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Contracts for Benefit of Third Parties–Right of Beneficiary to Sue in West Virginia

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STUDENT NOTES AND RECENT CASES

CONTRACTS FOR BENEFIT OF THIRD PARTIES—RIGHT OF BENEFICIARY TO SUE IN WEST VIRGINIA.—Just what is the right of a third party to sue in West Virginia upon a contract to which he is not a party has caused much confusion. In order to reconcile the West Virginia cases on this subject, it is important to distinguish between the two classes of contracts which pass under the term of contracts for the benefit of third parties.

First, we have the so-called sole beneficiary type of contract, where the promisee has no pecuniary interest in the performance of the contract, which is made solely for the benefit of another person. A typical illustration of such a contract is an ordinary life insurance contract payable to some one other than the insured. The beneficiary is not a party to the contract. The promisee is entitled to sue for breach of contract, but having suffered no pecuniary damage by the debtor’s failure to perform, would not seem upon principle entitled to recover substantial damages.¹ The right of a third party to maintain an action at law upon such a contract has never been recognized in England.² The English courts have so steadily refused to grant any relief to a beneficiary under such contracts, that by the Married Women’s Property Act a wife, or husband, or child named as beneficiary in an insurance policy is entitled to the proceeds of the policy although not entitled to sue for them directly.³ But the English view as to sole beneficiary contracts has never prevailed in this country. The prevailing view in the United States is that the party in interest may maintain an action in his own name upon such a contract.⁴ The right of the beneficiary to sue in West Virginia upon such a contract is now guaranteed by statute,⁵ which provides:

"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

¹ West v. Houghton, 4 C. P. D. 197 (1870); Burbank v. Gould, 15 Me. 113 (1838); Watson v. Randall, 20 Wend. 201 (N. Y. 1853); Adams v. Union R. Co., 21 R. I. 184, 42 Atl. 515 (1899). See WILLISTON, CONTRACTS, § 327.
² Tweddle v. Atkinson, 1 B. & S. 393 (1861); Cleaver v. Mutual Reserve Fund Life Assn., 1 Q. B. D. 147 (1892).
³ 45 & 46 Vict., c. 75, § 11.
⁴ Hendrick v. Lindsay, 93 U. S. 143 (1876); Hartman v. Pistorius, 248 Ill. 143, 94 N. E. 131 (1911); Baird v. Erie R. Co., 210 N. Y. 226, 104 N. E. 654 (1914).
⁵ W. VA. CODE, c. 71, § 2.
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."

However, the provisions of this statute have never been extended to any other than the sole beneficiary type of contract, and our court has said "a stranger to a contract cannot sue on it, by virtue of this statute unless it was made primarily for his benefit." Second, we have the so-called debtor-creditor type of contract, where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay his creditor. New York has gone farther than any other state in the debtor-creditor case, and allows the third party not a party to the contract to maintain an action upon such contract.

Today, while very few jurisdictions profess to follow Lawrence v. Fox, the states are very few that do not allow the creditor to maintain a direct action against the promisor. The most universal illustration of this right of the creditor to sue is where the grantee of premises subject to a mortgage assumes and agrees to pay the mortgage. England gives the mortgagee no right to maintain an action upon such a contract, but Massachusetts is the only jurisdiction in this country where it has been definitely decided that the mortgagee cannot proceed against the grantee. However, many jurisdictions treat mortgages separately from the ordinary debtor-creditor type of contract, although on principle there seems to be no real difference between the two. In many jurisdictions where the right of a third party to sue at law on such contracts is not recognized, he is nevertheless allowed to sue in equity under the doctrine of subrogation. This is the view that has been adopted by the West Virginia Supreme Court, and it is under that doctrine that the West Virginia cases on this subject can be reconciled. West Virginia has denied relief to the creditor who sues on such contracts only where the action has been brought

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7 Lawrence v. Fox, 20 N. Y. 295 (1859).
8 Tweddel v. Tweddel, 2 Bro. Ch. 152 (1787); Oxford v. Rodney, 14 Ves. 417 (1807).
at law, where the doctrine of subrogation is not recognized. There are no reported cases in this state where the remedy has been refused the beneficiary when the action was a bill in equity. The seeming conflict in the West Virginia cases is readily explainable on the theory that the right of the third party to sue at law in West Virginia on such contracts is not recognized, but when he sues in equity he is given substantially the same relief under the doctrine of subrogation.

—M. T. V.

CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN RULE.—The plaintiff sued for injuries sustained while attempting to cross the tracks of the defendant. He passed between freight cars standing on the side track and started to cross the middle track, when he was struck by an engine. Nine feet separated the tracks, and plaintiff had an unobstructed view each way, but failed to look in the direction of the approaching engine. Held, recovery is denied. Failure to use his senses amounts to contributory negligence, which becomes a question of law for the court and not for the jury. Robinson v. Chesapeake & Ohio R. Co., 110 S. E. 870 (W. Va. 1922.)

 Widely divergent views exist among the various state courts in regard to the liability of the railroad for injuries to pedestrians who fail to stop, look and listen before attempting to cross the railroad track. Pennsylvania enforces the arbitrary rule, declaring failure to observe the rule is negligence as a matter of law. The decisions declare the rule to be “peremptory, absolute and unbending.” Aiken v. Pennsylvania R. Co., 130 Pa. 380, 18 Atl. 686. This extreme rule has practically no following, and has received widespread criticism. 1 Am. Law Rep. 204. The view that it is not a rule of evidence, but one of absolute and unbending law cannot be affirmed as a rule of American law. 2 Thompson, Negligence, § 1642. For the court to say that the plaintiff is negligent as a matter of law in every case if he does not stop, look and listen, seems to be an unwarranted encroachment on the province of the jury. 13 Harv. L. Rev. 226. Other authorities emphatically maintain that such failure on the part of the plaintiff is not negligence per se, or as a matter of law, but is only evidence to be submitted to the jury. 2 Thompson, Negligence, § 1642; Judson v. Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514; Illinois Cen-