

INDEX

	PAGE
Bill of Complaint.....	1
Answer of Eastern States Construction Company.....	11
Amended Answer of Commercial Casualty Insurance Com- pany	12
Consent to Filing Thereof.....	26
Replications	26
Opinion	27
Affidavit of Services of Messrs. Hobart & Minard.....	43
Final Decree	52
Notice of Appeal.....	58
Petition of Appeal.....	60
Stipulation of Facts	63

TESTIMONY.

Witnesses for Complainant.

William F. Jerome, direct examination.....	81
cross "	98
re-direct "	127
Harry J. Garrison, direct examination.....	133
recalled, direct "	137
cross "	138
Albert R. McAllister, direct examination.....	135
recalled, direct "	139
cross "	150, 156
George Maier, direct examination.....	154
cross "	156

Witness for Defendant.

Harold S. Hays, direct examination.....	164
cross "	181

EXHIBITS.

Descriptive List of Exhibits Referred to
in Stipulation of Facts.

Exhibit Number	Description	Stipulation Paragraph Number	Printed at Page
1	April 13, 1928: Eastern States application and agreement to Commercial (Clarion-Venango job)	2	190
2	April 14, 1928: Eastern States and Commercial bond to Commonwealth of Pa. (Clarion-Venango job)	3	203
3	April 14, 1928: Contract, Eastern States and Commonwealth of Pa. (Clarion-Venango job)	4	207
4	Sept. 22, 1928: Eastern States application and agreement with Commercial re: Vernon-Hayfield job	6	217
5	Sept. 22, 1928: Eastern States and Commercial bond to Commonwealth of Pa. (Vernon-Hayfield job)	7	218
6	March 18, 1929: Eastern States application and agreement with Commercial re: West Meade Township job.....	10	219
7	March 22, 1929: Eastern States and Commercial bond to Commonwealth of Pa. (West Meade job).....	11	220
8	August 2, 1929: Eastern States letter to Dept. of Highways, Pa. re: Clarion-Venango job	15	221
9	August 3, 1929: Semi-final estimate \$2,868.83, Clarion-Venango job	16	222
10	August 3, 1929: Semi-final estimate \$16,175.41, Clarion-Venango job	16	222
11	August 10, 1929: Pa. Highway inter-departmental memorandum to Samuel Eckels re Clarion-Venango job	17	223
12	August 28, 1929: Auditor General's War-rant No. 8248 and endorsement.....	18	225
13	August 28, 1929: Auditor General's War-rant No. 8249 including endorsement.....	18	225

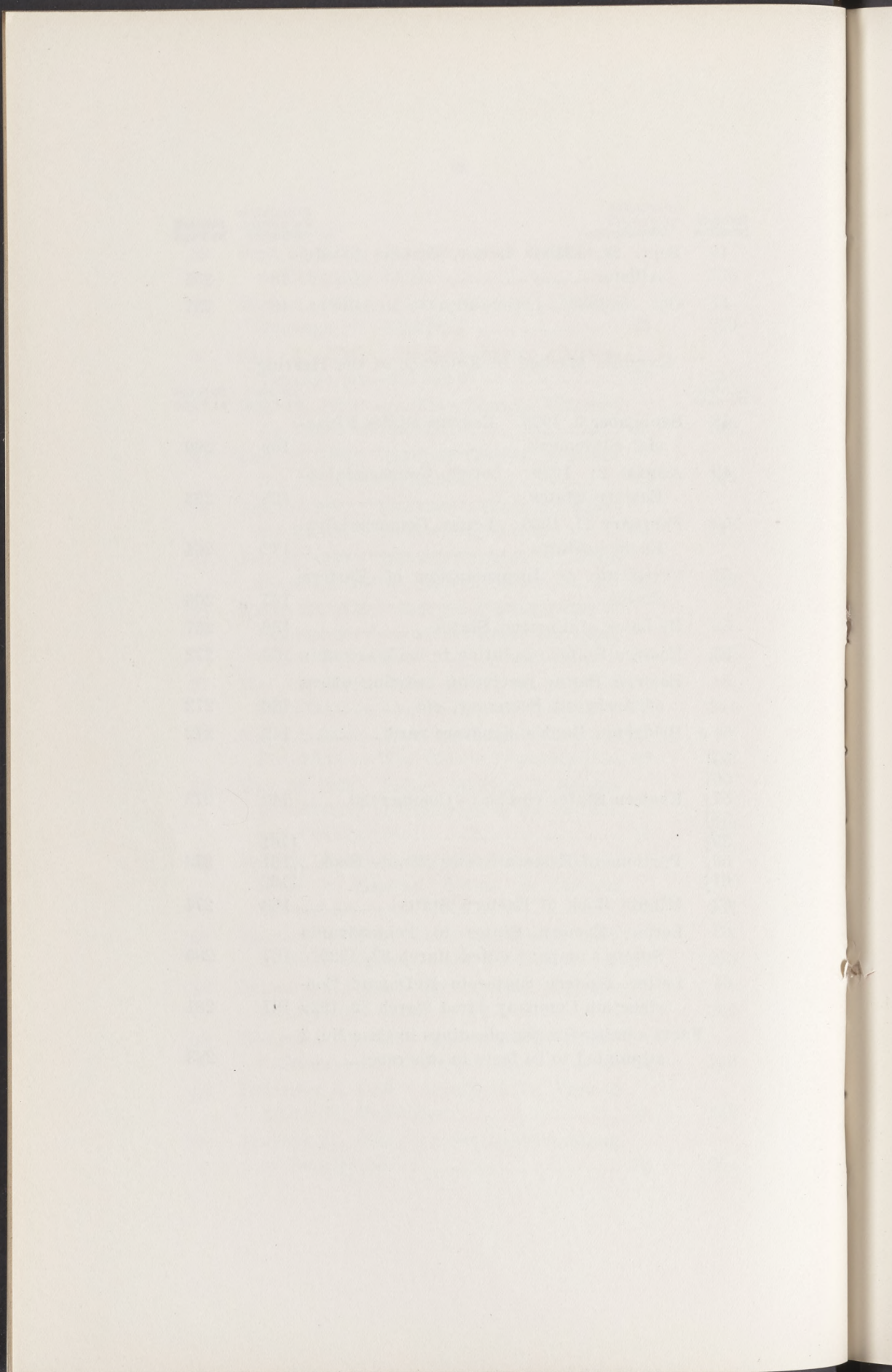
Exhibit Number	Description	Stipulation Paragraph Number	Printed at Page
14	August 22, 1929: Commercial's application for release of bond re Clarion-Venango job	19	225
15	August 28, 1929: Commonwealth's check No. 49979 for semi-final estimate on Clarion-Venango job (\$2,868.83).....	20	228
16	August 28, 1929: Commonwealth's check No. 49980 for semi-final estimate on Clarion-Venango job (\$16,175.41).....	20	229
17	Sept. 5, 1929: Eastern States check No. 3274 to Duquesne Slag Products Co.— \$1,766.25	23	230
18	Sept. 5, 1929: Eastern States check No. 3275 to Keystone Sand & Supply Co.— \$1,299.08	23	230
19	Sept. 5, 1929: Eastern States check No. 3286 to National Steel Fabric Co.— \$555.20	23	230
20	Sept. 5, 1929: Eastern States check No. 3277 to Mitchell & Graham—\$6,426.94....	23	230
21	Sept. 5, 1929: Eastern States check No. 3287 to Commercial Casualty Insurance Co.—\$4,536.68	23	230
22	Sept. 5, 1929: Eastern States check No. 3279 to Joe Weisner—\$557.29.....	23	231
23	Sept. 5, 1929: Eastern States check No. 3276 to Joe Weisner—\$451.66.....	23	231
24	Sept. 5, 1929: Eastern States application and agreement with Commercial re Indi- ana County job.....	24	231
25	Sept. 5, 1929: Eastern States and Com- mercial bond to County of Indiana.....	25	232
26	Sept. 5, 1929: Agreement between Eastern States and County of Indiana.....	26	232
27	Sept. 19, 1929: Request of William F. Jerome to Dept. of Highways of Pa.....	29	233
28	Sept. 24, 1929: Eastern States demand note for \$10,000.00 of Bridgeton Bank....	30-43	234

Exhibit Number	Description	Stipulation Paragraph Number	Printed at Page
29	Sept. 24, 1929: Eastern States assignment to Bridgeton Bank.....	31	238
30	Jan. 4, 1930: Final estimate, Clarion- Venango job—\$2,328.21	32	240
31	Jan. 4, 1930: Final estimate, Clarion- Venango job—\$17,349.63	32	240
32	Feb. 10, 1930: Auditor General Warrant No. 21912 for \$2,328.21.....	33	240
33	Feb. 10, 1930: Auditor General Warrant No. 21914 for \$17,349.63.....	33	240
34	Feb. 10, 1930: Treasurer's check No. 48884 for \$2,328.21 to Eastern States.....	34	241
35	Feb. 10, 1930: Treasurer's check No. 48886 for \$17,349.63 to Eastern States.....	34	242
36	March 28, 1930: Bridgeton Bank letter to Commercial re Contract Route 75, Appli- cation No. 4788.....	38	243
37	May 12, 1930: Final settlement check of \$23,719.65 re Vernon-Hayfield job.....	39	244
38	May 12, 1930: Final settlement check for \$10,039.24 re West Meade Township job..	40	245
39	May 14, 1930: Letter, William F. Jerome to Secretary of Highways of Pa. re Indi- ana County job.....	41	246
40	May 16, 1930: Letter, Secretary of High- ways to Eastern States re Indiana County job	42	247
41	January 13, 1930: Letter, Bridgeton Bank to State Highway Dept. Pa.....	45	248
42	January 17, 1930: Letter, Thos. D. Frye to Bridgeton Bank.....	45	249
43	November 29, 1930: Letter, Albert R. Mc- Allister to H. W. Frye.....	45	250
44	December 3, 1930: Letter, H. W. Frye to Albert R. McAllister.....	45	252
45	January 31, 1930: Letter, Eastern States to Commercial	48	254

Exhibit Number	Description	Stipulation Paragraph Number	Printed at Page
46	Sept. 21, 1930: Letter, Jerome to Mc- Allister	48	255
47	Oct. 15, 1930: Letter, Frye to McAllister..	48	257

Exhibits Marked in Evidence at the Hearing.

Exhibit Number	Description	Offered at Page	Printed at Page
48	September 5, 1929: Eastern States Finan- cial Statement	109	260
49	August 21, 1929: Letter, Commercial to Eastern States	128	263
50	February 11, 1930: Letter, Commercial to Eastern States	132	264
51	Certificate of Incorporation of Eastern States	135	266
52	By-Laws of Eastern States.....	136	267
53	Eastern States resolution re bank accounts	136	272
54	Eastern States resolution creating offices of Assistant Secretary, etc.....	136	272
54-a	Bridgeton Bank's signature card.....	142	272
55 } 56 } 57 } 58 }	Eastern States checks to Commercial.....	149	273
59 } 60 } 61 }	Portions of Eastern States Minute Book....	{161 161 162	273
62	Minute Book of Eastern States.....	163	274
63	Letter, Eastern States to Pennsylvania Surety Company dated March 22, 1929....	167	280
64	Letter, Eastern States to McDonald Con- struction Company dated March 22, 1929	167	281
	Facts admitted in the pleadings in Case No. 2 stipulated to be facts in this case.....		283



Bill of Complaint.

Bill of Complaint.

Filed August 26, 1933.

In Chancery of New Jersey

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey: 10

The complainant, Bridgeton National Bank, a corporation of the United States, having its principal office and place of business in the City of Bridgeton, Cumberland County, New Jersey, respectfully shows:

1. At all the times hereinafter mentioned the complainant was and it still is a corporation organized under the laws of the United States, and was and it still is duly authorized to transact a general banking business pursuant to said laws. 20

2. At all the times hereinafter mentioned the defendant, Commercial Casualty Insurance Company (hereinafter called the Insurance Company) was and it still is a corporation organized under the laws of the State of New Jersey, and was and it still is duly authorized to transact the business of surety on contracts and other undertakings in the State of New Jersey and in the Commonwealth of Pennsylvania. 30

3. At all the times hereinafter mentioned the defendant, Eastern States Construction Company, Inc. (hereinafter called the Construction Company) was and it still is a corporation of the State of New Jersey, duly authorized to transact business in the State of New Jersey and in the Commonwealth of Pennsylvania.

Bill of Complaint.

4. At all the times hereinafter mentioned the First National Bank of Pittsburgh, Pennsylvania (hereinafter called the Pittsburgh Bank) was and it still is a corporation duly organized under the laws of the United States.

10 5. On April 14, 1928, The Construction Company, in consideration of the payments therein specified, entered into a contract with the Commonwealth of Pennsylvania to furnish and deliver all the materials and to do and perform all the work and labor for the construction of 19183 feet of Highway Route No. 75 in the Borough of Emlenton and the Townships of Richland and Salem, in the Counties of Venango and Clarion, in the Commonwealth of Pennsylvania, at the unit prices bid by the Construction
20 Company for the respective estimated quantities, aggregating approximately the sum of \$248,210.27.

6. On April 14, 1928, the Construction Company as principal, and the Insurance Company as surety, entered into a bond to the Commonwealth of Pennsylvania in the sum of \$124,105.14 to be paid to said Commonwealth of Pennsylvania or its assigns, to which payment the Construction Company and the Insurance Company
30 bound themselves, their heirs, executors, administrators and successors, jointly and severally; said bond recited that whereas the Construction Company as principal had entered into a contract with Commonwealth of Pennsylvania bearing even date with said bond, for the improvement of a certain section of highway, as described in said contract, for approximately the sum of \$248,210.27, and
40 further recited that it was one of the conditions

Bill of Complaint.

of the award of the Secretary of Highways,
 acting for and on behalf of the Commonwealth
 of Pennsylvania, pursuant to which said contract
 was entered into, that "these presents" to wit
 said bond, should be executed; said bond was
 conditioned that if the Construction Company
 as principal should in all respects comply with 10
 the terms and conditions of said contract and
 its obligations thereunder, including the speci-
 fications, and such alterations as might be made
 in said specifications as therein provided for,
 and should well and truly and in a manner
 satisfactory to said Secretary of Highways
 complete the work contracted for, and should
 save harmless said Commonwealth from any
 expense incurred through the failure of the
 Construction Company to complete the work 20
 as specified, or for any damages growing out
 of the carelessness of the Construction Company
 or its servants, and should well and truly pay
 for all material furnished and labor performed
 in and about the construction of said highway;
 and should also save and keep harmless said
 Commonwealth against and from all losses to
 it from any cause whatever, including patent,
 trademark and copyright infringements, in the
 manner of constructing said section of roadway; 30
 and should on completion of the contract in an
 acceptable manner file with the Department of
 Highways of said Commonwealth an "Applica-
 tion for Release of Bond," which application
 should set forth *inter alia* that all claims for
 labor and materials used in connection with the
 execution of said contract had been satisfactorily
 settled, said application to be executed by the
 President or Vice-President and the Secretary
 of the company appearing as surety, to-wit, the 40

Bill of Complaint.

said Insurance Company; then said obligation to be void, otherwise to remain in full force and virtue.

10 7. On July 12, 1929, the performance of the contract was completed by the Construction Company according to, and without default of any of, the terms and conditions thereof, and, on said date, the completed work thereunder was duly accepted by the Commonwealth of Pennsylvania.

8. When said contract was completed there was due and owing from said Commonwealth to the Construction Company certain balances for semi-final and final payments, in accordance with the terms of said contract.

20 9. On August 2, 1929, one William F. Jerome (who was then an employee of the Construction Company) without the knowledge, consent or authority of the Construction Company, requested the Department of Highways of the Commonwealth of Pennsylvania to forward check for the semi-final estimate due the Construction Company on said contract to the Construction Company in care of the Insurance Company at the office of the Insurance Company
30 in Pittsburg, Pennsylvania.

10. On August 3, 1929 the Division Engineer of said Commonwealth certified two semi-final estimates therefor, in the sums of \$2,868.83 and \$16,175.41, respectively; both of which, on August 25, 1929, were certified by the Deputy Secretary of Highways of said Commonwealth to the Auditor General thereof for audit and payment. On August 27, 1929, said semi-final estimates were audited and approved by said
40 Auditor General, and, on August 28, 1929, he

Bill of Complaint.

issued his warrants, numbered 8248 and 8249, respectively to the Treasurer of said Commonwealth for the issuance of checks to pay the same. On the same date said Treasurer issued his checks on the Corn Exchange National Bank and Trust Company of Philadelphia, Pa. numbered 49979 and 49980 for said sums, respectively, in payment of the semi-final estimates of the work done by the Construction Company on said contract and sent the same by mail: Check No. 49979 for \$2868.83 to "Eastern States Construction Company, Meadville, Pa.," where it was deposited to the credit of the Construction Company in New First National Bank of Meadville, and, on August 30, 1929, payment thereof was collected by First National Bank of Pittsburgh, Pa., through the Pittsburgh Clearing House; and check No. 49980, for \$16,175.41 to "Eastern States Construction Co., c/o Commercial Casualty Ins. Co., 720 Grant Bldg., Pittsburgh, Pa." where it was delivered by the Insurance Company to said William F. Jerome and endorsed by him as follows:

"Deposit in
Farmers & Merchants Nat'l Bank
Bridgeton, N. J.
Eastern States Const. Co.
By William F. Jerome
Asst. Treas."

and deposited in said Farmers & Merchants Bank at Bridgeton, N. J. to the credit of the Construction Company on September 7, 1929.

11. On September 19, 1929, one William F. Jerome (who was then an employee of the Construction Company), without the knowledge, consent or authority of the Construction Company, requested the Department of Highways of the

Bill of Complaint.

Commonwealth of Pennsylvania to forward check for the final payment due the Construction Company on said contract to the Construction Company in care of the Insurance Company at the office of the Insurance Company in Pittsburg, Pennsylvania.

- 10 12. On September 22, 1929, the Insurance Company, in accordance with the terms of, and in the form required by, said bond and said contract, filed with the Department of Highways of said Commonwealth its application for release of said bond, executed by the duly authorized officers of the Insurance Company and attested by its corporate seal, wherein and whereby the Insurance Company recited that it was satisfied that all claims for labor and materials had
- 20 been satisfactorily settled, and agreed that the release of said bond by the Secretary of Highways, shall not be considered as a release from any claim for labor or materials furnished in connection with said contract, which claim did not appear either on the books or records or on the affidavit, or was misstated on the affidavit, of the Construction Company at the time of examination or receipt of the same by the Insurance Company; with the proviso that nothing
- 30 therein contained should increase the liability of the Insurance Company over and above the amount of the bond.

13. On September 24, 1929, the Construction Company borrowed from the complainant the sum of \$10,000.00 to be repaid on demand, with interest, and on said date executed and delivered to the complainant its demand note for said sum and delivered, with said note as collateral security for the payment thereof, its duly authorized
- 40 and executed assignment, also dated September

Bill of Complaint.

24, 1929, of the balance (therein stated to be \$21,000.00) due the Construction Company from said Commonwealth on said contract.

14. On October 1, 1929, the Construction Company notified the Insurance Company of the execution and delivery of said assignment by the Construction Company to the complainant. 10

15. On August 15, 1930, complainant duly demanded payment of said note, with interest, and upon default thereof, said note was duly protested according to law. The Construction Company then refused, and still refuses, to make payment of said note, and the full amount of the principal thereof, with interest from its date, is still due and owing to the complainant.

16. At the time of the making of said note and the execution and delivery of said assignment as collateral security therefor, there was due to said Construction Company from said Commonwealth, on the final estimate of work done on said contract, the sum of \$19,677.84. 20

17. On January 4, 1930, final settlement of said contract was made between the Construction Company and said Commonwealth, and the Division Engineer of said Commonwealth certified two final estimates of work done on said contract, in the sums of \$2,328.21, and \$17,349.63, respectively; both of which, on February 5, 1930, were certified by the Deputy Secretary of Highways of said Commonwealth to the Auditor General thereof for audit and payment. On February 7, 1930, said final estimates were audited and approved by said Auditor General, and on February 10, 1930, he issued his warrants, numbered 21912 and 21914, respectively, to the Treasurer of said Commonwealth for the issuance of checks 30 40

Bill of Complaint.

to pay the same. On February 10, 1930, said Treasurer issued his checks on Corn Exchange National Bank and Trust Company of Philadelphia, Pa., numbered 48884 and 48886, for said sums, respectively, in final payment for all the work done by the Construction Company on said contract, and sent the same by mail to "Eastern States Const. Co., c/o Commercial Cas. Ins. Co., 720 Grant Bldg., Pittsburg, Pa." where they were received by the Insurance Company on February 11, 1930.

18. Instead of delivering said checks to the Construction Company, or to said William F. Jerome, its employe, and the same being deposited by him to the credit of the Construction Company in the customary manner in accordance with his instructions from the Construction Company, he, on said February 11, 1930, at the request of the Insurance Company, but without the knowledge, consent or authority of the complainant, or of the Construction Company, and contrary to his instructions from said Construction Company, endorsed each of the said checks as follows:

30 "For deposit only in the first National Bank at Pittsburgh, Pennsylvania, to the credit of COMMERCIAL CASUALTY INSURANCE COMPANY BOND ACCOUNT. Eastern States Construction Company by: Wm. F. Jerome"

and delivered the same to the Insurance Company.

19. On February 28, 1930, the Insurance Company, without the knowledge, consent or authority of the complainant, or of said Construction Company, endorsed said checks as follows:

40

Bill of Complaint.

“Commercial Casualty Insurance Company Bond Acct. by H. S. Hays, Attorney-in-Fact;”

and without the knowledge, consent or authority of the complainant or of said Construction Company, deposited the same to its account in the First National Bank of Pittsburg, Pa. and payment thereof was collected by said First National Bank, of Pittsburg, Pa., from Corn Exchange National Bank and Trust Company of Philadelphia, Pa., through the Pittsburg Clearing House, on March 1, 1930, and the full amount thereof was credited to the account of the Insurance Company in said First National Bank, of Pittsburg, Pa. 10

20. The said endorsement of said checks, and the deposit thereof to the credit of the Insurance Company were without the knowledge, consent or authority of the complainant or of the said Construction Company, and were in violation of the complainant's right under said assignment, and deprived complainant of the benefit of the proceeds of said checks, or of any part thereof. 20

21. No part of said sum of \$10,000.00, or of the interest thereon, has been paid to the complainant; complainant has demanded payment thereof from the Construction Company but it has no assets to pay same other than from the said final payment under said contract; complainant had demanded payment thereof from the Insurance Company, but it denies complainant's right to collect said sum or any part thereof from it; complainant has demanded payment thereof from the Pittsburg Bank but it denies that it is liable to complainant for same, or any part thereof. 30 40

Bill of Complaint.

Complainant is without adequate remedy in the courts of law and therefore prays—

10 1. That Commercial Casualty Insurance Company, a corporation, and Eastern States Construction Company, Inc., a corporation, who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made;

2. That an account may be taken as follows:

(a) Of the amount due the complainant by virtue of its said assignment;

20 (b) Of the amount due, or paid, to the Construction Company and the Insurance Company, respectively, by the Commonwealth of Pennsylvania by virtue of the terms of the contract herein mentioned between the Construction Company and the Commonwealth of Pennsylvania;

(c) Of the amount paid, or credited, to the Insurance Company by the Pittsburgh Bank by virtue of the deposit of said checks.

30 3. That the Construction Company and the Insurance Company may severally be decreed to pay to the complainant the amount found to be due complainant by virtue of its said assignment, with interest and costs.

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

HOBART & MINARD,
Solicitors of Complainant.

GEORGE S. HOBART,
DUANE E. MINARD,
Of Counsel.

Answer of Eastern States Construction Company.

**Answer of Eastern States Construction
Company.**

Filed October 16, 1933.

Eastern States Construction Company, Inc.,
one of the defendants herein, answering the bill
of complaint, respectfully shows: 10

1. Paragraphs 1 to 21, both inclusive, are
admitted.

2. The money borrowed by this defendant
from complainant, as alleged in paragraph 13
of the complaint, was borrowed and exclusively
used for the completion of the work of the con-
tract described in paragraph 5 of the complaint,
and in payment for materials and labor furnished
in the performance of said contract. 20

3. This defendant joins in the prayer of the
complainant, in that it prays that on said ac-
counting prayed by complainant, defendant, Com-
mercial Casualty Insurance Company may be
decreed to pay to this defendant the amount
found to be due on the final payment checks
mentioned in paragraph 17th of the complaint,
over and above the amount thereof found to
be due to complainant, with lawful interest
thereon. 30

McALLISTER & McALLISTER,
McALLISTER and McALLISTER,
Solicitors for defendant,
Eastern States Construction
Company, Inc.

ALBERT R. McALLISTER
Albert R. McAllister,
Of counsel.

*Amended Answer of Commercial Casualty
Insurance Company.*

We hereby consent to the filing of the foregoing answer as of time.

HOBART & MINARD,
Solicitors for Complainant.

10

**Amended Answer of Commercial Casualty
Insurance Company.**

Filed January 21, 1935.

Defendant, Commercial Casualty Insurance Company, a New Jersey corporation, answering complainant's bill of complaint, says that:

- 20 1. It has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the bill of complaint and leaves complainant to its proof thereof.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. It has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4 of the bill of complaint and leaves complainant to its proof thereof.
- 30 5. It admits that on April 14, 1928 the Eastern States Construction Company, Inc. (hereinafter referred to as "Eastern States") entered into a written contract with the Commonwealth of Pennsylvania (hereinafter referred to as the "Commonwealth") as alleged in Paragraph 5, but as to the exact contents thereof this defendant prays that reference may be thereunto had, and in all other respects denies the allegations contained in Paragraph 5.
- 40

*Amended Answer of Commercial Casualty
Insurance Company.*

6. It admits that on April 14, 1928 Eastern States, as principal, and this defendant as surety entered into a bond bearing that date to the Commonwealth as alleged in Paragraph 6, but as to the exact contents thereof this defendant prays that reference may be thereunto had, and in all other respects it denies the allegations contained in Paragraph 6. 10

7. It denies that on July 12, 1929 the performance of the contract referred to in Paragraph 7 of the bill of complaint was completed and denies that the work thereunder was on that date duly accepted by the Commonwealth.

8. It denies that on July 12, 1929, when said contract is alleged in the bill of complaint to have been completed, that there were any balances for semi-final or final payments due to the Eastern States in accordance with the terms of said contract, and alleges that final payment under said contract did not fall or become due or payable until on or about January 4, 1930. 20

9. It denies that the request made by William F. Jerome for and in the name of Eastern States to the Department of Highways of the Commonwealth as alleged in Paragraph 9 of the bill of complaint was made without the knowledge, consent or authority of the said Eastern States. 30

10. It has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 10 of the bill of complaint and leaves complainant to its proof thereof.

11. It denies that the request alleged in Paragraph 11 of the bill of complaint to have been made by William F. Jerome for and in the name 40

*Amended Answer of Commercial Casualty
Insurance Company.*

of Eastern States to the Department of Highways of the Commonwealth was made without the knowledge, consent or authority of said Eastern States.

10 12. It admits that on or about August 22, 1929 it filed with the Department of Highways of said Commonwealth its application for release of said bond, executed by its duly authorized officers and attested by its corporate seal, but as to the exact contents thereof it prays that reference may be thereunto had, and in all other respects denies the allegations of Paragraph 12 of the bill of complaint.

20 13. It has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13 of the bill of complaint and leaves complainant to its proof thereof.

14. It denies Paragraph 14.

15. It denies Paragraph 15.

30 16. It denies Paragraph 16, and alleges that on September 24, 1929, the date of the alleged assignment by Eastern States Construction Company to complainant, final settlement of said contract had not been made and no sum was then due or owing to said Eastern States from or by said Commonwealth of Pennsylvania on said contract.

17. It admits Paragraph 17.

40 18. It admits that the check referred to in Paragraph 18 was received by it and was endorsed by said Eastern States for deposit in the First National Bank of Pittsburgh, Pennsylvania, to the credit of "Commercial Casualty Insurance Company bond account." It denies all other allegations contained in Paragraph 18.

*Amended Answer of Commercial Casualty
Insurance Company.*

19. It admits that it endorsed the check referred to in Paragraph 19 and deposited the same to the credit of its bond account in the First National Bank of Pittsburgh, Pennsylvania, and the same was collected and the proceeds thereof were credited by said First National Bank to the credit of its said account. It denies all other allegations contained in said Paragraph 19. 10

20. It denies Paragraph 20.

21. It admits that it denies complainant's right to collect said sum or any part thereof from it and it admits that the said Pittsburgh bank denies that it is liable to complainant for same or any part thereof. It denies all other allegations contained in Paragraph 21. 20

Further answering complainant's bill of complaint, defendant says:

22. Defendant Eastern States, in order to enable it to make and enter into the aforesaid contract (mentioned in Paragraph 5 of the bill of complaint and hereinafter referred to as the "Clarion-Venango" contract) dated April 14, 1928 with the Commonwealth of Pennsylvania, made written application to this defendant dated April 13, 1928, for and in its name, by William F. Jerome, its assistant secretary and treasurer, to have this defendant join with it in a bond to said Commonwealth in the amount and in the form required by said contract, a true copy of which said written application is hereto attached and made a part hereof and marked "Exhibit A." 30

23. Relying upon said written application of said Eastern States and upon each and every of the provisions thereof, and relying upon each 40

*Amended Answer of Commercial Casualty
Insurance Company.*

and every of the provisions of said contract, this defendant, as surety, joined with said Eastern States, as principal, in the execution of said bond to said Commonwealth and the same was delivered to the proper officers of said Commonwealth, together with said contract between
10 said Commonwealth and said Eastern States, in which and as part of which said contract said bond was incorporated, as by reference thereto will more fully appear.

24. On September 22, 1928 and on March 18, 1929, respectively, Eastern States made and delivered to this defendant two other applications and indemnity agreements, in form identical with the aforesaid application, which is hereto
20 attached and marked "Exhibit A" and containing the same covenants and provisions as therein contained, and in reliance thereon this defendant on the last mentioned dates respectively, as surety, made and entered into two other bonds, in form identical with the aforesaid Clarion-Venango bond, with Eastern States as principal, to said Commonwealth as obligee, the first in the sum of \$67,219.21 in relation to what
30 is hereinafter referred to as the "Vernon-Hayfield" contract and job, and the second in the sum of \$28,203.53 in relation to what is hereinafter referred to as the "West Meade" contract and job, and on said dates respectively Eastern States entered into the two contracts with the Commonwealth which are referred to in said Vernon-Hayfield application and bond and in said West Meade application and bond, respectively, which said last two contracts were in form identical with the aforesaid Clarion-Venango
40 contract. Eastern States proceeded with the performance of all three of the aforesaid con-

*Amended Answer of Commercial Casualty
Insurance Company.*

tracts, and all three of the aforesaid application agreements, bonds and contracts were in full force and effect from the time of the making thereof respectively to each and every of the times hereinafter mentioned.

25. William F. Jerome was at all times herein mentioned assistant secretary and treasurer of Eastern States and was the officer of said company who executed said application to this defendant for said Clarion-Venango bond and was the agent and representative of said company in charge of the performance of its said contracts with said Commonwealth, and at all times herein mentioned from and after the delivery to this defendant of said written application for said Clarion-Venango bond Eastern States held said William F. Jerome out to this defendant as its officer and agent with whom this defendant might deal in respect to said bond and said contracts and all matters arising thereunder, and this defendant in all things dealt with him accordingly, and his authority to act for and on behalf of Eastern States in respect to said bonds and said contracts and all matters arising thereunder between this defendant and said company has never at any time or in any respect, to the knowledge of this defendant, been questioned, denied or repudiated by Eastern States, but on the contrary has been ratified and confirmed by it.

26. In August, 1929, Eastern States owed bills and charges for labor and material furnished in connection with said Clarion-Venango job to an amount in excess of \$15,000.00 which this defendant, as surety on said Clarion-Venango bond, was liable to pay and the amount of

10

20

30

40

*Amended Answer of Commercial Casualty
Insurance Company.*

10 which Eastern States, in and by its said applica-
tion and indemnity agreement, had covenanted to
pay over to this defendant as soon as this de-
fendant should have become liable therefor, and
for the amounts of which Eastern States had not
made payment to this defendant, notwithstanding
that this defendant had become liable therefor,
and this defendant, to secure and further in-
demnify itself against loss, demanded of said
Eastern States that it order said Common-
wealth, pursuant to the established practice then
and there prevailing, to send the Common-
wealth's checks for the semi-final payments and
for the final payments on said Clarion-Venango
contract to this defendant and demanded that
20 said Eastern States make over said checks to
this defendant to the end that this defendant
might apply the proceeds thereof toward the
discharge of debts of Eastern States for labor
and material furnished to said Clarion-Venango
job, for which this defendant, as surety, was
liable. Pursuant to said demand, when the semi-
final payment on said Clarion-Venango job was
about to become due, Eastern States delivered
to this defendant an order dated August 2, 1929
30 directing said Commonwealth to forward its
semi-final estimate check on said Clarion-Venan-
go contract to it in care of this defendant at
this defendant's Pittsburgh, Pennsylvania, of-
fice, and agreed to comply with this defendant's
aforesaid demand.

27. On or about August 21, 1929 this defend-
ant forwarded to the Department of Highways
of said Commonwealth the aforesaid order of
Eastern States dated August 2, 1929 together
40 with this defendant's "Application for Release
of Bond" in accordance with the terms of and

*Amended Answer of Commercial Casualty
Insurance Company.*

in the form required by its said bond and by said Clarion-Venango contract, and stated therein, among other things, "that it was satisfied that all claims for labor and material had been satisfactorily settled," meaning and intending thereby that the payments under said contract coming into its hands pursuant to the aforesaid arrangement and agreement with Eastern States in respect thereto constituted a satisfactory settlement of all claims for labor and material in connection with said contract. 10

28. On or about September 5, 1929 said semi-final estimate checks on said Clarion-Venango contract having come into the possession of this defendant pursuant to the aforesaid order of and agreement with Eastern States, said Eastern States induced this defendant to release Eastern States from its aforesaid obligation to make over said semi-final estimate checks to this defendant and induced this defendant to surrender up said semi-final estimate checks to it in exchange for checks of said Eastern States drawn to the order of the aforesaid claimants respectively in the amounts of their respective bills, and this defendant delivered said checks of Eastern States to said claimants respectively and said claims were paid thereby. 20 30

29. On September 19, 1929 all work to be done and material to be furnished by Eastern States under and pursuant to all three of said contracts (viz., Clarion-Venango, Vernon-Hayfield and West Meade) had been done and furnished and no labor or material were thereafter furnished thereon. On that date it was estimated and believed by both Eastern States and this defendant that the final payment on said Clarion- 40

*Amended Answer of Commercial Casualty
Insurance Company.*

Venango job would amount to approximately \$20,000.00 and on that date there was due and owing by Eastern States to McDonald Construction Company, a sub-contractor, for labor and material furnished in the performance of said
10 Clarion-Venango contract, the sum of \$12,370.43. On that date Eastern States also owed for labor and material furnished in performance of said Vernon-Hayfield contract and West Meade contract the aggregate sum of \$59,060.54, whereas the further payments to be made by the Commonwealth in full settlement of said Vernon-Hayfield contract and West Meade contract amounted only to the aggregate sum of \$33,758.89.

20 30. On or about September 19, 1929 this defendant demanded of Eastern States, pursuant to its rights as surety on said bond and pursuant to the provisions of Eastern States' aforesaid obligations and indemnity agreements and pursuant to the then and there established and prevailing practice and custom in such matters, that Eastern States should make an order on said Commonwealth to send the final estimate checks on said Clarion-Venango contract to it in care of this defendant and should make over
30 said checks to this defendant to the end that this defendant might use and apply the proceeds thereof to the payment and discharge of the aforesaid debts of Eastern States for labor and materials furnished to said three contracts for which this defendant was then liable as surety as aforesaid, and said Eastern States, by its officers and agents thereunto duly authorized, recognized and admitted the right of this defendant to be indemnified as aforesaid and recognized
40 the right of this defendant under and by virtue of the provisions of the aforesaid applications

*Amended Answer of Commercial Casualty
Insurance Company.*

and indemnity agreements and by virtue of its position as surety as aforesaid, to receive said final payment under said contract as indemnity to this defendant against said claims for which this defendant was liable under its said bonds as aforesaid, and Eastern States agreed that said final estimate checks should be sent as aforesaid to this defendant and should be made over by it to this defendant. 10

31. Pursuant to the aforesaid demand of this defendant and the aforesaid agreement of Eastern States, said Eastern States, by its said officer and agent William F. Jerome thereunto duly authorized, on September 19, 1929, filed with said Department of Highways of said Commonwealth an order bearing that date, of which a true copy is hereto attached and made a part hereof and marked "Exhibit B." 20

32. The aforesaid arrangement and agreement between this defendant and said Eastern States was made, and said order dated September 19, 1929 from said Eastern States was written and delivered to said Department of Highways all prior to the making of the alleged assignment from Eastern States to complainant and all prior to the making of the alleged loan by complainant to said Eastern States. 30

33. Complainant took said alleged assignment from Eastern States charged with notice and knowledge of the aforesaid arrangement and agreement between this defendant and said Eastern States and of said order dated September 19, 1929 from said Eastern States to said Department of Highways, and charged with notice and knowledge of the provision contained in said Clarion-Venango contract between said 40

*Amended Answer of Commercial Casualty
Insurance Company.*

Eastern States and said Commonwealth prohibiting such assignment to complainant, and charged with notice and knowledge of this defendant's being surety for said Eastern States both on the bond embodied in said contract and on the
10 aforesaid other bonds, and charged with notice and knowledge of the prior right of this defendant to receive said final payment as indemnity to this defendant as aforesaid.

34. Any rights acquired by complainant of, in or to said final payment under or by reason of said alleged assignment to it were subsequent, subordinate and subject to the prior right of this defendant thereto.

20 35. Said Secretary of Highways recognized the right of this defendant to receive said final payment and accepted and complied with the order of said Eastern States dated September 19, 1929 ("Exhibit B" hereto attached) and pursuant thereto on or about February 11, 1930 this defendant received at its said Pittsburgh office two checks of said Commonwealth, one in the sum of \$2,328.21 and the other in the sum of \$17,349.62, both payable to Eastern States,
30 which said checks said Eastern States, by William F. Jerome, its officer and agent thereunto duly authorized as aforesaid, endorsed "For deposit only in the First National Bank of Pittsburgh, Pennsylvania, to the credit of Commercial Casualty Insurance Company Bond Account. Eastern States Construction Company by William F. Jerome," and delivered the same to this defendant, and this defendant thereupon deposited the same to the credit of its said bond account at said First National Bank of Pittsburgh
40 and, said checks having been collected in due

*Amended Answer of Commercial Casualty
Insurance Company.*

course, the proceeds thereof were credited by said bank to this defendant's said bond account in said First National Bank of Pittsburgh.

36. By reason of the facts aforesaid this defendant received said final payment in its own right as indemnity to it against its aforesaid liabilities incurred by it as surety for said Eastern States on the bonds aforesaid. 10

37. On January 17, 1930, in answer to complainant's inquiry, said Department of Highways of said Commonwealth informed complainant that the final estimate checks on said Clarion-Venango contract would be delivered to this defendant, but complainant took no steps of any kind to protect any rights that it had or might claim to have in respect thereto. 20

38. Complainant gave no notice to this defendant of said assignment which complainant alleges was made to it on September 24, 1929 by Eastern States until March 28, 1930, on which day it sent a letter to this defendant, with which it enclosed what purported to be a copy of the note and assignment made to it by Eastern States and in which it inquired—"Will you advise us whether you did receive on or about August 22, 1929 the above amount of \$19,044.24, and if so, will you pay the note out of such funds," but it therein made no demand upon and asserted no claim against this defendant. 30

39. Out of said \$19,677.84 received by this defendant as aforesaid on said Clarion-Venango contract final payment, this defendant paid the aforesaid sum of \$12,370.43 to said McDonald Construction Company and paid and applied the entire balance thereof toward the satisfaction 40

*Amended Answer of Commercial Casualty
Insurance Company.*

of the aforesaid debts for labor and material that were owing by Eastern States on said Vernon-Hayfield contract and West Meade contract as aforesaid. This defendant, subsequently to September 19, 1929, received from said Commonwealth the final estimate checks on said West Meade contract in the sum of \$10,032.24 and on said Vernon-Hayfield contract in the sum of \$23,719.65, which said checks Eastern States endorsed and made over to this defendant, and this defendant paid and applied the entire proceeds thereof toward the payment and discharge of the aforesaid debts of Eastern States for labor and material owing as aforesaid on said job. In addition to all sums received by this defendant as aforesaid this defendant has advanced and disbursed out of its own funds a sum in excess of \$40,000.00 in discharge of debts owing by Eastern States on contracts bonded by this defendant, for payment of which this defendant was liable as surety, and by reason thereof said Eastern States is still indebted to this defendant in a sum in excess of \$40,000.00.

40. Complainant asserted no claim and instituted no proceedings against this defendant until January 12, 1932, when it instituted an action-at-law against this defendant in the New Jersey Supreme Court for the recovery of the sum sought to be recovered by it herein, which action-at-law was non-suited. From the date of the alleged assignment to it on September 24, 1929 until January 12, 1932 complainant stood by and permitted this defendant to rely upon this defendant's right to said Clarion-Venango final payment, and permitted this defendant to pay out and disburse the same as aforesaid, and by its failure to assert a right or claim against this

*Amended Answer of Commercial Casualty
Insurance Company.*

defendant, induced this defendant to rely upon its unquestioned right to said final payment, and thereby has caused this defendant to change its position and to refrain from taking steps that it otherwise would have taken to further secure and indemnify itself against loss, and Eastern States has since become and now is insolvent. 10

41. Complainant is in laches and by reason of its aforesaid conduct and failure to act is estopped from now asserting any right to said fund as against this defendant.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel
with defendant Commercial
Casualty Insurance Company. 20

NOTE.

The Exhibit A "Application for Contract Bond" and Exhibit B "Order of September 19, 1929, to Department Highways" are same, respectively, as Exhibit No. 1, printed at pp. 190-202, and Exhibit No. 27, printed at p. 233. 30

*Replications.***Consent to Filing Thereof.**

10 Upon the understanding that the Replication heretofore filed by complainant shall stand as its Replication to this Amended Answer, we hereby consent to the filing of the within Amended Answer and hereby acknowledge service of a copy thereof.

HOBART & MINARD,
Solicitors for Complainant.

Dated: April 17, 1934.

Replications.

20 Filed November 2 and 21, 1933.

Complainant joins issue on the answer of the defendant, Commercial Casualty Insurance Company, and on the answer of the defendant, Eastern States Construction Company.

HOBART & MINARD,
Solicitors of Complainant.

30

40

*Opinion.***Opinion.**

Filed December 27, 1934.

SYLLABUS BY THE COURT.

1. As between owner and contractor, a non-assignability clause in a road construction contract is for the benefit of the owner only; and when the work is completely performed, without any default by the contractor, the owner's interest ceases and an assignment by contractor of moneys due him under the contract is not affected by such clause. 10

2. A direction by contractor to the owner to "forward our final check * * * to us in care of" the surety on contractor's bond, HELD in circumstances of instant case not to amount to an equitable assignment in favor of the surety.

3. Covenants in an application for a surety bond between the construction company as principal, and its surety, whereby the principal agrees to indemnify the surety against loss "in consequence of having executed the bond herein applied for, or * * * any and all other bonds executed," and assigning to surety "all moneys and properties that may be due and payable to the undersigned (principal) at the time of any breach or default" do not entitle the surety to appropriate moneys due the principal under the specific contract in question, under which there was no default by the contractor, and apply such funds against losses sustained by the surety on bonds executed subsequently for the same principal covering separate and distinct undertakings, especially where the money thus due the contractor had been theretofore assigned to a bona fide assignee as collateral for a loan which remains unpaid. 20 30

4. An attempt by a surety to obtain and appropriate moneys due to its principal, by having one of the principal's officers endorse over to the surety checks made to the order of the principal, when checks of the principal required 40

Opinion.

the signature of two officers, is ineffectual and the surety will be required to account therefor to the principal or its assignee.

DAVIS, V.-C.

In this cause complainant, Bridgeton National Bank, will be referred to as "Bridgeton Bank;"
 10 the defendant, Commercial Casualty Insurance Company, as "Commercial;" the defendant, Eastern States Construction Company, Inc., as "Eastern States."

Bridgeton Bank seeks a decree against Commercial in the sum of \$7,307.41, with interest, the amount claimed to be in the hands of Commercial, assigned to Bridgeton Bank by Eastern States. Eastern States, a New Jersey corporation, was engaged in the business of road building, and on April 13, 1928, made a written application and agreement with Commercial for the
 20 purpose of having Commercial become surety on a bond dated April 14, 1928, from Eastern States as principal and Commercial as surety to the Commonwealth of Pennsylvania as obligee, required by the written agreement entered into between Eastern States and said Commonwealth of Pennsylvania bearing same date, and relating among other things to the building of a road,
 30 which may be referred to as the "Clarion and Venango contract."

Subsequently, on September 29, 1928, Eastern States made another written application and agreement with Commercial and a bond was executed to the Commonwealth of Pennsylvania in accordance with the written agreement relating to the building of a road referred to as "Vernon and Hayfield contract;" and on March
 40 18, 1929, another written application and agreement was entered into by Eastern States and

Opinion.

Commercial, and on March 29, 1929, Eastern States as principal and Commercial as surety executed a bond to the Commonwealth of Pennsylvania in accordance with agreement bearing same date, relating among other things to the building of a road referred to as "West Meade Township contract."

10

On August 2, 1929, Eastern States owed bills for labor and materials furnished in connection with the Clarion and Venango contract aggregating \$15,593.10, which bills were afterward paid by Eastern States by checks dated September 5, 1929.

On August 2, 1929, Eastern States wrote a letter, signed by Wm. F. Jerome, who was assistant treasurer of that company, to the Penna. Dept. Highways, as follows:

20

"Please forward our semi-final estimate check on our Clarion-Venango County contract R-75 Appl. 4788 to us in care of The Commercial Casualty Co. 720 Grant Bldg. Pittsburgh, Penna."

On August 3, 1929, the division engineer of Pennsylvania certified to semi-final estimates on that contract in the sums of \$2,868.83 and \$16,175.41, which were afterward certified for payment, approved, audited, and issuance of checks authorized for the same, and on August 22nd, Commercial filed application for release of bond on the Clarion and Venango contract with the Department of Highways of Pennsylvania, and on August 28, 1929, the Treasurer of Pennsylvania issued two checks payable to Eastern States in payment of the semi-final estimates. The check for \$2,868.83 was deposited to the credit of Eastern States in New First National Bank of Meadville, and collected, and

30

40

Opinion.

the check for \$16,175.41 was mailed to Eastern States, c/o Commercial Casualty Insurance Company, 720 Grant Building, Pittsburgh, Pa., and received by William F. Jerome, assistant secretary and treasurer of Eastern States, and deposited to the credit of Eastern States in the
 10 Farmers and Merchants Bank at Bridgeton, N. J., and Eastern States then delivered to Commercial its checks in payment of the bills and charges aggregating \$15,593.10 to which reference has been made.

On September 25, 1929, Eastern States made another written application and agreement with Commercial, and a bond was executed to the County of Indiana, Commonwealth of Pennsylvania, with Eastern States as principal and
 20 Commercial as surety, in accordance with the application and the written agreement relating to the building of a road referred to as the "Indiana County contract."

On September 19, 1929, there was due to McDonald Construction Company for labor and materials, \$12,370.43, representing the amount finally agreed in settlement of its claim on the Clarion and Venango contract, and Commercial received on that contract, \$19,677.84; and there
 30 was also due for labor and materials furnished in connection with the West Meade Township contract, \$12,929.20, and Commercial received \$10,039.24; there was due on the Vernon-Hayfield contract, \$35,711.48; and on both the Vernon-Hayfield and West Meade Township contracts, not allocated as between them, \$10,422.86, and Commercial received thereon the sum of \$23,719.65; and on that same date all work to be done and materials to be furnished on said three
 40 contracts, had been done and furnished.

Opinion.

After that date, Pennsylvania, by its checks, all payable to the order of Eastern States, afterwards endorsed over to Commercial by Eastern States in the manner as shown on such checks, paid the final estimates on each of these contracts, and the bills and charges were paid therefrom to the extent of the final estimate payments on them, and the balance thereof was paid by Commercial. On September 19, 1929, said William F. Jerome sent a written request to the Department of Highways of Pennsylvania, which reads as follows:

“Please accept this as an order to forward our final check to us on the construction of Clarion-Venango County, R-75, Application 4788, to us in care of the Commercial Casualty Insurance Company, 720 Grant Building, Pittsburgh, Pennsylvania.”

On September 24, 1929, Eastern States borrowed from Bridgeton Bank, \$10,000, giving its note payable on demand, which note was protested on August 15, 1930, and upon which there remains due the sum of \$10,000 together with protest fees and interest, and with the giving of the note Eastern States executed and delivered to Bridgeton Bank a written instrument which is termed an assignment, and by which it assigned, transferred and set over to Bridgeton Bank the balance then due Eastern States from the Highway Department of Pennsylvania under the Clarion and Venango contract, subject to the understanding that upon the repayment of the said loan made upon the consideration of the assignment, the balance when paid, after deducting principal and interest on said loan of \$10,000, should be refunded and paid to Eastern States. The resolution of the Board of Directors of

10

20

30

40

Opinion.

Eastern States recited in the assignment was adopted March 2, 1929.

10 On January 4, 1930, the division engineer of Pennsylvania certified two final estimates on the Clarion and Venango contract in the sums of \$2,328.21 and \$17,349.63, which estimates were duly certified and approved, warrants issued, and checks of the Treasurer of Pennsylvania, dated February 10, 1930, for said sums respectively in final payment for all the work done by Eastern States on said Clarion and Venango contract, were sent by mail to "Eastern States Const. Co., c/o Commercial Cas. Ins. Co., 720 Grant Bldg., Pittsburgh, Pa.", which checks arrived at such address on or about February 10, 1930. Both checks were endorsed as follows:

20 "For deposit only in the First National Bank at Pittsburgh, Pennsylvania, to the credit of the Commercial Casualty Insurance Company, Bond Account.

EASTERN STATES CONSTRUCTION COMPANY
By Wm. F. Jerome.

COMMERCIAL CASUALTY INSURANCE COMPANY
Bond Account

By H. S. Hays,
Attorney in Fact."

30 and the signature of "Wm. F. Jerome" on these endorsements is the signature of William F. Jerome, the assistant secretary and treasurer of Eastern States. These checks were collected by First National Bank at Pittsburgh from Corn Exchange National Bank and Trust Company in Philadelphia, and the full amount credited by the former bank to the Commercial Bond Account.

40 On March 28, 1930, Bridgeton Bank sent a letter to Commercial, which letter was the first

Opinion.

communication, either oral or written, received by Commercial from Bridgeton Bank or from any officer or employee of Bridgeton Bank. This letter notified Commercial that Eastern States had borrowed from Bridgeton Bank on September 24, 1929, \$10,000, and had given a demand note therefor and the written instrument or assignment to which reference has been made, and enclosed to Commercial copies of the note, the resolution of Eastern States giving authority to borrow, and of the written instrument or assignment used as collateral. 10

At the time the \$10,000 was borrowed from Bridgeton Bank by Eastern States, Jerome was present in Bridgeton and he testified that he telephoned Mr. Hays, the assistant manager of Commercial, telling him of this loan and of this assignment executed as collateral, and that he also wrote him a letter to that effect. His testimony was that the letter was written in longhand from the Penn-Harris Hotel in Harrisburgh, of which he retained no copy. While the receipt of such a letter and telephone call is denied by Mr. Hays, I am inclined to believe that Mr. Hays was informed by Mr. Jerome of this loan, and through him, Commercial had information about it shortly after the loan was made, and in reaching this conclusion I have taken into consideration the fact that checks drawn by Eastern States in payment of bills had been, prior to that time, returned unpaid by Bridgeton Bank on account of insufficient funds, and Mr. Hays knew about them and was interested in having these checks made good, as well as considered a letter which Jerome wrote to Commercial on January 31, 1930, at which time Eastern States 20 30

Opinion.

owed more than the money it would receive on one or more of the contracts other than the Clarion and Venango contract, and stating in the letter that the final estimate on the latter contract would be received in a few days and on receipt of it Commercial should apply it to these
10 accounts except the amount owed the McDonald Construction Company.

At the time of the writing of the letter from Bridgeton Bank to Commercial, Commercial had not disbursed the moneys deposited in its bond account, being the balance on the Clarion and Venango contract. Subsequently, Commercial received all the moneys due on various other contracts to which reference has been made, and upon which it was surety on the bonds of Eastern
20 States, and disbursed the funds and applied the excess of \$7,307.41 which it had in its hands, which came from the Clarion and Venango contract, to its losses incurred on the remaining contracts upon which it was surety, claiming the right to apply this excess from the Clarion and Venango contract because of the provisions of the agreement and application for bond in connection with that contract, as well as the order given by Jerome, dated September 19, 1929, to
30 the Department of Highways with reference to the mailing of the checks. Commercial contends that these were assignments and were prior to any claim which Bridgeton Bank had under its assignment of September 24, 1929.

The provisions of the application and agreement in connection with the surety bond given under the Clarion and Venango contract between Eastern States and Commercial, so far as they

Opinion.

affect the matters in dispute in this cause between Commercial and Bridgeton Bank are:

“3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney’s fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed, for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and attorney’s fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not.”

10

20

30

40

Opinion.

10 “4th. That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper to obtain its release from all liability under any and every such bond, and to secure and further indemnify itself against loss and all damage and expenses which the Company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.”

20 “5th. That for the better protection and security of the Company, the undersigned, as of the date hereof, hereby assigns, transfers and conveys to the Company all the right, title and interest of the undersigned in and to all the supplies, tools, plant, equipment and materials of every nature and description that he or it may now or hereafter have upon said work, or in, or on, about the site thereof, and also all materials purchased for or chargeable to the said contract which may be in process of manufacture or construction, or in transportation, or in storage elsewhere, and also all his or its right in and to all subcontracts relating to said work which have been or may hereafter be made, together with the materials embraced therein, and as well all the rights, title and interests of the undersigned in and to all bonds executed to the undersigned securing the performance by said subcontractors of subcontracts, hereby subrogating said Company to all such rights, title and interests of the undersigned therein; and the undersigned does hereby authorize and empower the Company, its authorized agents or attorneys, to enter upon and take possession of said supplies, tools, plant, equipment, materials, and subcontracts, and enforce, use and enjoy the title thereto and the possession thereof in the event of any default on

30

40

Opinion.

the part of the undersigned in the performance of the contract hereinabove referred to or in the payment of the premiums above mentioned.”

“6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond.”

“7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney’s fees, which it may thereby incur, shall be included in such action and paid by the undersigned.”

Opinion.

10 “11th. That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said bond or any other former or subsequent bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request.”

20 There was no default by Eastern States under the Clarion and Venango contract. There was full performance of this contract by Eastern States prior to the assignment from Eastern States to Bridgeton Bank, and the Commonwealth of Pennsylvania had no interest in the retention of any of the moneys due Eastern States after the bond had been released and provision made for full payment of labor done and materials furnished thereunder. The contract between Eastern States and Commonwealth of Pennsylvania contained the provision that the contractor should not assign the contract or the right to any of the moneys to be paid thereunder, but that provision must be construed to have been placed therein for the benefit and protection of the Commonwealth, and the Commonwealth's interest having ceased, the assignability of the moneys due Eastern States thereunder as between Bridgeton Bank and Eastern States is not affected and the consent of the Commonwealth was not necessary to make such assignment valid.

Portuguess-American Bank v. Welles, 242 U. S. 7; 61 L. Ed. 116;

Burnett v. Jersey City, 31 N. J. E. 341;

40 *U. S. Fidelity & Guaranty Co. v. Newark*, 76 N. J. E. 230; 74 Atl. 192.

Opinion.

The right of Commercial to appropriate the overplus from the Clarion and Venango contract to make up its losses on the subsequent contracts on which it was surety, depends largely upon the construction to be given to the application and agreement for this bond.

Paragraph 6 in effect assigns to Commercial 10
moneys that may be due and payable to Eastern States at the time of any breach or default on said contract, the same to be credited upon any loss, cost, damage, charge or expense sustained or incurred by it under said bond.

Under Paragraph 3, Eastern States agrees to indemnify and keep indemnified Commercial 20
against all liability, etc. which it may sustain by reason of having executed this bond or by reason of or in consequence of the execution by Commercial of any and all other bonds *executed*.

As I read these provisions, I must reach the conclusion that this agreement cannot be construed to relate to bonds executed subsequently to this one, but only to the bond therein applied for and any others theretofore executed, unless Paragraph 11 should be construed to enlarge the meaning and scope of Paragraph 6. Paragraph 11 makes available to Commercial all collateral security deposited concerning the bond 30
in question or any former or subsequent bonds for its benefit, as well concerning this bond as all other former or subsequent bonds executed, but at the option of Commercial. No securities were deposited with this bond, and there being no default by Eastern States under the contract making Commercial liable on this bond, there was neither right nor occasion for Commercial to exercise any option in behalf of this bond. The obtaining of the checks representing the final 40

Opinion.

payment under this contract in the manner in which they were obtained, cannot be construed to be collateral security as contemplated under this clause. The use of the word "covenants" in that paragraph relates to the covenants set forth in the application and agreement, and its use in this Paragraph 11 cannot be construed to enlarge the provisions contained in the third paragraph so as to make those provisions applicable to bonds subsequently executed.

Commercial having filed the application for release of bond with the Commonwealth of Pennsylvania, after having satisfied itself that there was sufficient moneys due from the Commonwealth to pay for all bills for labor done and materials furnished under said contract, then obtained from Eastern States, through Jerome, the orders to have the checks mailed to Eastern States in its care. There were two of these letters written; as a result of the first one, the checks received, as I have stated, were deposited to the credit of Eastern States and the bills then due paid therefrom by checks drawn from the Eastern States and signed by the President and Assistant Treasurer. Under the second order which was dated September 19, 1929, the checks, together with the envelope directed to Eastern States, c/o Commercial, naturally came into the hands of Commercial. As I view it, the effect of such order was merely to enable Commercial to know when the checks reached Eastern States and to see that proceeds of such checks were applied to the payment of labor and materials on the Clarion and Venango contract which at that time were represented by the one claim of McDonald Construction Company. The mere receipt of these checks in the manner in which

Opinion.

they were received could not be determined to be an assignment by Eastern States to Commercial, because Commercial could not use such checks without a proper endorsement by Eastern States. The method which Commercial used was to have Jerome endorse these checks in the manner to which reference has been made, and then cause them to be deposited in the Bond Account of Commercial. This attempted transfer from Eastern States to Commercial, of the entire amount of these checks, thus enabling Commercial to appropriate the overplus after the payment of the McDonald Construction Company bill, to losses suffered by it on subsequent bonds, was ineffective. There was no authority then vested in Jerome, whether he endorsed the check in his official capacity as assistant treasurer, or merely as an individual as happened in this case, to transfer this entire fund to Commercial. Bridgeton Bank has not denied the right of Commercial to pay out of these moneys thus obtained, the bill of McDonald Construction Company. The evidence in the cause discloses that the active officers of Eastern States in its road building operations were W. H. Williams, who was president, and Wm. F. Jerome, who was assistant secretary and treasurer. These officers had charge of the contracts, and to a large extent the financial operations of the company relating thereto, but in no previous case, so far as the evidence discloses, did Jerome transfer the moneys of the company without the signature of the president or vice president, which practice was known to Commercial by reason of its dealings with Eastern States and its receipt of a number of checks drawn to it, as well as the inspection of checks to creditors passing through its

10

20

30

40

Opinion.

hands, all of which were signed by the president or vice president and treasurer or assistant treasurer of Eastern States. There was no authority given, so far as the minutes of Eastern States show, to Jerome to transfer a check by his endorsement alone, but on the other hand the

10 resolution of Eastern States authorizing the withdrawal of funds, provided for the signature of the president or vice president and treasurer or assistant treasurer, and there was no course of conduct on the part of Jerome that would give him the right to transfer the moneys of the company by the endorsement of a check over to another without the concurrence at least of the president or vice president, so that the transfer of this money, represented by these two checks,

20 from Eastern States to Commercial, was unauthorized. Commercial had the right to require the payment of \$12,370.43 to McDonald Construction Company, but had no right to appropriate the balance to other purposes than payment of bills on the Clarion and Venango contract as against Bridgeton Bank which had an assignment of these moneys.

My conclusion is that Bridgeton Bank is entitled to a decree against Commercial for the

30 sum of \$7,307.41, with interest, representing the amount of money of Eastern States which Commercial received over the amount necessary to pay the bill of McDonald Construction Company on the Clarion and Venango contract.

Determined: December 27th, 1934.

*Affidavit of Services of Messrs. Hobart & Minard.***Affidavit of Services
of Messrs Hobart & Minard.**

Filed January 21, 1935.

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

10

DUANE E. MINARD, being duly sworn according to law on his oath says:

I am a member of the firm of Hobart & Minard, solicitors of complainant, and have had general charge of the preparation, trial and argument of this case on behalf of the complainant. The following is a statement of the services in this case and in the case wherein Commercial Casualty Insurance Company was the complainant and Bridgeton National Bank and Eastern States Construction Company, Inc., were defendants (Chancery docket 100-131):

20

1933

- June 5. Draft of bill of complaint.
- June 27. Further work on complaint.
- 28. Further work on complaint.
- July 25. Letter to McAllister enclosing draft of Chancery complaint, etc.
- Aug. 11. Further consideration of rights of surety and assignee and memo re same. 30
- 19. Drawing replications to answers.
- 25. Letter re serving subpoena and complaint in Chancery suit; letter to clerk filing same.
- Sept. 23. Considering letter from Lum, Tambllyn & Colyer, attys. Commercial Cas. Ins. Co.; requesting further time to answer. 40

Affidavit of Services of Messrs. Hobart & Minard.

- Sept. 25. Letter to Lum, Tamblyn & Colyer.
27. Considering L. T. & C. letter and stipulation for extension of time to answer; memorandum on same to D. E. M.
- 10 Oct. 11. Considering letter from L. T. & C. respecting stipulation.
13. Letter to Chancery clerk filing papers in suit; letter to Lum, Tamblyn & Colyer re stipulation.
28. Letter to Mr. McAllister respecting replications.
- Nov. 1. Letter to Mr. McAllister respecting replications; letter to Chancery clerk filing same.
- 20 9. Studying demand for copies of documents and particulars; preparing reply.
10. Completing and serving replies thereto.
15. Examining answer of Commercial Cas. Ins. Co.
17. Making copies of answer; memo respecting replies.
- 30 18. Letter to Mr. McAllister respecting replies to Commercial Casualty Co.; answer in Chancery suit No. 1.
20. Filing reply and serving same.
20. Studying answer of Cas. Co.; preparing and filing replication thereto; preparing and submitting order of reference for consent; obtaining consent from Lum, Tamblyn & Colyer.
22. Letter to Mr. McAllister re consent to Order of Reference.
- 40

Affidavit of Services of Messrs. Hobart & Minard.

- Dec. 6. Considering complaint and exhibits in Com. Cas. Ins. Co. suit *v.* Bank & Eastern States Const. Co. in Chancery (No. 2) to enjoin prosecution of Pa. suit; order to show cause, and notice.
10. Preparing order for continuance for injunction proceedings. 10
15. Conference re injunction case in Chancery of N. J. memo on continuance of injunction.
19. Attendance before V.-C. Buchanan continuing hearing in Chancery Suit No. 2 on rule to show cause.
20. Reviewing pleadings, preparing order of designation; letter to Mr. Fairlie and Senator McAllister. 20
20. Considering Lum, Tamblyn & Colyer letter re holding Pa. suit in abeyance pending trial of N. J. Chancery suits; reply letter; letter to Mr. McAllister.

1934

- Jan. 2. Letter to Chancery clerk re Docket references to Chancery suits No. 1 and No. 2.
- 3, 4, and 6. Preparing draft of answer in Chancery Suit No. 2. 30
11. Studying proposed answers and counterclaims in Chancery suits; conference with Mr. Fairlie of Lum, Tamblyn & Colyer regarding stipulations for continuing hearings on chancery suits and for continuing argument of statutory demurrers in the Pittsburgh Bank case until final hearings.
13. Completing answers and counterclaims and stipulations in Chancery suit No. 40

Affidavit of Services of Messrs. Hobart & Minard.

2; and in Pittsburgh Bank suit and submitting same for execution, with letters to Mr. Fairlie and Mr. McAllister.

- 10 Jan. 16. Considering Fairlie's letter Jan. 15 and copy of his letter same day to Mr. McCandless; Commercial Casualty Ins. Co. attorney at Pittsburgh; letter to Chancery Clerk, filing answers and counterclaims.
18. Considering McAllister's letters of Jan. 16 and Jan. 17 and Fairlie's letter of Jan. 17.
25. Considering and approving stipulation for continuance of Pa. suit pending hearing in N. J. Chancery suits.
- 20 30. Considering letter of Jan. 29 from V.-C. Davis regarding order of designation and preparing and serving notice of hearing for April 25, 1934; reply to V.-C. Davis.
31. Considering Mr. McAllister's letter regarding hearing.

1934

- 30 Feb. 6. Letters to McAllister serving notice of hearing on Eastern States Const. Co.
10. Letter to Chancery clerk filing notice of hearing.
- Mar. 5. Considering defendants' proposal to amend bill in Chancery suit No. 2; conference with Mr. Fairlie re stipulation of facts; letter to Mr. McAllister explaining status of pleading and proposal for stipulation of facts in Chancery suits.
- 40

Affidavit of Services of Messrs. Hobart & Minard.

- Mar. 13. Considering Fairlie's two letters of March 12 respecting amended pleadings of Commercial Cas. Ins. Co. in Chancery suits No. 1 and No. 2.
14. Conference with McAllister and Fairlie relative to stipulation of facts and amendment of pleadings; examination of amended pleadings; letter to Fairlie. 10
15. Consideration of answers to proposed amendments to complaint of Commercial Co.; considering new pleadings and preparing reply pleadings; letter to Fairlie consenting to further pleadings.
16. Completing pleadings and delivering papers to Lum, Tamblyn & Colyer; considering Fairlie's letter of March 15. 20
16. Letter to Chancery clerk filing complainant's response to demand for bill of particulars; considering Fairlie's letter of March 16 regarding amended pleadings filed.
20. Conference with attorneys re stipulation of facts; Messrs. Fairlie, McCandless and Adams and Commercial Cas. and Mr. McAllister, Mr. Hobart & Minard; stipulation on order of reference; order of designation and notice of hearing in Chancery suit No. 2. 30
21. Further conference with attorneys of Commercial re stipulation; working with Mr. Fairlie and Mr. McCandless on stipulation of facts. 40

Affidavit of Services of Messrs. Hobart & Minard.

- 10 Mar. 22. Considering Fairlie's letter of March 22 respecting documents to be included in stipulation of facts; letter to Fairlie; revising and rewriting stipulation of facts; considering and approving order allowing amendment to Commercial Cas. Ins. Co. complaint in Chancery Suit No. 2.
24. Checking stipulation and preparing exhibits, day and evening.
26. Conference with Mr. Fairlie and working on stipulation.
- 27 Working on stipulation.
28. Working on stipulation and exhibits.
- 20 31. Examination of draft of stipulation and of exhibits; further check of some; preparing outline of memo for use at final hearing.
- April 4. Conference with Mr. Fairlie as to stipulation and amendments to pleadings.
4. Letter to president of bank re trial.
8. Further check of stipulation and exhibits.
- 30 10. Consideration of suggestions of Mr. Fairlie for changes in stipulation.
14. Preparing draft of statement under Chancery rules for use on final hearing.
16. Further work on statement.
16. Preparing outline of trial brief.
16. Conference with Mr. Fairlie re stipulation.
- 40 16. Examination of further amendments to answer of surety company and

Affidavit of Services of Messrs. Hobart & Minard.

- check of same with original answer
and with first amendment.
- April 17. Telephone conference with Mr. Mc-
Allister and others as to witnesses.
17. Further consideration of proposed
amendments to pleadings and of stipu- 10
lation.
- 19, 20, Further work on statement for use
and 21. at final hearing.
21. Preparing trial memo; drawing and
serving demand to produce.
21. Telephone conferences with witnesses
and further preparation for trial.
23. Further preparation for trial.
23. Serving notices to produce.
23. Work on trial brief. 20
24. Further work on trial brief.
24. Conference with witnesses in evening.
25. Trial of case.
25. Further conference with witnesses.
26. Trial of case.
- May 10. Preparing copies of exhibits for use
of Mr. Fairlie.
- 26, 27. Preparing abstracts of testimony. 30
- July 9.
- to 31. Preparing brief (parts of 14 days).
28. Preparing list of exhibits; confer-
ence with Mr. Fairlie re same.
- Aug. 3. Examination of transcript of opening
of counsel and further work on brief;
letters to Mr. Fairlie and Mr. Mc-
Allister.
14. Revising and completing brief; letters
to Mr. Fairlie and Mr. McAllister. 40

Affidavit of Services of Messrs. Hobart & Minard.

- Aug. 20, Considering of brief of surety company.
21. company.
- Oct. 30. Letter to Vice Chancellor Davis re brief of surety company and check of exhibits.
- 10 Dec. 29. Consideration of opinion of Vice Chancellor; making copies of same; letters to Mr. McAllister and to Bridgeton bank.
31. Preparing draft of final decree in Case No. 1.

1935

- Jan. 3. Preparing draft of final decree in Case No. 2.

20 According to my office records the time required in the performance of above services was approximately one hundred and seventy-five office hours of myself and my partner, Mr. Hobart, and two days at final hearing of case; and approximately twenty hours of attorneys employed at my office.

30 The above items do not include any services rendered to the Bridgeton National Bank in the action at law brought in the New Jersey Supreme Court or in the action at law brought by the Bridgeton National Bank against First National Bank of Pittsburgh in the District Court of the United States for the Eastern District of Pennsylvania.

40 In addition to the taxed costs fixed by the statute for filing bill of complaint and orders and other papers, and to expenses of attorneys and office stenographers the complainant, and my firm as its solicitors, have made the following necessary disbursements:

Affidavit of Services of Messrs. Hobart & Minard.

1934

Mar. 28.	Paid Burpo Company for photostat copies of exhibits..	\$ 24.60	
Apr. 26.	Train fare and traveling and living expenses of William F. Jerome (Little Falls, N. Y. to Camden, N. J.).....	45.00	10
May 7.	Bill of Fred W. Albert, Jr. for transcript of testimony at final hearing	160.00	
Aug. 3.	Bill of Fred W. Albert, Jr. for transcript of opening of counsel at final hearing.....	24.00	
		\$253.60	

DUANE E. MINARD 20

Sworn and subscribed to at
 Newark, N. J., this 4th day
 of January, 1935.

GEORGE A. HOBART,
 A Notary Public of New Jersey

30

40

Final Decree.

Final Decree.

Filed January 21, 1935

IN CHANCERY OF NEW JERSEY.

97-628.

10

Between

BRIDGETON NATIONAL BANK,
Complainant,

and

COMMERCIAL CASUALTY INSUR-
ANCE COMPANY and EASTERN
STATES CONSTRUCTION COM-
PANY, INC.,

20

Defendants.

Final Decree.

This cause coming on to be heard in the presence of Hobart & Minard, Solicitors of Complainant, Lum, Tamblyn & Colyer, Solicitors of Defendant, Commercial Casualty Insurance Company, and McAllister & McAllister, Solicitors of Eastern States Construction Company, Inc.;

30

And the court having examined the pleadings and having taken proofs orally, in open court, and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the court

40

(1) That there is due the complainant from the defendant, Eastern States Construction Company, Inc., the sum of \$10,000.00, with interest from September 24, 1929, by virtue of the execution and delivery by said defendant to complainant of said defendant's demand note dated September 24, 1929, for said sum of \$10,000.00, which said sum, with interest from September 24, 1929,

Final Decree.

to the day of the date hereof, amounts to the sum of \$13,185.00.

(2) That on September 24, 1929, said defendant, Eastern States Construction Company, Inc., executed and delivered to the complainant as collateral security for the payment of said note, an assignment, dated September 24, 1929, of the balance due said defendant from the Commonwealth of Pennsylvania, on a certain contract dated April 14, 1928, entered into by and between said Eastern States Construction Company, Inc., and said Commonwealth of Pennsylvania, whereby said defendant agreed to furnish and deliver all the materials and to do and perform all the work and labor for the construction of a certain highway known as Route No. 75 in the Borough of Emlenton and the Townships of Richland and Salem, in the Counties of Venango and Clarion in said Commonwealth. 10 20

(3) That on July 12, 1929, the performance of said contract was completed by said defendant, according to, and without default of any of the terms and conditions thereof, and that thereafter the work under said contract was duly accepted by said Commonwealth.

(4) That on the completion of said contract there were due and owing to said defendant from said Commonwealth certain balances for semi-final and final payments, in accordance with the terms of said contract; and that the final estimates for the work done on said contract as certified on January 4, 1930, by the Engineer of said Commonwealth amounted to the sums of \$2,328.21 and \$17,349.63, respectively, making the total amount then due said defendant from said Commonwealth on said final estimates the sum of \$19,677.84. 30 40

Final Decree.

(5) That on February 7, 1930, said final estimates were audited and approved by the Auditor General of the Commonwealth and on February 10, 1930, said Auditor General issued his warrants to the Treasurer of said Commonwealth for checks to pay the same; and on February 10, 1930, said Treasurer issued his checks, payable to said defendant, on Corn Exchange National Bank & Trust Company of Philadelphia, Pa. for said sums, respectively, in final payment of the amount due said defendant on said contract.

(6) That said checks without the authority of the complainant or of said defendant were endorsed by one, William F. Jerome, the then Assistant Secretary and Treasurer of complainant, and were delivered by him without the authority of the complainant or of said defendant, to the defendant Commercial Casualty Insurance Company; and that on February 28, 1930, the said defendant, Commercial Casualty Insurance Company, without the authority of the complainant or of the defendant, Eastern States Construction Company, Inc., deposited the same to the account of said Commercial Casualty Insurance Company in the First National Bank of Pittsburgh, Pa., and thereafter collected the same from Corn Exchange National Bank & Trust Company of Philadelphia Pa., on March 1, 1930; and that the full amount of said checks, to-wit the said sum of \$19,677.84, was thereupon credited to the account of said Commercial Casualty Insurance Company in said First National Bank of Pittsburgh, Pa.

(7) That said endorsement of said checks for said final estimates and the deposit and collection thereof by Commercial Casualty Insurance Company deprived complainant of the benefit of the proceeds of said checks or of any part thereof

Final Decree.

and were in violation of the complainant's rights under said assignment to the extent hereinafter mentioned.

(8) That at the time of the endorsement and deposit of said checks there was due from Eastern States Construction Company, Inc., the sum of \$12,370.43 to McDonald Construction Company, one of the subcontractors on said contract with said Commonwealth, and that thereafter there was paid to said McDonald Construction Company said sum of \$12,370.43 by Commercial Casualty Insurance Company pursuant to and in accordance with the terms of a certain application for contract bond dated April 13, 1928, made by Eastern States Construction Company, Inc. to Commercial Casualty Insurance Company, to secure the performance of said contract.

(9) That under the terms of said application for contract bond the Commercial Casualty Insurance Company was entitled to receive from and to set-off against Eastern States Construction Company, Inc., said sum of \$12,370.43, so due as aforesaid to McDonald Construction Company, but was not entitled to receive from or to set-off against Eastern States Construction Company, Inc., the balance paid to Eastern States Construction Company, Inc., by said Commonwealth on said final estimates, to wit, the sum of \$7,307.41; and that complainant is entitled to receive from Commercial Casualty Insurance Company by virtue of said demand note and said assignment the said sum of \$7,307.41, with interest from February 28, 1930, representing the amount due Eastern States Construction Company, Inc., which Commercial Casualty Insurance Company received as aforesaid over and above the amount due and paid to said McDonald Construction

Final Decree.

Company on said contract between Eastern States Construction Company, Inc., and the Commonwealth of Pennsylvania—which amount, with interest computed to this date, is the sum of \$9,427.24.

- 10 And the matter now coming before the court on application of the complainant to settle the final decree, and it appearing that due notice of this motion has been given to the defendants and that the form of proposed final decree has been duly served upon defendants,

It is, on this 21st day of January, 1935, on motion of Hobart & Minard, solicitors of complainant, ORDERED, ADJUSTED AND DECREED:

- 20 (a) That there is due and owing by the defendant, Commercial Casualty Insurance Company, to the complainant, the sum of \$9,427.24, and that there is due and owing by the defendant, Eastern States Construction Company, Inc., to the complainant, the sum of \$14,185.00.

- 30 (b) That said sum of \$9,427.24 so decreed to be due the complainant from Commercial Casualty Insurance Company be credited, if and when paid to complainant by said Commercial Casualty Insurance Company, on the amount so decreed to be due complainant from defendant, Eastern States Construction Company, Inc.

FURTHER ORDERED that the defendant, Commercial Casualty Insurance Company, pay to the complainant the costs of this suit to be taxed, including in said costs a counsel fee of \$1,250.00, which counsel fee is hereby allowed to the complainant and ordered to be taxed as part of the costs of complainant herein.

- 40 FURTHER ORDERED that the defendant, Commercial Casualty Insurance Company, within thirty

Final Decree.

days after service upon it or of its solicitors of true but uncertified copies of this decree and of said taxed costs, pay to the complainant said sum of \$9,427.24, and said taxed costs; and that in default of such payment execution issue against the goods and chattels, lands, tenements and hereditaments of said defendant, Commercial Casualty Insurance Company, directed to the Sheriff of the County of Essex, in accordance with the practice of this court.

10

Respectfully advised,

LUTHER A. CAMPBELL,
C.

F. B. DAVIS,
V.-C.

20

30

40

*Notice of Appeal.***Notice of Appeal.**

Filed February 11, 1935.

IN CHANCERY OF NEW JERSEY.

97/628.

10

*Between*BRIDGETON NATIONAL BANK,
*Complainant,**and*COMMERCIAL CASUALTY INSUR-
ANCE COMPANY, *et al.*,
*Defendants.**On Bill, etc.**Notice of
Appeal.*

20

To: Messrs. Hobart & Minard, solicitors for and
of counsel with Bridgeton National Bank.

SIRS:

30

TAKE NOTICE, that the defendant, Commercial
Casualty Insurance Company, hereby appeals
from the whole and every part of the final de-
cree made in the above entitled cause on the 21st
day of January, 1935, by His Honor Luther A.
Campbell, Chancellor of the State of New Jer-
sey, upon the advice of Honorable Francis B.
Davis, Vice-Chancellor, to the New Jersey Court
of Errors and Appeals in the Last Resort in All
Causes.

Dated: February 6th, 1935.

Respectfully,

LUM, TAMBLYN & FAIRLIE,

Solicitors for Defendant,

Commercial Casualty Insurance Company.

CHESTER W. FAIRLIE,

40

Of Counsel.

Notice of Appeal.

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

CHESTER W. FAIRLIE,
Of Counsel with Defendant,
Commercial Casualty Insurance Company.

10

Service of the foregoing Notice of Appeal is
hereby acknowledged this 7th day of February,
1935.

HOBART & MINARD,
Solicitors for Complainant,
Bridgeton National Bank.

