

1957

# Pacific Coast Title Insurance Co. v. Hartford Accident & Indemnity Company : Brief of Hartford Accident & Indemnity Company on Appeal

Utah Supreme Court

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Moreton, Christensen & Christensen; Attorneys for Hartford Accident and Indemnity Company;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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JAN 10 1958

PACIFIC COAST TITLE INSURANCE  
COMPANY, a corporation,  
*Plaintiff and Respondent,*

—vs.—

HARTFORD ACCIDENT & INDEMNITY  
COMPANY, a corporation,  
*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case No. 8719

UNIVERSITY UTAH

JAN 10 1958

PRUDENTIAL FEDERAL SAVINGS &  
LOAN ASSOCIATION, a corporation,  
*Plaintiff and Respondent,*

—vs.—

HARTFORD ACCIDENT & INDEMNITY  
COMPANY, a corporation,  
*Defendant and Appellant.*

LAW LIBRARY.

Case No. 8720

FELT SYNDICATE, INC.,  
*Plaintiff and Appellant,*

—vs.—

HARTFORD ACCIDENT & INDEMNITY  
COMPANY, a corporation,  
*Defendant and Respondent.*

Case No. 8736

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BRIEF OF HARTFORD ACCIDENT &  
INDEMNITY COMPANY ON APPEAL

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CHRISTENSEN

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Indemnity Company*

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# IN THE SUPREME COURT of the STATE OF UTAH

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PACIFIC COAST TITLE INSURANCE COMPANY, a corporation, <i>Plaintiff and Respondent,</i> —vs.—	}	Case No.8719
HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation, <i>Defendant and Appellant.</i>		
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation, <i>Plaintiff and Respondent,</i> —vs.—	}	Case No. 8720
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FELT SYNDICATE, INC., <i>Plaintiff and Appellant,</i> —vs.—	}	Case No. 8736
HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation, <i>Defendant and Respondent.</i>		

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## BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY ON APPEAL

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### PRELIMINARY STATEMENT

Three cases which were consolidated for trial in the district court, have been consolidated on appeal to this court. The defendant in each case is the Hartford Acci-

dent & Indemnity Company which was the surety on a contract bond of Cassady Company and C. P. Cassady, as principals. In two of these cases, it is the appellant and in the third case it is the respondent and cross-appellant. In this brief we shall refer to it as the Hartford. This brief is written as though the Hartford were the appellant in each case, since the points raised by it on its cross-appeal in the Felt case, are similar to those raised on its direct appeal in the other two cases.

The plaintiffs in each of the three cases are the three named obligees on the bond. The plaintiff, Prudential Federal Savings & Loan Association, is designated in the bond, as the lender obligee, and is herein referred to as Prudential Federal. The plaintiff Pacific Coast Title Insurance Company, is designated in the bond as the title obligee, and in this brief will be referred to as the Title Company. The plaintiff, Felt Syndicate, Inc., is a Nevada Corporation, designated in the bond as the owner obligee, and is herein referred to simply as Felt.

As above noted, the principals on the bond were Cassady Company, Inc., a corporation of the State of Utah, and C. P. Cassady. For purposes of these actions, they may be considered as one, and the name Cassady shall be used herein to designate either or both unless by context a different meaning is clearly made to appear. Another person not a party to this litigation, to which frequent reference will be made is Associated Accountants, a co-partnership, hereinafter referred to as Accountants.



The records on appeal in these cases consist of various papers, pleadings, orders, etc., filed and entered in each of the three cases, and a transcript of the testimony and trial proceedings together with certain exhibits received in evidence. In preparing the records on appeal, the Clerk prepared a separate folder and record for each case insofar as the papers and pleadings were concerned. However, there is only one transcript which is part of the record on appeal in all three cases. It is numbered in red numerals as part of the record in the Title Company case. Thus the record in the Title Company case as numbered and indexed by the Clerk, consists of 27 pages numbered consecutively from 1 to 27 plus the transcript whose pages are numbered in red from 28 to 452. The Prudential Federal record consists of 54 pages numbered consecutively from 1 to 54, and the Felt record consists of 59 pages, numbered consecutively from 1 to 59.

In order to avoid confusion all references to the transcript in this brief shall be indicated by the letter T. followed by the page number e.g. (T. 51). The number shall refer to the typewritten number rather than the red number. Thus page T.51 also bears the red number 79. References to the separate records of the individual cases shall be designated by the case name, the letter R., and the page number e.g. (Prud-Fed. R. 1, Felt R. 7, Tit. Co. R. 3. etc.).

## THE FACTS

These cases arise out of the following facts:

The promoters of Felt became interested in building a subdivision on a tract of land known as Morningside Heights Subdivision in Salt Lake County, in late 1949 or early 1950 (T. 228). Mr. Lloyd Broadhurst, one of the original promoters, contacted C. P. Cassady and C. J. Cassady, his son, who were builders in and around Arcadia, Calif., to determine whether they would be interested in building a one hundred unit subdivision (T. 228). The Cassadys were interested, and in about February of 1950, they came to Salt Lake City for the purpose of examining the tract, at which time they became acquainted with other promoters of Felt, and further discussed the prospective building program. (T. 229, 305).

At that time Felt provided the Cassadys with some plans and specifications of homes to be built on the subdivision. The Cassadys took these plans back to their place of business in California, and they were redrawn and redrafted by Cassady's own architects. (T. 229, 335). The purpose of this was so that Cassady would know exactly what materials and construction would be required. (T. 335-336). After the plans and specifications were redrafted by Cassady they were returned to Mr. B. D. Scott of Felt, who approved them. (T. 231, 336, 339). Scott submitted the plans to the Veterans Administration for approval and subsequently the Veterans Administration issued its certificates (Reasonable values; C.R.V.s.), to the effect that homes built according to such plans and specifications would be approved for G.I. loans up to a stated value. (T. 337-340). Scott

advised the Cassadys that the plans and specifications conformed to all local requirements of the Veterans Administration and with local building codes. (T. 231, 299).

Felt contemplated financing the entire project through a regular lending institution. On June 16, 1950, it entered into a contract with Prudential Federal, hereinafter referred to as the loan agreement, wherein the financial arrangements were outlined (Ex. Pr.-7). Under the terms of that agreement Prudential Federal agreed to loan to each owner and purchaser of the 100 lots in Morningside Heights Subdivision, funds in a specific amount, to be used in the construction and erection of a dwelling house and appurtenant improvements. The mortgage loans were to be made in accordance with the Servicemen's Readjustment Act of 1944, popularly known as the G.I. Bill of Rights. As a prerequisite to making the loan, Prudential Federal required that certain things be done, among which were the following: (1) that the mortgage loan be approved by Prudential Insurance Company of America, (not to be confused with Prudential Federal); (2) that an approved A.T.A. Title insurance policy showing title to the mortgaged real estate in the borrower, free and clear of all liens and incumbrances, except the lien for general taxes, be issued; (3) that the borrower pay a cash deposit to Prudential Federal to cover certain administrative and loan costs; (4) that the borrower authorize Prudential Federal in writing to make certain charges against the loan proceeds; (5) that the plans and survey of the homes be approved by the Veterans Administration; and (6) that

the borrower execute to Prudential Federal written authority to disburse the loan proceeds to pay course of construction costs on the home. The contract further provided in detail, as to the various stages of the completion of the home when disbursement of the mortgage loans would be made, e.g. 14% when the subfloor of the dwelling had been installed; 16% when the dwelling was to the square; 16% when the dwelling was roughed in, etc. (Ex. Pr-7).

The contract further provided that all the 100 homes would be completed within 180 days of the date of the agreement, and that failure on the part of Felt to complete within that time, would give Prudential Federal the right, upon ten days written notice, and at its election, to enter upon the real estate and complete or alter the dwelling house to comply with plans and specifications and for this purpose to use all of the loan proceeds and the payments. The contract further provided in detail the mechanical processes by which the parties under the contract would function. Included among these provisions was a provision for a bonded disbursing agency to make disbursements of the loan proceeds among Cassady, Felt and subcontractors and materialmen according to directions to be provided. Thus, Prudential Federal would make disbursements to Accountants in a lump sum figure, and Accountants would then take the responsibility for disbursing the funds among the various persons entitled to them. It was specifically provided in paragraph 2 of Article III that Accountants would secure from all laborers and materialmen and sub-

contractors, written lien waivers at the time of making payment to them, said waivers to cover in toto the amount of the particular disbursement of the loan proceeds made by Prudential Federal to Accountants. The contract then provided "such lien waivers *shall* be delivered to Prudential *prior to any further disbursement by Prudential* and Prudential will be under no obligation to make further disbursements until it shall have received lien waivers covering all prior disbursements." (Ex. Pr-7). (Emphasis ours).

Prior to the execution of the foregoing contract, construction work on a few homes had commenced some time in May or June of 1950. (T. 33, 59, 60, 318-319, 324). It appears that basement excavations had been dug upon perhaps a dozen or two of the 100 units. (T. 33, 59, 60, 318-319, 324). This work was performed by one Ross, a subcontractor of Felt and not of Cassady. (T. 330). During this period of time however, Cassady was negotiating with Felt for a construction contract. (T. 328).

A serious problem which entered into the negotiations was lack of adequate financing on the part of Cassady. (T. 37, 324, 326, 328). Cassady originally proposed to furnish what is known as a supervisal bond in the penal sum of \$100,000. (Depositions of C. P. Cassady, Deco Van Horn, Jr., and A. L. Blackburn, Exs. 39, 40, 41; T. 232). However, this was not acceptable to Prudential Federal. (T. 35, 412). Prudential Federal's attorneys prepared a form of bond which they deemed adequate for the protection of their interest and which was de-



livered to Cassady, and by him to his insurance agent in California. (T. 401, 403-405, 408, 419, 420; Exs. 38, 39, 40, 41). The bond finally issued by the Hartford was, in all respects material to this litigation, in the same form as the bond prepared by Prudential Federal's attorney. (Ex. Pr-7, H-38).

During this period of time Felt was negotiating with another contractor, and until the time Cassady actually signed the construction contract, it was questionable whether Cassady or the other contractor would eventually get the job of building the 100 homes. (T. 328, 329).

