

1957

Prudential Federal Savings & Loan Association v. Hartford Accident & Indemnity Co : Brief of Prudential Federal Savings & Loan Association, Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the FILED
STATE OF UTAH JAN 20 1957

Clerk, Supreme Court, Utah

PRUDENTIAL FEDERAL
SAVINGS & LOAN ASSOCIA-
TION, a corporation,
Plaintiff and Respondent,

vs.

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

Case No. 8720
UNIVERSITY UTAH
8719

JAN 10 1958

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BRIEF OF PRUDENTIAL FEDERAL SAVINGS
& LOAN ASSOCIATION, RESPONDENT

FRANKLIN RITER and
HARRY D. PUGSLEY
Attorneys for Respondent

Prudential Federal Savings &
Loan Association

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} Case No. 8720

BRIEF OF PRUDENTIAL FEDERAL SAVINGS
& LOAN ASSOCIATION, RESPONDENT

STATEMENT OF FACTS

Respondent adopts generally Appellant's statement of facts, but must add certain omitted matters. This case was consolidated for trial with two other cases likewise involving suits against Hartford Accident & Indemnity Company and all arising out of the same Contract Bond (Ex. Pr-1) which reads as follows, (Appellant quoted only certain portions):

“KNOW ALL MEN BY THESE PRESENTS:

That We, CASSADY COMPANY, Inc., a Utah corporation, and C. P. CASSADY of Arcadia, California, (hereinafter called the PRINCIPAL) and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, with its principal office in Hartford, Connecticut, and authorized to transact surety business in the State of Utah, (hereinafter called the SURETY) are held and firmly bound and obligated unto PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation of the United States of America, (hereinafter called LENDER OBLIGEE) and unto FELT SYNDICATE, a corporation of the State of Utah, (hereinafter called the OWNER OBLIGEE), and unto PACIFIC COAST TITLE INSURANCE COMPANY, a corporation of the State of Utah (hereinafter called TITLE OBLIGEE), as their respective interests may appear as obligees in the sum of SEVEN HUNDRED SIXTY THREE THOUSAND AND NO/100 (\$763,000.00) DOLLARS lawful money of the United States of America, for the payment of which PRINCIPAL AND SURETY bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the PRINCIPAL has entered into a contract with the OWNER OBLIGEE for the construction of dwelling houses and appurtenant improvements in a housing project known and designated as Morningside Heights Subdivision, located in Salt Lake County, Utah, which contract is by

reference incorporated herein and made a part hereof; and

WHEREAS, the LENDER OBLIGEE has agreed to lend to each qualified borrower, upon the security of a first lien mortgage, a sum of money to be used in the construction of a dwelling house and appurtenant improvements upon a lot in said housing project owned by the borrower; and

WHEREAS, the funds loaned by the LENDER OBLIGEE on the security of said first lien mortgage will be used with the consent of the borrower in making payments due the PRINCIPAL under said contract; and

WHEREAS, the TITLE OBLIGEE will issue ATA title insurance policies on each lot or parcel of real estate upon which the LENDER OBLIGEE makes a mortgage loan as herein stated; and

WHEREAS, the LENDER OBLIGEE, TITLE OBLIGEE, and OWNER OBLIGEE each desire protection as their interests may appear, in 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;

NOW, THEREFORE, the condition of this obligation is such that if the PRINCIPAL well and truly performs all the undertakings, covenants, conditions and agreements of said contract on its part and fully indemnifies and saves harmless the obligees from all loss,

cost, 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.

The foregoing, however, is subject to the following provisions:

1. The LENDER OBLIGEE shall have prior right and lien under this Bond as against the other Obligees herein named.

2. The SURETY and PRINCIPAL agree that, in the event the PRINCIPAL shall default in the performance of the undertakings, covenants, terms, conditions, and agreements of said contract on its part, the SURETY will have the option to cure and remedy said default and complete performance of said contract.

3. 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 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.

4. The SURETY agrees that any right of action or claim that either of the Obligees herein might have under this Bond may be subordinated to the other, and that such subordination will in no manner invalidate or qualify this Bond. The SURETY further agrees to recognize any such agreement of subordination and priority upon being furnished with signed evidence thereof.

5. No suit, action, or proceeding by reason of any default, whatever, shall be brought on this Bond after two (2) years from the date on which the final payment under the contract falls due, provided, however, that in the event there exists or is pending any collateral litigation which has the effect of making it impossible for any Obligee under this Bond to determine its rights hereunder, a suit, action, or other proceeding under this Bond may be instituted within six (6) months after entry of final judgment in said collateral litigation.

6. The prior written approval of SURETY shall be required with regard to any changes or alterations in said contract where the cost thereof, added to prior changes or alterations, causes the aggregate cost of all changes and alterations to exceed 10 per cent of the original contract price; but, except as to the foregoing, any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the Obligees of any extensions of time for the performance of the contract, or any other forbearance on the part of either the Obligees

or PRINCIPAL to the other, shall not in any way release SURETY or PRINCIPAL of the obligations of this instrument, notice of SURETY of any such alterations, extensions, or forbearance being hereby waived.

7. The aggregate liability of SURETY hereunder to the Obligees or their assigns is limited to the penal sum above stated, and SURETY, upon making any payment hereunder shall be subrogated to, and shall be entitled to an assignment of, all rights of the payee, either against PRINCIPAL or against any other party liable to the payee in connection with the loss which is the subject of the payment.

SIGNED, SEALED AND DATED
21st day of July, 1950.
PREMIUM ON THIS
BOND IS \$7,630.00

CASSADY COMPANY, INC

By /s/ C. P. Cassady
 /s/ C. P. Cassady

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

By /s/ A. L. Blackburn
 Attorney-in-Fact"

All parties knew that the financing program was such that individual loans were to be made to veteran purchasers of the lots in Morningside Heights and that until and when each lot had been sold, a note and mortgage executed, the proposed

veteran-borrower approved by the U. S. Veterans Administration, the mortgage actually recorded and the A-T-A policy of title insurance issued, Prudential had no right or duty to disburse any funds. This same procedure had to be repeated 100 times as such was a prerequisite to the disbursing of funds on each and all of the 100 separate loans.

Even as Hartford complains that it's bonded contractor, Cassady, had problems on procurement of materials because of the outbreak of the Korean crisis shortly following the execution of the Contract Bond, so too, the selling of these lots to veterans for future construction of dwellings became more difficult in light of the Korean crisis and their possible recalling into active duty.

As shown by Appellant's statement of facts, problems arose between Cassady as contractor, the suppliers of materials, Felt and Prudential throughout the last five months of 1950. In compromise settlement of such difficulties, the contractor, Cassady which had agreed to complete all 100 houses within 180 days from July 19, 1950 (Exh. PR-2), sought and received an extension of time for completion up to June 1st, 1951. This was by "Supplemental Agreement" dated February 16, 1951 (Ex. PR-6).

The said compromise settlement of prior difficulties and differences so dated February 16, 1951

provided that Prudential was given certain options as to disbursement of the funds. The said Supplemental Agreement (PR-6) provided in part,

“D. The balance of the loan proceeds, plus and deposited funds and the down payment, if any, shall be disbursed by PRUDENTIAL from and after the date of this Supplemental Agreement at such time or times, 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 and to assure the payment of all subcontractors, materialmen and laborers engaged in work on said project. The decision of PRUDENTIAL as to the time, manner, method and amount of payments shall be conclusive and shall be binding upon the parties hereto. Notwithstanding the immediate foregoing provision, PRUDENTIAL is hereby authorized and empowered to withhold ten per cent (10%) of all loan proceeds and down payments and not pay the same until the dwelling houses shall have passed final inspection by FEDERAL HOUSING ADMINISTRATION; VETERANS ADMINISTRATION or PRUDENTIAL and all qualifications have been met to secure mortgage insurance by Federal Housing Administration or guarantee by Veterans Administration.”

In partial recognition of the increase of costs and in an apparent effort to compromise the claims made by Cassady as to Felt's responsibility therefor, this Supplemental Agreement of February 16, 1951

in paragraph I of Article III increased the price per house to be paid to Cassady. The parties also confirmed and approved all disbursements of the funds paid by Prudential to Associated Accountants and then Felt, Cassady and Accountants "hereby irrevocably admit that they, and each of them, have secured from Prudential an accounting of the proceeds of all mortgage loans and down payments and the disbursal of same by Prudential to the date hereof." And then they further, "hereby admit, agree and declare that Prudential has performed all of its obligations under said Primary Contract and Disbursing Contract and supplement thereto dated the 22nd day of August 1950, from the respective dates thereof to the date of this Supplemental Agreement."

This said document (PR-6) extending the time of completion, establishing new disbursing procedures and discretionary powers in Prudential and acknowledging the full accounting by Prudential to date, was then signed by all parties. The appellant, as the Surety Company, did not dissent or object to the document or the provisions but affixed its approval in the following terms "Hartford Accident and Indemnity Company, as Surety on the bond of Cassady Company, Inc. does hereby consent to amended paragraphs 22 and 23 and 7 of the construction contract in connection with which its bond has been given."

It is noted from that February 16, 1951 Supplemental Agreement, that the changes approved by Hartford are: Paragraph 7 which modified the former contract to extend the time of completion from January 19, 1951 to June 1, 1951; paragraph 22 is the one increasing the price per house; and paragraph 23 grants to Prudential discretionary powers of disbursement. Those three were the only specific changes made in the primary construction contract of July 19, 1950; upon which the bond was issued, thus there was no occasion for Hartford's endorsement in February of 1951 to be any broader.

As no issue or complaint is made by the appellant as to the amount of the damages, \$88,723.85, found by the trial Court to have been suffered by Prudential, we shall not add any of the many facts testified to in support of that judgment. We join with Appellant in conceding that such amount was properly found and awarded by the trial Court.

SPECIAL NOTE:

1. In preparing this brief the term "Prudential" refers to Prudential Savings & Loan Association; the term "Felt" refers to Felt Syndicate, Inc.; the term "Cassady" refers to Cassady Co., Inc. and C. P. Cassady; and the term "Pacific" refers to Pacific Coast Title Insurance Company.

2. In referring to the transcript of testimony,

the black typed numerals are used instead of the red numerals.

