acted as surety for a statutory bond obtained by Lundy's for the remodeling project.

Hope's contends that Lundy's breached the contract to buy windows, entitling Hope's to damages in the amount of the contract price of $55,000. Hope's also contends that Bank IV wrongfully refused to pay Hope's on the bond when Lundy's breached the contract. Hope's has sued for breach of contract, and in the alternative, for recovery under the theory of quantum meruit. A trial to the court was held December 4 and 5, 1991. Two issues emerged as pivotal to the resolution of this case: (1) when was delivery of the windows due, and (2) if delivery was late, could Hope's lawfully suspend performance and demand certain assurances, (including ultimately, a demand for prepayment in full) that Lundy's would not back charge for the late delivery under the authority of K.S.A. §84-2-609? Because the court finds that a determination of these issues leads to the conclusion that Hope's was the party in breach of this contract, the plaintiff's request for relief is denied.

I. Facts

The following findings of fact are entered pursuant to Fed. R. Civ. P. 52. On June 13, 1988, defendant Lundy's entered into a contract with the Shawnee Mission School District as general contractor for the construction of an addition to the Rushton Elementary School. Lundy's provided a public works bond in connection with the Rushton project as required by K.S.A. §60-1111 (1983). The purpose of the bond was to insure that Lundy's paid any outstanding indebtedness it incurred in the construction of the project. The statutory bond was secured through defendant Bank IV.

Plaintiff Hope's is a manufacturer of custom-built windows. The initial contact between Hope's and Lundy's occurred through Mr. Richard Odor, a regional agent for Hope's in Kansas City. On June 29, 1988, Hope's contracted with Lundy's to manufacture ninety-three windows for the Rushton project. The contract price, including the cost of labor and materials for the windows, was $55,000.

Although the contract included a term pertaining to the time for delivering the windows, there is some controversy over the meaning of this provision. Even under the most favorable interpretation to Hope's, however, delivery was due twelve to fourteen weeks after Hope's received approved shop drawings from Lundy's on July 18. Thus, delivery was due no later than October 24, 1988.

During the late summer and fall of 1988, several discussions took place between Hope's and Lundy's concerning when the windows would be delivered to the job site. Production of the windows was delayed by events that, according to the testimony of Mr. Odor, were not the fault of Lundy's. On September 27, 1988, Mark Hannah, vice president of Lundy's wrote to Hope's requesting that installation of the windows begin October 19, and be completed by October 26. On October 14 Hannah again wrote to Hope's, threatening to withhold "liquidated damages" from the contract price if Hope's did not comply with these deadlines. Although there was no provision in the contract for liquidated damages, Hope's did not make any response to the October 14 letter.

The windows were shipped from Hope's New York plant to Kansas City on October 28. Delivery to the Rushton site was anticipated on November 4. On November 1, Hannah called Hope's office in New York to inquire about the windows. He spoke to Kathy Anderson, Hope's customer service manager. The substance of this conversation is disputed. Hope's claims that Hannah threatened a back charge of $11,000 (20% of the contract price) for late delivery of the windows. Hannah testified, however, that although the possibility of a back charge was discussed, no specific dollar amount was mentioned. Hannah specifically denies that he threatened to withhold $11,000 from the contract.

After her conversation with Hannah, Anderson immediately informed Chris Arvantinos, vice president of Hope's, of the threatened back charge. Arvantinos called Hannah to discuss the back charge, but he does not recall hearing Hannah mention the $11,000 figure. Arvantinos requested that Hannah provide assurances that Lundy's would not back charge Hope's, but Hannah was unwilling to provide such assurances.

In a letter written on November 2, Arvantinos informed Hannah that Hope's was suspending delivery of the windows until Lundy's provided assurances that there would be no back charge. Hannah received this letter on the morning of November 3, shortly before Mr. Odor visited Hannah at Lundy's. Odor, who had spoken with Arvantinos about the back charge, issued a new demand that Lundy's had to meet before Hope's would deliver the windows. He gave Hannah an invoice for the full amount of the contract price, demanding prepayment before the windows would be delivered.

Odor set out three ways that Lundy's could meet this demand: (1) payment of the contract price in full by cashier's check; (2) placement of the full contract price in an escrow account until the windows were installed; or (3) delivery of the full contract amount to the architect to hold until the windows were installed. All three options required Lundy's to come up with $55,000 before the windows would be delivered. Hannah believed that the demand presented by Odor superseded the letter from Arvantinos he received earlier that morning.

court say hope D.

Hannah informed Odor that there was no way for Lundy's to get an advance from the school district at that time to comply with Hope's request. The meeting ended, Lundy's did not prepay, and Hope's did not deliver the windows. On November 7, 1988, Lundy's terminated the contract with Hope's. Thereafter, Lundy's obtained an alternate supplier of the windows.

On February 15, 1989, Hope's notified defendant Bank IV of Lundy's failure to pay the contract price and demanded payment from Bank IV on the public works bond. Bank IV refused to pay Hope's claim. This action was filed by Hope's on March 20, 1989. Jurisdiction of the matter rests with this court pursuant to 28 U.S.C. §1332. . . .

II. Discussion . . .

A. Plaintiff's Contract Claim Against Defendant Lundy's

This case turns on the resolution of two central and interrelated issues: (1) when was delivery due under the contract, and (2) could Hope's lawfully demand the assurances it demanded from Lundy's under K.S.A. §84-2-609.[2] If the demands for assurances were proper, then Hope's would have been justified in suspending its performance and withholding delivery and Lundy's failure to provide assurances and subsequent termination of the contract amounted to a total breach. If, however, the demands for assurances were not proper under §84-2-609 then Hope's breached the contract by wrongfully withholding delivery of the windows and Lundy's was entitled to cancel the contract. The delivery date issue is addressed first because the matter of whether or not Hope's was already in breach for late delivery goes directly to the propriety of its demand for assurances.

1. Delivery Date

Even under Hope's interpretation of the delivery term, delivery of the windows was not timely.[3] At trial, Chris Arvantinos, Hope's vice president, testified that Hope's committed to deliver the windows twelve to fourteen weeks after July 18, 1988, the day Hope's received approved shop drawings. This would make delivery due between October 10 and October 24. In fact, the windows did not arrive in Kansas City until November 4, fifteen and one-half weeks after July 18. Hope's claims that this delay was "immaterial" and did not excuse Lundy's from its duties under the contract. Hope's is unable to cite any controlling authority to support this argument, however. Moreover, this argument misses the point. Even if an "immaterial" delay did not excuse future performance by Lundy's, no

2. Section 2-609 provides:

§84-2-609. Right to adequate assurance of performance.

> (1) . . . When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commerically reasonable suspend any performance for which he has not already received the agreed return.
>
> (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

K.S.A. §84-2-609 (1983).

3. "Delivery" is defined by Black's Law Dictionary as "[t]he act by which the res or substance thereof is placed within the actual or constructive possession or control of another. . . . What constitutes delivery depends largely on the intent of the parties." Black's Law Dictionary 385 (5th ed. 1979). In this case, the parties bargained for more than mere shipment of the windows. Arvantinos testified that Hope's committed to delivering the windows to the job site between October 10 and October 24. Thus, delivery was to occur under the parties' agreement when the windows arrived in Kansas City and were available for installation at the Rushton job site.

performance was due from Lundy's until the windows were delivered to the job site, which never occurred.

Hope's also argues, almost in passing, that the delay was caused by problems that were outside of its control, thus excusing Hope's from responsibility for the late delivery. Under a clause in the contract, Hope's disclaimed responsibility "for delayed shipments and deliveries occasioned by strikes, fires, accidents, delays of common carriers or other causes beyond our control. . . ." During the course of production, Hope's experienced problems with its "bonderizing" and prime paint system, which resulted in a delay in production of approximately two weeks. Hope's produced no evidence at trial, however, to show that this was a matter which was beyond its control. Moreover, it is interesting to note that Hope's did not contemporaneously seek from Lundy's any extension of the delivery date under this provision or notify Lundy's that it might result in a delay beyond October 24. It appears that reference to this clause is more of an afterthought born of litigation than a bona fide excuse for modifying the delivery date.

Hope's also contends that a three to four day delay resulted when Lundy's asked for a change in the design of the windows to include "weep holes" after production had already begun. However, Hope's representative, Odor, testified that nothing Lundy's did delayed Hope's manufacturing. Moreover, even accounting for this delay, Hope's was a week late delivering the windows.

2. Section 2-609 Demand for Assurances

The framework for judging demands for assurances under 84-2-609 was set forth in LNS Investment Co., Inc. v. Phillips 66 Co., 731 F. Supp. 1484, 1487 (D. Kan. 1990):

> To suspend its performance pursuant to [84-2-609], defendant must (1) have had reasonable grounds for insecurity regarding plaintiff's performance under the contract, (2) have demanded in writing adequate assurance of plaintiff's future performance and (3) have not received from plaintiff such assurance.

White and Summers note that what constitutes a "reasonable ground" for insecurity and an "adequate assurance" are fact questions. J. White & R. Summers, Uniform Commercial Code §6-2, at 236 (3d ed. 1988). Reasonableness and adequacy are determined according to commercial standards when, as is the case here, the parties are merchants. K.S.A. §84-2-609(2) (1983).

Although nothing in the record indicates that Hope's expressly claimed any rights under §84-2-609 during the course of this transaction, Hope's asserted at trial that the October 14 letter from Lundy's demanding delivery by October 16 and threatening liquidated damages gave Hope's reasonable grounds for insecurity. Delivery was not due until October 24 under Hope's version of the parties' agreement, and Lundy's had no right to demand performance early, let alone broach the withholding of liquidated damages. This letter might have justified a demand for assurances under §84-2-609. However, Hope's made no such demand after receiving the letter. Instead of invoking its rights under §84-2-609, Hope's chose not to respond at all to Lundy's threat of liquidated damages. This event merely came and went without any legal consequence.

Hope's in effect invoked its rights under §84-2-609 in response to Lundy's threat of a back charge during the November 1 phone conversations. Two separate demands for assurances were made in response to this threat. Initially, Chris Arvantinos demanded assurances that Lundy's would not back charge Hope's for the delayed shipment in a telephone conversation with Mark Hannah later in the day on November 1. Arvantinos memorialized this demand in a letter composed on that day and mailed on the second of November. In their telephone conversation, Hannah refused to provide assurances that Lundy's would not back charge Hope's.

Hope's made a second demand for assurances on November 3, when Richard Odor presented Hope's invoice to Hannah demanding payment in full. Thus, Hope's demanded assurances that it would not be back charged on November 1, and when that demand was refused, Hope's made a second demand on November 3. The court finds that Hope's was not entitled to invoke §84-2-609 on either occasion.

When Hope's made its first demand for assurances on November 1, it * was already in breach of the parties' agreement. Delivery of the windows was due by October 24, but the windows did not arrive in Kansas City until November 4. A party already in breach is not entitled to invoke §2-609 by demanding assurances. Law United States v. Great Plains Gasification Associates, 819 F.2d 831, 835 (8th Cir. 1987); cf. Sumner v. Fel-Air, Inc., 680 P.2d 1109 (Alaska 1984) (Section 2-609 does not apply after a breach has already occurred). To hold otherwise would allow a party to avoid liability for breaching its contract by invoking §2-609 to extract from the nonbreaching party an assurance that no damages will be sought for the breach. A nonbreaching party in need of prompt performance could be coerced into giving up its right to damages for the breach by giving in to the demands in order to receive the needed performance. This court refuses to endorse such a result.

The assurances which Hope's demanded, moreover, were excessive. "What constitutes 'adequate assurance' is to be determined by factual conditions; the seller must exercise good faith and observe commercial standards; his satisfaction must be based upon reason and must not be arbitrary or capricious." Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1310 (5th Cir. 1985). "If the assurances he demands are more than 'adequate' and the other party refuses to accede to the excessive demands, the court may find that the demanding party was in breach or a repudiator." J. White & R. Summers, supra, §6-2, at 236.

