

1965

# The American Oil Company v. General Contracting Corp., A Utah Corporation; Federal Insurance Co., A Corporation; and United States Steel Corporation : Respondent's Brief

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IN THE  
**SUPREME COURT**  
OF THE  
STATE OF UTAH

THE AMERICAN OIL COMPANY,  
corporation,

*Plaintiff and Appellant*

vs.

UNITED STATES STEEL CORPORA-  
TION, a corporation, and  
GENERAL INSURANCE CO., a cor-  
poration,

*Defendants and Respondents*

RESPONDENT

APPEAL FROM ORDER OF  
THIRD DISTRICT COURT  
HONORABLE STEWARD

PARSONS  
& LATHROP

E. V. ROBERTS

Attorney

and

States

Federal

WAYNE C. DURHAM and  
GARY L. THEURER,  
128 American Oil Bldg.,  
Salt Lake City, Utah,

*Attorneys for Plaintiff  
and Appellant.*

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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THE AMERICAN OIL COMPANY, a  
corporation,

*Plaintiff and Appellant,*

vs.

UNITED STATES STEEL CORPO-  
RATION, a corporation, and FED-  
ERAL INSURANCE CO., a corpora-  
tion,

*Defendants and Respondents.*

Case No.

10326

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**RESPONDENTS' BRIEF**

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**STATEMENT OF KIND OF CASE**

Appellant below commenced an action against a sub-contractor on a State Road Commission construction contract to whom it had sold petroleum products. The complaint also named as defendants the principal and the surety on a public contract bond secured by the parties, as alleged in the complaint, "in compliance with . . . Section 14-1-1, Utah Code Annotated, 1953".

## DISPOSITION IN THE LOWER COURT

Default judgment was entered against defendant General Contracting Corporation. Both Appellant and Respondents then filed motions for summary judgment. The court below denied Appellant's Motion for Summary Judgment, granted Respondents' Motion for Summary Judgment and entered judgment against Appellant dismissing its complaint with prejudice.

## RELIEF SOUGHT ON APPEAL

Appellant seeks:

- a) Reversal of the order of the court below denying its motion for summary judgment.
- b) Reversal of the order of the court below granting Respondents' motion for summary judgment.
- c) Reversal of judgment of the court below dismissing Appellant's complaint with prejudice.
- d) Granting of its motion for summary judgment and entry of judgment in its favor and against Respondent accordingly.

## STATEMENT OF FACTS

The first three paragraphs contained in Statement of Facts in Appellant's Brief appear to be accurate. The remaining portion of such "Statement of Facts" appears primarily to be argument.

Since both parties to this appeal are relying upon motions for summary judgment filed with the court below, we



will summarize as follows the pertinent uncontroverted facts which were before the court below:

1. September 25, 1961.

Respondent United States Steel Corporation, as principal, obtained from Respondent Federal Insurance Company, as surety, a statutory public contract bond in the penal sum of \$768,781.50 under the terms of which the State of Utah, by and through its State Road Commission, was the obligee (R. 5).

2. October 4, 1961.

Respondent United States Steel Corporation entered into a construction contract with the State Road Commission, the performance of which was the subject of said bond (R. 4). Defendant General Contracting Corporation was a subcontractor of Respondent United States Steel Corporation under the terms of said contract (R. 32).

3. December 11, 1961 through December 10, 1962.

Appellant supplied petroleum products to defendant General Contracting Corporation at the Cart Creek Bridge near the Flaming Gorge Dam site for which it billed defendant General Contracting Corporation the sum of \$3,725.10 (R. 34).

4. December 13, 1962.

The performance of said contract was completed by Respondent United States Steel Corporation (R. 42).

5. May 2, 1963.

D. Gordon Stringham, Senior Accountant, Estimates, responsible for auditing, estimates and final accounts for the State Road Commission of Utah made the following administrative determinations for and on behalf of the State of Utah by and through its State Road Commission in his official capacity as Examiner and Auditor of the accounts of said contract:

a) That the State of Utah had no claims to assert against either Respondent United States Steel Corporation or against its surety, Respondent Federal Insurance Company.

b) The amount due from the State of Utah to Respondent United States Steel Corporation (R. 42).

6. May 2, 1963.

“Final” field estimate was submitted on “estimate invoice” by said D. Gordon Stringham to Respondent United States Steel Corporation (R. 44). The amount stated in such final estimate dated May 2, 1963 was approved by Respondent United States Steel Corporation and ultimately was paid by the State of Utah to said Respondent (R. 43-44).

7. May 14, 1963.

Title 14, Chapter 1, Sections 1-4, Utah Code Annotated, 1953, upon which Appellant relies in its complaint, was repealed.

8. May 15, 1964.

Appellant filed its complaint in the court below rely-

ing upon Title 14, Chapter 1, Utah Code Annotated, 1953.

9. June 15, 1964.

Appellant obtained default judgment against defendant General Contracting Corporation in the sum of \$3,773.00, plus interest, statutory attorneys' fees and court costs (R. 16).

## ARGUMENT

### POINT I.

THE "THIRD-PARTY BENEFICIARY" THEORY AND ARGUMENT PRESENTED IN POINTS I AND II OF APPELLANT'S BRIEF WAS NEITHER RAISED NOR PRESERVED IN THE RECORD ON APPEAL; THEREFORE, NEITHER SUCH THEORY NOR SUCH ARGUMENT SHOULD BE CONSIDERED BY THIS COURT ON THIS APPEAL.