POINTS

POINT I

THE FINDINGS AND JUDGMENT IN FAVOR OF PRUDENTIAL ARE SUPPORTED BY ADEQUATE, COMPETENT AND MATERIAL EVIDENCE.

POINT II

THIS IS A LAW CASE AND THE FINDINGS OF THE TRIAL COURT ARE ENTITLED TO APPROVAL BY THE SUPREME COURT IF SUPPORTED BY COMPETENT EVIDENCE.

POINT III

THE PARTIES TO THE PRIMARY CONSTRUCTION CONTRACT AND THE CONTRACT BOND COMPROMISED AND SETTLED ANY AND ALL PRIOR CLAIMED CONTRACT BREACHES BY THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951.

POINT IV

HARTFORD IS ESTOPPED TO DENY THAT THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951 COMPROMISED AND SETTLED PRIOR ALLEGED BREACHES BY FELT AND PRUDENTIAL.

POINT V

EXPRESSIONS OF OPINION AS TO THE CONSTRUCTION OR INTERPRETATION OF A CONTRACT BY ONE OF THE PARTIES THERETO AFTER A CONTROVERSY HAS ARISEN AS TO THE LIABILITY TO IT OF THE OTHER PARTY TO THE CONTRACT AND NOT ACTED UPON BY THE OTHER PARTY HAVE NO WEIGHT OR RELEVANCY IN INTERPRETING THE CONTRACT.

POINT VI

THE RULE GOVERNING THE INTERPRETATION OF CONTRACTS THAT WHERE A CONTRACT BEARS MORE THAN ONE REASONABLE MEANING AN INTERPRETATION IS PREFERRED WHICH OPERATES MORE STRONGLY AGAINST THE PARTY FROM WHOM IT PROCEEDS HAS NO APPLICATION IN THIS CASE. HARTFORD'S REPRESENTATIVE CRITICALLY EXAMINED A PRELIMINARY DRAFT OF THE BOND MADE BY PRUDENTIAL, ALTERED IT SEVERAL RESPECTS; CAUSED THE BOND TO BE TYPEWRITTEN IN HIS OWN OFFICE AND FINALLY EXECUTED IT ON BEHALF OF HARTFORD. THE BOND IS IN LEGAL EFFECT AN INSURANCE CONTRACT AND HARTFORD IS A COMPENSATED SURETY AGAINST WHOM THE BOND WILL BE CONSTRUED FAVORABLE TO THE OBLIGEEES.

POINT VII

PRUDENTIAL DID NOT VIOLATE ANY OF ITS CONTRACTUAL OBLIGATIONS OWING BY IT EITHER TO HARTFORD, CASSADY OR FELT SUCH AS WOULD BAR ITS RECOVERY OF DAMAGES.

POINT VIII

IN ARRIVING AT A CORRECT CONSTRUCTION AND INTERPRETATION OF THE BOND, THE COURT SHOULD RECOGNIZE THAT THE ACTIVITIES OF PACIFIC AND ITS RELATIONSHIP TO THIS CASE ARE WHOLLY IMMATERIAL AND IRRELEVANT, AND THAT PRUDENTIAL IS A THIRD PARTY BENEFICIARY UNDER THE CONTRACT BETWEEN FELT AND CASSADY DATED JULY 19, 1950 (EX. PR-2). THE COURT SHOULD THEN APPLY CERTAIN WELL RECOGNIZED RULES OF INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

POINT IX

VIOLATIONS (IF SUCH VIOLATIONS OCCURRED) BY FELT OF ITS CONTRACTS WITH CASSADY CANNOT BE IMPUTED TO PRUDENTIAL SO AS TO BAR PRUDENTIAL'S RECOVERY AGAINST HARTFORD ON THE BOND. THE BOND SECURED DISTINCT AND SEPARATE RIGHTS OF THE OBLIGEEES. HARTFORD ASSUMED DISTINCT OBLIGATIONS TO PRUDENTIAL WHICH DID NOT RUN TO EITHER FELT OR PACIFIC AND PRUDENTIAL MAY THEREFORE HAVE ITS SEPARATE ACTION FOR THE BREACH OF THOSE OBLIGATIONS. HARTFORD CANNOT DEFEND PRUDENTIAL'S ACTION ON THE GROUND THAT THE OTHER OBLIGEEES, OR EITHER OF THEM, VIOLATED THE CONTRACTS WITH CASSADY OR BREACHED CONDITIONS OF THE BOND.

ARGUMENT

POINT I

THE FINDINGS AND JUDGMENT IN FAVOR OF PRUDENTIAL ARE SUPPORTED BY ADEQUATE, COMPETENT AND MATERIAL EVIDENCE.

POINT II

THIS IS A LAW CASE AND THE FINDINGS OF THE TRIAL COURT ARE ENTITLED TO APPROVAL BY THE SUPREME COURT IF SUPPORTED BY COMPETENT EVIDENCE.

The Morningside Heights Subdivision required financing through an individual mortgage on each of the one hundred lots. No project, construction loan was intended or ever contracted. As prospective Veteran purchasers were found for the one hundred lots, each applied separately for a loan from Pru-

dential. Each loan necessarily had to go through the customary processing of loan applications, credit report, inspection, approval by the Veterans Administration, approval by the loan committee, execution of the note and mortgage, search of the records, recording of the mortgage and issuance of a policy of title insurance.

Knowing of this and being experienced in the complications of loans to Veterans, Prudential was unwilling to accept a "supervisory" type of bond as originally tendered by Cassady. (C. J. Cassady's deposition, Ex. H39, P. 6, R. 281). All parties were advised as to the project generally and Prudential required a performance bond generally such as was finally executed by Hartford. Then in reliance upon this bond, rather than the newly formed corporation, Cassady Company, it proceeded to loan moneys on the separate 100 mortgages as and when the same were executed and delivered.

With nearly \$1,000,000.00 committed to this Morningside Heights project, and being subject to disbursement of the loaned moneys as authorized by the several Veteran borrowers, Prudential could not indiscriminately pour in money to meet the needs of Cassady. The financial troubles of Cassady stem from many sources, not merely lags in the availability of funds from the mortgages. The evidence shows that Cassady was without adequate financing

of its own to carry forward independent of the loan proceeds. Cassady's construction practices apparently were not efficient. There was inadequate supervision of the work and materials of the subcontractors made by Cassady. Not one of the 100 houses was ever taken to final completion by Cassady so as to procure the required approval by the Veterans' Administration, and the guaranty of Prudential's mortgages.

Prudential was not responsible for those basic causes of the breakdown, nor were either of the other two obligees of the Bond, Felt and Pacific. They all relied upon Hartford's Bond to guarantee performance by Cassady. Cassady by the primary construction contract of July 19, 1950, covered by the Bond, agreed to cause construction to be started within ten days and "carried forward diligently and expeditiously until all of the one hundred houses have been completed . . . within 180 days from the date of execution of this agreement . . ." (Para. 26, Ex. PR-2). The paragraph extended the completion time should delays be caused by Felt. Then it reiterated that Cassady "covenants and agrees that the construction of said houses shall be completed within the time herein set forth. Time is declared to be of the essence." Paragraph 2 of this same basic construction contract bound Cassady to construct the 100 houses "in strict conformity with the

specifications, plans and drawings” and “also in accordance with the rules and regulations of the Veterans Administration, the Federal Housing Administration and the Prudential Federal Savings and Loan Association, as the case may be.”

Why was it vital to Prudential that such construction be completed as scheduled and in accordance with the rules of the Veterans Administration and that it have a guaranty of such performance by Hartford? Prudential had agreed to loan about \$1,000,000.00 to the 100 prospective Veteran borrowers, when they were found and proper mortgages had been executed, approved and recorded. These were only 4% interest bearing loans for 100% of the appraised value of the dwellings if completed in accordance with the Veterans Administration rules and had a duration of 25 years. Upon such completion, the loans were to be guaranteed by the Veterans Administration. Prudential had an agreement whereby Prudential Insurance Company of America would purchase from it those one hundred mortgages. Hartford stipulates that not one of the one hundred houses was ever completed by Cassady in conformance with the rules of the Veterans Administration. Thus Prudential was never able to sell the mortgages and has been compelled to hold these low grade mortgages in its portfolio. It has suffered the damages awarded by the trial Court. Hartford

by its brief does not contest the amount or method of computing the damages (p. 26 of Appellant's brief.)

It is with this background that the Contract Bond must be understood and interpreted. The July 19, 1950 construction contract (Ex. PR-2) was incorporated by reference into the bond.

The last "Whereas" clause of the Bond recites that "the Lender Obligee, Title Obligee and Owner Obligee *each* desire protection as their interests may appear, in the event of the default by the Principal under said contract. . ." (Emphasis ours).

The bond then undertakes in the next paragraph to indemnify and save harmless the obligees "from all loss, cost, damage, and expense which they may suffer . . ." Paragraph 2 of the Conditions in the Bond gives Hartford the option to cure any of Cassidy's defaults in performance of the construction contract (but Hartford never offered to cure any of the defaults). Then paragraph 6 reads:

"The prior written approval of SURETY shall be required with regard to any changes or alterations in said contract where the cost thereof, added to prior changes or alterations, causes the aggregate cost of all changes and alterations to exceed 10 per cent of the original contract price; but, except as to the foregoing, any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the Obligees of any extension of

time for the performance of the contract, or any other forbearance on the part of either the Obligees or PRINCIPAL to the other, shall not in any way release SURETY or PRINCIPAL of the obligations of this instrument, notice of SURETY of any such alterations, extension, or forbearance being hereby waived.”

All of the changes and alterations pointed to by Appellant to excuse its liability under the Bond do not even approximate 10% of the original contract price of \$763,000.00. In addition, the extra costs, minor changes and alterations were all taken into account in February of 1951 when an extension of time was granted to Cassady and the price per house was increased, with the written consent of Appellant (Ex. PR-6).

