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Note and Comment

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MICHIGAN LAW REVIEW

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NOTE AND COMMENT

JUDICIAL REFORM IN MICHIGAN.—The legislature which has been in regular session this year has enacted a measure enlarging the scope of judicial action in a way likely to add very greatly to the usefulness of the courts. This law authorizes courts of record to make binding declarations of the rights of parties prior to the commission of a wrongful act.

In the MICHIGAN LAW REVIEW for December, 1917, a presentation of this subject appeared in the form of an article by Edson R. Sunderland, of this Law School, on "A Modern Evolution in Remedial Rights,—The Declaratory Judgment." It evoked a wide interest, and the author was asked to discuss the subject further at the meeting of the Michigan State Bar Association held in Kalamazoo in June, 1918. After hearing the paper the Bar Association instructed its Committee on Legislation and Law Reform to prepare a bill for the next legislature authorizing declaratory judgments. The author of the paper, as a member of this committee, drew the bill which has just been enacted into law,—the first statute of the kind, so far as we are aware, in the United States.

The subject has been given additional publicity by the CENTRAL LAW JOURNAL, which reprinted the paper read before the Michigan Bar Association. As a result of the agitation of the matter thus brought about, bills have been introduced in several states and are to be introduced in several more, providing for a similar extension of judicial power.

For the information of Michigan lawyers, and as a matter of interest to those in other states who are working upon bills of a similar nature, we give the text of the new Michigan law, which follows.

AN ACT to authorize courts of record to make binding declarations of rights.

The People of the State of Michigan enact:

SECTION 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

SECTION 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

SECTION 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

SECTION 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

SECTION 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the Supreme Court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

SECTION 6. This Act is declared to be remedial, and is to be liberally construed and liberally administered with a view to making the courts more serviceable to the people.

SUBSEQUENT IMPOSSIBILITY AS AFFECTING CONTRACTUAL OBLIGATIONS.— "Where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. * * * But where the party by his own contract creates a duty

or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine* v. *Jane,* Aleyn, 26, a case not really involving a question of impossibility. Most discussions of the effect of subsequent impossibility of performance upon contractual obligations start with this often quoted statement.

With the wisdom or folly of a party's undertakings by contract the court has no concern. That one entering into a contract should carefully consider what he is willing to bind himself to do and limit accordingly the scope of his promises and that courts should, generally speaking at least, require parties to contracts to live up to their undertakings as entered into would seem obviously to be sound policy. If all contracts were drawn by highly skilled lawyers or perhaps even by astute business men, a strict adherence to the second part of the statement above quoted would probably not lead to shocking results. Most contracts, however, are drawn informally and without the most competent advice, and the law must be shaped so as to accomplish substantial justice in the normal case. The skilled lawyer probably would so fully and carefully hedge about the promises that it might fairly be said in fact that the promisor intended to *guarantee* against contingencies not expressly provided for. The average person, on the other hand, in the usual informal contract promises in more general terms, either not thinking of the very unusual contingencies which might later arise to make performance on his part either impossible or impracticable, or if actually thinking of such possibilities considering it so obviously absurd that he should be expected to perform despite the changed condition that he does not bother to qualify his undertaking to take care of such unlikely difficulties.

If A, after promising to marry B, dies before the time for performance there is no question but that there is no liability upon A's estate for breach of contract. This doctrine certainly applies to all cases of contracts involving a personal relationship or personal service—the death of either party releases the parties from their contractual undertakings. See *Williams* v. *Butler,* 58 Ind. App. 47, 105 N. E. 387, where many of the cases are referred to; *Blakely* v. *Sousa,* 197 Pa. 305. The same result is reached where illness prevents performance of services that are personal in nature. *Robinson* v. *Davison,* L. R. 6 Ex. 268; *Spalding* v. *Rosa,* 71 N. Y. 41; and perhaps reasonable fear of illness may be sufficient. See *Lakeman* v. *Pollard,* 43 Me. 463.

