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Principal and Agent--Suit by a Disclosed Principal as a Third Party Beneficiary on a Contract Made Upon the Sole Credit of the Agent

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STUDENT NOTES AND RECENT CASES

PRINCIPAL AND AGENT—SUIT BY A DISCLOSED PRINCIPAL AS A THIRD-PARTY BENEFICIARY ON A CONTRACT MADE UPON THE SOLE CREDIT OF THE AGENT.—For convenience of treatment the following designations will be used: "A" for agent, "P" for principal, and "T" for third party. The situation proposed for examination is this: A is agent for P. A makes a contract with T who knows of both the existence and identity of P. T chooses to rely upon and to contract with A alone. T breaches the contract, and the question is, whether P may sue T on the theory that P is the "sole beneficiary" of the contract.

Identical facts were presented in the English case of *Die Elbinger Actien-Gesellschaft.Fur Fabrication Von Eisenbahn Material* v. *Claye.*[1] In that case T offered to supply certain wheels and iron tires which P wished to order. A accepted the offer and paid for the products, but T failed to deliver them within the time specified. The trial court left it to the jury to decide whether T had contracted with P or with A, and they found the latter to be the case; whereupon the court held that P could not sue on the contract, on principles of agency. Lush, J. said:

> "I quite agree—that an agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, that is, that the contract may be such as to make the principal as well as the agent himself a party to the contract. But if the principal be made a party to the contract, he must be both able to sue and liable to be sued;—he cannot be a party so as to be able to sue, and yet not a party so as to be liable on it.—What the defendant said in effect was—I will not deal with your foreign principal, but only with you. That being so, the foreigner is excluded both for the purpose of liability, and for the purpose of suing and taking the benefit of the contract."

[1] 8 Q. B. 313 (1873).

Mechem agrees with this as good agency law, and, citing the above case, says:[2]

> "But where it is found that the contract was made with the agent only as the other party to it, the principal cannot sue in his own name upon it at law."

The real ground of the decision in the above case, it is submitted, is that P can neither sue nor be sued upon a contract to which he is not a party, either in fact, or in contemplation of law.[3] Quaere: If that be true, would not the result have been the same, on principles of ordinary contract law in England, regardless of any agency relationship between P and A? In other words, it is believed that P was denied a recovery, not because he was a principal, but simply because he was not a "party to the contract."

It is arguable, then, that P would have a right to recover on such a contract, if there is any situation in our law wherein one who is not a party to a contract may nevertheless sue upon it. In fact, that is the situation in contracts made for the benefit of a third party, and commonly called "sole-beneficiary" or "third-party beneficiary" contracts, which Williston defines as "a contract in which the promisor engages to the promisee to render some performance to a third person."[4] In the terminology here adopted: T promises A that he (T) will do some act (deliver wheels and iron tires) for P. Can P then, although denied a recovery on principles of agency, sue T on the theory that P is the third-party beneficiary of the contract? The court so intimated in the case of *Rea et. al.* v. *Barker*,[5] wherein P was allowed to sue, although not named in the contract made between T and A, on the theory of a contract made for the benefit of P. The case arose on demurrer to the

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[2] MECHEM ON AGENCY, 2nd ed., §2055.
STORY ON AGENCY, §160 a. Story very broadly says, "if the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." This sweeping statement is criticized and virtually repudiated in Chandler *v.* Coe, 54 N. H. 561-576 (1874).

[3] It is true that an undisclosed principal is not *in fact* a "party to a written contract" made by his agent's authority, yet he is permitted to sue thereon, for the reason that in contemplation of law, the contract of the agent *is* the contract of the principal, and therefore the principal is a party to such a contract. See MECHEM, note 2 *supra*, §704 and 709. *Cf.* §1730.

[4] WILLISTON ON CONTRACTS, Vol. 1, §347.

[5] 135 Fed. 890 (1904).

complaint and it is not clear whether "sole credit" was given to A, in which event the case would not be directly in point with the English case, but the language of the court is broad:

> "The weight of authority is that a third party has a right of action upon a promise made for his benefit, though he is a stranger both to the promise and to the consideration, and the case is all the stronger in favor of the right when the consideration for the promise is derived from the party for whose benefit the contract is made."

Thus the court used the agency relationship as an added prop to its decision, rather than as a reason for denying recovery. An earlier Federal case, *Moline Iron Co.* v. *York Iron Co.*,[6] raised the question in the form of a query thus:

> "There has been some contention whether, with respect to a written contract executed in the name of an agent, the party who received the contract, knowing that the agent acted for a principal, could hold the principal—But quaere whether such election by a third party involves an abandonment by the principal of his rights against the third party under a contract made by his authority."

