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CONTRACTS IN IOWA REVISITED—THIRD PARTY BENEFICIARIES AND ASSIGNMENTS

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Third persons, not parties to a contract, may acquire rights thereunder on the making of the contract itself or they may acquire rights by subsequent transfer from one of the parties. The first subject is classified as the law of Third Party Beneficiaries and the latter subject as the law of Assignments. In view of a recent flurry of cases in the Iowa courts it seems appropriate to collect and analyze the Iowa decisions on these subjects since the publication of the "Iowa Annotations to the Restatement of Contracts".[1]

That a third person, who is not a party to the contract, may obtain original rights thereunder is a proposition accepted widely throughout the country in spite of objections variously urged such as lack of "privity" and being a "stranger to the consideration",[2] and has been applied in Iowa during this period to a variety of situations.[3]

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[1] IOWA ANNOTATIONS TO THE RESTATEMENT OF CONTRACTS (1934) will be subsequently referred to as IOWA ANNOTATIONS.

[2] For a comprehensive discussion of the law on Third Party Beneficiaries, see CORBIN, CONTRACTS §§ 772 *et seq.* (1951); WILLISTON, CONTRACTS §§ 347 *et seq.* (Rev. ed. 1936). Applicable RESTATEMENT OF CONTRACTS sections are 133-147 inclusive. These authorities will be subsequently referred to simply as CORBIN, WILLISTON, and RESTATEMENT.

[3] Most of the cases are referred to in subsequent discussion and footnotes in this article. However, certain of the cases are collected at this point.

(a) Mortgagee may recover a personal deficiency judgment against a grantee who took a deed in which there was a clause for assumption of the mortgage, by reference from referee's report, even though the grantor was not personally liable: *First Trust Joint Stock Land Bank of Chicago v. Thomas*, 223 Iowa 1018, 274 N.W. 11, 275 N.W. 392 (1937); CORBIN § 796; WILLISTON §§ 382-387; see collection of cases in IOWA ANNOTATIONS § 136-II-A-2; but the grantee may show that insertion of such a clause in the deed was without his consent: *Union Properties, Inc. v. Grant*, 229 Iowa 303, 294 N.W. 312 (1940); *Andrew v. Naglestad*, 216 Iowa 248, 249 N.W. 131 (1933). Claim was allowed on behalf of mortgagee against estate of assuming grantee, in *Federal Land Bank of Omaha v. Ditto*, 227 Iowa 475, 288 N.W. 618 (1939).

(b) Assignment of contract for purchase of land, with clause as to assumption of obligation in assignment, led to personal liability of as-

Legal controversy continues, however, over the problem of the incidental beneficiary who may not maintain an action and

signee: *Coral Gables, Inc. v Kleaveland,* 220 Iowa 1280, 263 N.W. 339 (1935); see collection of cases in IOWA ANNOTATIONS § 136-II-A-1. A new partnership may assume the obligations of the old partnership even though the creditor is not a party to the contract of assumption: *Western Mut. Fire Ins. Co. v. Lamson Bros. & Co.,* 42 F.Supp. 1007 (S.D. Iowa 1941).

(c) Son permitted to enforce oral promise made by decedent to father to devise property to son if father would permit son to live with decedent: *Ford v. Young,* 225 Iowa 956, 282 N.W. 324 (1938). The result of children securing some of the consequences of adoption without compliance with statutory adoption procedures, on the theory of a contract for inheritance made by others for the benefit of the child, and followed by performance by the child, is sometimes referred to as "adoption by estoppel". See such cases as In re *Painter's Estate,* 246 Iowa 307, 67 N.W.2d 617 (1954), and *Vermillion v. Sikora,* 227 Iowa 786, 289 N.W. 27 (1939), and discussion and cases in Uhlenhopp, *Adoption in Iowa,* 40 IOWA L. REV. 228, 291 (1955). See also IOWA ANNOTATIONS § 138.

An analogous case is In re *Estate of Wilmott,* 215 Iowa 546, 243 N.W. 34 (1932), in which a daughter recovered for services rendered decedent on the basis of express contract by father with decedent that decedent would pay daughter, thus eliminating certain alleged procedural errors.

(d) The joint and mutual will cases, although commonly treated in other places than in contracts books, do support the right of a third person to enforce a promise for his benefit which may be found in the making of mutual wills, and are essentially based on a contract theory, whether labelled as a third party beneficiary contract case or not. See TePaske, *A Study of Joint and Mutual Wills in Iowa,* 24 IOWA L. REV., BAR ASS'N SEC. 15 (1938), and particularly such cases as: In re *Estate of Johnson,* 233 Iowa 782, 10 N.W.2d 664, 148 A.L.R. 748 (1943), which refused to enforce, because of inadequacy of consideration, the alleged promise in a mutual will to leave property to children of deceased spouse; In re *Estate of Farley,* 237 Iowa 1069, 24 N.W.2d 453 (1946), which held that the appropriate way to enforce the rights of third parties in a mutual will situation was not to enjoin probate of the revoking will of the survivor, but to bring an action for specific performance or damages on the alleged promise found in the mutual will; and *Awtry's Estate v. Commissioner of Internal Revenue,* 224 F.2d 749 (8th Cir. 1955), which held that, with relation to the marital deduction under federal estate tax law, the presence of provisions in a mutual will of both decedent and the surviving spouse did not establish in Iowa a "terminable interest" in the survivor under federal law, to prevent use of the marital deduction, because the claims of third parties under the mutual will were only potential contract claims against the survivor which might never be exercised. Other cases enforcing the right of a third party are: *DeJong v. Huyser,* 233 Iowa 1315, 11 N.W.2d 566 (1943); *Child v. Smith,* 225 Iowa 1205, 282 N.W. 316 (1936). See also note 33, *infra*; annotation on "Joint, Mutual, and Reciprocal Wills", 169 A.L.R. 9; annotations on "Right of Beneficiary to Enforce Contract Between Third Persons to Provide for Him by Will", 2 A.L.R. 1193, 33 A.L.R. 739, and 73 A.L.R. 1395; Sparks, *Problems in the Formation of Contracts to Devise or Bequeath,* 40 CORNELL L.Q. 60, 63 (1954); *Contracts to Devise or Bequeath as an Estate Planning Device,* 25 Mo. L.R. 1, 3 (1955). The observation that these mutual will cases are based on contract theory is weakened by the rule referred to in note 33, *infra,* that the rights of third parties may be terminated by notice by one of the makers of the mutual will to the other during the lifetime of both, and by the opinion in the very recent Iowa case of *Gillette v. Cable,* 79 N.W. 2d 195 (Iowa 1956), which concluded, in a case involving an attempted revocation of an earlier joint will by subsequent mutual reciprocal wills, that the standard of competence, required for the revoking wills, and accordingly for termination of rights under the

over the problem of the vesting of rights in third parties free from change by the original parties to the contract. The recent case of *Johnson Farm Equipment Company v. Cook*[4] illustrates the problem of the incidental beneficiary. In that case, a suit against defendants for an alleged conversion of property of plaintiffs which defendants had seized in an attachment suit on behalf of a client, the defendants attempted to support a motion for summary judgment on the basis of an agreement by the plaintiff with interveners in the attachment suit (other creditors of defendants' client), to look only to an escrow fund and an attachment bond for payment of any judgment for the property; the money in the fund was apparently less than the alleged value of the property. The Court of Appeals for the Eighth Circuit reversed the lower court's granting of a summary judgment and held after an analysis of Iowa cases that the lower court could not, at least as a matter of law, hold that the defendants were anything more than incidental beneficiaries of the agreement, and that defendants as such incidental beneficiaries could not claim any benefits from the agreement. This is a sufficient illustration of the law that there are some persons who, although they may actually hope to receive some benefit from the promised performance of the contract, are not allowed to maintain an action for breach thereof.

The question remains, however, as to the basis upon which this distinction between the unprotected incidental beneficiary and the protected beneficiary is to be made. The Restatement

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contract manifested in the joint will, would not be that of contractual competence, but only that of competence to make or revoke a will. See further discussion of this case in notes 33 and 46, *infra*. In In re *Lender's Estate*, 78 N.W.2d 536 (Iowa 1956) the matter of an alleged breach of an alleged agreement to make mutual wills was disposed of on objections to the final report of the executrices of the surviving testatrix; the court decided any error in so proceeding was waived by failure to move to transfer from the probate docket.

