him one-half of all that might be recovered for them, he agreeing, in turn, to divide such compensation equally with his brother and sister who were in needy circumstances. The brother and sister had no knowledge of this agreement nor did they render any services in connection with the contest. The agreement to divide the fee having been omitted from the written contract of employment, it was decreed that the written agreement be reformed so as to include the omitted provision and that the reformed agreement be enforced. The Court says p. 85:

"The agreement, in itself, was a lawful one—one which could have been enforced at law as well as in equity. The claim to relief depends on the simple question whether the stipulation that the defendant would divide equally with the complainants constituted part of the consideration of the agreement. If it did, then this suit can be maintained upon the stipulation. \* \* \* If one person makes a promise to another, on lawful consideration, for the benefit of a third person, such third person may maintain an action, even at law, upon it. *Joslin vs. Car Co.*, 7 Vr. 141. And if suit is brought in equity, the promisee is not a necessary party to it.

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In the above case it will be observed that the promisees owed no debt, duty or obligation to the poor brother and sister of the promisor, to contribute to the latter out of the promisees' interest in the estate, nor was there any privity between them. Clearly they could not have recovered under the New York rule.

In *American Malleables Co. vs. Bloomfield*, supra. there was no debt, duty or obligation of  
 10 the promisee, namely the Town, to the factory owner to provide him with a new spur or secure to him the continuance of the old one, nor was there any privity between the promisee and the factory owner.

The following authorities expressly support plaintiff's view.

In *Ochs vs. Carnahan Co.*, (App. Ct. of Ind. 1907) 80 N. E. Rep. 163, the Court dealt with a  
 20 bond similar to the one in suit. For form of bond see 76 N. E. p. 788.

The contractor bound himself to the owner in the usual form, with condition that if the contractor should build and complete the building according to the plans and specifications "and shall pay for all materials used and for all help employed in the construction of said building, then this obligation to be void," &c.

On the reargument the Court said :

30 "A class of argument which has, to some extent, been pursued and must also be eliminated, is that which proceeds upon the assumption that the provision of the contract quoted is not for the benefit of the materialman or laborer, or that the sole purpose of the contract was to protect and indemnify the owner, Head. \* \* \* The words of the bond are: 'shall pay for all material used and all help employed in the construction of said building.' This is a certain and express agreement to pay for all material furnished and  
 40 for all help employed. The agreement to pay

is primarily for the benefit of the creditor to whom such payment must of necessity be made. Had the provision been that the contractor 'shall pay the M. J. Carnahan Company for all material furnished by it used in the construction of said building,' there could not, under the doctrine above stated, be any doubt as to the right of said M. J. Carnahan Company to recover in such an action as this. No one will suggest that the agreement to pay for all materials used and for all help employed was intended for the benefit of the owner, Head, himself. Incidentally, such payment might benefit him in that it would prevent the acquirement of a valid lien, but such result would be an incidental one only. \* \* \* It is practically impossible, at the time of contracting for the erection of a building, to name the persons who will subsequently furnish material therefor, or do labor thereon. Such parties were therefore described in general and comprehensive terms. The language used is inclusive—shall pay for 'all' material and 'all' help. The legal effect of the language used is no different from what it would have been had the agreement been to pay whoever shall furnish material or do labor. \* \* \* The identity of the person furnishing materials for use in the building referred to in the contract under consideration being established, as it is in this case, there is no room for a denial of the right of the appellee to maintain its action."

In *U. S. Fidelity & Guaranty Co. vs. American Blower Co.*, App. Ct. Ind., 1908, 84 N. E., p. 555, plaintiff sued on a similar bond for the protection of materialmen. There was no statute then requiring such a bond. The bond contained the provision that the contractor would, "among other things, pay for all material employed, used or furnished in said work in carrying out said contract." The surety defended upon the ground that the obligee had varied the contract, thereby releasing the surety.