The arguments made by Appellant in Points I and II of its Brief are wholly foreign to the record on appeal. The record contains no reference to any "third-party beneficiary claim". On the contrary, the record demonstrates that Appellant's action was filed under and pursuant to the provisions of "Section 14-1-1, Utah Code Annotated, 1953" (R. 2).

Appellant's complaint contains only one count. It clearly proceeds under and pursuant to the Public Bonding Statute. Thus, in paragraph 6 of the complaint (R. 2) Appellant specifically alleges that the execution of the

bond by the principal was "in compliance with . . . Section 14-1-1, Utah Code Annotated, 1953 . . ." In paragraph 11 of the complaint, Appellant alleges a belief that there are no other creditors — this too is a statutory prerequisite. Other creditors, if any, must be included as parties to the suit under the statute. In paragraph 12 of the complaint, Appellant avers that it is entitled to a reasonable attorneys' fee by virtue of Section 14-1-4. In the default judgment taken against defendant General Contracting Corporation, pursuant to said complaint, Appellant obtained judgment for such statutory attorneys' fees (R. 16).

The issues involved in this appeal were twice presented to the District Court, first on motion to dismiss the complaint prior to answer (R. 9-10) and second on joint motions of the parties for summary judgment (R. 37, 39-40). On each of these occasions, Respondents filed memoranda in support of their respective motions, discussing the *facts* alleged in the complaint, the *theory* of Appellant's case as stated by the complaint and *authorities and argument* in support of said motions. These memoranda are devoted wholly to the application of the respective bonding statutes (R. 18-23, R. 55-64). No reply memorandum was filed in response to either of these memoranda. No amended complaint was filed and Appellant did nothing of record to advise the court and the parties of a change of position or theory.

Despite this state of the record, Appellant relies in its brief primarily upon a common-law third party beneficiary

doctrine. It seeks on this appeal to hang this theory upon paragraph 9 of its complaint which reads (R. 2) :

“9. Pursuant to Exhibits ‘A’ and ‘B’, the defendant’s contractor and surety also owe plaintiff \$3,773.00.”

Paragraph 9 follows a recitation in the complaint that Exhibit “B” is a statutory bond, that defendant General Contracting Corporation was a subcontractor and that the subcontractor was liable to Appellant for petroleum products which it supplied to the subcontractor on the construction project. Paragraph 9, in this context, simply avers that by reason of the statutory bond, Respondents also, in addition to the subcontractor, are liable to Appellant. It certainly does not state a common-law cause of action.

The contract itself (Exhibit “A”) contains no third-party beneficiary covenants or provisions of any kind. Appellant, however, now relies upon the provisions of the statutory bond which, by Appellant’s own averments in paragraph 6 of the complaint, was obtained in compliance with the Public Bonding statute, to confer liability upon the principal of the statutory bond on a common-law third-party beneficiary theory without the aid of either averment or proof that any such result was ever contemplated by the parties. It is respectfully submitted that, even under our present broad rules of “notice pleading”, paragraph 9 of Appellant’s complaint certainly cannot be construed to allege a cause of action against the principal on such theory, separate and apart from the statutory claim.

These Respondents clearly and reasonably interpreted

Appellant's complaint to be filed under and pursuant to Title 14, Chapter 1, Sections 1-4, Utah Code Annotated, 1953. Their Motion to Dismiss served upon Appellant on June 4, 1964 (R. 9-10), and their subsequent answer (R. 25-8) made the position of Respondents clear in this regard. If this were not Appellant's true theory, it certainly had a duty, at absolute minimum, either to amend its complaint to state a claim based upon a common-law third-party beneficiary theory or to demonstrate of record that it relied upon some theory not stated in its complaint.

The record is clear that Appellant below sought to perfect judgment under rights created by statute. When it became apparent that it had failed properly to comply with required statutory conditions and that it was entitled to no relief under the statute, it has sought, through this appeal, to amend its pleadings, to alter its theory and to obtain automatic judgment from this court. We submit that it should not be permitted so to do. This court in *Pettingill v. Perkins*, 2 Utah 2d 266, 272 P. 2d 185 (1954) prohibited a party from making such a change in theory on appeal. The court there stated at page 269 of the Utah Reports:

"Having by his own pleadings, evidence and instructions tried and rested the case upon the theory that the mother's negligence would bar the father, he is bound thereby, as the law of the case. *He cannot now on appeal shift his theory and position.*" (Emphasis added.)

Similarly, it has been held that where, as in the instant case, one contractual theory is pursued at the lower

court level, a new theory of contract recovery may not be introduced on appeal. *Lynn v. Seby*, 29 N. D. 420, 151 N. W. 31 (1915). See generally, 5 Am. Jur. 2d, Appeal and Error, Section 569 (1962).