20

30

40

*Petition of Appeal.***Petition of Appeal.**

Filed February 19, 1935.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

*Between*BRIDGETON NATIONAL BANK,
*Complainant-Respondent,**and*COMMERCIAL CASUALTY INSUR-
ANCE COMPANY,
*Defendant-Appellant.**On Appeal
from the
Court of
Chancery.**Petition
of Appeal.*20 *To the Honorable the Court of Errors and Ap-
peals in the Last Resort in All Causes:*

The petition of Commercial Casualty Insur-
ance Company, appellant in the above entitled
cause, respectfully shows that:

30

Your petitioner finds itself aggrieved by a
final decree made in the Court of Chancery by
His Honor Luther A. Campbell, Chancellor of
the State of New Jersey, upon the advice of the
Honorable Francis B. Davis, Vice-Chancellor,
bearing date the 21st day of January, 1935, in
a certain cause in the said Court of Chancery
wherein Bridgeton National Bank was the com-
plainant and Commercial Casualty Insurance
Company and Eastern States Construction Com-
pany, Inc., were defendants, in this respect,
to wit:

40

That the said decree orders, adjudges and de-
crees that there is due and owing by the de-
fendant Commercial Casualty Insurance Com-
pany to the complainant the sum of \$9,427.24,

Petition of Appeal.

and further orders that the defendant Commercial Casualty Insurance Company pay to the complainant the costs of said suit to be taxed, including in said costs a counsel fee of \$1,250.00, which counsel fee is thereby allowed to the complainant, and further orders that the defendant Commercial Casualty Insurance Company pay to the complainant said sum of \$9,427.24 and said taxed costs, and that in default of such payment execution may issue for the said sum and costs. 10

And your petitioner humbly appeals from those portions of the said decree which orders, adjudges and decrees as aforesaid upon the ground that the same is erroneous for that it does not appear by the evidence before the court that there is due and owing by the defendant Commercial Casualty Insurance Company to the complainant Bridgeton National Bank the sum of \$9,427.24 or any other sum; and for that the evidence before the court was not sufficient to warrant said decree against your petitioner; and for that the evidence before the court shows that your petitioner's right and equity in and to the fund in question is prior and paramount to any right of complainant in or to the same; and for that it appears by the evidence before the court that as between your petitioner and the defendant Eastern States Construction Company, Inc., the payment to your petitioner of the fund in question in the manner in which it was paid to your petitioner is binding upon and has been ratified by said defendant Eastern States Construction Company, Inc., which has accepted the benefit thereof, and that complainant is not in a position to and has no right to question the same and no right to a decree that said fund or any part thereof be paid over to it by your petitioner; and for that it appears by the evi- 20 30 40

Petition of Appeal.

dence before the court that complainant by reason of its course of conduct and laches is estopped from prosecuting this suit and in equity is not entitled to recover from your petitioner any part of the fund in question; and for that the said counsel fee of \$1,250.00 is excessive;
 10 and for that the court should have made a decree denying the relief prayed for by complainant and dismissing complainant's bill of complaint.

Your petitioner, therefore, prays that the said decree may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

20 Dated: February 18, 1935.

LUM, TAMBLYN & FAIRLIE
 Solicitors for and of Counsel
 with Defendant-Appellant.

CHESTER W. FAIRLIE,
 Of Counsel.

Acknowledgment of Petition of Appeal.

30 Filed February 21, 1935

Service is hereby acknowledged this 19th day of February, 1935, of a true copy of the petition of appeal of Commercial Casualty Insurance Company, defendant-appellant in the above entitled cause.

HOBART & MINARD,
 Solicitors for and of counsel
 with Bridgeton National Bank,
 Complainant-Respondent.

40

*Stipulation of Facts.***Stipulation of Facts.**

Filed April 25, 1934.

IN CHANCERY OF NEW JERSEY.

97/628.

10

*Between*BRIDGETON NATIONAL BANK,
*Complainant,**and*COMMERCIAL CASUALTY INSUR-
ANCE COMPANY and EASTERN
STATES CONSTRUCTION COM-
PANY, INC.,*Defendants.**Case No. 1.**On Bill, etc.*

20

IN CHANCERY OF NEW JERSEY.

100/131.

*Between*COMMERCIAL CASUALTY INSUR-
ANCE COMPANY,*Complainant,**and*BRIDGETON NATIONAL BANK
and EASTERN STATES CON-
STRUCTION COMPANY, INC.,*Defendants.**Case No. 2.**On Bill, etc.*

30

STIPULATION OF FACTS.

(With descriptive list of Exhibits which de-
scriptive list is embodied in the index to this
printed record.)

40

Stipulation of Facts.

It is hereby stipulated and agreed by and between all three of the parties in each of the two above entitled causes, which are to be heard and tried together,

10 (a) that this stipulation shall be offered and admitted in evidence in lieu of other proof of the admitted facts hereinafter stated,

(b) that the copies of papers and documents which are submitted herewith, and those which are hereinafter otherwise mentioned and identified, shall be deemed and taken to be exhibits received in evidence in each of said causes and given the exhibit marks hereinafter assigned to them respectively, with like effect as if the originals thereof were produced at the trial and
20 duly proved and admitted and marked as exhibits,

(c) that nothing contained in this stipulation shall be deemed or operate to preclude any of said parties from proving any other facts or exhibits upon the trial of said causes, and

(d) nothing herein contained shall be deemed to be or operate as an admission by any of the parties hereto as to the relevancy, materiality, or legal effect of any of the facts or exhibits
30 hereby admitted.

The above mentioned BRIDGETON NATIONAL BANK is hereinafter referred to as "Bridgeton Bank." The above mentioned COMMERCIAL CASUALTY INSURANCE COMPANY is hereinafter referred to as "Commercial." The above mentioned EASTERN STATES CONSTRUCTION COMPANY, INC., is hereinafter referred to as "Eastern States."

Stipulation of Facts.

The exhibits herein mentioned as being submitted herewith are contained in a separate folder accompanying this stipulation.

1. The allegations contained in paragraphs numbered 1, 2, 3 and 4 of Bridgeton Bank's bill of complaint in the above entitled Cause No. 1 * * * are hereby admitted.

10

2. On April 13, 1928, Eastern States made a written application to and entered into a written agreement with Commercial bearing that date, a true copy of which said written application and agreement is attached to and made part of and designated as "Exhibit A" in Commercial's answer to Bridgeton Bank's bill of complaint in the above entitled Cause No. 1, and which said application and agreement is submitted herewith as Exhibit number "1."

20

3. On April 14, 1928 Eastern States, as principal, and Commercial, as surety, made, executed and delivered their bond bearing that date to the Commonwealth of Pennsylvania, as obligee, which said bond is submitted herewith as Exhibit number "2", and a true copy thereof is contained at pages 50 to 52 in Exhibit 3, mentioned in paragraph 4 of this stipulation.

4. On April 14, 1928 Eastern States and said Commonwealth of Pennsylvania made and entered into a written agreement bearing that date, a true copy whereof is submitted herewith as Exhibit number "3."

30

5. The aforesaid application "Exhibit 1," bond "Exhibit 2" and contract, "Exhibit 3" relate, among other things, to the building of a road, which for convenience is herein referred to as the Clarion & Venango job.

40

Stipulation of Facts.

6. On September 22, 1928 Eastern States made a written application to and entered into a written agreement with Commercial bearing that date, a true copy of which said written application and agreement is submitted herewith as Exhibit number "4."

10 7. On September 22, 1928 Eastern States, as principal, and Commercial, as surety, made, executed and delivered their bond bearing that date to the Commonwealth of Pennsylvania, as obligee, a true copy of which said bond is submitted herewith as Exhibit number "5."

20 8. On September 22, 1928 Eastern States and said Commonwealth of Pennsylvania made and entered into a written agreement bearing that date, in substantially the same form as the aforesaid Exhibit 3.

9. The aforesaid application "Exhibit 4", bond "Exhibit 5", and the contract referred to in paragraph 8 hereof relate, among other things, to the building of a road, which for convenience is herein referred to as the Vernon & Hayfield job.

30 10. On March 18, 1929 Eastern States made a written application to and entered into a written agreement with Commercial bearing that date, a true copy of which said written application and agreement is submitted herewith as Exhibit number "6."

11. On March 22, 1929 Eastern States, as principal, and Commercial, as surety, made, executed and delivered their bond bearing that date to the Commonwealth of Pennsylvania, as obligee, a true copy of which said bond is submitted herewith as Exhibit number "7."

Stipulation of Facts.

12. On March 22, 1929 Eastern States and said Commonwealth of Pennsylvania made and entered into a written agreement bearing that date, in substantially the same form as the aforesaid Exhibit 3.

13. The aforesaid application "Exhibit 6," bond "Exhibit 7" and the contract referred to in paragraph 12 hereof relate, among other things, to the building of a road, which for convenience is herein referred to as the West Meade Township job. 10

14. On August 2, 1929 Eastern States owed the following bills and charges for labor and material furnished in connection with said Clarion & Venango job:

Duquesne Slag Products Co....	\$1,766.25	
Keystone Sand & Supply Co...	1,299.08	20
National Steel Fabric Co.....	555.20	
Mitchell & Graham.....	6,426.94	
McDonald Construction Co....	4,536.68	
Joe Weisner	557.29	
Joe Weisner	451.66	
\$15,593.10		

All of said bills were paid by Eastern States Construction Company by checks dated September 5, 1929. 30

13. On August 2, 1929 Eastern States wrote a letter to the Pennsylvania Department of Highways bearing that date (in connection with said Clarion & Venango job), a true copy of which said letter is submitted herewith as Exhibit number "8".

16. On August 3, 1929 the Division Engineer of said Commonwealth of Pennsylvania certified two semi-final estimates on said Clarion & 40

Stipulation of Facts.

Venango job in the sums of \$2,868.83 and \$16,175.41 respectively, both of which, on August 25, 1929, were certified by the Deputy Secretary of Highways of said Commonwealth to the Auditor General thereof for audit and payment. On August 27, 1929 said semi-final estimates were audited and approved by said Auditor General and on August 28, 1929 he signed his warrants numbered 8248 and 8249, respectively, to the Treasurer of said Commonwealth for the issuance of checks to pay the same, true copies of which said semi-final estimates are submitted herewith as Exhibits numbered "9" and "10", respectively.

10
20 17. On August 10, 1929 an interdepartmental memorandum was attached to the aforesaid semi-final estimates on said Clarion & Venango job addressed to Mr. Samuel Eckels, of the Pennsylvania Department of Highways, a true copy of which memorandum is submitted herewith as Exhibit number "11".

18. True copies of the aforesaid Auditor General's warrants numbered 8248 and 8249 (including endorsements thereon) are submitted herewith as Exhibits numbered "12" and "13", respectively.

30 19. On August 22, 1929 Commercial filed its application for release of the aforesaid bond on the Clarion & Venango job with the Department of Highways of said Commonwealth, a true copy of which said application for release of bond is submitted herewith as Exhibit number "14".

40 20. On August 28, 1929 said Treasurer of the Commonwealth of Pennsylvania issued his checks on the Colonial Trust Company, Pittsburgh, Pa., numbered 49979 and 49980 for said

Stipulation of Facts.

sums respectively, in payment of the said semi-final estimates on said Clarion & Venango job, true copies of which said checks and of the endorsements appearing thereon, respectively, are submitted herewith as Exhibits numbered "15" and "16", respectively.

21. The said check No. 49979 for \$2,868.83 (Exhibit 15), was deposited to the credit of Eastern States in New First National Bank of Meadville, and on August 30, 1929, payment thereof was collected by First National Bank at Pittsburgh, Pennsylvania, through the Pittsburgh Clearing House, and Eastern States received the proceeds thereof. 10

22. The aforesaid check No. 49980 for \$16,175.41 (Exhibit 16) was mailed by said State Treasurer to "Eastern States Construction Co., c/o Commercial Casualty Ins. Co., 720 Grant Building, Pittsburgh, Pa.," where it was received on September 5, 1929 by William F. Jerome, Assistant Secretary and Assistant Treasurer of Eastern States, and was deposited in the Farmers & Merchants Bank at Bridgeton, New Jersey, to the credit of Eastern States on September 7, 1929. 20

23. On or about September 5, 1929, at the time said Jerome received the aforesaid check No. 49980 for \$16,175.41 (Exhibit 16) for Eastern States, as aforesaid, Eastern States delivered to Commercial its checks dated September 5, 1929, drawn on said Farmers & Merchants Bank payable to the order respectively of the claimants mentioned in the foregoing paragraph numbered "14" in the amounts there set opposite the said claimants respectively, and said checks were mailed to said payees respectively. A true copy 30

Stipulation of Facts.

of each of said checks is submitted herewith as Exhibits 17, 18, 19, 20, 21, 22 and 23, respectively.

10 24. On September 5, 1929 Eastern States made a written application to and entered into a written agreement with Commercial bearing that date, a true copy of which said written application and agreement is submitted herewith as Exhibit number "24".

25. On September 5, 1929 Eastern States, as principal, and Commercial, as surety, made, executed and delivered their bond bearing that date to the County of Indiana, in the Commonwealth of Pennsylvania, as obligee, a true copy of which said bond is submitted herewith as Exhibit number "25".

20 26. On September 5, 1929 Eastern States and said County of Indiana made and entered into a written agreement bearing that date, a true copy whereof is submitted herewith as Exhibit number "26".

27. The aforesaid application "Exhibit 24," bond "Exhibit 25" and contract "Exhibit 26" relate, among other things, to the building of a road which for convenience is herein referred to as the Indiana County job.

30 28. On September 19, 1929, the following bills and charges for labor and material furnished in connection with the aforesaid Clarion & Venango job, Vernon & Hayfield, and West Meade Township job were due and unpaid by Eastern States.

Stipulation of Facts.

		Commercial Received From State	
On the Clarion-Venango Job:			
McDonald Construction Co.....	\$12,370.43	\$19,677.84	
On the West Meade Township Job:			
Bessemer Cement Corp...\$4,046.02			
City of Meadville.....	55.55		10
Standard Portland Cement			
Co.	5,156.20		
Concrete Steel Co.....	352.38		
Truscon Steel Co.....	3,316.05		
		12,926.20	10,039.24
On the Vernon-Hayfield Job:			
Bessemer Cement Corp...\$24,785.52			
City of Meadville.....	164.50		
Standard Portland Cement			
Co.	8,151.18		
Genfire Steel Co.....	2,610.28		
		35,711.48	23,719.65
On Both the Vernon Hayfield Job and West Meade Township Job (not allocated as between them):			20
Standard Slag Co.....\$7,895.38			
Nickel Plate Sand and			
Gravel Co.	2,527.48		
		\$10,422.86	
TOTAL on all three jobs.....	\$71,430.97	\$53,436.73	

On September 19, 1929, all work to be done and materials to be furnished on said three jobs had been done and furnished, and no labor or materials were thereafter furnished thereon and subsequently to that date said Commonwealth by its checks payable to the order of Eastern States paid the final estimates on each of said three contracts as hereinafter set forth, and the above mentioned bills and charges were paid therefrom to the extent of said final estimate payments on said three contracts, and the balance thereof was paid by Commercial.

29. On September 19, 1929 William F. Jerome, Assistant Secretary and Assistant Treasurer of

Stipulation of Facts.

Eastern States, sent a written request bearing that date to the Department of Highways of the Commonwealth of Pennsylvania, a true copy whereof is submitted herewith as Exhibit number "27".

10 30. On September 24, 1929 Eastern States borrowed from Bridgeton Bank the sum of \$10,000.00, to be repaid on demand with interest, and on said date executed and delivered to Bridgeton Bank its demand note for said sum, a true copy of which said note together with the notary's certificate of protest thereof is submitted herewith as Exhibit number "28" (4 pages).

20 31. On September 24, 1929, simultaneously with the delivery of the aforesaid note, Eastern States made, executed and delivered to said Bridgeton Bank a written instrument bearing that date, purporting to be an assignment, a true copy whereof is submitted herewith as Exhibit number "29". The resolution of the Board of Directors of Eastern States, forming part of the exhibit, was adopted March 2, 1929.

30 32. On January 4, 1930 the Division Engineer of said Commonwealth certified two final estimates of work done on said Clarion and Venango contract in the sums of \$2,328.21 and \$17,349.63, respectively, both of which on February 5, 1930 were certified by the Deputy Secretary of Highways of said Commonwealth to the Auditor General thereof for audit and payment, and on February 7th and February 8th, 1930, respectively, said final estimates were audited and approved by said Auditor General. True copies of said last mentioned two final estimates and of the various endorsements thereon are submitted

Stipulation of Facts.

herewith as Exhibits numbered "30" and "31", respectively.

33. On February 10, 1930 said Auditor General issued his warrants numbered 21912 and 21914 respectively, to the Treasurer of said Commonwealth for the issuance of checks to pay the same, copies of which said warrants, with the endorsements thereon, are submitted herewith as Exhibits numbered "32" and "33", respectively. 10

34. On February 10, 1930 said Treasurer issued his checks on Corn Exchange National Bank & Trust Company of Philadelphia, Pa. numbered 48884 and 48886 for said sums respectively in final payment for all the work done by Eastern States on said Clarion & Venango contract and sent the same by mail to "Eastern States Const. Co., c/o Commercial Cas. Ins. Co., 720 Grant Bldg., Pittsburgh, Pa.," where they arrived on or about February 11, 1930. True copies of said two checks and of the endorsements appearing thereon are submitted herewith as Exhibits numbered "34" and "35", respectively. 20

35. On and about February 27, 1930 William F. Jerome, was Assistant Secretary and Assistant Treasurer of Eastern States. On said date said checks were endorsed in the manner appearing thereon. The signature "Wm. F. Jerome" on the endorsement on each of said checks is the signature of said William F. Jerome. 30

36. On or about February 28, 1930 Commercial, by H. S. Hays, attorney-in-fact, endorsed each of said last mentioned checks as appears thereon respectively and deposited the same to 40

Stipulation of Facts.

the credit of its "Bond Account" in First National Bank at Pittsburgh.

- 10 37. On March 1, 1930 said First National Bank at Pittsburgh, collected the amount said last mentioned two checks from Corn Exchange National Bank & Trust Company of Philadelphia, Pennsylvania, through the Pittsburgh Clearing House, and the full amount of said two checks was credited on that date by said First National Bank at Pittsburgh, to the credit of "Commercial Casualty Insurance Company Bond Account."

- 20 38. On March 28, 1930 Bridgeton Bank sent a letter to Commercial bearing that date, which said letter was the first communication, either oral or written, received by Commercial from Bridgeton Bank or from any officer or employee of Bridgeton Bank, a true copy of which said letter is submitted herewith as Exhibit number "36".

This paragraph is without prejudice to Bridgeton Bank's right to prove the allegations of paragraph 14 of its Bill of Complaint in case No. 1, which is denied by Commercial.

- 30 39. On or about May 12, 1930 final settlement of the aforesaid Vernon & Hayfield contract was made between Eastern States and said Commonwealth of Pennsylvania in the sum of \$23,719.65, which said sum was paid to Commercial on May 26, 1930 by endorsement over to Commercial from Eastern States of the check of the Commonwealth of Pennsylvania representing said final payment in that sum on said contract. A true copy of said check and endorsements thereon is submitted herewith as Exhibit number "37".

Stipulation of Facts.

40. On or about May 12, 1930 final settlement of the aforesaid West Meade Township contract was made between Eastern States and said Commonwealth of Pennsylvania in the sum of \$10,039.24, which said sum was paid to Commercial on June 5, 1930 by endorsement over to Commercial from Eastern States of the checks of the Commonwealth of Pennsylvania representing said final payment in that sum on said contract. A true copy of said check and endorsements thereon is submitted herewith as Exhibit number "38". 10

41. On May 14, 1930 a letter bearing that date and signed by said William F. Jerome, was sent to the Secretary of Highways of the Commonwealth of Pennsylvania relating to the aforesaid Indiana County contract, a true copy of which is submitted herewith as Exhibit number "39". This admission is made without prejudice of the right of Bridgeton Bank or Eastern States to show by competent proof that said letter was written by Jerome without the knowledge or authority of the officers or directors of Eastern States. 20

42. On May 16, 1930 the Secretary of Highways of the Commonwealth of Pennsylvania sent a letter bearing that date to Eastern States relating to the aforesaid Indiana County contract, a true copy of which said letter is submitted herewith as Exhibit number "40". 30

43. On August 15, 1930 Bridgeton Bank duly demanded payment from Eastern States of the aforesaid \$10,000.00 promissory note dated September 24, 1929 made to it by Eastern States, with interest thereon, and upon default thereof said note was duly protested according to law as appears by the notary's certificate of protest 40

Stipulation of Facts.

which is attached to said note and which is made part of the aforesaid Exhibit numbered "28".

10 44. On or about November 20, 1930, Commercial, as surety, on the bond, having completed the aforesaid Indiana County contract, final settlement thereof was made on that date in the sum of \$18,323.48 which said final estimate on said Indiana County contract was paid to Commercial by said Indiana County of Pennsylvania on January 10, 1931 in that sum.

45. Submitted herewith are the following exhibits relating to the moneys due, or to become due, to Eastern States from the Department of Highways as final payment on Clarion and Venango job.

20 *Exhibit No. 41:* Letter dated January 13, 1930 from C. W. Scull, Assistant Cashier of Bridgeton National Bank, to State Highway Department, Harrisburg, Pa.

Exhibit No. 42: Letter dated January 17, 1930 from Thos. D. Frye, Office Director and Comptroller, Pennsylvania Department of Highways, to Bridgeton National Bank.

30 *Exhibit No. 43:* Letter dated November 29, 1930 from Albert R. McAllister to H. W. Frye, Executive Secretary, Pennsylvania Department of Highways.

Exhibit No. 44: Letter dated December 3, 1930 from H. W. Frye, Executive Secretary, Pennsylvania Department of Highways to Albert R. McAllister.

40 46. On October 10, 1933 and October 11, 1933, respectively, Harry L. Garrison, as President of Bridgeton Bank, and Albert R. McAllister, as Secretary of Eastern States, signed

Stipulation of Facts.

and swore, respectively, to affidavits verifying the joint "Plaintiffs' Statement of Claim" in an action at law in the District Court of the United States for the Western District of Pennsylvania, wherein Bridgeton Bank and Eastern States are plaintiffs and said First National Bank of Pittsburgh, Pennsylvania, is defendant, which said "Plaintiffs' Statement of Claim" was filed in said United States District Court and suit therein begun thereon on November 13, 1933, and a true copy of which said "Plaintiffs' Statement of Claim" together with the exhibits thereto attached and together with the aforesaid affidavits verifying the same, is attached to and made part of Commercial's bill of complaint in said Suit No. 2 and is therein marked as Exhibit "E".

10

20

47. McDonald Construction Company, under and pursuant to a subcontract between it and Eastern States, did work and furnished material in connection with excavation and laying of pipes which was a component part of the aforesaid Clarion & Venango contract.

At the time of the receipt, by Commercial, of the proceeds of the Commonwealth's final estimate checks on the said Clarion & Venango job, there was due and owing by Eastern States to McDonald Construction Company, for the aforesaid labor and material furnished by it under said subcontract, as component part of said work, the sum of \$12,370.43 which sum McDonald Construction Company was under the laws of said Commonwealth entitled to be paid out of said final estimate payments.

30

Out of the proceeds of said final estimate checks Commercial properly and lawfully paid said McDonald Construction Company the said

40

Stipulation of Facts.

sum of \$12,370.43, leaving a balance of \$7,307.41 of said Clarion & Venango final estimate payment.

10 Bridgeton Bank and Eastern States severally admit that they are not entitled to any part of \$12,370.43 paid to McDonald Construction Company, and Bridgeton Bank's claim in the above entitled suits, respectively, is limited to the aforesaid balance of \$7,307.41 besides interest thereon, which claim Commercial denies.

The Eastern States admits that it is not entitled to recover from Commercial anything on the counterclaim filed by Eastern States against Commercial in above entitled cause No. 2.

20 Although Eastern States does not admit that it is indebted to Commercial in the full sum of \$41,462.58 as claimed in Commercial's amended bill of complaint, in the above entitled cause No. 2, Eastern States and Bridgeton Bank severally do admit that Eastern States is now indebted to Commercial (over and above the \$72,004.31 of credits shown by Commercial to Eastern States account in Commercial's said amended bill of complaint), in a sum in excess of the amount claimed herein by Bridgeton Bank
30 from Commercial, and that said admitted indebtedness of the Eastern States to Commercial is for labor and material that formed a component part of the work under the aforesaid Vernon & Hayfield job, West Meade job and Indiana job. (It is not intended that Commercial waives any part of its claim against Eastern States, as alleged in its Bill of Complaint in said case No. 2).

Stipulation of Facts.

48. The following letters are submitted herewith as follows:

Exhibit 45: Letter dated January 31, 1930, from "Eastern States Construction Co. by Wm. F. Jerome" to "The Commercial Casualty Co., 720 Grant Bldg., Pittsburgh, Pa."

Exhibit 46: Letter dated September 21, 1930, from "Wm. F. Jerome" to "Mr. A. R. McAllister, 26 So. Laurel Street, Bridgeton, N. J." 10

Exhibit 47: Letter dated October 15, 1930 from "H. W. Fry, Executive Secretary" (Pa. St. Highway Dept.) to "Honorable Albert R. McAllister, Bridgeton, New Jersey"

Dated: April 16, 1934.

LUM, TAMBLYN & COLYER,
Solicitors for Commercial
Casualty Insurance Co. 20

McALLISTER & McALLISTER,
Solicitors for Eastern States
Construction Co.

HOBART & MINARD,
Solicitors for Bridgeton
National Bank.

30

40

97/628.

IN CHANCERY OF NEW JERSEY.

10 *Between*

BRIDGETON NATIONAL BANK,
Complainant,

and

COMMERCIAL CASUALTY INSUR-
ANCE CO. and EASTERN
STATES CONSTRUCTION CO.,
INC.,

20 *Defendants.*

On Bill, etc.

*Final
Hearing.*

100/131.

IN CHANCERY OF NEW JERSEY.

Between
COMMERCIAL CASUALTY INSUR-
ANCE CO.,
30 Complainant,
and
BRIDGETON NATIONAL BANK
and EASTERN STATES CON-
STRUCTION CO., INC.,
Defendants.

On Bill, etc.
Final
Hearing.

DAVIS, V.-C.

William T. Jerome, for Complainant, Direct.

April 25th-26th, 1934.

Hobart & Minard, Esqs., representing Bridge-ton Nat'l Bank.

Lum, Tamblyn & Colyer, Esqs., Chester W. Fairlie, Esq., representing Commercial Casualty Insurance Co.

10

Albert R. McAllister, Esq., representing Eastern States Construction Co.

WILLIAM F. JEROME, sworn.

By Mr. Hobart.

Q Where do you live? A Where am I living?

Q Yes. A Little Falls, New York.

Q What is your occupation there at this time? 20

A I am with the Hercermer County, E. R. A.

Q Were you at one time employed by the Eastern States Construction Company? A I was.

Q In what capacity were you employed? A Assistant Secretary and Assistant Treasurer.

Q At the time you were working for the Eastern States, what particular part of the work of the company were you assigned to, if any? A Field work, purchasing and paying the 30 bills.

Q How long after the company began operations did you enter its employ? A At the time it started.

Q Now, coming down to the contract of April 14th, 1928, we have been calling that the Clarion-Venango contract, you are familiar generally with that contract? A Yes, sir.

Q Did you have anything to do with negotiating the application for the surety bond on that contract? A I believe I did, yes, sir. 40

William T. Jerome, for Complainant, Direct.

Q I call your attention to the paper which is in evidence as part of the stipulation known as Exhibit No. 1, is that the application to which I have referred—I am showing the witness a photostatic copy of the exhibit. A Yes, sir.

10 Q And was that signed on the last page on the day of the date, April 13th, 1928, Eastern States Construction Company, Inc., by William F. Jerome, Assistant Secretary and Treasurer? A Right.

Q That is your signature, that handwriting? A That is correct, that is my signature and my handwriting.

Q And where did this paper come from, did you furnish it or get it from the surety company? A I got it from the surety company.

20 Q At what office? A I don't know, that may have come from one of their agents, I can't say now.

Q I notice quite a good many questions and various statements in this application which are apparently in typewriting—I think they are all in typewriting except your signature at the end—who filled that out? A I don't know who filled it out now.

30 Q Well, where was it filled out, if you know? A I can't say now, Mr. Hobart, it was filled out by somebody else other than myself.

Q Is there anything on the document which indicates in what town or city the paper was prepared or signed? A Pittsburgh.

Q That appears? A Dated at Pittsburgh, Pennsylvania.

Q It is on the last page of the paper? A Yes, sir.

40 Q Now, who was it you saw of the surety company in the question of the signing of this application? A I think Walter R. Shirley.

William T. Jerome, for Complainant, Direct.

Q What was he? A He was an agent for the Commercial Casualty Company.

Q His office was where? A In Pittsburgh.

Q Did you meet in connection with this contract and the signing of the bond a gentleman by the name of Mr. Hays? A I don't know whether he was present or not at that time, Mr. Hobart. 10

Q Did you know Mr. Hays at that time? A I believe I did.

Q And who was Mr. Hays? A He was assistant manager of the Pittsburgh agency of the Commercial Casualty.

Q And who was the manager, if you know, at that time? A Mr. Ralph Rohrich.

Q After this contract of April 14th, 1928, was signed, and after you had signed this application, Exhibit 1, the Eastern States proceeded with the work? A Yes, sir. 20

Q Who had charge of the work for the Eastern States? A William H. Williams.

Q What was his position with the Eastern States? A President.

Q And while the work was proceeding, you were Assistant Secretary and Assistant Treasurer? A That is correct.

Q Are they the only official positions you ever held with the Eastern States? A I believe so. 30

Q Continuing now with the history of this contract known as the Clarion-Venango contract—

The Court: Were you a director of the Eastern States, too, or not?

The Witness: Yes.

Q But as far as any official position was concerned, your position was always that of Assist- 40

William T. Jerome, for Complainant, Direct.

ant Secretary and Assistant Treasurer, is that correct? A That is right.

The Court: Besides a director.

Q Yes, besides a director, that is correct, and
10 we don't question that. Now, reminding you the contract was dated in April, 1928, how soon after the contract was signed and the bond was given did the construction work begin? I don't want the exact day, but just generally, and give us the history of the contract. A I believe some time in the latter part of June.

Q What year, 1928? A The year the contract was signed, yes, sir.

Q The construction work, generally speaking,
20 was under the direction, you have already told us, of Mr. Williams? A Mr. Williams.

Q And what did you have to do with the work under that contract while it was proceeding? A I purchased materials, ordered the materials, took charge of the time, made records in connection with the job and I, at the same time, was estimating on other work.

Q I now want to bring you down to the date
30 of August 2nd, 1929, which was the year following the date of this contract. On that date, August 2nd, 1929, was the work still proceeding under that contract? A I believe it was.

Q Do you know about when the work on the contract was finished, I don't mean legally finished under the statute, but the actual work on the contract itself, the physical work? A No, I don't remember. We had a little work to do that spring, and we had to leave out a gap and fill over the winter, and our sub-contractor
40 held us up and we didn't get the paving put in

William T. Jerome, for Complainant, Direct.

that until the late spring or early summer. I don't remember exactly when that was finished.

Q When you speak of late spring or early summer, are you referring now to the year 1929? A Yes, sir.

Q Would it refresh your recollection if I showed you Exhibit No. 11, which is a memorandum at the Harrisburg office—I mean now as to the date, not necessarily the exact date, but the approximate date, as to when the actual work was finished? A From this letter I should say it would have been around the 1st of August that the job was completed. 10

Q Of 1929? A Yes.

Q I now call your attention to Exhibit No. 8, forming a part of the stipulation, being a letter dated August 2nd, 1929, wasn't that signed and sent by you? A Yes, sir. 20

Q Now, what was the occasion of your sending that letter? A We had finished the work, and we were expecting a semi-final estimate check, and we owed some bills on that contract which we expected to clear up with the semi-final estimate check, and according to the usual procedure we asked the State to forward the check to us in care of the surety so that they would know those bills were paid. 30

The Court: So who would know?

The Witness: The surety.

Q You are referring to certain unpaid bills on the Clarion-Venango contract? A Yes, sir.

Q Calling your attention to Exhibit No. 9, is that what we call the semi-final estimate? A Yes, sir.

Q And this, as I understand it, is prepared by certain officials of the State of Pennsylvania, 40

William T. Jerome, for Complainant, Direct.

you had nothing to do with preparing it? A No, sir.

Q Calling your attention again to this Exhibit No. 9, do you recognize the name of the division engineer? A Yes, sir, T. C. Frame.

10 Q And who was he? A He was the engineer in charge of the division under which we worked or completed this contract.

Q He is the engineer representing the State of Pennsylvania? A That is correct.

Q What is the date opposite his certificate? A August 3rd.

Q 1929? A Correct.

Q And does that help you to determine the date when the physical work was finished? A Yes, sir.

20 Q And was that the date as indicated by this certificate? A Yes, sir.

Q Referring now again to Exhibit No. 8, the letter of August 2nd, 1929, which you have already told us you sent to the Department of Highways in Harrisburg, did you show that letter to Mr. Hays, or anyone representing the Commercial Casualty Insurance Company before it was sent? A No, sir, I don't believe I did show that letter to them.

30 Q Did you have any conference or consultation with Mr. Hays, or anyone representing the surety company, before you sent it? A Yes. I don't remember who with, but it would probably be Mr. Hays.

Q At any rate, without going into detail on that, it was the result of that conference you sent this letter? A Yes, sir.

40 Q And during that conference you did discuss, as I understand it, certain unpaid bills on this particular job? A Yes, sir.

William T. Jerome, for Complainant, Direct.

Q Did the checks in payment of the semi-final estimate come through from the State of Pennsylvania? A Yes, sir.

Q I show you now Exhibits 15 and 16, both dated August 28th, 1929, are these the checks for the semi-final estimate? A Yes, sir.

Q I also show you Exhibit No. 14, which is headed "Application for Release of Bond," did you have any discussion with Mr. Hays, or anyone representing the surety company, with regard to that application? A I believe it was talked over. I don't remember much about that now, Mr. Hobart, it is something they would send in. 10

Q You had nothing to do with preparing the application? A No, sir.

Q That is handled by the insurance company and sent directly to the Department at Harrisburg? A That is correct. 20

Q I might call your attention to the fact in that connection, while we have this matter before us, it is stipulated this application was filed with the Department on August 22nd, 1929. When these two checks, Exhibits 15 and 16, were issued, do you know whether they were sent to the Pittsburgh office of the Commercial? A Yes, sir, they were. 30

Q Did you learn from anybody as a fact that the checks were there? A I believe Mr. Hays called me about it, or wrote to me, one or the other.

Q At any rate, did you go to the office of Mr. Hays in Pittsburgh? A Yes, sir.

Q And were the checks there at the time? A Yes, sir.

Q Did you at that time have a list of the bills that were then unpaid on this job? A Yes, sir. 40

William T. Jerome, for Complainant, Direct.

Q And did you discuss that matter with Mr. Hays? A We made out checks for those bills.

Q Who made them out? A I believe I did.

Q I show you now a series of checks which are Exhibits 17 to 23 inclusive, what is the date of those checks? A September 5th.

10 Q 1929? A That is right.

Q That is in your handwriting, I believe? A Yes, sir.

Q And who are the checks signed by? A William H. Williams, as President, and myself as Assistant Treasurer.

Q And are all of them signed in the same way? A I presume so. Yes, sir.

20 Q Attached to each of those checks I notice that there is a statement of what the particular bill is for, for example, materials, I notice, is one—I think perhaps they all refer to material—just so we might have a word or two as to the method of operation there, I will take one of these as an illustration without repeating the exhibit numbers. I will show you one of the original checks, the others having been photostatic copies, is that the form in which the vouchers were prepared, with the checks attached? A These are the checks themselves,
30 the check itself and the voucher for it.

Q These checks are drawn on the Farmers and Merchants National Bank of Bridgeton, New Jersey? A Yes, sir.

Q They were all drawn on the Farmers and Merchants National Bank? A Yes, sir.

Q Did the company have an account in that bank? A Yes, sir.

Q Were those checks paid? A Yes, sir.

40 Q Now, one of the checks for that semi-final payment was for a comparatively small amount—

William T. Jerome, for Complainant, Direct.

at any rate, you remember there were two checks for a semi-final? A Yes, sir.

Q And what was done with those two checks, to whose credit were they deposited? A The large one was deposited in the Farmers and Merchants Bank at Bridgeton to the credit of the Eastern States Construction Company, and the smaller one was sent to the Meadville Bank in Pennsylvania, or some one of our banks we had a field account in, at any rate, to the credit of the Eastern States Construction Company. 10

Q A field account? A The small check went there.

Q And these field accounts were for what, payrolls, materials, and so on? A That was for payroll and miscellaneous expenditures paid out in the field. 20

Q And also in the account of the Eastern States Construction Company? A That is correct.

Q Now, let us go on to the date of September 19th, 1929, on that date was a letter sent by you to the Department of Highways, referring now to Exhibit 27? A Yes, sir, we sent that letter.

Q That letter is signed Eastern States Construction Company by William F. Jerome, that is your signature on the letter? A Yes, sir. 30

Q How did you come to send that letter? A Well, it was the usual procedure, it was the same procedure we followed with the semi-final check, it was the usual procedure, and the understanding being that the surety company would itself pay the bills against that contract against which it had furnished a release of bond.

Q Now, up to the date of that letter, September 19th, 1929, had there been any default on 40

William T. Jerome, for Complainant, Direct.

any of the jobs of the Eastern States Construction Company? A No, sir.

Q Did it have several other jobs which you were working on? A Yes, sir.

10 Q Do you remember what they were? A We had two jobs in Crawford County, Pennsylvania, one of them was the Vernon-Hayfield, and the other was the West Mead, 5418.

Q And was this same surety company the surety company on those contracts? A Yes, sir.

Q What about the Indiana County job? A We got that in August of that year.

Q Of 1929? A Yes, sir. That was a job for the County of Indiana.

Q The same surety company? A Yes, sir.

20 Q Had they turned down any applications up to that time, up to that time? A Not up to the time they took that bond, no, sir.

Q Now, do you know whether or not at that time, September 19th, 1929, there was any unpaid bill on the Clarion-Venango job? A Yes, sir, there were the bills due the sub-contractors, the MacDonald Construction Company who were contractors for excavation.

30 Q As I understand it, that was in addition to those several bills which you had previously paid out of the semi-final? A Yes, sir. We paid MacDonald and there was a balance that would be due MacDonald Construction Company on the final estimate. We wouldn't know the exact amount until the final estimate was prepared.

Q Was that the only unpaid bill on the Clarion job at the time you sent the letter of September 19th, 1929? A Yes, sir.

40 Q Was there any default ever declared on any of your contracts, outside of the Indiana County job, referring now to the three you just

William T. Jerome, for Complainant, Direct.

mentioned? A I don't know whether—I imagine they must have declared a default on us after the work was already completed, but I don't know.

Q Who got the money? A The surety company.

Q I am referring now to the State of Pennsylvania, was there any default declared by the State of Pennsylvania on any of these three contract jobs, Clarion-Venango, Vernon-Hayfield and West Mead? A The Indiana County was, before completion. 10

Q That was still another contract entirely separate from the three I have mentioned? A Yes, sir.

Q Do you know whether the surety company collected the amounts due on these several jobs? A I presume they did. 20

Q At any rate, it did not come to you? A No, it didn't come to me.

Q That is the point I want to bring out. Now, coming back to the date of September 19th, 1929, at which time this letter was sent to which you have referred, shortly after that date did you have any part in the negotiations with the Bridgeton Bank with regard to this loan of \$10,000? A We tried to raise some money, and I went into Bridgeton to see if we could raise more money in order to keep the company operating, and with Mr. McAllister, and I believe, Mr. Maier, we went over to see the Bridgeton Bank, Mr. Garrison of the Bridgeton Bank. 30

Q Who was Mr. Maier? A He was a director of the company, and also Vice-President.

Q How long did those negotiations continue at the Bridgeton Bank? A I don't remember how long. 40

William T. Jerome, for Complainant, Direct.

Q Did Mr. Garrison grant it to you immediately, or was there some discussion about it? A I think we got it the same day we went over there.

10 Q And without going into further detail, do you recall the fact that this assignment, that has been referred to, and which is now in evidence, was given as collateral? A Yes, sir.

Q Do you know what was done with the proceeds of the note? A It was deposited in the Bridgeton National Bank.

Q To the credit of the Eastern States? A To the credit of the Eastern States Construction Company, and used in the payment of labor and material.

20 Q Now, after the loan was made and the assignment given, what, if anything, did you do in the way of notifying the surety company of the assignment, and of the note, and so forth? A I went to Harrisburg on my way back to one of the jobs which I was doing, and I stopped off at Harrisburg with the intention of talking it over with the State as to the assignment, but instead I called Mr. Hays by telephone.

30 Q Stop there a moment. Did you do that of your own accord or at anybody's request? A At the request of Mr. Garrison.

Q The President of the Bridgeton Bank? A Yes, sir.

Q Proceed. A And I called Mr. Hays and I told him we had gotten the \$10,000. and that we were using it to pay bills, and we had to make an assignment against the Clarion-Venango final.

Q When you speak of calling him, do you mean by telephone? A By telephone.

40 Q Did you recognize Mr. Hays' voice? A Yes, sir.

William T. Jerome, for Complainant, Direct.

Q How soon after the making of the loan did you stop at Harrisburg, as you describe? A It was within a day or two after the making of it, we were on our way back to one of the contracts.

Q Did you do anything else in the way of notifying Mr. Hays about the assignment and the loan? A Yes, I talked it over with Mr. Williams, and he said I had better write him a letter in the matter, and I think I went over to the Penn-Harris Hotel and wrote a letter. 10

Q Did you keep a copy of it? A No. A lot of letters I didn't keep copies of, I wrote them in longhand and I didn't keep a copy of that one to the State Highway.

Q At any rate, this letter you sent was in your own handwriting? A Yes, sir.

Q Addressed to whom? A Mr. Hays. 20

Mr. Hobart: We have asked the Commercial to produce that letter, your Honor.

Mr. Fairlie: There never was such a letter.

Mr. Hobart: You don't produce it on the ground you say there was no such a letter?

Mr. Fairlie: Yes.

Q Do you remember what you said in the letter? A I just confirmed the telephone conversation stating we had received \$10,000. and were able to continue on with our work, and we had to assign that much of the final estimate on the Clarion-Venango. 30

Q What did you do with the letter after you wrote it? A I mailed it to Mr. Hays.

Q At what address? A At Pittsburgh, care of the Commercial Casualty, I think it was 820 Grant Building, something like that. 40

William T. Jerome, for Complainant, Direct.

Q Pittsburgh, Pennsylvania? A Yes, sir.

The Court: What did you say the date of the letter was?

The Witness: It would be within three or four days of the date of the assignment.

10

Mr. Hobart: The assignment was dated September 24th, 1929.

Q Was work proceeding on these other contracts in the meantime, I mean now between September 19th up to the time you got your final estimate on the Clarion job? A They proceeded up to the fall of 1929 when we had to quit for winter, and the only work thereafter that we performed was overhauling the equipment, and removed it to two new contracts that we had secured.

20

Q Some time after that, in the month of February, 1930, did you receive word the final estimates were ready? A Yes, sir.

Q Where did you get that word from? A From the Commercial Casualty.

Q I now show you Exhibits 30 and 31, are those the final estimates of the Clarion job? A Yes, sir.

Q I now show you Exhibits 34 and 35, are those the checks of the Treasurer of the Commonwealth of Pennsylvania in payment of these two final estimates? A That is right.

30

Q When did you first see these checks? A At Mr. Hays' office in Pittsburgh.

Q How did you come to go to his office? A I went in there at his request when he told me the checks were there.

Q How did he tell you, telephone, telegraph, letter or how? A I don't remember.

40

William T. Jerome, for Complainant, Direct.

Q At any rate, he got word to you in some way and you went to Pittsburgh? A Yes, sir.

Q And when you got to Mr. Hays' office, describe where the checks were when you first saw them. A Mr. Hays gave me the checks, or showed the checks to me, I can't say whether it was morning or afternoon, I don't remember now. 10

Q Were they in an envelope, or out of an envelope? A No, they were out of an envelope.

Q Was anybody else present at the time he showed you these two checks, Exhibits 34 and 35? A No, I don't believe so.

Q When he showed you these checks was there anything in writing or typewriting on the back of them? A I don't know whether that was on there then or whether it was placed on there afterwards. 20

Q You are referring to the endorsement on the two checks? A Yes, that is, the typed part.

Q Reading, "For deposit only in the First National bank of Pittsburgh, Pennsylvania to the credit of Commercial Casualty Insurance Company bond account, Eastern States Construction Company by," that is all in typewriting? A Yes, that may have been on there before I got in, or it may have been put on there afterwards. 30

Q If it was put on there after you got in, did you put it on? A No. It seems to me he gave it to someone to type that on while I was there, but I don't remember for sure.

Q At any rate, you did not type it? A No.

Q You did sign the endorsement beside the word "by?" A Yes, sir.

Q That is your name? A Yes, sir. 40

William T. Jerome, for Complainant, Direct.

Q At whose request did you sign them?
A Mr. Hays'.

Q Did he give you any reason for asking you to sign them? A We had quite a discussion over the account, and the bills that the Eastern States Construction Company owed and, of course, he made the statement he would not give us those checks on account of the money we owed on other contracts.

Q Was there any claim made by him at that time that any unpaid bill was due on the Clarion contract other than the MacDonald Construction Company? A No, sir.

Q He made no such claim? A No, sir.

Q Was there anything at that time unpaid other than the MacDonald Construction Company? A No, sir.

Q And that was entirely on the Clarion-Venango contract, is that right? A That is right.

Q Now, up to that time in February, 1930, the time you were in Mr. Hays' office, up to that time, had there been any default by the State on any of your pending contracts? A No, sir.

Q Either on any of these four contracts, or any other contract? A No, sir, I don't think so—no, there had not been.

Q After you endorsed those two checks, as you have described, what did you do with them? A I didn't do anything with them, Mr. Hays had them.

Q In the course of your discussion about these checks, was there anything said at that time with regard to the assignment or the claim of the Bridgeton Bank? A Yes, as I recollect,

William T. Jerome, for Complainant, Direct.

I told them I was going to get the mischief for it myself.

Q You used some rather strong words?

A Yes.

Q What did Mr. Hays say, if anything, when you made that comment? A I didn't go into detail, I knew the general proposition, and the general trend of the conversation was I had to sign these checks in order to keep the company running. Everything we did at that time was an effort to keep the company going until we could get some of the contracts completed and the money in on them to straighten up. 10

Q And those moneys were due from the State of Pennsylvania when the final estimates were prepared? A That is correct.

Q Was anyone else present at the time of your conference with Mr. Hays? A I don't remember. 20

Q Was there any figure mentioned in that discussion as to the amount of the claim of the MacDonald Construction Company? A Yes, we talked that over, but I don't remember what the amounts were. There was a dispute in the amount, I know that.

Q A dispute between whom? A MacDonald Construction Company and ourselves. 30

Q You don't know what amount was finally fixed as due the MacDonald Company? A I think it was pretty close to \$12,000, as I remember, \$11,000 and some hundred dollars.

Q You don't know whether it was finally paid, do you? A No, I do not. There was one amount of, I think, \$700, \$710, that I wouldn't okay.

Q I would like to go back to the negotiations for the loan at the Bridgeton Bank. At the time you took part in those negotiations, did 40

William T. Jerome, for Complainant, Cross.

you say anything to Mr. McAllister, or any other officer of the Eastern States, about this order or letter you had sent to the Department a few days prior? A I believe I did. I know I did in connection with the semi-final.

Q With the semi-final? A Yes.

10 Q But you are not clear about the other ones? A I am pretty sure I did. It was the usual customary thing to do, it was more a matter of red tape than anything else.

Cross examination by Mr. Fairlie.

Q Mr. Jerome, you were with the Eastern States Construction Company from the time of its organization until the time of its death?

20 A Yes, sir.

Q And when did it die? A It must have been in the spring of 1930.

Q It went out of business at that time, didn't it? A Yes, sir.

Q Was it insolvent at that time? A If we kept everything together and kept up our contracts it would have been solvent.

Q It owed more money than it had money to pay out? A Yes, but we had contracts we
30 couldn't realize on.

Q You heard Mr. McAllister state that a good many things he didn't know anything about of the Eastern States affairs, and I ask you isn't it a fact that Mr. McAllister didn't know much about the Eastern affairs because he didn't have much to do with the Eastern States Construction Company? A Well, he didn't know anything but what I told him, I will admit that.

Q In other words, he wasn't one of the active carriers on of the business of the Eastern States
40 Construction Company? A No.

William T. Jerome, for Complainant, Cross.

Q As a matter of fact, there were only two active carriers-on of the business affairs of the Eastern States Construction Company? A That is right.

Q You were one of them? A Yes.

Q And Mr. Williams was the other? A Yes.

10

Q Mr. Williams is a practical, experienced road builder and contractor, isn't he? A I believe so, yes, sir.

Q And he superintended the work on these jobs, didn't he? A Yes, sir.

Q And that is a considerable job in itself, isn't it? A Yes, sir.

Q And that was the part of the work he was qualified to do and that is the part of the work he did? A That is right.

20

Q He watched the men put down the concrete and dig the excavations, and so forth, right? A That is right.

Q And the business management, the business affairs, that part of it, all that had to do with the financing and business management, was left to you in discussion and conference with Mr. Williams, wasn't it? A Yes, sir.

Q And you carried on all such parts of the business, didn't you? A Yes, sir, I made reports to Bridgeton occasionally.

30

Q When the final payments came due on the two Crawford County jobs along about May of 1930, wasn't it? A Final payments?

Q Yes, on the two Crawford County jobs? A I don't remember when they did come due.

Q Whenever they did come due, at any rate, you followed the same procedure you did with respect to the final payment on the Clarion-Venango? A Yes, sir.

40

William T. Jerome, for Complainant, Cross.

Q You sent an order to the Department of Highways? A Yes, sir.

Q That the checks should be sent to you in care of the Commercial Casualty Company? A Yes, sir.

10 Q And it was understood and agreed with Mr. Hays that the checks represented the money, wasn't it? A We didn't talk about that feature of it.

Q You didn't use those words, but certainly you understood the checks represented the money, didn't you? A Yes, sir.

Q So that you understood that the money from those jobs, the two Crawford County jobs, was coming from the State in care of the Commercial Casualty Insurance Company, right? A
20 That is right.

Q And when the checks came in you went in and endorsed them over to the Commercial Casualty Insurance Company, didn't you? A I believe I did.

Q Now, that typewriting on Exhibits 34 and 35, which were the final estimate payments on the Clarion-Venango contract No. 1., that typewriting was put on there by the Commercial
30 Casualty Insurance Company, wasn't it? A Yes, sir.

Q Presumably Mr. Hays, or under his direction, right? A Yes, sir.

Q And when it was handed to you to sign that endorsement was on there? A Yes, sir.

Q And there wasn't under the line on which you signed the words "Assistant Treasurer" or "Secretary"? A No.

Q Were you trying to commit a fraud of any kind? A No, sir.
40

William T. Jerome, for Complainant, Cross.

Q Will you explain why it is the words "Assistant Secretary" and "Assistant Treasurer" do not appear under your signature in the endorsement on the two checks Exhibits No. 34 and 35? A I never even gave it a thought, I don't know why it wasn't there.

Q You didn't notice it was not? A No, sir. 10

Q And if it had been there you would have signed anyway? A Yes, sir.

Q You were intending to sign as Assistant Treasurer and Secretary? A Yes, sir.

Q Did I understand you to say you did carry on the Eastern States Construction Company's business, didn't you? A I did say that, yes, sir.

Q As far as you know, Mr. Jerome, were the things you did for and on behalf of the Eastern States Construction Company accepted by the company as having been done by you for it? A I believe so. 20

Q You don't know of anything to the contrary, do you? A I was doing the best I could.

Q Nobody questioned what you were doing at the time? A No.

Q You were a director all this time? A I was a director, yes, sir.

Q And you consulted with Mr. Williams about the affairs of the company? A Nightly. 30

Q Now, you have said that in August, 1929, you were ready for the semi-final payment on the Clarion-Venango job, right? A Yes.

Q Now, there was, of course, something owing to the MacDonald Construction Company for work done on that job, right? A There was, yes.

Q And the full amount could not in August be determined because you don't know the final 40

William T. Jerome, for Complainant, Cross.

amount until the final estimate comes in from the State Highway Department? A That is correct, yes, sir.

Q So that as I understand it, there had to be some sort of a provision for the MacDonald Construction Company out of moneys to come in in the future, right? A Yes, sir.

Q And there was also this \$15,000. of other debts owing in August for work done in connection with only the one job, Clarion-Venango? A That was before the semi-final was paid, that is correct.

Q And in view of that situation, you felt that the semi-final and final coming in was certainly going to be enough to pay the bills on the Clarion-Venango job, at any rate? A Yes, sir.

Q And you asked the Commercial Casualty Company to file the application for release of bond on the Clarion-Venango job, didn't you? A Yes, sir.

Q You didn't intend the Commercial Casualty Company to commit any kind of fraud or false swearing, or anything of that kind, in doing such a thing? A No, sir.

Q Had, at the time the application for release of bond was filed on the Clarion-Venango job, all claims been satisfactorily settled, as you understood it? A With the exception of the MacDonald Construction Company, yes.

Q And what arrangement was made with respect to that? A That any money belonging to them would be paid from the final settlement.

Q Did that constitute satisfactory settlement to you? A Yes, sir.

Q Did it to the surety company? A Yes, sir.

Q You have had a great deal of experience with the State Highway Department, and matters of this kind, haven't you? A Yes, sir.

William T. Jerome, for Complainant, Cross.

Q Is there anything unusual about that practice? A Not that I know of.

Q Is it everyday practice? A As far as I know it is.

Q To get in the final and semi-final payments with which to pay the bills remaining on a job, this application of release has to be filed, doesn't it? A Yes, sir. 10

Q Was there some money in August, 1929, to be paid, eventually to be paid, to MacDonald Construction Company? A Yes, sir.

Q And at that time was the MacDonald Construction Company claiming it might be even more than the \$12,000. it finally figured out to be? A They didn't know themselves, they couldn't make any estimate. 20

Q It was an undetermined sum at that time? A Yes.

Q And as I understand it, you made an arrangement with Mr. Hays that the semi-final and final checks on the Clarion-Venango job should come to the Commercial Casualty to take care of the situation? A Yes, sir.

Q And you did that in August? A Yes, sir.

Q Mr. Jerome, I understood you to say that your arrangement with Mr. Hays concerning the semi-final payment on the Clarion-Venango contract was made in August, and I call your attention to the fact that the order to the Department of Highways to send the semi-final payment check care of the Commercial Casualty is dated August 2nd, which would indicate, I think, that rather than the 1st of August, your conference with Mr. Hays was probably during the last part of July? A You would think so by that. I wouldn't want to swear the date. 30 40

William T. Jerome, for Complainant, Cross.

Q That is Exhibit No. 8, it is dated August 2nd, and your conference with Mr. Hays was prior to the time you made that order, wasn't it? A Yes, it would indicate that.

10 Q Now, I call your attention to Exhibit No. 14, which is the application for release of bond on the Clarion-Venango job, and particularly to the date, 8-22-29, written on the bottom of it, and the initials—the name, rather, McElroy written under that? A Yes.

Q That indicates to you, doesn't it, that was filed in the Department on that day, 8-22-29?

A No, I don't see that it would. I don't know, of course, anything about this application for release. That may be they decided it was okay on that date, but then I don't know about that.

20 Q I call your attention on Exhibit No. 8, which is the order, to the same notation, 8-22-29, McElroy? A Yes.

Q Which would indicate, wouldn't it, that came into the Highway Department on August 22nd? A No, I think that is the time he got it into his department, to tie the two together. I am not certain as to that, I don't know.

30 Q If Mr. Hays says that you gave that order of August 2nd to him and he forwarded it to the Department, together with the application for release, and they came into the Department together on August 22nd, you have no clear recollection that would enable you to deny that? A No, if he says so, I imagine it is true.

40 Q You say this order which you gave dated August 2nd, Exhibit No. 8, was in accordance with the usual procedure in such road construction matters with the Department of Highways, is that correct? A As I understand it, yes, sir.

William T. Jerome, for Complainant, Cross.

Q So that the surety company would know that all the bills were paid, is that it? A That is the way I understand it, yes, sir.

Q And it is possible, as far as your recollection goes, that you did give that order of August 2nd to Mr. Hays so he was enabled to forward it with the application for release to the Department? A It is possible, yes, sir. 10

Q And before you gave him that order of August 2nd, you had conferred with him concerning the unpaid bills owing on the Clarion-Venango job? A Yes, I conferred with him prior to that.

Q And it was understood between you and him that the semi-final and final payments—it was between you and him at that time—that the semi-final and final payments when they came in should be made over in payment of the bills that were owing on the Clarion-Venango job? A But at that time we didn't mention the final, that was mentioned later. 20

Q But the final was going to be necessary to take care of the balance on MacDonald? A Yes, sir.

Q Was it contemplated also that would go on the MacDonald job? A Yes, sir.

Q These checks came in somewhere around September 5th, didn't they, 1929, for the semi-final payment? A Yes, sir. 30

Q And as I understand it, there were two checks, one that came out of the road fund, and some out of some other fund of the State? A That is correct.

Q Aggregating the proper amount for the final estimate payment as that final estimate had previously been submitted to you by the Department? A The semi-final, yes. 40

William T. Jerome, for Complainant, Cross.

Q And the smaller of those checks, which was twenty-eight hundred and some odd dollars, was of no concern to the Casualty Company at that time for the reason that the sixteen thousand and odd dollar check was enough to pay the bills that were then owing, right? A Yes, sir.

10 Q Now, if Mr. Hays testified that you left that \$16,000. check with him and that he mailed it to the bank, have you a clear enough recollection of the matter to deny he mailed it to the bank? A No, I think he did mail it to the bank.

Q To the same bank against which the checks were drawn for the payment of those bills, right? A Yes.

Q Now, do you remember any conversations you had with Mr. Hays at that time to the effect you did not want to endorse those checks over to Commercial, and that you would rather have your creditors see your own checks come out rather than the bonding company checks? A No, I think that was understood, that we would issue our own checks. If I am not mistaken I took the checks down with me already made out, I think.

Q And you asked Mr. Hays, didn't you, when you took those checks into him to permit it to be done that way, to mail out Eastern States checks so the creditors would not see the bonding company figuring in it, rather than the checks should be endorsed over to the bonding company and the bonding company checks mailed out? A I don't recollect that. I didn't figure it any other way except we would use our checks. That is the way I always understood it, but I wouldn't want to say for sure one way or the other.

40

William T. Jerome, for Complainant, Cross.

Q You are not clear on that, it is too long a time ago and I don't want to pin you down to what you don't clearly recollect. A I am most sure I took the checks down already made out.

Q But you don't recall the conversation distinctly that took place at the time? A No.

Q Now, that was on September 5th, 1929, and it was at the same time that you signed the application to Commercial for a bond on the Indiana County job, wasn't it? Let me show you—I show you Exhibit No. 24. A This is an application for another job.

Q For the Indiana County job? A That is my signature all right, and the date says the 5th.

Q September 5th, and as you now recall you made that application for bond, Exhibit No. 24, at the same time that these semi-final checks were sent out or arranged for? A Yes.

Q And that Indiana County job, that application for bond, was dated September 5th. I suppose work didn't actually get under way on the Indiana County job until the end of September or the first of October, is that right? A Probably the end of Septemebr.

Q Commercial did go on your bond on that Indiana County job pursuant to that application I just referred to, didn't it? A Yes, sir.

Q Now, after that, sometime between September 5th and the next couple of weeks did you apply to the Commercial or take up with the Commercial the matter of getting some bond from them in connection with a proposed job the Eastern States had at Harrisburg? A I don't remember or recall. We didn't have any job at Harrisburg, in the first place.

William T. Jerome, for Complainant, Cross.

Q I am informed it was another Indiana County job you proposed to get. A We had two Indiana County jobs and they both went to other bonding companies.

10 Q Did you take up with the Commercial the matter of getting a bond for the other Indiana County job? A I talked it over with them, but I don't think I asked for an application, I think I told them there were reasons why we were giving it to somebody else.

Q Didn't they tell you they wouldn't write that bond? A Mr. Hays didn't want to write the bond for Little Crawford, but I don't recall the other two jobs.

Q You can't deny positively now they refused to write the bond? A No.

20 Q You did say on your direct examination, Mr. Jerome, in about the middle of September, 1929, it became necessary to try to raise money to keep the company operating, is that right. A That is correct, yes, sir.

Q And at the time you applied for the Indiana County bond, on September 5th, you had furnished a financial statement of Eastern States to Commercial, hadn't you? A I presume I did, yes.

30 Q Is this paper I now show you, take that part, the financial statement which is referred to? A I guess it is.

Q And that is dated September 5th, isn't it, or that is its sworn date, September 5th? A Yes.

Q And it has your signature on it? A Yes, sir.

40 Mr. Fairlie: I will have it marked for identification unless you are willing it be marked now as an exhibit.

William T. Jerome, for Complainant, Cross.

The Court: This is not among the others?

Mr. Minard: Let me see it first before we decide what we are going to do with it.

Q Do you recall, Mr. Jerome, that very shortly after the application for the Indiana bond was made and this financial statement was submitted to Commercial, at that time Mr. Hays spoke to you about the home office of Commercial having criticized that statement and its accuracy and one thing and another? A Yes, he did, he told me in connection with one of our jobs that he had a little difficulty in getting it through. 10

Q Did he tell you they had investigated some of the statements contained in that? A No.

Q He didn't mention that? A No, he told me he had difficulty in getting a bond through, I think it was Little Crawford, I don't remember now. 20

(Said paper offered in evidence and marked Exhibit 48.)

The Court: Does it bear date?

Mr. Fairlie: Only as it says at the top, as of August 20th, signed as I have said, and then subscribed and sworn to this 5th day of September, 192— the year is not filled out—Gertrude E. Regan, Notary Public. 30

Q That year, Mr. Jerome, was actually 1929, wasn't it, where the date is left blank on there? A I should think it would be.

Q The notary's certificate? A I think it would be.

Q So it was a fact in the middle of September, 1929, that the financial condition of Eastern 40

William T. Jerome, for Complainant, Cross.

States Construction Company was not entirely satisfactory, is that so?

Mr. Minard: Objected to, the statement shows for itself.

10 The Court: I will let the question be answered.

The Witness: We never did have enough cash capital to work on, we had money coming to us we couldn't realize cash on at the time, and we had to borrow money from time to time when we could. We never had sufficient money at one time to operate the way we would have like to operate.

20 Q And by September 19th, as appears by paragraph 28 of the stipulation, the Eastern States owed bills due and unpaid for labor and material furnished in connection with the three jobs, Clarion-Venango, Vernon-Hayfield, and West Mead, aggregating the sum of \$71,430.97? You may not remember the figure exactly, but you remember there were bills owing? A I remember there were bills owing.

Q In a large sum? A It was a rather large sum, yes.

30 Q And on September 19th there was only the final payment to come in on the Clarion-Venango job, and only the final payment on the West Mead job, and only the final payment on the Vernon-Hayfield job, is that right? A There was money coming in.

Q On those jobs, they were the only final payments to come in? A That is right.

40 Q You remember discussing this situation with Mr. Hays in about the middle of September, 1929? A I discussed it several times,

William T. Jerome, for Complainant, Cross.

I don't remember the dates, but we did discuss it several times.

Q Throughout September you were in touch with Mr. Hays concerning the situation? A Yes.

Q And this order dated September 19th, which is Exhibit No. 27, to the Department of Highways, I understand you mailed this directly to the Department of Highways on September 19th, is that correct? A I presume I did, that is the date and that is the order and this is my signature. 10

Q And you knew that was received in due course at the Department's office? A Presumably, yes, sir.

Q Now, during September, or the middle of September, when you say you were having these conference with Mr. Hays, did you discuss the situation also with Mr. Williams? A Yes. 20

Q In connection with what you were doing during the month of September relative to these matters, were you or weren't you keeping Mr. Williams advised? A I did, I always kept him advised of what happened.

Q And did you tell Mr. Williams that Mr. Hays had demanded of you that you send an order to the State Highway Department making over the final payment on the Clarion-Venango job to the surety company? A Undoubtedly, yes. 30

Q Before you sent the order you told Mr. Williams that? A Yes, Mr. Williams understood we were doing that.

Q So when you sent this order, it was pursuant to an understanding between you and Mr. Williams, was it? Right.

Q And then when the final checks came in on the Clarion-Venango job in February, 1930, did 40

William T. Jerome, for Complainant, Cross.

Mr. Hays notify you he had received them?

A Yes, sir, he did.

Q Upon receipt from Mr. Hays of word that the checks had come in, you went to Mr. Hays' office and endorsed them over to the Commercial, didn't you? A I did, yes.

10

Q Now, in respect to the telephone conversation and letter that you have said you sent to Commercial's Pittsburgh office within a few days after the assignment to the bank of September 24th—I understood you to say in your direct examination that at the time the assignment was made to the bank Mr. Garrison, President of the Bridgeton Bank, requested you to go to the Department of Highways at Harrisburg concerning it, is that correct? A Yes, sir.

20

Q You just answered now, if I understood you, that Mr. Garrison of the Bridgeton Bank did ask you to go to the Department of Highways concerning this assignment, didn't he? A I think I was asked to notify the Department of Highways and the Commercial Casualty of the assignment. I knew I couldn't make a step so any assignment that Harrisburg would acknowledge because of the contract, the form of contract, and notified them of that, but that I could notify the surety company of the assignment so that they would hold the money after the MacDonald Construction Company had been paid, and by that time it looked as though we had plenty of balance on hand with which to pay the \$10,000 over the amount of the final estimate, which we would assume would be \$20,000 at that time.

30

Q But Mr. Garrison did ask you to go to the Department of Highways, didn't he, concern-

40

William T. Jerome, for Complainant, Cross.

ing this assignment? A He wanted to know if I would do that.

Q And you did go even as far as getting to Harrisburg? A I had to go through Harrisburg on my way back, yes.

Q And you did have in mind Mr. Garrison's request that you go to the Department of Highways? A Yes, I was thinking perhaps there might be some way I could do it. 10

Q At the time the assignment was made to the bank, you had told Mr. Garrison that the Department of Highways would not recognize this assignment, hadn't you? A I am pretty sure I did, because the contract says so, and the Department of Highways won't recognize any assignments.

Q The Department won't? A No. 20

Q You have had quite a wide experience with the Department of Highways, Mr. Jerome? A All our checks came in direct to the company.

Q You never knew of any checks signed and approved coming to anyone else than the contractor himself? A I never knew of any, no.

Q And you say that it was the practice of the Department to recognize no assignments? A It says so in the contract. 30

Q And you told Mr. Garrison that at the time of the assignment to the bank? A Yes, sir.

Q Did you tell Mr. Garrison at the time of the assignment to the bank that in this application, Exhibit No. 1, the Eastern States warranted the truth of the answers made by it to the questions contained therein, and that in answer to question No. 29: "Have you assigned or will you assign your payments on this con- 40

William T. Jerome, for Complainant, Cross.

tract, or any part thereof?" and the Eastern States said "No" in response to that. Did you tell Mr. Garrison so? A No, I did not. I can't tell you without reading what it says. I am afraid I was very lax in reading the application.

10 Q Did you tell Mr. Garrison, or those representatives of the bank who were present at the time, that you had sent this order of September 19th to the Department of Highways to send the final payment to Commercial? A I presume I did. I understood that thing was understood, and it was a regular practice. I wouldn't want to swear I said that exactly.

20 Q Now, you say that you were requested to give notice of this assignment to Commercial, and I assume you looked upon that request in itself as being rather an important formal step in the proceedings, in view of the situation, didn't you? A I knew we were getting \$10,000, and that we needed the \$10,000 and I was glad to get it, and that I intended to tell Mr. Hays, yes.

Q You were very much in need of that \$10,000? A Yes, we wanted it to continue operations with.

30 Q And also there was a letter that you wrote to Mr. McAllister, which you may recall, it was a letter dated September 21st, 1930, Exhibit No. 4 it is, in which you in that letter are referring back to this time in September, 1929, and I ask you to look at that letter. A Yes, I remember that letter.

Q And I call your attention also to a letter that you wrote on January 31st, 1930? A Yes.

40 Q To Commercial, No. 45? A Yes.

William T. Jerome, for Complainant, Cross.

Q Now, at the time you went to Harrisburg, having in mind you would see the Department concerning the assignment that had been made to the bank, was there anything in the situation as it existed between Eastern States and the Commercial, in view of the matters you have already testified to, that made you wonder what effect such notice to Mr. Hays was going to have on Commercial? A No, why— 10

Q Now, you recall—

Mr. Minard: Let him finish.

Q He said "No." The answer is no, is it?
A The answer is no.

Q Do you recall in this letter, Exhibit 46, that you have just looked at, you said that "Commercial would undoubtedly ask to take over all jobs immediately. At that time we still had hopes of coming through okay. In order to keep the Commercial quiet"—remember that? Now, that condition existed, didn't it? 20

Mr. Minard: What date was that?

Mr. Fairlie: In September, 1929, didn't it?

Mr. Minard: What was the date of the letter? 30

Q That letter is a letter you wrote, a letter referring back to a prior time? A I don't think it referred to that time right there.

Q In September, 1929, the condition was such it was necessary to keep the Commercial quiet, wasn't it? A I don't think so in September. No, the Commercial was working with us in September to keep things going. 40

William T. Jerome, for Complainant, Cross.

Q But at that time, in September, there were over \$70,000 of bills owing on these three jobs?

A I don't know about the amount, we had a lot of bills.

Q But the amount you are not prepared to mention? A No.

10

Q And there had been a refusal of the Commercial to go on your other Indiana County bond? A I don't know about that, either.

Mr. Minard: That isn't the truth.

The Witness: I don't think they turned us down, we had reasons for giving two other bonds to two other companies.

20

Q Mr. Hays had communicated to you some criticism which came from the home office concerning the September 5th financial statement?

A He communicated to me he had difficulty in getting the Newark office to pass on some of our bonds.

Q And the Indiana County contract, for which you made application on September 5th, was not yet well under way, there hadn't been expenses incurred on that yet? A Probably moving in, that is about all.

30

Q So when it comes to taking over the jobs, the Indiana County job was the only one that could have been taken over because the others were done, weren't they? A Well, now, yes, I guess we finished—we got that job in August—in September. We had work performed on the Indiana County job in September, and we were just finishing up the job in Crawford.

40

Q To use your own expression, if Commercial hadn't been kept quiet in September they would

William T. Jerome, for Complainant, Cross.

have taken some steps on the Indiana County job they just bonded wouldn't they? A Yes.

Q And you say in view of that existing condition, you did write the letter to Mr. Hays I think a few days after? A Yes, Mr. Hays knew I was trying to get that money.

Q Just stick to the letter now. Are you 10
positive? A I am.

Q And you addressed that letter to Mr. Hays personally? A Why, sure.

Q What is his full name? A Harold S. Hays.

Q Addressed to Harold S. Hays care of Commercial Casualty? A Yes, I think it is 820 Grant Building.

Q What city? A Pittsburgh.

Q You have no doubt about it? A No doubt 20
in my mind Mr. Hays knew about that.

Q And you wrote the letter? A Yes.

Q Did you put it into any explanation to try to still keep Commercial Casualty quiet in spite of the shock of receiving this notice, did you make any effort? A I didn't think it would be any shock to them, I thought they would be glad we had \$10,000.

Q To operate the company and get along? 30
A Yes.

Q Now, you didn't keep a copy of it? A No, quite a few letters I didn't if I was out and wrote them in longhand.

Q Did you ever write any more important letter than this? A It didn't appear as important then as it does now. I figured we would get the jobs finished and the bills paid up and there wouldn't be any trouble.

Q Out of all these gentlemen assembled at the Bridgeton Bank—who all were there, Mr. 40

William T. Jerome, for Complainant, Cross.

Garrison, Mr. Scull, Mr. McAllister— A I don't remember the details. I didn't expect when we went down the money was going to come from the Bridgeton Bank.

Q These men were there I mentioned? A I am sure Mr. Garrison was and Mr. McAllister.

10 Q Did anyone suggest any reason why the bank, to protect its own rights, shouldn't give its own notice of the assignment to the Commercial Casualty? A I don't remember.

Q Nobody mentioned that? A No, I don't remember that.

Q Nobody suggested anything about that? A Not that I know of.

Q Who was present at the time this request was made of you? A Mr. Garrison and Mr. McAllister, I am sure.

20 Q They were both there? A Yes.

Q And Mr. Garrison was president of the bank? A Yes.

Q Was Mr. McAllister attorney for the bank, to your knowledge? A I don't know.

Q But he was treasurer of Eastern States? A Yes, sir.

Q And who made the request? A Mr. Garrison, as I remember it.

30 Q Mr. McAllister didn't say anything about it? A Not that I know of.

Q And just exactly what was it Mr. Garrison said to you? A He said, "I would like to have"—the sum and substance of it was he would like to have Harrisburg know he was loaning the \$10,000 against that estimate, and also the surety company.

Q As well as the surety? A Yes.

40 Q And you went to Harrisburg for that purpose, that is, you stopped on the way from some

William T. Jerome, for Complainant, Cross.

other trip at Harrisburg for that purpose? A Yes, sir.

Q Where did you stop in Harrisburg? A We stopped at the Penn-Harris Hotel as a rule if we stayed overnight, but we didn't stay overnight, we stopped in there.

Q But you registered there? A No. 10

Q Have you tried to get the telephone record? A No, I have not.

Q Or the hotel record? A No, I have not. I just know under the circumstances this is what I did, that is all.

Q You did register at the hotel, didn't you? A I often have.

Q On this occasion? A No, I don't think so.

Q But you wrote the letter from the hotel? A Yes, sir. 20

Q What time of day was it you wrote the letter from the hotel? A It was right around lunch time.

Q And where in the hotel did you write it? A In their writing room.

Q And who was with you? A Mr. Williams.

Q Was he there in Harrisburg at the time? A He was with me.

Q And when did you telephone? A From Harrisburg. 30

Q To Mr. Hays? A At Harrisburg.

Q At what hour of the day? A I wouldn't want to be pinned down that close to it, I don't know.

Q And on what day? A Whatever day it was I went to Harrisburg. I don't have any record of that.

Q Is it possible for you to get down definitely enough so we can get the telephone records? That is what I am driving at, to be explicit. 40

William T. Jerome, for Complainant, Cross.

Mr. Minard: Produce the letter, that will simplify the matter.

Q Can you be definite enough so we can get those records? A No.

10 Q And the reason we can't find any records in the hotel is because you did not register? A I don't say I didn't register that day, but I don't think we did, we were driving through.

Q What hour of the day did you telephone? A I presume just before lunch.

Q To whom did you talk? A To Mr. Hays.

Q Personally? A Why, yes.

Q What was the number you called? A Was is Grant 4270? I don't remember, I can't tell you that, it would be hopeless.

20 Q And you can't tell me what day it was? A No.

Q And there is no way I can tell whether Mr. Hays was in Honolulu or Pittsburgh when you phoned? A No, if I could do it I would do it, because I am sure Mr. Hays had knowledge of this.

The Court: Did you call from a pay-station in the hotel?

30 The Witness: Yes, sir.

Q Was that call a person to person call, did they ask for Mr. Hays, or just get the office? A No, I presume it was a person to person call, but I don't remember. I know this—

The Court: You said it was four days after the note was given?

40 The Witness: Three or four days. I know this, that we were very anxious to get

William T. Jerome, for Complainant, Cross.

this money, and Mr. Hays was anxious that we get it, and I was glad of the fact I was able to tell him we did have it.

Q Did you ever receive any reply from Mr. Hays to this letter? A No.

Q You didn't get a written reply from him? 10
A No.

Q As far as you know the bank never got any acknowledgment of it, either, did it, you never heard of any going to the bank? A No, I did not.

Q And what hour of the day was it you telephoned to Mr. Hays? A I presumed shortly before noon, just from the fact we would start in the morning and we would get to Harrisburg before noon.

Q Are you positive that it was a person to 20
person call, so I can have the person to person calls looked up? A I am almost certain it was, because that would be the sensible way to contact him.

Q Why did you feel it was necessary to give the message to Mr. Hays instead of Mr. Rohrich, who was also in the office? A I will tell you why that is, because we dealt mostly with Mr. Hays. Mr. Hays and I were pretty 30
friendly, or I presumed that we were, and I looked upon Mr. Hays as a friend of mine, and he had tried to help us out.

Q Mr. Rohrich was the general manager of the Pittsburgh office? A Absolutely.

Q And it wouldn't have answered your purpose to get the Pittsburgh office and give this notice to Mr. Rohrich? A Why should I when I was dealing in everything else with Mr. Hays?

Q Now, you signed the application for this bond in your own name as Assistant Secretary 40

William T. Jerome, for Complainant, Cross.

and Assistant Treasurer, is that right? A Yes, sir.

Q You bought the material for these contracts? A Every bit of it.

Q And signed orders for the purchase of materials? A Yes, sir.

10 Q And you signed contracts for the purchase of materials? A Yes, sir.

Q And you signed sub-contracts for these sub-contractors in your own name as Secretary and Treasurer, didn't you? A Yes, sir.

Q You opened bank accounts in various places? A Yes, sir.

Q Yourself? A Yes, sir.

Q Consulting always generally with Mr. Williams? A Yes, sir.

20 Q But those things you did yourself, didn't you? A Yes, sir.

Q You opened bank accounts, among others, in the First National Bank at Meadville? A Yes, sir.

Q The First National Bank of Mercer, Pennsylvania? A Yes, sir.

Q The First National Bank at Emlenton, Pennsylvania? A Yes, sir.

30 Q And the First National Bank of Marion Center? A No, sir.

Q Some banks in Indiana County? A Yes.

Q Do you remember the names of them? A I think it was the Farmers Trust, but I am not certain of that.

Q You were the one to determine when checks came in which bank they would go to? A Yes, sir.

Q Sometimes there were banks that had made loans to Eastern States, and you gave or-

40

William T. Jerome, for Complainant, Cross.

ders to the Department to mail checks to that bank, there were such instances? A Yes, sir.

Q And when those checks came in the bank just deposited it to the credit of Eastern States and charged the credit against the loan at the bank, that happened, didn't it? A Yes, sir.

Q Without any endorsements from you? A 10
Yes, sir.

Q And that happened as the result of your having signed orders on the Department of Highways to send the checks there? A Yes, sir.

Q You looked upon the sending of the checks to a certain place the making over of money to that bank?

Mr. Minard: The question of assigning 20
money is a legal question. Mr. Fairlie is making an argument of fact and he is trying to get the witness to say yes once in a while in order to give credence to the statements which are not in the evidence and not stipulated, and I submit it is not cross examination.

The Court: This witness testified certain checks were mailed from the Department to certain of these banks where they had loans 30
and they were credited against the loans without endorsement, he has already testified to that.

Mr. Minard: That is obviously impossible, he did that because counsel is conducting an improper examination.

The Court: He says—

Mr. Minard: Yes, but that doesn't mean to say he gave away the company's money without an endorsement. 40

William T. Jerome, for Complainant, Cross.

The Court: He did say some of these checks were sent to some of these banks, were mailed directly to the bank, and the bank credited them to the loan, without endorsement.

10 The Witness: I know in one case we borrowed some money from the First National Bank of Meadville—in fact, we borrowed it three times, and each time I asked them to send the check due to company to that bank so that they could take out what we owed them. Twice the Department fell down on it and I got the check by mistake and I took it up to them, and the third
20 time it happened the check did go to them, and I wasn't in Meadville at the time, and they deposited it to our account and took out their loan and gave me the cancelled note when I got back.

The Court: Do I understand they deposited the check to the company's account and charged the note against your account?

The Witness: And gave me the cancelled note.

30 Q In other words, they used the proceeds of that Department check to pay their loan?

A To pay their loan, and deposited the balance into our account and we drew on it.

40 The Court: It is obviously impossible for him to testify how the bank handled it, without he has the records here to show, because there is a little difference between taking a check and crediting it on a note without any endorsement, or taking that check and depositing it to a depositor's account and

William T. Jerome, for Complainant, Cross.

charging the note to that account, because the bank would have a right to charge a note against an account if the note is due and payable at that bank.

Q You didn't endorse this check, you speak of, payable to the Meadville Bank, they just deposited it? A That is right. 10

The Court: I doubt very much whether a bank has the right to take a check and apply it against a note unless it is endorsed, but the bank certainly has a right to deposit a check to a depositor's account and then if the note is due charge it against the account.

Q And the order you sent to the Department of Highways was signed by you as Assistant Secretary and Treasurer, was it? A Yes, sir. 20

Q And you sent other orders from time to time to the Department of Highways to send checks to other banks, didn't you? A Whenever we had the money borrowed.

Q And you signed those orders as Assistant Secretary and Assistant Treasurer? A Yes, sir. 30

Q And you arranged the loans at these various banks? A Yes, sir.

Q These are what you call field accounts, I think. In your direct examination you referred to the First National Bank of Meadville as being a field account? A Yes, sir.

Q There were hundreds of thousands of dollars deposited in that field account, weren't there? A Yes, sir. I don't know as to the amount, but it ran considerably. 40

William T. Jerome, for Complainant, Cross.