Point I of Appellants brief refers to four Findings in this case which it claims are “wholly unsupported by the evidence”:

(a) Finding 4, referring only to the Felt’s qualification to do business, undoubtedly will be covered by Felt’s brief but is immaterial and irrelevant as to Hartford’s liability to Prudential;

(b) Finding 27 refers to a purported failure of Prudential to collect lien waivers from Accountants and the Court found that such did not result in any damage to Hartford or Cassady. In the first place this collection of lien waivers was a duty imposed on Accountants and merely an optional right

vested in Prudential. See Ex. PR-7—contract of June 16, 1950, Ex. PR-8—contract of August 10, 1950 and Ex. PR-6, Supplemental Agreement of February 16, 1951. In the second place, Prudential could only disburse funds as authorized by the borrowers and they together with Cassady, Felt and Hartford granted it discretionary powers of disbursement and none imposed upon Prudential a duty to collect lien waivers. This point will be more fully discussed in Point VII of this brief.

(c) Finding 29 is criticized on the ground that the Court “apparently determined that Cassady should not have commenced work until all of the mortgages had been executed and recorded.” The finding does not say or infer that. It relates to the undisputed fact that the “delay” in disbursing funds complained about by Appellant and Cassady was not by reason of any fault on the part of Prudential as Cassady or Appellant knew that no funds could be disbursed until the mortgages had been executed and recorded. Cassady knew of its own financial means, its own credit sources and abilities and elected to commence and prosecute work prior to the recording of any of the mortgages. The evidence shows that Cassady knew that there was a separate loan agreement on each of the 100 separate lots and Prudential would not advance money on a lot if the mortgage had not been recorded (C.

J. Cassady's testimony R. 250-1). Cassady took the initiative in going forward with its own money, sub-contractors and credit. If Cassady had considered itself delayed by Felt not paying the money on a certain schedule, Cassady could have extended the contract completion date until such had been corrected. Nevertheless Cassady plunged forward in building houses. It knew that it had no right to claim any money until each individual house was partially completed. The said construction contract further bound Cassady to arrange with its sub contractors to hold off their claims for payment in accordance with the percentage of completion schedule. In no event was more than 75% of the agreed price per house to be paid until it had "passed all necessary inspections of the Veterans Administration, . . .". (Para. 23 of Ex. PR-2).

(d) Finding 39 is a determination that the alleged breaches by Felt were not "substantial" and that if such had been, still the Supplemental Agreement of February 16, 1951 resolved the same by the extensions of time and increase in the price per house to be paid by Felt to Cassady. We shall leave to Felt a detailed response to the individual asserted breaches. At this time we point out that even if Felt had breached its contractual duties to Cassady, Hartford would still be liable severally, as a compensated surety, to Prudential. This point will be

discussed more in detail elsewhere in this brief. Likewise we shall analyze elsewhere in detail the effect of the accord and compromise arrangement accomplished by the Supplemental Agreement of February 16, 1951. We reiterate that the record shows that the purported breaches attributed by Appellant to Felt were not material. A compensated surety will not be discharged unless it shows actual prejudice to it by some departure by the obligee—there must be a *material* variance from the contract and only in such event there is a pro-tanto discharge of the surety.

50 Am. Jur., Suretyship, Sec. 320, Pg. 1115.

Appellant's "escape" paragraph is paragraph 3 of the conditions of the Bond which reads:

"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 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."

The obligations, referred to therein are contained in "said contract" being the construction contract of July 19, 1950 (Ex. PR-2) between Felt and Casady. Prudential and Pacific demanded the Bond as a condition precedent to the loaning of any monies

or the insuring of the mortgage liens. Any asserted breach by Felt could not be held against Prudential as it had no duties under "said contract".

Elsewhere in this brief we shall touch upon rules of construction of contracts executed by compensated sureties and the strict construction in favor of the obligees. The co-relative rule is that ambiguities extant in the contract of the compensated surety shall be resolved against the surety.

The following "hornbook" rule is vital in considering the Findings of the trial court:

"In a law case the trial judge sitting without a jury serves in two capacities. He finds the facts as a jury would and applies the law; we may not therefore go further into questions of fact in a law case tried to the court than we could in a law case tried to the jury. The judge passes exclusively upon the credibility of the witnesses and the weight of the evidence". (*Colemere vs. Layton*, 82 Utah 142, 22 Pac. (2nd) 218.)

Of equal importance is

". . . that on conflicting matters the evidence is to be viewed in the light most favorable to the party for whom judgment was entered, and when so viewed, if there is evidence supporting the judgment it will not be disturbed." (*Staley vs. Grant*, 2 Ut. (2d) 421, 276 Pac. (2d) 489.)

It is submitted that there is substantial evidence supporting each and every one of the Findings

questioned by Appellant, and that within the operating ambit of the foregoing rules said Findings should not be disturbed on appeal.

POINT III

THE PARTIES TO THE PRIMARY CONSTRUCTION CONTRACT AND THE CONTRACT BOND COMPROMISED AND SETTLED ANY AND ALL PRIOR CLAIMED CONTRACT BREACHES BY THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951.

POINT IV

HARTFORD IS ESTOPPED TO DENY THAT THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951 COMPROMISED AND SETTLED PRIOR ALLEGED BREACHES BY FELT AND PRUDENTIAL.

During the last five months of 1950 and January of 1951 difficulties arose on the project. Cassady complained that it had been injured by the slowness of Felt in selling the lots and the consequent delays in making money available to Cassady from the Veterans' mortgages to Prudential. The cost of materials had been going up. Prudential was unable to disburse any money until appropriate mortgages had been executed and recorded. It had been delayed because of the necessity of first having the proposed Veteran borrower approved by the U. S. Veterans Administration before any action could be taken by its own loan committee.

Cassady had also complained about the failure of Felt to supply a power connection to it at the inception of the project and that it had performed

some extra labor and furnished extra materials for which it had not been compensated by Felt.

On the other hand, Cassady was wrangling with its sub-contractors as to their methods and supervision (Ex. H-33) and Cassady was not completing the houses on schedule, or at all. Both Felt and Prudential had become greatly alarmed. Prudential's commitment from Prudential Insurance Company of America to purchase the mortgages as soon as they were guaranteed by the Veterans Administration, was expiring. All parties realized that something needed to be done to rejuvenate the project.

It was with these urgent problems before them that the Supplemental Agreement (Ex. PR-6) dated February 16, 1951 was drawn and executed. The last "Whereas" clause reads:

"WHEREAS, conditions have arisen whereby the parties deem it necessary and expedient to amend, modify, supplement and adjust certain provision of the Primary Contract, Construction Contract, and certain of the provisions of the Disbursing Contract, as amended by the supplemental agreement of August 22, 1950."

This compromise arrangement accomplished five basic things:

- (a) extended the time of completion date from January 17th to June 1st, 1951;
- (b) set up new procedures for dis-

bursement of the mortgage funds, including broad discretionary powers in Prudential;

(c) increased the contract price payable to Cassady on each of the houses above the original agreed schedule;

(d) changed the disbursement limit prior to final completion from 75% of the total price to 90% of the total price per house; and

(e) acknowledged and ratified the complete accounting by Prudential of all mortgage fund disbursements to that date.

All parties signed the document. However, Hartford placed a limited approval when its turn to sign came. As its bond was given only as to the construction contract of July 19, 1950 (Ex PR-2) between Felt and Cassady it endorsed its consent to only the changes in that construction contract. By this, it approved of the extension of time, the increase in the prices to be paid to its contractor, the changes in percentages and the new disbursement procedures so as to grant to Prudential discretionary powers. These three benefits and changes were approved by Hartford and its bonded contractor, Cassady.

It does not seem appropriate or proper for Hartford now to assert those matters which were compromised by this Supplemental Agreement (Ex. PR-6) as an excuse upon which to seek an escape of liability. Hartford has had all the benefits of

the extension of time, an increase in the price per house and a flexibility in financing, yet it now wants to revert to all the alleged prior breaches by Felt such as: failing to furnish electric power in July of 1950 and delays in paying the requested progress payments on schedule as a defense against its liability to Prudential.

At the time of this Supplemental Agreement of February 16, 1951, Hartford's bonded contractor had already passed the deadline for completing *all* of the 100 houses and had not yet completed one of them. Prudential could have stepped in on its contract and closed off the project then, but instead granted five additional months for completion. Felt could have stopped the contractor at that point also, but it agreed to the nearly five month extension and in addition boosted the price per house to be paid to Hartford's bonded contractor.

Here was an opportunity for the contractor to finish up the houses and gain more money. Hartford apparently welcomed this extension and signed its approval. Obviously Hartford considered this a fair and proper compromise of the prior difficulties or it would not have joined in the approval of the same in February of 1951.

In reliance upon such compromise and the approval by Hartford, Prudential withheld and waived its accrued right to step in and take over the pro-

ject and agreed to make available increased amounts of money otherwise not payable then. Hartford is now estopped to assert prior, claimed breaches of the contracts by Felt or Prudential. Hartford has received the benefit of the extension in time and the increase in price and funds to its bonded contractor and the Court will not hear its efforts to deny such acquiescence.

Cassady, with Hartford's approval, then proceeded in its efforts to complete the 100 houses in accordance with its contract so as to procure approval by the Veterans Administration. The inspection reports reflect numerous deficiencies in workmanship and materials on all of the dwellings. Though the construction contract limited the maximum obligation to pay Cassady to 75% of the agreed price per house prior to final completion and approval by the Veterans Administration, this ceiling was raised by the Supplemental Agreement of February 16, 1951 to 90%, by giving Prudential optional power to retain only 10% of the down payment and loan proceeds until a guarantee by the Veterans Administration had been issued on the mortgages after the houses passed final inspection.

The increase in price, the extension of time, the increase in the percentage of payment up to 90%, all aided Cassady to proceed. Still it lacked the ability or willingness to complete the houses

either by itself or through subcontractors. Cassidy's letter to Mr. Gerald Jackson, the general carpentry sub-contractor on the project, written during this period on June 13, 1951 reflects the inefficient piece-work procedures being followed, the absence of adequate supervision and a statement that "at no time has there ever been a material shortage which would ever necessitate the laying off of men or prevent the hiring of additional men if the work were progressing systematically." (This is Hartford's own Ex. H-33).

The project again closed down. Cassidy was never able to procure final approval by the Veterans Administration of a single house. Veterans Administration finally on October 8, 1952 refused to guarantee the mortgages. Neither Felt nor Prudential could be blamed now for the shut down after their generous effort in February of 1951 to give Cassidy every opportunity to complete the project.