The precise question now before this court was before the Supreme Judicial Court of Massachusetts in *Dix Lumber Company v. City of Boston*, 289 Mass. 291, 194 N. E. 117 (1935). In that case, as here, the action was filed under the State's Public Contractor's Bond Statute, but the materialmen failed to comply with the statute's terms. There, as here, on appeal, the claimant sought to pursue a common-law third-party theory, exclusive of the statute. The Massachusetts Supreme Court ruled that the third-party beneficiary theory could not be interjected on appeal stating:

*"We see nothing in this contention. Its petition as well as the original petition which began the case alleges that the bond was given pursuant to the statute and rights under a common-law bond cannot be established in these proceedings which were brought to enforce the security of the statutory bonds . . . Furthermore, the findings of the master show that it was the intention of all of the parties to the bond given that it was executed and delivered as a bond required by the statute. It is to be interpreted as carrying out that intent." (Emphasis added.)*

It is uncontroverted here that the bond was executed and delivered by the parties "as a bond required by the statute". We submit that the doctrine of the *Dix Lumber* case is sound and should be followed by this court. Its ap-

plication in this case is particularly apropos because of the corollary rule of appellate practice that a matter should not be considered on appeal if it is not properly raised and preserved of record in the court below. This rule is stated as follows in *North Salt Lake v. St. Joseph Water & Irr. Co., et al.*, 118 Utah 600, 223 P. 2d 577 (1950) :

“We are unable to pass on the contention that the motion to dismiss should not have been granted . . . The reason that we are precluded from considering this question is that issues were not framed in the court below. We cannot pass on matters raised for the first time in this court.”

ACCORD:

*Huber v. Deep Creek Irrigation Company, et al.*, 6 Utah 2d 15, 305 P. 2d 478 (1956).

*Rosander v. Larsen*, 14 Utah 2d 1, 376 P. 2d 146 (1962).

*Reliable Furniture Co. v. Fidelity & Guar. Ins. Under.*, 14 Utah 2d 169, 380 P. 2d 135 (1963).

*Chumney v. Stott*, 14 Utah 2d 202, 381 P. 2d 84 (1963).

*Hamilton, et al. v. Salt Lake County Sewerage Improvement District No. 1*, 15 Utah 2d 216, 390 P. 2d 235 (1964).

It is submitted, therefore, that the common-law third-party beneficiary claim of Appellant is at variance with the pleadings and the record, has not been properly raised and preserved by the Appellant and that this new theory is not properly before this court.



## POINT II.

EVEN ASSUMING FOR PURPOSES OF ARGUMENT THAT THE COMMON-LAW "THIRD-PARTY BENEFICIARY" THEORY AND ARGUMENT HAD BEEN DULY PLEADED AND PRESENTED OF RECORD TO THE COURT BELOW, THE ORDER AND JUDGMENT APPEALED FROM STILL SHOULD BE AFFIRMED BECAUSE THE STATUTORY RIGHTS SOUGHT TO BE ENFORCED BY APPELLANT ARE EXCLUSIVE.

Through Title 14, Chapter 1 entitled "Public Contract", Utah Code Annotated, the Legislature of the State of Utah has sought to protect the interests of mechanics and materialmen on public contracts by imposing upon political subdivisions of the State of Utah the option of either requiring a bond to protect their interests or in the alternative to waive sovereign immunity. In the event of the latter election, the political subdivision of the State of Utah can be sued as a private individual. However, a short one year statute of limitations is prescribed. See Title 14, Chapter 1, Section 3, Utah Code Annotated (now repealed) and Title 14, Chapter 1, Section 7 (the present statute).

Section 2, Chapter 1, Title 14, pursuant to which Appellant's complaint was filed, specifically required the supplying of a bond for the protection of mechanics and materialmen, then imposed the following specific procedural requirements: (Title 14, Chapter 1, Section 2, Utah Code Annotated, 1953.)

1. If an action is filed by the obligee within six months after completion and final settlement of the contract, any person who has furnished labor or materials may intervene.

2. If no such action is filed by the obligee within six months from the completion and final settlement of the contract, any person who has supplied labor or materials may sue the contractor and his surety:

- a) in the name of the obligee;
- b) in any court having jurisdiction in the County where the contract was to be performed;
- c) within one year after the complete performance and final settlement of such contract.

3. All claimants and creditors who do not intervene, or assert and establish their claims, in such action, shall be forever barred from recovery upon such bond.

Hence, whether the political subdivision chooses to require the bond or to waive Government indemnity, a strict and short one year statute of limitations applies. It is pertinent to note that no such procedural requirements and restrictions were placed in Title 14, Chapter 2 entitled "Private Contracts", Utah Code Annotated, 1953. It follows that the Legislature obviously much more strictly confined and limited statutory rights of mechanics and materialmen when furnishing services or materials on public contracts.

As set forth in some detail herein under Point I, Appellant in its pleading affirmatively avers that the bond

here involved was executed by the parties and issued "in compliance with" Chapter 1 of Title 14. The bond itself recites (R. 5) :

"WHEREAS, it was one of the conditions of the award of the Commission, pursuant to which said contract is entered into, that these presents should be executed."

It therefore cannot be disputed in this case that the bond here involved was executed by the parties as a requirement of the State of Utah under the provisions of former Title 14, Chapter 1, Sections 1-4. The Appellant here was a member of the class to which the bonding statute was directed. This was a public contract. Appellant supplied petroleum products to a subcontractor. Appellant had no contractual relationship with the State of Utah, with the prime contractor or with the surety. Had it complied with statutory requirements, Appellant would have been entitled to file an action under the provisions of the statute. It purported to do so, but failed to comply with any one of the following statutory conditions :

- a) action to be filed in the name of the obligee,
- b) in Daggett County, and
- c) within one year.