Lundy's argues that Hope's demand for assurances in the November 2 letter from Arvantinos was overly broad and unreasonable. The letter informed Lundy's that Hope's would not deliver the windows to the job site until it received assurances that it would not "be backcharged or otherwise held responsible for liquidated damages, delay charges *or any extra costs on account of time of delivery of the windows*." (emphasis added). When this demand was made, the windows had not yet arrived in Kansas City. Therefore, the parties did not know at this time whether the proper quantity of windows had been shipped, whether the windows were the correct size, who materially breached first

or whether they otherwise met Lundy's specifications. If there were any nonconformities in the shipment, there could have been another delay in the time of delivery while Hope's corrected the problem. Yet, Hope's demanded a blanket assurance that it would not be held responsible for *any extra costs* incurred because of "time of delivery of the windows." This demand was overly broad on its face and unreasonable under §84-2-609.

The assurances Hope's demanded on November 3 were also excessive. In his meeting with Mark Hannah, Richard Odor insisted that Lundy's prepay the contract price, deliver a cashier's check to the architect, or place the full contract price in an escrow account before the windows would be delivered. Yet, Lundy's never gave any indication that it was unable or unwilling to pay the amount it owed to Hope's when the windows were delivered and the bond stood as security for Lundy's obligation. Such a demand was unreasonable and amounted to a breach by Hope's. See Pittsburgh-Des Moines Steel v. Brookhaven Manor Water Co., 532 F.2d 572, 578-82 (7th Cir. 1976) (demanding under §2-609 a personal guarantee of payment from a shareholder, or that other party escrow the entire amount of the contract price before it was due, absent any showing of an inability to pay, was unreasonable); Scott v. Crown, 765 P.2d 1043 (Colo. Ct. App. 1988) (demanding payment in full before it was due was unreasonable demand under §2-609 and amounted to anticipatory breach). The payment terms under the contract were "Progress payments by the 10th of each month covering 90% of the total value of materials delivered and installation performed during the previous month with final payment upon completion of our [Hope's] work." By demanding prepayment, Hope's essentially attempted to rewrite this term of the contract. *Pittsburgh-Des Moines Steel,* 532 F.2d at 578-82 (Section 2-609 may not be used to force a contract modification); *Scott,* 765 P.2d 1043 (same).

yet it did

material breach

late and asking for assurance is a material breach

Although Hope's contends that a threatened back charge of $11,000 for a one week delay in shipment justified its demand for prepayment, the court is not persuaded that Lundy's made any specific demand for $11,000. The testimony on this issue was controverted, but only Kathy Anderson, Hope's customer service manager, testified, in a perfunctory manner, that an $11,000 back charge was threatened. Mark Hannah specifically denied making such a demand. Neither Chris Arvantinos nor Richard Odor testified to recalling receiving such a demand. There was also testimony at trial from one witness for Hope's that the threatened back charge was in the amount $5,000. The court is not persuaded that Lundy's went beyond making unspecified threats of a back charge for possible damages it would incur because of Hope's delay.

By threatening to withhold damages from the contract price, Lundy's was merely exercising its rights under K.S.A. §84-2-717,[4] which entitles a buyer to deduct from the amount owing on the contract any damages from the seller's breach. See, e.g., Patel v. Telerent Leasing Corp., 574 So. 2d 3

4. "§84-2-717. *Deduction of damages from the price*. The buyer on notifying the seller of his intentions to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." K.S.A. §84-2-717 (1983).

(Miss. 1990); Teeman v. Jurek, 312 Minn. 292, 251 N.W.2d 698 (1977). Giving notice of its intention to avail itself of a legal right did not indicate that Lundy's was unwilling or unable to perform under the contract. Indeed, the very nature of the right invoked by Lundy's manifests an intention that it would continue performing and pay the contract price due, less damages caused by Hope's delay. Thus, the demand for prepayment was unreasonably excessive when there was no indication that Lundy's would not pay Hope's when performance was due.

Both Hope's delay in delivering the windows and Hope's excessive demands entitled Lundy's to treat Hope's as in breach and to cancel the contract, which it did on November 7, 1988. K.S.A. §84-2-711 (1983) ("Where the seller fails to make delivery or repudiates . . . the buyer may cancel. . . ."). Thus, Hope's is not entitled to recover under its claim for breach of contract.

ruling

B. PLAINTIFF'S QUANTUM MERUIT CLAIM

Hope's also claims that it is entitled to compensation from Lundy's under the theory of quantum meruit. "Quantum meruit," which literally means "as much as he deserves," is a phrase used often in older cases to describe an equitable doctrine premised on the theories of unjust enrichment and restitution. Black's Law Dictionary 1119 (5th ed. 1979). Recovery was allowed under this theory when a benefit had been received by a party and it would be inequitable to allow the party to retain it. E. Farnsworth, Contracts §2.20, at 103 n.4 (2d ed. 1990). Instead of labeling it quantum meruit, courts today speak in terms of restitution. See Pioneer Operations Co. v. Brandeberry, 14 Kan. App. 2d 289, 789 P.2d 1182 (1990).

To recover in restitution, a breaching plaintiff must have conferred a benefit on the nonbreaching party. See Walker v. Ireton, 221 Kan. 314, 559 P.2d 340 (1977) (right to restitution limited to expenditures or services that benefited other party); Restatement (Second) of Contracts §374 (1979). The burden is on the breaching party to prove the extent of the benefit conferred, and doubts will be resolved against him. Restatement (Second) of Contracts §374 comment b (1977).

In this case, Hope's conferred no benefit on Lundy's. The windows manufactured by Hope's were never used in the Rushton project, and the court is not pursuaded that the installation advice provided by Christiansen Steel Erection for Hope's improved the project. Hope's admits that the only labor it claims to have provided at the Rushton job site was consultation work performed by Christiansen Steel Erection, a company Hope's subcontracted with to install the windows. Mike and John Christiansen visited the job site on several occasions to advise Lundy's on how to prepare the window openings for installation. The advice they provided, however, related to the installation of windows that were never used on the project. When Lundy's canceled its contract with Hope's, it obtained an alternate supplier of a different type of windows. These windows did not require the same careful preparation of the window openings as the Hope's windows. Lundy's job foreman testified that the Christiansen's advice became moot when the alternate supplier was obtained. "[A] party's expenditures in preparation for performance that do not confer a benefit on the other party do not give rise to a restitution interest." Restatement (Second) of Contracts §370 comment a (1977). Thus, because no benefit was conferred upon Lundy's, Hope's has no valid claim to restitution.

III. Conclusion

After careful consideration of the facts and law, this Court holds that Hope's breached the contract in question. Therefore, defendant Lundy's was entitled to cancel its performance and defendant Bank IV was not obligated to pay Hope's under the statutory bond.

It is therefore ordered that plaintiff's claims for relief are hereby denied, and judgment is entered in favor of defendants.

It is so ordered.

Problem 161

Assume NASA had agreed to make progress payments of $1 million monthly to Venture's Vehicles starting in January 2002. After NASA had made payments through October of that year, it learned that Venture's Vehicles was insolvent and had defaulted on a similar job it had with the European Space Agency. May NASA treat this as a repudiation? May it cut off the progress payments?

RESTATEMENT (SECOND) OF CONTRACTS

§252. Effect of Insolvency

(1) Where the obligor's insolvency gives the obligee reasonable grounds to believe that the obligor will commit a breach under the rule stated in §251 [a provision similar to UCC §2-609—Eds.], the obligee may suspend any performance for which he has not already received the agreed exchange until he receives assurance in the form of performance itself, an offer of performance, or adequate security.

(2) A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.[1]

Problem 162

In order to heat the music hall for the evening's performance each evening, the manager had to turn up the furnace by four o'clock in the

1. The Bankruptcy Code uses a purely bookkeeping test for insolvency: more liabilities than assets; see Bankruptcy Code §101(32).

afternoon. One February day the advertised event was a rock concert by the Body Bags, a popular group touring New England with their show. They were still in a city 80 miles away on the date of the performance, and traffic had been made impossible by a New England blizzard that stranded everyone. Certain that they would not show up, and figuring that in any event no audience would, the manager decided to cancel that evening's performance; he did not heat the music hall. It was understood by all parties that the performers, if they were ready, willing, and able to perform, were to be paid even though weather conditions caused the performance to be cancelled. Half an hour before showtime, the musicians did arrive; they had rented snowmobiles to get through. When they learned that there would be no show, they sued. The manager defended by pointing to their prospective inability to perform and the doctrine of impossibility. How would this come out in a court in which you were the judge? See Hathaway v. Sabin, 63 Vt. 527, 22 A. 633 (1891).

upset about not performing

Problem 163

After his horse Bucephalus won the Kentucky Derby, Alexander agreed to sell him to Phillip on September first for $15 million. On July tenth, Phillip learned that Alexander had sold Bucephalus to Darius for $20 million. Phillip sued immediately, but Alexander contended that no breach could possibly occur until the first of September. Who is right here? See Official Comment 2 to UCC §2-610.

reasonable time

Problem 164

Travis contracted to sell a houseboat to his friend Meyer for $35,000. They agreed to meet on the boat on August first and swap the boat for a check for that amount. On July fifteenth Meyer phoned Travis and told him that the deal was off. Travis refused to accept the cancellation and brought suit on August tenth for breach of contract. If Meyer can show that Travis never formally tendered the houseboat, is this a defense? If Travis had promised to paint the houseboat prior to delivery, is it a defense that he never did so after Meyer's call? If you were a judge, what would you require Travis to allege and prove here?

GREGUHN v. MUTUAL OF OMAHA INSURANCE CO.

Supreme Court of Utah, 1969
23 Utah 2d 214, 461 P.2d 285

TUCKETT, J. The plaintiff filed a separate action against each of the defendants to recover benefits due under health and accident policies issued by the defendants. The two cases were consolidated for trial. From an adverse verdict and judgment of the court below the defendants have appealed to this court.

On May 12, 1962, the defendant United Benefit Life Insurance Company issued a policy to the plaintiff, and on May 8, 1964, the defendant Mutual of Omaha Insurance Company issued a policy to the plaintiff. Both policies insured the plaintiff against loss arising from sickness or accident. At the time the policies were issued and for more than 20 years prior thereto the plaintiff had worked as a brick mason. During his adult life, except for a short period of time in the army and during another six-month interval when the plaintiff worked at a brewery, he had followed the trade of a brick mason. The record shows that the plaintiff's schooling had ended at the fifth grade.

The pertinent provisions of the policies we are here concerned with are: The Mutual of Omaha policy defines injuries as follows: "Injuries mean accidental bodily injuries received while this policy is in force and resulting in a loss independently of sickness and other causes." In the same policy the phrase "total loss of time" means "that period of time during which you are unable to engage in any other gainful work or service for which you are reasonably fitted by education, training or experience."

In the policy issued by United Benefit Life Insurance Company the insuring clause of the policy states that the policyholder is insured "against loss of life, limb, or sight resulting directly and independently of all other causes from accidental bodily injuries received while this policy is in force," and the term "loss of time" means "that period of time for which the insured is able to perform none of his occupational duties."

On September 21, 1964, while the plaintiff was working as a brick mason, a plank which was a part of the scaffold on which he was working fell from beneath him. The plaintiff caught himself with one hand on the wall and the other hand on the scaffold which prevented him from falling to the ground below. The plaintiff remained hanging until a fellow employee assisted him in regaining a position on the scaffold. Approximately an hour after this incident the plaintiff began to suffer pain in his back.

The next day the plaintiff continued to suffer pain in his lower back which radiated down his left leg. The plaintiff consulted Dr. Robert H. Lamb, an orthopedic surgeon. Dr. Lamb examined the plaintiff and took X-rays of the plaintiff's back and as a result he concluded that the plaintiff had a pre-existing condition of the back known as spondylolisthesis. This defect might be either congenital or acquired. Dr. Lamb was also of the opinion that the plaintiff had received an injury causing pressure on the new nerve roots at the lower lumbar level accounting for the plaintiff's numbness and pain.

