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Third Party Beneficiaries of Contractors' Survey Bonds Involving State Interest

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THIRD PARTY BENEFICIARIES OF CONTRACTORS' SURETY BONDS INVOLVING STATE INTEREST

The modern trend towards shifting business risks over upon the compensated surety brings sharply into focus the third party beneficiary doctrine of *Lawrence v. Fox*,[1] as it relates to the right of laborers or materialmen to recover directly from a surety by way of suit on a bond secured by the contractor as part of an original construction agreement.

Such a bond is the indicia of the security promise of the surety bought by the contractor and running directly to the person intended to be benefited, who is generally, though not necessarily, the owner of the property and often the only one intended to be benefited at the time the agreement was made. In New York, the beneficiary must be a direct beneficiary [2] who is identified as the one intended to be directly benefited according to the objective intent extracted from the words of the instrument.[3] Yet, direct beneficiaries need not be known at the time the contract is made. All that is required is that they be ascertainable at the time of the performance.[4] Where statutes direct the securing of such a bond, some courts hold that for the purpose of ascertaining intent, it is as though the statute itself were read into and made a part of the instrument.[5]

Statutes have been adopted by Congress and by a number of the states, making it the duty of public officers in certain cases to require of contractors for public work bonds conditioned for the payment of the claims of laborers and materialmen. Most of such statutes require this provision in addition to the condition for the faithful performance of the contract, and contemplate a single bond protecting both the public body and the laborers and materialmen. Some of these statutes merely require bonds for the payment of laborers and materialmen without defining the rights of such persons with respect to the bonds and without expressly authorizing such persons to sue on the bond. Other states not only require bonds conditioned for the benefit of laborers and materialmen, but expressly provide that such bonds shall inure to their use and benefit or that they may sue thereon.

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[1] 20 N. Y. 268 (1859).

[2] A direct beneficiary is one to be benefited directly by the performance of the contract and not from its breach. A beneficiary failing to meet this requirement is an incidental beneficiary having no greater standing than a person interested in the transaction from idle curiosity. WHITNEY, CONTRACTS § 76 (4th ed. 1946).

[3] Simson v. Brown, 68 N. Y. 355 (1877); Garsney v. Rogers, 47 N. Y. 233 (1872); see Note, 77 A. L. R. 28, 29 (1932). The intentions of the parties control in the creation of a right under the bond; but once the right is created, the law furnishes the remedy irrespective of the intention of the parties.

[4] Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds*, 38 YALE L. J. 2 (1928).

[5] See Note, 77 A. L. R. 152, 163 (1932).

Many states, including New York, provide a remedy of recovery, by way of the lien statute, for the individual who has benefited the real property directly by his labor or materials; but since the lien is limited to an *in rem* remedy against the private property benefited or the public funds provided, it becomes more advantageous to be able to proceed directly against the surety where the indebtedness exceeds the value of the property or public funds.[6]

This note is concerned with the right of the third party to seek his remedy directly from the surety by an action on the bond. The scope of inquiry involves not merely a determination whether the claim was intended to be within the coverage of the bond, but whether other interests, such as the interest of the state, will preclude recovery from the surety by way of an action on the bond. Also, a party claimant may be within the coverage of the bond and yet the claim may not. For example, the nature of the labor or materials supplied may be determinative of whether the party comes within the coverage of the lien statute or the bond, as for instance where they go directly into the performance of the principal contract.[7]

The difficulty of ascertaining the exact limits of the class of persons entitled to recover on such bond arises not so much from a complicated problem of law as it does from the multiplicity of parties involved and the constructions of the bond instruments, which have varied so widely in their terms that many decisions are so far regarded rather as aids to reasoning than as precedents. The question usually presented is, whether, from the terms of the particular instrument, read in the light of the surrounding circumstances, an intent to confer upon the third party a right to proceed directly against the surety can be discerned. In the absence of such a right, the action is limited to one against the owner who can then turn to the surety for his remedy.[8]

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[6] New York has provided the laborer or materialman with a lien remedy against private realty improved by them. N. Y. LIEN LAW § 3. However, no such lien attaches to public property itself. Instead, a lien is provided attaching to the public funds. N. Y. LIEN LAW § 5. So that, even where a state has enacted a lien statute, the lien remedy is less attractive where the public is the obligee.

