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Paul A. Richards

*Washington University School of Law*

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## MISSOURI DOCTRINE AS TO CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

From the middle of the nineteenth century the Missouri courts have, with a few exceptions, recognized the right of a third party to sue upon a contract made for his benefit. The occasional cases holding to the contrary during the gradual development of judicial recognition of this right have been unequivocally overruled. The position thus taken by the Missouri courts has been in accord with the prevailing weight of American authority, which holds that the person for whose benefit a contract is made may enforce the promise, even though he is a stranger both to the contract and the consideration. The promise need not be made to the third party beneficiary in form, but it must be made to him in fact, to give him the right to sue upon it; that is, it is essential that the third person be the one whom the contractors intended to benefit. The purpose of this article is to present a brief resume of the leading Missouri cases on this subject.

Two of the earliest cases are, *The Bank of Missouri v. Benoist*, 10 Mo., 519, and *Robbins v. Ayres*, 10 Mo., 538, both decided in 1847. In the *Bank of Missouri v. Benoist* the court expressly affirmed the doctrine that the third party beneficiary of a *simple* contract may maintain an action upon it. In *Robbins v. Ayres* it was held that in the case of *sealed* instruments the third party beneficiary must sue in the name of the promisee. The court went on to say that in the case of simple contracts the promise need not be in writing in order that the third person may maintain an action upon it in his own name.

The case of *Rogers & Peak v. Gosnell*, 51 Mo., 466 (1873) involved a sealed instrument executed between the vendors of a plot of land, and the defendant, who agreed to purchase

same. In this instrument was a promise on the part of the defendant to pay a debt of the vendors to the plaintiffs, who were their creditors. The court held that the party in whose name a contract is made for the benefit of another, is a trustee of an express trust, and may sue in his own name. (*Harney v. Dutcher*, 15 Mo., 89; *Miles v. Davis*, 19 Mo., 408). But it further held that the fact that the trustee may sue in his own name does not preclude the beneficiary from suing in his name, although a prior recovery by the trustee would bar another action by the beneficiary, who would, in such case, have his remedy against the trustee. Two things were established by this decision: first, that a third party beneficiary may sue in his own name when it appears on the face of the contract that he is the party to be benefited; second, that this proposition is not restricted to simple contracts, but applies as well to contracts under seal. In 1875 this case was again before the Supreme Court (58 Mo. 589) when it was held that the law presumes that when a promise is made for the benefit of a third person he accepts it—to overthrow this presumption a dissent must be shown. The principle was thus established that a third party beneficiary acquires a right immediately upon the formation of the contract, and that any subsequent revocation is ineffectual.

The case of *Heim v. Vogel*, 69 Mo., 529, holds that when a grantee accepts a deed poll containing a statement that the land conveyed is subject to a mortgage, which the grantee assumes and agrees to pay, a promise by the grantee for the benefit of the mortgagee is implied therefrom, and the mortgagee may sue the grantee. This doctrine is affirmed in *Crone v. Stinde*, 156 Mo., 262 (1900) which further holds that a third party beneficiary may enforce a contract if he adopts it after it is made, even though he is not named in the contract, or may not have known of it at the time. At present, a mortgagee may sue a grantee who has promised the mortgagor to pay the mortgage, in the U. S. Supreme Court, and in every state court except that of Massachusetts.

In *Utley v. Tolfree*, 77 Mo., 307 (1883) bankers received money from a customer on an express promise to pay it to the plaintiff, who recovered in this case. It was held to be no defense that the money was deposited in the customer's name with his consent, or that he at the time promised to make a further deposit to cover his own indebtedness to the bank and failed to do so.

An interesting question arises as to the liability of telegraph companies to the addressees of messages which they have contracted to deliver in case they are negligent in so doing. In the case of *Markel v. Western Union Telegraph Co.*, 19 Mo. A., 80 (1885) it was held that the addressee could recover from the telegraph company for its negligence in transmitting and delivering a message. In its decision the court went on to say that the third party beneficiary could not maintain an action, however, unless the benefit to the plaintiff was the cause of making the contract, and not merely *incidental* to carrying it out.

