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Robert T. Donley
West Virginia University College of Law

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THE SOLE BENEFICIARY PROBLEM IN WEST VIRGINIA

ROBERT T. DONLEY *

THE unique¹ statute in West Virginia permits the "sole" beneficiary of a promise² to maintain an action at law thereon, whether the promise is sealed or unsealed and without his having furnished the consideration or being in contractual privity with the promisor.³ This ill-chosen word created the problem of definition: Who is the "sole" beneficiary? It has resulted in conflicting ideas and expressions which it is the purpose of this paper to examine. It will be assumed that the reader is familiar, in a general way, with the peculiar doctrines applicable to third-party beneficiary contracts and with the modern classification⁴ which defines the beneficiary as either (a) a donee; or (b) a creditor; or (c) an incidental beneficiary.

The English common-law rule denied the beneficiary any enforceable rights, either at law or in equity, save in exceptional cases where a trust or other special relationship existed or was

* Member of the Monongalia county bar; assistant professor of law, West Virginia University, 1934-1937; instructor in law, 1942-1943.

¹ So far as the writer has been able to determine, no other state now has a statute conferring rights upon a "sole" beneficiary. The Virginia statute was amended in VA. CODE (1919) § 5143.

² Note that the statute does not use the word "contract".

³ W. VA. REV. CODE (1931) c. 55, art. 8, § 12: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." See Notes (1922) 28 W. VA. L. Q. 312 and (1926) 32 W. VA. L. Q. 342.

⁴ 1 RESTATEMENT, CONTRACTS (1932) § 133:

"(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Sub-section (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:

"(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 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;

"(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exists."

invented as a fiction.⁵ Various reasons were advanced in support of this denial: (a) that it would be a "monstrous proposition" to say that a person was a party to the contract for the purpose of suing but not for being sued;⁶ (b) that only an actual party to a contract may sue upon it; (c) that consideration must move from the party entitled to sue. These rules have been explained as being based upon the procedural limitations of the action of *assumpsit*; the argument being that prior to the development of that form of action the beneficiary had a substantive right enforceable in an action of debt or of account.⁷

Whatever the historical truth may be,⁸ the English view was perpetuated in Virginia and enunciated in 1841 in the case of *Ross v. Milne*.⁹ In holding that an action of debt would not lie upon the donee type of sealed indenture, or upon a parol contract to the same effect, the court relied upon the English doctrines previously mentioned and also advanced other reasons in support of its views. It was said that since the promisee could sue, if the beneficiary were also permitted an action the promisor would either be charged twice or the court would be compelled to stay one of the actions. As to the parol contract, the court wandered into a discussion of unexecuted gifts and the nonassignability at law of choses in action, treating the contract as a mere revocable order by the promisee to the promisor to pay money to the beneficiary. It was called an "oral chose in action" which even an assignee for value—much less a donee—could not enforce in his own name. The court concluded that the donee had no right, but assuming that he did, they were enforceable only in a court of equity.

The inconveniences and injustices resulting, presumably, from this decision, led to a statutory modification in 1849,¹⁰ which was in turn carried *verbatim* into the *West Virginia Code* of 1860¹¹ and perpetuated without change ever since and appears in the *Revised Code*, 55-8-12.

⁵ 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 360.

⁶ Crompton, J., in *Tweddle v. Atkinson*, 1 Best & Smith 398 (1816).

⁷ Hening, *History of the Beneficiary's Action in Assumpsit* (1909) 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 339.

⁸ See Williston's comment on Hening's argument, 2 WILLISTON, CONTRACTS 1033-4.

⁹ 12 Leigh 204 (Va. 1841).

¹⁰ Chapter 116, § 2. Johnson, P., took this view in *Johnson v. McClung*, 26 W. Va. 659, 666 (1885).

¹¹ Chapter 116, § 2.

Analysis of the language of this statute indicates that the legislature had at least five objects in view: (1) by the use of the word "covenant" to change the rule that only the parties to a sealed indenture (as distinguished from a deed-poll) could sue upon it; (2) to permit a joint promisee to sue without the joinder of his copromisees, where the joint promisee was actually a party to a contract which was made for his sole benefit; (3) by permitting action "in his own name" to overcome the objection mentioned in *Ross v. Milne* as to the nonenforceability at law of choses in action in the name of the assignee; (4) to change the rule that the consideration must move from the plaintiff; and (5) to abolish the doctrine of privity of contract.