The Legislature, in its wisdom, required the creation of statutory "third-party beneficiary" rights in favor of materialmen which had not theretofore existed to protect them against the doctrine of sovereign immunity. Such rights are subject to express statutory conditions and are created by the statutory bond. The Appellant here admit-

tedly must rely upon the language of the statutory bond. That language should not be lifted from context. The entire bond, together with the statutory provisions pursuant to which it was executed and filed, must be considered together. Being faced with an adverse adjudication in the court below holding that it had failed to satisfy the necessary statutory conditions, Appellant here seeks to escape from the application of the provisions of the very statute under which its complaint was filed. It seeks to appropriate unto itself the benefits of the statute without being bound by the necessary and incidental statutory obligations. This it should not be permitted to do.

In *General Electric Supp. Corp. v. Willey Electric Co.*, 47 Ohio App. 196, 191 N. E. 706 (1933), the court faced precisely the same problem. In reasoning that the claimants should not be permitted to have their cake and eat it too, the court there concluded:

“In the case before us, to hold that the statutory action was not exclusive, but that the common law action still remained, would be to penalize the indemnity company upon the failure of the claimant to comply with the provisions of the act. In other words, it would be to read into the contract the statute which fixes liability on the indemnifier, but to read out of the act any protection thereunder. If the indemnifier is chargeable with notice of the statutory provisions, so must the claimant be charged therewith.”

And in the final paragraph, the court said:

“We are therefore of the opinion that the law of Ohio is that the statutory remedy is exclusive and

the court properly sustained the demurrer to the petition.”

Similarly, in the case of *Dix Lumber Company v. Boston*, 289 Mass. 291, 194 N. E. 117 (1935), the court held that a bond, executed and delivered as a bond required by statute, must be interpreted as carrying out that intent, and could give rise to no common-law action exclusive of the statute. *Long Dell Lumber Co. v. Carr Construction Co.*, 172 La. 182, 133 So. 438 (1931) is to the same effect.

In *Standard Sanitary Manufacturing Co. v. Southern Surety Co.*, 59 S. W. 2d 291 (Tex. Civ. App. 1933) the court took a slightly different approach. There, the problem was the same. The claimant sought recovery upon a bond issued pursuant to statute without complying with statutory procedures. The court there recognized the existence of common-law *rights* under the provisions of that particular bond but ruled that the *remedies* available to the claimant were confined to those described by the statute. The court said:

“Even though the bond created a common law obligation independently of the statute, . . . since the bond was given in reference to the demand of the statute, it must be construed in connection therewith and . . . the remedies afforded by the statute were exclusive.

“Since such statute provided that an action could not be brought on a bond given in compliance with the terms thereof after one year from the completion of the job, . . . an action could not be maintained thereon after the expiration of said

period of limitation even though the bond be construed as the common law obligation.

“It would not be reasonable to hold that a contractor and his surety, by reason of their having executed a bond in response to the demands of the statute, and in compliance with the terms thereof, for the purpose of protecting rights created by the statute, should, by virtue thereof, be held responsible for obligations not authorized by such statute.”

This case is particularly pertinent to an analysis of the instant case inasmuch as there, as here, one of the questions involved was whether the statute of limitations built into the contracting bond statute should apply or whether the general statute of limitations for contracts should apply. The court clearly and reasonably held that the former should be applicable.

It is pertinent to note again in this regard that a one year statute of limitations is imposed by the statute whether the governmental subdivision elects to require a bond or to waive sovereign immunity. Appellant argues at page 10 of its brief that the “general statute of limitations” applies. If this were true, a one year statute would bar the materialman if sovereign immunity were waived, but the general statute of limitations would apply where an election was made to require a statutory bond. This interpretation flies directly into the face of the clear and unambiguous language of the statute. Such an absurd result certainly was never intended by the Legislature.

In the case of *Indemnity Insurance Company v. South Texas Lumber Company*, 29 S. W. 2d 1009 (Tex. Com. App.

1930) the court was faced with the same problem. After analyzing and quoting the pertinent public contract bonding statute, the court said:

“The above statutes clearly imply that the remedy there accorded to the materialmen, to enforce his cause of action arising under a bond such as the one herein involved, whether the bond be regarded as a statutory bond or not, is exclusive, and that his action on the bond is to be subject to the provisions of these statutes.”

One of the things which influenced the court in the Indemnity Insurance Company case, was the fact that there was such a significant disparity between the procedural provisions of the contractor's bond statute itself and procedures applicable to general contracts. This is true in the instant case as well since both the repealed statute and the present statute contain much more detailed and explicit procedural provisions than are applicable to the ordinary contract action. Certainly, under these circumstances it would appear that the Legislature intended that the remedies made available through these public bonding statutes should be exclusive and that no other action should be brought except under the terms of the statutes. Otherwise, if the Legislature had intended the general statute of limitations and other procedural requirements to apply, it would have enacted a statute similar to the *private* contracting provision in Section 14-2-1 which relies upon generally applicable common-law rules for jurisdiction, limitations of actions and party and notice requirements.