The Court says:

10 "It will be observed that this bond provided not only for the due performance of the contract but it also expressly secured for the payment of materialmen. In the case of *School District vs. Livers*, 147 Mo., 580, 49 S. W., 507, the Court, speaking of a bond similar to the one in this case, said, 'The bond is dual in its nature, being for the benefit and protection of the School District against loss or damage for the non-fulfillment of their contract by the contractors, and the payment by them of laborers for work done, and of materialmen for material furnished, which when once fixed could not be destroyed or taken away by any act of the School District.' Where such a bond has been required by statute the courts have recognized and given effect to its dual nature, and the right of materialmen to recover against the surety on a building contract is separate and independent of any right of action vesting in the oblige of such contract. Therefore alterations in the contract which of themselves might release the surety as to the oblige will not affect the right of the materialmen to proceed upon the bond. *Statutes requiring such bonds are for the purpose of providing security for laborers and materialmen, and to give them protection upon which they may rely.* \* \* \* *There is every reason for applying the same rule in the present case. The bond was not required by a statute, but it expressly provided for security to materialmen.*"

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In *United States vs. National Surety Co.*, 92 Fed. Rep., p. 549, C. C. A., 8th Circuit, 1899, a contractor gave bond with surety to the United States, with condition to duly perform the contract and to make full payments to all persons supplying him labor or materials in the prosecution of the work. Subsequently the Government modified the contract without the consent of the surety. A materialman brought suit upon the bond (in

40 the name of the United States to the use of the

creditor) and the surety pleaded the alteration as a defense. In overruling the defense, the Court says:

“The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, *and only on the bond*, which was intended solely for the protection of laborers and materialmen who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought and it sues to enforce an obligation which congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress. \* \* \*

The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. \* \* \*

The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government’s name being used as obligee in the latter agreement merely as a matter of convenience. \* \* \*

When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employe in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor.”

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In *U. S. Fidelity & Guaranty Co. vs. Omaha Building & Construction Co.*, 116 Fed. Rep., 145, C. C. A. 8th Circuit, (1902), there was involved a similar contractor's bond, with condition that the contractor should duly perform the contract "and shall well and truly pay for all material and labor entering into or employed in the construction of said building."

- The contract involved the construction of a  
 10 public building for the State of Nebraska, which was erected under a statute requiring the contractor to give a bond "for the faithful performance of said work and that all bills for work done and materials furnished shall be paid for." The surety filed a bill in equity, alleging that claims were made against it by various material men under the bond and praying an adjudication that the bond was not binding by reason of advance payments made to the contractor. The  
 20 Court overruled the defense, stating:

"But another and conclusive answer to these objections is that the appellant, by the express terms of its bond, bound itself to 'pay for all material and labor entering into or employed in the construction of said buildings' to the persons furnishing the same, and it is not alleged or pretended that the appellees, who furnished the material and labor, said or did anything to the injury of the appellant, &c., \* \* \* Their rights rest  
 30 on the covenant in the bond which the statute required to be inserted for their security and protection. This covenant is quite independent of the covenants contained in the bond for the security and protection of the state."

- In *Gastonia vs. Engineering Co.*, 131 N. C., 363, a contract between the town and the contractor included a provision that the contractor concurrent with the contract should execute a  
 40 bond conditioned to indemnify the town against all acts of the contractor and for the faithful per-

formance of the contract "and for the payment of all material used and wages of all laborers employed by said contractor."

The bond was payable to the town, with condition that the contractor "in all things" perform the contract.

The Court says, p. 365:

"Though no mechanic's lien could be filed against the property in the hands of the town, it was competent for the parties to contract and they did contract that the Engineering Company should pay for 'all materials used and wages of all laborers employed by said contractor', and the surety company became responsible for the execution of this stipulation."

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P. 366:

"Those claimants (material men) being the beneficiaries of the contract could have brought their separate actions on said contract against the Engineering Company and its surety, and it was eminently proper and saves multiplicity of suits, the time of the Court and unnecessary court costs that they should be co-plaintiffs in this action, to the end that the entire matter should be settled and determined in one action."

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In *Shoaf vs. Insurance Co.*, 127 N. C., 308, 80 Am. State Reports, 804, an insurance company had re-insured its risks, under a contract which expressly provided that the contract of re-insurance was only effective between the two parties and that no policy holder of the re-insured company should be entitled to enforce the re-insurance against the re-insuring company. Held, nevertheless, that the policy holder was entitled to recover for a loss against the reinsuring company.

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In *Philadelphia vs. Stewart*, 195 Pa. State, 309, a city ordinance required the contractor to give a bond for the payment of material and labor debts.