Equally clear is the situation where the carrying out of the contract involves necessarily the continued existence of a certain thing, as the music-hall in *Taylor* v. *Caldwell,* 3 B. & S. 826; or the potato crop in *Howell* v. *Coupland,* L. R. 9 Q. B. 462, 1 Q. B. D. 258. The fact that the potatoes in the latter case had to be planted after the contract was made was held very properly not to affect the situation. In *Nickoll* v. *Ashton* (1901), 2 K. B. 126, the rule was applied in a case where the thing had not actually been destroyed, but had ceased to exist in such form as to be available for the contemplated purpose. A still further extension of the doctrine is found in the well known Coronation Seat cases growing out of the postponement of the coronation of King Edward VII. In *Krell* v. *Henry* (1903), 2 K. B. 740, one

of those cases, Vaughan Williams, L. J., said: "Whatever may have been the limits of the Roman law, this case (*Nickoll* v. *Ashton*) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance." *Cf. Herne Bay Steamboat Co.* v. *Hutton* (1903), 2 K. B. 683. See also *Leiston Gas Co.* v. *Leiston, etc. District Council* (1916), 32 T. L. R. 588; *Alfred Marks Realty Co.* v. *Hotel*, 170 App. Div. (N. Y.) 484, cases growing out of the World War. In *Berg* v. *Erickson*, 234 Fed. 817, Sanborn, J., said that the Federal courts had not gone so far as the cases referred to in this class.

There is a third class of cases in which it is also clear that subsequent impossibility relieves the promisor of undertakings in terms absolute. Where a railroad company acquired certain land under eminent domain proceedings and erected a structure thereon it was held that a lessor who had covenanted that neither he nor his assigns should erect any buildings on such land was not liable for breach of covenant. *Bailey* v. *De Crespigny*, L. R. 4, Q. B. 180, a leading case in this class. There is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; * * * but people in general must always be considered as contracting with reference to the law as existing at the time of the contract. * * * And the words showing a contrary intention ought to be pretty clear to rebut that presumption." Maule, J., in *Mayor of Berwick* v. *Oswald*, 3 E. & B. 665. To which Hannen, J., in *Bailey* v. *De Crespigny*, adds: "To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made." In *Public Service Electric Co.* v. *Public Utility Commrs.*, 87 N. J. L. 128, where the company had contracted to furnish free lighting for public buildings it was held a later statute making such preference unlawful excused the company from further observance of the contract. But a subsequent change in law making performance not unlawful but only more difficult or expensive does not have the same effect. *Cowan* v. *Meyer*, 125 Md. 459; *Newport News & M. Valley Co.* v. *McDonald Brick Co.*, 109 Ky. 408. The lawful order of public officers and bodies not amounting to a change in law may relieve a promisor from his undertaking. *Southern R. Co.* v. *Wallace*, 175 Ala. 72; *Melville* v. *DeWolf*, 4 El. & Bl. 844. But if such order does not render performance impossible there is no relief. *Abbaye* v. *United States Motor Cab Co.*, 71 Misc. (N. Y.) 454.

There are cases, in which no doubt it was correctly held that performance was excused, which do not fall within any of the above classes. See *Mineral Park Land Co.* v. *Howard*, — Cal. —, 156 Pac. 458 (but cf. *Runyan* v. *Culver*, 168 Ky. 45); *Dolan* v. *Rodgers*, 149 N. Y. 489. Professor Frederic C. Woodward in 1 COL. L. REV. 533, suggests the following as properly extending the doctrine of the three classes of case herein mentioned: "If the contingency which makes the contract impossible of performance is such

that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused."

Another group of cases not usually discussed in connection with those above are the so-called "frustration of the adventure" cases. *Geipel* v. *Smith*, L. R., 7 Q. B. 404; *Jackson* v. *Union Marine Ins. Co.*, L. R., 10 C. P. 125; *Dahl* v. *Nelson*, 6 App. Cas. 38, are representative. In *Horlock* v. *Beal* (1916), 1 A. C. 486, the doctrine of these cases we find coalescing with that of the more familiar "impossibility" cases. See the interesting and valuable article on "War-time Impossibility of Performance of Contract" by Arnold D. McNair in 35 LAW Q. REV. 84.

