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Jacob v. Northeastern Corp.: Surety's Dilemma-Subrogation Rights or Perfected Security Interest

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JACOBS V. NORTHEASTERN CORP.: SURETY'S DILEMMA—SUBROGATION RIGHTS OR PERFECTED SECURITY INTEREST

Northeastern Corporation entered into a contract with the Pennsylvania Department of Highways for the construction of certain state roads. Northeastern was required by statute[1] to furnish a bond guaranteeing the faithful performance of the contract[2] and an additional bond to secure the payment of all labor and materialmen.[3] On the bond Northeastern was the principal; the Commonwealth was the obligee; and Great American Insurance Company was the surety. Northeastern also entered into a contract with the General State Authority for the construction of a certain state building. Pursuant to statute[4] both the performance and the payment bonds were made conditions of the contract. Travelers Indemnity Company was the surety on this bond; Northeastern was the principal; and the Commonwealth was the obligee. Each contract contained an *express* undertaking by Northeastern to pay labor and materialmen. Furthermore, in each bond application the contractor assigned his "contract rights" (rights to payment under a contract not yet earned by performance)[5] to the surety. These assignments were contingent upon the contractor's default and the surety's payment under the bond. Upon Northeastern's default to pay certain labor and materialmen, the respective surety companies made payment in compliance with the bonds. Northeastern was placed in receivership. Final payment under both construction contracts was due and payable to the contractor from the Commonwealth and each surety petitioned the court for the distribution of the retainage due on the respective contracts. Northeastern's receiver resisted the demand contending that the sureties were only entitled to a pro rata share as general creditors. The lower court granted the petition of the sureties.[6] The Pennsylvania Supreme Court in *Jacobs v. Northeastern Corp.*,[7] affirmed, relying upon the doctrine of equitable subrogation.

The doctrine of equitable subrogation is a "mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it."[8] It is most frequently applied where a surety makes good

1. PA. STAT. ANN. tit. 36, § 670-404 (1945).
2. Most often this type of bond is referred to as a performance bond. It guarantees that the work will be completed as required by the construction contract.
3. This type of bond will be referred to as a payment bond. Under it the surety guarantees that labor and materialmen will be paid for the work done under the construction contract.
4. PA. STAT. ANN. tit. 71, § 1707.11 (1949).
5. See PA. STAT. ANN. tit. 12A, § 9-106 (Supp. 1963).
6. No. 861, Allegh. County C.P. Court, July, 1963.
7. 416 Pa. 417, 206 A.2d 49 (1965).
8. McCormick's Adm'r v. Irwin, 35 Pa. 111, 117 (1860).

the default of his principal.[9] In such a case the surety is entitled to the retainage under the contract by subrogation to the rights of the contractor-principal,[10] the owner-obligee,[11] or the labor and materialmen.[12] While, in most instances, it is immaterial to whose right a surety is subrogated, situations do arise where it is an important factor. Such a situation occurs where a payment bond is required in a public construction contract.[13]

The payment bond in government construction contracts is designed to aid labor and materialmen, since government structures, unlike private buildings, are immune from mechanics' liens.[14] The government has no direct contractual obligation to pay labor and materialmen.[15] Having an "equitable obligation" to provide for payment,[16] both the federal[17] and

9. Before a surety is entitled to subrogation rights in equity the entire debt must be discharged. *E.g.*, American Sur. Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133 (1935); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958), *reversing*, 49 N.J. Super. 469, 140 A.2d 429 (1958). It is immaterial that the entire debt is not discharged by the surety so long as the creditor receives full satisfaction. Piedmont Coal Co. v. Hustead, 294 Fed. 247 (3d Cir. 1923), *cert. denied*, 264 U.S. 582 (1924).

10. This situation arises occasionally where the contractor does not finish the work and the surety does at a cost exceeding that retained by the obligee. *E.g.*, Wells v. City of Philadelphia, 270 Pa. 42, 46, 112 Atl. 867, 868 (1921); Continental Cas. Co. v. City of Pittsburgh, 68 F. Supp. 805, 806-08 (W.D. Pa. 1946).

11. Where a contractor fails to make payments to labor and materialmen, it is tantamount to a breach of contract with the owner-obligee. If this occurs and the surety makes good the contractor's default, it stands in the position of a surety completing a contractual obligation and equity will assign the owner's right against the contract to the surety. Martin v. National Sur. Co., 300 U.S. 588 (1937); Henningson v. United States Fid. & Guar. Co., 208 U.S. 404 (1907); Prarie State Bank v. United States, 164 U.S. 227 (1896); *In re* L. H. Duncan & Son, 127 F.2d 640 (3d Cir. 1942); Lancaster County Nat'l Bank's Appeal, 304 Pa. 437, 155 Atl. 859 (1931).

