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# Recent Decisions

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by Justice West, in the case of *Scott v. Gillespie*,[28] "The rule that, when a will once gives a fee simple title, a subsequent contradictory provision must fail, is not sufficient in these days, when from the words used such rule would go counter to the intention of the testator." Under this doctrine it is apparent that the words of inheritance, while they purport to pass an absolute fee, do not of themselves determine the status of the estate that the devisee is to take, as this is an issue which, under the general rule, must be derived from the whole will and all of its parts taken together.

*J. Frederick Meister.*

# RECENT DECISIONS

CONTRACTS — MUTUALITY OF OBLIGATION — "REQUIREMENTS CONTRACTS."— In the recent case of *In re United Cigar Stores Co. of America*, 8 F. Supp. 243 (D. C. S. D. N. Y. 1934), the court held that where the buyer, who had entered into a *requirements* contract to buy for ten years all the ice cream required for the buyer's stores, ceased doing business as a result of bankruptcy, the buyer had performed its contract so that the seller had no provable claim in bankruptcy for damages for breach of contract against the trustee in bankruptcy.

This case raises the question as to the extent of the duty of the buyer in a "requirements" contract. May he relieve himself of responsibility by going bankrupt, by selling his business, by materially curtailing his use of the product, by substituting some other product, or by ceasing operation of his business altogether until such time as it becomes again profitable for him to take advantage of his contract with the seller? The authorities are divided on all these questions, except that there seems to be no case in which it is held that the buyer is liable in damages for breach of contract on ceasing to do business because of a *bona fide* financial inability to maintain his business as a going concern.

If the buyer completely abandons the business the general tendency has been to hold him liable. See *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 Fed. (2d) 117 (C. C. A. 3d, 1929), where the buyer sold his factory, for whose *requirements* he had contracted for five years. Contra: *Drake v. Vorse*, 52 Iowa 417, 3 N. W. 465 (1879), which held that the buyer could discontinue his business at any time, without being subject to liability to the seller.

The theory of such cases generally centers about the language of the contract. Several methods of construction are used in order to hold the buyer liable. It has been held that under the contract the buyer has agreed, impliedly at least, to continue to use his normal *requirements* of the article contracted for during the period stipulated for in the contract. *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298 (C. C. A. 6th, 1903); *Chalmer & Williams v. Bledsoe & Co.*, 218 Ill. App. 363 (1920). It has been held that the buyer must purchase all that he *in good faith requires*. *Cragin Products Co. v. Fitch*, 6 Fed. (2d) 557 (C. C. A. 8th, 1925); *McKeever, Cook & Co. v. Cannonsburg Iron Co.*, 137 Pa. St. 606, 20 Atl. 938 (1890). It has been held,

28 103 Kan. 745, 176 Pac. 133 (1919).

also, that there is an implied promise to remain in the business. *Diamond Alkali Co. v. P. C. Tomson & Co., supra; Hickey v. O'Brien,* 123 Mich. 611, 615, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227 (1900); *Great Lakes & St. Lawrence Transport Co. v. Scranton Coal Co.,* 239 Fed. 603 (C. C. A. 7th, 1917).

The case of *Wells v. Alexandre,* 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218 (1891), is frequently cited to sustain the proposition that the buyer must take all the goods that his business, if maintained under substantially the same conditions as existed at the time the bargain was made, *would require.* The defendant, in this case, accepted the offer of the plaintiff to furnish three special steamers with coal for the year 1888. In the middle of the year the defendant sold the steamers to another company. It was, nevertheless held liable for failure to purchase coal. The court said: "The fact that the defendants deemed it best to sell the steamers cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers require." This case, however, represented an exceptional form of contract, which really involved the purchase and sale of coal, the amount of which was to be measured by the requirements of certain steamers rather than by the requirements of the purchasers. The steamers continued to require coal, and the amount required was held to fix the amount the defendant agreed to buy, even though they no longer owned the steamers.

In *Great Lakes & St. Lawrence Transport Co. v. Scranton Coal Co., supra,* the plaintiff obtained an injunction to prevent the defendant from selling its vessels. The defendant had contracted to haul the plaintiff's coal for three years. The court held that the defendant must continue in business during the term, and run its boats in a reasonable manner continuously.

