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Recent Decisions

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SURETYSHIP—RULE OF "STRICTISSIMI JURIS" NOT APPLIED TO SURETY COMPANY. Defendant was surety on a bond given for the faithful performance of a building contract. The bond provided that defendant surety company should be notified by registered mail addressed to its home office in Chicago of any act or default on the part of the contractor which might involve a loss for which defendant might be responsible, within 48 hours after said act or default should come to the knowledge of the owner, plaintiff herein, and such notice was made a condition precedent to recovery. Because of contractor's failure to prosecute the work with diligence, plaintiff terminated the contract as he had a right to do under its terms, and on December 20th, ad-

mittedly in due time, delivered to defendant at its New York office, where the bond had been executed, written notice of the contractor's default. The Trial Court dismissed the complaint on the ground that notice of default was not given pursuant to the terms of the bond. On appeal, HELD: That since the purpose of the clause was to insure prompt notice, and since the surety company was notified within the time specified in the bond, it was immaterial that the notice was sent to the New York office instead of the home office in Chicago, and that the judgment should be reversed (*McKegney v. Illinois Surety Co.*, Appellate Division, First Department, N. Y., Law Journal, Dec. 13, 1915).

Logically and on strict principle, it would seem that the decision cannot be supported. The parties made the contract and had a right to contract in a manner best suited to their requirements. If the Surety Company demanded that notice be sent to its Home Office in Chicago and the owner agreed to send such notice, the Court should not step in and make another contract for the parties. On the other hand, there cannot be the slightest doubt that the decision works substantial justice. The New York office issued the bond and was paid the premium, and the plaintiff had some reason to suppose that a notice to it would be sufficient. The Surety Company was not prejudiced. It had ample time to protect its interests. If necessary it could have notified the Home Office in Chicago of the default, within the forty-eight hours provided in the bond.

The case is a striking example of the modern tendency to distinguish between the conventional surety and the surety corporation (*Pingrey on Suretyship and Guaranty*, 2nd Ed., Secs. 442, 443). It has frequently been said that "a surety is the favorite child of equity," and all contracts of suretyship will be strictly construed in his favor (*Nat. Mechanic's Banking Assoc. v. Conkling*, 90 N. Y., 116). The rule however, has been greatly relaxed where the surety is a corporation and has received consideration for its undertaking. (*New Haven v. Eastern Brick Co.*, 78 Conn., 689, 63 Alt., 517; *Pacific Co. v. Fidelity Co.*, 33 Wash., 47, 73 Pac., 772; *Supreme Council v. Fidelity Co.*, 63 Fed., 48). Such a contract is more in the nature of insurance, and since the surety company makes the terms, the contract is generally

construed against it (*Amer. Surety Co. v. Pauly*, 170 U. S., 133; *Supreme Council v. Fidelity Co., supra*). The principal case is a three to two decision. The majority view appears to be the sounder one.

CORPORATION—RIGHT TO EXAMINE BOOKS—DIRECTOR MAY NOT DELEGATE. Relator, a resident of New York City, was a director in the Ferncliffe Cemetery Association. The corporation closed its city office and removed its books and records to a place twenty miles distant. The relator obtained a writ of peremptory mandamus, requiring the president and treasurer of the corporation to exhibit the books to an auditing company, as relator's agent. On appeal the order granting the writ was reversed and it was HELD, that mandamus would not lie unless a clear legal right had been denied and it is not the legal right of a director to delegate to an agent his right to inspect the corporate books. (*People ex rel. Bartels vs. Borgstede*, 169 App. Div., 421.)

