THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 3

DECEMBER 1935

NUMBER 1

THE PROTECTION OF LABORERS AND MATERIALMEN UNDER CON- STRUCTION BONDS*—Part I

MORTON C. CAMPBELL†

THE general use of surety bonds in connection with construction projects has produced many difficult problems relating to the legal protection given by such bonds to persons furnishing labor, materials, and other aids to construction. One important question is that of interpretation, a question of fact, though in most instances to be decided by the court. Another question is whether the law will give effect to a properly manifested intention to vest rights in such third-person-beneficiaries. In treating of these problems it has been deemed best to consider first bonds conditioned on the payment of persons furnishing labor or material; secondly, other types of bonds, in which an intention to protect such persons is not so clearly manifested; thirdly, certain difficulties, such as the conflict of interest between the owner and persons furnishing labor or materials when one bond with limited liability is given; fourthly, the rights of laborers and materialmen on certain special types of bond, including those given by subcontractors, indemnitors, or reinsurers; and lastly, the effect of collateral transactions or conduct on the distinct right of the laborer or materialman.

I. BONDS CONDITIONED ON THE PAYMENT OF CLAIMS FOR LABOR AND MATERIALS

Such bonds may be classified according as they are or are not required by statute, and according as the property is free from liens for labor or materials, whether of public or private ownership, or is subject to lien, as under many statutes in the case of private ownership.

* This article will be concluded in the next issue of the REVIEW.

† Professor of Law, Harvard Law School.

A. BONDS GIVEN IN COMPLIANCE WITH STATUTE WHEN THE PROPERTY
IS OF PUBLIC OWNERSHIP OR OTHERWISE FREE FROM LIEN

In cases falling under this heading,¹ the owner is commonly the United States, a state, a municipality, or other public body,² which enters into a contract with the principal for the performance of a work of construction, maintenance, or the like, and in obedience to statute the principal gives to the owner a surety bond conditioned, either directly or by reference to the contract, on the payment of persons furnishing labor or materials. Several different situations may be considered:

(1) If the statute provides that the person furnishing labor or materials shall have rights on a bond so conditioned,³ or may sue or have the right to sue on it,⁴ or that it shall be for his use or benefit,⁵ then the material-

¹ Many authorities on questions treated in this article are to be found in an excellent note in 77 A.L.R. 21 (1932).

² For treatment of the implied exclusion of public property used for public purposes from the operation of statutes providing for mechanics' liens, see *Hutchinson v. Krueger*, 34 Okla. 23, 25, 124 Pac. 591, 592 (1912); see notes, Ann. Cas. 1914C 103, *id.* 1913A 762; 35 L.R.A. 141, (1897), 20 L.R.A. (N.S.) 261 (1909), 41 *id.* 315 (1912).

³ *Hartford Acc. & Ind. Co. v. Board of Education*, 15 F. (2d) 317 (C.C.A. 4th 1926) (bond referring to contract).

⁴ *United States, for the use of Hill v. American Surety Co.*, 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906) (28 Stat. 278, c. 280 (1894); 40 U.S.C.A. § 270 (1928)); *Mankin v. United States*, 215 U.S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910) (33 Stat. 811, c. 778, (1905); 40 U.S.C.A. § 270 (1928)); *Gage v. Road Imp. District*, 153 Ark. 321, 240 S.W. 427 (1922); *French v. Powell*, 135 Cal. 636, 68 Pac. 92 (1902); *Peake v. United States*, 16 App. D.C. 415 (1900) (bond incorporating contract by reference); *United States, to use of Turover v. Tompkins Co.*, 63 App. D.C. 332, 72 F. (2d) 383 (1934) (lumber supplied for concrete forms and consumed in the work); *Dewey v. The State, ex rel. McCollum*, 91 Ind. 173 (1883); *State of Kansas, ex rel. Winkle Terra Cotta Co. v. United States F. & G. Co.*, 322 Mo. 121, 14 S.W. (2d) 576 (1929); *West v. Detroit Fid. & Sur. Co.*, 118 Neb. 544, 548, 225 N.W. 673, 675 (1929) (Comp. St. 1922, § 8526); *Easton School District v. Continental Cas. Co.*, 304 Pa. 67, 155 Atl. 93 (1931); *Webb v. Freng*, 181 Wis. 39, 194 N.W. 155 (1923) ("any party in interest" may maintain an action in his own name against contractor and sureties); *Hunter Machinery Co. v. Southern Sur. Co.*, 193 Wis. 218, 214 N.W. 613 (1927) ("benefit of the person furnishing labor or materials, who may sue").

The statutes of the United States (33 Stat. 811, c. 778 (1905), amending 28 Stat. 278, c. 280 (1894); 40 U.S.C.A. § 270 (1928)) give a right of action in the name of the United States for the use of a person furnishing labor or materials, established a preference in favor of the United States, and provide for the intervention of all persons furnishing labor and materials to obtain ratable distribution among them of the penal sum of the bond, and for bringing the action in the United States courts irrespective of the amount in controversy and not elsewhere.

⁵ *Los Angeles Stone Co. v. National Sur. Co.*, 178 Cal. 247, 173 Pac. 79 (1918); *Hub Hardware Co. v. Aetna Acc. & Liab. Co.*, 178 Cal. 264, 173 Pac. 81 (1918); *Philip Carey Co. v. Maryland Cas. Co.*, 201 Iowa 1063, 1066, 206 N.W. 808, 809, 47 A.L.R. 495, 498 (1927); *Board of Education v. Grant*, 107 Mich. 151, 64 N.W. 1050 (1895); *St. Paul v. Butler*, 30 Minn. 459, 16 N.W. 362 (1883); *Morton v. Power*, 33 Minn. 521, 24 N.W. 194 (1885); *Dawson v. Northwestern Const. Co.*, 137 Minn. 352, 163 N.W. 772 (1917) ("use of the obligee and of all persons doing work," etc.); *J. Jacob Shannon & Co. v. Continental Cas. Co.*, 106 N.J.L. 200, 148 Atl. 738 (1930). 63 A.L.R. 1381 (1929).

man,⁶ or his assignee, will have an enforceable right thereon against the surety, or the contractor and surety, according as one or both may have executed the bond.⁷ It is so held, even though the bond elsewhere provides that no right of action shall accrue to or for the use of anyone other than the obligee; such a provision is void because contrary to the statute.⁸ Moreover, the person furnishing labor or materials may maintain an action on the bond in a court of another state,⁹ or may have his claim thereon allowed in receivership or insolvency proceedings in another state.¹⁰ Furthermore, an additional provision to the effect that the bond may be assigned by the owner to materialmen does not exclude the rise of a right and maintenance of an action without such assignment.¹¹ These rules are obviously sound since it is clearly the legislative intent that persons furnishing labor or material to the contractor shall have direct rights on the surety bond.

Certain questions remain to be answered as to the coverage of the bond. It is generally held that subcontractors are within the favor of the bond and have the same rights as do those who merely furnish labor or materials;¹² likewise persons furnishing labor or materials to a subcontractor,¹³ or to one who received an assignment of the contract from the

⁶ Statements in this sub-topic concerning a materialman are equally applicable to a person furnishing labor and, if the coverage of the bond goes so far, to persons furnishing supplies, machinery, funds, and the like.

⁷ *Royal Ind. Co. v. Cliff Wood & Co.*, 10 F. (2d) 501 (C.C.A. 6th 1926) (Throckmorton's Ohio Code 1929, § 2365, 1-3); *State Bank of Duluth v. Heney*, 40 Minn. 145, 147, 41 N.W. 411, 412 (1889) (*dichum*); and cases in notes 3, 4, and 5, *supra*. See many other authorities collected in 77 A.L.R. 21, 142-148 (1932).

⁸ *Hartford Acc. & Ind. Co. v. Board of Education*, 15 F. (2d) 317 (C.C.A. 4th 1926) (bond referred to contract containing undertaking to pay claims for labor or material).

Contrast a situation in which the bond is not required by statute. *Infra*, notes 51-87.

⁹ *State of Kansas v. United States F. & G. Co.*, 322 Mo. 121, 14 S.W. (2d) 576 (1929); *Clark Plastering Co. v. Seaboard Sur. Co.*, 259 N.Y. 424, 429, 182 N.E. 71, 72 (1932); *Hunter Machinery Co. v. Southern Sur. Co.*, 193 Wis. 218, 214 N.W. 613 (1927).

¹⁰ *National Roofing Tile Co. v. Macdonald, Receiver*, 94 Conn. 240, 108 Atl. 726 (1919).

¹¹ *National Roofing Tile Co. v. Macdonald*, *supra*, note 10.

¹² *Chicago Bonding & Sur. Co. v. United States*, 261 Fed. 266 (C.C.A. 7th 1919); *Peake v. United States*, 16 App. D. C. 415 (1900); *United States, for use of Croll, v. Jack*, 124 Mich. 210, 82 N.W. 1049 (1900). 77 A.L.R. 21, 148 (1932).

¹³ *Hill v. American Sur. Co.*, 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906) (though bond read "that such contractor or contractors shall make payments to all persons supplying him or them," etc.); *Mankin v. United States*, 215 U.S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910) (same); *State v. Southern Sur. Co.*, 221 Ala. 113, 127 So. 805 (1930) (overruling *American Sur. Co. v. United States*, 127 Ala. 349, 28 So. 664 (1900)); *Pavarini & Wyne, Inc. v. Title Guar. & Sur. Co.*, 36 App. D. C. 348 (1911) (same); *General Motors Truck Co. v. Phillips*, 191 Minn. 467, 254 N.W. 580 (1934); *Newton A. K. Bugbee & Co., Inc. v. Consolidated Ind. & Ins. Co.*, 111

original contractor,¹⁴ or to a subcontractor with the assignee of the original contractor,¹⁵ or to a surety of a subcontractor who has taken over that part of the work after the insolvency of the latter.¹⁶ These results are sound enough if the condition of the bond is expressed to be for the payment of all persons furnishing labor or material for the doing of the work required by the principal contract;¹⁷ but are of less obvious propriety when the condition protects only persons furnishing labor or material *to the principal contractor* for such work.¹⁸

N.J.L. 323, 168 Atl. 388 (1933) (condition to pay claims of subcontractors, materialmen and laborers; benefit of materialmen and laborers). 70 A.L.R. 308, 309 (1931); 77 *id.* 21, 148 (1932).