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Such bond was given, naming the city as sole obligee. Suit was brought in the name of the City to the use of a material man. The defense was that the ordinance was ultra vires and that nothing was due to the city.

The Court says, page 312:

10 "The appellant voluntarily executed a bond as part of his contract with the city \* \* \* and he now seeks to evade the express obligation of the bond upon the ground that the condition was ultra vires upon the part of the city to exact. For such a defense to prevail the legal want of power in the City ought to be shown beyond question. In the present case the defense is as bare of legal as it is of moral merit. \* \* \* There is nothing ultra vires or contrary to public policy in this condition. It is the right as well as the interest of the City to secure good work upon its contracts for public improvements and there is no better policy towards that end than to satisfy honest and competent workmen that they can rely on being paid. There being no right of mechanic's lien against public works, the work and material men are, to that extent, in the contractor's power as to pay, and that fact has a natural tendency to produce skimmed and inferior materials by the class of men willing to run that risk. Against this risk the city is entitled to protect itself by exacting assurance from the contractor that he will pay his honest debts incurred in doing the City's work."

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30 Page 314:

"In the present case the action is on the bond, the City being the obligee and having, as already said, an interest to enforce the condition. The City recovers on its legal title though the money may ultimately go to the use of the plaintiff."

In *Philadelphia vs. Stewart*, 198 Pa. State, 422, an action was brought to the use of another material man, but on the same bond as in the preceding case. It was held that successive suits

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could be brought and that the first recovery did not exhaust the bond.

In *Philadelphia vs. Stewart*, 201 Pa. State Rep., 526, suit was brought by a material man upon an identical bond and it was contended that the surety was discharged because the City had modified the contract with the principal contractor. It was further urged that a prior suit in which the City was a party had resulted in a finding against the City, and, therefore, that no recovery could be had in the name of the City on the bond, for the benefit of the beneficiaries. In overruling this defense the Court held that the bond was executed pursuant to a public policy. 10

It is said at page 533:

“As a preliminary to awarding the contract to the principal contractor, it exacts from him what is called the ‘additional obligation’ for the protection of these subordinates. The ordinance might have directed the insertion of any name, that of mayor, director of public works, or other city officer as the obligee of the bond, thus in case of suit creating a legal plaintiff or trustee for the sub-contractors. The name of the use party could not be inserted, because the bond was a condition precedent to awarding the contract and the use parties could not then well be known either to the city or principal contractor. That this ordinance is a valid one which the City, to carry out a municipal policy which must inure to the benefit of the public, may adopt, cannot be questioned. True, no immediate financial benefit results to the City, but an indirect advantage does. It gets none of the money stipulated for in the bond and expects none; it merely assumes, voluntarily as part of its purpose the position of a sort of trustee in protecting those who are not wholly without merit and might otherwise be without remedy.” 20 30

In *Union Sheet Metal Works vs. Dodge*, 129 Cal., 390, (1900) the Court considered a non-stat- 40

utory bond given by a contractor for a public work, payable to the municipality as obligee, conditioned for the faithful performance of the contract, and that the contractor "will pay all his subcontractors, etc., all moneys that may become due them" and further providing that the bond should "enure to the benefit of any and all persons who labor for or furnish materials to the said contractor."

**10** There were then in force statutes providing for contractor's bonds to cover material men, but it was conceded that this bond did not comply with the statute. Defendant contended that inasmuch as the school building could not be subjected to any lien, that the School District had no authority to demand the undertaking of the contractor and that the undertaking was without consideration and void, and that there was no privity with the material man.

**20** Page 394:

"The defendants for and on behalf of (the contractor) and to enable him to secure the contract became his sureties and bound themselves in express terms that all persons furnishing labor or material for said building should be paid. Their contract contained the recital that it was for a valuable consideration. Plaintiff furnished labor and material and brought itself within the terms of the contract made by defendants. The undertaking, if not expressly authorized by statute, was not prohibited. It was not against public policy or good morals, nor in contravention of any statute."

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At page 395:

"The fact that a lien could not be filed by plaintiff upon the building was in contemplation of law known to the sureties when they signed the undertaking. By the undertaking they bound themselves to pay the obligations that might be incurred by their principal. This obligation having been incurred by the

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principal under the contract of guaranty made by defendants, is binding upon them. They are estopped from claiming that the undertaking was not the particular kind of undertaking required by the codes."