Q Hundreds of thousands of dollars, isn't that right? A I don't know whether it got that big or not. I guess it did.

Q You were the only representative of the Eastern States who ever had any dealings with the Highway Department? A No, Mr. Williams
10 went in occasionally, but most of the time I did.

Q Only on special matters he came up sometimes and went in? A Yes.

Q And the same thing is true of the Commercial Casualty Company, weren't you the representative of the Eastern States who had all the dealings with Commercial Casualty?
A Yes, sir.

Q From beginning to end, right? A Yes.

Q And with these various banks I have
20 mentioned, isn't that so? A Yes, sir.

Q Do you recall ever Mr. Williams having written a letter of any kind, at least to the Commercial, as a representative of Eastern States?
A No, because if he did he would have told me to write it.

Q And when you wrote it you signed your name to it, didn't you? A Yes.

Q And you kept the books, didn't you, of the Eastern States? A Yes.

30 Q And you maintained offices from time to time at different places where you were performing contracts, didn't you? A Yes, sir.

Q Did the Eastern States have any regularly established and equipped office anywhere else than these field offices? A They had an office in Mr. McAllister's office in Bridgeton.

Q In Mr. McAllister's law office? A In Bridgeton.

Q That was the registered office of the company, wasn't it? A I imagine—sure, it would
40 be registered there.

William T. Jerome, for Complainant, Re-direct.

Q The business was transacted by you from these field offices, wasn't it? A Yes, sir.

Q You didn't spend any time in the Bridgeton office, did you? A No, sir.

Q Was the office in Bridgeton merely a nominal headquarters or was it an actual working office of Eastern States Construction Company? A Well, no, I don't think it was a working office, as you mean it. 10

Q Did you spend any time in it? A In the winter, occasionally I would be there.

Re-direct examination by Mr. Hobart.

Q I would like to call your attention again, Mr. Jerome, to the financial statement to the Commercial Casualty, which has been marked Exhibit 48, which I note was sworn to by you before a notary public? A Yes, sir. 20

Q And was that statement correct, to the best of your knowledge, at the time? A To the best of my knowledge and belief I believed that to be true.

Q Was it based upon your records that you state you kept? A I presume it was, yes, sir.

The Court: Did you furnish the information? 30

The Witness: I am pretty sure I furnished the information, but it must have come from the books and records.

Q Of the company? A Yes.

Q Now, what bond was this statement furnished for? A The Indiana County.

Q And that is the bond which the Commercial wrote, didn't they? A Yes, sir. 40

William T. Jerome, for Complainant, Re-direct.

Q Now, I would like to ask you again about the order which you signed in August, 1929, relating to the semi-final estimate. Did you shortly after that date received a letter from Mr. H. S. Hays in regard to that subject, showing witness letter dated August 21st, 1929? A Yes, 10 sir, I received that letter.

Mr. Hobart: I offer that letter in evidence. (Said paper offered in evidence and marked Exhibit 49.)

Q Now, look at that letter. Does that refresh your recollection as to whether the application for the release of the bond was sent to Harrisburg with the order which you have 20 previously identified requesting the State Highway Department to send the semi-final checks to the surety company? A That letter is a letter from Mr. Hays asking me to send—I don't quite get the question.

Q Let me put it this way. Calling your attention to the order which you sent to the Highway Department with relation to the semi-final payment— A Yes.

Q Does the writing of that letter refresh 30 your recollection as to whether or not you sent that order to the State Highway or whether you left it with Mr. Hays to send with the application for the release? A I sent it to Mr. Hays.

Mr. Hobart: Your Honor will see the point of the question, the letter recites "Along with your order being sent to this office" and so forth.

William T. Jerome, for Complainant, Re-direct.

The Court: I rather gathered that from the notations on the exhibit, they are all the same time.

Mr. Hobart: And this letter verifies that it is dated August 21st.

Q You stated in answer to some questions of Mr. Fairlie's in the course of your discussion with Mr. Hays about the semi-final and about the final estimates, that the question came up about borrowing money, was that the subject matter of discussion with Mr. Hays? A We talked that over. 10

Q Did you tell him where you expected to borrow the money, or hoped to borrow it? A In Bridgeton. I didn't tell him what bank.

Q Are you able to fix the time and place when the subject matter of borrowing money at Bridgeton was discussed with Mr. Hays? A No, sir, I cannot. 20

Q Can you fix it with reference to the time that the loan was actually made by the Bridgeton National Bank, as to whether it was before or after the making of the loan? A Before.

Q Did you in the course of that discussion indicate how much you expected or hoped to borrow? A No, sir. 30

Q Was there any figure mentioned at all, any approximate amount? A No, I think I had hopes of getting around \$15,000 at the time, but I don't remember whether I told Mr. Hays that or not.

Q And did he encourage the idea of borrowing money, or otherwise, wish you luck, or anything of that sort? A I knew he wished me luck, but I don't know what he said at that time. 40

William T. Jerome, for Complainant, Re-direct.

Q Now, coming down to the occasion when you were borrowing this money from the bank on the 24th of September, you stated, in answer to Mr. Fairlie, that you presume you spoke to Mr. Garrison about the order of September 19th, that is the order with relation to the final
10 estimate. Have you any clear recollection on that subject? A No, I couldn't swear to the exact words of the conversation. I knew to my mind it was a thing that was usual, the thing we always did, and had counted on doing, that the checks would go to the bonding company so they would be sure the bills were paid, it seemed to be the usual course of procedure.

Q You knew that was the course of procedure, of course? A Yes.

20 Q And did you tell Mr. Garrison that, or haven't you any recollection about it? A I presumed he knew it, I wouldn't want to say I made the direct statement.

Q Now, did you say anything to Mr. McAllister as to the usual procedure, and particularly with reference to the semi-final or other final estimates? A It is my impression that I did. I thought that was brought up several times, but I can't fix the thing, no, sir.

30 Q In the course of your discussion with Mr. Hays, to which you have already referred as having taken place before the money was borrowed from the Bridgeton Bank, was there anything said in the course of that discussion as to what security, if any, or what collateral, if any,—was there anything said with reference to any collateral or any security that the company might give or would have to give in order to get the loan? A I don't recall, I don't recall it. I
40 know we talked about—the reason why I was

William T. Jerome, for Complainant, Re-direct.

going to Bridgeton I knew we would have to give an assignment, we had given an assignment on the semi-final, and Mr. Hays knew that.

Q An assignment to whom? A The Farmers and Merchants.

Q Of Bridgeton? A Of Bridgeton, and Mr. Hays knew that, and I presumed it might possibly have to be duplicated the same way, but I didn't know. 10

Q The question is was that part of the discussion? If you have no recollection that ends it. A I have no recollection.

Q Did the company at that time have an account in the Farmers and Merchants Bank at Bridgeton? A Yes, sir.

Q And were there any other banks in Bridgeton or elsewhere in New Jersey where the company carried accounts? A In the Cumberland National Bank of Bridgeton, and we had an account in the Bridgeton National in 1927, but they closed that out in 1928. 20

Q And these accounts to which Mr. Fairlie has referred in various banks in Pennsylvania which you opened in the name of the company, were they what you call field accounts? A We designated them as field accounts to distinguish between them and the home account. 30

Q Now, calling your attention to your testimony on cross examination where you stated that Mr. Hays notified you he had received the two checks, or the checks for the final estimate, do you recall whether the notice was in writing or in the form of a letter from Mr. Hays to you? A No, I think it was a letter, but I am not sure.

Q I show you a letter dated February 11th, 1930, purporting to be sent by Mr. H. S. Hays, look at that letter and state whether that was 40

William T. Jerome, for Complainant, Re-direct.

the notice Mr. Hays sent to you about the arrival of those two checks? A Yes, that is from Mr. Hays to me saying he received two checks on the Clarion-Venango job.

Mr. Hobart: I offer it.

10 (Said paper offered in evidence and marked Exhibit 50.)

Q Your attention was also called on cross examination to a letter dated September 21st, 1930, which is known as Exhibit No. 46. I want to again call your attention to that letter and particularly to that part thereof which states "The Commercial had not paid our bills a few weeks ago and is waiting until I get to Pitts-
20 burgh to okay the bills"—does that refresh your recollection as to whether there was any conversation with Mr. Hays as to your okay of bills by Commercial before they were paid? A I okayed eventually for MacDonald Construction Company a sum of around, I think it was \$11,700 to Mr. Hays and practically all the other bills I think on the Crawford County job I sent Mr. McCandless a list of them, and how much they were.

30 Q That list of bills on the Crawford County job, was that sent after that job had been defaulted? A I think it was.

Q Perhaps I misunderstood you.

Mr. Fairlie: It was the Indiana County.

Q Did you say Indiana? A I said Crawford.

Q I confused you with my question, undoubtedly. Are you referring to the Crawford
40

Harry J. Garrison, for Complainant, Direct.

County or Indiana County? A It is the Indiana County I sent bills to Mr. McCandless.

Q And that is the job where there was a default? A Yes, there was.

Q And was that okay of those bills sent in after the default on that job? A Yes, sir.

Q And all of those you okayed? A No, I think Mr. McCandless wrote me in connection with Crawford County bills, and what they were, and if they were really paid, and I wrote back and told him they were okay.

10

Q You are speaking of the Crawford job? A This one particular was water for the City of Meadville, and I think there were others, a lumber bill in Meadville.

Q Now, referring again to the occasion of the endorsement of those two checks on the final estimate for the Clarion-Venango job, at the time you endorsed those checks, as you previously testified, was the amount due MacDonald Construction Company finally determined? A No, sir, we hadn't determined it at the time.

20

HARRY J. GARRISON, sworn.

30

By Mr. Minard.

Q Mr. Garrison, where do you live? A Bridgeton, New Jersey.

Q And what is your business there? A I am president of the Bridgeton National Bank.

Q Showing you Exhibit 28 in the stipulation in this case, a note of September 24th, 1929, from Eastern States Construction Company to the Bridgeton National Bank for \$10,000, demand

40

Harry J. Garrison, for Complainant, Direct.

note, were you present when that note was negotiated? A Yes, sir.

Q And who else was present at the time? A Senator McAllister.

Q Anybody else? A No one else that I remember.

10 Q Well, at any time regarding this loan was Mr. Maier present? A I think Mr. Maier was in once.

Q Was Mr. Jerome there at any time? A No.

Q Mr. Jerome has testified you asked him to notify the surety company, and he says the State, of the assignment, do you recall that? A No, I never knew Mr. Jerome until sometime in 1930.

20 Q Did Mr. Jerome ever tell you or say in your presence that on the 19th of September, before that note was made, that he had issued directions to the Highway Department to send the final payment to the surety company?

Mr. Fairlie: Inasmuch as the witness says he never knew Mr. Jerome until 1930 sometime, it appears the question has to be answered one way, if it is answered at all, and I object to it.

30

The Court: Mr. Garrison can testify as to what took place.

Mr. Minard: We will withdraw Mr. Garrison and put on somebody else.

Albert R. McAllister, for Complainant, Direct.

ALBERT R. McALLISTER, sworn.

By Mr. Minard.

Q Where do you live, Mr. McAllister? A At Bridgeton, New Jersey.

Q Are you an officer of the Eastern States Construction Company? A Director, and Secretary and Treasurer. 10

Q And how long have you been in that capacity, acting in that capacity? A At the time the company was formally organized, I am not sure as to the year, I think it was 1927 or 1928.

Q Have you got the minute book there of the company? A No, but I have it up here, it is in my brief case at the end of the table. 20

Q Now, have you the minute book there? A Yes, sir.

Q Is there a certificate of incorporation in it? A Yes, sir.

Q Have you got a certified copy of it? A I have one in my brief case, certified copy in the same brief case.

Mr. Minard: I offer in evidence a certified copy of the certificate of incorporation. 30

Mr. Fairlie: It is admitted in our pleadings the company is a corporation.

(Said paper offered in evidence and marked Exhibit 51.)

Q Have you the by-laws of the company? A I have.

Mr. Minard: We offer the by-laws, so entitled, consisting of four sheets, type- 40

Albert R. McAllister, for Complainant, Direct.

written on both sides of each sheet, constituting eight pages.

(Said papers offered in evidence and marked Exhibit 52.)

10 Q Mr. McAllister, you have got a resolution of July 9th, 1927, what is that, a resolution designating the Cumberland National Bank—

The Witness: July 9th, 1927.

The Court: Is that the one you wanted to offer?

Mr. Minard: Yes.

The Court: That resolution may be marked.

20 (Said paper offered in evidence and marked Exhibit 53.)

Q Have you another resolution there on the 9th, for the appointment of an Assistant Secretary and an Assistant Treasurer? A Yes.

Mr. Minard: Will you have that one marked?

30 (Said paper offered in evidence and marked Exhibit 54.)

Q Can you tell me whether any other bank or banks have been designated as depositories of money? A My answer to that is yes.

Q What bank? A The Farmers and Merchants National Bank of Bridgeton, and the Bridgeton National Bank of Bridgeton.

Q What are the dates of those resolutions? A July 9th, 1927.

40 Q All the same day? A Yes, but a separate resolution.

Harry J. Garrison, Recalled, Direct.

Q For each one? A No, there is a resolution marked Exhibit 53, a general resolution for the deposit of funds of the company in the Cumberland National Bank of Bridgeton, and such other banks and institutions as may be deemed advisable by the President and Treasurer, and so forth.

10

Q All the others that may be deemed advisable by the President and Treasurer? A Yes.

Q Are they mentioned in your minutes? A Now, there is another resolution which has not as yet been marked, in the minutes of February 9th, which provides—

Q Do you mean February or July? A July.

Q You don't have to read it, identify it, give us enough description of it to identify it. A There was a resolution passed on July 9th, 1927, providing for the borrowing or the negotiating of certain notes, and the pledging of certain collateral with certain banks in Bridgeton.

20

Thursday, April 26th, 1934.

(Trial of the cause resumed, on the above date, pursuant to adjournment, at 10 o'clock A. M., in the presence of the Court and counsel for the respective parties.)

30

HARRY J. GARRISON, recalled.

By Mr. Minard.

Q Mr. Garrison, you in the beginning of your testimony testified that you made this loan?

A Yes, sir.

Q Will you describe what occurred at the time that loan was made? A Well, Mr. McAllis-

40

Harry J. Garrison, Recalled, Cross.

ter made the application, and we talked the matter all over, and later Mr. Maier was with him, and I don't remember who else, but there might have been others, I won't say, but Mr. McAllister is the man I was doing business with.

10 Q I show you Exhibit 27, a letter of September 19th, 1929, from Jerome to the State Highway Department, directing the final payment checks on the Clarion-Venango job be sent to the Eastern States in care of Commercial Casualty at Pittsburgh. At the time you made the loan, five days afterwards, on the 24th of September, did anybody tell you that had been done? A No, no indeed.

20 Q Would that have made any difference if you had known it, in making the loan? A It would.

Q Did you know anything about the endorsement of the final payment checks by Jerome over to the Commercial Casualty when it was done in February? A No.

Cross examination by Mr. Fairlie.

30 Q In November and December, 1930, did Mr. McAllister, to your knowledge, have some correspondence with the State Highway Department relative to this matter? A I don't know.

Q Did he show you any letters that he had received relative to it? A I don't remember that he did.

Albert R. McAllister, Recalled, Direct.

ALBERT R. McALLISTER, recalled.

By Mr. Minard.

Q Senator, yesterday you mentioned certain resolutions of July 9th, 1927, have you examined the book to ascertain whether there are any other resolutions or proceedings respecting the title, or duties, or character of employment of Jerome with Eastern States Construction Company? A Yes. 10

Q Are there any other proceedings than the resolution appointing Jerome, that you referred to yesterday? A No, none that I found.

Q Where did the corporation hold its directors' meetings? A South Laurel Street, Bridgeton.

Q Were all the directors' meetings held there? A Yes. 20

Q You were the Treasurer of the company? A Yes.

Q What was Mr. Maier's title? A Vice-President.

Q And you and Mr. Maier had your offices at Bridgeton? A Yes.

Q Did you know anything about this letter of August 2nd of Jerome's, Exhibit 8, directing the semi-final payment check to be sent to the company in care of— A No. 30

Q In care of the Pittsburgh office of Commercial? A No, not at the time.

Q Do you know when you found it out? A Sometime after the Bridgeton Bank pressed for the collection of this \$10,000 note.

Q After they had demanded payment, and had it been protested? A No, I think I knew about it before the actual protest, but they had occasion to inquire before when they would 40

Albert R. McAllister, Recalled, Direct.

receive their money from this final payment, which, as they understood it, had been assigned to them.

10 Q No, did you know that the checks for the semi-final payment, Exhibits 15 and 16, were sent to Pittsburgh instead of the office of the Eastern States? A I might have known that.

Q At the time? A I doubt that I knew it at the time, because my present recollection is that I never knew it was the practice to do a thing of that sort, but if I had, I wouldn't have considered it a serious matter to have the checks sent there.

20 Q Exhibit 27, the letter of September 19th, directing the final payment checks to be sent to Pittsburgh, did you know anything about the writing of that letter? A I certainly did not.

Q Was that letter, or the one of August 2nd, the subject of any action of the Board of Directors at any time? A Absolutely no.

Q Did the Board of Directors authorize the endorsement of the final payment checks, as shown on Exhibits 34 and 35, by Jerome and turn the same over to the Commercial Casualty Company? A No.

30 The Court: How many directors were there in this corporation?

The Witness: Seven.

The Court: Were minutes made of all the actions of the board of directors' meetings?

The Witness: I believe so.

The Court: Nothing was ever done without a minute was made of it?

40 The Witness: I don't think so.

Albert R. McAllister, Recalled, Direct.

Q Was there any action taken by the board of directors on that subject? A No.

By the Court.

Q Who kept the books? A Mr. Jerome.

Q Did you have anything to do with keeping the books? A No. 10

Q Did you take charge of depositing the money? A Only sums that were received from Mr. Jerome for deposit in our local banks.

Q Who had authority to sign checks, did he, Mr. Jerome? A Mr. Jerome, and the President, Williams.

Q And endorse checks? A Yes, sir.

Q And sign checks, issue checks? A Yes.

By Mr. Minard.

20

Q Mr. McAllister, referring to Exhibits 34 and 35, when did you find out that those checks had been endorsed by Jerome personally over—as they appear there in the exhibits? A I don't recall the date, except I didn't know it had been done until sometime after it had been done, or didn't know it was intended to be done until after it had been done.

Q When you borrowed that money on the 24th of September, did you know that Jerome had directed the checks to be sent to Pittsburgh? A No, I didn't know that. 30

Q Was that stated at the time by anybody? A No.

Q Your answer is no? A No, it wasn't said by anybody at that time.

Q I show you a deposit card of the Bridgeton bank, Bridgeton National Bank, that contains the signatures—Is that card a deposit card 40

Albert R. McAllister, Recalled, Direct.

in the bank showing the signatures upon which they would recognize the making of a check, the drawing of a check on that account?

10 Mr. Fairlie: I object to that question on the ground it couldn't possibly have any relevancy to any rights as between Bridgeton Bank and Commercial Casualty. It is the Bridgeton Bank's own record, it is a self-serving declaration, as far as they are concerned, and it is in all respects incompetent, immaterial and irrelevant.

The Court: Is that the Bridgeton Bank?

Mr. Minard: Our client.

The Court: What is the purpose of it?

20 Mr. Minard: The purpose is to show that the funds could not be diverted from the company's credit or account except on two signatures of officers. Now, this diversion of the final payment checks was made on one signature, and not an officer of the company. Now, I just want to show that that was not only a by-law requirement but the banks in which they had their money, and the card, state that it has to have two signatures, that is the purpose of the proof.

30 The Court: That was for the purpose of drawing funds from the Bridgeton National Bank?

Mr. Minard: For the purpose of checking out funds of the company.

The Court: I will let it go in, subject to the objection, and subject to it being disregarded if I find it not material.

The Witness: The answer is yes.

Albert R. McAllister, Recalled, Direct.

Q Now, were similar cards made out for the other banks in which the Eastern States had accounts?

The Court: Did you have knowledge of all the other cards?

The Witness: My answer could not be yes or no, I could only testify to certain banks. 10

The Court: This will be subject to the same objection, and the same ruling. If I find it immaterial I will disregard it.

The Witness: In the two other Bridgeton banks in which the company had accounts, but I don't know whether similar cards were filled out in the banks located in the towns where the jobs were being conducted. 20

Q Now, Exhibit 39, is a letter from Jerome to the State Highway Secretary asking them for a default notice on the West Meadville contract, was that letter authorized by the directors?

The Court: I will permit him to answer the question as to whether there was any action taken by the Board of Directors with reference to that letter. 30

The Witness: No.

The Court: Shown by the minutes.

Q Did you know that that letter had been sent at the time? A Up until the month of April, the exact date—

Mr. Fairlie: Of what year?

The Witness: 1929, no, 1930, the Eastern States had not been sued, no judgments 40

Albert R. McAllister, Recalled, Direct.

10 were against it, no suit was pending, no default had been made in any contract, but at or about that time, I should say the latter part of the month of March, when the company was preparing for its spring operation, it required the bank credit which it had had in the previous year, and it began making arrangements for those credits. The sum we required was from \$30,000 to \$35,000.

 The Court: I am letting it in subject to your objection. I think it will save time to find out what it is.

20 The Witness: In that financial situation we were promised the sum required, we had been promised early in the year, and the amount that was to have been supplied by the Bridgeton National Bank happened to be \$10,000, but because the \$10,000 had not been repaid which had been borrowed in September of the preceding year, the Bridgeton Bank refused to advance an additional \$10,000, the other banks refused to advance their proportionate shares—there were substantial sums of money coming to our company, and I was informed by Mr. Williams, the president of the company, that there was sufficient money in these accounts, plus the profits from two other contracts that had been secured, to pay all of the obligations of the company. The Glen Falls Indemnity was one of the bonding companies on the larger of the two new contracts, and no work, at least, very little work had been done on that job, and our equipment was on a small job which had been bonded by
30 the Equitable Indemnity Company, and
40

Albert R. McAllister, Recalled, Direct.

when we failed to secure our money from the banks, we applied to these two bonding companies, the Glen Falls and the Equitable, I can't give you the exact date of the application, but it was in the neighborhood of the last of March or the first of April—no, it was in the month of April. 10

Mr. Fairlie: 1930?

The Witness: 1930, and Mr. Sigmunds, of the Glen Falls, went over to New York, and we—

The Court: Were you with him?

The Witness: With me.

Mr. Fairlie: You are refreshing your recollection from the minute book as you go along, and turning the pages? 20

The Witness: Yes, and one memorandum I put in at the time.

Mr. Fairlie: They appear there in the minute book?

The Witness: Yes. It is not actually a minute, but put in there for a permanent record to refresh my memory at the time. I wanted to see if there was anybody with me at the time. And we arranged for a meeting with the president of the Equitable Indemnity, it is a short name, I have forgotten it, a three letter name, but I have forgotten it, and the proposition that Mr. Sigmunds made was that the Glen Falls would advance \$25,000 if the Equitable would advance \$5,000, which would give us \$30,000, and the Equitable stated that they would investigate the situation, send their man out on the job, and would let us know in two or three days whether they would supply 30 40

Albert R. McAllister, Recalled, Direct.

10 the \$5,000. Now, all the company's equipment was on that job, with the exception of one piece of equipment which was on the Glen Falls job. All of the work, as I recall, all the work on the other three jobs, which were the Commercial Casualty jobs, were completed, so far as equipment was concerned, it was simply a question of dressing the shoulders, or painting the guardrails, some small matters of that sort, but apparently the Equitable, which seems to have gone into the hands of the receivers since, and I have not been sorry, instead of going out and giving us a lift, they went out and immediately defaulted the job, seized all our equipment, and sold that equipment for a paltry sum.

20

Mr. Fairlie: The Equitable did that?

The Witness: Yes, Mr. Minard was wrong in that particular.

Mr. Minard: I said that, but I did not mean the Commercial Casualty.

The Court: I got the impression you meant the Commercial Casualty.

30 The Witness: No, the Equitable sold the equipment, and sold it for a paltry sum.

30

The Court: All your equipment?

The Witness: All except one piece of machinery, which the Glen Falls took after that. I presume they took that, I think so.

The Court: Did the Commercial take any of your machinery?

40

The Witness: None that I know of, everything was done with their jobs. Now, that, of course, was the beginning, a job having been defaulted, not having the capital re-

Albert R. McAllister, Recalled, Direct.

quired for the work that was necessary to be done, and one of the jobs which the Commercial Casualty had bonded, and which we had a large sum of money coming to us, it was only a question of painting the guardrail, a cost of \$600 or \$700, we could have painted that in the fall, and that would have given us something like \$20,000 or \$25,000, and the Highway Department being short of funds, or for some reason, they suddenly stopped the work and did not let us put that last coat of paint on, the effect of which was to carry the whole balance over to spring, and we couldn't get that money until after we had completed the work, and the job not having been completed, that made the company carry on its shoulders too great a load. I am glad to have this opportunity to make this general explanation, because the financial situation of the company was not what it would appear to be as it is represented here in the cold pleadings. The financial situation prior to the spring of 1930, with the normal amount of bank credit we had formerly would have been sufficient, in our judgment, to have carried the company through successfully.

Q Now, in paragraphs 20, 21, 22 and 23 of the amended complaint of the Casualty Company, in suit No. 2, they set forth the amounts of the claims, the names of the claimants, and the dates of the payment of accounts referred to in that paragraph of the stipulation. Did you know anything about those claims, either at or before the date when they purport to have been paid? A No.

Albert R. McAllister, Recalled, Direct.

Q Did you make any attempt to find out what accounts there were on which the Commercial based its withholding of the semi-final payment money? A I wrote repeatedly to Mr. Adams of the Commercial Casualty Company, for information, and for a long time I
10 received no reply, then later I received very unsatisfactory replies, but I didn't get the information.

Q When did you first obtain information about these debts and amounts?

Mr. Fairlie: I object, if the Court please, because the witness has already said, either as a witness in this case, or otherwise, he had not been able to see these books.

20 Mr. Minard: No proof of it.

Mr. Fairlie: No, I assume they appeared in Eastern States books what debts it owed for materials it had purchased, and because Mr. McAllister had some kind of difficulty with members of his own organization, Jerome, or somebody else, that is no fault of ours that he didn't know what was in the books. We were under no obligation to furnish one officer or director everything
30 he wanted, and he came to the bonding company and asked, and we said, "Go back and look at the company's books," and he said Mr. Jerome wouldn't let him see them.

The Court: What is the question?

(Question repeated.)

The Witness: I believe it was in your office in Newark during the present year.

Q That is the conference we had a few weeks
40 ago when the stipulation was made up? A Yes.

Albert R. McAllister, Recalled, Direct.

I don't believe I ever saw that prior to that time.

Q I show you some checks, a check dated December 23rd, 1929, from Eastern States to Commercial Casualty Insurance Company for \$500, do you recognize the signatures on that check? A Yes.

10

Q And you recognize that as the original check? A That is the form of check we use.

Q Is that a check? A It is a check.

Q The original? A The original check.

Q I show you also another check, cancelled check, dated December 7th, 1929, to Commercial Casualty, for \$327.91, and I ask if you identify that as an Eastern States check? A My answer I gave to the previous question is my answer to that.

20

Q Another one dated August 2nd, 1929, to Commercial Casualty, for \$1,000? A Same answer.

Q And another one of June 28th, 1929, to Commercial Casualty, for \$1,210.12? A Same answer.

Q Who signed those checks? A William H. Williams as President, and William F. Jerome as Assistant Treasurer.

30

Mr. Minard: I offer those in evidence.

Mr. Fairlie: For what purpose?

Mr. Minard: To show that the Commercial Casualty knew by the course of business that payments of money from the Eastern States required two signatures.

Mr. Fairlie: I have no objection to their being offered for that purpose so far as they are evidential of that.

(Said papers offered in evidence and marked Exhibits 55, 56, 57 and 58.)

40

Albert R. McAllister, Recalled, Cross.

Cross examination by Mr. Fairlie.

Q In November and December, 1930, you had some correspondence with the Department of Highways of Pennsylvania, did you not, Mr. McAllister, relative to this Clarion-Venango contract?

10

Mr. Minard: 1930?

Q Yes, sir, November and December, 1930.

A Yes, it must have been 1930. I was thinking it was 1929.

Q And I understand the Bridgeton National Bank had threatened you with criminal prosecution of some kind as the result of this? A Yes.

20 Q And that is what caused you to take it up with the Highway Department to find out what the facts were. A I would like to make a statement on that point as a personal privilege. The Highway Department in answer to a letter of the Bridgeton Bank said that the amount due on this contract was approximately \$5,500, and the bank having been told there was in the neighborhood of \$20,000, thought there was a discrepancy between the two sums, and certainly

30 there was, and when the bank brought to me the letter in which they stated there was only \$5,500 due from the Highway Department on this particular job, when I had represented to the Bridgeton Bank there was in the neighborhood of \$20,000, I did become curious. Mr. Fry, the executive secretary of the Highway Department—I don't know whether that letter was made an exhibit or not—makes an explanation and shows why that letter was written on the \$5,500

40 basis, that until they had checked the work they

Albert R. McAllister, Recalled, Cross.

couldn't know that there was more than that sum due. However, our office should have known and evidently did know, how much they had earned, or approximately how much they had earned.

Q So the basis of this correspondence, as I understand it, was to get from the Highway Department a statement of the situation, was it? 10
A Yes.

Q So you could explain it to the bank?
A And to myself, and to my Board of Directors.

Q And when you got these letters from the Highway Department, you exhibited them to the Bridgeton Bank so as to show what the situation was, didn't you? A Yes, sir.

Q And these letters, some of them, are in this stipulation? A Yes, sir, some of them. 20

Q Take for instance this No. 47, Mr. Fry, that is one of the letters? A Yes.

Q That you exhibited to your bank?
A Either to the bank or Walter H. Bacon who represented the bank at that time. I think they were all taken up with Mr. Bacon.

Q And the other letters, though we haven't pointed them out, also were exhibited? A Yes, sir, to the best of my knowledge and belief all 30
of them were.

Q Now, as a matter of fact, there was a very, very great deal of the affairs and business transactions, and records, and what-not, of the Eastern States Construction Company, that you did not have personal knowledge of, wasn't there?

A To be sure.

Q A very great deal? A I had nothing whatever to do with the mechanical operation of the company. 40

Albert R. McAllister, Recalled, Cross.

Q And at the last trial—you testified at the last trial in Bridgeton between these same parties? A Yes, sir.

Q And you recall you testified when asked what bank accounts they had, that the Eastern States had, you mentioned two or three Bridgeton Banks, and those were all you knew about? A Those were all the accounts that I had anything to do with.

Q And you didn't even know the names of the other bank accounts? A I could name some, but I couldn't be sure.

Q And when did the company become insolvent and go out of business, according to this narration you gave us a while ago, in May, 1930?

Mr. Minard: I object to that, any assumption the company is insolvent.

Q Is the company insolvent? A You ask if the company is solvent?

Q Insolvent? A Are you asking me now for an opinion as a lawyer, or do you want to know—it hasn't the assets with which to pay its bills.

Q And how long has it ceased to function for the object for which it was incorporated? A In the spring of 1930.

Q And since then it has been defunct and hasn't now assets wherewith to pay its bills? A That is true.

The Court: I suppose the company is still in existence, it hasn't defaulted in the payment of franchise taxes?

The Witness: Not for a sufficient period.

Q For instance, you didn't know, Mr. McAllister, when the final payments were about to

Albert R. McAllister, Recalled, Cross.

come due on the two Crawford County jobs, Mr. Jerome sent to the Highway Department the same kind of order, directing that the Highway Department send the final payments on the two Crawford jobs to Commercial, you knew nothing about it? A No, I had no information to that effect.

10

Q And these checks were endorsed over to Commercial just as were the final checks on the Clarion-Venango? A If you say that is true. That is the first I heard it.

Mr. Minard: That is not true by the face of the checks themselves. I object to the question, unless it states it is true.

Mr. Fairlie: I am glad you mentioned it. With that check the Assistant Secretary and Treasurer was not written underneath, and I forget to say that each time I refer to the check, that is true.

20

Q You knew nothing about that? A Not at that time.

Q You testified at the last trial, when you were asked about what contracts the Eastern States had to perform you knew about then, you said, in a general way, or something to that effect, do you recall that? A No.

30

Q The knowledge you had was in a general way, wasn't it, of the contracts? A Yes, in a general way, except I don't know that I would want to limit it in a general way. I knew the bonding obligations we had, I might not have the exact name of the job, whether it was the so-called Hayfield, or some such name as that.

Q You went out once and saw these jobs, didn't you? A Personally I was out once, and

40

George Maier, for Complainant, Direct.

I had some knowledge of the contracts, because one of those cost me \$2,200 for the bonding company's fees, which I never got, the bonding company's payments, and I also knew the Equitable was the one that had started the downfall of the company's business, so I wouldn't say my
10 knowledge was entirely general.

Q As you were making this longer statement on the stand here a minute or two ago, did I understand you were turning over the pages of this minute book I now have, and refreshing your recollection from it? A I refreshed my recollection from the last part there, a sheet of paper near the last of the minutes as they appear in the book.

Q The last meeting of the Board of Directors
20 was held on April 30th, 1930? A There were several conferences after that, but at no conference was there a quorum, and it wasn't a regularly called meeting.

GEORGE MAIER, sworn.

By Mr. Minard.

Q Where do you live, Mr. Maier? A Bridge-
30 ton, New Jersey.

Q Were you an officer of the Eastern States Construction Company? A Yes, sir.

Q For how long? A From the time of its organization.

Q Until as long as it continued to operate?
A Yes, sir.

Q Did you participate in the negotiations for borrowing the money from the Bridgeton Bank?
A I went there one day with Mr. McAllister to
40 talk the matter over.

George Maier, for Complainant, Direct.

Q Was it stated at that time that the letter of September 19th had been sent to the State Highway Commission directing them to send the final payment checks to Pittsburgh?

Mr. Fairlie: I object, if the Court please, to any questions asked this witness concerning what went on inside the Bridgeton Bank, and behind the back of the Commercial Casualty, of which we had no knowledge, and of which we had no representative present. 10

The Court: I think we had the same line of testimony from Mr. McAllister admitted conditionally. It is admitted conditionally, under the same conditions as the other testimony, and it will be disregarded if it is not material. 20

The Witness: No.

Q Did you know that letter had been written?

A No, I did not.

Q When did you find out it had been written?

A Several months later, when the Bridgeton Bank demanded payment of their note.

The Court: Mr. Maier was Vice-President or President?

The Witness: Vice-President. 30

Q Did you know the letter of August 2nd had been sent? A I did not.

Q Directing the semi-final payment checks to be sent to Pittsburgh? A I did not.

Q During the time of the company's existence, did you know of any case where either semi-final or final checks were sent to the Commercial rather than to the Eastern States? A I did not. 40

Albert R. McAllister, Resumed, Cross.

Q Did you know that the checks, the semi-final payment checks, had been endorsed over to Commercial Casualty in February, 1930? A I learned it somewhere around that time.

10 Q Do you know when you learned it, how soon after it occurred? A Around February, that is when I first learned of it.

Q Did you know anything about it beforehand? A I did not.

Q And how did you find it out? A Mr. McAllister told me.

Q After it had occurred? A Yes.

Cross examination by Mr. Fairlie.

20 Q What is your business, Mr. Maier? A I am a contractor and lumber dealer.

Q And did you devote a large proportion of each day of your time to the affairs of Eastern States Construction Company? A I did not.

Q The affairs of the Eastern States was in the hands of Mr. Williams and Mr. Jerome? A They were the main men on the job, yes, sir.

Mr. Minard: That is all we have, when they get through with Senator McAllister.

30

ALBERT R. McALLISTER, resumed.

By Mr. Fairlie.

40 Q I hand you, Mr. McAllister, the minute book of the Eastern States Construction Company, and I ask you to point in the minute book to the authority to someone, if there is any, to make applications to the Commercial Casualty

Albert R. McAllister, Resumed, Cross.

Insurance Company for bonds? A I looked at those minutes last night, and I did not find the authority to the Commercial Casualty Company, the only authority I found in the minutes was to the Southern Surety.

Q And will you look to the minute book for the authority to someone to make applications and to authorize someone to execute bonds as principal to the Commonwealth of Pennsylvania? A I don't recall seeing anything that authorizes that. 10

Q And will you look at the minute book and point to the authority of someone to open an account at the First National Bank at Meadville? A There is nothing in the minute book.

Q And will you point to the authority for the opening of an account in the First National Bank of Mercer? A The same answer. 20

Q Where is the authority in the minute book for the opening of an account at the First National Bank at Emlenton? A None.

Q And is there any for the opening of an account at the First National Bank of Merion Center? A These were all field accounts at these banks, I know such accounts were opened.

Q And you know, as Mr. Jerome testified, that in, say, this First National Bank at Meadville, which you refer to as a field account, there were hundreds of thousands of dollars deposited in that field account? A I presume there was. 30

Q As a matter of fact, the thousands of dollars that came into the Eastern States Construction Company went mostly into these banks I have just now named, being all banks outside of Bridgeton, am I not correct in that? A Yes, that is true. 40

Albert R. McAllister, Resumed, Cross.

Q Now, will you point in the minute book to the authority for making over to the Commercial Casualty Insurance Company the final payment on the two Crawford County jobs?

A There isn't any authority in the minute book.

10 The Court: Final payment on what?

Mr. Fairlie: On the two Crawford County jobs.

The Witness: May I ask, for the purpose of making a reply, that final payment was made after a default had been made on the Indiana job?

Mr. Fairlie: I would have to look at the date to answer your question. I can't say.

20 The Witness: I think it was.

Q Will you point in the minute book to the authority to anybody to deposit money received from the Department of Highways, or Commonwealth of Pennsylvania, or other sources, in any of these banks I last mentioned to you? A Shall I read it?

Q You are referring now to what? A I am referring to a resolution in the minutes, in answer to your question, marked Exhibit 53.

30 Q It is already marked, you are referring now to Exhibit 53, I see, which says—

The Court: Read it.

The Witness: Resolved that all funds of this company be deposited in the Cumberland National Bank at Bridgeton, and such other banking institutions as may be deemed advisable by the President and Treasurer, and subject to be withdrawn by check, draft,
40 note, or order of the company, signed by

Albert R. McAllister, Resumed, Cross.

the President of Vice-President and counter-signed by the Treasurer or Assistant Treasurer thereof."

Q At the trial of the action at law at Bridgeton, you testified that you had not, as Treasurer, given authority for the opening of these so-called field accounts, right? A I don't recall that I testified to that. In fact, I don't recall what my testimony was at that time on that point. 10

Q Do you recall this question and this answer: "Was the Bridgeton Bank the only depository of the moneys for the Eastern States Construction Company? No, the Farmers and Merchants here in Bridgeton, and the Cumberland National here in Bridgeton, and then there was an account opened by the President and the Assistant Treasurer in different towns that would serve as banking centers for the cashing of certain payroll checks, and things of that kind?" A I don't recall that answer, but that sounds like a correct answer. 20

Q It is a correct answer to the best of your knowledge? A Yes.

Q You never signed any checks, did you, for Eastern States money? A I may have signed, and probably did sign, some on the Bridgeton banks. 30

Q Do you recall— A I am certain I never signed any on any outside banks.

Q Do you recall this question and answer: "Who drew those checks on these accounts? All the checks that I have ever seen were drawn by Jerome and signed by Williams and Jerome?" 40

Albert R. McAllister, Resumed, Cross.

Mr. Minard: That refers to field accounts.

The Witness: I think it is likely I have signed checks on the Bridgeton banks, I think that is quite likely.

10 Q Do you remember this question and answer:
“How many different accounts were opened by
its President and Assistant Treasurer? You mean
from the time the company was incorporated
until— Yes. Well, I can’t definitely tell you
sitting here, but I know there were several.”
A I don’t recall, but that would be my answer
today.

20 Q Now, will you point to the minute book
for an authority to anyone to sign contracts
of any nature for the purchase of material or
for the doing of work? A Bear with me just a
minute, please. I would like to add to an answer
which I made in answer to your question regard-
ing the authority to make applications to Com-
mercial Casualty and say in the minutes of July
9th, 1927, I find a motion that the officers of the
company were authorized and permitted to
make the necessary applications for bonds to
cover and guarantee such contracts as the com-
30 pany may desire to bid upon from time to time,
and to execute all necessary instruments in con-
nection therewith. I think that should be a part
of my answer to your question. Now, as to
the question you have just asked, I know of
no authority, other than the authority that was
given generally to William Williams as general
manager, he was given full power to do all
things properly coming under the jurisdiction of
general manager in connection with the com-
40 pany’s business.

Albert R. McAllister, Resumed, Cross.

Q It wasn't physically or humanly possible for Mr. Williams to do personally everything that had to be done, was it? A No.

Q So that it was necessary for him to direct others to do things, wasn't it? A Perhaps the motion I just read implies that authority, or gives that authority.

10

Mr. Fairlie: May I have the minutes of July 9th, 1927? May I have it? I ask the Stenographer to mark as an exhibit the minutes of the first meeting of the Board of Directors of the Eastern States Construction Company held at the office of A. R. McAllister, 26 South Laurel Street, Bridgeton, New Jersey, on the 9th day of July, 1927, at 2:30 o'clock P. M., consisting of five or six pages.

20

(Said minutes marked Exhibit 59.)

The Court: What is the date?

Mr. Fairlie: The date?

The Court: Of that minute?

Mr. Fairlie: July 9th, 1927.

The Court: 1927?

Mr. Fairlie: 1927. I ask that there be marked as an exhibit in evidence the minutes of an adjourned meeting of the Board of Directors of the Eastern States Construction Company held at the registered office of the company, 26 South Laurel Street, in the City of Bridgeton, New Jersey, on Tuesday, April 10th, 1928, at three o'clock P. M.

30

(Said minute offered in evidence and marked Exhibit 60.)

Mr. Fairlie: And also the minute of the special meeting of the directors of Eastern States Construction Company held at the

40

Albert R. McAllister, Resumed, Cross.

registered office of the company on Saturday, May 19th, 1928, at 7:30 P. M.

(Said minute offered in evidence and marked Exhibit 61.)

10 Q I understand you testified at the last trial you never had any contact with the Commercial concerning the Eastern States' affairs prior to the fall of 1930? A I would say prior to 1930, I am not sure as to the exact part of 1930.

Q You say you did have contacts prior to the fall of 1930? A No, I didn't say that.

Q I didn't understand.

The Court: Prior to the fall of 1930?

20 The Witness: I am certain I had no dealings with the Commercial Casualty Insurance Company prior to 1930, whether it was in the fall of 1930, or in the early spring of 1930, or the summer of 1930, I can't be sure.

Q And the first contact you had with Commercial was when you first took up with Commercial the matter of the final payments on the Clarion-Venango job, concerning which you wanted to get information? A I am quite certain that
30 is correct.

Q And this minute book that you have produced here contains all the minutes that were ever written for the Eastern States Construction Company? A To the best of my knowledge and belief that does.

Q And who prepared them? A I am sure that I did.

Q And has this book been in your possession right along? A Frankly I can't remember any
40 time that it was out of my possession. Whether

Albert R. McAllister, Resumed, Cross.

it was out of my possession at any time in the preparation of the case, or during the conferences regarding the last case—I don't think it was ever out of my possession.

Q There have been no changes made in it, that you know of, from time to time? A Absolutely none, to the best of my knowledge and belief. 10

Q And were those minutes written at or about the days they respectively bear date? A Positively.

Mr. Fairlie: I offer the minute book in evidence as a whole.

Mr. Minard: This isn't your case yet, you know.

The Court: The way you are putting in the exhibits, it will be marked for identification until his case comes on. 20

(Said book offered and marked Exhibit 62 for identification.)

By Mr. Minard:

Q You were asked to point out in the minutes the authority for certain signing of contracts, and applying for bonds, and a great many other things. Aren't all those things specifically provided for in the by-laws? A It is my understanding. 30

Q So that there the duties of each officer is defined and limited to who the officers are? A In my opinion, yes.

Q So that within the limits of its powers of the by-laws, you never had any occasion to pass a resolution of the directors to give other or additional authority, did you? A That was my understanding. 40

Harold S. Hays, for Defendant, Direct.

Q Now, Mr. Fairlie asked you about these checks, Exhibits 37 and 38, which were turned over by Mr. Jerome to the Commercial Casualty Company, the date on the back of the check indicating it was deposited for payment as of the—
A May 26th, 1930.

10 Q And is the same true of the other check—here is the date on that—when it was put in the bank, No. 38? A June 1st, 1930.

Q Now, the default on the Indiana job was dated what day? A The letter of default, signed by James L. Stewart, was May 16th, 1930.

Q James L. Stewart, Secretary of Highways?
A Yes.

Q So turning these checks over to the Commercial then occurred after the default on the
20 contract? A That is right.

Q And after they had taken over the job?
A That is right.

By Mr. Fairlie.

Q By which you mean the two Crawford County checks were turned over at a date subsequent to the date on which the Indiana County contract had been defaulted by the State? A
30 Yes.

HAROLD S. HAYS, sworn.

By Mr. Fairlie.

Q Mr. Hays, during 1928, 1929, what was your occupation, and 1930? A Manager of the bonding department for the Commercial Casualty Insurance Company at Pittsburgh.
40

Harold S. Hays, for Defendant, Direct.

Q And as such did you have any dealings with the Eastern States Construction Company, or its representative? A Yes, I did.

Q What were the names of their representative or representatives of the Eastern States Construction Company with whom you had your dealings? A Mr. Jerome and Mr. Williams. 10

Q Did you see and deal with Mr. Jerome very frequently, or otherwise? A Quite frequently. I met Jerome about two months after I came with the company, and was at the road show with him in Cleveland.

Q When did you come with the company? A June 1st, 1928.

Q Did you have just as frequent contacts with Mr. Williams as you did with Mr. Jerome? A No, I did practically all my dealings with Mr. Jerome. The only time I would have dealings with Williams in a business way would be in connection with quantities on the job, to determine the certain kind of a fill, or concrete, with the physical portion of the job. 20

Q Did you have contact with any other representatives than those two, of the Eastern States Construction Company? A No.

Q What part of the work of the Eastern States, and its business, did Mr. Williams take care of and tend to, as far as your observation went? A Mr. Williams was the construction man handling the job and prosecuting the job, figuring the estimates. 30

Q Now, from your own observation and contact, what part of the work of Eastern States Construction Company, and the conduct of its business, did Mr. Jerome attend? A The figuring end and the bookkeeping end of the business, altogether, with the dealing with the salesmen 40

Harold S. Hays, for Defendant, Direct.

who would come around and get an order for certain materials on the job, and sign their contracts, and handle all matters of payment, with the material companies, and handle all matters of payment with the Highway Department.

10 Q Who handled the finances of the company, as far as your observation went? A Mr. Jerome. Bill Williams, when I would speak to him about something of a financial nature, he would refer me to Jerome, he said Jerome was the man handling the finances of the company, and he knew nothing about it.

Q Were there letters which came in from time to time from the Eastern States Construction Company? A Yes, sir.

20 Q Who signed those letters? A William F. Jerome.

Q Did you ever see a letter signed by Mr. Williams? A I don't believe I ever did.

Q Who signed the applications for these bonds? A Well, the Clarion-Venango job was executed when I came with the company but Jerome—I am not certain without I refer to the form, would have signed all the financial statements, and the applications, he was the company.

30 Q Now, in the latter part of July, 1929, Mr. Jerome has testified he had some conversation with you relative to the semi-final payment that was about to come due or be paid on the Clarion-Venango job, will you tell us what that conversation was? A It wasn't any particular conversation of any particular date that I had, but in June, or early in March, of 1929, they had a subcontractor, the MacDonald Construction Company, who was giving them quite a bit of trouble, and Jerome was in the office, together with Mr. Williams—I think the first time Bill was ever in
40

Harold S. Hays, for Defendant, Direct.

the office—with reference to that, and we wrote to the Pennsylvania Surety Company and to the MacDonald Construction Company about their not progressing on the contract satisfactorily, and giving them a ten day notice to proceed, and shortly after, or along in the middle of the summer MacDonald's work came up—

10

Q May I interrupt you at that point? I show you these two papers and ask you what they are. A They are copies of registered letters to MacDonald and Pennsylvania Surety, signed by Bill Jerome.

Q These papers you hold in your hand are not signed in his signature, but his name is typewritten? A Yes.

Q Did you see the originals of the letters these purport to be copies of? A Yes, sir, I dictated them. 20

Q Did you see Mr. Jerome sign them? A Yes.

Q And were they mailed from your office? A Yes.

Mr. Fairlie: I offer them, and I will have them marked later when counsel has finished reading them.

Mr. Minard: We will raise no question about them. 30

The Court: They will be admitted.

(Said papers offered and marked Exhibits 63 and 64.)

Q Now, I interrupted you, Mr. Hays. A Where was I?

Q At that point in March. A That is when Jerome and Williams were both in the office and he signed these letters. 40

Harold S. Hays, for Defendant, Direct.

Q I had asked you concerning the semi-final payment? A That is right.

Q Concerning which Mr. Jerome said arrangements were made in the latter part of July, 1929? A That is right.

10 Q What conversations did you have with Mr. Jerome in the latter part of July? A In connection with this MacDonald Construction matter, they had completed their work, and the Eastern States had completed their work, which meant that they would be getting ready for the semi-final estimate, and the MacDonald Construction Company had written us, through their attorney, that they were demanding some \$23,000. or \$24,000. as money they said was due to them, and Jerome and I had quite a few conferences to try to work out and see what amount
20 would be due to them, or nearly what amount, and the job was finished, the Highway Department sending us a status report every month showing the progress, whether it was 80, or 90, or 100% finished, and the amount that has been paid to date, and on one of those reports the Department stated they would pay a semi-final estimate if we would give them a release of bond, and another sub-contractor, the Mill Iron Construction Company had notified us they were
30 owed around \$800. or \$900. on that job, and Jerome and I had quite a few conferences, and I wrote to Mill Iron, and he wrote to them, about the amount that was owing.

Q Were there any other debts for labor or material owing on the Clarion-Venango job at that time? A Yes, a cement concern up at Emlenton, and other bills for materials.

40 Q It is stipulated on August 2nd there was some \$15,000 owing for material and labor? A That was what Jerome showed on his affidavit.

Harold S. Hays, for Defendant, Direct.

Q What conversation did you have with Mr. Jerome relative to the semi-final payment in view of this situation that you have outlined? A I explained to Mr. Jerome he could not secure the balance of the moneys on the contract until we furnished what the Department asked for as an application for a release of bond, and I explained to him what the application for release of bond meant, and explained to him we couldn't sign that application for release of bond in Pittsburgh, it had to be signed by our officers in Newark, and because the application for release of bond made certain statements as to bills on the job, that they had been satisfactorily settled, it was necessary that we have the money come to us so that we could pay his bills, and we had quite a talk concerning that procedure, and he finally stated that he would fix up his affidavits and he would give orders to the Highway Department having the money come to us in Pittsburgh. I explained to him it would be in his name but it would come to our office, and I told him before we would file the release of bond on that the order must be on record in Harrisburg so we would definitely know the moneys were coming to us and when they would come into us that we would expect him to endorse the checks so that we could secure the money and pay his bills.

Q What did he say to that? A I explained how we did it.

Q Did he say anything in response to that? A I explained we would put the money in an account in Pittsburgh and draw the checks against that account in payment of the bills, and he didn't like the idea very well, and after I explained to him what it was he finally consented, he said "if that is the procedure of the com-

Harold S. Hays, for Defendant, Direct.

pany and the only way I can get my semi-final estimate, I will do it."

Q Now, there has been reference to an order dated August 2nd, 1929, that was sent to the State Highway Department. Do you recall who sent the order to the Highway Department? A
10 I believe I did.

Q Do you recall when you sent the so-called application for release of bonds? A I presume it was at the same time.

Q As a matter of fact, is that so-called application for release of bond an application for release of bond or is it an application for release of final payment? A It is an application for the purpose—

20 Mr. Minard: Doesn't it speak for itself?

The Witness: Of having the Department pay the money to us.

Mr. Minard: Pardon me, I objected, and I would like to have that decided before the witness continues.

The Court: Let us look at it.

Mr. Fairlie: I withdraw the question.

The Court: As long as we are in this discussion I will take a look at it. That is what
30 it says, application for release of bond, it is a State form, isn't it?

The Witness: Yes, sir.

The Court: It is a printed form furnished by the State?

The Witness: Yes, it is in the contract, it is in every contract of the State Highway Department.

Mr. Minard: The exhibit in the case is
40 No. 14.

Harold S. Hays, for Defendant, Direct.

The Court: They call it a release of bond, but when you come to read it, as I see it, it is a release by the bonding company to the State so they can permit the payment of the money without any claim being made by the bonding company to the State and still reserves the right of any laborer or material man to proceed on the bond. It is merely a transaction between the State and the bonding company so that the bonding company cannot hold the State, as I understand. It is a release so far as the State is concerned. 10

Q Have you had any experience, Mr. Hays, with the Highway Department of Pennsylvania?

A Considerably.

Q Relative to its payment of semi-final and final payments on road building contracts? A Considerable experience. 20

Q Had the bills on this Clarion-Venango job been paid when Commercial filed that application? A No, sir.

Q Had the bills been satisfactorily settled? A They had been settled to the extent we were receiving the money to actually pay the bills in cash.

Q Was that the usual practice in handling such matters? A That was our practice, yes, sir. 30

Q Proceed with your narration of what transpired concerning the semi-final payment, what was done in respect to an order to the Highway Department from the Eastern States, and with respect to this application for release, when were they sent to the Department? A I did previously state, I believe, that Jerome had signed the order and had sent it in to us and had agreed 40

Harold S. Hays, for Defendant, Direct.

that when the checks came in they would be endorsed and we would pay their bills, then I sent the release of bond form, with the affidavit as to the unpaid bills, to our home office asking them to execute it, which they did and returned it to us, and I then sent it to Harrisburg, to the Department of Highways, with the order that the semi-final moneys come to us at our Pittsburgh office.

10 Q When did those checks reach you, or approximately, do you remember? A In the very early part of September.

Q Then what happened? A I believe I called Mr. Jerome, or I had been talking with him even before the checks arrived, he was anxious that the money would be received so his bills could be paid, and I called Mr. Jerome and
20 told him that the checks had been received and to come into the office and we would pay the bills, and he came into the office on the 5th of September for the purpose of endorsing that check over to us so that we could pay their bills, and at the same time we were considering a bond on an Indiana County job, and among other things discussed at that time was this Indiana County contract bond which they had secured some time before that, and when Mr. Jerome came in I told
30 him that the checks were here, or the check, as it was, and asked him to endorse the check and we would go down to the bank together and put it in the bank and we would draw our checks. In other words, I wanted him to know exactly the procedure we were following, and he didn't want me to do it that way, he stated he would prefer to pay those bills with his own checks because he didn't want his creditors, the material men, receiving checks from the bonding company, and
40 I explained and argued with him it was the pro-

Harold S. Hays, for Defendant, Direct.

cedure we followed, but he insisted and stated he wanted to do it with his own checks, that it would hurt their credit otherwise, and I finally consented to that requirement. He had with him checks without the name of the payee, or the material men in them, and those checks were signed by Bill Williams, and it would take Jerome's signature and the amount to be filled in to complete the transaction, and I directed him to fill in those checks as to the amount that was then due and owing on these contracts, and on the amount that was due to MacDonald Construction Company—we had no way of definitely determining what it would be actually in dollars and cents, because their contract with MacDonald Construction Company required that 10% of the amount due MacDonald be held until the final payment, and that check was made out payable to our company as trustee for MacDonald Construction Company, and I then took the check of \$16,000 and some odd dollars and put an endorsement on the back of it for deposit only in this bank in Bridgeton in which Mr. Jerome had drawn his checks, and I further had envelopes drawn and put the Eastern States Construction Company checks in those envelopes and mailed them out to the material men and mailed the State Highway check down to the Bridgeton Bank so it would be there when his checks came in.

Q The Bridgeton bank, you mean the Farmers and Merchants on which the Eastern States checks had been drawn? A Yes. After that procedure was gone through, we discussed the question of the MacDonald Construction Company claim, and their final amount that was due them, and when I first discussed with Jerome

Harold S. Hays, for Defendant, Direct.

about the release of bond I stated to him we had to have the money and he understood that meant the semi-final and the final estimates, because MacDonald Construction Company had an amount due out of the final estimate which was due and payable to them when the quantities
10 were determined, and I stated to Jerome at that time that the letter to Harrisburg had only covered the semi-final estimate and was not, as I requested originally, for both semi-final and final, and he said it was an error or oversight on his part, and I then stated we would have to have an order for the final estimate so we could clean up the MacDonald Construction Company's bill, and that was at the time of the September 5th conference.

20 Q And on September 5th was anything done with respect to the Indiana County contract? A Yes, we executed the bond, I believe it was that time—I know he signed some papers as of that date when he was in the office and reported it down to Newark, I believe, the following day.

Q Now, taking up the period from September 5th that you have just told us about to September 19th, which is the date of the order which Eastern States sent to the Highway Department
30 for final payment on the Clarion-Venango job, tell us what transpired during the interval—in the first place, did anything transpire in respect to your having gone on the new Indiana County bond on September 5th? A The first thing that happened was certain of the checks that had been drawn against the Bridgeton Bank were returned "N. S. F."—I remember one dealer in particular up in Emlenton called me, the check was \$100, or less than his bill should have been, and I told
40 him that amount would be taken care of out of

Harold S. Hays, for Defendant, Direct.

the additional moneys to come in, and several of the checks were "N. S. F." and shortly after we had reported the Indiana County bond to the home office I received a letter from them complaining severely of our having executed the bond, the information they had in connection with the statement we sent down did not gee up. 10

Mr. Minard: Can't we have the letter, instead of all this recollection?

Q Can you find the letter readily? I haven't seen the letter. Don't state any contents of the letter, you got the letter, then what happened?
A We were severely criticized.

Mr. Minard: Wait. I ask that the letter be produced. 20

Q Don't state what the letter contained. Did anything develop with respect to bills? A Yes, I was coming to that. I knew most of the boys that sold material in Pennsylvania to the various contractors, and as I would go to Harrisburg my association would become closer and I would get to know them pretty well, and at about that time they had finished—in fact, they had finished in August the two Crawford County jobs, they made a wonderful record on paving those two contracts, I think they were in second place in Pennsylvania in their speed on the job, and they finished those two jobs, and I got a telephone call one day from Mr. Treat of the Bessemer Cement Company, who had sold material on the two Crawford County jobs through, I guess you would call it, a sub-agent, or a dealer of theirs in Meadville, to the effect that the bills for cement on that job had not been paid, and they 30 40

Harold S. Hays, for Defendant, Direct.

were over \$25,000, and what did I know about it, and the Bessemer Cement was tied in with the Standard Slag of Youngstown, and subsidiary companies, and they furnished the slag on that job, and their credit man, Wasser, had called possibly two or three days after that with refer-
 10 ence to their unpaid bills on that job, and we were notified by the Tuscon Steel and the Sand Company in Meadville, the Nickel Plate Sand and Gravel, and it seemed as though everybody was excited about the money that was due them on that particular job.

By the Court.

Q When did this take place, Mr. Hays? A
 20 That would be all within four or five or six days after the Indiana County job had been completed, after the signing of the Indiana County contract.

Q When was that? A From the 10th to the 15th or 16th of September.

Q 1929? A Yes, of 1929, and that necessitated checking in to see what the situation was, and I had three or four conferences with Jerome during that period as to the unpaid bills, advising him as to the amounts that had been filed
 30 with us, and the way the material men were acting, because with this new Indiana County job it appeared that they would be reluctant to furnish material when they hadn't been paid for the Crawford County job.

By Mr. Fairlie.

Q In or about the middle of September, 1929, did anything arise in connection with any proposed new job with Eastern States, or any request that you go on a bond? A They were low
 40

Harold S. Hays, for Defendant, Direct.

bidder on the Merion Center contract, that is in Indiana County, and it was quite a good sized job, and I told them we couldn't handle it at all,

Q When did you tell them that? A That would be along about that portion of September, or shortly—in fact, a few days after they were the low bidder on it, because we absolutely were prohibited from writing any further bonds for the company. 10

Q Did you tell them why? A What is that?

Q Did you tell Jerome why? A On account of their financial condition, and the bills owing on the Crawford job.

Q Did Mr. Jerome say anything to you about the same time relative to loans, or borrowing money, or anything of that kind? A Well, that was a discussion we had had, not that particular time, but he was always telling me they were going to provide additional capital so they could take their discounts on their bills and be able to go along more smoothly and be able to do more work. As for borrowing money—it was his expression it was always additional capital. 20

Q He testified that he had told you that Eastern States was going to negotiate a loan. Did you have any conversation in which he told you he was going to negotiate a loan? A I never remember any conversation like that. 30

Q Now, tell us about the order to the Highway Department dated September 19th, how did that get to the Highway Department, and under what circumstances? A Well, when he was in for the settlement—

Q Strike that question out. Did you have any conversation with Mr. Jerome relative to the final payment that was coming on the Clarion-Venango job? A Yes, when he was in on the 40

Harold S. Hays, for Defendant, Direct.

10 settlement of the semi-final estimate, I told him
he had not presented the order for the moneys to
come to us so as to take care of the MacDonald
Construction Company claim, and then in our
subsequent conversations, after I found the bills
had been unpaid on the Crawford County jobs we
20 further discussed the order and I told him the
order would have to be immediately sent in and
when the moneys came in on that contract we
would apply any amount left over on the Clarion-
Venango job towards the bills of the Crawford
County jobs, because at that time they looked
as though they were \$25,000 shy on the two Craw-
fords, that is, the amount to come from the job
and the amount owed on the job, and I told him
under the application for bond we had the right
20 to do that, and when the moneys came into us
he would endorse them over to us so we could
put them in the bank, and I would not permit
him to work the same arrangement he worked
before, because of the checks coming back, and
furthermore on account of the bills owing, and
he said, "I don't want to see you lose a dime on
us, and when the checks come in, all right, I will
do that," and Jerome went back to Indiana and
that order that was sent down bears date of Sep-
30 tember 19th, which I presume that was the date
he wrote the order, and our conversation and
our agreement, however, was before September
19th.

Q What agreement do you refer to? A The
talk we had that he would come in and endorse
the check so we could put it in the bank and pay
his bills.

Q Did you ascertain whether or not the order
for the forwarding of the final payment to your
40 care had actually been received in the Highway

Harold S. Hays, for Defendant, Direct.

Department? A Yes, I did. At a later date I remember talking to Jerome and asking him if he had sent it in, and at that particular time he had not, and I think in one of the letters to him I asked him if he had sent the order to Harrisburg—and I was in Harrisburg at least once a month, and subsequently I found the order was in Harrisburg. 10

Q When was that order, what is the earliest date you know? A The latter part of September.

Q That you were in Harrisburg? A Yes.

Q You heard Mr. Jerome's testimony about his having mailed a letter to you within a few days after September 24th? A Yes, sir.

Q Advising you there had been an assignment made to the Bridgeton Bank? A Yes. 20

Q Did you receive from Mr. Jerome a letter advising you there had been an assignment made by the Eastern States to the Bridgeton Bank? A I did not.

Q Did you receive a letter from Mr. Jerome advising you that Eastern States had procured a loan from Bridgeton Bank? A I did not, never knew anything about it.

Q Did you within a few days after September 24th, 1929, or at any time thereafter, receive such a letter as Mr. Jerome testified he had mailed to you? A Never received any letter. 30

Q Have you any reason to suppose that such a letter ever arrived in your office without coming to your attention? A No, I do not presume—if it would come to the office marked to me it would come to my desk, and in my absence from the office the mail is held there.

Q Did you have any such telephone conversation with Mr. Jerome as he testified to at about this same time? A No, I did not. 40

Harold S. Hays, for Defendant, Direct.

Q Or at any other time? A Concerning that matter, no.

Q Did he ever advise you by letter, by telephone or any personal conversation that they had made an assignment to the Bridgeton Bank or had borrowed money from the Bridgeton Bank? A No, sir. The first time I knew about it was in the spring of 1930.

Q Are you positive that you never got any such notice? A I am absolutely sure.

Q Is there anything that makes you sure? A Yes.

Q What is it? A If we had gotten a notification of an assignment of moneys on that particular job it would have immediately shown us what our position would be on the Crawford County jobs, because we were relying on the additional money that wasn't owing the MacDonald Construction Company to pay the Crawford County bills, and that is something that doesn't happen to surety companies, it shouldn't happen.

Q Eventually these checks came in? A Yes.

Q And what happened then? A Jerome came in the office and endorsed the checks, and I deposited them in the First National Bank of Pittsburgh, bond account. I said, "Bill, here are the checks, endorse them", and he did.

Q Was there anything written on the back of it at the time you showed them to him? A Yes, I placed an endorsement on there, I had Grace Morris, a girl in the department, put an endorsement "Pay to the order of First National Bank of Pittsburgh, for deposit only, Eastern States" and a place for Jerome to sign it.

Q How do you account for the fact under his signature there is no title, Assistant Treasurer, or anything of that kind? A That was an

Harold S. Hays, for Defendant, Cross.

error. In fact, as far as the title is concerned, he never signed any of his mail with the title, and that was purely an error on the part of the girl, or myself, that I didn't put it in there.

Q He signed what you gave him to sign? A Yes, there was no question about signing the checks at all. 10

Cross examination by Mr. Minard.

Q Mr. Hays, I show you paragraphs 20, 21, 22, and 23 of Commercial Casualty Insurance Company's amendment to its bill of complaint in Chancery Suit No. 2, and ask you whether the dates given opposite those payments, alleged payments, are the correct dates of the payments?

Mr. Fairlie: Do you know whether all these dates are correct dates, of your own personal knowledge? 20

The Witness: No, the only connection I had in the actual payment of the bills that were paid by Eastern States Construction Company, I recognized \$310 to *Charter* and \$1,200 to *Rowe Brothers*, they were sub-contractors of MacDonald Construction Company. 30

Q Did you have anything to do with the payment of the bills? A Of the MacDonald Construction Company bills, yes.

Q What date did you pay them? A I presume it was the date shown here in our pleading.

Q What date is that? A Various dates.

Q So that these are correct, you think? A I couldn't say they are absolutely correct, it has been four years ago, but I do know I paid all the 40

Harold S. Hays, for Defendant, Cross.

MacDonald Construction Company sub-contractors' claims, and on the MacDonald Construction Company balance due them that was not disputed for quite a long time.

10 Q Do you know when that was determined or settled? A No, I do not. The check is marked here on May 23rd, 1930.

Q So that is the date of that payment? A I couldn't say so, but I presume so.

Q Have you any reason to doubt the correctness of this allegation in your pleadings? A Not the slightest. As for the other accounts I know nothing about that.

20 Q Here is the Crawford County job, you say you handled the money for— A I was referring to the company.

Q You didn't handle the money? A Not personally.

Q And didn't have anything to do with those jobs? A I demanded and secured that money and put it in the folder.

Q And you don't know anything about the payments made under it? A Under the Crawford County job?

30 Q Yes. A That was handled by the Claim Department.

Q Do you know anything about it yourself? A I have an idea of the bills filed with us, and they were subsequently paid.

Q And do you know whether they were the dates they were paid? A I wouldn't have any idea as to that.

Q You didn't pay them? A No, not personally.

40 Q And did not handle the settlement? A Of the Crawford County jobs?

Harold S. Hays, for Defendant, Cross.

Q Yes. A I handled the checks and the settlement of the MacDonald Construction Company account.

Q And that was the only one you handled?
A Yes.

Q Now, you wrote the letter of February 11th, 1930, to Jerome, notifying him you had received the final payment checks on the Clarion-Venango job, didn't you? 10

The Court: Is that one of the exhibits?

Mr. Minard: No, that is not in there, that is Exhibit 50.

Q You wrote that letter? A Yes, sir.

Q And you told him you were holding those checks in the strong box and you told him why you were holding them, didn't you? A For him to come in so he could endorse them. 20

Q And you told him there why you were holding them? A Until a copy of the final estimate is received so the status of the MacDonald Construction Company account may be determined.

Q And at that time the MacDonald claim, as you say there, was over \$20,000? A In June they filed a claim with us for over \$20,000. 30

Q June what year? A 1929.

Q And at the time this was filed, that had not been determined? A No, but the amount was admitted to be considerably less, admitted to be around \$15,000.

Q It wasn't determined or settled until that date in 1930, is that right? A In May.

Q 1930? A That is right.

Q How often did you see Mr. Jerome? A During what period? 40

Harold S. Hays, for Defendant, Cross.

Q During the period that he was employed by Eastern States Construction Company? A Oh, I suppose fifty or more times.

Q During how many years? A From the fall of 1928 until the late summer of 1930.

10 Q The fall of 1928 to the late summer of 1930, that was in about how many months? A Two months in 1928, twelve months in 1929—eighteen or nineteen months.

Q In eighteen or nineteen months you saw him possibly fifty times? A That is just a rough estimate.

Q You haven't any idea what the accurate answer is, have you? A That would be impossible to give an exact answer.

20 Q Did you know him when he was connected with the Bonham Construction Company? A No, never heard of him.

Q Where did you usually see him, in your office? A Either at our office or on the job at their offices, or in a hotel room, or in Harrisburg.

30 Q Did I understand you to say that Jerome signed all the applications for bonds? A I believe I stated the first bond was executed before I came with the company, and it was my recollection that Jerome had signed most of the applications, together with the financial statement.

Q But did you know these applications in this case here, the one on the Clarion-Venango job, Exhibit No. 1, Jerome signed?

Mr. Fairlie: The one Mr. Williams signed?

Q No. 4 wasn't signed by Jerome, Exhibit No. 4. A What application is that?

40 Q There it is, whatever it is. A That was signed by Mr. Williams and witnessed by the agent, Mr. Shirley.

Harold S. Hays, for Defendant, Cross.

Q You spoke about the Middle Iron Construction Company, do you know whether they were indebted to the Eastern States themselves at the time you say they had a claim? A Middle Iron Construction Company was indebted to Eastern States Construction Company?

Q Yes. A No.

10

Q You didn't know that? A No.

Q That the Eastern States had a claim against them for \$20,000 or more at the time you say Middle Iron had a claim against Eastern States on the Clarion-Venango job, you didn't know that? A No. What was that in reference to?

Q When did you make this arrangement with Jerome, the date of it, to have the semi-final check sent to your care? A The latter part of July.

20

Q When you say the latter part of July, can you give us any nearer than that as to the date? A 28th, 29th or 30th.

Q Was that the time you claim you had this arrangement about sending in the final as well as the semi-final checks? A That is right.

Q And is that the time you told him you were going to apply some of this money to the Crawford County jobs? A No, sir.

30

Q That did not occur then? A It had not come up then.

Q And then you received the semi-final check addressed to Eastern States Construction Company in a sealed envelope? A I presume it was sealed.

Q And who opened it? A I did.

Q You opened the Eastern States mail? A Yes, sir.

40

Harold S. Hays, for Defendant, Cross.

Q And you did that again with the final payment checks? A Yes, sir.

Q Are you in the habit of opening other people's mail? A Under similar conditions, yes.

Q When was it you told Jerome you were going to hold this money to pay other bills, the Crawford County bills? A It was at the time the claimants had notified us as to the large outstanding amounts on the Crawford jobs.

Q When was that? A The middle of September.

Q Before he sent in the order of September 19th? A Yes, sir.

Q And that is the time you arranged for that letter? A I had asked him previously, at the time of September 5th, to give me a letter on the final estimate so the balance on the MacDonald Construction Company could be paid to them.

Q That is on the 5th of February? A Of September.

Q What year? A 1930.

Q And that is the time you made your arrangements for your letter of September 19th, is that right? A I had made the arrangement originally, as I believe I testified, when I originally had a conversation with Mr. Jerome, I explained to him we had to have letters for both the semi-final and the final estimates, or, as I said, all moneys on the contract, and when he sent the order it was only for the semi-final estimate, and at that time when we settled the semi-final estimate business on the 5th of September I asked him for an order that subsequently was dated the 19th of September, and between the 5th of September and the 19th of September these other bills had been called to our attention, and I had been seeing Jerome, I suppose, during

Harold S. Hays, for Defendant, Cross.

that period, three or four times, and at that time I discussed it with him.

Q I didn't ask the circumstances, I asked for a date. A I was trying to explain.

Q I want answers. You can testify as long as you want, but I want you to answer my questions. A Excuse me.

10

The Court: I think that was a fair answer. I don't think there is any criticism about that answer, and I don't think it is fair to the witness to say it wasn't.

Mr. Minard: What I am trying to do is to get some dates, the circumstances about them is not what I am inquiring about.

The Court: He already testified exactly the same way. When this conversation took place about an order for the semi-final payment, at the same time there was to be an order for the final payment, and the final payment order was not furnished but then between the time that the semi-final order was furnished or sent in, and the 19th, he saw him and got this one. That is about as near as you can come to dates.

20

Mr. Minard: I asked for a date, and I am going back after it.

30

Q About the middle of September, about that time, you told Jerome you were going to use some of this money to pay other claims, is that right?

A Between the 10th and 16th, I would say, of September.

Q 1929? A No.

Q 1930? A Yes.

Mr. Fairlie: Are you sure of that year?

40

Harold S. Hays, for Defendant, Cross.

The Witness: I will amend my answer to that question.

Q I want the right answer, I don't want to trip you. A I have given it three times, it was 1929.

10 Q And that was then previous to Exhibit No. 50, your letter? A That is right.

Q Now, at the time you told him that, did you show him any document which you thought gave you the right to do that? A I don't believe I did.

Q The question of your right to do it wasn't mentioned? A I stated to him our right.

Q And that is all that was said? A And he took me at my word.

20 Q Without looking at the papers at all? A It wasn't usually done.

Q Please don't tell me that. You didn't look at the papers, the application, or the bond, or any written paper relating to the matter? A At that time, no.

Q How many times did you talk to Jerome about what you refer to about his obtaining additional capital for his job.

30 Mr. Fairlie: For the business of the company do you mean? He didn't say for the job.

The Witness: I wouldn't know how many times.

Q Have you any idea how many times? A Oh, I suppose three or four times.

40 Q At what time, or near what date? A I can't place any particular date.

Harold S. Hays, for Defendant, Cross.

Q Can you say whether any of these conversations occurred in the month of August, 1929?

A I wouldn't know.

Q Or September, 1929? A I wouldn't know.

Q You can't tell when it was, what year it was? A No, it would only be between the period I have mentioned, and it would have been during 1929, or the early part of 1930. 10

Q Could it have been in September, 1929?

A It could have been.

Q Did you ever talk with him over the telephone about that subject? A Additional capital?

Q Yes. A No.

Q Did you ever inquire whether he had gotten it or not? A No.

Q Did he ever tell you whether he had gotten it or not? A No. 20

Q He just talked to you about it and did not indicate whether he was making any progress about it? A That is right.

Q So that you never knew whether he was doing anything about it or whether he wasn't? A That is right.

Q Do you mean it was a matter that did not concern you at all? A It was a matter between Jerome and the directors of the Eastern States Construction Company in putting more money in. 30

Q And did that have any relation to your interest in the job? A That would be an underwriting matter that would make a case stronger, with additional capital in.

The Court: Have you any further testimony?

Mr. Fairlie: We rest.

*Exhibit No. 1.***EXHIBIT No. 1—Eastern States' application to Commercial dated April 13, 1928, for contract bond on the Clarion-Venango job.**

(NO. 20)

- 10 APPLICANTS MUST SUPPLY COPY OF CONTRACT SPECIFICATIONS AND OTHER DOCUMENTS WHICH ARE REFERRED TO AND MADE A PART OF THIS CONTRACT.

To be used without change by individuals, co-partnerships, and corporations in applying for CONTRACT OR PROPOSAL BONDS.

- 20 Under an Act for the Punishment of Crimes (Revision of 1898 of the Laws of the State of New Jersey) and the Supplements and Amendments thereto, any person obtaining property or credit by use of a false statement is guilty of a misdemeanor punishable by fine or imprisonment or both.

APPLICATION FOR CONTRACT BOND.

Bond No.....

To the COMMERCIAL CASUALTY INSURANCE COMPANY (hereinafter called the Company):

- 30 The undersigned desires the Company to execute bond for it in the sum of \$124,105.04 in favor of Commonwealth of Pennsylvania of Harrisburg, Pennsylvania and in such form as may be satisfactory to the Company and the obligee, the principal object of such bond being to guarantee the performance of a certain contract as hereinafter described. The undersigned guarantees the truth of all answers to the following interrogatories, and further guarantees the truth and accuracy of the undersigned's financial statement
- 40

Exhibit No. 1.

filed concurrently with this application. (If no financial statement is so filed, the undersigned guarantees that the last previous statement deposited with the Company represented at that time the undersigned's true and accurate financial condition and that the present net assets of the undersigned are approximately the same or more than as set forth in such previous financial statement.) 10

1. APPLICANT'S NAME IN FULL—Eastern States Construction Company.
2. Business Address. (Street, City and State)—Bridgeton, N. J.
3. *If Proposal Bond*, the probable total of contract is \$. and the undersigned agrees to pay \$. premium for said Proposal Bond and agrees that the Company shall execute the final or contract bond if required, should the undersigned be awarded the contract, unless the Company declines so to do, which right the undersigned hereby specifically grants to the Company. 20
4. The AMOUNT OF THE CONTRACT is \$248,210.07 and the undersigned hereby agrees to pay to the Company, as a PREMIUM or charge for the bond applied for, the rate of 15 per \$1,000 of contract amount, in advance, for the first 2 year (s) or fraction thereof and \$7.50 per \$1,000 annually thereafter until the undersigned shall serve upon the Company at its principal office in the City of Newark, N. J., conclusive written evidence of its discharge and release from any and all liability upon said bond and all matters arising therefrom. Should the contract exceed the said amount, the undersigned 30
40

Exhibit No. 1.

agrees to pay to the Company as additional premium for such excess, a further sum, calculated at the same rates per \$1,000; such additional premium to be chargeable as above from the date of the award of such additional work.

10 *If there be any maintenance or guarantee* of the contract after completion, covered either by contract bond or separate maintenance bond, the undersigned agrees to pay a further premium for such period at the rate of \$. per \$1,000 of contract amount annually, such premium, however, to be paid in advance for the full term thereof.

20 5. NATURE OF CONTRACT. (Give locality and description of work) Venango & Clarion County highway R-75 A-4788 Richland Twp. Emlenton Boro., Richland & Salem Twps. Len. 19,183' Wid 18' One course reinforced concrete.

6. *Maintenance* period after completion. None. What *guarantees* of tests? If but part of the contract is guaranteed, what part and contract price therefor? None.

30 7. *Is contractor made liable for loss, or injury,* to persons? Yes. To property? Yes.

8. Give name and address of architect or engineer in charge. Dept. of Highways, Harrisburg, Pa.

9. What is his estimate of cost of work? \$. Your estimate? \$230,000.00

10. When must work *begin*? As soon as notified. When must it be *finished*? 140 working days.

40 11. *Penalty* for non-completion on time? *Premium* for advance completion? \$.

Exhibit No. 1.

12. Payments, when to be made on contract?....
 Reserve?.....
13. Are payments to be made in CASH?.....
 If not wholly in cash, in what manner?.....

14. How much will be sublet? About \$122,000.00. 10
 Will sub-contractors furnish surety bonds?
 Yes.
15. Have you *purchased* the materials needed
 for this contract, and *within your esti-*
mates?.....
16. How are deliveries assured to you?.....
17. What insurance do and will you carry on
 this contract? Fire.....
- Public Liability
- Name of Company..... 20
 Amount of Policy \$.....
 Date Policy Expires.....
- Emp. Liability
- Name of Company.....
 Amount of Policy \$.....
 Date Policy Expires.....
18. Is compensation insurance carried?.....
 Name of Insurer.....
19. Names of OTHER BIDDERS on above con- 30
 tract, including highest and lowest:
- | Name | Address | Bid |
|--|---------|-----------------|
| (1) Eastern States Construction
Company, Inc., Philadel-
phia, Pa..... | | \$248,210.07 |
| (2) Russell Bros., Youngstown, Ohio | | \$248,534.91 |
| (3) David Bailey, Morrisdale, Pa... | | \$253,130.63 |
| (4) J. I. Dick, Scottdale, Pa..... | | \$261,303.00 |
| (4) D. W. Challis & Sons, Inc.,
Sewickley, Pa..... | | \$267,249.75 40 |

Exhibit No. 1.