If, however, certain materials had been furnished to the subcontractor on the sole credit of the contractor, it being agreed between them that the value thereof should be deducted from the subcontract price, the judgment rendered in favor of the subcontractor against the surety would be limited to the difference. *Consolidated Ind. Co. v. Salmon & Cowin, Inc.*, 64 F. (2d) 756 (C.C.A. 5th 1933) (probably).

¹⁴ *Hub Hardware Co. v. Aetna Acc. & Liab. Co.*, 178 Cal. 264, 173 Pac. 81 (1918).

¹⁵ *French v. Powell*, 135 Cal. 636, 68 Pac. 92 (1902) ("any materials or supplies furnished for the performance of the work contracted to be done").

In *American Guar. Co. v. Cincinnati Iron & Steel Co.*, 115 Ohio St. 626, 634, 155 N.E. 389, 392 (1927), protection was even extended to one who furnished materials to a materialman, which materials were incorporated into the work. *Contra: Garbutt v. Chappe*, 131 Cal. App. 284, 294, 21 Pac. (2d) 594, 598 (1933); *Claycraft Co. v. John Bowen Co.*, 191 N.E. 403 (Mass. 1934) (interpreting Mass. G. L. 1932 c. 149, § 29, and holding that the words "payment by the contractor or subcontractors" for labor and materials used in public construction do not protect one furnishing materials to a materialman).

In *Glades County v. Detroit Fid. & Sur. Co.*, 57 F. (2d) 449, 454 (C.C.A. 5th, 1932), the materialman recovered for material furnished to the contractor which came into the possession of the county and was turned over by it to a second contractor who completed the work after default of the first.

¹⁶ *Philadelphia v. H. C. Nichols Co.*, 214 Pa. 265, 273, 63 Atl. 886, 888 (1906).

It is obvious, however, that a materialman cannot recover for materials sold to the contractor, later sold under execution, and eventually resold to the person completing the work, and used by him therein. *Commonwealth to use of American Steel and Wire Co., v. Aetna Cas. & Sur. Co.*, 309 Pa. 263, 163 Atl. 530 (1932).

¹⁷ *Shuptrine v. Jackson Equipment & Service Co.*, 168 Miss. 464, 150 So. 795 (1933).

Obviously, one who furnishes materials to a subcontractor will be protected if it is so specifically provided. *Davy Fuel & Supply Co. v. S. R. Ratcliffe Plastering Co.*, 260 Mich. 276, 244 N.W. 472 (1932) (interpreting 3 Mich. Comp. Laws 1929, §§ 13132-13134).

¹⁸ Nevertheless, in *Hill v. American Sur. Co.*, 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906), in *Mankin v. United States*, 215 U.S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910), and in *Pavarini & Wyne, Inc. v. Title Guar. & Sur. Co.*, 36 App. D.C. 348 (1911), such a bond and statute were held to protect persons furnishing materials to a subcontractor. In the *Hill* case the court reasoned (1) that the purpose of the statute as manifested by its title and certain provisions required the protection of all persons furnishing labor or materials entering into the work of construction; and (2) this liberal interpretation is not harsh on the contractor and his surety for they could have easily exacted an indemnifying bond from the subcontractor. The court did not advert to the ease with which the materialman might have protected himself by requiring real or personal security of the subcontractor.

In the Pennsylvania case of *Philadelphia v. Wiggins*, 227 Pa. 343, 76 Atl. 31 (1910), the

(2) Moreover, if it is the bond, rather than the statute, which directly or by reference to the contract contains a provision for the accrual of a substantive right, a cause of action, or use or benefit to the person furnishing labor or materials, by the great weight of authority, he or his assignee will have a substantive right and an appropriate remedy against the surety, or the principal and surety, according as one or both may have executed the bond.¹⁹ Such is the expressed intention of the parties to the bond, and a corresponding legislative intent may be found, it seems, in the provision of the statute that the bond shall be conditioned on the payment of such claims.

(3) By the decisive preponderance of authority, although neither statute nor bond provides for the accrual to the person furnishing labor or materials of substantive right, cause of action, use or benefit, still, the statute having required a bond conditioned on his payment and such a bond having been executed, he is generally held to have a right (and an appropriate remedy) thereon.²⁰ By conditioning the bond on his payment the parties thereto have sufficiently manifested their intent that he shall have this right. The legislature, by requiring the bond to be so conditioned, has manifested an intent that when executed it should give rise to the right, and has thus created the right. In supporting this conclusion the courts often reason with considerable force that the purpose of the

bond virtually followed an ordinance of the city of Philadelphia in being conditioned on the payment of "all persons supplying the contractor with labor and materials, whether as a subcontractor or otherwise, in the prosecution of the work," and a person supplying materials to a subcontractor was properly held to have rights on the bond. And see *Philadelphia v. H. C. Nichols Co.*, 214 Pa. 265, 63 Atl. 886 (1906).

Contrast the interpretation placed on the Mechanic's Lien Act of Illinois (Smith-Hurd Rev. St. 1931, c. 82, § 23) by *Alexander Lumber Co. v. Coberg*, 356 Ill. 49, 190 N.E. 99 (1934), in which case a statute giving a lien on the fund to "any person who shall furnish material, etc., to any contractor having a contract with any municipality" was held not to protect persons furnishing materials to a subcontractor.

¹⁹ *Chaffin v. Nichols*, 211 Ill. App. 109, 114 (1918) (provision in bond that it was for the use and benefit of the materialman and might be sued on by him); *Commonwealth v. National Sur. Co.*, 253 Pa. 5, 97 Atl. 1034 (1916). See note, 77 A.L.R. 21, 118 (1932). And see *Alexander Lumber Co. v. Aetna Acc. & Liab. Co.*, 296 Ill. 500, 504, 129 N.E. 871, 872 (1921) (bond given for the protection not only of owner but of materialman, who shall have the right to enforce it).

²⁰ *London & Lancashire Ind. Co. v. State*, 153 Md. 308, 138 Atl. 231 (1927); *Wilson v. Whitmore*, 92 Hun 466, 36 N.Y.S. 550 (1895) (bond conditioned on payment for all materials, etc., though, apparently, not on doing of the work; held that lack of "privity" was not fatal, the statute was constitutional, and the materialman should have judgment against the surety), *affd. on opinion below* in 157 N.Y. 693, 51 N.E. 1094 (1898); *H. H. Robertson Co. v. Globe Ind. Co.*, 268 Pa. 309, 112 Atl. 50 (1920) (judgment in favor of the materialman affirmed without prejudice to rights of the Commonwealth; court said the materialman might have sued in name of Commonwealth); *Commonwealth v. Great American Ind. Co.*, 312 Pa. 183, 192, 167 Atl. 793, 797 (1933).

legislature was to provide the person furnishing labor or materials with a substitute for a lien on the improved property and so put him in a position comparable with that which would be his if the property were private rather than public.²¹ At any rate, the legislature evidently seeks the ultimate payment of such persons, and to vest rights in them is to make their protection sure, whereas to place rights in the public body would make it depend on the latter's caprice. In consequence of the manifested intent of the legislature, rights accrue to the materialman on the surety bond, although according to the decisions in the particular jurisdiction, in the absence of such statute, being a third-party-beneficiary, he would have no redress on the bond at law or in equity,²² or would have redress only if there were "privity" between himself and the promisee.²³

A municipal ordinance has been held to have an effect like that of a statute. This conclusion presupposes that the municipality had implied power not only to exact a bond conditioned on the payment of persons furnishing labor or materials, but also to fix the legal effect of such a provision. Although the former proposition is sound, the latter seems open to doubt.²⁴

²¹ *Oliver Const. Co. v. Williams*, 152 Ark. 414, 238 S.W. 615 (1922); *State Bank of Duluth v. Heney*, 40 Minn. 145, 147, 41 N.W. 411, 412 (1889).

Decisions differ on the question whether the bond is to be interpreted as commensurate in coverage with the lien statute. Typical cases holding that the bond is to be so limited are *Wisconsin Brick Co. v. National Sur. Co.*, 164 Wis. 585, 160 N.W. 1044 (1917) (freight on materials), and *Webb v. Freng*, 181 Wis. 39, 194 N.W. 155 (1923) (unconsumed forms and scaffolding). Among cases holding that it is not to be so limited are *Sherman v. American Sur. Co.*, 178 Cal. 286, 173 Pac. 161 (1918) (holding that while the word "materials" as used in a lien statute includes only those things which become component parts of the completed improvement, the same word as used in a statute requiring a surety bond has a much broader meaning and refers generally to things used up in the doing of the work), and *London & Lancashire Ind. Co. v. State*, 153 Md. 308, 138 Atl. 231 (1927).

Compare the situations presented in *E. I. Dupont DeNemours Co. v. Culgin-Pace Co.*, 206 Mass. 585, 92 N.E. 1023 (1910), and *Kennedy v. Commonwealth*, 182 Mass. 480, 481, 65 N.E. 828, 829 (1903), interpreting Mass. Pub. St. 1882, c. 16, § 64, and Mass. R. L. 1902, c. 6, § 77, providing that when public buildings, etc., upon which liens might attach for labor and materials if they belonged to private persons, are about to be constructed, a bond shall be taken for payment for all labor furnished and all materials used therein; the bonds were held to cover only such claims for labor and materials as would have been secured by liens if the property belonged to a private person. But see *Nash v. Commonwealth*, 182 Mass. 12, 17, 64 N.E. 690, 691 (1902).

²² *G. H. Sampson Co. v. Commonwealth*, 202 Mass. 326, 88 N.E. 911 (1909) (relief in equity); *Otis Elev. Co. v. Long*, 238 Mass. 257, 130 N.E. 265 (1921). Cf. *Nash v. Commonwealth*, 174 Mass. 335, 337, 54 N.E. 865, 866 (1899), 182 Mass. 12, 64 N.E. 690 (1902). See also *H. H. Robertson Co. v. Globe Ind. Co.*, 268 Pa. 309, 112 Atl. 50 (1920).

²³ *Wilson v. Whitmore*, 92 Hun 466, 36 N.Y.S. 550 (1895), *affd.* in 157 N.Y. 693, 51 N.E. 1094 (1898).