Finally these problems were worked out to the satisfaction of the various parties, and on July 19, 1950, Cassady entered into a contract with Felt, which is hereinafter referred to as the Construction Contract. (Ex. Pr-2). Under the terms of that agreement, Cassady agreed "to *supervise, co-ordinate and procure*, the construction of a total of 100 houses upon *contiguous* lots," (emphasis ours), in Morningside Heights Subdivision. It was agreed that such homes would be built in strict conformity with the plans and specifications, and in conformity with any plans, duties and obligations required by any governmental agency having the right to demand that said work should be performed in the manner specified by such agency, and also in accordance with the rules and regulations of the Veterans Administration. By paragraph 15 it was provided that neither party would assign, transfer or pledge, in whole or in part, the agreement or any of its rights or obligations

thereunder without the written consent of the other party first had and obtained. (Ex. Pr-2).

By paragraph 22, the number of houses to be built according to each basic floor plan was specified, together with the cost per unit and it was further provided in said paragraph that if the parties should thereafter agree to any change or alterations in the plans or specifications, and if such change should increase the cost of construction of the unit affected by such change, such increased cost would be added to the cost per house therein agreed upon. (Ex. Pr-2).

Paragraph 23 provided among other things, the schedule of payments following the course of construction schedule. This is at slight variance with the schedule of payments set forth in the loan agreement. This paragraph further provided inspections would be made at intervals not to exceed 15 days, and that the payments therein provided would be made within five days after the inspection. It was further provided as follows: "The foregoing schedule is to be used as a general guide. However, it is agreed that *disbursements will be made to second party* and the subcontractors in accordance with the *actual stage of completion* of each dwelling *within five days* after the inspections are made." (Emphasis ours).

By paragraph 24 of the same agreement Felt obligated itself to furnish and procure a power connection. By paragraph 26, Cassady agreed to commence construction under the contract within ten days from the

date of execution, and to cause the same to be carried forward diligently and expeditiously until all of the 100 houses had been completed, and to complete all of the 100 houses within 180 days from the date of execution of the agreement. (Ex. Pr-2).

On July 21, the Hartford issued its bond naming the three plaintiffs as obligees. (Ex. Pr-1). The last whereas clause of the bond recites:

“WHEREAS, the LENDER OBLIGEE, TITLE OBLIGEE, and OWNER OBLIGEE each desire protection as their interest may appear, in the event of default by the PRINCIPAL under said contract, *said protection to be subject to the performance by the LENDER OBLIGEE, the TITLE OBLIGEE and the OWNER OBLIGEE of their respective obligations* to the PRINCIPAL in connection with said contract; . . . .” (Emphasis ours).

The bond was conditioned as follows:

“NOW, THEREFORE, the condition of this obligation is such that, if the PRINCIPAL well and truly performs all of the undertakings, covenants, conditions and agreements of said contract on its part and fully indemnifies and saves harmless the obligees from all loss, costs, damage, and expense which they may suffer, either jointly and severally, by reason of failure so to do, and fully reimburses and repays obligees all outlay and expense which said obligees may incur in making good any such default; and further, if the PRINCIPAL shall pay all persons who have contracted, or will have contracted, directly with



PRINCIPAL for services or labor or materials furnished under the provisions of said contract, and shall keep and maintain each lot or building-site free and clear of labor and material liens, then this obligation shall be void; otherwise, it shall remain in full force and effect.” (Ex. Pr-1).

On page 2 of the bond the following provision 3 was set forth:

“The SURETY shall not be liable under the Bond to the Obligees, *and either of them, unless the Obligees, or either of them, shall make payment to the PRINCIPAL in reasonable compliance with the terms of said contract as to payments, and each shall perform all other obligations to be performed by each obligee under said contract* at the time and in the manner therein set forth.” (Emphasis ours.)

The provision last quoted, is of crucial importance to the determination of these cases. It is significant that this language is identical to that contained in the bond form prepared by Prudential Federal’s attorneys. It is Prudential Federal’s language. (Ex. Pr-8, Pr-38).

On August 10, 1950, Felt, Cassady, Accountants and Prudential Federal entered into a four party agreement, hereinafter referred to as the disbursal agreement. (Ex. Pr-8). This agreement provided in detail for the mechanics of disbursing the mortgage funds among the various parties entitled to receive the same. Paragraph 4 thereof reiterated the provisions of the loan agreement, requiring Accountants to obtain lien waivers from the laborers and materialmen, and to deliver the same to Prudential Federal before the latter firm would be

under any obligation to make further disbursements of loan proceeds. Paragraph 6 provided that in the event that inspections made by the Veterans Administration and Prudential Federal would disclose that the construction of any dwelling did not conform with the plans and specifications, Prudential Federal might withhold further disbursements of funds in connection with such dwelling house until corrections have been made to make such dwelling conform with plans and specifications. (Ex. Pr-8). Paragraph 5, together with Exhibit B attached to said agreement, provided in minute detail as to the exact percentage of completion represented by each phase of the work; and further provided that work should be inspected every two weeks, and that within five days thereafter Cassady should be paid for work done to the date of inspection. For example, excavation and grading represented 1.82% of the total work; concrete foundation represented 4.17% of the work; and the foundation complete represented 9.09% of the work. Under the terms of this agreement, as well as under the terms of the construction agreement, Cassady was entitled to be paid the exact percentage which he had earned up to the time of each inspection.

Paragraphs 11 and 12 provided for compensation of Accountants by Cassady, and Felt. Paragraph 13 provided that the compensation provided was based upon the assumption that inspections would be made not oftener than two weeks, and that there would be 12 to 14 periods of disbursement. In the event of more frequent inspections, or more disbursement periods than

14, Accountants would be paid a reasonable compensation for such additional work. (Ex. Pr-8).

Promptly upon the execution of the construction agreement Cassady entered upon the performance of his obligations thereunder. (T. 232, 233, 332). He immediately ran into difficulties. (T. 233). Felt failed to provide a power connection which it had agreed to provide in the construction agreement. (T. 197, 233, 313; Ex. H-32). As a result, Cassady was put to the expense of procuring a gasoline powered electric generator at a cost to him of \$2,137.44. (T. 197, 233, 240; Ex. H-32). Water was not available as agreed and surveys were slow. (T. 233).

More serious, was the failure of Felt's sales program to keep pace with the construction program. Although Cassady understood that the homes were practically all sold at the time the construction agreement was entered into, such was not the case. (T. 233, 257). Prudential Federal refused to disburse loan proceeds for any particular unit until an A.T.A. title policy had issued, and a mortgage had been executed by the purchaser-borrower and recorded. (T. 250). In some instances this was not accomplished until December of 1950, at a time when the construction work should have been virtually completed. (T. 38, 62, 105; Ex. Pr-36). This problem was further aggravated by cancellations by some veteran borrowers due to delay in prosecuting the work, thus occasioning further delay in locating, selling and signing a new veteran borrower. (T. 39, 323).

There were also cancellations and delays due to the Prudential Insurance Company refusing to approve some of the veteran purchasers. (T. 322, 323).

From the very outset there was a deficiency of monies. (T. 64, 65, 67, 235, 236, 258, 321, 347; Ex.s H-13-15). The project was "thirsting" for necessary money. (T. 64). At the time of the first inspection Cassady received but a very small fraction of the funds he was entitled to receive in accordance with the actual stage of construction. (T. 235, 258, Ex. H-32). After one month of work, Cassady had earned approximately \$80,000 and had been paid only about \$7,000. (Ex. H-32). He of course, made complaint about this, but there was no other money available at that time because the sales program and mortgage recording program were badly behind schedule. (T. 62, 65, 67, 262, 347; Ex.s H-32-H-34, Pr-36).

The project was designed to be accomplished by mass production methods. Cassady could not economically jump about the project from lot to lot as mortgages were recorded. Economical completion within the time contemplated by the contract, demanded that the houses be built in straight line order. (T. 332). Not having received the monies to which he was entitled, Cassady did not have sufficient funds to pay his laborers and material suppliers. (T. 66, 67, 236, 347; Exs. H-32-33). They became dissatisfied and threatened to discontinue furnishing labor and materials. (T. 67, 236, 268; Exs. H-13-15). The condition persisted, and the attitude of

the subcontractors and materialmen became more difficult. (T. 67, 236; Ex.s H-32-33). Many of them refused to continue performance and Cassady was required to find other materialmen in lieu thereof. (T. 236; Ex.s H-32, 33).

A good example of how this worked out is a random sample taken by the witness H. M. Calvert from the records of Prudential Federal. The first payment or disbursement of mortgage funds on Lot No. 161 was \$3,398.40. (T. 378; Ex. Pr-36). The amount of this payment indicates that the home was more than one-third completed at that time. Under Cassady's contract he would have been entitled to several progress payments before that time. (T. 379). However, because no mortgage had been recorded, he did not receive these badly needed payments, at the time when they would have done the most good. (T. 250, 251, 378-379). The exact language of Mr. Cassady on this point, colorfully, if not grammatically, describes the problem.

“A. The tract was started in July or the first of August of 1950. *Due to lack of payments from that period of time until the end of the year* caused the tract to be the complete fiasco that it was. By that I mean in time. Once a tract and once a situation is involved such that adequate financing is not given, as per agreed upon, the men doing the work would have to go out and seek some other means of finding money to meet their immediate needs. This happened especially at a bad time; because of the Korean War supplies and materials became scarce. If supply houses were not getting money at the proper

time, they were not going to advance but so much credit. The whole transaction and project was not only hampered, but you might say, the conclusion that has come about because of the lack of proper and adequate financing, according to the contract, regardless of any subsequent action — I mean, *nothing could change that lemon into an orange*. I mean you just don't make those changes. The whole hinge of that tract for six-months' time because of that type of financing, was the ultimate course of how it went." (T. 236-7). (Emphasis ours.)