This case also holds that it is immaterial whether or not the material man knew about the bond or relied upon it in extending credit.

In *St. Louis vs. Von Phul*, 133 No. 561 (1895), (expressly over-ruling *Kansas City, etc., Co. vs. Thompson*, 120 Mo., 221), contractors with the City for a public improvement gave a bond payable to the City, with condition to faithfully perform the contract and "pay to the proper parties all amounts due for material and labor used and employed in the performance thereof."

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A material man brought suit in the name of the City for his use on this bond. There was no statute authorizing such a bond. The Court sustained the action on the ground that it was public policy to give security and protection to those who expend labor or supply material in making improvements as is shown by the mechanics' lien laws applying to private improvements.

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Page 566:

"But it cannot be denied that the same equity exists and that the same moral obligation rests upon the City to protect those who improve its streets as rests upon those making private improvements. \* \* \* There can, we think, be no doubt that the duty the City of St. Louis owes to any one who should labor upon or furnish material for the improvements contemplated by the contract, would create such a privity between them as would entitle the latter to the benefits intended to be afforded them under the express conditions of the bond."

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It was further urged that the taking of the bond was ultra vires. Held, however, that inasmuch as the statute required the City to take a bond without specifying its form, there was implied power

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to prescribe a form of bond which would protect those who furnished labor and material, and that the requirement that laborers and materialmen should be paid was a proper and reasonable incident to the express power to improve the streets.

Page 568:

10 "Such a requirement gives credit to the contractor and enables him to secure labor and purchase material more readily and on better terms than could be done without the credit. Thus the contractor can secure better labor and cheaper materials and is enabled to take the contract on lower terms than he could otherwise safely do. It also enables one with small means and limited credit to compete with those more advantageously circumstanced. The City is thus enabled to secure greater competition in bidding and to obtain better execution of the work on lower terms. It was not only to the interest of the City but its plain business

20 duty to secure those advantages. We therefore think the City had the implied power to require the condition in the bond upon which plaintiff seeks to recover. We are unable to draw a substantial distinction between the power exercised by the City in making this provision for laborers and material men and that exercised in requiring the contractor to pay all such creditors as a condition to receiving his compensation from the city for the improvement."

30 In *School District of Kansas City vs. Livers*, 147 Mo. 580, the contractors for public work gave a bond to the School District conditioned that the bond was executed not only for the protection of the School District, but, also, for the benefit of any parties who might furnish materials used in the building, and that any such party might in the name of the School District maintain an action upon the bond.

40 Suit was brought in the name of the School District for the use of a material man. The Court says, page 584:

"Plaintiff's rights are original and independent of the School District, the Board being constituted under the bond the trustee of an express trust. The bond is dual in its nature, being for the benefit and protection of the School District against loss or damage for the non-fulfillment of their contract by the contractors and the payment by them of laborers for work done and of material men for material furnished, rights which when once fixed could not be destroyed or taken away by any act of the Schol District." \* \* \* 10

Page 585:

"In other words, there were two contracts with one consideration to support both."

Held that even though the sureties were discharged as to the School District by overpayment, the rights of the material men remained unimpaired.

The doctrine that a contract between persons made upon a valid consideration may be enforced by a third person though not named in the contract, when the obligee owes to him some duty, legal or equitable, which would give him a just claim, is reaffirmed and applied. This case does not rest upon an authorizing statute. 20

In *Lyman vs. City of Lincoln*, 38 Neb., page 794, the contract contained the following provision:

"The contractors shall file with the Board of Public Works receipts of claims from all parties furnishing materials and labor in the construction of such engine houses before the final estimate is paid and the work accepted from the hands of the contractors." 30

The bond provided that the contractors should fully perform the contract "or in default thereof, we jointly and severally bind ourselves \* \* \* to pay the City of Lincoln all damages which may result from such default."