²⁴ Nevertheless, in *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 317, 141 Atl. 27, 32 (1928), the Supreme Court of Pennsylvania explained the protection of materialmen in such

Nor does the fact that the materialman is given a lien on the "fund," that is, on the right of the contractor against the owner for payment of the contract price, lead to a different interpretation of the bond or statute;²⁵ the condition cannot be referred to the protection of the owner, for the lien rests on a chose in action belonging to the contractor rather than on property of the owner; nor does the lien render a right against the surety superfluous, for the fund may be insufficient.

In cases of this third type subcontractors have been held to lie within the favor of a bond protecting persons furnishing labor or materials.²⁶ Furthermore, persons furnishing labor or materials to subcontractors have been given recovery on the contractor's bond, and soundly so when the bond and statute are broadly worded, for example, conditioned on the payment of all persons furnishing labor or material for use in the work.²⁷

cases as *Philadelphia v. Stewart*, 195 Pa. 309, 315, 45 Atl. 1056, 1093 (1900), *Philadelphia v. Stewart*, 198 Pa. 422, 48 Atl. 275 (1901), and *Philadelphia v. Pierson*, 217 Pa. 193, 66 Atl. 321 (1907), on the theory that the municipality had implied power to place rights in the materialmen, although the court conceived that by the common law of Pennsylvania donee-beneficiaries were generally denied recovery. Fortunately, in view of more recent decisions in that state, *Concrete Products Co. v. United States F. & G. Co.*, 310 Pa. 158, 165 Atl. 492 (1933), and *Commonwealth v. Great American Ind. Co.*, 312 Pa. 183, 190, 201, 167 Atl. 793, 796, 800 (1933) (alternative decision), the first mentioned decisions may be, and preferably should be, placed on the ground that materialmen have rights on the bond at common law as donee-beneficiaries. And see *Copeland's Estate*, 313 Pa. 25, 169 Atl. 367 (1933).

In *Concrete Products Co. v. United States F. & G. Co.*, *supra*, judgment was given for a materialman against the surety company on a bond conditioned on payment of materialmen and stating that the undertaking should be for their benefit as well as for the benefit of the promisee; the bond was not given in pursuance of statute or ordinance; apparently, the court rested the decision on the ground that the materialman was a donee-beneficiary and would have explained *Greene County v. Southern Surety Co.* by the absence of any intention in that case that materialmen should have rights on the bond.

In *Commonwealth v. Great American Ind. Co.*, *supra*, it was held that a materialman who brought an action in the name of the Commonwealth was entitled to recover as a donee-beneficiary irrespective of any statute or ordinance, Kephart, J., recognizing that the position taken by the court in the former case of *Greene County v. Southern Surety Co.* in respect to donee-beneficiaries was being overruled.

²⁵ *Wilson v. Whitmore*, 92 Hun 466, 36 N.Y.S. 550 (1895), *affd.* in 157 N.Y. 693, 51 N.E. 1094 (1898).

This conclusion is even clearer when the statute provides that the bond or a part thereof shall inure to the benefit of the materialman, and that he may sue accordingly. *Hunter Machinery Co. v. Southern Sur. Co.*, 193 Wis. 218, 214 N.W. 613 (1927).

²⁶ *State v. Lund*, 80 Ind. App. 349, 357, 139 N.E. 466, 468 (1923) (*all debts due from the contractor, including those for labor, materials and board; held this enumeration not exclusive*).

²⁷ *Oliver Const. Co. v. Williams*, 152 Ark. 414, 238 S.W. 615 (1922) (contractor held liable to sub-subcontractor); *Associated Oil Co. v. Commery-Peterson Co., Inc.*, 32 Cal. App. 582, 163 Pac. 702 (1917) (contractor and his surety held liable to person furnishing supplies to sub-contractor on bond conditioned on payment for labor, materials, and supplies). See note 13, *supra*.

It is to be observed that the statute is an important factor in the interpretation of a bond, especially if the statute be referred to therein. Thus, if a statute requires the taking of a bond securing payment of claims for labor and materials and the bond given refers to the statute and obligates the contractor and surety to repay to the municipality any sum which it should have to pay to persons furnishing labor or materials, it is properly interpreted as creating rights in such persons; in this way the legislative purpose is accomplished and a meaningless interpretation of the bond avoided.²⁸ Likewise a bond conditioned on the payment of "all indebtedness incurred by the contractor for labor or material" and given, as the contract states, in pursuance of a statute which directs the taking of a bond conditioned on the payment "of all indebtedness incurred for labor or material," is properly held to cover indebtedness for labor or material incurred by a subcontractor.²⁹ Of course, if one accepts the rather extreme doctrine that a bond executed in attempted compliance with statute is attended with the same legal consequence as if the statutory requirements were incorporated therein, no difficulty will be encountered in reaching the same result.³⁰

In the three classes of cases considered in this sub-topic the practice varies as to the name in which the materialman should sue. In many states he may sue in his own name, if there is statutory authority or no statutory prohibition.³¹ In other states, in pursuance of statutory direction, the action is brought in the name of the state, on the relation of the materialman³² or for his use.³³ The mere fact that the municipality is

²⁸ E. I. Dupont DeNemours Powder Co. v. Culgin-Pace Contracting Co., 206 Mass. 585, 92 N.E. 1023 (1910) (Mass. Acts of 1904, c. 349).

²⁹ Griffith v. Stucker, 91 Kan. 47, 50, 136 Pac. 937, 938 (1913) (Kan. Laws of 1887, c. 179). And see Oliver Const. Co. v. Dancy, 137 Miss. 474, 499, 102 So. 568, 570 (1925) (bond not stated to be given in compliance with the statute).

³⁰ Williamson v. Williams, 262 Mich. 401, 247 N.W. 704, 89 A.L.R. 442 (1933). See extensive note on the general question in 89 A.L.R. 446 (1934).

³¹ Philip Carey Co. v. Maryland Cas. Co., 201 Iowa 1063, 206 N.W. 808, 47 A.L.R. 495 (1926); West v. Detroit Fid. & Sur. Co., 118 Neb. 544, 225 N.W. 673 (1929) (materialman may sue in his own name on bond); Webb v. Freng, 181 Wis. 39, 194 N.W. 155 (1923).

In some states the materialman runs afoul of a common law rule that only the promisee in an instrument under seal may maintain an action thereon. Even so, the materialman may sue in the name of the promisee, and recover substantial damages, although, theoretically, a suit in equity is indicated. L. Hand, J., in Maryland Cas. Co. v. Portland Const. Co., 71 F. (2d) 658, 660 (C.C.A. 2d 1934); 1 Williston, Contracts §§ 357, 358 (1920).

³² Dewey v. State, *ex rel.* McCollum, 91 Ind. 173 (1883); Kansas v. United States F. & G. Co., 322 Mo. 121, 135, 136, 14 S.W. (2d) 576, 582 (1929) (Kansas statute provided that one furnishing material for public construction in Kansas might bring action; Missouri statute that such person should sue in the name of the state).

³³ United States, for the use of Hill v. American Sur. Co., 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906) (28 Stat. 278, c. 280 (1894); 40 U.S.C.A. § 270 (1928)); Mankin v. United

named as promisee when the statute requires the bond to run to the state is not fatal.³⁴

B. BONDS GIVEN IN COMPLIANCE WITH STATUTE WHEN THE PROPERTY IS OF
PRIVATE OWNERSHIP AND SUBJECT TO LIEN

Bonds given under such circumstances and conditioned, directly or by reference to the contract, on the payment of persons furnishing labor or materials cannot be interpreted apart from the liens of various kinds frequently given by statute to such persons. If the lien is given and the surety bond required by the same statute, the two provisions must be interpreted as a whole; and, even if the provisions are independently enacted, the earlier legislation is a circumstance throwing light on the proper interpretation of the later. Several typical situations demand special attention.

(1) In some states legislation has provided that the owner might exempt his property from liens in favor of persons furnishing labor or materials by procuring from the contractor a surety bond conditioned on the payment of such persons. The inference is then almost irresistible that the legislature intended such persons to have rights on the bond; for the owner is in no peril of liens; on the other hand, the persons furnishing labor or materials need protection and must have been intended to have rights on the bond in lieu of the liens on the property they would otherwise have had. It is generally held that they have such rights.³⁵

(2) In other states persons furnishing labor or materials have liens on the property of the owner for the amount of their respective claims, notwithstanding the execution of a statutory surety bond conditioned on payment of their claims. Here also the legislature has clearly intended to give

States, 215 U.S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910) (33 Stat. 811, c. 778 (1905); 40 U.S.C.A. § 270 (1928)); Board of Education v. Grant, 107 Mich. 151, 64 N.W. 1050 (1895) (2 How. Stat., § 8411c); Easton School District v. Continental Cas. Co., 304 Pa. 67, 155 Atl. 93 (1931).

In State Bank of Duluth v. Heney, 40 Minn. 145, 41 N.W. 411 (1889), it was held that the specification of a certain remedy, that is, an action in the name of the public body for the use of the materialman, was exclusive.

³⁴ Board of Education v. Grant, 107 Mich. 151, 64 N.W. 1050 (1895).

³⁵ Stewart-McGehee Const. Co. v. Brewster, 171 Ark. 197, 284 S.W. 53 (1926) (see C. & M. Digest, Ark., §§ 6906, 6912 (1921)) (*dictum*); Mansfield Lumber Co. v. National Sur. Co., 176 Ark. 1035, 5 S.W. (2d) 294 (1928) (*arguendo*); Steffes v. Lemke, 40 Minn. 27, 41 N.W. 302 (1889); Burns v. Maltby, 43 Minn. 161, 45 N.W. 3 (1890). See Kansas Gen. Stats. 1909, § 6255.

Of course, if the *owner*, in accordance with statute (e.g., Cahill's Cons. Laws of N.Y. 1930, c. 34, § 19), gives bond with surety for the purpose of discharging a mechanic's lien already filed, although the bond runs to a public officer, an action may be brought thereon by the lienor. Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 N.Y.S. 678 (1907).

such persons rights on the surety bond.³⁶ It is true that under this interpretation they receive cumulative protection, but there are situations, although they are rare, in which a lien on the property would not suffice. Furthermore, the legislature could have perceived no need of requiring the owner to take a bond solely for his own indemnity, inasmuch as his self-interest would suffice to that end.

