

office that one's memory pictures "Hoh"; but in his class-room, there behind the desk—in his class-room when some man had interposed a question. There he sits, crouched somewhat forward on the desk; his black-haired eagle-face seems set with anticipation of the clash of views, his heavy shoulders tense, for all their student's stoop,—there he sits, silent through several seconds. You too grow tense for the struggle; but as you watch his eyes, you thrill with a dawning wonder, almost awe—slowly, alone, you see him climbing up into the mountain, to see this little question set out against the background of the whole, to look again upon the body of the Law as one,—and signal down to you the way to join him. ✓

K. N. L.

BUILDERS' BONDS AND MATERIALMEN

In cases where a building contractor gives to the owner and obligee a surety bond securing the performance of the builder's contract and protecting the owner against the liens of laborers and materialmen, there is a good deal of apparent conflict as to whether or not the laborers and materialmen are beneficiaries of the contract and can maintain suit against the bondsmen for sums due them from the contractor. If they can sue at all, it is clear that they must sue as third-party beneficiaries of a contract to which they themselves are not parties. The question, on which the seeming conflict exists, is as to whether or not they are in fact third-party beneficiaries.

In the recent case of *Forburger Stone Co. v. Lion Bonding & Surety Co.* (1919, Neb.) 170 N. W. 897, the question was decided in favor of the materialman, three judges dissenting. The facts seem to be that the defendant surety company bound itself to the owner and obligee to see that the building contractor should perform all of his duties to the owner, one of these duties being that he should pay all claims for labor and material. It was expressly provided in the bond that the surety should be notified of any act on the part of the principal that might involve loss to the surety, immediately upon knowledge of such an act coming to the owner or his supervising architect. No notice of this sort was ever given to the surety, and yet the court held that the materialman could maintain suit.

The rule that a third-party beneficiary can enforce a contract made for his benefit is too well established to need reaffirmation.¹ This is true whether the third party is a donee² or is a creditor of the promisee.³

¹ See Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008.

² *Scaver v. Ransom* (1918) 224 N. Y. 233, 120 N. E. 639; *In re Edmundson's Estate* (1918) 259 Pa. 429, 103 Atl. 277.

³ *Lawrence v. Fox* (1859) 20 N. Y. 268.

Even in England and in Massachusetts the supposed rule to the contrary is greatly modified by exceptions and by relief in equity.⁴ Hence it is not necessary to determine in the present case whether the materialman is a donee or a creditor of the obligee in the bond, except for the purpose of determining whether or not he is a beneficiary at all.

So far as appears, the obligee in the bond was the owner of the premises, and such owner owed no debt to the materialman. The building contractor did owe such a debt, but he is not the obligee. Presumably the materialman had a statutory power to file a lien upon the building and so the owner was under a correlative liability to have his property rights greatly limited by such a lien; but this does not mean that the owner owed any *duty* to the materialman or that the latter was a creditor (or obligee) of the promisee. This fact does show, however, that the owner had an interest of his own to protect when he obtained a promise of the surety to see the materialman satisfied. The existence of this interest in the obligee causes the case to be governed by the rules applicable to creditor-beneficiaries.⁵ It makes it certain that the materialman is not the *sole* beneficiary.

If the materialman is not the sole beneficiary, is there any reason for holding that he is a beneficiary at all? It is believed that there is very slight reason. A third party's right as a beneficiary may be based upon one of two things: First, he may have the legal right, even though he is not a promisee and gave no consideration, because the contracting parties intended him to have such a right. Secondly, he may be given such a right, even though the contracting parties did not intend it, on the ground of general convenience and in order to avoid circuity of action. It is upon the first that the rights of a *cestui que trust* are based, as also are the rights of any sole third-party beneficiary. It is upon the second that the rights of creditor-beneficiaries frequently depend, although it is always quite possible for the contracting parties to have the interests of the third party in mind and to intend him to have a legally enforceable right.

In the case of a builder's bond do the contracting parties *intend* to confer a legal right upon the materialman? In some instances there are statutes expressly requiring such a bond for the benefit of laborers

⁴ See (1918) 27 YALE LAW JOURNAL, 1026, and comment on *The Collection of Royalties from the Sub-Assignee of a Copyright* (1919) 28 *ibid.* 259.