All of this occurred at a particularly inopportune time. The Korean War had broken out in June of 1950 with a resultant scarcity in building materials. (T. 158, 236-237). Suppliers were naturally more willing to serve those who could pay cash. (T. 158, 236-237). Although Cassady had contracts with most of his laborers and materialmen, they justifiably refused to perform when they could not be paid. (T. 236-37; Exs. H-32,33). Cassady then had to go into the open market and make purchases at prices inflated by wartime pressures. He estimated the cost of this at \$17,500. (T. 244). He was further handicapped by not having the funds to buy in wholesale quantities, and to achieve the benefit of discounts for cash sales. (T. 158, 244). This could have amounted to a "considerable saving." (T. 158). The gravity of the situation was recognized by all concerned with the project. (Exs. H-13, 14, 15). Cassady complained to Accountants that every disbursement was insufficient. (Ex. H-34). He repeatedly wrote to Felt, advising it, of the situation and pointing out that the success of the



project was imperiled. (Exs. H-13, 14, 15). Felt likewise recognized the gravity of the situation and directed it to the attention of Prudential Federal. (Exs. H-13, 14, 15). Notwithstanding this, the situation failed to improve materially. (T. 236).

Eventually Cassady found it necessary to engage the services of attorneys to bring the matter to a head. (T. 268; Ex. H-32). The attorneys wrote letters to Felt (T. 268; Ex. H-32), and this finally resulted in the execution of a supplementary and modifying agreement dated September 20, 1950. (Ex. Pr-5). By the provisions of that agreement, the period for completion was extended to 210 days from the date of the original construction agreement. (Ex. Pr-5). No other changes were made.

The execution of this agreement did not materially improve the situation. (T. 236, 268). The sales program and mortgage recording program continually lagged behind the progress of construction and this condition persisted throughout the fall of 1950. (T. 64, 65, 67, 236, 268; Ex. Pr-36).

Notwithstanding the financial difficulties and other hardships and impediments resulting from Felt's breaches, Cassady attempted to go forward and complete the project. Initially satisfactory progress was maintained. (T. 141, 259-260). Although delays were encountered, the rough work was completed satisfactorily. (T. 69, 141, 145, 155, 259; Ex. F-24). So far as the record shows all of the 100 houses passed their first inspection

satisfactorily and most of them passed the second inspection satisfactorily. (Ex. F-24). Note: Ex. F-24 does not contain first and second inspection reports for all of the 100 homes. However, all those in the record show full compliance with the first inspection, and most of them show compliance with the second inspection.

However, as time went on, difficulties increased. Cassady had difficulty in meeting obligations to subcontractors and materialmen due to insufficiency of progress payments to him. Organization broke down and gave way to chaos. (T. 157, 158). The inevitable result was that the quality of work deteriorated. For example, substandard materials were furnished by dissatisfied material suppliers; lumber was not promptly worked giving rise to problems of deterioration by weather and theft; and lumber, properly installed, was not promptly painted, causing warping, etc. (T. 153-155). Although these defects were noted by the inspector, and due notice thereof was given to Prudential Federal, it did not hold up any progress payments, *and did absolutely nothing* to require compliance with V. A. standards by Cassady. (T. 68, 70, 71, 156, 157; Ex. F-34). The errors were thus compounded and piled one on top of the other.

Another difficulty resulting from the delays in payment and extension of time for building the homes, was that mortgage funds which should have been used for construction work were necessarily diverted to course of construction interest. At the inception of the project, the



veteran borrowers were required to pay a deposit which included enough to cover anticipated interest on the borrowed moneys during the anticipated and scheduled course of construction. (Ex. Pr-7). However, because the time for completion was so long delayed, a portion of the loan proceeds had to be applied for this purpose. In other words, course of construction interest became a much larger item than originally planned and contemplated. As a result approximately \$16,000 of money which should have been available for payment of construction costs, went out of one pocket of Prudential Federal and into the other as course of construction interest. (T. 177-184).

By February of 1951, the project had completely bogged down. On February 16, 1951, Prudential Federal, Felt, Cassady and Accountants, entered into a new agreement hereinafter called the Supplemental Agreement. (Ex. Pr-6). By the terms of that agreement the period for completion of the construction was extended to June 1, 1951. All of the prior agreements of the several parties were amended to conform to that. Accountants were relieved of further obligation to make disbursements and it was provided that from that time on Prudential Federal would disburse the mortgage funds "in such manner and in such amounts as *in the sole judgment and discretion of Prudential is necessary and proper to secure the expeditious completion* of the aforesaid dwelling houses . . . *The discretion of Prudential as to the time, manner and method and amount of payments shall be conclusive, and shall be binding upon the parties*

*hereto.*" (Emphasis ours.) Prudential Federal's right to declare the project in default by serving a ten day written notice on Felt was preserved. The Hartford consented to the execution of this agreement to the extent that it modified the construction contract of July, 1950. (Ex. Pr-6).

From the date of the supplemental agreement, to February of 1952, there is something of a hiatus in the record. There is little evidence to show what transpired during that period of time. From Ex. F-24, it appears that the homes were substantially completed during this period. In a large percentage of the cases they were occupied by the purchasers. (T. 190). However, none of them had been completed to the satisfaction of the Veterans Administration. At that time, Mr. Wilson E. Taylor, Attorney in charge of surety bond claims for the Hartford, came to Salt Lake from San Francisco to determine the status of the matter, and what could be done to bring it to a conclusion. (T. 82, 187-198, 251, 265). At that time, it appeared that there was approximately \$22,500 undisbursed from the mortgage proceeds. (T. 82, 84, 85, 126, 251, 376). It was estimated by the Veterans Administration inspector that the several homes in the tract could be completed in accordance with V. A. requirements at a cost of approximately \$26,500. (T. 190, 215). Cassady was without funds to proceed. (T. 215). All parties were agreed that the funds remaining undisbursed should be applied to this purpose, and that every effort should be made to complete the homes and obtain V. A. approval. (T. 87, 191, 193,

264). Felt then indicated that it had made an assignment of its rights under the construction contract to Wright-Wirthlin, a real estate agency. (T. 85, 86, 193, 221; Ex. H-31). This was without the consent of Cassady. (T. 238). The realtors were unwilling to subordinate their rights, and therefore, the funds which Felt would be entitled to receive under the construction contract, could not be made available except by going through the procedure of declaring Felt in default in accordance with the loan agreement. (T. 191, 193, 194-195). It was contemplated that this procedure would be followed but nothing in this direction was accomplished by Prudential Federal until "very late in the game," (August 12, 1952) when it finally got around to serving notice of default. (T. 73, 95-97; Ex. Pr-30).

Also, in February of 1952, the matter of extra expenses incurred and work performed by Cassady was discussed at a meeting of interested parties. Cassady presented a long list of extra expenses for which he had not been reimbursed. (T. 87, 195-198, 278). No representative of Felt raised any objection to the claimed extras. Mr. Snyder said merely, that Felt had no funds with which to pay the same. (T. 198). Mr. Thomas Taylor, of Prudential Federal testified that many of the items appeared to him to be entirely justifiable. (T. 87). Although there is a conflict in the record, as to whether certain of the claimed items of extras should properly be allowed, there are certain items about which there appears to be no dispute, among which are the following:

Under the disbursing agreement of August 10, 1950, (Ex. Pr-8), it was contemplated that the project would be completed within the 180 days provided in the original construction contract, and that Associated Accountants, the bonded disbursing agency, would have to make no more than 12 to 14 disbursals. (Par. 13, disbursal agreement.) However, the project got bogged down immediately, and in September of 1950, the time for completion was extended. (Ex. Pr-5). Also, because of irregular inspections made in the initial phases, disbursals had to be made more frequently than every two weeks, during the early phases of construction. Because of this fact, Accountants was required to make many more than the 12 to 14 disbursals contemplated in the original disbursal agreement for which it was entitled to extra compensation. (Par. 13, disbursal agreement). Under the terms of the disbursal agreement, Cassady was partially responsible for Accountant's fees, including the extra compensation for extra disbursals. Therefore, because of the delays caused by slowness of payments to Cassady, extra disbursal periods were required, which resulted in an extra disbursal expense to Accountants. Although Accountants originally claimed a much larger fee, it was finally settled by Cassady for a figure between \$4,000 and \$5,000. (T. 197, 260). No other party to this litigation has questioned this as a legitimate extra.

It is undisputed, that there were some revisions in the house plans, and that more of the more expensive and less of the less expensive type of homes were to be built. (T. 242, 243). The number of the different floor

plans and elevations to be built was not definitely established until September 27, 1950, more than two months after commencement of the project. (Ex. H-32). Thus, Cassady had not only the additional expense of additional units of the more expensive type, but actually two months delay in getting final instructions as to the number of each type of unit to be constructed. Here was another item of extra expense incurred by Cassady, undisputed by any other party, for which he was never reimbursed. (T. 242).

Cassady sustained a substantial loss of buying power due to lack of payments as per contract. This was estimated by him as over \$17,500. It resulted in two ways. Contractors with whom he had contracts were not paid on schedule. Due to the Korean War, and a shortage of materials, they refused to complete their contracts, since they were not being paid for the materials which they had furnished and they could get a better price for them elsewhere. It thus become necessary to buy the materials on the open market, at a higher price, stimulated by the Korean War. Secondly, it was impossible to take advantage of cash discounts, which were available upon prompt payment for materials bought in large quantities. (T. 244.) (See also letters in Exs. H-32, H-33.)

Cassady also found it necessary to borrow money from Peter Shelby in the approximate amount of \$30,000. This again was due to the failure of Felt to make payments timely. (T. 245). This is another item of extra

expense which is undisputed in the record and for which Cassady was never reimbursed.

In August, 1952, the obligees served notice of default on Cassady and the Hartford. (Ex. Pr-30). In response thereto, the Hartford, through Wilson Taylor, by letter addressed to Prudential Federal's attorney, advised that since Felt Syndicate had not lived up to its contractual obligations, and "as the rights of Prudential Federal Savings & Loan Association under the bond . . . are contingent upon Felt . . . fulfilling all its obligations" the Hartford would have no obligation to comply with the demands of the letter. (Ex. H-29). Prudential Federal responded to this letter, but made no dissent to the interpretation placed upon the bond by the Hartford. (Ex. H-28, T. 206).

Later that month, and pursuant to arrangements previously made, Prudential Federal's attorney visited Wilson Taylor in San Francisco to discuss this matter. (T. 201). Mr. Taylor expressed the view that "the rights of Prudential [Federal] under the bond were contingent upon Felt and the title company both fulfilling their contracts with Cassady." (T. 204). Prudential Federal's attorney concurred saying, "you are probably right." (T. 205, 219).