12. Most commonly where a surety pays a creditor upon the principal's default, it is entitled to be substituted to the creditor's right against the principal. *E.g.*, American Sur. of N.Y. v. Bethlehem Nat'l Bank, 314 U.S. 314 (1941). This rule has been extended in federal construction contract cases to permit the surety to be subrogated to the "equitable lien" of the labor and materialmen *against* the United States. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962). Pennsylvania seemingly has adopted this view in the instant case. Jacobs v. Northeastern Corp., 416 Pa. 417, 427, 206 A.2d 49, 54 (1965). See generally ARANT, SURETYSHIP 357-67 (1931); ELDERS, STERNS' LAW OF SURETYSHIP 439-78 (1951); SIMPSON, SURETYSHIP 205-23 (1950).

13. See Note, *Reconsideration of Subrogative Rights of the Miller Act Payment Bond Surety*, 71 YALE L.J. 1274 (1962).

14. See Equitable Sur. Co. v. McMillan, 234 U.S. 448, 455 (1914); United States *ex rel.* Hill v. American Sur. Co., 200 U.S. 197, 203 (1906); National Sur. Corp. v. United States, 133 F. Supp. 381, 383 (Ct. Cl. 1955). In private construction contracts mechanics' lien laws, which have been enacted in almost every state, apply. See Comment, 68 YALE L.J. 138 (1958).

15. See United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947).

16. National Sur. Corp. v. United States, 133 F. Supp. 381 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 902 (1955). Some courts have referred to the right of labor and materialmen as imposing an "equitable lien" or a "moral obligation" on the United States. *E.g.*, American Sur. Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133 (1935); Bank of Ariz. v. National Sur. Corp. 237 F.2d 90 (9th Cir. 1956); Belknap Hardward & Mfg. Co. v. Ohio River Contracting Co., 271 Fed. 144 (6th Cir. 1921).

17. *E.g.*, The Heard Act, 28 Stat. 278 (1894), as amended, 33 Stat. 811 (1905),

state[18] governments have enacted measures requiring payment bonds so that labor and materialmen would have more than just a direct contractual action against a defaulting, and usually insolvent, contractor.[19] It would seem to follow that if a surety were subrogated to the rights of the contractor or labor and materialmen, it would have no right to the retainage, since neither the defaulting contractor nor the labor and materialmen would have such a right.[20] Some courts, therefore, have subrogated the surety to the position of the government-owner.[21] These courts reason that the surety is performing an "equitable obligation" owed to the government by the contractor and is, therefore, substituted to the rights the government-owner might have asserted against the retainage for payment of labor and materialmen.[22]

Prior to the *Jacobs* case Pennsylvania decisions followed this line of reasoning with one added feature: the contractor must have *expressly* promised to pay labor and materialmen in the construction contract with the government-obligee.[23] Although the construction contract in the *Jacobs* case

required a single bond covering both faithful performance and the prompt payment of labor and materialmen. It was superseded by The Miller Act, 29 Stat. 794 (1935), 40 U.S.C. § 270 (1958), as amended, 73 Stat. 279 (1959), 40 U.S.C. § 270 (1960), which requires two distinct bonds, a performance and payment bond. See generally Cushman, *Surety Bonds on Federal Construction Contracts: Current Decisions Reviewed*, 25 FORDHAM L. REV. 241 (1956).

18. *E.g.*, PA. STAT. ANN. tit. 36, § 670-404 (1945); PA. STAT. ANN. tit. 71, § 1707.11 (1949).

19. It is to be noted that the surety has the right to exoneration, that is, the right to compel the principal to discharge its debts. If the surety has already paid the principal's debt, it is entitled to reimbursement from the principal. These basic postulates of the law of suretyship distinguish the surety agreement from the insurance agreement. See Finkelstein v. Keiths' Fabrics, Inc., 278 F.2d 635 (5th Cir. 1960); see generally SIMPSON, SURETYSHIP 212-14 (1950); Smedley, *Indemnification before Payment—A New Remedy for the Surety*, 40 KY. L.J. 161 (1951).