(e) The interest of a survivor in so-called joint bank accounts and in U. S. government bonds has finally been enforced on a contract theory, as a third party beneficiary, even though the survivor did not furnish any of the account and even though there was no compliance with ordinary rules of joint tenancy, gift or testamentary disposition: In re *Estate of Murray*, 236 Iowa 807, 20 N.W.2d 49 (1945) (U. S. treasury bonds); *Hill v. Havens*, 242 Iowa 920, 48 N.W.2d 870 (1951) (joint bank account); see cases collected in the *Hill* opinion and various comments on the matter in Comment, 37 IOWA L. REV. 291 (1952), and in Sayre, *A Review of Iowa Contract Law: 1942-1952*, 38 IOWA L. REV. 506, 517 (1953). On U. S. Savings Bonds, see annotation in 37 A.L.R.2d 1221. The recent case of In re *Miller's Estate*, ... N.W.2d ..... (Iowa 1956), upheld the interest of a survivor in debentures payable to "John Miller or Robert Miller, either one or the survivor", on a joint tenancy theory, even though the deceased furnished the money for purchase of the debentures, and as against an attempt to vary or contradict the instrument by parol evidence. Interests in joint bank accounts and in proceeds of an insurance policy were held not to be testamentary in In re *Lender's Estate*, 78 N.W.2d 536 (Iowa 1956).

[4] 230 F.2d 119 (8th Cir. 1956) (an appeal from the Southern District of Iowa; there is no reported opinion of the District Court).

of Contracts, quoted by the Eighth Circuit and apparently accepted as a guide, sets up categories of donee and creditor beneficiaries who may have rights, and then states that all others are incidental beneficiaries who do not acquire any rights.[5] The Restatement definitions in section 133 are as follows:

> "(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in subsection (3):
> "(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;
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> "(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;
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> "(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist."

It is interesting to note, however, that none of the prevailing opinions in cases decided in the Iowa Supreme Court since the publication of the Restatement of Contracts, related to the problem of the incidental beneficiary, makes any reference to the Restatement definitions.[6] Furthermore, there are two rather recent Iowa Supreme Court decisions, not cited in the opinion of the Eighth Circuit, that present difficulties as to compliance with the Restatement classification and do not seem to be consistent with some earlier Iowa cases decided during this same period.

In *Chicago & Northwestern Railway Company v. Kramme*,[7] a 1953 case, the majority opinion interpreted a license agreement given by the railway company to a contractor to use a private crossing, in which agreement there was language of indemnity to the railway from liability for loss, damage, injury, or death, and also language of promise "to pay for all . . . injury to or death of persons, . . . arising . . . from . . . said facility", so that this clause, other than the indemnity clause, supported an action by the railway to recover for hospital and medical expenses incurred by

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[5] RESTATEMENT § 147 states that the incidental beneficiary acquires no rights. § 135 states the duties created by a gift promise, and § 136 the duties created by a promise to discharge a duty.

[6] The dissenting opinion in *Chicago & N.W. Ry. v. Kramme*, 244 Iowa 944, 59 N.W.2d 204 (1953), makes passing reference to RESTATEMENT § 147.

[7] 244 Iowa 944, 59 N.W.2d 204 (1953).

the railway for an injured employee, even though the railway apparently was not liable for the injury, which seems to have been caused by the operations of the contractor over the private crossing. In support of this interpretation, the majority opinion states:

> "The agreement quoted last above seems to have been intended not merely for plaintiff's protection but also for the benefit of persons injured from use of the crossing. There is little doubt that Stewart [the employee], had he seen fit, could have recovered these expenses from defendants by virtue of the agreement. . . . Not only could Stewart have enforced the agreement had he seen fit, but this plaintiff is entitled to do so.",

citing Rules 2 and 3, Iowa Rules of Civil Procedure, and some cases in support.[8]

In *Reeves v. Better Taste Popcorn Company*,[9] a 1954 case, where there was an agreement for the purchase of popcorn from a tenant, in which no reference was made to payments to the landlord or to rent, except that the landlord signed on the agreement a consent to it, the Court allowed an action on this contract against the purchaser by the landlord for an amount representing the landlord's share of the crop, agreed upon as rent between the landlord and the tenant. The opinion refers to some evidence that in prior years payments had been made directly to the landlord, but had not so been made in this case.[10] The opinion merely states

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[8] 244 Iowa 944, 949, 59 N.W.2d 204, 207 (1953). Iowa R.C.P. 2 (1954) states: ". . . a party with whom or in whose name a contract is made for another's benefit, . . . may sue in his own name without joining the party for whose benefit the action is prosecuted." R.C.P. 3 authorizes a direct action on a public bond where "intended for the security of the public generally, or of particular individuals". Mere recitation of these rules, however, does not aid in the determination of the basic question of incidental beneficiaries, whether in the words of Rule 2 it was "made for another's benefit" or in the words of Rule 3 it was "intended for the security". For illustrations of actions by third persons on bonds or insurance policies required by statute or departmental rule, emphasizing problems of interpretation such as whether a judgment must first be secured against an insured, see: *Hoosier Cas. Co. of Indianapolis v. Fox*, 102 F. Supp. 214 (N.D. Iowa 1952); *Eggermont v. Central Surety & Ins. Corp.*, 236 Iowa 197, 17 N.W.2d 840 (1945) (motor vehicle carrier policy— Missouri law); *Sanford Mfg. Co. v. Western Mut. Fire Ins. Co.*, 229 Iowa 283, 294 N.W. 406 (1940) (motor freight terminal liability policy); *Schulte v. Great Lakes Forwarding Corp.*, 228 Iowa 1012, 291 N.W. 158 (1940) (motor carrier insurance policy); *Dickson v. Fidelity & Cas. Co.*, 223 Iowa 518, 273 N.W. 102 (1937) (securities dealer bond); *Kellogg v. Bell*, 222 Iowa 510, 268 N.W. 534 (1936) (securities dealer bond); *Ellis v. Bruce*, 215 Iowa 308, 245 N.W. 320 (1932) (truck owner). See also *McCann v. Iowa Mut. Liab. Ins. Co.*, 231 Iowa 509, 1 N.W. 2d 682 (1942).

[9] 246 Iowa 508, 66 N.W.2d 853 (1954).

[10] Plaintiff also asked for reformation of the contract to provide for payments to plaintiff which defendant resisted on the theory plaintiff was not a party to the contract. The court merely stated it found it unnecessary to decide that question. See subsequent discussion in the body of this article, and note 39, on the right of a third person to assert claims of the promisee.

that because the contract was, in part, for the landlord's benefit, it is enforceable by her.

Does either one of these case situations comply with the definition of donee or creditor beneficiary as set out in the Restatement? To be a donee beneficiary the Restatement requires a purpose of the promisee to make a gift or to confer a right not due from the promisee. It seems inconceivable that these cases belong in this gift classification. A creditor beneficiary classification also encounters difficulties. In the *Reeves* case the landlord was a creditor of the promisee tenant, and in the *Kramme* case, although there was apparently no legal liability of the railroad to the employee, still, in that situation as in many other cases, there may be, at least, in the words of the Restatement, an "asserted duty of the promisee to the beneficiary". However, the Restatement requires that the performance will satisfy the actual or supposed or asserted duty. This requires that the promise be interpreted to call for performance to the third person, not to the promisee. Merely providing the debtor with sufficient funds to give to the third party is not considered enough to support an action by the third party under the contract; the creditor there is only an incidental beneficiary.[11] In the *Reeves* and *Kramme* cases, the promise, at least in words, did not call for performance to the third party. Conceivably the *Reeves* case might support an interpretation to pay to the landlord, in view of the stated prior experience, although there is no articulation of this position in the opinion. In the *Kramme* case it is much more difficult to add, by implication, to the phrase "agrees to pay for all injury", the additional words, "to the injured party." Such an interpretation, furthermore, would, it is believed, throw an added complication into the litigation. Such an interpretation would make it clear that the action sued on is really that of failure to perform to the beneficiary and not failure to perform to the promisee. Although it is true that the promisee, as well as the beneficiary, may maintain an action for failure to perform to the beneficiary, satisfaction of the duty to the beneficiary should relieve the promisor of his duty to the promisee.[12] In the release by the employee of the contractor and the railway, which was present in this case, there may have been an inclusion of the items for which the railway is seeking recovery; the railway might not desire a theory that could cut down its recovery because of prior release by the employee.[13]

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[11] CORBIN §§ 787, 779D; RESTATEMENT § 133, Illustration 9; SIMPSON, CONTRACTS § 81 (1956); GRISMORE, CONTRACTS § 234 (1947).