Appellant stands in the position of its principal. Nothing appears in the record to show any evidence or an alleged breach of contract by Prudential, or Felt after this February 16th, 1951 Supplemental Agreement. Notwithstanding their efforts to help out Cassidy, it did not finish the project or any house therein. The complete abandonment of the entire project by Cassidy soon followed.

Appellant could have stepped forward under its Bond and completed the project but it did nothing further.

The trial Court found as a fact that Cassady had admitted, declared and agreed that Prudential had performed all of its contractual obligations to February 16, 1951 (Finding 17, PR-29-31). Further, the trial Court found as a fact that any differences between Felt, Cassady and Hartford were resolved by extensions of time granted to Cassady by the Supplemental Agreement between the parties entered February 16, 1951, (Finding 39, PR-39). This being a law case and there being substantial evidence to support such Findings, the appellate Court is bound thereby.

POINT V

EXPRESSIONS OF OPINION AS TO THE CONSTRUCTION OR INTERPRETATION OF A CONTRACT BY ONE OF THE PARTIES THERETO AFTER A CONTROVERSY HAS ARISEN AS TO THE LIABILITY TO IT OF THE OTHER PARTY TO THE CONTRACT AND NOT ACTED UPON BY THE OTHER PARTY HAVE NO WEIGHT OR RELEVANCY IN INTERPRETING THE CONTRACT.

Appellant in its Point V-D attempts to apply the rule that “contemporary construction of a contract by the acts of the parties is entitled to great weight” in interpreting the meaning of a contract (6 Ruling Case Law 852). Reference is made to the

letter of Sept. 5, 1952, addressed by Mr. Wilson Taylor, attorney for the Appellant, to the attorney for Prudential (Ex. H-29) and Prudential's reply thereto of September 10, 1952 (Ex. H-28) and also to the testimony of Mr. Wilson Taylor (R. 200-205, 218, I. 219) as to a conversation in San Francisco during late September, 1952, between Mr. Wilson Taylor and the attorney for Prudential as to Appellant's liability under its bond. In that conversation Mr. Taylor denied liability on the part of his client, basing his position on the grounds set forth in his letter of September 5, 1952 (Ex. H-29) to wit, that breaches by Felt of its contract with Cassady were imputable to Prudential. Mr. Taylor asserted that in such conversation the attorney for Prudential said, "Well, you are probably right about that." (R. 219).

The foregoing is the totality of evidence concerning the alleged "contemporaneous practical construction" of the meaning of the bond by the parties. In order to understand fully the situation existing at that time, it is necessary to refer to Prudential's Ex. PR-30. This exhibit is the written demand dated August 12, 1952, by Prudential, Felt and Pacific upon Cassady and Hartford to complete the dwelling houses in the Morningside project and also a demand that they secure release of labor and material liens filed against the project. Mr. Wilson

Taylor in his letter of Sept. 5, 1952 (Ex. H-29) admits receipt of this demand by Hartford. The evidence shows that by September, 1952, the project was uncompleted and that Hartford had denied liability on its part to take over and complete it. (Ex. H-29). A controversy had therefore arisen between the parties as to Hartford's responsibility prior to the San Francisco conversation between Wilson Taylor and Prudential's attorney. There was no practical construction of the meaning of the relevant provisions of the bond during the progress of the construction work. The conversation between two attorneys occurred *subsequent* to the cessation of operations and subsequent to the controversy which had arisen as to Hartford's liability. A few days later (on Oct. 8, 1952) Veterans Administration refused to guarantee payment of the veterans' mortgages. (R. 10, 11, 14, 52, 53). In February, 1952, the status of the project and the ability of Cassady to complete it and fully perform his contract was in serious question and a conference of the interested parties was held in Salt Lake City with Mr. Wilson E. Taylor representing Hartford present (R. 187). At that time Hartford knew that Cassady was without funds and unable to complete the project (R. 215). Cassady had not finally abandoned the work "but he was probably willing to." (R. 215). Mr. Wilson Taylor, as representative of

Hartford, knew at that time that Veterans Administration had required "a long list of miscellaneous, small-miscellaneous items that had to be done [to the houses] to make them acceptable to Veterans Administration and Federal Housing Administration." (R. 217).

The mere opinion of a party as to the construction of a contract, not carried into effect by any act, will not amount to a practical construction of the contract.

13 Corpus Juris — Contracts — Sec. 517,
pg. 549

Shaw vs. Andrews, 62 Fed. 460

Potter vs. Phoenix Insurance Co., 63 Fed.
482

James Poultry Co. vs. Nebraska City,
135 Neb. 787, 284 N.W. 273

"The opinion of the manager of the seller as to its legal obligations under the contract, as reflected by his statements in correspondence after the execution of the instrument is not entitled to any weight in determining whether a valid contract was made."

Miller v. Robertson, 266, U.S. 243, 69
L. Ed. 243

Previous to the time of the San Francisco conversation, a demand had been made upon Hartford to complete the project and relieve the properties from labor and material liens. Hartford had denied

its duty under the bond to comply with the demand. After the conversation, Hartford continuously asserted this same legal position. It did not change or modify it, and was not induced to change its position because of the conversation. The controversy continued. Hence there was no harmonious construction ever adopted by the parties. (*Ellis vs. Stone*, 21 N.M. 230, 158 Pac. 480; L.R.A. 1916 F. Pg. 1228; *Hodges Irrigation Co. v. Swan Creek Canal Co.*, 111 Utah 405, 181 Pac. (2nd) 217.)

The statement of the attorney for Prudential in tentative and qualified assent to Wilson Taylor's theory of Hartford's defense was no more than an expression of opinion regarding the law governing the case and was not an admission of fact. It cannot be applied in construing the contract. The admission of a party in relation to a question of law is no evidence.

Crockett v. Morrison, 11 Missouri 3

Wright v. Quathrochi, 330 Mo. 173; 49 S.W. (2nd) 3

National Union Fire Ins. Co. v. Richards (Texas C. A.) 290 S.W. 912

Caswell v. Maplewood Garage, 84 N. H. 241, 149 Atl. 746, 73 A.L.R. 433

Grand Truck Western R. Co. v. H. W. Nelson Co., 116 Fed. (2d) CCA 6th 823, Rehearing denied 118 Fed. (2nd) 252

Atlanta and Lowry Nat. Bank v. Maughan,
et al, 25 Ga. App 25, 131 S.E. 916

31 Corpus Jur. Sec., Sec. 272, Pg. 1026

It therefore appears that Appellants Point V-D has no value in interpreting the bond now in question.

POINT VI

THE RULE GOVERNING THE INTERPRETATION OF CONTRACTS THAT WHERE A CONTRACT BEARS MORE THAN ONE REASONABLE MEANING AN INTERPRETATION IS PREFERRED WHICH OPERATES MORE STRONGLY AGAINST THE PARTY FROM WHOM IT PROCEEDS HAS NO APPLICATION IN THIS CASE. HARTFORD'S REPRESENTATIVE CRITICALLY EXAMINED A PRELIMINARY DRAFT OF THE BOND MADE BY PRUDENTIAL, ALTERED IT SEVERAL RESPECTS; CAUSED THE BOND TO BE TYPEWRITTEN IN HIS OWN OFFICE AND FINALLY EXECUTED IT ON BEHALF OF HARTFORD. THE BOND IS IN LEGAL EFFECT AN INSURANCE CONTRACT AND HARTFORD IS A COMPENSATED SURETY AGAINST WHOM THE BOND WILL BE CONSTRUED FAVORABLE TO THE OBLIGEEES.

1. *A strict construction of the bond against Prudential is not justified as it did not draft the bond in final form. Hartford was as much the author of the bond as Prudential.*

Appellants Point V-C represents an effort to apply the well known rule of contract interpretation set forth in Restatement of Contracts, Sec. 236(d) which is quoted by Appellant. There can be no quarrel with this statement, but it has no

application to the facts and circumstances surrounding the execution and delivery of the bond which is the subject of this action. Hartford's Ex. H 38 is a yellow paper rough draft of a bond which was prepared by the attorney for Prudential (R. 42). The evidence shows clearly that at the time this draft was made the question as to the form and effect of the proposed bond had not been settled and was in the process of negotiation. (R. 232, 327, 328, 329). A supervisory bond had been drafted by Hartford (Blackburn's deposition, Ex. H-40, pg. 5, and also R. 414). Thereafter C. P. Cassady came to Salt Lake City from Arcadia, California, and presented this draft of bond to the interested parties, C. J. Cassady's deposition, Ex. H.-39, pg. 6). It was rejected by Prudential (C. J. Cassady's deposition, Ex. H-39, pg. 6; R. 281). As a result of the disagreement as to the form of the bond, Prudential's attorney made a suggested draft (Ex. H-38) and it was delivered to C. J. Cassady, who in turn delivered it to C. P. Cassady. He returned to Arcadia, California, with this draft and delivered it to one Van Horn, an insurance agent who wrote business for Hartford. Van Horn in turn delivered it to A. L. Blackburn (C. P. Cassady's deposition, Ex. H-39, pg. 9, 10, 12; Deco Van Horn deposition, Ex. H-41, pgs. 5, 6, 7; A. L. Blackburn deposition, Ex. H-40, pg. 6). Mr. Blackburn then proceeded to make

alterations in the draft (Ex. H-38) by eliminating one paragraph in its entirety, changing the numbering of certain paragraphs, inserting the words "have the option to" in newly renumbered paragraph 2 and adding an addendum. The bond document which was finally executed by Hartford (Ex. PR-1) was then typewritten in Hartford's office under Mr. Blackburn's direction. (Deposition of A. L. Blackburn, Ex. H-40, pgs. 8, 9, 10). Mr. Blackburn at that time was superintendent of Hartford's bond department. In that capacity he had "general charge of underwriting acceptance of bonds", (Deposition of A. L. Blackburn, Ex. H-40, pg. 2). It was Mr. Blackburn's duty to supervise and approve any of Van Horn's bond writing or underwriting beyond Van Horn's general limits or for any type other than Van Horn had general authority to write (Deposition of A. L. Blackburn, Ex. H-38, pgs. 3 and 4). Blackburn had dictated and prepared the supervisory bond which Prudential had rejected (Deposition of A. L. Blackburn, Ex. H-38, pg. 5).