20. Mr. Justice Jackson in United States v. Munsey Trust Co., 332 U.S. 234 (1947) said:

> If the United States were obligated to pay laborers and materialmen unpaid by the contractor, the surety who discharged that obligation could claim subrogation [to the laborers and materialmen claim against the United States]. But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation . . . . They cannot acquire a lien on public buildings. . . .

Id. at 242. See American Sur. Co. v. Hinds, 260 F.2d 344, 368 (10th Cir. 1958); Phoenix Indem. Co. v. Earle, 218 F.2d 645, 649 (9th Cir. 1955).

21. See Henningson v. United States Fid. & Guar. Co., 208 U.S. 404 (1907); Prarie State Bank v. United States, 164 U.S. 227 (1896); Lancaster County Nat'l Bank's Appeal, 304 Pa. 437, 155 Atl. 859 (1931). For a discussion of the development and origin of the doctrine of subrogation to the rights of the United States, see Note, 20 U. CINC. L. REV. 494 (1951).

22. Prarie State Bank v. United States, *supra* note 21, at 232-33.

23. In Lancaster County Nat'l Bank's Appeal, 304 Pa. 437, 155 Atl. 859 (1931), the contractor did expressly undertake such an obligation in the construction contract between the Commonwealth and the contractor. That court subrogated the surety to the position of the Commonwealth and permitted the surety to recover the retainage which the Commonwealth was holding as a stakeholder. However, later Pennsylvania decisions distinguished the *Lancaster* case where there was no express promise by the contractor

contained that specific promise,[24] the court added that such a distinction would no longer be followed.[25] The court apparently relied on a federal decision[26] which stated that the right of subrogation was a creature of equity and existed independent of any contractual relations between the government and the contractor.[27] Of itself, this was a progessive step on the part of the *Jacobs* court.[28] The court held as "applicable and binding" the case of *Lancaster County Nat'l Bank's Appeal*,[29] wherein a surety was given the retainage under a public construction contract after making payments in accordance with the bond provisions. That court had subrogated the surety to the right which the Commonwealth might have asserted against the retainage, on the theory that the surety had completed an "obligation" owed to the Commonwealth.[30] The *Jacobs* court, however, did not apply the *Lancaster* rule by subrogating the sureties to the position of the Commonwealth. Instead it announced that the sureties were being subrogated to the "equitable lien" of the labor and materialmen *against* the Commonwealth,[31] relying on the recent federal decision of *Pearlman v. Reliance Ins. Co.*[32]

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to pay labor and materialmen contained in the construction contract and denied the surety the right to recover the retainage. See City of Philadelphia v. National Sur. Corp., 140 F.2d 805 (3d Cir. 1944); DuBois v. United States Fid. & Guar. Co., 341 Pa. 85, 18 A.2d 802 (1941); Sundheim v. Philadelphia School Dist., 311 Pa. 90, 166 Atl. 365 (1933). The distinction was announced in Jacobs v. Northeastern Corp., 416 Pa. 417, 206 A.2d 49 (1965):

> The right of the sureties to the funds rests upon the application of the doctrine of equitable subrogation. It is clear that our rule has been that the right of a surety on a public construction bond to be subrogated to the right to the monies withheld by the Commonwealth must be based on the existence of an obligation of the contractor contained in the construction contract to pay labor and materialmen.

Id. at 419, 206 A.2d at 50.

24. *Id.* at 420-22, 206 A.2d at 50-51.

25. *Id.* at 426, 205 A.2d at 53.

26. Memphis & Little Rock R.R. v. Dow, 120 U.S. 287 (1887).

27. *Id.* at 301-02.

28. It matters not that an express promise is lacking. Courts may easily find such a promise by implication. See Henningson v. United States Fid. & Guar. Co., 208 U.S. 404 (1907).

29. 304 Pa. 437, 155 Atl. 859 (1931).

30. *Id.* at 444, 155 Atl. at 862. Furthermore, the construction contract contained a provision forbidding the contractor from assigning his rights, unless permission was obtained from the Commonwealth. No such provision was contained in the *Jacobs* construction contract.

