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Contracts

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CONTRACTS

Insurance Contracts—Breach by Anticipatory Repudiation. In *Trompeter v. United Insurance Company*[1] the Washington supreme court considered, for the first time, the controversial problem of breach by anticipatory repudiation in insurance contracts. The plaintiff purchased from the defendant insurance company an accident insurance policy which provided: "If such injury . . . shall wholly and continuously disable the Insured for one day or more, the Company will pay indemnity at the rate of One Hundred ($100.00) Dollars per month, beginning with the first medical treatment during disability, so long as the Insured lives and suffers total loss of time. . . ." Following a serious injury, the plaintiff filed a claim with the company for disability benefits. Initially, the company denied the validity of the claim on the ground that the injury was only temporary. But later the defendant offered to pay the plaintiff if he would execute a release, which he did. Subsequently, the plaintiff made further claims for benefits to compensate for the same injury, but these claims the defendant refused to honor, alleging total discharge by the release. The plaintiff then sued to recover the accumulated monthly indemnity of one hundred dollars per month *plus all future installments.* He contended that, because the defendant refused to pay the recurring installments of monthly indemnity, it had completely repudiated its contract, and therefore the plaintiff was entitled to the value of *all future installments* on the theory of breach of contract by anticipatory repudiation.

The trial court found as follows: (1) the plaintiff was totally and permanently disabled; (2) there was no consideration for the alleged release; (3) the defendant had repudiated its contract. The court concluded that the plaintiff was entitled to the *present value of all future installments,* as well as the installments presently due. The defendant appealed, contending that the recovery should have been limited to the *accumulated monthly installments.*

The Washington supreme court reversed the trial court, holding that while the refusal to pay the amount due was a breach, it was not such a repudiation as to entitle the plaintiff to recover, in a lump sum, all future installments under the policy. The court reasoned that the insurance company, instead of repudiating its obligations under

[1] 151 Wash. Dec. 115, 316 P.2d 455 (1957).

the policy, had recognized that the policy was still in force, but defended on the ground that it had paid all amounts due and had been discharged of further liability by the plaintiff's release.

An anticipatory breach of contract arises upon an absolute and unequivocal repudiation[2] of a contract by one party before he is under a present duty to perform.[3] While most jurisdictions have accepted the doctrine of breach by anticipatory repudiation in bilateral contracts,[4] it is generally held to be inapplicable to contracts where there exists an executory obligation on the part of one party only.[5]

The reason for this distinction is supposed to find its justification in the often-quoted case of *Hochester v. De la Tour.*[6] In that case it was said that the reason for allowing an action for breach by anticipatory repudiation was that otherwise the obligee would have to go through the useless process of keeping himself ready and willing to perform until the time for the obligor's performance arrived. On the basis of this reasoning, if the injured party never had any performance to render, or, having such a performance, had already performed it, it would not be necessary for his protection to give him an immediate action for damages for the anticipatory breach.[7]

Corbin suggests that the real reasons for allowing an immediate action for an anticipatory repudiation are that the repudiation often causes immediate loss in property values and disturbs the serenity of the promisee, and that to allow the action makes for an early settlement of the dispute and a timely payment of damages.[8] These reasons would seem to apply to contracts where there exists an executory

[2] *McClosky & Co. v. Minweld Steel Co.,* 220 F.2d 101 (3rd Cir. 1955); *Kentucky v. Home Mut. Life Ins. Co. v. Rogers,* 196 Tenn. 641, 270 S.W.2d 188 (1954); *Gilmore v. American Gas Machine Co.,* —— Ohio ——, 129 N.E.2d 93 (1952); *Humphrey v. Placid Oil Co.,* 244 F.2d 184 (5th Cir. 1957); *Campos v. Olson,* 241 F.2d 661 (9th Cir. 1957); *Salot v. Wershow,* —— Cal. ——, 320 P.2d 926 (1958).

[3] 4 CORBIN, CONTRACTS § 959 (1951).