Inspection of the corporate books by directors is essential to enable them to perform their duties; hence their right to inspection is absolute. (*People ex rel. Leach vs. Central Fish Co.*, 117 App. Div., 77; *People ex rel. Onderdonk vs. Mott*, 1 How. Pr., 247.) In case a director's motives are hostile to the corporation the remedy to prevent his inspection is by removing him pursuant to General Corporation Law, secs. 90 and 91. (*People ex rel. Leach vs. Central Fish Co., supra.*) It has been held that a stockholder may be assisted in his examination of books by an accountant or attorney at law, if the accounts are complicated or intricate. (*People ex rel. Clason vs. Nassau Ferry Co.*, 86 Hun, 128.) A director has a like right. This is admitted in the principal case but relator seeks to go further and to delegate his right altogether. The application is made on the ground of inconvenience to the director in travelling to the office, removed twenty miles from the city. The writ, we submit, was properly denied.

The right of a director to inspect corporate books arises from the fact that he is under a duty, springing from the position of trust he occupies, to scrutinize corporate dealings and accounts.

The directors are entrusted with the internal control of the corporation and are liable to account to the corporation and its stockholders for any losses which their knowledge and care might have avoided. (*Hun vs. Cary,* 82 N. Y., 65; *Kavanaugh vs. Gould,* 147 App. Div., 281; *Thomp. Corp,* 2nd Ed., Section 4502.) In the case of a stockholder, upon whom rests no duty to inspect the books, the courts have allowed an agent to be appointed to inspect alone (28 La. Ann., 204). The court, by way of dictum, intimates that this same rule would apply in a hostile proceeding for a discovery, or under the power of visitation.

The decision in the instant case seems sound and is undoubtedly correct in jurisdictions which regard directors as mere agents and, as such, incapable of delegating their agency. In New York the case is in accord with *People ex rel. McInnes vs. Columbia Bag Co.* (*supra*), wherein an order appealed from was modified so as to allow only one accountant to aid the director and the period for continuing the examination was materially limited. Both decisions evidence the desire of the courts to protect the corporation. The inconvenience to the director is plain. Cases may well arise in which the inconvenience will be so great as to prohibit the director from obtaining the information to which he is entitled by virtue of his position as director. It is doubtful, however, if the court will relax the rule, which classes this duty of the director as one involving discretion and the exercise of judgment and, therefore, a duty which the corporation never intended could be delegated. (*2 Am. & Eng. Ency. of Law,* Vol. 21, page 856.)

CLAYTON ACT—COMPULSORY SALES—RESTRAINT OF TRADE. Plaintiff is a retail dealer on a very large scale; defendant, a manufacturer of a cereal widely known under the trade name of "Cream of Wheat," an unpatented product, composed of "middlings," the supply of which was found to be in no way monopolized by defendant. Defendant sold its product to plaintiff for a considerable period under a system of price regulation which prices were designed to give the small retailer a fair profit. Plaintiff refused to abide by this agreement, and sold at a lower price than the retailer, whereupon defendant refused

to make any further sales. Plaintiff brought an action under Section 16 of the Clayton Act to have defendant's sales system adjudged illegal and for injunctive relief against its further continuance and to compel defendant to accept plaintiff's orders. HELD that Sec. 16 of the Clayton Act did not authorize or contemplate any such relief as prayed for and that an order refusing a preliminary injunction should be affirmed (*The Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 225 Fed ; N. Y. Law Journal, Nov. 17, 1915, affirming 224 Fed., 566).

At common law the right of a dealer to trade with whom he pleased was always recognized (*Cooley on Torts, p.* 278); *Greater N. Y. Film Co. v. Biograph Co.*, 203 Fed., 39). The question, therefore, clearly narrows down to the proposition: Does the passage of the Clayton Act prohibit these practices? The Court adopted the view of the common law, saying that the act expressly recognized the right referred to above. The Clayton Act (Act, Oct. 15, 1914, C. 321; 38 Stat., 730, Sec. 2), provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * * And provided further that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade." Since the Court found as a fact that the defendant in no way restrained trade, the clause quoted above would seem to be an effective answer to the plaintiff's contentions.