It is manifest from this evidence that Hartford's representative and agent, Blackburn, had as much to do with preparing and determining the final form of the bond (Ex. P-1) which is the subject of this action, as did Prudential's attorney. The draft prepared by Prudential's attorney (Ex. H-38) was thoroughly "worked over" by Blackburn.

He had complete authority to negotiate this bond, and in the exercise of this authority he proceeded critically to examine the yellow paper draft and amend it to suit his ideas. The draft was no longer that of Prudential as it had passed through Hartford's processes of examination and amendment. There can be denying the fact that the bond in final form was typewritten under Blackburn's direction in his office, and then finally executed by him on behalf of Hartford. Here is no situation where the cited rule of interpretation of contracts will be applied. Prudential did not prepare a bond and place it before Hartford for execution on a "take it or leave it" basis — a situation which characterizes the cases where this rule has been applied. Neither did Prudential present a printed or fixed form of bond usually used in the conduct of its business and require Hartford to execute it. It did prepare a yellow paper draft of a bond which manifestly was to be presented to the surety company for examination, criticism, amendment and final acceptance by the interested parties — not Hartford alone, but all of the parties to the bond. There is no evidence that either Prudential, Felt or Pacific exercised any unfair influence or pressure on Hartford to cause it to write the bond for which it received the sum of \$7,630.00 premium. The rule has been well stated:

“In the absence of the taking of an unfair advantage, the fact that a contract is drawn by the attorney for one of the parties does not necessarily call for the application of a strict construction against him.” (Syl. in *Moore v. Freeman*, 58 N.M. 139, 266 Pac. (2nd) 674, 41 A.L.R. (2nd) 1388).

2. *Hartford is a compensated surety and doubtful provisions of the bond should be construed in favor of the obligees.*

As above stated, Hartford received the sum of \$7,630.00 premium for writing the bond in question, (Ex. P-1). It was therefore a compensated surety. The rule is firmly established in Utah that in the case of a compensated surety, doubtful provisions of a contract, the performance of which the surety guarantees, are construed in favor of the obligee. If a bond is open to two constructions, one of which will uphold and the other defeat the claim of the obligee, that which is most favorable to the claim of the obligee will be adopted.

50 Am. Jur.—Suretyship—Sec. 318, pg. 1112

21 Ruling Case Law—Principal and Surety—Sec. 200

Annotation: 12 A.L.R. 382

Annotation: 94 A.L.R. 876

M. H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 Pac. 998

Atlantic Trust Co. v. Launenburg, 160
Fed. 90; 90 C.C.A. 274

Murray City vs. Banks, 62 Utah 296,
219 Pac. 246

Tolton Investment Co. v. Maryland Cas-
ualty Co., 77 Utah 226, 293 Pac. 611.

Hartford was paid a substantial premium in consideration of its assuming the risk of surety on a bond which its authorized agent had placed in final form, after critical examination, analysis and amendment.

3. *Bonds of compensated sureties are treated as insurance contracts and are construed most strongly against the insurer in case of ambiguities or uncertainties.*

50 Am. Jur. Suretyship, Sec. 318, pgs.
1112, 1113

Annotation: 63 A.L.R. 721

Annotation: 100 A.L.R. 1452

National Surety Co. v. McCormick, 268
Fed. (C.C.A.) 185

Tibbett vs. Mercantile Credit Guaranty
Co., 79 Fed. (CCA) 95

M. K. and T. Rwy. Co. v. American Sur-
ety Co., 291 Mo. 92, 236 S.W. 657

M. H. Walker Realty Co. v. American
Surety Co., supra

Coney v. United Surety Co., 217 N.Y.
268, 111 N.E. 832.

The facts surrounding the final draft of the bond (Sub. par. 1, supra) and these acknowledged rules of interpretation (Sub. para. 2 and 3, supra) nullify and obliterate any argument of Appellant that the bond in question should be construed against Prudential because of its history during the process of negotiations of the parties as to its form.

POINT VII

PRUDENTIAL DID NOT VIOLATE ANY OF ITS CONTRACTUAL OBLIGATIONS OWING BY IT EITHER TO HARTFORD, CASSADY OR FELT SUCH AS WOULD BAR ITS RECOVERY OF DAMAGES.

Appellant in its Point III asserts that Prudential was guilty of three distinct breaches of its contractual obligations owing by it to Hartford, Cassady and Felt and is therefore prevented from recovering from Hartford the admitted damages suffered by it. Each alleged breach will be discussed separately.

1. *Failure to obtain Lien Waiver.* There was no obligation upon Prudential to collect lien waivers from laborers and materialmen. That obligation rested solely upon Associated Accountants, the independent disbursing agency. Proof of this assertion is found in the following relevant provisions of the several contracts involved in this action.

(a) *Contract of June 16, 1950, between Prudential and Syndicate. (Ex. PR-7).*

“It is agreed that disbursements of the proceeds of the mortgage loans contemplated by this agreement and the down payments deposited with Prudential under this agreement, if any, will be made by Prudential to Associated Accountants at the time and times and in the manner herein provided, without responsibility on the part of Prudential, for the proper allocation and disbursements of said funds by Associated Accountants; and that payment by Prudential to Associated Accountants, as herein provided, shall be a full acquittance of Prudential for said payments. It is further understood between Prudential and Syndicate that Associated Accountants will disburse the funds received by them from Prudential in payment of all costs of the erection and construction of said dwelling houses and improvements to the end that the contractor and all sub-contractors shall receive just and proper amounts due them. Associated Accountants shall secure from all laborers on said dwelling houses, from all suppliers of material used in the construction of said dwelling houses, and from all sub-contractors, written waivers of lien and lien rights at the time of making a payment or payments to them, and said waivers shall cover or total the amount of the particular disbursement of the loan proceeds and down payment (if any) made by Prudential to Associated Accountants and from which disbursement said payment or pay-

ments is or are made. Such lien waivers shall be delivered to Prudential prior to any further disbursement by Prudential and Prudential will be under no obligation to make a further disbursement until it shall have received lien waivers covering all prior disbursements." (Par. 2, Ex. PR-7).

(b) *Contract of August 10, 1950, between Felt, Cassady, Associated Accountants and Prudential (Ex. PR-8).*

"Before any disbursement of any funds is made by Third Party [Associated Accountants] as provided in the next preceeding paragraph, in payment of any labor and materials furnished on the job, the Third Party [Associated Accountants] shall obtain lien waivers from the various sub-contractors involved for such labor and materials furnished up to the period involved in such disbursement. Such lien waivers will thereupon be delivered by Third Party [Associated Accountants] to Fourth Party [Prudential] as required by the contract entered into between First Party [Felt] and Fourth Party [Prudential] dated June 16, 1950, in order that further disbursements of loan proceeds may be had from Fourth Party [Prudential]. (Par. 4, Ex. PR-8).

(c) *Contract of February 16, 1951, between Prudential, Felt, Cassady and Associated Accountants (Ex. PR-6).*

"The balance of the loan proceeds, plus any deposited funds and the down payment, if any, shall be disbursed by Prudential from

and after the date of this Supplemental Agreement at such time or times, 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 and to assure the payment of all sub-contractors, materialmen and laborers engaged in work on said project. The decision of Prudential as to the time, manner, method and amount of payments shall be conclusive and shall be binding upon the parties hereto. Notwithstanding, the immediate foregoing provision, Prudential is hereby authorized and empowered to withhold ten per cent (10%) of all loan proceeds and down payments and not pay the same until the dwelling houses shall have passed final inspection by Federal Housing Administration; Veterans Administration or Prudential and all qualifications have been met to secure mortgage insurance by Federal Housing Administration or guarantee by Veteran Administration. (Par. 2 of Art. I of Ex. PR-6).

“It is understood and agreed that the sums indicated in the next preceding paragraph shall be paid by the first party [Felt] to the sub-contractor involved through a bonded disbursing agency. All payments due from first party [Felt] to the second party for or on account of the construction of the houses mentioned and described in paragraph 22 hereof shall be made from and after the date of this agreement at such time or times, or in such manner and in such amounts as Prudential Federal Savings and Loan Association deems necessary and proper to secure

the expeditious completion of the aforesaid dwelling houses and to assure the payment of all sub-contractors, materialmen and laborers engaged in work on said project within the limits as set forth in paragraph 22, as amended hereby. In no event, however, shall the payments be less than those prescribed in this paragraph 23 prior to this amendment. No payments shall be made unless second party [Cassady] shall approve and certify in writing that such payments are only for work incorporated in and materials delivered to the project. (Par. 2 of Art. III of Ex. PR-6).

It is manifest from the foregoing excerpts from the contracts involved in this action that up to the date of the execution of the Supplemental Contract of Feb. 16, 1951 (Ex. PR-6) that all payments to laborers and materialmen were made by Associated Accountants, which concern was an independent, bonded disbursing agency. The contract of August 10, 1950, between Felt, Cassady, Associated Accountants and Prudential (Ex. PR-8) *affirmatively placed the duty on the disbursing agency of collecting lien waivers and delivering them to Prudential. There was no responsibility for this task placed on Prudential.* Prudential could refuse if it elected to make additional disbursements from mortgage proceeds to Associated Accountants if it did not receive lien waivers from the latter, *but it was not prohibited from doing so.* Neither did the contracts condition such disbursements on Prudential receiving such lien waivers.

After the execution of the Supplemental Contract of February 16, 1951 (Ex. PR-6), Prudential was vested with plenary discretionary power and authority in making disbursements. At its option it could withhold 10% of any amount to be paid until the houses passed final inspection by Veterans Administration, but here again such action was optional and not mandatory. (It should be noted that Hartford approved this provision vesting this authority in Prudential by its endorsement attached to the Supplemental Contract of Feb. 16, 1951 (Ex. PR-6)). There was no requirement covering collection of lien waivers after February 16, 1951.

It is impossible to torture from these contract provisions any duty imposed upon Prudential to secure lien waivers as a condition to making future disbursements from mortgage proceeds. Since no such duty ever existed, there could be no breach of contract on this score.