On October 8, 1952, the Veterans Administration finally rejected each and all of the 100 homes, and gave final refusal to approve any of them for G. I. loans. (T. 11, 12, 17, 41, 53, 104, 110, 142, 154).



In April of 1953, Welch Planning Mill filed an action against Prudential Federal and Felt and the various 100 home owners, to recover monies due it for furnishing materials to the job, and to foreclose its materialman's lien claims against the project. Subsequently other lien claimants intervened, and eventually claims in the total sum of approximately \$30,000 were filed. The Hartford was also interpleaded as a third party defendant. That litigation was eventually terminated in October of 1955 by a compromise settlement whereby Prudential Federal and the Hartford each contributed \$10,000 in full satisfaction of all claims of materialmen, and also all claims of the home owners for defective workmanship, etc. There was never an adjudication as to the merits of any of these claims, and none of the defendants in the prior litigation ever admitted legal liability to any of the plaintiffs or cross-claimants. (Tit. Co. R. 2, 7, 12, 19).

Within the six month period allowed by the bond, each of the three plaintiffs filed their respective suits against the Hartford to recover on the bond. (Tit. Co. R. 1; Prud. Fed. R. 1; Felt, R. 1). The suits were duly consolidated for trial before the Hon. A. H. Ellett. Two pretrials were held (T. 1-16, 17-21), after which the cases came regularly on for trial in December of 1956. (T. 22). Evidence was taken for a period of three days, after which time, further evidence, by way of depositions, was taken in Los Angeles. (Exs. 39, 40, 41). The cases were finally argued in March of 1957, after which the court entered judgments in favor of each of the plain-

tiffs and against the defendant. (T. 424; Tit. Co. R. 22; Prud. Fed. R. 41-42; Felt R. 45-47). Motions to amend the findings of fact and conclusions of law and to set aside the judgments or in the alternative for a new trial were duly made by the Hartford in each of the three cases. (Tit. Co. R. 14-15; Prud-Fed. R. 43-47; Felt R. 48-50). Some minor modifications were made in the findings of fact and conclusions of law in the Prudential Federal case, and the amount of the judgment was reduced. (Prud. Fed. R. 48, 49, 50). Otherwise the findings, conclusions and judgments were not disturbed. (Tit. Co. R. 16; Prud. Fed. R. 48; Felt R. 51).

At the outset of the Morningside Heights Building program Felt, a Nevada corporation was duly qualified to do business in Utah, having qualified on March 28, 1950. However, prior to the litigation involving the lien claimants, on September 2, 1952, its franchise was forfeited for non-payment of taxes. It was reinstated on January 7, 1954, but its franchise was again forfeited on March 21, 1956, during the progress of the instant litigation, and was never reinstated. (T. 135, 138, 139, 278-9; Ex. H-23).

The amount of damages awarded to the plaintiffs Prudential Federal and Felt is not in issue in this appeal, and we therefore do not detail the basis on which damages to those two plaintiffs were determined.

The only loss of any kind sustained by the Title Company was the expense incurred by it in defending



the original lien claim suit on behalf of Prudential Federal. (T. 173). This included both court costs and attorney fees. Under the terms of its policy it was obligated to defend Prudential Federal's title. (T. 173). This was true regardless of whether there was any merit to the lien claims. (T. 173). Had the claims been wholly groundless the title company would still have had the obligation of defending them. It, however, contributed nothing toward the settlement of the lien claims. Its loss resulted wholly from its contractual obligations to Prudential Federal, and not to any default on the part of the Hartford's principal. (Tit. Co. R. 12-13, T. 173).

In summary, Cassady contracted to supervise, coordinate and procure the construction of one hundred homes for Felt in accordance with V. A. requirements. The Hartford executed a performance bond. Prudential Federal agreed to loan the necessary monies upon the performance of certain conditions precedent. Felt failed to make progress payments to Cassady in accordance with its contractual agreement, and otherwise breached its contract. As a result Cassady was unable to complete the one hundred homes in accordance with V. A. requirements. Prudential Federal did nothing to protect its own interest and permitted the project to "go to pot" when it had the means to save it and prevent substantial loss. The Hartford's bond specifically exonerated it from liability to all obligees in the event of breach on the part of either or any of them. The Hartford therefore contends that the judgments below should be reversed.

## POINTS TO BE ARGUED

## POINT I.

THE COURT MADE FINDINGS OF FACT IN ALL THREE CASES WHOLLY UNSUPPORTED BY THE EVIDENCE, AND THEREFORE CONTRARY TO LAW.

## POINT II.

FELT WAS GUILTY OF SUBSTANTIAL AND MATERIAL BREACHES OF ITS CONTRACTUAL OBLIGATIONS TO THE HARTFORD'S PRINCIPAL, WHICH BREACHES CONTRIBUTED TO CAUSE THE ULTIMATE LOSSES SUSTAINED BY THE VARIOUS PARTIES TO THIS LITIGATION.

## POINT III.

PRUDENTIAL FEDERAL WAS GUILTY OF SUBSTANTIAL AND MATERIAL BREACHES OF ITS CONTRACTUAL OBLIGATIONS, AND FAILED TO TAKE STEPS TO PREVENT OR MINIMIZE THE DAMAGES, WHICH CONTRIBUTED TO CAUSE THE ULTIMATE LOSSES SUSTAINED BY THE VARIOUS PARTIES TO THIS LITIGATION.

## POINT IV.

THE COURT DREW ERRONEOUS CONCLUSIONS OF LAW, BASED UPON FACTS UNSUPPORTED BY EVIDENCE, AND CONTRARY TO FAMILIAR PRINCIPLES OF LAW.

## POINT V.

UNDER THE PLAIN LANGUAGE OF THE BOND, A BREACH UPON THE PART OF ANY OF THE OBLIGEEES, WOULD DEFEAT THE RIGHTS OF ALL, AND THEREFORE THE BREACHES ON THE PART OF BOTH FELT AND PRUDENTIAL DEFEAT THE RIGHTS OF ALL OBLIGEEES.

## POINT VI.

FELT BEING A NON-RESIDENT CORPORATION AND HAVING FORFEITED ITS CORPORATE FRANCHISE TO DO BUSINESS IN THIS STATE, HAS NO STANDING TO MAINTAIN ITS ACTION IN THE UTAH COURTS.

## POINT VII.

THE TITLE COMPANY DID NOT SUSTAIN ANY COMPENSABLE DAMAGE, AND THEREFORE IS NOT ENTITLED TO RECOVER ANYTHING FROM THE HARTFORD.

## ARGUMENT

## POINT I.

THE COURT MADE FINDINGS OF FACT IN ALL THREE CASES WHOLLY UNSUPPORTED BY THE EVIDENCE, AND THEREFORE CONTRARY TO LAW.

In its motion to amend the Findings of Fact and Conclusions of Law in each of the three cases before the court, the Hartford pointed out specifically and in detail, wherein the court made Findings of Fact wholly unsupported by the evidence, or contrary to the great weight of the evidence. (Tit. Co. R. 14-15; Prud. Fed. R. 43-47; Felt R. 48-50). We refer to those motions for a detailed statement as to errors thus made. It is not necessary to repeat all of that here. Some of the Findings which we attacked were of little or no significance. Some of the Findings in the Prudential Federal case were substantially modified by the court. However, so that there may be no supposition by the Court, that we tacitly acquiesce in any of the Court's Findings which

we have heretofore attacked, and which have not subsequently been amended or stricken, we wish to state here, that we do not waive any such defects nor do we acquiesce in them. In general, they will be discussed in connection with other points in this brief. A few of them are of such major importance that we believe that our exceptions to them should at least be noted here although they will be discussed in greater detail under later points.

(a) Finding No. 4 in the Prudential Federal Case to the effect that Felt was "at all times material" to the case, qualified to carry on business in the State of Utah, and Finding No. 1 in the Felt case, to the same general effect, are wholly contrary to the evidence. The status of Felt was stipulated by its attorneys and by the Hartford's attorney and further demonstrated by a certificate from the Secretary of State of Utah showing it not to be in good standing at the time of trial. There is no evidence to the contrary. The importance of this will be demonstrated under Point VI.

(b) By the last sentence of Finding No. 27 in the Prudential Federal case, the court finds there is no evidence that Prudential Federal's failure to collect lien waivers from Accountants resulted in any damage or prejudice to the Hartford or Cassady. The record shows without dispute that lien claims in excess of \$30,000 were asserted and filed by various laborers, subcontractors and materialmen; that Prudential Federal was unable to defeat such claims by producing lien waivers, and that by reason thereof, such claims were eventually

compromised and settled by the payment by both Prudential Federal and the Hartford of the sum of \$10,000 each, to the lien claimants. We believe that a \$10,000 loss must be regarded as substantial prejudice.

(c) By Finding No. 29 in the Prudential Federal case and Finding No. 18 in the Felt Case, the court apparently determined that Cassady should not have commenced work until all of the mortgages had been executed and recorded. This would have meant that work would not have been commenced until December of 1950. (T. 38, 62, 106). However, the evidence shows that some of the Veteran purchasers became dissatisfied at the slow rate of progress of the project, and cancelled their loan agreements. (T. 39, 62). This made it necessary to locate and sell to a new Veteran purchaser-borrower. (T. 39, 62, 323). Certainly if Cassady had not started work until December of 1950, there would have been more cancellations, and the program would have been further delayed. Moreover, under the construction contract, (Ex. Pr-2, Par. 26), Cassady was obligated to commence construction work within ten days, and to complete the homes within 180 days. Under paragraph 23 of the same agreement, Felt was obligated to make disbursements to Cassady according to the "actual stage of completion" of the work. There is no provision or limitation in the construction contract or the disbursal contract, that payments shall depend upon Felt's sales program, or upon mortgage monies being made available. The agreement to pay is unqualified, unconditional and unambiguous. There can be no doubt that in order to



get the job done within the time stipulated by the contract Cassady had to rely upon Felt's promise to pay according to the actual stage of completion. The evidence shows without dispute, that in order for the work to have been accomplished within the time contemplated by the contract, that it was necessary that it be promptly commenced and prosecuted in an orderly fashion. It could not have been done by skipping about the subdivision doing a home here and a home there as the homes were sold. The entire success of the project depended upon mass production methods, and this involved proceeding with the project as a unit. The only way that Cassady could hope to comply with his contractual obligation was to build accordingly, and to rely upon Felt to make the course of construction payments, as they became due. The failure of Felt to make payments in accordance with its contractual obligations, was the real cause of the ultimate failure of the project.

