Chapter 4: Contracts

J. Edward Collins
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Contracts

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§4.1. Teaching contract: Entitlement to salary upon resignation. In 1916 the Supreme Judicial Court handed down a decision in a case involving a schoolteacher who died during the summer vacation after she had completed her teaching for the academic year. Her salary was payable monthly and the payment for the last month of the year had not become due at the time of her death. In denying the right of her executrix to recover for the balance of the salary accruing during the vacation period, the Court regarded the contract as entire and subject to an implied condition that she should be living and physically able to work during the full term of the contract, even though the complete consideration had been furnished by her in less than the twelve-month period prior to her death. This decision in Donelan v. City of Boston has been criticized by Williston as being unsound, a criticism that has been echoed by the Courts of Appeal for the Second and Third Circuits, as well as by legislation and administrative regu-

2 3 Williston, Contracts §§838 (rev. ed. 1936): “There was no express condition qualifying the city's promise, and as the teacher had substantially fulfilled her contract, there was no failure of consideration. There can be no doubt that ten month's teaching was the essential if not the sole exchange of twelve monthly payments. The decision in effect allows the city to receive services without full payment for them.”
3 In re Wil-low Cafeterias, Inc. 111 F.2d 429 (2d Cir. 1940); In re Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947). In each case the bankruptcy of an employer was involved. Employees under a union contract were entitled to vacations with pay, the extent of the vacation being based upon the individual employee's length of service. Vacation pay was regarded as additional wages, the consideration for it furnished by the year's service, only the time of its receipt being postponed. Such vacation pay constitutes a valid expense of administration in bankruptcy.
4 In 1928, G.L., c. 29, §31, was amended to provide that the annual salary of any teacher employed by the state “whose regular service is rendered from September first to June thirtieth, shall be for his service for the number of weeks established by the department [of education] for such school to be in session during such period, payable, however, in equal installments on the first day of each month, and the amount earned and unpaid at the time of his resignation, retirement, death or
lations designed to prevent, in Massachusetts, a reoccurrence of the result had in the Donelan case.

During the 1960 Survey year a variation of the Donelan problem was presented in Ohrenberger v. City of Boston. The plaintiff occupied the position of associate director of physical education in the city's schools. Pursuant to his employment contract his vacation period had been designated as running from July 6 through August 30, 1954. On July 12 he was elected by the school committee to be assistant superintendent of schools. He accepted this position on the following day, thereupon undertaking the duties of his new position. In an action to recover the unpaid but allegedly earned balance of his salary as associate director for the period July 13 through August 30, representing his vacation pay, he was unsuccessful in both the trial court and the Supreme Judicial Court, it being found that his case did not fit within the corrective provisions of the school committee regulations since he did not fail to complete the school year because of "death, resignation, retirement, marriage or discharge." In reaching its conclusion the Court adverted to the Donelan case and the criticism leveled against it, but found it inapplicable, and therefore left undecided whether it would now be followed.

The decision in the Ohrenberger case presents great difficulties. A question may be raised as to the soundness of the Court's conclusion that the school committee regulations were not controlling. By them, upon resignation, the employee is entitled to have his salary proportioned on the basis of one-tenth of the actual salary for each school month in service. On precedent, acceptance by him of the position of assistant superintendent effected an implied resignation of his position as associate director of physical education, but, says the Court, such implied resignation is not a resignation within the meaning of that word as used in the regulations since the regulations contemplate injury or leave of absence shall be paid forthwith to the persons entitled thereto."

Acts of 1928, c. 183, §1. By subsequent amendment, Acts of 1932, c. 127, §2, advances of pay may be made in advance of the teacher's regular vacation to the extent of the pay to which he will become entitled during such vacation period.

Section 391.1 of the Rules and Regulations of the School Committee of the City of Boston provides: "Teachers, [and] members of the supervising staff . . . whose compensation is established at a fixed rate per annum, and who do not complete the school year because of death, resignation, retirement, marriage or discharge, shall be entitled to that proportion of their salary for the last school year, which shall be obtained by allowing one tenth of the annual salary for the school year for each school month in the service the last school year . . ."