2. *Neglect by Prudential to Withhold Payments or Require that Cassady's Defective work be Corrected.*

Appellant's counsel must make this contention with his "tongue in his cheek" to use old folk speech. Note what he wrote in his brief:

"We anticipate that Prudential Federal's attorneys will contend that the contractual provisions above referred to, were optional

or elective 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 action authorized by the contract. It did, however, apart from any contractual obligation have a common law duty to mitigate its own damages.” (Pg. 41)

Counsel is entirely correct in admitting that Prudential’s authority with respect to withholding payments or requiring Cassady to perform its contract was optional and not mandatory. It possessed the authority under the several contracts (pertinent paragraphs being quoted above) to stop making disbursements of the mortgage proceeds unless and until Cassady effectually remedied the defects in the houses reported by Veterans Administration inspection, *but it was not compelled to do so*. Likewise under paragraph 7 of the contract between it, Felt, Cassady and Associated Accountants dated June 16, 1950 (Ex. PR-7), Prudential could “at its election, enter upon all the real estate herein involved and complete or alter said dwelling houses, or any of them, to comply with the plans and specifications”, but this grant was a right or privilege and not the imposition of a compulsory duty.

There is no ambiguity or uncertainty in the contracts as to Prudential’s option to stop disbursements or to elect to complete the project upon Cassady’s default, and likewise there is not a suggestion

that Prudential was *obligated* to follow such courses of action.

As to Prudential's duty to mitigate or lessen the damages suffered by it by reason of Cassady's failure to complete the houses so as to earn the approval of Veterans Administration and its guarantee of the mortgages, the following quotation from Appellant's brief is determinative:

"The amount of damages awarded to plaintiff, 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." (Page 26 of Appellant's brief).

The duty of a party to take such action as will mitigate or lessen his damages goes to the question of the *measure* or *amount* of damages. Such duty does not relate to the determination of the question as to whether a cause of action exists or whether his action or lack of action bars recovery.

"In legal contemplation the term 'damages' is the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of a contractual obligation or a tortious act. Expressed in other terms, damages are the pecuniary consequences which the law imposes *for the breach of some duty or the violation of some right.*" (Emphasis supplied) (15 Am. Jur.—Damages, Sec. 2, page 387).

The so called duty to avoid consequences cannot arise until a cause of action has accrued which will entitle the plaintiff to at least nominal damages.

1 Sedgwick on Damages (8th Ed.) Sec.
204

Dippold et al, vs. Cathlamet Timber Co.
(111 Oregon 199, 225 Pac. 202)

15 Am. Jur.—Damages—Sec. 27, pg. 423

Annotations: 81 ALR 283

Inasmuch as Appellant elected not to question on this appeal either the amount of damages awarded Prudential or the basis on which they were determined, it logically follows that its assertion that Prudential was guilty of breach of contract, barring recovery because it failed to mitigate damages has no legal substance. Appellant, by its acceptance of the amount of damages awarded Prudential has foreclosed the question as to mitigation, and in any event the duty to mitigate damages arises only after a plaintiff's right to recovery has been determined.

(3) *Failure to take over and complete project.*

This point overlaps the alleged breach discussed in B, supra, and is really the same proposition argued by appellant under its sub-caption B of its Point III. It has been answered above. Prudential, under the terms of the several contracts, was not charged with the duty to complete the project. It

had the *privilege* of doing so at its *option*. The *privilege* imposed no *duty*. Prudential did not breach any contract in this regard. Appellant had the same right and *option* to “cure and remedy said default and complete performance of said contract.” (Ex. PR-1)

POINT VIII

IN ARRIVING AT A CORRECT CONSTRUCTION AND INTERPRETATION OF THE BOND, THE COURT SHOULD RECOGNIZE THAT THE ACTIVITIES OF PACIFIC AND ITS RELATIONSHIP TO THIS CASE ARE WHOLLY IMMATERIAL AND IRRELEVANT, AND THAT PRUDENTIAL IS A THIRD PARTY BENEFICIARY UNDER THE CONTRACT BETWEEN FELT AND CASSADY DATED JULY 19, 1950 (EX. PR-2). THE COURT SHOULD THEN APPLY CERTAIN WELL RECOGNIZED RULES OF INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

Before reaching the heart of the controversy between Prudential and Hartford, Respondent believes that it should invite the Court’s attention to certain subsidiary, but highly relevant propositions, which affect the solution of the principal legal problem in this case. Each proposition will be discussed separately.

1. *Pacific was not a party to any contract involved in this action and was not guilty of any violation of the terms of the bond.*

Pacific’s role in this transaction was that of

an insurer of the titles of the 100 building sites in Morningside Heights upon which the veteran-owners placed separate mortgages to secure the repayment of funds loaned to them individually by Prudential. (Substantially all of the mortgage proceeds, under written authority of the veteran mortgagors, were disbursed by Prudential to Associated Accountants under the terms of the contract dated August 10, 1950, between Prudential, Felt, Cassady and Associated Accountants (Ex. PR-8). The insurance contracts written by Pacific were A-T-A policies in favor of Prudential and guaranteed that the liens of the mortgages wherein Prudential was mortgagee were first and prior, except for current taxes. Work had been commenced on the project and material delivered to the site prior to the recording of Prudential's mortgages (a fact known by Pacific). Pacific issued these policies upon the reliance of the protection afforded it by the bond. (R. 169, 170, 171, 172). Since Pacific was not a party to any of the contracts, Hartford, of course, has never asserted it violated any of them. Further, Hartford has never asserted that Pacific violated any of the conditions of the bond. It has resisted liability to Pacific solely on the ground that Pacific suffered no compensable damages (See Appellant's brief, pages 59-63). Pacific's activities in this transaction are irrelevant to the issues in this case and may be wholly disregarded.

2. *Prudential is a third party beneficiary under the Contract dated July 19, 1950, between Felt and Cassady (Ex. PR-2).*

The above mentioned contract contains pertinent provisions as follows:

Par. 1. "The Second Party [Cassady] agrees to supervise, coordinate and procure the construction of a total of 100 houses upon contiguous lots in said Subdivision to be designated by First Party [Felt Syndicate], said houses to be built in strict accordance with the plans, specifications and elevations on file with the Veterans' Administration, a copy of which plans, elevations and specifications are attached to this agreement * * *."

Par. 2. "Second Party [Cassady] agrees fully to perform this agreement in strict conformity with the specifications, plans and drawings referred to, or incorporated herein, and also in conformity with any plans, drawings and specifications in effect at the date of this agreement 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, the Federal Housing Administration and the Prudential Federal Savings and Loan Association, as the case may be."

Par. 11. "Second Party [Cassady] agrees to furnish a performance bond in the amount of \$763,000.00 * * * for the faithful performance of this contract, and the adequate, skillful and prompt supervision and co-

ordination of the construction program, and for the completion of such construction within the time hereinafter specified. * * * Said bond is to be furnished before any work is commenced by Second Party [Cassady] and shall run to the First Party [Felt], to Prudential Federal Savings and Loan Association, to the Security Title Company or the title insurance company issuing the title insurance policies on each of said lots * * *.”

Par. 18. requires fire insurance during course of construction with loss payable to Prudential.

Par. 25. provides that Cassady should be entitled, in addition to all other compensation, to 50% of all other profits if it “shall perform its undertakings in this agreement to the satisfaction of the Veterans Administration, Federal Housing Administration, and Prudential Federal Savings and Loan Association, as the case may be.”

It is manifest that in this basic agreement Prudential became and was a third party beneficiary inasmuch as (a) the dwelling houses must be constructed not only with the approval of the V.A. and F.H.A., but also of Prudential, and (b) Prudential is nominated in specific terms as a beneficiary of the bond which Cassady must provide under the terms of the contract. Stated otherwise, the violation by Cassady of the covenant to cause these dwelling houses to be constructed with the Veterans Administration’s approval gives rise to

a cause of action not only in favor of Felt, but also in favor of Prudential. Under the decisions of the Utah Supreme Court, Prudential is a third party beneficiary to this contract and is entitled to prosecute an action upon the same.

M. H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 Pac. 998

DeLuxe Glass Co. v. Martin, 116 Utah 444, 208 Pac. (2d) 1127

See also:

Annotation in 81 A.L.R. 1271

Grand Lodge etc. United States F. and G. Co., 2 Wash. (2d) 561, 98 Pac. (2d) 971.

Appellant in its brief does not question the above stated position of Prudential.

3. *The Contract of July 19, 1950 (Ex. PR-2) and the bond which is the subject of this action must be construed together.*

Blythe Fargo Co. vs. Free, 46 Utah 234, 148 Pac. 427

M. H. Walker Realty Co. v. American Surety Co. supra

DeLuxe Glass Co. v. Martin, supra.

The rule supporting the above statement is so well established in Utah that no comment is necessary other than the above citation of decisions of the Supreme Court propounding and applying such rule.

4. *In construing the bond the Court should apply the following established rules of interpretation:*

(a) *If the recitals in a contract are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail.*

Shaffron v. Mt. Vernon-Woodberry Mills,
70 Fed. (2d) 963, 94 A.L.R. 543, 547

Wilson vs. Towers, 55 Fed. (2d) 199, 200

Moore v. Baasch, 109 Wash. 568, 187
Pac. 388

Irwins Bank vs. Trust Company, 195 In-
diana 669, 145 N.E. 869, 146 N.E. 909

National Bank v. U. S. Trust Co., 184
Wash. 212, 50 Pac. (2d) 904

Ross v. Ross, 233 App. Div., 626, 253
N.Y. Sup. 871

12 Am. Jur. Contracts, Sec 241, pg. 776.

The bond, which is the subject of this action, contains the following provisions vital in the determination of this appeal:

(1') The bond recites that Cassady is principal and Hartford is surety and that they are "held and firmly bound and obligated unto Prudential (called Lender Obligee), unto Felt Syndicate (called Owner Obligee), and unto

Pacific Coast Title Insurance Company (called Title Obligee), "*as their respective interests may appear as obligees.*"

(2') In the first preamble the contract of July 19, 1950, is recited, "which contract is by reference incorporated herein and made a part hereof."