(d) Finding No. 39 in the Prudential Federal case, which is like Finding No. 20 in the Felt case, and Finding No. 18 in the Title Company case, is crucial to all three of these cases. In the face of a record replete with evidence of breach after breach on the part of Felt, to which there is no dissent or dispute, and corroborated by practically every witness who took the stand, the court finds that Felt did not breach its contractual obligations to Cassady or to the Hartford in any substantial manner. These breaches will be discussed in some detail under our Point II. *infra*. We merely note at this time that the record was without dispute; that

there were repeated and continuous breaches on the part of Felt in failing to make course of construction payments in accordance with the construction contract; that there was failure to provide a power connection in the inception of the work; that Felt did not pay Cassady for extra work and materials furnished by him, and that Felt without the written consent of Cassady, assigned its rights under the construction contract.

(e) By Finding No. 11 in the Felt case the court finds that at no time did the structures meet the requirements of the Veterans Administration. This is in direct conflict with the undisputed evidence, including that offered by Felt itself, that in the initial phases of construction, the workmanship was entirely satisfactory, and not until a financial breakdown had occurred, without fault on the part of Cassady, did the inspectors start noting deficiencies.

(f) We also note here our dissent to the court's finding No. 17 in the Title Company case, and No. 38 in the Prudential Federal case to the effect that Prudential Federal did not breach its contractual obligations. This will be more fully discussed under our Point III.

## POINT II.

FELT WAS GUILTY OF SUBSTANTIAL AND MATERIAL BREACHES OF ITS CONTRACTUAL OBLIGATIONS TO THE HARTFORD'S PRINCIPAL, WHICH BREACHES CONTRIBUTED TO CAUSE THE ULTIMATE LOSSES SUSTAINED BY THE VARIOUS PARTIES TO THIS LITIGATION.

It is elementary that an obligee would have no right to recover on the bond of a contractor, if it had itself breached the bond or the contract on which it was written, in any material respect. 10 Appleman, Insurance Law and Practice, page 50. That rule must apply with even greater force here, where Felt and Cassady are really co-adventurers. Under the terms of the construction agreement Cassady agreed to do certain things in connection with the building program. Felt was responsible for other matters such as off-site improvements, water connections, etc. If the project was successful they were to share in the profits. Each had an interest in seeing the project successfully completed. Under these circumstances Felt should not be permitted to recover from Cassady's surety, for reasons which were forcefully and effectively stated by Judge Kennedy in the case of *U. S. vs. U. S. F. & G. Co.* (D.C. Wyo.) 4 F. Supp. 854, 855 as follows:

"It seems quite evident that the rule of law should be that a joint adventurer [Felt] under these circumstances should not be permitted to recover upon a bond given to guarantee the fulfillment of the contract of his co-adventurer [Cassady]. The duties of the contractor [Cassady] to fulfill the provisions of his contract are no more imperative than those of one who is jointly interested with him in its success. The obligations are the same, to wit, to see that the contract is fulfilled in every particular before a surety should be compelled to answer for the default. As a matter of fact, the principal contractor [Cassady] might as well be entitled to recover for his own default against his own surety



[Hartford] as to permit one jointly interested with him in its success [Felt] to do so. Such a rule of law would open the door to fraud of a serious type. Counsel have assured us that the books have been searched in vain for a judicial precedent and the court itself has verified their conclusion. Perhaps the lack of precedent arises from the fact that one has never before attempted to enforce his claim upon the bond of the principal contractor who was his joint adventurer.”

That language was quoted with approval in *Theobald-Jansen Elec. Co. vs. P. H. Meyer, et al.*, 77 F. (2d) 27.

We have noted that Felt was guilty of substantial breaches in four important particulars. We herewith discuss them in some detail.

**A. FELT FAILED TO MAKE PAYMENTS TO CASSADY SUBSTANTIALLY IN ACCORDANCE WITH THE PROVISIONS OF THE CONSTRUCTION CONTRACT.**

This fact was recognized by nearly every witness called to testify in this case. Thomas Taylor, president and general manager of Prudential Federal, testified that there were insufficient funds to make payments to subcontractors, and that the project “was thirsting for necessary money,” (T. 64); and “. . . the project was bogging down due to lack of money,” (T. 65); and there was considerable difficulty all through the fall keeping payments to Cassady up with the work. (T. 67).

Cassady testified that the first progress payment was insufficient in amount, and that that situation con-

tinued in existence throughout the course of the project, even after the execution of the supplemental agreement of February 1951. Mr. Cassady's testimony is illuminated by letters of complaint received from various subcontractors and materialmen which were received in evidence, and show the dissatisfaction that was developing. (T. 268, 275; Exs. H-32, H-33). Felt recognized that payments were in default, and that the project was imperiled. In a series of letters to Prudential Federal, Felt repeatedly called attention to the fact that payments were behind construction, and urged that everything possible be done to expedite recording of mortgages and bring progress payments up to date. (Exs. H-13, H-14). In an undated letter, obviously written in the late summer or fall of 1950 to Prudential Federal, Felt, over the signature of Scott, recognized that the "situation in Morningside Heights could become *grave*." (Ex. H-15) (Emphasis ours).

Felt's witness Mulcock, also testified that an orderly flow of funds into the project was necessary; that the problem was made more acute by reason of the Korean War; that lack of available cash prevented the contractor from obtaining cash discounts, etc. (T. 158). He further testified that work progressed more rapidly at the start than later. (T. 155, 157). A sample home, picked at random by the witness, lot 203, passed its first two inspections satisfactorily. (T. 145, 155). Deficiencies were not noted until May of 1951 on the third inspection. (T. 144-145, 155, 156). This was typical of the situation with respect to other units. (Ex. F-24). In other words the

project started out satisfactorily, but the deficiencies in necessary monies inevitably led to a break-down, resulting in deficiencies of workmanship and materials. (T. 157, 158). The witness Scott also recognized that the absence of an orderly flow of mortgage funds into the project would inevitably defeat its success. (T. 157, 158). *There is no evidence in the record to the contrary.*

In the face of such a record, we do not understand how the court could find that Felt did not breach any material obligations. It must be borne in mind that Felt had an obligation *to Cassady to pay according to the course of construction*, and that *said obligation was not qualified as to recording mortgages, sales program or any other manner*. It must also be borne in mind that the bond specifically provided the “surety shall not be liable under the bond . . . unless the Obligees . . . shall make payment to the principal in reasonable compliance with the terms of said contract as to payments . . .” This breach alone is sufficient to defeat the rights of all the plaintiffs to recover in their three separate actions. As was so well said by the Supreme Court of the United States in the case of *People of Puerto Rico vs. Title Guaranty Co.*, 227 U.S. 382, 335 S. Ct. 362:

“If within the time allowed for performance the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform.”

- B. WITHOUT THE CONSENT OF CASSADY, FELT ASSIGNED ITS RIGHTS UNDER THE CONSTRUCTION CONTRACT TO WRIGHT-WIRTHLIN, A FIRM OF REAL ESTATE AGENTS.

The next item of breach, which is established without contradiction in the record, is that Felt, without the consent of Cassady assigned a portion of its rights under the contract directly to Wright-Wirthlin, a firm of real estate salesmen. (Ex. H-31). This led to serious difficulties at the time the parties were attempting to wind up the project, as is shown by the undisputed testimony of Wilson Taylor, and corroborated in part by Thomas Taylor and other witnesses. There was available in February, 1952, approximately \$22,500 of mortgage funds. (T. 82, 85, 189). This would have been practically sufficient to complete the project in accordance with V. A. requirements. All of the interested parties were willing that said funds be so used. However, because of the fact that Felt had made an assignment to Wright-Wirthlin of monies which it would otherwise have been entitled to receive, it was impossible to apply these funds to the completion of the project. (T. 188-195).

**C. FELT NEGLECTED TO PROVIDE A POWER CONNECTION TO CASSADY, AS A RESULT OF WHICH HE WAS PUT TO THE EXPENSE OF HIRING AN ELECTRIC GENERATOR AT A COST IN EXCESS OF \$2,000.**

The record shows without dispute, and even Felt's witnesses admitted, that there was a failure to furnish a power connection as required by the construction contract. This occurred at the inception of the project when money was particularly scarce, as a result of which Cassady necessarily incurred expenses in an amount in excess of \$2,000 to provide a power generator at a time

when funds were dearly needed and should have been available for the payment of materialmen and subcontractors.

D. CASSADY PERFORMED EXTRA LABOR AND FURNISHED EXTRA MATERIAL, NOT CONTEMPLATED BY THE CONSTRUCTION CONTRACT, FOR WHICH HE WAS NEVER PAID OR REIMBURSED BY FELT.

In our statement of facts herein, we detailed at some length items of extra expense incurred by Cassady wholly undisputed by Felt or any other party to this litigation. There is no need to repeat the details of those extra expenditures here. In the aggregate those which are undisputed went into many thousands of dollars. It is significant that no officer of Felt was called to testify on its behalf, or to dispute the items of extra claimed by Cassady. The only witness called at all by Felt was Scott, whose connection with Felt terminated in the late winter or spring of 1951, who had no knowledge of what transpired after that time in connection with the project, and who did not participate in any way in the meetings where the matter of extra expenses was discussed. This failure on the part of Felt to rebut the evidence amounts to a tacit admission of its veracity.

In summary, the record shows without dispute that Felt never made payment to Cassady in accordance with the actual stage of construction, i.e., in accordance with its contractual agreement; that this failure immediately resulted in dissatisfaction among materialmen and subcontractors with consequent disharmony, loss of coordin-

ation, loss of efficiency, loss of buying power, and complete disintegration of effective organization; that Felt failed to reimburse Cassady for items of extra work and expense to the further prejudice of the work; that Felt failed to provide a required power connection to the further detriment of Cassady; and that Felt, without the consent of Cassady, and in violation of its contractual obligations, assigned a portion of its rights under its contract with Cassady, and that such assignment was a substantial impediment contributing to the ultimate failure to complete the construction in accordance with V. A. requirements.