The application of the public contract bond statute is treated in *Campbell Building Co. v. District Court of Millard County*, 90 Utah 552, 63 P. 2d 255. The court there stated:

“The bond required by the statute to be given by the contractor is for the purpose of protecting mechanics and materialmen. Section 17-1-1, R. S. 1933. This statute is highly remedial for the benefit of and to provide security for all persons who furnish labor and material on public work.”

The statute also was treated by this court in *State v. Campbell Building Co.*, 94 Utah 326, 77 P. 2d 341. That case is on all fours with the case at bar with respect to the time upon which the statute of limitations commences to run which will be discussed below. Appellant cites and quotes from this case, asserting that it supports Appellant’s theory of “non-exclusive” application of the public bonding statute. We submit that it does not. Appellant relies upon the following statement from the court’s opinion in that case:

“Claims of creditors against the contractor are not affected by the statute. We opine such claims may be asserted at any time within the general statute of limitations.”

However, the court then continues:

*“It is only when it is sought to hold the surety — only when recovery is to be made under the bond — that the provisions of the statute come into play. The restrictions are two-fold: to give the obligee a priority to determine and protect any claim it may have, and to fix a one year limitation on the surety’s liability to other creditors.”* (Emphasis added.)



Certainly, as is stated above by the court, creditors of the contractor would not be compelled to comply with the bonding statute. The statute was not passed for their benefit. However, the Appellant here is *not* a creditor of the contractor. His only conceivable claim is derived from the language of the bond itself which admittedly was filed in compliance with the statutory mandate. Furthermore, Appellant *does* here seek "to hold the surety". Both in the court below and on this appeal, Appellant seeks judgment against the surety on the bond. It follows that "the provisions of the statute come into play" and that having failed to comply with the statute, Appellant's cause must fail.

Title 14, Chapter 1, Section 1 (now repealed) reads in pertinent part:

"Every person entering into a contract for the construction or alteration of, or addition to, any public work, building, structure or improvement, shall, before the work under any such contract is commenced, be required to furnish a good and sufficient bond for the faithful performance of such contract, *and further conditioned that the contractor will promptly make payment to all persons supplying labor or materials used in the prosecution of the work.*" (Emphasis added.)

It is submitted that the language from the bond upon which the Appellant does and must rely is the very language *required* by the statute, that the remedies prescribed by the statute are exclusive and that the failure of Appellant to comply with the statutory conditions is fatal to its claim against the *contractor and the surety* of the bond.

A very nice question could have arisen in this case as to which statute applies. For example, it is clear from Appellant's complaint that it expressly relied upon Title 14, Chapter 1, Utah Code Annotated, 1953. The bonding provision thereof (14-1-2) provided that "a right of action" would accrue in favor of a materialman "six months" after the completion and final settlement of the contract, providing that no action had been filed by the obligee on the bond during that period. However, substantially prior to the accrual of such "right of action" in this case, and on May 14, 1963, Sections 1 through 4 of Title 14, Chapter 1 were repealed. Hence, the very statutory provisions under which the complaint was filed were repealed before any right of action accrued thereunder and before this action was filed. Hence, it could be argued that the court below had no jurisdiction whatsoever to entertain the claim under the provisions of the repealed statute and that Appellant's rights, if any, must be derived from the new provisions contained in Sections 5-9 of the repealing statute (Title 14, Chapter 1).

However, it was not necessary below and it is not necessary here to determine which of the public contract bonding statutes apply for the reason that Appellant complied with the provisions of neither of them. Under the provisions of either statute, Appellant's complaint was properly dismissed by the court below. The two statutes will be discussed below in sequence.

## POINT III.

APPELLANT IS NOT ENTITLED TO RECOVER AGAINST RESPONDENTS UNDER THE PROVISIONS OF TITLE 14, CHAPTER 1, SECTIONS 1-4, UTAH CODE ANNOTATED, 1953.

Appellant's complaint was filed under and pursuant to the provisions of Title 14, Chapter 1, Sections 1-4, Utah Code Annotated, 1953. Assuming, for purposes of this discussion, that this statutory provision is applicable, it does not benefit Appellant for the reason that Appellant failed to comply with three necessary statutory conditions which will be discussed below.

- a) *Appellant was not a proper party and could not properly maintain an action in its own name under said statutory provisions; such action must be filed in the name of the obligee on the bond.*

Title 14, Chapter 1, Section 2 of the former statute provides in pertinent part that a materialman may institute a direct action against the contractor and his surety "in the name of the obligee".

The obligee under the bond is the State of Utah, by and through the State Road Commission of Utah. Appellant has no standing under the statute through which it sought to invoke the jurisdiction of the court below under its claimed statutory cause of action to prosecute the action in its own name and on its own behalf. The action

must be maintained, if at all, in the name of the State of Utah by and through the State Road Commission of Utah for the benefit of and on behalf of the Appellant.

The requirement that the action be filed in the name of the obligee is not an arbitrary requirement. One of the purposes of the whole statutory procedure is to permit only one civil action, to require all creditors to join and litigate their respective claims in the same action and to reasonably apprise all potential creditors of the pendency of such claims. An action on file entitled *American Oil Company v. United States Steel Corporation* obviously would not give laborers and materialmen notice of the pendency of a statutory cause of action in which they may participate. On the other hand, if the statutory condition is followed and the action brought in the name of the obligee, for and on behalf of the claiming laborer or materialman, potential claimants would be alerted and would have an opportunity to intervene as provided by the statute.