If the buyer makes changes in his business, or has substituted other articles for those covered by the contract, the issue should be settled by determining whether the contract caused the change or whether it was brought about by a technical improvement that would have been made in any event.

The plaintiff, in *Loudenback Fertilizer Co. v. Tennessee Phosphate Co., supra,* entered into a contract whereby it was to buy its entire consumption of phosphate rock for use in making fertilizers from the defendant at a fixed price and the defendant agreed to supply the same as ordered. The plaintiff was to be allowed to order as much as 3,000 tons yearly and the agreement was to run five years. It was understood that the plaintiff normally used about 1,500 tons yearly. For more than a year, during the term of the contract, the plaintiff bought no phosphate rock but bought acid phosphate from other manufacturers instead, because it could make the fertilizer cheaper by using the acid instead of the rock. At the end of the year, the price of the rock having materially increased, the plaintiff ordered the maximum of 3,000 tons. The court held that the plaintiff, by substituting acid phosphate for the rock previously used and contracted for, solely because it was more profitable, had substantially breached the contract, and so could not recover in breach of contract from the defendant when he failed to deliver the rock according to the terms of the contract.

In another case where the defendant had contracted to buy all the coal used by it from the plaintiff, the defendant using "slack" coal in its plant, the court held that the plaintiff could not substitute "nut" coal from another company solely because it was cheaper than the contract price of "slack" coal. *McKeever, Cook & Co. v. Cannonsburg Iron Co., supra.* However, a buyer was not held for failing to keep up his purchases of alcohol when he was prevented from using it by government order. The buyer had agreed to buy all the alcohol used in its plant, approximately 1,800 barrels for the next year, from the plaintiff. The buyer used only 568 barrels of alcohol during the year because the government withdrew the permit for its use of alcohol. The plaintiff sued the buyer claiming the buyer had bought 1,800 barrels, and so was liable for breach of contract for failing to take the whole amount. The court, however, held that the defendant had not bought 1,800 barrels but only the amount it *needed* during the year and so had complied with the contract. *Cragin Products Co. v. Fitch, supra.* In the case of *Cannonsburg Iron Co. v. McKeever,* 138 Pa. St. 184, 16 Atl. 97 (1888), it was held that where the defendants had agreed to purchase from the plaintiffs as much as they should *require* for their mill, the defendants were not liable for failing to purchase as much coal as originally contemplated because of having substituted natural gas for fuel. The court said: "What coal was necessary for consumption in their works they must take from the plaintiffs. This was all they were bound to do, and all the plaintiffs were bound to furnish them; and it is of no consequence whether the falling off in that consumption was occasioned by the contraction of their business, or by the introduction of gas. In either case less coal was necessary for the defendants' manufactory, and they were not obliged to pay for what they did not require."

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INSURANCE—INDEMNITY INSURANCE.—The plaintiff, having already been awarded a judgment for $7,500 in the case of *Merrill v. Beckwith,* 61 Fed. (2d) 912 (C. C. A. 5th, 1932), under a survival statute, and not having been paid, now directly sues the decedent's insurance company on a policy of automobile liability indemnity insurance held by the decedent. The insurance company defends on the grounds, first, that the policy was to cover losses actually sustained by the decedent, not his liabilities; and, second, that the policy was issued solely for the benefit of the insured, and therefore a third party had no right to maintain an action on it. *Held,* that the plaintiff could recover. *Ohio Casualty Ins. Co. v. Beckwith,* 74 Fed. (2d) 75 (C. C. A. 5th, 1935). The court said that the distinction between that type of insurance policy which insures against *liability* and that which insures against *losses* is to be found in the intention of the parties as disclosed in the contract. If the intention is that the insured is to be protected against actual *losses* it has become the custom to insert within the policy a clause providing that no action shall lie against the insurer "unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue." Whereas, a policy which does not contain this "no action" clause, but insures against *loss* imposed upon the assured by law, and, also, contains provisions to the effect that the assured will immediately notify the insurer of any injury to persons, or damage to property, covered by it, and will not settle any claim growing out of such injury or damage without the consent of the insurer, that the insurer will defend in the name of and on behalf of the assured any suit brought against the latter to enforce any such claim, is, the court maintained, a policy of insurance against *liability*. The court cites numerous cases to uphold the distinction it makes. *Malley v. American Indemnity Corporation,* 297 Pa. St. 216, 146 Atl. 571 (1929); *Schambs v. Fidelity & Casualty Co.,* 259 Fed. 55 (1919); *American Indemnity Co. v. Fellbaum,* 114 Tex. 127, 263 S. W. 908 (1924).