In *Harvey Lumber Co. v. H. & C. Lumber Co.*, 39 Mo. A., 214 (1890) it was held that where one party agrees for a sufficient consideration to pay the debts of another, the creditors of the latter may sue the promisor.

In the case of the *City of St. Louis to Use v. Von Phul*, 133 Mo., 561 (1896) the defendant had entered into a contract with the city to repair certain streets, giving a bond conditioned on the payment of all sums due for labor or material furnished for such repairs. The plaintiff, a cement company, sued the defendant on this bond for failure to pay for materials which they had furnished him for use in carrying out his contract for the repair of the streets. The plaintiff recovered in this case, since the city is under a positive obligation to keep its streets in good condition, and since it was the plain intent of the contracting parties, in the giving of this bond, to benefit a certain class of persons, of whom the plaintiff was one. This

is regarded as a leading case on this phase of contract law, and expressly overruled *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218. *School District v. Livers*, 147 Mo., 580, is in accord with this case, the court holding that workmen and materialmen may recover from a surety for the promise of a contractor to a district or municipality to pay for his labor and materials. *Buffalo Forge Co. v. Cullen & Stock Mfg. Co.*, 105 Mo. A., 484 (1904) expressly decides under facts very similar to those in *City of St. Louis v. Von Phul*, that the laborers and materialmen shall be presumed to be the parties intended to be benefited, and hence may sue upon such a contractor's bond.

Where a contract is entered into by two parties for the benefit of a third party, such third party can maintain an action on the contract even though he is not named therein, provided that his interest is not merely that of indemnity. (*Bank v. Commission Co.*, 139 Mo. A., 110.)

In the case of *Van Meter v. Poole*, 119 Mo. A., 296 (1906) it was held that a third person may sue on a contract entered into with a principal debtor, binding the defendant to pay a debt for which the plaintiff is liable as surety, since this is an agreement to pay the surety's debt, and as such is for his benefit.

In *Scheele v. Lafayette Bank*, 120 Mo. A., 611 (1906) the insured, for the purpose of securing notes held by the defendant bank, contracted to assign an insurance policy to the bank, both for its benefit, and for the benefit of the plaintiff, his daughter. A new policy was thereupon issued which provided that 5/6ths of the value thereof should be paid to the bank, and that the other 1/6th should be paid to the plaintiff; the bank agreeing to advance and pay all premiums subsequently accruing on the policy. The court held that the benefit to be derived by the plaintiff from the bank's agreement to pay the premiums was substantial, and not merely incidental, and

that therefore the plaintiff was entitled to sue the bank for breach of this agreement.

*Howson v. Trenton Water Co.*, 119 Mo., 304 (1893) is one of the most important Missouri cases on this subject, for that case decides that a water company, which agrees with a town to be liable for damages caused by its failure to supply water sufficient to extinguish all fires, cannot be sued on such an agreement by a citizen, even though he and others pay a special tax to the company under the contract. This decision is based on the ground that the benefit to be conferred upon an *individual* citizen by the contract is *incidental* to the contract, the primary object being to benefit *all* the citizens in their corporate capacity, and to protect the municipality.

In *O'Connell v. Trust Co.*, 165 Mo. A., 398 (1912) it was held that an agreement made by a vendor of land with the vendee, whereby the former deposited with a third party an amount of money to protect the vendee against judgments which were a lien against the land, was not an agreement for the benefit of the holders of the judgments.

It is sufficient in order that the third party beneficiary may sue, that the promisee owe to him some obligation or duty, legal or equitable, which would give him a just claim. (*Lime & Cement Co. v. Wind*, 86 Mo. A., 163.)