31. Jacobs v. Northeastern Corp., 416 Pa. at 426, 206 A.2d at 54.

32. 371 U.S. 132 (1965) (Clark, Douglas and Brennan, JJ., concurred in the result but disagreed in theory). The *Pearlman* case was as inconsistent as the *Jacobs* decision. Mr. Justice Black, speaking for the majority relied on the Prarie State v. United States, 164 U.S. 227 (1896) and Henningson v. United States Fid. & Guar. Co., 208 U.S. 404 (1907) holdings, which had subrogated the surety to the right of the United States rather than to the right of the labor and materialmen. Instead of actually applying these holdings, the Court announced its "equitable lien" theory:

> [T]hat the Government had a right to use the retained funds to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the funds; that the contractor, had he completed his job and paid his laborers

The right of subrogation is an equitable right. In the *Jacobs* case, however, there was an assignment of the contractor's rights under the construction contract to the surety in the bond application as collateral. Does not the surety have a *legal* right to the retainage in the case of the contractor's default and its (the surety's) compliance with the bond provisions? It would seem that the transaction was intended to have effect as security,[33] and that the "assignment" of "contract rights" as collateral created a "security interest" as defined by the Uniform Commercial Code.[34] A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation;"[35] it may be created by an "assignment."[36] Furthermore, "contract rights" may be the subject matter of such an assignment.[37] The broad scope of article 9 does indicate that where one has received an assignment of contract rights to secure an obligation, he has a security interest.[38] It seems to follow that where a surety receives "contract rights" by an assignment to secure performance of its obligation, it has a *legally enforceable* interest—a security interest. To protect this *legally enforceable security interest* a surety should be compelled to comply with the filing re-

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and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefits of all these rights to the extent necessary to reimburse it.

Id. at 141.

The concurring opinion clarified the majority's interpretation of *Prarie State Bank* and *Henningson* and cites these cases for their actual holding, that the surety was subrogated to the position of the United States who would in good conscience have paid the laborers and materialmen. The correct interpretation of these cases achieves the same result. It, however, rests the surety's recovery on a different theory. Once the surety has performed the "equitable obligation" to the United States, the contract has been completed. Then the surety's recovery will depend upon its *legal* right to the retainage. The surety's right to the fund rests on the contract between the surety and the contractor. If there is an assignment in this contract, the surety will recover the fund as a *legal* right.

For discussions on this controversial case, see 4 B.C. IND. & COM. L. REV. 748 (1963); 14 SYRACUSE L. REV. 713 (1963); 41 TEXAS L. REV. 735 (1963); 16 VAND. L. REV. 448 (1963).

33. UNIFORM COMMERCIAL CODE § 9-102, comment 1: "[T]he principal test whether a transaction comes under this article is: is the transaction intended to have effect as security?"

34. The Uniform Commercial Code has been enacted in thirty-one states and the District of Columbia. *E.g.*, PA. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (Supp. 1963); N.J. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (1962).

35. UNIFORM COMMERCIAL CODE § 1-201(37).

36. UNIFORM COMMERCIAL CODE § 9-102(2): "This Article applies to security interests created by contract including pledge, assignment . . . ."

37. UNIFORM COMMERCIAL CODE § 9-102(1)(a). Except as provided in sections 9-103 and 9-104, article 9 applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including . . . accounts or contract rights . . . ." The comment to section 9-106 states that "the recognition of the contract right as collateral in a security transaction makes clear that this Article rejects any lingering common law notion that only rights already earned can be assigned."

38. See Pearlman v. Reliance Ins. Co., 371 U.S. 132, 137 (1962), wherein the Court noted that the surety was being subrogated to a "security interest" in the withheld funds. This case arose in New York before the Code was in effect. But see note 57 *infra*.

quirements set forth in the Code.[39] It has been suggested that the courts need not look beyond the Code to determine what rights the surety may have.[40] Since the Code has provided a *legal* remedy for sureties, where none had existed at common law, resort to the doctrine of equitable subrogation is superfluous and should be abandoned.[41]

Earlier decisions applying Pennsylvania law appeared to follow this reasoning. A federal district court in *United States ex rel. Greer v. G. P. Fleetwood & Co.*[42] held that a trustee in bankruptcy, taking as a lien creditor, had a priority to the retainage over the surety's unperfected security interest.[43] A county court, when confronted with a similar problem, held that a surety's failure to file financing statements rendered its unperfected security interest subordinate to a perfected security interest held by a bank, which had also received an assignment of contract rights from the contractor.[44]

Undaunted by these cases, the *Jacobs* majority concluded that the sureties were not required to comply with article 9.[45] The court predicated its conclusion of the "equitable lien" theory of subrogation. It stated:

> Of basic importance is the general rule of Section 9-102(2) . . . that Article 9 "applies to security interests *created by contract.* (Emphasis supplied). Rights of subrogation, although growing out of a contractual setting and ofttimes articulated by the contract, do not depend for their existence on a grant in the contract, but are created by law to avoid injustice. Therefore, subrogation rights are not "security interests" within the meaning of Article 9.[46]

The majority in *Jacobs*, however, avoids the question of whether the

39. See UNIFORM COMMERCIAL CODE §§ 9-204, 9-302, 9-303, 9-304, 9-401, 9-402, 9-403, 9-404. See generally, Coogan, *A Suggested Analytical Approach to Article 9 of the Uniform Commercial Code*, 63 COLUM. L. REV. 1 (1963); Coogan, *How to Create Security Interests Under the Code—And Why*, 48 CORNELL L.J. 131 (1962).

