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Can a Third Party Beneficiary Who is Not a Payee Enforce a Contract for His Benefit?

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an Ohio decision holding that the term "heirs" as used in a deed to describe the remaindermen, included an adopted child of the life tenant.[13] It was presumed in that case that the grantor intended the words in the deed should have their ordinary meaning, and that to exclude an adopted child the grantor would have to do so expressly. The Kentucky court said that the Ohio statute on adoption[14] was much broader than the Kentucky provision and that the cases were distinguishable. It is submitted that the Statute in Kentucky is sufficiently broad to include an adopted child in a deed where the remaindermen are described as "her heirs". It must be admitted that the adopted child is an heir of the foster parent. Suppose *A* conveys land to *B*, a stranger, for his life and at *B's* death to *B's* heirs. *B* has an adopted child, his only heir-at-law, who claims the land. The Kentucky court could scarcely hold that the adopted child did not take the land, because by the statutory provisions of this Commonwealth the adopted child is the heir of the foster parent. Should it make any difference if *A* is the adopted child's foster father's parent? It seems difficult to frame language more direct and expressive than that used in the Kentucky Statute showing the intention to place an adopted child upon an absolute equality with natural children. Certainly the grantor, in the principal case, should be presumed to know that it was possible for the life tenant to adopt a child and that such child would be an heir of the life tenant. It is submitted that the fictitious intent of the grantor should not be allowed to overrule the ordinary interpretation of the words of the deed.

When the court supplied words limiting succession to the daughter's heirs-at-law, who should be of her blood, it amended rather than construed the deed. The word "heirs" has an ascertained meaning, and here scarcely requires interpretation. There being nothing in other portions of the deed to indicate that the word "heirs" was not used in its ordinary sense, the court departed from that primarily meaning of the term for the purpose of giving effect to what it guessed was the intention of the grantor, feeling perhaps that such a departure constituted a fairer distribution of the property. The grantor should have expressly limited the remaindermen to heirs of the daughter's blood if he intended this result.

J. GRANVILLE CLARK

CAN A THIRD PARTY BENEFICIARY WHO IS NOT A PAYEE ENFORCE A CONTRACT FOR HIS BENEFIT?

In contemplation of divorce, H, the husband, made a valid contract with W, his wife, providing that he would pay her a certain sum monthly for the support and maintenance of their children

[13] Laws v. Davis, 34 Ohio App. 157, 170 N. E. 601 (1930).

[14] ". . . the adopted child shall stand in the same relation for all purposes to such declarant as he or she would be in if they were a child born in lawful wedlock . . .", as cited in Laws v. Davis, *supra* note 13.

until they should reach their majority.[1] The divorce was obtained and G, the guardian of the children, sues to enforce the back payments due under the contract. The majority of the court said that only W could sue on the contract since she was both promisee and payee. Since the children were neither, they were incidental beneficiaries only and could not enforce a contract for their benefit. The dissenting opinion agreed that the plaintiff could not recover as a third party beneficiary, but argued that there could be a recovery on the ground that the contract created a trust obligation against H and in favor of W for the benefit of the children and that a suit could be brought by the guardian against H, joining W, to enforce this trust.[2]

In only one case have I been able to find and support for the holding that the mother and not the child is the only one who can enfore the contract and there it is in the form of *dictum*.[3] Williston says, however, that everywhere a child is able to enforce a contract between the father and mother for his support and maintenance, and usually as a third party beneficiary.[4] Certainly the child is a creditor beneficiary rather than a donee beneficiary due to the father's continuing duty to support him, regardless of the contract. This should enable the child to sue on the contract in his own name.

In *Brill* v. *Brill*[5] the father of a bastard agreed to pay the mother certain sums at stated intervals for the support and maintenance of the child. It was held that the child could enforce the contract against the promisor and that the mother could not release its interest. The reason given for the holding was that, ". . . the primary and main benefit is for Edward, the third party involved."[6] Also in *Weinberger* v. *Van Hessen*[7] the infant was allowed to enforce a stranger's contract with its mother to support the child for life. By analogy Kentucky seems to permit the infant to enforce the contract against the promisor in such a case. In *Wickliffe's Ex'rs.* v. *Smith*[8] the evidence showed that the defandant had agreed to pay a certain sum to a bank to the order of the promisee, a citizens' committee, for the purpose of building a certain road in that county. In deciding that case the Kentucky Court of Appeals held that the county was a

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[1] Percival v. Luce, 114 F. (2d) 774, 775 (C. C. A. 9th, 1940).