[12] CORBIN §§ 812, 824; RESTATEMENT § 136(1)(c).

[13] No attempt is made here to discuss the argument as to interpretation of the clause apart from the third party beneficiary argument. The interpretation reached by the Court may be permissible without use of the third party beneficiary argument. The dissent disagreed as to interpretation and as to use of the third party beneficiary idea. The third party beneficiary concept is also used as an aid to interpretation in In re *Disinterment of Tow*, 243 Iowa 695, 53 N.W.2d 283 (1952),

In any event, it is submitted that more attention should have been paid in each case to the interpretation problem before the rather casual assumption was made that these contracts were for the benefit of a third party.

These two cases are also difficult to reconcile with some of the earlier Iowa decisions during this period. There are three earlier cases in which the Court refused to permit an action by the third party. In *Bankers Trust Company v. Knee*[14] the Court refused to consider that a particular mortgage on property taken by the partners in a deed, "subject to" a mortgage, became a personal liability of the partnership merely because the partners in a partnership agreement recited the mortgage and stated "co-partners have taken title subject to the mortgage which they have agreed to pay." The Court merely stated, in support of the decision, that this was a contract of partnership and was not a contract for the benefit of a third party. In *Allen v. Massachusetts Bonding & Insurance Company*[15] the Court affirmed the sustaining of a demurrer against interveners, who were customers of a particular stock broker, and who were attempting to recover from the defendant, for loss of securities deposited with the broker as collateral, on a bond issued by defendant to the stock broker in which the defendant promised "to indemnify [stock broker] against direct loss of any . . . securities . . . held by the Insured as collateral . . . whether or not the Insured is liable therefor." The Court merely stated that there was no merit to the contention that this was executed with purpose and intent to cover this loss and pointed out that interveners were not parties to the conract and not named or referred to therein. In *Casey v. Jesup Creamery Company*[16] the Court affirmed a directed verdict against a physician, who was attempting to recover against an employer for medical services rendered to an employee, beyond the amount granted by the Workmen's Compensation law, under an agreement between the employer, insurance carrier, and employee, whereby the employer and insurance carrier promised to pay a specified

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where the Court, as a part of an argument in support of an interpretation of IOWA CODE §§ 141.24, and 141.25 (1954), which provide for an order of disinterment on application of "party . . . in civil proceedings" and only where "someone is . . . civilly liable", allowing the insurance company to apply for disinterment, stated, 243 Iowa at 698, 53 N.W.2d at 28, that: "The employee, though not a party to the insurance contract was nevertheless a member of a class for whose benefit the contract was made. There is a relationship between him and the insurer-carrier. One for whose benefit a contract is entered into may maintain action to enforce his rights under it. Venz v. State Auto. Ins. Assn., 217 Iowa 662, 666, 251 N.W. 27. The rule is unquestioned in this state. It is unnecessary that the beneficiary assent to the contract or even that he have knowledge of it. Rodgers v. Reinking, 205 Iowa 1311, 1319, 217 N.W. 441."

[14] 222 Iowa 988, 270 N.W. 438 (1936), prior opinion in 263 N.W. 549 (1935).

[15] 218 Iowa 294, 253 N.W. 498 (1934).

[16] 224 Iowa 1094, 278 N.W. 214 (1938).

amount "plus all medical expense". The Court pointed out that the agreement was not made for the "express benefit" of the physician and that he was only incidentally benefitted. In these cases, even though there was either an actual duty, or an asserted duty of some sort, of the promisee to the third person, the apparent difficulty in each case seems to be that there was no promise to perform to the third party. This conclusion is particularly supported by the statement in the *Casey* case that it must be for the express benefit of the third party; the only reasonable interpretation of express benefit is that it must call for performance to the third party. *In re Estate of Walker,*[17] while approving the maintenance of an action by children of one of the parties to an antenuptial agreement in which there was a promise to pay to these children certain amounts if the parent did not survive, used the following language, after discussing some prior Iowa cases, in adhering to the express benefit test:

> "The difficulty with the argument of the administrator herein is that too much reliance is placed upon what has been said in the foregoing quotations and citations, without giving adequate consideration to what was actually decided. . . . Counsel concede, what even a superficial examination of the authorities demonstrates, that there is a definite conflict of decisions on the question now before us. However, we are satisfied that the decisions of this court are consistent in this. Where a contract is supported by a legal consideration and is *expressly* made for the benefit of a third party, that third party may sue thereon."[18]

None of these prior Iowa cases was referred to in the prevailing opinion in either the *Reeves* or the *Kramme* cases, first discussed, nor was any attention paid to the announced test of "express benefit". Attention either to the Restatement classification, prob-

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[17] 234 Iowa 1126, 15 N.W.2d 260 (1944).

[18] 234 Iowa 1126, 1132, 1133, 15 N.W.2d 260, 264 (1944). Three earlier cases during this period, although supporting the right of a third person to bring an action on the contract only on a statement that a third party for whose benefit a contract is made may bring an action, seem to be consistent both with the Restatement test and the "express benefit" test: *Venz v. State Auto Ins. Ass'n,* 217 Iowa 662, 251 N.W. 27 (1933), supporting direct action by the injured party on a liability insurance policy, under a clause providing for direct action after judgment secured against insured, clearly calls for express benefit of third party and performance to the third party will satisfy the obligation of the promisee-insurer; *Climon v. Lepley,* 218 Iowa 1038, 256 N.W. 739 (1934), an action by a sister against a brother, grantee in a deed in which he promised to pay the sister, and *Preston v. Howell,* 219 Iowa 230, 257 N.W. 415 (1934), involving a promise by bondholders to relieve statutory liability of directors to creditors, clearly display an express intent to benefit the sister and the directors, and also comply with the test for a donee beneficiary in the Restatement, of showing a purpose to make a gift to the third person. *Preston v. Howell,* stated by the Eighth Circuit in *Johnson Farm Equipment Co. v. Cook, supra,* note 4, to have been used as authority by the district judge, was distinguished by that court because reference was made to the directors and the scope of their rights was set out.

lems of interpretation previously referred to, or these prior cases, might have produced a different result. On the other hand, attention in the Eighth Circuit opinion to the apparent tendency displayed by the Iowa Supreme Court in these recent cases toward the expansion of the categories of protected beneficiaries might have produced a different result there.[19]

Another question of importance is when do the rights of the third person become so firmly fixed, *i.e.*, vested, that the original parties may not alter or vary them by subsequent agreement. The recent Iowa decision of *Iowa Home Mutual Casualty Company v. Farmers Mutual Hail Insurance Company*[20] involved this problem. This was a declaratory judgment action to determine whether defendant insurer should contribute to plaintiff insurer a share of personal injury and death claims of other defendants. Defendant insurer had issued a standard automobile liability policy to the father of the driver of father's car, who had allegedly injured the other defendants. This policy contained the usual "omnibus clause" defining as an insured not only the named insured but also persons driving with the consent of the named insured. Plaintiff-insurer had issued to the son-driver a liability policy of the "non-ownership" variety. The defendant insurer alleged, among other things, that the father's policy had been modified a few days before the accident by a rider excluding the son from coverage. The plaintiff insurer replied, essentially, that there was no consideration for the rider,[21] that there was fraud

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[19] The Eighth Circuit opinion, 230 F.2d 119, at 124, stated: "Iowa law does not go beyond the principles which have been stated [quotations from RESTATEMENT and WILLISTON], in its recognition of third party rights. The Iowa Supreme Court has specifically held that an incidental beneficiary cannot claim any right to the performance of a contract between other parties. Casey v. Jesup Creamery Co., 224 Iowa 1094, 278 N.W. 214; Chicago, R. I. & P. Ry. Co. v. City of Ottumwa, 112 Iowa 300, 83 N.W. 1074, 51 L.R.A. 763; German State Bank v. Northwestern Water & Light Co., 104 Iowa 717, 74 N.W. 685 [see discussion of this case in CORBIN § 779G, page 55, and § 795, note 29]. . . . Contracts made between two parties for the benefit of a third are enforceable by the latter under certain conditions. Among these conditions is . . . that the contract was made for his express benefit. That he might immediately benefit by the contract . . . is not determinative of the question at all. Casey v. Jesup Creamery Co., supra, 278 N.W. at page 215. Some of the Iowa cases have engaged in even more restrictive expression as to the application of the principles we have set out. To enable a third party to sue upon such a contract it must have been made for his benefit; and if its primary object was to subserve the interests of one or both of the parties to the contract, they alone can maintain an action for the breach. Messenger v. Votaw, 75 Iowa 225, 39 N.W. 280, 281, and the German State Bank case, supra, 74 N.W. at page 686, went so far as to declare that 'The principle (that one may sue upon a promise made to another for his benefit) is . . . confined to cases where the person for whose benefit the promise is made has the sole, exclusive interest in its performance.' "

[20] 73 N.W.2d 22 (Iowa 1955).