The plaintiff was treated by a course of physical therapy in the hospital which treatment did not relieve his symptoms, and subsequently two surgical procedures were performed in an effort to effect a cure of the plaintiff's back problems.

The defendants made payments to the plaintiff pursuant to the terms of the policies until on or about June 1965 when the defendants notified the plaintiff that the plaintiff's ailment would be considered a loss due to illness without confinement, and that a payment of $300 would represent the final payment of benefits under the policies. Upon failure of the defendants to further perform, these actions resulted.

Trial was had in the court below on the issues as to whether or not the plaintiff was totally and permanently disabled within the terms and conditions of the policies, and whether or not the accidental fall of the plaintiff activated and precipitated a latent condition of the plaintiff's back to a disability condition. During the course of the trial the plaintiff testified that he had experienced no back problems prior to the accident of September 21, 1964, and that he had continuously worked as a brick mason for approximately 30 years except for two short periods. The plaintiff's attending physician, Dr. Lamb, testified that he was of the opinion that the plaintiff would be unable in the future to continue on with the trade of brick masonry. The defendants also called medical experts who testified as to the plaintiff's condition. The testimony of these physicians conflicted in some respects with the testimony of Dr. Lamb, but it was generally agreed that the plaintiff would be unable to follow his trade as a brick mason. There was some testimony to the effect that the plaintiff might be physically capable of engaging in some other line of work such as brick masonry contracting.

The jury returned a general verdict finding the issues in favor of the plaintiff. After the verdict was returned, the court calculated the amount due under the terms of the policies together with interest to the time of trial. In addition thereto the court found that the defendants had repudiated their contracts of insurance and concluded that the plaintiff was entitled to a lump sum judgment for future benefits which would accrue under the terms of the policies. The court received evidence as to the life expectancy of the plaintiff and based thereon calculated and made a finding as to future benefits.

The defendants are here contending that the evidence failed to show that the plaintiff was totally disabled and that his disability did not result from the accident alone exclusive of all other causes. While it is true that plaintiff suffered from a condition of the back, there is no dispute in the evidence that the plaintiff had carried on his trade as a brick mason over a long period of time without being aware that he had a defect known as spondylolisthesis and without that condition interfering with his work. It must be concluded that the defendants when they issued their policies of health and accident insurance took the plaintiff in the condition they then found him. There is evidence of record from which the jury could conclude that the plaintiff's disability resulted proximately from the accident and that the nondisabling and dormant condition of the plaintiff's back was precipitated into a disabling condition by the accident in question. While the defendants excepted to the court's instructions to the jury and also excepted to the refusal of the court to give certain of the defendants' requested instructions, from our review of the instructions we are of the opinion that the issues were fairly and adequately submitted to the jury and we find no grounds for reversal of the verdict.

This brings us to what we consider the most critical problem in the case. Did the court err in granting an award for future disability under the doctrine of anticipatory breach? This problem is one of first impression in this jurisdiction. While the defendants cite the case of Colovos v. Home Life Insurance Co. of New York as being an expression by this court as to what the rule is, an examination of the case reveals that the doctrine of anticipatory breach was not before the court. The decisions of a number of the states permit an insured to recover a money judgment for the present value of future payments based upon the insured's life expectancy. However, the great majority of decisions permit recovery under a disability policy only of installments accrued and unpaid. The doctrine of anticipatory breach has not ordinarily been extended to unilateral contracts. As stated in the Restatement of Contracts: In unilateral contracts for the payment in installments after default of one or more, no repudiation can amount to an anticipatory breach of the rest of the installments not yet due. We are of the opinion that it was error for the trial court to enter judgment for future benefits to become due under the policies.

The verdict and the decision of the trial court amounts to a determination that the plaintiff is entitled to the monthly payments as specified in the insurance policies so long as he is totally and permanently disabled. Defendants are not relieved of the obligation of making the payments unless the plaintiff should recover or die. Should the defendants fail in the future to make payment in accordance with the terms of the policies without just cause or excuse and the plaintiff is compelled to file another action for delinquent installments, the court at that time should be able to fashion such relief as will compel performance.

This matter is remanded to the trial court with directions to modify its judgment so as to eliminate that part of the judgment pertaining to future benefits under the policies. Plaintiff (respondent) is entitled to costs.

CROCKETT, C.J., and CALLISTER and HENROID, JJ., concur.

ELLETT, Justice (dissenting). I dissent.

The plaintiff claimed that he was totally and permanently disabled under the terms of the policies written by the defendants. After making some periodic payments, the defendants denied any liability to make further payments on the grounds that if the plaintiff had any disability, it was not related to causes covered in the policies.

By rendering its verdict in favor of the plaintiff, the jury found that plaintiff was permanently and totally disabled under the terms of the policies. There was evidence to support the verdict and, therefore, the issue of the permanency and totality of the disability under the policies has been concluded, and the prevailing opinion accepts these facts.

While the majority of cases listed in the digests have held that recovery in actions involving health and accident policies is limited to accrued and past-due installments, there is respectable and, in my opinion, better reasoned authority to the contrary.

In those actions which have been brought to interpret, apply, or enforce the terms of a policy and where no repudiation of further liability is involved, then the recovery is properly limited to accrued and past-due installments. However, where there is a repudiation of all contractual obligations, I think it is the better policy to allow full recovery in one action, as was done in the case now before us.

Some of the cases which limit recovery to past-due installments do so because of a provision in the policy requiring the insured to furnish proof of continued disability as a condition of liability to pay. This should not be necessary where there has been a determination in court that the disability is *total and permanent.*

It does not appeal to me as being just or fair to permit an insurer which has breached its contractual obligation to pay, to insist that the insured must *abide* by the terms of the contract insofar as those terms favor the insurer. One who abrogates his contract is in no position to compel the other party to be bound by the terms of the contract.

Some of the cases which limit recovery to past-due installments do so upon the ground that to permit a recovery beyond the installments as set out in the contract would be in abrogation of the express provisions of the contract.

Such a holding confuses a suit for specific performance with an action in damages for breach of contract.

At common law an action of Debt would lie for money due under a contract, but only one cause could be brought on the contract. Where a contract was to be performed in installments, an action could not be maintained until all installments were due. The action of Assumpsit changed the law so that recovery could be had as soon as there had been a nonperformance of any installment obligation. However, the idea that only one action would lie for breach of a contract still persisted, and so a plaintiff had to recover all damages in one action, including installments not yet due. He got judgment for the total amount promised when there was a breach of the one installment of the contract.

Later on in the process of development of the law, installment contracts came to be regarded as divisible into separate parts, and thus an action of Indebitatus Assumpsit (he promised to pay) would lie upon each installment as it became due. See Corbin on Contracts, §949. . . .

There can be no quarrel with the rule that where the contract has become wholly unilateral, as where nothing further is to be done by the plaintiff, the mere failure to pay one or more installments when due would not, in and of itself, be considered a repudiation of the contract as to future payments, since the breach does not go to the essence of the contract. However, where there is a failure to pay one installment, coupled with an announcement by the insurer that no future payments will be made, then damages for the partly anticipatory breach should be allowed. See Corbin on Contracts, Sec. 966.

Since the plaintiff in this case was determined to be totally and permanently disabled, the defendants cannot relitigate those matters. By assuming the defendants would pay according to the contract, the prevailing opinion ignores the fact that the plaintiff sued for damages, not specific performance, and would compel him to abide by terms of the contract when neither party requests such a ruling. The decision grants to the defendants an opportunity to refuse gain to pay the installments to plaintiff and says that in such an event the trial court "should be able to fashion such relief as will compel performance." I am unable to know just what relief the decision has in mind. Under the pleadings as framed in this case, the relief to which plaintiff was entitled has already been given him.

If it appears, as in this case, that a party to a contract makes an outright refusal to comply with the terms thereof and so notifies the other party, then I can see no legal reason why that other party may not accept the anticipatory breach of the contract and sue for his damages. What reason is there in law or good conscience to give a locus penitentiae to the party whose wrongful conduct precipitates a lawsuit? Why should an appellate court set the stage for further litigation when the matters have already been fully determined?

By informing the plaintiff herein that no further payments would be made upon the policies, the defendants were guilty of an executory breach of the contracts which entitled the plaintiff to sue for his damages and to put an end to further litigation.

I would affirm the judgment of the trial court and in so doing would ignore the dictum in the case of Colovos v. Home Life Ins. Co. of New York, 83 Utah 401, 412, 28 P.2d 607 (1934).

QUESTIONS

not about SP - dam Dissent

1. Do you agree with the majority or the dissent here?

2. What policy reasons support the majority's position? Which would point the other way?

3. Could the court solve the problem by a decree of specific performance with respect to future installments as they come due? See Corbin §969; John Hancock Mutual Life Insurance Co. v. Cohen, 254 F.2d 417 (9th Cir. 1958).

CORBIN ON CONTRACTS §965

What the plaintiff asks for and what he is given is a judgment for money damages. It is merely an accidental circumstance that where the contractual duty is a duty to pay money, the performance that is expressly promised is identical in character with the performance that is required by a judgment for money damages. Obviously, a judgment for money damages is not a judgment for the specific performance of a promise to deliver goods, to convey land, or to render service. In the case of an express contract for the payment of money, however, a judgment for money damages may appear to one who looks at the matter only superficially to be a judgment for specific performance. This it certainly is not if the judgment is not for the full sum promised, but is merely for its present value after making proper discount for advance collection. Furthermore, in an action for damages for breach of a promise to make a money payment, the plaintiff ~~can get judgment~~ for much more than the amount promised him if he can ~~prove with reasonable~~ certainty the amount of additional losses that the defendant had reason to foresee. Therefore, a plaintiff should not be deprived of his remedy in damages for an anticipatory repudiation merely because the promised performance is similar in character to the performance that is required by the judicial remedy that is commonly given for all kinds of breaches of contract.

Problem 165[2]

Return to the facts of Problem 159, wherein NASA contracted with Venture's Vehicles for the space scooter to be delivered on July 1, 2020, and on April 5, 2016, the company informed NASA by letter that it was repudiating the contract. NASA's purchasing director was dumbfounded by this news but immediately began casting about for a substitute, which NASA found on September 10, 2016, signing a contract on that date to pay the new company $48 billion for delivery of the scooter as agreed. Assume that the price for such scooters specified in the contract was $32 billion and that the market price for the scooters would be $45 billion on April 5, 2016, and $55 million on July 1, 2020.

(a) You are the chief attorney for NASA and your phone rings with these questions. *Must* NASA sue now? Take mitigatory action now? Or may it treat the repudiation as a *brutum fulmen* (Latin for "empty noise") and await performance in 2010 as agreed? At what moment will its damages be measured? See UCC §§2-610, 2-713, and 2-723. Do these sections conflict? What does "learned of the breach" mean in §2-713? See Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064 (5th Cir. 1984).

(b) If NASA does nothing, may Venture's Vehicles change its mind, retract the repudiation, and reinstate the contract? See UCC §2-611. If NASA had contracted with another company for the space scooter on learning of the repudiation, would Venture's Vehicles have been able to do this?

2. This Problem has become moot under the revised version of Article 2, which clears up the confusion in the language of the original Article, and now makes it clear that the measuring moment for damages is at the end of a commercially reasonable period following the repudiation. See new §2-610(1)(a)

CHAPTER

9

THIRD PARTY BENEFICIARIES

I. TYPES OF THIRD PARTY BENEFICIARIES

Problem 166

Judge Hardy promised his son Andy that he would buy him the used ar that Andy had been admiring down at MGM Motors if Andy would gree to go to law school instead of pursuing a career in the theater. Andy lid go to law school, which, of course, he loved so much he gave up any urther thoughts of an alternative career. Judge Hardy failed to buy the romised car, but Andy was so happy in his studies that he didn't care. IGM Motors cared, however, and it brought suit against Judge Hardy for ailing to buy the car from the dealership. MGM claimed to be the third arty beneficiary of the promise Judge Hardy made to Andy. Should this uit succeed? Try to articulate your reasons for deciding either way.