40. 4 B.C. IND. & COM. L. REV. 748, 755 (1963).

41. *Ibid.*

42. 165 F. Supp. 723 (W.D. Pa. 1958).

43. *Id.* at 725. The question of the surety's subrogative rights was never placed in issue. Here the surety relied on the assignment it had received in the bond application from the contractor. Since the surety did not file financing statements, the trustee in bankruptcy as a lien creditor, according to section 9-310 of the Code, had a priority in the retainage.

44. See Hartford Acc. & Indem. Co. v. State Pub. School Bldg. Authority, 26 Pa. D. & C.2d 717 (C.P. 1961). In May, 1956, a public construction contractor assigned all of his present and future accounts receivable to a bank in order to secure a loan. The bank perfected its security interest by filing financing statements. In May, 1957, the contractor entered into a building contract with the Authority for the construction of a school. In the bond application the contractor assigned his rights under the contract to the surety. The contractor defaulted. The surety then filed financing statements and completed the work. The Dauphin County Common Pleas Court held that the assignee-bank was entitled to the retainage, since it had a prior perfected security interest. Section 9-312(5) of the Code was followed.

45. Jacobs v. Northeastern Corp., 416 Pa. at 427, 206 A.2d at 54.

46. *Id.* at 429, 206 A.2d at 56.

conditional assignments of *contract rights* to the sureties created "security interests," thereby failing to recognize the existence of this legal remedy made available to the sureties by the adoption of the Uniform Commercial Code in Pennsylvania. The Code, for the first time, in an attempt to dismiss the common-law notion that only those rights already earned could be assigned, recognizes contract rights as collateral in a security transaction.[47] This is expressly made clear by section 9-102 which extends the application of article 9 not only to transactions intended to create security interests in contract rights but also to the sale of such contract rights.[48] This newly available means of creating a security interest by the assignment of contract rights should be applicable and binding in payment bond surety cases. Such a result would promote the Code's policies and purposes by dispensing with the complexities and confusion which have developed in this area.[49] Section 1-102 provides that the Code should be liberally construed and applied to promote the following underlying policies:[50]

(a) to *simplify, clarify* and *modernize* the law governing commercial transactions;
(b) to permit the continued *expansion of commercial practices* through custom, usage and agreement of the parties;
(c) to make *uniform* the law among the various jurisdictions.[51]

It is worthy of note that section 9-312(7) of the 1952 Official Draft of the Code contained a provision expressly dealing with the controversy between sureties and other secured parties. It provided:

> A security interest which secures an obligation to reimburse a surety or other person secondarily obligated to complete performance is subordinate to a *later security interest* given to a secured party who makes a new advance, incurs a new obligation, releases a perfected security interest or gives other new value to enable the debtor to perform the obligation for which the *earlier secured party* is liable.[52]

It has been suggested that the deletion of this provision by the drafters of the Code in 1953 indicates that they did not intend article 9 to apply to

47. UNIFORM COMMERCIAL CODE, § 9-106, comment.
48. UNIFORM COMMERCIAL CODE, § 9-102(1).
49. For a discussion on the distinctions necessary to evaluate these problems, see Rudolph, *Financing on Construction Contracts Under the Uniform Commercial Code*, 5 B.C. IND. & COM. L. REV. 245 (1964). See also Creyke, *Recent Developments in the Right of Sureties in Defaulting Federal Contracts*, 5 B.C. IND. & COM. L. REV. 139 (1963); Jordan, *The Rights of a Surety Upon the Default of Its Contractor-Principal*, 41 ORE. L. REV. 1 (1961); Speidel, *"Stakeholder" Payments Under Federal Construction Contracts: Payment Bond Surety v. Assignee*, 47 VA. L. REV. 640 (1961).
50. UNIFORM COMMERCIAL CODE § 1-102(1).
51. UNIFORM COMMERCIAL CODE § 1-102(2). (Emphasis added.)
52. UNIFORM COMMERCIAL CODE, 1952 Official Draft. (Emphasis added.)