(3) The third class of cases resembles the second except that under the lien statute the aggregate of liens on the property of the owner is limited to the amount due from him to the contractor. Here it is all the more apparent, in view of the greater need, that the legislature intends to vest rights in the persons furnishing labor or materials.³⁷

(4) In California the Code of Civil Procedure³⁸ provides in effect that persons furnishing labor, materials, or the like, shall have liens for the value thereof on the property of the owner, but if a bond be taken conditioned for payment of such persons and by its terms insuring to their benefit and giving them rights of action thereon (either in a suit for foreclosure of the lien or in separate suits), and the contract and bond be duly filed for record, then the aggregate recovery under such liens shall be restricted to the amount found to be due from the owner to the contractor and judgment shall be rendered on the bond for the deficiency. This statute has been held to be constitutional,³⁹ and the bonds taken and filed thereunder are allowed their full statutory and common law effect. Thus, while a deficiency judgment in favor of a person furnishing labor or materials against the surety is proper,⁴⁰ a direct judgment by the former against the latter for the full amount of his claim in accordance with the terms of the bond has been sustained,⁴¹ and it is held to be unnecessary that a materialman file claim of lien,⁴² or that any amount be due from owner to contractor.⁴³ Furthermore, when the required bond is taken but not filed (so that the lien of each materialman is for the full amount of his claim), the statute being constitutional, full effect is given to the unfilled bond

³⁶ *Mansfield Lumber Co. v. National Surety Co.*, 176 Ark. 1035, 5 S.W. (2d) 294 (1928) (see C. & M. Digest, Ark., §§ 6915, 6916 (1921)); *Truscon Steel Co. v. B. & T. Const. Co.*, 170 La. 1083, 129 So. 644 (1930).

³⁷ *Standard Asphalt & Rubber Co. v. Texas Bldg. Co.*, 99 Kan. 567, 162 Pac. 299, L.R.A. 1917C 490 (1917) (see Kan. Gen. Stat. 1909, §§ 6246, 7006).

³⁸ §§ 1183-1203 (1931).

³⁹ *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15 (1916).

⁴⁰ *Roystone Co. v. Darling*, *supra* note 39.

⁴¹ *Purinton v. Olsten*, 45 Cal. App. 621, 188 Pac. 288 (1920); *Roberts v. Security Trust & Sav. Bank*, 196 Cal. 557, 238 Pac. 673 (1925).

⁴² *General Electric Co. v. American Bonding Co.*, 180 Cal. 675, 182 Pac. 444 (1919).

⁴³ *Santa Cruz Portland Cement Co. v. Snow Mountain & Co.*, 96 Cal. App. 615, 621, 274 Pac. 617, 619 (1929).

and the materialman is held to have a right thereon for the amount of his claim.⁴⁴ Of course, if the benefit of the bond does not inure to the materialman but is explicitly confined to the owner, the former will have no rights thereon.⁴⁵

Incidentally, if full recovery is had by the materialman from the surety, it is submitted that the latter is not subrogated to any lien of the former on the property of the owner, for the bond given to the owner by the surety fixes the relation between them as that of real surety and personal principal, respectively.⁴⁶ It is to be observed that even a failure of the owner to file the bond merely increased his own risk; it in no way injured the surety, for his liability would have been just as great if the bond had been filed. Of course, the surety is subrogated to the right of his principal, the contractor, to the unpaid contract price, if any, since his payment of the materialman has freed that fund from the grasp of the owner.

(5) A fifth type of situation is that in which persons furnishing labor or material are given liens on the fund, that is, on the right of the contractor against the owner for the contract price. Clearly, the intention of the legislature in requiring a surety bond is that such persons shall have rights thereon and it is so generally held;⁴⁷ they may need such protection, for the fund may be insufficient; and the owner does not, for the lien is not on his property.

In any of the situations discussed in this sub-topic, the rights on the bond of the person furnishing labor or material are all the clearer if the statute places in him a right to receive payment, a right of action, or the use or benefit of the bond.⁴⁸

In each of the situations thus far considered in this sub-topic the bond has been explicitly conditioned on the payment of persons furnishing labor or materials. The omission of such a condition may be cured by a provision of the statute that a formal bond securing the doing of the work

⁴⁴ *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947 (1916).

⁴⁵ *Luke v. Southern Sur. Co.*, 104 Cal. App. 727, 286 Pac. 490 (1930).

⁴⁶ Thus there is present a relation of subsuretyship, the order of ultimate liability being contractor, surety, and owner.

⁴⁷ *Brink v. Bartlett*, 105 La. 336, 339, 29 So. 958, 960 (1901) (La. Stat. no. 180 of 1894; La. Rev. Stat. 1884, §§ 2879, 2883); *United States F. & G. Co. v. Parsons*, 147 Miss. 335, 362, 112 So. 469, 475 (1927) (see *Hemenway's Miss. Code* 1917, 1921, §§ 2434, 2434b; *Miss. Ann. Code* 1930, §§ 2274-2276); *Hartford Acc. & Ind. Co. v. Natchez Inv. Co., Inc.*, 161 Miss. 198, 222, 132 So. 535, 135 *id.* 497 (1931). In the *Natchez Company* case the court said that the giving of the bond "displaced" the lien on the fund, evidently meaning only that the lien was no longer entitled to the priority over assignments assured to it by § 2275.

⁴⁸ *Stewart-McGehee Const. Co. v. Brewster*, 171 Ark. 197, 284 S.W. 53 (1926) (C. & M. Digest, Ark., § 6912 (1921)) (*dictum*); *Standard Asphalt & Rubber Co. v. Texas Bldg. Co.*, 99 Kan. 567, 162 Pac. 299, L.R.A. 1917C 490 (1917) (Kan. Gen. Stat. 1909, § 7007); *Brink v. Bartlett*, 105 La. 336, 29 So. 958 (1901).

shall also contain an obligation for the payment of persons furnishing labor or materials and, in the absence thereof, shall inure to their benefit in the same manner as if the obligation were included therein. Such a statute has been held not to violate the Fourteenth Amendment of the Federal Constitution and to vest rights in the persons furnishing labor and materials,⁴⁹ even though the bond purports to confine rights to the owner.⁵⁰

C. BONDS GIVEN IN THE ABSENCE OF STATUTORY REQUIREMENT WHEN THE PROPERTY IS OF PUBLIC OWNERSHIP OR OTHERWISE FREE FROM LIEN

In situations to be discussed in this sub-topic and the following one the treatment differs much from that of the two preceding sub-topics. Though there is no statute requiring him to do so, the owner in entering into a contract with the principal for the doing of a work of construction, maintenance, or the like, takes from the latter a surety bond conditioned, directly or by reference to the contract, on the payment of persons furnishing labor or materials;⁵¹ furthermore, the owner is under no liability to the materialman,⁵² that is, the owner is not personally responsible, nor is the property of the owner subject to lien, for the payment of his claim;⁵³ obviously, the most frequent instance is where the owner is the United States, a state, a municipality, or other public body, and the property on which the work is done is in public use.⁵⁴ Now, in requiring a bond of such form the public body or other owner may be actuated by various motives, selfish or unselfish. It is obvious that its interests will be best served if persons furnishing labor and materials are given redress against the surety. A prospective bidder of limited means is assured of

⁴⁹ *United States F. & G. Co. v. Parsons*, 147 Miss. 335, 362, 112 So. 469, 475, 53 A.L.R. 88, 96 (1927) (statute also gave persons furnishing labor or materials the right to intervene in an action subject to the owner's priority of claim).

⁵⁰ *Hartford Acc. & Ind. Co. v. Natchez Inv. Co., Inc.*, 161 Miss. 198, 222, 132 So. 535, 135 *id.* 497 (1931).

⁵¹ The same reasoning applies to situations in which the bond is conditioned, expressly or impliedly, on the payment of subcontractors, or persons furnishing supplies, machinery, funds, or other aids to the work.

⁵² Throughout this sub-topic statements concerning the materialman are equally applicable to persons furnishing labor, and if the coverage of the bond is broad enough, to persons furnishing supplies, machinery, loans, and the like.

⁵³ A case of private construction in which the owner is not subject to liability, real or personal, is found in *Adirondack Core & Plug Co. v. N.Y.C.R.R. Co.*, 238 App. Div. 346, 264 N.Y.S. 484 (1933), *infra* note 65.

⁵⁴ Another such case is *French v. Farmer*, 178 Cal. 218, 172 Pac. 1102 (1918), in which the construction was being done for a railroad company on land of the United States government.

For treatment of the implied exclusion of public property in public use from the operation of statutes providing for mechanics' liens, see *Hutchinson v. Krueger*, 34 Okla. 23, 25, 124 Pac. 591, 592 (1912); see notes, Ann. Cas. 1914 C103; *id.* 1913A 762; 35 L.R.A. 141; 20 L.R.A. (N.S.) 261; 41 *id.* 315.

ample credit and placed more nearly on an even footing with other bidders, and thus a larger field of bidders is likely; and even after the contract is let it is to the advantage of the owner to have suitable materials supplied cheaply and quickly to the contractor.⁵⁵ While it is true that the cost of a surety company's bond will be reflected in an increase of the contract price, the advantages stated are well worth it. Furthermore, especially if the owner is a public body, recognition may well have been given to the general, economic importance of having the claims of persons furnishing labor and materials satisfied; and at all events a certain peace of mind arises from the contemplation that the components of an improvement have not been furnished at the expense of others. True enough, it is not to motive, but to intention, that the law attaches its consequences. Nevertheless, motive is important in ascertaining intention; that is, it is a circumstance which aids interpretation. Here it is clearly the normal intention of owner, contractor, and surety, not merely that *performance* shall run to the materialman, but that he shall have a *right* on the surety bond which will enable him to enforce performance. Consequently, courts may well recognize a strong inference of fact or even a *prima facie* legal presumption to that effect. Moreover, the legal consequences of a contrary interpretation would fall short of the evident purposes of the bond; for then the public body or other owner alone would have a right on the bond and any action at law that it could maintain (based on non-payment of the materialman) would be merely for nominal damages;⁵⁶ and, while it is conceivable that equity might grant specific performance at its suit, even so the burden of such litigation would fall on it rather than on the materialman, who is the beneficiary of the relief sought.

It being the intention of the parties to clothe the materialman with appropriate rights on the bond, the law should and generally does give effect to that intention,⁵⁷ notwithstanding that he is not a promisee, does

⁵⁵ Such a provision "enables one with small means and limited credit to compete with those more advantageously circumstanced. The city is thus enabled to secure greater competition in bidding and to obtain better execution of the work on lower terms." Macfarlane, J., in *City of St. Louis v. Von Phul*, 133 Mo. 561, 568, 34 S.W. 843, 845, 54 Am. St. Rep. 695, 698 (1896).