Commonwealth v. Hawkes, 123 Mass. 525 (1878). This case involved a police court justice who, while active as such, was elected to the state House of Representatives, in which position he sat while also continuing to act as a justice. Upon information brought by the Attorney General it was held that he could not lawfully occupy the two positions simultaneously. Upon acceptance of the elective position he impliedly resigned from his position as a justice, no assent or concurrence to the resignation by a superior authority being necessary. By statute, G.L., c. 30, §21, a person is inhibited from receiving at the same time more than one salary from the treasury of the Commonwealth.
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an employee's severance from the school system, something that did not occur here. This would appear to be an unduly narrow reading of the regulations. If, as the Court suggests, the regulations were undoubtedly adopted to overcome the effect of the Donelan case, they should be read to accomplish that purpose rather than to thwart it. The language making the regulation applicable to teachers and supervisory staff employees "who do not complete the school year because of . . . resignation" would undoubtedly have covered Ohrenberger if he had expressly resigned his then position to accept the higher one. In other words, it appears that the purport of the regulations is to cover an employee who does not complete his contract during the school year because of his resignation from the position covered by the contract. If this interpretation is a correct one it is difficult to see why the same result should not be achieved in the case of an implied resignation as well as in that of an expressed resignation.

Although the Court does not specifically state that the regulations are to be strictly construed because in derogation of the common law as enunciated in the Donelan case, this appears to be uppermost in the Court's thinking. Such a judicial attitude in the construction of legislation has been deprecated, and properly so, by legal philosophers. It is similarly deplorable in the construction of administrative regulations.

But even if it should be assumed that the Court's conclusion that the regulations do not cover the Ohrenberger situation is a correct conclusion, the fact that the regulations might be inapplicable hardly resolves the problem unless the Court is basing its decision upon the Donelan case, something it purports not to do. It appears inescapable that the Court is repeating its earlier error to require now, not only that the employee must live during the contract period of his vacation but also must occupy the contract position during that period. For the second time the Court has blinded itself to the fact that the employer in both the Donelan case and the Ohrenberger case has received the full benefit of the employment contract for which he is required to pay only a fraction of the contract price. If such was acceptable doctrine in 1916,
as a matter of employment contract law, it cannot today be regarded as anything but an antediluvian throwback.

§4.2. Teaching contract: Tenure. A second decision involving a teacher, troublesome to a teacher called upon to criticize judicial opinions, is that of Rhine v. International Y.M.C.A. College.\(^1\) In a statement of faculty personnel policy given to all teaching appointees of the college, it is enunciated that after three years of service faculty members might assume they have permanence of tenure provided their work is satisfactory, subject to modification in the event of (1) a change in educational policy involving the teaching subject or department discontinuance or (2) a serious financial crisis requiring drastic budget reconstruction. The first three years of teaching service is probationary, reappointment notice to be given not later than March 15th of each contract year. The plaintiff, an assistant professor, taught at the college under three successive one-year contracts, being notified in February of his third teaching year that he would not be reappointed because of curtailment owing to reduced enrollment and an impending curriculum reorganization. However, in June, the college, through its president, offered him a one-year contract under the condition that it should be a terminal appointment with no commitment beyond the academic year. The contract was accepted by the teacher. Thereafter becoming dissatisfied, he sought an adjustment of his position through various procedural steps in the college. Being unsuccessful, he brought action for breach of contract, apparently contending that the tender, in June, of the terminal contract for the fourth year constituted a breach of his third-year contract. In holding for the defendant the Supreme Judicial Court rightly concluded that the status of the teacher during the first three years was probationary, without tenure, and with no right to reappointment. Upon his acceptance of the fourth year terminal contract he was bound by its terms, including the terminal provisions.

The difficulty with the decision is not in these conclusions but in the implications of the case. In fact, for the period of his first three years, the college by its policy statement could be said to have led the teacher to believe that at the end of his third year, if the college desired to employ him thereafter, it would do so only under a contract giving him tenure. As the Court correctly states: "It [the policy statement] certainly implies no commitment for continuance of employment, if for any reason the experimental relationship leads to the conclusion that a more extended relationship may be unsatisfactory." But does it not imply a commitment that if his employment is continued beyond the third-year period it will be on a tenure basis? And is this commitment not a part of his first three contracts, the failure to comply with which constitutes a breach thereof?

Of course, there is no doubt but that the teacher may, as a matter of basic contract law, waive any right he may have to receive a tenure con-

\(^1\) 339 Mass. 610, 162 N.E.2d 56 (1959).
tract and that this waiver may be accomplished by the subsequent execution of a no-tenure contract. But does not the holding of this case suggest that the college may, by the annual proffer of a new terminal contract and its subsequent execution by the teacher (traditionally in a poor bargaining position), completely stultify the provisions of its policy statement over an indefinite period of years?