In the case of *Lumber Co. v. Niedermeyer*, 187 Mo. A., 180 (1915) the plaintiff, a lumber dealer, having knowledge of a contract between the defendant and "T" (by which the defendant agreed that if "T" would give a deed of trust on some lots on which he desired to erect two houses, he, the defendant, would obtain money thereon to pay, and would pay the bills of the plaintiff for the lumber used in said houses), sold the lumber for these houses to "T". "T" executed the deeds of trust, and the defendant obtained more than enough money to pay the said bills, but refused to do so. Plaintiff recovered.

In *Duerre v. Ruediger*, 65 Mo. A., 407 (1895) it was held that a promise is not within the Statute of Frauds simply because it is for the benefit of a third party who may sue upon it.

Fraternal benefit societies have caused some difficulty in this matter. While the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived and upon which he may maintain an action against the insurance company, yet the person named as beneficiary in the certificate of a fraternal benefit association acquires not a vested right, but a mere expectancy which it is within the power of the insured member to defeat at any time. (*Masonic Benevolent Association v. Bunch*, 109 Mo., 560).

In *Ellis v. Harrison*, 104 Mo., 270, it was held that a creditor may sue an individual or firm upon his or its promise to an outgoing partner to pay his liabilities.

*Atkinson v. Hardy*, 128 Mo. A., 349, decided that where the plaintiff's parents executed a note, secured by deed of trust on their homestead, to plaintiff's grandfather, who, on the death of the plaintiff's father agreed that if their mother would convey to the plaintiffs their interest in the land, he would transfer the note to the plaintiffs, and the mother did so convey the land to the plaintiffs, they were entitled to enforce the contract against the grandfather or his representative.

Another interesting question is as to the right of the contracting parties to rescind the contract before the beneficiary has assented thereto. There are two opposing views on this question. One is, that there is no privity between the promisor and the beneficiary until the latter assents to the contract, and that consequently until he does so, the contracting parties may rescind or change it as they see fit. The other view, and this is the theory which the Missouri courts follow, is that since the law, operating upon the acts of the contracting parties, creates the necessary privity between the promisor and

the beneficiary immediately upon the consummation of the contract, it follows that the contracting parties can not thereafter rescind the contract without the third person's consent:

The promisor may, as defense, set up the invalidity of the debt he promised to pay. Thus, in *Gate City Bank v. Chick*, 170 Mo. A., 343, it was held that one who assumed all the grantor's debts, in return for an assignment of property, could dispute the validity of any debt so assumed.

Difficulties arise when the rights of the promisee are considered. It would be manifestly unjust to subject the promisor to two actions for the same breach. Yet should not the promisee be allowed to maintain an action for breach of a contract to which he is one of the principal parties, even though not the party to be benefited? The courts have surmounted this obstacle, however, by holding that a recovery by either party (i. e. either the promisee or the beneficiary) is a bar to an action by the other. (*Snider v. Adams Express Co.*, 77 Mo., 523; *American Nat'l. Bank v. Klock*, 53 Mo. A., 335; *Gunnell v. Emerson*, 73 Mo. A., 291.)

In the case of a creditor-beneficiary it was held in *Leckie v. Bennet*, 160 Mo. A., 145, that such a beneficiary had a right against both the original debtor and the new promisor, a recovery being permitted against both. Defenses that would be good against the promisee, however, are good against the creditor.

The action by the third party cannot be maintained merely because he will be incidentally benefited by performance of the contract; he must be a party to the consideration, or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance. In all cases, the contract must be a valid contract between the contracting parties, and the third party takes subject to all inherent equities affecting the principal parties.

At first thought it seems that this allowance of an action by a third party beneficiary is a violation of the rule that consideration must always move from the promisee. Yet in these cases the third party is not the promisee, and hence is not required to furnish the consideration.

From the foregoing cases, it will be seen that the courts of Missouri construe contracts involving a benefit to a third person with the utmost liberality, and inquire only as to the intention of the parties. If it was their intention, or rather their reason for entering into the contract, that a third party should be benefited, then that third party may sue, whether he be a sole, donee, creditor, or mortgagee beneficiary.

PAUL A. RICHARDS '23.