⁵⁶ Unless the bond provides that the owner may include the materialman's claim as an element of damage. *New York Filtration Co. v. City of Kenosha*, 167 Wis. 371, 167 N.W. 451 (1918).

⁵⁷ *Maryland Cas. Co. v. Portland Const. Co.*, 71 F. (2d) 658 (C.C.A. 2d 1934); *National Sur. Co. v. Hall-Miller Decorating Co.*, 104 Miss. 626, 61 So. 700, 46 L.R.A. (N.S.) 325 (1913); *Southwestern Portland Cement Co. v. Williams*, 32 N.M. 68, 251 Pac. 380, 49 A.L.R. 525 (1926), *Campbell's Cases on Suretyship* 13 (1931); *N. O. Nelson Co. v. Stephenson*, 168 S.W. 61 (Tex. Civ. App. 1914); *Builders Lumber & Supply Co. v. Chicago Bonding & Sur. Co.*, 167 Wis. 167, 166 N.W. 320 (1918). *Contra*: *Miller v. Bonner*, 163 La. 332, 111 So. 776 (1927). See cases cited *passim*, and 49 A.L.R. 534 (1927).

not give consideration, is not "in privity" with the promisee,⁵⁸ and furnishes the materials without knowledge of or reliance on the bond.⁵⁹ In thus vesting rights in materialmen, the law is merely applying its principle of protecting third-person-beneficiaries.⁶⁰ It would hardly be correct to regard the materialmen as creditor-beneficiaries since they have no rights against the promisee (the public body) or in its property. They more nearly resemble donee-beneficiaries,⁶¹ since the public body which exacts the promise is under no liability to the materialmen for the performance promised.

It is to be observed, however, that the usual inference or presumption arising from the expression of an undertaking or condition to pay materialmen may be rebutted. Such is generally the effect of a provision in the bond that substantive or procedural rights thereon, or the use of benefit thereof, shall accrue to no person other than the owner. The undertaking or condition to pay materialmen must then be referred to an intention to create rights in the owner alone. This result is clearly justified in those cases of private construction where the owner's property may be subjected to lien; for the condition to pay makes for the indemnification of the owner. Moreover, even in cases of public or other construction where the owner is under no risk of lien or other liability, the condition to pay will not be in vain, for the owner will have a right of specific performance which he may exercise if he continues in the mood of protecting materialmen.⁶²

The authority of a public body and its officers to exact a bond conditioned on the payment of materialmen should not be open to doubt. The reasons heretofore given for inferring or presuming an intention in the public body (or its officers) to protect materialmen are equally indicative of an implied authority conferred by the legislature on the public body and officers to accomplish that desirable result, whether the legislature expressly requires or authorizes the giving of a bond (though without

⁵⁸ On principle, "privity" is not necessary. Some courts, thinking otherwise, have found it in the reasons stated *supra* for presuming intention. *City of St. Louis v. Von Phul*, 133 Mo. 561, 572, 34 S.W. 843, 846, 54 Am. St. Rep. 695, 701 (1896), overruling *Kansas City & C. Co. v. Thompson*, 120 Mo. 218, 25 S.W. 522 (1894).

⁵⁹ *Baker & Co. v. Bryan*, 64 Iowa 561, 566, 21 N.W. 83, 85 (1884); *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N.W. 238, 17 L.R.A. (N.S.) 906 (1908).

⁶⁰ This principle is of general reception in most of the American states. 1 Williston, *Contracts* §§ 347-403 (1920); *Restatement, Contracts*, §§ 133-147 (1932).

⁶¹ *Maryland Cas. Co. v. Portland Const. Co.*, 71 F. (2d) 658 (C.C.A. 2d 1934).

⁶² *Contra: Hipwell v. National Sur. Co.*, 130 Iowa 656, 661, 105 N.W. 318, 320 (1906) (contract containing agreement to pay for labor and materials and to save the city harmless; bond conditioned on full performance of contract, but with proviso that no person whose name was undisclosed should have any share or benefit therein).

stipulating that it contain a provision for the protection of persons furnishing labor and materials),⁶³ or not.⁶⁴

In New York and Pennsylvania⁶⁵ the fact that materialmen might be thrown into competition with the public owner in the distribution of the penal sum of the bond has been held to indicate an intention of the parties to the bond that no rights should arise in the materialmen, since doubtless the dominant purpose of the bond is the protection of the owner.⁶⁶ The inquiry then naturally arises whether in these two states the public owner has any redress on the surety bond because of the contractor's failure to make payment to materialmen. Obviously it has not suffered substantial damage, for it has not paid the materialmen,⁶⁷ and it is not even under liability to the materialmen, real or personal. Nor does it help that in

⁶³ *Baker & Co. v. Bryan*, 64 Iowa 561, 565, 21 N.W. 83, 84 (1884); *City of St. Louis v. Von Phul*, 133 Mo. 561, 567, 34 S.W. 843, 844, 54 Am. St. Rep. 695, 697 (1896), overruling *Kansas City & Co. v. Thompson*, 120 Mo. 218, 25 S.W. 522 (1894), and distinguishing *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S.W. 784 (1893) (citizen whose property was burned denied an action on contract of water company).

⁶⁴ *National Sur. Co. v. Hall-Miller Decorating Co.*, 104 Miss. 626, 61 So. 700, 46 L.R.A. (N.S.) 325 (1913); *Doll v. Crume*, 41 Neb. 655, 59 N.W. 806 (1894); *N. O. Nelson Co. v. Stephenson*, 168 S.W. 61 (Tex. Civ. App. 1914); *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N.W. 238, 17 L.R.A. (N.S.) 906 (1908).

⁶⁵ *Fosmire v. National Sur. Co.*, 229 N.Y. 44, 127 N.E. 472 (1920); *Van Clief & Sons, Inc. v. City of New York*, 141 Misc. 216, 252 N.Y.S. 402 (1931) (provision to pay materialmen ascribed to desire to avoid inconvenience to owner arising from statutory liens on fund); *Adirondack Core & Plug Co. v. N.Y.C.R.R. Co.*, 238 App. Div. 346, 264 N.Y.S. 484 (1933) (reversing 144 Misc. 558, 258 N.Y.S. 916 (1932); private construction but owner's property not subject to lien; rested on *Fosmire* case); *City of Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. 961 (1899), 203 Pa. 640, 53 Atl. 508 (1902); *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 308, 141 Atl. 27, 29 (1927), approved as to this point in *Concrete Products Co. v. United States F. & G. Co.*, 310 Pa. 158, 165, 165 Atl. 492, 495 (1933); *Patterson v. New Eagle Borough*, 294 Pa. 401, 405, 144 Atl. 423, 424 (1928) (even though the bond referred to a statute which required a bond protecting persons furnishing labor or materials in other kinds of construction); *Pittsburgh v. Bucanelly Const. Co.*, 300 Pa. 27, 150 Atl. 100 (1930) (like *Patterson* case).

⁶⁶ It is to be observed that this competition might arise through the materialman's recovering on the bond before default in the completion of the work, or through both owner and materialman claiming recovery, one on the ground of non-completion and the other on that of nonpayment.

Perhaps the *Fosmire* and *Van Clief* cases can be rested on the ground that a statute or ordinance required the taking of a bond conditioned on performance of the work, and hence impliedly forbade any competing protection. But see *Southwestern Portland Cement Co. v. Williams*, 32 N.M. 68, 251 Pac. 380, 49 A.L.R. 525 (1926).

Of course, if a statute requires the taking of a bond conditioned on both performance of the work and payment of materialmen, there is little difficulty in interpreting the bond as vesting rights in materialmen as well as in the owner and giving legal effect to that interpretation. *Commonwealth v. Great American Ind. Co.*, 312 Pa. 183, 192, 167 Atl. 793, 797 (1933).

⁶⁷ And if it had, the payment would not have been the proximate consequence of the breach, since the public owner was under no liability.

some instances the fund, that is, the contract price owing from owner to contractor, is subject to statutory liens, for the fund is the property of the contractor.⁶⁸ Nevertheless, the very inadequacy of the legal remedy affords good reason for specific performance in equity at the suit of the public owner: the decree should require that the surety pay the materialmen and so perform the condition or obligation of the bond.⁶⁹

In most states the power and incentive of the owner to fix a limit of liability amply large to cover both species of default are explicitly or tacitly regarded as refuting any intention on the part of owner or of legislature that the owner should have the only or even the superior right arising on the bond.⁷⁰

Obviously, if separate bonds be given, one conditioned on the performance of the work and the other on payment of claims of persons furnishing labor or materials, any difficulty with respect to intention which would arise from the danger of competition is not present, and legal effect should be, and generally is, given to the intention that the materialmen should

⁶⁸ *Village of Argyle v. Plunkett*, 226 N.Y. 306, 311, 124 N.E. 1, 3 (1919).

⁶⁹ In *Johnson Service Co., Inc., v. Monin, Inc.*, 253 N.Y. 417, 421, 422, 171 N.E. 692, 693 (1930), which was an action brought by a materialman against the surety company, the city joined in the prayer that the surety be made to pay in accordance with its promise, and it was held that the surety should make payment either to the city in trust for the materialman or directly to the latter. And see *Wilson v. Moon*, 240 App. Div. 440, 442, 270 N.Y.S. 859, 862 (1934). The theory of trust may be open to question since the same reasoning employed by the New York courts to deny a direct legal right to the materialman would militate against giving him a right as *cestui que trust*. The preferable theory is that of specific performance; being available for the benefit of an ordinary donee-beneficiary, it should be here. *Crocker v. New York Trust Co.*, 245 N.Y. 17, 19, 156 N.E. 81, 82 (1927).