[2] Percival v. Luce, 114 F. (2d) 774 (C. C. A. 9th, 1940).

[3] Franklin v. Ford, 13 Ga. App. 469, 79 S. E. 366, 367 (1913) (Dictum).

[4] 2 Williston, Contracts (rev. ed. 1936) sec. 356.

[5] 282 Pa. 276, 127 Atl. 840 (1925).

[6] *Id.* at 842. (In the later case of Book's Estate, 297 Pa. 543, 147 Atl. 608, 610 (1929) the court said that the reason for the enforcement of the Brill contract was public policy, but in the Brill case itself there is no mention of public policy as such.)

[7] 260 N. Y. 294, 183 N. E. 429 (1932). (Though the infant would become payee upon reaching his majority, he could not sue until then. Therefore, for the payments prior to his attaining his majority the situation would be analogous to that in the Luce case.).

[8] 225 Ky. 796, 10 S. W. (2d) 291 (1928).

proper party plaintiff in the committee's action against the promisor, although the county was neither promisee nor payee and there was nothing to show that the committee was its servant or agent. In an analogous situation the beneficiary was allowed to enforce a contract between others to pay his debt to a fourth party, even though he was not a payee.[9]

Not only is the weight of authority contra to the principal case, but it is submitted that it is illogical also, if we are to support the American rule respecting obligee beneficiaries. It is admitted that the plaintiff can not recover if he is an incidental beneficiary[10] and it is also admitted that there can be a recovery if he is a direct and not an incidental beneficiary. Therefore, it is hard to follow the court's reasoning in denying relief to the children as incidental beneficiaries in the light of its statement that:

> "It is true that the money which the defendant promised to pay Dorothy Lehman was to be used by her for the support and maintenance of the minors. It is also true that if the money had been so used, such use would have benefitted the minors."[11]

Despite this admission the court assumed that the children were only indirect and incidental beneficiaries, since they were neither promisees nor payees. But who else will benefit from the contract? The promisee will not, since she must use the money for the support and maintenance of the children as promided by the contract, and her admission of this fact is shown by the appointment of a guardian to bring the action, when she might perhaps have sued as promisee.[12] The question who is the direct beneficiary is determined by the intention of the parties.[13] The contract itself,[14] and a reasonable interpretation of the evidence, show that the children were intended to be the direct beneficiaries.

That the children were direct beneficiaries is shown conclusively by ascertaining the nature of an incidental beneficiary. A definition which is taken from a Kentucky case says: ". . . such person is an incidental beneficiary if the benefits to him are merely incidental to the performance of the promise and if he is neither a donee beneficiary nor a creditor beneficiary."[15] Suppose B contracts with A to

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[9] Tasin v. Bastress, 284 Pa. 47, 130 Atl. 417 (1925). (Here the money was to be paid to the creditor by the promisor and not to the beneficiary.)

[10] National Bank v. Grand Lodge, 98 U. S. 123 (1878; Percival v. Luce, 114 F. (2d) 774, 775 (C. C. A. 9th, 1940) (Dictum); Spurrier *et al.* v. Burnett *et al.*, 207 Ky. 736, 270 S. W. 25 (1925).

[11] Percival v. Luce, *supra* n. 10.

[12] Croker v. New York Trust Co., 245 N. Y. 17, 156 N. E. 81 (1927); 2 Williston, Contracts (rev. ed. 1936) secs. 390, 392.

[13] Standard Oil Co. of New Jersey v. National Surety Co., 234 Ky. 764, 768, 29 S. W. (2d) 29, 31 (1930) (Dictum); Banker v. Breaux, 133 Tex. 183, 128 S. W. (2d) 23 (1939).

[14] *Supra* n. 1.