Though, as seen above, the courts have shown a tendency to break in upon the rigid doctrine laid down in *Paradine* v. *Jane*, the process has not gone so far but that the decision of the United States Supreme Court in *The Columbus Power & Light Co.* v. *Columbus*, Adv. Ops., Apr. 14, 1919, is to be deemed in accord with the present law. In that case the Railway Company claimed to have been relieved of its contract obligation to furnish eight tickets for twenty-five cents by the action of the National War Labor Board in raising wages of the company's employees more than 50%, thereby increasing the operating expense of the line by about $560,000, and leaving the gross earnings of the company short of paying expenses, taxes, etc. Thoughtful people observing the recent tendency of the Government in handling wage problems may very naturally regret that the result in the case was not otherwise. That hard cases make bad law ,however, is all too familar.

R. W. A.

THE EFFECT OF A STRIKE UPON THE TIME OF PERFORMANCE OF A CONTRACT. —A makes a contract with B, whereby B agrees to repair A's ship. No time of performance is specified. Due to a peaceable strike in B's ship yards thirty-seven days more than would ordinarily be required are actually required by B in order to complete the repairs. Can A recover for the damages he has sustained through the delay?

This question was presented in the recent case of *Richland S. S. Co.* v. *Buffalo Dry Dock Co.*, (C. C. A. 1918), 254 Fed. 668. It was held (one judge dissenting) that A could not recover, because B had exercised due diligence in making the repairs, and "the question is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances at the time the contract was made, but in view of the circumstances existing when the contract was being performed". One justice dissented on the ground that "what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by circumstances and conditions which subsequently arose".

It is clear that where the time of performance is specified, liability for a delay due to a strike can only be avoided, by an express exemption of liability therefor in the provisions of the contract. See BENJAMIN, SALES, 571; CAR-

VER, CARRIAGE BY SEA, Sec. 611; 4 LAWSON, RIGHTS & REMEDIES, Sec. 1823. But, as to whether a strike will excuse the delayed performance of a contract, which fails to stipulate the time of performance, the courts have expressed the same conflicting opinions, as are apparent in the two opinions in the principal case. The difficulty arises in defining a reasonable time. This difficulty has been avoided in many cases, where damages have been sought for a delay due to a peaceable strike, by attaching a liability to the contract, or on the theory that such a strike does not sever the relation of master and servant, and the employer is liable for the wrongful conduct of his servants. *Blackstock* v. *N. Y. & Erie R. R. Co.*, 20 N. Y. 48; *Read* v. *St. L., K. C. & N. R. R. Co.*, 60 Mo. 199, 207. But where the strike is accompanied with violence and intimidations, and the "strikers" prevent others, secured by the company to take their places, from performing, they can no longer be regarded as servants within this rule, and the carrier will not be responsible for a delay thereby occasioned. *Geismer* v. *L. S. & M. S. R. Co.*, 102 N. Y. 563, 571; *P. C. & St. L. R. W. Co.* v. *Hollowell*, 65 Ind. 188. In *P., Ft. W. & C. R. R. Co.* v. *Hazen*, 84 Ill. 36, the court, recognizing the distinction between a peaceable strike and one accompanied with violence, said: "For the delay resulting from the refusal of the employers of the company to do duty, the company is undoubtedly responsible. For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company". See also *Haas* v. *K. C., F. S. & G. R. R. Co.*, 81 Ga. 792, 795. Contra, *I. & G. N. Ry Co* v *Tisdale*, 74 Tex. 8. Such distinction is repudiated in the principal case. Since in the principal case, the delay was due to a peaceable strike, it would seem clear that a recovery of damages would have been allowed in many jurisdictions because of the employer's liability for the misconduct of his servants.

According to the minority opinion, circumstances might exist when the contract is made, which would warrant the implication that the contractor was merely required to exercise due diligence. Whether that alone were required would be a question of intention, to be gathered from the contract in the light of circumstances surrounding the parties when the contract was made. Thus, on the one hand, it might be said that in the case of loading or unloading a vessel, the contractor need merely exercise due diligence, *Hick* v. *Rodocanachi*, 65 L. T. R. (N. S.) 300 [1893], A. C. 22; *Empire Transp. Co.* v. *Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919; *Cross* v. *Beard*, 26 N. Y. 85. On the other hand, something more than due diligence may be required, if the contract and the circumstances, existing when the contract was made, evince such an intention. In other words, a strike or any contingency would afford an excuse only if so contemplated by the parties. See *Eppens, Smith & Wiemann Co.* v. *Littlejohn*, 164 N. Y. 187; *Ellis* v. *Thompson*, 3 Mees. & W. 445, 448; *Cocker* v. *Franklin Manufacturing Co.*, 3 Sumn. 530. *Contra, Strange* v. *Wilson*, 17 Mich. 342. According to the majority opinion of the principal case, what the parties intended