[4] Ibid., *McFerran v. Heroux,* 44 Wn.2d 631, 269 P.2d 815 (1954). The court in that case said: "Where a party to a contract repudiates the contract, either by a positive refusal to perform before performance is due or by putting it out of his power to perform, an action for damages brought immediately is not premature." Accord, *Casey v. Murphy,* 143 Wash. 17, 253 P. 1078 (1927), and *Hunter v. Wenatchee Land Co.,* 50 Wash. 438, 97 P. 494 (1908). See also, *Mignon v. Tuller Fabric Corp.,* 148 N.Y.S.2d. 605 (1956); *Placid Oil Co. v. Humphrey,* 244 F.2d 184 (5th Cir. 1957); *City of Reyston v. Littrell Engineering Co.,* 87 Ga. App. 903, 75 S.E.2d 678 (1953).

[5] 4 CORBIN, CONTRACTS § 959 (1951); But see *Pollock v. Pollock,* —— Texas ——, 46 S.W.2d 292 (1932), where the Texas court states that the doctrine of breach by anticipatory repudiation is not restricted to those cases where the contract is still executory on both sides.

[6] 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853).

[7] 4 CORBIN, CONTRACTS § 962 (1951); Note, *Anticipatory Breach of Contract-Effects of Repudiation,* 8 MIAMI L. Q. 68 (1953).

[8] 4 CORBIN, CONTRACTS § 961 (1951).

obligation on the part of one party only, as well as to bilateral contracts.[9] The anticipatory repudiation of a bilateral contract relieves the injured promisee of any further duty to perform. This is precisely the position of the promisee of a repudiated contract where there exists an executory obligation on the part of only one party. In neither situation does the promisee have a further duty to perform. Why an immediate cause of action should be awarded one promisee and denied the other is not apparent. The harm caused to the plaintiff is equally great in either case; and it seems strange to deny a remedy of this kind merely on the ground that he has already performed as his contract required.[10]

The majority of jurisdictions have refused to allow recovery for breach by anticipatory repudiation where there exists an executory obligation on the part of only one party, due to a misconception that to do so would allow the acceleration of a money debt.[11] This is clearly erroneous. There is no acceleration. The promisee is allowed his remedy of damages as a substitute for performance. An action for breach of anticipatory repudiation is in *assumpsit* and not *debt*.

The Washington supreme court, in the present case, did not expressly deny that a contract executory as to the obligation of only one party could be breached by that party's anticipatory repudiation. The court took the position that there was not, on the facts before the court, such a repudiation as to allow recovery on that ground. In reaching this result, the court relied on the decisions of *Mobley v. New York Life Ins. Co.*[12] and *New York Life Ins. Co. v. Viglas.*[13] These cases held that the mere refusal to pay monthly benefit installments upon a mistake or misunderstanding of matters of fact or upon the erroneous construction of a disability clause was sufficient to constitute a breach of the disability clause, but that it did not amount to a renunciation or repudiation of the policy. In the present case, the refusal to pay was not due to any erroneous construction of a disability clause, but was rather a direct denial of any liability because of the

[9] *Pollock v. Pollock,* —— Texas ——, 46 S.W.2d 292 (1932). In this case, the Texas court said: "...We are of the opinion that the rule of anticipatory breach should still be applied, because every reason that can be given for applying the rule to the one instance applies with equal force to the other. The doctrine which excepts contracts fully performed by one side from the general rule is purely arbitrary and without foundation in any logical reason." This decision is still good law in Texas. See *Humphrey v. Placid Oil Co., supra* footnote 4.

[10] 4 CORBIN, CONTRACTS § 962 (1951).

[11] Id. § 964.

[12] 295 U.S. 632 (1935).

[13] 297 U.S. 672 (1936).

alleged release. In the *Mobley* case, the refusal to pay was caused by the insurer's good-faith, but mistaken, belief that the total disability asserted by the insured no longer existed. The validity and binding character of the policy was not denied. The insurer denied his duty to pay the installments because he honestly disputed the existence of facts that were a condition precedent to his obligations. The insurer admitted that, if the facts did exist, it was his duty to pay. However, in the principal case, the insurer denied his liability under the policy in spite of the occurrence of the condition precedent to his duty to pay. He refused to pay because he believed he had been effectively relieved of any liability under the policy by a release.