It was admitted in this case that there was not a scintilla of evidence to show that the third party elected to look solely to the agent. But as is apparent from the language of the court, it is intimated that even had there been an election to look solely to the agent, the principal would still not have abandoned his rights. With the exception of these two Federal cases, no others have been found which hold, or even suggest, that P may recover in such case. With this in mind, it is proposed to consider the case upon principle,—whether P *ought* to be allowed a recovery, beginning with the arguments in favor of the contention.

If, as believed, the true reason for denying P a recovery was that he was not a "party to the contract", that reason must disappear when the doctrine itself disappears. Stated affirmatively, if one *can* sue on a contract to which he is not a party, then the reason for refusing to allow P to sue, vanishes. This position is strengthened by the fact that in

[6] 83 Fed. 66 (1897).

England there is no doctrine of third-party beneficiary contracts.[7] The refusal to adopt the doctrine was based upon two reasons, as stated by Prof. Corbin:[8]

> "The technical difficulty is two-fold. The beneficiary is not a party to the contract—. The promisee—having suffered no pecuniary damage by failure of the promisor to perform his agreement, it would seem cannot recover substantial damages."

But the American courts have generally adopted the contrary viewpoint and allowed a suit by the sole-beneficiary, "upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."[9] From this it is drawn that here was a situation where the ordinary rules of law failed to provide an adequate remedy,[10] and therefore the courts allowed the sole-beneficiary to sue.

But if this be true, and the doctrine of third-party beneficiary contracts is an innovation in the law of contracts, in order to supply an adequate remedy at law, then there is no basis for its application where our agency case is involved. In a word, if P *has* an adequate remedy against T, there is no reason for allowing him, as a sole-beneficiary, to sue T. Yet P can always recover through a suit by A,[11] and it seems also by a suit in the name of A.[12] In the case we are discussing, A has a full right to sue T and recover from him substantial damages.[13] If P has this adequate remedy, then no longer is it true that "justice requires some remedy to be given the beneficiary." It is submitted therefore, that the application of the theory of third-party beneficiary contracts to agency cases is unnecessary and unwarranted.

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[7] Cleaver *v.* Mutual Reserve Fund Life Association, 1 Q. B. 147 (1892).

[8] 27 YALE L. J. 1008.

[9] Dean *v.* Walker, 107 Ill. 540, 41 Atl. 803, (1883), quoting from Brewer *v.* Dyer, 7 Cush 337 (1851). See also an instructive note to, Baxter *v.* Camp, 71 Conn. 245 (1898), in 71 Am. St. Rep. 169 at page 189. At page 187 it is said, "There is a great diversity of opinion as to what the real basis of the rule is, and at least five different grounds have been mentioned upon which the rule in some of its phases, is supposed to rest."

[10] N. 4, *supra*, §357-358.

[11] MECHEM ON AGENCY, 2nd. ed. §2027, citing the principal case, saying, "where the effect of the transaction is such that the contract is made with the agent, not as agent, but as principal, and as the only principal, there the agent alone may sue."

[12] N. 11, *supra*, §2055, saying that "the principal cannot sue *in his own name*, implying that he might sue in the name of the agent.

[13] N. 11, *supra*.

It may be objected that such reasoning is inapplicable to the "debtor-creditor" type of contract, in which T promises A that he (T) will pay A's debt to P, for the reason that P is allowed to sue T (in most states at law),[14] although P *has* an adequate remedy at law against A upon the old debt. That is, if P has an adequate remedy at law, yet is nevertheless allowed to sue T in the "debtor-creditor" type of contract, that P, having an adequate remedy in the agency case, should nevertheless be allowed to sue upon the contract made for his benefit. This would be a valid argument, were it conceded that the agency contract in question here is more like a "debtor-creditor" contract than like a sole-beneficiary contract. But it is submitted that such is not the case, and that the agency contracts here involved, while not exactly either type, is more closely analogous to the sole-beneficiary type. The only difference between the agency contract and the sole-beneficiary type, is that in the former the beneficiary is the principal of the promisee, while in the latter, no such relationship exists. Outside of that extrinsic relationship, which has not been incorporated into the agency contract, the situation is the same. In each there is but a sole beneficiary. In neither is A, the promisee, benefitted by the promise made by T. On the contrary, in the debtor-creditor type, there is always the prior, existing debt between A and P, standing forth as the basis of a liability between them, regardless of any contract made with T, and existing before he is brought into any contractual relationship whatever with A or P. Therefore it is believed that the agency case under discussion more nearly resembles the sole-beneficiary type of contract, and if so, the principles and reasoning applicable to the latter should control in an analysis of the agency contract.