The Court did not touch upon the question raised by Judge Hough in his very learned opinion in the court below (224 Fed., 566), that it is open to doubt whether Congress could validly bring about the result sought by the plaintiff, viz: compulsory sales. The learned District Judge strongly intimated that no such power resided in Congress, but the Appellate Court did not discuss this phase of the case, choosing to rely upon the grounds

stated above. The opinion (Lacombe, J.), closes with the trite statement that, "We have not yet reached the stage where the selection of a trader's customers is made for him by the government." It is, moreover, interesting to note that the ultimate object of the suit, as stated by Judge Hough (p. 573), was to compel defendant to furnish plaintiff with its product at $3.95 per case, thereby accomplishing the very object plaintiff sought to prove was illegal, viz: "price fixing."

This decision is worthy of note in that it confirms the views of the District Judge which were undoubtedly looked upon as an important interpretation of a statute of vital interest to the industries of the country.

EQUITY—CIVIL RIGHTS—EXCLUSION OF DRAMATIC CRITIC FROM THEATRE—STATUTORY REMEDY EXCLUSIVE.—Plaintiff, a dramatic critic, was excluded from defendants' theatres upon the ground that his criticisms were offensive. In a suit to restrain the continuance of such exclusion plaintiff's motion at Special Term for an injunction *pendente lite* was granted. HELD, on appeal, that plaintiff's sole right to redress rests upon the Civil Rights Law, since the Common Law gives no such right; that where a statute creates a right and prescribes a remedy for its violation, such remedy is exclusive, and since the statute herein provides a penalty only, no action for damages or for an injunction can be maintained; that plaintiff is not entitled to equitable relief upon the theory that the remedy provided by the statute is inadequate, that not being the case. (*Woollcott v. Shubert*, 169 App. Div., 194.)

At Common Law the proprietor of a theatre had a right to decide who should be admitted to witness the plays he produced; his enterprise was a private one and he could discriminate and receive whom he pleased. (*Collister v. Hayman*, 183 N. Y., 250; *People ex rel. Burnham v. Flynn*, 189, *id.*, 180; *Aaron v. Ward*, 203, *id.*, 351.) A ticket of admission to a place of amusement was but a revocable license. (*Marrone v. Washington Jockey Club*, 227 U. S., 633.) Even the original

Civil Rights' Act (Laws of 1895, Chap. 1042), only forbade discriminations on account of race, creed or color. The Court, merely for the purposes of the appeal, assumed that the present Act (Laws of 1913, Chap. 265), radically changed the scope of the earlier Act, and that the legislative intent of the present one was to forbid every form of discrimination, without limitation.

"Where a statute confers a right and prescribes adequate means for protecting it, * * * (the plaintiff) is confined to the statutory remedy." (*Dudley v. Mayhew*, 3 N. Y., 9.) But does this necessarily involve the finding as made by the Court in the principal case that "where a statute creates a right and prescribes a remedy for its violation, such remedy is exclusive?" If so, the legislative intent would appear to have been merely to give the wrongdoer the option of deciding whether (as in this case), admission is to be allowed, or the penalty paid. Since the Court declined to base its decision primarily upon an interpretation of the Civil Rights' Act, it is submitted that the finding that the statutory remedy is entirely adequate seems unfounded. It is not a fair assumption that the statute aimed to give a public character to theatrical performances, assigning only a penalty for violations, but not thereby withholding the usual remedies of one wrongfully excluded from a public place? Defendants are important personages in the theatrical world, and if they continue refusing plaintiff admission to all the theatres they control, as they threaten, his usefulness as a critic and his ability to earn his livelihood in such vocation must be seriously impaired, if not destroyed, and it would consequently seem that "he has shown special damage beyond the compensating power of the statutory penalty."