Furthermore, by the use of the word "action" rather than "suit", it seems reasonably clear that the intent was to afford the sole beneficiary a remedy in an action at law, and to leave untouched any relief that he might have in a court of equity, as indicated by the dictum in *Ross v. Milne*. However, if the promise calls for nothing but the payment of money by the promisor to the beneficiary, under circumstances not within traditional equity jurisdiction it is arguable that equity should refuse relief for the reason that the plaintiff has a full, complete and adequate remedy at law.¹² If this contention is upheld, then in such types of cases the words "may maintain" would be construed as "must maintain". Finally, as a matter of construction, one who is not a "sole" beneficiary may not maintain an action at law because the statute does not permit him to do so, and the rule of *Ross v. Milne*, that he has no such right at common law would remain unchanged.

The statute thus solved some problems, but created new ones by the omission to define what is meant by the word "sole". This is gradually and haphazardly being determined by the process of inclusion and exclusion. Certain kinds of beneficiaries have been excluded from the definition. Thus, in the familiar type

¹² In *Blanton v. Keneipp, et al.*, 155 Va. 668, 156 S. E. 413 (1931), the Virginia court, construing the amended statute, held that it did not preclude a suit in equity by a mortgagee against a grantee assuming payment of the mortgage, on the theory of adequate remedy at law. In such cases the liability of the promisor is based upon the equitable doctrine of subrogation and not upon privity of contract or upon the furnishing of the consideration. But the court refused to express an opinion as to whether the plaintiff could have maintained an action at law. If so, it is merely cumulative and does not oust traditional equity jurisdiction.

of creditor beneficiary contract,¹³ the creditor is not the sole beneficiary for the reason that the debtor-promisee also benefits pecuniarily by having his debt paid by the promisor, even though the debtor has become a bankrupt.¹⁴ The Virginia court has construed the identical statute in a number of cases. In one case it was said that it must appear that the covenant was made for the benefit of the person bringing the action.¹⁵ In another, it was held that there might be successive sole beneficiaries of an insurance policy.¹⁶ The sole beneficiary must be "plainly designated by the instrument" the extrinsic evidence is inadmissible to show that the covenant was made solely for the plaintiff's benefit, since this would violate the parol evidence rule.¹⁷ In one case, the court seems to employ the test of the subjective *intent* of the promisee to benefit the beneficiary rather than the objective *effect* of the benefit.¹⁸ Apparently, the test to determine the party to be benefited is made as of the time of the formation of the contract, notwithstanding the fact that later events may render the performance pecuniarily beneficial both to the promisee and to the beneficiary.¹⁹

¹³ Johnson v. McClung, 26 W. Va. 659 (1885); King v. Scott, 76 W. Va. 58, 84 S. E. 954 (1915); Petty v. Warren, 90 W. Va. 397, 110 S. E. 826 (1922); Hamilton v. Wheeling Public Service Co., 88 W. Va. 573, 107 S. E. 401 (1921). For additional cases see RESTATEMENT, CONTRACTS. W. VA. ANNOR. (1938) § § 133-144.

¹⁴ Aetna Life Ins. Co. v. Maxwell, 89 F. (2d) 988 (C. C. A. 4th, 1937), construing W. VA. REV. CODE (1931) c. 55, art. 8, § 12. This was an action at law upon a group indemnity policy issued by the defendant to a medical society of which doctor *H* was a member. The plaintiff recovered a judgment against *H* in a malpractice suit and *H* became bankrupt. Held, plaintiff cannot maintain an action at law upon the policy. This is a well considered case and collects many authorities. See Note (1937) 44 W. VA. L. Q. 149.

¹⁵ Stuart v. James River, etc. Co., 24 Gratt. 294 (Va. 1874).

¹⁶ Clemmit, et al. v. New York Life Ins. Co., 76 Va. 355 (1882). (Defendant issued a life insurance policy to *M*. payable to *W*, his wife, if she be living; if not, to her children. Plaintiff was her only child. *D* repudiated the policy in 1856. The wife died in 1868. *M* died in 1877. Held, *P* may maintain an action at law. The insurance was for the benefit of the wife and children not jointly, but separately and contingently.)

¹⁷ Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. 899 (1897).

¹⁸ Casselman's Adm'x v. Gordon & Lightfoot, 118 Va. 553, 88 S. E. 58 (1916). Real estate was conveyed to one who did not assume payment of encumbering deeds of trust. He, in turn, conveyed to *D* who assumed payment. Held, the holder of the notes can maintain action at law against *D*. This conclusion treats the owner of the notes as a donee beneficiary. The weight of authority is contra. See 2 WILLISTON, CONTRACTS 1122.