A material man sued the sureties upon this 40

bond. The Court held (page 799), that the clause requiring the contractors to file receipts from furnishers of material and labor was equivalent to a promise by the contractor to make such payments, and therefore secured by the bond. Defendants then contended that the sole obligation of the sureties was to pay to the City the damages sustained by it through the failure to file such receipts. The Court said, page 800:

10 "If this contention is correct the clause referred to in the contract is meaningless. The City of Lincoln could suffer no damages by the failure of Layne and Sweet to pay for the labor or material used in the construction of these buildings; and no lien for such labor or materials could be asserted against such buildings. But the nature of the contract and bond considered, counsel's contention is too narrow a construction. Obviously the City of Lincoln intended by this

20 bond to protect from defaults of its contractors all those who might labor on or furnish material for its buildings. The petition assailed sets out no statute or ordinance authorizing the City of Lincoln to do this, but we do not deem such a statute or ordinance indispensable. The awarding of the contract to Layne and Sweet was a sufficient consideration to them and their sureties to support their promise to pay for this labor and material. The promise they made to the City of Lincoln was for the benefit of all who labored on these buildings and all who furnished

30 material that was used in their construction; and since Lyman had furnished material to these contractors which was used in these buildings for the City, the bond enured to his benefit and he can maintain a suit thereon."

In *Sample vs. Hale*, 34 Neb., 220, the contract for building obligated the contractor to pay his laborers and material men "so that each and all persons may receive his or their just dues in that behalf."

40 The bond was payable to the State of Nebraska,

as sole obligee, with condition that the contractor should faithfully perform the contract. A material man brought suit on the bond and the sureties defended on the ground that the provision of the contract obligating the contractor to pay for his material and labor was ultra vires.

The rule in *Knapp vs. Swaney*, 56 Mich., 349, and *Baker vs. Bryan*, 64 Iowa, 561, stated and followed. Held that the contract was not ultra vires, and that plaintiff was entitled to recover under the rule. 10

Page 226:

“That if one makes a promise to another for the benefit of a third person, such third person may maintain an action upon such promise.”

In *Doll vs. Crume*, 41 Neb., 655, a contract for a public road contained a provision that the contractor “will pay all laborers and material men on the work embraced in this contract.” The sureties guaranteed that the contractor would perform his covenant to pay all laborers, and that such guaranty should entitle any such laborer, upon default, to sue and recover against the guarantors. In a suit by a laborer against the guarantors it was contended that the laborer could not sue on the agreement inasmuch as the bond ran to the City of South Omaha, and it alone could sue thereon. Held, however, that the promise was for the benefit of third persons and that plaintiff might recover thereon. Further held that the act of the City in over-paying the contractor did not release the surety from its obligation to such third persons. 20 30

In *Baker vs. Bryan*, 64 Iowa, 561, there was a contract with the School District to build a school house “free from liens or claims of every kind.” This was secured by a bond payable to the School District, with condition that the contractor perform his contract, “and shall pay all claims for 40

material, labor, etc., used in the construction of said building."

The statute required that such a building be erected under contract secured by bond, but did not prescribe the form of bond, nor did it authorize either contract or bond to protect material men or laborers.

At page 564 the Court says:

10 "We are of the opinion that the contract and bond considered separately and together show that all persons furnishing labor or materials to be used in the construction of the school house were intended to be secured by the bond. \* \* \* While it is true that no lien can be enforced against a school house, and that no claim could be enforced against the School District, it is evident that the parties intended to impose upon the contractor an obligation to pay for all labor and materials used in the construction of the building. \* \* \* (page 565). It is evident that

20 these covenants in the two instruments were not intended for the security of the School District for the simple reason that it could never have a claim against the contractor for debts he owed to third persons. The District, as we have seen, was liable for no claim for materials or labor and no lien existed in favor of third persons. It would suffer no loss or prejudice on account of the failure of the contractor to pay for material or labor. The bond, therefore, as to the covenants under consideration, was not intended to secure

30 the District. It was intended to secure those to whom the contractor should become indebted on account of labor and material."

It was further urged that the School District had no legislative authority to make such a contract. Held, however, that the law in giving general power to contract permitted the securing of subcontractors.

40 "That subcontractors knowing that they were secured would do better work and furnish better material than if they felt uncer-

tain about their pay, cannot be doubted. It is equally certain that the credit which the contractor would gain by the security, would enable him to prosecute the work more rapidly and with greater hope of profit. These things, it may be readily seen, would result in great benefit to the District. It therefore cannot be doubted that the law in conferring authority upon the Directors to enter into a contract and demand a bond for its faithful performance, intended that covenants to pay the claims of subcontractors, which would protect the interest of the District, could be incorporated therein. The parties for whose benefit these covenants were made may prosecute actions upon the instruments containing them." 19

It was further held that it was immaterial that there was no proof of the plaintiff relying upon bond.