This is an area in which there appears to be a dearth of cases. It is somewhat unfortunate that the Court did not more clearly spell out the contract rights of the teacher adversely affected by the execution of the fourth-year contract. It is to be hoped that as a precedent the holding of this decision will not be extended beyond the narrow limits of its facts.

§4.3. Restitution: Tender of performance. It is hornbook law that when a contract calls for simultaneous performance by both parties, in order for the plaintiff to recover for the defendant's breach he must allege and prove that he tendered performance, or stood ready, able, and willing to do so, and further that the defendant failed to perform upon demand. In Bruni v. Andre, the same requirements were called for although the only legal relief available was not for breach of contract but for restitution for benefits conferred by the plaintiffs and received by the defendants under an oral contract for the purchase and sale of land unenforceable because of the Statute of Frauds.

Pursuant to an oral agreement the defendants obligated themselves to convey land to the plaintiffs for a stated sum of money when the title to the land should be cleared of possible defects. In reliance upon the agreement the plaintiffs made certain improvements to the land, and although thereafter the title was cleared the defendants failed to convey the property. The Supreme Judicial Court held that the defendants' motion for a directed verdict should have been granted.

The immediate obstacle to the plaintiffs' recovery for breach of contract was the Statute of Frauds pleaded by the defendants. This proved to be insurmountable, the Court properly refusing to give weight to the plaintiffs' contention that the contract was taken out from under the Statute by part performance, this contention being recognized with respect of land contracts only in equity and not at law. The plaintiffs

2 Any criticism of the opinion filed in this case must be tempered by the recognition that counsel for the plaintiff was of little or no assistance to the Court in resolving the legal issues presented as evident by the plaintiff-appellant's brief, which shows a total citation of one case and that one to support a contention that the determination as to whether the terminal appointment constituted an accord and satisfaction or a release was a matter for the jury.


2 There is some question whether specific performance will be granted upon an oral contract for the sale of land at the instance of the buyer who has paid the full purchase price. In Glass v. Hulbert, 102 Mass. 24, 28 Am. Rep. 418 (1869), it is stated that the part performance must be such as to create an estoppel against the plea of the Statute of Frauds in order for the oral contract to be enforceable in equity. This principle is reiterated in Andrews v. Charon, 289 Mass. 1, 193 N.E. 737 (1935).
were not thereby foreclosed from legal relief, however, since the Court read the pleadings to assert a right to recover for expenditures incurred under the contract. The language of the opinion, in dealing with this point, is unfortunately not free from ambiguity. At one point the rights of the plaintiffs at law are stated to be confined to recovery for expenditures, while at another point reference is made to the defendants' benefits as an alternative to the plaintiffs' expenditures as a measure of recovery.\(^3\)

Having determined, however, that the plaintiffs could maintain an action at law for quasi-contractual relief, the Court then proceeded to require that they establish their contract rights and the defendants' contract obligations in precisely the same way as though the action were being maintained for breach of the contract. There being no evidence from which to conclude that the defendants were obligated to notify the plaintiffs when title to the property was clear and, further, no evidence of the plaintiffs' ability to perform or of their tender of performance, and no evidence of defendants' unwillingness to perform, the plaintiffs failed to establish a cause of action.

Since the defendants apparently did not raise the question of the Statute of Frauds until after the action was brought, it might be inferred from the decision that tender of performance by the plaintiffs would have been excused if the defendants had earlier asserted that they had no enforceable contractual obligations. Why any distinction should be made between a situation wherein the Statute of Frauds was raised by a nonperforming defendant prior to suit, in which instance it would appear that the plaintiff would be excused from both tendering performance and making demand for the defendant's performance, and a case wherein the Statute is raised for the first time in the litigation is difficult to see, as long as recovery is not based upon breach of contract but restitution. It is quite apparent now that the defendants

\(^3\) Frequently the loss suffered and the benefit received are co-extensive. When not, the innocent recipient of the benefit is generally liable to the extent of the value of the benefit received or the loss suffered, whichever is the lesser. Restatement of Restitution §42. However, when the benefit conferred is received on the basis of a bargain between the parties, there is authority to the effect that the defendant is obligated to pay the plaintiff for the detriment he has suffered. 2 Restatement of Contracts §355(1) and Comment a. See, in this connection, Cave v. Osborne, 193 Mass. 482, 79 N.E. 794 (1907). Apparently holding to the contrary that even in such a situation recovery is limited to the value of the benefit conferred is Petition of Rosen, 236 Mass. 321, 128 N.E. 413 (1920).