⁵ Observe, however, that the agreed performance by the promisor will not be the satisfaction of an obligation owed by the promisee to the beneficiary, a requirement once insisted upon by the New York courts. *Vrooman v. Turner* (1877) 69 N. Y. 280; *Durnherr v. Rau* (1892) 135 N. Y. 219, 32 N. E. 49. It will merely protect the promisee from the exercise of the materialman's *power* of filing a lien, terminating the promisee's *liability* to a damaging decrease in his property rights.

and materialmen.⁶ These, however, are no doubt all cases where the obligee is the United States, a State, or a municipality, the statute being passed because the mechanics' lien laws give to the laborer or materialman no lien upon public buildings. If there is no such lien, the obligee has no interest to protect; and if the materialman is mentioned in the bond at all, he must be a *sole* beneficiary and the obligee must have intended him to have a legal right. Even where there is no such statute and where the obligee has an interest to protect, the bond may be so worded that the duty of the obligor to the obligee can be fulfilled only by the obligor's making a payment direct to the third party.⁷ Such a wording is evidence of an intention to confer a legal right upon the third party.

In the principal case there was no statute like that above mentioned, the materialman had security by virtue of his power to file a lien, and it does not appear that the wording of the bond required a payment by the surety direct to the materialman. Under these circumstances it requires a strong effort of the imagination to suppose that the owner had any philanthropic intention of conferring a legal right upon the materialman against the surety. It seems much more probable that he took the bond solely for his own protection and that it was immaterial to him what means the surety used to fulfil its duty to him.⁸

Should the materialman be allowed to sue on the ground of general convenience and to avoid circuity of action? No dogmatic answer seems justified, but there are strong reasons for the negative. The court should not compel the surety to pay the materialman, when there were other ways in which the surety could perform its contractual duty to the owner, and especially when, as here, such payment to the materialman would not be a fulfillment of the surety's whole duty to the obligee.⁹ To do so would force the surety to do more than his contract required, while at the same time leaving him quite open to another suit by the owner.

⁶ Federal Statutes, 30 Stat. L. 906, ch. 218; 33 Stat. L. 811, ch. 778; *Equitable Surety Co. v. McMillan* (1913) 234 U. S. 448, 34 Sup. Ct. 803; *Illinois Surety Co. v. Davis Co.* (1916) 244 U. S. 376, 37 Sup. Ct. 614; Calif. Code Civ. Proc. sec. 1203; *Carpenter v. Furrey* (1900) 128 Calif. 665, 61 Pac. 369; Ind. Rev. St. 1881, secs. 4246, 4247.

⁷ Such was the case of *Lawrence v. Fox*, *supra*, where Fox promised Holly to pay Holly's debt to Lawrence. See also *Ochs v. Carnahan Co.* (1908) 42 Ind. App. 157, 80 N. E. 163.

⁸ *Standard Gas Power Corp. v. New England Casualty Co.* (1917, N. J. Ct. Err.) 101 Atl. 281, noted in (1917) 27 YALE LAW JOURNAL, 274; *Lancaster v. Frescoln* (1902) 203 Pa. 640, 53 Atl. 508; *Parker v. Jeffery* (1894) 26 Or. 186, 37 Pac. 712. See *contra*, *Ochs v. Carnahan Co.*, *supra*.

⁹ It must be admitted that the fact that the obligee will also have an action against the surety for breach of contract is not in itself a sufficient reason for denying an action to the materialman. But *cf.* *National Bank v. Grand Lodge* (1878) 98 U. S. 123.

Even if all doubts as to whether the materialman is a beneficiary of the contract should be resolved in favor of the plaintiff (and in the case of many surety bonds it may properly be so resolved), the decision in the present case ought still to have been against him. His right was in any case a conditional right, the condition being that notice of the principal's default be given to the surety.¹⁰

It is said by the court that "the rights of laborers and materialmen to be paid for their labor and material are 'fixed' when they have faithfully performed the labor or furnished the material; and no failure of the contractor thereafter can invalidate the rights so fixed." Metaphorical language is always dangerous to exact reasoning; here trouble lies in the use of the word "fixed." It conceals all distinctions between a "power" and a "right" and between conditional rights and unconditional rights. Suppose that A sells goods to B for a price payable after B's ship comes in,¹¹ or after peace is declared, or in case it rains before June 1. The legal relations of A and B are "fixed" in the sense that offer and acceptance are complete and rights exist. The goods belong to B, and A has a conditional right to payment. Neither party has a power of revocation. Yet A can maintain no suit until another operative fact occurs, viz. the ship comes in, or peace is declared, or rain before June. If the operative fact constituting the condition is a voluntary act by A himself, he may be properly described as having a *power*. In the present case, after a default by the principal, the owner would have the power of creating a right in himself against the surety by giving notice; and the right of the beneficiary, "fixed" though it may be in the sense of irrevocable, is still conditional upon notice being given. It is true that after a beneficiary acquires a right, whether conditional or unconditional, the obligee cannot discharge it by some subsequent act,¹² but the dissenting justice is quite right in saying that the third party must take the contract as it was made: if it