"As the bond was for their benefit they will be presumed to have relied upon it from the first until the contrary is shown. They show by bringing these actions that they now rely upon the bond." 20

In *Knapp vs. Swaney*, 56 Mich., 345 (1885). Contended that the County was without power to make a contract providing for the payment of debts for which it was not liable. Judge Cooley says, page 349:

"But when this case is properly considered it does not appear to be a case in which the municipality has in any particular stepped aside from its proper functions or stepped over its proper bounds; it has simply made a contract for the construction of a necessary public building and agreed upon the method and conditions of payment. It has gone no further than so far it had indisputably a right to go. But it is said that among the conditions is one which the corporate Board had no right to impose, because it did not concern the public, but was a matter exclusively between the contractors and those who would deal with them. It was 30  
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for this reason that the condition is assumed to be ultra vires. And had the condition been made the subject of independent contract instead of being incorporated in a contract for a proper corporate work, the objection to it would have been insurmountable. Whether it was invalid here is a very different question. The purpose of the stipulation is very manifest. It is that a contract the County has made shall not be the means of mischief to whose who, though not contractors with the County, may perform labor or furnish materials in reliance upon the moneys to be paid under it. It would seem that to prevent such mischief it was a proper object to be had in view by any public Board when entering into a public contract. It would seem that there was a moral obligation in the case which the Board might well recognize even though not compellable to do so. \* \* \* We are of opinion that there was nothing ultra vires in this condition and that the relators are bound by it."

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In *Board of Education vs. Aetna Indemnity Co.*, 159 Ill. App., 319 (1911) a contract with the City for a public school obligated the contractor to "make payments to all persons supplying said party of the first part labor and materials in prosecution of said work." The bond named the City as obligee, with condition that the contractor shall perform his contract and "shall promptly make payment to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract."

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Action was brought in the name of the City for the use of materialmen, and recovery was sustained, the Court saying:

"The real meaning of the parties is that the obligors contract to perform the condition of the bond under the conventional sanction of a penal sum. \* \* \* To hold the bonds in question valid and binding is only to compel the obligors to do the thing they bound themselves to do. \* \* \* We do

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not think that the contention that because there was no statute requiring the Board of Education to take a bond for the protection of subcontractors, the condition for their protection in the bonds in question cannot be enforced for the benefit of the (materialmen), is tenable. \* \* \* The instruments sued on being under seal, only the obligee can maintain an action at law on them; but it is no defense that the beneficial interest is in another or that the plaintiff when it recovers will be bound to account for the proceeds to another.” 10

*Sterling vs. Wolf*, 163 Ill., 467, was to some extent relied on by the defendant below. The case on an examination shows that it has no bearing on the present controversy. The contractor in his proposal before the letting of the contract, proposed to furnish sureties for the performance of the contract and the payment for materials, etc. The contract as entered into, however, contained no such provision and the bond as actually entered into provided merely for the faithful performance of the *contract*. The Court held: 20

“If the question were between the contractor and the City it would be going very far to hold that the parties intended the proposal to become a part of their agreement; except in so far as it fixed the prices of the work; but to hold that they must have so intended and then not only carry that intention into the contract of appellees, but enlarge the meaning of the language in the proposal, would be to violate the plainest rules of the law of suretyship.” 30

## POINT V.

**The bond being in the form prescribed as a condition of the bid, and being a part of the consideration for the letting of the contract, is an independent contract and is to be enforced according to its terms, even though such terms impose upon the obligors provisions not included within the construction contract.**

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The Court below in denying the plaintiff relief proceeded upon the theory that this bond is altogether a bond of indemnity, limited in its application to the due performance of the contract, and that the clause providing that the principal shall also pay the material and labor debts is surplusage.

The bond is that the principal shall perform all of his obligations under the contract" and shall *also* pay" for his labor and material.

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If it had been intended to make this bond a mere bond of indemnity to secure the Commissioners against any breach of the contract, there is no conceivable purpose for this additional clause.

Clearly the intent was to bind the obligors to the due performance of the contract and also, in addition, to something more not included in the contract, namely, an obligation to pay the material and labor debts.