The difficulty in permitting recovery for detriment suffered when the performance is had under a contract unenforceable because of the Statute of Frauds is commented upon by Corbin: "If the facts are such as to make the recognized remedy of reasonable compensation for benefits received an inadequate remedy, the courts are free to adopt this suggestion [that the Statute of Frauds should not prevent recovery of expenditures in reliance on the oral contract, even though the defendant was in no way "enriched" by them] as they formerly were to grant restitution to prevent unjust enrichment. It would merely be an additional step toward the complete nullification of the statute. Surely, an action for damages so computed is an 'action whereby to charge' the defendant upon his express promise." 2 Corbin, Contracts §422, p. 459 (1950).
do not intend to perform because under the Statute of Frauds the contract is unenforceable. In this posture of the case should it not be sufficient for the plaintiffs’ recovery on a quasi-contractual basis to show the bargained-for benefits conferred on the defendant which have not been and otherwise will not be compensated for?

§4.4. Illegality: Performance in violation of statute. A contract may be illegal for any of a number of possible reasons. The consideration may be illegal. The contemplated performance may be illegal. Or illegality may even taint the contract in a situation in which the performance of the promised act is not, apart from the promise, unlawful, but the promise to do the act makes it such.¹

The case of Bucella v. Schuster² involved the problem of the right to recover under a contract tainted with illegality, in that the performance was had in a manner violative of a statute, although performance in such manner was not required by the agreement. The plaintiff sought to recover for labor performed and equipment rented pursuant to a contract for the blasting of a ledge on the defendant’s land. By statute,³ a city blasting permit had to be secured by the person using the explosives, the applicant for the permit being required to post a surety bond in an amount fixed by the issuing officer (in no event to exceed ten thousand dollars), to cover the risk of damage from the blasting operation. The plaintiff failed to secure either the bond or permit. The Supreme Judicial Court held that the plaintiff was entitled to recover, his conduct being regarded as not so repugnant to public policy as to preclude recovery for his services and equipment rental expenses.

The Court rested its decision upon the opinion of Holmes in the case of Fox v. Rogers.⁴ In that case a lawful contract was made to lay a drain. By statute drain pipes were required to be made of cast iron. Those installed by the plaintiff were of earthenware. There was also some question as to whether the plaintiff did not open up a portion of the street in violation of city ordinances in laying the pipe. Mr. Justice Holmes did not concern himself with the statute and ordinance but concluded that the contract was lawful since it did not contemplate unlawful performance, there being no illegality in either promise or consideration. Beyond this he suggested that even if the contract had contemplated the specific items, the installation of which would have been violative of the statute, the plaintiff might still have been able to recover. This is not one of Holmes’ better opinions.⁵

In the subsequent decision of Tocci v. Lembo,⁶ an attempt was made to put the Fox opinion back on the track by suggesting that the statute

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¹ §4.4. 12 Restatement of Contracts §512. Comment e in this section points out that there is no impropriety in law in refraining from competition with another to an extent beyond that which could legally be promised.
³ G.L., c. 148, §10A.
⁴ 171 Mass. 546, 50 N.E. 1041 (1898).
⁵ See criticism of the language of the opinion in 6 Williston, Contracts §1761 (rev. ed. 1938).
tory violation in that case was only incidental to the performance of the contract and raised but a doubtful question of public policy. It seems to be on this basis that the Bucella case was decided.

In cases involving this problem, the statute requiring the license or permit should be carefully examined to see what was sought to be accomplished thereby. The purpose of the requirement of the permit here was quite apparent — to guarantee, by the accompanying bond, that those who might be injured by the blasting operation would have some assurance of compensation for any claims they might have. The statute says nothing about competency in handling explosives as being a condition to the issuance of the permit.

The statute does not, as it might have done, provide that contracts made or performed in violation of it, would be unenforceable at the instance of the violator. Is the absence of such a provision significant? In other Massachusetts cases involving the right of unlicensed persons to recover on contracts involving their unlicensed services, recovery has been denied to an attorney, an insurance broker, and a wholesale liquor dealer. On the other hand recovery has been permitted by one acting as a real estate broker and by a person doing the work of a plumber.