would make no difference; the sole, essential inquiry would be merely whether or not there was negligence in performance. Since it is the fundamental purpose of the construction of a contract to give effect to the intention of the parties, it may be said that the minority opinion seems to propound the better view. The cases, above cited, indicate that it is supported by much authority.

It was also pointed out in the dissenting opinion of the principal case that the contractor knew of the "unsettled condition of labor and the prospect of a strike" at the time the contract was made, and failed to make any disclosure thereof to the owner of the ship. C. L. K.

THE DOMICIL OF PERSONS RESIDING ABROAD UNDER CONSULAR JURISDICTION.—The question of domicil under consular jurisdiction was discussed at some length by the present writer in an article which appeared in an earlier number of this review. See 17 MICH. LAW REV. 437-455. When that article was written some much quoted dicta and the decision of the Court of Appeal in *Casdagli* v. *Casdagli*, 87 L. J. P. 73, 79, indicated that according to the English rule a domicil of choice could not be acquired under consular jurisdiction. The author ventured to criticise that extraordinary rule from the point of view of the authorities and on principle. With regard to the authorities it was suggested that what appeared to be the English rule was the outcome of an obsolete theory of immiscibility, an imperfect analogy with commercial domicil in prize law, an equally imperfect analogy with the anomalous doctrine of Anglo-Indian domicil, and the accumulated dicta of distinguished judges. On principle it was urged that the rule involved an unnecessary confusion of domicil with *lex domicilii* and that the acquisition of domicil under consular jurisdiction should be governed by the same principles which control the acquisition of domicil elsewhere. The American case of *Mather* v. *Cunningham*, 105 Me. 326, and LORD JUSTICE SCRUTTON'S dissenting opinion in the *Casdagli Case* were commended as offering a more satisfactory solution of the problem from all points of view.

It is gratifying to learn that LORD JUSTICE SCRUTTON'S dissenting opinion has been approved unanimously in the House of Lords. *Casdagli* v. *Casdagli*, 88 L. J. P. 49. Every line of authority which could be thought to lend any support to the decision rendered by the majority in the Court of Appeal seems to have been reviewed exhaustively in the House of Lords, and in every instance the authority was found insufficient or beside the point. The doctrine of immiscibility, whatever significance in general it may retain at the present day, was eliminated from the problem presented by the case. LORD FINLAY said: "It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicil in such countries as China and the Ottoman Dominions, owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by Courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such Courts, the presumption

against the acquisition of a domicil in such a country might be regarded as overwhelming, unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made, the strength of the presumption against the acquisition of a domicil there is very much diminished. Egypt affords a very good illustration of this." 88 L. J. P. 49, 53. The analogy with commercial domicil in prize law was repudiated. Referring to *The Indian Chief*, LORD ATKINSON remarked that "judicial observations made in reference to this commercial domicil have been treated as applicable to civil domicil, a most misleading error." 88 L. J. P. 49, 66. The doctrine of Anglo-Indian domicil was rejected as anomalous and not in point. See 88 L. J. P. 49, 61, 66. The accumulated dicta were swept aside. See 88 L. J. P. 49, the pages cited in connection with each of the following cases: *The Indian Chief*, 54, 66, 73; *Maltass* v. *Maltass*, 54, 68; *In re Tootal's Trusts*, 54, 55, 56, 60, 61, 62, 68, 69, 73, 74; *Abd-ul-Messih* v. *Chukri Farra*, 56, 57, 58, 59, 61, 62, 63, 69, 74. Except for the case of *Tootal's Trusts*, their Lordships appear to have been unanimous in thinking that the Court of Appeal had been misled by dicta. LORD FINLAY seems to have considered *Tootal's Trusts* an authority in support of the Court of Appeal, but he thought that it was erroneous and that it ought to be overruled. VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PHILLIMORE found nothing in point in *Tootal's Trusts* except dicta which they agreed in repudiating. VISCOUNT HALDANE could not agree with the other Lords as to the precise point which the case was intended to decide, but he joined in rejecting its dicta. Just what *Tootal's Trusts* decided is no longer important since it has been repudiated in connection with the only type of case in which it could have any practical application.