¹⁹ Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120 (1890). This case upheld an action at law upon a fire insurance policy issued by *D*, payable to *P*, mortgagee, as his interest might appear. The debt exceeded the face amount of the policy. The court said that *P* was the sole beneficiary of the policy. This would seem to ignore the fact that, had the debt been reduced by partial payment to an amount less than the face of the policy,

Respectable authorities construing the statute have said that "the term 'sole beneficiary' . . . was originally created to designate a donee beneficiary".²⁰ This, however, does not solve the problem where, in an admittedly donee case, there are two or more persons who are named beneficiaries or who are members of a designated class. In brief, is the word "sole" synonymous with the word "single"? To this question seemingly contradictory answers have been made which, however, it is believed, can be reconciled.

In *Jenkins v. C. & O. Ry.*,²¹ the defendant promised a county court to transport to a pesthouse all persons suffering from small-pox. The plaintiff having contracted the disease, was placed by the defendant in an unheated box car and transported to the pesthouse, but his feet were frozen because of failure to heat the car. The court held that the plaintiff could maintain an action of assumpsit. In support of its decision the court, without comment or analysis, cited the statute, two West Virginia cases not in point,²² and *Ross v. Milne*. It then said: "This doctrine has been extended, by persuasive authority, to one of a class of persons where the class is sufficiently designated." There was no discussion of the question whether a member of a class comes within the meaning of the words "*the sole beneficiary*," but the decision must be considered as a tacit holding to that effect.

A similar decision was rendered in *Meadows v. McCullough*,²³ in which the court upheld the right of an employee to sue at law upon a contract between the defendant and the employer whereby the former promised to furnish hospital treatment to the employees, each of whom contributed to the fund paid to the defendant. This is a stronger case because the consideration moved, in part, from the plaintiff to the defendant. The point here questioned was not discussed, the court contenting itself with the statement that

it would also have been for the benefit of the insured. See discussion in 2 WILLISTON, CONTRACTS § 401A; cf. *Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, 17 S. E. 303 (1893), with *Staats v. Georgia Home Ins. Co.*, 57 W. Va. 571, 50 S. E. 815 (1905). It is submitted that the mortgagee's right is that of a creditor rather than that of a donee, and consequently he should not be treated as a sole beneficiary.

²⁰ *Aetna Life Ins. Co. v. Maxwell*, 89 F. (2d) 988 (C. C. A. 4th, 1937), citing 2 WILLISTON, CONTRACTS § 357 and *Haines v. Pacific Bancorporation*, 146 Ore. 407, 30 P. (2d) 763 (1934).

²¹ 61 W. Va. 597, 57 S. E. 48 (1907).

²² *Nutter v. Sydenstricker*, 11 W. Va. 547 (1877) and *Johnson v. McClung*, 26 W. Va. 659 (1885). The *Jenkins* case was cited with approval in *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932), noted in (1933) 39 W. VA. L. Q. 266.

²³ 101 W. Va. 103, 132 S. E. 194 (1926).

the plaintiff seeks to recover "under the authority of" the statute.

The *Jenkins* case has been variously commented upon by later cases. Thus, in *Neil v. Flynn Lumber Co.*,²⁴ the court said that the contract was made "for the mutual advantage of both parties"²⁵ (the county court and the railway company) in an effort to prevent the spread of a contagious disease". This language was repeated in *Hamilton, Admr'x v. Paint Creek, etc. Co.*,²⁶ the court adding that "it was held (in the *Jenkins* case) that one of such class of persons, in whose interest also the contract was made, may maintain in his own name an action against the carrier." If these observations are sound, then a sole beneficiary right may be created even though the contract was made for the "mutual advantage" of the promisor and the promisee, or if the contract was made by them "in the interest" of a person or class of persons.

Another group of cases involves insurance and indemnity policies. In *O'Neal v. Pocahontas Transportation Co.*,²⁷ it was held that a general automobile indemnity policy was not made for the sole benefit of anyone who might be injured in the operation of the car. And, in *Criss v. United States F. & G. Co.*,²⁸ it was held that no action would lie upon such a policy until and unless the injured party has first obtained a judgment against the tort-feasor. The court distinguished the *Jenkins* case upon the ground that there the beneficiary's injuries arose out of the negligence of the promisor.²⁹ It was further said that the covenants in the policy "are not for the sole benefit of the plaintiff or the class to which she belongs". However, in *Smith v. United States F. & G. Co.*,³⁰ it was held that where the injured party had obtained a judgment against the promisee, the former is permitted to maintain an action at law upon the policy. There was no discussion

²⁴ 71 W. Va. 708, 77 S. E. 324 (1913).