A proper analysis in this type of case should be made to determine whether the purpose of the statute requiring the license or permit was designed to protect the public health, welfare, or morality against fraud or incompetence. If so, the Court would be on firm ground in refusing to recognize enforceable contract rights in an unlicensed person. On the other hand, to cite just one example, if the statute was designed to raise revenue, no such result could be justified. This approach might be more fruitful than any test based upon the seriousness of the illegality, or whether the illegal act constituted more than an incidental part of performance, or whether the illegal act was so excessively repugnant

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7 325 Mass. at 709, 92 N.E.2d at 255. It also pointed out that the opinion could be supported on the failure of the defendant to plead illegality. The opinion in the Bucella case rejects this latter proposition. A reading of the Fox decision raises a question as to whether this summary rejection is justified.

8 As an example of a statute so providing see Acts of 1957, c. 762, §2; now G.L., c. 112, §87RR.

The fire prevention statute does provide that violators of the fire prevention regulations dealing with the illegal use of explosives may be proceeded against in equity by the Commonwealth, a city, or town, and may be sued in tort by anyone injured by an explosion of an explosive kept or transported by the violator contrary to the provisions of the statute or regulations. G.L., c. 148, §§21, 22.

9 Ames v. Gilman, 10 Metc. 239 (Mass. 1845); Browne v. Phelps, 211 Mass. 376, 97 N.E. 762 (1912).


13 Berriere v. Depatie, 219 Mass. 33, 106 N.E. 572 (1914). See criticism of this case on basis of the Court's distinction between one holding himself out as a plumber and one doing plumbing work under the contract in 6 Corbin, Contracts §1512 n.11 (1951).
to public policy as to preclude recovery for either the contract price or the value of the services performed.

§4.5. Damages: Willful and unintentional deviations. The remedies of a contractor seeking to recover against an owner for work performed, whether on a contractual or quasi-contractual basis, are frequently to be determined by whether he has fully or substantially completed the construction in accordance with the terms of the contract. When the failure of complete performance is due to the willful and deliberate fault of the contractor, the Massachusetts courts have been traditionally strict in denying liability. Thus, in Bowen v. Kimball,\(^1\) decided in 1909, recovery of an unpaid balance in excess of $9000 was denied a contractor whose willful deviations on a $96,500 building amounted in value to $800. Replacement of the nonconforming plastering would have cost about $7000.

The strictness of this approach has been criticized as effecting a penalty or forfeiture, “the extent of the penalty being in inverse proportion to the size of the breach.”\(^2\) It has, however, been noted that some of the more recent cases in this state have softened the application of the doctrine slightly,\(^3\) although they have not repudiated it in any way.

During the 1960 Survey year, the Supreme Judicial Court decided Lantz v. Chandler,\(^4\) where the contractor’s deviations were not intentional but the cost of correcting them was substantial. Involved were the defendants’ requested instructions to the effect that for the contractor to recover for substantial performance his deviations must be immaterial, justified, or excused. The denial of the requested instruction was upheld, the Court stating that when the deviation is unintentional, recovery may be had even though the deviation is more than immaterial or de minimis, as long as it is less than a substantial nonconformance with the contract.

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\(^3\) Morello v. Levakis, 293 Mass. 450, 200 N.E. 271 (1936), and Zarthar v. Saliba, 282 Mass. 558, 185 N.E. 367 (1933), are noted in 3A Corbin Contracts §707 (1960), as instances in which recovery was permitted despite the contractor’s furnishing of substituted materials, he believing the substituted product to be superior to that specified, and it being in fact suitable and satisfactory. The same result was had when the deviations were comparatively unimportant or easily remedied and fully compensable by a price reduction.

Within the past ten years the strict rule was affirmed in Ficara v. Belleau, 331 Mass. 80, 117 N.E.2d 287 (1954), a case involving a willful abandonment of the job by the contractor who left an unfinished building. Here the owner sued the contractor. Because of the contractor’s willful default he was barred in his cross action for breach of contract, but he was permitted to have the assessed damages reduced by the amount of the price unpaid by the owner. The Court responded to the criticism of Williston (see note 2 supra) by refusing to permit the owner to recover, against the intentionally defaulting contractor, damages measured by the cost of making the structure conform, thereby repudiating Glazer v. Schwartz, 276 Mass. 54, 176 N.E. 613 (1938).

The holding is consistent with previous Massachusetts cases, as well as the general common law, and would not be particularly worthy of comment except for the fact that the Court again recognizes that anything greater than immaterial or de minimis intentional deviations will bar the contractor from recovering for substantial performance, citing Bowen v. Kimball to that effect.