Although the Washington court professes to follow the *Mobley* and *Viglas* cases, it is obvious that it has extended the rule of those cases to cover a very different fact situation. In so doing, the court was able to avoid deciding whether or not the doctrine of breach by anticipatory repudiation was applicable to contracts where there exists an executory obligation on the part of only one party. As a result, the following question is posed for the Washington lawyer: Was it the intent of the court merely to avoid applying the doctrine in this particular case, or is it to be concluded that the doctrine has no applicability in this type of case? The unnecessary confusion of the law continues.

Third Party Beneficiary Contracts. In *American Pipe & Construction Company v. Harbor Construction Company*,[1] a unique situation arose, calling for a brief re-examination of the law of third party beneficiaries.[2] The city of Anacortes obligated itself to deliver water to the Shell Oil Company's new refinery. To accomplish this, the city had to install pipe lines to the refinery. The city contracted with the American Pipe & Construction Company, hereinafter referred to as the supplier, to furnish the pipe for this project. Since time was of the essence in the city's contract with Shell, the city exacted a promise from the supplier that the pipe would be delivered to the trench sides and that the deliveries would be completed by a certain date.

Subsequent to the execution of this contract the city solicited bids

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1 151 Wash. Dec. 229, 317 P.2d 521 (1957).

2 For an extensive and critical analysis of the existing law and theory of the law of third party beneficiaries, see *Third Party Beneficiary Concept: A Proposal*, 57 COL. L. REV. 406 (1957).

for the installation job. The specifications for the bids included the requirement that the installation job was to be completed in ninety-five days, and also a recital of the supplier's promise as to dates of delivery of the pipe. The Harbor Construction Company, hereafter referred to as the installer, was the successful bidder. The contract between the city and the installer provided that: "In no case shall the Owner (meaning the city) be liable for claims made by the Contractor (meaning the installer) for failure of the Owner's manufacturer to deliver as scheduled or promised."[3] (Parenthesis added.)

The supplier brought suit on a contract having no connection with the contract which is the subject of this note. In that suit the installer cross-complained for damages resulting from the failure of the supplier to make deliveries as promised in its contract with the city. The installer claimed that he was a third party beneficiary of the supplier's contract with the city.

The right of a beneficially interested third person to enforce a contract as a third party beneficiary was established in the landmark case of *Lawrence v. Fox*.[4] These third persons who are recognized as having enforceable rights created in them by a contract to which they are not parties and for which they have given no consideration, have been loosely grouped into three classes: (1) creditor beneficiaries, (2) donee beneficiaries, and (3) incidental beneficiaries. The third person is a creditor beneficiary if the promisee expresses an intention that this third person shall receive the performance of the promisor in satisfaction and discharge of some actual or supposed duty or liability of the promisee. If, on the other hand, the promisee expresses an intention that this third person shall receive either the benefit of the promisor's performance or the security of the promise itself as a gift, the third person is a donee beneficiary.[5] An incidental beneficiary, as Prof. Corbin aptly defines him, is one who is neither a

[3] 151 Wash. Dec. at 231, 317 P.2d at 523.

[4] 20 N.Y. 268 (1859).

[5] 4 CORBIN, CONTRACTS §§ 774-785 (1951); WILLISTON, CONTRACTS, § 386 (1936); RESTATEMENT, CONTRACTS § 133 (1932). See also for further reference on the existing law of third party beneficiaries; Isbrandtsen Co. v. Local 1291 of International Longshoremen's Assn., 204 F.2d 495 (3rd Cir. 1953); U.S. v. Inorganic, Inc., 109 F. Supp. 576 (E.D. Tenn. 1952); Johnson Farm Equipment Co. v. Cook, 230 F.2d 119 (8th Cir. 1956), Leahy v. Smith, 137 Cal.2d 884, 290 P.2d 679 (1955); Watson v. Aced, — Cal.2d —, 319 P.2d 83 (1957); Permian Basin Inv. Corp. v. Lloyd, — N.M. —, 312 P.2d 533 (1957); Vikingstad v. Baggot, 46 Wn.2d 494, 282 P.2d 824 (1955). For articles discussing and analyzing the law of third party beneficiaries, see 17 BROOKLYN L. REV. 29 (1950), 27 AUST. L. J. 175 (1953), 44 KY. L. J. 470 (1950), 17 MO. L. REV. 214 (1952), 12 U. PITT. L. REV. 295 (1951), 1 SYRACUSE L. REV. 334 (1949).