### POINT III.

PRUDENTIAL FEDERAL WAS GUILTY OF SUBSTANTIAL AND MATERIAL BREACHES OF ITS CONTRACTUAL OBLIGATIONS, AND FAILED TO TAKE STEPS TO PREVENT OR MINIMIZE THE DAMAGES, WHICH CONTRIBUTED TO CAUSE THE ULTIMATE LOSSES SUSTAINED BY THE VARIOUS PARTIES TO THIS LITIGATION.

A. PRUDENTIAL FEDERAL FAILED TO OBTAIN LIEN WAIVERS FROM ACCOUNTANTS CONTRARY TO ITS OBLIGATIONS BOTH UNDER THE LOAN AGREEMENT AND THE DISBURSING AGREEMENT.

We have already discussed this matter under Point I hereof, and we can add nothing to it at this point.

B. PRUDENTIAL FEDERAL NEGLECTED TO HOLD UP PAYMENTS OR TO TAKE ANY OTHER ACTION TO REQUIRE THAT DEFECTIVE WORK ON THE PART OF CASSADY BE CORRECTED.



Under both the loan agreement and the supplemental agreement Prudential Federal had the right to withhold the disbursement of any funds until Cassady's work had been approved by the V.A. inspector. Prudential Federal regularly received reports of the V.A. inspector, and it also had its own inspector on the job. It therefore was fully apprised as to any deficiencies in workmanship. Notwithstanding this fact, it did *absolutely nothing* to require or compel Cassady to bring his work into line with V.A. requirements. We anticipate that Prudential Federal's attorneys will contend that the contractual provisions above referred to, were optional or elective with Prudential Federal, and not mandatory. That may well be true, in the sense that Prudential Federal would not be liable in damages to other parties for failure to take the action authorized by contract. It did, however, apart from any contractual obligation, have a common law duty to mitigate its own damages. Had it held up payments to Cassady as soon as deficiencies in workmanship were noted, the errors could have been readily corrected, instead of being compounded. Cassady would either have been required to correct the deficiencies or a new contractor would have been engaged to complete the work. While this might not have completely eliminated the loss, it would have substantially mitigated it. It does not appear that Prudential Federal even took the trouble to obtain bids from other contractors for completing the work when it became apparent that Cassady could not or would not complete in accordance with V.A. requirements. Instead, it sat supinely by, disbursing funds until

the mortgage proceeds were exhausted, apparently heedless of the consequences, and content to let the project "go to pot" and to salvage its profit from the assets of the bonding company.

C. PRUDENTIAL FEDERAL FAILED TO TAKE OVER  
THE COMPLETION OF THE PROJECT, AS IT HAD  
THE CONTRACTUAL RIGHT TO DO.

This sub-point is very closely allied with the one immediately preceding. Under both the loan agreement and the supplemental agreement, Prudential Federal had the right, upon the failure to complete the construction within the time provided by said contracts, to take over the project and complete the construction using the mortgage loan funds for that purpose. Thus, any time after June 1, 1951, Prudential Federal could have taken over and completed the project. As late as February 1952, the project could have been completed in accordance with V.A. requirements, according to the undisputed evidence for about \$26,500. There was then available in undischursed mortgage funds approximately \$22,500, so even at that late date, the project could have been completed for a loss of approximately \$4,000. Still Prudential Federal was unwilling to take any action, and not until August of 1952 did it even take the trouble to declare a default. If its failure in this regard was not a breach of any affirmative contractual obligation, it was at least a breach of its common law duty to mitigate its damages, and it should not now be permitted to recover from the bonding company those profits which it never needed to have lost, had it but taken a few simple steps in its own interest.

## POINT IV.

THE COURT DREW ERRONEOUS CONCLUSIONS OF LAW, BASED UPON FACTS UNSUPPORTED BY EVIDENCE, AND CONTRARY TO FAMILIAR PRINCIPLES OF LAW.

## POINT V.

UNDER THE PLAIN LANGUAGE OF THE BOND, A BREACH UPON THE PART OF ANY OF THE OBLIGEES, WOULD DEFEAT THE RIGHTS OF ALL, AND THEREFORE THE BREACHES ON THE PART OF BOTH FELT AND PRUDENTIAL DEFEAT THE RIGHTS OF ALL OBLIGEES.

Points IV and V involve essentially the same questions, and may be discussed together. Both involve the correct interpretation of two important provisions of the bond. It is and always has been the contention of the Hartford, that a breach upon the part of any of the obligees, would operate to exonerate the surety of and from any and all liability to either or any of the obligees. In making this contention we rely upon five separate grounds as set forth below.

A. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE BOND MAKES IT CLEAR THAT A BREACH UPON THE PART OF ANY OF THE OBLIGEES RELEASES THE SURETY AS TO ALL OF THEM.

The clear language of the bond itself, indicates that the protection afforded by the bond is subject to performance, by each and all of the obligees. The last whereas clause of the bond contains the following language:

“Said protection to be *subject to the performance* by the LENDER OBLIGEE, the TITLE OBLIGEE *and* the OWNER OBLIGEE of their respective obligations to the PRINCIPAL in connection with said contract; \*\*\*” (Emphasis ours.)

Condition 3 of the bond provides as follows:

“The SURETY shall not be liable under this Bond to the Obligees, and either of them, *unless* the Obligees, or either of them, *shall make payments to the PRINCIPAL in reasonable compliance with the terms of said contract as to payments*, and *each* shall perform *all other obligations to be performed by each obligee* under said contract *at the time and in the manner* therein set forth.” (Emphasis ours.)

We do not see that any meaning, other than that ascribed by the surety to the foregoing language can be given to it. Effect and meaning must be given to all of the language used in the bond. It is an elementary principle of contract law, that a party who breaches an agreement, is not entitled to look to the other party for damages. “An obligee would have no right to recover on the bond of a contractor, if it had itself breached the bond in any material respect.” 10 Appleman, Insurance Law & Practice, p. 51. Therefore, there would have been no point whatsoever in employing the foregoing language if the parties had meant nothing more than that a breach by one obligee would merely bar that obligee from recovery. Obviously the parties intended some thing more than this, and they used language which to us seems perfectly clear. Condition 3 recites that the “surety shall

not be liable" unless *each* shall perform *all* of the obligations to be performed *by each* obligee under the contract *at the time and in the manner therein set forth*. It is difficult to conceive what language the parties might have used to express more clearly their intent. Nor can any other meaning be reasonably ascribed to the aforesaid language.

**B. THE CIRCUMSTANCES OF THE PARTIES AT THE TIME THE BOND WAS WRITTEN, MAKE IT CLEAR THAT IT MUST HAVE BEEN THE INTENTION OF THE PARTIES THAT THE SURETY WOULD NOT BE LIABLE UNLESS EACH OF THE OBLIGEEES PERFORMED ITS OBLIGATION.**

While we do not believe that the language of the bond is ambiguous, if any ambiguity exists a resort to extrinsic evidence will certainly clarify the same.

Let us look to the circumstances of the parties at the time the bond was signed, in the light of which the bond must be construed. 9 Appleman, Insurance Law and Practice, p. 68; *Continental Bank v. Stewart*, 4 Ut. (2d) 228, 291 Pac. (2d) 890. The evidence shows without dispute that Cassady's financial statement was unsatisfactory, and that he was having considerable difficulty in obtaining a bond. Felt was so uncertain as to Cassady's financial position, that it was seriously considering the employment of another contractor to take on this work. Negotiations to obtain a bond in Salt Lake City were completely without avail, and the bond was finally written in Los Angeles with the financial backing of a third party brought into the picture by Cassady. The con-



struction which Prudential Federal and the Title Company would have the court place on the bond, would make the bonding company a surety not only for Cassady, but also for Felt. In view of Cassady's precarious financial position, it must have been apparent to all concerned, that this project could succeed only if Cassady received progress payments timely, and had an orderly flow of mortgage funds into the project to keep payments to materialmen and suppliers up to date. It is inconceivable that in light of this background, the bonding company would have undertaken to guarantee performance on the part of Cassady without insisting that every party to the obligation fully perform its contract. To construe otherwise, would permit Felt to deliberately shipwreck the project and then throw the entire loss on the bonding company.

**C. THE LANGUAGE OF THE BOND WAS NOT DRAFTED BY REPRESENTATIVES OF THE SURETY COMPANY, BUT RATHER BY REPRESENTATIVES OF THE OBLIGES, AND PARTICULARLY PRUDENTIAL FEDERAL, AND THEREFORE ANY AMBIGUITIES IN THE LANGUAGE OF THE BOND SHOULD BE CONSTRUED MOST STRONGLY AGAINST THE OBLIGES RATHER THAN AGAINST THE SURETY.**

While we recognize that ordinarily ambiguous language of a bond will be construed most strongly against a surety company, that rule should have no application in this case. The rule found its origin in the general principle that in construing contract documents, ambiguous language will be construed most strongly against the



party who employed it. However, that reason is wholly non-existent in the case at bar. This bond was not on a printed form, carefully drawn and prepared by a battery of legal experts for the surety, as is frequently the case. On the contrary, the language is not that of the surety at all. The stipulations and admissions of Prudential Federal's attorney, and the undisputed testimony of C. P. Cassady, Deco Van Horn, and Mr. Blackburn, establish beyond question, that the bond form suggested by the Hartford was wholly rejected, and the bond was finally written in accordance with a form prepared by representatives of Prudential Federal. The language of the bond on which the Hartford relies, is language drafted by Prudential Federal's attorney.

This comes within the provision of the Restatement of Contracts, Sec. 236 (d) :

“Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.”

D. THE OBLIGEES THEMSELVES, AND PARTICULARLY PRUDENTIAL FEDERAL, INTERPRETED THE BOND, THE SAME AS THE SURETY INTERPRETED THE BOND, AND ALL PARTIES INTERPRETED IT, AS THE SURETY NOW INTERPRETS IT.