§4.6. Third party beneficiary: Materialman's recovery upon contractor's bond. During the last hundred years, Massachusetts has consistently adhered to the rule that a third party for whose benefit a contract was made cannot maintain an action thereon even though he should be described specifically in the instrument as an intended beneficiary. Judicial exceptions to the rule have been carved out in cases in which the promisor received assets that in equity belonged to the beneficiary, in which the promisee and beneficiary were blood relations, in which the litigating parties were a lessor and a lease-assignee in possession, and in other situations based upon "subtle interpretation" of the existing rule and its exceptions.

The problem has arisen from time to time when materialmen have sought to recover on bonds given by contractors to owners, which bonds have been conditioned upon the payment of project materialmen and laborers. There being no privity of contract between the materialmen and the surety, recovery has been denied, except in situations in which the Supreme Judicial Court construed the materialman's reliance upon the bond as an acceptance of an offer of a separate unilateral contract made by the surety under the bond language.

During the 1960 Survey year there was presented to the Court, in the case of Waite Hardware Co. v. Ardini & Pfau, Inc., the question of whether an unpaid materialman who supplied a subcontractor on a highway construction project for the Massachusetts Turnpike Authority had any standing to proceed in equity against the prime contractor and his surety, and to receive payment from a payment bond executed

5 1 Restatement of Contracts §§174, 175.

§4.6. 1 See 4 Corbin, Contracts §826 (1951).
5 4 Corbin, Contracts §826 (1951).
7 In Johnson-Foster Co. v. D'Amore Construction Co., 314 Mass. 416, 50 N.E.2d 89, 148 A.L.R. 353 (1943), the bond provided that it was "also made for the use and benefit of all persons . . . who may furnish any material or perform any labor for and on account of said contract . . . and they . . . are hereby made obligees hereunder the same as if their own proper respective names were written hereunder as such, and they and/or each of them may proceed or sue hereon." The unnamed materialmen were found to have entered into a unilateral contract by selling material to the contractor in reliance upon the promise of the surety contained in the bond.
by them, the bond running to the authority as obligee, and being conditioned upon payment of all laborers and materialmen involved in the prosecution of the work. Demurrers interposed by the authority, the prime contractor, and surety were sustained. The Supreme Judicial Court affirmed.

The opinion pointed out that the bond was not covered by the statute setting out the requirements of a performance bond on a construction contract with the Commonwealth or a municipality; the authority, although a public instrumentality performing an essential governmental function, is not the Commonwealth, and its contracts are not made on behalf of the Commonwealth. Therefore the statutory provisions for payment of materialmen out of statutory payment bonds were inapplicable. Regarded as a common law bond, stated the Court, the contract contained no provisions constituting an offer running to the materialmen. The Court refused to imply such an offer from the fact that the usual purpose of a payment bond is to insure the payment of materialmen, especially in public works contracts in which the property cannot be subject to mechanics' liens. This position was taken despite the recognition that there appeared to be no other reason for the bond in this case, and further despite the fact that in the case of similar bonds under municipal or state contracts protection is given the materialmen by virtue of the statutes.

This seems to be a hard doctrine, although consistent with the Massachusetts rule denying rights of recovery to third party beneficiaries. It is unfortunate that the Court was not able to come up with some "subtle interpretation" characteristic of some previous Massachusetts decisions in this field, because the materialman here seems to be neither fish nor fowl. He does not have the mechanics' lien rights available to the supplier on a private construction job; neither does he have the statutory protection under a bond available on a state or municipal project. Undoubtedly the legislation creating the statutory rights in the latter situation was intended to cover all public contracts not subject to a lien. It has now been remedied by an amendment extending the statutory protection to this type of case. In the meantime, the best that can be said for the materialman here is that he was unfortunately ahead of his time and his plight may have been instrumental in the enactment of the corrective legislation.

9 G.L., c. 149, §29. Although amendments in 1955 (Acts of 1955, c. 702, §2) require a statutory payment bond in such a construction project, the amendments did not become operative until after the execution of the bond in this case.

10 The materialman's contention of reliance, upon which the case of Johnson-Foster Co. v. D'Amore Construction Co., 314 Mass. 416, 50 N.E.2d 89 (1943), commented on in note 7 supra, rested, was therefore rejected, there being no offer upon which reliance could be placed.

11 This may be contrasted with the position taken by the Supreme Court of Alabama in Fidelity & Deposit Co. v. Rainer, 220 Ala. 262, 125 So. 55, 77 A.L.R. 13 (1929).

12 See note 9 supra.