The final settlement by the House of Lords of this long vexed question is equally satisfactory on principle. It has now been established in the English law that the requisites of domicil under consular jurisdiction are exactly the same as they would be anywhere else, *viz.*, residence and the *animus manendi*. Nothing of the nature of a normal relationship to the peculiar laws of the country of residence or of complete identification with the general life of the inhabitants is necessary. See 88 L. J. P. 49, 56, 61, 63, 65. LORD ATKINSON said: "I concur with SCRUTTON, L. J., in thinking that there is no test which must be satisfied for the acquisition of a domicil of choice in Egypt other than, and in addition to, those by which a similar domicil is acquired in a European country, namely, voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period." 88 L. J. P. 49, 73. All confusion between domicil and the *lex domicilii* has been avoided. See 88 L. J. P. 49, 56, 63, 71, 72. The distinction between these two conceptions was admirably stated by LORD FINLAY, as follows: "The position of British subjects in such a country is not ex-territorial. The domicil is acquired, and can be acquired only by residence in Egypt. The law applicable to the foreigner so residing is, by the consent of the Egyptian Government, partly Egyptian and partly English. This is the result of the Convention between the two Governments. Although the dom-

icil is Egyptian, the law applicable to persons who have acquired such a domicil varies according to the nationality of the person. The foreigner does not become domiciled as a member of the English community in Egypt, but he acquires an Egyptian domicil, because he, by his own choice, has made Egypt his permanent home, and you have then to consider by what code of law he and his estate are governed according to the law in force in Egypt. The domicil is purely territorial, and you go to the law in force in the territory to see what system of law it treats as applicable to resident foreigners, and to what Courts they are subject. 88 L. J. P. 49, 56. Finally, this position has been atained without distorting the nature of consular jurisdiction. It is not necessary to regard consular judisdiction as delegated authority; no dialectical legerdemain need be indulged in order to find sovereignty and reconcile it with realities. While the position of persons subject to consular jurisdiction is not regarded as ex-teritorial, the jurisdiction itself is ex-territorial in a very real sense. "The jurisdiction exercised by His Majesty in Egypt is indeed ex-territorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore for this purpose really part of the law of Egypt affecting foreigners there resident. The position of a British subject in Egypt is not ex-territorial; if resident there, he is subject to the law applicable to persons of his nationality. Whether that law owes its existence simply to the decree of the Government of Egypt, or to the exercise by His Majesty of the powers conferred on him by treaty, is immaterial." Per LORD FINLAY, 88 L. J. P. 49, 53; see also 51, 52, 56, 63, 71, 72.

The decision of the House of Lords in *Casdagli* v. *Casdagli* has brought the question of domicil under consular jurisdiction to a final and satisfactory settlement. *Tootal's Trusts* may be relegated to the custody of the mystagogue. Although that famous case is no longer significant as an authority, it will always be a decision of considerable historical interest because of the curious chapter in the evolution of dicta which it provoked.

E. D. D.

RAILROAD EMPLOYMENT — ADAMSON LAW — NON-APPLICATION TO SWITCH TENDER.—Primarily an enactment of a legislative body is to be carried out according to its express terms. If the terms are clear, explicit, unambiguous, the enactment is not subject to judicial interpretation and the courts cannot go beyond it to ascertain the legislative intention because the words themselves are presumed to convey the intention of the legislature. If the words and terms are free from doubt they must be given their ordinary and natural meaning although this may give to the enactment a narrower, wider, or different scope than intended by the legislature. The above principles are aptly expressed by SUTHERLAND in his work on STATUTORY CONSTRUCTION, second edition, annotated by LEWIS. On page 696 he says, "the rules of construction with which the books abound apply only where the words are of doubtful import; they are only so many lights to assist the court in arriving with more accuracy at the true interpretation of the intention." And on page 697, "courts are not at liberty to speculate upon the intentions of the legislature

where the words are clear and to construe an act upon their own notions of what ought to have been enacted". And again on page 701 the author says, "even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity".