²⁵ Italics supplied. If this interpretation be correct, the infected persons should probably be treated as incidental beneficiaries. In any view, it is difficult to see how they could be treated as sole beneficiaries.

²⁶ 103 W. Va. 402, 137 S. E. 535 (1927). The expression is probably a groping for the erroneous doctrine, sometimes applied to third party beneficiary contracts, that the beneficiary should be permitted to sue under "real party in interest" statutes. See 2 WILLISTON, CONTRACTS, § 366.

²⁷ 99 W. Va. 456, 129 S. E. 478 (1925).

²⁸ 105 W. Va. 380, 142 S. E. 849 (1928).

²⁹ It is submitted that this is not a valid basis for distinction. The question is: who may sue, and in what forum, to recover damages for breach of a contract to which he was not a party? The manner of the breach, whether negligent, wilful or otherwise, would seem to furnish no answer to this question.

³⁰ 109 W. Va. 280, 153 S. E. 584 (1930).

of the statute, nor were the *O'Neal* or *Criss* cases distinguished. It is difficult to find a distinction between these cases upon the basis of the definition of a sole beneficiary. It seems clear that the injured plaintiff is not a donee because the tort-feasor is also interested in the discharge of his liability and it was primarily for this purpose that the contract was made.³¹

Cases involving group insurance policies present the problem in another aspect, and most squarely raise the question of whether "sole" is synonymous with "single". In *Somog v. West Virginia etc., Insurance Co.*,³² an employee who had contributed by wage deductions to the payment of the premium upon a group policy was permitted to recover disability benefits in an action at law. The present problem was not discussed. This was followed by *Johnson v. Inter-Ocean Casualty Co.*,³³ in which the court based the decision upon the ground that "he for whose interest³⁴ a promise is made, may maintain an action upon it; though the promise be made to another and not to him". The syllabus varies this by stating that "he for whose benefit"³⁵ a promise is made may maintain an action. There was no discussion of the statute and the only West Virginia case cited was *Nutter v. Sydenstricker*,³⁶ which is not in point. Finally, in the recent case of *Watts v. Equitable Life Assurance Society*,³⁷ the court tacitly affirmed the employee's right of action, by remanding the case with permission to amend the declaration.

Since none of these cases cited or discussed the statute, they cannot be considered as conclusively authoritative upon the question. However, they and the *Jenkins* case and those approving it, have gone far to establish the doctrine that "sole" does not mean "single". As applied to group insurance, it is arguable that this conclusion does not necessarily follow, (especially where the employees pay the premium in whole or in part) upon the

³¹ Notwithstanding that the policy may in terms provide for a direct enforceable right against the insurer (compare *American Fidelity and Casualty Co. v. Big Four Taxi Co.*, 111 W. Va. 462, 163 S. E. 40 (1932) applying Code, 17-6-6) this alone does not determine the nature and incidents of that right, or whether the injured party is a sole beneficiary and therefore entitled to maintain an action at law. The sound view, it is submitted, is that of *Aetna Life Ins. Co. v. Maxwell*, 89 F. (2d) 988 (C. C. A. 4th, 1937).

³² 110 W. Va. 205, 157 S. E. 400 (1931).

³³ 112 W. Va. 396, 164 S. E. 411 (1932).

³⁴ Italics supplied. The same language is used in *Nutter v. Sydenstricker*, 11 W. Va. 547 (1877).

³⁵ *Ibid.*

³⁶ 11 W. Va. 547 (1877), distinguished in *Petty v. Warren*, 90 W. Va. 397, 110 S. E. 826 (1922).

³⁷ 23 S. E. (2d) 923 (W. Va. 1943).

ground that, in reality, the insurer has made as many separate promises to the employer as there are employees, but to avoid the inconvenience of issuing a separate policy evidencing each promise, they have all been included in the one master policy.³⁸ Each employee may then be treated as the "sole" or "single" beneficiary of the separate promise made for his benefit. The issuance of a certificate to each employee strengthens the realistic basis for such a decision, and seems to be in consonance with the actual intent of the parties. Manifestly, such considerations do not apply with equal force to the indemnity insurance cases, nor to situations such as that in the *Jenkins* case.