The construction adopted by the bonding company was set forth by the surety's attorney, Mr. Wilson E. Taylor in a letter as early as September, 1952, addressed to Prudential Federal's attorney, to which no dissent

was made. The undisputed testimony of Mr. Wilson E. Taylor shows that Prudential Federal's attorney concurred in this interpretation in an oral conference at San Francisco in September of 1952. The acts of the parties, and the interpretation which they placed on the language of the bond, is good evidence of the intention of the parties.

E. UNDER WELL ESTABLISHED LAW, THIS COURT CANNOT REFUSE TO GIVE EFFECT TO THE PLAIN MEANING AND INTENT OF THE LANGUAGE USED BY THE PARTIES, AND AS THE SURETY HAS LIMITED ITS LIABILITY IN APT TERMS, THE COURT CANNOT UNDER THE GUISE OF CONSTRUING THE CONTRACT, CREATE A GREATER LIABILITY THAN THE SURETY CONTRACTED.

It is not for the court to ascribe to the language of the parties a meaning never intended by them.

In the early case of *Smith v. Bowman*, (Ut.), 88 Pac. 687, this court said:

“In determining the true intention of the parties to the bond in question, we must look not to disconnected sentences, or only a portion of a sentence, taken from the context, but we must look at the bond as a whole, and consider it in connection with the contract attached to it and for the security of which it was given. \*\*\* The parties to the bond had the undoubted right to contract as to *who should and who should not be benefited by its obligations*. \*\*\*

“\*\*\* The parties having thus expressed themselves unambiguously, we can see no reason why this court should strain after reasons for thwart-

ing their obvious purpose in an endeavor to read some one into the bond not intended to be benefited by it. \*\*\* These cases but illustrate the principle that the *liability of a surety on his bond is entirely dependent upon his covenants and agreements so construed as not to extend the liability by implication beyond the terms of his contract.* \*\*\*” (Emphasis ours.)

The rule there laid down, has been invariably followed since that time. In *Blyth-Fargo Co. v. Free*, (Ut.), 148 Pac. 427, this court, speaking through Justice Frick, said:

“It certainly cannot be questioned that appellant, like all other persons, *had a right to limit and define the precise obligations it was willing to and did assume*, regardless of the terms of the contract. \*\*\*” (Emphasis ours.)

And further:

“This being so, *we have no right to extend the scope and effect of the bond beyond what the parties thereto*, from the language used by them, must have intended it should have. Nor are we permitted to have recourse to only a few general expressions in order to determine the intention of the parties. In order to arrive at the true intention of the parties, all that is said in the bond must be considered and *where the bond contains express restrictions and limitations, as is the case here, the courts have no right to look to other instruments for the purpose of extending the scope and effect of the bond.* \*\*\* When we come to lay down the rules of construction, however, and give scope and effect to the language used by the parties in written contracts or documents, all parties have the right to insist that *we shall be careful*

*in not extending the scope and effect of their language beyond what they intended it to have, and to that end they have a right to insist that courts be bound by the usual ordinary rules of construction. The question here is, not whether under the circumstances, it would not be more just to permit respondent to recover on the bond; but the question is whether it was the intention of the parties to the bond that it should have the right to do so. \*\*\**" (Emphasis ours.)

And further:

*"Where limitations and restrictions are placed in a BOND IN EXPRESS TERMS, it requires no argument to prove that rights in conflict with or in derogation of such limitations and restrictions may not be inferred and enforced. To do so would be to violate every canon of interpretation."* (Emphasis ours.)

In a concurring opinion Chief Justice Straup said:

*"I concur. In determining the meaning of a written contract, the primary factor is to ascertain the intention of the parties. That largely is to be ascertained from the language employed by them. As to sureties, their liability is not to be extended by implication beyond the terms of their contract. They have the right to stand strictly on the express terms of it and to insist that they be not held responsible for any liability or obligation not directly expressed within it. When on such consideration the intention of the parties as so expressed is once ascertained, then the contract with such ascertained intention is given effect and applied, not liberally or strictly, nor generously or niggardly, but truly completely, and conformably with such ascertained intent of the parties."* (Emphasis ours.)

In *W. H. Walker Realty Co. v. American Surety Co. of N.Y.*, (Ut.), 211 Pac. 998, this court said:

“The plain stipulations of the undertaking of a surety company which is paid for undertaking the risk will be enforced in its favor the same as those of a gratuitous surety.”

In *Paxton v. Spencer*, (Ut.), 265 Pac. 751, the rule was reiterated in the following succinct language:

“The liability of the surety must be determined and measured by the terms of the bond.”

Perhaps the most recent expression is found in *Boise-Payette Lumber Co. v. Phoenix Indemnity Co.*, (Ut.), 280 Pac. (2d) 418, where this court quoted with approval from *Blyth-Fargo Co. v. Free*, *supra*, as follows:

“‘Appellant, like all others competent to contract, had the right to enter into just such a contract as it saw fit and to limit its obligations in any particular it deemed proper, and, if the company or contractor were dissatisfied with the limitations contained in the bond as executed, either, or both could refuse to accept it.’”

The Utah decisions are entirely harmonious with the general rule as set forth by the text writers. See 50 Am. Jur. 1114-1115; 4 Williston on Contracts, pages 3491-2, 3547; 5 Couch's Cyclopedia of Insurance Law, pages 4262 to 4267; Stearns, Law of Suretyship, Fifth Ed. pages 12, 13 and 107; Restatement of Security, Sec. 88.

## POINT VI.

FELT BEING A NON-RESIDENT CORPORATION AND HAVING FORFEITED ITS CORPORATE FRANCHISE TO DO BUSINESS IN THIS STATE, HAS NO STANDING TO MAINTAIN ITS ACTION IN THE UTAH COURTS.

We previously noted that Felt was incorporated as a Nevada corporation in the spring of 1950, and thereafter qualified to do business in the State of Utah. In 1952, prior to the commencement of the litigation between the several lien claimants on the one hand and Felt, Prudential Federal and Hartford on the other, Felt forfeited its franchise to do business in the State of Utah, for failure to pay taxes. Its franchise was subsequently reinstated in accordance with Utah law, but was again forfeited during the pendency of the instant litigation. It has never been reinstated, and had not been reinstated up to the time of trial of the cases at bar. It is the contention of the Hartford, *First*: That when Felt's corporate rights in Utah were forfeited for non-payment of taxes, any rights which it then had were forever lost, and could not be revived or reinstated by again qualifying to do business in Utah; and *Secondly*, even if such rights were not forever lost, Felt in any event had no right to maintain the instant suit against the Hartford at a time when its corporate rights in Utah had been forfeited.

Sec. 59-13-61, U.C.A., 1953, provides as follows:

“If a tax computed and levied hereunder is not paid before 5 o'clock p.m. on the last day of the eleventh month after the date of delinquency,



the corporate powers, rights and privileges of the delinquent taxpayer, if it is a domestic corporation, shall be *suspended*, and if a foreign corporation, it shall thereupon *forfeit its rights* to do intrastate business in this state.” (Italics ours.)

It will be noted that a distinction is made between domestic and foreign corporations. Whereas, the rights of domestic corporations are merely “suspended” for non-payment of taxes, the rights of foreign corporations are “forfeited.” The words “suspend” and “forfeit” do not carry the same legal significance, and it appears to us quite obvious that the Legislature intended to make a distinction between the consequences of non-payment of taxes on domestic and foreign corporations.

The significance to be attached to the word “suspend” was set forth by the Missouri Court in construing a statute somewhat similar to ours in *Leibson v. Henry*, 356 Mo. 953, 204 S.W. (2d) 310, as follows:

“‘Suspend’ ordinarily means temporary cessation; in its natural signification, something which may not be permanent rather than that which necessarily is so; \*\*\*”

The word “forfeit” carries a different connotation. In 23 Am. Jur., commencing at page 599, it is defined as follows:

“In a strict signification, a forfeiture is a divestiture of property without compensation, in consequence of a default or an offense, and the term is used in such a sense in this article. A forfeiture, as thus defined, is imposed by way of

punishment, not by the mere convention of the parties, but by the lawmaking power, to insure a prescribed course of conduct.”

And further:

“The primary and legal meaning of the word ‘forfeit’ is ‘to lose.’”.

The following definitions are found in Black’s Law Dictionary, 3rd Ed.:

“To lose an estate, a franchise, or other property belonging to one, by the act of the law, and as a consequence of some misfeasance, negligence, or omission. \*\*\*

“\*\*\* To incur loss through some fault, omission, error, or offense; loss. \*\*\*”

There are many cases to the same effect. As illustrative we cite the following: *State v. Cook*, (La. App.), 13 So. (2d) 473, quoting with approval the American Jurisprudence definition above set forth; *Rekas v. Dopkavich*, 362 Pa. 292, 66 A. (2d) 230, where the court said:

“As a verb, ‘forfeit’ in its primary sense means ‘to lose’; and that is also its legal meaning. 26 C.J. Sec. 4, p. 891, 37 C.J.S., Forfeit; 23 Am. Jur. Sec. 2, p. 599.”,

and *Sands v. Holbert*, 93 W. Va. 574, 117 S.E. 896, where the court said:

“To forfeit is to incur loss through some fault, omission, error, or offense. It is synonymous with ‘loss.’”

Under the plain and unequivocal language of the statute, any rights which Felt may ever have had to proceed against the Hartford were forfeited and forever lost, when its franchise was revoked for non-payment of taxes in 1953. Sec. 16-9-3, U.C.A., 1953, sets forth the disabilities of non-complying foreign corporations. In so far as material here, that statute provides as follows:

“Any foreign corporation doing business within this state and failing to comply with the provisions of Sections 16-8-1, and 16-8-2, shall not be entitled to the benefit of the laws of this state relating to corporations, *and shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state on any claim, interest or demand arising or growing out of or founded on any tort occurring, or of any contract, agreement or transaction made or entered into, in this state by such corporation or by its assignors or by any person from, through or under whom it derives its interest or title or any part thereof.*” (Emphasis ours.)

Under this statute, it is clear beyond question, that Felt had no right to maintain the instant suit in the Utah courts. Such is the uniform effect given to such statutes wherever they have been construed by the courts. In *Aalwyns Law Institute v. Martin*, (Cal.), 159 Pac. 158, the court said:

“When a corporation has failed to pay its license tax, and a *forfeiture* of its charter has been declared, it *ceases to be a corporation.*” (Emphasis ours.)