[7] But this will not be true if the claim is too remote. Royal Indemnity Co. v. Day and Maddock Co., 114 Ohio St. 58, 150 N. E. 426 (1926) (disallowing claim for rental of a concrete mixer used by the contractor); Beals v. Fidelity and Deposit Co., 76 App. Div. 526, 78 N. Y. Supp. 584 (4th Dep't 1902) (disallowing claim for cost of tools and implements used in performance of a contract for the construction of a retaining wall, where the tools and implements survived the performance). *But cf.* Title Guaranty Co. v. Crane, 219 U. S. 24, 55 L. ed. 73 (1910); National Surety Co. v. United States, 228 Fed. 577 (C. C. A. 6th 1916) (where the federal statute, on the other hand, has been construed to include some of the very items disallowed elsewhere).

[8] *See* Byram Lumber and Supply Co. v. Page, 109 Conn. 256, 258, 146 Atl. 293, 295 (1929).

Less difficulty has been encountered where the language of the bond expresses an intention to primarily benefit a third party;[9] or where the bond is given in obedience to a statute directing that the bond provide a cause of action for third parties;[10] or where there is a specific recital that the third party may enforce an action on the bond;[11] or where there is no express reference to third parties.[12]

Where the intent is clearly to indemnify a specific person (such as the owner of the property) against all claims of the materialmen and laborers, the latter are not direct beneficiaries and can not act on the bond.[13] Such an intent is usually evidenced by direct expressions in the bond or deduced from language indicating a purpose to hold the owner harmless in relation to any money that might be due the materialmen from the contractor.[14]

It is the middle-ground, between bond agreements indicating an intent to indemnify and those indicating an express intent to permit a third party to enforce an action directly against the surety on the bond, which is examined here.

The controversial problem arises in the narrow but not uncommon situation where a state or municipality requires that a bond be furnished, in obedience to a statute, conditioned upon faithful performance of the building contract. This, in and of itself, would pose no problem were it not for the custom that arose whereby agencies of the state or municipality requested the inclusion among the terms of the bond of a clause guaranteeing payment of claims or wages due laborers and materialmen, arising from the performance of or failure to perform the contract. Such a bond came to be known, therefore, as one running directly to the public but containing an extrastatutory provision for the benefit of the third party.[15]

The main purpose of such a stipulation is to protect the state rather than to benefit laborers and materialmen; and from this, it

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[9] Clark Plastering Co. v. Seaboard Surety Co., 237 App. Div. 274, 260 N. Y. Supp. 468 (1st Dep't 1932); American Surety Co. of N. Y. v. Wells Water District, 253 App. Div. 19, 1 N. Y. S. 2d 614 (3d Dep't 1937); see Note, 77 A. L. R. 142 (1932).

[10] Strong v. American Fence Construction Co., 245 N. Y. 48, 156 N. E. 92 (1927).

[11] Graybar Electric Co. v. Seaboard Surety Co., 157 Misc. 275, 283 N. Y. Supp. 522 (Sup. Ct. 1935).

[12] Maltby and Sons Co. v. Wade, 131 Misc. 143, 227 N. Y. Supp. 90 (Sup. Ct. 1928), *aff'd*, 224 App. Div. 779, 230 N. Y. Supp. 839 (4th Dep't 1928).

[13] McGrath v. Bagley, 273 App. Div. 822, 76 N. Y. S. 2d 298 (2d Dep't 1948); Warsawer v. Burghard, 234 App. Div. 346, 254 N. Y. Supp. 749 (1st Dep't 1932). There, an owner of land hired a real estate agent to find a purchaser, which he did. The contract of sale contained a clause whereby the purchaser agreed to indemnify the owner against any claim the agent might make for commission. It was held that the agent could not maintain an action as beneficiary against the purchaser for the commissions.

[14] Skinner Bros. Mfg. Co. v. Shevlin E. Co., 231 App. Div. 656, 248 N. Y. Supp. 380 (1st Dep't 1931); Southern Surety Co. v. United States Cast Iron Pipe and Foundry Co., 13 F. 2d 833 (C. C. A. 8th 1926).