In the fifth preamble it is recited as follows: "Whereas the Lender Obligee, Title Obligee, and Owner Obligee *each* desire protection *as their interests may appear*, in 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 supplied)

(3') The condition of said bond "is such that if the principal well and truly performs all the undertakings, covenants, conditions and agreements of said contract on its part and fully indemnifies and saves harmless the Obligees from all loss, cost, 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 from labor and material liens, then

this obligation shall be void; otherwise, it shall remain in full force and effect.” (Emphasis supplied)

(4') It is provided further in the bond as follows: “*The Lender Obligee shall have prior right and lien under this bond as against the other Obligees herein named.*” And it is further provided: “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 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 supplied)

The foregoing provisions quoted from Contract of July 19, 1950 (Ex. PR-2) and the Bond (Ex. PR-1) make it clear that Prudential, acting independently of Felt and Pacific has the right to assert a cause of action in its favor on the bond. Prudential is a direct Obligee. The terms of the bond in this respect carry out and emphasize the fact that Prudential was a third party beneficiary under the contract. The bond was written in this form in order to protect Prudential as a third party beneficiary under the contract. It is further to be noted that by an express declaration Prudential is given a prior right as against Felt and Pacific against the indemnity of the bond. This provision specifically eliminates the troublesome

question which arises in connection with bonds where several obligees having separate and several claims as beneficiaries. Obviously a surety is liable only for the maximum penal amount of the bond. Unless this quoted paragraph were in this bond, the three beneficiaries would be compelled to share pro rata in the penal amount of the bond. However, with this provision in the bond, Prudential has a first and prior claim for indemnity. Its claim must be satisfied before either Felt or Pacific can claim the protection. In this case this question does not arise because the penal amount of the bond far exceeds the claims of Prudential, Felt and Pacific. However, the provision is extremely pertinent in discovering the contractual intentions of the parties to this bond.

(b) *Surrounding Circumstances*: If there is an ambiguity in a contract, resort may be had to the situation of the parties and the circumstances under which it was entered into for the purpose, not of changing the writing, but of furnishing light to determine the intention of the parties and the meaning of the terms they used and when these are ascertained they must prevail over the dry words of the agreement.

Walker v. Brown, 165 U. S. 654, 41 L. Ed.
865, 17 Sup. Ct. 453

Kauffman v. Raeder, 108 Fed. (8 Cir.)
171, 54 LRA 247

Boley vs. Butterfield, 57 Utah 262, 194
Pac. 128

Reed vs. Forced Underfiring Corpora-
tion, 82 Utah 529, 26 Pac. (2d) 323

Fox Film Corporation vs. Ogden Theater
Co., 82 Utah 279, 17 Pac. (2d) 294, 90 A.L.R.
1299.

(c) *Attainment of factual results.* "When it becomes clear that the parties intended to produce a certain factual result, interpretation should be affected by reasonable and necessary implications, so that the legal effect then given to the instrument will be such as to attain the intended factual result. A court may thus be able to realize the aims and purposes of the parties, even though their express words would otherwise be interpreted differently and would produce different legal effect. This may be done without the necessity of any formal decree of reformation."

Corbin on Contracts, Vol. 3, Sec. 545,
pgs. 90, 91.

POINT IX

VIOLETIONS (IF SUCH VIOLETIONS OCCURRED) BY FELT OF ITS CONTRACTS WITH CASSADY CANNOT BE IMPUTED TO PRUDENTIAL SO AS TO BAR PRUDENTIAL'S RECOVERY AGAINST HARTFORD ON THE BOND. THE BOND SECURED DISTINCT AND SEPARATE RIGHTS OF THE OBLIGEEES.

HARTFORD ASSUMED DISTINCT OBLIGATIONS TO PRUDENTIAL WHICH DID NOT RUN TO EITHER FELT OR PACIFIC AND PRUDENTIAL MAY THEREFORE HAVE ITS SEPARATE ACTION FOR THE BREACH OF THOSE OBLIGATIONS. HARTFORD CANNOT DEFEND PRUDENTIAL'S ACTION ON THE GROUND THAT THE OTHER OBLIGEES, OR EITHER OF THEM, VIOLATED THE CONTRACTS WITH CASSADY OR BREACHED CONDITIONS OF THE BOND.

The foregoing proposition is declaratory of Prudential's contention which, being denied by Hartford, created the principal issue in this case. Prudential's theory of the case was adopted by the trial Court in its Findings and Judgment.

There are four propositions which stand out in this case so strongly that they defy contradiction:

1. Cassady failed, neglected and refused to procure the 100 dwelling houses in Morningside Heights to be constructed in accordance with the plans and specifications approved by Veterans Administration. (Hartford admits this fact).

2. Cassady failed, neglected and refused to secure from Veterans Administration its approval of the construction of such dwelling houses. (Hartford admits this fact).

3. Because the said dwelling houses were not constructed in accordance with the plans and specifications approved by the Veterans Administration, it refused to guarantee the mortgages owned and held by Prudential. (Hartford admits this fact).

4. As a result of the refusal of Veterans' Administration to guarantee said mortgages, Prudential suffered damages. (Hartford on this appeal has neither questioned the amount of damages awarded Prudential nor the method of the trial Court in determining these damages.)

It is manifest, therefore, that Cassady was guilty of violation of the contract dated July 19, 1950 between Felt and Cassady (Ex. PR-2) performance of which by Cassady was guaranteed by Hartford. Since Prudential was a third party beneficiary under said contract it had a direct action thereon against Cassady for its violation thereof and an action against Hartford as surety on Cassady's bond. The bond itself specifically designated Prudential as an obligee thereof and recognized its clear right to claim and sue thereon.

Prudential, therefore, respectfully but emphatically asserts to the Court that it has affirmatively *made* its case against Hartford and the evidence in the action fully supports that conclusion beyond peradventure.

Hartford, therefore, in order to defeat Prudential's claim must rely upon *defensive* facts, and failing therein, Prudential is entitled to recover its damages. The principal defences asserted by Hartford may be summarized as follows:

(a) Felt was guilty of four separate violations of its contract with Cassady dated July 19, 1950 (Ex. PR-2) which would bar recovery of damages by it against Cassady and Hartford.

(b) The breaches of contract by Felt are imputable to Prudential so as to bar recovery against Hartford on the bond of its damages.

It is important at this stage to take into consideration the status of the case of *Felt Syndicate, Inc. vs. Hartford Accident and Indemnity Company*, designated as Case No. 8736 in this Court. This above action together with the action of *Pacific Coast Title Insurance Company vs. Hartford Accident and Indemnity Company*, designated as Case No. 8719 in this Court as well as the subject action of *Prudential vs. Hartford* were consolidated for trial. However, separate Findings and Judgment were entered in each case. These actions are now pending on appeal in this Court. In the action of *Felt vs. Hartford* (No. 8736 supra) the trial Court found no substantial breaches by Felt of the Felt-Cassady contract of July 19, 1950, but reduced pro tanto the award recoverable by it on account of an alleged assignment of part of its claim made by Felt to a third person. It did, however, allow Felt to recover from Hartford the balance of the damages. Felt appealed from the part of the judgment which reduced its claim pro tanto by the amount

of the alleged assignment. Hartford cross appealed from the part of the judgment allowing Felt recovery for the unassigned part of its damages.

It is obvious that if the Supreme Court affirms the judgment in *Felt v. Hartford* and thereby disallows Hartford's cross-appeal or if the Supreme Court not only allows Felt's judgment against Hartford to stand but also directs that judgment be entered in favor of Felt against Hartford for the pro tanto deduction made by the trial Court, then in either of said events Hartford's defensive fortification in the subject case (*Prudential v. Hartford*) is entirely demolished. There will be a judicial determination that Felt was guilty of no substantial breach of the Felt-Cassady Contract of July 19, 1950. Since there was no breach by Felt there was no default to impute to Prudential to bar its claim against Hartford, and therefore the judgment in favor of Prudential must be affirmed. (Prudential has hereinbefore demonstrated that there was no breach of any of the contracts by it).

On the other hand, should the Supreme Court reverse the judgment in favor of Felt against Hartford on the ground that Felt was guilty of substantial breaches of its contracts with Cassady (and thereby sustain Hartford's cross-appeal) or if in the instant case the Supreme Court should determine that Felt was guilty of substantial breaches of its

contracts with Cassady, independent of its decision in *Felt v. Hartford* (A situation which is difficult to envision in view of the joint trial and the one record on appeal), then in such situation Prudential insists that such breaches by Felt are not imputable to it under the terms of the Felt-Cassady contracts and of the bond now sued upon. If such contention be sustained the judgment in favor of Prudential must be affirmed.

For the purpose of this discussion, let it be assumed that Felt was guilty of substantial violations of the Felt-Cassady contract of July 19, 1950 (Ex. PR-2) in the particulars alleged and claimed by Hartford.

Hartford relies upon the "escape" paragraph of the bond to support its contention that the defaults of Felt are imputable to Prudential so as to bar recovery on the bond by the latter. This provision reads as follows:

"3. 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 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 herein set forth." (Emphasis supplied)

Also of material consideration on this point are the recitals of the fifth preamble of the bond:

“WHEREAS, the LENDER OBLIGEE, TITLE OBLIGEE and OWNER OBLIGEE each desire protection as their interests may appear, in the default of 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.”

We are, therefore confronted with the question as to how far and with what potency can the contractual violations of Felt be visited under Prudential and Pacific so as to bar either of them from recovery on the bond.

The preambles of the bond summarize the functions of the three obligees in the proposed transaction and describe these functions in sufficient detail as will inform a court exactly what part of the entire transaction each obligee was supposed to perform. The fifth preamble above quoted is of particular importance in interpreting the contract. There is the rule of contract law quoted above and which is re-stated as follows:

“If the recitals [in a contract] are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail.”

With this rule to guide us, an examination of paragraph 3 of the operative part of the bond above quoted is in order. It is suggested that this provision is open to two constructions :

(1) That the three obligees jointly and severally agree to make the payments to Cassady as required of Felt by the basic contract, or to see that payments are made by Felt as a condition to enforcing the bond. (This is Hartford's theory.) This is an absurd construction. Applied to Pacific which is not a party to the contract, it is requiring it to do something impossible of performance. Pacific has no relationship with Felt whereby it could force Felt to perform its agreement with Cassady. Further, in the alternative, it would require Pacific to pay Cassady if Felt did not. The mere statement of this situation shows what an absurd situation this construction produces as to Pacific. With respect to Prudential, such interpretation requires it really to guarantee the payments from Felt to Cassady. This makes it an *ultra vires* contract because a Federal savings and loan association is not authorized by law or regulations to act as a surety for or guarantor of another concern's debts. In fact, the Home Loan Bank regulations cry against such interpretation. Further, the second and third preambles of the bond explain clearly that Prudential is a lender of funds to borrowers, who in turn will

authorize Prudential to disburse the proceeds of the loan to make the payments due Cassady from Felt. These recitals clearly define the obligation of Prudential in the premises. They do not even suggest that Prudential guarantees that if the mortgage proceeds are insufficient to make the contract payment in full Prudential will make up the deficiency. Stated otherwise, such construction requires the wildest kind of distortion of the language to make Prudential a guarantor of the obligations of Felt.