Bonds Given in New York to Discharge a Mechanic's Lien. The bonds discussed in this subtopic are to be sharply distinguished from those given under the provisions of Cahill's Consol. Laws of N.Y. 1930, c. 34, §§ 5, 21, 23, to discharge a lien acquired by a person furnishing labor or materials to a contractor or subcontractor in the course of public construction. Such a person may acquire a lien upon the money of the state or municipality applicable to such construction to the extent of the amount due or to become due on the principal contract. This lien may be discharged by the contractor's or subcontractor's entering into an undertaking with surety conditioned on payment of such judgment as may be recovered in an action to enforce the lien. In a suit on the surety bond, the validity, priority, and extent of the lien are of paramount importance. Pertinent cases are *American Radiator Co. v. City of New York*, 223 N.Y. 193, 119 N.E. 391 (1918); *Schuessler v. Mack*, 240 App. Div. 449, 270 N.Y.S. 287 (1934); and *Border v. Frank G. Cook & Sons, Inc.*, 240 App. Div. 476, 270 N.Y.S. 229 (1934).

⁷⁰ Authorities cited *passim*.

Some cases stress the power of supervision over the work residing in the public owner; but this power affects the quality of the work, and not economy in purchase and use of labor and materials. See *Southwestern Portland Cement Co. v. Williams*, 32 N.M. 68, 77, 251 Pac. 380, 383, 49 A.L.R. 525, 532 (1926), *Campbell's Cases on Suretyship*, 13, 17 (1931).

This matter is also treated *infra*, sub-topic III-A. (This sub-topic will be published in the second part of this article, in the February number of the REVIEW.)

have rights.⁷¹ For similar reasons a like conclusion is reached in Pennsylvania when a single bond is given for both purposes but priority of the claim of the municipality provided for therein.⁷²

Furthermore, although the bond is dual in scope, if it directly or by reference to the contract manifests an intention to place in the materialman a substantive right to receive payment,⁷³ or a right of action (which presupposes such a substantive right), or the use or benefit thereof, then the only real question is whether legal effect shall be given to the intention so manifested, and the foregoing comments concerning authority of the public body and its officers and the necessity of privity between owner and materialman become pertinent. Most authorities soundly recognize the presence of rights in the materialman.⁷⁴ It seems to be the present

⁷¹ *Philadelphia v. Stewart*, 195 Pa. 309, 315, 45 Atl. 1056 (1900); *Philadelphia v. Stewart*, 198 Pa. 422, 48 Atl. 275 (1901) (holding that the judgment recovered by a materialman against the city in the former action was no bar to a like action prosecuted by this materialman); *Philadelphia v. Pierson*, 217 Pa. 193, 66 Atl. 321 (1907); *Philadelphia v. Jafolla*, 311 Pa. 575, 167 Atl. 569 (1933).

The cases just cited were explained by Kephart, J., in *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 317, 141 Atl. 27, 32 (1928), on the ground that the bonds were executed in pursuance of an ordinance of the city and that the city had implied authority by ordinance not only to require the execution of a bond protecting persons furnishing labor and materials but also to create rights in their favor in derogation of the common law. Since the more recent decisions of *Concrete Products Co. v. United States F. & G. Co.*, 310 Pa. 158, 165 Atl. 492 (1933), and *Commonwealth v. Great American Ind. Co.*, 312 Pa. 183, 189, 190, 201, 167 Atl. 793, 796, 800 (1933) (alternative decision), the first mentioned cases may and preferably should be rested on the ground that rights will be created in donee-beneficiaries at common law.

The like result would probably be reached by the courts of New York under more recent views as to what constitutes "privity." See *Maltby & Sons Co. v. Wade*, 131 Misc. 143, 227 N.Y.S. 90 (1928), *affd.* in 224 App. Div. 779, 230 N.Y.S. 839 (1928).

⁷² *Portland Sand & Gravel Co. v. Globe Ind. Co.*, 301 Pa. 132, 138, 151 Atl. 687, 689 (1930) (bond was also given for the use and suit of materialmen).

⁷³ As in *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 393, 62 Pac. 41, 42 (1900) ("hold ourselves responsible to" materialmen).

⁷⁴ *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 394, 62 Pac. 41, 42 (1900); *City of St. Louis v. Von Phul*, 133 Mo. 561, 34 S.W. 843, 54 Am. St. Rep. 695 (1896) (bond given providing that materialmen might sue in the name of the owner), overruling *Kansas City Co. v. Thompson*, 120 Mo. 218, 25 S.W. 522 (1894); *School District of Kansas City v. Livers*, 147 Mo. 580, 49 S.W. 507 (1899) (like facts); *St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 243, 196 S.W. 767, 771 (1917), *cert. denied* in 245 U.S. 651, 38 S. Ct. 11, 62 L. Ed. 531 (1917); *C. A. Burton Machinery Co. v. National Sur. Co.*, 182 S.W. 801, 803 (Mo. App. 1916); *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20, 76 N.Y.S. 386 (1902); *Maltby & Sons Co. v. Wade*, 131 Misc. 143, 227 N.Y.S. 90 (1928) (relying on *Seaver v. Ransom*, 224 N.Y. 233, 237, 120 N.E. 639, 640 (1918)), *affd.* without opinion in 224 App. Div. 779, 230 N.Y.S. 839 (1928), and expressly disapproving the contrary decision of *Lyth v. Hingston*, 14 App. Div. 11, 43 N.Y.S. 653 (1897) (alternative decision); *Newark Concrete Pipe Co. v. National Sur. Co.*, 131 Misc. 718, 228 N.Y.S. 569 (1928); *Crudup v. Oklahoma Portland Cement Co.*, 56 Okla. 786, 156 Pac. 899 (1916); *Portland Sand & Gravel Co. v. Globe Ind. Co.*, 301 Pa. 132, 151 Atl. 687 (1930)

attitude of the courts of New York that a bond of this form imports an intention that the materialman should have a right thereon, but junior in rank to that of the owner, and that legal effect should be given to that intention; the result is that the materialman may sue on the bond if the owner has received substantial performance or other satisfaction,⁷⁵ but not otherwise.⁷⁶

A right in a materialman has been recognized even though the condition of the bond to pay persons having claims for labor and materials is accompanied by a more specific provision that it is for the use and suit of persons having liens therefor, and such liens cannot be had; this conclusion is fortified when a statute requires a bond to be conditioned as stated.⁷⁷

In certain cases the surety bond contains promises running directly to persons furnishing labor or material as well as to the owner; it is then properly and generally held that such persons have rights on the bond.⁷⁸ The promises running to them may be interpreted as offers which, if not revoked, will be accepted by the furnishing of labor or materials in reliance on them. Rights would then arise irrespective of any rule favoring third-party-beneficiaries. Nevertheless, persons furnishing labor or materials are not confined to this theory of recovery; they would better claim as third-party-beneficiaries under the promises made to the owner not only to do the work but to pay laborers and materialmen; it is intended that they shall have rights thereon and the law gives effect to that

(bond ran to the use of materialmen and gave them the right to sue); *Texas Fid. & Bonding Co. v. Rosenberg Ind. School District*, 195 S.W. 298 (Tex. Civ. App. 1917).

Moreover, in the Missouri cases cited *supra* it was held that the action might be maintained in the name of the owner for the use of the materialman because the bond so provided.

⁷⁵ *Maltby & Sons Co. v. Wade*, 131 Misc. 143, 227 N.Y.S. 90 (1928), *affd.* without opinion in 224 App. Div. 779, 230 N.Y.S. 839 (1928).

⁷⁶ *Eddy, Inc., v. Fidelity & Deposit Co.*, 265 N.Y. 276, 279, 192 N.E. 410, 411 (1934). *Buffalo Cement Co. v. McNaughton*, 90 Hun 74, 79, 35 N.Y.S. 453, 456 (1895), *affd.* on the opinion below in 156 N.Y. 702, 51 N.E. 1089 (1898). But see *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20, 76 N.Y.S. 386 (1902) and *Newark Concrete Pipe Co. v. National Sur. Co.*, 131 Misc. 718, 228 N.Y.S. 569 (1928), in which cases performance of the contract with the city did not appear.

In the *Eddy* case, a city ordinance provided that no recovery should be had on the bond unless notice be first given to the city, and it was held that judgment should not have been rendered until the city had been given the chance of a hearing, in which it might protect its interest or that of some other materialman.

⁷⁷ Sub-topic II-E, note 56. (This sub-topic will be published in the second part of this article in the February number of the *Review*.)

⁷⁸ *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576 (1902); *Williams v. Tingey*, 26 Cal. App. 574, 147 Pac. 584 (1915); *Panama Commercial Co. v. Tingey*, 26 Cal. App. 576, 147 Pac. 585 (1915).

intention irrespective of the direct undertakings; thus reliance is unnecessary⁷⁹ and revocation is ineffective.

Of course, the inference or presumption of intention to create a legal right in the materialman is not rebutted by the fact that the bond is also conditioned on saving the public body harmless from any default on the part of the contractor or by the fact that the contract provides that it shall or may withhold payment until claims for labor or materials are satisfied and evidence thereof produced.⁸⁰

Frequently, the terms of bonds given in connection with public construction (although in the absence of any statutory requirement), are sufficiently broad to cover materials furnished to an immediate⁸¹ or remote⁸² subcontractor, or to an assignee of the contract,⁸³ or to a surety of a subcontractor who has taken over that part of the work after insolvency of the latter.⁸⁴ Furthermore, the expression "persons furnishing labor or materials" is properly interpreted as including subcontractors.⁸⁵

If, however, the bond in terms protects persons furnishing materials *to the contractor*, the writer believes that an interpretation covering materials furnished to a subcontractor would be unjustified,⁸⁶ notwithstanding the decisions relating to bonds for public construction given in obedience to statute.⁸⁷

D. BONDS GIVEN IN THE ABSENCE OF STATUTORY REQUIREMENT WHEN THE PROPERTY IS OF PRIVATE OWNERSHIP AND SUBJECT TO LIEN

In this sub-topic, as in the last, the absence of statute requires a method of treatment different from that earlier employed. Here, in taking a bond

⁷⁹ *N. O. Nelson Co. v. Stephenson*, 168 S.W. 61 (Tex. Civ. App. 1914).

⁸⁰ *Southwestern Portland Cement Co. v. Williams*, 32 N.M. 68, 251 Pac. 380, 49 A.L.R. 525 (1926).

