Volume 44 | Issue 2 Article 8

February 1938

Contract for the Benefit of Third Persons--Liability of Insurer on Malpractice Policy to Injured Party

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RECENT CASE COMMENTS

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS — LIABILITY OF INSURER ON MALPRACTICE POLICY TO INJURED PARTY. — *H*, a physician, was covered by a group policy of insurance which provided that the insurance company would upon notice defend and indemnify each assured against loss and expense arising out of claims for damages on account of any malpractice alleged to have been committed during the policy period; and that the insolvency or bankruptcy of the assured would not relieve the company from any payment for which it would otherwise be liable under the policy; and if, because of the insolvency or bankruptcy, an execution on a judgment recovered against the assured be returned unsatisfied, the judgment creditor should have the right to recover the amount of the judgment against the company to the same extent that the assured would have had to recover had he paid the judgment. In an action by plaintiff against *H* he was found to be guilty of malpractice and a judgment rendered against him, defendant company appearing to defend *H*. Execution on judgment against *H* was returned unsatisfied because *H* had gone into bankruptcy. Plaintiff instituted action under the West Virginia statute entitling sole beneficiaries to sue at law. *Held,* that plaintiff was a creditor beneficiary and therefore not authorized to sue at law. *Aetna Life Insurance Company of Hartford Conn. v. Maxwell.*[1]

Contrary to the view prevalent in England and Massachusetts, most American courts have taken the view that the party in interest may maintain an action in his own name upon a contract made for his benefit.[2] In West Virginia this right is statutory[3] but extends only to sole beneficiary contracts.[4] The fact that *H* was a bankrupt is misleading, in that at first blush it would seem that the plaintiff is the sole beneficiary, since *H's* liability to plaintiff has already been discharged. But the fact that the debt is barred by the Statute of Limitations or by a discharge in bankruptcy will not operate to make a creditor beneficiary a sole beneficiary, for

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1 89 F. (2d) 988 (C. C. A. 4th, 1937).

2 Ohio Casualty Ins. Co. v. Beckwith, 74 F. (2d) 75 (C. C. A. 5th, 1934); Meyer v. National Surety Co., 90 N. J. L. 126, 100 Atl. 164 (1917); Glen v. Ins. Co., 56 N. Y. 379 (1874); Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 78 S. W. 85 (1903).

3 W. VA. REV. CODE (Michie, 1937) c. 55, art. 8, § 12.

4 Criss v. United States F. & G. Co., 105 W. Va. 380, 142 S. E. 849 (1928); State v. Royal Indemnity Co., 99 W. Va. 277, 128 S. E. 439 (1925).

the debtor, even though a bankrupt, has an interest in seeing his debt paid.[5]

However, the creditor beneficiary, if plaintiff can be found to be such, is not denied relief in equity in West Virginia. The courts have been indefinite in their tests for ascertaining what beneficiaries fall within the protected types, but it is well settled that an incidental beneficiary is not entitled to relief by virtue of the promises in the contract.[6] It is commonly said that the beneficiary entitled to relief must be a third person whom the contracting parties "intend" shall receive a "direct benefit" from the promise.[7] The case of *Lawrence v. Fox*[8] has probably had more influence than any other in strengthening the theory that a creditor beneficiary has a "direct right" on a contract made by the privies thereto to discharge the promisee's obligation. Here, however, some distinction must be made and the contract looked at closely, for it is well settled that a mere promise by the insurer to indemnify against loss does not give the injured party a right to sue on the contract. In such a case the promisee himself has no right of action until he has suffered loss or expense, hence one claiming damages by virtue of a derivative right can assert no claim against the promisor.[9] On the other hand, it is generally held that if an intent can be legitimately shown to give the third party a right, that intent should be given effect.[10] Here, obviously the requisite intent is shown by a clause in the policy which expressly provides that the party injured by malpractice, in case his claim is not satisfied, shall have a direct right to sue on the policy. But this same clause created a condition precedent which was binding upon the plaintiff for the courts are all in accord that, if the promise is conditional the beneficiary, like the immediate contracting parties, acquires his rights only upon the performance or happening of the condition.[11] Plaintiff satisfied the condition by bringing his action against *H*, thus determining the loss suffered. The fact that plain-

[5] RESTATEMENT, CONTRACTS (1932) § 133.
[6] *Id.* § 147.
[7] 2 WILLISTON, CONTRACTS (2d ed. 1936) § 356A and cases cited.
[8] 20 N. Y. 268 (1859).
[9] Nat. City Bank v. Berwin, 240 App. Div. 550, 270 N. Y. S. 678 (1934); Embler v. Hartford, *etc.* Co., 158 N. Y. 431, 53 N. E. 212 (1899); 2 WILLISTON, CONTRACTS § 403.
[10] Malley v. American Indemnity Corp., 297 Pa. 216, 146 Atl. 571 (1929), 81 A. L. R. 1322 (1932); Portland, *etc.* Co. v. Globe Co., 301 Pa. 132, 151 Atl. 687 (1930); Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1924).
[11] RESTATEMENT, CONTRACTS § 136.

tiff was undetermined at the time the contract was entered into was also an obstacle to his claim after his status had been determined. But it is settled that if the beneficiary satisfies the other requisites entitling him to sue it does not matter that he is not named in the contract, and the fact that he is not known at the time of the making of the contract is immaterial. He may even be one of a class of persons, if the class is sufficiently designated.[12]

The result in *Aetna Life Insurance Company of Hartford Conn. v. Maxwell* is correct beyond a doubt. The rules of law governing the status of the plaintiff were clearly against his claim as a sole beneficiary, and the case adds clarity to the proposition.

H. G. W.

INTERNAL REVENUE — ADMINISTRATIVE LAW — FINALITY OF FINDINGS OF THE BOARD OF TAX APPEALS. — The stockholders of *X* corporation, contemplating a sale of the entire stock of *X*, organize a dummy corporation, *Y*, to which some of the assets of *X* are transferred. After the sale, the former stockholders of *X*, now stockholders of *Y*, vote that *Y* make a "gift or honorarium" to former employees of *X*. The commissioner of internal revenue treated the amount received by *B*, one of the former employees of *X*, as taxable income. This payment was likewise held by the Board of Tax Appeals to be "compensation," taxable as income, and not a tax-exempt "gift."[1] The circuit court of appeals (one judge dissenting) upheld the finding of the Board,[2] and the Supreme Court granted *certiorari*.[3] *Held* (four justices dissenting), that the ultimate finding that this payment constituted compensation involved a question of law, or at least a mixed question of law and fact, and the Court could look into all the circumstances and substitute its judgment for that of the Board of Tax Appeals. Judgment reversed. *Bogardus v. Commissioner of Internal Revenue*.[4]

The Revenue Act of 1924, which created the Board of Tax Appeals,[5] provided for no appeal from the Board; the result being that a proceeding before this administrative tribunal was considered

[12] Burton v. Larkin, 36 Kan. 246, 13 Pac. 398 (1887); Lemz v. Chicago, *etc.* R. Co., 111 Wis. 198, 86 N. W. 607 (1901); RESTATEMENT, CONTRACTS § 139.

[1] 45 STAT. 798 (1928), 26 U. S. C. A. § 22 (b) (3).

[2] Bogardus v. Helvering, 88 F. (2d) 646 (C. C. A. 2d, 1937).

[3] 57 S. Ct. 790 (1937).

[4] 58 S. Ct. 61, 5 U. S. L. Week 203 (1937).

[5] 43 STAT. 336 (1924), 26 U. S. C. A. § 600.