[21] The rider was added before the end of the term, and apparently without any return of premium, change in policy, or other benefit to the insured. Apparently there was no legal benefit or detriment. The

and mistake in procuring it and that the named insured, within a reasonable time after learning of the truth, notified defendant in writing of rescission, repudiation and cancellation of the modification. The trial court sustained a motion to strike the essential portions of the plaintiff's reply and entered judgment against the plaintiff. The Supreme Court affirmed, the principal point being that the son-driver, to whose rights the plaintiff insurer' succeeded, had no rights at the time of the alleged modification, and was accordingly in no position to assert the claims made.[22]

There are really two problems involved in such a case, although the Court's discussion is not so clearly delineated. One problem is whether the parties may alter or vary the original contract so as to cut off the beneficiary. The second question is, even assuming an affirmative answer to the first question, may a potential beneficiary successfully urge that an effective alteration has not been made. As to the first question, the Restatement of Contracts in sections 142 and 143 makes a distinction between the cases of the donee beneficiary and the creditor beneficiary, as follows:

> "Section 142. . . . Unless the power to do so is reserved, the duty of the promisor to the donee beneficiary cannot be released by the promisee or affected by any agreement between the promisee and promisor, but if the promisee receives consideration for an attempted release or discharge of the promisor's duty, the donee beneficiary can assert a right to the consideration so received, and on doing so loses his right against the promisor.
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> "Section 143. . . . A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if,
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> (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and
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> (b) the promisee's action is not a fraud on creditors."

There have been differences of opinion among courts and in textual discussions as to when the rights of beneficiaries vest, for instance as to whether knowledge by the beneficiary is required, whether reliance is required, whether creditor and donee beneficiary cases should be treated differently, and particularly as to

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lack of consideration argument would seem to be a good one unless the Iowa Court were disposed to expand the "waiver" concept. See discussion in Hudson, *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties*, 5 DRAKE L. REV. 3 (1955).

[22] Defendant's argument that the father would be only secondarily liable and the son primarily liable was not passed on by the Court. Also, discussion of plaintiff's appeal as to the dismissal of the injury claimants was said not to be necessary because of previous discussion as to son's claim against defendant insurer and dismissal of action by injured claimants against father, rendering moot the liability of his insurer.

whether the rule commonly applied in life insurance cases for vesting of rights at the time of making of the contract even if there is no knowledge by the beneficiary,[23] should be applied to other donee beneficiary cases, as the Restatement states.[24] Some argument points out the inequity of establishing a preferred position over a creditor beneficiary for a donee beneficiary who has done nothing, and that the rule in life insurance cases was a result of an early statutory preference in some states.[25] Others have pointed out the analogy of the donee beneficiary to the early vesting in the executed gift or trust cases. The opinion in *Stanfield v. W. C. McBride, Inc.*, a Kansas case cited in the Iowa case and similar to it, simply considered an extension of indefeasibility to such a situation an "affront to common sense." [26]

In terms of the classification used by the Restatement, the son, apparently assumed in the opinion to be a person who, if other requirements were met, would have rights on a contract executed

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[23] Of course ordinarily there is no vested right in the beneficiary when the right is reserved to change the beneficiary: *Stolar v. Turner*, 237 Iowa 593, 21 N.W.2d 544 (1946); *Petty v. Mutual Benefit Life Ins. Co.*, 235 Iowa 455, 15 N.W.2d 613 (1944); *Shepherd v. Pacific Mut. Life Ins. Co.*, 230 Iowa 1304, 300 N.W. 556 (1941); *Penn Mut. Life Ins. Co. v. Mulvaney*, 221 Iowa 925, 265 N.W. 889 (1936); *Potter v. Northwestern Mut. Life Ins. Co.*, 216 Iowa 799, 247 N.W. 669 (1933). Even with such reservation, however, the right of a named beneficiary may be vested if there was a promise with consideration not to change the beneficiary: *Aetna Life Ins. Co. of Hartford v. Morlan*, 221 Iowa 110, 264 N.W. 58 (1935); but the insurance company will be protected if it pays without knowledge to the apparent beneficiary: *Bennett v. Union Central Life Ins. Co.*, 220 Iowa 927, 263 N.W. 25 (1935). See collection of cases in IOWA ANNOTATIONS § 142. It was reiterated during this period that a beneficiary may not obtain a vested right in a certificate in a fraternal association: *Kubin v. Kubin*, 232 Iowa 1034, 6 N.W.2d 860 (1942).

[24] For a discussion of the effect of variation of contract on beneficiaries' rights, see CORBIN §§ 812, 813, 814; WILLISTON §§ 396, 396A, 396B, 397; Page, *The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Party*, 12 WIS. L. REV. 141 (1937); Comment, *The Vesting of a Donee Beneficiary's Interest*, 39 MARQUETTE L. REV. 384 (1956).

[25] Page, *op. cit. supra*, note 24.

[26] 149 Kan. 567, 88 P.2d 1002 (1939). The similarities were that there was a claim through omnibus insured driver, claim by an insurer that the driver had been removed from the omnibus coverage before the end of the policy term and before the accident, and a response of fraud and no consideration for such modification. The Kansas court said, 149 Kan. at 570-573, 88 P.2d at 1004, 1005: "In the case of life insurance contracts the almost universal rule is that, in the absence of a statute or power of revocation the beneficiary acquires a vested right of which he may not be deprived without his consent. . . . But these cases do not reach the question before us. . . . To hold that the moment A and B enter into an agreement for the benefit of C, that such third party has at that moment and under all circumstances acquired an interest in the contract which is indefeasibly vested, is an affront to common sense. While the doctrine of Lawrence v. Fox, 20 N.Y. 268, was adopted in this state at an early date and has been steadily adhered to through the years it should not be pushed beyond the bounds of reason." The same incident was involved in litigation in *Employers Mut. Cas. Co. v. American Auto. Ins. Co.*, 131 F.2d 802 (10th Cir. 1942).

by others,[27] would be a donee beneficiary [28] because there was no apparent obligation from the promisee, the named insured, to the son that would be satisfied by the contract. Under the Restatement rule this right would then not be subject to alteration or release by the original parties from the time of the making of the contract, without regard to knowledge by the donee beneficiary. However, the Court did not follow this Restatement rule but concluded, without any reference to the Restatement classification or consideration of a possible difference between creditor and donee beneficiary cases,[29] that the son had no rights at the time of the accident, stating:

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[27] CORBIN § 807. See collection of cases in Annotation in 72 A.L.R. 1375, entitled "Automobile Liability Insurance: 'Omnibus Coverage Clause' ", particularly division XVII, "By whom, or in whose name, the indemnity granted by the clause may be recovered", which has been supplemented in 106 A.L.R. 1251 and 126 A.L.R. 544.