If, on the other hand, these cases be interpreted to mean that a member of a designated class is a sole beneficiary, that conclusion must be reconciled with the decision in *Standard Oil Co. of N. J. v. Smith, et al.*³⁹ There, in an equity suit to recover upon a subcontractor's bond, the defendant contended, in effect, that the plaintiff's proper remedy was by an action at law. The court held to the contrary, saying that the statute means "exactly what it says The provision of the bond herein relative to the payment of materialmen and laborers is a covenant for their primary benefit as a class. Because the covenant is for the protection of a class no one of whom has a distinctive right to the benefit, an action at law is not permissible under the *Johnson*⁴⁰ case. But we have repeatedly held that one of such a class could proceed in equity for the benefit of himself and the other members of his class."

The precedents are, then, in this position: in both group insurance policies and in contractors' bonds the covenants are for the protection of a class; but in the former each employee has a "distinctive right to the benefit", while in the latter the materialman or laborer has no such right. And, this result is reached in the former type of case by ignoring, and in the latter by applying, the provisions of a statute that is almost one hundred years old and was not actually intended to apply to either specific situation.⁴¹

³⁸ This view is here suggested only upon an argumentative basis. The writer can perceive no real difference between one promise to render two or more separate performances, and two promises, in the same contract, to render such separate performances.

³⁹ 116 W. Va. 16, 178 S. E. 281 (1935).

⁴⁰ Referring to *Johnson v. McClung*, 26 W. Va. 659 (1885).

⁴¹ Upon the assumption that the decision in *Ross v. Milne* gave rise to the enactment of the statute.

Thus, the propounded question: whether "sole" is synonymous with "single", cannot be answered categorically. In some cases it is, in others it is not.⁴² Yet, it is submitted, that the court has arrived, by a sort of judicial intuition, at sound conclusions in both instances, whether the point be examined from the standpoint of statutory construction, the intent of the contracting parties or the practical results to be achieved. The basis for the distinction is this: that the legislature, in using the word "sole" intended to deal with benefit of the promise *as between the promisee and the beneficiary*,—not as between two or more beneficiaries. In a word, it was intended to designate by the word "sole" a donee, not necessarily as the recipient of a pure gift from the promisee, but as the recipient of a performance which would result in the discharge of no actual, supposed or asserted obligation owing by the promisee to the beneficiary; nor would breach of the promise occasion more than nominal damages to the promisee. At the same time, performance would confer upon the beneficiary something to which he was not previously entitled.⁴³ It is immaterial that there are two or more donees, whether designated by name or as members of a class, for, *as between themselves and the promisee* (donor) they are the sole beneficiaries within the meaning of the statute.⁴⁴

This construction is also consonant with the intent of the parties and with the practical consideration involved. Thus, in situations such as that in the *Jenkins* case, or in the group insurance cases, there will not ordinarily be a total breach of the contract as to all beneficiaries. It would be unjust and impolitic to require an individual employee to resort to a court of equity and deprive him of the very practical advantage of the right of trial by a jury. Of course, if there has been a complete breach of the master policy, or if the insurer has a defense applicable to the entire contract, equity should take jurisdiction in order to avoid a multiplicity of actions. On the other hand, there is ordinarily more than a single breach of a contractor's bond. A court

⁴² Compare the decisions in *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24 (1905) and *Simmers v. Star Coal & Coke Co.*, 113 W. Va. 309, 167 S. E. 737 (1933)—noted in (1933) 39 W. VA. L. Q. 358—holding that the word "all" is unambiguous, with the decision in *Hodge v. Garten*, 116 W. Va. 564, 182 S. E. 582 (1935) holding that, under some circumstances, "all" may mean "some". See *Hardman, A Problem in Interpretation* (1936) 42 W. VA. L. Q. 110. Cf. *Light v. E. M. Grant & Co.*, 73 W. Va. 56, 79 S. E. 1011 (1913).

⁴³ See RESTATEMENT, CONTRACTS § 133, quoted *supra* note 4.

⁴⁴ In the language of the RESTATEMENT, *ibid.*, the determining factor is the "purpose of the promisee in obtaining the promise".

of equity is a more convenient forum for the ascertainment of the rights of the parties, and the promisee can and should be made a party, since he has a pecuniary interest in the result of the case. It is plainly the creditor-beneficiary type of contract under the test here suggested, both because performance of the promise will relieve the promisee of his own obligations to the materialman and laborers, and because nonperformance will result in actual damages to him.