Since the policy in the principal case was in accord with the last description, it was held to be a policy of indemnity against *liability* rather than *loss*. However, it is worthy of note that decisions on this question are far from being uniform. See Note, 48 L. R. A. (N. S.) 184.

The second defense involves a point of much more importance. As the court says, it relates to a phase of law which has not been decided in any reported case to be found in careful search. This phase of law is whether an injured party may directly sue the insurer of his tort-feasor on a contract of liability insurance between the tort-feasor and the insurer? Professor Vance substantiates the contention of the court that this point has never been decided. He says: "In the absence of statute the injured person acquires no rights whatsoever under a liability policy insuring the tort-feasor, unless the policy makes express provision for payment to such injured person, or by reasonable construction of the policy provisions an intent to benefit the injured party can be inferred." VANCE ON INSURANCE (2nd ed.) 682. Apparently the furthest the courts have gone to favor the injured party is to allow him the right to garnishee the insurance company. *Patterson v. Adan,* 119 Minn. 308, 138 N. W. 281 (1912). However, Vance says that this rule "has been accepted in a few jurisdictions, but is opposed to the overwhelming weight of authority." VANCE ON INSURANCE (2nd ed.) 685.

It is more than interesting, then, to examine the reasoning whereby the court created this precedent. The first step in the process was that there was nothing said in the contract as to who had the right to bring suit against the insurer for the amount of the judgment against the insured, although the contract admitted the insurer's liability for that amount. In other words, there was no "no action" clause in the contract, and thus nothing therein which would specifically prevent the injured party from bringing suit for the amount of the unpaid judgment. This point made, the court went on to say: "The conclusion is inescapable, as it seems to us, that appellant's policy confers a benefit upon an injured person who recovers a judgment against the assured in an action for damages coming within its provisions. If appellant had agreed to pay a debt which assured owed to appellee, the latter would have had a clear right to enforce the contract. *There is no difference in principle* in the obligation assumed by the policy." (The italics are mine.)

Thus it will be seen that the court justifies its holding on the basis of a third party creditor beneficiary arrangement. In support of its decision the court cites *Durnherr v. Rau,* 135 N. Y. 219, 32 N. E. 49 (1892), stating the decision of that case to be that "Where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit on him and furnishes him a remedy." Upon closer examination of that case it is doubtful that it is quite as much in line with the present decision as the court construes it to be. It actually reads as follows: "It [the contract] must have been entered into for his beenfit, or at least, such benefit must be the direct result of performance, and so within the contemplation of the parties. . ."

In further support of its decision the court cites *Byram Lumber Co. v. Page,* 109 Conn. 256, 146 Atl. 293 (1929), stating the decision of the latter case to be that the law will furnish the injured party a remedy even though the primary purposes of the parties to the contract was to benefit themselves only. And, finally, the court cites the case of *Whitehead v. Burgess,* 61 N. J. Law 75, 38 Atl. 802 (1897), to support its contention that the third party need not be known or know of the contract at the time it is entered into. The case of *Levy v. Daniels U-Drive Auto Renting Co., Inc.,* 108 Conn., 333, 143 Atl 163 (1928), would seem more in point to support the present case. There a statute included a third party beneficiary contract in every contract concerned with the renting of an automobile from any auto-renting company in the state in favor of whomever might be injured by such automobile. It is analogous because in that case also the beneficiary was unknown to the contracting parties; and because the primary purpose of those parties was to benefit themselves alone, the law presumed that the parties wished to benefit an unknown beneficiary and furnished him with a remedy.

In the final consideration of the cogency and value of the present decision it is helpful to refer to a somewhat prophetic article by Professor Herbert D. Laube