[28] CORBIN § 807. The *Iowa Home Mutual* case is referred to in the 1956 Pocket Parts to CORBIN §§ 781 and 813, and is commented on in terms which suggest that the principal problem was the rights of the injured parties. Under the heading "When Must the Beneficiary be Identified", the comment is: "A liability insurance policy may create rights in a third party who may be injured in the future but no such party has a right before the injury occurs. Therefore the parties to the policy have power to modify or discharge the policy at any time before occurrence of an injury to a third person. A third person who is not covered by the terms of the policy as modified has no enforceable right. Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co."; and in § 813, under the heading "Power of the Promisee to Discharge—Revocation Distinguished": "Where a beneficiary is wholly indeterminate when the contract is made and cannot become a beneficiary unless some future event occurs, the contracting parties have power to modify or discharge the contract prior to the occurrence of that event. Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co., 73 N.W.2d 22, ... Iowa ..... (1955), holding that a liability insurance policy covering insured third parties can be modified to exclude them prior to the occurrence of the injury." The principal reference in the case was to the son's (the omnibus insured) rights, and not to the injured parties; the court thought it was unnecessary to discuss these parties; see discussion in note 22, *supra*. The injured parties, it should be noted, in terms of the Restatement classification, would be creditor beneficiaries in Iowa because of the liability of the owner for injuries committed by a person driving his automobile with his consent, under Iowa Code § 321.493 (1954). In the absence of the Iowa statutory liability of the owner, the injured parties would be creditors only of the beneficiary and thus not strictly within the Restatement test of discharging an obligation of the promisee (named insured), but Corbin believes these parties should be treated as creditor beneficiaries, at least if the language of the contract calls for performance to them. CORBIN §§ 787(10) and (11), 795, 807. A common provision in automobile liability policies is for the insurer to pay on behalf of the insured (by definition including a permissive driver) sums which insured shall become legally obligated to pay as damages, with a provision for no action against an insurance company until after the judgment against the insured or agreement; this would seem to call for performance to the injured parties. See note 18, *supra*.

[29] IOWA ANNOTATIONS § 142 states at page 734: "The rule stated by this section has also been applied by the Iowa Court in a case other than one involving a life insurance policy. Thus, where two railroad companies contracted to maintain a switch to a light company's plant with a specified method of termination reserved, it was held that the railroad companies could not later terminate the contract except as

> "Iowa subscribes to the prevailing American rule that a contract between two parties may be enforced by a third person for whose benefit it was made. . . . This is true even when the third party beneficiary is not expressly named or identified, or even known when the contract is made,[30] or when his beneficial interest is dependent on a contingency, if he or the contingency is sufficiently described to make identification possible.[31] . . . But we also recognize that this right is always subject to the right of the original contractors to modify or terminate the contract before the third party has acquired rights under it. [citing cases which, however, do not involve donee beneficiaries][32] . . . And as was the case in Stanfield v. W. C. McBride, Inc., supra, the change or modification was made before James became the driver of his father's car or was an insured under or, so far as the Record shows, had any knowledge of, the insurance contract."

It is not clear what the Court considers to be necessary before vesting; the opinion seems, however, to be proceeding on a theory

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provided, and the light company could force them to perform according to the terms of the contract. Cedar Rapids R'y & Light Co. v. Railway Co. (1910), 145-528, 124 N.W. 323." As this writer reads that case, however, there was knowledge and reliance by the beneficiary before the attempted termination, thus applying a rule like § 143, instead of § 142.

[30] CORBIN § 781; WILLISTON § 378; RESTATEMENT § 139.

[31] The Court in its opinion did not seem to be concerned about the problem of identification of the son as coming within the omnibus clause of the policy. A beneficiary must be identified or identifiable to acquire rights [CORBIN § 781; and SIMPSON, CONTRACTS § 85 (1956)], but it would seem clear enough, in view of the family relationship, that the omnibus clause covering drivers with consent would include, from the point of view of identfication, a son from the very beginning. SIMPSON, CONTRACTS § 85 (1956) and GRISMORE, CONTRACTS § 238 (1947) cite the case of *Stanfield v. W. C. McBride, Inc., supra,* note 26, cited in the Iowa case and involving a similar attempt to recover through an omnibus insured from an insurance company that had allegedly modified a policy to remove the particular individual, as authority for the proposition that an agreement may be rescinded as to the third party's rights, up to the time of being capable of identification. The opinion itself refers to lack of knowledge by the potential beneficiary, and does not seem to be concerned with identification, although that may be a deficiency in the case.

[32] Coen & Conway v. Scott Co. Bank, 205 Iowa 483, 218 N.W. 325 (1928) (was treated as an incidental beneficiary anyway); Peters v. Goodrich, 192 Iowa 790, 185 N.W. 903 (1921) (assumption clause in deed was not in accordance with agreement and was not supported by consideration); Shult v. Doyle, 200 Iowa 1, 201 N.W. 787 (1925) (see discussion in body of article and note 38, *infra*); American Sav. Bank v. Borcherding, 201 Iowa 765, 208 N.W. 518 (1926) (see discussion in body of article and notes 39 *et seq.*); Gilbert v. Sanderson, 56 Iowa 349, 9 N.W. 293 (1881) (creditor-beneficiary-mortgagee). The usual reference in these cases is that the alteration is valid if before knowledge and acceptance by the third person. See note 29, *supra.*

Reichart v. Downs, 226 Iowa 870, 285 N.W. 256 (1939), may also concern alteration of a creditor beneficiary contract. After a lease was executed the landlord noted on the lease, by agreement with tenant, "First parties stand good for gas until crops are raised, but get refund". Apparently there was a later independent promise by the landlord to pay for the gas. Subsequently tenant agreed with landlord to release landlord from the agreement to pay for gas, if landlord would release

of requiring knowledge and perhaps more, such as reliance (driving the car), in the donee beneficiary case before the right becomes vested.[33]

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landlord's lien so tenant could receive government loan on a crop; the seller of fuel was immediately notified, but continued to supply the tenant and seeks to recover for goods supplied apparently after the notice. It is not clear upon what basis the Court held, but it simply stated: "We are constrained to hold that Downs [the landlord] was not obligated to pay this account." This could be explained on the theory that there was a termination of the series of offers in the promise directly to the seller, by the notification of release, or on the theory that if the suit were on the original contract in the lease the obligation could be released to the extent there was no reliance.

[33] Two other groups of Iowa cases pertaining to alteration of rights of donee third parties are worthy of mention. Where mutual wills have been made pursuant to some contractual arrangement, third parties have acquired rights thereunder, even though these cases are not usually discussed in contracts books as a third party beneficiary situation. See discussion in note 3(d), *supra*. In these cases it is often stated that the provisions of the mutual wills, including those for third parties, are not binding on the respective parties if one testator, during the lifetime of both testators, notifies the other of his revocation of his will: *Jennings v. McKeen*, 245 Iowa 1206, 65 N.W.2d 202 (1954); *Luthy v. Seaborn*, 242 Iowa 184, 46 N.W.2d 44 (1951); ATKINSON, WILLS § 49 (2d ed. 1953); TePaske, *A Study of Joint and Mutual Wills in Iowa*, 24 IOWA L. REV., BAR ASS'N SEC., 15 (1938). It is not at all clear how such a termination of rights may be supported in view of the apparent theory that the provisions of the mutual wills are enforceable on contractual principles, except on a possible interpretation that the only promise, if there is any promise at all, to be inferred from the mutual will situations, is a promise not to revoke after death of one, or not before the death except on notice. See discussion in note 3(d), *supra*; Sparks, *Legal Effect of Contracts to Devise or Bequeath Prior to Death of the Promisor: II*, 53 MICH. L. REV. 215, 222, 225 (1954). In spite of the continual reference to the above mentioned rule, prior to the very recent case of *Gillette v. Cable*, 79 N.W.2d 195 (Iowa 1956), no Iowa case was discovered which denied the third party rights solely because of a revocation during lifetime. However, there was one case where the Court, as an alternative to the argument there was never a contract to leave property to the claimant, did point out there was a revocation with notice during lifetime: *Hale v. Iowa-Des Moines Nat. Bank & Trust Co.*, 243 Iowa 303, 51 N.W.2d 421 (1952) [for litigation by a party to the alleged contract, see *Hale v. Campbell*, 46 F.Supp. 772 (N.D. Iowa 1942)].