Problem 167

Judge Hardy paid MGM Motors $20,000 upon MGM's promise to eliver a new car to Andy Hardy on his fifteenth birthday. Judge Hardy ever made it to Andy's birthday, and MGM never delivered the car to ndy. Andy has sued. Should he recover from MGM? Would your answer iffer if Judge Hardy had owed Andy $20,000?

. *The Historical Development of Beneficiary Rights*

The above Problems address the issue of when, if ever, a third person, , not a party to a contract between A and B, should be able to enforce B's romise to A. The traditional English approach was not to allow X to nforce B's promise under contract law (although some English courts used the fiction of an equitable trust to get to the same place). The following decision, Lawrence v. Fox, is the classic case demonstrating a more liberal American approach. Following *Lawrence* are two famous New York cases representing attempts to extend the potential class of third parties who can enforce a contract to which they are not a party.

LAWRENCE v. FOX
Court of Appeals of New York, 1859
20 N.Y. 268

Appeal from the Superior Court of the city of Buffalo. On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at general term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and therefore not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State — in an able and pains-taking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analysed — that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the Court for the Correction of Errors. (Farley v. Cleaveland, 4 Cow., 432; same case in error, 9 id., 639.) In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not enure to his benefit. The hay which Cleaveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. (Barker v. Buklin, 2 Denio, 45; Hudson Canal Company v. The Westchester Bank, 4 id., 97.) It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schermerhorn v. Vanderheyden (1 John. R., 140), has often been reasserted by our courts and never departed from. . . . But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promiser. The case of Felton v. Dickinson (10 Mass., 189, 190), and others that might be cited, are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (Berley v. Taylor, 5 Hill, 577-584, et seq.), until his dissent was shown. The cases cited, and especially that of Farley v. Cleaveland, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which, for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

Johnson, C.J., Denio, Selden, Allen and Strong, JJ., concurred. Johnson, C.J., and Denio, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

Comstock, J. (Dissenting.) The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case, it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally.

He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed, that in a case thus situated, the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on this question, are quite numerous. In some of them, the dicta of judges, delivered upon very slight consideration, have been referred to as the decisions of the courts. Thus, in Schermerhorn v. Vanderheyden (1 John., 140), the court is reported as saying, "We are of opinion, that where one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of Dalton v. Poole (Vent., 318, 332), decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases. . . .

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A delivers money or property to B, which the latter accepts upon a trust for the benefit of C, the latter can enforce the trust by an appropriate action for that purpose. (Berly v. Taylor, 5 Hill, 577.) If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator of the trust. Thus, in Comyn's Digest (Action on the case upon Assumpsit, B. 15), it is laid down that if a man promise a pig of lead to A, and his executor give lead to make a pig to B, who assumes to deliver it to A, an assumpsit lies by A against him. The case of The Delaware and Hudson Canal Company v. The Westchester County Bank (4 Denio, 97), involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. . . .

GROVER, J., also dissented.

Judgment affirmed.

A digression about novation:

Restatement (Second) of Contracts §280. Novation

A novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.

Problem 168

Fox borrowed $300 from Holly and promised to repay Lawrence, a creditor to whom by chance Holly owed the same amount. Holly then told Lawrence about the new loan; Lawrence just grunted. When the debt from Fox came due, Lawrence contacted Fox and asked him when he could expect payment. Fox replied that he was financially embarrassed just at present. Lawrence then called Holly and told him all this. Holly replied that since Fox had promised to pay this debt, Holly felt that he no longer owed it, and Lawrence should look only to Fox for repayment. Is this the law? See First American Commerce Co. v. Washington Mutual Savings Bank, 743 P.2d 1193 (Utah 1987).

Problem 169

As part of their divorce agreement, George promised Martha that he would make her car payments until the vehicle was paid for completely. He was true to his promise for six months, but then he suddenly left the state and could not be found. The finance company to whom the automobile dealership sold the paper is hounding Martha for payment. She calls you, her divorce attorney. She doesn't owe this debt any more, does she?

Problem 170

Professor Chalk of the Gilberts Law School was scheduled to make a speech in Detroit in late February. His fee for the speech was to be $1,000. He came down with a cold in early February and became worried about the advisability of going to Detroit just as he was recovering. He phoned his friend Professor Podium and asked him if he would make the speech in his stead. Podium agreed, so Chalk phoned the president of the group to whom he was to give the speech and asked if the substitution was acceptable. Since Podium was an even better speaker than Chalk, the president also agreed. When Podium failed to show up on the day scheduled, the organization sued Chalk for its wasted expenses. Is he liable?

Back to third party beneficiary law and the second famous New York Court of Appeals case on point.

SEAVER v. RANSOM
Court of Appeals of New York, 1918
224 N.Y. 233, 120 N.E. 639

POUND, J. Judge Beman and his wife were advanced in years. Mrs. Beman was about to die. She had a small estate, consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave $1,000 to plaintiff, $500 to one sister, plaintiff's mother, and $100 each to another sister and her son, the use of the house to her husband for life, and remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, 34 years old in ill health sometimes a member of the Beman household. When the will was read to Mrs. Beman, she said that it was not as she wanted it. She wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning, and, although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said, if she would sign the will, he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die, it was found that his will made no provision for the plaintiff.

This action was brought, and plaintiff recovered judgment in the trial court, on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him by his promise to give plaintiff $6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. O'Hara v. Dudley, 95 N.Y. 403, 47 Am. Rep. 53; Trustees of Amherst College v. Ritch, 151 N.Y. 282, 45 N.E. 876, 37 L.R.A. 305; Ahrens v. Jones, 169 N.Y. 555, 62 N.E. 666, 88 Am. St. Rep. 620. Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust, except on property obtained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

An action on the contract for damages, or to make the executors trustees for performance, stands on different ground. Farmers' Loan &

Trust Co. v. Mortimer, 219 N.Y. 290, 294, 295, 114 N.E. 389. The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence v. Fox, 20 N.Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, Contracts for the Benefit of a Third Person, 15 Harv. L. Rev., 767; Corbin, Contracts for the Benefit of Third Persons, 27 Yale L. Rev., 1008. The general rule, both in law and equity (Phalen v. United States Trust Co., 186 N.Y. 178, 186, 78 N.E. 943, 7 L.R.A. [N.S.] 734, 9 Ann. Cas. 595), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." Hendrick v. Lindsay, 93 U.S. 143; Lehow v. Simonton, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly on Contracts (2d ed.) p.253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Halsbury's Laws of England, 342, 343; Jenks' Digest of English Civil Law, §229) that a contract cannot be enforced by or against a person who is not a party (Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1). But see, also, Forbes v. Thorpe, 209 Mass. 570, 95 N.E. 955; Gardner v. Denison, 217 Mass. 492, 105 N.E. 359.

In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Lawrence v. Fox, supra; Garnsey v. Rogers, 47 N.Y. 233, 7 Am. Rep. 440; Vrooman v. Turner, 69 N.Y. 280, 25 Am. Rep. 195; Lorillard v. Clyde, 122 N.Y. 498, 25 N.E. 917; Durnherr v. Rau, 135 N.Y. 219, 32 N.E. 49; Townsend v. Rackham, 143 N.Y. 516, 38 N.E. 731; Sullivan v. Sullivan, 161 N.Y. 554, 56 N.E. 116. Secondly. To cases where the contract is made for the benefit of the wife (Buchanan v. Tilden, 158 N.Y. 109, 52 N.E. 724, 70 Am. St. Rep. 454; Bouton v. Welch, 170 N.Y. 554, 63 N.E. 539), affianced wife (De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807, Ann. Cas. 1918C, 816), or child (Todd v. Weber, 95 N.Y. 181, 193, 47 Am. Rep. 20; Matter of Kidd, 188 N.Y. 274, 80 N.E. 924) of a party to the contract. The close relationship cases go back to the early King's Bench case (1677), long since repudiated in

England, of Dutton v. Poole, 2 Lev. 211 (s.c., 1 Ventris, 318, 332). See Schemerhorn v. Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland v. Welch, 162 N.Y. 104, 110, 56 N.E. 556.

The right of the third party is also upheld in, thirdly, the public contract cases (Little v. Banks, 85 N.Y. 258; Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211, 5 Ann. Cas. 504; Smyth v. City of New York, 203 N.Y. 106, 96 N.E. 409; Farnsworth v. Boro Oil & Gas Co., 216 N.Y. 40, 48, 109 N.E. 860; Rigney v. N.Y.C. & H.R.R.R. Co., 217 N.Y. 31, 111 N.E. 226; Matter of International Ry. Co. v. Rann, 224 N.Y. 83, 120 N.E. 153. Cf. German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220), where the municipality seeks to protect its inhabitants by covenants for their benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration (Rector, etc., v. Teed, 120 N.Y. 583, 24 N.E. 1014; F.N. Bank of Sing Sing v. Chalmers, 144 N.Y. 432, 439, 39 N.E. 331; Hamilton v. Hamilton, 127 App. Div. 871, 875, 112 N.Y. Supp. 10). It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan v. Tilden that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessaries of life. It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. De Cicco v. Schweizer, supra. The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan v. Tilden, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In Sullivan v. Sullivan, supra, the grandniece lost in a litigation with the aunt's estate, founded on a certificate of deposit payable to the aunt "or in case of her death to her niece"; but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr v. Rau, supra, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan v. Tilden. Borland v. Welch, supra, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P.J., writing for the court below well said:

> The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case.

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in Gifford v. Corrigan, 117 N.Y. 257, 262, 22 N.E. 756, 15 Am. St. Rep. 508, says that the case rests upon that broad proposition; Edward T. Bartlett, J., in Pond v. New Rochelle Water Co., 183 N.Y. 330, 337, 76 N.E. 211, 213, calls it "the general principle"; but Vrooman v. Turner, supra, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." 69 N.Y. 285, 25 Am. Rep. 195. As late as Townsend v. Rackham, 143 N.Y. 516, 523, 38 N.E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." Buchanan v. Tilden went further than any case since Lawrence v. Fox in a desire to do justice rather than to apply with technical accuracy strict rules calling for a legal or equitable obligation. In Embler v. Hartford Steam Boiler Inspection & Ins. Co., 158 N.Y. 431, 53 N.E. 212, 44 L.R.A. 512, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in Buchanan v. Tilden, to the effect that an employee could not maintain an action on an insurance policy issued to the employer, which covered injuries to employees.

In Wright v. Glen Telephone Co., 48 Misc. Rep. 192, 195, 95 N.Y. Supp. 101, the learned presiding justice who wrote the opinion in this case said at Trial Term:

> The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case.
>
> The case at bar is decided upon its peculiar facts. Edward T. Bartlett, J., in Buchanan v. Tilden.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house. Gridley v. Gridley, 24 N.Y. 130; Brown v. Knapp, 79 N.Y. 136, 143; Dinan v. Coneys, 143 N.Y. 544, 547, 38 N.E. 715; Blackmore v. White, [1899] 1 Q.B. 293, 304. That would be because the testatrix had in substance bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible, but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. Matter of Edmundson's Estate (1918, Pa.) 103 Atl. 277, 259 Pa. 429. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement. . . .

Judgment affirmed.

QUESTIONS

1. What factual variation in this case keeps the doctrine of Lawrence v. Fox from being directly on point? That is, given *Lawrence*, why was it necessary to litigate *Seaver* at all?
2. If the aunt here was making a *gift* to her niece, and gift promises are not enforceable until delivery, how can the niece sue to enforce the gift promise? If it is the policy of the law not to enforce unperformed gift promises, isn't that policy violated here?
3. What harm would come from denying donee beneficiaries the power to sue the promisor? The worst thing they are out is a gift.