[15] See Note, 77 A. L. R. 126 (1932).

would appear that the latter were incidental beneficiaries and, therefore, not in a position to recover on the bond. Yet, majority jurisdictions permit recovery on the theory that the public is benefited by the condition and it is conducive to good workmanship and materials being directed to the job.[16] Others, including New York, have taken the view that the condition impairs the security of the public body for which the work is done, and is, therefore, prejudicial to its interest.[17] Others have passed on the competency or power of the obligee to enter into the extrastatutory provision of the bond, and, incidentally, the policy of making the provision.[18]

To what extent may a laborer or materialman recover on such a building contractor's surety bond, where his interests conflict with those of the state or municipality and thus threaten to deplete or exhaust the security to the damage of the state or municipality?

The leading case in New York on the question is *Fosmire v. National Surety Company,*[19] where the State Highway Commission, pursuant to the requirements of the Highway Law, exacted of the contractor a bond conditioned upon faithful performance of the building contract. There was included in the bond an added provision, not required by statute, that the state would be protected against claims for wages of laborers employed on the job. The added provision was inserted at the direction of the state agency. It was by virtue of this express reference to laborers in the bond that an unpaid laborer sought recovery directly from the surety, contending that he was a direct beneficiary of the contract. The contractor had defaulted, with the result that the state was forced to complete the work at increased cost and heavy loss, for which the bond was security. Recovery was denied the laborer because "the dominant purpose of the bond was protection to the State, and that purpose would be defeated if laborers would be permitted to sue for wages as often as there was a default, and, exhausting the penalty of the bond, leave nothing for the State. The State did not intend to make the employees of its contractors the beneficiaries of a cause of action to be enforced in hostility to its own." [20]

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[16] United States Gypsum Co. v. Gleason, 135 Wisc. 539, 116 N. W. 238 (1908); City of Philadelphia v. Stewart, 195 Pa. 309, 45 Atl. 1056 (1900); Baker v. Bryan, 64 Iowa 561, 21 N. W. 83 (1884).

[17] Fosmire v. National Surety Co., 229 N. Y. 44, 127 N. E. 472 (1920); State v. C. S. Jackson & Co., 137 La. 931, 69 So. 751 (1915); Park Bros. & Co. v. Sykes, 67 Minn. 153, 69 N. W. 712 (1897).

[18] American Fidelity Co. v. State, 128 Md. 50, 97 Atl. 12 (1916); Union Sheet Metal Works v. Dodge, 129 Cal. 390, 62 Pac. 41 (1900) (holding that the condition is valid and that the materialmen can recover); Smith v. Bowman, 32 Utah 33, 88 Pac. 687 (1907) (allowing recovery on the reasoning that if the bond consisted only of the extra provision not required by the statute, it could still be reached by third parties); Doll v. Crume, 41 Neb. 655, 59 N. W. 806 (1894) (holding that the extra provision can be inserted without statutory authority).

[19] 229 N. Y. 44, 127 N. E. 472 (1920).

[20] *Id.* at 46, 127 N. E. at 473.

The New York viewpoint expressed in this case is a minority view which has never been overruled in New York. The case has been cited within and without the state [21] as authority for the proposition that a beneficiary entitled to maintain a cause of action on a contract to which he was not a party, must be a direct beneficiary and more specifically, that in bond agreements identical to the one in the *Fosmire* case, a beneficiary who claims in hostility to the state is not a direct beneficiary.[22]

The majority opinions outside of New York have encouraged recovery in the same situation. Instead of looking to the instrument for the intent to benefit the complainant, as New York does, the majority seems to confer the right more from an idea that a moral duty rests upon the state to protect the laborers and materialmen on the job, rather than reliance on requirements of privity and consideration.[23] In one such jurisdiction where a statutory interpretation required that the beneficiary give consideration, this theory of moral duty was held to be insufficient consideration.[24]

Some majority courts have engaged in a presumption that the parties fixed the amount of the bond sufficiently in anticipation of all claims of direct beneficiaries; [25] or, by holding that permitting recovery has a tendency to impel public officials to fix the amount of the bond more prudently in the future.[26] Others rely on the belief that liberal recoveries in this field of law have a tendency to improve the quality of materials and workmanship directed into the performance of the contract.[27] The fact that the amount of the claim did not exhaust the penalty of the bond,[28] or that the statute of the state did not provide a lien remedy,[29] or that the state had not as yet asserted a priority, have also served as bases for recovery. However, in the latter situation the court avoided passing directly on this

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[21] Jackman Cigar Mfg. Co. v. John Berger & Son Co., — Ind. —, 52 N. E. 2d 363 (1944).