⁸¹ *Standard Acc. Ins. Co. v. Simpson*, 64 F. (2d) 583 (C.C.A. 4th 1933) ("pay all lawful claims for labor performed and materials used"); *Philadelphia v. H. C. Nichols Co.*, 214 Pa. 265, 273, 63 Atl. 886, 888 (1906) ("all sums of money due for labor or materials furnished or performed in and about the said work"; alternative decision); *Molony & Carter Co. v. Pennell & Harley, Inc.*, 169 S.C. 462, 169 S.E. 283 (1933) (bond of contractor, secured by securities deposited by him with highway department conditioned on payment for all labor, materials and supplies used in and about the construction); *Finch v. Enke*, 54 S.D. 164, 222 N.W. 657 (1929) ("all claims incurred for materials, supplies, tools, and appliances, in carrying out the provisions of said contract").

⁸² *Blair & Franse Const. Co. v. Allen*, 251 Ky. 366, 367, 65 S.W. (2d) 78, 79 (1933) (subcontractor of a subcontractor of a subcontractor allowed recovery on bond conditioned for payment of claims for labor, materials and supplies).

⁸³ *Kaufmann v. Cooper*, 46 Neb. 644, 65 N.W. 796 (1896) ("all claims for labor or materials furnished in or about said contract").

⁸⁴ *Philadelphia v. H. C. Nichols Co.*, *supra* note 81.

⁸⁵ *Habig v. Layne*, 38 Neb. 743, 57 N.W. 539 (1894).

⁸⁶ The writer has not encountered authorities one way or the other. ⁸⁷ *Supra* note 13.

conditioned, either directly or by reference to the contract, on the payment of laborers and materialmen, the owner usually contemplates that he may incur risk, either by undertaking personal liability to persons furnishing labor or material, for example, by the execution of a guaranty, or, as is more frequently the case, through the subjection of his property to statutory liens in favor of such persons. Hence, not only is the owner influenced by the same motives as were discussed in the preceding subtopic relating to public construction,⁸⁸ but he also has the powerful incentive of procuring protection against his own risk. Here again the ultimate question is one of intention, that is, of interpretation of the transaction between owner and surety. They certainly contemplate that the condition, since it is to pay the materialman,⁸⁹ will beget performance to the latter and so be for his benefit; but the decisive question is, what is their common objective intention as to the creation of rights?⁹⁰ This question must be viewed from the respective standpoints of promisor and promisee, surety and owner. As far as the owner is concerned, it is clear that his interests require that he should have a right against the surety (or the contractor and the surety if both join in the bond) that payment be made to materialmen; for the owner is under risk, and this is the surest and most direct way of securing him against threatened or suffered loss. The more difficult question is whether the owner also contemplates the creation of rights in the materialmen. If one of his purposes is to serve them, it will be best effected in this way; if to serve himself by serving them, that is, by inducing them to furnish labor or materials cheaply and promptly, and to bring about equality among bidders and so widen the field of bidding, this purpose will be best accomplished so; and even if his only incentive is to serve himself, that is, by procuring protection against his own risk, the presence of rights in the materialmen may induce the latter to enforce payment and thus relieve the owner, if not from the circuitous and burdensome process of paying and later suing for reimbursement,⁹¹ at least from the vexation and expense of a suit for exoneration or

⁸⁸ Subtopic I-C, *supra*. Boulden, J., in *Fidelity & Deposit Co. v. Rainer*, 220 Ala. 262, 267, 125 So. 55, 59, 77 A.L.R. 13, 20 (1929); Wanamaker, J., dissenting in *Cleveland Metal Roofing & Ceiling Co. v. Gaspard*, 89 Ohio St. 185, 209, 106 N.E. 9, 15-16 (1914), L.R.A. 1915A 768, 778, Ann. Cas. 1916A 745, 753.

⁸⁹ Of course, what is said in this sub-topic concerning the materialman is equally applicable to a person furnishing labor, and, if the coverage of the bond be wide enough, to persons furnishing supplies, machinery, funds, and the like.

⁹⁰ See the illuminating opinion of Maltbie, J., in *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 261, 146 Atl. 293, 294 (1929).

⁹¹ *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 104, 87 N.E. 976, 978-979, 27 L.R.A. (N.S.) 573, 583 (1909).

specific performance or an action for damages.⁹² The probable attitude of the surety (or of contractor and surety, if both execute the bond), remains to be considered. How will he be affected by undertaking obligations to materialmen as well as to the owner? Payment made to a materialman by the surety (or the contractor), before or after judgment, will also constitute performance of his obligation to the owner. Payment to the owner, however, will not work discharge of an obligation of the surety to the materialman, unless the owner has already paid the materialman and so become subrogated to his right; but, although the surety would have to ascertain at his peril whether the owner had paid the materialman, still the chance of misrepresentation on the part of the owner is so remote that this risk is negligible. Suppose, however, that the surety has paid neither the owner nor the materialman; under the authorities governing analogous situations, the owner, having come under imminent risk, for example, through the filing and maturing of a lien on his property, may maintain an action at law against the surety (or the principal) for the amount of the lien, even though he has not yet paid the lienor.⁹³ Since the owner will perhaps not use the money so recovered in satisfying the materialman, it may be objected that duality of obligation would expose the surety (or the principal) to the risk of double recovery. The answer is that either may avert such double recovery by resorting to equity,⁹⁴ or by appropriate proceedings under the codes or the practice acts.⁹⁵ Hence there

⁹² Maltbie, J., in *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 265, 146 Atl. 293, 295-296 (1929); Boulden, J., in 220 Ala. 262, 267, 125 So. 55, 59, 77 A.L.R. 13, 20 (1929).

The suit would be for exoneration, if the surety be bound to the materialman; so that owner and surety would stand in the relation of surety and principal, respectively; on principle, for specific performance, if the surety be not so bound (*Ranelaugh v. Hayes*, 1 Vern. 189 (1683)), but under the authorities for damages (*infra* note 93).

⁹³ Sedgwick, *Damages* § 789 (9th ed. 1912). Mr. Sedgwick properly criticizes this result. At law, the owner would better be confined to an action for nominal damages against the contractor, and also against the surety if the latter is held to be obligated to the materialman; thus the owner would be driven into equity to file a bill for exoneration. There is a theoretical objection to recovery of full damages at law, namely, that the owner has not come under sole liability (so that it is not reasonably certain that he will have to pay in the end), but only under alternative liability. There is also the practical objection that the principal or surety, as the case may be, will be subjected to the risk that the owner will not use the money so recovered in paying the materialman and thus the contractor or surety be twice compelled to make compensation.

⁹⁴ A court of equity, at the suit of contractor or surety, may well enjoin the action of the owner temporarily, and make the injunction permanent if and when either should pay the materialman and so exonerate the owner. 1 Williston on Contracts, § 392 (1920).

⁹⁵ The materialman could be made a party to the action brought by the owner against the surety or the principal at the instance of either plaintiff or defendant, and the judgment be made to contain a provision for its discharge on payment made by surety or principal to the

seems to be no reason for thinking that either surety or principal would be averse to the duality of obligation. In conclusion, it is submitted that there is at least a strong inference of fact, and probably a *prima facie* legal presumption,⁹⁶ that the owner on the one side and the surety (and contractor) on the other, have the common, objective intention of vesting rights in the materialmen as well as in the owner. The inference or presumption being unrebutted, by the better view and the weight of authority, the materialmen have direct legal rights on the surety bond,⁹⁷ although they are not parties thereto, gave no consideration therefor and

materialman. *Wilson v. Stilwell*, 9 Ohio St. 468, 471 (1859). *Cf. Rector &c. of Trinity Church v. Higgins*, 48 N.Y. 532, 539 (1872).

These remedies of surety or principal, while guarding the rule of full damages against unjust consequences, can be logically sustained only on the assumption that the plaintiff has not suffered substantial damage.

⁹⁶ *Concrete Steel Co. v. Illinois Sur. Co.*, 163 Wis. 41, 46, 157 N.W. 543, 544 (1916) ("If the contract be to pay a debt due to a third person, presumably it is for his benefit unless it appears that the contract was not so intended").

⁹⁷ *Wm. Bayley Co. v. Columbia Cas. Co.*, 50 F. (2d) 899 (C.C.A. 5th, 1931); *French v. Farmer*, 178 Cal. 218, 172 Pac. 1102 (1918); *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 146 Atl. 293 (1929); *American Sur. Co. v. Smith*, 100 Fla. 1012, 130 So. 440 (1930); *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 103, 87 N.E. 976, 978, 27 L.R.A. (N.S.) 573, 582 (1909) (*dictum*); *Jordan v. Kavanaugh*, 63 Ia. 152, 18 N.W. 851 (1884) (bond conditioned on performance of contract which provided that principal should pay persons furnishing labor or materials, and give bond securing owner against such claims; general statute authorizing suit by beneficiaries of bonds); *Getchell & Martin Lumber Co. v. Peterson & Sampson*, 124 Iowa 599, 100 N.W. 550 (1904); *Algonite Stone Mfg. Co. v. Fidelity & Deposit Co.*, 100 Kan. 28, 163 Pac. 1076, L.R.A. 1917D 722 (1917); *Dixon v. Horne*, 180 N.C. 585, 105 S.E. 270 (1920); *Warren Webster & Co. v. Beaumont Hotel Co.*, 151 Wis. 1, 138 N.W. 102 (1912) (bond conditioned on principal's paying "all indebtedness"); *Concrete Steel Co. v. Illinois Sur. Co.*, 163 Wis. 41, 157 N.W. 543 (1916) (bond conditioned on principal's satisfying "all claims and demands"); *Yawkey-Crowley Lumber Co. v. Sinaiko*, 189 Wis. 298, 304, 206 N.W. 976, 978 (1926) (owner held to be subrogated to right of materialman).

Contra: Maryland Cas. Co. v. Johnson, 15 F. (2d) 253, 255 (D.C. Mich. 1926), and authorities cited therein.

In many of the cases cited in this footnote, the bond also contained a condition that the work be delivered free from lien or that the owner be saved harmless from lien or reimbursed therefor. Such cases are treated in sub-topic II-D, to be published in the second part of this article, in the February number of the REVIEW.