NOTE ON TERMINOLOGY

In third party beneficiary problems there are always at least three parties: the promisor, the promisee, and the third party beneficiary. It is particularly crucial to your success in this area that you be able to put the right label on the characters presented by the facts (and you should practice doing it with the materials that follow). How do you sort them out? After all, in a bipartite contract *both* of the original contracting parties will be promisors.

To find the promisor, ask yourself which one of the original contracting parties made a promise to the other that benefits a third party. The answer will reveal the promisor for purposes of third party beneficiary analysis. The promisor is almost always the defendant.

The promisee will be the original contracting party to whom the promise is made. As we shall see, it is the promisee's relationship to the third party beneficiary that determines many of the legal results.

The third party beneficiary will be a stranger to the original contract who is benefitted thereby. This stranger will almost always be the plaintiff.

H. R. MOCH CO. v. RENSSELAER WATER CO.
Court of Appeals of New York, 1928
247 N.Y. 160, 159 N.E. 896

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the H. R. Moch Company, Inc., against the Rensselaer Water Company. From a judgment of the Appellate Division (219 App. Div. 673, 220 N.Y.S. 557), reversing an order of the Special Term, and granting defendant's motion for judgment dismissing the complaint for failure to state facts sufficient to constitute a cause of action, plaintiff appeals. Affirmed. . . .

CARDOZO, C.J. The defendant, a waterworks company under the laws of this state, made a contract with the city of Rensselaer for the supply of water during a term of years. Water was to be furnished to the city for sewer flushing and street sprinkling; for service to schools and public buildings; and for service at fire hydrants, the latter service at the rate of $42.50 a year for each hydrant. Water was to be furnished to private takers within the city at their homes and factories and other industries at reasonable rates, not exceeding a stated schedule. While this contract was in force, a building caught fire. The flames, spreading to the plaintiff's warehouse near by, destroyed it and its contents. The defendant, according to the complaint, was promptly notified of the fire, "but omitted and neglected after such notice, to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress, or extinguish the fire before it reached the warehouse of the plaintiff, although the pressure and supply which the defendant was equipped to supply and furnish, and had agreed by said contract to supply and furnish, was adequate and sufficient to prevent the spread of the fire to and the destruction of the plaintiff's warehouse and its contents." By reason of the failure of the defendant to "fulfill the provisions of the contract between it and the city of Rensselaer," the plaintiff is said to have suffered damage, for which judgment is demanded. A motion, in the nature of a demurrer, to dismiss the complaint, was denied at Special Term. The Appellate Division reversed by a divided court.

Liability in the plaintiff's argument is placed on one or other of three grounds. The complaint, we are told, is to be viewed as stating: (1) A cause of action for breach of contract within Lawrence v. Fox, 20 N.Y. 268; (2) a cause of action for a common-law tort, within MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440; or (3) a cause of action for the breach of a statutory duty. These several grounds of liability will be considered in succession.

(1) We think the action is not maintainable as one for breach of contract.

No legal duty rests upon a city to supply its inhabitants with protection against fire. Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N.Y. 46, 42 N.E. 405, 30 L.R.A. 660, 51 Am. St. Rep. 667. That being so, a member of the public may not maintain an action under Lawrence v. Fox against one contracting with the city to furnish water at the hydrants, unless an intention appears that the promisor is to be answerable to individual members of the public as well as to the city for any loss ensuing from the failure to fulfill the promise. No such intention is discernible here. On the contrary, the contract is significantly divided into two ranches: One a promise to the city for the benefit of the city in its corpoate capacity, in which branch is included the service at the hydrants; and he other a promise to the city for the benefit of private takers, in which ranch is included the service at their homes and factories. In a broad ense it is true that every city contract, not improvident or wasteful, is for he benefit of the public. More than this, however, must be shown to give right of action to a member of the public not formally a party. The enefit, as it is sometimes said, must be one that is not merely incidental nd secondary. Cf. Fosmire v. National Surety Co., 229 N.Y. 44, 127 N.E. 72. It must be primary and immediate in such a sense and to such a legree as to bespeak the assumption of a duty to make reparation directly o the individual members of the public if the benefit is lost. The field of bligation would be expanded beyond reasonable limits if less than this vere to be demanded as a condition of liability. A promisor undertakes to upply fuel for heating a public building. He is not liable for breach of ontract to a visitor who finds the building without fuel, and thus contracts cold. The list of illustrations can be indefinitely extended. The carrier of he mails under contract with the government is not answerable to the nerchant who has lost the benefit of a bargain through negligent delay. he householder is without a remedy against manufacturers of hose and ngines, though prompt performance of their contracts would have stayed he ravages of fire. "The law does not spread its protection so far." Robins ry Dock & Repair Co. v. Flint, 48 S. Ct. 134.

So with the case at hand. By the vast preponderance of authority, a ontract between a city and a water company to furnish water at the city ydrants has in view a benefit to the public that is incidental rather than nmediate, an assumption of duty to the city and not to its inhabitants. uch is the ruling of the Supreme Court of the United States. German lliance Ins. Co. v. Homewater Supply Co., 226 U.S. 220. Such has been ie ruling in this state (Wainwright v. Queens County Water Co., 78 Hun, 46, 28 N.Y.S. 987; Smith v. Great South Bay Water Co., 82 App. Div. 427, 1 N.Y.S. 812), though the question is still open in this court. Such with w exceptions has been the ruling in other jurisdictions. Williston, ontracts, §373, and cases there cited; Dillon, Municipal Corporations th ed.) §1340. The diligence of counsel has brought together decisions that effect from 26 states. Only a few states have held otherwise. Page, ontracts, §2401. An intention to assume an obligation of indefinite exteon to every member of the public is seen to be the more improbable hen we recall the crushing burden that the obligation would impose. Cf. one v. Presque Isle Water Co., 104 Me. 217, at p. 232, 71 A. 769. The nsequences invited would bear no reasonable proportion to those tached by law to defaults not greatly different. A wrongdoer who by gligence sets fire to a building is liable in damages to the owner where e fire has its origin, but not to other owners who are injured when it reads. The rule in our state is settled to that effect, whether wisely or unwisely. If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward.

The cases that have applied the rule of Lawrence v. Fox to contracts made by a city for the benefit of the public are not at war with this conclusion. Through them all there runs as a unifying principle the presence of an intention to compensate the individual members of the public in the event of a default. For example, in Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211, the contract with the city fixed a schedule of rates to be supplied, not to public buildings, but to private takers at their home. In Matter of International R. Co. v. Rann, 224 N.Y. 83, 85, 120 N.E. 153, the contract was by street railroads to carry passengers for a stated fare. In Smyth v. City of New York, 203 N.Y. 106, 96 N.E. 409, and Rigney v. New York Cent. & H.R.R. Co., 217 N.Y. 31, 111 N.E. 226, covenants were made by contractors upon public works, not merely to indemnify the city, but to assume its liabilities. These and like cases come within the third group stated in the comprehensive opinion in Seaver v. Ransom, 224 N.Y. 233, 238, 120 N.E. 639. The municipality was contracting in behalf of its inhabitants by covenants intended to be enforced by any of them severally as occasion should arise.

(2) We think the action is not maintainable as one for a common-law tort. . . .

(3) We think the action is not maintainable as one for the breach of a statutory duty. . . .

The judgment should be affirmed, with costs. . . .

Judgment affirmed, etc.

NOTE ON MUNICIPAL CONTRACTS

Consider the case of Koch v. Consolidated Edison Co. of New York, 62 N.Y.2d 548, 479 N.Y.S.2d 163, 468 N.E.2d 1 (1984), which concerned a defendant who had been found liable for a citywide blackout in the city of New York. Part of the defendant's appeal concerned the lower court's failure to dismiss the city's claim based on Con Edison's contracts with the Power Authority of the State of New York (PASNY). The Power Authority had purchased two generating plants from Con Edison, and Con Edison had agreed to continue to provide transmission and delivery of the electricity produced in the two plants to all existing recipients, including the city of New York. A service agreement was entered into in which was recited Con Edison's willingness, by use of its existing facilities, to assist PASNY in serving the needs of the Astoria-Indian Point customers. Con Edison was obligated to provide the same quality of service to PASNY's customers as it did to its own customers, under Con Edison's regular tariff schedules. In a simultaneously executed "Contract for the Sale of Power and Energy," Con Edison agreed to provide sufficient energy to meet the requirements of PASNY's affected customers.

The appellate court upheld the trial court; the city was a third party beneficiary. In its decision on this point, the appellate court felt compelled to distinguish *Moch* and another famous case, Kornblut v. Chevron Oil Co. (cited below in the quotation). In the latter case, the court refused third party beneficiary status to the estate of a person who died in his auto alongside the New York Thruway while waiting for the assistance of the defendant's repair truck. The defendant had contracted with an agency of the state to provide "rapid and efficient roadside automotive service." The following is an excerpt from the court's distinction in *Koch.*

> To be distinguished are our holdings in Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 [contract between water company and city to supply water for fire hydrants did not create a duty to member of the public] and Kornblut v. Chevron Oil Co., 62 A.D.2d 831, 407 N.Y.S.2d 498, affd. on opn. below, 48 N.Y.2d 853, 424 N.Y.S.2d 429, 400 N.E.2d 368 [contract with Thruway Authority to provide repair services did not create duty to members of the public]. In neither of those cases did the operative contract provide that the service was to be rendered other than for the contracting party, city or authority. Moreover, in *Moch* we noted the distinction between the agreement of the water company, there in issue, to furnish water at the hydrants and the agreement of the water company to provide direct service to members of the public at their homes and factories (247 N.Y., at pp. 164, 166, 159 N.E. 896). In the present instance, the purpose of the enabling legislation was expressly stated to be "To preserve reliability of electric service in the metropolitan area of the city of New York" (Public Authorities Law, §1001-a, subd. 1), and the service agreement contained the express obligation to "operate and maintain all the facilities necessary to deliver power to Astoria-Indian Point Customers [which included plaintiffs] in accordance with good utility operating practice." Indeed, the essence of the responsibility of a public utility is to provide services to the consuming public.

QUESTIONS

Is the court's rationale persuasive? What policy considerations are at lay? Are the consequences of loss of power to a city caused by a utility's ilure to adequately provide the power any more foreseeable than the onsequences of a loss of water to an entity who depends upon the water 1 part for fire protection?

. *The Need for the Restatement (Second) Changes*

The concepts developed in the above three New York Court of ppeals cases were incorporated wholesale into the original Restatement f Contracts (1932):

§133. Definition of Donee Beneficiary, Creditor Beneficiary, Incidental Beneficiary

(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3):

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed to be asserted to be due from the promisee to the beneficiary;
(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;
(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty.

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.

As time went on the three categories of third party beneficiaries established by the New York Court of Appeals and given the imprimatur of the first Restatement of Contracts (creditor, donee, and incidental) proved embarrassing because they did not quite describe all the possible beneficiaries who ought to be allowed to sue. The next problem illustrates a typical situation, but to understand it you need to know something about mechanic's liens.

A *lien* is a property interest given to creditors in the debtor's property to protect a credit extension. Some liens are voluntarily incurred by the debtor (a mortgage, for example), but many liens arise either by operation of common law or by statute to protect certain worthy creditors (for example those who perform work on personal property, such as garage mechanics, are given an *artisan's lien* on the property in their possession for the value of their services remaining unpaid).

Mechanic's liens are statutory liens given to those who perform work on or supply materials to a construction project. The lien is for unpaid wages or goods delivered and it attaches to the realty under construction. If the lienors remain unsatisfied and have followed certain formalities (filing a notice of intention to claim the mechanic's lien, for example), the realty can be sold under judicial supervision and the proceeds of the sale are used to pay off the lienors. This is true even if the owner of the realty has already made payment in full to the general contractor, who failed to pass the money on to those actually doing the labor or supplying the materials. The idea here is to keep the owner very interested in making sure that the project's laborers and suppliers get paid.