[22] United States Fidelity & Guaranty Co. v. Triborough Bridge Auth., 297 N. Y. 31, 74 N. E. 2d 226 (1947); Associated Flour Haulers and Warehousemen v. Hoffman, 282 N. Y. 173, 26 N. E. 2d 7 (1940); J. P. Duffy Co. v. Board of Education, 255 App Div. 493, 8 N. Y. S. 2d 245 (1st Dep't 1938), *aff'd*, 280 N. Y. 773, 21 N. E. 2d 527 (1939); E. J. Eddy, Inc. v. Fidelity and Deposit Co., 265 N. Y. 276, 192 N. E. 410 (1934); Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 159 N. E. 896 (1928); W. J. McCormack S. Co. v. Edw. D. W. Milligan, Inc., 253 App. Div. 743, 300 N. Y. Supp. 789 (2d Dep't 1937).

[23] S. W. Portland Cement Co. v. Williams, 32 N. M. 68, 251 Pac. 380 (1926).

[24] McDonald v. American National Bank, 25 Mont. 456, 65 Pac. 896 (1901).

[25] Fidelity & Deposit Co. v. Rainer, 220 Ala. 262, 125 So. 55 (1929); see Note, 77 A. L. R. 205 (1932).

[26] S. W. Portland Cement Co. v. Williams, 32 N. M. 68, 251 Pac. 380 (1926).

[27] See note 16 *supra*.

[28] Commonwealth v. National Surety Co., 253 Pa. 5, 97 Atl. 1034 (1916).

[29] See Note, 77 A. L. R. 141 (1932).

point.[30] Still another court decided that recovery would tend to induce the seeking in the future of two bonds, one for the protection of the state and the other for the benefit of laborers and materialmen.[31] It has even been suggested that the state "might well be left to look after its own interests in the matter." [32]

A persuasive argument was advanced in one state where the statute provided a lien remedy. The court reasoned that the filing of a lien and the resultant imposition of a charge upon the state would render it decidedly to the interests of the state that laborers and materialmen have a direct right of recovery upon the bond itself; that such a right of recovery is of more benefit to the state in the long run. Recovery was deemed preferable to a situation where the immediate obligation is on the state and all rights have to be worked out through the state. Furthermore, recovery would avoid circuity of action. Commenting on the possibility of such claims exhausting the penalty of the bond, the court said that this was possible but improbable; that such an instance would be so rare as not to present a barrier to recovery, "for if the parties intended to create a direct obligation to the sub-contractors, then we must assume that they fixed the amount of the bond accordingly, and it was only by assuming that they did not intend to create such an obligation that the danger of loss to the owner from recognizing it would become material." [33]

One criticism of the *Fosmire* case labelled the New York decision unsound because the pleadings failed to show that the state had any claim, or that the penalty of the bond was likely to be exhausted. It was suggested that the third party might have recovered if the state had been joined as a party to the action and if it could have been shown that the interests of the state were not imperilled.[34] This conclusion receives considerable support from later decisions on questions left open in the *Fosmire* case, which in no way disturbs the basic theory of the case.

When Judge Cardozo spoke in the *Fosmire* case, he concluded with this statement: "What the defendant's liability would be if the action were prosecuted by the people we need not now determine." [35] This question came before the court ten years later in a case involving a bond identical to the one in the *Fosmire* case. The Municipal Board of Education had exacted the bond to guarantee performance

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[30] *See* Aetna Casualty & S. Co. v. Earl E. Lansdell Co., 142 Va. 450, 130 S. E. 235 (1925); Commonwealth v. National Surety Co., 253 Pa. 5, 97 Atl. 1034 (1916).

[31] S. W. Portland Cement Co. v. Williams, 32 N. M. 68, 251 Pac. 380 (1926).