With respect to the foregoing statement that an interpretation of the bond which casts Prudential in the role of a surety or guarantor of Felt's performance of the Felt-Cassady contract of July 19, 1950 (Ex. PR-2) would result in Prudential entering into an ultra vires agreement, attention is particularly invited to the fact that Prudential is a corporation of the United States of America. It was organized and exists under and by virtue of the Home Loan Bank Act (Sec. 1464, Title 12, U.S.C.A.) The powers are defined by said Federal Statutes. It is not and was not authorized to act as surety or guarantor of another's debt. (Felt was not indebted to Prudential) (*Deep Rock Oil Corporation v. Salisbury* 130 Fed. (2d) (8th Cir.) 387 Cf: *Tracy Loan and Trust Co. vs. Merchants Bank*, 50 Utah 196, 167 Pac. 353; *Zions Savngs Bank & Trust Co. vs. Tropic and East Fork Irr. Co.*, 502 Utah 101,

126 Pac. (2d) 1053). This situation calls into operation another well recognized rule of contract interpretation:

“An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous. Such interpretation is preferred to one which renders it invalid. It will not be interpreted so as to be invalid unless such interpretation is required by the terms of the agreement in the light of surrounding circumstances.” (12 Am. Jur. Contracts—Sec. 251 Pgs. 793, 794 on this point.)

A case of particular relevancy on this point is *Pine River Logging and Imp. Co. vs. United States*, 136 U. S. 279, 46 L. Ed. 1164, 22 Sup. Ct. 920. Quoting from 12 Am. Jur. at page 794 the following is a fair summary of the relevant holding in this case:

“Contracts with individual Indians for the cutting and delivery of a *designated quantity of dead and down timber* on an Indian reservation will not be construed as authorizing the removing of *all timber of that character on the reservation* because such construction was put on the contracts by the parties interested and was approved by the government agent under whose superintendence the work under the contracts was done, since *such construction would be inconsistent with the regulations prescribed by the President under the authority of an Act of Congress*” (Emphasis supplied)

It is therefore asserted that the bond which is the subject of this action will not be given the interpretation for which Hartford contends since such construction would be inconsistent with Prudential's corporate powers and in violation of the Acts of Congress and the Regulations of Home Loan Bank thereunder which govern and control Prudential's corporate existence and authority.

(2) As an alternative interpretation of paragraph 3 of the operative part of the bond, it is submitted that the correct construction thereof is that as a condition to enforcing the bond *each obligee must perform its own covenants and promises*. By this construction each obligee is responsible for its own acts and not for the promises or acts of the other obligees. It may be supposed Pacific would forfeit its right to claim under the bond if it had refused to issue the title policies, because there is at least an implied promise to do so — "TITLE OBLIGEE will issue ATA title insurance policies" — although such implication must arise out of the recitals of the fourth preamble and not as an affirmative covenant. Prudential would lose the right to recover on the bond if it had refused to make the mortgage loans, but neither Pacific nor Prudential forfeits their respective rights to claim on the bond because of the defaults of Felt.

With these alternative interpretations — one which leads to absurd results (or with respect to Prudential involves *ultra vires* promises) and the other which appears to be the reasonable one, it is submitted a court will adopt the latter one (2 *supra*). This conclusion is amplified and reinforced by the above quoted fifth preamble of the bond. The application of the rule of law above stated (*Schaffran v. Mt. Vernon etc. Co.*, *supra*) requires that this preamble govern the bond. It recites first that each of the obligees “*desire protection as their interests may appear*” in the default of the Principal under said contract, and secondly, the recital continues that said protection will be subject to a condition. What is that condition? It is this, that: Prudential must perform its obligations with respect to Cassady. Pacific must perform its obligations with respect to Cassady. Felt must perform its obligations with respect to Cassady.

The preamble makes it certain beyond doubt that each obligee stands on its own feet. One does not guarantee the acts of another. The fact that one obligee defaults does not deny recovery to the others. With the preamble (recital) clear it controls the operative part, (paragraph 3 *supra*) for the reason that Paragraph 3 of the operative part of the bond is ambiguous (i.e. it is subject to the two interpretations above indicated), and being

ambiguous the recitals of the bond (i.e. the fifth preamble) govern the construction of the bond.

Respondent has previously referred to two well known rules governing the construction and interpretation of bonds of compensated sureties. The rules are set forth in sub-paragraphs 2 and 3 of Point VI of this brief. The first rule is:

“If a bond is open to two construction, one of which will uphold and the other defeat the claim of the obligee, that which is most favorable to the claim of the obligee will be adopted.”

The second rule proclaims that:

“Bonds of compensated sureties are treated as insurance contracts and are construed most strongly against the insured in case of ambiguities or uncertainties.”

There is a third rule as to compensated sureties which is a corollary to the two rules above stated as follows:

“* * * the rule is well established * * * that a bond will be construed favorable to the bonded if such construction is consistent with the object for which the bond is issued.” (*Title Guaranty Co. v. Bank of Fulton*, 89 Ark. 471, 117 S.W. 537, 59 L.R.A. (ns) 676; *Wichita v. Home Ct. Co.*, 151 Kan. 679, 101 P. 2d 219; Cert. denied 311 U. S. 673, 85 L. Ed. 436, 61 S. Ct. 49, and authorities therein cited)

Granting that the bond is ambiguous with respect to the issue here discussed it is submitted that the application of the above stated rules would compel the construction here set forth in favor of Prudential.

Finally, the terms of the "escape" provision (being Paragraph 3 of the bond above mentioned) in and of itself bears out the construction urged by Prudential. This Paragraph relieves Hartford from liability unless:

"1. The obligees, or either of them *shall make payments* to principal in reasonable compliance with the *terms of said contract as to payments*, and

2. each [Obligee] shall perform all other obligations to *be performed by said obligee* under said contract at the time and in the manner therein set forth"

The Felt-Cassady contract of July 19, 1950 (Ex. PR-2) specifically provides that payments for the houses (Par. 22 of contract) shall be paid by Felt to the *sub-contractors* through a bonded disbursing agency (Par. 23 of contract). The contract then provides that if Cassady shall perform its undertaking to the satisfaction of Veterans Administration, Federal Housing Administration and Prudential, as the case may be, within the time stipulated (and time is made of the essence) that Cassady shall receive 50% of the net profit in addition to compensation for such work as set forth in Par. 23.

These provisions must be read in *connection with* Preamble 2 of the bond which recites that the Lender Obligees (Prudential) has agreed to loan to qualified borrowers upon security of first lien mortgages sums of money to be used in construction of the dwelling houses and the provision of Preamble 5 which recites that each obligee “*desire protection as their interests may appear*” but subject to the performance by obligee “*of their respective obligations to the Principal [Cassady]*” in connection with said contract (See Sub-paragraph 3 of Point VIII of this brief).

It is manifest that by the terms of the Felt-Sassady contract of July 19, 1950 (Ex. PR-2) that *only* Felt was under any obligation to Cassady to make payments or cause payments to be made to Associated Accountants for disbursement to the subcontractors, and further that Cassady was to receive 50% of the net profits only if it performed the contract satisfactorily to Veterans Administration, Federal Housing Administration and Prudential as the case may be. Cassady never did earn the approval of Veterans Administration or of Prudential (FHA is not involved). It, therefore, never earned the right to share in the profits, if any.

Felt was, therefore, the party under the contract which was charged with the responsibility of

making or causing to be made payments for and on account of the sub-contractors — not Prudential and not Pacific. However, under the provision of the “escape” paragraph of the bond, either Prudential or Pacific at the election of either *might* make such payments or cause them to be made. Note that the provisions of the paragraph recite “that unless the Obligees, *or either of them* shall make the payments etc.” These words allowed and permitted either Prudential or Pacific to make the payments if Felt did not *but did not require them to do so*. The obligation was imposed on Felt. The phraseology was intended to allow either Prudential or Pacific to exercise such right, but there was no compulsion on them to do so in order to claim under the bond. This conclusion is reinforced by the additional provision of the “escape” paragraph that payments should be made to Cassady “*in reasonable compliance with the terms of said contract as to payments.*” What terms of the contract required Prudential or Pacific to make payments? There are none. The duty was Felts.

Of importance is the second provision of the “escape” paragraph — “unless each (obligee) shall perform all other obligations *to be performed by each obligee* under said contract”. There can be no doubt that as to obligations other than the payment of money, each obligee stood on its own feet — “*obliga-*

tions to be performed by each obligee". Here is a plain unambiguous recognition that each obligee in order to claim on the bond must perform the obligation assumed by it above — not the other obligee's obligations. It is apparent that Hartford's interpretation of the first condition of the "escape" paragraph is at variance with the unambiguous declaration of the second provision. The interpretation hereby submitted by Prudential brings the two provisions into harmony, and does no violence to the language of either provision. All other rules of construction aside, it is submitted that it is the reasonable and logical interpretation and is wholly consistent with the external facts and circumstances shown by the evidence.

CONCLUSION

Respondent respectfully submits to the court that it has fully answered all of the contentions of the Appellant in its brief and that it has shown that the evidence before the trial court was substantial and competent to support the findings and conclusions of the trial court. The burden of proof was on the Respondent, as the plaintiff in this case, but such has been fully discharged. Now the Appellant is in a defensive position and charged with the duty of showing to the court that the findings of the trial court are not supported by competent and

substantial evidence, and that the conclusions and judgment are contrary to law. The admissions of Appellant, as referred to above in the brief, make it clear that it is in a defensive position. These admissions virtually made the case for Respondent. Unless Appellant can convince the Honorable court that its defenses are sustained not only by substantial, competent evidence, but by appropriate rules of law, the judgment in favor of Prudential must be affirmed.

Respectfully submitted,

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