Problem 171

When John Adams decided to build his dream house, he hired the Hoban Construction Company to do the work. Worried about the possibility of mechanic's liens, Adams made Hoban Construction get a surety who would post a bond promising to pay all those who performed work on the project or who delivered materials to the job site. The Jefferson Surety Company, at Hoban's request, issued such a bond making the payment promise to Adams. During the construction Adams made periodic progress payments to Hoban Construction, withholding 15 percent as retainage to be paid on completion of the job. When Adams' architect certified that Hoban had completed the construction properly, and Hoban issued a certificate stating that it had paid off all of the laborers and suppliers, Adams released the retainage to Hoban. Two months later the Washington Brick Company realized that it had never been paid for the bricks it had delivered to the Adams project. The time for the filing of intention to claim a mechanic's lien had passed, and Hoban Construction, the only entity with which it had had a contract, was bankrupt. Washington Brick knew about the surety bond promising to pay off the suppliers, and so made a claim for payment from the surety. When the request was refused, Washington Brick brought suit against Jefferson Surety, claiming to be a third party beneficiary of the promise made in the bond. Answer these questions:

(a) Who is the promisor here? The promisee?

(b) What kind of third party beneficiary is Washington Brick? Creditor, donee, or incidental? You may assume that Adams had no contract with Washington Brick, which contracted only with Hoban Construction.

(c) Is the last question easier to answer if the owner of the realty who demanded the bond was the United States government rather than a private individual like Adams? (You should know that no one can get a mechanic's lien on public property — on the post office, for example).

NOTE ON THE MILLER ACT

Under the Miller Act, 40 U.S.C. §270, the general contractor must furnish a payment bond. Although property of the United States is not subject to any mechanic's lien, subcontractors and suppliers who meet specific time and procedural requirements under the act can sue the surety directly if payment is not made. 40 U.S.C. §270(b). Suit can, therefore, be brought directly under the act rather than under the common law concerning third party beneficiaries.

The Miller Act also requires general contractors to provide a performance bond to the United States. The performance bond insures that the performance will be completed in the time required. Performance bonds are also often used in private construction contracts. Although there is some split of authority, it is generally accepted that third-party suppliers and subcontractors are not third party beneficiaries of performance contracts. See, e.g., Frommeyer v. L.&R. Construction Co., 139 F. Supp. 579 (D.N.J. 1956).

Situations like that presented in Problem 171 led to an overhaul of third party beneficiary terminology when the Restatement (Second) of Contracts was created:

> **§302. Intended and Incidental Beneficiaries**
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Comment d to this section states that "if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary."

II. EXPANDING USE OF THIRD PARTY BENEFICIARY CONCEPTS

In more than one case, plaintiff's attorney has felt compelled to raise the third party beneficiary claim in circumstances that might be characterized as "facts requiring a grasping of at least one straw." Sometimes the beneficiary argument is used to supplement a tort claim in a case in which there is at least some question concerning the validity of the tort. Consider the next two cases.

BLAIR v. ANDERSON
Supreme Court of Delaware, 1974
325 A.2d 94

DUFFY, J. This appeal submits for decision a sovereign immunity defense by the State of Delaware to a claim arising out of incarceration in a Delaware Correctional institution.

I

Plaintiff, formerly a Federal prisoner, alleges that while incarcerated in he New Castle County Correctional Institution he was attacked by a fellow risoner and that defendants, including the State, were negligent in permit-ing such assault. The Superior Court granted the State's motion to dismiss he action on the ground that it is barred by the doctrine of sovereign immu-ity whether the claim be regarded as based on contract or in tort. 314 A.2d 19 (1973). Our analysis of the legal issues in the case persuades us that the ourt's conclusion was correct as to tort but not as to the contract claim.

II

By statute, 11 Del. C. §6505(a)(13), the Department of Correction is uthorized:

> To agree with the proper authorities of the United States for payment to the General Fund of the State of such sums as shall be fixed by the Department for the maintenance and support of offenders committed to the Department by authority of the United States.

Under that statute the Department, on December 8, 1968, entered nto a contract with the United States Department of Justice (Bureau of risons);[1] the service to be performed by the State is described therein as s]afekeeping, care and subsistence of persons held under authority of ny United States statute . . ." and among the rules and regulations govern-g custody and treatment of such persons is this:

> **1. Responsibility for Prisoners' Custody**
>
> It is the responsibility of the sheriff, jailer, or other official responsible for the administration of the institution to keep the prisoners in safe custody and to maintain proper discipline and control.

The State argues that it may not be sued by plaintiff because the ctrine of sovereign immunity permits such suit only after waiver by legislative act and the General Assembly has not passed such an act.

1. The Bureau of Prisons is required to provide, inter alia, for the "[s]afekeeping, care, d subsistence" of a prisoner and for his "protection." 18 U.S.C. §4042.

III

The Delaware Constitution provides that "[s]uits may be brought against the State, according to such regulations as shall be made by law," Art. 1, §9, Del. C. Ann., and the judicial history of the provision makes it plain that the defense of sovereign immunity may be "waived by legislative act and only by legislative act." George & Lynch, Inc. v. State, Del. Supr., 197 A.2d 734 (1964); Shellhorn & Hill, Inc. v. State, Del. Supr., 187 A.2d 71 (1962). It is clear, however, that waiver need not be made in express statutory language. Specifically, when the General Assembly authorizes a contract to be made it implicitly and necessarily waives immunity to suit for breach by the State of that contract. George & Lynch, Inc. v. State, supra. While the justice of that proposition stands on its own merit, we do note also that there is a tendency (recognized by the Court below) to narrow the doctrine of sovereign immunity. Cf. Wilmington Housing Authority v. Williamson, Del. Supr., 228 A.2d 782 (1967); Holden v. Bundek, Del. Super., 317 A.2d 29 (1972).

IV

First, as to plaintiff's claim in tort, a suit by a Federal prisoner for injury caused by a fellow prisoner is apparently within the scope of the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680; United States v. Muniz, 374 U.S. 150 (1963). But we find no basis, in statutory waiver or otherwise, for departing from the well established Delaware law as to immunity. Therefore, so much of the decision below as accords that defense to the State against a tort claim by plaintiff will be affirmed. Shellhorn & Hill, Inc. v. State, supra.

V

Considering now plaintiff's second theory, it is clear that to the extent of the contract with the United States the State has waived sovereign immunity in a suit for its own breach of that contract. Beyond doubt that is true as to any claim by the United States (which is the other contracting party), but we are concerned here, not with a suit by the Federal Government, but by a claimant who was committed to the State facility by authority of the United States (pursuant to the contract).

Upon examining the agreement the Superior Court concluded that plaintiff was a donee or incidental beneficiary thereof without standing to sue. In our view, he is a creditor beneficiary.

It is established Delaware law that a third party beneficiary of a contract may sue on it. Astle v. Wenke, Del. Supr., 297 A.2d 45 (1972). Generally, the rights of third-party beneficiaries are those specified in the contract; but if performance of the promise will satisfy a legal obligation which a promisee owes a beneficiary, the latter is a creditor beneficiary with standing to sue. Restatement of Contracts §133(1)(b). Compare Astle v. Wenke, supra.

Here, the United States obviously owed a duty of care and subsistence to a person it caused to be committed and it owed him a statutory duty of "safekeeping" and "protection." 18 U.S.C. §4042. By the contract Delaware agreed to perform that duty. And the terms of the agreement show that the duty amounts to more than the "room and board" minimum which the State argued; the duty included "safekeeping" and care as well.

While there may be semantic concerns about calling a prisoner a "creditor" or "beneficiary" (or both) of a Federal-State incarceration contract, the point is that plaintiff was the very subject of the agreement between governments. He was the person (for present purposes) whom the State contracted to safekeep, to care for and to provide with subsistence. Under these circumstances he has not only a direct interest in the contract but a right to enforce it as against the State if it fails to provide the requisite minimums.

In sum, we hold that the State, by entering into the contract with the United States, waived any defense available to it based upon the principle of sovereign immunity and that plaintiff is in law a creditor beneficiary of the agreement. It should be emphasized that we make no judgment as to any alleged breach of contract by the State nor as to any measure of damages to be applied. We decide only that the State may not avail itself to a defense of sovereign immunity to defeat plaintiff's contract claim. . . .

In conclusion we note that under the present state of the law a basic unfairness may result which the judiciary cannot correct. We hold here that plaintiff may sue the State and such a right may be denied by virtue of the sovereign immunity doctrine to State prisoners held in the same institution. But a different result would mean that plaintiff would be without a remedy which is available under the Federal Tort Claims Act, 28 U.S.C. §1346(b), etc., to other prisoners in a Federal prison. We can only suggest that the General Assembly and responsible officers in the Executive Branch consider the problem.

Reversed as to the contract claim.

BAIN v. GILLISPIE
Court of Appeals of Iowa, 1984
357 N.W.2d 47

SNELL, J. James C. Bain serves as a referee for college basketball games. During a game which took place on March 6, 1982, Bain called a foul on a University of Iowa player which permitted free throws to a Purdue University player. That player scored the point that gave Purdue a last-minute victory. Some fans of the University of Iowa team blamed Bain for their team's loss, asserting that the foul call was clearly in error.

John and Karen Gillispie operate a novelty store in Iowa City, specializing in University of Iowa sports memorabilia. The store is known as Hawkeye John's Trading Post. Gillispie's business is a private enterprise for profit having no association with the University of Iowa or its sports program.

A few days after the controversial game, Gillispies began marketing T-shirts bearing a reference to Bain. It showed a man with a rope around his neck and was captioned "Jim Bain Fan Club." On learning of it, Bain sued Gillispies for injunctive relief, actual and punitive damages. Gillispies counterclaimed, alleging that Bain's conduct in officiating the game was below the standard of competence required of a professional referee. As such, it constituted malpractice which entitles Gillispies to $175,000 plus exemplary damages. They claim these sums because Iowa's loss of the game to Purdue eliminated Iowa from the championship of the Big Ten Basketball Conference. This in turn destroyed a potential market for Gillispies' memorabilia touting Iowa as a Big Ten champion. Their claim for actual damages is for loss of earnings and business advantage, emotional distress and anxiety, loss of good will, and expectancy of profits. Exemplary damages are asked because Bain's calls as a referee were baneful, outrageous, and done with a heedless disregard for the rights of the Gillispies.

The trial court found the Gillispies had no rights and sustained a motion for summary judgment dismissing Gillispies' counterclaim. They appeal, contending the trial court erred in finding no genuine issue of material fact. The triable issues claimed are: 1) that Gillispies' damages were a reasonably foreseeable consequence of Bain's acts as a referee, or 2) that Gillispies are beneficiaries of an employment contract between Bain and the Big Ten Athletic Conference. . . .

"The question of whether a duty arises out of a parties' relationship is always a matter of law for the courts." Soike v. Evan Mathews and Co., 302 N.W.2d 841, 843 (Iowa 1981). Applying these maxims to Gillispies' tort claim, we find the trial court properly granted the summary judgment against the claim. It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure Gillispies' business or one similarly situated and subject him to liability. The range of apprehension, while imaginable, does not extend to Gillispies' business interests. Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillispies have cited no authority, nor have we found any, which recognizes an independent tort for "referee malpractice." Absent corruption or bad faith, which is not alleged, we hold no such tort exists. Compare: Smith v. State, 324 N.W.2d 299, 300 (Iowa 1982); see also Georgia High School Association v. Waddell, 248 Ga. 542, 543, 285 S.E.2d 7, 8-9 (1981); Shapiro v. Queens County Jockey Club, 184 Misc. 295, 300, 53 N.Y.S.2d 135, 138-39 (1945). As the trial court properly reasoned:

> This is a case where the undisputed facts are of such a nature that a rational fact finder could only reach one conclusion — no foreseeability, no duty, no liability. Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is a liability to a merchandiser like the Gillispies, why not to the thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks." There is no tortious doctrine of athletic official's malpractice that would give credence to Gillispie's counterclaim.