[32] Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds*, 38 YALE L. J. 2, 23 (1928).

[33] Byram Lumber and Supply Co. v. Page, 109 Conn. 256, 146 Atl. 293, 296 (1929).

[34] See note 32 *supra*.

[35] Fosmire v. National Surety Co., 229 N. Y. 44, 49, 127 N. E. 472, 473 (1920).

of the contract and payment for all materials used, and services rendered, in connection with the work. The Municipal Corporation was a party to the action and joined in the prayer that the surety be made to pay in accordance with its promise. There was no hostility to any interest of the state. The court held that the amount claimed could be recovered from the surety and paid to the municipality to be held in trust for the claimant third party, and, in fact, for the avoidance of circuity of action might be paid to the third party directly.[36]

However, the trust provision in that case was not intended to decide that a third party with insufficient interest to maintain an action on the contract might thereupon treat the promisee as trustee of a cause of action in his favor and, in effect, require him to sue in equity. This was pointed out by the court in a later case where the City of New York declined to sue on the bond and join in the action for the benefit of the third party. The city, was satisfied since the work was done, and, therefore, had no further interest in the matter. The court denied recovery deciding that no one could force the city to join in the action for the benefit of the third party; but, the court added that recovery would have been granted if the city had elected to join in the suit.[37]

In further variations of the *Fosmire* decision, recovery was allowed where the claim of the municipality had already been settled in full,[38] but was disallowed where the municipality had not, as yet, received substantial performance.[39] Recovery was granted in a case where two bonds had been secured. Since the state was protected in a separate bond, recovery was allowed the materialmen because "No competition arises between the State and another beneficiary, as was in the case of *Fosmire v. National Surety Company.*" [40]

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[36] Johnson Service Co. v. Monin, Inc., 253 N. Y. 417, 422, 171 N. E. 692, 693 (1930). "In thus holding the surety to the performance of its covenant, we do not leave it helpless, without means of reimbursement. What it pays to the Municipality will be subject to a trust for the benefit of the Buckeye Blower Co., [one of the subcontractors whose lien was disallowed as defective, but whose right of action was recognized against the surety] and indeed for the avoidance of circuity may be paid to that company directly. In return it will have the right to be subrogated in an equivalent amount to the right of its own principal, the general contractor, to collect from the Municipality the balance due under the contract. In the end, the materialman will have reimbursement from the surety and the surety from the City. The loss will fall on the contractor who in equity should bear it."

[37] William S. Van Clief & Sons v. City of New York, 141 Misc. 216, 252 N. Y. Supp. 402 (Sup. Ct. 1931).

[38] See note 12 *supra.*

[39] E. J. Eddy, Inc. v. Fidelity & Deposit Co., 265 N. Y. 276, 192 N. E. 410 (1934).

[40] McClare v. Mass. Bonding & Ins. Co., 266 N. Y. 371, 377, 195 N. E. 15, 16 (1935). There was shown a clear intent on the part of defendant to benefit two classes of creditors, namely, those who were creditors because of debts arising out of cash forfeits, and those who were creditors because they had furnished work, labor and services in connection with the staging of boxing bouts. Since the State was the sole beneficiary of one bond, and no other

Where a bond was given for the benefit of any materialman or laborer having a joint claim, as well as for the obligee herein, recovery was allowed, but the court was careful to point out that recovery was not inconsistent with the *Fosmire* decision because all claims of the obligee were settled and the penal sum of the bond was greater than all claims of third parties.[41] In recent years, the decisions in New York have followed the *Fosmire* viewpoint.[42]

Judge Cardozo, in *Strong v. American Fence Co.*,[43] distinguished the *Fosmire* case by pointing out that the bond involved was required by a federal statute, and that both the purpose of the statute and the expression in the bond, specifically, gave laborers a right of action on the bond. The right of action was the dominant purpose of the bond, as contrasted with the purpose of the bond in the *Fosmire* case, which by statute was intended only to guaranty performance of the contract, but to which was added the extra-statutory provision for payment of claims of laborers and materialmen. In the *Fosmire* case, Judge Cardozo had stated: "A different question would be here if the bond had been conditioned for the payment of wages and nothing else. The interest of the State in the welfare of those who labor on its public works might then point to an intention to create a cause of action in their favor." [44] Judge Cardozo, referring to the above expression, stated, "*Fosmire v. National Surety Company* holds nothing to the contrary. There are many grounds of distinction. Enough for present purposes that there the bond was not exacted in fulfillment of a duty." [45] A similar right of recovery was granted on a bond expressly giving the third party a direct right of action on the bond despite the fact that the claimants were previously held not entitled to share in funds remaining in the hands of municipal officials.[46]