Construction Bonds Given by Owner to Mortgagee. In analogy with the authorities cited in this footnote, it is generally held that a surety bond, given by owner to a mortgagee and conditioned not only on completion of the work of construction but also on the payment of persons furnishing labor or materials, carries rights to such persons as beneficiaries. *Johnston v. Lindsey*, 183 Ark. 466, 36 S.W. (2d) 396 (1931) (private construction); *Woodhead Lumber Co. v. E. G. Niemann Investments, Inc.*, 99 Cal. App. 456, 278 Pac. 913 (1929) (private construction); mortgage of obligee superior to any liens which might be acquired; judgment for subcontractor). The like law governs similar surety bonds given by the contractor to one having a mortgage on property of the owner. *Bristol Steel & Iron Works v. Plank*, 178 S.E. 58 (Va. 1935).

were not identified when the bond was given,⁹⁸ and although the bond was not required by statute.⁹⁹ This presumption or inference may be fortified by circumstances, for example, that the bond is erroneously stated to be given in obedience to a statute which requires a bond in the case of construction of a different kind or at a different place and gives the materialman a right of action thereon;¹⁰⁰ or that the bond states that the materialman shall have a right of action or that it be for his use or benefit.¹⁰¹ It may be, however, that the suggested inference or presumption is not recognized by a particular court or, if it be so recognized, that it is rebutted by stipulation or other fact indicative of the contrary.¹⁰² It will then be necessary to consider whether the materialman has other ways of attacking the surety. In the comparatively rare case in which the owner is personally obligated to the materialman, even though conditionally (for example, on a guaranty), not only may the latter resort to equitable execution if judgment be had against the owner and execution at law be returned unsatisfied, or to some appropriate statutory method of seizing an intangible asset of an obligor, but also he would be vested with a present legal right against the surety under the rule of *Lawrence v. Fox*.¹⁰³ The rule of that case, however, seems not to have been extended to cover the situation in which the promisee's liability to the plaintiff consists merely in a lien on property.¹⁰⁴ May the materialman then have relief in equity? It is true that he cannot here rely on equitable execution

⁹⁸ Restatement of Contracts, § 139 (1932).

⁹⁹ On principle, privity is not necessary, but, if it were, the requirement might well be regarded as fulfilled by a personal obligation running from owner to materialman, or by the lien of the latter on the former's property.

¹⁰⁰ *American Sur. Co. v. Smith*, 100 Fla. 1012, 130 So. 440 (1930); *Lake Charles Planing Mill Co., Ltd., v. Grand Lodge*, 127 La. 238, 53 So. 550 (1910).

¹⁰¹ *Getchell & Martin Lumber Co. v. Peterson & Sampson*, 124 Iowa 599, 100 N.W. 550 (1904) ("firmly bound to all persons who may be injured by breach of conditions of this bond"); *Lake Charles Planing Mill Co., Ltd., v. Grand Lodge*, *supra* note 100.

¹⁰² Thus, a bond may contain a stipulation that it shall be for the benefit of the owner alone. Such a stipulation should be given legal effect in the absence of a statutory provision to the contrary.

In *Weller v. Goble*, 66 Iowa 113, 23 N.W. 290 (1885), the bond was conditioned on performance of the contract, which bound the principal to use the money received by him thereunder in paying for labor and materials. In an action brought by a materialman against an individual surety, judgment was given for the surety, first on the ground that it did not appear that the amount due was sufficient to pay all materialmen and hence the plaintiff did not show damage, and, secondly, that at any rate rights were not intended to accrue to materialmen as a class, since the contract was not to pay all materialmen (fully or ratably) but only such as the contractor might elect to pay in case the amount due turned out to be insufficient.

¹⁰³ 20 N.Y. 268 (1859); Restatement, Contracts, §§ 133-147 (1932).

¹⁰⁴ Restatement, Contracts, §§ 133-147 (1932).

or the like remedies. Nevertheless, the writer submits that he should be given, as security for his claim against the contractor, a substantive equitable interest in the right of the owner against the surety.¹⁰⁵ The writer finds supporting analogies in the equitable interest which a creditor acquires in certain rights accruing to a surety from his principal or a stranger.¹⁰⁶ Now it is true that the suggested result cannot be rested on any theory that the owner is a surety for the contractor's surety to the materialman, since that would be to assume that the surety is bound to the materialman, the very matter in question. Nevertheless, because of the lien resting on his property, the owner is a real surety for the *contractor* to the materialman, and it is submitted that the materialman may well be held equitably entitled to the right of the owner against the contractor's surety for the following reasons: (a) It is a peculiar asset in the hands of the owner, peculiar in this respect, that the benefit of the asset must necessarily accrue to the materialman and cannot come to the owner or his general creditors, the consequence being that it is valuable to the materialman and no one else; (b) the suit prosecuted by the materialman will relieve the owner from the burden of realizing on the asset, and payment as decreed in such suit will discharge the obligation of the owner to the materialman and that of the surety to the owner; and (c) the rules just referred to, governing a creditor's rights in securities and obligations held by a surety, afford analogies sufficiently cogent to justify this extension.

In a few jurisdictions, however, the materialman is denied a right on the bond on the ground that there is no intention to place rights in him

¹⁰⁵ Of course, if the owner should pay the materialman, the latter's interest would cease and the owner would have a cause of action against the surety (and the contractor) for his reimbursement, which could be reached by any creditor of the owner and would pass to his assignee for creditors or trustee in bankruptcy.

¹⁰⁶ Thus, for the purpose of securing his claim against the principal, a creditor is held to have an equitable interest in any security received by the surety from the principal even though the creditor's right against the surety is merely a lien on the latter's property. (*Baltimore & Ohio R.R. Co. v. Trimble*, 51 Md. 99, 113 (1879); and see *Van Orden v. Durham*, 35 Cal. 136 (1868) and *Sherrod v. Dixon*, 120 N.C. 40 (1897)). Moreover, there are cases in which the creditor, having the personal obligation of the surety, is held entitled to a security *res* received by the latter from a stranger conditioned on payment of the principal debt (*Black v. Kaiser*, 91 Ky. 422, 427, 16 S.W. 89, 90 (1891); *O'Neill v. State Sav. Bank*, 34 Mont. 521, 527, 87 Pac. 970, 971 (1906) (*dictum*)), and to a bond or other obligation received by the surety from a stranger and containing an undertaking or condition to pay the principal debt (*Curtis v. Tyler*, 9 Paige (N.Y.) 432 (1842); *Merchants Nat. Bank v. Cumings*, 149 N.Y. 360 (1896); *Goff v. Ladd*, 161 Cal. 257, 118 Pac. 792 (1911) (placed on above stated ground and also on ground that the creditor was a creditor-beneficiary)). The position of the writer is that either analogy may be extended to meet the present situation: the first to cover a personal obligation received from a stranger, and the second to protect a creditor having a mere lien on property of a surety. See note 45, to be published in the second part of this article, in the February number of the *REVIEW*.

(but only in the owner for the latter's sole protection)¹⁰⁷ or that legal effect will not be given to such intention,¹⁰⁸ or on both grounds.¹⁰⁹

The coverage of the bonds considered in this sub-topic depends on their proper interpretation. One question is whether a bond conditioned on the payment of persons furnishing labor or materials protects a subcontractor, that is, a person who engages with the principal contractor for the doing of a part or all of the work and who thus incidentally furnishes labor or materials, or whether it protects only a person who merely furnishes labor or materials without undertaking the accomplishment of a result. The better view is that the bond protects the subcontractor.¹¹⁰

The question also arises whether persons furnishing labor or materials to a subcontractor are within the coverage of the bond. If the bond is broadly conditioned on paying the claims of persons furnishing labor or material in or about the work, or in connection therewith, it seems to be clear that such persons are within its coverage;¹¹¹ but, if on the payment of persons furnishing labor or materials *to the contractor*, it would seem that the contrary position should be taken.¹¹²

¹⁰⁷ *Sun Ind. Co. v. American University*, 58 App. D.C. 184, 26 F. (2d) 556 (1928) (the court reasoning that in view of the limitation of liability there might be a conflict of interest between owner and materialmen); *Cleveland Metal Roofing & Ceiling Co. v. Gaspard*, 89 Ohio St. 185, 195, 106 N.E. 9, 12 (1914), L.R.A. 1915A 768, 774. Ann. Cas. 1916A 745, 748 (court also stressed lack of reliance; individual sureties), disapproved in *Royal Ind. Co. v. Northern Ohio Granite Co.*, 100 Ohio St. 373, 376, 126 N.E. 405, 12 A.L.R. 378, 380 (1919). Cf. authorities *infra*, sub-topic II-D, note 43, to be published in the second part of this article, in the February number of the REVIEW.

¹⁰⁸ *Central Supply Co. v. United States F. & G. Co.*, 273 Mass. 139, 173 N.E. 697 (1930).

¹⁰⁹ *First M. E. Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141 (1914); *Dupont De Nemours Powder Co. v. National Sur. Co.*, 90 Wash. 227, 232, 155 Pac. 1050, 1052 (1916), 94 Wash. 461, 464, 162 Pac. 866, 867 (1917).

¹¹⁰ *Woodhead Lumber Co. v. E. G. Niemann Investments, Inc.*, 99 Cal. App. 456, 278 Pac. 913 (1929) (surety bond given by owner to mortgagee); *Johnson Electric Co., Inc. v. Columbia Cas. Co.*, 101 Fla. 186, 133 So. 850 (1931); *Hartford Acc. & Ind. Co. v. W. & J. Knox Co.*, 150 Md. 40, 47, 132 Atl. 261, 263 (1926); *Indemnity Ins. Co. v. The Stamberger Co.*, 37 Ohio App. 236, 239, 174 N.E. 629, 631 (1930).

In *Carolina Portland Cement Co. v. Carey & Boettner*, 145 La. 773, 82 So. 887 (1919), a bond executed by a surety company was conditioned on payment of subcontractors; strangely enough, it was held not to protect a materialman, though the promisees therein included subcontractors and materialmen; the court improperly relied on the doctrine of *strictissimi juris*.

¹¹¹ *Pacific States Electric Co. v. United States F. & G. Co.*, 109 Cal. App. 691, 695, 293 Pac. 812, 813 (1930) (*arguendo*).

¹¹² No case has been found in which this question was decided.

American Employers' Ins. Co. v. Lee & Kincaid Coal Co., 226 Ala. 262, 146 So. 408 (1933), is not *contra* to the proposition of the text; in that case a bond was given by P-2, a subcontractor with S-2 as surety, to S-1, the surety of the principal contractor (in public construction), conditioned on payment of persons furnishing materials to P-2, but also importing as wide coverage as the bond executed by S-1. Since that bond would have protected persons furnishing materials to a subcontractor, it was held that a person furnishing materials to P-3, a subcontractor of P-2, should recover from S-2.

[To be concluded]