(5) Milliron Construction Company,
Inc., DuBois, Pa..... \$273,184.37

20. *Have you applied elsewhere* for this bond?
No. State name of company and why de-
clined

10 21. What other surety companies have you dealt
with? Southern Surety.

22. How long have you been engaged in contract-
ing work? 1 year (members 5 to 7 years).

23. What other similar contracts have you com-
pleted ON YOUR OWN ACCOUNT? North-
umberland Co., Penna. \$172,064.78.
.....

20 24. State particulars of PRESENT UNCOM-
PLETED CONTRACTS:

Description	Location
State Highway	Northumberland Co.
.....	
.....	

Total of Contract	Amount Completed	Probable Date of Completion
\$172,064.78	\$ 70% plus	Before June 1, 1928
\$.....	\$.....	
\$.....	\$.....	

30 25. With what bank *have you arranged a loan*
for the purpose of handling this contract?
Yes.

26. What is the amount of such loan? 50,000.00

27. What security, if any, has the bank required
for the loan? Endorsement.

28. When and how must you repay the loan?
Completion of job.

Exhibit No. 1.

29. *Have you assigned or will you assign* your payment on this contract, or any part thereof? No.
30. Is your present plant sufficient for this contract? Yes. If not, state what needed and expenditure necessary?..... 10
31. Are you surety or endorser upon any bond, note, or other obligation not included in your liabilities? No.
If so, give names and amounts.....
32. *Are you having ANY controversy* with ANY one over ANY contract or payment of labor or material bills on ANY contract? No.
33. Are there ANY *mechanics'* liens filed on ANY of your work anywhere? No. 20
34. Are there any judgments against you? No. 20
35. Have you ever failed in business? No.
36. Are you *threatened* with any law suits? No.
37. Are you interested in more than one line of business? No.
If so, give particulars.....
38. IF A CORPORATION, answer these questions: Capital paid in cash? \$.....
In what State incorporated? N. J. When? July 7, 1927. Principal Office? Bridgeton. 30
President's name? W. H. Williams. Vice-President's name? George Maier. Secretary's name? A. R. McAllister. Treasurer's name? A. R. McAllister. Directors' names? George Maier, Bldg., Supplies, Bridgeton, Thos. Goslin, Bldg., Supplies, Wildewood, N. J., Albert R. McAllister, Lawyer, State Senator, Bridgeton, N. J., W. H. Williams and W. F. Jerome.

Exhibit No. 1.

39. If A CO-PARTNERSHIP, give the names of all individuals composing same:

Name	Address	Age
.....		
.....		

10 If a *special* partnership, give name of special partner and amount obligated for:

40. In what company are your employes bonded?

.....
Do their bonds expire during the life of this contract?.....Give date.....

REFERENCES.

Name	Occupation	Address
20 (1) Lehigh Cement Co.	Cement	Pittsburgh, Pa.
(2) Concrete Products Co.	Pipe	" "
(3) Concrete Steel Co.	Steel	New York City
(4) Farmer & Merchants Natl. Bank		Bridgeton. N. J.
(5) Cumberland National Bank		" "

30 IN CONSIDERATION of the execution of said bond by the COMMERCIAL CASUALTY INSURANCE COMPANY (hereinafter called the Company), the undersigned hereby covenants with the Company, its successors and assigns:

1st. To furnish to the Company upon request, the complete figures showing the full amount of contract herein referred to, or the Company may, at its option, apply to the obligee for such information, which the obligee is hereby authorized to furnish, and the Company is authorized to inspect the books of the undersigned

40

Exhibit No. 1.

relating thereto, for the purpose of ascertaining the correct amounts.

2nd. That in the event the Company executes said bond with Co-sureties or reinsures any portion of said bond with Reinsuring Companies, or procures the execution of said bond, the undersigned agrees that all of the terms and conditions of this agreement shall apply and operate for the benefit of the Company, the Co-sureties, the Reinsuring Companies and the procured sureties, as their interests may appear. 10

3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed, for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and attorney's fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid 20 30 40

Exhibit No. 1.

said sum or any part thereof or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the
10 belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not.

4th. That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper to obtain its
20 release from all liability under any and every such bond, and to secure and further indemnify itself against loss and all damage and expense which the Company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

5th. That for the better protection and security of the Company, the undersigned, as of the date hereof, hereby assigns, transfers and
30 conveys to the Company all the right, title and interest of the undersigned in and to all the supplies, tools, plant, equipment and materials of every nature and description that he or it may now or hereafter have upon said work, or in, or on, about the site thereof, and also all materials purchased for or chargeable to the said contract which may be in process of manufacture or construction, or in transportation, or in storage elsewhere, and also all his or its rights in and to all
40 subcontracts relating to said work which have

Exhibit No. 1.

been or may hereafter be made, together with the materials embraced therein, and as well all the rights, title and interests of the undersigned in and to all bonds executed to the undersigned securing the performance by said subcontractors of subcontracts, hereby subrogating said Company to all such rights, title and interests of the undersigned therein; and the undersigned does hereby authorize and empower the Company, its authorized agents or attorneys, to enter upon and take possession of said supplies, tools, plant, equipment, materials, and subcontracts, and enforce, use and enjoy the title thereto and the possession thereof in the event of any default on the part of the undersigned in the performance of the contract hereinabove referred to or in the payment of the premiums above mentioned.

6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond.

7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the

Exhibit No. 1.

bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current
10 funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in
20 such action and paid by the undersigned.

8th. That the undersigned further authorizes and empowers any attorney in any State of the United States on behalf of the Company, to appear for the undersigned, and confess judgment against the undersigned, for any sum or sums of money up to the amount of the bond executed by the Company upon the faith and security afforded by the undersigned under this agreement with costs, interest and counsel or attorney's
30 fees; this authority to continue until the Company's liability under this bond shall have wholly terminated. Whenever the laws of any State shall provide a method for confession of judgment to which the authority hereby given will not apply, the undersigned further agrees to execute upon the Company's demand such papers as will carry into effect the entry of judgment by confession as above agreed against the undersigned.

40 9th. That no act or omission of the Company, in modifying, amending, limiting, or extending

Exhibit No. 1.

any instrument executed by the Company, shall in any wise affect the undersigned's liability hereunder and the undersigned agrees that the Company may alter, change, modify, amend, limit, or extend any instrument, and may execute renewals thereof, or other and new obligations in its place, or in lieu thereof, and without notice to the undersigned, notice being expressly waived, and in any such case, the undersigned shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, as fully as if such instrument were described at length herein. 10

10th. That it shall not be necessary for the Company to give the undersigned notice of any act, fact or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instrument by it so executed, or the undersigned's rights or liabilities hereunder, notice of all such being hereby expressly waived. 20

11th. That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said bond or any other former or subsequent bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request. 30

12th. That the Company shall have the exclusive right for itself, and for the undersigned, 40

Exhibit No. 1.

to decide and determine whether any claim, demand, liability, suit, action, order, judgment on adjudication, made or brought against the Company and principal on said bond, jointly or severally, shall or shall not be defended, tried or appealed, and its decision shall be final, conclusive and binding upon the undersigned, and any
 10 order, judgment or adjudication made, entered or affirmed as a result thereof, or any loss, cost, charge, expense or liability thereby incurred, sustained or paid, shall be borne by the undersigned, and the undersigned especially consents thereto.

13th. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Com-
 20 pany in consequence of its failure to execute such bond; nor shall any claim be made in case the bond executed, be not accepted by or on behalf of the obligee.

14th. That these covenants shall be binding not only upon the undersigned, jointly or severally, but as well upon the respective heirs, executors, administrators, successors and assigns of the undersigned.

30 Dated at Pittsburgh, Pennsylvania, this 13th day of April, 1928.

EASTERN STATES CONSTRUCTION Co., Inc.
 (Applicant)

By WM. F. JEROME, Asst. Sec. & Treas.
 (Officer's name and title if applicant
 be a corporation)

Note:—If a copartnership, firm name must be signed, also name of individual who signs. If corporation, corporate name must be signed in full, with the officer's
 40 name and title on line below.

Exhibit No. 2.

EXHIBIT No. 2—Eastern States and Commercial contract bond dated April 14, 1928 to Commonwealth of Pa. on the Clarion-Venango job.

CONTRACT BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, 10
EASTERN STATES CONSTRUCTION COMPANY, INC.,
of 3809 CHESTNUT STREET PHILADELPHIA, PENNA.
hereinafter called the "Principal," and COM-
MERCIAL CASUALTY INSURANCE COMPANY, a cor-
poration incorporated under the Laws of the
State of New Jersey hereinafter called the
"Surety," are held and firmly bound unto the
Commonwealth of Pennsylvania in the full and
just sum of ONE HUNDRED TWENTY-FOUR THOU-
SAND ONE HUNDRED FIVE AND 14/100 DOLLARS 20
(\$124,105.14) lawful money of the United States
of America, to be paid to the said Common-
wealth of Pennsylvania, or its assigns, to which
payment well and truly to be made and done,
we bind ourselves, our heirs, executors, adminis-
trators and successors, jointly and severally,
firmly by these presents.

Sealed with our respective seals and dated
this 14th day of April, 1928.

WHEREAS, The above bounden "Principal" has 30
entered into a contract with the said Common-
wealth of Pennsylvania, by and through the
Secretary of Highways, bearing even date here-
with, for the improvement of certain section
of highway in Emlenton Borough, Clarion and
Venango Counties, Richland and Salem Town-
ships, Commonwealth of Pennsylvania, on Route
No. 75, Section No....., Application No.
4788, being approximately NINETEEN THOUSAND
ONE HUNDRED EIGHTY-THREE (19,183) feet in 40

Exhibit No. 2.

length, for approximately the sum of Two HUNDRED FORTY-EIGHT THOUSAND TWO HUNDRED TEN and 27/100 Dollars (\$248,210.27) the said highway being situated FROM A POINT IN EMLENTON BOROUGH, VENANGO COUNTY AT END OF BRICK PAVEMENT AT STA. 1658+13 TO THE CLARION-
 10 VENANGO COUNTY LINE AT STA. 1735 86 AND FROM THE CLARION-VENANGO COUNTY LINE AT STA. 729+83.3 TO THE VENANGO CLARION COUNTY LINE AT STA. 799+98.7 AND FROM THE VENANGO CLARION COUNTY LINE AT STA. 1798+40 TO THE CLARION VENANGO COUNTY LINE AT INTERSECTION OF ROUTE 75. APPLICATION 3484 AT STATION 1860+69.2 and,

WHEREAS, it was one of the conditions of the award of the Secretary of Highways, acting for
 20 and on behalf of the Commonwealth of Pennsylvania, pursuant to which said contract was entered into, that these presents should be executed.

Now, THEREFORE, the condition of this obligation is such that if the above bounden "Principal" as Contractor shall in all respects comply with the terms of the contract and conditions of said contract, and his, their or its obligations thereunder including the specifications therein
 30 referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner satisfactory to the Secretary of Highways, complete the work contracted for, and shall save harmless the Commonwealth of Pennsylvania from any expense incurred through the failure of said Contractor to complete the work as specified, or for any damages growing
 40 out of the carelessness of said Contractor or his, their, or its servants and shall well and truly

Exhibit No. 2.

pay for all material furnished and labor performed in and about the construction of said highway.

And also shall save and keep harmless the said Commonwealth of Pennsylvania against and from all losses to it from any cause whatever, including patent, trademark and copyright infringements, in the manner of constructing said section of roadway; and shall, on the completion of the contract in an acceptable manner, file with the Department of Highways an "Application for Release of Bond," which application shall set forth, inter alia, that all claims for labor and materials used in connection with the execution of the contract have been satisfactorily settled, said application to be executed by the President or Vice-President and the Secretary of the Company appearing as Surety; then this obligation to be void or otherwise to be and remain in full force and virtue.

It is further provided that any alterations which may be made in the terms of the contract or in the work to be done under it or the giving by the State of any extension of time for the performance of the contract or any other forbearance on the part of either the State or the Principal to the other shall not in any way release the principal and the surety or sureties or either or any of them, their heirs, executors, administrators, successors or assigns, from their liability hereunder, notice to the surety or sure-

Exhibit No. 2.

ties of any such alterations, extension or forbearance being hereby waived.

EASTERN STATES
CONSTRUCTION CO. INC.
Contractor.

10 (SEAL)

By WM. H. WILLIAMS
President.

Attest:

WM. F. JEROME
Asst. Secretary.

COMMERCIAL CASUALTY
INS. CO.,
Surety Company.

20 (SEAL)

By RALPH A. ROHRICH
Attorney-in-Fact.

Attest: WITNESS

M. A. SCHUMAN

Approved as to form and legality:

ROSCOE R. KOCH
Deputy Attorney-General.

30

40

Exhibit No. 3.

EXHIBIT No. 3—Contract dated April 14, 1928, between Eastern States and Commonwealth of Pa. for the Clarion-Venango job.

Exhibit No. 3 is a printed book containing 219 pages entitled:

10

**“PENNSYLVANIA
DEPARTMENT OF HIGHWAYS
SPECIFICATIONS AND CONTRACT”**

The following are the only portions of it that may be in any way material to the present case, viz:

“SPECIFICATIONS

It is understood and agreed that everything herein contained, and also the proposal or bid, are hereby made part of these specifications and contract.

20

1. Definitions. Wherever in these specifications the following words and expressions, or pronouns used in their stead, occur, they shall have the meanings here given:

‘State’—Commonwealth of Pennsylvania.

‘Department’—Department of Highways of Pennsylvania.

30

‘Secretary’—Secretary of Highways or Deputy Secretary of Highways of Pennsylvania.

‘Engineer’—Chief Engineer of the Department of Highways, acting directly or through an assistant or other representative duly authorized by the Secretary or the Chief Engineer, such assistant or representative acting within the scope of the particular duties assigned to him or of the authority given him.

40

Exhibit No. 3.

'Contractor'—Party of the second part to the contract, acting directly or through his agents or employees.

10 'Surety'—The corporate body which is bound with and for the Contractor, who is primarily liable and which engages to be responsible for his payment of all debts pertaining to and for his acceptable performance of the work for which he has contracted.

20 'Contract'—The agreement covering the performance of the work and the furnishing of materials in the construction of the roadway. The Contract shall include the 'Proposal', 'Drawings', 'Specifications', 'Contract Bond,' and 'Notice to Proceed', also any and all supplemental agreements which reasonably could be required to complete the construction of the roadway in a substantial and acceptable manner.

'Contract Bond'—The approved form of security furnished by the Contractor and his Surety as a guaranty of good faith on the part of the Contractor to execute the work in accordance with the terms of the Specifications and Contract.

30 (Other definitions appearing in this Exhibit No. 3 are omitted from this record as being in no way relevant to the case.)

"18. *Surety Bond.* The Bidder to whom the contract is awarded will be required to execute a bond in the sum of one-half ($\frac{1}{2}$) of the amount of the contract with a Surety acceptable to the Secretary.

40 21. *Subletting or Assigning of Contract.* The Contractor shall not sublet, sell, transfer, assign or otherwise dispose of the contract or any por-

Exhibit No. 3.

tion thereof, or of his right, title or interest therein, without the written consent of the Secretary.

61. *Semi-Final Estimates.* When the work has been completed, the Engineer shall make an inspection of the roadway and, in the event that repairs and removals are necessary which cannot be made promptly due to no fault of the Contractor, or if, for any reason, the Engineer deems it advisable, a semi-final estimate may be made, from which shall be retained a sum sufficient to cover the cost of said repairs, removals, etc.

10

62. *Acceptance and Final Payment.* Upon the acceptance of all work specified in this contract by the Engineer, he shall certify this acceptance to the Secretary, in writing, together with the entire amount of each class of work performed and value thereof. Upon receipt of this certificate from the Engineer, the Secretary, after making all legal and equitable deductions, shall certify to the Auditor General the amount due in final payment of the contract, and shall notify the Contractor and his Surety of the satisfactory completion of the contract.

20

63. *Release of Bond.* The Secretary will withhold the payment of any semi-final or final estimate, pending the receipt of the 'Application for Release of Bond', properly executed by the Surety. The standard form attached herewith, as page 55, should be detached, executed and forwarded to the Department at Harrisburg, Pennsylvania, for the purpose of securing this release."

30

40

Exhibit No. 3.

CONTRACT.

THIS AGREEMENT, made this 14th day of April, A. D. 1928, between the Commonwealth of Pennsylvania, by the Secretary of Highways, hereinafter called the party of the first part, and EASTERN STATES CONSTRUCTION COMPANY, INC. of 3809 Chestnut street, Philadelphia, Pa., a corporation, incorporated under the laws of the State of New Jersey its successors and assigns, party of the second part, hereinafter called the Contractor.

WITNESSETH, that the Contractor, for and in consideration of the payment or payments herein specified and agreed to by the party of the first part, hereby covenants and agrees to furnish and deliver all the materials and to do and perform all the work and labor in the improvement of a certain section of highway in Emlenton Borough, Richland and Salem Townships, Venango and Clarion Counties, Commonwealth of Pennsylvania, on Route No. 75, Section No..... Application No. 4788, being approximately nineteen thousand one hundred eighty-three (19,183) feet in length, at the unit prices bid by said Contractor for the respective estimated quantities, aggregating approximately the sum of Two Hundred Forty-eight Thousand Two Hundred Ten and 27/100 Dollars, (\$248,210.27) and such other items as are mentioned in its original proposal, which proposal and prices named, together with the following specifications are made a part of this contract and accepted as such, and also the drawings of the roadway, prepared by the Department of Highways, which drawings as verified by said Department are also agreed by each party as being a part hereof; the said roadway being situated as follows:

Exhibit No. 3.

From a point in Emlenton Borough, Venango County, at end of brick pavement, at Station 1658 + 13 to the Clarion-Venango County line, at Station 1735 + 86 and from the Clarion-Venango County line, at Station 729 + 83.3 to the Venango-Clarion County line, at Station 779 + 98.7 and from the Venango-Clarion County line, at Station 1798 + 40 to the Clarion-Venango County line at intersection of Route 75, Application 3484, at Station 1860 + 69.2. The surface course to be reinforced cement concrete eighteen (18) feet in width and nine (9) inches in depth at sides and seven (7) inches in depth at center with reinforcement as per drawings. 10

The Contractor further covenants and agrees that all of said work and labor shall be done and performed in the best and most workmanlike manner and that all and every of said materials and labor shall be in strict and entire conformity, in every respect, with the said specifications and drawings and shall be subject to the inspection and approval of the Engineering Executive of the Department of Highways, or his duly authorized assistant, and in case any of said material or labor shall be rejected by the said Engineering Executive, or his assistant, as defective or unsuitable, then the said materials shall be removed and replaced with other approved materials and the said labor shall be done anew, to the satisfaction and approval of the said Engineering Executive, or his assistant, at the cost and expense of the Contractor. 20 30

The Contractor further covenants and agrees that all and every of the said materials shall be furnished and delivered and all and every of the said labor shall be done and performed, in every respect to the satisfaction and approval of the 40

Exhibit No. 3.

Engineering Executive aforesaid, on or before the expiration of one hundred forty (140) working days after written notice has been given by the Engineer to begin work. It is expressly understood and agreed that in case of the failure on the part of the Contractor, for any reason, except as herein provided, to complete the furnishing and delivery of the said materials and the doing and performance of said work within the aforesaid one hundred forty (140) working days, the party of the first part shall deduct from any moneys due or which may become due the Contractor, or if no moneys shall be due, the party of the first part shall have the right to recover the amount of Sixty-five dollars (\$65.) per day for each and every day elapsing between the time stipulated for the completion and the actual date of completion, in accordance with the terms hereof; said deduction to be made or said sum to be recovered, not as a penalty but as liquidated damages. Provided, however, that allowance may be made by the Secretary of Highways, at his discretion, over the period hereinbefore specified for the completion of the said work, for causes over which said Contractor has no control and which must delay the completion of the said work, and in such case the Contractor shall become liable for said liquidated damages for delays commencing from the date on which said extended period shall expire.

It is distinctly understood and agreed that no claim for extra work or materials, not specifically herein provided, done or furnished by the Contractor, will be allowed by the Secretary of Highways, nor shall the Contractor do any work or furnish any materials not covered by these specifications and contract, unless such work is

Exhibit No. 3.

ordered in writing by the Engineering Executive. In no event shall the Contractor incur any liability by reason of any verbal directions or instructions that he may be given by the said Engineering Executive, or his authorized assistants, nor will the said party of the first part be liable for any materials furnished or used or for any work or labor done, unless said materials, work or labor are required of said Contractor on written order furnished by the said Engineering Executive. Any such work or materials which may be done or furnished by the Contractor without such written order first being given shall be at said Contractor's own risk, cost and expense and he hereby covenants and agrees that without such written order he shall make no claim for compensation for work or materials so done or furnished.

It is further distinctly agreed that the said Contractor shall not assign this contract, nor any part thereof, nor any right to any moneys to be paid him hereunder, nor shall any part of the work to be done, or material furnished under said contract be sublet, without the consent in writing of the Secretary of Highways.

It is also agreed and understood that the acceptance of the final payment by the Contractor shall be considered as a release in full of all claims against the Commonwealth of Pennsylvania arising out of, or by reason of, the work and materials furnished under this contract.

The Contractor shall accept, insofar as the work covered by the contract is concerned, the provisions of the Workmen's Compensation Act of 1915, and any supplements or amendments thereto, which may hereafter be passed, and shall insure his liability thereunder or file with

Exhibit No. 3.

the Department of Highways a certificate of exemption from insurance from the Bureau of Workmen's Compensation of the Department of Labor and Industry.

10 The bond, given by the Contractor, in a sum equal to fifty (50) per centum of the total contract price of the work to be done, to secure a proper compliance with the terms and provisions of this contract, is hereto attached and made a part hereof. The release of this bond will be a condition subsequent to the receipt by the Secretary, of the "Application for Release of Bond," executed by the party or parties appearing thereon as Surety.

20 All questions or disputes arising between the parties hereto respecting any matter pertaining to this contract or any part thereof or any branch of said contract shall be referred to the Secretary of Highways and the Attorney General or First Deputy Attorney General of the Commonwealth of Pennsylvania, whose decision and award shall be final, binding and conclusive upon all parties without exception or appeal; and all right or rights of any action at law or in equity under and by virtue of this contract and all matters connected with it and relative thereto are hereby
30 expressly waived. Reference of questions under this arbitration provision shall not be made until after the preparation of the final estimate and must be made prior to the payment thereof.

The Contractor hereby further agrees to receive the prices set forth in the following schedule as full compensation for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this contract, or
40 agreement, and in all respects to complete said

Exhibit No. 3.

contract to the satisfaction of the said Secretary of Highways:

(At this place in the Contract is set forth a "Schedule of Prices".)

Aggregate Amount at Unit Prices...\$248,210.27

10

IN WITNESS WHEREOF, The Secretary of Highways, by authority in him vested, has hereunto subscribed his name on behalf of the Commonwealth of Pennsylvania and affixed the seal of the Department of Highways hereto, and the said EASTERN STATES CONSTRUCTION COMPANY, INC. has hereto attached its corporate seal, duly attested by the signatures of its duly authorized officers, the day and year first above written.

20

COMMONWEALTH OF PENNSYLVANIA,

By W. A. VAN DUZER
Deputy Secretary of Highways.

Attest:

(SEAL)

H. W. FRY
Executive Secretary.

EASTERN STATES CONSTRUCTION
COMPANY INC. (SEAL)

30

Contractor.

By WM. H. WILLIAMS,

Attest:

(SEAL)

President.

WM. F. JEROME
Asst. Secretary.

Approved as to form and Legality: ROSCOE R. KOCH
Deputy Attorney General.

40

Exhibit No. 3.

CONTRACT BOND.

In the printed book, Exhibit No. 3, at pages 50-52 thereof, is embodied the original executed contract bond, which is printed separately in this record as Exhibit No. 2, *supra*.

10 APPLICATION FOR RELEASE OF BOND.

In the printed book, Exhibit No. 3, at page 55 thereof is the "Application for Release of Bond", which is printed in this record as Exhibit No. 14, post.

In said printed book, Exhibit No. 3, immediately following said "Application for Release of Bond", the numbered paragraphs continue, beginning with paragraph numbered 65 and running to paragraph numbered 462, which contain specifications and directions in no way material to the present case.

20

30

40

*Exhibit No. 4.***EXHIBIT No. 4—Eastern States' application dated September 22, 1928 to Commercial for contract bond on the Vernon-Hayfield job.**

Exhibit No. 4 is on the same printed form as Exhibit No. 1, *supra*, and contains the same paragraphs numbered 1st to 14th, both inclusive, as are contained in said Exhibit No. 1. 10

This Exhibit No. 4 is an application dated September 22, 1928 for a contract bond in the sum of \$87,219.21 in favor of Commonwealth of Penna. made by Eastern States Construction Company to Commercial Casualty Insurance Company in connection with a contract between said Eastern States and said Commonwealth for the "Construction of highways in Vernon & Hayfield Twps., Cranford Co., R-85, A-5214" which contract is referred to in this case as the Vernon-Hayfield job. 20

This application for contract bond is executed as follows:

"Dated at Mercer, Pa. this 22nd day of September, 1928.

EASTERN STATES CONSTRUCTION
COMPANY,
Applicant. 30

By WM. H. WILLIAMS.

W. R. SHIRLEY."

*Exhibit No. 5.***EXHIBIT No. 5—Eastern States and Commercial bond dated September 22, 1928 to Commonwealth of Pennsylvania on the Vernon-Hayfield job.**

10 This Exhibit No. 5 is identical in form with the bond hereinabove printed as Exhibit No. 2, *supra*.

20 This is a bond of Eastern States Construction Company as principal and Commercial Casualty Insurance Company as surety to the Commonwealth of Pennsylvania in the sum of \$87,219.21 dated September 22, 1928 referring to a contract entered into between Eastern States Construction Company and the Commonwealth of Pennsylvania bearing even date "for the improvement of a certain section of highway in Vernon and Hayfield Townships, Crawford County, Commonwealth of Pennsylvania, on Route No. 85, Application No. 5214, being approximately Twenty-two Thousand Six Hundred Twenty-two (22,622) feet in length, for approximately the sum of One Hundred Seventy-four Thousand Four Hundred Thirty-eight and 42/100 Dollars (\$174,438.42)." For Eastern States Construction Company it is executed by Wm. H. Williams, President, attested by Wm. F. Jerome, Asst. Secretary, and for Commercial Casualty Insurance
30 Company, by Ralph A. Rohrich, Attorney-in-fact, witnessed by M. A. Schuman.

Exhibit No. 6.

EXHIBIT No. 6—Eastern States' application dated March 18, 1929 to Commercial for contract bond on the West Mead job.

Exhibit No. 6 is on the same printed form as Exhibit No. 1, *supra*, and contains the same paragraphs numbered 1st to 14th, both inclusive, as are contained in said Exhibit No. 1. This Exhibit No. 6 is an application dated March 18, 1929 for a contract bond in the sum of \$28,203.53 in favor of Commonwealth of Penna. made by Eastern States Construction Co. to Commercial Casualty Insurance Company in connection with a contract between said Eastern States and said Commonwealth for "R. C. Road in West Mead Twp. Crawford County, Appl. 5418", which contract is referred to in this case as the West Mead job. This application for contract bond is executed as follows:

"Dated at Meadville this 18th day of March, 1929.

EASTERN STATES
CONSTRUCTION Co., INC.
(Applicant)

Attest:

H. S. HAYS.

By WM. F. JEROME,
Asst. Sec.-Treas."

*Exhibit No. 7.***EXHIBIT No. 7—Eastern States and Commercial bond dated March 19, 1929 to Commonwealth of Pennsylvania on the West Mead job.**

10 This Exhibit No. 7 is identical in form with the
bond hereinabove printed as Exhibit No. 2, *supra*.
This is a bond of Eastern States Construction
Company as principal and Commercial Casualty
Insurance Company as surety to the Common-
wealth of Pennsylvania in the sum of \$28,203.53
dated March 19, 1929, referring to a contract
entered into between Eastern States Construc-
tion Company and the Commonwealth of Penn-
sylvania bearing even date "for the improvement
20 of a certain section of highway in West Mead
Township, Crawford County, Commonwealth of
Pennsylvania, Application No. 5418, being ap-
proximately Seven Thousand One Hundred Ten
(7,110) feet in length, for approximately the sum
of Fifty-six Thousand Four Hundred Seven and
05/100 Dollars (\$56,407.05)." For Eastern
States Construction Company it is executed by
Wm. H. Williams, President, attested by Wm.
F. Jerome, Asst. Secretary, and for Commercial
Casualty Insurance Company, by Harold S.
30 Hays, Atty-in-fact.

Exhibit No. 8.

EXHIBIT No. 8—Letter dated August 2, 1929, from Eastern States to Department of Highways, Penna., re Clarion-Venango job.

WM. H. WILLIAMS
President
ALBERT R. McALLISTER
Sec. and Treas.

GEO. MAIER
Vice-President
WM. F. JEROME
Asst. Sec. and Asst. Treas.

**EASTERN STATES
CONSTRUCTION COMPANY
INCORPORATED**

PAVING CONTRACTORS

26 South Laurel Street, Bridgeton, New Jersey
FIELD OFFICE Meadville, Penna.,

Aug. 2nd, 1929.

Penna. Dep't. Highways
Harrisburg, Penna.

Att. Mr. Howard Fry:

Dear Sir:—

Please forward our *semi final estimate* check on our Clarion-Venango County contract R.-75 Appl. 4788 to us in care of The Commercial Casualty Co. 720 Grant Bldg. Pittsburgh, Penna.

Very truly yours,

EASTERN STATES CONSTRUCTION CO.

By. Wm. F. Jerome.

8/22/29 McElroy.

Address all correspondence relative to construction, invoices, purchases, shipments, etc. to field office.

10

20

30

40

Exhibits No. 9 and No. 10.

**EXHIBIT No. 9 and EXHIBIT No. 10—
Semi-final estimates on Clarion-Venango job.**

10 Exhibits No. 9 and No. 10 are the semi-final estimates of the Commonwealth of Pennsylvania of the work done by Eastern States Construction Company on said Clarion-Venango contract, in and by which it appears that on August 3, 1929 the Division Engineer of said Commonwealth certified two semi-final estimates on said Clarion-Venango job in the sums of \$2,868.83 and \$16,175.41 respectively, and that on August 25, 1929 the Deputy Secretary of Highways of said Commonwealth certified each of said two semi-final estimates to the Auditor General of said Commonwealth for audit and payment, and that 20 on August 27, 1929 each of said two semi-final estimates was audited and approved by said Auditor General in the sums aforesaid respectively, all in due form, regularly, and in accordance with the provisions of the laws of said Commonwealth relating thereto.

30

40

Exhibit No. 11.

EXHIBIT No. 11 — Inter-departmental memorandum of the Highway Department, Penna., dated August 10, 1929, addressed to Samuel Eckels re Clarion-Venango job.

Clarion-Venango

R-75

10

Appl. 4788

P. M. Tebbs, O. R. 213

August 10, 1929

Mr. Samuel Eckels

Attached for your approval is semi-final estimate on the contract of the Eastern States Construction Company, Route 75, Application 4788, Clarion and Venango Counties. This estimate is in two parts, but the additions and deductions will be explained on the combined portion.

20

The contract was awarded in 1928 with 140 days allowed for its completion, 151 were used none of which were prior to the notice to proceed. Therefore, the work was completed with an apparent overrun of 11 days. Sufficient funds are being retained to cover liquidated damages for this period.

The contract is in the amount of \$248,210.27. The additional work amounts to \$2,296.60 or .92 per cent. of the contract, while the deductions amount to \$13,707.46 or 5.52 per cent. leaving a net deduction of \$11,410.86, or 4.60 per cent. of the contract.

30

The additional work consists of 318 cubic yards of borrow amounting to \$349.80 which is due to raising the grade somewhat in the vicinity of Station 1809+.

44 feet of 15-inch reinforced concrete pipe amounting to \$114.40. This additional pipe was

40

Exhibit No. 11.

used at Stations 1662+, 741+, and 1845+, to accommodate drainage which was not evident when the preliminary estimate was prepared.

10 961 feet of 4-inch tile underdrain amounting to \$864.90 was used between Stations 1658+ to 1662+ and 1670+ to 1678+, where it was apparent that conditions were not properly provided for.

The main deductions are in Class 1 Excavation and Class "A" Concrete, but due to a possible variation in the final quantities will not be explained at this time.

20 \$1,000.00 is being retained on the State-aid portion, and \$4,500.00 on the State portion to cover any variation in the final quantities and apparent overrun in working time, and with these retentions it is recommended that the final estimate be approved as submitted.

Enc.

Copy to: Auditor General

State Treasurer

Mr. Thos. D. Frye

Mr T. C. Frame, Division 1

Mr. H. S. Mattimore

Mr. H. K. Craig

30

Exhibits No. 12, No. 13 and No. 14.

**EXHIBIT No. 12 and EXHIBIT No. 13—
Auditor General's warrants for semi-final
payment on Clarion-Venango job.**

Exhibits No. 12 and No. 13 are the two war-
rants of the Auditor General of Pennsylvania
directed to the State Treasurer each dated 10
August 28, 1929, numbered respectively 8248 and
8249 in the sums respectively \$2,868.83 and
\$16,175.41, to be paid to Eastern States Con-
struction Company on account of said Clarion-
Venango job pursuant to the aforesaid semi-final
estimates Exhibits No. 9 and No. 10, all in due
form, regularly, and pursuant to the provisions
of the laws of said Commonwealth pertaining
thereto.

20

**EXHIBIT No. 14—Application for release
of bond on Clarion-Venango job.**

Form No. 463

APPLICATION FOR RELEASE OF BOND

Commonwealth of
Pennsylvania

Department of
Highways

In pursuance of an order issued by the Secre- 30
tary of Highways, of the Commonwealth of
Pennsylvania under authority in him vested by
Act of Assembly of May 31, 1911, P. L. 468,
and its supplements, and amendments requiring
surety companies to file with the said Depart-
ment an application for the release of the bond
given in connection with contracts to save harm-
less the Commonwealth of Pennsylvania and all
persons furnishing materials or performing labor
in connection therewith,

40

Exhibit No. 14.

10 The Commercial Casualty Insurance Company
of Newark, New Jersey surety on the bond of
Eastern States Construction Co., of Bridgeton,
N. J. for the reconstruction and improvement
of a certain section of highway in Richland Twp.
Emlenton Borough, Richland & Salem Town-
ships, Venango and Clarion County, Common-
wealth of Pennsylvania on Route No. 75, Section
No., Application No. 4788, being approxi-
mately Nineteen Thousand One Hundred Eighty-
Three (19,183) feet in length, after a careful ex-
amination of the books and records of said con-
tractor, or after receipt of an affidavit from the
contractor, which examination or affidavit satis-
fies this company that all claims for labor and
materials have been satisfactorily settled, hereby
20 makes application to the Secretary of Highways
for the release of said bond and all liability
thereunder to the Commonwealth of Pennsyl-
vania.

30 The Commercial Casualty Insurance Company
hereby agrees that the release of this bond, by
the Secretary of highways, shall not be con-
sidered as a release from any claim for labor or
materials furnished in connection with this con-
tract, which claim did not appear either on the
books and records or on the affidavit, or was mis-
stated on the affidavit of the said Eastern States
Construction Company at the time of examina-
tion or receipt of the same by the said surety
company, provided, however, that nothing herein
contained shall increase the liability of the said

Exhibit No. 14.

surety company over and above the amount of the bond.

COMMERCIAL CASUALTY
INSURANCE COMPANY,
Surety Company

By W. VAN WINKLE O. K. 10
Vice-President R & C

Attest:

THOS. A. SMITH JR.
Assistant Secretary

(SEAL)

NOTE—This application if executed by any person other than the President or Vice-President of the company must be accompanied by a certificate showing authority conferred upon the person so signing to execute such instruments on behalf of the company represented. 20

8/22/29 McElroy
O. K. Stern 8/22/29

30

40

EXHIBIT No. 15 and EXHIBIT No. 16.

Commonwealth's checks in payment of semi-final estimate on Clarion-Venango job.

Void Unless Presented for Payment within Sixty Days

Aud.Gen.Warrant

No. 49979

No. 8248

Commonwealth of Pennsylvania

TREASURY DEPARTMENT

Harrisburg, Pa.

AUG 28 1929

COLONIAL TRUST COMPANY

Pittsburgh, Pa.

Pay Twenty eight hundred sixty eight and 83/100.....\$2868.83
To the Order of

MOTOR FUND

Eastern States Construction Co.,
Meadville, Pa.

M. Augustuffert
For EDWARD MARTIN State Treasurer

ENDORSED:

CREDITED TO THE ACCOUNT
of the Within Named Payee
or Endorsee

Perforated:
Paid—

Endorsement Supplied and Guaranteed by
NEW FIRST NATIONAL BANK
60-411 Meadville, Pa. 60-411

Exhibit No. 15.

228

EXHIBIT No. 16.

Void Unless Presented for Payment within Sixty Days

Aud.Gen.Warrant
No. 8249

No. 49980

Commonwealth of Pennsylvania
TREASURY DEPARTMENT
Harrisburg, Pa.
COLONIAL TRUST COMPANY
Pittsburgh, Pa.

AUG 28 1929

Pay Sixteen Thousand one hundred seventy five and 41/100.....\$16,175.41
To the Order of

MOTOR FUND

Eastern States Construction Co.,
c/o Commercial Casualty Ins. Co.,
720 Grant Bldg., Pittsburgh, Pa.

M. Augustuffert
For EDWARD MARTIN State Treasurer

ENDORSED:

Deposit in
Farmers & Merchants Nat'l Bank
Bridgeton N. J.
Eastern States Const. Co.
By Wm. F. Jerome
Asst. Treas.

Perforated:
Paid—9/9/29

Exhibit No. 16.

229

Exhibits No. 17 to No. 23.

EXHIBITS No. 17 to No. 23—Checks of Eastern States dated September 5, 1929.

10 These seven exhibits are all checks drawn by Eastern States Construction Company on Farmers & Merchants National Bank, Bridgeton, N. J., each dated September 5, 1929, each signed by Wm. H. Williams, President, and Wm. F. Jerome, Asst. Treasurer, each being endorsed by the payee named in it, each being perforated paid on the dates hereinafter shown respectively, and being made payable respectively to the following payees in the following amounts respectively, viz.:

20 EXHIBIT No. 17—Duquesne Slag Products Company for \$1766.25—Perforated—Paid 9/18/29.

Originally protested and returned for insufficient funds as appears by endorsements thereon.

EXHIBIT No. 18—Keystone Sand & Supply Company for \$1299.08—Perforated—Paid 9/9/29.

30 EXHIBIT No. 19—National Steel Fabric Company for \$555.20—Perforated—Paid 9/9/29.

EXHIBIT No. 20—Mitchell & Graham for \$6,426.94—Perforated—Paid 9/23/29.

EXHIBIT No. 21—Commercial Casualty Insurance Co., Trustee for McDonald Construction Co. for \$4,536.68—Perforated—Paid 9/18/29.

40 Originally protested and returned for insufficient funds as appears by endorsements thereon.

Exhibit No. 24.

EXHIBIT No. 22—Joe Wiesner for \$557.29—Perforated—Paid 9/16/29.

EXHIBIT No. 23—Joe Wiesner for \$451.66—Perforated—Paid 9/16/29.

10

EXHIBIT No. 24—Eastern States' application dated September 5, 1929 to Commercial for contract bond on the Indiana County job.

Exhibit No. 24 is on the same printed form as Exhibit No. 1, *supra*, and contains the same paragraphs numbered 1st to 14th, both inclusive, as are contained in said Exhibit No. 1. This Exhibit No. 24 is an application dated September 5, 1929 for a contract bond in the sum of \$61,873.74 in favor of County of Indiana, Penna., made by Eastern States Construction Company to Commercial Casualty Insurance Company in connection with a contract between said Eastern States and said County of Indiana, Penna., for "Reinforced concrete highway (16,384 ft. 16 ft. (8'x6') in Indiana Co. (state aid) Appl. No. 3652) Penna.," which contract is referred to in this case as the Indiana County job. This application for contract bond is executed as follows:

20

30

"Dated at Pittsburgh, Pa. this 5th day of Sept., 1929.

EASTERN STATES CONSTRUCTION
COMPANY,
(Applicant)

W. R. SHIRLEY

By Wm. F. JEROME."

40

*Exhibits No. 25 and No. 26.***EXHIBIT No. 25—Eastern States and Commercial bond dated September 5, 1929 to the County of Indiana on the Indiana County job.**

- 10 This Exhibit No. 25 is identical in form with the bond hereinabove printed as Exhibit No. 2, *supra*. This is a bond of Eastern States Construction Company as principal and Commercial Casualty Insurance Company as surety to the County of Indiana in the sum of \$61,873.74, dated September 5, 1929, referring to a contract entered into between Eastern States Construction Company and the County of Indiana, by and through its County Commissioners, bearing even date, "for the improvement of a certain section
- 20 of highway in West Wheatfield, Indiana County, Commonwealth of Pennsylvania, being approximately sixteen thousand three hundred eighty-four (16,384) feet in length, for approximately the sum of one hundred twenty-three thousand seven hundred forty-seven and 48/100 Dollars (\$123,747.48)." For Eastern States Construction Company it is executed by Wm. H. Williams, President, attested by Wm. F. Jerome, Asst. Secretary, and for Commercial Casualty Insurance
- 30 Company, by Harold S. Hays, Attorney-in-Fact, witnessed by J. A. Morris.

- EXHIBIT No. 26—Contract dated September 5, 1929 between Eastern States Construction Company and the County of Indiana, Penna., for the improvement of a highway in West Wheatfield Township, Indiana County, 16,384 feet in length at specified unit prices aggregating approximately**
- 40 **\$123,747.48.**

Exhibit No. 27.

EXHIBIT No. 27—Order dated September 19, 1929 from Eastern States to Department of Highways.

WM. H. WILLIAMS
President
ALBERT R. McALLISTER
Sec. and Treas.

GEO. MAIER
Vice-President
WM. F. JEROME
Asst. Sec. and Asst. Treas.

10

**EASTERN STATES
CONSTRUCTION COMPANY**

INCORPORATED

PAVING CONTRACTORS

26 South Laurel Street, Bridgeton, New Jersey

FIELD OFFICE Bolivar, Penna.,

Sept. 19th, 1929.

Mr. Howard Fry, Executive Sec.,
Department of Highways,
Commonwealth of Pennsylvania,
Harrisburg, Pennsylvania.

20

Dear Mr. Fry:

Please accept this as an order to forward our final check to us on the construction of Clarion-Venango County, R-75, Application 4788, to us in care of the Commercial Casualty Insurance Company, 720 Grant Building, Pittsburgh, Pennsylvania.

30

Very truly yours,

EASTERN STATES CONSTRUCTION CO.,

By WM. F. JEROME

Address all correspondence relative to construction, invoices, purchases, shipments, etc. to field office.

40

Exhibit No. 28.

EXHIBIT No. 28—Note dated September 24, 1929, Eastern States to Bridgeton Bank.

(No. 153.) Printed and sold by Wm. F. Murphy's Sons Co., 503 Chestnut St., Phila.

10

EXHIBIT NO. 28.

-page (a)-

\$10,000.00/100

September 24, 1929 19

20

30

40

ON DEMAND after date, WE promise to pay to the order of BRIDGETON NATIONAL BANK TEN THOUSAND and 00/100 Dollars, with Interest from date, without defalcation, for value received; and have delivered with this note, as collateral security, Assignment of balance due on contract made by Eastern States Construction Company with the State Highway Department of the Commonwealth of Pennsylvania in Venango and Clarion Counties in said State on Route 75 known as Application 4788 upon which there is due and to grow due the sum of \$21,000. and do agree, on demand, to deposit with the holders such additional security as they may from time to time require, and in default thereof this note shall instantly become due and payable as though it had actually matured, and upon default of payment at maturity, whether such maturity occurs by expiration of time or default in depositing additional security as above agreed, do hereby authorize and empower the holders hereof, for the purpose of liquidation of this note, and of all interests and costs thereon, to sell, transfer, and deliver the whole or any part of such security, or any additions thereto, or substitute therefor, without any previous demand,

Exhibit No. 28.

advertisement, or notice, either at brokers' board, or public or private sale, at any time or times thereafter, with the right on the part of such holders to become the purchaser and absolute owner thereof, free of all trusts and claims. And it is further agreed that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment of any past or of any future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one general continuing collateral security for the whole of said obligations, so that the deficiency on any one shall be made good from the collaterals for the rest, hereby remaining responsible for any deficiency in payment, and waiving any benefit, exemption, or privilege under any law now or hereafter to be in force.

EASTERN STATES CONSTRUCTION
COMPANY

GEORGE MAIER, V.-P.

ALBERT R. McALLISTER, Sec.

Due

30

40

Exhibit No. 28.

EXHIBIT NO. 28.

-page (b)-

EASTERN STATES CONSTRUCTION
COMPANY

GEORGE MAIER, V-Pres.

10

ALBERT R. McALLISTER, Secy.

BRIDGETON NAT. BANK

CHARLES W. SCULL, Asst. Cashier.

Date of Entry	Interest Paid To	Amount Of Int.	Paid On Prin.	Balance Due
12/31-29	12/31-29	165.00		
5/22-30	3/31-30	150.00		

20

EXHIBIT NO. 28.

-page (c)-

Endorsements—

Eastern States Construction Company
George Maier, V-P
Albert R. McAllister, Sec.

30

BE IT KNOWN, That on the day of the date thereof, I, JAMES BACON, Notary Public of the State of New Jersey, by lawful authority, duly commissioned and sworn, residing in Bridgeton, in the County of Cumberland, in said State, at the request of the Bridgeton National Bank, at Bridgeton, exhibited the original note, of which the above is a true copy, to a clerk in the Bank where the same is made payable, and demanding payment thereof, received for answer.....

40

.....
“That the drawer had not sufficient funds in bank to pay the note,” and at the same time gave

Exhibit No. 28.

notice to the maker and endorser of the non-payment thereof.

WHEREUPON, I, the said notary, at the request of the aforesaid, have and do hereby solemnly protest against the drawer of said note and all others concerned, for all exchange, re-exchange, costs, damages and interests suffered or to be suffered for want of payment thereof.

10

Thus done and protested, at Bridgeton aforesaid the 15th day of August, 1930.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial seal, the day and year last above written.

JAMES BACON Notary Public.

I, JAMES BACON, Notary Public of New Jersey, do hereby certify that I demanded payment of the note above referred to, on the 15th day of August, 1930, at three o'clock p. m., at the Bridgeton National Bank where payment of the same was refused, and therefore I caused a notice of non-payment to be served on the maker and endorser thereof (addressed to each of them) of which notices the following is a copy:

20

Bridgeton, N. J., August 15, 1930.

Bridgeton National Bank

30

Sir:

Note for Ten thousand dollars and cents By Eastern States Construction Company dated the 24th day of September, 1929, and endorsed by you, being this day due and unpaid, it is delivered to me for protest by The Bridgeton National Bank, of Bridgeton, N. J., and protested for non-payment, payment having been duly de-

40

Exhibit No. 29.

manded, and you are looked to for payment thereof, of which you hereby have notice.

Very respectfully,

JAMES BACON, Notary Public

10 Said notice was served on said maker and endorers of said note on August 15, 1930, by depositing the same in the Post Office at Bridgeton, N. J., at the hour of five p. m., prepaying the postage thereon, sealed and addressed to the maker and endorers, as follows:

Maker—Eastern States Construction Company,
Bridgeton, N. J.

Endorsers—Eastern States Construction Company—George Maier—Albert R. McAllister.

20 JAMES BACON *Notary Public.*

EXHIBIT No. 29—Eastern States assignment to Bridgeton Bank dated September 24, 1929.

30 FOR AND IN CONSIDERATION of the sum of TEN THOUSAND DOLLARS (\$10,000) the EASTERN STATES CONSTRUCTION COMPANY, pursuant to resolution duly adopted at a meeting of its Board of Directors, regularly called and held March 2, 1929, do hereby assign, transfer and set over unto the Bridgeton National Bank of Bridgeton, the balance now due said Eastern States Construction Company from the Highway Department of the Commonwealth of the State of Pennsylvania, upon a certain contract between the said Eastern States Construction Company and the said Pennsylvania State Highway Department, situate in
40 the Counties of Venango and Clarion in the Com-

Exhibit No. 29.

monwealth of Pennsylvania, on Route No. 75, and known as Application 4788, amounting to TWENTY-ONE THOUSAND DOLLARS (\$21,000), it being understood that upon the repayment of the loan made upon consideration of this assignment the balance thereof when paid as aforesaid, after deducting principal and interest of said loan of Ten Thousand Dollars (\$10,000), shall be refunded and paid to the said Eastern States Construction Company. 10

IN WITNESS WHEREOF, pursuant to due corporate action, the above assignment has been duly executed by the assignor, its corporate seal hereto affixed, attested by its Secretary this twenty-fourth day of September, 1929.

EASTERN STATES
CONSTRUCTION COMPANY, 20
By GEORGE MAIER
Vice-President.

Attest:

ALBERT R. McALLISTER,
Secretary.

(SEAL)

Eastern States
Construction Co. 30

Attached to the foregoing assignment is a certified copy of a resolution adopted by the Board of Directors of Eastern States Construction Company on March 2nd, 1929, which resolution is printed as part of Exhibit N. 62, post, at P. 277.

Exhibits No. 30, 31, 32 and 33.

**EXHIBIT No. 30 and EXHIBIT No. 31—
Final estimates on Clarion-Venango job.**

10 Exhibits No. 30 and No. 31 are the final estimates of the Commonwealth of Pennsylvania of the work done by Eastern States Construction Company on said Clarion-Venango contract, in and by which it appears that on January 4, 1930, the Division Engineer of said Commonwealth certified two final estimates on said Clarion-Venango job in the sums of \$2,328.21 and \$17,349.63, respectively, and that on February 5, 1930 the Deputy Secretary of Highways of said Commonwealth certified each of said two final estimates to the Auditor General of said Commonwealth for audit and payment, and that 20 on February 7, 1930, each of said two final estimates was audited and approved by said Auditor General in the sums aforesaid, respectively, all in due form, regularly, and in accordance with the provisions of the laws of said Commonwealth relating thereto.

**EXHIBIT No. 32 and EXHIBIT No. 33—
Auditor General's warrants for final payment 30 on Clarion-Venango job.**

Exhibits No. 32 and No. 33 are the two warrants of the Auditor General of Pennsylvania directed to the State Treasurer, each dated February 10, 1930, numbered respectively 21,912 and 21,914, in the sums respectively of \$2,328.21 and \$17,349.63, to be paid to Eastern States Construction Company on said Clarion-Venango job pursuant to the aforesaid final estimates, Exhibits No. 30 and No. 31, all in due form, regularly and pursuant to the provisions of the laws of 40 said Commonwealth pertaining thereto.

EXHIBIT No. 34 and EXHIBIT No. 35.

Commonwealth's checks in payment of final estimate on Clarion-Venango job.

Void Unless Presented for Payment within Sixty Days

Aud.Gen.Warrant

No. 48884

No. 21912

Commonwealth of Pennsylvania

TREASURY DEPARTMENT

Harrisburgh, Pa.

FEB 10 1930

CORN EXCHANGE NATIONAL BANK and TRUST COMPANY

Philadelphia, Pa.

Pay Twenty Three Hundred Twenty Eight and 21/100.....\$2328.21
To the Order of

MOTOR FUND

Eastern States Const., Co.,
c/o Commercial Cas. Ins. Co.,
720 Grant Bldg., Pittsburgh, Pa.

Otto F. Missnon
For EDWARD MARTIN State Treasurer

ENDORSED:

For Deposit only in the First National Bank at
Pittsburgh, Pennsylvania to the credit of Commer-
cial Casualty Insurance Company Bond Account
Eastern States Construction Company
By: Wm. F. Jerome

Commercial Casualty Insurance Company
Bond Acct.

By: H S Hays
Attorney-in-Fact.

Perforated:
Paid—3/1/30

Exhibit No. 34.

EXHIBIT No. 35.

Void Unless Presented for Payment within Sixty Days

Aud.Gen.Warrant

No. 21914

Commonwealth of Pennsylvania

TREASURY DEPARTMENT

Harrisburg, Pa.

FEB 10 1930

CORN EXCHANGE NATIONAL BANK and TRUST COMPANY

Philadelphia, Pa.

Pay Seventeen Thousand Three Hundred Forty Nine and 63/100.....\$17,349.63
To the Order of

MOTOR FUND

Eastern States Const. Co.,
c/o Commercial Cas. Ins. Co.,
720 Grant Bldg., Pittsburgh, Pa.

Otto F. Missnon
For EDWARD MARTIN State Treasurer

ENDORSED:

For Deposit only in the First National Bank at
Pittsburgh, Pennsylvania to the credit of Commer-
cial Casualty Insurance Company Bond Account

Eastern States Construction Company

By: Wm. F. Jerome

Commercial Casualty Insurance Company

Bond Acct.

By: H S Hays

Attorney-in-Fact.

Perforated:

Paid—3/1/30

Exhibit No. 35.

242

Exhibit No. 36.

**EXHIBIT No. 36—Bridgeton Bank's letter
to Commercial dated March 28, 1930.**

HARRY J. GARRISON
President, and Trust Officer

HOWARD M. SMALLEY
Cashier

WILLIAM T. LANING
Vice President

CHARLES W. SCULL
Asst. Cashier

THE BRIDGETON NATIONAL BANK
BRIDGETON, NEW JERSEY

10

March 28, 1930.

Commercial Casualty Insurance Company,
Newark, New Jersey.

Gentlemen:

On September 24th, 1929 the Eastern States
Construction Company borrowed \$10,000.00 on
demand note giving as collateral order for the
payment by the Department of Highways for the
State of Pennsylvania \$21,000.00 due on Contract
Route 75, known as application No. 4788.

20

We have been informed by the Department of
Highways of Pennsylvania that they paid to you
on August 22nd, 1929, \$19,044.24 due on this con-
tract and that there was also due on this contract
\$5,500.00 subject to additions or deductions de-
pending upon the final checking of quantities for
the work performed.

I am enclosing copy of note, copy of resolution
for authority to borrow, also copy of order to
Highway Department State of Pennsylvania
used by them as collateral.

30

Will you advise us whether you did receive on
or about August 22nd, 1929, the above amount of
\$19,044.24 and if so will you pay the note out of
such funds.

Respectfully yours,

C. W. SCULL

Asst. Cashier.

40

EXHIBIT No. 37—Final settlement check on Vernon-Hayfield job.

Void Unless Presented for Payment within Sixty Days

Aud.Gen.Warrant
No. 29882

No. 39845

Commonwealth of Pennsylvania
TREASURY DEPARTMENT
Harrisburg, Pa. MAY 15 1930
PHILADELPHIA NATIONAL BANK
Philadelphia, Pa.

Pay Twenty Three Thousand Seven Hundred Nineteen and 65/100.....\$23,719.65
To the Order of

MOTOR LICENSE FUND

Eastern States Const. Co.,
c/o Commercial Cas. Ins. Co.,
720 Grant Bldg.,
Pittsburgh, Pa.

G R Mathers
For EDWARD MARTIN State Treasurer

Endorsed:

Pay to the order of
The Commercial Casualty Insurance Co.
Eastern States Construction Co.
By Wm. F. Jerome,
Asst. Treas.

Commercial Casualty Ins. Co.
By Ralph A. Rohrich,
Atty-in-fact.

Credited account of
Commercial Casualty Ins. Co.
Claim a/c No. 2
Endorsement Guaranteed
Union National Bank
Wm. Schneider, Teller.

Perforated—Paid 5/27/30.

Exhibit No. 37.

EXHIBIT No. 38—Final settlement check on the West Mead job.

Exhibit No. 38.

Aud.Gen.Warrant
No. 29866

Void Unless Presented for Payment within Sixty Days

No. 39828

Commonwealth of Pennsylvania
TREASURY DEPARTMENT
Harrisburg, Pa.
PHILADELPHIA NATIONAL BANK
Philadelphia, Pa.

MAY 15 1930

Pay Ten Thousand Thirty Nine and 24/100.....\$10,039.24

To the Order of

MOTOR LICENSE FUND

Eastern States Const. Co.,
c/o Commercial Cas. Ins. Co.,
720 Grant Bldg.,
Pittsburgh, Pa.

G R Mathers
For EDWARD MARTIN State Treasurer

Endorsed:

Pay to the order of
The Commercial Casualty Insurance Co.
Eastern States Construction Co.
By Wm. F. Jerome,
Asst. Treas.

The Commercial Casualty & Insurance Co.
Commercial Casualty Ins. Co.
By H S. Hays
Atty-in-fact.

Perforated—Paid 6/6/30.

245

Exhibit No. 39.

EXHIBIT No. 39—Letter from Eastern States to Secretary of Highways May 14, 1930.

Indiana, Penna.
May 14th, 1930.

10 Mr. James L. Stuart,
Secretary of Highways
Harrisburg, Penna.

Dear Sir:—

This Company has a contract to build a certain section of Highway in Indiana County, West Wheatfield Twp. known as Application #6284.

20 On account of lack of finances we will be unable to complete this work and in order to enable the Bonding Co. to arrange for its completion as soon as possible we ask that you declare this contract in default in accordance with the contract and specifications.

Very truly yours,

EASTERN STATES
CONSTRUCTION CO.,

By WM. F. JEROME,
Asst. Sec. & Treas.

30 CC Commercial Casualty Co.

Exhibit No. 40.

**EXHIBIT No. 40—Letter from Secretary
of Highways to Eastern States May 16, 1930.**

May 16, 1930.

Indiana
E. Wheatfield T. 10
A-6284
O.R. 213

Eastern States Construction Company
26 South Laurel Street,
Bridgeton, New Jersey.

Gentlemen:

I have your letter of May 14, advising that you
are unable to continue with the construction of
Application 6284 in West Wheatfield Township,
Indiana County, in accordance with your con- 20
tract, due to lack of finances.

In view of this statement you are hereby de-
clared in default and the work is turned over to
the Commercial Casualty Insurance Company of
Newark, New Jersey, surety on this contract, for
completion.

Very truly yours

JAMES L. STUART
Secretary of Highway. 30

Exhibit No. 41.

EXHIBIT No. 41—Letter from Bridgeton Bank to State Highway Department January 13, 1930.

January 13, 1930.

10 State Highway Department,
Harrisburg, Pa.

Gentlemen:

We hold an order from the Eastern States Construction Company on contract, Route 75, application 4788, for \$21,000.00 as collateral for borrowed money.

Is this money due? If not kindly advise us when it will be due and we will forward to you the order held by us as collateral.

20

Respectfully,

C. W. SCULL

Asst. Cashier

Bridgeton National Bank.

30

40

Exhibit No. 42.

**EXHIBIT No. 42—Letter from Department
of Highways to Bridgeton Bank January 17,
1930.**

COMMONWEALTH OF PENNSYLVANIA

Department of Highways

Harrisburg

10

Refer to

Venango

R-75

A-4788

O. R. 640

January 17, 1930.

The Bridgeton National Bank,
Bridgeton,
New Jersey.

20

Attention: Mr. C. W. SCULL

Assistant Cashier

Gentlemen:

In reply to your letter of January 13 regarding the contract of the Eastern States Construction Company, Route No. 75, Venango County, the release of the bond on this project was filed August 22, 1929, and semi-final estimate amounting to \$19,044.24 was paid on August 26, 1929, the check being forwarded in care of the Commercial Casualty Insurance Company of Newark, New Jersey, the surety on this job.

30

There is still due on the project \$5500.00, this amount being subject to additions or deductions, depending upon the final checking of quantities for the work performed. This check will be delivered to the Commercial Casualty Insurance Company of Newark, New Jersey.

Very truly yours,

THOS. D. FRYE

Office Director and Comptroller

40

Exhibit No. 43.

EXHIBIT No. 43—Letter from Albert R. McAllister to Department of Highways November 29, 1930.

November 29, 1930.

In re: O. R. 106 Venango R-75.

10

H. W. Fry, Executive Secretary,
Department of Highways,
Harrisburg, Pennsylvania.

Dear Mr. Fry:

20

I regret that it is necessary to again annoy you about this matter. On the 24th of September of last year officials of the Eastern States Construction Company assigned to the Bridgeton National Bank of Bridgeton the balance then due that Company from the Highway Department of the Commonwealth of Pennsylvania, on contract known as Route 75, application 4788.

30

In the letter which you very kindly wrote me April 25th, you showed a payment of \$19,677.84 on February 6 of this year. I understand the contract was completed in the month of July of 1929. Therefore, this sum would appear to have been owing to the Eastern States Construction Company in the month of September of 1929, however, on January 17th, of this year the Bridgeton National Bank received a letter from Thomas D. Frye that there was due on the project \$5500.

40

The Bank therefore claims that the statement made by the Eastern States officials, that there was more than \$19,000. owing, was false and threatens criminal prosecution of the officers. I was the Treasurer of the Company and signed the collateral note in which this statement was made, therefore, I am vitally interested.

Exhibit No. 43.

The accounts were kept by the Assistant Treasurer and my representation was based upon the figures furnished to me by him. I am not at all exercised about the final outcome but you will appreciate my embarrassment if publicity were given to a statement of this kind. The question that I would like to have you answer is in the nature of an explanation of the statement made by Thomas D. Frye to the Bridgeton National Bank. 10

If you would be willing to write me, after a reference to the original letter by Thomas D. Frye, explaining the situation in accordance with the facts, I would at least be in a position to lay the letter before the Bridgeton Bank who, in my opinion would be in an embarrassing position if it attempted to take an affidavit on the basis that only \$5500. was due. 20

I understand from the Assistant Treasurer that there is still more than \$10,000 in the possession of the Surety Company on this contract and that it has no claims against the job for any part of that amount. So far we have been unable to get the Surety Company to give us any figures, although repeated requests have been made by letter and in person to the home office. 30

Your prompt reply will be very greatly appreciated.

Very truly yours,

ALBERT R. McALLISTER.

Exhibit No. 44.

**EXHIBIT No. 44—Letter from Department
of Highways to Albert R. McAllister Decem-
ber 3, 1930.**

COMMONWEALTH OF PENNSYLVANIA

Department of Highways

Harrisburg

December 3, 1930.

10

In your reply
please refer
to:

Venango

A-4788

R-75

O. R. 261

20

Honorable Albert R. McAllister,
Bridgeton
New Jersey

Dear Mr. McAllister:

30

In reply to your letter of November 29, 1930, let me say that it appears that the Bridgeton National Bank has misinterpreted the meaning of the letter written to them on January 17, 1930, by Mr. Thos. D. Frye, with reference to the contract of the Eastern States Construcion Company on Route 75, Application 4788, Venango County.

40

From our records it appears that the semi-final estimate, in the amount of \$19,044.24, was paid on August 26, 1929, as was stated in the said letter. The final estimate was paid on February 6, 1930, in the amount of \$19,677.84. This amount was, of course, an unpaid balance on the contract on the date of Mr. Frye's letter, January 17, 1930, but the amount was not at that time finally ascertained. This amount could not be ascertained until the final estimate was received and

Exhibit No. 44.

checked by the Central Office. It was for this reason that Mr. Frye stated the matter as he did in the second paragraph of his letter, giving the amount of the retained percentage, or \$5,500.00, and calling attention to the fact that such amount was subject to additions or deductions depending upon the final checking of quantities for the work performed. It is quite apparent that in the final estimate the additions and extra work performed brought up this total to the amount of the final estimate, or \$19,677.84.

10

If the bank was misled by this statement it is because they failed to notice that the amount of the retained percentage, as given by Mr. Frye, was stated to be subject to additions or deductions, and was not a final amount. The additions and extra work on these contracts often run into large amounts.

20

Trusting that this may serve to clear up any existing uncertainties in this matter, I am

Very truly yours

H. W. FRY,
Executive Secretary.

30

40

Exhibit No. 45.

EXHIBIT No. 45—Letter from Eastern States to Commercial January 31, 1930.

WM. H. WILLIAMS
President
ALBERT R. McALLISTER
Sec. and Treas.

GEO. MAIER
Vice-President
WM. F. JEROME
Asst. Sec. and Asst. Treas.

10 **EASTERN STATES CONSTRUCTION
COMPANY INCORPORATED**
Paving Contractors
26 South Laurel Street, Bridgeton, New Jersey
Field Office Indiana, Penna.
Jan. 31, 1930

The Commercial Casualty Co.
720 Grant Bldg.
Pittsburgh, Penna.

20 Gentlemen:

We are returning affidavit showing the bills we owe on the Crawford County jobs. The two items left off appear on our copy and were evidently left off when recopying your form. We are sorry this occurred. It was unintentional for we had asked the companies left off to write to you in reference to the accounts.

30 We realize that the amounts owed are more than the estimates will be but you will receive our final estimate on the Clarion-Venango contract within a very few days and on receipt of it you can apply it to these accounts all except the amount owed the McDonald construction Co. which you know about. We also have an item of \$1500.00 due us from the Supervisors of Rockdale Twp. Crawford County which we will send you to apply against these bills. This will more than balance these accounts so you need not feel

Exhibit No. 46.

alarmed at releasing the bond on the Crawford County jobs.

Very truly yours

EASTERN STATES
CONSTRUCTION CO.

By WM. F. JEROME,

10

Address all correspondence relative to construction, invoices, purchases, shipments, etc., to Field Office.

**EXHIBIT No. 46—Letter from Jerome to
McAllister September 21, 1930.**

WM. H. WILLIAMS
President

GEO. MAIER
Vice-President

20

ALBERT R. McALLISTER
Sec. and Treas.

WM. F. JEROME
Asst. Sec. and Asst. Treas.

EASTERN STATES CONSTRUCTION
COMPANY INCORPORATED

Paving Contractors

26 South Laurel Street, Bridgeton, New Jersey

Field Office Bradford, Penna.

September 21st, 1930.

Mr. A. R. McAllister,
26 So. Laurel Street,
Bridgeton, N. J.

30

Dear Mr. McAllister:

Received your letter and am sorry that the Bridgeton National Bank is taking the attitude it has. I don't know just what I can do to help out.

We did have the \$19,000.00 coming to us when we assigned it. The fact that the State paid that much on that contract since that time should

40

Exhibit No. 46.

prove that. The fact that we could not obtain that money for ourselves should not alter the fact. When the assignment was made we only owed on that job the balance of the excavation paid on the final which left us enough to pay the Bridgeton National Bank. Unfortunately the
10 check had to go to the Bonding Co. and they insisted they would hold it as we owed so much on other jobs they were interested in. I told you about this at the time and you said we could probably collect it thru the courts but that it wouldn't do us any good to try it. And that is true as the Commercial would undoubtedly ask to take over all jobs immediately. At that time we still had hopes of coming thru O.K. In order to keep the Commercial quiet and also because
20 we undoubtedly could not get the cash anyway and because we did owe so much I finally signed the check and the Commercial put the cash in a separate fund in Pittsburgh where I feel sure it is at present. The Commercial had not paid our bills a few weeks ago and is waiting until I can get to Pittsburgh to O.K. the bills.

We finished paving here last Tuesday, paving a little over 4 miles in one month and 4 days. It certainly is a shame we could not have continued
30 another year. We sure would have been out of the hole.

I am listing the bond numbers on a separate sheet. In a day or two will be well caught up here and can get busy on packing up the Eastern States papers etc. and will let you have any information etc. you need. I am willing and want to help straighten out all affairs but I must live in the meantime and so must do it between my other work.

Exhibit No. 47.

Clarion-Venango County Job.	Bond # 62827
Crawford County Job, R- 85.	" # 67876
Crawford County Job, A-5418.	" # 75940
Indiana County Job, A-6284	" # 56216

The Indiana County Job finals are ready for inspection and final has not been paid to date as far as I can ascertain. 10

Very truly yours

WM. F. JEROME.

Address all correspondence relative to construction, invoices, purchases, shipments, etc., to Field Office.

EXHIBIT No. 47—Letter from Department of Highways to McAllister October 15, 1930. 20

COMMONWEALTH OF PENNSYLVANIA
Department of Highways
Harrisburg

October 15, 1930

In your reply please
refer to Venango

R-75

O. R. 261

30

Honorable Albert R. McAllister
Bridgeton
New Jersey

Dear Mr. McAllister:

In reply to your letter of October 8, 1930, I may say that I have investigated the matter of the Eastern States Construction Company contract on Route 75, Venango County, and find that 40

Exhibit No. 47.

the following claims were filed with this Department:

	C. L. Shrodes	\$161.80
	103 Forest View Avenue	
	Baltimore, Maryland	
10	William D. Morgan	\$ 83.00
	St. Petersburg	
	Pennsylvania	
	George Summers	\$ 6.15
	Maddensville	
	Pennsylvania	
	Kenneth O. Altman	\$ 12.20
	St. Petersburg	
	Pennsylvania	

20 I find also that on August 2, 1929 the contractor directed that the semifinal check be sent in care of the surety company and on September 19, 1929 directed that the final check be sent in care of the surety company. We have no record of bills which may have been paid by the surety company. The final estimate was approved for payment on February 5, 1930.

30 With reference to the notice of the assignment which you state was given by the bank to this Department, I find a letter in our files from the bank under date of January 13, 1930, to the following effect: "We have an order from the Eastern States Construction Company on contract on Route 75, Application 4788 for \$21,000.00 as collateral for borrowed money. Is this money due? If not, please advise us when it will be due and we will forward to you an order held by us as collateral."

40 Apparently the order referred to was never forwarded, since it does not appear in the file.

Exhibit No. 47.

However, I do not believe it would have been of any great assistance since our contract prohibits assignment or subletting without the written consent of the Secretary of Highways. It is customary practice in such cases to do what was done by the surety company in this instance, that is, to secure an irrevocable order from the contractor directing that estimate checks be sent to him in care of the creditor. Such an order had been filed on behalf of the surety company.

10

The only suggestion I can make under the circumstances is that your bank take some action against the surety company to restrain them from prorating this money to other jobs to the prejudice of your claim.

Very truly yours

20

H. W. FRY,
Executive Secretary.

30

40

Exhibit No. 48.

EXHIBIT No. 48—Eastern States Financial Statement September 5, 1929

CONTRACT DEPARTMENT

FINANCIAL STATEMENT TO THE COMMERCIAL CASUALTY INSURANCE COMPANY NEWARK, NEW JERSEY

Name Eastern States Construction Company,

Business Address Meadville, Pennsylvania

Statement of Assets and Liabilities as of August 20, 1929.

This statement must be made up by Applicant, his or its Bookkeeper.
Agents not allowed to do this.

Cash in Bank (as per Schedule "A")	\$ 10,572.96
Cash on Hand	150.00
Certified Checks deposited with bids	2,000.00
Moneys earned but not shown (as per Schedule "B")	17,827.32
Accounts Receivable from completed contracts, including retainage and excluding claims not approved for payment (as per Schedule "C")	58,461.67
Earned Estimates and Retainage on uncompleted contracts shown by Engineers' or Architects' estimates (as per Schedule "D")	66,173.74
Other Accounts Receivable (as per Schedule "E")	15,829.19
Notes Receivable (as per Schedule "F")	700.00
Materials in Stock not included in any items above (present value)	10,980.50
(a) Available for Contracts Under way \$	
(b) Other Materials \$	

Total Current Assets \$182,695.38

FIXED ASSETS

Equipment at Book Value (as per Schedule "G")	\$ 47,900.00
Real Estate (as per Schedule "H")	
(a) Used for Business Value \$	
(b) Homestead Value \$	
(c) Held as Investment Value \$	
All Other Assets (explain fully if credit expected)	
Furniture and Fixtures	1,000.00
Notes Receivable	41,000.00

Total Assets \$272,595.38

Notes Payable (as per Schedule "I")	
(a) To Banks Regular	\$ 21,500.00
(b) To Banks for Certified Checks	2,000.00
(c) To Material Furnishers	none
(d) To Others (exclusive of equipment)	5,000.00
Owing Sub-Contractors, Account of Retained Percentage and Current Estimates	13,100.00
	5,510.24
Accounts Payable (as per Schedule "J")	77,753.09
(a) Not Past Due \$	
(b) Past Due \$	

Total Current Liabilities \$124,863.33

Encumbrances on Equipment (as per Schedule "G")	3,600.00
Encumbrances on Real Estate (as per Schedule "H")	
All Other Liabilities	
Notes receivable discounted	41,000.00
Capital Stock (paid up) if a corporation	50,535.00
Surplus and Undivided Profits	52,597.05

Total Liabilities \$272,595.38

(The above mentioned schedules, which constitute a part of the financial statement, are omitted from this printed record.)

Exhibit No. 48.

For the purpose of inducing the COMMERCIAL CASUALTY INSURANCE COMPANY to issue or procure the issuance of bonds and other writings obligatory in the nature thereof and of establishing and procuring credit from time to time without depositing collateral security to the full amount thereof, the undersigned furnish(es) the COMMERCIAL CASUALTY INSURANCE COMPANY the foregoing as a true and accurate statement of the undersigned's financial condition as of the date given and hereby represent(s) that the answers to the foregoing interrogatories are true. The undersigned agree(s) to notify the COMMERCIAL CASUALTY INSURANCE COMPANY promptly of any change that materially reduces the undersigned's pecuniary financial responsibility, and to furnish additional or supplemental financial statements or other information from time to time as required by the COMMERCIAL CASUALTY INSURANCE COMPANY. The undersigned hereby authorize(s) and request(s) any or all depositories or banks in which any funds of the undersigned may be deposited or from which moneys may be borrowed, to advise the COMMERCIAL CASUALTY INSURANCE COMPANY whenever requested by it, the amount of such deposits and/or loans; and any depository bank, material man, supply house, or other person, firm, or corporation is hereby authorized to furnish any information requested by the COMMERCIAL CASUALTY INSURANCE COMPANY concerning any transaction with the undersigned; and the COMMERCIAL CASUALTY INSURANCE COMPANY may furnish copies of the foregoing statement and any information which it now has, or may hereafter obtain, to other companies

10

20

30

40

Exhibit No. 48.

for the purpose of securing reinsurance or co-insurance.

IF CORPORATION Sign Here:

EASTERN STATES CONST. CO.
(Name of Corporation)

10

By Wm. F. Jerome,
Asst. Sec.-Treas.

ATTEST:

.....
Secretary.

Subscribed and Sworn to before me this 5th
day of September, A. D. 192...

20

Gertrude E. Ryan,
Notary Public.

GERTRUDE E. RYAN, Notary Public
My Commission Expires Next
Session of Senate.

30

40

Exhibit No. 49.

**EXHIBIT No. 49—Letter Commercial to
Eastern States August 21, 1929.**

COMMERCIAL CASUALTY INSURANCE
COMPANY
NEWARK, NEW JERSEY

—
Pittsburgh, Pa.

10

August 21, 1929

Pittsburgh Branch Office
Ralph A. Rohrich, Manager
730 Grant Building
Grant Street at Fourth Avenue
Telephone Grant 2300

Eastern States Construction Company
Meadville, Pennsylvania

20

ATTENTION:—Mr. W. F. Jerome

Re:—Clarion-Venango County—R-75
Release of Bond.

Dear Mr. Jerome:

Release of bond is in Harrisburg along with your order directing that the semi-final be sent to this office, and I expect same to be received almost any day.

I find that the order you gave us was in the form of a letter, asking that your semi-final check come here, and was not in the usual form of an irrevocable order, directing that all moneys due on this contract come to this office. It is necessary that we have the uniform letter to forward to the Highway Department, directing that all moneys coming on this contract, which will be the semi-final and final estimate, come to this office so that we may complete negotiations.

30

Of course, you do not know how much you owe McDonald and will not know until the final esti-

40

Exhibit No. 50.

mate is received, and there will be an amount due McDonald out of the final estimate. Therefore, we must have both the semi-final and final estimate come to this office.

10 For your convenience I am enclosing a form of letter that we use on all cases, and ask that you kindly sign same and return at once, and I will handle the details from here.

I expect to see you the first part of next week.

Very truly yours,

PITTSBURGH BRANCH OFFICE

H. S. HAYS
Assistant Manager.

HSH:AS
Encl.

20

EXHIBIT No. 50—Letter from Commercial to Eastern States February 11, 1930.

COMMERCIAL CASUALTY INSURANCE
COMPANY

Newark, New Jersey.

Pittsburgh Branch Office
Ralph A. Rohrich, Manager

30 720 Grant Building,
Grant Street at Fourth Avenue

Pittsburgh, Pa.
February 11, 1930.

Mr. W. F. Jerome,
Eastern States Construction Company,
Indiana, Pennsylvania.

Dear Bill:

40 I received in this morning's mail Auditor General's Warrant number 21914 identified as

Exhibit No. 50.

check number 48886 drawn on the Corn Exchange National Bank and Trust Company of Philadelphia, Pennsylvania and made payable to the Eastern States Construction Company in the amount of \$17,349.63 on your contract number 3160350. I have also received Auditor General's Warrant number 21912 identified as check number 48884 drawn on the Corn Exchange National Bank and Trust Company of Philadelphia, Pennsylvania made payable the same as the other check in the amount of \$2,328.21 covering the same contract. 10

This is the Clarion-Venango Job and I am holding these checks in the strong box until a copy of the final estimate is received so that the status of the McDonald Construction Company may be properly determined. 20

I am leaving for Harrisburg Wednesday night, February 12th and while there will secure a copy of the final estimate.

I would suggest that next week a day be set aside to review the entire transaction and an attempt be made to satisfactorily settle this account.

Yours very truly,

PITTSBURGH BRANCH OFFICE

H. S. HAYS

Assistant Manager. 30

HSH:M

*Exhibit No. 51.***EXHIBIT No. 51—Certificate of incorporation of Eastern States.**

10 Incorporated "by virtue of the provisions of
an Act of the Legislature of the State of New
Jersey entitled 'An Act Concerning Corporations
(Revision of 1896)', and the several supple-
20 ments thereto and acts amendatory thereof" by
the name of "Eastern States Construction Com-
pany", with principal office in the City of Bridge-
ton, County of Cumberland, the name of the
agent in charge thereof being Albert R. McAl-
lister; the objects of the corporation being "to
carry on the business of general contractors, and
to build and repair roads and highways", with
various other broad powers and objects enumer-
ated; authorized capital 1500 shares of common
20 stock without nominal or par value and \$75,-
000.00 of preferred stock divided into 750 shares
of a par value of \$100.00 each; the names of the
incorporators being George Maier, Bridgeton,
N. J., William Williams, Bridgeton, N. J. and
Thomas S. Goslin, Wildwood, N. J.

Recorded in the Cumberland County Clerk's
Office July 8, 1927 and filed in the office of the
Secretary of State of New Jersey July 9, 1927.

30

40

Exhibit No. 52.

EXHIBIT No. 52—By-Laws of Eastern States.

ARTICLE III.—DIRECTORS

Sec. 1. *Number, Qualification and Term of Office.* The property and business of this Company shall be managed by its Board of Directors, three in number. Directors are required to be stockholders. They shall be elected at the annual meeting of stockholders, and each Director shall be elected to serve until his successor shall be elected and shall qualify. 10

Sec. 2. *Regular Meetings.* Regular meetings of the Board of Directors, of which no notice shall be necessary, shall be held at 2 o'clock P. M. on the second Saturday in each month, or if any of said days shall be a legal holiday, then on the next secular day, not a legal holiday, at the office of the Company, Bridgeton, New Jersey. Regular meetings of the Board may also be held elsewhere, if so directed by the Board or the President, but two (2) days' notice of such meetings shall be given to each Director, either personally or by mail or by telegram. 20

ARTICLE V.—OFFICERS

Sec. 1. *Officers.* The officers of the Company shall be chosen by the Directors and shall be a President, Vice-President, Secretary and Treasurer. The Secretary and Treasurer may be the same person, and the Vice-President may hold at the same time the office of Secretary or Treasurer. 30

Sec. 2. *Election and Qualification.* The Board of Directors, at its first meeting after each annual meeting of stockholders, shall choose a President and Vice-President from their own num- 40

Exhibit No. 52.

ber, and a Secretary and a Treasurer who need not be members of the Board.

10 Sec. 3. *Other Officers.* The Board may appoint such other officers, (including additional Vice-Presidents, who need not be Directors, Assistant Secretaries and Assistant Treasurers, and agents as it shall deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties, as shall be prescribed from time to time by the Board.

Sec. 4. *Salaries.* The Salaries of all officers and agents of the Company shall be fixed by the Board of Directors.