Although these principles are well-established the courts occasionally depart from them or misapply them in their anxiety to effectuate the known intention of the legislature. The case of *Coke* v. *Illinois Central R. Co.* (Jan., 1919), 255 Fed. 190, seems to be an instance of this. With the exception of the case of *Wilson* v. *New*, 243 U. S. 332, upholding the constitutionality of the act, this is the only federal case involving an interpretation of the Adamson Act (Act of Congress, approved Sept. 3 and 5, 1916, C. 436, 39 Stat. 721). The title of the act is "An Act to establish an eight hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes." The act provides that "Beginning January 1st, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad * * * and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads. * * *" A switchman, whose employment involved attending to a switch over which all the trains to and from defendant's station passed, sued to recover the extra compensation provided by the Adamson Act. The court denied recovery, holding that the act applied only to the employees of the four Brotherhoods, namely, Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers and Brotherhood of Railway Trainmen.

The decision undoubtedly conforms to the intention of Congress in passing the act. To arrive at this intention Judge McCall went beyond the act itself and consulted extraneous sources, particularly the message of President WILSON and the remarks of Senator UNDERWOOD, (who had charge of the bill), as they appear in the Congressional Record. On principle, as we have seen, the court was justified in doing this only if the act was not clear or if it was ambiguous. The court says, at the outset, that "broadly speaking, the act might be construed to include every employee of such railroad from president down to section hand, who was in any capacity actually engaged in doing those things necessary to the operation of trains; such as directing their operation in a supervising way, maintaining the roadway, lining up switches for their operation, or aboard the trains manually operating them, etc." Such a construction, it is submitted, would be erroneous because it goes beyond the express terms of the act. The act embraces only the employees, "who are now or may hereafter be actually engaged in any capacity in the operation of trains." There is an obvious distinction between the employees who are engaged in the actual operation of trains, as the act

prescribes, and the employees who are engaged, within the meaning of the court, *supra,* "in doing those things necessary to the operation of trains". To hold that the act embraces the latter class would be a manifest enlargement of the clear, reasonable and ordinary meaning of the words of the act.

The words of the act are certainly unequivocal and explicit and it would seem that the court is not justified in its statement that "it is too much to say that the terms of the act are clear and unambiguous". The act plainly and clearly specifies the class of employees intended to be embraced. Of course, a question may arise, as in the instant case, as to whether or not a certain employee comes within the class specified. Such question, however, has nothing to do with the clarity of the words of the act; it merely involves a determination of the proper application of the words. Let us illustrate by an analogous case. The Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". The question has arisen whether a corporation is a "person" within the meaning of this provision. Could it be correctly said that the provision is ambiguous because it is uncertain whether it embraces a corporation? No. The words are express and clear and the question as to their proper application does not impart to the words the quality of ambiguity. The same may be said of the clause of the Fourteenth Amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Ambiguity cannot be said to inhere in this clause merely because a question may arise as to whether a particular person is a citizen of the United States within its meaning.

The question as to what employees of the railroad come within the class specified in the Adamson Act may be answered by giving to the words of the act their natural and ordinary meaning. The words, "actually engaged in the operation of trains" are significant. They clearly convey the idea intended by the legislature, namely, that the act should embrace only the employees engaged "on the engines and in the cars". If the legislature had intended in addition to embrace the employees doing those things incidental or accessory to the actual operation of trains, such as switchmen, it undoubtedly would have included in the act a provision to that effect. There certainly is a distinction between the operation of a train and the operation of a switch or the doing of anything else which is a necessary aid to the actual operation of the trains.

The Adamson Act was clearly intended to provide only for the employees of the four Brotherhoods, or, in other words, for only the employees who are engaged "on the engines and in the cars". The instant case, therefore, reaches the right decision in excluding the plaintiff from the operation of the act. However, the resort by the court to sources beyond the act itself to ascertain the intention of the legislature was improper, because it was predicated on the proposition that the act is ambiguous. Furthermore, the resort was unnecessary, because the words of the act, when given their natural and ordinary meaning, clearly convey the intention of the legislature.