surety cases.[53] However, it is submitted that the deletion of this provision is more reasonably explained. It is to be noted that this subsection would have permitted a bank-assignee or lien creditor of a contractor who had met the requirements to prevail over a surety, whether or not that surety had *previously* perfected its security interest. No doubt such a result would have been unjust. To place the surety in a comparable position with that held by the bank-assignee and the lien creditor, the drafters deleted this subsection. Now the surety and the bank assignee or lien creditor must vie according to the governing rules of section 9-301[54] and section 9-312(5).[55]

Furthermore, the majority decided that it was "exceedingly clear" that filing was not needed to prevent deceiving or misleading creditors about the available assets of the contractor;[56] that none of the purposes of the Code's filing requirements would be served if a security interest was considered created in this situation and subject to article 9.[57] However, the purpose of article 9 and the filing requirements is "to allow subsequent creditors of the *debtor-assignor* to determine the true status of his affairs."[58] It appears that the *Jacobs* decision defeats this purpose and restricts commercial transactions. Contractors will be precluded from obtaining needed financing. Banks will be more stringent in advancing credit. The general community will suffer from the decline in competition and the increase in public construction costs.[59]

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53. Rudolph, *op. cit. supra* note 49, at 250.

54. UNIFORM COMMERCIAL CODE § 9-301 provides in part:

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
(a) persons entitled to priority under Section 9-312;
(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. . . .

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. . . .

55. UNIFORM COMMERCIAL CODE § 9-312(5) provides:

In all cases not governed by other rules stated in this section . . . priority between conflicting security interests in the same collateral shall be determined as follows:
(a) in the order of filing if both are perfected by filing, regardless of which security attached first under Section 9-204(1) and whether it attached before or after filing;
(b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and
(c) in the order of attachment under Section 9-204(1) so long as neither is perfected.

56. 416 Pa. at 428, 206 A.2d at 54-55.

57. *Id.* at 428, 206 A.2d at 54.

58. UNIFORM COMMERCIAL CODE § 9-103, comment 2.

59. See Federal Assignment of Claims Act, 65 Stat. 41 (1951), 31 U.S.C. § 203 (1958), which provides that a contractor can assign his contract right against the United States to a bank or other financing institution. The purpose of this section is to make it

These results seem to follow merely because the surety "might" be entitled to the withheld funds.[60]

CONCLUSION

It is submitted that where a contractor assigns his rights under a construction contract to a surety to secure the performance of an obligation, article 9 of the Code is applicable and should govern the priority of the claims.[61] The scope and language of the Code are of such breadth as to require sureties to comply with the requirements set forth therein.[62] Where an adequate *legal* remedy has been provided, there should be no resort to equitable doctrines,[63] especially one so enmeshed in confusion.

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easier for the government contractor to secure financing for carrying out its obligations to the Government, and thus to encourage the small contractor to compete for such jobs. See United States v. Hadden, 194 F.2d 327 (6th Cir. 1951). Hence, contractors can assign claims against the United States to a bank as collateral in order to borrow needed capital required to complete the contract. General Cas. Co. v. Second Nat'l Bank, 178 F.2d 679 (5th Cir. 1950). See also American Fid. Co. v. National City Bank, 266 F.2d 910 (D.C. Cir. 1959); see generally Rudolph, *op. cit. supra* note 49, at 253; Speidel, *op. cit. supra* note 49, at 648-65; Comment, 20 U. CHI. L. REV. 119 (1952).

60. Some cases interpreting the Federal Assignment of Claims Act have held that the bank-assignee will prevail. See General Cas. Co. v. Second Nat'l Bank, 178 F.2d 679 (5th Cir. 1950); Coconut Grove Exch. Bank v. New Amsterdam Cas. Co., 149 F.2d 73 (5th Cir. 1945). The Court of Claims has consistently held for the surety. See National Union Fire Ins. Co. v. United States, 304 F.2d 465 (Ct. Cl. 1962); Royal Indem. Co. v. United States 93 F. Supp. 891 (Ct. Cl. 1950).

61. See SPIVACK, SECURED TRANSACTIONS 63-64 (1962).

62. Jacobs v. Northeastern Corp., 416 Pa. at 429-30; 206 A.2d at 55 (dissent).

63. *Cf.* 77 Stat. 14 (1963), 11 U.S.C. § 96(a)(6) (Supp. 1964), wherein it is provided that "the recognition of equitable liens where available means of perfecting legal liens have not been employed is declared to be contrary to the policy of this section."