In *Gillette v. Cable*, supra, a subsequent revoking will of the wife, one of the testators in a prior joint will, was held to prevent the acquisition of rights by beneficiaries named in the prior joint will of both husband and wife, which was apparently assumed by the Court to have been sufficient otherwise to evidence (or result in) a contract for the benefit of those third persons. The beneficiaries named in the first will complained, *inter alia*, that the wife was not competent at the time of the execution of the second (revoking) will, and apparently contended that the standard of competence ought to be a contractual one, rather than one for making or revoking a will. The Court concluded that there need be only a showing of competence to make a will, not of competence to contract. Having announced that rule, the Court affirmed the trial court's finding for the surviving husband, one of the parties to the original joint will, who was the beneficiary of the second will of his wife. The language of the opinion attributes scant contractual significance to the joint will arrangement during the lifetime of both testators. See the following excerpts, 79 N.W.2d 195, 198: "We may assume the earlier (joint) will would have been sufficient to evidence (or result in) a contract for the benefit of third persons named therein as ultimate devisees and legatees, had either maker died and the survivor

Even assuming that the parties may prevent an accrual of rights to a third person by subsequent alteration, the question

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taken advantage of and accepted the provisions made in the joint will for him by the other. Only if and when that happens does a binding contract emerge in such cases, which third party beneficiaries may enforce. . . . The cases cited by plaintiffs are in no disagreement with the postulate that no binding contract exists so long as both parties live. Either may revoke. . . . But we find no logic for the intended contention that *greater* capacity is required to revoke a reciprocal will. There was no contract inter vivos that either party could not rescind in the lifetime of the other. . . . Nor was there any contract for third party benefit. As appellee aptly states: 'While both testators live, their joint will is ambulatory and revocable.' Third party beneficiaries have no right or interest that either testator may not disregard so long as both live. . . . Plaintiff's reasoning would logically require greater mental competence to revoke a mutual than an individual will in any case, at least where the mutual one contained provision for a third person beneficiary. But the premise is unsound. So long as both testators live there is no irrevocable contract. . . . Mutual wills are naturally resorted to only by persons closely bound by ties of relationship or of mutual friendship and interest. There is every reason for keeping them as readily revocable as are other wills."

No complete discussion of the *Gillette* case is attempted; however, a few comments are submitted. Merely suggesting there is no irrevocable contract and that either party may terminate by notice does not by itself demonstrate there was no contract at all during the lifetime of both. The presence of the contract during lifetime is the feature that supports irrevocability of the assumed contractual provisions if there is no revocation with notice. See discussion and cases in note 3(d), *supra*, and a case such as *Stewart v. Todd*, 190 Iowa 283, 173 N.W. 619 (1919), not involving a third party, which enforced the claim as against revocation without notice. Parenthetically, it should be noted that the Court, in the *Gillette* case, specifically stated it was making no pronouncement on the possible solution of deciding the rights of the third parties were terminated by the husband's revocation and notice during lifetime, because such a solution would leave unresolved the validity of the wife's disposition in the revoking will of the property, apparently all of which was in her name. Although not specifically stated, the Court is apparently not proceeding either on a theory of mutual agreement by the husband and wife to rescind any contract evidenced by the prior joint will.

To the extent that rights of third parties in these mutual will cases are subject to loss in the manner stated, the rule of the Restatement about donee beneficiary rights becoming fixed at the making of the contract is not followed.

However, in the area of "equitable charge" on real estate, the Iowa Court decided that the interest of the beneficiary became vested without act or assent on the part of the beneficiary, and prevailed in spite of an agreement for reduction of payments, made by grantor and grantee allegedly before any knowledge by the beneficiary: *Carlson v. Hamilton*, 221 Iowa 529, 265 N.W. 906 (1936), citing *Rodgers v. Reinking*, 205 Iowa 1311, 217 N.W. 441 (1928). This is in accord with the rule of the Restatement about donee beneficiary rights becoming fixed at the making of the contract. Although the equitable charge or servitude is treated in the property area of the law, there seem to be contractual aspects: *Anderson v. Anderson*, 234 Iowa 277, 12 N.W.2d 571 (1944) (equitable charges on land accruing more than five years before action were considered outlawed by statute of limitations on implied promises; the implied promise was found in the acceptance of the deed; when the debt was gone the remedy was gone); see other references to contractual aspects of an "equitable charge" in *Trustees of Iowa College v. Baillie*, 236 Iowa 235, 252, 17 N.W.2d 143, 146, (1945); AMERICAN LAW OF PROPERTY §§ 9.23, 9.27, 9.30, 9.37 (1952); RESTATEMENT OF PROPERTY §§ 541, 556, 557 (1944).

remains if the third person may urge that an effective alteration has not been made or raise objections to it that one of the original parties might raise. In the instant Iowa case the plaintiff alleged there was fraud, mistake, and no consideration and that the named insured had rescinded, repudiated, and cancelled the modification indorsement. The Iowa Court refused to allow the third party to assert such claims. The Court cited with apparent approval the Kansas cases of *Stanfield v. W. C. McBride, Inc.*,[34] and *Employers Mutual Casualty Company v. American Automobile Insurance Company*,[35] which refused to permit the third party (employer and employer's insured), who claimed through an employee driving a car lent by a garage-insured to the employer, on a policy issued to the garage with the usual omnibus insured clause, to assert that a rider modifying the policy to exclude the omnibus coverage was issued without consideration and through fraud.[36] The same two Kansas cases were urged upon the court in an action before the Eighth Circuit Court of Appeals arising in Missouri,[37] a declaratory judgment action by an insurance company as to its obligations under an insurance policy when it alleged it had removed coverage of the particular driver by agreement with the named insured before the end of the term; the Eighth Circuit opinion permitted the injured parties to raise the objection of no consideration for the modification, rejecting the Kansas cases as not in accordance with Missouri law. No reference is made in the Iowa opinion to this Eighth Circuit decision.

The Iowa cases cited in the *Home Mutual* decision as supporting the proposition that a third party, a potential beneficiary, may

[34] 149 Kan. 567, 88 P.2d 1002 (1939), 38 MICH. L. REV. 1093 (1940).

[35] 131 F.2d 802 (10th Cir. 1942).

[36] The plaintiff insurer in the *Iowa Home Mutual* case argued, in view of the allegation of rescission of the modification by the named insured, that, although the modification was only voidable and not void, it had been avoided, thus distinguishing the case of *Stanfield v. W. C. McBride, Inc., supra,* note 34, where there was no showing of attempted cancellation or avoidance of the modification. The Court concluded that this fact made no difference, that the son's rights were not enlarged because the notice did not serve to rescind the modification and that it was still in effect subject to the father, the named insured, bringing about a judicial cancellation. At least where title to property is not involved, it should not be necessary to require court action to avoid the agreement; one of the remedies of the defrauded has been stated to be an option to rescind: WILLISTON §§ 1523, 1524; MCCLINTOCK, EQUITY § 84 (2d ed. 1948). This matter is not pursued here any further, however, because there does not seem to be any reasonable basis for a distinction between the claims of no consideration, mistake, and fraud (either asserted outside court or in court or not asserted at all by the defrauded) as far as permitting a third person to raise these matters. The concentration of argument in the Kansas decision is on the no consideration argument, whereas in the Iowa case the most reference is to fraud and mistake, but the principle of asserting defenses of the promisee should be the same.

[37] Wackerle v. Pacific Employers Ins. Co., 219 F.2d 1 (8th Cir. 1955), *cert. den.* 349 U.S. 955 (1955). A comment on this case appears in 40 MINN. L. REV. 83 (1955), but there is no discussion of the problem of the third party's raising the argument of no consideration.

not raise the point of the ineffectiveness of the change in the policy, are not convincing in support of the Court's position. Two cases are principally cited for this position, *Shult v. Doyle*,[38] and *American Savings Bank v. Borcherding*.[39] The latter case involved an attempt by a successor mortgagee to impose personal liability on a grantee in a deed which recited merely that it was "subject to the mortgage". The Bank asked for reformation of the deed to provide for an assumption clause; this plea apparently proceeded solely on the fact that an original contract for sale, almost a year previously, had provided for an assumption of the mortgage. The opinion of the Court first pointed out that prima facie the assumption clause had been abandoned before the deed and referred to the rule about the parties being able to vary the agreement before the third party knew of it.[40] Having already concluded there was no right in the Bank because of the variation, the Court, citing cases involving attempts by grantees to reform deeds when there was no consideration,[41] concluded that, because the Bank's claim was a statutory gift to it,[42] and the Bank furnished no consideration, it was not entitled to a reformation. This would seem to be a misconception of the rule against reformation in favor of a volunteer; third parties should be entitled to reformation if consideration has been furnished by someone.[43] *Shult v. Doyle* also is cited in support, with the quotation:

> "His rights are purely legal. They do not arise out of any equity. * * * The cause of action thus created in his favor is a bit of legal grace; it cost him nothing; it simply fell upon him without effort or knowledge on his part. * * * He has no ground of appeal to equity either to expand it or to prevent its shrinkage." [44]

Several comments should be made as to the strength of *Shult v. Doyle* in support of the conclusion not to allow the potential beneficiary to assert that there was no effective alteration of the contract. The action essentially was an action by a mortgagee to recover a personal judgment for the debt against subsequent vendees of the mortgagor. The first vendee, by contract, assumed

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[38] 200 Iowa 1, 201 N.W. 787 (1925).