In the later case of *U.S.F. & G. Co. v. Matthews*, (Cal. App.), 274 Pac. 769, the court said:

“In consequence of the fact that in 1907 the plaintiff corporation failed to pay its state corporation license tax, its corporate charter was at that time forfeited.”

And the court further said:

“That upon the forfeiture of the license of a corporation it is dead, and, consequently, rendered incapable of performing any act, is attested by a long line of authorities in this state. See *Rossi v. Claire*, 186 Cal. 544, 549, 199 P. 1042; *Sharp v. Eagle Lake Lumber Co.*, 60 Cal. App. 386, 389, 212 P. 933; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 580, 89 P. 335, *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 P. 1040; *Van Langingham v. United Tuna Packers*, 189 Cal. 353, 208 P. 973. It therefore becomes apparent that the corporation itself had no power to assign the judgment. \*\*\*

\* \* \*

“In the case of *Aalwyn’s Law Institute v. Martin*, 173 Cal. 21, 159 P. 158, in principle it is held that when a corporation has failed to pay its license tax, and by reason thereof its charter has been forfeited, the corporation is dead, and that in its behalf the trustees of the corporation are the only persons or representatives who have any standing in court. It is therefore manifest that as the corporation itself has no power or capacity to act in the premises, and as its directors, acting as trustees for the corporation, gave no notice of appeal, the notice purporting to emanate from the corporation was a nullity. *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508, 69 S.E. 822, 32 L.R.A. (N.S.) 446.”

Perhaps the most recent decision on that subject from that jurisdiction is *Reed v. Norman*, (Cal. App.), 302 Pac. (2d) 690, where the court said:

“Respondents Norman and Haskins move to dismiss plaintiff’s appeal upon this ground: That the complaint asserts an alleged cause of action belonging to defendant Norman Decorating Co., Inc., a domestic corporation, and plaintiff’s action, brought by him as a stockholder, is derivative in nature; that the corporate right to do business has been suspended for nonpayment of its franchise tax; that there has been no reinstatement or revivor of that right, and hence the corporation cannot prosecute or defend any suit; \*\*\*

\* \* \*

“During such suspension the corporate disability extends to the defense of an action and the right of appeal from an adverse judgment. *Boyle v. Lakeview Creamery Co.*, 9 Cal. 2d 16, 19-20-68 P. 2d 968; *Fidelity Metal Corp. v. Risley*, 77 Cal. App. 2d 377, 383, 175 P. 2d 592. \*\*\*

\* \* \*

“\*\*\* As the court declared in the *Ransome-Crummey Co. v. Superior Court*, supra, 188 Cal. 393, 397, 205 P. 446, 448: ‘During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes.’ The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision. See, also 6A Cal. Jur. No. 864, p. 1469. That case is controlling here. There is no right to maintain this action.”

See also the annotation in 97 A.L.R. pp. 483-484, where it is said:



“The power of a corporation to sue and to be sued is extinguished at common law when its existence is terminated; and this extinction involves, as a matter of procedure, the abatement of any action to which it may be a party, pending at the time of its dissolution, or the bar of any subsequently commenced action.”

The case closest in point of fact which our research has discovered, and therefore the one we consider most helpful on this point, is *Leibson v. Henry*, 356 Mo. 953, 204 S.W. (2d) 310. In that case the Court construed the provisions of a Missouri statute, somewhat similar to our own, which provided as follows:

“If any corporation shall fail to comply with the provisions of this article on or before the thirty-first day of December, the corporate rights and privileges of such corporation shall be *forfeited*, and the Secretary of State shall thereupon cancel the certificate, or license, of such corporation by appropriate entry on the margin of the record thereof, whereupon all the powers, privileges and franchises conferred upon such corporation by such certificate, or license, shall subject to rescission as in this article provided, *cease and determine*, \*\*\*” (Emphasis ours.)

The court then quoted with approval from the decision in *State v. A.B. Collins & Co.*, 34 F. Supp. 550, as follows:

“It would be difficult to conceive of any language which could be more expressive of dissolution of corporate existence than the language used in this statute. Failure to comply with the provisions of law, so says the statute, ipso facto results in the *forfeiting* of the corporate rights and



privileges of such corporation. The Secretary of State does not forfeit those rights and privileges. They are *ipso facto forfeited*." (Emphasis ours.) The court then went on to say :

"It is not even debatable that mere suspension (to say nothing of forfeiture) of corporate powers would of necessity so disable a corporation as to bring about at least a temporary cessation of its usual and ordinary business during the period of suspension, because in the absence of its franchise, or license, it could lawfully do nothing."

And it concluded as follows :

"From the plain language of the statute, and upon the authority of the cases cited, our conclusion is that the effect of a forfeiture as provided in section 5091 to ipso facto, completely conclude the corporate entity, and without judicial action except and subject to the right of rescission upon the application and showing required by Sec. 5093."

#### POINT VII.

THE TITLE COMPANY DID NOT SUSTAIN ANY COMPENSABLE DAMAGE, AND THEREFORE IS NOT ENTITLED TO RECOVER ANYTHING FROM THE HARTFORD.

It is of course the general rule that attorneys' fees are not recoverable items of damage unless specifically stipulated for by contract, or unless authorized by some special statute. It is stated thus in 15 Am. Jur. pp. 550-51, Damages Sec. 142:

“As a general rule, in the absence of any contractual or statutory liability therefor, attorneys’ fees and expenses incurred by the plaintiff or which the plaintiff is obligated to pay, in the litigation of his claim against the defendant, aside from usual court costs, are not recoverable as an item of damages, either in an action ex contractu or an action ex delicto. *Nor are attorneys’ fees and other expenses of former litigation, particularly suits prosecuted by the plaintiff against the defendant, recoverable in a subsequent action.*” (Emphasis ours.)

To the same effect in *Oleck on Damages*, p. 596, Sec. 287:

“As a general rule, litigation expenses and costs are not recoverable as costs in actions at law. This general rule applies to such litigation expenses as attorneys’ fees.”

The rule applies equally to prior litigation as to litigation then in suit. *Oleck on Damages*, p. 603, Sec. 290:

“The rule is also well established that attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof, and this rule applies equally in courts of law and in courts of equity.”

The reasons for the rule are well explained by the author at pages 605-607, Sec. 290 as follows:

“The policy of the rule is obvious. If the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an inde-

pendent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment. \*\*\* When a defendant breaches a lease, violates the terms of a contract, commits a tort, misrepresents goods sold, unlawfully retains the personal property of the plaintiff, or remains in possession of real estate after the expiration of his tenancy, necessitating proceedings, his conduct is wrongful and may require a suit against him by the plaintiff. Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent.

\* \* \*

“\*\*\* It is obvious that if the defendant in the Smith case, *supra*, could not maintain an action for damages which he had suffered by an unfounded prosecution, the converse of the proposition would be true, that is, a plaintiff can not bring an action against a defendant who has made a groundless and causeless defense. Equal justice forbids treating one party to a suit more generously than the other.”

Utah is committed to this rule. See *Dahl v. Prince*,

119 Ut. 556, 230 P. (2d) 328, where this court said:

“With respect to the award of \$200 for attorney fees as damages for depriving plaintiff of possession by writ of attachment, the judgment was clearly erroneous. There was no contract involved which authorized the award of counsel fees and there was no basis for an award of punitive damages. See 15 Am. Jur. p. 551, 25 C.J.S. Damages, Sec. 50, p. 531, and Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869. Cf. St. Joseph Stock Yards Co. v. Love, 57 Utah 450, 195 P. 305, 25 ALR 569.”

The title company has pointed neither to any contractual provision nor to any statute which would circumvent the general rule and permit it to recover attorney's fees as general damages in this litigation. It stands in exactly the same position as would have Prudential Federal, had it not had the benefit of title insurance, and had had the expense of defending itself in the prior litigation. In that suit, the legal acts of Prudential Federal were called into question. Substantial rights were asserted against it, not only concerning priority of liens but also that Prudential Federal was holding certain monies which should have been paid to others. Ultimately, Prudential Federal contributed \$10,000 toward a settlement of the lien claims. It seems clear beyond question that if Prudential Federal had borne its own defense expenses in the lien claim litigation, it could not now recover them from the Hartford, as an item of general damages. We do not see how the title company can be in any better position.

As to court costs, they are awarded as of course to the prevailing party. However, in the prior litigation

there was no prevailing party. There was a general compromise of rights to which all parties to that litigation agreed. Therefore neither was entitled to recover costs against the other. Since Prudential Federal could not, under any view of the case, recover court costs in the prior litigation, its insurer can be in no better position in the instant suit.

### CONCLUSION

The judgment in favor of Felt should be reversed for the following reasons:

1. Felt was guilty of substantial and material breaches of its contractual obligations to Hartford's principal.

2. Felt was a co-adventurer with Hartford's principal and therefore has no right to recover against the Hartford for loss of profits.

3. Prudential Federal was guilty of substantial and material breaches, which under the terms of the bond would defeat Felt's rights to recover against the Hartford.

4. Any rights which Felt may have acquired, were forfeited under the terms and provisions of Sec. 59-13-61, U.C.A., 1953.

5. Felt has no standing to maintain this action in the Utah Courts under the provisions of Sec. 16-9-3, U.C.A. 1953.

The judgment in favor of Prudential Federal should be reversed for the following reasons:

1. Prudential Federal was guilty of substantial and material breaches of its contractual obligations.

2. Prudential Federal failed to take reasonable steps to mitigate its damages.

3. Felt was guilty of substantial and material breaches of its contractual obligations, which under the terms of the bond defeat any rights which Prudential Federal might have against the Hartford.

The judgment in favor of the Title Company should be reversed for the following grounds and reasons:

1. Both Felt and Prudential Federal were guilty of substantial and material breaches, which under the terms of the bond, defeat any rights which the Title Company might assert against the Hartford.

2. The Title Company has not sustained any compensable damage.

In each case the judgments should be reversed with directions to enter judgment in favor of the defendant and against the plaintiff, no cause of action.

Respectfully submitted,

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