The problem raised in the *Fosmire* case has been controlled in the federal jurisdiction by resort to legislation requiring that persons contracting with the United States for public construction work must provide the penal bond with sufficient sureties, the bond to contain the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract. Under a ruling of the Supreme Court, a bond so given inures to the protection of laborers and materialmen employed by the

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purpose for the second bond was shown, the plaintiff creditors were considered direct beneficiaries, otherwise, the giving of the bond would be an idle act or gesture.

[41] See note 11 *supra*.

[42] See note 22 *supra*.

[43] 245 N. Y. 48, 156 N. E. 92 (1927).

[44] Fosmire v. National Surety Co., 229 N. Y. 44, 48, 127 N. E. 472, 473 (1920).

[45] Strong v. American Fence Co., 245 N. Y. 48, 53, 156 N. E. 92, 94 (1927).

[46] American Surety Co. of N. Y. v. Wells Water D., 253 App. Div. 19, 1 N. Y. S. 2d 614 (3d Dep't 1937).

subcontractors, and the contractor remains liable to the extent of the penalty though the subcontractors have been paid before notice of the claim.[47]

The federal statute in its earliest form did not give any preference to the United States against the surety,[48] but by later amendment expressly conferred a preference on the United States requiring that all laborers and materialmen must join in a single suit against the surety brought not later than twelve months after final settlement with the United States. If the penalty of the bond is not sufficient to pay all such claimants, they share pro-rata.[49]

In New York, there is no similar statute, but in this particular, the *Fosmire* decision has effectively, though perhaps not deliberately given the state the preference which the federal statute gives to the United States. After the state has settled its claim against the surety, the laborer or materialman makes out a prima facie case by proving his own demand. He must prove his damages or fail, and in no event is he entitled to more than his pro-rata share unless, of course, the amount of bond is adequate. The surety need not fear that his final liability will be greater in the aggregate than the penalty of the bond, for after the laborer or materialman has made out his prima facie case, the proof of such claim is sufficient to cast the burden on the surety to show in reduction of the damages that there are other unpaid claimants entitled to share in the security. The aggregate liability to all must be within the penalty.[50]

Conclusion

It is difficult to be unimpressed by the arguments of the majority jurisdictions that liberality in allowing recovery, in a situation like the *Fosmire* case, tends to benefit the state by affording a more secure basis to laborers and materialmen for entering upon public works. Nor is it easy to overlook the benefit that the state must derive from permitting recovery, wherever subcontractors and materialmen have a right to proceed directly against the property benefited or the public funds provided by way of a lien.

Furthermore, it is a matter of sound business to advocate a liberal extension of the right of materialmen to recover from the compensated surety. Although the materialman receives his security for nothing, and receives this right by donation, so to speak, yet in the gradual adjustment of prices and wages, his compensation tends to become smaller as the risk of non-payment is thrown upon a com-

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[47] Mankin v. United States, 215 U. S. 533, 54 L. ed. 315 (1910).

[48] Davidson Bros. Marble Co. v. United States *ex rel.* Gibson, 213 U. S. 10, 53 L. ed. 675 (1909).

[49] United States v. Mass. Bonding & Ins. Co., 18 F. 2d 203 (C. C. A. 6th 1927).

[50] Strong v. American Fence Co., 245 N. Y. 48, 156 N. E. 92 (1927).

mercial surety. Little solicitude is shown for the compensated surety, especially when he has had a chance to investigate his risk before signing the bond and has been paid to take the risk. A New York court has stated that the trend of opinion is to permit a right of recovery against the compensated surety who has issued the standard form of bond, by way of a liberal interpretation and a resolving of ambiguities in favor of the one for whose benefit the bond is given.[51]

Of course, the majority idea of the moral duty of the state furnishing the basis of recovery seems to be expressed in every state where a lien statute provides a means to laborers or materialmen of encumbrancing private property or public funds (standing in the place thereof) when they have benefited or improved such property by their work or materials. In New York the mechanics lien does not attach to public buildings or real property, but does attach to the public funds provided for the improvements furnished by the claimants.