[39] 201 Iowa 765, 201 N.W. 518 (1926), prior opinion in 203 N.W. 712 (1925), permitting reformation. In a subsequent step in the litigation the mortgagor-vendor secured reformation of the deed: 205 Iowa 633, 216 N.W. 719 (1927).

[40] See collection of cases in IOWA ANNOTATIONS § 143, and previous discussion in this article.

[41] Else v. Kennedy, 67 Iowa 376, 25 N.W. 290 (1885), and Dolph v. Wortman, 185 Iowa 630, 168 N.W. 252 (1919).

[42] IOWA CODE § 10968 (1924), now IOWA R.C.P. 2 (1954). See discussion in note 8, *supra*. The right probably is not conferred by the statute. WILLISTON § 366.

[43] RESTATEMENT § 506; WILLISTON §§ 1547, 1556; MCCLINTOCK, EQUITY § 108 (2d ed. 1948). See collection of cases in 112 A.L.R. 909 on right of third person to maintain action of reformation.

[44] 73 N.W.2d 22, 25 (Iowa 1955).

the mortgage, but before delivery of a deed he contracted to sell to a second vendee who contracted only to take subject to the mortgage, which would not impose personal liability. A deed was drawn up, signed by the mortgagor, containing an assumption clause, and delivered to the second vendee, without running title through the first vendee. The trial court granted judgment in favor of the mortgagee against the second vendee, who pleaded for reformation of the deed to remove the assumption clause, and against the plaintiff in his claim against the first vendee. Appeals were taken by both losers; there was no showing of an appeal by the mortgagor, who was a party in the case. The quoted phrase from the opinion appears in connection with the discussion as to the subsequent vendee's liability, and the argument that he did not really assume the mortgage in spite of the words of assumption. The first part of the paragraph, not quoted in the *Home Mutual* opinion, stated: "As to the plaintiff herein, his rights are subordinate to the real agreement entered into as between the defendants." It is clear that, although the Court did write of "expanding or preventing its shrinkage", the Court was simply referring to the usual rule that the promisor may assert against the beneficiary all defenses it may have against the promisee.[45] The point of the remark is that the beneficiary should be no better off than the promisee, not that he should be worse off. Further, it is interesting to note that in a subsequent part of the opinion in *Shult v. Doyle,* when considering the appeal of the mortgagee in the claim against the first vendee, the Court actually allowed the third party to assert a claim of the promisee and did not adopt the position of putting the beneficiary in a worse position than the promisee. The Court stated, in connection with this aspect of the case:

> "Stated briefly, this [defense] is that, though Dealy [the first vendee] bound himself originally to assume the mortgage, yet by a process of novation, he had obtained a release from such obligation from his vendor, Doyle, in that Doyle had accepted the Hawkins defendants as a substitution for Dealy. The legal proposition contended for is that the vendor Doyle, as mortgagor, had the same power to release and discharge Dealy from that obligation as he had to bind him to it in the first instance, provided that it was done before the mortgagee had knowledge of the contract or had accepted the same. Conceding the general proposition contended for on the authority of *Gilbert v. Sanderson,* 56 Iowa 349, yet the agreement with Doyle for substitution, upon which Dealy relies for his discharge, is under attack as being invalid. We are sustaining that attack. Doyle was entitled to an assumption clause from Dealy. He agreed to accept one from the Hawkins defendants, in lieu thereof. This implied a valid agreement from the Hawkins defendants. He did not obtain it, and Dealy was in no position to procure it for

[45] CORBIN § 818; WILLISTON § 394; RESTATEMENT § 140.

> him. This being so, Dealy is in no position to claim any benefit from such attempted contract with Doyle."[46]

Note again that the mortgagor had not appealed from the decree, but that the Court proceeded, on behalf of the plaintiff mortgagee, beneficiary, to determine the validity of the discharge of the original promise, even though the mortgagee beneficiary may not have known of the arrangement at the time of the alleged variation. What was permitted in *Shult v. Doyle* was not permitted in *Iowa Home Mutual Casualty Company v. Farmers Mutual Hail Insurance Company*, when the Court refused to permit the raising of the questions of no consideration, fraud and mistake.

To round out the discussion of the rights of third parties in contracts, reference should be made to the acquisition of rights by the assignment process.[47] An initial inquiry in assignment cases is as to what rights may be effectively assigned. During the period under examination the Iowa Court decided that an assignment of wages from a future employment is void.[48] There was also occasion to reiterate that there may not be an assignment of rights which are personal to the assignor; this was a case involving an assignment by a bank to trustees in reorganization of a promise by defendant to answer for his son's debt to the bank if

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[46] 200 Iowa 1, 16, 201 N.W. 787, 793 (1925). It is interesting to observe that, in the very recent Iowa case of *Gillette v. Cable*, 79 N.W.2d 195 (Iowa 1956), referred to in notes 3(d) and 33, *supra*, involving rights of third parties under joint and mutual wills, where there was a subsequent revoking will, although the Court affirmed a finding of competence as to the revoking will, it did not seem at all disturbed about permitting the beneficiary to argue the question of competency to execute a document the net effect of which would be to eliminate rights claimed by the beneficiaries under a contract manifested in the earlier joint will.

[47] For comprehensive discussion of law pertaining to assignments, see CORBIN §§ 856 *et seq.*; WILLISTON §§ 404 *et seq.* RESTATEMENT sections are 148-177 inclusive.

[48] Coyle v. Des Moines Gately's Inc., 230 Iowa 511, 298 N.W. 797 (1941). The suit was one for damages for wrongfully procuring withholding of pay checks. The Court dismissed this aspect of the case, stating that having given authority, plaintiff had no legal cause for complaint. RESTATEMENT § 154; CORBIN § 874; WILLISTON § 413. For a subsequent case affirming cancellation of assignment and damages, actual and exemplary, for securing withholding of wages when underlying debt was allegedly discharged, see *Bishop v. Baird & Baird*, 238 Iowa 871, 29 N.W.2d 201 (1947). *Burk v. Morain*, 223 Iowa 399, 272 N.W. 441 (1937), concluded that an assignee of an heir's expectancy in an estate did not have such an interest as would permit him to contest the probate of the will. The present status of such holding is doubtful in view of the holding in In re *Duffy's Estate*, 228 Iowa 426, 292 N.W. 165 (1940), which permitted a judgment creditor of an heir to contest. See discussion in Note, *Right of Persons Claiming Through an Heir to Contest a Will*, 27 IOWA L. REV. 443, 447 (1942).

For discussion of Iowa legislative changes in 1955 in the area of accounts receivable, as to the rule against present assignment of future rights, see *Assignment of Accounts Receivable—A Comment on Recent Iowa Legislation*, 6 DRAKE L. REV. 25 (1956).

the bank would extend time of payment and not sue.[49] The Court also concluded that there may be an assignment of a portion of a claim if both portions of the claim are joined in the same action; this was decided in a case in which the problem of venue was involved, and in which there was a decision that an action against an insurance company may be brought in the county of plaintiff's residence.[50] Several cases involved the problem of assignability, where there were clauses purporting to restrict assignability. In two cases the Court supported assignability in spite of the clauses, one case involving assignability by the administrator in an insolvent estate,[51] the other approving assignability by the guardian of an insolvent estate of a contract to enforce an option to redeem corporate stock,[52] both cases apparently proceeding on the theory that the restrictions in the documents were not aptly phrased to prohibit assignment by operation of law or that a statute authorized it anyway. It was also decided that a bank draft was not an assignment,[53] that the assignment device could not be used to avoid the statute about an unlicensed foreign corporation not bringing an action,[54] and that there may be an assignment of a claim solely for collection.[55] Two cases decided that there may be effective gifts of choses in action simply by delivery of a written

[49] Evans v. Cole, 225 Iowa 756, 281 N.W. 230 (1938); RESTATEMENT § 151; CORBIN § 865; WILLISTON §§ 412, 419. See also Connolly v. Des Moines & C.I. Ry., 246 Iowa 874, 68 N.W.2d 320 (1955) (option contract as to real estate calling for agreement as to price or submission to agreed realtor held too personal for optionor or optionee to assign).