There remain to be mentioned two recent cases in which it is deferentially submitted, the court has used inaccurate language in reference to the statute.⁴⁵ In *Chitwood v. Collins*,⁴⁶ the court said: "Code, 55-8-12, permitting a suit in equity by third persons upon a contract made for their benefit, does not specify that they shall have furnished a consideration." This statement is incorrect because the cited statute provides that the sole beneficiary may maintain an action, not a suit in equity. The rights of the plaintiffs in this case to specific performance of a contract to make a will are enforceable in equity, not by virtue of the statute, but by virtue of the traditional powers of a court of equity to grant the relief sought.⁴⁷

Again, in *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co., et al.*,⁴⁸ the court said: "In *Chitwood v. Collins*. . . it was held that a donee beneficiary of a contract between two other persons could enforce that contract in equity for his own benefit. This case would appear definitely to align this jurisdiction with the many others which have sustained the enforceability by a third person beneficiary of his rights in a contract between others.

⁴⁵ The limits of this article do not permit of a discussion of all West Virginia cases dealing with the statute. For further cases, see RESTATEMENT, CONTRACTS, W. VA. ANNOT. (1933) § 133, *et seq.* Mention may, however, be made of *Delp v. Missouri State Life Ins. Co.*, 116 W. Va. 508, 182 S. E. 580 (1935), noted in (1936) 42 W. VA. L. Q. 242. An insurance company had issued a group policy to an employer, and having become insolvent, its assets were sold to defendant which promised to carry out the obligations of the policies. It was held that, notwithstanding that insolvency may have cancelled the policies, plaintiff employee may maintain an action at law. A similar decision was rendered in *Cosmopolitan Life Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166 (1905). The statute was not cited. The decision was based upon the exception to the common law rule, *viz.*, that the promisor may be sued at law where he has received money or property of the promisee and agreed to deliver it to the third party. See WILLISTON, CONTRACTS § § 348-360 and 370.

⁴⁶ 122 W. Va. 267, 8 S. E. (2d) 830 (1940).

⁴⁷ RESTATEMENT, CONTRACTS § 138; *Ralphsnyder v. Ralphsnyder*, 17 W. Va. 28 (1880); *Cooper v. Cooper*, 65 W. Va. 712, 64 S. E. 927 (1909); *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911 (1899).

⁴⁸ 123 W. Va. 53, 14 S. E. (2d) 922 (1941).

If a donee beneficiary can enforce such a contract, no reason is perceived why a creditor beneficiary may not do so.”

An uncritical application of this language would change the existing law by permitting a donee beneficiary to resort to equity in any case, notwithstanding the fact that he may have an adequate remedy at law by virtue of the statute.⁴⁹ Furthermore, this jurisdiction has for many years been aligned with the weight of authority in sustaining the enforceability of third party beneficiary contracts, the only indefiniteness being to the proper forum for their enforcement. Finally, this language seems to rest the creditor-beneficiary's right in equity upon analogy rather than upon the numerous native precedents in point.⁵⁰

The foregoing observations are not made in a spirit of capriciousness or quibbling. It is believed that sound decisions are more likely to result from a due regard to the historical background of the common law, the statute and the distinctions made in previous cases, than from reliance upon persuasive authorities which did not have to wrestle with the definition of the word “sole”.

To sum up: Practically all the West Virginia cases can be reconciled by limiting the operation of the statute to cases of the donee type of contract—keeping in mind the special senses in which the word “donee” is used. This is not, however, offered as a panacea for the ills for which the statute may be responsible. It is possible, for example, to make a contract whereby *A* promises *B* (1) to pay a debt owing to *C* by *B*, and (2) to make an additional payment as a gift to *C*. Here, *C* is the creditor beneficiary of the first promise and the donee beneficiary—the “sole” beneficiary—of the second. If *A* pays the debt but fails to pay the gift, it is submitted that *C* should have the right to recover in an action at law, although it would be doing considerable violence to language to say that *C* is the “sole” beneficiary of *A*'s promise, unless it be held that one promise to render two performances is, in legal effect, two separate promises.

The ideal solution is an amendment to the statute, similar to that made in Virginia.⁵¹ Until that fortunate occurrence, the court will doubtless continue to struggle with the problem.

⁴⁹ See discussion *supra*, note 12.

⁵⁰ *Supra*, note 13.

⁵¹ VA. CODE (1919) § 5143; “. . . and if a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made”, *etc.*