In its brief, Appellant relies upon *Board of Education v. Southern Surety Co.*, 76 Utah 63, 287 P. 332 (1930). It is respectfully submitted that that case is wholly inapposite. There, the action *was* brought in the name of the obligee. The plaintiff had standing to sue and the court had jurisdiction over the parties and the subject matter. That case holds only that the publication of notice to other creditors was not jurisdictional. Because of the language of the Board of Education case, Respondents did not raise in their motion to dismiss and memorandum in support

thereof or in their motion for summary judgment and memorandum in support thereof the failure of Appellant to publish notice to creditors.

However, this court treated the precise question here involved in *Utah State Building Commission, for the use and benefit of Mountain States Supply Company v. Great American Indemnity Co., et al.*, 140 P. 2d 763, 105 Utah 11, which is cited at page 5 of Respondents' memorandum in support of their motion for summary judgment (R. 58). That case, the only case in which this court has treated this subject, is conspicuously absent from the list of authorities cited by Appellant. There, the obligee on the bond was the Utah State Building Commission. The action was prosecuted in the name of the State Building Commission for the use and benefit of the materialman. The defendant defended upon the ground that the Utah State Building Commission was not a "body politic or corporate" and that the action should have been brought in the name of the State of Utah. After ruling that the Utah State Building Commission was the obligee on the bond and was a proper body politic or corporate, District Judge Crockett, writing the opinion for the court, stated:

"The Utah State Building Commission was the only proper obligee on the bond, and the only entity that could have properly brought this action."

Similarly, here, the State of Utah by and through the State Road Commission of Utah was the only proper obligee on the bond, and the only entity that could have properly brought this action. The action, therefore, was properly dismissed by the court below.

- b) *The District Court in Salt Lake County had no jurisdiction to entertain an action under said statutory provisions for the reason that they require said action to be filed in the County where the contract was to be performed.*

The statute upon which Appellant relied in its complaint (former Title 14, Chapter 1, Section 2, Utah Code Annotated, 1953) provides that a materialman may sue the contractor and his surety, but that the action must be filed in a "court having jurisdiction *in the County where the contract is to be performed.*" It is undisputed that the contract here involved was to be performed wholly within the confines of Daggett County, Utah.

Again, this condition is consistent with the basic purposes of the public bond statute. To protect the interests of all possible laborers and materialmen, the Legislature specifically required the filing of the action in the County where the work was to be performed. If so filed, it would be a simple matter for all interested materialmen to keep themselves apprised of actions filed in the particular County involved in the name of the obligee for their benefit. This would not be true if any particular materialman could commence an action in any County in the State of Utah.

Under Point III in its Brief, Appellant asserts that the Federal Courts had construed "the Miller Act" to be "a venue requirement and not one of jurisdiction". It is true that some Federal cases have so held. However, we have

not found a ruling by United States Supreme Court on this issue, and the Federal authorities are in substantial conflict. Representative Federal cases holding that the Miller Act requirement (Title 40, Section 270 B, United States Code Annotated) that the action must be brought in the United States District Court for the district "in which the contract was to be performed and executed and not elsewhere" limits the jurisdiction of the Federal court are:

1) *United States for the use and benefit of Greenville Equipment Co. v. U. S. Cas. Co.*, D. C. Del. 1962, 218 F. Supp. 653. In that case, the court stated the applicable rule as follows:

"This being an action under the Miller Act and the contract in question relating to work in Delaware, this U. S. court for the District of Delaware has the exclusive statutory jurisdiction."

2) *U. S. for use and benefit of Fairbanks Morse & Co. v. Bero Const. Corp.*, D. C. N. Y. 1957, 148 F. Supp. 295. In that case, the court stated the rule as follows:

"Jurisdiction under the statute is therefore vested solely in the District Court for the Eastern District of Virginia where such contract was to be performed and executed. The requirement that the action be brought in the District where the contract was to be performed and executed is a jurisdictional requirement. It is not met by bringing suit in this District which has no jurisdiction over the controversy. *United States, to use of New York Plumbers' Specialties Co. v. Silverburgh Construction Co.*, D. C. E. D. N. Y., 10 F. Supp. 121; *United States, for use and benefit of Johnson v. Morley*

Construction Co., D. C. W. D. N. Y., 17 F. Supp. 378.”

The Utah statute here involved by its express terms constitutes a limited and conditional waiver of Governmental immunity. To obtain rights thereunder, materialmen must comply strictly with the statutory conditions imposed. Although the Utah Supreme Court has not yet resolved this precise issue, it has ruled under a somewhat analogous situation that the conditions contained in a statutory cause of action must be strictly complied with. Title 30, Chapter 3, Section 1, Utah Code Annotated, 1953 provides that the District Court may enter a decree of divorce where “plaintiff shall have been an actual and bona fide resident of this State and of the county where the action is brought for three months next prior to the commencement of the action”. In *Weiss v. Weiss*, 111 Utah 353, 179 P. 2d 1005, this court ruled that where the statutory condition of residency within the County was not met that the District Court had no *jurisdiction* and could not consider the case on its merits. In that case, the District Court involved found that the plaintiff was not a resident of the County where the action was brought, then entertained the cause on its merits and entered judgment against plaintiff. The Supreme Court modified the judgment to hold that the complaint was dismissed because the trial court had no jurisdiction stating:

“If it finds that there was not such residence it has no power to further act as to the marriage contract and if it acts in such regard it exceeds its authority.”