20 Sec. 5. *Term of Office.* Each officer of the Company shall hold office until his successor is chosen and qualifies in his stead, or until he shall resign or shall have been removed in the manner hereinafter provided. Any officer elected or appointed by the Board of Directors, or by the President or other officer of the Company, may be removed at any time by the affirmative vote of a majority of the whole Board of Directors.

30 Sec. 6. *The President.* The President shall be the chief executive officer of the Company; he shall preside at all meetings of the stockholders and directors; he shall have general and active management of the business of the Company, and shall see that all orders and resolutions of the Board are carried into effect.

He shall execute bonds, mortgages, and other contracts requiring a seal, under the seal of the Company; shall keep in safe custody the seal of the Company and, when authorized by the Board, affix the same to any instrument requir-

Exhibit No. 52.

ing it, and when so affixed it shall be attested by the signature of the Secretary or the Treasurer.

He shall be *EX OFFICIO* a member of all standing committees, and shall have the general powers and duties of supervision and management usually vested in the office of President of a Company.

10

Sec. 7. Vice-President. The Vice-President shall, in the absence of disability of the President, perform all the duties and exercise the powers of the President, and shall perform such other duties as the Board of Directors shall prescribe.

Sec. 8. Secretary. The Secretary shall attend all sessions of the Board and all meetings of the stockholders, and record all votes and the minutes of all proceedings in a book to be kept for that purpose; and shall perform like duties for the standing committees, when required. He shall give, or cause to be given, notice of all meetings of the stockholders and of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors or President, under whose supervision he shall be. He shall be sworn to the faithful discharge of his duty.

20

30

Sec. 9. Assistant Secretary. In the absence or disability of the Secretary, the Assistant Secretary, if such officer be appointed, as provided in these By-Laws, shall perform all the duties of the secretary, and when so acting shall have all powers of, and be subject to all the restrictions upon the Secretary. He shall perform such other duties as from time to time may be assigned to him by the Board of Directors. He shall be sworn to the faithful discharge of his duties.

40

Exhibit No. 52.

10 Sec. 10. *Treasurer.* The Treasurer shall have the custody of the Corporate funds and securities, and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Company, and shall deposit all moneys, and other valuable effects, in the name and to the credit of the Company, in such depositories as may be designated by the Board of Directors.

20 He shall disburse the funds of the Company as may be ordered by the Board, taking proper vouchers for such disbursements, and shall render to the President and Directors, at the regular meetings of the Board, or whenever they may require it, an account of all his transactions as Treasurer and of the financial condition of the Company.

30 He shall give the Company a bond, if required by the Board of Directors, in a sum and with one or more sureties satisfactory to the Board for the faithful performance of the duties of his office, and for the restoration or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his control belonging to the Company.

 Sec. 11. *Assistant Treasurer.* In the absence or disability of the Treasurer, the Assistant Treasurer, if such officer be appointed, as provided in these By-Laws, shall perform all the duties of the Treasurer, and when so acting, shall have all the powers of, and be subject to all the restrictions upon the Treasurer. He shall perform such other duties as from time to time may be assigned to him by the Board of Directors.

Exhibit No. 52.

If the Board of Directors shall so require he shall give to the Company a bond in such sum as the Board of Directors may deem advisable, conditioned for the faithful performance of the duties of his office and the restoration to the Company, at the expiration of his term, or in case of his death or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Company. 10

ARTICLE VII.—CONTRACTS, CHECKS, DRAFTS,
BANK ACCOUNTS, ETC.

Sec. 1. Deposits. All funds of the Company shall be deposited from time to time to the credit of the Company in such bank or banks, trust company or trust companies, or other depositories as the Board of Directors may from time to time designate, or as may be selected by any officer or officers of the Company to whom such powers may, from time to time, be delegated by the Board of Directors. 20

Sec. 2. *Checks, Drafts, etc.* All checks, drafts or orders for the payment of money, notes or other evidences of indebtedness, issued in the name of the Company, shall be signed by such officers as are authorized by the Board of Directors. All checks shall be drawn from the regular check books or pads of the Company, and a record shall be kept of the purpose and the amount for which each check was drawn. 30

Exhibits No. 53, 54 and 54-a.

EXHIBIT No. 53—Eastern States resolution re bank accounts.

This is printed as part of the Minute Book which is Exhibit #62, post.

10

EXHIBIT No. 54—Eastern States resolution creating offices of Assistant Secretary, etc.

This is printed as part of the Minute Book which is Exhibit #62, post.

20

EXHIBIT No. 54-a—Bridgeton Bank's signature card.

“Authorized signature of
Eastern States Const. Co. Date 9/25/29
for the “BRIDGETON NATIONAL BANK”
Bridgeton, N. J.

Signature

George Maier	V. Pres.
A. R. McAllister	Sec.-Treas.
Wm. F. Jerome	Asst. Treas.

30

Remarks

Checks require two signatures.”

40

Exhibits Nos. 55 to 61.

EXHIBIT No. 55, EXHIBIT No. 56, EXHIBIT No. 57 and EXHIBIT No. 58—Eastern States checks to Commercial.

These four exhibits numbered 55 to 58 are cancelled checks of Eastern States Construction Company all drawn to the order of Commercial Casualty Insurance Company for premiums, each signed by Wm. H. Williams as President and by Wm. F. Jerome as Assistant Treasurer, drawn respectively on the following banks for the following sums and dated as follows:

12/23/29	New First National Bank, Meadville, Penna.	\$500.00	10
12/ 7/29	New First National Bank, Meadville, Penna.	\$327.91	
8/ 2/29	New First National Bank, Meadville, Penna.	\$1,000.00	20
6/28/29	First National Bank of Mercer, Penna.	\$1,210.12	

EXHIBIT No. 59, EXHIBIT No. 60 and EXHIBIT No. 61—Portions of Eastern States Minute Book.

Hereinafter printed as part of the Minute Book which is Exhibit #62, post. 30

*Exhibit No. 62.***EXHIBIT No. 62—Minute Book of Eastern States.**

FIRST MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD JULY 9, 1927.

- 10 Present: Messrs. T. S. Goslin, George Maier, William Williams, W. F. Jerome and A. R. McAllister, being a majority of the Directors of the Company.

* * * * *

RESOLVED, that the offices of Assistant Secretary and Assistant Treasurer be and the same hereby are created.

* * * * *

- 20 Upon motion duly made and unanimously carried W. F. Jerome was duly elected Assistant Secretary and Assistant Treasurer of the Company.

* * * * *

- 30 RESOLVED, that the funds of this company be deposited in the Cumberland National Bank of Bridgeton, and such other banking institutions as may be deemed advisable by the President and Treasurer and be subject to be withdrawn by the check, draft, note or order of the company, signed by the President or Vice-President and countersigned by the Treasurer or Assistant Treasurer thereof.

* * * * *

- 40 Upon motion duly made and unanimously carried the officers of the Company were authorized and directed to make the necessary applications for bonds to cover and guarantee such contracts

Exhibit No. 62.

as the Company may desire to bid upon from time to time, and to execute all necessary instruments in connection therewith.

Upon motion duly made and unanimously carried the officers of the Company were duly authorized to enter into any contract or contracts with any municipality, corporation or individual for the construction of any street, road or similar operation. 10

Upon motion duly made and carried William Williams was duly elected General Manager of the Company with full power to do all the things properly coming under the jurisdiction of a general manager in connection with the Company's business.

* * * * *

20

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD JANUARY 21, 1928.

No action except report of President and Treasurer. Nothing pertinent to this case.

REGULAR MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD AUGUST 13, 1927.

Nothing pertinent to this case. 30

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD APRIL 7, 1928.

No quorum. Adjourned to April 10, 1928.

Exhibit No. 62.

ADJOURNED MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD APRIL 10, 1928.

Present Messrs. Williams, Goslin, Maier and
McAllister.

10

* * * * *

Mr. Williams reported that this Company had been the successful bidders on a contract for three and six-tenths (3-6/10) miles of road in Clarion and Venango Counties in the State of Pennsylvania and that the contract price was \$248,210.27; that they had qualified with the Highway Department and that Mr. Jerome was now securing a bond.

* * * * *

20

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD MAY 19, 1928.

Mr. Williams reported * * * that the Venango job is progressing satisfactorily. The grading is practically completed on 6000 feet, one bridge being completed and the headers to a second bridge are ready to pour.

* * * * *

30

Mr. McAllister further stated that it would be necessary to secure an additional \$10,000.00 and suggested the purchase of additional preferred stock by the present stockholders on a pro rata basis; that is, T. S. Goslin, 21 shares; George Maier & Bro., 25 shares; William Williams, 7 shares; Winchester Bonham, 21 shares; A. R. McAllister, 5 shares; C. N. Anderson, 21 shares; R. H. Minch, 3 shares.

40

Exhibit No. 62.

Mr. Goslin stated that if Mr. Jerome would present to him a statement of the Company's standing at this time satisfactory to him, his check would be ready on Monday and Mr. McAllister agreed to turn his check over at the same time. Mr. Bonham agreed to make every effort to finance the purchase of 21 shares and Mr. Williams and Mr. George Maier agreed to do the same. Mr. McAllister volunteered to see Senator Minch and Mr. Goslin agreed to take the matter up with Mr. Anderson.

10

Mr. Jerome was asked to present the statement to Mr. Goslin on Monday and to call upon Judge Logue with such data and other information as might be interesting to the Bank considering its investment in the Company.

20

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD FEBRUARY 22, 1929.

Nothing pertinent to this case.

ADJOURNED MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD MARCH 2, 1929.

Present: Messrs. Maier, Jerome, Williams and McAllister, being a majority of the Board.

30

* * * * *

The following preamble and resolution were unanimously adopted:

WHEREAS, it may become necessary for the Company to assign and hypothecate earned but unpaid balances from time to time to secure temporary additional finances,

Now, THEREFORE, BE IT RESOLVED, that the officers of the Company be and they hereby

40

Exhibit No. 62.

are authorized and empowered, to hypothecate, assign and pledge to any banking institution, or individual, such unpaid balance or balances as may be proper in the opinion of said officers to secure the loan or advance of any additional funds to be used by the Company in connection with its business.

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD FEBRUARY 22, 1930.

Present: Messrs. Maier, Jerome, Williams, Goslin and McAllister, being a majority of the Board.

The minutes of May 19, 1928, February 22, 1929 and March 2, 1929 were read and approved.

Mr. Jerome was present and presented figures up to February 1, 1930. The net result of the showing by Mr. Jerome was not very gratifying. It showed that about \$6000 had been lost on one job and reasonable margins of profit on others but after charging off the overhead the balance indicated that the Company had operated without making any substantial net gain.

Mr. Jerome stated that the auditor was working on the books and audit would be completed in about two weeks.

Mr. Williams stated that in his opinion additional capital should be secured in order to take care of the bills and make possible the taking of discounts which would contribute quite substantially to the profits of the company.

After a general discussion of the affairs of the Company, it was determined that an annual meeting would be called at a later date when the audit was completed.

Exhibit No. 62.

There being no further business the meeting adjourned.

SPECIAL MEETING OF BOARD OF DIRECTORS
OF EASTERN STATES CONSTRUCTION
COMPANY HELD APRIL 30, 1930.

Present: Messrs. Bonham, Jerome, Williams,
Goslin, Maier, McAllister and by invitation Mr.
Platt and Mr. A. P. Sigmans, Supervisor of
Surety Claim Department of the Glens Falls In-
demnity Company.

10

The President stated that owing to delay in re-
ceiving payments from the State Highway De-
partment the Company was without ready funds
to proceed with its work and that an application
had been made to the Banks for additional fin-
ancing but that the application had been refused.

20

The Treasurer stated that he had arranged
with Mr. Seabrook to advance the necessary
monies to finish the contracts, provided the
Bridgeton Banks would extend additional credit
to the Seabrook Engineering Corporation for
such amount as might be necessary to proceed
with the work and that owing to the refusal of
the Banks to do this, the offer of Mr. Seabrook
had been withdrawn.

30

The present financial situation was presented
to Mr. Sigmans of the Glens Falls Indemnity
Company, together with a statement made for
the Cumberland National Bank from the audit
prepared by Price-Waterhouse.

Mr. Sigmans stated that he would immediately
go to Harrisburg and arrange a meeting in New
York for Friday, May 2, at the Commodore
Hotel, stating he would make an appointment for
Mr. Williams and Mr. Jerome and Mr. McAllis-

40

Exhibit No. 63.

ter to meet with the representatives of the Equitable Indemnity Company. This was agreed to by the Company.

(No directors' meetings are recorded in the minute book other than those above mentioned.)

10

EXHIBIT No. 63—Letter Eastern States to Pennsylvania Surety Company dated March 22, 1929.

**EASTERN STATES CONSTRUCTION
COMPANY**

Bridgeton, New Jersey

Field Office—Meadville, Pa.
March 22, 1929.

20

REGISTERED
Pennsylvania Surety Company,
Wabash Building,
Pittsburgh, Pennsylvania

Gentlemen:

30

We desire to advise that the McDonald Construction Company has defaulted in the performance of their sub-contract with us which covered the grading and excavating on Highway route number 75, in Clarion and Venango Counties, Pennsylvania.

We have written them today, copy of the letter being attached hereto and if this default is persisted in and any loss is sustained by our company we will proceed to hold your company liable under the terms and obligations of your bond on behalf of the McDonald Construction Company as principal, issued to us as obligee.

40

Exhibit No. 64.

Consider this as a formal notice that to date the McDonald Construction Company has defaulted on their agreement with us.

Please advise what action you intend to take on the above.

Yours very truly,

10

EASTERN STATES CONSTRUCTION COMPANY

William F. Jerome

GM

EXHIBIT No. 64—Letter Eastern States to McDonald Construction Company dated March 22, 1929.

EASTERN STATES CONSTRUCTION
COMPANY

20

Bridgeton, New Jersey

Field Office—Meadville, Pa.
March 22, 1929.

REGISTERED

McDonald Construction Company,
McDonald, Pennsylvania

Gentlemen:

30

IN RE: Eastern States Construction Company
versus McDonald Construction Company,
McDonald, Pa.

Under the conditions of the contract entered into between the Eastern States Construction Company and your company you agreed to do all grading on State Highway contract, Route 75, Venango and Clarion Counties.

40

Exhibit No. 64.

10 In that you have failed to comply with the terms of the agreement as above mentioned we are hereby formally notifying you to have a sufficient working force on this job and to proceed towards its completion within ten days from the date of this letter or we will be forced to exercise our rights as contained in the before described agreement and bond.

Yours very truly,

EASTERN STATES CONSTRUCTION COMPANY

William F. Jerome (signed).

GM

20

30

40

*Facts Admitted in the Pleadings in Case No. 2.***Facts Admitted in the Pleadings
in Case No. 2.**

At the trial it was stipulated and agreed that the facts admitted by Commercial and Bridgeton Bank in the pleadings in each of the two cases that were being tried together should be deemed and taken to be facts admitted also in the other case. The following are the facts alleged in Commercial's bill of complaint in Case No. 2 and admitted in Bridgeton Bank's answer thereto. 10

"5. On January 12, 1932 Bridgeton Bank, as plaintiff, instituted an action at law in the New Jersey Supreme Court against Commercial, as defendant upon a summons and complaint served and filed therein, a true copy whereof is hereto attached and made a part hereof and marked 'Exhibit A.' " 20

(Bridgeton National Bank is the sole plaintiff and Commercial Casualty Insurance Company the sole defendant in said New Jersey Supreme Court suit. The said New Jersey Supreme Court summons is tested January 12, 1932. The complaint in said action at law alleges substantially the same facts as are alleged in Bridgeton Bank's bill of complaint in case No. 1, supra). 30

"7. Commercial having answered Bridgeton Bank's said complaint and said action at law having been put at issue, the same came on for trial on September 27, 1932 in the Cumberland County Circuit of said New Jersey Supreme Court before Honorable William Frank Sooy, Judge, and a jury, and after the proofs of said Bridgeton Bank had been received therein Com- 40

Facts Admitted in the Pleadings in Case No. 2.

mercant moved for a non-suit. In the course of the argument of said motion for non-suit Bridgeton Bank's attorney said—"We may decide to make a motion to transfer this to the equity court", and the court said—"I will grant the motion to non-suit, subject to your right to make
10 application, if you have any, for a transfer of the cause of action." Bridgeton Bank made no application for transfer, and judgment of non-suit in favor of Commercial was entered therein against Bridgeton Bank on October 8, 1932."

"13. On or about November 13, 1933 said Bridgeton Bank and said Eastern States, as plaintiffs, instituted an action at law against said First National, as defendant, in the District Court of the United States for the Western District of Pennsylvania upon Plaintiffs' Statement
20 of Claim, filed therein, a true copy of which is attached hereto and made a part hereof and marked Exhibit E, in a cause entitled Bridgeton National Bank, a corporation, and Eastern States Construction Company, a corporation, *versus* First National Bank of Pittsburgh, Pa., a corporation, No. 7717—Law Term, 1933, which said action at law in said United States District Court is pending and undetermined therein."

30 "14. In said action at law instituted by Bridgeton Bank and Eastern States in said United States District Court said plaintiffs are suing said First National upon the same two checks that are involved in the suit pending in this court wherein said Bridgeton Bank is complainant and Commercial and Eastern States are defendants, and both said pending action at law and said pending suit in Chancery involve the same fund, money and claim."

Facts Admitted in the Pleadings in Case No. 2.

“20. In connection with the aforesaid Clarion & Venango job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

10

Date	Name	Amount
	To and for McDonald Construction Company:	
4/ 9/30	Boyles & Millison, sub-contractors—McDonald Const. Co..	\$ 1,400.30
4/ 9/30	Roe Bros, subcontractor, McDonald Const. Co.	1,200.00
4/11/30	C. L. Schroeder, subcontractor, McDonald Const. Co.	310.00
6/10/30	Commercial Cas. Ins. Co.—prem. on bond #52017 — McDonald Const.	537.50
5/ 6/30	Roe Bros., subcontractors, McDonald Const. Co.....	3,243.56
5/23/30	McDonald Const. Co. Balance..	10,215.75
		\$16,907.11
	LESS sum held for McDonald Construction Company out of the semi-final estimate payment on said contract.....	4,536.68
		\$12,370.43
6/19/28	H. M. Potter—Investigation exp.	48.56
2/28/30	H. M. Potter—Investigation exp.	57.78
5/17/32	J. M. McCandless—legal services, &c.	42.41

20

30

“21. In connection with the aforesaid Vernon & Hayfield job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

40

Facts Admitted in the Pleadings in Case No. 2.

	Date	Name	Amount
	9/16/30	J. F. Moran—Investigation exp.	\$ 17.65
	12/ /30	Genfire Steel Co.	1,100.00
	12/ 6/30	Standard Slag Co.	5,384.93
	12/26/30	Commercial Casualty Ins. Co. (Pitts. B. O.)—Investigation exp.	19.22
	2/ /31	Nickel Plate Sand & Gravel Co.	1,877.48
	8/18/31	Standard Portland Cement Co.	8,151.18
10	8/18/31	Bessemer Cement Co.	20,597.20
	8/22/31	J. M. Stoner & Sons—Court costs	30.60
	10/17/31	City of Meadville—Water	117.00
	7/17/32	J. M. McCandless—Investigation exp.	121.95

“22. In connection with the aforesaid West Meade Township job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

	Date	Name	Amount
	9/ 6/30	J. F. Moran—Investigation exp.	\$ 17.65
	11/28/30	W. F. Jerome—Reimbursement	22.09
	12/ 5/30	Truscon Steel Co.	2,272.56
	12/ 6/30	Standard Slag Co.	2,510.45
	2/14/31	Nickel Plate Sand & Gravel Co.	650.00
	8/19/31	Bessemer Cement Corp.	4,344.24
	8/19/31	Standard Portland Cement Co.	5,539.68
	8/22/31	J. M. Stoner & Sons—Court costs	30.60
	10/21/31	City of Meadville, Pa.—Water	33.00
	5/17/32	J. M. McCandless—Investigation exp.	121.95
	8/23/32	Concrete Steel Co.	100.00

“23. In connection with the aforesaid Indiana County job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, Eastern States having on or about May 14, 1930 advised the Secretary of Highways of Pennsylvania that due to lack of funds it was unable to continue with

Facts Admitted in the Pleadings in Case No. 2.

the construction work under this contract, and the said Secretary of Highways, by notice addressed to said Eastern States under date of May 16, 1930, having declared Eastern States to be in default under said contract and having turned the work over to Commercial, as surety on said bond, for completion, to wit:

10

Date	Name	Amount
6/ 7/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—Payroll to 6/7/30	\$ 307.50
6/14/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll &c. 6/11/30	410.73
6/19/30	H. M. Potter—Investigation exp.	80.83
6/30/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll &c. 6/18/30	759.08
6/28/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll &c. 6/25/30	1,093.60
7/ 8/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll &c. 7/5/30	2,027.93
8/ 1/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll &c. 7/12/30	910.70
10/11/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—misc. bills	43.38
10/ 4/30	Commercial Casualty Insurance Co. (Pitts. B. O.)—premium compensation & liability policies	88.17
11/21/30	A. F. Blessing	1,532.08
12/31/30	Commercial Casualty Insurance Co. (Pitts. B. O.)	73.08
2/ /31	Standard Slag Co.	5,450.00
3/ 2/31	Wagner's Garage—Hauling	10.00
3/ 4/31	J. Wagner Estate	349.04
4/ 7/31	Philip Carey Co.	73.44
4/ 8/31	National Steel Fabric Co.	6,479.36
4/ 8/31	D. H. Wendel	1,628.69
5/23/31	New Florence Lumber Co.	85.00
5/23/31	J. K. Davidson & Bro.	2,677.85
8/18/31	Bessemer Cement Corp.	15,551.80
8/18/31	York Ice Machinery Co.	177.00
8/18/31	Dow Chemical Co.	831.18
11/12/31	Russell Brothers	350.00
12/28/31	J. M. McCandless	713.60
5/13/32	J. M. McCandless	121.95

20

30

40

The History of the Literature of the United States

Investigation work under the contract and

it will be the first of its kind in the

field of the history of the literature of the

United States. It is the first of its kind

in the field of the history of the literature

of the United States. It is the first of its

kind in the field of the history of the

literature of the United States. It is the

first of its kind in the field of the

history of the literature of the United

States. It is the first of its kind in the

field of the history of the literature of the

United States. It is the first of its kind

in the field of the history of the literature

of the United States. It is the first of its

kind in the field of the history of the

literature of the United States. It is the

first of its kind in the field of the

history of the literature of the United

States. It is the first of its kind in the

field of the history of the literature of the

United States. It is the first of its kind

in the field of the history of the literature

of the United States. It is the first of its

kind in the field of the history of the

literature of the United States. It is the

first of its kind in the field of the

history of the literature of the United

States. It is the first of its kind in the

field of the history of the literature of the

United States. It is the first of its kind

in the field of the history of the literature

of the United States. It is the first of its

kind in the field of the history of the

INDEX

	PAGE
Statement of the Case.....	1
Specification of the respects in which the degree is alleged to be erroneous.....	12

ARGUMENT.

Respects in which it is contended that the opinion of the court below does not fully and accurately set forth the proved facts	13
POINT I. At the time (September 24, 1929) of the pur- ported assignment by Eastern States to Bridgeton Bank of the fund in question, the equitable right and title to said fund was already vested in Commercial.....	20
(A) Analysis of the proofs.....	20
(B) Citation of authorities.....	37
POINT II. In addition to and entirely independently of the equitable assignment shown in Point I, the equitable right and title to said fund was vested in Commercial by the assignment contained in Clause "6th" of the Indemnity Agreement and by Clause "11th" was appli- cable to payment of debts on the other contracts.....	43
POINT III. Eastern States held William F. Jerome out to Commercial as its agent with whom Commercial might deal in respect to all matters connected with the said bonds and contracts, and never in any way repudiated his acts, but accepted the benefits thereof, and ratified and confirmed the same, and is bound thereby. The Bank has no standing to claim that Jerome's acts were not binding on his company.....	46
POINT IV. Bridgeton Bank by the purported assignment to it did not acquire a right to the fund superior to Commercial's right, and has not made out a case against Commercial	56
(A) Bridgeton Bank took its assignment chargeable with notice of Commercial's rights.....	56
(B) The covenant and guarantee against assignment..	59
(C) No "balance now due".....	61

	PAGE
(D) Commonwealth would not have been justified in paying to the Bank.....	62
(E) Under the rules of equity the assignment was not effective to transfer a right superior to Commercial's right	63
(F) There is no proof of non-payment.....	64
POINT V. If Bridgeton Bank ever had any rights against Commercial they have been lost by reason of the Bank's laches, and the Bank has waived them, and is estopped from now recovering the fund from Commercial.....	65
POINT VI. Notice to Commercial.....	71
(A) October 1, 1929.....	71
(B) March 28, 1930.....	75
POINT VII. The counsel fee of \$1,250 awarded to complainant is excessive	75
CONCLUSION	76

New Jersey Court of Errors and Appeals

<i>Between</i> BRIDGETON NATIONAL BANK, <i>Complainant-Respondent,</i> <i>and</i> COMMERCIAL CASUALTY IN- SURANCE COMPANY, <i>Defendant-Appellant.</i> 	<i>On Appeal from the Court of Chancery.</i> <i>On Bill for Money Decree.</i> <i>Decree for Complainant. Defendant's Appeal.</i>
---	--

Sat below: DAVIS, V.-C.
 CAMPBELL, C.

BRIEF OF APPELLANT.

(All italics are ours except where otherwise noted. "Stip." refers to the Stipulation of Facts, pp. 63-79.)

Statement of the Case.

This is an appeal by Commercial Casualty Insurance Company ("Commercial") from a decree in Chancery, advised by Hon. F. B. Davis, Vice-Chancellor, which adjudges that Commercial pay to Bridgeton National Bank ("Bridgeton Bank") the sum of \$7,307.41 besides interest and costs including a counsel fee of \$1250.00.

The fund in controversy is part of the final payment that was made by the Commonwealth of Pennsylvania to Eastern States Construction Company ("Eastern States") on a road construction contract which Commercial had bonded

for Eastern States and which is referred to herein as the *Clarion-Venango* contract.

In about the middle of September, 1929, under the circumstances hereinafter set forth, by an equitable assignment, Eastern States made over to Commercial the final payment that was to become due to Eastern States on said *Clarion-Venango* contract, the agreed purpose being that Commercial, as surety, should apply the same, first, to the payment of the claim of McDonald Construction Company, a sub-contractor on said *Clarion-Venango* contract, and then to the payment of labor and material bills on two other contracts which Eastern States had with the Commonwealth and which Commercial had likewise bonded, viz., the *Vernon-Hayfield* contract and the *West Mead* contract, which two last mentioned contracts are sometimes referred to in the record as the *Crawford County jobs*. That assignment and agreement were made by Eastern States to indemnify Commercial as its surety on all three of said contracts, there being at that time a total of \$71,430.97 of bills owing on said three contracts for which Commercial, as surety, was liable, and there being a total of only \$53,436.73 of payments still to become due to Eastern States on said three contracts. Circumstances were such, as we shall show, that Commercial, pursuant to Eastern States' indemnity agreements with it, demanded that said *Clarion-Venango* final payment be made over to it. The Commonwealth, however, made a practice of recognizing no assignments, but in lieu thereof the established practice was for the contractor to order the checks to be sent to it in care of the surety and then, upon the checks coming to the surety, to endorse them over to the surety. That was the arrangement agreed upon in this case,

and on September 19th, 1929, Eastern States filed with the Commonwealth the required order that its final payment checks on the Clarion-Venango contract be sent to it in care of Commercial at the latter's Pittsburgh office.

On or about February 11, 1930, the said checks in the aggregate sum of \$19,677.84 were received by Commercial, endorsed over to it by Eastern States, and deposited in Commercial's "Bond Account" at the First National Bank of Pittsburgh. There Commercial held the money pending final adjustments on and approval by Eastern States of the bills that were to be paid.

Commercial still had said fund in hand when, on or about March 28, 1930, it received a letter under that date from Bridgeton Bank (Ex. 36, p. 243), advising that on *September 24th, 1929*, (which was subsequent to Eastern States' aforesaid agreement and equitable assignment to Commercial and five days after Eastern States had given its aforesaid order of *September 19th, 1929*, to the Commonwealth) Bridgeton Bank had loaned Eastern States \$10,000.00, taking as collateral therefor an assignment of the balance due to Eastern States from the Commonwealth on said Clarion-Venango contract. Copies of the note and assignment were enclosed with the letter. It asserted no claim against and made no demand upon Commercial, but merely inquired whether Commercial had received the moneys mentioned in the letter, "and if so will you pay the note out of such funds?" Of course, Commercial's position was that Eastern States had made the moneys over to it as indemnity against its liability for the aforesaid labor and material bills and that the fund was not sufficient to leave anything over after those liabilities had been paid.

The aforesaid "letter was the first communication, either oral or written, received by Commercial from Bridgeton Bank or from any officer or employee of Bridgeton Bank" (Stip. p. 74, Par. 38). For two years after that letter Commercial heard nothing more from Bridgeton Bank. Meanwhile, the said bills were adjusted and approved by Eastern States, the final payments on the two Crawford County jobs were made over to Commercial by the same procedure and in the same manner that the Clarion-Venango final payment had been made over to it, and Commercial disbursed the aggregate of \$53,436.73 received by it from said three contracts toward payment of the \$71,430.97 of bills owing thereon, and out of its own funds paid the deficit of \$17,994.24 (Stip. p. 71, Par. 28).

During said two year period, also, Commercial had been compelled to take over and complete still another (a fourth) contract that it had bonded for Eastern States, viz., what is referred to as the *Indiana County* contract. It had been entered into and bonded on September 5th, 1929; work on it was begun about October 1st, 1929; and by letter dated May 16, 1930 (Ex. 40, p. 247), the Secretary of Highways declared it in default and turned it over to Commercial, as surety, for completion. That was the end of Eastern States; it had become insolvent (p 98, ll. 20-30); the bill alleges (p. 9, l. 33) that "it has no assets." Commercial's total loss on the four contracts is in excess of \$40,000.00 (p. 78, ll. 20-40).

During said two year period, also, Bridgeton Bank had on August 15th, 1930, demanded payment from Eastern States on its aforesaid demand note and had protested it (Ex. 28, p. 236). Furthermore, Bridgeton Bank had threatened the

treasurer of Eastern States with criminal prosecution (p. 150, l. 18), but not a word was there from Bridgeton Bank to Commercial until *January, 1932*, when Bridgeton Bank instituted an action at law in the New Jersey Supreme Court against Commercial on substantially the same allegations as are contained in its bill of complaint herein (p. 283).

If one were to study the entire record with this particular point in mind, we believe he could not escape the conclusion that that action at law and this ensuing litigation, although nominally in the name of Bridgeton Bank as plaintiff or complainant, was actually instigated and prosecuted by the treasurer of Eastern States, with the consent of the Bank, in an effort to set himself right with the Bank, and that that fact accounts for the manner in which Eastern States, in the pleadings, is made to appear as repudiating the acts of its other officers. It is difficult to account otherwise for its present apparent cooperation with the Bank (p. 11; p. 284, Pars. 13-14) notwithstanding that it has been defunct since the spring of 1930 and there has been no meeting of its directors since April 30, 1930 (p. 154, l. 20).

Having been non-suited in said New Jersey Supreme Court action at law, Bridgeton Bank on August 26, 1933, filed its bill herein (pp. 1-10), in which it alleged (Pars. 9 and 10, pp. 4-5) certain details relative to the payment of the *semi-final* estimate on said Clarion-Venango contract, although the semi-final was paid before it made its loan and its present claim is based entirely on the *final* and not at all on the semi-final payment. Then it alleges (Par. 11) that said order of September 19, 1929, to the Department of Highways was made by one William F.

Jerome, an employee of Eastern States, "without the knowledge, consent or authority" of Eastern States; that on September 24, 1929, the loan was made and the assignment taken as collateral security (Par. 13); that on October 1, 1929, *Eastern States* notified Commercial of the execution and delivery of said assignment to Bridgeton Bank (Par. 14); that on February 10, 1930, the two final payment checks were issued and sent to Eastern States in care of Commercial (Par. 17); that at the request of Commercial, but without the knowledge, consent or authority of either Eastern States or Bridgeton Bank, said Jerome endorsed said checks for deposit to Commercial's said "Bond Account," and, incidentally, no title is written under his signature on said endorsement (Par. 18); that on February 28, 1930, Commercial endorsed and deposited said checks, and on March 1, 1930, the full proceeds thereof were credited to its said "Bond Account" at said First National Bank of Pittsburgh (Par. 19); that on August 15, 1930, Bridgeton Bank demanded payment from *Eastern States* of said note, and upon default thereof the same was protested (Par. 15); that said note has not been paid and Eastern States "has no assets to pay same other than from the said final payment under said contract" and Commercial "denies that it is liable to complainant for same" (Par. 21). That is Bridgeton Bank's entire case as alleged in its bill.

An answer was filed on behalf of Eastern States admitting all the allegations of the bill and joining in the prayer thereof (p. 11). It is signed by Messrs. McAllister & McAllister as solicitors for Eastern States, and by Albert R. McAllister as of counsel, he being also treasurer of Eastern States (p. 135, l. 10).

Commercial's amended answer (pp. 12-25), on which the case went to hearing, alleges the facts hereinabove set forth and further shows (see particularly Pars. 22 to 41) that Commercial bonded said Clarion-Venango contract in reliance upon the provisions of Eastern States' written application therefor and indemnity agreement in respect thereto, and in reliance upon the provisions of said contract in which and as part of which said bond was incorporated; that it had also bonded said two Crawford County contracts in reliance upon similar applications and indemnity agreements; that said Jerome was Assistant Secretary and Assistant Treasurer of Eastern States and was the person held out to Commercial by Eastern States as its officer and agent with whom Commercial might deal in respect to said bonds and contracts and all matters arising thereunder, and that Commercial in all things dealt with him accordingly, and that his authority to act for and on behalf of Eastern States in respect to said bonds and contracts and all matters arising thereunder between Commercial and Eastern States has never at any time or in any respect been questioned, denied or repudiated by Eastern States, but on the contrary has been ratified and confirmed by it; that on September 19, 1929 all work to be done and materials to be furnished by Eastern States on all three of said contracts had been done and furnished, and that the further payments to become due to Eastern States on said three contracts and bills owing by it for labor and material thereon were on that date as has been hereinabove set forth; that by virtue of the said bonds Commercial was liable for the payment of all of said bills, and Eastern States, both by virtue of the relation of principal and surety existing between it and Commercial and also by virtue of the provisions

of all three of said applications and indemnity agreements, was liable and in duty bound to indemnify Commercial in respect thereto; that on or about September 19, 1929 Commercial demanded of Eastern States, pursuant to its rights as surety and pursuant to the provisions of Eastern States' aforesaid applications and indemnity agreements, and pursuant to the then and there established and prevailing practice and custom in such matters, that Eastern States should make an order on said Commonwealth to send the final estimate checks on said Clarion-Venango contract to Eastern States in care of Commercial and should make over said checks to Commercial to the end that Commercial might use and apply the proceeds thereof to the payment and discharge of the aforesaid debts of Eastern States for labor and materials furnished on said three contracts; that Eastern States, by its officers and agents thereunto duly authorized recognized and admitted the right of Commercial to be indemnified as aforesaid and to receive said final payment under said Clarion-Venango contract as indemnity to it against said claims for which it as surety was liable under all three of its said bonds; that said "Eastern States agreed that said final estimate checks should be sent as aforesaid to this defendant and should be made over by it to this defendant;" that pursuant to the aforesaid demand and agreement Eastern States by said Jerome thereunto duly authorized, on September 19, 1929 filed with said Department of Highways the aforesaid order bearing that date directing said checks to be sent to it in care of Commercial; that the aforesaid agreement between Eastern States and Commercial was made and said order was written and delivered by Eastern States all prior to the mak-

ing of the said alleged loan by and assignment to Bridgeton Bank; that Bridgeton Bank took said alleged assignment from Eastern States charged with notice and knowledge of all the matters and facts aforesaid; that any rights acquired by Bridgeton Bank of, in or to said final payment under or by reason of said assignment to it were subsequent, subordinate and subject to the prior right of Commercial thereto; that said Secretary of Highways recognized Commercial's right to receive said final payment and accepted and complied with Eastern States' said order dated September 19, 1929; that on or about February 11, 1930 said final payment checks were received at Commercial's Pittsburgh office, and Eastern States, by said Jerome, its officer and agent thereunto duly authorized, endorsed the same "For Deposit only in the First National Bank of Pittsburgh, Pa., to the credit of Commercial Casualty Insurance Company Bond Account. Eastern States Construction Company by William F. Jerome," and delivered the same to Commercial, and the full proceeds thereof were in due course credited to Commercial's said Bond Account at said First National Bank of Pittsburgh; that by reason of the facts aforesaid Commercial received said final payment in its own right as indemnity to it against its aforesaid liabilities incurred by it as surety for said Eastern States on the bond aforesaid; that on January 17, 1930, in answer to Bridgeton Bank's inquiry, said Department of Highways informed Bridgeton Bank that the final estimate checks on said Clarion-Venango contract would be delivered to Commercial, but Bridgeton Bank took no steps of any kind to protect any rights that it had or might claim to have in respect thereto; that Bridgeton Bank gave

Commercial no notice of said assignment except its aforesaid letter of March 28, 1930, wherein it made no demand upon and asserted no claim against Commercial; that Commercial denies (Par. 14) that on October 1, 1929 Eastern States notified it of the execution and delivery of said assignment to Bridgeton Bank; that Commercial has disbursed the entire amount of said final payment in the manner and for the purpose hereinabove set forth; that Bridgeton Bank asserted no claim and instituted no proceedings against Commercial until January 12, 1932, when it instituted its aforesaid New Jersey Supreme Court action at law for the recovery of the sum sought to be recovered by it herein; that from the date of the alleged assignment to it on September 24, 1929 until January 12, 1932 Bridgeton Bank stood by and permitted Commercial to rely upon Commercial's right to said Clarion-Venango final payment, and permitted Commercial to pay out and disburse the same as aforesaid, and by its failure to assert a right or claim against Commercial Bridgeton Bank induced Commercial to rely upon its unquestioned right to said final payment, and thereby has caused Commercial to change its position and to refrain from taking steps that it otherwise would have taken to further secure and indemnify itself against loss, and Eastern States has since become and now is insolvent; that Bridgeton Bank is in laches and by reason of its aforesaid conduct and failure to act is estopped from now asserting any right to said fund as against Commercial.

After the filing of the bill herein and while the case was at issue and awaiting trial, Eastern States joined as co-plaintiff with Bridgeton Bank in an action at law in the United States District

Court for the Western District of Pennsylvania against said First National Bank of Pittsburgh to recover on the alleged unauthorized endorsement of said two Clarion-Venango final payment checks which Commercial had deposited in its "Bond Account" in said First National Bank. (Stip. pp. 76-77, Par. 46; and p. 284, Pars. 13 and 14). Inasmuch as judgment against the First National in that case would have been tantamount in effect to a judgment against Commercial on the same claim here involved, Commercial filed its verified bill in Chancery of New Jersey against Bridgeton Bank and Eastern States, whereupon an *ad interim* restraint (continued on final hearing, 175 Atl. Rep. 807) was granted against the further prosecution of said Pennsylvania action at law. This bill for restraint is what is referred to in the record as "Case #2." By stipulation (p. 63, top p. 64) the two cases were tried together. Case #2 is in no way involved on the present appeal, but we set forth these facts in respect to it so that the printed record may be intelligible.

Many of the facts and exhibits were embodied in a Stipulation (pp. 63-79) which was supplemented by further exhibits and testimony taken at the final hearing.

It appears by the Stipulation (Par. 28, pp. 70-71) that no part of the \$10,000.00 loaned by Bridgeton Bank went into or was used by Eastern States in connection with any of the three contracts in question, namely, the Clarion-Venango job, and the two Crawford County jobs.

It is stipulated (pp. 77-78, Par. 47) that out of the \$19,677.84 final payment on the Clarion-Venango contract, Commercial rightfully paid \$12,370.43 to McDonald Construction Company,

sub-contractor on that job, and that Bridgeton Bank's claim is limited to the balance in the sum of \$7,307.41.

It is stipulated (pp. 70-71, Par. 28) that Commercial disbursed the whole of that balance of \$7,307.41 in payment of labor and material bills owing on the two Crawford County contracts for which it, as surety, was liable.

The decree appealed from requires Commercial to pay that sum again—this time to Bridgeton Bank, plus interest, costs, and \$1,250.00 counsel fee.

Specification of the respects in which the decree is alleged to be erroneous.

The Petition of Appeal (pp. 60-62) specifies the following respects in which the decree is alleged to be erroneous:

(1) That it does not appear by the evidence before the court that there is due and owing by the defendant Commercial Casualty Insurance Company to the complainant Bridgeton National Bank the sum of \$9,427.24 or any other sum.

(2) That the evidence before the court was not sufficient to warrant said decree against your petitioner.

(3) That the evidence before the court shows that your petitioner's right and equity in and to the fund in question is prior and paramount to any right of complainant in or to the same.

(4) That it appears by the evidence before the court that as between your petitioner and the defendant Eastern States Construction Company, Inc., the payment to your petitioner of the fund in question in the manner in which it was

paid to your petitioner is binding upon and has been ratified by said defendant Eastern States Construction Company, Inc., which has accepted the benefit thereof, and that complainant is not in a position to and has no right to question the same and no right to a decree that said fund or any part thereof be paid over to it by your petitioner.

(5) That it appears by the evidence before the court that complainant by reason of its course of conduct and laches is estopped from prosecuting this suit and in equity is not entitled to recover from your petitioner any part of the fund in question.

(6) That the said counsel fee of \$1,250.00 is excessive.

(7) That the court should have made a decree denying the relief prayed for by complainant and dismissing complainant's bill of complaint.

ARGUMENT.

The opinion of the court below (pp. 27-42) sets forth further details of the facts proved. We respectfully submit, however, that in the following respects the facts stated in the opinion of the court below are not substantiated by the record, to wit:

(1) From line 16 on page 33 to line 11 on page 34, wherein it is stated that Jerome, by telephone and letter, notified Hays, of Commercial, of the loan from and assignment to Bridgeton Bank. We shall analyze the evidence in this regard, which, we submit, does not sustain the burden of proof resting on complainant, if this alleged notice is an essential element upon which complainant's right to recover depends.

We shall also set forth the reasons which, we submit, make it immaterial whether or not Jerome gave such notice to Commercial.

(2) Lines 32-37, page 33, wherein the court below stated it to be a fact "that checks drawn by Eastern States (Exs. 17 to 23, pp. 230-231) in payment of bills had been, prior to that time (i. e., prior to the loan from Bridgeton Bank to Eastern States), returned unpaid by Bridgeton Bank on account of insufficient funds, and Mr. Hays knew about them and was interested in having these checks made good." The proved fact is that said checks were not drawn on or returned by Bridgeton Bank, but were drawn on and returned by Farmers & Merchants National Bank of Bridgeton, and at the time of the loan from Bridgeton Bank to Eastern States Mr. Hays was not "interested in having these checks made good," for the reason that they had already been made good and each and every one of them had been paid on or before September 18, 1929, all of which appears by reference to said Exs. 17 to 23.

(3) Lines 25-34, page 34, in which the court below said that Commercial claims "the right to apply this excess (i. e., the \$7,307.41 in question) from the Clarion and Venango contract because of the provisions of the agreement and application for bond in connection with that contract, as well as the order given by Jerome dated September 19, 1929 to the Department of Highways with reference to the mailing of the checks. Commercial contends that these were assignments and were prior to any claim which Bridgeton Bank had under its assignment of September 24, 1929." This only partially and inaccurately states Commercial's claim and contention. It

entirely ignores the proved agreement between Commercial and Eastern States pursuant to which and the proved circumstances under which said order of September 19, 1929 was given by Eastern States to the Department of Highways. One of Commercial's contentions is that prior to the assignment to Bridgeton Bank of September 24, 1929 the right, title and interest of, in and to the final payment on the Clarion-Venango contract, in equity, had become vested in Commercial, as we shall hereinafter show by the proofs.

(4) Lines 14-15, page 38, in which the court below said—"There was no default by Eastern States under the Clarion and Venango contract." Commercial contends that Eastern States' failure to pay the labor and material bills that were due and owing on September 19, 1929 constituted such "breach" of all three of its said contracts as entitled Commercial, under the provisions of all three of said indemnity agreements, to demand and receive from Eastern States the whole of the final payments to be made on said three contracts.

(5) Lines 28-35, page 38, wherein the court below held that the prohibition of assignment contained in the Clarion and Venango contract enured solely to the benefit of the Commonwealth and that "the assignability of the moneys due Eastern States thereunder as between Bridgeton Bank and Eastern States is not affected." The court below made no reference to the fact that in its application for the Clarion-Venango bond Eastern States had covenanted with Commercial that it would not assign any payment falling due under the contract, and no mention of the fact that the provisions of the

contract are part and parcel to the bond and part of the condition of suretyship existing between Eastern States and Commercial.

(6) Lines 4-9, page 39, wherein the court below said that "The right of Commercial to appropriate the overplus (\$7,307.41) from the Clarion and Venango contract to make up its losses on the subsequent contracts on which it was surety depends largely upon the construction to be given to the application and agreement for this bond." Commercial's contention is that its said right to demand and receive indemnity from Eastern States existed not only under Eastern States' application for the Clarion-Venango bond, but also under its applications and indemnity agreements in respect to the two Crawford County bonds, and that its right to the said overplus on the Clarion-Venango contract as indemnity to it against Eastern States' unpaid labor and material bills on the two Crawford County jobs existed by virtue of the agreement which Eastern States, by Jerome, entered into with it on or before September 19, 1929, whereby Eastern States agreed to and did make over said final payment to Commercial.

(7) Line 10, page 39 to line 13, page 40, wherein the court below construes the provisions of Eastern States' application for and indemnity agreement in respect to the Clarion-Venango bond (Ex. 1, pp. 190-202). This portion of the opinion of the court below is expressed as if there had existed only Eastern States' indemnity agreement in respect to the Clarion-Venango contract, whereas the two subsequent Crawford County indemnity agreements from Eastern States to Commercial were identical in form and contained the same paragraphs numbered "1st" to "14th" as are contained in said Ex. 1 (Ex.

4, p. 217; Ex. 6, p. 219), so that if Ex. 1 is construed to relate only to other bonds previously executed, Exs. 4 and 6 must be likewise construed and must, therefore, embrace the Clarion-Venango bond, which was the first one executed. Furthermore, the opinion of the court below makes no mention of and does not purport to pass upon the contention which Commercial urged and now urges in respect to the construction and effect of said indemnity agreements, as hereinafter set forth.

(8) Lines 22-28, page 40, wherein the court below states that as a result of Eastern States' order dated August 2, 1929 to the Department of Highways (Ex. 8, p. 221) the *semi-final* checks on the Clarion-Venango contract were received by Commercial and "were deposited to the credit of Eastern States and the bills then due paid therefrom by checks drawn from the Eastern States and signed by the President and Assistant Treasurer." The court below makes no mention of the proof which showed that Eastern States, by Jerome, had agreed that the semi-final checks would be made over to Commercial, and that when the checks came in Jerome prevailed upon Hays to release him from the agreement and to deposit the checks directly in Eastern States' account so that the creditors might not see the bills being paid by Surety Company checks, or the fact that Eastern States diverted the proceeds of said semi-final payment to other purposes so that its checks (Exs. 17-23, pp. 230-231) drawn in payment of the bills then owing on the Clarion-Venango contract were returned for insufficient funds—a lesson to Hays to permit no like procedure in respect to the final payment checks. We shall set forth the proofs in this regard.

(9) Line 31, page 40 to line 5, page 41, wherein the court below holds that the effect of the order of September 19, 1929 (Ex. 27, p. 233) "was merely to enable Commercial to know when the checks reached Eastern States and see that proceeds of such checks were applied to the payment of labor and material on the Clarion-Venango contract which at that time were represented by the one claim of McDonald Construction Company," and that "The mere receipt of these checks in the manner in which they were received could not be determined to be an assignment by Eastern States to Commercial, because Commercial could not use such checks without a proper endorsement by Eastern States." Here again, the court below entirely ignores and makes no mention of the oral agreement pursuant to which said order was given to the Department of Highways, or the facts or circumstances under which Eastern States, by Jerome, agreed to make over said final payment to Commercial "to keep Commercial quiet," as we shall show, or the fact that upon receipt of the checks by Commercial Eastern States was in equity bound to endorse them over to Commercial pursuant to said agreement. The court below speaks of the "mere receipt of these checks in the manner in which they were received" as not constituting an assignment, but says nothing of Commercial's contention that the receipt of the checks and the endorsing of them over to Commercial was a mere detail in the performance by Eastern States of the binding agreement that it had made with Commercial to do so.

(10) Line 5, page 41 to line 20, page 42, wherein the court below sustains Bridgeton Bank's contention that Jerome's endorsement of

the checks in question was without authority and was ineffective to transfer the fund to Commercial. This, we submit, is not substantiated by the record, and we shall set forth the evidence upon which we base Commercial's contention that all that Jerome did was in the course of the exercise of his apparent and actual authority, and was with the knowledge and approval of Williams, the President of Eastern States, and was never in any way questioned or disputed by Eastern States, and has been ratified and confirmed by Eastern States, and that Eastern States has accepted the benefit thereof, and that Bridgeton Bank has no right to and is in no position to question or repudiate the acts of Jerome which Eastern States has accepted as binding upon it.

(11) Nor does the opinion of the court below make any mention of the undisputed evidence that we shall set forth and upon which Commercial contends that if Bridgeton Bank ever had a right to the fund in question superior to the right of Commercial, Bridgeton Bank, by its course of conduct, its apparent acquiescence and its laches, to the detriment of Commercial, after Commercial had been induced to change its position by reason thereof, is now estopped, in equity, from recovering said fund from Commercial.

(12) And the opinion of the court below makes no mention of the failure of Bridgeton Bank to take any reasonable precautions at the time it took its purported assignment from Eastern States, or its failure to make any inquiries, or its being chargeable with notice of Commercial's rights.

(13) And the opinion of the court below makes no mention of the fact that nowhere in the record is there any proof as against Commercial

that Bridgeton Bank's loan to Eastern States has not been paid, in whole or in part, or that it holds no other collateral from Eastern States to the benefit of which Commercial would be entitled.

The foregoing respects in which we respectfully take exception to the findings and conclusions of the court below, necessitate an analysis of the record in order that the facts *proved* may be determined.

POINT I.

At the time (September 24, 1929) of the purported assignment by Eastern States to Bridgeton Bank of the fund in question, the equitable right and title to said fund was already vested in Commercial.

Later we shall show by the record that all that Jerome did throughout in connection with Eastern States' dealings with Commercial was done pursuant to his apparent and actual authority, was accepted, ratified and confirmed by his company, and is binding upon it and upon Bridgeton Bank. For the present we shall assume that to be the fact, and shall show that prior to September 24, 1929, Eastern States, by Jerome, made an equitable assignment to Commercial of the Clarion-Venango final payment.

In the first place, let it be noted that the Clarion-Venango contract provides (Ex. 3, p. 213, ll. 22-28) that it is "distinctly agreed that the said Contractor shall not assign * * * any right to any moneys to be paid him hereunder * * * without the consent in writing of the Secretary of Highways." The Secretary of Highways (p. 259), Jerome (p. 130, ll. 12-17; and p. 122, l. 38 to p. 125, l. 30; p. 104, ll. 36-40)

and Hays (p. 169, ll. 18-40) all explain that the Department will not recognize assignments and that "it is customary practice in such cases to do what was done by the surety company in this instance, that is, to secure an irrevocable order from the contractor directing that estimate checks be sent to him in care of the creditor" (Secretary of Highways, p. 259). Jerome made a practice (p. 125, ll. 24-27) of also using this method for paying bank loans, that is, he would give the Department of Highways an order to send the check to a specified bank; the bank, upon receipt of the check payable to Eastern States' order, would deposit it to the credit of Eastern States, without requiring endorsement by Jerome, and would then charge the loan or note against Eastern States' account, thereby getting payment on only one signature, viz., Jerome's signature on the said order to the Department of Highways (p. 122, l. 38 to p. 125, l. 30).

In late July and early August, 1929, (Jerome, p. 101, l. 32 to p. 104, l. 5) work on the Clarion-Venango job had been substantially completed and Eastern States was desirous of taking such steps as were required by the contract to enable it to procure from the Commonwealth the "semi-final estimate payment", the pertinent requirements of the contract in respect to payments being found in paragraphs 61, 62 and 63 at page 209.

By reason of the said provisions of the contract the filing by Commercial of the required "Application for Release of Bond" was a condition precedent to the Commonwealth's payment of the semi-final estimate. The form for said "Application for Release of Bond" (Ex. 14,

p. 225) was embodied in the contract between Eastern States and the Commonwealth (Ex. 3, p. 216; Hays, p. 170, l. 36). Though it is referred to as an "Application for Release of Bond", an examination of it, read in connection with the contract, discloses that it is in fact not that, but an application or consent from the surety to release of the semi-final and final payments under the contract (the Court, top p. 171). It recites that the Surety makes the application after an examination or affidavit which "satisfies this Company that all claims for labor and materials have been *satisfactorily settled*." (As to the practice in this regard see *Jerome*, p. 102, l. 20 to p. 103, l. 12; *Hays*, p. 171, ll. 17-32).

At that time (late July and early August, 1929), however, Eastern States owed bills amounting to \$15,593.10 for labor and material furnished to the Clarion-Venango job (Stip. No. 14, p. 67), and in addition to that sum provision also had to be made for settling the claim of McDonald Construction Company, one of the sub-contractors on said job, the amount of which had not then been determined (*Jerome*, p. 103, ll. 13-27; *Hays*, p. 168, ll. 4-21).

To provide for those claims, and in order that Commercial might be in a position to file said application and recite therein that all claims had been "satisfactorily settled", Eastern States, by *Jerome*, on or about August 2nd, 1929, agreed with Commercial, acting through Harold Hays, Assistant Manager of Commercial's Pittsburgh office, that both the semi-final and final payments on the Clarion-Venango job would be made over to Commercial in order that Commercial might apply the money to the payment of said claims. This *July and August, 1929*, arrangement and

agreement, is fully established by the testimony of Hays and Jerome.

Hays testified concerning it at *p. 168, l. 1, to p. 172, l. 14*. "I told him (Jerome) before we would file the release of bond on that, the order must be on record at Harrisburg so we would definitely know the moneys were coming to us and when they would come into us that we would expect him to endorse the checks so that we could secure the money and pay his bills" (*p. 169, ll. 25-31*). Jerome "consented, he said * * * 'I will do it' " (*bot. p. 169, top p. 170*) and he "agreed that when the checks came in they would be endorsed and we would pay their bills" (*bot. p. 171, top p. 172*). Jerome accordingly gave Hays the order of August 2nd, 1929, and when Hays had got the "Application for Release of Bond" executed at his Home Office, he forwarded it together with the order to the Department where they were both received on August 22, 1929, as appears by the notation "8/22/29 McElroy" on each (*Ex. 8, p. 221; Ex. 14, p. 225*). By his letter of August 21, 1929, (*Ex. 49, p. 263*) Hays advised Jerome that they had been forwarded and called attention to the fact that the order referred only to the semi-final and that another order would be required for the final (*See also Hays, top p. 174*). The said order reads:

"Please forward our semi-final estimate check on our Clarion-Venango County contract R-75, Appl. 4788, to us in care of The Commercial Casualty Co., 720 Grant Bldg., Pittsburgh, Penna."

Hays' aforesaid version of the *July-August* agreement is in no way contradicted but in all essential respects is corroborated by Jerome's testimony at *p. 101, l. 32 to p. 105, l. 30; and p. 128, l. 2, to p. 129, l. 9; and p. 87, ll. 10-34*.

When the *semi-final* checks (Exs. 15 and 16, pp. 228-229) were received, Jerome, on *September 5th, 1929*, prevailed upon Hays (p. 172, l. 35 to p. 173, l. 7) not to have them endorsed over to Commercial so that the bills would be paid by Commercial's checks as had been agreed, but to deposit them in Eastern States' account so that the bills would be paid by Eastern States' checks. Bridgeton Bank lays great emphasis on this. The fact is that Hays thereby learned a lesson, for although he took the precaution of himself depositing the check in Eastern States' account and himself mailing out to creditors the Eastern States' checks (Exs. 17-23, pp. 230-231) that were drawn against that very deposit, nevertheless *Eastern States diverted the money to other purposes and the creditors' checks were returned "N. G."* (Hays, p. 172, l. 15 to top p. 175; Stip. No. 23, p. 69; Jerome, p. 87, l. 25, to p. 89, l. 14; and p. 105, l. 30, to p. 107, l. 10). Later Eastern States made said checks good and they were all paid on or before *September 18, 1929*, as appears by the perforated payment dates on them (Exs. 17-23, pp. 230-231). But certainly Hays had learned from this experience that in the future he could place no such reliance on Jerome or Eastern States (see p. 178, ll. 20-24).

Bridgeton Bank's claim as we have said, is based solely on the final payment and not at all on the semi-final payment. Nevertheless the Bank in its bill and proofs dragged in the semi-final payment as a basis for arguing that the fact that the *semi-final* checks were not endorsed over to Commercial is evidence that the *final* checks were not intended to be endorsed over. We submit that on the contrary it all leads up to, lays a basis for, and tends to substantiate Hays' testimony in respect to *the later agree-*

ment that he made with Jerome in about the middle of September, 1929, concerning the final payment, as we shall proceed to show.

It was on *September 5th, 1929*, that Jerome induced Hays not to hold him to his agreement to endorse over the semi-final checks. During the next two weeks thereafter "things began to break" and the whole picture of Eastern States' affairs took on a new aspect.

First, the Eastern States' checks came back "N. G." (Hays, p. 174, l. 26, to p. 175, l. 5).

Secondly, Eastern States had on September 5th made application to Commercial to bond a fourth contract for it, to wit, the Indiana County contract (Application Ex. #24; Stip. #24; Bond Ex. #25; Stip. #25; Contract Ex. #26, Stip. #26; *Hays* p. 174, ll. 20-25; *Jerome*, p. 107, ll. 19-24). To procure that bond Jerome had submitted to Commercial a financial statement of Eastern States (Ex. #48; *Jerome* p. 108, l. 25, to p. 110, l. 18). Hays sent it to the Home Office and says (top p. 175): "shortly after we had reported the Indiana County bond to the home office I received a letter from them complaining severely of our having executed the bond, the information they had in connection with the statement we sent down did not gee up." Jerome admits (p. 109, l. 14) "that very shortly after the application for the Indiana bond was made and this financial statement was submitted to Commercial" Hays spoke to him "about the home office of Commercial having criticized that statement and its accuracy".

Thirdly, "within four or five or six days after the signing of the Indiana County contract" (dated Sept. 5, 1929) several materialmen got in touch with Hays concerning their large bills against the two

Crawford County jobs "and it seemed as though everybody was excited about the money that was due them" (Hays, p. 175, l. 21, to p. 176, l. 15).

Fourthly, in about the middle of September, 1929, it became necessary for Eastern States to "try to raise money to keep the company operating" (Jerome, p. 108, ll. 20-24). Jerome never mentioned to Hays that Eastern States was going to negotiate a loan, but "he was always telling me they were going to provide additional capital * * * it was his expression, it was always additional capital" (Hays p. 177, ll. 17-31). In this Hays is corroborated by Eastern States' minute book (p. 276, l. 30, to p. 277, l. 20; and p. 278, ll. 32-36).

Fifthly, Hays had to tell Jerome "along about that portion of September", i. e., 10th to 16th, that "we absolutely were prohibited from writing any further bonds for the company * * * on account of their financial condition and the bills owing on the Crawford job." (Hays, p. 177, ll. 7-17), and although Eastern States was low bidder on "quite a good sized job" at Merion Center, Indiana County, "I told them we couldn't handle it at all" (Hays, top p. 177; Jerome, p. 107, l. 33, to p. 108, l. 20).

By September 19th, 1929 all three of said jobs (Clarion-Venango; Vernon-Hayfield; and West Meade) had been completed (Stip. #28. p. 71) and it is stipulated that on that date there was "due and unpaid" to McDonald Construction Company in connection with the Clarion-Venango contract the further sum of \$12,370.43, and in addition to that sum there were \$59,060.54 of bills "due and unpaid" on the two Crawford County jobs, (Stip. #28), making a total of \$71,430.97 for which Commercial, as surety, was liable on those three jobs. By the condition of each of said three bonds (Exs. #2, #5 and #7) Commercial was

liable for Eastern States' full performance of all the terms and conditions of each of said three contracts respectively, including payment "for all material furnished and labor performed in and about the construction" of each of said highways respectively. *H. H. Robertson Co. v. Globe Indemnity Co.*, 77 Pa. Super. 422; *Commonwealth v. R. L. Bonham Co.*, 297 Pa. 514. Though the final payment on the Clarion-Venango contract would be more than was necessary to pay the McDonald Construction Company's claim of \$12,-370.53 as a sub-contractor on that job, the final payments on the two Crawford County jobs would not be sufficient to meet the \$59,060.54 of labor and material bills due and owing in connection with them (Stip. Par. 28, p. 71).

It is clear, therefore, that between September 5th and September 19th, 1929, the situation had become critical. Commercial faced a loss. It behooves Commercial to look to its indemnity agreements and to take such steps as were possible "to secure and further indemnify itself against loss" (Ex. #1, Par. 4th, p. 198).

Eastern States' applications and indemnity agreements to Commercial (Exs. #1, #4 and #6) had contemplated just such situation and had accordingly provided, *inter alia*, as follows:

"3rd: That the undersigned will at all times indemnify and keep indemnified the Company and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for or by reason or in consequence of the execution by the Company of any and all other bonds executed for

us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument * * *, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not * * *."

"4th: That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper * * * to secure and further indemnify itself against loss * * *."

"11th: That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said Bond or any former or subsequent Bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the Bond or undertaking hereby applied for, as also concerning all other, former or subsequent bonds and undertakings executed by us or for others at our request."

Under the existing circumstances and under these provisions of the three indemnity agreements, *as between Eastern States and Commercial*, Commercial, as surety, was clearly entitled to demand from Eastern States the sole right to receive the Clarion-Venango final payment as security and indemnity to it against loss on all three of said contracts.

In each of its said three indemnity agreements Eastern States had covenanted (Par. 3rd thereof) that it "will at all times indemnify and

keep indemnified the Company and hold and save it harmless *from and against any and all* liability * * * by reason or in consequence of the execution by the Company of *any and all other bonds* executed for us at our instance and request, and that *we will pay over* * * * to the Company * * * all sums and amounts of money which the Company * * * shall * * * become *liable* to pay, on account of the execution of *any* such instrument * * * such payment to be made to the Company as soon as it shall have become *liable* therefor, whether the Company shall have paid said sum or any part thereof or not."

On September 19th, 1929, Commercial had "become liable to pay" the said sum of \$71,430.97 "in consequence of the execution by" it of said three bonds, and Eastern States was *then* bound to "pay over" that sum to Commercial. That was its covenant. It had *failed* to comply with its said covenant.

In exactly that case paragraph "4th" of the Indemnity Agreements provides "That in the event of the failure of the undersigned to comply with or make due performance of *any covenant hereof*, the Company may at any time thereafter *take such steps as* it may deem necessary or proper * * * *to secure and further indemnify itself against loss* * * *."

That is just what Commercial did. It demanded and took from Eastern States the only sort of assignment of the final payment on the Clarion-Venango contract that was possible or that could be effective "to secure and further indemnify itself against loss" not only by reason of its Clarion-Venango bond, but also "by reason or in consequence of the execution by it

of any and all other bonds executed'' by it for Eastern States, to wit, *between September 5th and September 19th, 1929, Hays demanded and Eastern States, agreed that the said final payment should go and belong to Commercial, as surety, toward the payment of Eastern States' said debts, on all three of said contracts, that Eastern States would order the Commonwealth to send the final payment checks to it in care of Commercial, and that when the checks were received it would endorse them over to Commercial. That agreement and order, we submit, constituted a valid and enforceable equitable assignment of said fund.*

The circumstances were such that it was not possible for Eastern States to do more than that by way of assigning and making over said final payment to Commercial, for the reason, as we have above shown, that the Commonwealth recognizes no assignments of moneys due or to become due under such contract (Jerome, p. 113, ll. 12-33), and refuses to issue checks for such payments to anyone other than the contractor himself (Jerome, p. 113, ll. 20-30). It does, however, recognize the rights of the surety and the necessity of protecting the surety, and, therefore, pursues the practice of mailing the checks to the contractor in care of the surety when it has an order on file directing it to do so. That puts the checks and the money represented thereby entirely beyond the control of the contractor and within the control of the surety. Jerome so understood and intended (Jerome, p. 100, ll. 2-25).

If upon receipt of the checks by Commercial Eastern States had refused to carry out its agreement to endorse them over to Commercial, there seems to be no doubt that a court of equity

would have recognized and enforced Commercial's right to the fund as between it and Eastern States.

If the assignment had been evidenced by such a writing as that which Bridgeton Bank subsequently took, it still would have been an "equitable assignment", and would have been of no greater force or validity merely as a result of its being differently *evidenced*.

The proofs leave no doubt that the aforesaid agreement in respect to said final payment was made between Eastern States and Commercial prior to September 24, 1929, which was the date of the assignment to Bridgeton Bank. Let us review the evidence concerning this *September agreement* between the contractor and the surety.

As we have shown, Jerome, at the time he induced Commercial to file the "Application for Release of Bond," so as to have the Commonwealth make the semi-final payment, agreed to Hays' demand that Commercial should receive both the semi-final and final payments (Hays, top p. 174; Jerome, p. 102, ll. 1-20; and p. 103, ll. 20-39), but *at that time*, as we have shown, the final payment was included in the arrangement only for the purpose of taking care of the final settlement with McDonald Construction Co. for such balance as might be due it in connection with the Clarion-Venango job (Hays, p. 185, l. 18, to p. 188, l. 10). That agreement, however, was made in the latter part of July (Hays, p. 185, ll. 18-22; Jerome, p. 103, l. 22, to p. 104, l. 8). By the middle of September, as we have shown, a very different situation existed.

Hays testified (p. 176, ll. 18-34): "I had three or four conferences with Jerome dur-

ing that period (Sept. 10th to 16th) as to the unpaid bills (on the two Crawford County jobs), advising him as to the amounts that had been filed with us, and the way the material men were acting, because with this new Indiana County job (that had just been bonded on September 5th) it appeared that they would be reluctant to furnish material when they hadn't been paid for the Crawford County job."

Jerome fully agrees with this (Jerome, p. 110, l. 18, to p. 111, l. 38).

Hays testified (p. 178, l. 34): "When he (Jerome) was in on the settlement of the semi-final estimate (that was on September 5th), I told him he had not presented the order for the moneys to come to us so as to take care of the McDonald Construction Company claim, and then in our subsequent conversations, after I found the bills had been unpaid on the Crawford County jobs we further discussed the order and I told him the order would have to be immediately sent in *and when the moneys came in on that contract we would apply any amount left over on the Clarion-Venango job towards the bills of the Crawford County jobs*, because at that time they looked as though they were \$25,000. shy on the two Crawfords, that is, the amount to come from the job and the amount owed on the job, and I told him under the application for bond we had the right to do that, *and when the moneys came into us he would endorse them over to us so we could put them in the bank, and I would not permit him to work the same arrangement he worked before, because of the checks coming back, and furthermore on account of the bills owing, and he said, 'I don't want to see you lose a dime on us, and when the checks come in, all right, I will do that,'* and Jerome went back to Indiana (County) and that order (Ex. #27) that was sent down bears date September 19th, which I presume was the date he wrote the order,

and our conversation and our agreement, however, was before September 19th."

To the same effect see the cross examination of Hays at pp. 185-188.

The order of September 19, 1929 (Ex. #27; Stip. #29) that Eastern States, by Jerome, gave to the Department of Highways pursuant to said understanding and agreement reads as follows:

"Please accept this as an order to forward our final check to us on the construction of Clarion-Venango County, R-75, Application 4788, to us in care of the Commercial Casualty Insurance Company, 720 Grant Building, Pittsburgh, Pennsylvania."

Jerome in no way contradicts this testimony of Hays, but on the contrary in large measure corroborates it—p. 110, l. 20, to p. 112, l. 10.

"Q: To use your own expression, if Commercial hadn't been kept quiet in September they would have taken some steps on the Indiana County job which they had just bonded, wouldn't they? A: Yes." (Jerome, p. 116, l. 38, to p. 117, l. 5).

"Q: And did you tell Mr. Williams (President of Eastern States) that Mr. Hays had demanded of you that you send an order to the State Highway Department making over the final payment on the Clarion-Venango job to the surety company? A: Undoubtedly, yes. Q: Before you sent the order you told Mr. Williams that? A: Yes, Mr. Williams understood we were doing that. Q: So when you sent this order, it was pursuant to an understanding between you and Mr. Williams, was it? A: Right." (Jerome, p. 111, ll. 18-38).

The matter at that time lay solely between the contractor and its surety. No rights of third parties (such as the Bank) were involved. Not only did Eastern States have a perfect right

to agree that the money be made over to Commercial for payment of the said debts, but, as principal, it owed that duty to its surety, and in and by its said Indemnity Agreements it had covenanted that it would indemnify the surety in respect to all three contracts.

Hays' aforesaid testimony, we submit, is clear, definite, and convincing. Not only is it uncontradicted, but it rings true and is consistent with and supported by all the surrounding facts and circumstances. The course which he pursued was the natural course and the one that he was bound to pursue in the discharge of his duty to his employer under such circumstances.

In its brief below, Bridgeton Bank quoted from the letter (Ex. #50 p. 264) that Hays wrote to Jerome in February, 1930, advising him that the Clarion-Venango final payment checks had come in. The Bank's brief said "there was not a word in this letter about unpaid bills on *other* contracts, the sole reference being to the McDonald claim" and that "it is obvious that this letter that both Mr. Hays and Mr. Jerome were concerned at that time only with the McDonald claim."

We submit that in the light of the facts and circumstances proved, the letter justifies no such inference. The September agreement between the parties was, *inter alia*, that "when the moneys come in on that contract (Clarion-Venango) we would apply *any amount left over on the Clarion-Venango job towards the bills of the Crawford County jobs*" (p. 178, ll. 12-15). Not until a settlement could be effected in respect to McDonald's excessive claim on the Clarion-Venango job could it be determined how much,

if anything, would be left out of the Clarion-Venango final payment to apply on the Crawford County jobs. That was why Hays referred only to the McDonald claim in his said letter. The McDonald claim came first. Hays' anxiety to have something left over after payment of that claim resulted in his suggesting in his said letter "that next week a day be set aside to review the entire transaction and an attempt be made to satisfactorily settle this account." If any excess remaining were simply to be paid over by Commercial to Bridgeton Bank, Hays would not have been so much concerned about the satisfactory settlement of the McDonald claim. Note also that this letter of February 11, 1930, (Ex. #50) was written just after Jerome's letter to Hays of January 31, 1930 (Ex. #45, herein-after quoted) in which Jerome had said, "you will receive our final estimate on the Clarion-Venango contract within a very few days and on receipt of it you can apply it to these" Crawford County jobs.

Further evidence and corroboration of the aforesaid agreement between Eastern States and Commercial is found in the fact that in January, 1930, before the final payment checks on the Clarion-Venango job had been received, a question arose as to Commercial's filing the required "Release for Application of Bond" in respect to the two Crawford County jobs, and that in connection therewith Eastern States wrote to Commercial on January 31, 1930, (Ex. 45, p. 254) saying:

"We realize that the amounts owed are more than the estimates will be but *you will receive our final estimate on the Clarion-Venango contract within a very few days and*

on receipt of it you can apply it to these accounts, all except the amount owed to McDonald Construction Co. (i. e., on the Clarion-Venango job) which you know about. We also have an item of \$1500.00 due us from the Supervisor of Rockdale Twp., Crawford County, which we will send you to apply against these bills. This will more than balance these accounts so you need not feel alarmed at releasing the bond on the Crawford County jobs."

(Incidentally, note how utterly inconsistent this letter is with Jerome's testimony (pp. 112-121) that on or about October 1st, 1929, by letter and telephone he had notified Hays of the assignment to Bridgeton Bank.)

Further evidence and corroboration of the said agreement is found in a letter (Ex. 46, p. 255) that Jerome wrote to Albert R. McAllister, Treasurer of Eastern States, under date of September 21, 1930. It will be noticed that that letter was written seven months after Commercial had received the Clarion-Venango final payment, and six months after Bridgeton Bank had sent its letter of March 28, 1930 to Commercial, and sometime after Bridgeton Bank had threatened Mr. McAllister with criminal prosecution. Apparently Mr. McAllister was trying to find out what had happened, and Jerome explained to him in that letter. He mentioned the fact "that we could not obtain that money for ourselves," and said "the check had to go to the Bonding Co. * * * as we owed so much on other jobs they were interested in." He said, "I told you about this at the time." He then reminds Mr. McAllister that "at that time we still had hopes of coming through O. K.", and mentions the fact that "Commercial would undoubtedly ask to take over all jobs immediately" (i. e., if its aforesaid demand for indemnity had not been complied

with) and then states that it was "*in order to keep Commercial quiet*" that he did what he did. On oral examination also, Jerome definitely testified that "if Commercial hadn't been kept quiet in September they would have taken some steps on the Indiana County job they just bonded" (p. 116, l. 38, to p. 117, l. 5).

As a circumstance lending even further probability and certainty to the fact of said September agreement concerning the Clarion-Venango final payment is the fact that exactly the same procedure was subsequently followed in respect to the final payments on the two Crawford County jobs (Jerome, p. 99, l. 32, to p. 100, l. 25; Stip. #39 and #40, pp. 74-75; Checks, Ex. 37 and Ex. 38, pp. 244-245) in respect to which Jerome testified that he "understood the checks represented the money" and "understood that the *money* from those jobs * * * was coming from the State in care of Commercial." Furthermore, there is the fact that Jerome was accustomed to pay bank loans by the same method, as we have shown above.

Such are the proved facts under this Point I. It remains to cite the authorities in respect to such equitable assignment.

This was an equitable assignment of money to become due (earned), and operated upon the fund as soon as it became due. *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq., (E. & A.) 809 at 813.

"anything which clearly manifests the *intention* of the creditor to make a specific appropriation of a particular thing to a particular purpose and a willingness on the part of the transferee to accept such appropriation, may take effect as an equitable assignment" 2 R. C. L. 620.

"What amounts to a present appropriation, which constitutes an equitable assignment, is a question of intention to be gathered from all the language, construed in the light of attendant circumstances" 5 C. J. 910.

In *Bank of Harlem v. Bayonne*, 48 N. J. Eq., 246 at 252-253, Vice-Chancellor Green states the incidents of an equitable assignment, citing numerous authorities.

So, also, does Judge Rellstab in *re Stiger* (N. J. Dist.) 202 Fed. 791.

And see also:

3 *Pomeroy's Eq. Jr. Sect.* 1280.

Germania &c. Assn. v. Fraenkel R. Co., 82 N. J. Eq. 49 at 61.

Brindze v. Atlantic City &c. Assn., 75 N. J. Eq. 405.

Brokaw v. Brokaw, 71 N. J. Eq. 215 at 218.

Cope v. Walton Co., 77 N. J. Eq. 512 at 515; affirmed 79 N. J. Eq. 165.

Essex County v. Lindsey, 41 N. J. Eq. 189 at 196.

Bernz v. Marcus Sayre Co., 52 N. J. Eq. 275 at 282.

Seyfried v. Stoll, 56 N. J. Eq. 187 at 189.

"Any writing or act which indicates the intent of the assignor to make an appropriation of the fund or part of it will in equity be enforced as an assignment." *Weaver v. Atlantic Roofing Co.*, (Grey, V. C.), 57 N. J. Eq. 547 at 553. *Harlem Bank v. Bayonne*, 48 N. J. Eq. 246 at 253; *Bower v. Hadden &c. Co.*, 30 N. J. Eq. 171 at 173.

In view of the prohibition against assignment and the practice of the Highway Department, the order of September 19th constituted everything that was possible for Commercial "to lay hold of that thing (final payment) in the manner in which its nature permits it to be laid hold of."

Board of Education v. Duparquet, 50 N. J. Eq. 234 at mid. 240.

There was an actual appropriation which conferred a present right on Commercial, although the circumstances did not admit of its immediate exercise. *Cogan v. Conover Mfg. Co.*, (E. & A.), 69 N. J. Eq., 809 at 811.

In *Lanigan v. Bradley & Currier Co.* (Pitney, V. C.), 50 N. J. Eq. 201, the equitable assignment of part of the contract price to become due to a builder *was made out altogether by parol agreement to assign and acts thereunder*, and the assignee's claim to the fund was held superior to that of materialmen who had served stop notices on the owner.

Eastern States, by its agreement with Commercial and its order to the Secretary of Highways given pursuant thereto, *parted with the control of the fund*. *Lanigan v. Bradley & Currier*, 50 N. J. Eq. 201 at 205-206. It is true that because of the Commonwealth's practice the final payment check was expected to be drawn to the order of Eastern States, but that fact did not leave control of the fund with it. It could not get the fund without the checks and the checks were to be delivered to Commercial. It could not get the checks or the fund away from Commercial because it had agreed that the fund should go to Commercial. If it had become necessary, equity would have enforced that agreement. It did not become necessary because Eastern States endorsed over the checks as by its promise it was bound to do. Eastern States' *promise* was not consistent with the funds being paid to or received by Eastern States. (*id. bot. p. 205*).

In *Lanigan v. Bradley & Currier*, *supra*, at p. 206, Vice-Chancellor Pitney refers to the test

laid down in *Trist v. Child*, 21 Wall 441: "Does the contract or arrangement in question authorize the depositary of the fund to pay it directly to the creditor or party claiming as assignee without the further intervention of the debtor or party originally entitled to it?" The promise and agreement of Eastern States to make over the fund to Commercial would have authorized the Commonwealth to pay it directly to Commercial but the Commonwealth was unwilling to do so. In our present case further intervention of Eastern States was contemplated by the arrangement to the extent only that it had promised to endorse over the checks, and that intervention was contemplated only because of the necessities of the situation—there was no other way of doing it. If upon receipt of the checks by Commercial, Eastern States had refused to endorse them, the decree of a court of equity for the specific performance of that promise would have constituted authorization to the Commonwealth to pay directly to Commercial. Or, if upon Eastern States' refusal to endorse the checks, the Commonwealth has deposited the money in court and interpleaded Eastern States and Commercial, title to the fund would have been decreed to be in Commercial. And if the Commonwealth had been willing to pay the fund directly to Commercial, it would in equity have been authorized, justified and protected in so doing, for that was the intended result and effect of the agreement between Eastern States and Commercial. Eastern States could not have complained of it for it would have constituted nothing else than a short cut to the promised end. The only reason that the arrangement provided for the checks coming to Commercial and being endorsed over by Eastern States was that it was known to both parties that the Commonwealth would not recog-

nize any assignment of the fund and would not pay otherwise than by checks drawn to the order of the contractor.

So, it has been held that a contract for the sale of flour which contained the following: "I also agree to indorse the cheques from the asylum and hand over to you as received by me in settlement of the accounts" constituted an equitable assignment of the moneys from the checks as and when received from the asylum. *West v. Newing*, 82 L. T. Rep. (N. S.) 260.

An agreement that funds to arise out of the performance of a contract should be paid to indorsers of notes given to raise the money to enable the parties to perform the contract constitutes an equitable assignment. *York v. Conde*, 61 Hun. 26, 15 N. Y. S. 380.

In *Union Trust Co. v. Bulkley* (C. C. A., 6th Cir.) 50 Fed. 510, a parol assignment of book accounts existing and to come into existence, was sustained as against the trustee in bankruptcy of the assignor and in favor of the assignee who in reliance upon the oral assignment had become endorser on the assignor's note. The court said:

"Circumstances are strongly corroborative of the truth of petitioner's (i. e., the assignee-endorser) testimony that there was a present assignment coterminous with the continuance of the indorsements * * *. That it was a valid agreement, though resting only in parol, cannot be gainsaid" (p. 513).