The trial court also found that there was no issue of material fact on the Gillispies' claim that they were beneficiaries under Bain's contract with the Big 10. Gillispies argue that until the contract is produced, there exists a question of whether they are beneficiaries. There is some question of whether there is a contract between Bain and the Big 10. In his response to interrogatories, Bain stated that he had no written contract with the Big 10, but that there was a letter which defined "working relationship." Although this letter was never produced and ordinarily we would not decide an issue without the benefit of examining the letter's contents, we nevertheless find the issue presently capable of determination. By deposition Gillispies answered that there was no contract between them and Bain, the Big 10 Athletic Conference, the University of Iowa, the players, coaches, or with any body regarding this issue. Thus, even if the letter were considered a contract, Gillispies would be considered third-party beneficiaries. Because Gillispies would not be privy to the contract, they must be direct beneficiaries to maintain a cause of action, and not merely incidental beneficiaries. . . .

Gillispies make no claim that they are creditor beneficiaries of Bain, the Big 10 Athletic Conference, or the University of Iowa. "The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973), cert. denied 419 U.S. 830 (1974). It is clear that the purpose of any promise which Bain might have made was not to confer a gift on Gillispies. Likewise, the Big 10 did not owe any duty to the Gillispies such that they would have been creditor beneficiaries. If a contract did exist between Bain and the Big 10, Gillispies can be considered nothing more than incidental beneficiaries and as such are unable to maintain a cause of action. Olney v. Hutt, 251 Iowa 1379, 1386, 105 N.W.2d 515, 518 (1960).

Consequently, there was no genuine issue for trial which could result in Gillispies obtaining a judgment under a contract theory of recovery. The ruling of the trial court sustaining the summary judgment motion and dismissing the counterclaim is affirmed.

Affirmed.

Problem 172

The boxing match between Bill Holt and Bobby Startup was the fight of the decade, but it ended badly when Bill was repeatedly floored in the ninth round and finally knocked out seconds before the bell. He never recovered consciousness. Everyone at the fight was outraged that the referee, ex-champion Killer Knight, allowed the fight to continue after the first two knockdowns in the beginning of the ninth round. Hearing the criticism later, Knight said, "You got to let them fight because the crowd likes blood." Knight was publicly condemned by the Referees' Association for failing to stop the fight long before the fatal blow. Bill Holt's estate filed suit against Killer Knight, contending that it was a third party beneficiary of his contract with the boxing association that hired him to referee the fight. Will this theory succeed?

Problem 173

What arguments might be made either way on the following possible third party beneficiary claims?

(a) An injured tort victim sues the insurance agency that issued a policy to the tortfeasor. Compare Delmar News v. Jacobs Oil Co., 584 A.2d 531 (Del. Super. 1990), with Flattery v. Gregory, 397 Mass. 143, 489 N.E.2d 1257 (1986).

(b) Corporate shareholders sue to prevent the breach of a merger agreement between their corporation and another. See Bush v. Brunswick Corp., 783 S.W.2d 724 (Tex. App. 1989).

(c) A school bus driver, injured when the brakes failed, sues the entity that sold the bus to the school district. See DuPont v. Yellow Cab Co. of Birmingham, 565 So. 2d 190 (Ala. 1990). See Uniform Commercial Code §2-318 (which gives the states three possible alternatives to adopt here).

(d) A bookstore employee who was raped when the security system's alarm failed sues the seller of the system. See Hill v. Sonitrol of Southwestern Ohio, 36 Ohio St. 3d 36, 521 N.E.2d 780 (1988); compare Rhodes v. United Jewish Charities of Detroit, 184 Mich. App. 740, 459 N.W.2d 44 (1990).

(e) After the mother died, the father stopped making payments under the divorce property settlement and is sued by his daughter for missed payments and the cost of going to college (also provided for in the settlement). See Morelli v. Morelli, 102 Nev. 326, 720 P.2d 704 (1986).

III. RIGHTS OF THE PARTIES

A. *The Promisor's Defenses*

The third party beneficiary's rights are *derivative* from those of the promisee, so that the third party beneficiary gets no better rights against the promisor than the promisee had. This means that the promisor is able to raise almost all defenses arising from the original contract regardless of whether sued by the promisee or the third party beneficiary. The following Restatement provision reaches this result in a convoluted fashion.

RESTATEMENT (SECOND) OF CONTRACTS

§309. DEFENCES AGAINST THE BENEFICIARY

(1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is

voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.

(2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, nonoccurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

(3) Except as stated in subsections (1) and (2) and in section 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or the promisee's claims or defenses against the beneficiary.

(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

Problem 174

When Cable TV Company signed Wanda Wonderful to star in a new television series it was producing, the contract between them required her to procure and maintain a $4 million life and health insurance policy payable to the company in the event she couldn't work for health reasons. Wanda took out such a policy with the NoRisk Insurance Company. She made the required monthly payments for the first six months but then missed two in a row. The company sent her numerous letters reminding her of the required amounts, but she ignored them. Tragically, she mysteriously drove her car off a canyon road. By coincidence, she and the grace period on the policy expired together. When Cable TV Company sent in a notice of claim, NoRisk Insurance responded that the policy had lapsed. Cable TV sued, arguing that once its rights were established, those rights existed wholly apart from the contract, unaffected by subsequent problems between the original contracting parties. How should this come out?

Problem 175

Nicely Johnson borrowed $500 from Sky Matheson but won it back in a floating craps game the next night. One of the losers was Nathan Detroit, who owed Nicely $350 of Nicely's winnings, and he promised Nicely to pay that amount to Sky Matheson the next day. When he did not do so, Sky sued Nathan. He argued that any defense of illegality pertained to the original gambling debt and did not taint the promise Nathan made to pay the money to him. How should this come out?

B. *Vesting of the Beneficiary's Rights*

Under the first Restatement, the original contracting parties remained free to change the contract to the detriment of the third party beneficiary until the moment when the beneficiary's rights *vested.* Vesting was automatic for donee third party beneficiaries but required reliance by creditor third party beneficiaries before their rights vested. Once the creditor/donee distinction disappeared in the Restatement (Second), the vesting rules had to change also.

RESTATEMENT (SECOND) OF CONTRACTS

§311. Variation of a Duty to a Beneficiary

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee. . . .

BOARD OF EDUCATION OF COMMUNITY SCHOOL DISTRICT NO. 220 v. VILLAGE OF HOFFMAN ESTATES

Appellate Court of Illinois, 1984

126 Ill. App. 3d 625, 81 Ill. Dec. 942, 467 N.E.2d 1064

Sullivan, J. Defendant Village of Hoffman Estates (Village) appeals from the granting of summary judgment for plaintiff Board of Education of Community School District No. 220 (District) in an action seeking a declaration of District 220's rights as a beneficiary under the terms of certain annexation agreements. The sole question before us is whether District 220 acquired any rights under the agreements which could not be altered by subsequent amendment mutually agreed to by the contracting parties.

The facts of the case are largely undisputed. In 1975, two groups of developers (Owners), desiring to have certain tracts of land annexed to the Village, entered into annexation agreements with the Village. Each agreement provided in relevant part that the Owners would pay to the Village "the sum of $135 per residential unit as developed." The funds paid were to be held in escrow "for the benefit of education," and the agreements further provided that during the 5-year period following execution of the agreements, the parties thereto would use their best efforts to cause the area annexed to be included within the boundaries of School District 15. If, at any time during the prescribed period, their efforts were successful, the funds were to be paid to School District 15. If, however, their efforts were unsuccessful, then at the end of the 5-year period the escrowed funds were to be paid to District 220.

The Owners and the Village were not successful in their attempts to have the area in question included within the boundaries of District 15, and shortly before the expiration of the 5-year period, they amended their agreements, extending the period to nine years and providing that they would use their best efforts to cause the area to be included within the boundaries of "School Districts 15 or 54." Again, if their efforts were unsuccessful, then at the end of the 9-year period the funds were to be paid to District 220. At all pertinent times, the land which is the subject of the annexation agreements has been within the boundaries of District 220, and it has provided free education for the children residing in that area, as it is required to do under the Illinois School Code. (Ill. Rev. Stat. 1981, ch. 122, par. 10-20.12.) The funds required by the agreements have been paid and are currently being held in escrow.

After the 5-year period prescribed by the original annexation agreements expired, District 220 brought the instant action seeking a declaration that it was presently entitled to receive the escrowed funds on the ground that it was a donee beneficiary of the contracts between the Owners and the Village, and that the contracting parties had no power to alter the terms of their agreements without its consent. The trial court granted summary judgment for District 220, ruling that, as a matter of law, execution of the agreements created a vested right, subject to divestment, in District 220, and that the purported amendments were therefore ineffective. Since the 5-year period had elapsed, and the "divesting condition subsequent," i.e., inclusion of the land within the boundaries of School District 15, had not occurred, the trial court ordered that the escrowed funds be paid to District 220. This appeal followed.

Opinion

The issue presents us with the question of when the rights of a third-party beneficiary under a contract become "vested"; that is, at what point s the third-party's right to demand performance irrevocable and ınamendable. The parties herein are in agreement that District 220's tatus is that of a donee beneficiary, since the promise made for its benefit vas a gift rather than a means of repaying some debt owed it by the Village. 'his point being conceded, the sole issue is whether the Owners and the 'illage retained any right to amend that portion of their agreements which onferred a benefit upon District 220.

It is established that third-party beneficiaries have enforceable rights ınder contracts made for their benefit. (See, e.g., Carson Pirie Scott & Co. Parrett (1931), 346 Ill. 252, 178 N.E. 498 (creditor beneficiary); Riepe v. chmidt (1916), 199 Ill. App. 129 (donee beneficiary).) However, we are ware of only one case directly concerned with the question of subsequent evocation or amendment. In Bay v. Williams (1884), 112 Ill. 91, 1 N.E. 40, Bay purchased land from Newman and Sissons, promising as partial onsideration therefor to pay certain notes owed by them to Williams. ubsequently, Sissons agreed to release Bay from that promise. When 'illiams sought to recover from Bay, he asserted the release as a defense, and the supreme court, in a divided opinion, held that the promise to pay "invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary." (112 Ill. 91, 97, 1 N.E. 340, 342-343.) Subsequent cases, relying on *Bay*, have stated that the rights of a creditor beneficiary become vested immediately upon exe-cution of the contract (see, e.g., Town & Country Bank of Springfield v. James M. Canfield Contracting Co. (1977), 55 Ill. App. 3d 91, 12 Ill. Dec. 826, 370 N.E.2d 630; Pliley v. Phifer (1954), 1 Ill. App. 2d 398, 117 N.E.2d 678), although none of those cases involved an attempted rescission or modification of an original agreement. It appears that the same rule is applied to contracts made for the benefit of a donee beneficiary (see, e.g., Joslyn v. Joslyn (1944), 386 Ill. 387, 54 N.E.2d 475), but it seems to be based more on an analogy to the law of trusts or gifts than to the law of contracts. We are aware that this rule is contrary to that expressed in the Restatement (Second) of Contracts, which states that, in the absence of language in the contract making the rights of a third-party beneficiary irrevocable, "the promisor and promisee retain power to discharge or modify the duty by subsequent agreement" until such time as the beneficiary, without notice of the discharge or modification, "materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or the promisee." (Restatement (Second) of Contracts §311 (1979).) Furthermore, it appears that the majority of jurisdictions have now adopted the rule as set forth in the Restatement (see 17 Am. Jur. 2d Contracts §317 (1964); 17A C.J.S. Contracts §373 (1963), and cases cited therein), perhaps on the theory that the parties to a contract should remain free to amend or rescind their agreement so long as there is no detriment to a third party who has provided no consideration for the benefit received.