L. S. H.

RIGHT OF MATERIALMAN TO SUE THE SURETY ON CONTRACTOR'S BOND.—In the recent case of *Forburger Stone Co.* v. *Lion Bonding and Surety Co. et al.* (Neb., Feb., 1919), 170 N. W. 897, a materialman sued on a surety's bond conditioned upon the faithful performance by the contractor of his contract to pay for materials used in construction of a private building. The bond contained the following provision: "That the said surety shall be notified in writing of any act on the part of said principal, which shall involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the duly authorized representative or representatives of the obligee herein, who shall have supervision of the completion of the said contract". No such notice was given by the plaintiff in this action, but he was allowed to recover (three justices dissenting) on the ground that the agreement to pay for material used was for the benefit of the materialman and that notice as required by the bond was impossible in this instance because "the plaintiff did not have a representative in this business" and "could not know when some act of the contractor came to the knowledge of the owner of the building".

The strict English rule that a third party cannot sue upon a contract to which he is not a party except under the circumstances summarized in *Mellen* v. *Whipple*, 1 Gray 317, has not met with general favor in this country, and whether the right is sought to be founded upon code provision, or the theory of trusteeship in the promisor or agency in the promisee, or upon blood relationship or existing legal obligation between the promisee and the third party, the latter is usually conceded the right today in this country to sue upon a promise made for his benefit. *Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 198 Fed. 721, 749; ANSON, CONTRACTS, KNOWLTON'S ED., note p. 279; PARSONS, CONTRACTS, 9th Ed., Vol. I, p. 503, 505; note, 25 L. R. A. 257. In *Jefferson* v. *Asch*, 53 Minn. 446, the Court says, "But we do not think there is any case to be found in which such an action was sustained upon a bare promise, with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties". Yet those jurisdictions which hold that a mortgagee of premises may sue upon a grantee's promise to assume the mortgage even though the grantor is not personally liable therefor, certainly go far in the direction of conferring upon a mere volunteer the right to sue. *McDonald* v. *Finseth*, 32 N. D. 400; *Hare* v. *Murphy*, 45 Neb. 809; *Crone* v. *Stinde*, 156 Mo. 262 (deed of trust); *McKay* v. *Ward*, 20 Utah 149. And Indiana has now distinctly announced that no legal or equitable duty due from the promisee is requisite to a recovery by the third party. *Reed* v. *Adams Steel and Wire Works*, 57 Ind. App. 259. Pennsylvania and Oregon have seemingly followed the doctrine of *Jefferson* v. *Asch, supra*, in denying the materialman's right to recover against the surety on the ground that the former is in no way a privy to the contract. *Brower Lumber Co.* v. *Miller*, 28 Ore. 565; *Parker* v. *Jeffery*, 26 Ore. 186; *First Methodist Episcopal Church* v. *Isenberg*, 246 Pa. St. 221. In a majority of the courts the only inquiry in such a situation as the principal case presents is whether or not the intent

of the contracting parties was to benefit the third party. (For a discussion of the power of the municipality, without aid of statutory provision, to require protection for laborers and materialmen, see *City and County of Denver* v. *Hindry*, 40 Colo. 42, 11 L. R. A. (N. S.) 1028 and note.)