* * * * *

"The interest conveyed by an assignment to secure the assignee against liability as an indorser (surety) is commensurate in degree and duration with the liability it secures. *Hamlin v. European Co.*, 72 Me. 83. The transaction has all the elements of an equitable assignment of that kind of property as effectually as if it were created by mortgage,

although not evidenced by writing (*Merchants Bank v. Gregg*, 107 Mich. 148; 64 N. W. 1052; *McDonald v. Daskam*, 116 Fed. 276; 53 C. C. A. 554), and meets all the requirements to its validity as an assignment declared in *Wright v. Ellison*, 68 U. S. 16-22; 17 L. Ed. 555, where it is said 'it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor and an agreement that the creditor should be paid out of it.''' (*id.* p. 514).

"It is well settled that an assignment of choses in action by parol for the purposes of security is valid'' (*id.* p. 517).

"The rights accruing from such a transaction depend upon equitable principles which are part of the general law'' (*id.* p. 517).

BISPHAM'S PRINCIPLES OF EQUITY
—9th Ed.—P. 288, Sec. 167: "No particular form of words is necessary in order to make a valid assignment of a chose in action. Nor is any written instrument required, for it is sufficient if there is a verbal declaration, whereby the intention to part with the ownership of the chose is properly manifested. Thus if defendant is a creditor of B, and wishes to transfer the debt to C, an order, verbal or written from defendant, directing B to pay the amount due to C, will be a good equitable assignment."

On the basis of these cases, we submit, the oral agreement between Jerome and Hays which led to Jerome's order of September 19, 1929 to the Highway Department directing them to send the checks for the final estimate payment to Commercial constituted an equitable assignment of the fund. All the elements of an equitable assignment were present. There was a mutual intent and assent and an appropriation of the fund to the use of Commercial for the purpose aforesaid.

POINT II.

In addition to and entirely independently of the equitable assignment shown in Point I, the equitable right and title to said fund was vested in Commercial by the assignment contained in Clause "6th" of the Indemnity Agreement and by Clause "11th" was applicable to payment of debts on the other contracts.

Clause "6th" of Eastern States' said Indemnity Agreements, to which clause no reference has hereinabove been made; *also* constituted an assignment to Commercial of said final payment. It is as follows:

"6th. That in further consideration of the execution of said Bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all monies and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said Bond."

The assignment contained in that clause is, in effect, not absolute but contingent. It assigns "all the deferred payments and retained percentages, and any and all monies * * * that may be due and payable * * * *at the time of any breach or default in said contract*, or that thereafter may become due and payable." That is, the assignment is contingent upon there being "any breach or default in said contract."

There never was a "default" of the contract in the sense that Eastern States abandoned or failed to complete the work, but we submit that on September 19, 1929, there existed such "breach" of the contract as was intended by the parties to this Indemnity Agreement to make the assignment effective. One of Eastern States' obligations under the contract was to pay all labor and material bills. *It is stipulated* that on September 19th such bill in the sum of \$12,370.40 was "*due and unpaid by Eastern States*" on the Clarion-Venango job (Stip. Par. 28), and as a result thereof Commercial was *liable* therefor. A reading of the entire Indemnity Agreement and a consideration of the relation of suretyship that existed between Eastern States and Commercial makes it clear, we submit, that it was just such situation and contingency that was intended to make over to the surety for its indemnification the moneys due and to become due under the contract—a breach, a failure on the contractor's part to perform its obligation whereby a liability fell on the surety that would not otherwise exist against it.

The contingency existing, clause "6th" operated to make over the entire final payment to Commercial, and clause "11th" made it "available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds", that is, for the \$12,370.40 "due and unpaid" on the Clarion-Venango job and also the \$59,060.54 "due and unpaid" on the said two Crawford County jobs (Stip. #28).

The wording of the Indemnity Agreement and the fact that there existed the aforesaid "breach", distinguished this case from such cases as *Massachusetts Bonding Co. v. Chouteau*,

264 Fed. 793, which construes almost the identical assignment clause that is here involved. In that case no breach or default of the contract appeared, and it was therefore held that the assignment intended in that particular clause had not become operative. That case makes it clear, however, that in this present case the assignment had become effective because the contingency of "any breach * * * in said contract" had occurred within the meaning and intent of *this* contract, bond and indemnity agreement.

Lacy v. Maryland Casualty Co. (C. C. A., 4th Cir.). 32 F. (2d) 48 involved similar (but not identical) provisions in the application agreements. The surety was held entitled to apply retained percentages from one contract to the discharge of its liability on other contracts pursuant to the provisions of the Application Agreement.

Southern Surety Co. v. Greenville, 261 Fed. 929 and 264 Fed. 793, turned upon a provision in the indemnity agreement that if the surety released, the provision for assignment should be void. There is no such provision in our present indemnity agreement, nor any such release by the surety as was there involved.

In Fidelity & Deposit &c. v. Central Bank, 48 Fed. (2d) 477, the appellant surety had lost its lien by failing to assert it when payments were made.

We repeat now, as we did in the court below, that we urge this Point II as being entirely independent of and in addition to the oral agreement and equitable assignment shown under Point I.

POINT III.

Eastern States held William F. Jerome out to Commercial as its agent with whom Commercial might deal in respect to all matters connected with the said bonds and contracts, and never in any way repudiated his acts, but accepted the benefits thereof, and ratified and confirmed the same, and is bound thereby. The Bank has no standing to claim that Jerome's acts were not binding on his company.

We take it to be the well settled law (1) that in addition to the powers expressly conferred upon an officer or agent of a corporation by the directors he will be held to have those which may be inferred from the manner in which he has been permitted by the directors to transact its business, and (2) that his corporation cannot be heard to repudiate his acts after it has ratified, acquiesced in or knowingly profited by them.

Aerial League v. Aircraft Corp. (E. & A.)
97 N. J. L. 530.

Peach v. Palisade Realty & Amusement Co. (E. & A.) 86 N. J. L. 238.

Phoenix Pottery Co. v. Perkins Co., 79
N. J. L. 78.

Crossley v. St. Philip Neri Corp., 74 N. J.
L. 653.

Dierkes v. Land Co., 80 N. J. L. 369.

Jackson Realty Co. v. Lehman, 83 N. J.
Eq. 636.

Murphy v. Cane, 82 N. J. L. 557, 563.

Byron v. Byron, Hefferman & Co., 98 N. J.
L. 127.

In *Flaherty v. Atlantic Lumber Co.*, 58 N. J.
Eq. 467 at 473, it was said:

"The doctrine that a corporation may act only by a resolution of its board, and under

its corporate seal, has long been abandoned. In the conduct of its ordinary business a corporation acts by its agents, who may be appointed without formal action of its board and not even in writing. *American Insurance Co. v. Oakley*, 9 Paige 500. Corporations may be bound by acceptance and ratification of previously unauthorized acts of an agent, even when in the course of his principal's business he perpetrates a fraud." *Garrison v. Technic Electric Co.*, 10 Dick. Ch. Rep. 708.

Eastern States was incorporated July 9, 1927 under our New Jersey General Corporation Act (Ex. 51, p. 266). It was a closed corporation consisting of about seven or eight stockholders, none of whom, excepting William H. Williams, President, and William F. Jerome, Assistant Secretary and Assistant Treasurer, appear to have known anything about or to have had anything to do with the road building business that the company was organized to engage in. During its whole existence its directors held only eight meetings (Ex. 62, pp. 274-280), only two of which, viz., February 22, 1930 and April 30, 1930, were held after the Clarion-Venango contract was entered into on April 14, 1928, that being the first of the four contracts that Commercial bonded.

At the first meeting of directors held on July 9, 1927 (Ex. 62, pp. 274-275) the offices of Assistant Secretary and Assistant Treasurer were created by resolution and Jerome was appointed to those offices. William H. Williams, who served as President throughout the life of the Company, was at that first meeting "duly elected General Manager of the Company with full power to do all the things properly coming under the jurisdiction of a General Manager in connection with the Company's business."

From that time on Williams and Jerome ran the Company, and it clearly appears by the record that all of the others took no active part in the conduct of its business affairs. Though Mr. McAllister was Treasurer and Secretary, his testimony makes it clear that he knew nothing about the Company's affairs except what Jerome told him.

Jerome testified: That "there were only two active carriers-on of the business affairs of Eastern States," viz., Williams and himself (top p. 99); that Williams attended to the actual construction work and Jerome carried on all other phases of the business (p. 99 and p. 101, l. 15); that McAllister, the treasurer, "didn't know anything but what I told him" (p. 98, l. 37); that on the two Crawford County jobs he, Jerome, signed the orders to the Department and endorsed the checks when they were received (p. 100); that so far as he knew the things he did for and on behalf of Eastern States were accepted by the company as having been done by him for it (p. 101, ll. 19-31); that nobody questioned what he was doing (*id.*); that he was a director as well as having the title of Assistant Secretary and Assistant Treasurer (*id.*); that he nightly consulted Williams about the affairs of the Company (*id.*); that he "always kept him advised of what happened" (p. 111, l. 25); *that before he sent the order of September 19, 1929, to the Department of Highways, he told Williams that Hays had demanded of him that he "send an order to the State Highway Department making over the final payment on the Clarion-Venango job to the surety company"* (p. 111, ll. 26-38); *that when the order of September 19th was sent, it was pursuant to an understanding between him and Williams* (*id.*); that he himself, by his own name alone, signed the application for this bond, bought every bit of the material for these contracts, signed orders for the pur-

chase of the materials, signed contracts and subcontracts, opened bank accounts in various places (mentioning five of them), gave orders to the Department of Highways to send checks to specified banks, thereby applying the proceeds of the checks to the payment of loans, with no signature but his own, and arranged loans at these various banks (p. 121, l. 39 to p. 127, l. 15); that he was the only representative of Eastern States who ever had any dealings with the Highway Department, except that Williams "went in occasionally" (p. 126, l. 10); *that from beginning to end he himself was the representative of Eastern States who had all dealings with Commercial and with the various banks that he mentioned (p. 126); that he himself wrote all letters to Commercial and signed his own name, and Williams wrote no letters (p. 126); that he kept the books of Eastern States and maintained offices from time to time at different places where contracts were being performed (p. 126).*

Maier, Vice-President, testified that the affairs of Eastern States were in the hands of Williams and Jerome who "were the main men on the job", (p. 156, ll. 20-30) and his testimony shows that he knew practically nothing about the company's affairs.

McAllister testified: That he was Treasurer (p. 139, l. 23); that he had nothing to do with the keeping of the books, which was done by Jerome (p. 141, l. 10); that he, McAllister, had nothing to do with depositing money, except such sums as Jerome sent "for deposit in our local banks" (p. 141, l. 14); *that Jerome had authority to sign checks, endorse checks, and issue checks (id.); that he did not know how signature cards were made out in any of the banks where the company had accounts, except the two banks at Bridgeton (p. 143, l. 15); that he never had any knowledge about the debts his company owed on these jobs until the conference at which the stipulation in this*

case was prepared (bot. p. 148); that he had "nothing whatever to do with the mechanical operation of the company" (bot. p. 151); that most of the company's money was deposited in banks outside of Bridgeton, that is, it was deposited in the field accounts that Jerome opened (bot. p. 157); that he "probably did sign some checks on the Bridgeton banks" but never any on any outside bank (bot. p. 159); that Williams as general manager "was given full power to do all things properly coming under the jurisdiction of general manager in connection with the company's business", that it wasn't possible for Williams to do personally everything that had to be done, so that "perhaps" the motion giving power to Williams "implies" power to direct others to do things (that is, to leave it for Jerome to do) (p. 160, l. 28 to p. 161, l. 10).

Hays testified: That he had practically all his dealings with Jerome; "the only time I would have dealings with Williams in a business way would be in connection with quantities on the job, to determine the certain kind of fill, or concrete, with the physical portion of the job" (p. 165); that he had contact with no representative of Eastern States other than Jerome and Williams (p. 165); "Mr. Williams was the construction man handling the job and prosecuting the job" (p. 165); Jerome handled the finances and all other phases of the business (p. 165, l. 35 to p. 166, l. 15); all letters were signed by Jerome and he never saw a letter signed by Williams (p. 166); that Jerome "was the company" (p. 166, l. 38) and signed applications, financial statements, orders, contracts &c. (bot. p. 165 to p. 166, l. 28); "When I would speak to him (Williams) about something of a financial nature, he would refer me to Jerome. He said Jerome was the man handling the finances of the company, and he knew nothing about it." (p. 166, ll. 9-15).

The extent to which Jerome "was the company" as to all matters other than the actual construction work which Williams took charge of, is further evidenced by the exhibits in the case, as, for instance, he alone signed three of the applications for bonds (Exs. 1, 6 and 24); he alone signed the order to the Department of Highways of August 2, 1929 (Ex. 8) as well as the order of September 19, 1929 (Ex. 27), and as well as the orders by which he paid bank loans as above set forth; he alone endorsed over to Commercial not only the two Clarion-Venango final payment checks in question (Exs. 34 and 35) but also the two final payment checks on the Crawford County jobs (Exs. 37 and 38); he alone signed the request to the Department of Highways to declare a default on the Indiana County job (Ex. 39), and in this regard let it be noted that the Department's reply (Ex. 40) to said request was addressed to Eastern States at Mr. McAllister's office (p. 247); Jerome's letter to Commercial of January 31, 1930 (Ex. 45, p. 254); Jerome's letter to Mr. McAllister of September 21, 1930 (Ex. 46, p. 255), in which he said "I told you about this at the time" and in which he makes it apparent that the others knew only what he reported to them; he alone signed and furnished the financial statement (Ex. 48, p. 260); and he alone signed the notice of default to the Pennsylvania surety company (Ex. 63, p. 280) and to the McDonald Construction Company (Ex. 64, p. 281).

And let it be noted that in the minutes of the directors' meeting of February 22, 1930 (p. 278), after the Clarion-Venango final payment checks had been received and endorsed over by him to Commercial, Mr. Jerome "was present and presented figures" and there was "a general dis-

cussion of the affairs of the company", with the result that "Mr. Williams stated that in his opinion additional capital should be secured in order to take care of the bills and make possible the taking of discounts." We submit that it is simply unbelievable that under these circumstances the directors did not know of and approve all that Mr. Jerome had done in respect to said Clarion-Venango final payment. According to the testimony above quoted he was in constant touch with Mr. Williams concerning it at the time and did it all with Mr. Williams' knowledge and approval. Furthermore, in his letter to Mr. McAllister he said (p. 256, l. 12) "I told you about this at the time."

Bridgeton Bank offered in evidence four checks (Exs. 55-58, p. 273) by which Eastern States had made payments to Commercial, and argues that because these checks bore the signatures of two officers Commercial was thereby put on notice of a limitation of Jerome's authority. We admit that some of the bank accounts were opened in such manner as to require the signatures of two officers on checks, but there is no proof that they were all opened in like manner. If the checks that Bridgeton Bank offered in evidence are notice of anything, certainly the notice does not extend beyond what appears on the face of the checks, to wit, that those particular checks bore two signatures, from which it might be inferred that the particular bank account on which they were drawn had been opened in such manner as to require two signatures for withdrawal of funds from that particular account. That has no relation to Jerome's apparent authority to deal with all relations between his company and its surety, to order the checks sent to Commercial for payment of said debts, to endorse

the checks over to Commercial pursuant to his agreement to do so, and "*to keep Commercial quiet.*"

The evidence of the Bank's own witnesses, as well as ours, is all to the effect that Williams and Jerome had absolute and unqualified authority to manage the affairs of the company and that everything that Jerome did in his dealings with Commercial was done with the knowledge and approval of Williams.

The by-laws and resolutions of directors (it not being claimed by the Bank that Commercial had any knowledge of them) are of no consequence in this case because it is uncontroverted that, no matter what the by-laws and resolutions said, the fact is that everybody connected with Eastern States was content to leave all the affairs of the company in the hands of Jerome and Williams and to accept and adopt everything that they did in the way that they did it.

Bridgeton Bank, in the court below, laid great emphasis upon the fact that when Hays had his stenographer typewrite the endorsement on the back of the final payment checks in question (Exs. 34-35, pp. 241-242), she neglected to typewrite the words "Assistant Secretary and Assistant Treasurer" under the line provided for Jerome's signature, and neither Hays nor Jerome noticed the omission (Jerome p. 100, l. 22 to 100, l. 14; Hays, p. 180, l. 26 to p. 181, l. 10).

First let it be noted that Eastern States, by the stipulation herein, recognizes that it approved and adopted said endorsement by Jerome. It says (bot. p. 77 of Stip.) that "Commercial properly and lawfully" paid McDonald \$12,370.43

"out of the proceeds of said final estimate checks." Of course, it could not have done so "properly and lawfully" unless the checks and proceeds thereof had first been properly and lawfully made over to it. Indeed, after the checks had been made over to Commercial, Eastern States, instead of repudiating the endorsement, O. K.'d the bills that Commercial was to pay out of the proceeds of the checks (Jerome, p. 132, ll. 20-30 and top p. 133), and this was done with the knowledge and assent of McAllister, Treasurer of the company (Ex. 46, p. 255).

Bridgeton Bank is in no position to question the endorsement of the checks to Commercial by Jerome. The Bank was not named as payee in the checks and, as negotiable instruments, had no right, title or interest of, in or to them. The fact that Eastern States endorsed the checks over to Commercial gives the Bank no rights greater than or different from what it would have had if the checks had been made payable directly to Commercial as the payee named therein. Neither the checks nor the endorsement of them gave rise to any rights in the Bank.

The Bank apparently attempts, first, to establish some right existing in Eastern States against Commercial by reason of the allegedly unauthorized endorsements, and then to treat those rights as somehow or other inuring to the Bank's benefit. *But the Bank holds no assignment from Eastern States of any claim that Eastern States had or might claim to have against Commercial,* and in any event Eastern States cannot complain of the endorsement and deposit of the checks because, among other things, it knowingly received the full value of the checks in and by the payment of its said debts.

It is clear that Eastern States did not deem the endorsement of the checks by Jerome to be unauthorized. The endorsements were in recognition by Eastern States of Commercial's right and were made pursuant to the agreement that Eastern States, by Jerome, had made with Commercial, as aforesaid, that it would endorse over the checks.

We submit that even now it is not actually and in fact Eastern States that is attempting to repudiate Jerome's acts more than three years after they occurred, but that it is the Bridgeton Bank that is doing so and, with the assistance of Mr. McAllister, who was instrumental in procuring the loan from the Bank and who says (Ex. 43) "I am vitally interested", is dragging Eastern States into the litigation, apparently upon some theory that Eastern States' repudiation of Jerome's acts will open the door to the Bank's recovering from Commercial.

Not until after Bridgeton Bank's bill was filed herein on August 26, 1933 (practically four years after Jerome had done the things now complained of) was there any appearance whatsoever of Eastern States in any way repudiating or questioning Jerome's authority to do what he did.

The final checks on the two Crawford County jobs were endorsed over to Commercial by Jerome just as he had endorsed over the Clarion-Venango final checks (except that the "Asst. Secty. & Asst. Treas." appears under his signature on those endorsements). The proceeds of all the checks were disbursed by Commercial in payment of Eastern States' aforesaid debts. The money remained for some time in Commercial's hands before it was disbursed (Ex. 46). Mr.

McAllister knew of it and there can be no doubt that the other officers and directors of Eastern States also knew of it. Nevertheless, there is no suggestion that Eastern States ever in any way questioned Commercial's right to have the money or expressed to Commercial even a doubt as to Jerome's authority to do what he had done.

POINT IV.

Bridgeton Bank by the purported assignment to it did not acquire a right to the fund superior to Commercial's right, and has not made out a case against Commercial.

A.

On September 24th, 1929, Bridgeton Bank, we submit, took its assignment chargeable with notice and knowledge of Commercial's aforesaid right and title to said final payment.

Eastern States' order of September 19, 1929 was immediately filed with the Secretary of Highways. (Stip. Par. 29; Ex. 27; see also Ex. 47). Unless Bridgeton Bank was willing to accept "a pig in a bag" as security for its loan of September 24th, 1929, to Eastern States, it was incumbent upon the Bank to make inquiry as to what right and title to the fund in question Eastern States had and could assign to it and what prior assignments of and rights against the fund already existed.

"In order to deprive an assignee of standing as a bona fide purchaser, it is not necessary to show that the assignee had actual knowledge of the equity at the time of the assignment to him; it is sufficient to prove knowledge by the assignee of facts sufficient to put him upon inquiry which, if pursued, would lead to actual knowledge" 5 C. J. 975.

Haverstick v. Sheirich, 304 Pa. 437; 155 Atl. 159.

If the Bank had inquired of the Secretary of Highways, as any careful person would have done under the circumstances, it would have been advised of the order of September 19th. This is evident from the fact that in response to its first letter to the Department of Highways (Ex. 41 dated January 13, 1930) the Department did in fact advise it that the final payment "check will be mailed to the Commercial Casualty Insurance Company" (Ex. 42, dated January 17, 1930). Knowledge of the order and of the fact that the final check was to be mailed to the surety company would certainly have been sufficient to put the Bank to further inquiry from the surety company, and that would have resulted in its being fully informed of the surety company's right and title to the fund.

Moreover, unless the Bank was willing to accept "a pig in a bag," it was incumbent upon the Bank to examine the contract under which the payment in question was to become due, and from such examination it would not only have learned that the contract itself (Ex. 3, p. 213, ll. 22-28) expressly prohibited such assignment as was proposed to be made to it, but it would also have learned that Commercial was surety and that as surety it had an interest in the final payment. That, again, would have required inquiry from Commercial and would have resulted in the Bank's being fully informed of Commercial's right and title to the fund.

The Bank, however, made no inquiry of the Secretary of Highways until its letter of January 13, 1930 (Ex. 41), and made no inquiry of Commercial until March 28, 1930 (Stip. Par. 38;

Ex. 36). It chose to accept "a pig in a bag," and cannot be heard now to complain of the result—at least, not as against Commercial, which was in no way at fault.

"The office and value of notice of the assignment, given by the assignee of a debt or money held on deposit or in trust, to the debtor, depositary or trustee, is to prevent the debtor, depositary or trustee and *innocent third parties from dealing with the original assignor* as still the creditor, owner or beneficiary." (syllabus) *Board of Education v. Duparquet* (Pitney, V. C.) 50 N. J. Eq., 234. (The Vice-Chancellor's opinion in that case deals at length with the subject of notice given by an assignee). So, in our present case, the order on file with the Secretary of Highways was notice to everyone who might thereafter deal with Eastern States in respect to said final payment (*Haverstick v. Sheirich*, 304 Pa. 437; 155 Atl. 159; 76 A. L. R. 912). That order and notice operated to deprive Eastern States of "the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him (Eastern States) absolutely, free from encumbrance * * *." That precaution is always taken by diligent purchasers and encumbrancers. If it is not taken, there is neglect; * * *." *Board of Education v. Duparquet*, *supra*, at 240.

"The burden of proof is on the subsequent assignee to show that he was a bona fide purchaser for value, without notice of the prior assignment." 5 C. J. 956, Note 60.

"If a purchaser has before him facts which should put him on inquiry, it is equivalent to notice of the fact in question." *Tantum v. Green* (E. & A.) 21 N. J. Eq. 364 at 367.

Jerome said "I presume I did" tell Mr. Garrison, President of the Bank, at the time the assignment was made to the Bank, that he, Jerome, had sent the order of September 19th to the Department of Highways to send the final payment to Commercial (p. 114, ll. 10-18 and p. 130, ll. 2-30; and see p. 97, l. 38 to p. 98, l. 14). Mr. Garrison denies this. However, that may be, it behooved the Bank to inquire of the Department of Highways, and such inquiry would have revealed what Mr. Garrison says Eastern States did not tell him.

B.

The assignment to the Bank was not effective to transfer a right superior to Commercial's right because, *inter alia*, of the covenant against assignment contained in the contract and in Eastern States' application for the bond.

The very contract referred to in the Bank's assignment provides (Ex. 3, at p. 213, ll. 22-28) that it is "distinctly agreed that the said Contractor shall not assign *any right to any moneys to be paid him hereunder*, without the consent in writing of the Secretary of Highways." The Secretary of Highways gave no such consent to the purported assignment to the Bank. This was not the ordinary case of a stipulation against assignment involving merely the contractor and contractee, for here the surety was also involved. That prohibition of assignment was of as much importance to the surety as to the Commonwealth. The contract that Commercial guaranteed as surety was the contract with that provision in it. It cannot be assumed that Commercial would have become surety in the absence of that stipulation. It was part and parcel of the bond that Commercial executed. The contract stip-

ulates (p. 214, ll. 8-13) that "the bond * * * is hereto attached and made a part hereof." So, also, the bond recites the contract (p. 203, ll. 30-40; and p. 204, ll. 18-23). The bond and contract are bound together in one printed book (p. 216). Each is part of the other, and the two together constitute Commercial's undertaking as surety. The Commonwealth, Eastern States and Commercial, *all three*, in and by the bond and contract, had made moneys to fall due under the contract *non-assignable* without the written consent in writing of the Secretary of Highways, and, clearly, in giving consent to any assignment of moneys to become due under the contract the Secretary of Highways would owe a duty to the surety. "The contract * * * was specifically made a part of this bond and the two must be read together and construed as a whole." *Meyer v. Standard &c. Co. (E. & A.) N. J. L.* ; 177 *Atl.* 255.

Furthermore, in its application (Ex. #1) to Commercial for the bond, Eastern States said (p. 190, l. 37): "The undersigned guarantees the truth of all answers to the following interrogatories." Interrogatory #29, (top p. 195) and the answer of Eastern States thereto are as follows: "29. *Have you assigned or will you assign your payment on this contract, or any part thereof?—No.*" Commercial entered into the bond in reliance upon that guarantee, and in reliance upon the bond the Commonwealth entered into the contract, which contract also stipulated against and prohibited assignment. *There was, therefore, no right of assignment remaining in Eastern States to the detriment of its surety.*

"The parties to a contract may expressly prohibit assignment and such stipulation will

be recognized and enforced by the courts." 2 R. C. L. 599, and cases there cited.

This was a *tripartite* agreement. The prohibition in question, under the circumstances, was not merely for the protection of the Commonwealth, but was also a protection to the surety as one of the parties on the bond, which bond was a part of the contract itself. Of all of this, as we have shown, the Bank was chargeable with notice.

Such cases as *Burnett v. Jersey City*, 31 N. J. Eq. 341, wherein it has been held that such provisions against assignment are for the protection of the parties to the contract and cannot give rise to rights in third parties, are not in point, we submit, for the reasons above stated.

C.

The assignment (Ex. #29, p. 238) purported to assign only "the balance now *due*" on said contract, and the fund now sought to be recovered by Bridgeton Bank from Commercial was not "due" at the time of the execution and delivery of the assignment to the Bank.

The semi-final payment had been made in August, as above set forth. The final payment would not become due until the job had been accepted, acceptance certified by the Engineer to the Secretary, the amount of final payment determined and certified by the Secretary to the Auditor General, all as set forth in Paragraph 62 of the contract (p. 209, ll. 16-27). This was not done until February 5th, 1930 (Stip. Par. 32, p. 72). Under this contract the job was not accepted and the final payment was not "due" until the aforesaid conditions precedent had been met. *U. S. v. American Bond Co.* 233 Fed. 364;

Commonwealth of Pennsylvania v. Peil Construction Co., 284 Pa. 64.

"The term 'moneys due' used in an assignment has been said to mean moneys payable at the time when the assignment was made" 5 C. J. 946, Note 65.

If the purported assignment to the Bank were to operate as a basis for enabling the Bank to take the fund in question away from the surety to whom it was paid, surely it would have to be strictly construed against the Bank and could not result in taking from the surety anything more than is definitely and literally expressed in it. However the words, "the balance now due," might be interpreted as between the Bank and the assignor, we submit that as between the Bank and the surety they ought not, in justice and equity, to be extended to include anything more than money "now due" at the time of the assignment. The final payment being not *due* at the time of the assignment, was not included in it.

D.

The assignment to the Bank was not effective to transfer a right superior to Commercial's right because, *inter alia*, the Commonwealth would not have been justified in paying the fund to the Bank.

The authorities cited under Point I of this brief lay down the rule that the effectiveness of such an assignment is to be tested by whether or not the debtor would be justified in making payment directly to the assignee. Surely, in the face of the prohibition against assignment upon which the surety relied, and in the face of Commercial's rights and interests as surety, and in the face of Eastern States' said order of September 19th,

1929 to the Commonwealth, the assignment to the Bank could not be held to authorize or justify the Commonwealth in ignoring the surety and paying the fund directly to the Bank.

E.

By well recognized rules of equity the Bank's assignment was not effective to transfer a right superior to Commercial's right:

If a subsequent assignee has notice of a prior assignment, his rights will be subordinate to those of the earlier assignee. *2 R. C. L. 627-628*. We have shown above that the Bank took its assignment chargeable with notice of the prior rights of Commercial.

As between successive assignees taking equal equitable titles, the rule is that the one obtaining the legal title will prevail. *5 C. J. 955*. As we have shown, Commercial obtained the legal title.

As between successive assignees taking equal equitable title, he who has the stronger equity will prevail, although subsequent in time. *5 C. J. 955*. Under the circumstances herein set forth, even if the assignment to the Commercial had been subsequent to that of the Bank, Commercial would nevertheless prevail because it clearly has the stronger equity. *Jenkinson v. New York Finance Co., 79 N. J. Eq. 248 at bot. 259 and bot. 268*.

An assignee whose assignor complies with the contract provisions concerning assignments of rights thereunder, will be preferred to one who claims by prior assignment of such rights, but whose assignment is not made in conformity with the provisions of the contract. *5 C. J. 955, Note*

49. We have shown that in making its purported assignment to the Bank Eastern States violated not only the provisions of the contract, but also its guaranty against assignment contained in its Application to Commercial (Ex. #1), and that, on the other hand, the equitable assignment to Commercial was in conformity with the provisions of the contract, was recognized by the Secretary of Highways, and was in accord with the then prevailing practice and usage in respect to such bonds to and contracts with the Commonwealth.

No part of the money loaned by the Bank went into any of the three contracts in question. This is admitted in Paragraph #28 of the Stipulation (p. 71). The Bank was what the above cited cases refer to as a mere "volunteer."

F.

There is no proof, as against Commercial, that the Bank's loan still remains unpaid.

It is possible that this lack of proof is not due to mere oversight. We understand that the Bank held as collateral for the loan notes that were made or endorsed by some of Eastern States' stockholders, individually. It is quite possible that the Bank itself has collected and that this litigation is carried on for the benefit of those who were compelled to pay. *Proof* of non-payment is an essential element of the Bank's alleged case.

POINT V.

If Bridgeton Bank ever had any rights against Commercial they have been lost by reason of the Bank's laches, and the Bank has waived them, and is estopped from now recovering the fund from Commercial.

On January 13, 1930, Bridgeton Bank sent its first notice, inquiry, or communication of any nature to the State Highway Department (Ex. #41), saying:

"We hold an order from Eastern States Construction Company on contract, Route 75, Application 4788, for \$21,000.00 as collateral for borrowed money.

"Is this money due? If not kindly advise us when it will be due and we will forward to you the order held by us as collateral."

On January 17, 1930, the State Department of Highways replied (Ex. #42, p. 249) to Bridgeton Bank advising it that the semi-final payment had been made in August, "the check being forwarded in care of the Commercial Casualty Insurance Company of Newark, New Jersey, the surety on this job", and as to the final payment the reply said:

"There is still due on the project \$5500.00, this amount being subject to additions or deductions, depending upon the final checking of quantities for the work performed. *This check will be delivered to the Commercial Casualty Insurance Company of Newark, New Jersey.*"

Notwithstanding that definite advice, the Bank did nothing.

On January 31, 1930, Eastern States wrote to Commercial the letter hereinabove quoted (Ex. #45) in which it said, "you will receive our final estimate on the Clarion-Venango contract with-

in a very few days and on receipt of it you can apply it to these accounts all except the amount owed the McDonald Construction Co.” On or about February 11, 1930, said checks were received (Stip. Par. 34) and on or about February 27th, (Stip. Par. 35) they were endorsed (Stip. Par. 35) as aforesaid (Exs. #34 and #35) and in due course they were collected and the proceeds credited to Commercial’s said “Bond Account” (Stip. Par. 37). About a month later, and about two months after it had been advised by the Department of Highways, as aforesaid, Bridgeton Bank made its first inquiry of Commercial, to wit: its letter of *March 28, 1930* (Ex. #36, p. 243; Stip. Par. 38, p. 74), in which it referred to the \$19,044.24 *semi-final* payment made in August, and asked “Will you advise us whether you did receive on or about August 22nd, 1929, the above amount of \$19,044.24 and if so will you pay the note out of such funds.” Needless to say, Commercial would not “pay the note out of such funds”. *Still the Bank took no action and asserted no claim.*

On May 15, 1930, the Commonwealth issued its two checks (Exs. #37 and #38), bearing that date, in the sums of \$23,719.65 and \$10,039.24, in final settlement on the Vernon-Hayfield and West Meade jobs, respectively (Stip. Pars. 39-40). On or about June 1st, 1930, Eastern States, by said William F. Jerome, endorsed over to Commercial the said two final payment checks on the Vernon-Hayfield and West Meade jobs, and they were deposited to Commercial’s account at The Union National Bank at Pittsburgh (Exs. #37 and #38; Stip. Pars. 39 and 40). On August 15, 1930, Bridgeton Bank demanded of *Eastern States* payment of its said note (Ex. #28; Stip. Par. 43) and protested it. On September 21st,

1930, Jerome wrote to A. R. McAllister, Treasurer of Eastern States, the letter that we have above quoted (Ex. #46) in which he said, referring to the final payment on the Clarion-Venango job, "Commercial put the cash in a separate fund in Pittsburgh where I feel sure it is at present. The Commercial had not paid our bills a few weeks ago *and is waiting until I can get to Pittsburgh to O. K. the bills.*" On October 15, 1930, the Secretary of Highways, answering a letter that Mr. McAllister had apparently written on behalf of the bank, said (Ex. #47): "The only suggestion I can make under the circumstances is that your bank take some action against the surety company to restrain them from prorating this money to other jobs to the prejudice of your claim." Mr. McAllister submitted to the Bank all the correspondence that passed between him and the Department of Highways (McAllister, p. 151, ll. 16-30). *Still the Bank took no action and asserted no claim against Commercial.*

After all this notice and opportunity to the Bank to assert and protect its rights in the fund, if it claimed any, the entire proceeds of the said final payments on said Clarion-Venango, Vernon-Hayfield, and West Meade contracts, aggregating \$53,436.73, Commercial applied toward paying the aforesaid \$71,430.97 of claims owing against those three jobs, and the deficit of \$17,994.24 Commercial had to advance, and it is still part of Eastern States' indebtedness to it (Stip. Par. 28 and 47). Not until January 12, 1932 (*three years* after Commercial had received the fund) did Bridgeton Bank assert any claim to it or against Commercial. On that date it began suit against Commercial in the New Jersey Supreme Court (p. 283, ll. 16-30), *and was*

non-suited. By that time Eastern States had become insolvent (p. 98, ll. 20-30; p. 9, l. 33).

Before Commercial received the checks (Feb. 11, 1930; Stip. #35) the Bank was charged with knowledge of the facts as hereinabove set forth, and, moreover, was definitely advised by the Highway Department (Jan. 17, 1930; Ex. #42) that the Clarion-Venango final estimate check would be sent to Commercial. If the Bank had any right that would thereby be violated, it might have sought to restrain the sending of the check to Commercial. It at least might have promptly communicated with Commercial, advising Commercial of the alleged right which it now asserts, and demanding that the checks be made over to it. It might have demanded of Eastern States that the checks be made over to it. It might have sought to restrain Eastern States from endorsing over the checks to anyone other than the Bank. As suggested in the letter of the Secretary of Highways to Mr. McAllister (Ex. #47), it might have sought to restrain Commercial "from prorating this money to other jobs to the prejudice of your claim." *The Bank not only did none of these things, but it did nothing. Not even did it advise Commercial that it asserted any rights to the fund or against Commercial, or as against Commercial's right to pay over the fund to Eastern States' said creditors.*

Commercial, as surety, pursuant to its aforesaid rights against, and pursuant to its aforesaid agreement with Eastern States, received the money in its own right as indemnity to it against its liability for the payment of said bills. The Bank, with full knowledge of all these facts, stood by, did nothing, asserted no right and permitted Commercial to distribute the fund to the said creditors. Moreover, by its silence and

seeming acquiescence, it induced Commercial to rely upon said indemnity in its hands. As Jerome testified (p. 116, l. 39 to p. 119, l. 3) and wrote to McAllister (Ex. #46), Eastern States endorsed the checks over to Commercial "in order to keep the Commercial quiet." Commercial was "kept quiet" not only because Eastern States had so turned the fund over to it as indemnity, *but also because Bridgeton Bank kept quiet* and did nothing to indicate any doubt or question as to Commercial's right to distribute the fund to said creditors.

Commercial was thereby induced to change its position, to forego taking steps that it otherwise might and would have taken against Eastern States for its better security and indemnification (Jerome p. 116, l. 39 to p. 117, l. 3).

Not until after Eastern States had become defunct and insolvent did Bridgeton Bank come forward with the assertion of any claim against Commercial. It was then too late for Commercial to do what it could have done three years previously and what it would have been induced to do if the Bridgeton Bank had promptly asserted a claim to the fund. Even if the assignment to the Bank had in point of time been prior to the assignment to Commercial, the Bank would be estopped by reason of the facts hereinabove set forth.

"The assignee prior in point of time is prior in point of right * * * unless his conduct or failure to take such reasonable precautions as may be practicable has misled the subsequent assignee to his prejudice, in which case the subsequent assignee obtains a superior title by estoppel." 5 C. J. 954.

With full knowledge of all the facts the Bank either was convinced that it had no right to the fund, or else it intentionally waived and abandoned any right that it might have had.

In *Crawford v. Winterbottom*, 88 N. J. L. 588 at 589, the Supreme Court, per Black, J. said:

"A waiver is an intentional abandonment or relinquishment of a known right. The intention may be shown by conduct as well as by express words. Mere silence at a time when there was no requirement to speak is not a waiver, nor evidence from which a waiver may be inferred. *Armstrong v. Insurance Co.*, 130 N. Y. 560. Waiver belongs to the family of estoppel, and often they are convertible terms. *Maloney v. Northwestern Masonic Aid Ass'n.*, 40 N. Y. Supp. 918, 921; 8 App. Div. 575. In strictness, however, the term 'waiver' is used to designate the act or consequence of the act of one side only while the term 'estoppel' (*in pais*) is applicable, where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts. *McCormick v. Orient Ins. Co.* 86 Cal. 260; 24 Pac. Rep. 1003."

Certainly, under the circumstances hereinabove set forth, it cannot be said that "there was no requirement" for the Bank to speak. Under such circumstances the Bank had either to assert or abandon any right that it might have claimed. Its conduct was more than mere silence; it was relinquishment, abandonment, waiver—*neglect*.

POINT VI.**Notice to Commercial.**

Bridgeton Bank's brief in the court below seemed to rest its claim chiefly upon a contention that Commercial had knowledge of the Assignment to the Bank prior to the time that it actually disbursed the fund in payment of Eastern States' said debts on the jobs in question.

We submit that the Bank's contention in this regard is quite beside the point. Commercial's *right* to the fund, as between it and Eastern States, was vested and fixed not only before the Bank notified Commercial, but even before the Assignment to the Bank was made. *No notice that either the Bank or Eastern States might thereafter give could deprive Commercial of that vested right.*

The testimony of Jerome that on or about October 1st, 1929, at the request of Mr. Garrison, he advised Hays of the Assignment to the Bank, both by letter and telephone, is utterly incredible (Jerome, pp. 112-122; Hays, pp. 179-180; Garrison, p. 134, ll. 13-19). If this court takes the view that said alleged notice of October 1st, 1929, is in any way material, we respectfully urge that the testimony of Jerome, Hays and Garrison, last above cited, be examined by the court, for the present length of this brief does not permit of our setting forth as fully as should be if the question is material. We beg, however, to point out some facts in respect to it:

On direct examination (pp. 92-94) Jerome testified that "at the request of Mr. Garrison" he went to Harrisburg on his way back from the job, "and I stopped off at Harrisburg with the intention of talking it over with the State as to

the Assignment, but instead I called Mr. Hays by telephone * * * and I told him we had gotten the \$10,000 and that we were using it to pay bills, and we had to make an Assignment against the Clarion-Venango final." That "was within a day or two after the making of it." He was then asked "Did you do anything else in the way of notifying Mr. Hays about the Assignment and loan?" and he answered, "Yes, I talked it over with Mr. Williams, and he said I had better write him a letter in the matter, and *I think* I went over to the Penn-Harris Hotel and wrote a letter."

Note that on direct (p. 193, l. 10) he said that after talking with Mr. Williams "I went over to the Penn-Harris Hotel and wrote a letter," but on cross examination (p. 119, ll. 24-28) he said, he wrote the letter in the hotel writing room and that Mr. Williams was there with him at the time.

Note also that his direct examination made it clear that Mr. Garrison's request had been that he should notify the Department of Highways and that he stopped off at Harrisburg for that purpose, "but instead I called Mr. Hays by telephone" (p. 92, l. 27). At p. 112 of this cross examination he repeated that Mr. Garrison requested him to go to the Department of Highways at Harrisburg concerning the matter, and in his following answer (ll. 20-38) he makes it clear that the reason he changed his mind after he got to Harrisburg was: "I knew I couldn't make a step so any Assignment that Harrisburg would acknowledge because of the contract, the form of the contract * * * but that I could notify the Surety Co.", and so he says "*I think* I was asked to notify the Department of Highways and the Commercial Casualty of the Assignment."

Mr. Garrison, however, being called to the stand immediately following Jerome, testified definitely and positively (p. 134) that Mr. Jerome was not present at the time the loan was made and that he "never knew Mr. Jerome until sometime in 1930."

Mr. Jerome was "pretty sure" that at the time the loan was made he told Mr. Garrison that the Department of Highways wouldn't recognize any Assignment (p. 113, ll. 13-33). But Mr. Garrison says he never met Jerome until 1930.

Likewise Jerome said (p. 114, ll. 10-18) "I presume I did" tell Mr. Garrison or those representatives of the Bank who were present at the time the loan was made that he had sent the order of September 19th to the Department of Highways to send the final payment to Commercial, but Mr. Garrison said (p. 138, l. 27) "No, no indeed," nobody told him that had been done.

We have already pointed out the utter inconsistency between this alleged notice of October 1st and what Jerome said in his letter of January 31st, 1930 to Commercial (Ex. 45, p. 254) "you will receive our final estimate on the Clarion-Venango contract within a very few days and on receipt of it you can apply it to these accounts."

It is equally inconsistent with Jerome's testimony that it was necessary for him to try to keep Commercial quiet in September, 1929.

Jerome kept no copy of the letter, and never received an acknowledgment of it (p. 121, ll. 5-15).

Hays (pp. 179-180) denies that he ever received such a letter or telephone communication and is "absolutely sure" that he never got any

such notice. For the reason that "If we had gotten a notification of an Assignment of money on that particular job it would have immediately shown us what our position would be on the Crawford County jobs, because we were relying on the additional money that wasn't owing the McDonald Construction Company to pay the Crawford County bills, and that is something that doesn't happen to Surety Companies, it shouldn't happen."

The court below said that in reaching the conclusion that the alleged notice of October 1st, 1929 had in fact been given, he had "taken into consideration the fact that checks drawn by Eastern States in payment of bills had been, prior to that time, returned unpaid by Bridgeton Bank on account of insufficient funds, and Mr. Hays knew about them and was interested in having these checks made good." We have shown that the court below misapprehended the proofs in this regard, that the checks had all been paid on or before September 18th, and that they therefore had nothing whatever to do with the procuring of this new loan. We submit, therefore, that the court below was led to its conclusion by a misapprehension of the facts.

We respectfully submit, also, that the proofs were not sufficient to justify the court below in reaching the conclusion that it did reach in respect to said alleged notice. If it is a material element in the case, the burden rested on Bridgeton Bank to prove it, and we submit that the Bank has not sustained that burden of proof by Mr. Jerome's sole testimony, conflicting, inconsistent, flatly contradicted by two other witnesses, improbable, and incredible.

The fact is *stipulated* (Stip. Par. 38) that the Bank's letter of March 28, 1930, to Commercial (Ex. #36) "was the first communication, either oral or written, received by Commercial from Bridgeton Bank or from any officer or employee of Bridgeton Bank." Not only was it the first, but it was also the last and only one. No other is anywhere referred to in the record.

Not only had the equitable title been assigned to Commercial, but the money had been actually paid to it so that it had the *legal title* as well as the equitable right, *before it received its first notice of the assignment to the Bank.*

The said letter inquires, Will you pay our note out of the money that we understand you received last August? Not a word as to any prior, superior or adverse claim of the Bank either as to the August payment referred to or as to the final payment; no demand; no assertion of any claim. And there the matter dropped—not a word further from the Bank for the next two years, viz., until the aforesaid New Jersey Supreme Court suit was begun on January 12, 1932. And meanwhile, of course, Commercial had disbursed the fund in payment of said debts, as it was in duty bound to do, had refrained from taking such steps as it could and would have taken if both Eastern States and Bridgeton Bank had not by their conduct induced it to "keep quiet."

POINT VII.

The counsel fee of \$1250. awarded to complainant is excessive.

We submit that a counsel fee of \$1250. on a \$7300. claim is excessive.

Sparks v. Lorentowitz (E. & A.), 106 N. J. Eq. 178, involved a leasehold worth many times \$7300.

The court below allowed us a counsel fee of \$1000. This court affirmed the decree in our client's favor in all respects except that this court said (*id.* p. 185): "It remains to mention the counsel fee which was allowed to counsel for complainant in the sum of \$1000. and which we think should be reduced to \$250."

Counsel's affidavit of services (pp. 43-51) includes many items (of disbursements as well as services) for which counsel might properly charge their client, but which have nothing to do with such "advocacy" as that for which, as we understand the matter, counsel fees are allowed to the prevailing party in a Chancery suit.

Furthermore, in said affidavit of services it is quite impossible to distinguish between what is related to this suit and what is related to the other suit (referred to in the affidavit, p. 43, l. 20) that was tried with it and in which this appellant was the prevailing party, and in which the decree carried neither costs nor counsel fee to this appellant, viz, *Commercial Casualty Insurance Company v. Bridgeton National Bank*, 175 Atl. 807.

CONCLUSION.

We respectfully submit:

1. That Commercial's right and title to the fund in question is prior and paramount to any right of Bridgeton Bank thereto.
2. That the oral agreement which Eastern States, by Jerome, made with Commercial on or about September 19, 1929, and the written order of that date to the Department of Highways, and the endorsement to Commercial of the Commonwealth's two final payment checks on the Clarion-Venango contract, are all valid, effectual, binding

and enforceable against both Eastern States and Bridgeton Bank.

3. That Bridgeton Bank has not proved such case as entitles it to shift the burden of this loss (if it is a loss to the bank) from itself, where it now rests, onto Commercial.

4. That Commercial is chargeable with neither wrong nor neglect, and that Bridgeton Bank was negligent throughout, failed to make reasonable inquiry, slept on its rights, and by its seeming acquiescence lulled Commercial into a sense of security in respect to the fund in question.

5. That the decree appealed from should be reversed, and that Bridgeton Bank's bill of complaint should be dismissed, with costs and counsel fee to Commercial.

Respectfully submitted,

LUM, TAMBLYN & FAIRLIE,
Solicitors for and of Counsel with
Commercial Casualty Insurance
Company, Defendant-Appellant.

CHESTER W. FAIRLIE,
Of Counsel.

INDEX



INDEX

	PAGE
(1)	
STATEMENT OF THE CASE.....	1
(2)	
GROUNDS OF APPEAL	3
(3)	
BRIEF OF THE ARGUMENT.....	4
Explanatory Statement	4
Summary of Facts.....	6
Summary of Questions at Issue and Conclusions of Davis, V. C. thereon.....	14
Summary of Argument.....	17

ARGUMENT.

I.

THE PROVISIONS IN THE CLARION-VENANGO CONTRACT RELAT- ING TO THE TRANSFER OR ASSIGNMENT OF THE CONTRACTOR'S RIGHT OR INTEREST THEREIN DO NOT BAR THE CLAIM OF THE BRIDGETON BANK AS AGAINST COMMERCIAL.....	19
--	----

II.

COMMERCIAL HAD NOTICE OF THE CLAIM OF THE BANK UNDER ITS ASSIGNMENT BEFORE COMMERCIAL PAID ANY OF THE BILLS ON CONTRACTS SUBSEQUENT TO THE CLARION-VENANGO CON- TRACT	28
--	----

III.

IN SO FAR AS RELATES TO THE BALANCE OF \$7,307.41 (PART OF THE PAYMENT MADE BY THE COMMONWEALTH TO EASTERN STATES OF THE FINAL ESTIMATE) THE RIGHT OF BRIDGETON BANK THERETO BY VIRTUE OF ITS ASSIGNMENT IS PRIOR TO THE RIGHT OF COMMERCIAL BY VIRTUE OF THE PROVISIONS OF THE APPLICATION FOR BOND.....	35
Construction of Application for Bond.....	35
Discussion of Authorities.....	42

IV.

THE DIRECTION BY JEROME TO THE HIGHWAY DEPARTMENT OF PENNSYLVANIA TO FORWARD THE CHECKS FOR THE FINAL ESTIMATES DUE EASTERN STATES ON THE CLARION-VENANGO CONTRACT, IN CARE OF COMMERCIAL, WAS NOT AN EQUITABLE ASSIGNMENT TO COMMERCIAL OF THE AMOUNT OF SAID ESTIMATES, EXCEPT ONLY TO THE EXTENT OF THE SUM DUE A SUBCONTRACTOR OF EASTERN STATES UNDER SAID CONTRACT....	57
--	----

V.

JEROME'S ENDORSEMENT OF THE CHECKS FOR THE FINAL ESTIMATES ON THE CLARION-VENANGO CONTRACT, DID NOT TRANSFER THE TITLE THEREOF TO COMMERCIAL.....	63
---	----

VI.

THE COURT OF CHANCERY WAS CORRECT IN ADJUDGING THAT COMMERCIAL SHOULD PAY TO BRIDGETON BANK THE SUM OF \$7,307.41, WITH INTEREST FROM FEBRUARY 28, 1930, AMOUNTING TO THE TOTAL SUM OF \$9,427.24.....	76
--	----

VII.

THE DECREE PROPERLY ORDERED THAT COMMERCIAL PAY THE TAXED COSTS OF BRIDGETON BANK, INCLUDING A COUNSEL FEE OF \$1,250.00.....	77
---	----

VIII.

CONCLUSION	79
APPENDIX "A." Summary of Pleadings	80
APPENDIX "B." Chronological Summary of Facts.....	97

New Jersey Court of Errors and Appeals

Between

BRIDGETON NATIONAL BANK,
Complainant-Respondent,

and

COMMERCIAL CASUALTY IN-
SURANCE COMPANY,
Defendant-Appellant.

On Bill, &c.

*On Appeal
from the
Court of
Chancery.*

BRIEF IN BEHALF OF BRIDGETON NATIONAL BANK, Complainant-Respondent.

(1)

Statement of the Case.

This matter comes before the court on an appeal by Commercial Casualty Insurance Company from a final decree of the Court of Chancery advised by Hon. Francis B. Davis, *V. C.*, on January 21, 1935, in a suit wherein Bridgeton National Bank was complainant and Commercial Casualty Insurance Company and Eastern States Construction Company, Inc., were defendants.

The decree adjudged as follows:

“(a) That there is due and owing by the defendant, Commercial Casualty Insurance Company, to the complainant, the sum of \$9,427.24, and that there is due and owing by the defendant, Eastern States Construction Company, Inc., to the complainant, the sum of \$14,185.00.

(b) That said sum of \$9,427.24 so decreed to be due the complainant from Commercial Casualty Insurance Company be credited, if and when paid to complainant by said Commercial Casualty Insurance

Company, on the amount so decreed to be due complainant from defendant, Eastern States Construction Company, Inc.

FURTHER ORDERED that the defendant, Commercial Casualty Insurance Company, pay to the complainant the costs of this suit to be taxed, including in said costs a counsel fee of \$1,250.00, which counsel fee is hereby allowed to the complainant and ordered to be taxed as part of the costs of complainant herein.

FURTHER ORDERED that the defendant, Commercial Casualty Insurance Company, within thirty days after service upon it or of its solicitors of true but uncertified copies of this decree and of said taxed costs, pay to the complainant said sum of \$9,427.24, and said taxed costs; and that in default of such payment execution issue against the goods and chattels, lands, tenements and hereditaments of said defendant, Commercial Casualty Insurance Company, directed to the Sheriff of the County of Essex, in accordance with the practice of this court" (pp. 56, 57).

For convenience, the several parties will be referred to herein as follows:

Bridgeton National Bank (the complainant below and respondent herein) as "Bridgeton Bank."

Commercial Casualty Insurance Company (one of the defendants below and appellant herein) as "Commercial."

Eastern States Construction Company, Inc. (one of the defendants below) as "Eastern States."

(2)

Grounds of Appeal.

No appeal was taken by Eastern States.

Commercial appealed from the following parts of said decree:

1. That there is due and owing by Commercial to Bridgeton Bank the sum of \$9,427.24.

2. That Commercial pay to Bridgeton Bank the costs of the suit, including a counsel fee of \$1,250.

3. That Commercial pay Bridgeton Bank said sum of \$9,427.24, and said taxed costs, and that in default of payment execution may issue therefor.

On the following grounds:

1. That it does not appear by the evidence that there is due and owing by Commercial to Bridgeton Bank said sum of \$9,427.24, or any other sum.

2. That the evidence was not sufficient to warrant said decree.

3. That the evidence shows that the right and equity of Commercial in and to the fund in question is prior and paramount to any right of Bridgeton Bank in and to the same.

4. That it appears by the evidence as between Commercial and Eastern States that the payment to Commercial of the fund in question is binding upon, and has been ratified by, Eastern States (which has accepted the benefit thereof), and that Bridgeton Bank is not in a position to, and has no right to, question the same, and no right to a decree that the fund or any part thereof be paid to Bridgeton Bank by Commercial.

5. That it appears by the evidence that Bridgeton Bank, by reason of its course of conduct and laches, is estopped from prosecuting

this suit, and in equity is not entitled to recover from Commercial any part of the fund in question.

6. That said counsel fee of \$1,250 is excessive.

7. That the Court of Chancery should have made a decree denying the relief prayed for by Bridgeton Bank and dismissing its bill of complaint (pp. 60-62).

(3)

Brief of the Argument.

Explanatory Statement.

In the Court of Chancery the case wherein Bridgeton Bank was complainant and Commercial and Eastern States were defendants (herein referred to as Suit No. 1) was consolidated for the purpose of final hearing with a case in the same court wherein Commercial was complainant and Bridgeton Bank and Eastern States were defendants (herein referred to as Suit No. 2).

In Suit No. 2 no appeal has been taken.

The pleadings in Suit No. 1 are summarized in Appendix A.

The pleadings in Suit No. 2 (including counter-claims) were in large part repetitions of the pleadings of the same facts by the respective parties in Suit No. 1, except, however, that certain facts were alleged by Commercial in its bill in Suit No. 2 which were not specifically set forth in its answer in Suit No. 1; the facts so alleged by Commercial in Suit No. 2 were admitted by the other parties in their answers as amended at the final hearing; instead of printing in full the pleadings in Suit No. 2, the facts so alleged and admitted by the pleadings therein are

set forth in the State of Case under the caption "Facts Admitted in the Pleadings in Case No. 2" (pp. 283-7). They are also summarized in Appendix A.

For the purpose of the final hearing all parties joined in a stipulation of facts to which there was prefixed a descriptive list of the exhibits therein mentioned; forming part of said stipulation there was an appendix containing copies of said exhibits.

Said stipulation provided:

(a) It is to be offered in evidence in lieu of other proof of the facts therein stated.

(b) The copies of the papers and documents submitted with the stipulation are to be received in evidence in each case with like effect as if the originals were produced and duly proved.

(c) Nothing in the stipulation is to preclude any of the parties from proving any other facts or exhibits.

(d) Nothing in the stipulation is to operate as an admission as to the relevency, materiality or legal effect of any of the facts set forth in the stipulation or of the exhibits therein mentioned (p. 64).

The exhibits referred to in said stipulation are numbered 1 to 47 (pp. 190-259).

At the final hearing additional testimony and exhibits were offered by all the parties.

The exhibits offered at the trial are numbered 48 to 64 inclusive (pp. 260-282).

Davis, V. C. decided (pp. 27-42) that Bridgeton Bank, by virtue of the assignment from Eastern States, was entitled to a decree that Commercial pay to the Bank a certain part of

the final estimate due Eastern States on a contract between it and the Commonwealth of Pennsylvania for the construction of a highway in that state, the checks for which had been forwarded to and collected by Commercial; said part of said final estimates amounted to the sum of \$7,307.41; interest thereon from the date that said checks were collected by Commercial to the date of the final decree, made up the remainder of the amount adjudged to be due Bridgeton Bank from Commercial—amounting to the total sum of \$9,427.24, as set forth in the final decree.

His opinion in Suit No. 1 is reported in 117 N. J. Eq. 371, 175 Atl. 801.

His opinion in Suit No. 2 is reported in 117 N. J. Eq. 383, 175 Atl. 807.

Summary of Facts.

As between Eastern States and Commercial, the suits involved an accounting with respect to the amounts paid by Commonwealth of Pennsylvania and by the County of Indiana in that state for work done and materials furnished under four contracts with Eastern States known as:

1. Clarion-Venango contract, dated April 14, 1928 (Stip. pars. 4, 5; p. 65; Ex. 3, p. 207).

2. Vernon-Hayfield contract, dated September 22, 1928 (Stip. pars. 8, 9; p. 66).

3. West Meade contract, dated March 22, 1929 (Stip. pars. 12, 13; p. 67).

(All made with the Commonwealth of Pennsylvania.)

4. Indiana County contract, dated September 5, 1929 (Stip. pars. 26, 27; Ex. 26, p. 232).

(Made with the County of Indiana in the Commonwealth of Pennsylvania.)

The Bridgeton Bank has no interest in said accounting, except insofar as relates to the amount paid by Pennsylvania on contract No. 1, known as the *Clarion-Venango* contract; its interest in that payment is limited to the extent of the amount due it for principal and interest on the demand note of Eastern States made to Bridgeton Bank on September 24, 1929, and secured by an assignment of that date to Bridgeton Bank from Eastern States of the amount due the latter from Pennsylvania on said contract (Exs. 28, 29; pp. 234-9).

The testimony established the following facts:

First: On September 24, 1929, Eastern States executed and delivered its demand note to Bridgeton Bank for the sum of \$10,000, on which the full amount of the principal, with interest from this date, remains unpaid (Ex. 28, pp. 234-8).

Second: On September 24, 1929, Eastern States delivered to Bridgeton Bank as collateral security for said note, an assignment of the balance "now due" Eastern States on the *Clarion-Venango* contract (Ex. 29, pp. 238-9).

Third: The semi-final payment on said contract was made by two checks, both dated August 28, 1929, and drawn to the order of Eastern States, for \$2,868.83 and \$16,175.41 (Stip. pars. 20, 21, pp. 68-9; Exs. 15 and 16; pp. 228-9).

The check for \$2,868.83 was collected by Eastern States through First National Bank of Meadville; the check for \$16,175.41 was sent to Eastern States in care of Commercial, at the latter's Pittsburgh office. It was endorsed, "Eastern States Const. Co. by William F. Jerome, Asst. Treas." and deposited to the credit of

Eastern States in Farmers & Merchants Bank at Bridgeton (Stip. par. 22; p. 69). At or about the time of the deposit of the second check Eastern States delivered to Commercial the checks of Eastern States in payment of seven claims for labor and material on the Clarion-Venango job, amounting to a total of \$15,593.10 (Stip. pars. 14 and 23; pp. 67 and 69; Exs. 17 to 23, pp. 230, 231).

Fourth: On September 19, 1929, Eastern States had completed all the work on said contract (p. 71, ll. 28-30).

Fifth: On said date there was due McDonald Construction Company, a subcontractor of Eastern States on the Clarion-Venango contract, the sum of \$12,370.43; thereafter (on May 23, 1930) said sum was paid to said Construction Company out of the final estimates on said contract (p. 285, ll. 10-30).

Sixth: The final estimate on said contract amounted to the sum of \$19,677.84, thus leaving a balance of \$7,307.41 in dispute, after said payment of \$12,370.43 to said Construction Company.

Seventh: The entire amount of said final estimate, to wit, \$19,677.84 on said Clarion-Venango contract, was deposited to the credit of Commercial in its bond account in the First National Bank of Pittsburgh, Pa. on an endorsement of the two checks of the treasurer of the Commonwealth of Pennsylvania, by Jerome (personally) and by one Hays—the assistant manager and attorney-in-fact of Commercial (Stip. pars. 32-37, pp. 72-4; Exs. 34, 35, pp. 241, 242).

Eighth: There was no default by Eastern States in the performance of the Clarion-Venango contract; and all the work thereon had been com-

pleted and all the material therefor had been furnished at or prior to September 19, 1929 (p. 71, l. 30).

Ninth: The work of McDonald Construction Company was a "component part" of the Clarion-Venango contract; and it was accordingly admitted by Bridgeton Bank and Eastern States that neither was entitled to any part of that amount; hence the claim of Bridgeton Bank was limited to said balance of \$7,307.41, with interest; and so far as Bridgeton Bank and Commercial are concerned, the controversy relates solely to said balance of \$7,307.41.

The claim of Commercial is that by virtue of the terms of the application of Eastern States for the bond relating to the Clarion-Venango contract, Commercial was entitled to receive from the Commonwealth of Pennsylvania not only said sum of \$12,370.43 (which Bridgeton Bank concedes was due to, and was lawfully paid to, McDonald Construction Company as a subcontractor of Eastern States on said contract), but was also entitled to receive (and to retain as against Bridgeton Bank, as assignee of Eastern States) the balance of \$7,307.41 of the final estimate on said contract, by reason of the fact that Commercial as surety for the performance by Eastern States of the three subsequent contracts, above mentioned (numbers 2, 3 and 4), was obliged to pay, and did in fact pay, for the account of Eastern States various sums of money in settlement of unpaid bills of Eastern States, the total of which exceeded said balance of \$7,307.41.

The amounts of said payments and the dates thereof, so made by Commercial (as set forth in

its amended bill of complaint in Suit No. 2 and as admitted by Bridgeton Bank), are as follows:

Contract #2—Vernon-Hayfield—\$37,417.21.

Payments made between September 16, 1930 and July 17, 1932 (p. 286, ll. 1-15).

Contract # 3—West Meade—\$15,642.22.

Payments made between September 6, 1930 and August 23, 1932 (p. 286, ll. 20-30).

Contract # 4—Indiana County—\$41,805.99.

Payments made between June 7, 1930, and May 13, 1932 (p. 287, ll. 10-40).

On September 19, 1929, all work and material on contract No. 1—the Clarion-Venango contract—had been done and furnished; all bills due from Eastern States to subcontractors on said job had been paid on or prior to that date, except the bill of McDonald Construction Company amounting to \$12,370.43; that amount was thereafter paid to said Construction Company out of the final estimates on said contract and is no longer in dispute (Stip. par. 28, pp. 70, 71).

The final payment by Commercial to McDonald on account of the Clarion-Venango contract was made on May 23, 1930 (p. 285, l. 22).

On September 19, 1929, all work and material on the Vernon-Hayfield contract and on the West Meade contract, had also been done and furnished (par. 28 of Stip., p. 70); but on that date certain bills for labor and material of subcontractors on said jobs had not been paid by Eastern States and those bills were thereafter paid by Commercial, during the period from September 6, 1930, to August 23, 1932 (pp. 285, 286); the first of said payments on said subsequent contracts was made nearly a year after

the Clarion-Venango contract had been completed, the last payment being made nearly two years after completion (p. 286).

Thus it appears that the note and assignment of Eastern States to Bridgeton Bank was *after* the date of the completion of the Clarion-Venango job, though prior to the date of the certification of the final estimate and the date of the checks issued by the Commonwealth of Pennsylvania in payment of said estimates.

The provisions in the Application for Bond on the Clarion-Venango contract upon which Commercial relies to sustain its claim to the said balance of \$7,307.41, are in the form of certain covenants forming part of said Application, as follows:

“3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney’s fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed, for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected

therewith, including counsel and attorney's fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not."

"5th. That for the better protection and security of the Company, the undersigned, as of the date hereof, hereby assigns, transfers and conveys to the Company all the right, title and interest of the undersigned in and to all the supplies, tools, plants, equipment and materials of every nature and description that he or it may now or hereafter have upon said work, or in, or on, about the site thereof, and also all materials purchased for or chargeable to the said contract which may be in process of manufacture or construction, or in transportation, or in storage elsewhere, and also all his or its rights in and to all subcontracts relating to said work which have been or may hereafter be made, together with the materials embraced therein, and as well all the rights, title and interests of the undersigned in and to all bonds executed to the undersigned securing the performance by said subcontractors, of subcontracts, hereby subrogating said Company to all such rights, title and interests of the undersigned therein; and the undersigned does hereby authorize and empower the Company, its authorized agents or attorneys, to enter upon and take possession of said supplies, tools, plant, equipment, materials, and subcontracts, and enforce, use and enjoy the title thereto and the possession

thereof in the event of any default on the part of the undersigned in the performance of the contract hereinabove referred to or in the payment of the premiums above mentioned."

"6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond."

"7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in such action and paid by the undersigned."

"11th. That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said bond or any other former or subsequent bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request."

(Ex. 1, pp. 197-201.)

For convenience a summary of the pleadings and a chronological summary of the facts (giving the dates of the various exhibits and of the several events that occasioned the litigation) are annexed hereto as Appendix A and Appendix B, respectively.

Summary of Questions at Issue and Conclusions of Davis, V. C. thereon.

1. Was the balance due Eastern States from the State of Pennsylvania (under the Clarion-Venango contract) at the time of the assignment thereof to Bridgeton Bank on September 24, 1929 as collateral security for the payment of the note of Eastern States, capable of assignment in view of the provision in the contract between Eastern States and the State of Pennsylvania that the contractor should not assign the contract or the right to any of the moneys to be paid thereunder?

Davis, V. C. held that said balance was assignable (p. 38, ll. 15-40).

2. Did Commercial have notice of said assignment?

Davis, V. C. held that Commercial had information from Jerome about this assignment

"shortly after" the loan was made (p. 33, l. 15 to p. 34, l. 10).

3. Under the terms of the application for bond, above quoted (pp. 190-192), was Commercial authorized to appropriate the balance due Eastern States from the State of Pennsylvania on the Clarion-Venango contract (which had been completed by Eastern States without default) for the purpose of applying the surplus of such funds (after payment of an amount admittedly due a subcontractor under *said* contract) to reimburse itself, as surety of Eastern States on bonds for other contracts subsequent to said contract, for payments thereafter made by Commercial by reason of its suretyship on the bonds for said subsequent contracts?

Davis, *V. C.* held that Commercial was not entitled to appropriate the said balance due Eastern States on the Clarion-Venango contract—except *only* to the extent of the unpaid amount due from Eastern States to a subcontractor on said contract; and that the surplus remaining after payment of said subcontractor belonged to Bridgeton Bank under its assignment from Eastern States (p. 39, l. 20, to p. 40, l. 14).

4. Was the letter of September 19, 1929, that had been written by Jerome (purporting to be acting in behalf of Eastern States) to the Executive Secretary of the Department of Highways of Pennsylvania to forward the "final check" of Eastern States (representing the amount of the final estimates due Eastern States from the State of Pennsylvania on the Clarion-Venango contract) "to us in care of" Commercial at Pittsburgh, Pennsylvania an equitable assignment to Commercial of the entire amount due Eastern States on said final estimates?

Davis, *V. C.* held that said letter was not an assignment by Eastern States to Commercial (p. 40, l. 14, to p. 41, l. 10).

5. Were the endorsements by Jerome of the two checks of the State of Pennsylvania for the final estimates due Eastern States on the Clarion-Venango contract, effective to transfer the entire amount of said checks from Eastern States to Commercial?

Davis, *V. C.* held that this attempted transfer was ineffective, in so far as it enabled Commercial to appropriate the "overplus" (after payment of the amount due a subcontractor on the Clarion-Venango contract) to losses suffered by Commercial on subsequent bonds (p. 41, l. 12, to p. 42, l. 25).

6. It being conceded that Commercial had in fact applied the surplus of the amount of said final estimates (after payment of the amount due said subcontractor on the Clarion-Venango contract) to reimburse itself for payments on bonds for subsequent contracts on which Commercial was surety, was Bridgeton Bank entitled to a decree as against Commercial for the amount of said surplus, to wit, the sum of \$7,307.41, with interest from the date of the appropriation of said balance?

Davis, *V. C.* held that the Bank was entitled to a decree for said amount, with interest (p. 42, ll. 28-35).

In so far as the conclusions of the Court of Chancery, as set forth in the opinion of Davis, *V. C.*, are findings of fact, "great weight" should be given by this court to such findings, as the court below sees the witnesses and is in a better

position to judge their credibility than the reviewing court.

Grunt v. Weissman, 107 N. J. Eq. 107;
Guardian Life Insurance Company v. Mareczko, 114 N. J. Eq. 369, 373;
Thirteenth Ward Building & Loan Ass'n. v. Weissberg, 115 N. J. Eq. 487, 496.

SUMMARY OF ARGUMENT.

I.

The provisions in the **Clarion-Venango** contract relating to the transfer or assignment of the contractor's right or interest therein do not bar the claim of the **Bridgeton Bank** as against **Commercial**.

II.

Commercial had notice of the claim of the **Bank** under its assignment before **Commercial** paid any of the bills on contracts subsequent to the **Clarion-Venango** contract.

III.

In so far as relates to the balance of \$7,307.41 (part of the payment made by the **Commonwealth** to **Eastern States** of the final estimate) the right of **Bridgeton Bank** thereto by virtue of its assignment is prior to the right of **Commercial** by virtue of the provisions of the **Application for Bond**.

Construction of Application for Bond.
Discussion of Authorities.

IV.

The direction by Jerome to the Highway Department of Pennsylvania to forward the checks for the final estimates due Eastern States on the Clarion-Venango contract, in care of Commercial, was not an equitable assignment to Commercial of the amount of said estimates, except only to the extent of the sum due a subcontractor of Eastern States under said contract.

V.

Jerome's endorsement of the checks for the final estimates on the Clarion-Venango contract, did not transfer the title thereof to Commercial.

VI.

The Court of Chancery was correct in adjudging that Commercial should pay to Bridgeton Bank the sum of \$7,307.41, with interest from February 28, 1930, amounting to the total sum of \$9,427.24.

VII.

The decree properly ordered that Commercial pay the taxed costs of Bridgeton Bank, including a counsel fee of \$1,250.00.

ARGUMENT.

I.

The provisions in the Clarion-Venango contract relating to the transfer or assignment of the contractor's right or interest therein do not bar the claim of the Bridgeton Bank as against Commercial.

By assignment dated September 24, 1929, Eastern States, in consideration of the sum of \$10,000, assigned, transferred and set over to Bridgeton Bank "the balance now due" Eastern States from the Highway Department of Pennsylvania upon the Clarion-Venango contract (amounting to \$21,000) "it being understood that upon the repayment of the loan made upon consideration of this assignment the balance thereof when paid as aforesaid, after deducting principal and interest of said loan of Ten Thousand Dollars (\$10,000), shall be refunded and paid to the said Eastern States Construction Company."

Prior to the date of this assignment, to-wit, on September 19, 1929, all work and material on said contract had been done and furnished by Eastern States and all bills of subcontractors had been paid, except the bill of McDonald Construction Company (par. 28 of Stip., p. 70); the letter of February 11, 1930 from Mr. Hays (Ex. 50, pp. 132, 264) shows that the McDonald bill was the only unpaid claim under consideration up to that date.

Likewise, prior to the date of this assignment, to-wit, on August 22, 1929, Commercial had filed with the Department of Highways its application for release of bond on said contract, setting forth that after an examination of the books and records of the contractor (or after receipt

of an affidavit from the contractor) Commercial is satisfied that all claims for labor and material "*have been satisfactorily settled*" (par. 19 of Stip., p. 68; Ex. 14, pp. 68, 225).

Thereafter, in due course, to wit, on January 4, 1930, the Division Engineer of Pennsylvania certified the final estimates for said contract; on February 5, 1930, said estimates were certified by the Deputy Secretary of Highways to the Auditor General, and on February 10, 1930, checks were issued in payment thereof.

The bill of McDonald Construction Company—one of the subcontractors of Eastern States on the Clarion-Venango contract—amounted to the sum of \$12,370.43, including the bills of several subcontractors of McDonald, and after crediting thereon a sum which Commercial already held out of the proceeds of the *semi* final payment on said contract. The final settlement was made with McDonald on May 23, 1930 (p. 285, ll. 20-25).

In so far, therefore, as relates to the Clarion-Venango contract, all moneys due the contractor and all bills of subcontractors were paid and the Commonwealth of Pennsylvania had no further interest therein, or any liability therefor, or any concern with the bond for the performance thereof; application for release of bond was filed by Commercial and the contract was fully performed prior to the date of the assignment from Eastern States to Bridgeton Bank; shortly thereafter the amount due Eastern States was adjusted and determined by the Engineer of the Commonwealth and checks in payment thereof were sent to Eastern States.

The condition of the contract bond filed by Commercial with the Commonwealth as surety for the performance of said contract is:

“Now, THEREFORE, the condition of this obligation is such that if the above bounden ‘Principal’ as Contractor shall in all respects comply with the terms of the contract and conditions of said contract, and his, their or its obligations thereunder including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner satisfactory to the Secretary of Highways, complete the work contracted for, and shall save harmless the Commonwealth of Pennsylvania from any expense incurred through the failure of said Contractor to complete the work as specified, or for any damages growing out of the carelessness of said Contractor or his, their, or its servants and shall well and truly pay for all material furnished and labor performed in and about the construction of said highway.

And also shall save and keep harmless the said Commonwealth of Pennsylvania against and from all losses to it from any cause whatever, including patent, trademark and copyright infringements, in the manner of constructing said section of roadway; and shall, on the completion of the contract in an acceptable manner, file with the Department of Highways an ‘Application for Release of Bond,’ which application shall set forth, inter alia, that all claims for labor and materials used in connection with the execution of the contract have been satisfactorily settled, said application to be executed by the President or Vice-President and the Secretary of the Company appearing as Surety; then this obligation to be void or otherwise to be and remain in full force and virtue.”

(Ex. 2; pp. 204, 5.)

So far as this bond is concerned the Commonwealth of Pennsylvania had no further interest therein, as admittedly Eastern States completed the work in a manner satisfactory to the Secretary of Highways (as evidenced by the payment of the final estimates); and payment was made (either by Eastern States or by Commercial) "for all material furnished and labor performed in and about the construction of said highway;" and "Application for Release of Bond" (duly executed by Commercial, was filed (on August 22, 1929) with said Department of Highways.

The provision of the contract as to assignment is as follows:

"It is further distinctly agreed that the said Contractor shall not assign this contract, nor any part thereof, nor any right to any moneys to be paid him hereunder, nor shall any part of the work to be done, or material furnished under said contract be sublet, without the consent in writing of the Secretary of Highways."

(Ex. 3, p. 213, ll. 20-25.)

We submit that said provision is intended for the protection of the Commonwealth, and that as between two assignees of moneys due under the contract the provision does not affect their respective rights. The contract has been completely performed, the Commonwealth has paid all that it owes thereon and has received all that it paid for; neither the contractor nor any subcontractors have any further claim.

It may also be noted that if the assignment to the bank is not good, then the claim of Commercial, in so far as it is based upon the assignments set forth in the Applications for Bonds, is no better than that of the bank.

The question of the validity of an assignment of a payment for work done under a contract for public improvement, made without the consent of the public authority having charge of the improvement (the contract providing that without such consent the contractor shall not assign any of the moneys payable under the contract or his claim thereto), was considered by the United States Supreme Court in *Portuguese-American Bank v. Welles*, 242 U. S. 7; 61 L. Ed. 116.

The facts in that case, in so far as they relate to this question, are strikingly similar; a construction company had a contract with the City of San Francisco for certain public work; the company had obtained a loan from the bank secured by an order on the city which was intended to be and was taken as an assignment. Welles was a subcontractor, and after the date of the assignment, served notice on the city to withhold payment in accordance with a statute of the State of California. It was admitted by Welles that if the assignment was valid his rights were subordinate thereto, and the question was whether the assignment was void under a term of the contract which provided that the contractor should not assign or sublet the whole or any part of the contract without the consent of the Board of Public Works, and that he should not assign any of the moneys payable under the contract or his claim thereto, unless with like consent. The city made no objection to the assignment but did not consent thereto and was indifferent as between the parties.

After discussion of the facts and of the law applicable thereto, the court held that the bank had prior title, saying:

“The assignability of a debt incurred under a contract like the present sometimes

is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and consequently that the decree must be reversed."

Citing:

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870;

Burnett v. Jersey City, 31 N. J. Eq. 341;

Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

In *Burnett v. Jersey City*, 31 N. J. Eq. 341, this Court at page 352, said (*italics ours*):

"The contract for the erection of the building contained a provision that the contractor should not, by power of attorney or otherwise, assign any of the moneys payable under the agreement, unless by and with the assent of the board of public works, to be signified by endorsement upon the agreement, and that, if the contract should be assigned otherwise than as therein specified, the board should have the power to notify the contractor to discontinue all work under the contract, and also power to complete the work themselves, at the contractor's expense, the cost to be deducted out of the moneys due or to become due to him under the agreement. It is alleged that the express consent of the board of works was not given or endorsed on the agreement pursuant to its provisions, but, if true, the omission cannot avail the appellants or avoid the claims of the respondents under the assignment. The *covenant* and the penalty for its violation were evidently designed for the protection of the city against the dereliction

or insolvency of the contractor. The appellants had no interest in it, no right to demand its fulfillment, and were entitled to no indemnity for its violation."

In *United States Fidelity & Guaranty Co. v. Newark*, 76 N. J. Eq. 230, this case and other New Jersey cases were cited by Howell, V. C. He said:

"Nor do I think that the consent of the city was necessary to effectuate the transfer. The contract of the city was obtained by a very formal proceeding, viz., the passage of a resolution by the board of street and water commissioners and its approval by the mayor. This was supposed to be necessary in view of the provisions hereinabove quoted from the Stewart & Abbott contract. It has, however, been held in many cases in this state that provisions of that character are inserted in contracts, not for the benefit of the contractor, subcontractors or materialmen, but for the protection of the city. Vice-Chancellor Van Fleet so held in *Shannon v. Hoboken*, 37 N. J. Eq. (10 Stew.) 123; affirmed, *Id.* 318, and also in *Essex Freeholders v. Lindsley*, 41 N. J. Eq. (14 Stew.) 189. In *Bank v. Bayonne*, 48 N. J. Eq. 246, it was expressly held that a provision of that character did not invalidate an assignment of the money earned under the contract. In *Burnett v. Jersey City*, 31 N. J. Eq. (4 Stew.) 341, the restrictive words were the same as those in the contract under discussion."

In *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572, it was held:

"A stipulation in a street-grading contract, that such contract shall not be assigned, nor any of the moneys due thereunder, without the written consent of the city, and that no claim as against the city, can be asserted by virtue of an assignment without consent, is solely for the benefit of the city, and cannot, in a contest wherein no

claim is asserted against the city, be invoked by a junior assignee, with consent, to defeat the demand of one to whom the contract has previously been assigned as collateral security for a debt, though without the consent of the city."

Numerous other authorities to the same effect may be found in the books, but the above are sufficient. We quote a summary of the argument on this subject as set forth in *2 Dillon, Municipal Corporations*, Fifth Edition, Section 832, pages 1280-2 (italics in the original):

"Under a statute which prohibits a contractor from assigning, subletting, or otherwise disposing of a contract with a city, or of his right, title, or interest therein, or his power to execute such contract without the previous consent in writing of the department or official awarding the same, and which declares that the municipal corporation shall be relieved and discharged from any and all liability and obligations growing out of the contract to the contractor or to his assignee, transferee, or sublessee, and that he and they shall forfeit all moneys earned thereunder except so much as may be required to pay his employees, an assignment of the contract by an individual to a corporation renders the contract invalid and operates to relieve the municipality from all liability and obligations growing out of the contract. But in New York it has been held that under such a statute the contractor is not prohibited from *assigning money* payable to him under the contract, and that his assignee may recover these moneys from the municipality. Similar considerations govern the effect of a clause in a contract prohibiting the assignment thereof and providing for a forfeiture thereof in the event of its being assigned. Such a clause, forming a part of the contract, has the force of law over those who are parties to the contract. But this provision is inserted in the

contract *solely for the benefit of the city*, and prevents any claim being asserted against it in the absence of its consent. It is a shield to protect the city, and is not intended for the benefit of persons with whom the contractor may deal. Notwithstanding such a provision the contractor may assign moneys due or to become due under the contract, and the assignment is valid and enforceable and takes priority over statutory liens subsequently filed."