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As said in *U. S. Fidelity & Guaranty Co. vs. American Blower Co.*, App. Ct. Ind., 1908, 84 N. E., p. 555, in dealing with a bond in practically identical form:

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"The bond is dual in its nature, being for the benefit and protection of the School District against loss or damage for the non-fulfillment of their contract by the contractors, and the payment by them of laborers for work done, and of materialmen for material furnished."

### POINT VI.

**The contract (distinguished from the bond) shows that the commissioners contemplated that the materialmen and laborers should be paid and to that end inserted provisions authorizing, though not requiring, the commissioners to ascertain the amount of and pay all such debts, even to the extent of advancing money therefor.** 10

Article XVII of the contract (p. 105) provides, in substance, as follows:

1. That the Commissioners may retain the contractor's money and apply the same to any damages sustained by the Commissioners through the contractor's default.

2. That the Commissioners may retain (but without application) so much of the contractor's money as the Commissioners may think sufficient to settle all claims against the Commissioners resulting from the contractor's default and also all claims for labor and material. 20

3. The Commissioners are authorized to make settlements of any such claims and apply the contractor's money thereto.

4. If the contractor's money in the hands of the Commissioners is insufficient to pay such sums as may be found by the Commissioners to be due under the claims for labor and material, the Commissioners may, at their discretion, pay the same and the contractor thereupon agrees to repay such sums to the Commissioners. 30

The last provision contemplates claims for which the Commissioners are not in any sense legally liable. It applies to such material and labor claims as the Commissioners, in their discretion, may see fit to pay and the amount to be paid is such amount as the Commissioners, in 40

their discretion, may find to be due. The contractor, in substance, constitutes the Commissioners as his agent to pass upon his labor and material debts and to pay the same for him, if the Commissioners, in their discretion, elect so to do, in which event the contractor agrees to repay the amounts so advanced by the Commissioners in paying his debts.

- 10 Conceivably the Commissioners might, in order to prevent stoppage of the work, make such advances, and in such event the contractor agrees to repay the same.

Such agreement to repay is covered by the general provision of the bond to perform the contract.

- 20 But in the event that the Commissioners do not see fit to make such advances the additional clause of the bond was inserted solely for the protection of the materialmen and in the enforcement of which the Commissioners could have nothing but a sentimental interest.

#### POINT VII.

**The right of the plaintiff to recover on this bond is quite independent of whether or not the plaintiff has another remedy under the Municipal Lien Act.**

- 30 The Court below based its decision, in part, on the finding that the authorities sustaining recovery in other jurisdictions, did so only where the materialman had no other method of protection.

- 40 It seems to us that the present question is altogether a matter of construing the contract which the parties made, and that even though the Municipal Lien Law provides a remedy, the parties were not thereby disabled from entering into a

contract giving the materialmen an additional security or remedy.

(Since then Vice-Chancellor Stevens has decided that the Municipal Lien Law does not apply, for reasons stated in the annexed copy of his opinion.)

An examination of the cases in other states does not, however, bear out the Court's generalization.

The Court apparently refers to expressions in some of the cases commenting on the absence of other remedy of the materialman as a reason for endeavoring to construe the contract for his benefit, in order to avoid a hardship. In no case that we have examined is the right to recover made to depend upon whether or not the materialman has another remedy. 10

#### POINT VIII.

**Plaintiff is equally entitled to recover for goods sold to the receiver of Healey Contracting Company, as though to the corporation before the receivership.** 20

Our contention is that the contractor for which the defendant became surety was the corporate entity known by the name of Healey Contracting Company; that the essence of this corporate entity is the corporate franchise and that it is immaterial whether this corporate franchise continues to be exercised by the same body of stockholders or by the same officers and directors as in office when the bond was written or by a new Board of Directors, or by a receiver appointed by the Court for the express purpose of exercising the corporate franchise in the stead of the officers and directors. The New Jersey Statute vests title to the franchise in the receiver (Sec. 68, Corporation Act). 30 40

The corporate assets are a trust fund in the hands of its directors, and the appointment of a receiver by the Court is essentially no more than the superseding of the trustees appointed by the stockholders, with a trustee appointed by the Court. The trust fund is the same. The corporate franchise remains unimpaired until the corporation has been dissolved and the state franchise tax, even though accruing after the receivership, continues to be a first charge on the assets in the hands of the receiver.