The action there had to be filed *in the County where the plaintiff resided*. The action here had to be filed *in the County* where the work was to be performed. In each case, the Legislature, for sound legislative reasons, imposed the statutory conditions. In either case, the District Court has no jurisdiction to proceed unless the statutory condition has been satisfied. Admittedly, there has been no compliance here. The court, therefore, properly dismissed the action below.

- c) *Appellant's claimed right of action under said statutory provisions is barred by the special statute of limitations contained therein.*

Former Title 14, Chapter 1 provided in Section 2 specifically that action be commenced not later than one year after the "completion and final settlement" of the contract. The Utah Supreme Court in *State, et al. v. Campbell Building Co., et al.*, 94 Utah 326, 77 P. 2d 341 stated as follows with respect to the proper interpretation and application of this language:

"Final settlement within the statute does not mean final payment or final disposition of all matters under the contract. The time of final settlement is the time when the obligee in the bond, the state, has administratively determined that performance under the contract has been made by the contractor, and the obligee has determined the amount due under the contract; that is, the obligee has determined whether or not it has any claims to assert against the surety because of the contractor's failure to perform according to his obligations under the contract.

“\* \* \*

“‘Final settlement’ under the statute is the determination by the obligee as to whether it has any claims against the contractor, and what it considers it owes the contractor. This could not be affected by the fact that the contractor may not agree with the determination. The most essential thing is whether the obligee asserts a right to recover under the bond on a claim against the contractor, except as such amount may affect the claim, if any, it asserts against the surety under the bond. The question as to whether there has been a ‘final settlement’ is not affected by the acceptance or rejection of the statement by the contractor.”

Applying this test to the uncontroverted facts before the court at the hearing of the respective motions of the parties for summary judgment, it is clear that the date of “completion and final settlement” of the contract here involved was May 2, 1963. On that date, D. Gordon Stringham, being duly authorized, and acting for and on behalf of the State of Utah by and through the State Road Commission, the obligee on the bond, made each of the required administrative determinations (R. 42-3):

- 1) The contractor completed performance of the contract on December 13, 1962.
- 2) The State of Utah had no claims to assert against either the contractor or its surety.
- 3) The amount due the contractor.

The court in the Campbell case at pages 333-4 of the Utah Reporter sets out verbatim the pertinent testimony

of the representative of the obligee. A comparison of that testimony with the affidavit of Mr. Stringham on file in this matter demonstrates that identical determinations were made in each case. The estimate prepared in the case at bar by Mr. Stringham is designated "15 and final" (R. 44). It was the final administrative determination by the obligee, and at the date thereof, the statute of limitations commenced to run.

The case at bar is much stronger than the Campbell case in that here the "estimate invoice" attached to the supplemental affidavit of D. Gordon Stringham demonstrates that the administrative determination by the State of Utah was accepted and approved by the contractor and was paid by the obligee (R. 43-4). In the Campbell case, the contractor objected to the final estimate and in subsequent litigation demonstrated that the administrative determination initially made in the State's estimate was incorrect. Notwithstanding this fact, the court in the Campbell case ruled that the "completion and final settlement", as contemplated by the statute, was the date upon which such administrative determination initially was made by the State Road Commission.

In its Brief, Appellant seeks to follow two separate escape routes to avoid facing the uncontroverted facts which establish of record the "final settlement" date. Neither route is open to it. First, at page 3 of the Brief, Appellant tells the court that the "completion and final settlement" date is a "disputed fact". However, the existence of this claimed "disputed fact" did not preclude

Appellant below from praying for summary judgment, relying upon the various affidavits of D. Gordon Stringham (R. 35-6, 42-3, 46-7), and affirmatively asserting to the court below "there is no genuine issue as to any material fact" (R. 37). It is pertinent here to note also that the affidavits submitted by Appellant in support of its motion for summary judgment do not relate to any "common-law" claim, but establish facts material only to the statutory claim.

We submit that the action of Appellant below brings this case within the teachings of *Mastic Tile Division of the Ruberoid Company v. Acme Distributing Company*, Feb. 1964, 15 Utah 2d 136, 389 P. 2d 56. There, as here, both parties submitted the issues on documentary evidence to the trial court inviting summary judgment. There, as here, after entry of summary judgment, one of the parties claimed that disputed facts existed. In discussing such claim, this court stated:

"Both sides laid the matter in the lap of the court by their mutual motions, and under the facts of this particular case unequivocally invited and authorized the court to decide the case by interpreting the documents. This the court did. Having done so in a case like this, where interpretation of the writings was the only issue, we do not think the court should be required to submit to the subsequent urging of the loser that although he took his chances without reservation, he must have another go at the case, — although it is conceivable that in some other and unusual case this might be so."

The second route of attempted escape is by inaccurate statement of claimed fact. At page 15 of the Brief, Appellant glibly states that the "complete performance and final settlement" date was "May 21, 1963". The facts establish by the record in this regard are summarized as follows:

1) In paragraph 5 of his first affidavit, D. Gordon Stringham states the conclusion that "date of complete performance and final settlement" was "May 21, 1963" (R. 36).