On this point, Davis, *V. C.*, in his opinion, said:

"There was no default by Eastern States under the Clarion and Venango contract. There was full performance of this contract by Eastern States prior to the assignment from Eastern States to Bridgeton Bank, and the Commonwealth of Pennsylvania had no interest in the retention of any of the moneys due Eastern States after the bond had been released and provision made for full payment of labor done and materials furnished thereunder. The contract between Eastern States and Commonwealth of Pennsylvania contained the provision that the contractor should not assign the contract or the right to any of the moneys to be paid thereunder, but that provision must be construed to have been placed therein for the benefit and protection of the Commonwealth, and the Commonwealth's interest having ceased, the assignability of the moneys due Eastern States thereunder as between Bridgeton Bank and Eastern States is not affected and the consent of the Commonwealth was not necessary to make such assignment valid." (citing cases.) (p. 38, ll. 15-35.)

II.

Commercial had notice of the claim of the Bank under its assignment before Commercial paid any of the bills on contracts subsequent to the Clarion-Venango contract.

The final settlement with McDonald Construction Company and the payment to that company for work and material furnished by it to Eastern States in the performance of the Clarion-Venango contract, amounting to the sum of \$12,370.43, was made on May 23, 1930 (p. 285, ll. 25-30); so far as that payment is concerned, it makes no difference whether Commercial had notice of the assignment by Eastern States to Bridgeton Bank of the balance due Eastern States under that contract, as Bridgeton Bank makes no claim against Commercial by reason of the payment to McDonald—the Bank admitting that Commercial was legally justified in paying McDonald Construction Company the amount due that company out of the proceeds of the final estimates on the Clarion-Venango contract—whether such payment was made with or without notice to Commercial of the assignment to the Bank.

After making said payment to McDonald there still remained a balance of \$7,307.41 out of the final estimate that had been paid to Eastern States by the Commonwealth of Pennsylvania; this balance was part of the total amount of the two checks representing the final estimate, to wit, the sum of \$19,677.84 that had been appropriated by Commercial on the strength of Jerome's endorsement of those checks on or about February 10, 1930.

But as to payments made by Commercial of claims against Eastern States for work and

materials furnished Eastern States on contracts *subsequent* to the Clarion-Venango contract, the testimony shows that *before* any claims were paid by Commercial on such subsequent contracts, Commercial had received notice of the assignment to the Bank.

The first notice was given to Commercial's agent at Pittsburgh by Jerome within a day or two after the date of the assignment, September 24, 1929. Jerome testified that after Bridgeton Bank had made the loan of \$10,000.00, and had received from Eastern States an assignment of the balance due on the Clarion-Venango contract, he stopped off at Harrisburg, Pa., for the purpose of discussing the matter of the assignment with the Department of Highways and from that point called Mr. Hays at Pittsburgh by telephone. "I told him we had gotten the \$10,000 and that we were using it to pay bills, and we had to make an assignment against the Clarion-Venango final" (p. 92). This telephone conversation was within a day or two after the loan was made while "we", that is, Jerome and Williams, were on the way back to one of the contracts (p. 93).

Jerome further says that Williams told him he had better write a letter and thereupon Jerome went to the Penn-Harris Hotel and wrote a letter in long-hand to Mr. Hays confirming the telephone conversation, "stating we had received \$10,000, and were able to continue on with the work, and we had to assign that much of the final estimate on the Clarion-Venango" (p. 93).

Jerome then mailed this letter to Hays at Pittsburgh, Grant Building; the letter was written within three or four days from the date of the assignment (p. 94).

Jerome further said: "I knew we were getting \$10,000 and that we needed the \$10,000 and I was glad to get it, and that I intended to tell Mr. Hays" (p. 114).

There is "no doubt in my mind Mr. Hays knew about that" (p. 117).

He then gave further details as to the circumstances under which this letter was written at the Penn-Harris Hotel, stating that it was written in the writing room about lunch time on the day he went to Harrisburg (p. 119). "I know this that we were very anxious to get this money. Mr. Hays was anxious that we get it and I was glad of the fact that I was able to tell him, we did have it" (pp. 120-121).

A telephone call was made to Mr. Hays, Assistant Manager, (instead of to the General Manager), because the witness and Hays were friendly; "I looked upon Mr. Hays as a friend of mine and he had tried to help us out." (p. 121).

Prior to the date of the loan by the Bridgeton Bank witness had discussed with Mr. Hays the question of borrowing money from a bank in Bridgeton—though not mentioning what bank (p. 129).

So far as relates to the notice which Jerome says he gave to Hays both by telephone and by letter, the witness Hays made a flat contradiction.

He said that he did not receive a letter from Jerome advising of the assignment to the bank or of the loan made by the bank; also that he had no such telephone conversation with Jerome as he testified, and that the first time he knew about it was in the spring of 1930 (pp. 179-180).

Mr. Hays also testified, however, that practically all his dealings were with Jerome (p. 165); and that Jerome handled the finances of Eastern States (p. 166), and that he had "quite a few conferences" with Jerome about the McDonald Company and other sub-contractors (pp. 168-170); the witness also described in detail the arrangements he made with Jerome for the application of the checks in payment of the *semi* final estimate in September of 1929 (pp. 172-179).

One or the other of these two witnesses must be mistaken in his recollection as to the notice of the assignment which Jerome says was given to the Commercial three or four days after the loan was made.

We submit that the record shows clearly that Hays was keeping close track of the financial condition of Eastern States—as is evidenced by his own testimony to wit; he knew that Jerome was hoping to obtain additional capital (pp. 177, 188); and that early in September, 1929, he demanded and received from Jerome a sworn financial statement of the condition of Eastern States (pp. 108-109, 127; Ex. 48, p. 260).

In view of the fact that in the latter part of August or early in September, 1929, Hays had begun to question the financial ability of Eastern States to carry out certain contracts in which Commercial was interested as surety, the reasonable probability is that as soon as Jerome was in a position to assure Hays that additional capital had been raised he, Jerome, would be likely to notify Hays of the good news, as the loan would be helpful not only to Eastern States but would relieve, to a considerable extent, the alarm which Hays had already manifested as to the financial condition of Eastern States.

As between Jerome and Hays, the Vice Chancellor gave credence to the testimony of Jerome, saying:

“At the time the \$10,000 was borrowed from Bridgeton Bank by Eastern States, Jerome was present in Bridgeton and he testified that he telephoned Mr. Hays, the assistant manager of Commercial, telling him of this loan and of this assignment executed as collateral, and that he also wrote him a letter to that effect. His testimony was that the letter was written in longhand from the Penn-Harris Hotel in Harrisburg, of which he retained no copy. While the receipt of such a letter and telephone call is denied by Mr. Hays, I am inclined to believe that Mr. Hays was informed by Mr. Jerome of this loan, and through him, Commercial had information about it shortly after the loan was made, and in reaching this conclusion I have taken into consideration the fact that checks drawn by Eastern States in payment of bills had been, prior to that time, returned unpaid by Bridgeton Bank on account of insufficient funds, and Mr. Hays knew about them and was interested in having these checks made good, as well as considered a letter which Jerome wrote to Commercial on January 31, 1930, at which time Eastern States owed more than the money it would receive on one or more of the contracts other than the Clarion and Venango contract, and stating in the letter that the final estimate on the latter contract would be received in a few days and on receipt of it Commercial should apply it to these accounts except the amount owed the McDonald Construction Company” (p. 33, l. 15 to p. 34, l. 12).

While we think the conclusion of the Vice Chancellor is correct on the question of veracity as between Hays and Jerome, the legal right of the parties to the fund in dispute does not depend on whether or not Commercial had notice

of the bank's assignment. However that may be, the testimony shows *without* dispute that Commercial had notice of the assignment before any payments were made by it for account of Eastern States on the contracts subsequent to the Clarion-Venango contract.

The fact of such notice appears, in the first place, from the testimony of Jerome on the occasion when he endorsed the checks for the final estimate on the Clarion-Venango job. At that time Jerome discussed with Hays the assignment of the claim of the Bridgeton Bank and remarked that, "I was going to get the mischief for it myself" (p. 97, l. 1). In Mr. Hays' testimony counsel for Commercial took pains to direct Hays' attention to the testimony of Jerome on a variety of subjects, including the circumstances under which Jerome endorsed these checks, but refrained from asking Hays whether Jerome discussed the matter of the assignment to the bank, and Hays did not deny that there was such a discussion. Hence there is no contradiction in Jerome's testimony that the assignment was discussed on that occasion.

In the second place, it appears that Bridgeton Bank, on March 28, 1930, notified Commercial by letter of the loan and assignment and enclosed a copy of the note and other papers relating thereto (Ex. 36, p. 243; par. 38 of Stip. p. 74).

Repeated efforts were made by Mr. McAllister, Treasurer of Eastern States, to obtain information as to the items for which Commercial was holding the balance of the final estimate on the Clarion-Venango job, but without obtaining satisfactory replies (pp. 147, 148).

No payments were made by Commercial of any bills or contracts subsequent to Clarion-Venango contract until December 6, 1930 (in the case of Vernon-Hayfield contract), December 5, 1930 (in the case of West Meade contract) and until June 7, 1930 (in the case of Indiana County contract) (pp. 285-7).

The dates and the amounts of the payments made by Commercial on these three subsequent contracts, are set forth in the pleadings in Suit No. 2—printed in State of Case under the caption “Facts Admitted in the Pleadings” (See pp. 286, 7).

These admissions show without dispute that not one of the bills for which Commercial claims the right of set-off as against the balance received on the Clarion-Venango contract was paid by Commercial until several months after its agent at Pittsburgh had received verbal notice from Jerome of the assignment to the bank, and after Commercial's Home Office at Newark had received written notice thereof.

It makes no difference so far as the question of notice is concerned whether we use Jerome's testimony or Hays' testimony, as to the notice which Jerome says he gave to Hays in the latter part of September, 1929; there is no dispute about the fact that Commercial was advised of the assignment in February of 1930, through its Pittsburgh agent, and was further advised in writing in March of 1930 at its Home Office; both notices were prior to the date of payment of any of the bills on the three subsequent contracts, so that if Commercial paid those bills, it did so with its eyes open, and in the face of and with knowledge of the claim of Bridgeton Bank under its assignment. Under these circum-

stances the appropriate remedy of Commercial was to file a bill of interpleader, wherein the claimants to the fund could set up their respective rights. Instead of so doing it chose to apply the balance of the fund to the payment of claims on the other contracts; in so far as Bridgeton Bank is concerned we submit that Commercial had no right to make such application of the surplus of the balance of the final estimates on the Clarion-Venango contract.

III.

In so far as relates to the balance of \$7,307.41 (part of the payment made by the Commonwealth to Eastern States of the final estimate) the right of Bridgeton Bank thereto by virtue of its assignment is prior to the right of Commercial by virtue of the provisions of the Application for Bond.

Construction of Application for Bond.

The note given by Eastern States to the Bridgeton Bank is dated September 24, 1929, and the assignment given as collateral security for the payment thereof bears the same date (Exs. 28 and 29, pp. 234, 238).

There is no dispute of the fact that Eastern States has not paid any part of the principal or interest on said note.

Likewise there is no dispute of the fact that the bank would be entitled to receive the balance of \$7,307.41 out of the final estimate paid to Eastern States by the Commonwealth of Pennsylvania, except for the question as to the validity of the assignment (discussed under Point I hereof); and except for the question as to

whether Commercial has a prior right to said balance by virtue of certain provisions in the application by Eastern States to Commercial for bond re Clarion-Venango contract (Ex. 1, pp. 19-202).

The application for bond is dated April 13, 1928, and the bond issued pursuant thereto as well as the contract (between Eastern States and Pennsylvania) to secure the performance of which the bond was given, are both dated April 14, 1928 (Exs. 2 and 3, pp. 203 and 207).

On or prior to September 19, 1929 (five days before the date of the note and the assignment), all work and material on said contract had been done and furnished by Eastern States; there had been no default therein by Eastern States and performance was completed in a manner satisfactory to the Secretary of Highways—as evidenced by the approval of the final estimate in January, 1930 and the payment of the amount due Eastern States (as fixed by said final estimate) on February 10, 1930; the final estimate was not an allowance for *additional* work or material, but was merely an accounting for the purpose of checking prices and quantities for work and material already done and furnished; the money had been earned and was due; nothing remained to be done except to figure the exact balance, and to make the final payment.

In the third paragraph of said application for bond (Ex. 1, p. 190) Eastern States agrees to indemnify Commercial against all damages which Commercial might sustain by reason of executing the bond “herein applied for,” or by reason of the execution by Commercial “of any and all other bonds executed” for Eastern States. So far as this paragraph is concerned it is obviously

limited to the bond given for the *specific* contract, to wit, in this case the Clarion-Venango contract or to "other" bonds *theretofore* executed. There is nothing in said third paragraph which contemplates, or even suggests, that any of the terms of said paragraph relate to bonds that might *thereafter* be executed by Commercial for Eastern States.

In the sixth paragraph of said application Eastern States in further consideration of the execution of *said* bond (that is, the bond for the Clarion-Venango contract), assigns to Commercial all deferred payments and retained percentages and any moneys that may be due and payable to Eastern States *at the time of any breach or default in said contract*, or that thereafter may become due and payable to Eastern States on account of said contract (or on account of extra work or materials) and agrees that such money and payments shall be the sole property of Commercial and credited by it upon any loss or damage "sustained or incurred by it under *said bond*."

We submit that the reasonable construction of this paragraph is that the right of Commercial to receive moneys payable to the Eastern States arises *only* in the event of a breach or default in the contract.

But there never was any breach or default in the Clarion-Venango contract; some months after the payment of the final estimate, Commercial did in fact apply \$12,370.43 of the final estimate to the payment of the bill of McDonald Construction Company, a subcontractor of Eastern States on said contract; and it is conceded that Commercial is entitled to credit for that amount, thus leaving in dispute the balance of \$7,307.41.

Inasmuch as Bridgeton Bank concedes that the payment to McDonald was lawful we have no further concern with said paragraph 6—except, that the language thereof may be considered in the interpretation of other provisions of the application for bond; and, particularly, the eleventh paragraph thereof.

In said eleventh paragraph it is agreed by Commercial that “these covenants” and all collateral security, if any, shall at the option of Commercial, be available in its behalf and for its benefit “as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request.”

So far as this paragraph is concerned we may eliminate from consideration the reference to “collateral security,” as it is admitted that no such security was at any time deposited by Eastern States with Commercial.

The issue is therefore narrowed to the interpretation of what is meant by the phrase “these covenants” shall be “available” in its behalf and for its benefit concerning “subsequent bonds.”

It may be claimed by Commercial that said eleventh paragraph is to be read in connection with said sixth paragraph, whereby Eastern States assigned deferred payments and retained percentages and all moneys that may be payable to Eastern States. But said sixth paragraph refers to moneys due and payable “at the time of any breach or default in said contract;” the further clause in said sixth paragraph “or that thereafter may become due and payable on ac-

count of said contract," obviously also relates to breach or default.

This becomes apparent when we consider the phrases used therein to describe the moneys payable to the contractor. These are:

1. All deferred payments.
2. All retained percentages.
3. All moneys that *may* be due and payable.

These three clauses evidently refer to moneys already earned but not yet paid.

And finally, we have a further provision for payment, namely, "or moneys that *thereafter* may become due and payable."

If, therefore, the assignment under the sixth paragraph becomes effective only at the time of a breach or default in said contract, then such construction disposes of the question so far as relates to the fund in dispute.

On the assumption, however, that Commercial will claim, either that the assignment under the sixth paragraph is not limited to the occasion of a breach or default in the particular contract for which the bond was given, or that Commercial is entitled to subrogation either under the eleventh paragraph or under the general doctrine, so as to justify it in *also* setting off against the fund due Eastern States under the Clarion-Venango contract, payments made by it on other and subsequent bonds, we proceed to a discussion of such claim.

All the other contracts upon which Commercial executed bonds as surety are *dated later than the Clarion-Venango contract*, and all the payments made by Commercial for Eastern States on said

subsequent contracts were after the Clarion-Venango contract had been completed and the amount due Eastern States thereon had been approved and paid by the Commonwealth—the earliest of the payments on such other contracts being made in June of 1930 and the latest in August of 1932.

So far as relates to the Clarion-Venango contract the evidence is undisputed that the only bill remaining unpaid by Eastern States, when the checks for the final estimate were delivered in February of 1930, was that of its subcontractor, McDonald Construction Company; this appears from the testimony of Jerome who said that the Clarion-Venango contract had been completed about August 1, 1929 (pp. 84-85); *at that time* there were several other unpaid bills on said contract, but these were all settled out of the proceeds of the *semi final* estimate (pp. 87-89; Exs. 17 to 23, pp. 230-231); at the time Jerome sent to the Department of Highways his letter of September 19, 1929, wherein he directed the Department to forward the final check “to us” in care of Commercial at Pittsburgh (Ex. 27, p. 233), all bills had been paid except McDonald and the exact amount of that was not then known (p. 90).

The testimony of Mr. Hays is to the same effect; he said that the Eastern States had completed the work and that McDonald was demanding \$23,000 or \$24,000 (pp. 168 and 183); that the exact amount of that claim was not finally settled until May of 1930 (p. 183); that the only claim which he discussed with Jerome when the letter of September 19, 1929, was written, in so far as relates to the Clarion-Venango job, was the claim of McDonald (pp. 177-178).

Mr. Hays says that at the time he asked Mr. Jerome to write the letter of September 19, 1929, to the Department he told Mr. Jerome that any amount of the final estimate that was left over (after settling the McDonald claim), would be applied towards the bills of the "Crawford County Jobs" (pp. 178, 179). These were the jobs known as Vernon-Hayfield and West Meade (p. 90, contracts 2 and 3, dated respectively September 22, 1928 and March 22, 1929). Mr. Hays admits that he did not show Jerome any "document" under which Commercial claimed the right to apply the Clarion-Venango payments to settlement of bills on other contracts (p. 188).

Although Mr. Hays says that in September, 1929, the fact that certain bills on said other contracts were unpaid, had been called to "our attention" (p. 186), nevertheless when he notified Mr. Jerome in February, 1930, of the receipt of the checks for the final estimate on the Clarion-Venango job, there was not a word in this letter about unpaid bills on *other* contracts, the sole reference being to the McDonald claim. We quote from said letter (dated February 11, 1930—Ex. 50, p. 264):

"This is the Clarion-Venango job and I am holding these checks in the strong box until a copy of the final estimate is received so that the status of the McDonald Construction Company may be properly determined.

I am leaving for Harrisburg Wednesday night, February 12th and while there will secure a copy of the final estimate.

I would suggest that next week a day be set aside to review the entire transaction and an attempt be made to satisfactorily settle this account."

It is conceded that there were unpaid bills on the contracts other than Clarion-Venango, but

it is obvious from this letter (Ex. 50, p. 264) that both Mr. Hays and Mr. Jerome were concerned at that time only with the McDonald claim.

Jerome testified that on the occasion when he was persuaded by Mr. Hays to endorse the checks for the final estimate on the Clarion-Venango job, Hays said "he would not give us those checks on account of the money we owed on other contracts" (p. 96, l. 10). But at that time none of the bills on said other contracts had been paid by Commercial; and the amount of said bills had not even been determined. Mr. Hays did not personally handle the settlement of such other bills (p. 182). Aside from the bills which are described in the pleading of Commercial as "investigation exp.", the earliest date of payment on either of the Crawford County jobs (Vernon-Hayfield and West Meade) was in *December of 1930* (p. 286).

Discussion of Authorities.

So far as concerns the Commercial's claim of the right of subrogation, we may first note that such right arises by operation of law and is not dependent upon contract. See 60 C. J., title "Subrogation," pp. 695 and 700.

This doctrine cannot avail to sustain Commercial's claim in the present case, as it is well-settled that the right of subrogation does not extend to securities or claims *other* than the one for which the surety is bound. The rule on this subject is summarized as follows in 60 C. J., p. 751 (*italics ours*):

"* * * a surety will be subrogated *only* to such rights and securities as are held by the creditor with respect to the *particular debt or contract* for which the surety is bound; and, *unless there is an agreement*

causing the result to be otherwise, sureties on an obligation given to procure a loan with which to discharge another debt or encumbrance cannot be subrogated to the rights of the creditor whose debt or encumbrance is discharged, but only to the rights of the lender or the creditor in the debt for which they are bound."

It is equally well-settled that the surety is not entitled to subrogation of the rights of the creditor until he has paid in full the debt for which he is surety; 60 C. J. (pp. 720, 743).

In *Receivers of New Jersey Midland Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658, 661, this court stated the rule as follows:

"The right of subrogation cannot be enforced until the whole debt is paid; and until the creditor be wholly satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim."

See, further, *Blue Stone B. & L. Ass'n. v. Glasser*, 117 N. J. Eq. 392.

It appears without dispute that at the time Commercial diverted the checks for the final estimate on the Clarion-Venango contract it had not *then* paid either the McDonald claim (arising out of that contract), or *any* of the claims arising out of the later contracts. Hence at that time Commercial was not entitled to subrogation even as to the McDonald claim—still less as to the claims on other contracts. However, inasmuch as Bridgeton Bank admits that the McDonald claim was subsequently paid by Commercial out of the proceeds of said final estimate, the Bank is not in a position to make any further claim to that part of the final estimate so paid

to McDonald, as the McDonald bill was for work arising out of the particular contract.

An entirely different question arises as to claims arising out of the other contracts; so far as those claims are concerned, Commercial, under the well-settled rule above quoted, is not entitled to subrogation, as those claims did not arise out of the particular debt or contract for which the surety was bound by virtue of the bond on the Clarion-Venango contract.

The application of the rules relating to subrogation to construction contracts is discussed in 60 C. J., pp. 777-781. As between the surety and the assignee of the contractor, we concede that the general rule is that the rights of the surety are superior to those of the assignee, *in so far as relates to the funds payable under the particular contract*. The cases on this subject are cited in 60 C. J. pp. 779, 780, but those cases (with one exception hereafter discussed) deal with a situation where the surety and the assignee both asserted their respective claims *under the same contract*.

The result accordingly is that so far as the present case is concerned the doctrine of subrogation does not justify Commercial in retaining such part of the proceeds of the final estimate on the Clarion-Venango contract as was in excess of the amount paid McDonald by Commercial.

The sole question on this phase of the case is whether by virtue of the terms of the application for the bond on the Clarion-Venango contract the right of Commercial is superior to that of Bridgeton Bank.

The pertinent paragraphs of this application are quoted in the opinion of the court below

(pp. 35-8); the question is whether under the terms of that application Commercial has the right to apply the balance of the proceeds of the final estimate (after paying McDonald), to the payment of unpaid bills on other and subsequent contracts.

A leading case is *Southern Surety Co. v. Town of Greeneville*, 261 Fed. 929 (C. C. A. 6th Cir.). The terms of the application for a bond in that case are very similar to those in the present case. The construction company had a contract with the Town of Greeneville for certain public work; it signed an application to the surety company which contained an assignment of certain personal property as security. The surety claimed that this security was intended to protect it from liability, not only on account of the bond mentioned in the application, but on account of other bonds which it had given to other municipalities for the benefit of the construction company, under one of which the surety had incurred liability by reason of the default of the construction company. No loss was incurred on the Greeneville contract; the town paid the construction company the amount due it in excess of the claim of the surety, and then filed a bill of interpleader joining as defendants the surety and the trustee in bankruptcy of the construction company; the question was whether the surety or the trustee was entitled to the fund in dispute.

The District Court decreed that the fund belonged to the trustee; on appeal of the surety this decree was affirmed.

In the course of the opinion the Appellate Court discussed the various provisions of the application for the bond. The language of the

seventh paragraph thereof is identical with that of the eleventh paragraph in this case. (See 261 F. at p. 931). Other paragraphs are very similar to those in the present case.

The court pointed out that the second covenant (which corresponds to the third paragraph of the present case) contained no provision for security by way of pledge or mortgage; also that the first part of the fourth paragraph (which corresponds in part to the fifth paragraph and in part to the sixth paragraph in the present case) omitted any mention of pledged or mortgaged property; also that the second part of the fourth paragraph which contained the assignment of the tools, etc., relating to the contract in question and of the proceeds thereof (corresponding in part to the fifth paragraph hereof), nowhere suggested that the security should extend to any other obligation.

The court then pointed out that the last sentence of the fourth paragraph made the assignment void if the Surety Company should not sustain the loss on the specific fund, to wit, that relating to the Greeneville contract, and concluded that the general language of the seventh paragraph (eleventh paragraph hereof) was not sufficient to overcome the evidence of a contrary intent, as indicated by other provisions in the application, saying "To hold otherwise would be to make the general prevail over the particular and specific, thus contravening the usual rule of construction" (p. 932).

While in the present application there is no *express* provision whereby in the event that the Surety Company is released from liability the assignment becomes void, (as in the Greeneville case), nevertheless the provisions of the appli-

cation are limited to the specific bond; thus the fifth paragraph, which assigns the tools and materials, authorizes the Surety Company to take possession in the event of any default "in the performance of the contract *hereinabove referred to* or in the payment of the premiums above mentioned" (p. 199, l. 20); paragraph 6 refers to *said* bond, to breach or default in *said* contract, to loss and expense sustained or incurred "under *said* bond"; and the seventh paragraph refers to the reservation of an amount to cover contingent claims "under the bond *herein applied for*."

Hence, the reasoning in the Greeneville case is directly applicable to the present case.

The legal principles in that case were cited with approval under varying circumstances in the following:

Baltimore Trust Co. v. Metropolitan Casualty Ins. Co., 3 Fed. Supp. 404, 408 (aff. 68 Fed. (2d) 121).

Lacy v. Maryland Casualty Co., 32 Fed. (2d) 48, 54, (C. C. A. 4th Cir.).

O'Connor v. Great Lakes Pipe Line Co., 63 Fed. (2d) 523, 527.

Of these three cases the Lacy case is the only one which on the facts is similar to the present case. In that case it appears that one Lacy had been awarded several contracts for the construction of roads in North Carolina; the two in question were known as Nos. 151 and 378; they both provided for progress payments, and for a retained percentage until the entire work was completed; there was a separate bond and a separate application in each case. Both applications assigned to the surety the contractor's title to tools and materials and also assigned (in the form of a covenant) all payments "specified to be with-

held," in the event of a claim or default under the bond.

The eighth paragraph of the application provided that the covenants and all collateral security should be available for the benefit of the surety "as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request"—the wording of the said eighth paragraph being identical with the eleventh paragraph in the application for the Clarion-Venango contract (Ex. 1, p. 201).

The contractor became insolvent and made a contract with the surety whereby the latter agreed to advance the money necessary to complete the contracts, taking as security his equipment and certain corporate stock; thereafter the contractor proceeded with the work with the funds advanced by the surety; the surety finally took over both contracts and completed them, though no formal notice of default was ever given.

On No. 151 there was a profit of \$10,000; on No. 378 there was a loss of \$139,000 and on all the contracts as a whole the loss exceeded the profits.

While the work was proceeding and before the surety took over the contracts a certain bank loaned money to Lacy on the security of assignments of the moneys due or to become due on Nos. 151 and 378. The District Court held the surety had a prior claim on all funds on all contracts. The Appellate Court held, however, that different principles applied to the two contracts in question; taking up first No. 378 (on which there was a loss), the Appellate Court held that the decree of the court below in sustaining the surety's claim of prior right was correct and

that the surety was entitled to the moneys on that particular contract—not because of the terms of the application, but on the doctrine of subrogation whereby the surety who completed the contract on default of the principal became subrogated to the rights of the obligee and, therefore, had an equity in the funds due the contractor which was superior to that of the assignee; and that this equity extended both to current estimates and to the retained percentage.

It will be observed that as to said contract 378 the court applied the doctrine of subrogation, as set forth in the above quotation from *Corpus Juris*.

In dealing with contract 151 (on which a profit had been realized), the court pointed out that a different situation existed; after stating that the right of subrogation extended *only* so far as was necessary to reimburse the surety and that any remaining funds should be applied to the claims of assignees or other persons entitled thereto the court held that the surety was not entitled to the *profit* except to the extent necessary to reimburse it for expenditures made thereunder. The court then discussed the question whether the surety was entitled to these funds *by virtue of the terms of the assignment*, the surety claiming that thereunder it should receive both the current estimates and the retained percentage on the contract in question.

The court held that a different rule applied as between the current estimates and the retained percentage, saying:

“We think that its position is sound as to the retained percentage. The application in question by a covenant contained in the second paragraph, which we have italicized,

assigned to the casualty company, in event of claim or default, the retained percentage under the contract. When the contractor became insolvent and the company was obliged to finance the project and ultimately to take it over, there was certainly a 'default' within any fair meaning of the language used, and the assignment of the covenant thereupon became effective. The eighth paragraph made this retained percentage available as security, not only for loss sustained on the bond covering the particular project, but also for loss sustained upon any other bond executed by the company for the contractor.

We have carefully considered the case of *Southern Surety Co. v. Town of Greeneville* (C. C. A. 6th) 261 F. 929, and we do not think that it conflicts with our decision here. In that case an assignment clause conveyed tools and equipment as security, with a provision that it should be null and void if the company should suffer no loss under the bond; and it was held that such assignment clause was not a covenant within the meaning of a general clause like that embodied in clause eight of this contract. Here, however, the clause assigning the retained percentage refers to itself as a covenant, and there are other differences in language which clearly distinguish this case from that.

We do not agree with the contention of the company, however, that anything more is assigned than the retained percentage. The language is, 'all payments specified in the above mentioned contract to be withheld by the obligee until the completion of the work, shall, as soon as the work is completed, be paid to the company—and this covenant shall operate as an assignment thereof.' This does not assign all moneys due under the contract, but the 'payments specified in the above mentioned contract to be withheld,' i. e., what are commonly referred to as the retained percentages, the percentage with-

held from the progress payments on current estimates. And we think also, on the principle that the language of the printed application is to be construed most strongly against the company, that payments 'specified to be withheld' is limited strictly to the percentage of the progress payments retained by the Commission and does not include the final payment, which is not 'to be withheld' but to be paid when due upon the completion of the contract."

The court accordingly held that as to contract 151 the surety might use the *retained percentages* (only) to apply to losses on other contracts, holding same, not on the theory of subrogation but as assignee; but that any of the funds arising from said contract (other than the retained percentages) should be applied to the claim of the bank and to the estate of H. D. Lacy (said Lacy during his lifetime having had a contract with his brother, the contractor, for one-half of the profits); the case was then remanded to determine the amount to be applied to said claims.

The principles announced in that decision may be summarized as follows:

(a) Under the doctrine of subrogation no part of the profit on one contract could be applied to reduce the loss on the other contract.

(b) Under the terms of the assignment, as set forth in the application of the bond, the proceeds of the one contract on which there was a profit could be applied to the loss, in so far as those proceeds (and only in so far) consisted of retained percentages as distinguished from progress payments or current estimates. The use of the retained percentage for that purpose was based upon the provision in the application, as-

signing said percentage, whereby said provision describes itself *as a covenant*.

(c) The proceeds of the contract so to be used did *not* include the final payment.

Applying these rulings to the facts in the present case we have the following situation:

First: The present case is not controlled by the doctrine of subrogation, as there was no default in the work of the Clarion-Venango contract; and all claims of subcontractors under that contract (including the claim of McDonald) have been paid.

Second: There was no "breach or default" in said contract within the meaning of the terms of the application for bond (Ex. 1, p. 190); the fact that there was some delay in paying the McDonald claim was not a breach or default, as that delay was due to the uncertainty as to the amount due McDonald; the amount due that subcontractor was not finally determined until several months after the payment of the final estimates; and when so determined it was paid out of the final estimates and is not now in dispute.

Third: The provision in the sixth paragraph of the application herein (Ex. 1, p. 199) differs materially from the corresponding provision in the Lacy case (quoted in full at p. 50 of 32 Fed. (2d)), in that the provision in the Lacy case reads: "This covenant shall operate as an assignment thereof"—that is, of the payments mentioned in the said provision—and it was on the strength of that wording that the court held that the assignment was a covenant and, therefore, there was a distinction from the Greeneville case (see p. 54); here the corresponding provi-

sion is not recited as a "covenant" and does not use that term.

Moreover, even under the language of the "covenant" in the Lacy case it was held that the right of the surety was limited to the amount of the retained percentage; the court expressly says that the amount to which the surety company was entitled "does not include the final payment" (p. 54).

Paragraph 60 of the general provisions of the Clarion-Venango contract under the title "Payments" reads:

"At intervals of once a month, from time to time as the work progresses, the Engineer will make an estimate of the value of the work done, and ninety per centum (90%) of such estimated value when the same exceeds one thousand dollars (\$1,000.00) shall be certified by the Secretary to the Auditor General for payment."

Paragraph 61 reads:

"When the work has been completed, the Engineer shall make an inspection of the roadway and, in the event that repairs and removals are necessary which cannot be made promptly due to no fault of the Contractor, or if, for any reason, the Engineer deems it advisable, a semi-final estimate may be made, from which shall be retained a sum sufficient to cover the cost of said repairs, removals, etc."

Paragraph 62 reads:

"Upon the acceptance of all work specified in this contract by the Engineer, he shall certify this acceptance to the Secretary, in writing, together with the entire amount of each class of work performed and value thereof. Upon receipt of this certificate from the Engineer, the Secretary, after making all legal and equitable deductions, shall

certify to the Auditor General the amount due in final payment of the contract, and shall notify the Contractor and his Surety of the satisfactory completion of the contract" (p. 209).

The semi final estimates are Exhibits 9 and 10 (p. 222); the final estimates are Exhibits 30 and 31 (p. 240).

In neither of the two final estimates is any specific sum stated as retained percentage. However, we need not consider what amount, if any, of the final estimates is to be classified as "retained percentage"; as pointed out in the Lacy case the provision in the application there under consideration was to be construed "most strongly" against the surety—and the court accordingly ruled that the language therein "all payments specified in the above mentioned contract to be withheld by the obligee until the completion of the work," did not include the final payment, for the reason that such payment was not "to be withheld" (in the language of the provision in question), but was to be paid when due "on the completion of the contract."

The assignment provision in the present case (sixth paragraph of Ex. 1, p. 199) is not as broad as the corresponding provision in the Lacy case, as said sixth paragraph limits the application of the proceeds of payments received under the assignment to loss, etc. "sustained or incurred by it (the surety) under *said bond*" (p. 199, l. 38).

In any event the ruling of the Lacy case was based solely upon the quoted provision which described the assignment as "this covenant"; and the court tied that expression to the further provision in the application that "these covenants" shall be available for "other former or

subsequent bonds and undertakings"—and, in this respect, the corresponding provision of Exhibit 1 in this case does *not* describe the assignment as a covenant (sixth paragraph). Hence, if the present case is to turn on the construction of the language of the application, the controlling authority is the Greeneville case, *supra*, where, the language of the application closely resembles that of Exhibit 1.

The Lacy case came before the Circuit Court of Appeals the second time and is reported under the name of *Maryland Casualty Co. v. Lacy*, 46 Fed. (2d) 409. The court reiterated its former view that the surety company was entitled to the retained percentage (only) to apply against losses under other contracts, and that the rest should be paid to the bank under its assignment and to the claim of the estate of H. D. Lacy; the only new question on the second appeal was as to proper method of computing the amount of the retained percentage—a point with which we are not concerned in the present case.

If there is any doubt as to the construction of the application, that doubt should be resolved against the surety, as the surety prepared the application and it must be construed most strongly against it. See Greeneville case, *supra*, 261 Fed. at p. 932.

The general rule is that a contract of indemnity is strictly construed. See 31 C. J., p. 434, sec. 28, title "Indemnity"; 50 C. J., p. 256, sec. 422, title "Principal and Surety."

We submit that under the terms of the application Commercial had no right to use any part of the final estimate for the payment of bills for

work and materials on contracts other than the Clarion-Venango contract.

On this point, Davis, V. C., after quoting the pertinent provisions of the application and agreement in connection with the surety bond under the Clarion-Venango contract, said:

“The right of Commercial to appropriate the overplus from the Clarion and Venango contract to make up its losses on the subsequent contracts on which it was surety, depends largely upon the construction to be given to the application and agreement for this bond.

Paragraph 6 in effect assigns to Commercial moneys that may be due and payable to Eastern States at the time of any breach or default on said contract, the same to be credited upon any loss, cost, damage, charge or expense sustained or incurred by it under said bond.

Under Paragraph 3, Eastern States agrees to indemnify and keep indemnified Commercial against all liability, etc. which it may sustain by reason of having executed this bond or by reason of or in consequence of the execution by Commercial of any and all other bonds *executed*.

As I read these provisions, I must reach the conclusion that this agreement cannot be construed to relate to bonds executed subsequently to this one, but only to the bond therein applied for and any others theretofore executed, unless Paragraph 11 should be construed to enlarge the meaning and scope of Paragraph 6. Paragraph 11 makes available to Commercial all collateral security deposited concerning the bond in question or any former or subsequent bonds for its benefit, as well concerning this bond as all other former or subsequent bonds executed, but at the option of Commercial. No securities were deposited with this bond, and there being no default by Eastern States under

the contract making Commercial liable on this bond, there was neither right nor occasion for Commercial to exercise any option in behalf of this bond. The obtaining of the checks representing the final payment under this contract in the manner in which they were obtained, cannot be construed to be collateral security as contemplated under this clause. The use of the word 'covenants' in that paragraph relates to the covenants set forth in the application and agreement, and its use in this Paragraph 11 cannot be construed to enlarge the provisions contained in the third paragraph so as to make those provisions applicable to bonds subsequently executed'' (p. 39, l. 1 to p. 40, l. 15).

We submit that his construction of the Application is correct both on reason and authority.

IV.

The direction by Jerome to the Highway Department of Pennsylvania to forward the checks for the final estimates due Eastern States on the Clarion-Venango contract, in care of Commercial, was not an equitable assignment to Commercial of the amount of said estimates, except only to the extent of the sum due a sub-contractor of Eastern States under said contract.

On September 19, 1929, Mr. Jerome wrote to the Executive Secretary of the Department of Highways of the Commonwealth of Pennsylvania a letter reading as follows:

"Please accept this as an order to forward our final check to us on the construction of Clarion-Venango County, R-75, Application 4788, to us in care of the Commercial Casualty Insurance Company, 720 Grant Building, Pittsburgh, Pennsylvania."
(Ex. 27, p. 233.)

This letter was signed "Eastern States Construction Company by Wm. F. Jerome."

While Jerome did not sign this letter as an officer of Eastern States, it is admitted that at the date thereof he was the Assistant Secretary and the Assistant Treasurer. But there is no proof that any of the other officers or directors of Eastern States authorized Jerome to send such an order or had any knowledge of it until long after the checks for the final estimate had been sent to Commercial at Pittsburgh, pursuant to that letter.

Mr. McAllister who was the Secretary and Treasurer and one of the directors of Eastern States, testified that he "certainly did not" know anything about said letter, and that it was not the subject of any action by the Board of Directors at any time, and that the Board did not authorize the endorsement by Jerome of the checks for the final payment (p. 140, ll. 10-30).

Mr. McAllister further testified that when he negotiated the loan to Eastern States from the Bank on September 24, 1929, he did not know that Jerome had directed that the checks be sent to Pittsburgh and that it was not so stated by anybody at that time (p. 141, ll. 20-35).

Mr. Maier, one of the incorporators of Eastern States (Ex. 51, p. 266), a member of the Board of Directors (Ex. 62, pp. 274, 276, 279), and the Vice President of the company from the time it was organized, and as long as it continued to operate (pp. 154, 5), participated in the negotiations for the loan. He said that he did not know that said letter of September 19th had been written and did not find out about it until "several months later" when the Bank demanded payment of the note (p. 155, ll. 10-30); he knew noth-

ing about the endorsement by Jerome of the checks for the final estimates until Mr. McAllister told him after it had happened (p. 156).

As to the checks for the semi-final payment, Mr. McAllister was not entirely clear as to whether he knew that these checks had been sent to Pittsburgh instead of to the office of the company at Bridgeton; he said: "I doubt that I knew it at the time" (p. 140, ll. 10-12); Mr. Maier said he did not know about the direction to send said checks to Pittsburgh (p. 155, ll. 30-35).

McAllister stated: "I never knew it was the practice to do a thing of that sort" (p. 140, l. 15); and Maier stated he never knew of another case where either the semi-final or final checks had been sent to Commercial instead of to Eastern States (p. 155, l. 40).

Commercial will no doubt claim that said letter of September 19, 1929, was an equitable assignment to it of the final amount due Eastern States on the Clarion-Venango contract. There are several answers to this claim:

First: This theory of equitable assignment is an afterthought, as it is not alleged in the pleadings of Commercial.

The answer of Commercial in suit No. 1 will be examined in vain to find any reference to such a theory (pp. 12-25); it is true that the answer sets up that Jerome, on September 19, 1929, filed with the Department of Highways what the answer describes as an "order"—(referring to said Exhibit 27); but the reference in the answer to said "order" is in connection with the alleged "demand" of Commercial that Eastern States give such an order so that Commercial

might use the proceeds for the payment of labor and material on three contracts for which Commercial was liable as surety, and in connection with the alleged agreement of Eastern States, as set forth in the application for the bond on the Clarion-Venango contract (p. 21, ll. 15-20).

There is no claim in the pleadings or elsewhere in the record of the final hearing that Commercial claimed to be entitled to the proceeds of the checks for the final estimate by virtue of the theory of an "equitable assignment."

Second: Jerome, the Assistant Secretary and the Assistant Treasurer of Eastern States, had no authority to give such an order in behalf of Eastern States. It had not been the practice of Eastern States or of any of its officers to request the Highway Department of the State of Pennsylvania to send the checks of Eastern States to the Pittsburgh office of Commercial; the only officers who testified on the subject (the Secretary and the Vice-President) so swore; both of them said they knew nothing about the order relating to the final estimates.

Third: In any event, the doctrine of equitable assignment, under the circumstances of this case, cannot be extended further than to justify the Commercial in paying the claim of the McDonald Construction Company; it is undisputed that so far as the Clarion-Venango contract is concerned (to which contract the application for the bond refers), all bills of subcontractors and others had been paid by Eastern States, except the bill of the McDonald Construction Company and of certain of the latter's subcontractors; all these were eventually paid by Commercial, the final settlement being on May 23, 1930 (p. 285, l. 22).

If the doctrine of equitable assignment can be considered at all, the most that can be done with that doctrine is to justify the payment by Commercial of the use of such amount of the final payment on the Clarion-Venango contract as was sufficient to pay the claim of McDonald Construction Company. But as Bridgeton Bank does not dispute the right of Commercial to pay the McDonald claim, the question is narrowed to the issue whether equitable assignment would include an assignment of the *entire* amount of the final payment, or is limited to such amount thereof as was necessary to pay the McDonald claim.

It is obvious that at the time this alleged "order" was given by Jerome, both he and the Pittsburgh Manager of Commercial were concerned only with the unpaid bills on the *Clarion-Venango* contract; this appears from the letter of the Pittsburgh Manager to Jerome of February 11, 1930 (Ex. 50, p. 264), where the manager notifies "Dear Bill" (referring to Jerome) that he has received the checks for the final estimates and he says: "I am holding these checks in the strong box until a copy of the final estimate is received so that the status of the McDonald Construction Company may be properly determined" (p. 265, ll. 15-20).

The letter then suggests that a day be fixed "next week" to review the entire transaction and "an attempt be made to satisfactorily settle *this account*" (p. 265, ll. 25-30) (*italics ours.*)

At that time the exact amount of the bill of McDonald was not known (p. 90) and it was not finally adjusted until over three months thereafter (p. 183, ll. 30-35; p. 285, l. 22).

Under these circumstances, we submit that it is impossible to read into this so-called "order" of Jerome an equitable assignment of the *entire* balance due Eastern States—even if Jerome had any authority to use the funds of Eastern States, or to permit Commercial to use them, for the purpose of paying bills on other and subsequent contracts.

On this point, Davis, V. C. held:

"Commercial having filed the application for release of bond with the Commonwealth of Pennsylvania, after having satisfied itself that there was sufficient moneys due from the Commonwealth to pay for all bills for labor done and materials furnished under said contract, then obtained from Eastern States, through Jerome, the orders to have the checks mailed to Eastern States in its care. There were two of these letters written; as a result of the first one, the checks received, as I have stated, were deposited to the credit of Eastern States and the bills then due paid therefrom by checks drawn from the Eastern States and signed by the President and Assistant Treasurer. Under the second order which was dated September 19, 1929, the checks, together with the envelope directed to Eastern States, c/o Commercial, naturally came into the hands of Commercial. As I view it, the effect of such order was merely to enable Commercial to know when the checks reached Eastern States and to see that proceeds of such checks were applied to the payment of labor and materials on the Clarion and Venango contract which at that time were represented by the one claim of McDonald Construction Company. The mere receipt of these checks in the manner in which they were received could not be determined to be an assignment by Eastern States to Commercial, because Commercial could not use such checks without a proper endorsement by Eastern States. The method

which Commercial used was to have Jerome endorse these checks in the manner to which reference has been made, and then cause them to be deposited in the bond account of Commercial. This attempted transfer from Eastern States to Commercial, of the entire amount of these checks, thus enabling Commercial to appropriate the overplus after the payment of the McDonald Construction Company bill, to losses suffered by it on subsequent bonds, was ineffective" (p. 40, l. 15 to p. 41, l. 18).

We submit that the Vice Chancellor correctly construed this alleged order; and that even if Jerome was authorized to send it to the Highway Department, it did not amount to an equitable assignment of the amount due Eastern States for the final estimate—except only to the extent that might be necessary to pay the only remaining bill on the Clarion-Venango contract—the legal right to pay which the Bank does not dispute.

V.

Jerome's endorsement of the checks for the final estimates on the Clarion-Venango contract, did not transfer the title thereof to Commercial.

Eastern States was organized under the General Corporation Law of this State by certificate filed July 9, 1927 (Ex. 51, pp. 135, 266). Among the objects for which it was formed were "to carry on the business of general contractors, and to build and repair roads and highways" (Ex. 51, p. 266).

The authorized capital stock consisted of 1500 shares of no par common stock, and \$75,000 of preferred stock divided into 750 shares of the par value of \$100 each.

The incorporators were George Maier, William Williams and Thomas S. Goslin (Ex. 51, p. 266).

The by-laws were adopted on July 9, 1927 (Ex. 52, pp. 136, 267). Article V, under the title of "Officers" has the following, among other, provisions:

"Sec. 1. *Officers.* The officers of the Company shall be chosen by the Directors and shall be a President, Vice-President, Secretary and Treasurer. The Secretary and Treasurer may be the same person, and the Vice-President may hold at the same time the office of Secretary or Treasurer."

"Sec. 3. *Other Officers.* The Board may appoint such other officers, (including additional Vice-Presidents), who need not be Directors, Assistant Secretaries and Assistant Treasurers, and agents as it shall deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties, as shall be prescribed from time to time by the Board."

"Sec. 8. *Secretary.* The Secretary shall attend all sessions of the Board and all meetings of the stockholders, and record all votes and the minutes of all proceedings in a book to be kept for that purpose; and shall perform like duties for the standing committees, when required. He shall give, or cause to be given, notice of all meetings of the stockholders and of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors or President, under whose supervision he shall be. He shall be sworn to the faithful discharge of his duty."

"Sec. 9. *Assistant Secretary.* In the absence or disability of the Secretary, the Assistant Secretary, if such officer be appointed, as provided in these By-Laws, shall perform all the duties of the Secretary, and when so acting shall have all powers of, and be subject to all the restrictions upon the Secre-

tary. He shall perform such other duties as from time to time may be assigned to him by the Board of Directors. He shall be sworn to the faithful discharge of his duties."

"Sec. 10. *Treasurer*. The Treasurer shall have the custody of the Corporate funds and securities, and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Company, and shall deposit all moneys, and other valuable effects, in the name and to the credit of the Company, in such depositories as may be designated by the Board of Directors."

"Sec. 11. *Assistant Treasurer*. In the absence or disability of the Treasurer, the Assistant Treasurer, if such officer be appointed, as provided in these By-Laws, shall perform all the duties of the Treasurer, and when so acting, shall have all the powers of, and be subject to all the restrictions upon the Treasurer. He shall perform such other duties as from time to time may be assigned to him by the Board of Directors."

At the first meeting of the Board of Directors (held July 9, 1927) the following resolution was adopted:

"RESOLVED, That the offices of Assistant Secretary and Assistant Treasurer be and the same hereby are created."

After the adoption of said resolution W. F. Jerome "was duly elected Assistant Secretary and Assistant Treasurer of the company." (Ex. 62, p. 274).

At the same meeting the following resolution was adopted:

"RESOLVED, That the funds of this Company be deposited in the Cumberland National Bank of Bridgeton, and such other banking institutions as may be deemed advisable by the President and Treasurer and

be subject to be withdrawn by the check, draft, note or order of the Company, signed by the President or Vice-President and countersigned by the Treasurer or Assistant Treasurer thereof."

(Ex. 62, p. 274.)

Mr. McAllister was the Secretary and Treasurer of the company from the time of its organization (p. 135, ll. 10-15).

Mr. William H. Williams was the President (p. 149, ll. 25-30; Exhibits 2, p. 206; 3, p. 215; 4, p. 217; 5, p. 218; 7, p. 220; 8, p. 221; 17 to 23, p. 230; 25, p. 232; 27, p. 233; 45, p. 254; 46, p. 255; 55 to 58, p. 273).

Mr. George Maier was the Vice President (p. 139, l. 25; 155, l. 30; Ex. 54a, p. 272; Exs. 8, 27, 28, 29, 45 and 46).

It was the practice of Eastern States, in accordance with the resolution, to pay its bills by checks signed by two officers. This is shown by exhibits 17 to 23 inclusive (pp. 230, 1); par. 23 of stipulation (p. 69). These were the checks that were issued for the purpose of paying certain bills out of the proceeds of the *semi* final estimate on the Clarion-Venango contract. These checks were prepared in the presence of Mr. Hays, the Assistant Manager of the Pittsburgh office (pp. 88-89 and pp. 172-173).

Certain other checks are also in evidence as exhibits 55-58 inclusive; (p. 149 and p. 273). These four checks were dated, respectively, December 23, December 7, August 2, and June 28 (all in the year 1929). Each of them was drawn to the order of Commercial in payment of premiums.

These four checks are also signed by two officers of Eastern States, to wit, Williams as Presi-

dent, and Jerome as Assistant Treasurer. There can be no doubt that Commercial had notice of the fact that so far as checks were concerned the signatures of two officers of Eastern States were required.

But when we come to the critical occasion in February of 1930 when Commercial diverted the two checks of the Commonwealth of Pennsylvania for \$2,328.01 and \$17,349.63 (Exs. 34 and 35, pp. 241, 242), we find that the Commercial's Assistant Manager at Pittsburgh, instead of taking up with Mr. Williams, the President of the company (whose name had heretofore appeared as a joint signature on the checks of Eastern States), or with any other officer of the company, the question of the right or authority of Jerome to endorse these checks he was content to rely upon the sole endorsement of Jerome—and even his endorsement was not in his official capacity as Assistant Treasurer of Eastern States.

Both the checks are endorsed for deposit, etc., to credit of Commercial "Eastern States Construction Company by Wm. F. Jerome."

There can be no pretense that Commercial's manager had any right to rely upon that course of business, in so far as relates to the transfer of the funds of Eastern States; there is no evidence that Jerome (or, for that matter any other officer of Eastern States) had ever endorsed a check to the order of Commercial; and all the checks that Commercial's Assistant Manager had ever seen were signed not only by Jerome as Assistant Treasurer, but also by Williams as President. That was the only occasion when the money of Eastern States was transferred in that manner; in dealing with the checks for the

semi-final estimates Jerome had refused the request of Hays to make such a transfer.

Such endorsements on their face were insufficient to transfer title to Commercial. Even if Jerome had endorsed the checks in his official capacity the question would still arise whether he had authority to divert the funds of Eastern States; under the by-laws the duties of Assistant Treasurer are specified; they are expressly limited to the event of the absence or disability of the Treasurer, and "such other duties as from time to time may be assigned to him by the Board of Directors."

It will no doubt be claimed by Commercial that in dealing with Jerome it had no actual notice of the limitation upon his authority as fixed by the by-laws, and that, therefore, it was entitled to rely upon his apparent authority as indicated by his field management of the affairs of Eastern States, and by his dealings with the Pittsburgh office. We submit, that his title of *Assistant* was enough to put Commercial on notice that his powers and duties were limited, but however that may be, so far as the drawing of the money of Eastern States was concerned, Commercial did have actual notice that this could be done only by the signatures of two officers.

The application for the contract bond and the checks and the correspondence were in themselves sufficient to put Commercial on notice that Jerome's position was that of Assistant Secretary and Treasurer and that other persons were acting as President, Vice-President, Secretary and Treasurer of Eastern States (Ex. 1, p. 202; Ex. 2, p. 206; Ex. 4, p. 217; Ex. 5, p. 218; Ex. 6, p. 219; Exs. 17 to 23, p. 230; Ex. 25, p. 232; Ex. 45, p. 254; Exs. 55 to 58, p. 273).

The fact that Jerome and Williams were the active managers of the construction work of Eastern States would not justify Commercial in assuming that Jerome *alone* had any authority either as an Assistant Treasurer or in his individual capacity to use the assets of the company for the benefit of Commercial.

There is no proof that Williams knew anything about the transfer of the assets of Eastern States by means of these endorsements; and yet Hays admitted that his dealings were with both Jerome and Williams (p. 165); and that he dealt with Williams in a business way in connection with various physical details as to the work under the contract (p. 165).

"Mr. Williams was the construction man handling the job and prosecuting the job, figuring the estimates" (p. 165, l. 32).

Jerome handled the bookkeeping, the purchase of supplies, payments, and finances (pp. 165-166).

The diversion of the assets of Eastern States to Commercial by means of these endorsements was *only in part* for the settlement of the Clarion-Venango contract; in so far as that contract is concerned the bank admits that part of the money received from the Commonwealth of Pennsylvania was lawfully used to pay the McDonald claim; but a very different question arises as to the balance in dispute; it does not appear that even the amount of the bills on the other contracts was known to Jerome or to Hays at the time the Commercial diverted and held the balance of the final estimate on the Clarion-Venango contract—after payment of the McDonald claim; not one of those bills was actually paid on the other

contracts until several months thereafter (pp. 286, 7).

Presumably it will be claimed by Commercial that even if the original transfer of the checks for the final estimates was unauthorized, that nevertheless it is entitled in equity to set-off against the amount thus received by it enough of the subsequent bills paid by Commercial to equal the amount received by it by virtue of crediting to its own account the proceeds of said checks. But the validity of any such claim depends upon the terms of the application for the bond on the Clarion-Venango contract discussed above.

So far as the present point is concerned the only matter for consideration is what authority, if any, Jerome had to transfer assets of Eastern States to Commercial—at least to the extent that the amount of the assets so transferred exceeded the amount due McDonald; and what right, if any, Commercial had at the time of such transfer to receive the proceeds of said checks—at least to the extent that the amount thereof exceeded the amount due McDonald.

Under the negotiable instruments law a signature without authority is no better than a forged signature and is “wholly inoperative,” (3 Comp. Stats. of 1910, p. 3738, sec. 23).

The authority of officers of a corporation to endorse checks and other instruments payable to the corporation has been discussed in several New Jersey cases.

In *Dennis Metal Co. v. Fidelity Union Trust Co.*, 99 N. J. L. 365, the New Jersey Supreme Court stated that not even the president of a corporation had power to endorse checks “by virtue of holding the office of president” (p.

368). In that case the president diverted the funds to his own benefit and the bank was held liable on the ground that the endorsement was unauthorized. So far as the legal rule is concerned, we submit it makes no difference whether the beneficiary of an unauthorized endorsement is himself an officer of the corporation, or whether the beneficiary is a third party. The present case is even stronger than the Dennis case in the respect that the endorsement in that case purported to be made by Dennis "as president," while in the present case Jerome did not indicate by his endorsement that he was acting in his official capacity as "Assistant Treasurer."

The Dennis case was approved by the Court of Errors and Appeals in *Economy, etc., Co. v. Fidelity Union Trust Co.*, 105 N. J. L. 206, and the principle stated in the Dennis case is extended to include an endorsement *to a third party*, and the bank again was held liable because of the unauthorized endorsement by the "president" of the corporation to whose order the checks were drawn.

To the same effect see also:

Passaic-Bergen Lumber Co. v. United States Trust Co., 110 N. J. L. 315.

Singer Sewing Machine Co. v. Citizens National Bank, 111 N. J. L. 199 (affirmed on opinion below 112 N. J. L. 497).

In *Slavin v. Passaic Nat. Bank & Trust Co.*, 114 N. J. L. 341, this court sustained a directed verdict for the plaintiff against the bank and laid down the following principles with relation to the endorsement of a check payable to a corporation:

"Where a bank receives a check drawn on it, payable to a corporation, and endorsed by the corporation's agent, the bank thereby

has direct notice of the agency by the endorsement, and is bound to take notice and inquire as to the limitations of his authority.

While it is customary for some official, or employe of a corporation to be authorized to endorse, in some form, checks payable to the corporation, the sole fact that a person is the treasurer of a corporation does not give him the power to endorse, transfer or cash checks payable to the corporation's order, and a bank which has dealings with a corporation must be assured that an officer, who endorses checks payable to the corporation, and receives from the bank the proceeds therefrom, has such authority."

In the opinion the court quotes from the case of *Aerial League of America v. Aircraft &c. Corp.*, 97 N. J. L. 530, as follows:

" 'a corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them.' "

In *Erie R. R. Co. v. S. J. Groves & Sons Company*, 114 N. J. L. 216, 176 Atl. 377, this court said:

"The rule is that the principal is bound by the acts of his agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. The question in every case depending upon the apparent authority of the agent is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business

usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question; * * *” (citing cases).

There are two leading cases in the State of New York wherein the same principles are stated:

In *Wagner Trading Co. v. Battery Park National Bank*, 228 N. Y. 37, 126 N. E. 347; 9 A. L. R. 340, the bank was held liable for conversion of the funds of the plaintiff by virtue of having transferred to the personal account of the president of the plaintiff checks drawn to the order of the plaintiff and endorsed with the name of the plaintiff and the name of its president. The court said that when the bank accepted the checks for deposit to the personal account of the president “it did so at its peril to ascertain whether Wagner (the president) had authority to indorse them and by his indorsement transfer the money to be paid thereon to his personal account. * * * If Wagner had no such authority, title to the money in question never passed to the defendant (the bank), and, if it received it, it did so without authority, and must account and make payment to the owner.”

Another important case in New York is *Wen Kroy Realty Co. v. Public National Bank*, 260 N. Y. 84, 183 N. E. 73. The court said:

“In a multitude of cases in all jurisdictions, a principal despoiled, in that way, by a general agent, to whom its property has been intrusted with power to transfer it in behalf of the principal, has been allowed to reclaim its property or to recover damages for its conversion, either from the agent or from any person claiming title through the agent with knowledge or notice that by the transfer the agent deprived his principal of

its property. Such recovery has not been permitted upon any theory that a party having notice of the agent's breach of trust takes subject to all equities in favor of the principal. In a long line of cases the courts of this state have consistently held that a general agent of a corporation, intrusted by the corporation with the management of the corporate affairs, has no actual authority, though he may in some circumstances have apparent power, to appropriate the corporate property to his own use by transfer to himself directly or indirectly, and that is true as well of negotiable instruments as other property. Because the attempted transfer is made without actual authority, it constitutes a conversion, and passes no title to any one who is not entitled to rely on the apparent authority." (Citing numerous cases.)

It is argued by Commercial that its agent, because of the course of dealing with Jerome, had a right to rely upon his apparent authority. But that claim cannot be sustained because, first, the previous course of dealings between Commercial's agents and Eastern States showed that the signatures of two officers were necessary to transfer moneys of the corporation; second, on the *only* previous occasion when the question arose as to the authority of Jerome to endorse checks of Eastern States, that is, on the occasion when the proceeds of the *semi* final estimates were distributed to the subcontractors on the Clarion-Venango contract, Jerome had insisted that the checks of the Commonwealth of Pennsylvania for such semi final estimates be deposited *in the account of Eastern States* and he refused Hays' request that those checks be turned over to the latter for the purpose of application by Commercial to the payment of such bills; third, Jerome did not endorse the checks for the final

estimates in his official capacity as Assistant Treasurer; even if he had done so, the question of his authority would still be open; but, in any event he did not do so, and that fact was an additional notice to Commercial's agent that there was no *corporate* intent to transfer these funds to Commercial.

In the opinion of Davis, *V. C.*, he discussed the evidence relating to the authority of Jerome and reached the following conclusions:

"There was no authority then vested in Jerome, whether he endorsed the check in his official capacity as assistant treasurer, or merely as an individual as happened in this case, to transfer this entire fund to Commercial. Bridgeton Bank has not denied the right of Commercial to pay out of these moneys thus obtained, the bill of McDonald Construction Company. The evidence in the cause discloses that the active officers of Eastern States in its road building operations were W. H. Williams, who was president, and Wm. F. Jerome, who was assistant secretary and treasurer. These officers had charge of the contracts, and to a large extent the financial operations of the company relating thereto, but in no previous case, so far as the evidence discloses, did Jerome transfer the moneys of the company without the signature of the president or vice president, which practice was known to Commercial by reason of its dealings with Eastern States and its receipt of a number of checks drawn to it, as well as the inspection of checks to creditors passing through its hands, all of which were signed by the president or vice president and treasurer or assistant treasurer of Eastern States. There was no authority given, so far as the minutes of Eastern States show, to Jerome to transfer a check by his endorsement alone, but on the other hand the resolution of Eastern States authorizing the withdrawal of funds, pro-

vided for the signature of the president or vice president and treasurer or assistant treasurer, and there was no course of conduct on the part of Jerome that would give him the right to transfer the moneys of the company by the endorsement of a check over to another without the concurrence at least of the president or vice president, so that the transfer of his money, represented by these two checks, from Eastern States to Commercial, was unauthorized. Commercial had the right to require the payment of \$12,370.43 to McDonald Construction Company, but had no right to appropriate the balance to other purposes than payment of bills on the Clarion and Venango contract as against Bridgeton Bank which had an assignment of these moneys" (p. 41, l. 18 to p. 42, l. 27).

VI.

The Court of Chancery was correct in adjudging that Commercial should pay to Bridgeton Bank the sum of \$7,307.41, with interest from February 28, 1930, amounting to the total sum of \$9,427.24.

The total of the two checks for the final estimates on the Clarion-Venango contract, was the sum of \$19,677.84.

The Bank conceded that Commercial was entitled to use part of said total, to wit, the sum of \$12,370.43 in payment of the claim of McDonald Construction Company, and asked for a decree for the balance of \$7,037.41, with interest from the date of the deposit of the checks to the decree of Commercial on February 28, 1930. Vice Chancellor Davis agreed with this view, saying:

"My conclusion is that Bridgeton Bank is entitled to a decree against Commercial for the sum of \$7,307.41, with interest, repre-

senting the amount of money of Eastern States which Commercial received over the amount necessary to pay the bill of McDonald Construction Company on the Clarion and Venango contract" (p. 42, ll. 28-35).

Final decree was accordingly entered on January 21, 1935, directing that Commercial pay to Bridgeton Bank the sum of \$9,427.24—the excess over said balance of \$7,307.41 being represented by the interest on said amount from February 28, 1930, to the date of the decree.

We submit that under the circumstances of this case the conclusion of the Court of Chancery that the Bank was entitled to a decree for the sum of \$7,307.41, with interest, was correct, and that the decree so adjudging should be affirmed.

VII.

The decree properly ordered that Commercial pay the taxed costs of Bridgeton Bank, including a counsel fee of \$1,250.00.

Commercial claims in its petition of appeal that the counsel fee of \$1,250.00 allowed to Bridgeton Bank in the decree of the Court of Chancery is "excessive."

This allowance was based on an affidavit of services submitted to the Court of Chancery at the time of the settlement of the decree (pp. 43-51). The facts therein stated as to the nature and extent of services and disbursements were not questioned.

Among the items of disbursements in addition to the statutory taxed costs for filing of bill of complaint, etc., and in addition to the expenses of attorneys, etc., were bills for photostats, traveling expenses of the witness Jerome, and

the official transcript of the testimony, amounting to \$253.60.

The Chancery Court was requested to include said items of necessary disbursements amounting to \$253.60, in addition to the allowance of counsel fee, but declined so to do and fixed the allowance at the sum of \$1,250.00 in addition to the statutory costs (p. 56, l. 35).

After deducting the necessary expenses of \$253.60, it will be observed that the net amount of the counsel fee is approximately \$1,000—without taking into consideration, office and traveling expenses of the attorneys for the Bank.

There can hardly be any serious question about the fact that Commercial should be required to pay a reasonable counsel fee; the litigation resulted in a decree against it for a substantial amount after years of litigation, in the course of which Commercial constantly and consistently denied any liability whatever on its part to Bridgeton Bank.

The affidavit of services shows that the actual time required in the litigation in the Court of Chancery (exclusive of any charges for services in the action at law in the New Jersey Supreme Court, or in the action at law in the United States District Court was approximately 175 office hours of members of the firm of the solicitors for the Bank, and two days at the final hearing of the case and 20 hours of attorneys employed in the office of the solicitors. If we estimate the value of office services at \$10.00 per hour, we get a result of \$1,750.00 for office work; and if we add a very small further amount for two days in court and the work of attorneys employed in the office of solicitors, a very modest charge would be not less than \$2,000.

The court allowed approximately half this amount; while the Bridgeton Bank has not appealed from this part of the decree on the ground that the allowance was too small, it seems obvious that on the basis of any reasonable calculation an allowance of \$1,250.00 (including therein all disbursements) was well within the discretion of the Court of Chancery and should not be disturbed by this court.

VIII.

CONCLUSION.

The decree of the Court of Chancery should be affirmed with costs.

HOBART & MINARD,
Solicitors of Complainant-Respondent.

APPENDIX A.*Summary of Pleadings.*

The following summary of the pleadings in Suit No. 1 refers to the several paragraphs of the bill by numbers; after each paragraph there is stated the amended answer of Commercial, with notes and references to the said stipulation and the exhibits mentioned therein; then follows a summary of the answer of Eastern States.

The pleadings are printed in the State of Case as follows:

Bill of Complaint, pages 1-10.

Answer of Eastern States, page 11.

Amended Answer of Commercial, pages 12-25.

Replication, page 26.

Facts admitted in pleadings in Suit No. 2, pages 283-7.

1. Complainant is a bank organized under the laws of the United States.

Ans. No knowledge.

(Note: This fact admitted in stipulation.)

2. Commercial is a New Jersey corporation authorized to transact a surety business in New Jersey and in Pennsylvania.

Ans. Admitted.

3. Eastern States is a New Jersey corporation organized to do business in New Jersey and Pennsylvania.

Ans. Admitted.

4. The First National Bank of Pittsburgh, Pennsylvania is a corporation under the laws of the United States.

Ans. No knowledge.

(Note: This fact admitted in stipulation.)

5. On April 14, 1928, Eastern States entered into a contract with Pennsylvania to furnish the materials and to do the work for the construction of a certain highway in the counties of Venango and Clarion in Pennsylvania at certain unit prices aggregating the sum of \$248,210.27.

Ans. Admitted.

(Note: Referred to in stipulation as "the Clarion and Venango job"; Exhibit 3, pp. 65, 207.)

6. On April 14, 1928, Eastern States as principal and Commercial as surety, entered into a bond to Pennsylvania for \$124,105.14, conditioned (*inter alia*) that Eastern States should comply with the conditions of the contract, should complete the work in a manner satisfactory to the Secretary of Highways, should save the Commonwealth harmless from expense through failure to complete the work, should pay for all material and labor in and about the construction of the highway; and on completion of the contract in an acceptable manner should file with the Department of Highways an "Application for Release of Bond" setting forth that all claims for labor and materials had been "satisfactorily settled."

Ans. Admitted.

(Note: Admitted in Stip.; Ex. 2, pp. 65, 203; also included in Ex. 3, p. 207, at 216.)

7. On July 12, 1929, said contract was completed by Eastern States according to its terms, and the work thereunder was duly accepted by Pennsylvania.

Ans. Denied.

8. When the contract was completed there was due from Pennsylvania to Eastern States

certain balances for semi-final and final payments, in accordance with the contract.

Ans. Denied; alleges that final payment did not become due until January 4, 1930.

9. On August 2, 1929, one William F. Jerome (an employee of Eastern States) without the knowledge, consent or authority of Eastern States, requested said Department of Highways to forward checks for the semi-final estimate to Eastern States in care of Commercial at the latter's office in Pittsburgh.

Ans. Denies that the request made by Jerome in the name of Eastern States was made without the knowledge, consent or authority of Eastern States.

10. On August 3, 1929, the Division Engineer of Pennsylvania certified two semi-final estimates in the sums of \$2,868.83 and \$16,175.41.

On August 25, 1929, said estimates were certified by the Deputy Secretary of Highways to the Auditor General for audit and payment.

On August 27, 1929, said estimates were audited and approved by the Auditor General.

On August 28, 1929, he issued his warrants for checks to pay same.

On August 28, 1929, the treasurer issued his checks in payment of said estimates and sent same by mail to Eastern States; the check for \$2,868.83 was deposited to the credit of Eastern States in a bank at Meadville and duly collected.

The check for \$16,175.41 was sent to Eastern States in care of Commercial, "No. 720 Grant Building, Pittsburgh, Pa.," where it was delivered by Commercial to Jerome, endorsed by him for deposit in Farmers & Merchants National Bank, Bridgeton, N. J. "by Wm. F. Jerome Asst.

Treas." and deposited in said bank to the credit of Eastern States on September 7, 1929.

Ans. No knowledge.

(Note: Admitted in stipulation. See paragraphs 16, 18, 20, 21 and 22; Exs. 9, 10, 12, 13, 15, 16, pp. 67, 68, 69, 222, 225, 228, 229.)

11. On September 19, 1929, said Jerome without the knowledge, consent or authority of Eastern States requested the Department of Highways to forward check for the final payment to Eastern States in care of Commercial at the latter's office in Pittsburgh.

Ans. Denies that said request was made without the knowledge, consent or authority of Eastern States.

12. On September 22, 1929, Commercial, in accordance with the terms of said bond and contract, filed with said Department its application for release of said bond, duly executed and sealed and reciting that said Commercial was satisfied that all claims for labor and material had been settled, etc.

Ans. Admits that on *August* 22, 1929, Commercial filed with said Department its application for release of bond, duly executed and sealed; prays reference to the original; denies other allegations.

(Note: Admitted in stipulation; see par. 19 of Ex. 14, p. 225.)

13. On September 24, 1929, Eastern States borrowed from complainant the sum of \$10,000. and delivered its demand note therefor, and with said note as collateral security, its assignment (also dated September 24, 1929) of the balance (therein stated to be \$21,000.) due Eastern States from said Commonwealth on said contract.

Ans. No knowledge.

(Note: Admitted in stipulation. See pars. 30 and 31; Exs. 28 and 29, pp. 72, 234, 238.)

14. On October 1, 1929, Eastern States notified Commercial of the execution and delivery of said assignment.

Ans. Denied.

15. On August 15, 1930, complainant demanded payment of said note with interest, and upon default, it was duly protested; Eastern States refused to make payment and the full amount thereof is still due.

Ans. Denied.

(Note: Stipulation admits demand for payment of note and protest thereof. See pars. 30 and 43; Ex. 28, pp. 72, 75, 234.)

16. At date of said note and assignment there was due Eastern States from Pennsylvania, on the final estimate of work done on said contract the sum of \$19,677.84.

Ans: Denied; alleges that on September 24, 1929, final settlement of said contract had not been made and no sum was then due Eastern States from or by said Commonwealth on said contract.

17. On January 4, 1930, final settlement of said contract was made between Eastern States and Pennsylvania and the Division Engineer certified two final estimates of work in the sums of \$2,328.21 and \$17,349.63.

On February 5, 1930, said estimates were certified by the Deputy Secretary of Highways to the Auditor General for audit and payment.

On February 7, 1930, they were audited and approved by the Auditor General.

On February 10, 1930, he issued his warrants to the treasurer to issue checks to pay same.

On February 10, 1930, the treasurer issued his checks (Nos. 48884 and 48886) for said sums in final payment and mailed same to Eastern States in care of Commercial (720 Grant Bldg.,

Pittsburgh, Pa.) where they were received by Commercial on February 11, 1930.

Ans. Admitted.

(Note: Also admitted in stipulation. See pars. 32, 33 and 34; Exs. 30, 31, 32, 33, and 34, pp. 72, 73, 240, 241.)

18. Instead of delivering said checks to Eastern States or to said Jerome, its employee, and depositing same to the credit of Eastern States in the customary manner, in accordance with Jerome's instructions, said Jerome on February 11, 1930, at the request of Commercial but without the knowledge, consent or authority of complainant or of Eastern States, and contrary to instructions from Eastern States, endorsed the said checks for deposit in the First National Bank of Pittsburgh, Pa. to the credit of Commercial "Eastern States Construction Company by: Wm. F. Jerome" and delivered same to Commercial.

Ans. Admits that the checks were received by Commercial and endorsed for deposit to the credit of Commercial; denies all other allegations.

19. On February 28, 1930, Commercial without the knowledge, consent or authority of complainant, or of Eastern States, endorsed said checks "Commercial Casualty Insurance Company Bond Acct. by H. S. Hays, Attorney-in-Fact"; and without the knowledge, consent or authority of complainant or of Eastern States deposited same to its account in the First National Bank of Pittsburgh, Pa. and payment thereof was collected in due course on March 1, 1930, and the full amount was credited to the account of Commercial in said First National Bank.

Ans. Admits that Commercial endorsed the checks and deposited them to the credit

of its bond account in said First National Bank and that the same were collected and the proceeds credited to its account; denies all other allegations.

20. Said endorsement and deposit of said checks were without the knowledge, consent or authority of the complainant or of Eastern States, and were in violation of complainant's rights under its assignment.

Ans. Denied.

21. No part of said sum of \$10,000 and interest has been paid complainant; complainant has demanded payment from Eastern States but it has no assets to pay same other than from the said final payment under said contract; complainant has demanded payment from Commercial but it denies complainant's right to collect said sum or any part thereof; complainant has demanded payment from the Pittsburgh bank but it denies that it is liable therefor.

Ans. Admits that it denies the right of complainant to collect from Commercial; admits that Pittsburgh bank denies that it is liable to complainant; denies the other allegations.

Prayer for Relief.

1. That defendants may answer without oath.
2. That an account may be taken;
 - (a) Of the amount due complainant by virtue of its assignment.
 - (b) Of the amount due or paid to Eastern States and the Commercial Company by Pennsylvania by virtue of said contract.
 - (c) Of the amount paid or credited to Commercial by said Pittsburgh bank by virtue of the deposit of said checks.

3. That defendants may be decreed to pay the complainant the amount due it by virtue of said assignment, with interest and costs.

4. That subpoena may issue, etc.

Further Answer of Commercial.

In addition to the answers to the several paragraphs of the bill of complaint as above summarized, Commercial further answered the bill by alleging (paragraph numbers correspond to the numbers of said "further" answer):

22. On April 13, 1928, Eastern States made written application to Commercial to have it join in a bond to Pennsylvania in the amount and form required by the contract; copy attached as Exhibit "A."

(Note: See paragraph 2 of stipulation; Ex. 1, pp. 65, 190.)

23. Commercial as surety joined with Eastern States in the execution of said bond and delivered same to said Commonwealth.

24. On September 22, 1928, and on March 18, 1929, Eastern States made and delivered to Commercial two other applications in the same form as Exhibit "A"; and Commercial as surety entered into two other bonds in the same form as said Clarion-Venango bond, the first for \$67,219.21 for the "Vernon-Hayfield" job and the second for \$28,203.53, for the "West Meade" job; and Eastern States made two contracts with Pennsylvania in the same form with Clarion-Venango contract and proceeded with the performance of all three thereof.

(Note: Stipulation admits the making of these applications, bonds and contracts. See pars. 6, 7, 8 and 9, p. 66, and Exhibits 4 and 5, pp. 217, 218, relating to Vernon-Hayfield

job; and pars. 10, 11, 12 and 13, pp. 66, 67, and Exs. 6 and 7, pp. 219, 220, relating to West Meade job.)

25. Said Jerome was Assistant Secretary and Treasurer of Eastern States and was the officer who executed the said application for Clarion-Venango bond and was the representative of Eastern States in charge of said contracts, said Eastern States held him out as its officer and agent with whom it might deal in respect to said bonds and contracts, and his authority has never, to the knowledge of Commercial, been questioned or denied by Eastern States, but has been ratified and confirmed by it.

26. In August, 1929 Eastern States owed bills and charges for labor and material in connection with Clarion-Venango job in excess of \$15,000 which Commercial as surety was liable to pay; Commercial demanded of Eastern States that it order Pennsylvania, "pursuant to the established practice" to send checks for the semi-final payments and for the final payments on said contract to Commercial and demanded that Eastern States make over said checks to it to apply towards the discharge of said debts for which Commercial was liable; pursuant to said demand Eastern States delivered to Commercial an order, dated August 2, 1929, directing Pennsylvania to forward its semi-final estimate check to said bank at Pittsburgh.

(Note: See stipulation, pars. 14 and 15, p. 67, and Ex. 8, p. 221.)

27. On August 21, 1929, Commercial forwarded to Department of Highways said order of August 2, 1929, together with its application for release of bond, as required by said bond and said contract, meaning thereby that the payments under said contract coming into its hands

pursuant to said arrangement and agreement with Eastern States, constituted a "satisfactory settlement" of all claims for labor and material on said job.

28. On September 5, 1929, said semi-final checks came into possession of Commercial pursuant to said order and agreement and Eastern States induced Commercial to release Eastern States from its obligation to make over the semi-final checks and induced it to surrender them in exchange for checks of Eastern States drawn to the order of the several claimants and Commercial delivered said checks to the said claimants and their claims were paid thereby.

29. On September 19, 1929, all work and material under said three contracts had been done and furnished, and no labor and material were thereafter furnished thereon; on that date it was believed by Eastern States and Commercial that the final payment on the Clarion-Venango job would amount to about \$20,000; and on that date there was due by Eastern States to McDonald Construction Company, a subcontractor, the sum of \$12,370.43.

Eastern States also owed for labor and material on Vernon-Hayfield and West Meade contracts the sum of \$59,060.54, on which the further payments to be made in settlement thereof amounted to \$33,758.89.

30. On September 19, 1929, Commercial demanded of Eastern States pursuant to said agreements and to the "established and prevailing practice and custom" that Eastern States order Pennsylvania to send the final estimate checks on the Clarion-Venango contracts, in care of Commercial, and make over said checks to Commercial so that it might apply the proceeds

thereof to the payment of said debts of Eastern States for labor and material on said three contracts, for which Commercial was then liable as surety.

Eastern States, by its officers and agents, duly authorized, recognized the right of Commercial to be indemnified as aforesaid, and to receive said final payment under said contract, and Eastern States agreed that said final estimate checks should be made over by it to Commercial.

31. Pursuant to said demand and agreement Eastern States, by Jerome, on September 19, 1929, filed with said Department of Highways, an order of that date, copy attached marked Exhibit "B."

(Note: See stipulation, par. 29, Ex. 27, pp. 71, 233.)

32. Said agreement was made and said order of September 19, 1929, was written and delivered to said Department, prior to the making of the assignment from Eastern States to Bridgeton Bank and prior to the making of the loan by the bank to Eastern States.

33. Bridgeton Bank took said assignment with notice and knowledge of said arrangement and agreement between Commercial and Eastern States, and of said order of September 19, 1929, and of the provision in said Clarion-Venango contract prohibiting such assignment and of Commercial's being surety on the bond "embodied in said contract," and on said other bonds and of the prior right of Commercial to receive said final payment as indemnity.