There is no lien statute applying to the federal jurisdiction. Instead, a federal statute requires that the contractor provide a bond expressly giving the laborer or materialman the right to act on the bond against the surety. The bond is regarded as a substitute for the mechanics lien, for "As against the United States, no lien can be provided upon its public buildings or grounds, ..." The Supreme Court has referred to such a bond as being in the nature of a special lien in the sense that the bond is substituted in the place of the public buildings as the thing on which the lien is charged.[52] Therefore, unless some added right is given, the third party has less security when directing his efforts or materials into real property of the state, than when he improves private realty.

The fact that the lien remedy is unavailable or limited where public property is involved, has caused majority jurisdictions to allow recovery to laborers and materialmen against the surety by direct action on the bond on the basis of a moral duty resting upon the public to at least equalize the remedies provided where improvements are made to private property. With this in mind, federal jurisdictions have provided a statute requiring that the contractor's bond expressly give the laborer or materialman a direct cause of action against the surety on the bond, somewhat in the nature of a special lien. New York makes available a limited lien statute where the public is the obligee and a history of decisional law currently proclaiming the need and desirability for permitting a liberal right of recovery to the third party laborer or materialman on the surety bond but conditioning such right on the absence of hostility to conflicting interest of the state.

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[51] *See* McClare v. Mass. Bonding & Ins. Co., 266 N. Y. 371, 377, 195 N. E. 15, 17 (1935).

[52] United States v. American Surety Co., 200 U. S. 197, 203, 50 L. ed. 438, 440 (1906).

Which of the above three methods, therefore, of dealing with the same problem, would be best suited to cope with the post war construction program, which is bound to bring about an unprecedented resort to the use of contractors' bond agreements?

One may well inquire whether New York should find an advantage in emulating the federal approach to the matter, since, as we have seen, the right of the third party beneficiary may stand or fall dependent on the attitude of the state in the matter. It is apparent that an immediate benefit from a statute such as the federal statute is that at all times, the parties know where they stand.

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APPRAISAL OF STOCK WHERE CERTAIN STOCKHOLDERS HAVE DISSENTED—BASIS FOR DETERMINING VALUE

While the management of a corporation is vested in its board of directors,[1] there are some functions over which the directors do not have exclusive power, and in the exercise of which the consent of a number of stockholders must be obtained. These acts, which require the stockholders' assent, are usually acts other than everyday business affairs, and are often termed "extraordinary acts." [2] They include: issuance of stock to employees,[3] voluntary sale of a corporation's property, rights, privileges and franchises,[4] making changes respecting shares or capital,[5] merging,[6] and consolidating.[7]

Where a corporation wishes to effect these results, a problem arises as to those stockholders who object. In order to protect the rights of these dissenting minority shareholders and at the same time allow the bulk of the shareholders to take beneficial action without being hindered by a minority,[8] the Stock Corporation Law gives them

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[1] N. Y. GEN. CORP. LAW § 27; Manson v. Curtis, 223 N. Y. 313, 323, 119 N. E. 559, 562 (1918) (as a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office); Pollitz v. Wabash R. R., 207 N. Y. 113, 100 N. E. 721 (1912); Beveridge v. N. Y. E. R. R., 112 N. Y. 1, 19 N. E. 489 (1889); Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363 (1888).

[2] Metropolitan Elevated R. R. v. Manhattan Elevated R. R., 11 Daly 373, 475 (N. Y. 1884).

[3] N. Y. STOCK CORP. LAW § 14.

[4] N. Y. STOCK CORP. LAW § 20.

[5] N. Y. STOCK CORP. LAW § 36.

[6] N. Y. STOCK CORP. LAW § 85.

[7] N. Y. STOCK CORP. LAW §§ 86, 91.

[8] "The purpose of section 21 of the Stock Corporation Law was to protect dissenting shareholders, and the process of appraisal was designed to meet two