In re U. S. Car Co., 60 N. J. Eq., 514, E. & A., Chief Justice Gummere in holding that the franchise tax accruing after the appointment of a receiver is nevertheless a first charge on the assets, gives expression to this idea that the receiver exercises the franchise in place of the officers and directors, as follows:

“It is in reality an arbitrary imposition laid upon the corporation without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises or whether or not *it is exercising them either by its officers or directors or through a receiver.* The sole test in determining its liability to comply with those conditions so long as they remain unrevoked, is the existence or non-existence of the corporation. \* \* \* At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it, but on the contrary its corporate life was continued for the benefit of its creditors, pending the final distribution of its assets.”

The idea is perhaps more explicitly expressed in *Central Trust Co. vs. N. Y. & Northern R. Co.* N. Y. Court of Appeals, 1888, Vol. 18 N. E. Rep.,

page 92 (same case Vol. 1 L. R. A., page 260), where Justice Peckham, dealing with a franchise tax levied in New York against an insolvent corporation in the hands of a receiver, says:

“But what does the receiver operate? Under this order of the Court he takes possession of all the property of the corporation, and proceeds to operate—that is, to run—its trains, and to do all that was formerly done under the direction of the Board of Directors. In this way he uses the franchise which has been conferred by the State upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court, he acts as the company *to the same extent pro hac vice as if the Board of Directors were operating the railroad*. It is the franchise which is being used in both cases—only in the one case it is used for the company and substantially by it by means of its Board of Directors; while in the other case the same franchise is being used, and the road is operated under it by an officer of the court until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law.”

The receiver thus operating under the corporate franchise in place of the Board of Directors by express order of the Court, continued the performance of the contract of the Healey Contracting Company, without default, until March, 1914.

We submit that the surety is liable for materials furnished after the receivership, toward the performance of this contract, regardless of who, for the time being, controlled the operation under the corporate franchise of Healey Contracting Company.

MCDERMOTT & ENRIGHT,  
JOHN M. ENRIGHT,  
Of Counsel with Appellant.

IN CHANCERY OF NEW JERSEY.

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BLAW STEEL CONSTRUCTION Co.,  
*and*  
 PASSAIC VALLEY SEWERAGE COM-  
 MISSIONERS.

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MR. CONOVER ENGLISH, for Complainant.

MESSRS. RIKER & RIKER, for Defendants.

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STEVENS, V. C.:

This is a bill to enforce a municipal lien against the Passaic Valley Sewerage Commissioners. The defendants plead that the Commissioners are not a municipality and that is the sole question to be decided.

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In the case of *Van Cleve v. Passaic Valley Sewerage Commissioners*, 42 Vr., 183, 574, it was held by Pitney, J., in the Supreme Court and by the Court of Errors and Appeal that by the act of 1903, the Commissioners were not constituted a municipality. To overcome constitutional objections to that act, the legislature enacted Chapter 10 of the Laws of 1907. If they were not a municipality under the former act, still less are they under the latter.

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It is contended, however, that if not a municipality, they are a municipal agent and are therefore within the decision in *Hermann & Grace v. Freeholders of Essex*, 1 Buch., 541. That was a suit brought by a sub-contractor against the Essex County Building Commission and the Board of Chosen Freeholders of the County of Essex to enforce his lien under the act of 1892. It was held by Vice Chancellor Emery that the suit would be on the theory that the county was a municipality within the meaning of the municipal lien act and that the Building Commission was but the county's agent. It is obvious that on that theory, the municipality is the principal and should be joined in the suit. I have examined the record in the case just cited and I find that both the Building Commission and the Board of Freeholders were made parties and that the notices required to be

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served upon the chairman and financial officer of the municipality were alleged to have been given to them as such. Here the only defendants outside of the receiver is the Sewerage Commissioners and the only allegation is, that *its* chairman and *its* treasurer were served. As the lien is the creature of statute, it will only arise where the statutory requirements are complied with. As there is no allegation that the chairman and financial officer of the municipality were served, the case is not brought within the act of 1892, even if the presence of the municipality could be dispensed with. It could hardly be presumed that the chairman and treasurer of the Commissioners is the chairman and financial officer of the various municipalities embraced in the sewerage scheme, and I do not quite understand on what theory they could be held to represent them.

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