MASTER AND SERVANT—DUTY OF MASTER TO PROMULGATE RULES TO PROTECT EMPLOYER FROM NEGLIGENT ACTS OF CO-EMPLOYEES—WHEN QUESTION OF FACT FOR JURY—Plaintiff was engaged in the hold of a scow in hooking coal-buckets to a cable suspended from a derrick which traveled on rails over the hold of the scow, and by means of which a vessel alongside was

receiving coal. The conditions under which plaintiff worked and the narrowness of the place rendered it necessary for him, in order to hook a bucket to the cable, to stand upon the cross-bar of another bucket, and in such a position that it was impossible for him to see the derrick which ran on rails above his head. The swell occasioned by a passing excursion boat caused plaintiff to lose his balance upon his narrow foothold and in saving himself he reached up and caught one of the rails upon which the derrick travelled. At that moment the derrick approached and without warning passed over his hand, resting on the rail. In his effort to save himself, plaintiff swung his other arm over the rail and sustained, in all, injuries resulting in the loss of one hand and one arm below the shoulder. On appeal from the Appellate Division's affirmance (by divided court) of the dismissal of the complaint at Trial Term, HELD, That the failure of the employer to adopt measures to guard against the obvious danger which arose from the method in which the work was conducted, presented a question of fact which should have been submitted to the jury (*Dzkowski v. Reynoldsville Carting Co.*, 216 N. Y., 173).

When the act of an employee may make dangerous the work of another employee which would otherwise be safe, it becomes the duty of the employer to make such rules as will enable those whose safety is put in jeopardy to be advised of the danger so as to be able to avoid it. (*Eastwood v. Retsof Mining Co.*, 86 Hun, 91, affirmed 152 N. Y., 652.) The existence of such duty is of course predicated on the fact that the danger of injury to an employee from any specific omission of a co-servant is reasonably and fairly to be apprehended by the master. (*Berrigan v. N. Y. L. E. & W. R. R. Co.*, 131 N. Y., 582.) An employee cannot recover at common law as against his employer for the negligence of his co-employee. (*Litchfield v. Buffalo Rochester etc. R. R. Co.*, 73 App. Div., 1; *Ingraham v. Fosburgh*, 73 App. Div., 129; *Streets v. Grand Trunk R. R. Co.*, 76 App. Div., 480; *Huffcut on Agency*, p. 331). But the holding in the principal case emphasizes the point that while a master is immune from suit on the ground of a co-employee's negligence, he must be prepared to demonstrate that he has not been derelict in his

duty to give proper notice to plaintiff of the possibility of impending danger which he must reasonably apprehend. The Court confined itself to deciding that it could not be fairly said as matter of law that the rocking of the scow by a passing steamer was not such an occurrence as the employer could in reason anticipate, and that the complaint below presented an issue of fact which should have been submitted to the jury. (*McDonald v. Metropolitan Street Railways Company*, 167 N. Y., 66). The duty of the master to furnish a safe place in which his employee may work, is well established (*Berry v. Atlantic Storage Co.*, 50 App. Div., 590; *Levy v. Grove Mills Paper Co.*, 80 App. Div., 384; see distinctions noted in this volume, *ante*, p. 12); it seems clear that the ground upon which plaintiff herein based his action is a specification of the broader ground of liability just referred to.

WATER AND WATER RIGHTS—MILL POND OF LOWER FEE OWNER ON LAND OF UPPER FEE OWNER—RESPECTIVE RIGHTS TO ICE THEREON—Riparian owners on a stream were seized in fee of adjacent tracts of land. A mill dam, with the right of flowage, maintained by the defendant under a chain of title derived from a common grantor, caused a pond to overflow two acres of plaintiff's land. In a suit in equity to restrain defendants from taking ice from the pond on plaintiff's land, HELD, an injunction would issue (*Valentino v. Schantz*, 216 N. Y., 1).

As between the owner of the soil and one having a right to flow the land for creating a water power, the title to the ice is in the former (Farnham, Law of Waters and Water Rights, Vol. 2, p. 1603). The title, however, is subject to the right of the mill owner, to have the ice left to melt, if this be necessary to maintain a proper supply of water for his mill (*Dodge v. Berry*, 26 Hun, 246). The right of flowage is restricted therefore, and not denied, since the owners of the pond land may remove the ice upon their land, only if by so doing the stream's flow is not materially diminished and the mill owner suffers no actual damage thereby (*Marshall v. Peters*, 12 How. Pr., 218;