[15] Hendrix Mill & Lumber Co. *et al.* v. Meador *et al.*, 228 Ky. 844, 848, 16 S. W. (2d) 482, 483 (1929); see *supra* n. 4.

erect an expensive building on A's land. C's adjoining land would be enhanced in value by the performance of the contract, but he can not enforce the contract, since it was not made for his benefit.[16] Another example of an incidental beneficiary occurred in a case where A promised to pay B's expenses on a certain expedition. The latter's creditors could not sue on the contract, for there was no intent to benefit them, and they were only incidental beneficiaries.[17] In a case where an abstracter of title for a vendor was negligent, he was not liable to the vendee for the resulting damage. The latter was not intended to be benefitted by the contract between the vendor and the abstracter.[18] In the *Luce* case the children were specifically mentioned in the contract and evidently occupied such an important position in the contemplation of the parties that it is impossible to agree with the court's assertion that they are only incidental beneficiaries.

The courts that have considered the situation in the principal case, and yet have not permitted a recovery by the children as third party beneficiaries, often struggle to avoid a harsh result by permitting a recovery as a result of what seems to be strained reasoning.[19] Possibly one way to permit the plaintiff to recover in these jurisdictions is on the ground that a trust was created for the benefit of the children, with the promisee as trustee of the promise.

We must examine the contract of the principal case, as well as the circumstances surrounding it, to ascertain whether a trust was created. The contract provides,

> "Second: For the support and maintenance of the aforesaid children the party of the first part shall pay to the party of the second part the sum of $25.00 per month for each of said children, the payment of said sum of $25.00 per month to discontinue as each child attains the age of majority."[20]

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[16] Restatement, Contracts (1932) sec. 133.

[17] 2 Williston, Contracts (rev. ed. 1936) sec. 402.

[18] Shine v. Nash Abstract & Investment Co., 217 Ala. 498, 117 So. 47 (1928). For additional cases on this point see footnote 9 in 2 Williston, *supra* n. 8. Also the creditor mentioned in n. 9, *supra*, is an incidental beneficiary according to 2 Williston, Contracts (rev. ed. 1936) sec. 356.

[19] Another reason to permit the children to recover as third party beneficiaries is the "Close Relationship Doctrine" which has considerable support in the United States, acccording to Clarke v. McFarland's Ex'rs., 35 Ky. (5 Dana) 45, 48 (1837) (Argument); *supra* n. 7 at page 430; 2 Williston, Contracts (rev. ed. 1936) sec. 357; Note (1926) 24 Michigan Law Review 414. Williston says that this view allows the child to recover from the promisor on the ground that his legal personality merges with that of the promisee's, his mother, due to their close relationship, so as to allow him to sue on the grounds that he has become promisee. However, Williston criticizes this doctrine as a crude fiction.

[20] *Supra* n. 1.

The following example will best explain how the trust theory is applied under these circumstances. The first real example of this type of trust occurred in the case of *Tomlinson* v. *Gill*,[21] where A promised B that if she would consent to his being appointed administrator of her deceased husband's estate, he would pay the latter's debts to the extent that they were not paid by the estate. A creditor enforced this agreement against A on the ground that a trust was created for his benefit with B as trustee. This could not be a trust, for a trustee must act so as to manifest an intention to act as trustee.[22] Here there is nothing to indicate that B realized that she was a trustee or intended to act as one. Therefore, this is a typical third party beneficiary case and a recovery would be allowed in the United States on that ground.[23] In another case A advanced money to M at a certain rate of interest to be paid to her for life. Upon A's death M was to hold it for the use of B and pay it over at a certain time to B. It was held that M was trustee for A during her life and for B afterwards.[24] It is submitted that this case was incorrectly decided. Since M paid interest, he had the use of the money and was under only a personal obligation to repay the money as a debt.[25] Therefore, there could be no trust there, for a promisor can not be trustee of his own debt.[26] In another case a father made a sealed contract with promisees to the effect that his executors would pay £60,000 to them in trust for his illegitimate sons. The latter were able to enforce this agreement on the ground that a trust was created for their benefit.[27] This was probably not a trust, for the so-called trustees here would make themselves liable to the beneficiaries by not suing. This showed that they did not realize that there was a trust. For there to be a trust the trustee must realize that there is a trust and manifest an intention to act as trustee.[28]

It is submitted that this class of cases is wrong in holding that a trust arises. The words are words of promise and not of trust.[29]

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[21] 1 Amb. 330 (Ch. 1756), 27 Eng. Reprint 221. *Contra:* West v. Houghton, L. R. 4 C. P. 197 (1879).