[50] Welch v. Taylor, 218 Iowa 209, 254 N.W. 299 (1934); RESTATEMENT § 156; CORBIN § 889; WILLISTON § 441.

[51] In re Estate of Owen, 219 Iowa 750, 259 N.W. 474 (1935).

[52] Strub v. Schmidt-Kurz Improvement Co., 234 Iowa 1372, 14 N.W.2d 628 (1944). See Note, *Instruments Containing Restrictions on Assignment under Iowa Code Section 539.2*, 33 IOWA L. REV. 114 (1947); IOWA ANNOTATIONS § 151-III-C; CORBIN §§ 872, 873; WILLISTON § 422. A policy clause prevented assignment of fire insurance policy without consent before loss, in *Stoner v. First Amer. Fire Ins. Co.*, 215 Iowa 665, 246 N.W. 615 (1933), but did not prevent assignment of wind and tornado policy after loss, in *Parker v. Iowa Mut. Tornado Ins. Assn.*, 220 Iowa 262, 260 N.W. 844 (1935).

[53] Andrew v. Pilot Mound Sav. Bank, 215 Iowa 290, 245 N.W. 329 (1932).

[54] Heyl v. Beadel, 229 Iowa 210, 294 N.W. 335 (1940), 130 A.L.R. 994.

[55] Carson-Pirie-Scott & Co. v. Long, 219 Iowa 444, 257 N.W. 815 (1935), subsequent opinion in 222 Iowa 506, 268 N.W. 518 (1936). Compare with Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944), 30 IOWA L. REV. 574 (1945), a suit to enjoin from engaging in practice of law, where defendant, a non-lawyer, took assignments and brought action, but the court distinguished the earlier case by stating the assignments to Barnett were colorable, and he was engaged in business of taking assignments in this fashion.

assignment,[56] one case involving shares of stock,[57] and another involving an interest in an insurance policy.[58]

The law of assignments also requires an examination into the possible limitations on the rights of the assignee. Several cases have reiterated the commonly stated rule that the assignee gets no better rights than the assignor; this has been applied to taking subject to claims of the debtor against the assignor,[59] to a case where an equitable owner of a claim prevailed against a purchaser who gave as value only an antecedent debt,[60] to a case where an admission against interest by the assignor of a claim for assault and battery was admissible against the assignee,[61] and in a case of an assignee for benefit of creditors with reference to a mortgagee's claim to proceeds of a fire insurance policy.[62] The Court was also required to announce that notice to the obligor of the assignment

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[56] On the question of gift assignments, see CORBIN §§ 909 *et. seq.*, particularly § 921, on written assignments by assignor; WILLISTON §§ 438A, 438B, 439, 440, 440A; IOWA ANNOTATIONS § 158-II

[57] Leedham v. Leedham, 218 Iowa 767, 254 N.W. 665 (1934) (written assignment was delivered in escrow).

[58] Petty v. Mutual Benefit Life Ins. Co., 235 Iowa 455, 15 N.W.2d 613 (1944) (the insured in a life policy simply wrote a letter before death indicating his desire that the proceeds of the policy were to go to the recipient of the letter, the Court relied upon a statement in the case in note 57, *supra*, that a written assignment of a chose in action is enough, and also upon the provision in Iowa Code § 539.1 (1954), that certain instruments are assignable by "other writing"; the Court overruled any prior statements that an old line insurance policy is not property which could be the subject of a gift). Note the comment in *In re Estate of Conner*, 240 Iowa 479, 36 N.W.2d 833 (1949), that, although delivery of a certificate of deposit in escrow to deliver upon death was sufficient to constitute a gift inter vivos, "we do not imply delivery was essential", 240 Iowa at 487, 36 N.W.2d at 83. Also note *Provident Mut. Life Ins. Co. of Phila. v. Bennett*, 58 F.Supp. 72 (N.D. Iowa 1944), holding, as between a husband insured and his divorced wife, that a previous oral gift of proceeds of endowment policy followed by surrender of policy to her, was valid; *cf. Woodward v. United States*, 106 F.Supp. 14 (N.D. Iowa 1952). See Annotation, "Gift of Life Insurance Policy", 33 A.L.R.2d 273.

[59] Klassie v. Holt, 233 Iowa 826, 10 N.W.2d 540 (1943); Mutual Surety Co. of Iowa v. Bailey, 231 Iowa 1236, 3 N.W.2d 627 (1942); Creel v. Hammans, 234 Iowa 532, 3 N.W.2d 305 (1944); RESTATEMENT § 167; CORBIN § 896; WILLISTON § 432.

[60] Stegemann v. Bendixen, 219 Iowa 1190, 260 N.W. 14 (1935). See RESTATEMENT § 174; CORBIN § 900; WILLISTON § 438; on problem of taking free of equities of third persons.

[61] Lake v. Moots, 215 Iowa 126, 244 N.W. 693 (1932). The assignee of a claim was held to be in as good a position as the assignor, in *Albert v. Maher Brothers' Trf. Co.*, 215 Iowa 197, 243 N.W. 561 (1932), where the driver of an automobile was permitted to recover as an assignee of his guest's personal injury claim even though the driver was contributorily negligent, if the guest was not negligent. It should be noted that these cases are illustrations of the Iowa position permitting assignments of claims for damages personal in nature. See IOWA ANNOTATIONS § 547.

[62] Central Nat. Bank & Trust Co. v. Simmer, 228 Iowa 784, 293 N.W. 460 (1940).

by the obligee of a contract was not essential to an effective assignment.[63]

The question of priority of successive assignments has also come in for attention during this period. In an early case the Court decided that a conditional assignment, an assignment by a contractor to a surety on his performance bond of all deferred payments, although prior in time, did not prevail over a subsequent unconditional assignment to a bank of all the moneys to become due under the contract, at least as to an installment already due at the time of default on the contract.[64] There were statutory developments in the Fifty-Sixth Assembly concerning assignments of accounts receivable, which have an impact on the matter of priority of assignments, instituting a recording system as a method of determining priority.[65] A discussion of this legislation is contained in another article in this REVIEW.[66]

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[63] Dultmeier Mfg. Co. v. Kulow, 230 Iowa 1224, 300 N.W. 513 (1941) (the court pointed out that there was no question of priority of successive assignments and that prejudice because of lack of notice was an affirmative defense).

[64] Coon River Coop. Sand Assn. v. McDougal Construction Co., 215 Iowa 861, 244 N.W. 847 (1932). This case is referred to in detail in CORBIN § 875, and criticized for its reasoning that an unconditional assignment should prevail over a conditional assignment, but approved as to result on the theory that the payments in conflict were due before the default, so that the assignment to the surety of payments due in default could not operate on that amount.

In Zimmerman v. Horner, 223 Iowa 149, 272 N.W. 148 (1937), the Court intimated that an assignment of a cause of action against a construction company, as security for notes, which was prior in time to a subsequent assignment to another party, would not prevail in law because it was for security only, but then concluded that priority of assignments was not in the case because the first assignee had not relied on the assignment but had instead made a binding election of remedies by levying on the judgment received under the cause of action as the property of the debtor-assignor and buying in at the execution sale; at the execution sale he received no more of an interest than his debtor had in the claim which was nothing in view of the subsequent assignment. See IOWA ANNOTATIONS § 173.

[65] Iowa Laws (1955), 56th G.A., ch. 253.

[66] See *Assignment of Accounts Receivable—A Comment on Recent Iowa Legislation*, 6 DRAKE L. REV. 25 (1956).