2) In paragraph 2 of his supplemental affidavit (R. 42-3), Mr. Stringham "supplements and amends" paragraph 5 of his prior affidavit "relating to his conclusion as to the date of 'complete performance and final settlement'" by setting forth the underlying facts. Those facts are:

- (a) Contract was completed on December 13, 1962.
- (b) Determination of amount due from the obligee to the contractor and that the obligee had no claims against either the contractor or the surety was made on May 2, 1963.
- (c) Letter was mailed on May 21, 1963 indicating approval for payment after acceptance of the State's "15 and final" estimate by the contractor.

3) In paragraph 2 of Mr. Stringham's "second supplemental affidavit" (R. 46-7), he reiterates that the obligee's final estimate (made on May 2, 1963) "constitutes a determination by the Commission that it has no

claims to assert against the contractor or its surety and the amount due to the contractor”.

We submit that under the doctrine of the Campbell case, these facts demonstrate conclusively that the “final settlement” date was May 2, 1963.

Appellant’s action below admittedly was not filed within one year after May 2, 1963. The action, therefore, is barred by the very statute upon which it purports to be based and the complaint below was properly dismissed.

#### POINT IV.

#### APPELLANT IS NOT ENTITLED TO RECOVERY AGAINST RESPONDENTS UNDER THE PROVISIONS OF TITLE 14, CHAPTER 1, SECTIONS 5-9, UTAH CODE ANNOTATED, 1953.

Effective May 14, 1963, Title 14, Chapter 1, Sections 1-4, Utah Code Annotated, 1953 was repealed and a new public contract bonding statute was enacted in its place which is now contained in Title 14, Chapter 1, Sections 5-9. Assuming for purposes of this discussion, that the provisions of the new statute are controlling, Appellant’s action below still was properly dismissed. Appellant failed to comply with three mandatory requirements of the new statute which will be discussed below:

- a) *Appellant did not comply with the notice requirements of said statutory provisions.*

Title 14, Chapter 1, Section 6, Utah Code Annotated, 1953 sets forth jurisdictional notice requirements and pro-

vides that the claimant "shall not have a right of action upon such payment bond" unless he has given the prescribed notice. Since the record contains no averment of compliance with such requirements, Appellant had no right of action under the bonding statute which was in effect at the time this action was filed.

- b) *The District Court in Salt Lake County had no jurisdiction to hear the subject action for the reason that an action upon the bond must be filed in an appropriate court in the political subdivision in which the contract was to be performed.*

Again, the complaint avers and the fact is uncontroverted that the contract here involved was to be performed in Daggett County, State of Utah. Title 14, Chapter 1, Section 6 requires that "every suit instituted" on the statutory bond "shall be brought in the appropriate court in the political subdivision in which the contract was to be performed, and not elsewhere". The same arguments apply to this statutory provision which were made under Point III hereof, sub-paragraph b. It follows that the District Court of Salt Lake County had no jurisdiction to entertain this particular action under the provisions of the new statute.

- c) *Appellant's claimed right of action, if processed under said statutory provisions, would be barred by the special statute of limitations contained therein.*

Title 14, Chapter 1, Section 7, Utah Code Annotated, 1953 provides in pertinent part:

“\* \* \* Provided, however, that no such suit shall be commenced after the expiration of one year from the date on which the plaintiff performed the last of the labor or furnished or supplied the last of the materials for which the suit is brought, except, that if the claimant is a subcontractor of the contractor, no such suit shall be commenced after the expiration of one year from the date on which final payment under the subcontract became due.”

The claimant here was not a subcontractor of the contractor. The claimant was a materialman who supplied petroleum products to a subcontractor; hence, the one year statute of limitations commenced to run upon the date when Appellant supplied the last petroleum products to the subcontractor. Attached to the affidavit of W. L. Olsen filed in support of Appellant's motion for summary judgment are statements demonstrating that the last petroleum products were supplied to the subcontractor on December 10, 1962. Therefore, it was required to file its action under the terms of the new statute on or before December 10, 1963. Having failed to do so, the action was barred by the special statute of limitations contained in the statute.

### CONCLUSION

Appellant here filed a complaint asserting a statutory cause of action. Neither the complaint nor any other document contained in the record on appeal would reasonably apprise the adverse parties or the court that Appellant de-



sired in the alternative to assert a common-law third party beneficiary claim.

The record demonstrates and the court below found that Appellant did not comply with required statutory conditions. The statutory remedies are exclusive. The provisions of the public contract bonding statutes (both old and new) preclude recovery under the facts of this case.

Through this appeal, the Appellant seeks to amend its pleadings, to assert a new cause of action and to obtain automatic judgment — this without the aid of averment or proof. It should not be permitted so to do.

We submit that the order and judgment entered by the court below from which this appeal is taken was duly and properly entered and should be affirmed.

Respectfully submitted,

PARSONS, BEHLE, EVANS  
& LATIMER,  
520 Kearns Building,  
Salt Lake City, Utah,

E. V. BOORMAN, JR.,  
Box 510,  
Provo, Utah,  
*Attorneys for Defendants  
and Respondents.*