[22] 1 Scott, The Law of Trusts (1939) sec. 14.2 and sec. 24.

[23] Steele v. Clarke, 77 Ill. 471 (1875); Restatement, Trusts (1935) sec. 14.

[24] Moore v. Darton, 4 DeG. & Sm. 517 (V. C. 1851), 64 English Reprint 938. *Contra: In re* Caplan's Estate. Bulbreck v. Sylvester, 45 L. J. Ch. 280 (1876). It probably overrules Moore v. Darton, though it does not specifically mention it. Also Richard v. Delbridge, L. R. 18 Eq. 11 (1874) overruled a somewhat similar case, Morgan v. Malleson, L. R. 10 Eq. 475 (1870).

[25] 1 Scott, The Law of Trusts (1939) sec. 14.4; 2 Williston, Contracts (rev. ed. 1936) sec. 360; Restatement, Trusts (1935) sec. 14.

[26] Restatement, Trusts (1935) sec. 14.

[27] Fletcher v. Fletcher, 4 Hare, 67 (V. C. 1844), 67 English Reprints 564. *Contra:* Colyear v. Mulgrave, 2 Keen, 81 (Rolls Court 1836), 48 English Reprint 559.

[28] *Supra* n. 25.

[29] Corbin, Anson on Contracts (Fifth Ed. 1930) sec. 285, footnote 4.

Usually no trust was mentioned or contemplated.[30] The reason for such strained reasoning is that in England a party can not recover on a contract made for his benefit if he is not a party to the contract, and the courts frequently torture such cases into trusts to avoid a harsh result.[31] The admission of these facts by the English Courts is indicated by the fact that later cases renounce the trust theory.[32]

The test whether there is a trust or a third party beneficiary contract would seem to be whether the payee is to collect the money under a duty as trustee and pay the proceeds to a third person, while performing all the other duties of a trustee; or whether the third person can collect the money.[33] The other duties of a trustee would be to keep the trust money separate from his own[34] and care for it for the benefit of the beneficiary.[35] This would not make the beneficiaries in circumstances similar to the *Luce* case cestuis of a trust, as it might seem at first glance, for the parent or guardian acts for them in collecting the money and any action brought is treated as that of the child.

It is submitted that the *Luce* case is wrong and conflicts moreover with the weight of authority. This is an ordinary case of a third party beneficiary which is sometimes confused with a trust.

E. R. WEBB

THE BREACH OF A PENAL STATUTE WHICH HAS FOR ITS PURPOSE THE PROTECTION OF THE INDIVIDUAL MEMBERS OF THE GENERAL PUBLIC AS EVIDENCE OF NEGLIGENCE

A recent California case[1] raises a matter which has caused a great deal of disagreement and uncertainty among the different courts in the field of Torts. Plaintiff was driving her car and attempted to make a left turn. Defendant's street car approached at a speed in excess of the maximum speed provided for by statute and collided with the car. The opinion in deciding for the plaintiff said:

> "If the jury believed that the defendant, Sherman was traveling at a rate of speed in excess of 15 miles an hour,—and according to his own testimony he was so traveling—the defendant's negligence was established. The violation of an ordinance or statute is negligence per se."

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[30] Corbin, *Contracts for the Benefit of Third Persons* (1930) 46 Law Quarterly Review 12, 17; Note (1932) 81 A. L. R. 1271, 1272.

[31] 1 Scott, The Law of Trusts (1939) sec. 14.4.

[32] Vandepitte v. Preferred Accident Insurance Corporation (P. C. 1933) A. C. 70, 77; *In re* Rotherham Alum and Chemical Co., 25 Ch. Div. 103, 111 (1883); *In re* Empress Engineering Co., 16 Ch. Div. 125, 127 (1880); West v. Houghton, L. R. 4 C. P. 197 (1879). Colyear v. Mulgrave, 2 Keen, 81 (Rolls Court 1836), 48 English Report 559; 2 Williston, Contracts (rev. ed. 1936) sec. 360.

[33] 1 Scott, The Law of Trusts (1939) sec. 14.2.

[34] *Ibid.*

[35] *Ibid.* and sec. 14.

[1] 93 Pac. (2) 135 (1939).