creditor nor a donee, and who has no enforceable interest in the contract involved.[6]

The Washington supreme court held, affirming the judgment of the trial court, that the installer had no enforceable interest in the supplier's contract with the city. The court reasoned that, as the city had disclaimed any duty or liability as to the time of delivery to the installer, there was no duty or liability which could be discharged by the performance of the supplier. Therefore, the installer could not be a creditor beneficiary of the supplier's promise. The court, finding no intent by the promisee city that the supplier was to assume any direct obligation or performance to the installer, held that the installer could not enforce the provisions of the supplier's contract with the city as a donee beneficiary.

It is readily apparent that the installer does not fall within either the donee or creditor beneficiary classifications as they exist today. However, it does appear that it was intended by the promisee city that the installer was to be more than incidentally benefited by the supplier's promise. The city owed a duty to Shell to have the water delivered by a certain date. To assure the meeting of this time requirement, the city exacted a promise from the supplier that deliveries would be made by certain dates. It seems quite obvious that the city intended the performance and the immediate benefit of this promise to go to the installer, as the delivery dates promised by the supplier were included in the specifications for the installation job. The installer undoubtedly relied on this promise when he made his bids, and if the city had not intended him to utilize these dates in making his bid, it would not have placed them in the specifications. Nevertheless, when the installer sought to recover damages because the promise was not performed, he was denied because his status was not that of a donee or creditor beneficiary.

The right of a third party beneficiary to enforce a promise rests chiefly upon the fact that the promise obtained from the promisor by the promisee creates, and *is intended by the promisee to create, reasonable expectations on the beneficiary's part which induces him to change his position in reliance on the promised performance.*[7] In the present case the installer relied on the promise in submitting his bid, and it seems quite apparent that the promisee city intended him

[6] 4 CORBIN, CONTRACTS § 779 c (1951).
[7] Ibid. at § 775.

to do so. Admittedly, the installer fits neither the donee nor the creditor nomenclature; however, the reasons for allowing third party beneficiaries to recover are present. If the facts of a given case present the very reasons for allowing recovery, the mere inapplicability of existing legal terminology ought not to defeat an interest which is in substance no different from those which are presently protected under the terms donee or creditor beneficiaries. Although other jurisdictions have allowed recovery, despite the fact that the third party was not strictly speaking a donee or creditor benefiiciary,[8] the present case seems to indicate a lack of willingness on the part of the Washington court to extend the current doctrines of third party beneficiaries to such an extent. If a defect in existing legal terminology is all that is preventing recovery in the present case, a new term, such as *commercial beneficiary,* could be created to remedy this present defect.

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CORPORATIONS

Right to Repurchase Shares. In *Jackson v. Colograssi*[1] the Washington court construed a 1947 amendment to RCW 23.08.080 for the first time. The amendment reads as follows:

> (2) Every corporation organized hereunder shall have the power to purchase, hold, sell, and transfer shares of its own capital stock: *Provided,* that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital stock of the corporation.

The plaintiff was a trustee in bankruptcy who was suing to recover $18,000 paid for the purchase of shares by the now bankrupt corporation. The defendants had purchased $18,000 worth of stock and also obtained a repurchase agreement from the corporation. Subsequently, the defendants requested that the corporation repurchase the shares. Since the corporation did not have sufficient cash to repurchase the shares, the defendants were willing to accept a cancellation of a por-

[8] There have been numerous cases allowing recovery to a third party beneficiary although there was a complete absence of a donative spirit and also of any actual, supposed, or asserted duty of the promisee to the beneficiary at the time the contract was made. See Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); Coxhead v. Winsted Hardware Mfg. Co., 4 F.R.D. 448 (D. Conn. 1945); Johnston v. Franklin Kirk Co., 183 Ind. App. 519, 148 N.E. 177 (1925); *cf.* Burt v. Brownstone Realty Co., 95 N.J.L. 457, 112 Atl. 883 (1921).

[1] 50 Wn.2d 572, 313 P.2d 697 (1957).