¹⁰ It does not appear that the words of the bond expressly describe notice as a condition precedent to the duty of the surety. They may merely take the form of an express promise by the owner and obligee to give such notice. While an express promise is quite different from an express condition, it is very reasonable in the present case to imply a condition—that is, to infer that the parties intended that the fulfilment of the owner's promise to give notice should be a condition precedent to the surety's duty to pay. Even if the defendant were not a surety the inference from the words here used should be the same. We do not need to rely upon the doctrine that a surety's contract is to be most strictly construed in his favor. Of course, if the bond expressly described notice as a *condition*, there is no room for inference or construction.

¹¹ See *Gray v. Gardner* (1821) 17 Mass. 188. See on the whole matter the study by the present writer, *supra*, p. 739.

¹² *West Duluth v. Norton* (1894) 57 Minn. 72, 58 N. W. 829; *School Dist. ex rel. Koken Iron Works v. Livers* (1899) 147 Mo. 580, 49 S. W. 507; *Doll v. Crume* (1894) 41 Neb. 655, 59 N. W. 806; *Equitable Surety Co. v. McMillan* (1913) 234 U. S. 448, 34 Sup. Ct. 803.

was without consideration he gets nothing; if it was voidable for infancy, insanity, or fraud, it is voidable as against the third party;¹³ if the contract is vitiated by mistake of fact the third party acquires no right;¹⁴ if the contract was illegal and void as to the promisee it is no less so as to the third party;¹⁵ and if the promisor's duty is expressly or impliedly conditional the third party's correlative right is likewise conditional.¹⁶

There is no hardship whatever to the materialman involved in these rules. He has given no consideration for the surety's promise. He sold his goods in reliance upon the credit of the building contractor and upon his statutory lien. If these have depreciated in value, this was a risk he consciously assumed. If he has any right against the surety on the bond, it comes to him "by a sort of unexpected grace." If it is subject to some difficult condition, nothing is being taken from him; his gift is merely of less value than it might have been. He should not look his gift horse in the mouth. This is true even though the plaintiff was clearly intended as a beneficiary. *A fortiori* is it true if he is suing merely to avoid circuity of action by a sort of subrogation to the right of the obligee against the defendant. It makes absolutely no difference whether the third party is able to fulfil the condition or not. The legal relations constituting the contract were indeed "fixed" before he ever saw the document. He must take it as he finds it.

A. L. C.

TAXATION OF CAR COMPANIES DOING INTERSTATE COMMERCE

The drain on public finance, caused by the state's increasing participation in the social and industrial development of the present period, has exerted a tremendous pressure on the states to discover new sources of taxation. The vastly augmented amount of personalty, particularly, has engaged the earnest attention of the tax gatherer. Particularly has this gentleman's attention been directed to the property¹ of foreign

¹³ *Arnold v. Nichols* (1876) 64 N. Y. 117; *Jenness v. Simpson* (1910) 84 Vt. 127, 139, 78 Atl. 886; *Cohrt v. Kock* (1881) 56 Ia. 658; *Crowe v. Lewin* (1884) 95 N. Y. 423; *Dunning v. Leavitt* (1881) 85 N. Y. 30; *Green v. Turner* (1898, C. C. E. D. Wis.) 80 Fed. 41.

¹⁴ *Crowe v. Lewin* (1884) 95 N. Y. 423; *Stevens Inst. v. Sheridan* (1878, Ch.) 30 N. J. Eq. 23; *Rogers v. Castle* (1892) 51 Minn. 428, 53 N. W. 651; *Episcopal Mission v. Brown* (1894) 158 U. S. 222, 15 Sup. Ct. 833.

¹⁵ *National Surety Co. v. Kansas City Brick Co.* (1906) 73 Kan. 196, 84 Pac. 1034.

¹⁶ *Jenness v. Simpson* (1910) 84 Vt. 127, 143, 78 Atl. 886; *Osborne v. Cabell* (1883) 77 Va. 462.

¹The late Professor W. N. Hohfeld referred to the ambiguity in the use of the concept "property" in the following language: "A second reason for the tendency to confuse or blend non-legal and legal conceptions consists in the