34. Any rights of Bridgeton Bank to the final payment were subsequent, subordinate and subject to the prior right of Commercial thereto.

35. Said Secretary of Highways recognized the right of Commercial to receive said final payment and complied with the request of Eastern States; and pursuant thereto Commercial on February 11, 1930, received said two checks, payable to Eastern States, which said checks, said Eastern States by William F. Jerome, its officer and agent thereunto duly authorized, endorsed and delivered to Commercial; said checks having been collected in due course, the proceeds thereof were credited to Commercial's bond account at the First National Bank of Pittsburgh.

36. Commercial received said final payment in its own right as indemnity against its said liabilities incurred by it as surety on said bonds.

37. On January 17, 1930, said Department of Highways informed Bridgeton Bank that the final estimate checks on the Clarion-Venango contract would be delivered to Commercial, that complainant took no steps to protect its rights thereto.

(Note: See Ex. 42, p. 249.)

38. Bridgeton Bank gave no notice to Commercial of said assignment until March 28, 1930, on which date it sent a letter to Commercial with copy of the note and assignment.

(Note: See stipulation, par. 38, Ex. 36, pp. 74, 243.)

39. Out of said \$19,677.84 received by defendant on the Clarion-Venango contract, Commercial paid the sum of \$12,370.43 to McDonald Construction Company and paid and applied the balance thereof towards the said debts for labor and material on Vernon-Hayfield and West Meade contracts.

Subsequent to September 19, 1929, Commercial received from Pennsylvania final estimate

checks on Vernon-Hayfield contract for \$23,719.65, and on West Meade contract for \$10,032.24, which Eastern States endorsed to Commercial and the latter applied the proceeds towards the payment of debts on said jobs.

In addition to all said sums Commercial has disbursed out of its own funds more than \$40,000 in discharge of debts of Eastern States on contracts bonded by Commercial.

40. Bridgeton Bank made no claim against Commercial until January 12, 1932, when it brought an action at law against it in the New Jersey Supreme Court to recover the sum sought to be recovered herein, which action was non-suited.

From the date of the assignment on September 24, 1929, until January 12, 1932, Bridgeton Bank permitted Commercial to rely upon its right to the Clarion-Venango final payment and permitted Commercial to disburse the same, and thereby has caused Commercial to change its position and to refrain from taking steps that it otherwise would have taken to secure itself against loss, and Eastern States has since become and now is insolvent.

41. Bridgeton Bank is in laches, and is estopped from now asserting any right to said fund as against Commercial.

Answer of Eastern States.

1. Admits paragraphs 1 to 21 of bill of complaint.

2. The money borrowed from complainant was used exclusively for the completion of the work in the contract described in the bill, and in payment for materials and labor furnished in the performance of said contract.

3. Eastern States joins in the prayer for an accounting, and that Commercial may be decreed to pay to it the amount found to be due on the final payment checks mentioned in the bill, over and above the amount found to be due complainant with interest.

Replications.

Replications in statutory form.

In addition to the pleadings in Suit No. 1, there are certain facts set forth in the bill of complaint, as amended, of Commercial in Suit No. 2, which were admitted in the answers thereto; instead of printing the pleadings in said suit at length, the facts, as alleged in the bill and admitted in the answer, are printed in the State of Case under the caption "Facts Admitted in the Pleadings in Case No. 2" (pp. 283-7).

The following is a summary of the facts so admitted:

5. On January 12, 1932, Bridgeton Bank brought an action at law in the New Jersey Supreme Court against Commercial alleging substantially the same facts as are alleged in Bridgeton Bank's bill of complaint in Suit No. 1 (p. 283, ll. 10-30).

7. Said action at law came on for trial on September 27, 1932, in the Cumberland Circuit, and resulted in a judgment of non-suit (p. 283, l. 30 to p. 284, l. 15).

13. On November 13, 1933, Bridgeton Bank and Eastern States brought an action at law against First National Bank of Pittsburgh, Pa., in the District Court of the United States for the Western District of Pennsylvania, which action is pending and undetermined in said court (p. 284, ll. 15-28).

14. In said action at law the plaintiffs therein were suing said First National Bank upon the same two checks involved in the action in the Court of Chancery.

20. In connection with the aforesaid Clarion & Venango job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

Date	Name	Amount
	To and for McDonald Construction Company:	
4- 9-30	Boyles & Millson, subcontractors—McDonald Const. Co.	\$ 1,400.30
4- 9-30	Roe Bros., subcontractors, McDonald Const. Co.	1,200.00
4-11-30	C. L. Schroeder, subcontractor, McDonald Const. Co.	310.00
6-10-30	Commercial Cas. Ins. Co.—prem. on bond No. 52017—McDonald Const.	537.50
5- 6-30	Roe Bros., subcontractors, McDonald Const. Co.	3,243.56
5-23-30	McDonald Const. Co. Balance	10,215.75
		<u>\$16,907.11</u>
	LESS sum held for McDonald Construction Company out of the semi-final estimate payment on said contract	4,536.68
		<u>\$12,370.43</u>
6-19-28	H. M. Potter—Investigation exp.	48.56
2-28-30	H. M. Potter—Investigation exp.	57.78
5-17-32	J. M. McCandless—legal services, &c.	42.41

(p. 285.)

21. In connection with the aforesaid Vernon & Hayfield job and under and pursuant to the

aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

Date	Name	Amount
9-16-30	J. F. Moran—Investigation exp....\$	17.65
12- -30	Genfire Steel Co.	1,100.00
12- 6-30	Standard Slag Co.	5,384.93
12-26-30	Commercial Casualty Ins. Co. (Pitts. B. O.)—Investigation exp...	19.22
2- -31	Nickel Plate Sand & Gravel Co.	1,877.48
8-18-31	Standard Portland Cement Co.	8,151.18
8-18-31	Bessemer Cement Co.	20,597.20
8-22-31	J. M. Stoner & Sons—Court costs..	30.60
10-17-31	City of Meadville—Water.....	117.00
7-17-32	J. M. McCandless — Investigation exp.	121.95
Total		\$37,417.21

(p. 286.)

22. In connection with the aforesaid West Meade Township job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, to wit:

Date	Name	Amount
9- 6-30	J. F. Moran—Investigation exp....\$	17.65
11-28-30	W. F. Jerome—Reimbursement.....	22.09
12- 5-30	Truscon Steel Co.	2,272.56
12- 6-30	Standard Slag Co.	2,510.45
2-14-31	Nickel Plate Sand & Gravel Co.	650.00
8-19-31	Bessemer Cement Corp.	4,344.24
8-19-31	Standard Portland Cement Co.	5,539.68
8-22-31	J. M. Stoner & Sons—Court costs..	30.60
10-21-31	City of Meadville, Pa.—Water.....	33.00
5-17-32	J. M. McCandless — Investigation exp.	121.95
8-23-32	Concrete Steel Co.	100.00
Total		\$15,642.22

(p. 286.)

23. In connection with the aforesaid Indiana County job and under and pursuant to the aforesaid application, bond and contract in connection therewith Commercial paid out and disbursed as aforesaid the following sums on the following dates respectively, to the following named persons, firms and corporations, Eastern States having on or about May 14, 1930 advised the Secretary of Highways of Pennsylvania that due to lack of funds it was unable to continue with the construction work under this contract, and the said Secretary of Highways, by notice addressed to said Eastern States under date of May 16, 1930, having declared Eastern States to be in default under said contract and having turned the work over to Commercial, as surety on said bond, for completion, to wit:

Date	Name	Amount
6- 7-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll to 6-7-30.....\$	307.50
6-14-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll, &c. 6-11-30	410.73
6-19-30	H. M. Potter—Investigation exp.....	80.83
6-20-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll, &c. 6-18-30	759.08
6-28-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll, &c. 6-25-30	1,093.60
7- 8-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll, &c. 7-5-30..	2,027.93
8- 1-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—payroll, &c. 7-12-30	910.70
10-11-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—Misc. bills.....	43.38
10- 4-30	Commercial Casualty Insurance Co. (Pitts. B. O.)—premium compensation and liability policies.....	88.17
11-21-30	A. F. Blessing.....	1,532.08
12-31-30	Commercial Casualty Insurance Co. (Pitts. B. O.).....	73.08
2- -31	Standard Slag Co.....	5,450.00
3- 2-31	Wagner's Garage—Hauling	10.00
3- 4-31	J. Wagner Estate.....	349.04
4- 7-31	Philip Carey Co.....	73.44
4- 8-31	National Steel Fabric Co.....	6,479.36
4- 8-31	D. H. Wendel.....	1,628.69

5-23-31	New Florence Lumber Co.....	85.00
5-23-31	J. K. Davidson & Bro.....	2,677.85
8-18-31	Bessemer Cement Corp.....	15,531.80
8-18-31	York Ice Machinery Co.....	177.00
8-18-31	Dow Chemical Co.....	831.18
11-12-31	Russell Brothers	350.00
12-28-31	J. M. McCandless.....	713.60
5-13-32	J. M. McCandless.....	121.95

Total\$41,805.99
(p. 287.)

APPENDIX B.

Chronological Summary of Facts.

The following summary is based upon:

1. The pleadings as amended in suit No. 1, and the facts admitted in the pleadings in suit No. 2.
2. The stipulation of facts.
3. The appendix thereto.
4. The testimony and exhibits at final hearing. (References to "pars." are to paragraphs of Stipulation of Facts—pp. 63-79).

1927

- July 9. Eastern States organized as a corporation and by-laws adopted.
(pp. 135, 136, 266, 267, 274.)
- July 9. First meeting of Board of Directors of Eastern States; resolution adopted re bank deposits.
(Exs. 53, 59, 62; pp. 136, 272, 161, 273, 274.)
- July 9. Resolution of Eastern States adopted creating offices of Assistant Secretary and Assistant Treasurer and electing Jerome thereto.
(Ex. 62, p. 274.)

1928

- April 10. Meeting of Board of Directors of Eastern States. Report presented that company was the successful bidder on the Clarion-Venango contract and that Mr. Jerome was securing a bond.

(Ex. 62; pp. 161, 276.)

- April 13. Eastern States made application to Commercial for contract bond for sum of \$124,105.04 to secure Clarion-Venango job.

(par. 2, Ex. 1; pp. 65, 190.)

- April 14. Eastern States as principal and Commercial as surety gave bond to Commonwealth of Pennsylvania for said amount on said contract.

(par. 3, Ex. 2; pp. 65, 203.)

- April 14. Eastern States and Pennsylvania entered into a contract for said job.

(pars. 4 and 5, Ex. 3; pp. 65, 207.)

- May 19. Meeting of Board of Directors of Eastern States. Report that the "Venango job is progressing satisfactorily."

(Ex. 62; pp. 162, 276.)

- Sept. 22. Eastern States made application to Commercial for bond to secure Vernon-Hayfield contract; on said date Eastern States and Commonwealth of Pennsylvania executed said contract and Eastern States as principal and Commercial as surety gave bond to said Commonwealth to secure said contract.

(pars. 6, 7, 8 and 9; Exs. 4 and 5; pp. 66, 217, 218.)

1929

- March 18. Eastern States made application to Commercial for bond to secure West Meade contract.

(pars. 10, 13; Ex. 6; pp. 66, 67, 219.)

1929

March 22. Eastern States and Commonwealth of Pennsylvania executed said contract and Eastern States as principal and Commercial as surety gave bond to said Commonwealth to secure said contract.

(pars. 11, 12; Ex. 7; pp. 66, 67, 220.)

March 22. Eastern States notified Pennsylvania Surety Company by letter that McDonald Construction Company had defaulted in the performance of subcontract re Clarion & Venango Counties; on same date Eastern States notified said Construction Company of the latter's failure to comply with said subcontract.

(Exs. 63 and 64; pp. 167, 280, 281.)

June 28. Eastern States paid Commercial the sum of \$1210.12 by check signed by Williams as President and by Jerome as Assistant Treasurer; said check passed through the Pittsburgh office of Commercial.

(Ex. 58; pp. 149, 273.)

Aug. 2. Eastern States paid Commercial the sum of \$1,000 by check signed by Williams as President and by Jerome as Assistant Treasurer; said check passed through the Pittsburgh office of Commercial.

(Ex. 57; pp. 149, 273.)

Aug. 2. Eastern States owed certain bills and charges (as detailed in stipulation) for labor and material on Clarion-Venango job, amounting to \$15,593.10. (par. 14; p. 67.)

(Note: All said bills paid by Eastern States on September 5, 1929, Exs. 17-23; pp. 230, 1.)

1929

- Aug. 2. Eastern States by Wm. F. Jerome sent letter to Pennsylvania Department of Highways requesting Department to forward "our semi-final estimate check * * * to us" in care of Commercial at Pittsburgh, Penna. (par. 15, Ex. 8; pp. 67, 221.)
- Aug. 3. Division Engineer of said Department certified two semi-final estimates on Clarion-Venango job for \$2,868.83 and \$16,175.41. (par. 16, Exs. 9, 10; pp. 67, 222.)
- Aug. 10. Memorandum attached to said semi-final estimates explaining computation thereof, and recommending that \$1,000, be retained on the State-Aid portion and \$4,500 on the two portions to cover variation in final quantities and that with these retentions "the final estimate be approved as submitted." (par. 17, Ex. 11; pp. 68, 223.)
- Aug. 21. Letter from H. S. Hays, Assistant Manager Pittsburgh office of Commercial to Eastern States, attention Jerome, stating that "release of bond" is in Harrisburg, with "your order directing that the semi-final be sent to this office."

Letter requests another form of order, directing that all moneys "which will be the semi-final and final estimate come to this office."

Letter further states:

"Of course you do not know how much you owe McDonald and will not know until the final estimate is received, and there will be an amount due McDonald out of the final estimate. Therefore, we must have both the semi-final and final estimate come to this office."

(Ex. 49; pp. 128, 263.)

1929

- Aug. 22. Commercial filed with the Department of Highways its application for release of bond on said Clarion and Venango job, duly signed and sealed by its officers and setting forth that after a careful examination of the books and records of the contractor, or after receipt of an affidavit from the contractor, "which examination or affidavit satisfies this company that all claims for labor and material have been satisfactorily settled"; agrees that the release of the bond by the Secretary of Highways shall not be considered as a release from any claim for labor and material, which did not appear either on the books and records or on the affidavits, or was misstated on said affidavit.
(par. 19, Ex. 14; pp. 68, 225.)
- Aug. 25,
27, 28. Semi-final estimate certified by Deputy Secretary of Highways to the Auditor General, approved by the latter, warrant signed by the latter to the Treasurer for checks and two checks issued in payment of said semi-final estimates.
(pars. 16, 18, 20; Exs. 9, 10, 12, 13, 15 and 16; pp. 67, 68, 222, 225, 228, 229.)
- Aug. 30. Treasurer's check for \$2,868.83 (part of semi-final) was collected by Eastern States.
(pars. 20 and 21; Ex. 15; pp. 68, 69, 228.)
- Sept. 5. Treasurer's check for \$16,175.41 (part of semi-final) was received by Jerome.
(par. 22; Ex. 16; pp. 69, 229.)
- Sept. 5. Eastern States delivered to Commercial its checks, all of this date, to the order of the claimants named in paragraph 14 for the amounts of the several claims.
(pars. 14 and 23; Exs. 17-23; pp. 67, 69, 230, 231.)

1929

- Sept. 5. Eastern States made application to Commercial for bond to secure Indiana County contract; on said date Eastern States and Indiana County executed said contract and Eastern States as principal and Commercial as surety gave bond to secure said contract.
(pars. 24, 25, 26 and 27; Exs. 24, 25 and 26; pp. 70, 231, 232.)
- Sept. 5. Affidavit of Jerome to financial statement of Eastern States made to the Commercial with statement of assets and liabilities as of August 20, 1929.
(Ex. 48; pp. 109, 260.)
- Sept. 7. Treasurer's check for \$16,175.41 (part of semi-final estimate on Clarion-Venango job) was deposited in Farmers & Merchants Bank at Bridgeton, N. J., to the credit of Eastern States.
(pars. 20 and 22; Ex. 16; pp. 68, 69, 229.)
- Sept. 19. On this date all work and material on Clarion-Venango job, Vernon-Hayfield job, and West Meade job, had been done and furnished; certain bills were unpaid by Eastern States as detailed in stipulation.
The only unpaid bill on Clarion-Venango job was that of McDonald Construction Company for \$12,370.43.
(par. 28, p. 70.)
- Sept. 19. Eastern States by Jerome sent a letter to the Department of Highways requesting said Department "to forward our final check to us (on construction of Clarion-Venango job) in care of the Commercial Casualty Insurance Company, 720 Grant Bldg., Pittsburgh, Pennsylvania."
(par. 29; Ex. 27; pp. 71, 233.)

1929

Sept. 24. Eastern States borrowed from Bridgeton Bank \$10,000 on demand note of that date; and executed and delivered as collateral security an assignment of the balance "now due" Eastern States on the Clarion-Venango job.
(pars. 30 and 31; Exs. 28 and 29; pp. 72, 234, 238.)

Oct. 1. Eastern States notified Commercial of the execution and delivery of said assignment. (See par. 14 of bill.) Commercial denies this notice.
(See par. 38 of Stip., p. 74.)

(Note: Bridgeton Bank claims this notice was given by telephone and letter by Jerome to the Assistant Manager of Commercial at the latter's Pittsburgh office; the manager denied that such notice was given; Vice Chancellor Davis found that it was given (p. 33, ll. 25-40 of State of Case).)

Dec. 7. Eastern States paid Commercial the sum of \$327.91 for premium by check signed by Williams as President and by Jerome as Assistant Treasurer; check passed through the Pittsburgh office of Commercial.
(Ex. 56; pp. 149, 273.)

Dec. 23. Eastern States paid Commercial the sum of \$500 by check signed by Williams as President and by Jerome as Assistant Treasurer; said check passed through the Pittsburgh office of Commercial.
(Ex. 55; pp. 149, 273.)

1930

Jan. 4. Division Engineer of Pennsylvania certified two final estimates for Clarion-Venango contract for \$2,328.21 and \$17,349.63.
(par. 32, Exs. 30 and 31; pp. 72, 240.)

1930

- Jan. 13. Letter from C. W. Scull, Assistant Cashier of Bridgeton Bank to State Highway Department stating that the bank holds an order for \$21,000 as collateral and inquiring "is this money due"; if not, kindly advise when it will be due and "we will forward" the order.
(par. 45, Ex. 41; pp. 76, 248.)
- Jan. 17. Letter from Thos. D. Frye, Office Director and Comptroller of Bridgeton Bank in reply to letter of January 13; advises that release of bond was filed Aug. 22, 1929, that semi-final estimate of \$19,044.24 was paid Aug. 26, 1929, and that there was "still due" \$5,500, subject to the final checking of quantities.
(par. 45, Ex. 42; pp. 76, 249.)
- Jan. 31. Letter from Eastern States by Wm. F. Jerome to Commercial at Pittsburgh, returning affidavit showing bills "we owe on the Crawford County jobs."
Letter continues, "We realize that the amounts owed are more than the estimates will be but you will receive our final estimate on the Clarion-Venango contract within a very few days and on receipt of it you can apply it to these accounts, all except the amount owed the McDonald Construction Co. which you know about * * *."
(par. 48, Ex. 45; pp. 79, 254.)
- Feb. 5, 7, 8 and 10. Final estimates certified by Deputy Secretary of Highways to the Auditor General, approved by the latter; warrant signed by the latter to the treasurer for checks and two checks issued in payment of said final estimates.
(pars. 32 and 33; Exs. 30, 31, 32 and 33; pp. 72, 73, 240.)

1930

- Feb. 10. Said treasurer issued check numbered 48884 for \$2,328.21, and check numbered 48886 for \$17,349.63 in final payment for all work of Eastern States on Clarion-Venango job; and sent same by mail to Eastern States, care of Commercial "720 Grant Bldg. Pittsburgh, Pa."
(par. 34; Exs. 34 and 35; pp. 73, 241, 242.)

- Feb. 11. Letter to "Dear Bill" (Jerome) from H. S. Hays, Assistant Manager of office of Commercial at Pittsburgh, advising said checks have been received for Clarion-Venango job.

Letter further states:

"I am holding these checks in the strong box until a copy of the final estimate is received so that the status of the McDonald Construction Company may be properly determined.

I am leaving for Harrisburg Wednesday night, February 12th and while there will secure a copy of the final estimate.

I would suggest that next week a day be set aside to review the entire transaction and an attempt be made to satisfactorily settle this account."

(Ex. 50; pp. 132, 264.)

- Feb. 27. Each of said checks was endorsed by William F. Jerome in the manner following:

"For Deposit only in the First National Bank at Pittsburgh, Pennsylvania to the credit of COMMERCIAL CASUALTY INSURANCE COMPANY BOND ACCOUNT
Eastern States Construction Company

by: Wm. F. Jerome."

(pars. 34 and 35; Exs. 34 and 35; pp. 73, 241, 242.)

1930

- Feb. 28. Commercial by H. S. Hays, its attorney-in-fact, endorsed each of said checks below the above quoted endorsement of said Jerome, as follows:

“COMMERCIAL CASUALTY INSURANCE
COMPANY

Bond Acct.

By: H. S. HAYS

ATTORNEY-IN-FACT”

(par. 36; Exs. 34 and 35; pp. 73, 241, 242.)

- March 1. First National Bank of Pittsburgh collected said checks and the full amount was credited on this date to Commercial.

(par. 37, p. 74.)

- March 28. Letter from Bridgeton Bank to Commercial advising that Eastern States borrowed \$10,000, giving as collateral an order for the payment by the Department of Highways of \$21,000 on route 75 and stating, “We have been informed by the Department that they paid to you on August 22, 1929, \$19,044.24, due on this contract, and that there was also due \$5,500; encloses copy of note, resolution and of order to Highway Department.”

Asks whether you received said amount on Aug. 22, 1929, and, if so, “will you pay the note out of such funds.”

(par. 38; Ex. 36; pp. 74, 243.)

April 9
and 11.

Payments made by Commercial to certain of the subcontractors of McDonald Construction Company on account of the Clarion-Venango contract. (p. 285, ll. 10-20.)

- May 6. Payment made by Commercial to a subcontractor of McDonald Construction Company on account of the Clarion-Venango contract. (p. 285, l. 20.)

1930

- May 12. Final settlement made of Vernon-Hayfield contract between Eastern States and Pennsylvania for \$23,719.65.
(par. 39, p. 74.)
- May 12. Final settlement made of West Meade contract with Eastern States for \$10,039.24.
(par. 40, p. 75.)
- May 14. Letter from Eastern States by Jerome (from "Indiana Penna.") to Secretary of Highways relating to Indiana County contract, stating "We ask that you declare this contract in default * * *."
(Carbon copy to Commercial.)
(par. 41; Ex. 39; pp. 75, 246.)
- May 15. Check issued by Treasurer of Pennsylvania for \$23,719.65, to the order of Eastern States care of Commercial, Pittsburgh, Pa., in settlement of Vernon-Hayfield contract.
(par. 39; Ex. 37; pp. 74, 244.)
- May 15. Check issued by Treasurer of Pennsylvania for \$10,039.24 to the order of Eastern States care of Commercial, Pittsburgh, Pa. in settlement of West Meade contract.
(par. 40; Ex. 38; pp. 75, 245.)
- May 16. Letter from Secretary of Highways to Eastern States at Bridgeton, acknowledging receipt of letter of May 14th and stating "in view of this statement you are hereby decreed in default and the work is turned over to the Commercial Casualty Insurance Company of Newark, New Jersey, surety on this contract for completion."
(par. 42; Ex. 40; pp. 75, 247.)
- May 23. *Balance* of \$10,215.75 paid by Commercial to McDonald Construction Company on account of Clarion-Venango contract.
(p. 285, ll. 25 to 30.)

1930

- May 26. Said check for \$23,719.65 in settlement of Vernon-Hayfield contract paid to Commercial by endorsement as follows:

“Pay to the order of
The Commercial Casualty Insurance
Co.
Eastern States Construction Co.
By Wm. F. Jerome
Asst. Treas.”

(par. 39; Ex. 37; pp. 74, 244.)

- June 5. Said check for \$10,039.24 in settlement of West Meade contract paid to Commercial by endorsement as follows:

“Pay to the order of
The Commercial Casualty Insurance
Co.
Eastern States Construction Co.
By Wm. F. Jerome.
Asst. Treas.

(par. 40; Ex. 38; pp. 75, 245.)

- June 10. Premium on bond of McDonald Construction Company paid to Commercial and charged against Clarion-Venango contract.
(p. 285, l. 20.)

(Note: The payments made by Commercial to and for McDonald Construction Company on April 9, April 11, May 6, May 23 and the premium on bond June 10, 1930, aggregate the sum of....\$16,907.11
DEDUCT the amount held for said Construction Company out of semi-final estimate (as alleged by Commercial and admitted by Bridgeton Bank) 4,536.68
Leaving a balance due said Construction Com-
pany of\$12,370.43

(See Stip. pars. 28 and 47, pp. 70, 77; also p. 285, l. 30.)

The aggregate of the final estimates on the Clarion-Venango contract is the sum of\$19,677.84
 DEDUCT amount admittedly due McDonald Construction Company for work on said contract 12,370.43
 Balance of final estimates in dispute
 \$7,307.41)

1930

- Aug. 15. Bridgeton Bank demanded payment from Eastern States of said note with interest; and upon default thereof the note was duly protested.
 (par. 43, p. 75.)
- Sept. 21. Letter from Jerome to A. R. McAllister (from Bradford, Penna.) advising "We did have the \$19,000. coming to us when we assigned it. The fact that the State paid that much on that contract since that time should prove that. The fact that we could not obtain that money for services should not alter the fact. When the assignment was made we only owed on that job the balance of the excavation paid on the final which left us enough to pay the Bridgeton National Bank. Unfortunately the check had to go to the Bonding Co. and they insisted they would hold it as we owed so much on other jobs they were interested in * * *"
 (par. 48; Ex. 46; pp. 79, 255.)
- Oct. 15. Letter from H. W. Fry, Executive Secretary to Mr. McAllister advising as to the claims filed with the Department of Highways and stating that on August 2, 1929, the contractor (Eastern States) directed that the semi-final check be sent in care of the Surety Company and on September 19, 1929, directed that the final check be sent in care of the

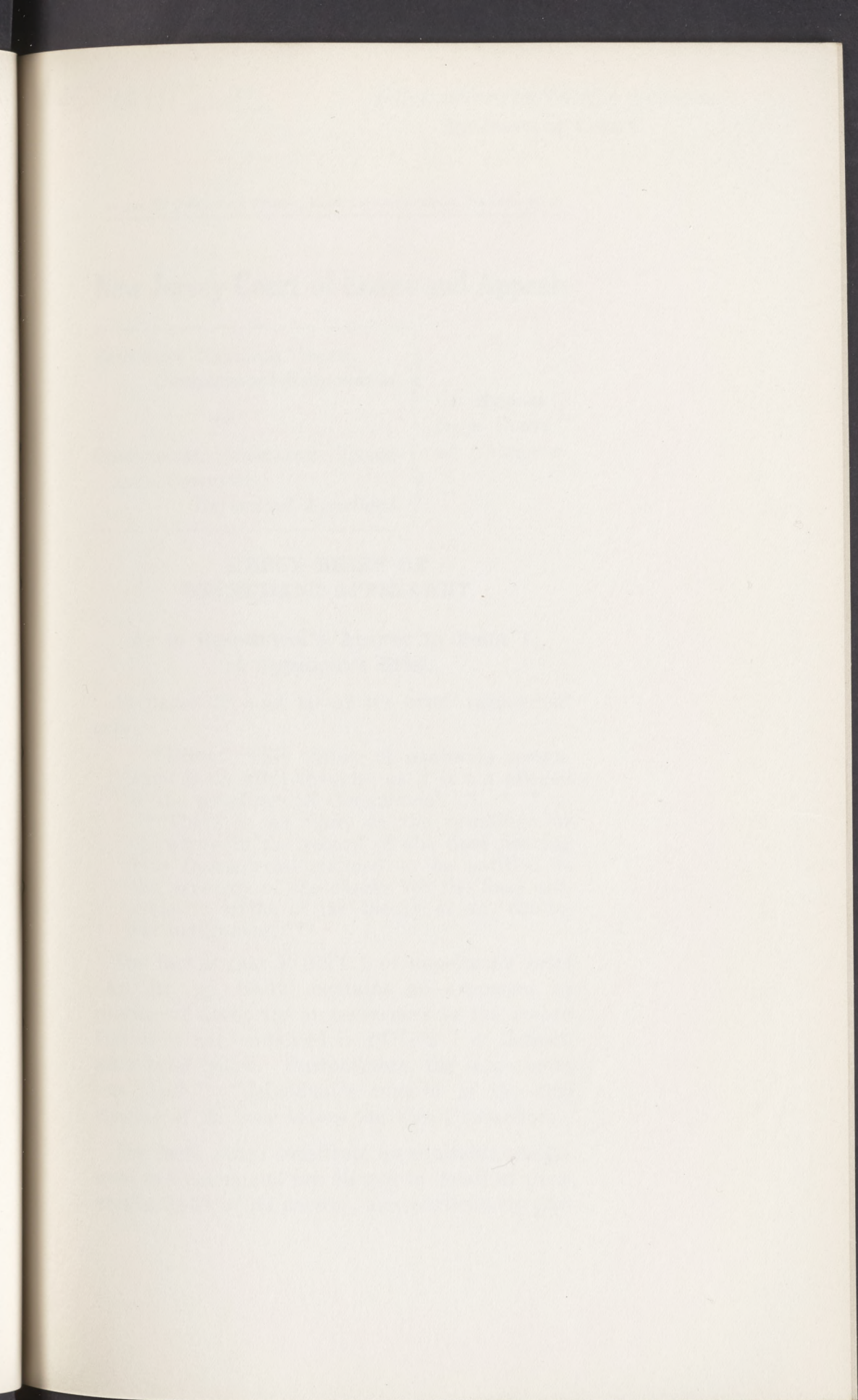
Surety Company; that the final estimate was approved on Feb. 5, 1930. (par. 48; Ex. 47; pp. 79, 257.)

1930

- Nov. 20. Final settlement made on Indiana County contract for \$18,323.48. (par. 44, p. 76.)
- Nov. 29. Letter from Mr. McAllister to Mr. Fry inquiring about balances due from Highway Department on route 75 (Clarion-Venango contract). (par. 45; Ex. 43; pp. 76, 250.)
- Dec. 3. Letter from Mr. Fry to Mr. McAllister in reply to letter of Nov. 29, 1930, explaining as to balances due and stating that the final estimate was \$19,677.84. (par. 45; Ex. 44; pp. 76, 252.)

1931

- Jan. 10. Said check of \$18,323.48 on Indiana County contract paid to Commercial. (par. 44, p. 76.)
- (Note: In addition to the payments made by Commercial, to or for sub-contractors and others, on the Clarion-Venango contract, it is stipulated that Commercial made various payments on contracts *other than* the Clarion-Venango contract.
- As to Vernon-Hayfield contract, the dates and amounts of the payments are set forth in paragraph 21 of Commercial's bill of complaint.
- As to West Meade contract, the dates and amounts of the payments are set forth in paragraph 22 of said bill.
- As to Indiana County contract, the dates and amounts of the payments are set forth in paragraph 23 of said bill (See pp. 285-7).)



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

New Jersey Court of Errors and AppealsBRIDGETON NATIONAL BANK,
*Complainant-Respondent,**vs.*COMMERCIAL CASUALTY INSUR-
ANCE COMPANY,
*Defendant-Appellant.**On Appeal
from Court
of Chancery.***REPLY BRIEF OF
DEFENDANT-APPELLANT.****As to Respondent's Answer to Point I
of Appellant's Brief.**

At pages 59 and 60 of its brief respondent says:

"First: This theory of equitable assignment is an after-thought, as it is not alleged in the pleadings of Commercial. * * *

"There is no claim in the pleadings or elsewhere in the record of the final hearing that Commercial claimed to be entitled to the proceeds of the checks for the final estimate by virtue of the theory of an 'equitable assignment.'"

The fact is that POINT I of appellant's brief (Ap. Br. pp. 20-42) contains no argument or citation of authority or references to the record that were not contained in POINT I of defendant's brief below. Furthermore, the same point was made by defendant's counsel in the oral opening of the case before the Vice Chancellor.

The facts which constitute an equitable assignment to Commercial are alleged in detail in paragraphs 22-34 of its answer, and particularly par-

agraph 30 (pp. 20-21) alleges Eastern States' agreement of September, 1929.

We submit that under the authorities cited in appellant's brief the facts alleged in defendant's answer and fully substantiated by the record constitute what is referred to in the law as an "equitable assignment," and that "this theory of equitable assignment" is properly a matter of argument and not of pleading.

On pages 31-37 of appellant's brief we have cited and extensively quoted the proofs by which it is established that between September 5th and September 19th, 1929 Commercial demanded and *Eastern States* agreed that the said final payment should go and belong to Commercial, as surety, toward the payment of Eastern States' said debts on all three of said contracts, that Eastern States would order the Commonwealth to send the final payment checks to it in care of Commercial, and that when the checks were received it would endorse them over to Commercial. Nowhere in respondent's brief do we find any attempt to question or dispute the fact of that oral agreement, notwithstanding that in defendant's brief below it was set forth in the same manner and by the same references to and quotations from the record as are contained in appellant's brief. As the matter now stands, therefore, it appears to be undisputed that that oral agreement was made (except the respondent's contention as to Jerome's lack of authority), and it remains for this court to determine whether that proved agreement—entered into under the circumstances set forth in appellant's brief, and for the purpose, among other things, of "keeping Commercial quiet"—is to be treated as a mere nullity, or whether, as between Eastern States and Commercial, it resulted in any rights

or equities in Commercial, and, if so, what rights and equities existed in Commercial as a result of it, for Bridgeton Bank necessarily took its subsequent assignment subject to all such rights and equities as then existed in Commercial by virtue of said oral agreement between Commercial and Eastern States, and, as we have shown in POINT IV "A" (Ap. Br. pp. 56-59) of appellant's brief, Bridgeton Bank took its assignment chargeable with notice of such rights and equities as existed in Commercial.

Respondent's brief (here, as in the court below) makes no mention of the said oral agreement but throughout directs attention to Eastern States' order of September 19th filed with the Department of Highways as being the sole basis of Commercial's claim of an equitable assignment. Thus, respondent's brief says (mid p. 59) "Commercial will no doubt claim that said letter of September 19, 1929, was an equitable assignment to it of the final amount due Eastern States on the Clarion-Venango contract," and (at top p. 62) "we submit that it is impossible to read into this so-called 'order' of Jerome an equitable assignment of the *entire* balance due Eastern States," and in its caption to POINT IV it says (mid. p. 57) "The direction of Jerome to the Highway Department * * * was not an equitable assignment to Commercial of the amount of said estimates, except only to the extent of the sum due a sub-contractor of Eastern States under said contract." And so, also, the court below in its opinion made no reference to the oral agreement and expressed its view merely as to "*the effect of such order.*"

Commercial does not now and did not in the court below contend that said order, in and of itself, constituted an equitable assignment, but on

the contrary contended and now respectfully submits that the said oral agreement constituted an equitable assignment of the fund to Commercial and that said order was given pursuant to and in performance of the agreement. The giving of the order was a step in the course of carrying out and giving effect to the agreement entered into by Eastern States and Commercial, and so also was the receipt and endorsement over to Commercial of the checks in question as to which the court below said: "The mere receipt of these checks in the manner in which they were received could not be determined to be an assignment by Eastern States to Commercial, because Commercial could not use such checks without a proper endorsement by Eastern States." Commercial's *right* to the fund, as between it and Eastern States, was vested and enforceable in equity by virtue of said oral agreement, and was in no way dependent upon Eastern States' endorsement of the checks. *That* it had promised to do, and, if it had refused to perform that promise, equity would have considered that as done which should be done and would have protected and enforced Commercial's right to the fund pursuant to said agreement. The promise, made to "keep Commercial quiet," had put it beyond the power of Eastern States to exercise any option in the matter or to exercise any further control over the fund.

As a second answer to POINT I of appellant's brief, respondent's brief urges (mid. p. 60) that Jerome "had no authority to give such an order in behalf of Eastern States." This contention as to lack of authority of Jerome is dealt with generally in POINT III of appellant's brief (Ap. Br., pp. 46-56). In addition to the authorities

there cited we beg to direct the court's attention particularly to what Vice Chancellor Walker said in the case of *Cope v. Walton Co.*, 77 N. J. Equity 512 at 519; affirmed 79 N. J. Equity 165 (cited at p. 38 of appellant's brief).

What possible right or standing has Bridgeton Bank to question Jerome's authority to act for his corporation? The said oral agreement was made and the said order of September 19 was given before Bridgeton Bank had taken its assignment and at a time when the matter lay solely between Eastern States and its surety on the three contracts in question.

What right or standing has Bridgeton Bank to undo or nullify Eastern States' acquiescence in and adoption and ratification of Jerome's said acts on its behalf?

Eastern States having induced Commercial to rely upon Jerome's acts and promise and to refrain from taking such steps as it might otherwise have taken for its protection, what right or standing has Bridgeton Bank to assert now that these dealings between principal and surety, which had never in any way been questioned or repudiated by the principal, were unauthorized, void and of no more effect than if they had never occurred?

As a third and last answer to Point I of appellant's brief, the respondent urges (Res. Br. pp. 60-61) that "in any event, the doctrine of equitable assignment, under the circumstances of this case, cannot be extended further than to justify Commercial in paying the claim of the McDonald Construction Company."

Without any agreement, so much of the Clarion-Venango final payment as was necessary

to pay McDonald Construction Company as subcontractor on that job could be applied to no other purpose. The whole point and purpose of the proved oral agreement was that the final payment was made over to Commercial in order that the sum remaining after payment of McDonald Construction Company might be applied on the unpaid labor and material charges against the two Crawford County jobs. There seems to be simply no point in saying that "if the doctrine of equitable assignment can be considered at all, the most that can be done with that doctrine is to justify the payment by Commercial of the use of such amount of the final payment on the Clarion-Venango contract as was sufficient to pay the claim of McDonald Construction Company" (Res. Br., top. p. 61). Either the facts alleged in Commercial's answer and substantiated by the proofs constitute an equitable assignment of the *entire* fund, or they constitute no assignment at all.

The respondent (Res. Br. p. 61) adduces nothing in support of this contention other than Commercial's letter to Eastern States dated February 11, 1930 (Ex. 50, p. 264), which as we have shown at pages 34-35 of our main brief, was written just eleven days after Eastern States' letter to Commercial of January 31, 1930 (Ex. 45, p. 254) in which Eastern States had said to Commercial "you will receive our final estimate on the Clarion-Venango contract within a very few days and on receipt of it you can apply it to these accounts (Crawford County jobs), all except the amount owing to McDonald Construction Co.," thereby recognizing and corroborating the fact that up to the time of the writing of that letter Commercial knew nothing about the assignment to the Bank, and thereby also infer-

entially recognizing and confirming its aforesaid oral agreement and equitable assignment of September 1929 pursuant to which it had filed said order with the Department of Highways, and pursuant to which the final payment checks would shortly come to Commercial, and pursuant to which Eastern States would and later did endorse over said checks to Commercial.

**As to Respondent's Answer to Point V
of Appellant's Brief.**

Even if the oral agreement made in September 1929 and the order filed pursuant thereto were ineffective to create any rights in Commercial, and even if the provisions of the Indemnity Agreement did not have the effect for which appellant contends in Point II of its brief, and even if the assignment to the Bank was effective notwithstanding the arguments contained in Point IV of appellant's brief, we respectfully insist that *nevertheless any rights against Commercial that Bridgeton Bank might have had have been lost by reason of the Bank's course of conduct and laches, and the Bank has waived them, and is estopped from now recovering the fund from Commercial for the reasons set forth in Point V of appellant's brief (pp. 65-70).*

As to this, we find no attempted excuse or answer in respondent's brief other than the statement at the bottom of page 33 to the effect that "repeated efforts were made by Mr. McAllister, treasurer of Eastern States, to obtain information as to the items for which Commercial was holding the balance of the final estimate on the Clarion-Venango job, but without obtaining satisfactory reply (pp. 147, 148)," and on oral argument respondent's counsel stated, as we

understood him, that appellant overlooks the fact that Mr. McAllister testified that the Bank's delay in taking action against Commercial was due to the fact that he, Mr. McAllister, could not find out what Commercial had done with the money.

Mr. McAllister, however, did not testify that his personal lack of information had any bearing upon the Bank's course of conduct, and we submit that, in any event, Mr. McAllister had nothing to do with *the Bank's* rights or duties in respect to its now alleged claim against Commercial.

He had seen fit to let Jerome perform the duties of treasurer of Eastern States. He could have learned from Jerome and from Eastern States' books and records all that he wanted to know about the bills that Eastern States owed on the three contracts in question (Jerome, p. 132, ll. 23-30). Whether Mr. McAllister knew it or not, the fact was that his company owed only McDonald Construction Co. on the Clarion-Venango contract (Stip. 28, pp. 70-71; Stip. 47, pp. 77-78) which sum was determined on or about February 18, 1930, pursuant to Commercial's letter of February 11, 1930, to Eastern States (Ex. 50, p. 265, l. 24), and was paid and settled in full by Commercial on or before May 23, 1930 (p. 285, ll. 10-26). If Commercial had no right to the surplus, certainly the fact that *Mr. McAllister* had no "satisfactory" information as to the unpaid bills on the two Crawford County jobs is no sort of excuse or justification for *the Bank's* course of conduct which is set forth according to the record in Point V of appellant's brief.

We respectfully submit, therefore, that Point V of appellant's brief stands unanswered, and that by reason of the facts therein set forth Bridgeton Bank is not in equity entitled to the decree appealed from.

**As to Statements Contained, from Page to Page,
in Respondent's Brief.**

At page 9, lines 15-35, is an instance of the manner in which respondent states "the claim of Commercial."

The only claim that Commercial makes or made in the Court below to *an assignment "by virtue of the terms of the application"* is the claim set forth in Point II of its brief (Ap. Br. pp. 43-45).

In Point I of appellant's brief (at bottom of p. 27 to top of p. 31) we pointed out those provisions of the "Applications and Indemnity Agreements" which gave Commercial the right to demand indemnity, and placed upon Eastern States the duty to indemnify Commercial, in respect to the said unpaid bills on all three of said contracts. It was pursuant to such demand and in recognition of such duty that Eastern States *agreed* in September, 1929, to make over to Commercial the Clarion-Venango final payment as set forth in Point I of appellant's brief.

Except as aforesaid, Commercial did not in the court below and does not now base its right upon the provisions of the "Application for Bond" or the "Indemnity Agreement" embodied therein (c. f., Opinion, p. 34, ll. 25-34). Therefore, we shall make no specific reference to the many other places in its brief where respondent

states not the claims and contentions that are actually made by appellant in this regard, but the claims and contentions imputed to appellant by respondent.

Page 10, line 10, "Contract #4—Indiana County" is in no way involved in this suit, except as it has been referred to for the purpose of fixing dates, etc.

Pages 14-16. From our main brief and from what is set forth elsewhere in this reply brief, it is clear that respondent's "Summary of Questions at Issue and Conclusions of Davies, V. C., Thereon," is limited to the view of the case which complainant takes, and ignores the fact that *substantially every allegation contained in defendant's answer has been fully proved*, and ignores practically every point, issue and fact urged by defendant both here and in the court below.

The ultimate question, of course, is "Does the record establish such state of facts as entitles Bridgeton Bank to the decree appealed from?" We respectfully submit that for the reasons and upon the authorities set forth in appellant's brief, the facts pointed out in appellant's brief deny Bridgeton Bank's alleged right in equity to now shift the burden of this loss from itself, where it now rests, onto Commercial.

Bottom p. 16-top page 17. There is no doubt as to the correctness of what respondent here says relative to the weighing of the balance of credibility as between contradictory witnesses, but the only substantial conflict of testimony that

exists in this case is found in Hays' insistence that he knew nothing of the assignment to the Bank prior to the spring of 1930 (i. e., the Bank's letter of March 28, 1930) and Jerome's insistence that he told Hays about it (Ap. Br. pp. 71-75; Res. Br. pp. 29-32).

Point I of Respondent's Brief, pages 19-27. This corresponds to Point IV "B" of appellant's brief, pages 59-61.

We do not doubt that *as against a stranger to the contract* the final payment was "capable of assignment" in accordance with respondent's argument, but the point, as we see it, is whether it was "capable of assignment" *as against the surety* under the contract provisions and circumstances shown in our brief. None of the authorities cited by respondent dealt with such a situation as appears here—in effect a *tripartite* agreement to which the surety was a party (Ap. Br. pp. 59-61) of which fact the Bank was chargeable with notice (Ap. Br., Point IV "A," pp. 56-59).

Furthermore, no mention is made by respondent of the fact that a clear-cut and definite equity existed in favor of Commercial by reason of Eastern States having induced the bond, which is part of the contract, by representing and "guaranteeing" that it would not assign any part of its payment under the contract (Ap. Br. bot. p. 60). Bridgeton Bank took its assignment subject to all infirmities and existing equities, and this, we submit, was clearly one of them.

Point II of Respondent's Brief, pp. 28-35: This corresponds to Point VI of appellant's brief, pages 71-75.

Appellant does not now and did not in the court below claim that it had actually paid out the fund in question before it received the Bank's letter of March 28, 1930, but we agree with respondent's statement (Res. Br. bot. p. 32) that "the legal right of the parties to the fund, in dispute does not depend on whether or not Commercial had notice of the Bank's assignment" prior to the time that it disbursed the fund in payment of Eastern States' said debts.

It seems meaningless to say, as respondent says (bot. p. 34) "that it did so with its eyes open, and in the face of and with knowledge of the claim of Bridgeton Bank under its assignment" for Commercial had to pay the bills in any event, and the question now is whether the bank has established a right in equity to compel Commercial to make this further payment.

If Hays' testimony is believed as against Jerome's, or even if the view be taken that Jerome's testimony is not sufficient to sustain the burden of proof in the face of Hays' testimony, then the Bank has failed to show that Commercial had any knowledge of the Bank's assignment prior to receipt of the Bank's letter of March 28, 1930.

At mid. p. 33 respondent's brief says "there is no contradiction of Jerome's testimony that the assignment (to the Bank) was discussed on that occasion," viz. when Jerome endorsed the checks in question but we direct the court's attention to Hays' testimony at the top of page 180 where he said "The first time I knew about it was the Spring of 1930." Furthermore, Jerome's testi-

mony (bot. p. 96, top p. 97) which respondent cites in this regard is weak on the face of it. It was a faltering answer to a leading question, "Was there anything said at that time with regard to the assignment or the claim of the Bridgeton Bank? A Yes, as I recollect, I told them I was going to get the mischief for it myself."—Note that the "it" refers to the assignment concerning which he was asked. He was "going to get the mischief" for that assignment to the Bank. He was conscious of the wrong that had been done in making that assignment to the Bank without advising the Bank concerning Commercial's prior right. He even went so far as to say that at the time of the assignment to the Bank he told Mr. Garrison that he had sent the order of September 19th to the Highway Department (p. 114, ll. 10-18), but Mr. Garrison denied it (p. 138, l. 27).

The true explanation as to why the same security was given twice, first to Commercial and then to the Bank, is found, we submit, in Jerome's testimony (bot. p. 117): "*I figured we would get the jobs finished and the bills paid up and there wouldn't be any trouble.*" It was Mr. Maier, as Vice President, and Mr. McAllister, as Secretary, who executed the assignment (p. 239), and there is no reason to believe at that time they knew any more about the agreement that Jerome had made with Commercial than they knew about the rest of the company's business (Ap. Br., pp. 48-50). Mr. Williams, the President, knew all about it (p. 111, ll. 18-38), but there is no evidence that he was present or that he knew the assignment was being given to the Bank. It is clear, we believe, that Jerome, who handled all the financial affairs of the company, "figured" that the company would be able

to repay the loan "and there wouldn't be any trouble." Other contracts than the three in question are referred to in the record and may have seemed to Jerome at that time to be sufficient basis for his optimism, as for instance, the Indiana County contract that had just been signed on September 5th, and there were also the two other Indiana County jobs that "both went to other bonding companies" (Jerome, top p. 108), and the contract with the Supervisors of Rockdale Township (p. 254, l. 35). So, also, Mr. McAllister testified (p. 144, ll. 27-35), "there were substantial sums of money coming to our company, and I was informed by Mr. Williams, the president of the company, that *there was sufficient money in these accounts, plus the profits from two other contracts that had been secured, to pay all of the obligations of the company.*"

Under such circumstances, of course, there seemed to Jerome to be no risk involved in giving the second assignment to the Bank, and he arranged accordingly with Mr. Maier and Mr. McAllister. Commercial, however, had taken a different view of the prospects.

Point III of Respondent's Brief, pp. 35-57.

In these pages of its brief respondent goes to great length in setting up imaginary contentions attributed to appellant and then showing that they have no merit. We have hereinabove indicated, as we did in our original brief, all that we claim "by virtue of the provisions of the Application for Bond."

In these pages of its brief there are, however, some specific statements that call for reply:

At page 35, line 35, respondent says: "There is no dispute of the fact that Eastern States has not paid any part of the principal or interest on said note." As to this, see appellant's brief Point IV "F," at page 64. Also the allegation of non-payment in paragraph 21 of the Bill (p. 9, l. 28) and the denial thereof in paragraph 21 of Commercial's Answer (p. 15, l. 18).

At bottom page 35, respondent says: "There is no dispute of the fact that the bank would be entitled to receive the balance * * * except for the question as to the validity of the assignment * * * and except for the question as to whether Commercial has a prior right to said balance by virtue of certain provisions in the application." If those are the only two questions in dispute it would seem that both parties have labored unnecessarily on several other questions.

Was the oral agreement of September 1929 followed by the order of September 19th, and the endorsement over of the checks, all a nullity? Is it not on all fours with *West v. Newing* (cited in Ap. Br. p. 41) wherein it was held that a contract of sale which contained the following: "I also agree to indorse the cheques from the asylum and hand over to you as received by me in settlement of the accounts" constituted an equitable assignment of the moneys from the checks as and when received from the asylum?

Is there any doubt that Commercial is chargeable with neither wrong nor neglect, and that Bridgeton Bank was negligent throughout, failed to make reasonable inquiry, failed to give notice to the Department of Highways, slept on its rights, if it had any, and by its silence when it should have spoken and by its seeming acquiescence when it should have acted lulled

Commercial into a sense of security in respect to the fund in question and induced it to change its position to its now irreparable prejudice?

Or is there any doubt that Bridgeton Bank took its "pig in a bag" chargeable with notice of Commercial's rights and subject to all infirmities and to all equities existing in favor of Commercial?

Pages 42-44 are devoted to "Commercial's claim of the right of subrogation," although Commercial has never mentioned any such claim.

Pages 45 to 57 are devoted to meeting arguments that were never made by Commercial in respect to the interpretation and effect of the "Application for Bond." Previously in this reply brief, we have restated our position in this regard.

Point IV of Respondent's Brief, pp. 57-63. This is dealt with above in this reply brief. As to the statements of fact made by respondent on these pages we beg to refer to pages 47-56 of appellant's brief and the evidence there cited.

Point V of Respondent's Brief, pp. 63-77. This point as to Jerome's endorsement of the checks in question has already been mentioned in this reply brief. It is fully dealt with in Point III, pp. 46-56 of appellant's brief.

Respectfully submitted,

LUM, TAMBLYN & FAIRLIE,
Solicitors for and of Counsel
with Defendant-Appellant.

CHESTER W. FAIRLIE,
Of Counsel.

46 MAY.T.1935

Filed after the Oral Argument
by leave of Court.

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

New Jersey Court of Errors and Appeals

Between

BRIDGETON NATIONAL BANK,
Complainant-Respondent,

and

COMMERCIAL CASUALTY INSUR-
ANCE COMPANY,
Defendant-Appellant.

On Bill, &c.

*On Appeal
from the
Court of
Chancery.*

SUPPLEMENTAL BRIEF IN BEHALF OF BRIDGETON NATIONAL BANK, Complainant-Respondent.

Pursuant to leave granted by the court at the oral argument, this supplemental brief is submitted in behalf of Bridgeton Bank, complainant-respondent.

As in our main brief, the several parties will be referred to herein as follows:

Bridgeton National Bank as "Bridgeton Bank."

Commercial Casualty Insurance Company as "Commercial."

Eastern States Construction Company, Inc., as "Eastern States."

The questions at issue between the parties and the views of Davis, *V.-C.*, thereon, are summarized at pages 14-16 of our main brief.

The facts are summarized in chronological order in Appendix "B," which is annexed to our main brief at pages 97-110.

(a)

Comments on Main Brief of Appellant.

We will now refer to certain statements in the main brief of appellant; the references in the left hand margin hereof are to the pages of that brief (*italics ours*):

(Page 2.) Appellant states that "about" the middle of September, 1929, Eastern States, by an equitable assignment, "paid over" to Commercial the final payment that *was to become due* to Eastern States on the Clarion-Venango contract, and that the "agreed purpose" was that Commercial, as surety, should apply the same, first to the payment of the claim of the McDonald Company, a sub-contractor of Eastern States on the Clarion-Venango contract, and *then* to the payment of bills on two other contracts which Commercial had bonded; it is also stated that because of the practice of the Commonwealth of Pennsylvania in "recognizing no assignments," it was the "established" practice for the contractor to order the checks to be sent to it in care of the surety and then to endorse them over to the surety, and that "that was the arrangement agreed upon in this case."

Bridgeton Bank takes issue with these statements; in the first place, the evidence does *not* show that the "agreed" purpose was that Commercial should apply *all* of the final payment to the payment of bills on *other* contracts; the most that can be claimed is that the final payment should be applied to the settlement of the McDonald claim.

Moreover, the only person who undertook to make any "agreement" on behalf of Eastern States was Jerome, the Assistant Secretary and

Treasurer; in our main brief (pp. 58-60) we have summarized the evidence which shows that it had never been the *practice* of Eastern States or of any of its officers (even Jerome) to request the Highway Department of Pennsylvania to send the checks of Eastern States to the Pittsburgh office (or to any other office) of Commercial; and that Mr. McAllister, Secretary and Treasurer and one of the Directors, and Mr. Maier, the Vice-President and a Director, knew nothing either about the so-called "practice," or that Jerome had ever requested the checks of Eastern States to be sent to that corporation in care of Commercial at the latter's Pittsburg office, and still less that they had any knowledge or had made any agreement in behalf of Eastern States that the *purpose* of sending the checks that belonged to the corporation to Commercial was to apply them either in payment of the McDonald claim or of the claims on the other contracts. The statements in the brief assume facts that were not proved by Commercial, but on the contrary, were disproved by the officers of Eastern States.

The brief assumes that the "arrangement" whereby the Highway Department sent the checks of Eastern States in care of Commercial was "agreed upon," whereas, such alleged agreement was not proved—unless the court should conclude that Jerome had authority to bind the corporation in making such disposition of the money that belonged to the corporation—without the knowledge of any of the other officers or directors that he, Jerome, intended to appropriate money of the corporation to Commercial for the payment of bills not only of McDonald, but of contractors on other contracts made subsequent to the Clarion-Venango contract.

Further discussion of this claim of Commercial is found at pages 59-63 of our main brief.

(Page 4.) It is stated that the final payments on the two Crawford County jobs (referring to the Vernon-Hayfield contract, dated September 22, 1928, and the West Meade contract, dated March 22, 1929), were made over to Commercial "by the same procedure and in the same manner that the Clarion-Venango final payment had been made over to it." The only part of this statement which is justified by the record is that the checks for the Crawford County contracts were endorsed over to Commercial; they were not endorsed "in the same manner" as the checks for the final payment on the Clarion-Venango contract, but on the contrary, were endorsed by Jerome as "Asst. Secty. & Asst. Treas."

Moreover, these payments were long after the endorsement of the Clarion-Venango checks, namely, on May 26, 1930, and June 5, 1930, respectively (pars. 39 and 40 of Stip., pp. 74, 75).

(Pages 8-10.) Here the brief repeatedly asserts that the payment of the final checks on the Clarion-Venango contract was "duly authorized" by Eastern States; this again begs the question of the authority of Jerome to transfer the funds of Eastern States without the knowledge of the other officers and directors of the latter.

(Page 9.) Brief alleges that Bridgeton Bank took the assignment from Eastern States with "notice and knowledge" of the alleged "agreement" between Eastern States and Commercial, and of the order given by Jerome to the Highway Department. But there is no proof that the Bank had any *actual* knowledge; if this part

of the brief is intended to argue that the Bank had implied knowledge, that might raise the question whether the Bank was under a duty to make any independent investigation at the time it made the loan by inquiry *at that time* from the State Highway Department at Pennsylvania as to whether any amount, and, if so, what amount, was due from the State of Pennsylvania to Eastern States; it is submitted that the Bank was not under any duty to make such inquiry; it was dealing with reputable and well-known men of the City of Bridgeton, and had a right to rely upon their representations as to the amount that was due Eastern States on the Clarion-Venango contract; moreover, if the Bank had made an independent inquiry, it would have been advised that there was a substantial balance *then due* to Eastern States, and that the *exact* amount had not yet been fixed by the engineer of the Commonwealth of Pennsylvania; the final certificate by the engineer showed a total due Eastern States of \$19,677.84 (Exs. 30 and 31, p. 240)—which corresponded substantially to the amount of \$21,000 recited in the assignment from Eastern States to the Bank of September 24, 1929 (Ex. 29, p. 239).

(Page 11.) It is stated that according to paragraph 28 of the stipulation, no part of the \$10,000 loaned by the Bank “went into or was used by Eastern States” in connection with the Clarion-Venango job, and the two Crawford County jobs. But the testimony of Jerome (which was not contradicted) is that the money was borrowed “in order to keep the company operating” (p. 91, l. 35); and that the proceeds were deposited in the Bridgeton Bank to the credit of Eastern States and “used in the payment of labor and material” (p. 92, l. 18).

Moreover, in said paragraph of the stipulation there are listed several items of bills for labor and material on all *three* contracts and the stipulation states that "the above mentioned bills and charges were paid therefrom to the extent of said final estimate payments on said three contracts"; there is nothing in the stipulation (or elsewhere in the record) which justifies the statement that no part of the money loaned by the Bank was used in connection with any of these contracts.

(Pages 17, 18.) Here the appellant's brief deals with the collection of the *semi-final* payments to Eastern States and assumes that Eastern States had *agreed* that these checks "would be made over" to Commercial; the brief then alleges that Jerome prevailed upon Hays to release him from the *agreement*; and refers to the "binding agreement" that Eastern States had made with Commercial to endorse the *final* checks to Commercial "pursuant to said agreement".

The fundamental error in this argument is the same as we have pointed out above, namely, that appellant assumes that Jerome had authority to agree to dispose of the semi-final and the final checks, whereas the proof is that none of the other officers or directors knew that he was using the money of Eastern States to protect Commercial against the possibility of claims for labor and materials. These claims up to that time had not been paid by Commercial, and were not in fact paid until several months or, in some cases, two or three years thereafter; the dates and amounts of the payments made by Commercial on each of the contracts are listed at pp. 285-7 of State of Case.

Moreover, Jerome did *not* endorse the semi-final payments to Commercial, but on the contrary, deposited them to the account of Eastern States (p. 89, ll. 1-20).

It is true that Mr. Hays insisted that Eastern States draw checks in payment of certain bills on the Clarion-Venango contract (other than the bill of McDonald Construction Company, the amount of which was then in dispute and was not determined until several months thereafter), and checks were drawn accordingly in payment of these bills, each signed by the President of Eastern States and by Jerome as Assistant Treasurer (Exs. 17-23, pp. 230, 231).

There is certainly nothing in that procedure which is evidential of an equitable assignment by Eastern States to Commercial of the amount of either the semi-final or of the final estimates; on the contrary, that evidence shows that Jerome refused to deliver the semi-final checks to Commercial for the purpose of paying bills.

Moreover, the checks that were drawn in payment of said bills were signed both by the President and by the Assistant Treasurer, so that if Hays ever had any doubt about the right of Jerome to transfer funds of the Eastern States to Commercial, that doubt must have been removed when the checks in payment of these bills were signed *both* by the President and by Jerome.

(Pages 19, 20.) The brief alleges there is no proof that the Bank's loan has not been paid. But the answer of Eastern States to the bill of complaint of the Bank admits that the note had not been paid (p. 9, l. 30; p. 11, l. 12). The answer is signed by "Albert R. McAllister" as of counsel—who was the Secretary and Treasurer of

Eastern States. Paragraph 43 of the stipulation states that demand for payment of the note was made and that upon default thereof the note was duly protested (p. 75); Exhibit 28 is a copy of the protest (pp. 236-8); Exhibit 36 is a letter from Bridgeton Bank to Commercial inquiring if Commercial will pay the note out of the funds on the Clarion-Venango contract (p. 243); Exhibit 41 is a letter from Bridgeton Bank to the Highway Department advising that the Bank holds an order from Eastern States as collateral for borrowed money, and inquires if the money is due (p. 248); Exhibit 43 is a letter from Mr. McAllister to the Department of Highways, inquiring how much money is due and stating that the Bank threatens "criminal prosecution" (pp. 250, 251).

Mr. McAllister testified that he did not know anything about Jerome's letter directing that the semi-final payment check be sent to Eastern States in care of Commercial, and that he found it out "sometime after the Bridgeton Bank pressed for the collection of this \$10,000 note" (p. 139, ll. 30-35); he further testified about negotiations for a further loan with the Bridgeton Bank and said that "because the \$10,000 had not been repaid which we had borrowed in the September of the preceding year, the Bridgeton Bank refused to advance an additional \$10,000, and the other banks refused to advance their proportionate share" (p. 144, ll. 20, 25).

Moreover, if the note has been paid it would be difficult for Commercial to explain how it happens to be in the possession of the Bank.

An indebtedness shown to have existed is presumed to continue. (22 C. J. 90). This rule applies to non-payment of a note. *Goslee v. Rowe*, 157 Atl. 267 (Conn.) and cases therein cited.

(Page 20.) The brief states that the dealings of Jerome with Commercial were "accepted, ratified and confirmed by Eastern States." This is a broad statement which is not justified by the proof, particularly when we recall that the only other officers of Eastern States who testified (McAllister and Maier) said they knew nothing about Jerome's dealings with Commercial with reference to the semi-final and final payments and his letters to the Highway Department until long after the event (See pp. 58-60 of our main brief).

(Page 21.) The brief refers to an "irrevocable" order from the contractor—quoting from a letter which they describe in the brief as from the "Secretary of Highways" (p. 259 of State of Case).

This letter was not from the "Secretary" of the Highway Department, but from the "Executive Secretary" who is an entirely different person and with quite different duties. But however that may be, Jerome could not give to the Executive Secretary or to the Secretary of Highways any order that would be "irrevocable" so as to affect the interests of other parties; and, moreover, the so-called order was not an order for the payment of money to a third party (which the Highway Department says it would not recognize), but merely a request to the Executive Secretary that the "final check" be sent "to us" in care of the Commercial (Ex. 27, p. 233.)

(Page 21.) The brief says that Jerome used this method also for paying bank loans, and that checks payable to Eastern States were sent to banks by the State Highway Department and deposited to the credit of Eastern States "without requiring endorsements by Jerome."

That is an entirely different thing; you can use a rubber stamp for depositing checks to your order in your own bank account, but it requires an endorsement to transfer the check to another.

(Page 30.) The brief says that because the contract between Eastern States and the Commonwealth forbids assignment of moneys due under the contract, a subterfuge was adopted in the form of endorsing the checks over to Commercial in order to put the checks and the money "entirely beyond the control of the contractor"; it is claimed that the previous "agreement" on the part of Jerome to do this constitutes a valid equitable assignment, but it is said (under heading "B," pp. 59-61) that an assignment, in writing, to the Bank was no assignment at all because it was prohibited by the contract. An assignment is the effect or result of certain action and not the form of the action itself. Our main brief points out that if the assignment, in writing, to the Bank could not be made, an equitable (oral) assignment was in no better situation. However the so-called "agreement" of Jerome to have the final payment checks sent to Eastern States in care of Commercial at Pittsburgh did not put the checks "entirely beyond the control of the contractor and within the control of the surety" and even when they were endorsed it was with the understanding that they would be used for the purpose described in Exhibit 50 (pp. 264-5); to wit, the payment of the McDonald claim.

(Pages 41-2.) The authorities relate to an actual assignment in the form of an agreement to endorse checks or to pay certain funds for a particular purpose. In our case the request of Jerome to send the checks to Eastern States in care of the Commercial, did not constitute an

intention to transfer the money to Commercial and did not amount to an equitable transfer of the money itself. It was merely a post office address at which Eastern States was to receive the checks made to *its* order. It was not a direction upon the Highway Department to make the checks payable to Commercial or to pay the money to Commercial. The cases cited refer to direct payments from a debtor to a third party without the money passing through the creditor.

The brief tries to make these authorities fit the present case by saying that Jerome's "order to the Highway Department directed them to send the checks and the final estimate payment to *Commercial*" and that they constituted an "equitable assignment of the fund." But that is not what Jerome requested the Highway Department to do. He requested it to send the check to *Eastern States* at Commercial's office address in Pittsburgh.

(Page 43, et seq.) Under Point II the brief admits that there was no default in the Clarion-Venango contract, but claims at page 44 that there was a "breach" because there was an unpaid bill due McDonald. The undisputed testimony of McAllister is that at the time of that final payment, the company had not been sued, there were no judgments against it, no suits were pending, and no default had been made in any contract (*pp. 143-4*).

Jerome also testified that the company was not in default on any contract at that time (*p. 91*), and the only outstanding bill on the Clarion-Venango contract was that of the McDonald Construction Company, and that they did not know the exact amount until later (*p. 90*).

Certainly a contractor cannot be held to have breached a contract by not paying a bill until he knows how much the bill is. The McDonald Company had not started any suit and did not know what the amount was, any more than Eastern States knew. If such a situation constitutes a breach or default as between the contractor and the surety company, it is only necessary for the surety company to instigate an unjust claim against the contractor and then declare a default immediately upon the contractor's refusal to pay the bill as submitted. But since the provisions of the bond application brought this right of the surety into existence, only in case of default, that situation did not arise until long after the claim of the Bank arose and then on other contracts.

(Page 61.) Under heading "C" it is said that enough money to satisfy the Bank's claim was not *due* at the time the loan was made. If the word "due" means immediate payment, that is true, but if the word "due" means the amount earned up to that time, then more than enough to pay the Bank's claim had accrued. The contract had been completed and the semi-final estimates, which evidenced the completion of the work, had been passed. All that remained to be done was the final computation of quantities and prices and a final check-up on details for the ascertainment of the exact amount of the final payment. The money was due in the sense that it had been earned.

(Page 69.) The italicized paragraph states that the failure of the Bridgeton Bank to do anything about its claim, after Commercial knew that it had one, "induced" Commercial "to change its position, to forego taking" steps that it otherwise might and would have taken against

Eastern States to better secure their indemnification.

In support of this statement the brief cites from Jerome's testimony (*pp. 116, 117*), where Jerome answered in the affirmative a question as to whether if Commercial had not been kept quiet in September they would have taken steps on the Indiana County job they had just bonded. In that respect it may be noted that Commercial did take over the Indiana County job so that it did do later all of the things it could have done in September, 1929. Otherwise there is no suggestion in the record as to what action Commercial did forego and what steps they could take which they did not take afterwards.

(Page 75.) The brief says that meanwhile "Commercial had disbursed the fund in the payment of said debts." But this refers to a date of January 12, 1932, when the suit was brought in the Supreme Court. This overlooks the fact of the Bank's letter of March 28, 1930, and all the intervening correspondence and negotiations of McAllister with the Surety Company.

McAllister testified that he wrote "repeatedly" to the Commercial for information and for a long time received "no" reply at all and later received "very unsatisfactory replies," but did not get the information until the attorneys of the parties had a conference during the year 1934 for the purpose of preparing a stipulation for use at the final hearing of this suit (p. 148).

(b)

Comments on Reply Brief of Appellant.

The following comments refer to the Reply Brief of appellant and the page references in the left-hand margin are to the pages of that brief:

(Pages 2, 3, 4, 6, 7, 9, 15.) Here the Reply Brief refers in several instances to the so-called "agreement" in September between Jerome and Hays; this raises the same question of the authority of Jerome and the lack of proof to show that he was authorized to make any such alleged agreement—which we have discussed both in our main brief and in the foregoing comments on the main brief of the appellant.

It is sufficient to say at this point that the argument of appellant is based upon an *assumption* that such an agreement in fact existed, without proof of such fact.

Moreover, no consideration is shown for such an agreement. No circumstance appears (as alleged at the bottom of page 15, and top of page 16) which caused Commercial to alter its position or forego any rights in consideration of such an agreement. All the conditions which existed were those which might reasonably be anticipated in cases of this kind and the risk was compensated for in the premium on the bond.

If there was such a further agreement in September, where is the consideration for it?

(Pages 3 and 9.) The brief claims that the Bank's brief makes no mention of the oral agreement. Naturally no mention would be made of it because it was not claimed below or proven. In the court below Commercial claimed that the

application for the bond contained assignments of all moneys due under past or future contracts bonded by Commercial. They have shifted their position on that score. The amended answer of Commercial refers specifically to the indemnity agreement (contained in the application for the bond on the Clarion-Venango contract), and annexes a copy thereof to the answer as Exhibit A (pp. 15 and 25). The answer states that Commercial joined in the execution of the bond "relying upon said written application of said Eastern States * * * and relying upon each and every of the provisions of said contract" (par. 23 of Answer, pp. 15, 16). The answer then alleges that the defendant demanded of Eastern States an order to send the final estimate checks to Commercial "pursuant to the provisions of Eastern States' aforesaid obligations and *indemnity agreements* and pursuant to the then and there established and prevailing practice and custom in such matters" (par. 30 of Answer, p. 20, l. 20).

They now say, at page 9, that Commercial does not base its right under the provisions of the application for bond, or the indemnity agreement, but they base their right solely upon the alleged oral agreement given for the indemnification, pursuant to the provisions of the application and indemnity agreement, and that that oral agreement was made in recognition of Eastern States' duty in that regard. Again, no consideration is shown.

(Page 11.) They agree that the provision in the contract against assignment without consent of the State Highway Department was not effective "as against a stranger to the contract", as claimed in our brief, but they say that the surety was not a stranger to the contract, that it

was a party to a "tri parte" agreement to which the Surety was a party, and that, therefore, the provision of the agreement against assignment was effective and that the Bank was chargeable with notice of this fact.

Of course, Commercial was not a party to the contract, it was merely a party to the surety bond, and we fail to see any distinction between its status and that of a stranger with respect to the non-assignability clause of the agreement.

(Pages 12, 15, 16.) They admit that they had not paid out the fund when they received notice of the Bank's claim. They also admit that the legal rights of the parties do not depend upon whether Commercial had notice of the assignment to the Bank before disbursing the funds. If that is so, how was Commercial subsequently "lulled" into a sense of security and induced to change its position to its prejudice (as claimed at the bottom of page 15, and top of page 16)?

During practically all the time from the date of the Bank's letter of March 28, 1930 to the time the suit was brought, efforts were being made by correspondence, and by negotiations with Commercial, to ascertain what the facts were about this money. Commercial "stalled" the proposition as much as possible, and when it finally refused to give any information on the subject, the suit was started. If (as they say at the top of page 12), the rights of the parties do not depend on this notice, what point is there in saying (as they do at the end of the 4th paragraph on page 12) that the Bank failed to show that Commercial had any knowledge of the Bank's assignment prior to March 8, 1930?

(Page 13.) There is a distortion of Jerome's testimony. They quote Jerome's answer that

he was going to "get the mischief" for it himself, which obviously referred to endorsing the checks for the final payment. Appellant says the word "it" refers to the assignment to the Bank. Obviously Jerome did not make the assignment to the Bank, and was not the moving factor in obtaining the loan from the Bank. Garrison said he did not know Jerome. All the record indicates was that the loan was made to Maier and McAllister, as Vice-President and Secretary, respectively, and they signed the note and executed the assignment.

They say that there was no reason to believe that Maier and McAllister knew any more about the agreement to turn this final payment over to Commercial, than they knew about the rest of the company's business. Obviously they did not know that there had been any such agreement, or they would not have given the note and the assignment. They also say that there was no evidence that Williams was present, or knew the assignment had been given to the Bank. The evidence clearly shows that Williams did know. He was with Jerome on the trip back after the loan had been obtained. He stopped with Jerome at Harrisburg when Jerome called up Hays and told him about it.

Jerome testified that it was Williams who suggested that he confirm the telephone notice by a letter, which Jerome says he wrote and mailed.

Circumstances of the note alone indicated that Jerome did *not* handle "all the financial affairs of the company."

(Page 14.) They say that under these circumstances "there seemed to Jerome to be no risk involved in giving the second assignment to the Bank," and he arranged accordingly with

Mr. Maier and Mr. McAllister. Obviously, Jerome was not the guiding influence in that loan and no responsibility was cast upon him to determine the question of risk in giving the Bank assignment. The fact is that he concealed from Maier and McAllister and from the Bank the fact that he had already sent a letter to the Highway Commission to send the checks in care of Commercial at Pittsburgh. He concealed this fact because he knew he had done wrong in sending that letter, without the knowledge of the other officers of Eastern States.

(Page 15.) The situation in *West v. Newing*, which they say is like the present case, involved a written contract of sale and a written authority or permission to turn the checks over. There is no such situation in this case.

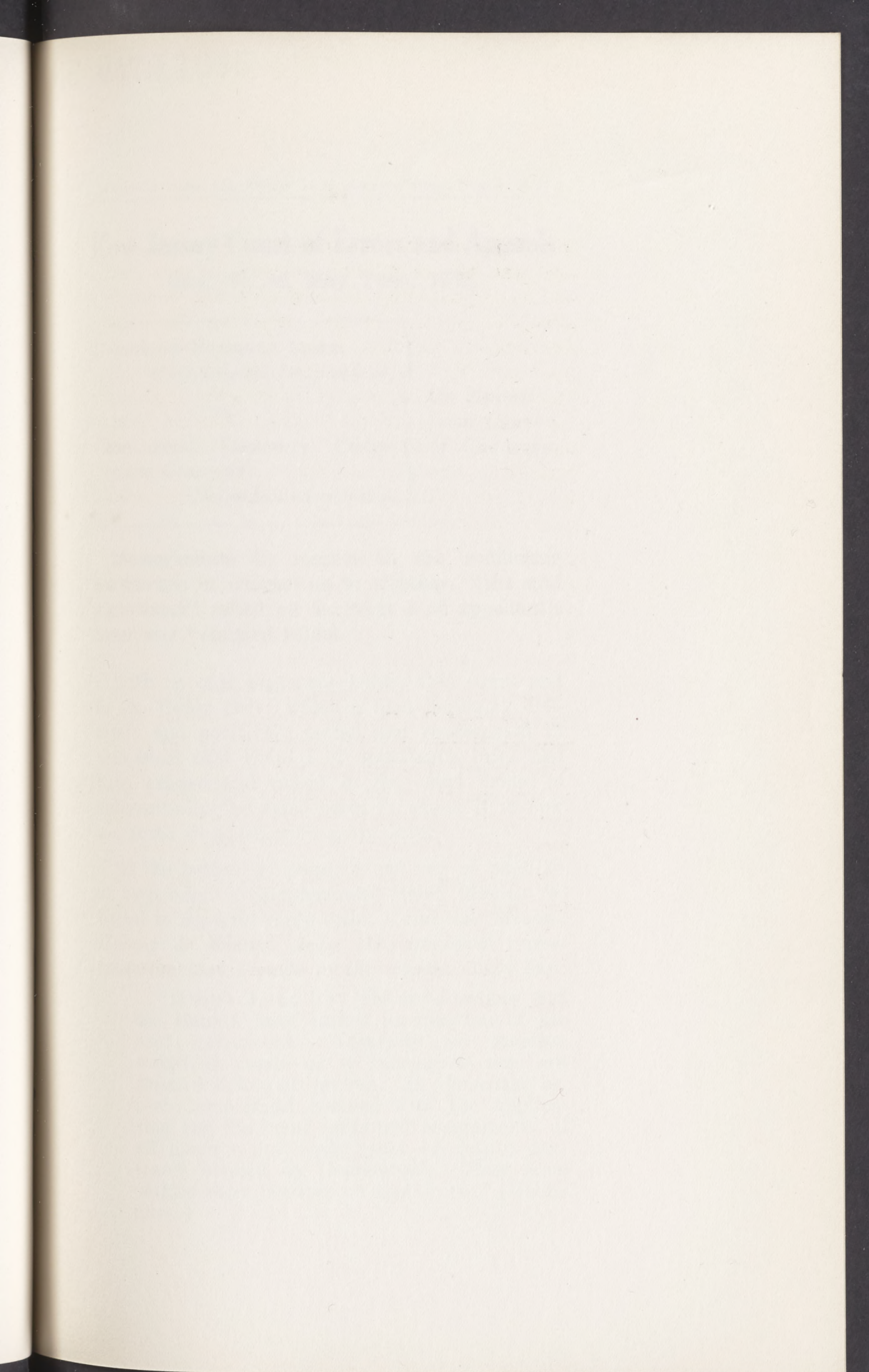
(Pages 15-16.) Here again it is claimed that the failure of the Bank to bring suit on its claim between March 28, 1930, and when it did bring suit, "lulled" Commercial into a sense of security and induced it to change its position. Commercial did not change its position; it kept the money and refused to give any information.

There is no proof that it suffered any prejudice by the Bank's inaction during that interval.

HOBART & MINARD,

Solicitors of Complainant-Respondent.

June 1, 1935.



1. The first part of the report is a summary of the work done during the last year. It is a very brief summary, but it gives a good idea of the work that has been done. It is a very good summary, and it is a very good example of how to write a summary.

2. The second part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

3. The third part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

4. The fourth part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

5. The fifth part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

6. The sixth part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

7. The seventh part of the report is a description of the work that has been done during the last year. It is a very detailed description, and it gives a good idea of the work that has been done. It is a very good description, and it is a very good example of how to write a description.

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

New Jersey Court of Errors and Appeals

Case No. 46, May Term, 1935.

BRIDGETON NATIONAL BANK,
Complainant-Respondent,

vs.

COMMERCIAL CASUALTY INSUR-
ANCE COMPANY,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

Memorandum in respect to the conflicting statements of counsel as to whether "the oral agreement" relied on in Point I of appellant's brief was "claimed below."

Both on oral argument before this court and in the Reply Brief which I filed herein, I definitely and positively stated and represented to this court that Point I of appellant's brief had been argued and urged in the court below in substantially the same form in which it is now set forth in appellant's main brief.

At the bottom of page 14 and top of page 15 of respondent's Supplemental Brief, filed in rebuttal to my said reply brief, I find that *Messrs. Hobart & Minard deny the aforesaid representation that I made to this court.* They say:

"(Pages 3 and 9.) The brief claims that the Bank's brief makes no mention of the oral agreement. Naturally no mention would be made of it *because it was not claimed below* or proven. In the court below Commercial claimed that the application for the bond contained assignments of all moneys due under past or future contracts bonded by Commercial. *They have shifted their position on that score.*" (Italics mine.)

In order that this court may know whether or not said oral agreement and Point I of appellant's brief based thereon were "claimed below," I have procured from Messrs. Hobart & Minard the carbon copy of my brief in the court below that was served upon them, and have deposited it with the Sergeant-at-Arms of this court. All blue pencil underscoring on it is mine. All black pencil markings on it are theirs.

A mere glance at the portions marked in blue pencil on pages 18-32 of said brief below will suffice, so far as concerns said conflicting representations made to this court by counsel.

With very few changes Point I of appellant's brief (pp. 20-42) is copied from Point I of defendant's said brief below (pp. 8-32) in which defendant's argument based on said oral agreement was set forth in the court below. Said Point I of defendant's brief below (at p. 32 thereof) concludes with the following paragraph:

"On the basis of these cases the *oral agreement* between Jerome and Hays which led to Jerome's order of September 19, 1929 to the Highway Department directing them to send the checks for the final estimate payment to Commercial constituted an equitable assignment of the fund. All the elements of an equitable assignment are present. There was a mutual assent and an appropriation of the fund to the use of Commercial for the purposes stated in the agreement."

Copies of this memorandum have been served upon Messrs. Hobart & Minard.

Respectfully submitted,

CHESTER W. FAIRLIE,
Of Counsel with Defendant-Appellant.