There is the further consideration based upon the fundamental principle that contracts are largely a matter of the expressed intent of the parties. T has expressed his intent to deal with A alone, and to be responsible to him only. If so, should his interest be disregarded and should T be subjected to a liability which he did not intend, and impliedly at least, to which he has dissented?

There is also doubt as to whether P could sue T on such

[14] N. 4, *supra*, §881.

a contract under the present West Virginia statute,[15] as interpreted by the Supreme Court of Appeals. In *King* v. *Scott*[16] it was said:

> "In the use of the word 'sole', the legislature seems clearly to have intended to avoid a double right of action against the covenantor or promsior, on account of a single consideration."

In an earlier case,[17] it was remarked that:

> "If one could sue on it, the other could not. It was not intended for the benefit of both in the sense that either could sue."

In other words, under the statute, if the promisee could sue on the promise, then the beneficiary could not, because he was not the "sole" beneficiary. Therefore it is submitted, that since A can, admittedly, sue T, that P is not a "sole" beneficiary within the interpretation made by the court. To allow such a suit would subject T to a double right of action on account of a single consideration.

We may then marshal the arguments in favor of allowing P to sue as a third-party beneficiary as follows: The reason for denying P a recovery, (namely, that one not a party to a contract, either in fact, or in contemplation of law, cannot sue upon it), is no longer a valid reason in American courts; that the reason of the rule having ceased, the rule itself should cease; that there is more reason to apply the doctrine of third-party beneficiary contracts to this agency situation, than in the ordinary case, because P, in addition to being a beneficiary, has also furnished the consideration.

The arguments in opposition are: that the doctrine of third-party beneficiary contracts is an innovation upon the law of contracts and should not be extended unless justice requires;[18] that since P has an adequate remedy at law against T, the reason for the origin of the doctrine is inapplicable; that T should not be subjected to a liability which he did not intend; and finally, it is doubtful whether P is a sole-beneficiary within the meaning of the West Virginia statute as interpreted by our court.

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[15] W. Va. Code, Ch. 71, §2.
[16] 76 W. Va. 58, 84 S. E. 954 (1915).
[17] Johnson v. McClung, 26 W. Va. 659 (1885).
[18] PAGE ON CONTRACTS, 2nd ed., §2387.

It is submitted that the arguments last given are the more weighty. The very absence of authority for permitting P so to sue is an indication, at least, that the profession has never regarded P as having such a right. While this is no argument against the proposition, still it is a tacit admission that the doctrine of third-party beneficiary contracts is inapplicable in a suit by a disclosed principal, on a contract in which sole credit is given to his agent.

—R. T. D.

PUBLIC OFFICER—REMOVAL OF FOR INCOMPETENCY.—By petition to the circuit court the petitioner sought to have the D, a member of the district board of education, removed from office, on the general ground of incompetency; under W. Va. Code, Ch. 7, §7 and Art. IV, §6 of the Constitution. One of the specified grounds was that the D could not read writing. D demurred and the trial court sustained the demurrer. Held, demurrer correctly sustained. *Sharps* v. *Jones*, 131 S. E. 463 (W. Va. 1926).

The court not only states that a school board member who cannot read writing is not incompetent to fill the office, but goes further and says that there are absolutely no educational requirements for membership on a district board of education. Does it necessarily mean, because educational requirements for board members are not laid down in so many words in the West Virginia Code, that a school board member would be *competent* to fill his place satisfactorily, from an educational standpoint, if he is illiterate? What does the word "incompetence" mean? W. Va. Const. Art. IV, §6. What does "incompetency" mean? W. Va. Code, Ch. 7, §7. "Incompetence" and "incompetency" have the same meaning, and the one here applicable is the state of being incompetent; unfit; lacking ability. "Incompetent" means not answering all requirements; incapable; unqualified; unfit. WEBSTER, NEW STANDARD DICTIONARY, 1920. "Incompetent" means not duly qualified; not answering all requirements; unsuitable; incapable; not legally fit. BLACK, LAW DICTIONARY, 2ND ED. District boards of education have broad discretionary powers and much authority over the schools in their district, and members would seem to be incompetent, within the scope of that