In the instant case, the Village does not contend that we should alter the rule established 100 years ago in Bay v. Williams, a rule which apparently has not been considered in the light of modern trends in the law of contracts, and we therefore need not express our views thereon. Instead, the Village asserts that the above rule is inapplicable where, as here, there are two possible beneficiaries of the promise, and the ultimate beneficiary could not be determined until certain specified events occurred. Under those circumstances, it maintains, no rights could have vested in District 220, since it was not assured of being a beneficiary of the promise, and the parties should therefore be free to alter their agreement. It is District 220's position that the right became vested as soon as the Owners and the Village executed the agreements, although the right was subject to divestment. Therefore, it posits, no amendment was possible. Unfortunately, although both sides cite several cases which purportedly support their arguments, none of the cases involve a situation even remotely analogous to the facts before us. All of the cases cited involved a single, identifiable beneficiary, whereas here, there are quite obviously two possible beneficiaries.

In considering this issue, we begin with the premise, accepted by most commentators, that a third-party beneficiary contract may exist even if the beneficiary is not named, not identifiable, or not yet in existence, so long as the beneficiary is identifiable or in existence when the time for performance arrives. These same commentators note, however, that such beneficiaries have no vested rights until they are identified, and that contracts made for their benefit may therefore be rescinded or modified by the parties thereto until such time as the beneficiaries are identified. (See e.g., J. Calamari & J. Perillo, Contracts §17-9 (2d ed. 1977); 4 Corbin, Contracts §781 (1951); L. Simpson, Contracts §122 (2d ed. 1965). See also 17A C.J.S. Contracts §373 (1963).) We have indicated that such agreements are valid in Illinois, as where a contract provides that final payment will be withheld until a general contractor provides proof that all materialmen and subcontracts have been paid. (See Town & Country Bank of Springfield v. James M. Canfield Contracting Co. (1977), 55 Ill. App. 3d 91, 12 Ill. Dec. 826, 370 N.E.2d 630.) Clearly, under such contracts, the third-party beneficiaries are not identifiable until they provide materials or service, and it could never be seriously contended that they had any vested rights prior to that time which would preclude the contracting parties from modifying the agreement.

Our courts have never considered the question of modification or rescission under similar facts, although the few cases from other jurisdictions which have addressed the issue indicate that until the third-party beneficiary is identified, no vested rights arise. In Stanfield v. W. C. McBride, Inc. (1939), 149 Kan. 567, 88 P.2d 1002, Stanfield was awarded judgment for injuries he suffered when struck by an automobile owned by Miller-Morgan Motor Co. (Miller-Morgan) and driven with its consent by an employee of W. C. McBride, Inc. (McBride). McBride paid the judgment, then sought to recover from Miller-Morgan's insurer, claiming that its employee was covered under the omnibus clause of Miller-Morgan's automobile policy. The evidence disclosed that the omnibus clause had been stricken from the policy eight days before the accident occurred, and the court ruled that while McBride's employee was a potential third-party beneficiary under the contract of insurance, he had no vested rights thereunder until such time as he became identified as an actual beneficiary, and the parties to the contract were free to modify or rescind their agreement prior to that time. Accord, Winchester v. Sipp (1960), 252 Iowa 156, 106 N.W.2d 55.

Similar reasoning is evident in Associated Teachers of Huntington, Inc. v. Board of Education, Union Free School, District No. 3, Town of Huntington (1973), 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670. There, a contract between the association and the school board provided that sabbatical leaves would be granted to as many as 3 percent of the staff per school term. Twenty-one teachers submitted applications, and it was understood that not all could be granted leave. Prior to considering the applications, the school board stated that, due to financial considerations, no leaves would be granted, and the association brought an action to enforce the agreement. The court noted that the individual teachers had no vested rights, since none was assured of being granted leave and the third-party beneficiaries under the contract had not yet been identified. However, the court went on to hold that the association, as promisee, had a right to enforce the contract.

While the cases cited are not directly on point, we believe that they are analogous. Here, although two entities are named in the contract, it could not be ascertained until certain events occurred which would be the third-party beneficiary. Thus, while it is true that the field of potential beneficiaries is much smaller than in the above-cited cases, ultimately — by the terms of the contract — there could be only one beneficiary of the funds held in escrow "for the benefit of education," and that beneficiary could not be identified until the time for performance arose; i.e., until the land was included within the boundaries of School District 15 or 5 years elapsed, whichever event occurred first. It does not appear to us that District 220 was any more certain to be the beneficiary than was District 15 or that it had any greater claim to the funds than did District 15. District 220 points out that during that 5-year period, it was providing education for the children residing in the area, and apparently asserts that we may conclude from that fact that the phrase "for the benefit of education" meant "for the benefit of District 220." We disagree. District 220, in providing education for the children, was doing what it is required to do under the School Code, a duty which it might have had for only a short time should the school boundaries have changed. It appears to us from the language of the contract that the parties thereto intended to confer a benefit on whichever school district would be serving the area over the long term, and they apparently hoped that that district would be District 15 rather than District 220.

Based on the clear language of the contract, it is our view that District 220 was merely a potential beneficiary of the promise to pay certain specified sums for the benefit of education, and the undisputed facts establish that the actual beneficiary of the promise had not yet been identified at the Village and the Owners modified their agreement. Since neither school district was identified as the beneficiary, neither had a vested right under the contract, and we hold that under those circumstances the parties were free to modify their agreement.

For the foregoing reasons, the order of the trial court is reversed, and the cause remanded for further proceedings not inconsistent with the views expressed herein.

Reversed and remanded.

LORENZ and PINCHAM, JJ., concur.

Problem 176

Fox borrowed $300 from Holly and promised to repay it the following week to Lawrence, one of Holly's creditors to whom Holly owed the same amount. The next day Holly phoned Fox and said, "Forget repaying Lawrence the money. I've changed my mind and want you to repay the money directly to me next week. I'll settle my debt with Lawrence later."

Fox didn't care, so he said it was fine with him. Lawrence learned of this modification agreement and, fearing that Holly would never get around to honoring the debt, Lawrence brought an action in equity to enjoin Fox from paying the debt to Holly. You are the judge. Do you issue the injunction? Would your decision be influenced by any of the following facts?

(a) The modification agreement was entered into before Lawrence ever became aware of the first promise by Fox.

(b) Instead of (a), Lawrence did learn of the original Fox promise but never acted on it in any way.

(c) On learning of the original Fox promise, Lawrence dropped his plans to sue Holly and garnish his wages.

(d) Do your answers depend in any way on the state of Holly's finances?

Problem 177

(This Problem appeared on the Indiana bar exam in July 1971.)

In June 1968, John Good, having decided to retire and wishing to help his alma mater, ABC College, entered into a written lease agreement for the facilities of his small factory with his employee, Henry Work. The lease provided that for a period of ten years from the date of the lease, Henry Work, as lessee, would pay as rental the sum of $1,200 each month to ABC College.

John Good sent a copy of said lease agreement to ABC College and eceived the usual form letter acknowledging gifts.

Henry Work made the $1,200 monthly payments to ABC College until uly 1970, when he advised John Good that the factory equipment was old nd it would be impossible for him to continue in business unless he ould purchase new equipment of the value of $15,000, and that he could ot purchase the same unless the rent were reduced to $900 per month. ohn Good agreed to reduce the monthly rental to $900, and Henry Work urchased the new equipment.

ABC College learned of the reduction in rent when it received Henry Vork's check for $900, which it refused to accept, and is now demanding 1,200 per month. John Good and Henry Work have come to you for dvice as to their rights and liabilities. Advise them.

IV. MORTGAGES AND THIRD PARTY BENEFICIARIES

A *mortgage* is a consensual lien on real property given by the mortagor (the fee simple owner) to the mortgagee (the financing entity). echnically, the mortgage is a deed transferring the legal interest in the ealty to the lender. Modern courts, however, have no trouble in concludg that this is merely a method of collateralizing a loan, and that the "real" owner is the mortgagor. Courts of equity have long recognized a right to redeem the property, even if the debt was recently defaulted, by paying off the mortgage and recovering the property. This right, called the *equity of redemption*, is what is meant by the "equity" homeowners are said to "build" in their property as they make mortgage payments.

Problem 178

Because the property was heavily mortgaged to the Gable State Bank and Scarlett was having trouble making the mortgage payments, she decided to sell her equity in her ancestral home, Tara, to Vivien, her next door neighbor. Vivien was unable to finance her own mortgage, so Scarlett agreed to let Vivien *assume* (promise to pay) her mortgage commitment to the bank. Vivien then paid Scarlett $10,000 for her equity in Tara. Vivien made the required payments for two years and then stopped. The Gable State Bank brought a foreclosure proceeding and sold the property. The sale did not bring enough to pay the debt; there was a deficiency of $8,000. Answer these questions:

(a) Does Scarlett still owe the debt to Gable State Bank? Why or why not?

(b) If Gable State Bank wants to sue Vivien and phones you, its attorney, what is its cause of action against her since she made no promise directly to the bank, and no one at the bank had ever met her?

An *assumption of the mortgage* means that the buyer of the property undertakes a personal liability to make the payments. Sometimes the buyer is not willing to shoulder this burden, but still wants to buy the property. In such a case, the buyer may contract only to purchase the property *subject to* the mortgage. What does this mean?

Obviously there is no way that the mortgagor and the buyer of the equity can free the land from the mortgage lien simply by their agreement, so the buyer will always take the land subject to the mortgage. But if this is the only understanding between the parties, the buyer of the equity makes no binding promise to pay off the mortgage (though the buyer will *try* to do so in order to acquire the land free of the mortgage lien). If the buyer is unable to make the necessary payments, the bank will foreclose and take the property, but any deficiency is owed only by the original mortgagor (and anyone else who has *assumed* the mortgage debt). In actuality, a *subject to* purchaser is entering into a *unilateral* contract, hoping to make all the payments but avoiding any promissory liability guaranteeing their continuance.

Problem 179

When Scarlett agreed to sell her equity in Tara to Vivien, Vivien was only willing to take the property subject to the mortgage in favor of Gable

State Bank. As a result, Scarlett charged her $14,000 for her equity. After two years of possession and steady payments made on time, Vivien wearied of Tara and moved to Atlanta. She made no further payments. Answer these questions:

(a) Does Scarlett still owe the mortgage amounts to Gable State Bank? If she is forced to pay the bank, may she sue Vivien on any theory?

(b) If Gable State Bank brings suit against Vivien will it prevail? (Do you understand why Scarlett made Vivien pay $4,000 more in this contract than in the one in the last Problem?)

(c) Why would *Vivien* have been interested in a subject to purchase? What possible advantage does she get out of this arrangement?

In the situation in which the buyer of the equity of redemption assumes the mortgage, the assumption promise creates a Lawrence v. Fox pattern, with the bank in the position of the creditor third party beneficiary. Obviously the promisee here (the seller of the equity) wants the promise of payment in order to gain security from future liability. If the equity has been transferred many times and the current owner is only holding subject to the mortgage but the buyer assumes the mortgage, are similar third party beneficiary rights created? Strangely enough this problem arises often enough to be annoying.

Problem 180

Scarlett sold her equity in Tara to Vivien, who took subject to the mortgage but did not assume it. Three years later Vivien sold the equity in Tara to Clark, who assumed the mortgage debt owed to Gable State Bank. When Clark missed payments, Gable State repossessed the property and sold it at a foreclosure sale. The proceeds from this sale brought enough to pay all but $8,000 of the mortgage amount, so Gable State Bank brought suit against Clark, claiming to be a third party beneficiary of his promise to Vivien to assume the mortgage. Clark argued that since Vivien did not owe any personal liability to Gable State Bank (and since no one ever makes gifts to banks), Gable State was at best an *incidental* beneficiary of his promise. How should this come out?

Why in the world would Vivien have made Clark undertake personal liability on a debt she herself did not owe? The leading case is Schneider v. Ferrigno, 110 Conn. 86, 147 A. 303 (1929). See also Kilmer v. Smith, 77 N.Y. 226 (1879) (reformation for mistake may be appropriate where there is a mistake as to the existence of a duty; see comment b to Restatement (Second) of Contracts §312).