It would seem that the law is well settled that if the bond given by the contractor is conditioned against *liens or claims on the property*, the sureties are not liable unless the property is such that liens or claims may be asserted against it. *Smith* v. *Bowman*, 32 Utah 33, 9 L. R. A. (N. S.) 889, and note. Hence, if the contract is with a municipality or public corporation the surety cannot be liable to anyone on the bond. Yet, as was brought out in *Lumber Co.* v. *Schwartz*, 163 Mo. App. 659, such a conclusion makes the stipulation absolutely meaningless, and the court in that case regarded the contract as one for the benefit of the materialmen. See also *National Surety Co.* v. *Foster Lumber Co.*, 42 Ind. App. 671. But certainly in the absence of provisions or phraseology showing an exclusive purpose to indemnify or protect the city, a bond requested by the latter and conditioned for payment by the contractor of all claims for material might reasonably be construed as a dual contract by the city on behalf of itself and materialmen who could assert no lien or claim on the property when completed. COOLEY, C. J, in *Knapp* v. *Swaney*, 56 Mich. 345; *Denvers* v. *Howard*, 144 Mo. 671; *American Surety Co.* v. *Thorn-Halliwell Cement Co.*, 9 Kan. App. 8; *Kaufmann* v. *Cooper*, 46 Neb. 644; *Williams* v. *Markland*, 15 Ind. App. 669; *United States Gypsum Co.* v. *Gleason*, 135 Wis. 539; *Mack Mfg. Co.* v. *Mass. Bonding and Insurance Co.*, 103 S. C. 55; *Baker* v. *Bryan*, 64 Ia. 561; *Citizens Trust and Guaranty Co.* v. *Peebles Paving Brick Co.*, 174 Ky. 439, *semble*. While, as was contended in the dissenting opinion of the principal case, a private contract might perhaps be distinguished on this ground, there are a number of cases which make no effort to differentiate. *Ochs* v. *Carnahan*, 42 Ind. App. 157; *Concrete Steel Co.* v *Illinois Surety Co.*, 163 Wis. 41. And those which grant recovery on the *owner's* promise to pay the materialmen are seemingly in accord as far as principle is concerned. *Carolina Hardware Co.* v. *Raleigh Banking and Trust Co.*, 169 N. C. 744, which held that the owner's promise to pay for materials made the contractor a mere agent; *Gaffney* v. *Sederberg*, 114 Minn. 319; *Morrison* v. *Payton*, 31 Ky. L. Rep. 992. But in any view of the matter, the intent is one of fact and if apparent from the terms of the contract or bond, that intent will govern the relations of the parties and their rights. *Sample* v. *Hale*, 34 Neb. 220; *Doll* v. *Crume*, 41 Neb. 655; *Equitable Surety Co.* v. *U. S.*, 234 Fed. 448, (statute); *Greenfield Lumber and Ice Co.* v. *Parker*, 159 Ind. 571; *Gretchell and Martin Lumber Co.* v. *Peterson and Sampson*, 124 Ia. 599; *Searles* v. *City of Flora*, 225 Ill. 167; *Montgomery* v. *Rief*, 15 Utah 495; *Union Sheet Metal Works* v. *Dodge*, 129 Cal. 390; *Standard Gas Power Corporation* v. *New England Casualty Co.*, 90 N. J. Law 570; *Burton Machinery Co.* v. *Ruth*, 196 Mo. App. 459.

The argument of the majority opinion in the principal case that the materialman could not know when the defaulting act of the contractor came to the knowledge of the owner is fully met by the question put by Justice

DEAN'S dissent: "Who knew better than plaintiff as to the time when the contractor failed to pay for the building stone? Who but the plaintiff, whose knowledge was first hand, would be expected to bring the fact of nonpayment 'to the knowledge of the owner of the building'?" If, however, it was impossible for the third party to give the required notice, should he be privileged to escape performance of the substantial conditions of the bond and sue on a contract of his own making? To concede to the third party greater liberties than those enjoyed by the signatory obligee is indeed a departure not only from justice and reason but from law established by an overwhelming consensus of opinion. *Knight and Jilson Co.* v. *Castle,* 172 Ind. 97, 27 L. R. A. (N. S.) 573; *Episcopal Mission City* v. *Brown,* 158 U. S. 222; *Trimble* v. *Strother,* 25 Ohio St. 378; *Green* v. *McDonald et al.,* 75 Vt. 93; *Clay* v. *Woodrum,* 45 Kan. 116; *Heath* v. *Coreth,* 11 Tex. Civ. App. 91; *Dunning et al.* v. *Leavitt,* 85 N. Y. 30; *Malanaphy* v. *Fuller and Johnson Mfg. Co.,* 125 Ia. 719, 723; *Ellis* v. *Harrison,* 104 Mo. 270; *Crowell* v. *Hospital,* 27 N. J. Eq. 650; *Union City Realty Co.* v. *Wright,* 145 Ga. 730. Furthermore, "In determining the question [right of materialmen to sue sureties on contractors' bonds] it is well to bear in mind that sureties are favorites of the law, and that their liability is not to be extended by implication beyond the terms of their contract. They are bound by their agreement and nothing else; and they have a right to stand upon the strict terms of their obligations." *Smith* v. *Bowman, supra.* L. G.